

AUTONOMY VS BENEFICENCE: ETHICS AND THE REPRESENTATION OF CHILDREN AND YOUNG PEOPLE IN LEGAL PROCEEDINGS

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Differing approaches have developed in relation to the legal representation of children and young people. The two dominant approaches are 'direct' representation (where the lawyer acts on the instructions of the child) and 'best interests' representation (where the lawyer acts separately upon an assessment of the child's best interests or receives instructions from a responsible adult). Given that international law recognises that children have the capacity to participate in legal processes, this article will consider the ways in which children are legally represented across Australia, analyse their strengths and weaknesses, and suggest options to reduce ethical concerns.

I INTRODUCTION

It has been observed that 'most lawyers operate in moral isolation by not seeing their clients as complete human beings'.¹ While some may disagree with this assessment, it may have merit in the context of a lawyer's relationship with a child client. It is certainly true that differing approaches have developed in relation to the legal representation of children and young people in Australia and internationally. These approaches range from 'direct' representation, where the lawyer acts upon the instructions of the relevant child or young person, to 'best interests' representation, where the lawyer does not act upon instructions of the relevant child but rather acts separately upon his or her assessment of the child's best interests or receives

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¹ Y Ross, *Ethics in Law* (Butterworths, 3rd ed, 2001) 39.

instructions from a responsible adult² accepted by a court and who is generally a parent or guardian of the relevant child.³

Contemporary Australian law underpins the use of best interests representation in civil litigation (including family law) and child welfare proceedings. The direct representation approach is generally limited to criminal proceedings (and child welfare proceedings in some jurisdictions in specific circumstances). In contrast, direct representation applies to both civil and criminal matters involving adults unless the adult is not mentally competent.

In the United States, the debate in relation to the various representation approaches has been influenced by the so-called principles of ‘autonomy’ and ‘beneficence’.⁴ Autonomy is the quality of serving the child’s legal rights by following his or her expressed wishes whereas beneficence, in relation to child representation, is that quality which results in the care and protection of the child.⁵ Given these differing approaches, ethical questions arise as to which approach best serves the interests of the child or young person and which approach best serves the interests of justice. Vendrell argues that any blind allegiance by a legal representative to either beneficence or autonomy is potentially harmful to a child client, and that a balance of both principles should underpin the legal representation of children.⁶ In contrast, the New South Wales Law Society argues that, where possible, children and young people should be represented on a direct representation basis.⁷

In light of international law now recognising that children can and do have the capacity to participate in legal processes to enforce their rights,⁸ this article will compare the ways in which children are legally represented across Australia in the various

² This approach involves the use of a ‘next friend’ or ‘guardian *ad litem*’ who instructs the lawyer on the relevant child or young person’s behalf. The next friend *commences* proceedings on behalf of the child or young person whereas a guardian *defends* proceedings commenced by a child or young person. The collective terms, ‘tutor’ or ‘litigation guardian’, are generally used throughout Australia to describe a next friend or guardian *ad litem*.

³ These approaches are discussed in Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC), *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) Chapter 13 (‘Legal Representation and the Litigation Status of Children’).

⁴ M Ventrell, ‘Legal Representation of Children in Dependency Court: Towards a Better Model – The ABA (NACC Revised) Standards of Practice’ (1999) *National Association of Children’s Counsel (NACC) Children’s Law Series* 167, 170. Ventrell credits the identification of the themes beneficence and autonomy in this context to Donald Bross, Education Director of the University of Colorado Health Sciences Department Kempe Children’s Center. The concept of ‘beneficence’ is, of course, well known to ethicists, particularly in the health and medical sciences.

⁵ *Ibid.*

⁶ *Ibid* 171.

⁷ Law Society of New South Wales, *Representation Principles for Children’s Lawyers* (2002) 4-6 <http://www.lawsociety.com.au/uploads/filelibrary/1038355147282_0.5690935283305489.pdf> at 9 January 2009.

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS art 12 (entered into force 2 September 1990) which states: ‘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.’

jurisdictions by considering the laws, court rules, practice standards and guidelines that currently exist. In doing so, the strengths and weaknesses of the current approaches will be analysed and options to reduce ethical concerns will be suggested.

II CURRENT LAW AND PRACTICE

A *Criminal Law*

Legal representation in juvenile justice matters mirrors the adult criminal justice system where the lawyer acts on the direct instructions of the child or young person. In other words, the child or young person *is* the client. Given the age of criminal responsibility,⁹ there is a lesser issue of incompetence in the child or young person giving instructions and therefore the legal representative focuses on the young client's expressed wishes. In other words, the system should provide the child with full autonomy with little attention to beneficence.¹⁰ While acknowledging that post adjudication disposition may consider the rehabilitation or treatment of the child or young person, the lawyer is still bound by the instructions of the young client in the traditional way.¹¹ Notwithstanding, it is acknowledged that the lawyer-control model is likely to underpin the relationship.¹²

All Australian jurisdictions have limited reference in their relevant juvenile justice legislation to the need to protect children's rights or to the child's right to legal representation.¹³ The relevant legislation in some jurisdictions refers to the need to ensure that children understand the nature and purpose of the proceedings.¹⁴ As the relevant legislation reflects both justice and welfare concerns, questions arise about how the lawyer's traditional adversarial role in the court might be affected.¹⁵ Unfortunately, little research has been conducted into the representation of children and young people in criminal matters, and in particular, whether there are any significant differences between the legal representation of adults as compared to children and young people. In relation to the available research, it has been observed that as a significant number of children and young people 'plead guilty', the Children's Courts are in reality institutions for imposing penalties rather than institutions for determining guilt or innocence.¹⁶ In their South Australian study, Naffine and Wundersitz observed that the lawyers

⁹ The age of criminal responsibility is 10 years under federal law and in all state and territory jurisdictions. This is subject to the principle of *doli incapax* where children aged under 14 years are believed to be innocent and incapable of a criminal act unless that presumption is successfully rebutted. For a general discussion see: T Crofts, 'The Criminal Responsibility of Children' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 167.

¹⁰ Ventrell, above n 4, 171.

¹¹ Ibid.

¹² For a discussion of lawyers and ethical theories (including the 'lawyer-dominated model') see: Ross, *Ethics in Law*, above n 1, 33-53.

¹³ *Youth Justice Act 2005* (NT) ss 4(d), 62; *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a); *Juvenile Justice Act 1992* (Qld) s 79 (also see: sch 1 'Charter of Juvenile Justice Principles'); *Young Offenders Act 1993* (SA) s 30(2)(b); *Youth Justice Act 1997* (Tas) ss 4(d), 5(b), 29(a)(ii); *Children, Youth and Families Act 2005* (Vic) ss 10(2), 524, 525; *Young Offenders Act 1994* (WA) ss 6(c), 7(c), 44(2)(b). *The Children and Young People Act 1999* (ACT) ss 23 and 24 indicate that children can be represented on a best interests basis in this jurisdiction.

¹⁴ See, eg, *Juvenile Justice Act 1992* (Qld) s 72.

¹⁵ N Naffine and J Wundersitz, 'Lawyers in the Children's Court: An Australian Perspective' (1991) 37(3) *Crime and Delinquency* 374, 375.

