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CHILDREN AND THE LAW: ISSUES IN THE ASIA PACIFIC REGION

ADDRESS

CHILDREN AND CHILDREN'S RIGHTS IN THE CONTEXT OF FAMILY LAW

by

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BRISBANE

Children and Children's Rights in the Context of Family Law

Introduction

The last 100 years have seen the worst examples of human rights abuses that the world has known. Modern technology has provided a new scale to the atrocities that we can inflict upon each other. Quite apart from the two world wars, we have seen the Holocaust, the Armenian and Ruandan genocides, the Soviet Gulags, Vietnam, Cambodia and many others. All too often children have featured as among the principal victims. It is therefore not surprising that the nations of the world supported the introduction of the United Nations Convention on the Rights of the Child (UNCROC).

It has become fashionable amongst conservative critics in this and other countries to scoff at such international instruments and to even seek to use these atrocities as evidence of their failure. However my question to such individuals is as to what they would replace them with. Where else do we find a source of guidance and a measure of what is the proper way to treat children, the disabled, women and others in a position of disadvantage in various parts of the world. So-called advanced western countries are not immune from this behaviour as the example of Nazi Germany taught us only too well. Instruments such as UNCROC provide us all with a basic code as to the treatment of our children.

It is only in recent years that issues relating to the rights of children have begun to loom large in the family law area in Australia. It is true that the Family Law Act 1975 contained provisions relevant to the rights of children; notably s 43(c) which directs specific attention to the issue and the provision for a court to order that a child could be separately represented, now found in s 68L.

However, the real impetus for change has clearly come from UNCROC, which Australia ratified in 1991. It is worth remembering that Australia played a significant role in the drafting of that Convention. It is disappointing that Australia has not acted to incorporate it into domestic law in this country, although it will be noted that in a decision delivered on 19 June 2003, the majority of the Full Court of the Family Court expressed the view that the Family Law Reform Act 1995 had the effect of incorporating aspects of the Convention into Australian law[1]. That decision is likely to be challenged however, and no doubt the High Court will have the opportunity of clarifying that issue. Whatever be the outcome, it is clear that the Convention heavily influenced the wording of the 1995 Family Law Reform Act and this was acknowledged by the Minister in the second reading speech introducing the legislation[2].

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[1] B and B and Minister for Immigration & Multicultural & Indigenous Affairs [2003] FamCA 451

[2] See Hansard, House of Representatives, 8November 1994, p 2759.

That legislation is couched in the language of rights attaching to children and responsibilities attaching to parents, and uses a similar approach to that of the English Children Act 1989. It is interesting to note that Canada intends to introduce similar legislation in the near future.

It is now relatively uncommon for important cases involving children to not pay some attention to human rights law, and to UNCROC in particular. On any view of the law as it operates in this country, it is appropriate to have regard to UNCROC and similar human rights instruments that Australia has ratified in interpreting Australian Statutes. As the Full Court of the Federal Court pointed out in the recent case of *Al Masri*[3], courts will arrive at interpretations of statutes inconsistent with such instruments only when the legislative intention to over-ride them is absolutely clear.

Particular Matters Affecting Children in the Australian Family Law Context

Last year 13,194 residence orders were made in the Family Court, together with 14,150 contact orders. These figures represent both consent orders sanctioned by the Court, and determinations made by judges where parents were unable to agree about the most suitable living arrangements for their children.

The just, efficient and timely management and determination of child-related applications is essential if the Court is to comply with its legislative mandate to act in accordance with that somewhat amorphous phrase 'the best interests of the child'. And although the provision which requires the Court to so act is intended for judges when they are considering whether to make parenting orders, when I refer to 'the Court' in the context of children's matters I include court counsellors and mediators, child representatives and court experts, as well as judges and other decision makers who are involved in the determination of parenting disputes.

I do so because only 5% of applications result in defended hearings in which a decision about the children is made by a judicial officer. This means that most parental disputes are handled by others outside the courtroom, and one would hope that they are also motivated to enhance the child's best interests, even if he or she is only present in the abstract.

