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".

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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.