¹⁶ N Ross, 'Legal Representation of Children' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 544, 564; see also: C Cuneen and R White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 3rd ed, 2007) 250-1.

appeared to have more impact in the pre-court negotiations about the charges made against their young clients, rather than in their ultimate representation in court.¹⁷ More importantly, the lawyers in their study indicated that they sometimes found themselves doing what they thought was in the best interests of the child rather than acting strictly in accordance with the child or young person's instructions.¹⁸ They also observed that the lawyers were prone to limiting their child client's participation; generally advising them that it was not in their interests to talk in court, even when their young client suggested they would like to say something or participate more directly.¹⁹

In their report, *Seen and Heard: Priority for Children in the Legal Process*, the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission commented that 'many lawyers' have difficulties accepting instructions from a child client.²⁰ The report provides the following example of a young person's experience of being represented by a duty solicitor in the Children's Court in a regional Queensland town:

He was being represented by the duty solicitor on this particular day and Carlos wanted to have his own solicitor represent him. He asked the duty solicitor to request bail for him. The duty solicitor refused and replied that he did not have a chance of getting it. Halfway through the solicitor's submission to the court, Carlos stood up and said 'Excuse me, your Highness, if it pleases the court I would like to speak'. The Magistrate granted Carlos' request. Carlos said, 'If it pleases the court I would like to sack my lawyer as I not [sic] think that he is acting in my best interests, actually I do not think he is doing me any good at all. If it pleases the court, I would like to ask for bail myself.' If Carlos had been an adult client would the solicitor have ignored his instructions for a bail application? I should think not.²¹

Despite this 'lawyer-control' problem in juvenile justice matters, the *Seen and Heard* Report commented that it had 'heard no major criticism of the direct representation model beyond the issue of instructions of children'.²² That having been said, more research and investigation is clearly desirable.

B *Civil Litigation*

While children and young people may be liable in civil proceedings, they may not commence or defend such proceedings on their own behalf.²³ Civil proceedings may,

¹⁷ Naffine and Wundersitz, above n 15, 386.

¹⁸ Ibid.

¹⁹ Ibid 389. See also: Ross, 'Legal Representation of Children', above n 16, 565. Ross refers to her PhD research which includes an empirical study of 35 lawyers who represent children in New South Wales. She states that her 'initial data suggests that the lawyers in this study who represented children in relation to criminal proceedings generally had a much greater appreciation of the importance of children's participation than was evident in the Naffine and Wundersitz research ... A 2005 client survey of the Children's Legal Service in NSW supports this conclusion'.

²⁰ ALRC and HREOC, above n 3, [13.5].

²¹ Ibid.

²² Ibid.

²³ In the civil jurisdictions of State and Territory courts, children and young people are most frequently involved in personal injury matters. In federal civil courts children and young people sometimes appear in relation to consumer issues or in public law matters concerning income support or immigration decisions: see ALRC and HREOC, above n 3, [13.7]. It is worth noting that the *Federal Magistrates Court Rules 2001* (Cth) stipulate that proceedings involving a minor require the appointment of a litigation representative 'unless the Court orders otherwise': r 11.08(2).

however, be instituted or defended on behalf of a child or young person by a third party historically known as a ‘next friend’ or a ‘guardian *ad litem*’.²⁴ The next friend or guardian *ad litem* (collectively known as the ‘tutor’²⁵ or ‘litigation guardian’²⁶) is generally a parent or legal guardian of the relevant child or young person and he or she acts in an unpaid capacity in the place of the child or young person taking responsibility for the conduct of the proceedings.²⁷ While the common law recognises that the tutor should act in the best interests of the child,²⁸ there is no strict legislative responsibility on the tutor in some jurisdictions although the *Federal Court Rules*, for example, require that a certificate be filed by the solicitor on the record stating ‘that the tutor has no interest in the proceeding adverse to that of the person under disability’.²⁹ By contrast, the *Uniform Civil Procedure Rules 1999* (Qld) require that for a settlement or compromise to be effective, ‘the litigation guardian for the party must produce to the court ... an affidavit made by the party’s solicitor stating why the settlement or compromise is in the party’s best interests’.³⁰

Clearly the focus in civil proceedings involving children and young people is beneficence over autonomy. The interests of the relevant child or young person are served if the tutor/litigation guardian correctly assesses the interests of that child or young person and the legal system sees fit to protect those interests.³¹ It should not be overlooked that despite the relevant rules stipulating that a person may not act as a tutor/litigation guardian for a child or young person in which that person ‘has an interest

²⁴ For example, the *Federal Court Rules 1979* (Cth) provide that ‘an infant or minor may sue by his next friend’ (O 43 r 1(1)) and that ‘an infant may defend in a proceeding by his guardian appointed for that purpose’ (O 43 r 1(2)). While the former *High Court Rules 1952* (Cth) (O 16 r 18) used this terminology, the current *High Court Rules 2004* (Cth), which commenced on the 1 January 2005, now use the term ‘litigation guardian’: see *High Court Rules 2004* (Cth) r 21.08 (‘persons under disability’). The litigation guardian has no right of appearance but must ‘act by a solicitor’: *High Court Rules 2004* (Cth) r 21.08.3. This rule is mirrored in State and Territory jurisdictions: see, eg, *Uniform Civil Procedure Rules 2005* (NSW) pt 7 div 4 (regs 7.13-7.18).

²⁵ The *Federal Court Rules 1979* (Cth) thereafter provide that ‘the Court may, on motion by a party to a proceeding or any other person, appoint a tutor for a person under disability for the purpose of the proceeding’: O 43 r 2(1) (O 4 states that a ‘tutor’ means a next friend, guardian *ad litem* or committee of the person or estate of a person under disability). See also: *Uniform Civil Procedure Rules 2005* (NSW) reg 7.14 where the collective term ‘tutor’ is used. However, further note that in NSW, a ‘person may become the tutor of a [person under legal incapacity](#) without the need for any formal instrument of appointment or any order of a court’: *Uniform Civil Procedure Rules 2005* (NSW) reg 7.15.1.

²⁶ This is the term used in the *High Court Rules 2004* (Cth) r 21.08 (‘persons under disability’) and the *Federal Magistrates Court Rules 2001* (Cth) pt 11 div 11.2 (‘litigation guardian’). See also: *Uniform Civil Procedure Rules 1999* (Qld) ch 3 pt 4 (ss 93-99). The litigation guardian has no right of appearance but must ‘act by a solicitor’: *High Court Rules 2004* (Cth) r 21.08.3; *Uniform Civil Procedure Rules 1999* (Qld) s 93(3). There is no equivalent provision in the *Federal Magistrates Court Rules 2001* (Cth).

²⁷ This includes, in the case of the next friend, incurring liability for litigation costs, see ALRC and HREOC, above n 3, [13.8]

²⁸ *Rhodes v Swithenbank* (1889) 22 QBD 577, 579 (Lord Esher); *In re Taylor's Application* [1972] 2 QB 369; see ALRC and HREOC, above n 3, [13.10].

²⁹ *Federal Court Rules 1979* (Cth) O 43 r 4(6)(b). There is a similar requirement in New South Wales: *Uniform Civil Procedure Rules 2005* (NSW) reg 7.16(b).

³⁰ *Uniform Civil Procedure Rules 1999* (Qld) s 98(2)(a).

³¹ Ventrell, above n 4, 171.

adverse to the interest of the person under disability',³² the lawyer does represent the tutor/litigation and not the relevant child or young person.

Interestingly, in relation to the competence issue in civil proceedings, the *Seen and Heard* Report commented that some young people:

may have a cause of action they wish to pursue independently and many are sufficiently mature to do so. Many young people live independently. Some of these young people have causes of action but no suitable family member to act as next friend. The mature minor test was developed in British and Australian courts initially in relation to the ability of a child to make informed decisions concerning medical treatment independent of parents. It may be useful in this broader context.³³

Given this view, the *Seen and Heard* Report recommended that there should be a rebuttable presumption that a child over the age of 16 years living independently is competent to initiate or defend civil proceedings.³⁴ Whether the age of 16 years is the appropriate measure is, of course, debatable.³⁵ It does, of course, generally represent the 'age of consent'³⁶ for sexual relations and the age by which a child can consent to medical treatment.³⁷ Given that the age of 16 also represents the new minimum school leaving age,³⁸ this recommendation should be seriously considered.