Although the cases determined by a judge usually represent the most difficult parenting disputes, it is apparent – and appropriate – that judges are only involved in a small and somewhat unrepresentative proportion of matters.

The family law system, in my view, still takes a somewhat paternalistic approach to children when it comes to considering their involvement in proceedings that are explicitly concerned with their welfare and care. Such children are rarely seen, yet they are the prime rationale for many mediation sessions. They may be legally represented at final hearings, but a fairly constant criticism is that some child representatives do not consider it necessary to meet with the child before so doing. Children are permitted by the Family Law Act to initiate proceedings on their own behalf[4], but not surprisingly they very rarely, if ever, do. They are not permitted to

[3] Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs (2002) FCA 1009
[4] Section 65C(b) Family Law Act

give evidence without the leave of the Court, and such leave is rarely granted[5]. Children are rarely seen by judges, regardless of their age or circumstances.

I would like to briefly canvass in the time available this afternoon the issue of children's right to be heard. I also want to draw your attention to some more fundamental concerns about the role of the adversarial system, specifically how it appears to be operating in a manner which is detrimental to children rather than sensitive to their needs.

Finally, given the attention directed this week at what is referred to colloquially as 'joint custody', I think it is important to consider what is motivating this movement, and what it might mean for *children* if they were presumed to be shared by parents - instead of the usual focus on what it might mean for their *parents*.

As always, the problems in this area are easier to identify than are the solutions, but I will offer some suggestions as to how we might move forward in these difficult but most important areas of family law.

1/ *The face and voice of the child*

Representation of children is the norm in criminal proceedings in which they are involved, but in proceedings involving their welfare and best interests it is much more patchy.

As I have said, since its passage in 1975 the Family Law Act has provided that children whose parents have a Family Court dispute may be separately represented by a lawyer appointed for that purpose. This was a far sighted provision and one which preceded Australia's ratification of the UNCROC by more than 15 years. Its purpose was given greater impetus and clarity when the Convention came into effect in Australia in early 1991, and articles 3, 12.1 and 12.2 are particularly relevant[6].

For several years after the Act's passage the role of the child's representative was unclear, as the legislation provided no guidance. The jurisprudence developed gradually in response to pragmatic concerns raised in contested cases. These included issues such as how significant are the child's instructions, what material is privileged, how does the child representative liaise with court counsellors and expert witnesses, and does representation make the child a party to the proceedings?[7]

In 1994 in the case of *Re K* the Full Court of the Family Court reviewed the role and functions of the child's representative and suggested a list of criteria to be considered as indicia of the need for a child to have independent representation[8]. Without repeating these verbatim, they include cases involving allegations of child abuse, (whether physical, sexual or psychological), where the child is apparently alienated

[5] Section 100B(2) Family Law Act
[6] These articles are set out in Appendix 1
[7] For a most useful account of this topic see Representing the Child's Best Interests in the Family Court of Australia, Report to the Chief Justice, September 1996, Family Court of Australia.
[8] Re K (1994) FLC 92-461

from one or both parents, where none of the parties is legally represented and where it is proposed to separate siblings.

The main bulk of funding for child representatives comes from legal aid funds, on rare occasions defrayed by costs orders obtained against parents. Although the State and Territory Commissions now usually appear to have adequate resources to provide representation when it is ordered, there are still occasions where funds are denied in cases which, in the judges' view, cry out for the child having a legal voice. And several years ago the situation was very different, with some States seeing almost half the orders made not being effected due to legal aid financial constraints. In this context it is of interest to note that in *Re K* the Full Court pointed out that the failure to provide representation for all children affected by family law proceedings may be a breach of Australia's international obligations, particularly UNCROC.[9]

It is, of course, one thing to provide representation and another to be satisfied that it is effective. A Committee consisting of representatives of the Family Court, Government, the Federal Magistrates Service and the legal profession has now settled guidelines for child representatives and these should be made available very shortly and will be then be available via the Court's website[10]. The guidelines lay down minimum standards for the conduct of child representatives in areas such as the relationship with the child, the information the child should receive, case planning and additional skills and information required for those representing indigenous children, and children with disabilities.

