REPRESENTATION PRINCIPLES FOR CHILDREN'S LAWYERS

5TH EDITION

December 2025

THE LAW SOCIETY
OF NEW SOUTH WALES

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REPRESENTATION PRINCIPLES FOR CHILDREN'S LAWYERS

ENDORSEMENT

The Representation Principles for Children's Lawyers (**Representation Principles**) is an ongoing project of the Law Society of NSW (**the Law Society**). The Council of the Law Society adopted the first edition on 19 October 2000, the second edition on 21 March 2002, the third edition on 20 September 2007 and the fourth edition on 20 November 2014. The fifth edition was adopted by the Council of the Law Society on 27 November 2025.

ACKNOWLEDGEMENTS

The fifth edition of the Representation Principles was reviewed and updated by members of the 2023, 2024 and 2025 Children's Legal Issues Committee.

We are also grateful to the many others who contributed their time and efforts to reviewing the Representation Principles, including significant contributions from Daniel Kennard, Solicitor-in-Charge of Legal Aid NSW's Your Voice – Children's Out of Home Care Advocacy Service, Dr Judy Cashmore AO, Professor Emerita, the University of Sydney Law School, and Dr Peiling Kong, Clinical Psychologist and PhD graduand (Law) at the University of Sydney. Thanks also to Sally Cole, Jody Nunn and Anna Dawson for their review and comments.

We are extremely grateful to Rick Welsh and Mary Gleeson of the Indigenous Issues Committee for their generous contributions to a chapter new to the fifth edition, "Representing Indigenous Children". We extend our thanks to Emma Hudson-Buhagiar, of the Aboriginal Legal Service (NSW/ACT) Limited, who also contributed to this chapter.

Most importantly, we are grateful to the young people who consented to their comments about lawyers and their experience of legal proceedings being included in this edition of the Representation Principles. We sincerely thank Kate Duffy of Legal Aid NSW, who conducted the consultation with young people aged 16-23 who were past or current clients of Legal Aid NSW, and shared relevant quotes from these young people which appear throughout the document.

The Law Society thanks everyone who has been, and continues to be, involved with this project.

COMMENTS

The Law Society encourages readers to provide feedback and suggestions for further refining and expanding the Representation Principles. Please address your correspondence to the Policy Lawyer for the Children's Legal Issues Committee.

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PREFACE TO THE FIFTH EDITION

In 1997 the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission called on the legal profession to develop guidelines for the legal representation of children and young people. In 2000, the Law Society of NSW answered that call with its publication of the first edition of the Representation Principles for Children's Lawyers (**Representation Principles**).

Over the years, updated editions of the Representation Principles have been published to reflect changes in law and practice, as well as the increasing complexity of legal proceedings involving children. We remain indebted to the previous contributions of earlier Children's Legal Issues Committees, as well as external experts, lawyers, consultants, and most importantly, young people, who provided invaluable insight and expertise to this evolving resource.

The fifth edition of the Representation Principles incorporates two key updates. This edition seeks to explicitly recognise the significant over-representation of Indigenous children in care and protection and criminal law proceedings in NSW, with the inclusion of a new chapter called "*Representing Indigenous children*". It is essential that the Representation Principles recognise that different and important principles apply to the representation of Indigenous children, and that best practice requires active efforts by the practitioner to promote the child's connection to family, culture and Country.

Secondly, this edition of the Representation Principles includes further guidance for the representation of children in criminal law proceedings. In including additional criminal law related principles, the Children's Legal Issues Committee sought to recognise the intersection of criminal law and care proceedings, and the overrepresentation of children in care in the youth justice system. Best practice requires lawyers representing children to not be siloed in their practice and to have a working knowledge of adjacent jurisdictions.

In publishing this fifth edition, the Law Society of NSW is proud to continue providing specialised guidance for lawyers representing children in criminal law matters, and in public and private family law matters. Children are, by their nature, a cohort who require particular assistance and care in navigating legal proceedings. We hope that the Representation Principles continue to ensure the highest quality of legal representation and assistance for children across NSW.

Children's Legal Issues Committee 2025
James Clifford, Chair
Kerri Phillips, Deputy Chair

DEFINITIONS

'Child'

These principles use the term 'child' to refer to a person under the age of 18. This term is used to be consistent with definitions under the United Nations Convention on the Rights of the Child (**UNCROC**). It is important to be aware that some legislation creates a distinction between a 'child' and a 'young person'. For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (***Care Act***) defines a 'child' as a person under 16 and a 'young person' as a person who is aged 16 or 17.

'Direct representative'

A direct representative receives and acts on instructions from the child client, irrespective of what the representative considers to be in the child's best interests. A direct representative owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult client. Examples of matters where a child will have a direct representative include:

- all types of criminal matters;
- if they are over the age of 12, have capacity, and are the subject of proceedings under the *Care Act*, and
- if they are over the age of 10, have capacity, and are the subject of proceedings under the *Adoption Act 2000* (NSW) (***Adoption Act***).

'Best interests representative'

A best interests representative does not act on the child's instructions. Their role includes obtaining relevant evidence, facilitating the participation of the child in the proceeding, minimising the trauma to the child associated with the proceeding, informing the court about the child's views and wishes, and making submissions to the court, based on all of the relevant evidence, about the course of action they consider to be in the best interests of the child.[1] A best interests representative must be independent and impartial.