C Family Law

The legal representation of children and young people in family law proceedings either involves the appointment of an 'independent children's lawyer' or the use of a 'case guardian'.

³² See, eg, *Federal Court Rules 1979* (Cth) O 43 r 4(3); *Federal Magistrates Court Rules 2001* (Cth) r 11.10.

³³ ALRC and HREOC, above n 3, [13.17]; see also: *Gillick v West Norfolk Wisbech Area Health Authority* [1986] AC 112; *Secretary, Department of Health and Community Services v JMB and SMB* (1992) FLC ¶92-293 (also known as 'Marion's case').

³⁴ ALRC and HREOC, above n 3, Recommendation 68.

³⁵ For example, see comments made by Mushin J in *Re A (a child)* (1993) FLC ¶92-402, 80,114-5.

³⁶ The age of consent for heterosexual or homosexual sex is 16 years in the Australian Capital Territory; New South Wales; Northern Territory; Victoria and Western Australia. It is 17 years in South Australia and Tasmania. In Queensland the age of consent is 16 years for vaginal sex and 18 years for anal sex.

³⁷ See, eg, *Minors (Property and Contracts) Act 1970* (NSW) s 49.

³⁸ The school leaving age is currently 16 years in Queensland, South Australia and Tasmania; 'under 16 years' in Victoria; and 15 years in the Australian Capital Territory; New South Wales and the Northern Territory. New South Wales is proposing to raise the school leaving age to 16, see NSW Government, *Raising the School Leaving Age: Consultation Paper* (2008) New South Wales Government Department of Education and Training <<https://www.det.nsw.edu.au/media/downloads/reviews/schleavage/schleavagecons.pdf>> at 21 January 2009. The school leaving age has been effectively increased to 18 years in Western Australia (young people aged 16 or 17 'must be in education, training or employment', see Department of Education and Training, *Raised Leaving Age* (2008) <<http://www.det.wa.edu.au/schoolleavingage/detcms/portal/>> at 9 January 2009. For a general discussion of school leaving ages see D Butler and B Mathews, 'School Education' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 302.

1 *Independent Children's Lawyer*

Despite the fact that children and young people are the subject of family law parenting disputes, there is no requirement that a relevant child or young person be legally represented unless the court believes that the relevant child or young person should be 'independently represented', and if so, the court has the power to order that outcome.³⁹ The appointed 'independent children's lawyer'⁴⁰ ('ICL') is not obliged to act upon instructions of the relevant child or young person but rather is required to 'form an independent view, based on the evidence available to the [ICL] of what is in the best interests of the child ... and act in relation to the proceedings in what the [ICL] believes to be the best interests of the child'.⁴¹ While it was historically left to the Family Court judges to determine the particular roles and functions of the ICL, the legislation was amended in 2006 to include a comprehensive statement of the ICL's 'role' including the following specific duties to:

- (a) act impartially in dealings with the parties to the proceedings; and
- (b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and
- (c) if a report or other document that relates to the child is to be used in the proceedings:
 - (i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and
 - (ii) ensure that those matters are properly drawn to the court's attention; and
- (d) endeavour to minimise the trauma to the child associated with the proceedings; and
- (e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

While the inclusion of these duties is welcome, it is clear that the role of the ICL remains based on a model of beneficence. That having been said, recently released *Guidelines for Independent Children's Lawyers*⁴² are encouraging. For example, while the *Guidelines* make it clear that the 'child is not the decision maker', they do state that the 'best interests of the child will ordinarily be served by the ICL enabling the child to be involved in decision-making about the proceedings'.⁴³ The *Guidelines* acknowledge

³⁹ *Family Law Act 1975* (Cth) ('FLA') s 68L(2), (3). Despite the court's power to order the appointment of an Independent Children's Lawyer (ICL), such representation is not always able to be funded by the various legal aid commissions. Victoria Legal Aid (VLA), for example, has recently adopted a more restrictive approach in order to reduce the number of grants. Since early 2008, VLA has only supported the appointment of an ICL in what it describes as 'the clearest and most compelling cases': see VLA, *Changes to Family Law Funding* (2008) <<http://www.legalaid.vic.gov.au/xfw/1707.htm>> at 8 January 2009. This policy decision has led to a quota of appointments applying to requests made by the Federal Magistrates Court of Australia in that state.

⁴⁰ This is the term used in *Family Law Act 1975* (Cth) s 68LA.

⁴¹ *Family Law Act 1975* (Cth) s 68LA(4). See also: ALRC and HREOC, above n 3, [13.22].

⁴² National Legal Aid, *Guidelines for Independent Children's Lawyers* (2007) <<http://www.nla.aust.net.au/res/File/PDFs/ICL%20guidelines-6-12-07.pdf>> at 9 January 2009. They were developed by National Legal Aid and have subsequently been endorsed by the Chief Justice of the Family Court of Australia, and also by the Federal Magistrates Court of Australia.

⁴³ National Legal Aid, above n 42, 2.

that this will depend upon ‘the extent to which 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 views’.⁴⁴ The *Guidelines* then go on to further articulate the role of the ICL and his or her relationship with the relevant child or young person. In particular, the *Guidelines* state that the ‘ICL must be truly independent of the court and the parties to the proceedings’ and that child or young person has the *right* ‘to establish a professional relationship with the ICL’.⁴⁵ In addition, the ‘ICL is expected and encouraged to seek peer and professional support and advice where the case raises issues that are beyond his or her expertise’.⁴⁶

If the best interests and expressed wishes of a child or young person coincide, the ‘best interests’ model can be an effective blend of beneficence and autonomy.⁴⁷ Nevertheless, the appointment of a best interests representative, as Vendrell comments:

places an attorney in a substituted judgment role which is inconsistent with an attorney’s primary ethical directive, and for which the attorney may not be trained. Additionally, the phenomenon of ‘relaxed representation’ where an attorney presumes the requirements of zealous advocacy do not apply seems to appear when attorneys are appointed to this [guardian *ad litem* type] function. The model emphasizes beneficence over autonomy.⁴⁸

Vendrell’s comment about appropriate training is important, particularly in the Australian context. Apart from being legally competent, the best interests advocate needs a knowledge and ability to understand a child’s perspective, level of development and family or social dynamics.⁴⁹ Ross observes that lawyers need to have the skills and commitment to develop rapport and relationships with children, and in particular, ‘trust’.⁵⁰ She further observes that communication skills which assist lawyers to relate to children are fundamental and are not usually taught as part of a law degree or during pre-admission practical legal training. Ross comments that:

Some lawyers may have some innate sensitivity and ability to relate to children: others will not. Some lawyers may learn these skills on the job: others will struggle to attain them. There is a real need for training in this area, to support the ability of lawyers to interview children of different ages effectively and develop relationships which allows them to respectfully and carefully elicit views, where children wish to be involved. This involves giving children a choice about how they participate. This, of course, takes time, but there is no reason to think that it is not possible in many situations where lawyers represent children.⁵¹

Since 1996, a short training course has been provided by National Legal Aid and the Family Law Section of the Law Council of Australia to support the role of the lawyer appointed as an ICL. This training is required for any lawyer seeking to be added to the

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ventrell, above n 4, 172.