The Committee was established because I saw the need for explicit and comprehensive guidelines to overcome fairly widespread concerns that representation was no guarantee that children's wishes were necessarily heard and, (more importantly), taken into account in the decision making process.

Of course, what a child may *want* is not necessarily what is most appropriate for the promotion of his or her best interests. Recognising this, the guidelines require the child's representative to act according to what *she or he* considers to be in the best interests of the child. This, where the child is verbal, requires the legal representative to seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others.

The guidelines also stipulate that 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 a sibling may want to express a wish.

Section 68F(2)(a) of the Family Law Act requires the Court to consider the wishes of a child, and give them such weight as the age and maturity of the child require. Providing an appropriate mechanism for the obtaining of such wishes is very important, but it is not always easy. Similarly, considering what weight should be given to children's views at particular ages presents a number of difficulties. Sections 68G and H of the Act respectively deal with the manner in which the court may be

[9] Re K (1994) FLC 92-461at 80,776

[10] The draft guidelines are set out in Appendix 2.

informed about the child's wishes, and make it clear that children are not to be required to express wishes.

Children's wishes are commonly conveyed to the Court in a family report provided pursuant to section 62G.This provides that in children's cases the Court may direct a family and child mediator or welfare officer to give the court a report on "such matters relevant to the proceedings as the Court thinks desirable". Such a report may then be received in evidence in the proceedings and its author will frequently be examined and cross examined on its contents. Family reports are often also useful settlement tools, as they provide the parties with an objective assessment of the children's circumstances, wants and needs.

Family reports are often written on the basis of a series of interviews with the children and the relevant adults, such as parents, family members and possibly teachers. This frequently involves the mediator observing how the children and relevant adults interact with each other, either in an office or home environment. The children will be interviewed and may be asked their preferences about their future living arrangements, but report writers are skilled social workers or psychologists who are very aware of the dangers associated with their responses. They may reflect parental pressure, loyalty to one or other, or a bald description of what a child said may result in a breakdown in the relationship with the non preferred parent, or some form of reprisal. The skills of a report writer are to convey to the Court children's wishes in a context of the circumstances in which the interview took place, including observations of intonations, body language and the like.[11]

When it comes to views expressed by young children it may well be that courts place too little weight on them. The Children's Issues Centre at the University of Otago, New Zealand, concluded from a study they conducted in 1997:

"One of the most important conclusions to be drawn from our study is that children do have views about their lives after parental separation and that they are highly capable of expressing their views. Even children as young as five years' of age can talk about their feelings and what situations mean to them despite the complexity of the experiences . . . the view that children's capacities to understand and participate have been underestimated (Mayall, 1994; Simpson, 1989) is reinforced for us by this study."26 (footnotes omitted)[12].

I have little doubt that many children - and particularly older children - feel disempowered by Court proceedings.

Sometimes a judicial officer will see children during the course of the hearing, possibly because they indicate that they would like to express their views directly to the judge, or because there is some apparent limitation in the evidence being presented at the trial[13]. Judges should possibly consider doing this more often,

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[11] See also Chisholm, R (1998) "Children's Participation in Litigation", paper presented at the Third National Family Law Conference, Melbourne Australia October 1998, http://www.familycourt.gov.au/papers/fca3/chisholm.pdf

[12] Access and Other Post-Separation Issues – A Qualitative Study Research Report, University of Otago, July 1997.

