The Representation of Young Children in Court Proceedings in Victoria

John Fogarty AM

Helen Bayes' article in the November 1999 edition of Australian Children's Rights News - "Involving young children in decision making" - causes me to draw attention to what appears to be a significant difference between the Family Court of Australia and the Victorian Children's Court in the practice and perhaps legal principles relating to the representation of young children in those Courts. In the latter Court the general practice, and perhaps the requirements of its legislation, appear to produce the result that only in a minority of cases are children under the age of eight represented in proceedings in the Family Division of that Court. On the other hand the Family Court draws no age distinction in the representation of children, and it may be said as a generality that in many cases it places emphasis upon the representation of children who are too young or immature to be able to articulate their wishes or perceptions.

To explain this apparent inconsistency it is necessary to provide some brief background.

Section 68L of the *Family Law Act* 1975 (Cth) empowers the Family Court (and any other court exercising jurisdiction under that Act, including State Magistrate's Courts) in most proceedings relating to a child to order that that child be separately represented.

In the Family Court these orders are frequently made. Whilst the question whether an order for representation should be made can be determined by the Court at any stage of the proceedings, the practice is for that to be determined at an early stage of the management of the particular case. The Court makes a number of important initial decisions for the proper handling of children's cases, including whether the child should be represented and/or whether a family report should be prepared, as well as orders for confidential counselling and other more routine orders aimed at both controlling and expediting the proceedings. The making of any of those orders, and in particular here an order that the child be separately represented, is determined having regard to the best interests of the child: see sections 60B, 65E and 68F. Section 68F sets out a list of factors to be considered in any decision relating to a child, including the wishes of the child and the child's maturity and level of understanding.

In a number of cases the Full Court of the Family Court has emphasised the importance of representation and the responsibilities of the child representative, and has also provided a wide but non-exclusive list of categories of case where child representation order "should normally be made", see; re K (1994) FLC 92-461 and P v P (1995) FLC 92-615. These are well-known and important cases which do not need further analysis in this brief article. It is sufficient for present purposes to point out that these categories include young and immature children.

Both the well-recognised authorities and the daily practice of the Family Court in relation to the representation of children make clear that there is no criterion of age or maturity as a limitation on representation. Rather, the practice is to recognise that children in proceedings before the Court may require representation and that it is imperative that the Court have regard to the need for children to be represented, whatever their age. Indeed, the younger the child the more likely it may be that the child may require representation.

In the earlier history of the Court orders for separate representation were less commonly made, but the experience of the Court over almost a quarter of a century now has demonstrated the importance of separate representation and the risk of unsatisfactory outcomes if the child is not represented. This is especially so in the sort of cases that were referred to in re K and the general importance of young children, particularly those who cannot speak for themselves, being heard.

The major limitation on an approach of virtual universality of representation in at least significant cases is that in practice separate representation is almost always funded by legal aid, in Victoria through Victoria Legal Aid (V.L.A.). Budgetary restrictions place limitations on the number of orders which V.L.A. will finance. In March 1999 V.L.A. indicated to the Melbourne Registry of the Court a policy of appointing up to 600 child representatives in a twelve month period. This limitation of numbers is based solely upon budgetary restrictions. In matters under the *Family Law Act* 1975 (Cth), neither the Commonwealth guidelines nor the administration of legal aid by V.L.A. impose any restriction or limitation based upon the age or maturity of the child.

This appears to be in sharp contrast with V.L.A.'s guidelines in relation to representation of children in the Children's Court. Although the guidelines have changed to a small degree over the years, broadly speaking it may be said that from 1993 until June 1997 the guidelines were that a child would be separately represented through the V.L.A. "if the child is mature enough to give instructions (usually age seven or more)". Then from June 1997 it was "if the child is over the age of seven and mature enough to give instructions".

In April 1998 this latter guideline was added by providing that legal aid "may" be granted to a child under the age of eight if the magistrate "has found or expressed the opinion that the child is mature enough to give instructions and adjourns the hearing for the child to seek legal representation." This addition to the guideline is a

reference to section 20 of the *Children's and Young Person's Act* 1989 (Vic) which is referred to later in this article.