⁴⁸ Ibid.

⁴⁹ Ross, ‘Legal Representation of Children’, above n 16, 573.

⁵⁰ Ibid. Ross comments that ‘developing relationships with children was not a priority for all the family lawyers interviewed as part of a study of lawyers who represent children in NSW. Indeed some family lawyers deliberately limited contact with children in case children were harmed by the contact.’

⁵¹ Ibid.

relevant Legal Aid family law panel. In addition to attending the training course, applicants are expected to have the necessary experience in working with children in family law matters.⁵²

2 Case Guardians

While it is uncommon for children and young people to commence proceedings under the *Family Law Act 1975* (Cth), they are legally able to do so.⁵³ Notwithstanding, the *Family Law Rules 2004* (Cth) only allow a child⁵⁴ to ‘start, continue, respond to, or seek to intervene in, a case only by a case guardian’.⁵⁵ The *Rules* now specify who can be a case guardian and the conduct of the proceedings when one is appointed.⁵⁶ Under r 6.09 a person may be a case guardian if he or she:

- (a) is an adult;
- (b) has no interest in the case that is adverse to the interest of the person needing the case guardian;
- (c) can fairly and independently conduct the case for the person needing the case guardian; and
- (d) has consented to act as a case guardian.

Under r 6.13(1) a person appointed as the case guardian:

- (a) is bound by [the *Family Law Rules*];
- (b) must do anything required by [the *Family Law Rules*] to be done by the party;
- (c) may, for the party, do anything permitted by [the *Family Law Rules*] to be done by the party; and
- (d) if seeking a consent order (other than an order relating to practice and procedure) must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party’s best interests.

It is noteworthy that the case guardian is under the general duty of disclosure that applies to all parties.⁵⁷

D Care and Protection

The state and territory based care and protection jurisdictions have differing approaches to the legal representation of children and young people including both the best interests

⁵² For example, the Legal Aid Commission of NSW expects panellists to be experienced with at least 25% of their practice for the last 5 years involving family law matters as it applies to children, see Legal Aid Commission of NSW, *Panel for Independent Children’s Lawyers – Information for New Applicants* (2007) <<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/15675001194911799937.pdf>> at 9 January 2009.

⁵³ *Family Law Act 1975* (Cth) ss 65C(b), 69C(2)(c).

⁵⁴ Or a person with a disability.

⁵⁵ *Family Law Rules 2004* (Cth) pt 6.3, r 6.08 (formerly called a ‘next friend’ under *Family Law Rules 1984* (Cth) O 23 r 3(1)). As to the power to appoint see *Family Law Rules 2004* (Cth) pt 6.3, rr 6.10, 6.11.

⁵⁶ *Family Law Rules 2004* (Cth) rr 6.09, 6.13(1).

⁵⁷ *Family Law Rules 2004* (Cth) rr 6.13(2), 13.01.

and direct instructions models. Children are, generally speaking, represented by legal practitioners rather than by social science trained non-lawyers.⁵⁸ In all jurisdictions ‘where children are parties to the proceedings or are entitled to appear or be given notice of an application, those children able to give instructions generally are represented on the basis of those instructions’.⁵⁹ This, of course, depends on the age and level of maturity of the relevant child.

Where the direct instructions approach is preferred, the focus is clearly autonomy over beneficence. To quote Vendrell, under this approach:

An attorney functions as a client directed advocate. Given the choice of representing the best interests or expressed wishes of the client, the attorney is bound to represent expressed wishes, which could be harmful to a child. This model does not prohibit the attorney from acting in her capacity as counselor for the client, and ethics codes include the counseling function.⁶⁰

Obviously, where the best interests approach is applicable, the emphasis is beneficence rather than autonomy. The *Seen and Heard* report recommended that:

In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of that representation, the child’s willingness to participate and ability to communicate should guide the representative rather than any assessment of the ‘good judgment’ or level of maturity of the child.⁶¹

1 *Direct Representation*

(a) *New South Wales*

The Children's Court of New South Wales may appoint a ‘legal representative’ for a child or young person if it appears to the Children’s Court that the child or young person needs to be represented in any proceedings before it.⁶² The court also has the power to appoint a guardian *ad litem* for the child where he or she has ‘special needs because of age, disability or illness’.⁶³

The child’s legal representative is required to act as either a ‘direct instructions representative’ or an ‘independent legal representative’ depending on the child’s age or

⁵⁸ ALRC and HREOC, above n 3, [13.23]. In NSW, a private legal practitioner is appointed by the Children’s Court via a referral from the Legal Aid Commission of NSW, see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99(1).

⁵⁹ ALRC and HREOC, above n 3, [13.32].

⁶⁰ Ventrell, above n 4, 172.

⁶¹ ALRC and HREOC, above n 3, Recommendation 70 (this recommendation and comment applies to all types of matters including care and family law matters).

⁶² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99(1). A legal representative for a child or young person who has not been appointed by the court may appear only with the leave of the court: s 99(2).

⁶³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 100. The Court may also appoint a guardian *ad litem* for either or both the parents of the relevant child in suitable circumstances: see s 101.

level of disability.⁶⁴ There is a rebuttable presumption that a child who is not less than 12 years of age is capable of giving proper instructions to his or her legal representative, and consequently, the lawyer acts as a direct representative.⁶⁵ Where the court declares that the relevant child under the age of 12 is capable of giving instructions, then the child's legal representative must act as a direct instructions representative.⁶⁶ Interestingly, this procedure is contingent on the young child's lawyer making an application for such having presumably formed a view that the young child was capable of giving instructions.⁶⁷ Similarly, where the court declares that the relevant child who is aged 12 years or over is not capable of giving instructions, then the child's legal representative must act as an independent legal representative.⁶⁸ Again, this declaration is contingent on the young child's lawyer making an application for such having formed a view that the young child was incapable of giving instructions.⁶⁹

Whether the age of 12 is the appropriate benchmark to qualify a child as being presumed competent to give a lawyer instructions is, of course, debatable. Interestingly, when the legislation commenced nearly a decade ago, the benchmark age was 10. The logic underpinning the age of 10 being set as the benchmark was that it accords with the age of criminal responsibility. In other words, if a child at age 10 is capable of being charged with a crime and is capable of giving instructions to a lawyer as to pleading guilty or not, then such a child should also be capable of giving instructions to a lawyer appointed to represent the child in welfare proceedings. Of course it should not be overlooked that the age of criminal responsibility is subject to the principle of *doli incapax* (discussed earlier). While one may speculate whether the decision to increase the benchmark age from 10 to 12 in 2007 was a consequence of lobbying from lawyers, the New South Wales Government argued that the change was based on 'child development evidence that most 10 and 11 year olds are incapable of understanding the legal ramifications of their instructions, the intricacies of legal procedure in care matters and the various legal, procedural and jurisdictional issues that may arise'.⁷⁰ While social scientists would agree that any analysis of a child's interaction with the law must take account of how they develop, the 'rigid, age-bound views of children's abilities' that dominated developmental science for much of the 20th century are now questioned.⁷¹ That having been said, the benchmark age of 12 has some appeal given that most children would be in transition towards high school and experiencing the greater choices and responsibility associated with being in high school. Perhaps there is an argument now in New South Wales that it is the minimum age of criminal responsibility that should be reviewed upwards to age 12 notwithstanding the possible application of *doli incapax* to age 14.

⁶⁴ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99A.

⁶⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99C(1).

⁶⁶ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99B(2).

⁶⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99C(2).

⁶⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99C(2).

⁶⁹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99(4).