[13] Order 23 Rule 4(1), Family Court Rules. Note that where this occurs and the child is separately represented, the consent of the separate representative is required (Rule 4(2)). Those present at the

especially in cases involving older children, although I cannot see it becoming a mandatory requirement as it is in some overseas jurisdictions such as Quebec. There are usually good reasons for caution.[14]

In a recent case[15] I invited the children through their legal representative, to meet with me should any of them want to speak to me directly. They accepted the invitation and I met with each of the three individually in the presence of the child representative. I made it clear to the children that I would not necessarily act on the views they expressed to me, but that I would take them into account. The reasons in that case included the age of the older children, and because some time had elapsed since the counsellor's report. As a result of the counsellor's evidence, I also had some concerns about whether the children's views recorded by the counsellor represented their real views, and whether they might have changed with the passage of time.

One of the major reasons for caution is the use to which the information provided by children in such circumstances can be put. Order 23 Rule 4 of the Family Law Rules provides that information given in an interview with a judge is inadmissable in any court, and as a result the Judge may act on information that is unknown and untestable by the parties.

Where the children are content for the information to be made known to the parties, such natural justice concerns can be addressed by seeking a subsequent report that would be put into evidence. This is what I did in the case to which I refer.

There is also a legitimate concern that judges may not have the training or skills to elicit and interpret children's wishes. This, however, is capable of being addressed by the Court offering such training. It is also said that children may feel intimidated by the process of judicial interview. This is undoubtedly possible. However, difficulties associated with this can usually be averted by obtaining the views of the counsellor and taking submissions from the child representative. It is also important that the interview be *offered* to children in appropriate circumstances, but that no pressure be exerted on them to attend.

Doogue and Blackwell have argued that much greater emphasis should be given to obtaining the views of the child and they discuss means as to how this can be achieved. In particular, they emphasise the dual requirements of Article 12 of

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interview may include a family and child counsellor, a welfare officer or another person specified by the judicial officer (Rule 4(3)).

[14] See generally: J. Cashmore "Children's Participation in Family Law Matters" in C Hallett and A Prout *Hearing the voices of children: Social Policy for a New Century*, Falmer Press, forthcoming; J. Doogue and S. Blackwell "How do we best serve children in proceedings in the Family Court?" Volume 3 Part 8 *Butterworths Family Law Journal* (New Zealand), December 2000; *B v B (Minors) (Interviews and Listing Arrangements)* (1994) 2 FLR 489 per Nourse LJ and Wall J.

[15] ZN and YH and Child Representative (2002) FLC 93-101

UNCROC, namely that children have a right to be heard and also (underlining added) to have their views taken into account in the decision-making process[16].

Apart from this course, the alternatives seem to be that the children should give evidence themselves, or should be heard as the result of a counselling interview conducted by an experienced person.

I wonder if it is not time to re-think the approach of never calling children as witnesses. They give evidence in other courts. Methods have been developed to protect them, including the opportunity to give evidence by video link from a location other than the court room, There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them doing so. To refuse them this right may well be a breach of their entitlements under UNCROC and may effectively prevent the Court from ascertaining their wishes. Possible problems include cases where a parent has coached or placed undue pressure on a child, but experience allows such difficulties to be identified and managed.

Nevertheless, the process usually employed of the child being interviewed by an experienced counsellor would seem to be the solution in most cases. However where wishes are in issue, care must be taken to ensure that the wishes that have been expressed are still current.

Further, it is extremely important that counsellors be properly trained, particularly in the techniques of interviewing children. Although Courts are not bound to accept their recommendations, it must be realised that they carry considerable weight. Very often, the decision whether or not to extend legal aid in a particular case is dependent upon the contents of the counsellor's report, and many cases are settled out of court as a result of these recommendations. The future of the children in question may thus be determined by what appears in the report, and the responsibility of the counsellor is thus a heavy one. [17]

The carrying out of this task becomes even more difficult in relation to children coming from different cultural and ethnic backgrounds. Legitimate concerns have been expressed that some of our counsellors preparing reports have too limited an understanding of these ethnic or cultural factors. These concerns must be and are being addressed.

The extent to which the different registries of the Family Court are involving children, to varying degrees, in mediation sessions is also being examined with a view to uniformity and best practice. The Court is currently undertaking an audit of its child inclusive practices across all its registries.