Space does not permit me to delve into the difficult question of "maturity" and all of the ramifications involved in either the ascertainment of that, and by whom, the usefulness of it as a criterion for representation. The critical point for present purposes is that whilst in the one Court concerned with children V.L.A. imposes no age or maturity restriction on representation, in another Court dealing perhaps with the same child and certainly with analogous cases there is a rejection of representation based on the grounds of age and maturity.

However, it is said that this is no arbitrary determination by V.L.A. or one based on budgetary considerations and that what would otherwise seem, at least to me, to be a clear age-based discrimination within the *Equal Opportunity Act* 1994 (Vic) is justified, perhaps required by the relevant legislation or is otherwise reasonable.

The legislative provisions are to be found in the *Children and Young Persons Act* 1989 (Vic). That establishes two divisions of the Children's Court–the Family Division and the Criminal Division. We need not be concerned in this article with the Criminal Division. That relates to children aged between ten and seventeen who are facing criminal proceedings. Whilst there may be difficulties in particular cases about the maturity of a child in that age category to give instructions, nevertheless, having regard to the age range and the nature of the proceedings, it is obvious that the representative of that child would proceed on the basis of representing his/her wishes and perceptions.

The Family Division is concerned essentially with protective proceedings. That is, proceedings by the State seeking orders about the future of that child arising from the view of the child protection department that the child is in need of protection. In this context the child could be at any age from newly born to under eighteen. As the Children's Court has in recent years dealt with approximately 2500 such applications each year obviously a significant percentage of those proceedings would relate to children under the age of eight.

Section 87 of the *Children and Young Persons Act* 1989 (Vic) sets out a list of matters which the Court must consider when determining whether or not to make a protection order. It is clear, particularly from the amendments to that section in 1994, that the paramount consideration is "the need to protect children from harm and to protect their rights and to promote their welfare". Amongst the other matters which the Court is required to take into account is that it "must consider any wishes expressed by the child and give those wishes such weight as the Court considers appropriate in the circumstances". (So far this seems little different from the *Family Law Act* 1975 (Cth) structure. In this jurisprudence "best interests" and "welfare" are treated as interchangeable.).

The question of legal representation of children is dealt with in sections 20 and 21 of the *Children and Young Persons Act* 1989 (Vic). Section 21 is straightforward. It provides that "subject to Section 20, a child must be legally represented in proceedings in the Family Division". Section 20 is a relatively complex provision having regard to the essentially basic matter with which it is dealing. Subsection (1) provides that if in such proceedings "a child" is not separately represented the Court may adjourn the proceedings for the child to obtain legal representation. It is to be noted that this relates to any child independently of age or maturity. Subsection (2) provides if the child is "mature enough to give instructions" but is not represented the Court must adjourn the proceedings for the child to obtain representation.

The complexity surrounding this issue appear largely to arise from section 20(9) which provides :

> *"Counsel or a solicitor representing a child in any proceedings in the Court 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." (underlining added)*

As I understand the procedures when a child is involved in protective proceedings in the Family Division, an application for representation is made directly to V.L.A., an officer of which will grant the application if the child satisfies, inter alia, its guidelines referred to above, namely maturity and aged over seven years, but will refuse the application if the guidelines are not complied with. On the other hand, if the Court makes an order under section 20(1) V.L.A. "may" grant legal representation independently of the age or maturity of that child. It appears that that step is taken by the magistrates of the Court from time to time but not as a generality. Hence, the overall circumstance that by and large children under eight are not represented.

The primary justification for that appears to be in terms of section 20(9) referred to above. In the Victorian Law Foundation's recent publication – "Guidelines for Lawyers acting for Children and Young Persons in the Children's Court" – it is said that "whilst there has been some confusion about how this should be interpreted, the generally accepted view is that the nature of the relationship is the same as for adult clients – that is, the lawyer should act on the client's instructions". Hence, apparently, the conclusion that if the child is not old enough or mature enough to give "adult" instructions the child should not be represented at all.