⁷⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2006 (Reba Meagher, Minister for Community Services).

⁷¹ J Lawrence, 'The Developing Child and the Law' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 83, 83.

(b) Victoria

The relevant legislation in Victoria requires children to be represented in various 'Family Division' matters (including care matters).⁷² A legal practitioner representing a child in any proceeding in the Children's Court of Victoria 'must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child'.⁷³ Where a child is not considered mature enough to give instructions, the court has the power to adjourn the case to enable legal representation to be obtained, but only if there are exceptional circumstances 'in the best interests of a child'.⁷⁴

While the relevant legislation does not prescribe a specific age, a 'Protocol' was developed in 1992 between the then Department of Health and Community Services and Legal Aid Victoria that 'generally speaking a young client aged seven (plus or minus one year) is capable of giving instructions'.⁷⁵

(c) South Australia, Western Australia and the Australian Capital Territory

Generally speaking, children and young people are legally represented in all three jurisdictions. Under the relevant South Australian legislation, the child who is the subject of the application is considered to be a party to that application⁷⁶ and he or she must be legally represented unless the court is satisfied the child has made an informed and independent decision not to be represented.⁷⁷ In Western Australia, the relevant 'child' is also a party to the proceedings,⁷⁸ although there is a judicial discretion as to whether the child 'ought to have separate legal representation'.⁷⁹ The legislation in the Australian Capital Territory provides that the court should only hear a care and protection matter if a child or young person has a lawyer.⁸⁰ Notwithstanding, the court may proceed to hear a matter where it is satisfied that a child has had reasonable opportunity to get legal representation and where it is satisfied that a child's best interests will be adequately represented in the proceedings.⁸¹

All three jurisdictions mandate the use of a direct instructions approach which applies unless the child is not capable of properly instructing the legal representative.⁸² In the event that a child is not capable of properly instructing the legal practitioner, a best

⁷² *Children Youth and Families Act 2005* (Vic) s 525(1).

⁷³ *Children Youth and Families Act 2005* (Vic) s 524(2), (10).

⁷⁴ *Children Youth and Families Act 2005* (Vic) s 524(4).

⁷⁵ L Akenson, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (1992) Victoria Law Foundation 12

<http://www.victorialaw.org.au/pdfbook/GUIDE_LAWYERS_ACTING_FOR_CHILDREN_189K_B.PDF> at 9 January 2009. Also see ALRC and HREOC, above n 3, [13.25] where the ALRC comments that while the Protocol emphasises maturity rather than the specific age of the child, the Victorian Government submission (*IP Submission 213*) noted that 'children of the age of seven years and over are normally considered mature enough to give instructions'.

⁷⁶ *Children's Protection Act 1993* (SA) s 46(1).

⁷⁷ *Children's Protection Act 1993* (SA) s 48(1).

⁷⁸ *Children and Community Services Act 2004* (WA) s 147(a).

⁷⁹ *Children and Community Services Act 2004* (WA) s 148(2).

⁸⁰ *Children and Young People Act 1999* (ACT) s 23(1)(a).

⁸¹ *Children and Young People Act 1999* (ACT) s 23(1)(b).

⁸² *Children's Protection Act 1993* (SA) s 48(2); *Children and Community Services Act 2004* (WA) s 148(4); *Children and Young People Act 1999* (ACT) s 24(4)(a).

interests approach applies.⁸³ In Western Australia, a child who does not wish to give his or her lawyer instructions, will also be represented on a best interests basis.⁸⁴ Moreover, it is the Children's Court in Western Australia that determines whether or not the child has sufficient maturity and understanding to give instructions, and not the appointed lawyer.⁸⁵

Curiously, the relevant legislation in the Australian Capital Territory requires the relevant lawyer to inform the court as to 'whether he or she is acting on the instructions of the child or young person or in the best interests of the child or young person, *or both* [emphasis added].⁸⁶ This seems somewhat unusual and, as Ross comments, confuses the two roles.⁸⁷

2 *Best Interests Representation*

(a) *Queensland*

The relevant legislation in Queensland prescribes a best interests approach to the legal representation of children in care and protection matters.⁸⁸ While the lawyer is under an obligation to present the child's views and wishes if possible, the best interests approach applies 'regardless of any instructions from the child'.⁸⁹ Despite the specific statutory reference to the use of a best interests approach, Ross comments that in practice private, lawyers 'who assess their child as *Gillick*-competent directly represent children' in care and protection matters.⁹⁰

(b) *Tasmania*

The relevant legislation in Tasmania prescribes that the court cannot determine a care application unless the relevant child is legally represented, or the court is satisfied the child has made an informed and independent decision not to be represented.⁹¹ The legislation is similar to the *Family Law Act 1975* (Cth) and assumes a best interests representation approach.⁹²

⁸³ *Children's Protection Act 1993* (SA) s 48(2); *Children and Community Services Act 2004* (WA) s 148(4); *Children and Young People Act 1999* (ACT) s 24(4)(b).

⁸⁴ *Children and Community Services Act 2004* (WA) s 148(4).

⁸⁵ *Children and Community Services Act 2004* (WA) s 148(5).

⁸⁶ *Children and Young People Act 1999* (ACT) s 23(1)(c).

⁸⁷ Ross, 'Legal Representation of Children', above n 16, 559.

⁸⁸ *Child Protection Act 1999* (Qld) s 110(1).

⁸⁹ *Child Protection Act 1999* (Qld) s 110(3).

⁹⁰ Ross, 'Legal Representation of Children', above n 16, 560. 'Gillick competency' is the common law test used to assess a child's capacity to consent to medical treatment. For a general discussion see B McGivern, 'Medical Treatment' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 430, 436.

⁹¹ *Children, Young Persons and Their Families Act 1997* (Tas) s 59(1). Note s 59(2) however ('subsection (1) does not apply if the Court is of the opinion that it is in the best interests of the child to proceed with the hearing in the absence of the child's representative').

⁹² *Children, Young Persons and Their Families Act 1997* (Tas) ss 54, 55, 59.

(c) Northern Territory

Recently enacted legislation will require the relevant child's lawyer to act on a best interests basis 'regardless of any instructions from the child'.⁹³ The relevant lawyer must, however, 'present the views and wishes of the child to the Court'⁹⁴ and *may* do the following:

- (a) interview the child; and
- (b) explain to the child the role of the legal representative; and
- (c) present evidence to the Court about the best interests, and the views and wishes, of the child; and
- (d) cross-examine other parties to the proceedings and their witnesses; and
- (e) make applications and submissions to the Court for the child; and
- (f) lodge an appeal against a decision of the Court for the child.⁹⁵

It is interesting to note that while the child's lawyer 'must' present the child's views to the court, the use of the word 'may' in relation to the other matters listed above would appear to signify the exercise of some discretion on the part of child's lawyer. The *Guidelines for Independent Children's Lawyers*,⁹⁶ applicable in family law matters, would make these required matters.⁹⁷ One assumes best practice in child welfare matters would also require these matters to be done, although there is debate among lawyers about the benefits of interviewing a pre-school child.

III PRINCIPLES FOR THE REPRESENTATION OF CHILDREN AND YOUNG PEOPLE IN LEGAL PROCEEDINGS

A Introduction

In their *Seen and Heard* report, the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (not surprisingly) found that 'quality representation of children is of crucial importance for effective decision making concerning children and for assuring children a say in decisions that affect them'.⁹⁸ After observing that differences had emerged between jurisdictions, the report concluded 'the legal profession needs to determine the ethical basis and corresponding rules and standards for the representation of children in the family law and care and protection jurisdictions'.⁹⁹ Consequently, the report recommended that:

⁹³ *Care and Protection of Children Act 2007* (NT) s 146(6)(a). As at May 2008 this Act has only commenced in part. The pre-existing legislation provides no guidance on the model of representation. It does provide that children over 10 years old who are the subject of an application should be provided with written notice of the care application, and further allows the court make such provision for the legal representation of the child 'as it thinks fit': *Community Welfare Act 1983* (NT) ss 36(2), 39(3).