2/ The "Joint Custody' Debate

I must say that I am rather surprised that arguments supporting a legislative joint parenting presumption have found favour once again with Parliamentarians. In so

[16] Doogue and Blackwell ob. cit.
[17] See also Chisholm, R The role of experts in assisting court's in children's cases: A judicial view (2002).

saying I must confess that I am unsure what the proponents of this initiative actually want, and what they understand the current law to be. One of the difficulties in this area is the high level of emotion and rhetoric, which unfortunately is not accompanied by clarity of argument. Do those who argue for 'joint custody' mean that each parent should have the child with him or her for equal periods of time, or do they want to share the legal responsibilities that attach to parenthood (in which case they have this now, unless the Court makes an order varying that situation)[18].

The headline in *The Australian* of 18 June - PM Backs Dads in Custody Overhaul - is telling in itself. I can't confirm that the Prime Minister *is* really supporting this move, although I would hope he explores the relevant issues before going public on it. But the sub editor's focus on *fathers*, and the omission of any reference to *children* are unfortunately common features of the discussions about this topic.. And – while not wanting to sound pedantic - the reference to 'custody' indicates a lack of understanding of the very principles of family law, the term 'residence' having replaced 'custody' in the Family Law Act 7 years ago.

From what I have read and heard over the past few days this recent debate has been fuelled by that old hoary chestnut - the Court's anti men bias. It is interesting to read the newspaper comment and hear the occasional talk back radio session and note how rapidly the discussion turns to gender wars, how content the commentators are to rely on anecdotes, and how rarely the best interests of children feature. Similar considerations apply to the approach of some politicians.

My major point here is that if what is being asked for is a presumption that children spend approximately equal portions of time with both parents this will work to the detriment of many children for whom such an arrangement is inappropriate or impractical. Such a presumption is parent focussed, not child focussed, and could be seen as placating a parent (of either gender) rather than advancing the welfare of a child.

To encourage a better informed consideration of the very important topic of children's' welfare in the context of parental separation may I offer the following:

Amendments to Part VII of the *Family Law Act* dealing with children's issues came into operation throughout Australia in mid 1996.

The principles of the amending legislation are described in section 60B(2) as

: - *except when it is or would be contrary to a child's best interests:*

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development
(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

[18] Sections 61B and 61C Family Law Act.

(d) parents should agree about the future parenting of their children.

The intention of these amendments was **not** to introduce any presumptions as to who would parent children after separation. It was rather to encourage parental responsibility, and exhort both mothers and fathers to focus on their children's future wellbeing rather than their own grief and anger. This concentration on responsibilities rather than rights appears to have been a resounding failure, if the media reports on 'joint custody' are accurately being reported. So too does the intention of the amendments to remove the proprietorial concepts of 'custody' of children and 'access' to them and replace them with 'residence' and 'contact' respectively.

Research carried out in Australia and elsewhere over the past two decades has constantly shown the psychological benefits to children in maintaining the links with both parents, regardless of the fact that the adult relationship has broken down. Increased self esteem, psychological resilience and better educational performance are some of the outcomes[19]. The Court strives to do this where it considers it appropriate, and many parents do so as a result of the arrangements they make themselves. **However,** where parents are abusive, dysfunctional or unwilling to maintain contact, the research shows that the consequences for the children can be damaging, and contact inappropriate.[20]

The Court's role in children's matters is very clear. Section 65E of the Family Law Act requires it, when deciding whether to make a particular parenting order in favour of a child, to consider the best interests of that child as the paramount consideration. Section 68F(2) sets out a number of matters that must be considered when determining those best interests. These matters include:

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

> *(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or*
>
> *(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;*

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[19] N. Balla The Best Interests of the Child in the Post Modernist Era: A Central but Illusive and Limited Concept, Paper presented at the *Special Lectures 2000: Family Law, a Colloquium on Best Interests of the Child: Perspectives on the Resolution of Custody Disputes, Toronto, Canada*.