I agree with the Guidelines that section 20(9) is confusing but I must say that I would not have given it that interpretation against the strong presumptive background of representation of children in proceedings important to their future. I would have thought that subsection (9) means no more than it says, namely that representatives shall act in accordance with instructions "as far as it is practicable" having regard to the maturity of the child, but it says nothing about the case of a child who, whether above or below the age of eight, lacks sufficient maturity to give worthwhile instructions.

On more general grounds of principle, some (although

one would think not many) may attempt to justify this approach on the basis that the child protection workers involved in the particular case (and behind them the department) would adequately represent the best interest or welfare of the young child. Whilst I do not wish to criticise the hard working protection officers in their difficult task, experience in Victoria (and interstate and overseas) demonstrates that in many cases this would be an unsafe assumption upon which to proceed.

It also appears that this approach may also be based upon a wider misunderstanding. In the Law Foundation's Guidelines immediately after the quotation referred to above, it is said that "This is quite different from the role of the Separate Representative in the Family Court, who acts 'in the best interest of the child' ". This approach seems to suggest that there is a dichotomy between "best interest" and "wishes", whereas they are integral components of the same exercise. That is, the wishes of a child are an important part of that child's best interests.

It also appears to misunderstand the approach of the Family Court where the child is mature enough to express his or her wishes or perceptions. That evidence will be presented to the Court by the child representative and by the family report (and the parties). The increasing tendency of the Court has been to give significant weight to such wishes. Happiness and contentment are critical aspects of a child's life. However, cases can arise where the child's wishes or perceptions may not appear to be in his or her best interests and in that case the child representative would be expected to present material on both of those aspects. The Court will then determine the matter by regarding the best interests (which include the child's wishes) as the paramount consideration. I must say for my own part that I have difficulty in seeing that the approach to protective proceedings in the Children's Court would be any different: see the terms of section 87 referred to above.

It is only an accident of federation that these jurisdictions relating to children are divided in Australia between the Family Court and the State Children's Courts. In most other countries they are exercised by the one court which applies the same principles to both aspects of the jurisdiction. It seems to me that it is undesirable that there should be any difference in Australia.

Postscript

Since writing the above, a decision of significance on this issue has been delivered by the Victorian Civil and Administrative Tribunal (*G v Victorian Legal Aid*; 20 December 1999). The facts and issues are too complex to discuss in any detail in this short article. In addition, in view of my criticism of an important aspect of this decision, I should declare an interest. I was a witness in those proceedings, primarily directed to the legislation and practice about separate representation in the Family Court.

For present purposes this case may be summarised in this way. It related to alleged discrimination within the *Equal Opportunity Act* 1994 (Vic) arising from a number of refusals by V.L.A. to grant legal aid for the separate representation of a child in protective proceedings in the Children's Court whose age varied from under six years to over seven years at the relevant times.

The Tribunal concluded that V.L.A. had discriminated against the child on three occasions on the basis of age. But it also concluded that it was "reasonable" for V.L.A.

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Silence on Welfare of Refugee Children in Detention Centres

Defence for Children International, Australian section, has written to the Immigration Minister, the Hon. Phillip Ruddock MHR, raising a number of concerns about the welfare and well-being of refugee children being held in Detention Centres at Port Hedland in Western Australia and Woomera and Nunungar in South Australia. Citing information received that Iranian and Afghan women had been taken to Port Augusta Hospital to give birth, necessitating that interpreters be flown from Adelaide, DCI has asked the Minister to provide information on what is happening to refugee children. We would like to know:

- how many children are in detention centres?
- what is their status (ie are they accompanied or unaccompanied)?
- if unaccompanied, who is responsible for them sending any visa application outcome?
- what, if any, independent aassessment of the children well being is provided?
- are children independently represented in subsequent legal proceedings?

In addition DCI raised its grave concern about the physical environment in which the children are living - particularly in Woomera and Nunungar where temperatures recently have soared to 45°C mark. The State President of the Australian Medical Association, the State Labor MP for the area and Woomera's Uniting Church Minister, have all expressed their concern about the effect of extreme heat on people unused to it.

DCI has asked the Minister why families with children cannot be relocated to accomodation in Adelaide used recently by Kosovo refugees, thus putting them in touch with culturally appropriate servives and interpreters. Above all this would allow the children some semblence of a normal life.