⁹⁴ *Care and Protection of Children Act 2007* (NT) s 146(6)(b).

⁹⁵ *Care and Protection of Children Act 2007* (NT) s 146(7).

⁹⁶ National Legal Aid, above n 42.

⁹⁷ *Ibid*, see, eg, 5.1 (information which should be explained to the child); 6.2 (meeting the child); 6.9 (final hearing/the trial); 6.11 (appeals).

⁹⁸ ALRC and HREOC, above n 3, [13.2].

⁹⁹ *Ibid* [13.84].

clear standards for the representation of children in all family law and care and protection matters should be developed ... In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the litigation as an adult client would. In determining the basis of representation, the child's willingness to participate and ability to communicate should guide the representative rather than any assessment of the 'good judgment' or level of maturity of the child.¹⁰⁰

In response to this recommendation, the former Children's Legal Issues Committee of the Law Society of New South Wales¹⁰¹ developed comprehensive guidelines for the representation of children and young people.¹⁰² Following a year-long process of consultation and refinement, and consideration of overseas developments, in particular by the American Bar Association ('ABA') and the National Association of Children's Counsel ('NACC'), the Law Society released the first edition of its *Representation Principles for Children's Lawyers* in November 2000. After further consultation and research, and in particular ascertaining the views of relevant children and young people,¹⁰³ the Law Society adopted a revised second edition in March 2002. A third edition, that primarily updates terminology following legislative changes in family law and child welfare jurisdictions, was adopted in September 2007 and will be publicly available shortly. Representation principles have also been developed in the Australian Capital Territory in 2004 (for child welfare matters only)¹⁰⁴ and South Australia in 2007.¹⁰⁵ In addition, the Legal Aid Commissions have developed various best practice guidelines and practice standards for child representation in various jurisdictions.¹⁰⁶

¹⁰⁰ Ibid Recommendation 70.

¹⁰¹ The Children's Legal Issues Committee of the Law Society of New South Wales was established in 1999. In 2005 it was merged into the Family Issues Committee (for child welfare matters) and the Criminal Law Committee (for criminal matters).

¹⁰² Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7. On page ii the NSW Law Society acknowledges that the 'American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (5 February 1996) and Louise Akenson, *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* (August 1999) (a project of the Victoria Law Foundation) have been used in the drafting of these Representation Principles'. The writer was involved in the revision of the second edition and forthcoming third edition of the *Representation Principles for Children's Lawyers*.

¹⁰³ A Sherry and K Graham, *This is What I Think of You: Feedback On Representation Principles For Children's Lawyers* (2001) (a Report prepared for the Children's Legal Issues Committee, NSW Law Society with the support of UNICEF and the Legal Aid Commission of NSW Children's Legal Service).

¹⁰⁴ Law Society of the ACT, *Guidelines for Lawyers Representing Children and Young People in Care & Protection Matters in the ACT Children's Court* (2004) <<http://www.lawsocact.asn.au/content/services2/Guidelines%20for%20Representing%20Children.pdf>> at 9 January 2009.

¹⁰⁵ Law Society of South Australia, *Guidelines for Lawyers Acting for Children* (Law Society of South Australia, 1st ed, 2007). See also: G Monahan, 'A Matter of Principles: The Development of Guidelines for Representing Children and Young People in State Courts' (2005) 27(8) *Bulletin (Law Society of South Australia)* 17.

¹⁰⁶ For example, see Legal Aid Commission of New South Wales, *Children's Criminal Practice Standards* (2007) <<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/49294001194474196265.pdf>> at 8 January 2009; Legal Aid Commission of New South Wales, *Practice Standards for Independent Children's Lawyers in Family Law Matters* (2007) <<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/47085001194475133484.pdf>> at 8 January 2009.

B *Representation Principles for Children's Lawyers*

While the New South Wales *Representation Principles for Children's Lawyers*¹⁰⁷ acknowledge that several approaches or models exist in the relevant jurisdictions, the Law Society favours the direct representative model for all jurisdictions.¹⁰⁸ Such a position acknowledges the competence and capacity of most children to express views about decisions that affect them, and to provide instructions to lawyers.¹⁰⁹ As Akenson notes in her introduction to the Victorian *Guidelines for Lawyers Acting for Children and Young People in the Children's Court*, lawyers who represent children and young people negotiate ethical and practical issues not usually faced when acting for adults.¹¹⁰ However, she reminds lawyers that they owe 'the young client the same duties of undivided loyalty, confidentiality and competent representation as are due an adult client'.¹¹¹

The *Representation Principles* are framed on the basis that, in all cases and in all jurisdictions, the child's right to be heard should be respected. Adults frequently underestimate the knowledge and understanding of children, and their capacity to work through problems and provide a cogent view of what is in their interests.¹¹² While children, in particular very young children, may not be capable of providing instructions on all aspects of a matter, the *Representation Principles* encourage the development of skills in legal representatives to discern through careful questioning those aspects that are important to the child.¹¹³ Even in those jurisdictions where the direct instructions model does not apply, the *Representation Principles* recommend that legal practitioners should take the time to carefully record the wishes of the child where possible and seek to present those views in court.¹¹⁴

The *Representation Principles* are contained within 10 areas.

1 *Who is the Client?*

The *Representation Principles* acknowledge the differentiation between a lawyer's role as direct representative or best interests representative.¹¹⁵

2 *Role of Practitioner*

The *Representation Principles* reinforce the use of the direct instructions model unless the relevant law imposes a different model or the lawyer determines that the child is

¹⁰⁷ Hereafter referred to as the 'Representation Principles'.

¹⁰⁸ Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 4-6.

¹⁰⁹ S Currie, 'Children's Legal Issues: Representation Principles for Children's Lawyers' (1999) 37(10) *Law Society Journal* 48, 50. For a general discussion see G Monahan, 'Principles for Representing Children and Young People' (2004) 42(2) *Law Society Journal* 76.

¹¹⁰ Akenson, above n 75, 6.

¹¹¹ *Ibid* 9.

¹¹² Currie, above n 109, 51.

¹¹³ *Ibid*.

¹¹⁴ This recommendation is consistent with that made by the NACC with respect to the *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* (5 February 1996); also see: NACC, *Recommendations for Representation in Abuse and Neglect Cases* (2001) <<http://www.naccchildlaw.org/?page=PracticeStandards>> at 9 January 2009.