[20] JB Kelly, 'Current Research on Children's Post Divorce Adjustment: no Simple Answers', (1993) 31 Family and Conciliation Courts Review 29, M Kline, J Johnston and J Tschann, 'The Long Shadow of Marital Conflict: A Model of Children's Post Divorce Adjustment', (1991) Journal of Marriage and the Family 297. B Rodgers and J Pryor 'Divorce and Separation: The Outcomes for Children', Joseph Rowntree Foundation, York 1998, Helen Rhoades 'Posing as Reform – the Case of the Family Law Reform Act'; (2000) 14 Australian Journal of Family Law, 142.

(h) the attitude of the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents

(i) any family violence involving the child or a member of the child's family;

Unfortunately, the disputes the Court is called upon to adjudicate very frequently involve one – (or sometimes two) - parents who, the evidence before the judge suggests, are incapable for reasons of violence, addiction or temperament of caring for a child. In such cases joint parenting, in any shape of form, is completely out of the question. In a limited number of cases contact is quite inappropriate.

In a judgment delivered just 2 months after the Family Court opened its doors, (and when the previous concepts of custody and access represented the law) Justice Demack considered whether there was a case for joint custody or sole custody and the extent to which the father ought to have access to the child. In his judgment, he said

``I find the concept of joint custody a very difficult one to understand, but under sec. 61(1) of the Family Law Act , Parliament has enacted that the married parents of a child have joint custody of that child. Whatever this means, it appears to me that it is a state of fact and law which can only continue where the parties are in full amicable agreement about all aspects of the care, protection, custody, control, education and welfare of the child. Once there is disagreement on any of these issues, there must be some source of authority to determine what the resolution of the disagreement is to be.
It seems to me, therefore, that in most instances, once the matter comes to Court, there is no place for an order for joint custody. To make such an order once the parties have chosen the path of litigation is to either encourage further litigation or to require the parties to achieve some kind of compromise which will almost inevitably have a disturbing effect upon their relationship with the child.''[21]

> The jurisprudence of this Court has been consistent, and very rarely have joint custody orders been made in contested proceedings under the Act, in either its original or current forms. Cases such as *Padgen*[22]*, H and H-K*[23] and *Forck and Thomas* [24]established that these orders were not appropriate unless the parties were compatible, and were able to cooperate, communicate and trust each other. These factors are incompatible with litigation and are rarely present in contested proceedings.

The Full Court also made it clear that the pre-*Reform Act* case law principles that had been developed to deal with custody and access disputes continue to be applicable to residence and contact applications made since mid 1996.[25]

[21] Yann and Yann (1976) FLC 90-027, at 75,120.
[22] (1991) FLC 92-231
[23] (1990) FLC 92-128
[24] (1993) FamLR 516.
[25] B and B: Family Law Reform Act 1995 (1997) FLC 92-755

A presumption of joint parenting would have ramifications far beyond the population of parents who come before the Court. Many of those we do not see negotiate in the shadow of the law, whilst others are completely unaffected by its provisions but are able to make workable and sensible arrangements concerning their children. For those somewhere in the middle I would be concerned that one or other parent – and it can, of course, be either the father **or** the mother – may put pressure on the other parent to agree to the child being 'shared' in circumstances where the child's best interests would be compromised by such an outcome. And I am not being unduly cynical when I suggest that it is more likely to be in circumstances where the pressuring parent is unduly powerful, controlling and overly self focussed, that such pressure is applied.

In addition to situations in which a parent is an inappropriate primary carer, there are a number of obvious other factors which militate against shared parenting.

These include:

- where the parents live considerable distances away from each other and consistency of schooling and peer relationships cannot easily be maintained (to say nothing of the travel difficulties encountered by the child) ,

- Where the parents continue to express hostility to each other, are unable to cooperate with each other or are inflexible;

- Where the parents cannot ensure that their work patterns and living arrangements can accommodate the demands of the children.

- Where the accommodation and other facilities to meet the needs of children in two households are not financially within the reach of both parents, given that separation frequently results in less resources being available.