Sally Castell-Mcgregor

The Representation of Young Children in the Family Division of the Children's Court in Victoria

I have been invited to respond to issues raised in the article by the Honourable John Fogarty A.M. entitled "The Representation of Young Children in Court Proceedings in Victoria". Constraints imposed by the brevity of my article will lead to some necessary over-simplification of the issues. I also should declare my interests in two of the matters mentioned in the preceding article:

- I appeared as a witness in the proceedings referred to, *G v Victoria Legal Aid*, 20 December 1999, Victorian Civil and Administrative Tribunal; and
- I was a member of the reference group which advised the project consultant who wrote the Victoria Law Foundation publication, "Guidelines for Lawyers Acting for Children and Young People in the Children's Court".

First, to clarify the current Victoria Legal Aid guidelines for granting assistance, aid may be provided if the child is mature enough to instruct. Children aged seven and above are assumed to qualify. Under seven, assistance may be provided where a Magistrate, representative of the Department of Human Services, or Children's Court duty lawyer expresses the opinion that the child has sufficient maturity to instruct.

These guidelines are based on two considerations. Section 20(9) of the *Children and Young Persons Act* 1989 (Vic) is quoted in full in the preceding article. It states that representation is to be on instructions, having regard to the maturity of the child. The age of seven is used solely as a guide in terms of the age at which it is likely for the child to have developed maturity sufficient to instruct, and is based on expert opinion provided by the Director of the Children's Court Clinic, Dr Pat Brown.

The practice of representation provided by practitioners appearing in Melbourne Children's Court is founded on the proposition that if you do not appear to present your client's instructions, you do not appear at all. There would seem to be no legislative foundation for any other model. It is not appropriate to import a brand of representation from some other jurisdiction such as the child representative role in the Family Court to "fill the gap".

Models of representation in the two jurisdictions are different for a reason. The Family Court model of child representation operates in a jurisdiction in which, in the main, two parents contend for care of the child. The child representative communicates to the Court the child's wishes, and presents what the child representative assesses to be in the child's best interests. In general, if the child representative did not present the best interests case, it is possible that no other party would do so.

In the event that the child's wishes and the child representative's view of the child's best interests do not coincide, the child representative may be obliged to pass on the child's desire for one outcome, and present a case for the opposite. The child is spared witnessing this by the simple expedient of not attending the proceedings. This is to avoid the undesirable feature of children being placed in the position of publicly and in the presence of the parties having to chose between parents.

In the Children's Court the contest is between the carer and the state. Often, proceedings determine whether the child remains within the family or is removed to foster care. Children attend court unless they choose not to. They participate as fully as they wish to in proceedings. Legal representation on an instructions basis facilitates this participation. Rather than a decision between two carers, proceedings require the Department of Human Services to present the case for minimal state intervention in a family's life. This intervention must seek to achieve an outcome in the best interests of the child. The best interests case is therefore presented by the Department.

The rigour and clarity of the instructions model of child advocacy are its essential strengths. For an amplification of the operation of the model I recommend the Victoria Law Foundation publication, "Lawyers Acting for Children and Young People in the Children's Court".

Andrew McGregor is manager of Victoria Legal Aid's Youth Legal Service, which provides representation for children and young people in the Family and Children's Courts.

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to impose a requirement "that the child in question be of sufficient maturity to give instructions". The basic reason for that latter conclusion was that "it is intrinsic to the relationship between a client and his or her legal representative that the client be able to instruct the legal representative"; and that in this type of case "the question is whether the particular child is capable of giving instructions, and so be able to utilise that assistance". This latter conclusion is not expressed as being based on the provisions of the *Children and Young Persons Act* 1989 (Vic), but seems to be asserted as if this was and is a self-evident ("intrinsic") proposition. This approach raises issues of great significance in the representation of children generally and their right to be heard. With appropriate respect to the detailed and careful judgment of the senior member constituting the Tribunal, they are views with which I profoundly disagree.

The Honourable John Fogarty AM is an Advisory Board Member of DCI – Australia and served as a Justice of the Family Court of Australia for over 20 years prior to his recent retirement.