¹¹⁵ Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 2-3.

incapable of giving instructions.¹¹⁶ A lawyer should not act as both a direct representative and a best interests representative.¹¹⁷ This approach of ‘normalising’ (where possible) the client relationship between the relevant child and the lawyer is in keeping with the approach recommended in the United States by the ABA and the NACC:

The child’s attorney has a duty, as far as reasonably possible, to maintain a normal attorney-client relationship, including the obligation to zealously represent the child’s interests within the bounds of the law¹¹⁸ ... The child’s attorney has a duty to provide competent representation, which includes knowledge, skill, thoroughness and preparation. This includes knowledge of services available for the child.¹¹⁹

3 *Capacity to Give Instructions*

The *Representation Principles* emphasise that a child’s ability to communicate and willingness to participate should determine capacity to give instructions rather than the child’s level of maturity.¹²⁰ There is a similar obligation prescribed by the ABA/NACC:¹²¹ ‘the scope of representation by the child’s attorney includes the duty, within reason, to abide by the client’s decision concerning the objectives of representation.’¹²²

4 *Taking Instructions and Preferences*

Regardless of the representation approach, the *Representation Principles* stipulate that the relevant lawyer must see every child that he or she is representing, unless there are exceptional circumstances,¹²³ and suggests some basic rules for interviewing children.¹²⁴ There has been some opposition expressed about this principle applying in separate representation matters. In its response for feedback in relation to the first edition, the New South Wales Bar Association questioned any mandatory provision of this type and urged discretion.¹²⁵ The Family Law Committee of the Law Society of South Australia went further and stated that in family law separate representation matters ‘it is not standard practice for [the lawyer] to see the child who is represented’.¹²⁶ This approach is now out-of-step with the new *Guidelines for*

¹¹⁶ Ibid 4-6.

¹¹⁷ Ibid 5-6.

¹¹⁸ Ventrell, above n 4, Appendix ‘B’ Ten Fundamentals of Legal Representation of Children, rr 1 and 2; see also: ABA Model Rules of Professional Conduct (Model Rules): Preamble; 1.14(a); ABA Model Code of Professional Responsibility (Model Code): EC 7-1; EC 7-12; ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (ABA Standards): Preface; A-1.

¹¹⁹ ABA Model Rules: 1.1; ABA Model Code: DR 6-101(A)(1)(2); ABA Standards B-1; C.

¹²⁰ Law Society of New South Wales, *Representation Principles for Children’s Lawyers*, above n 7, 7-8.

¹²¹ Ventrell, above n 4, Appendix ‘B’ Ten Fundamentals of Legal Representation of Children, r 3.

¹²² ABA Model Rules: 1.2(a); ABA Model Code: DR 7-101(A)(1); EC 7-7; EC 7-8; ABA Standards: B-4.

¹²³ Law Society of New South Wales, *Representation Principles for Children’s Lawyers*, above n 7, 9-13. No examples of ‘exceptional circumstances’ are contained in the accompanying commentary. The Commentary does however note, at page 9, that ‘funding deficiencies often make it difficult for practitioners to spend time with the child they are representing’.

¹²⁴ Ibid 13.

¹²⁵ Letter to the Law Society of NSW from the Bar Association of NSW, 26 February 2001.

¹²⁶ Letter to the Law Society of NSW from the Law Society of South Australia (Family Law Committee), 12 February 2001.

*Independent Children's Lawyers*¹²⁷ applicable to independent children's lawyers in family law matters and the recent Law Society of South Australia, *Guidelines for Lawyers Acting for Children*, which, although not applicable to family law proceedings, do stipulate that: 'Other than in exceptional circumstances, the legal practitioner must meet with their client. The practitioner should see the client as soon as possible, well before the first hearing whenever possible.'¹²⁸

The ABA/NACC impose a duty upon children's lawyers 'of effective, thorough and developmentally appropriate communication with the client, including the duty to meet with the client'.¹²⁹

5 Duties of Representation

The duties of a lawyer depend upon the type of representation.¹³⁰ The *Representation Principles* stipulate that both a direct representative and a best interests representative should act 'in a competent and professional way in accordance with the *Solicitors Rules*¹³¹ and general legal requirements'.¹³² The ABA/NACC impose a similar ethical obligation¹³³ but, interestingly, goes further and contains a potential 'dobbing-in' obligation for any lawyer with knowledge that a child lawyer has committed a breach of his or her ethical duties.¹³⁴

6 Confidentiality

Regardless of the representation model, the *Representation Principles* stipulate that the relevant lawyer owes a duty of confidentiality to the child.¹³⁵ In the case of a best interests representative, it is argued that the principle will assist 'to develop trust between the representative and the child',¹³⁶ nevertheless it is acknowledged that the child would not 'have the protection of client legal privilege'.¹³⁷ The relevant ABA/NACC rule is straight forward on the issues of confidentiality and privilege:¹³⁸

¹²⁷ National Legal Aid, above n 42, 5 (6.2 meeting the child).

¹²⁸ Law Society of South Australia, *Guidelines for Lawyers Acting for Children*, above n 105, 12 (r 4.1).

¹²⁹ ABA Model Rules: 1.4 (a), (b); ABA Model Code: EC 7-8; 9-2; ABA Standards: C-1; A-3; B-1(5); D-2; E-2; F-4.

¹³⁰ Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 14-24.

¹³¹ Law Society of New South Wales, *Solicitors Rules, Made Under the 1987 Act Which are Deemed (by Virtue of Schedule 9 Clause 24 of the 2004 Act) to Have Been Made Under the 2004 Act* (2004) <<http://www.lawsociety.com.au/page.asp?PartID=574>> at 25 January 2009.

¹³² Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 15-16.

¹³³ Ventrell, above n 4, Appendix 'B' Ten Fundamentals of Legal Representation of Children, r 10 - Model Rules: 1.6, 3.7; Model Code: DR 4-101; 5-102; ABA Standards: A-1; Comment B-2(2).

¹³⁴ Ventrell, above n 4, Appendix 'B' Ten Fundamentals of Legal Representation of Children, r 7 'Attorneys knowing that a child's attorney has committed a rules violation may have a duty to inform authorities': Model Rules: 8.3; Model Code: DR 103(A); ABA Standards: No Provision.

¹³⁵ Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 25-7.

¹³⁶ *Ibid* 25.

¹³⁷ *Ibid*.

¹³⁸ Ventrell, above n 4, Appendix 'B' Ten Fundamentals of Legal Representation of Children, rr 6 and 10.

The child's attorney has a duty of full investigation of the case but shall not communicate about the subject of representation with a represented party without counsel's consent. Opposing counsel shall not communicate with a represented child without the child's attorney's consent¹³⁹ ... The child's attorney is bound by attorney-client confidentiality and privilege.¹⁴⁰

7 *Conflict of Interest*

Regardless of the representation model, the *Representation Principles* stipulate that the New South Wales *Solicitor's Rules* 'in relation to conflict of interest and the duty to avoid conflicts of interests' apply to the relevant lawyer.¹⁴¹ The ABA/NACC prescribe a similar prohibition¹⁴² and further state that 'the child's attorney must be sensitive to the age and maturity of the client where waiver is an issue.'¹⁴³ They are also quite direct on the issue of payment by third parties for child representation:¹⁴⁴ 'The child's attorney may not accept third party compensation without assurance that the payment will not effect the representation.'¹⁴⁵

8 *Access to Documents and Reports*

In relation a direct representative, the *Representation Principles* prescribe that a child client 'is entitled to access documents' held by the lawyer.¹⁴⁶ Apart from an assessment of the child's capacity to comprehend the contents of a document or report, the *Representation Principles* urge the lawyer to consult with, and where necessary involve, the author of a document or report where it is likely that it may contain information that could cause distress to the child.¹⁴⁷ In relation to a best interests representative, apart from the issue of an assessment of the child's capacity to comprehend the contents of a document or report, 'the best interests representative must have regard to court orders and any legislative requirements governing disclosure in these situations'.¹⁴⁸

9 *Interaction with Third Parties*

The *Representation Principles* acknowledge that where the lawyer 'considers it necessary to employ the services of another professional or service provider to further the case, the child should be consulted about the involvement of the third party and advised about the nature and purpose of the referral'.¹⁴⁹

¹³⁹ ABA Model Rules: 4.2; ABA Model Code: DR 7-104 (A) (1); ABA Standards: C-2(4); C-6.