- Where prior to separation one parent has had the major role in child care and the other parent does not have the parenting skills necessary to meet the needs of the children.

The impacts of the 1996 amendments on the 95% of separating parents who do **not** seek orders from the Court are difficult to assess. In the few years following the introduction of the new laws the numbers of applications for parenting orders increased quite considerably. Anecdotally there were reports that fathers had misunderstood their intent, and assumed that henceforth they would automatically share their children on an equal basis[26].

However, over a consistent period (and regardless of the state of the law), privately negotiated consent orders filed with the Court have been far more likely to confirm that the children will remain in the primary care of their mother than they are to suggest any other arrangement.

[26] See H Rhoades, R Graycar and M Harrison, 'The Family Law Reform Act 1995: The First Three Years' (University of Sydney and Family Court of Australia, 2000)

Research carried out during the first 3 years of the operation of the 1996 amendments showed that there was confusion about the meaning of shared parental responsibility in the then new section 60B. Interviews with counsellors showed that, although they generally supported the 'shared parenting' ideal, most viewed 'equal time' arrangements as disruptive and destabilising for children, and said they would not recommend them unless there was an existing high level of co-operation between the parents. The vast majority of those surveyed agreed that there is a considerable divergence between the theory and practical reality of shared parenting, with most noting that the reforms have failed to make a difference to post-separation arrangements in practical terms. Their reasons for the failure of shared parenting in practice included the following: :

> '[The failure of shared parenting] is not necessarily a reflection on people's genuineness. Most parents would – and do – agree with the theory of shared responsibility but find the practical reality difficult, often as a result of the personal pain of separation.'
>
> 'Mostly women end up carrying lots of responsibility and male partners still have children for limited time and do not consistently make themselves available to the children.'
>
> 'Few separated couples are adult enough to work together as a parenting team.'
>
> '[Shared parenting fails] because often cases involve domestic violence and the abuse continues through the children.'[27]

I would urge the Federal Government not to rush into such a proposal, but to examine carefully the consultation process and final report of a Canadian Family Law Committee, which was initiated at the request of the Deputy Ministers responsible for Justice in that country and published in November 2002[28]. The report resulted from extensive research and consultations with family law professionals, parents, advocacy groups and interested Canadians, as well as ministers and officials from the Federal, provincial and Territorial tiers of government

It recommended quite substantial amendments to the Divorce Act. However in response to the option which suggested amendments to introduce shared parenting similar to that contained in Part VII of the Australian Family Law Act. The report concluded:

"Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child. There should be no presumptions in law that one parenting arrangement is better than another. It is also a term that seems to focus

[27] ibid . see also H Rhoades, 'The Rise and Rise of Shared Parenting Laws – a Critical Reflection' (2002) 19 Canadian Journal of Family Law 75-113.
[28] Final Federal-Provincial- Territorial Report on Custody and Access and Child Support 'Putting Children First', November 2002'

on parent's rights rather than the child. Its meaning and application is ambiguous and this may itself promote litigation"[29].

3/ *The Role of the Adversarial System in Children's Matters*

This afternoon I would like to suggest to you that the current adversarial system for determining child matters is not working effectively.

Although the Family Court plays a less adversarial and more active role in proceedings involving children than it does when determining financial disputes, it is true to say that the parties via (where they have them) their legal representatives essentially determine the issues in the case, what evidence is to be adduced and in what manner this is to occur. The weaknesses in the system have been exacerbated in recent years as the proportion of litigants who represent themselves has increased. Indeed, the active role played by the Court's Self Represented Litigants Committee has drawn attention to a number of weaknesses in the manner in which proceedings are conducted.

But whether parties are self represented or not, Judges are increasingly finding themselves being presented with reams of unnecessary material, usually dwelling on events long past. This material is frequently adult and not child focussed and replete with allegations about what each party is alleged to have done to the other. A common scenario is that witnesses are called who can provide little or no relevant information, and trials become lengthier and more expensive. The relationship between the parties – if it is not already in tatters – deteriorates to the extent that they are unable to effectively co-parent their children in the future to any extent without hostility. The children lose, the system gets bogged down and precious resources are wasted.

I should say also that, whilst most lawyers are competent and conscientious, they have had instilled in them the obligation to 'go into bat' for their clients as hard as it is possible to do. To act otherwise in civil and criminal proceedings is inappropriate and may well attract complaints as to competence, and even professional misconduct claims. I would like it to be accepted that family law proceedings, in which the wellbeing and best interests of children are involved are different, and should therefore be the subject of a different approach by all concerned – the Court, of course, included.

The Court is trying to find a better way, and I am personally convinced that we must work hard – and cooperatively with all those involved – to think more laterally. We already have something of a model in the Melbourne Magellan pilot, in which the judge played an active role in liaising with the parties, the State Welfare Department, Legal Aid Commission, police etc where cases involved serious allegations of physical or sexual abuse[30]. This concentrated effort reduced

[29] Ibid at page vii.

[30] See T Brown, with R Sheehan, M Frederico and L Hewitt (2002), 'Resolving Family Violence to Children', the evaluation of Project Magellan, a pilot program for managing Family Court residence and ontact disputes when allegations of child abuse have been made.

delays, ensured that relevant information was provided within short time frames and allowed a complete picture of the child's circumstances to be produced. Many matters settled on the basis of the information provided, and in a manner which satisfied the judge that the child's future welfare would be protected. Magellan is about to be implemented nationally across the Court where serious child abuse is alleged, but it does not necessarily provide a model basis for the management of *all* children's cases.

We have so far not considered any other models, but have begun to examine various European systems, in some of which judges play an active role in defining the issues to be determined, deciding whether a particular witness is necessary, and how her or his evidence is to be provided. Ideally these hearings are conducted within a short period of time after proceedings are commenced and are of limited duration. Characteristically they are actively managed by the judge, whose task is largely to look for a solution, and who emphasises what will be best for the child in the future, rather than what might have occurred in the past.

In considering how the system might be improved the Court is very aware that merely grafting on another system's approach to these cases will not solve the problem – in fact it may well increase existing problems. Similarly, jumping in with untested proposals is a recipe for disaster. Our early thoughts suggest that once due deliberation has produced a workable model this should be piloted in a particular registry or registries, and also carefully evaluated to ensure that there are no unintended consequences.

However, if there is one thing about which there is a fair degree of consensus among experienced judges and other relevant professionals is that an adversary system developed in England for the determination of criminal and civil cases a number of centuries ago is not an appropriate method for the determination of family law disputes concerning children in the 21st century. It places undue focus on the rights of parents and far too little focus on the rights of children.

Many people say that they have such a fear of the courts and of the time and expense involved in litigation that they will do anything to avoid it. I can understand this feeling. The Family Court of Australia has gone to considerable lengths to simplify its procedures, to encourage the early resolution of disputes and to make the Court more user friendly. We are about to introduce new and modern Rules, and a simpler set of forms. However, we need to turn our attention to whether the whole system of dealing with children's cases needs to be re-thought from start to finish. While reform of trials is important, it may be that a more focussed intervention by the Court at an earlier stage would produce even more satisfactory results.

APPENDIX 1

Article 3

1. 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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. 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, in a manner consistent with the procedural rules of national law.

APPENDIX 2

Guidelines for The Child's Representative (DRAFT)

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 alone 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. 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 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;
- prepare reports for the Court;
- 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 overdependent 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 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.

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.

6.2 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.

6.3 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. 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.

6.4 Case Planning

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

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 formally 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 direct 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.

6.5 Changing, Reviewing or Terminating 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.

6.6 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.

6.7 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.

6.8 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, in an admissible form where possible, 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.

6.9 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.

6.10 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.

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. This policy can be found on the Court's website.

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)."[*]

More explanations can be found in *The Family Court Book* published by and available from the Family Court of Australia and also at the Court's website: www.familycourt.gov.au

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