¹⁴⁰ ABA Model Rules: 1.6, 3.7; ABA Model Code: DR 4-101; 5-102; ABA Standards: A-1; Comment B-2(2).

¹⁴¹ Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 28-9.

¹⁴² Ventrell, above n 4, Appendix 'B' Ten Fundamentals of Legal Representation of Children, r 9.

¹⁴³ ABA Model Rules: 1.7; ABA Model Code: DR 5-101 (A); 5-105(A), (C); 5-107 (B); ABA Standards: B-2(2).

¹⁴⁴ Ventrell, above n 4, Appendix 'B' Ten Fundamentals of Legal Representation of Children, r 8.

¹⁴⁵ ABA Model Rules: 1.8(f); ABA Model Code: DR 5-107 (A), (B); ABA Standards: No Provision; Exception: State payment is permissible.

¹⁴⁶ Law Society of New South Wales, *Representation Principles for Children's Lawyers*, above n 7, 29.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.* 30.

10 *Ending the Relationship*

Lastly, the *Representation Principles* acknowledge that the lawyer ‘should prepare the child for the end of the relationship before the end of the case’ and ‘determine what contact, if any, they will continue to have’.¹⁵⁰ Not surprisingly, it is noted that the ‘child client has the right to dismiss their direct representative, regardless of how or by whom the direct representative was appointed’.¹⁵¹ Interestingly, in the context of a best interests representative, while it is noted that the child cannot dismiss the lawyer, it is further noted that where the lawyer ‘becomes aware of the child’s dissatisfaction and that dissatisfaction cannot be resolved, the representative should bring this to the attention of the Court and seek specific instructions’.¹⁵²

IV CONCLUSION

As a general rule, the client sets the goals of representation in legal advocacy.¹⁵³ Subject to any competing duty or obligation under the rules of professional conduct, lawyers are required to follow and advance the ‘wishes and directions’ of their client.¹⁵⁴ This may pose a moral dilemma for a lawyer who could be required to advance a position on behalf of a client with which the lawyer disagrees. While lawyers are encouraged to exercise their ‘forensic judgment’ in client representation, they ‘are not required to critically assess the soundness of the judgment of the client’.¹⁵⁵ This outcome generally changes when a lawyer represents a child or young person in legal proceedings. The lawyer’s role is arguably less ‘representational’ and more ‘protective’ in its delivery.¹⁵⁶ While a lawyer’s duties and obligations depend upon the type of legal matter and process in issue, forms of paternalistic advocacy dominate. Whether this outcome is consistent with a child’s right to participate in legal processes to enforce their rights,¹⁵⁷ is questionable. While a measure of discretion is needed in the assessment of the maturity of a child or young person’s wishes and directions, the right to participate should be forefront.

While the law needs to protect any person, including a child, that is incapable of giving instructions to a lawyer, it also needs to nurture and support a ‘client-centred’ approach to the relationship between a lawyer and person the lawyer is representing. Despite observations that a lawyer-dominated approach may exist in some professional relationships,¹⁵⁸ irrespective of the age of the client, a client-centred approach is a more likely outcome for a client aged 18 years or more. Why this should differ for a client aged under 18 years, but otherwise competent, is a good question. Perhaps the logic does lie with the type of proceeding that involves the child or young person.

The use of the best interests approach in family law and child welfare proceedings may be appropriate given that the young client is the ‘subject’ of the proceedings, as distinct

¹⁵⁰ Ibid 31-2.

¹⁵¹ Ibid 32.

¹⁵² Ibid.

¹⁵³ ALRC and HREOC, above n 3, [13.3].

¹⁵⁴ Ibid (in particular, the lawyer’s duty to uphold the law and the lawyer’s duty to the court).

¹⁵⁵ Ibid.

¹⁵⁶ Ibid [13.4].

¹⁵⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS art 12 (entered into force 2 September 1990).

¹⁵⁸ Ross, *Ethics in Law*, above n 1, 38.

from a ‘party’ to the proceedings. This logic, however, does not explain why most jurisdictions have moved to a direct instructions model in appropriate child welfare proceedings. The setting of an age to trigger the question of a child’s maturity to provide instructions to a lawyer¹⁵⁹ is understandable given that it represents a straight forward evidentiary benchmark. Nevertheless, it may also mean that little or no assessment of the child’s maturity occurs below, or even above, that benchmark. While some would argue that lawyers are qualified to make an assessment of a child client’s maturity to provide direct instructions, surely it is a matter for the court to ultimately determine whether the child client is incapable (or capable) of providing direct instructions.¹⁶⁰ Moreover, if the court had real doubts in relation to the competence of a child or young person it could be assisted in this assessment by evidence given by a relevant expert. If a best interests approach is applicable, then the lawyer’s role should be clearly articulated in the relevant legislation and enhanced where necessary by guidelines or best practice publications to reinforce the child client’s right to participation in the legal process.

The difference in the approaches used in the representation of children and young people in criminal and general civil proceedings is difficult to justify. If children are criminal responsible at between 10 - 14 years of age, and able to instruct a lawyer like a competent adult, then why do children and young people generally lack the capacity to instruct their lawyer in their own civil proceedings? While it has been suggested that reducing the litigation-competency benchmark from 18 to 16 years, or creating a rebuttable presumption of competence at aged 16, may be appropriate,¹⁶¹ an assessment of competency, irrespective of age, should be relatively straight forward. Regardless of this suggestion, the relevant *Rules* of the court should leave open the possibility of the child or young person being considered competent by the court to direct their own proceedings.¹⁶² They should also adopt a requirement that for a settlement or compromise of a claim involving a child or young person to be effective, satisfactory evidence must be presented to the court from the child’s lawyer or litigation guardian stating the reasons why the settlement or compromise is in the best interests of the relevant child or young person.¹⁶³

The development of principles and guidelines to assist lawyers in the representation of children and young people are to be welcomed. Interestingly, the Law Society of New South Wales’ *Representation Principles for Children’s Lawyers* have received both praise *and* criticism.¹⁶⁴ Early criticism particularly focused on the issue of the separate representation of children in family law.¹⁶⁵ There appears to be opposition to any suggestion that a direct representation model should apply where the separate or independent representation of children is ordered in family law matters in relation to a child with sufficient age or level of maturity to provide instructions. This is, of course, a

¹⁵⁹ See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 99A-99D.

¹⁶⁰ As occurs currently in Western Australia: *Children and Community Services Act 2004* (WA) s 148(5).

¹⁶¹ ALRC and HREOC, above n 3, Recommendation 68.

¹⁶² See, eg, *Federal Magistrates Court Rules 2001* (Cth) r 11.08(2).

¹⁶³ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) s 98(2)(a).

¹⁶⁴ Comments have been received from organisations such as the Family Court of Australia; NSW Children’s Court; NSW Bar Association; Legal Aid Commission of NSW and the South Australian Law Society.

¹⁶⁵ See, eg, Letter to the Law Society of NSW from the Bar Association of NSW, above n 125; and Letter to the Law Society of NSW from the Law Society of South Australia (Family Law Committee, above n 126).

criticism of any mandatory requirement to ascertain the wishes or views of the child, and of course, the criticism is now out-of-step with the recently released *Guidelines for Independent Children's Lawyers*.¹⁶⁶ It is also out-of-step with our international obligations in respect of child and young people.¹⁶⁷

¹⁶⁶ National Legal Aid, above n 42, 5 (6.2 meeting the child).

¹⁶⁷ See *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS art 12 (entered into force 2 September 1990).