Depending on the jurisdiction, a best interests representative may be referred to as:

- an Independent Children's Lawyer or 'ICL', if they are appointed under the *Family Law Act 1975* (Cth) (***Family Law Act***); or
- an Independent Legal Representative or 'ILR', if they are appointed under the *Care Act*; or
- a Separate Representative, if they are appointed under the *Adoption Act*, the *Civil and Administrative Tribunal Act 2013* (NSW) (***CAT Act***) or in proceedings under the *parens patriae* jurisdiction in the NSW Supreme Court.

Some legislation clearly sets out the age upon which a child is presumed to have capacity to instruct a lawyer (for example the *Care Act* presumes that children aged 12 and over have capacity, and the *Adoption Act* presumes that children aged 10 and over have capacity). Other legislation does not make this distinction (for example the *Family Law Act* and the *CAT Act*).

Substitute decision makers - 'Guardian ad litem', 'litigation guardian' and 'tutor'

In cases where the legislation provides for a child of a particular age to instruct a lawyer, but they do not have the capacity to do so, the Court may appoint a lawyer as a 'best interests representative' or alternatively, appoint a substitute decision maker to represent the child's best interests. Where a substitute decision maker is appointed, that person will provide instructions to the lawyer.

Substitute decision makers have different names, depending on the jurisdiction:

- in proceedings under the *Care Act* and the *Adoption Act*, a substitute decision maker is called a 'guardian ad litem'.
- in proceedings under the *Family Law Act*, a substitute decision maker is called a 'litigation guardian'.
- in other civil proceedings in NSW, 'tutors' can be appointed under the *Uniform Civil Procedure Rules 2005* (NSW).

1 See, for example, *P and P* (1995) FLC 92–616, 82,157, where the Full Court of the Family Court (as it then was) set out some general guidelines for the role of a best interests representative.

ABBREVIATIONS

Care Act means the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

CAT Act means the *Civil and Administrative Tribunal Act 2013* (NSW).

DCJ means the NSW Department of Communities and Justice.

DLR means Direct Legal Representative.

OOHC means Out of Home Care.

Family Law Act means the *Family Law Act 1975* (Cth).

FCFCOA means the Federal Circuit and Family Court of Australia.

ICL means Independent Children's Lawyer.

ILR means Independent Legal Representative.

UNCROC means the United Nations Convention on the Rights of the Child.

A. WHO IS THE CLIENT?

PRINCIPLE A1 – The child is the client (direct representative)

Where a legal practitioner is acting as the direct representative of a child, the child is the client. The direct representative must act upon the instructions of the child client, regardless of who appointed the practitioner or who is paying their legal fees.

Direct representatives may be appointed by a court or retained directly by the child. In some cases, the child's representation may be funded by Legal Aid NSW or the Aboriginal Legal Service (NSW/ACT) Ltd, or by the child's parent or guardian. Regardless of who is funding the legal representation, the child remains the client and the person funding the legal representation has no authority to direct the practitioner as to how they should undertake their role. This should be explained to the child.

Where third parties are involved in appointing or funding legal representation or become involved in the direct representative's relationship with the child, the direct representative should clearly state their role to the third party and explain the limitations of the third party's involvement in the legal representation of the child. The same prohibition against disclosure of confidential information provided by the child client applies to third parties that may be funding the legal representation, as to any other third party. This includes the requirement of the direct representative to disclose information to the child client obtained in the course of their role as the child's direct representative. Direct representatives may need to advise or remind third parties that it is the child who is the client of the representative.

PRINCIPLE A2 – The child is not the client (best interests representative)

A best interests representative does not have a client. A best interests representative acts as an officer assisting the court by representing the best interests of the child. Nevertheless, the child must still be given the opportunity to express their views and have those views taken into account.

A best interests representative is usually appointed by a court, but in some cases, they are retained directly by the parents or guardians of the child. In circumstances where a representative has not been appointed by the court, the representative may appear only with leave.

Despite the fact that some children who are provided with a best interests representative may be intellectually, developmentally and emotionally capable of providing instructions, the best interests representative is not bound by the views and wishes expressed by the child. The best interests representative does not act on the instructions of the child, parent, guardian or anyone else connected with the child or the legal proceedings.

A best interests representative should facilitate the child's participation in the proceedings. They should seek the child's views and ask the child whether they want some or all of those views shared with the court and the other parties. If the child does want their views to be shared, the best interests representative should present evidence of the child's views to the court. The ways in which evidence of a child's wishes and views can be presented to the Court are set out in Principle D2.

Best interests representatives must consider all of the relevant evidence before deciding what position to take in any proceeding and must conduct their role consistently with what they consider to be the best interests of the child. In order to do this, the representative should obtain all relevant information to assist the court, including expert evidence. Best interests representatives usually have the same status as a party to a proceeding and are bound by the orders and directions made by the Court.

PRINCIPLE A3 – The substitute decision maker is the client (substitute decision-maker)

Where a substitute decision maker has been appointed on behalf of a child in legal proceedings, the substitute decision maker is the client of the legal practitioner. The practitioner is to act on the instructions of the substitute decision maker.

Where a court appoints a substitute decision maker, that person is given authority to conduct proceedings on behalf of the child. The practitioner gives advice to the substitute decision maker and acts on their instructions. There is no relationship between the practitioner and the child, although the practitioner may need to communicate with the child in performing their duties as instructed by the substitute decision maker. General principles for communicating with children remain relevant for practitioners acting for a substitute decision maker.

B. ROLE OF PRACTITIONER

PRINCIPLE B1 – Always be clear about your role

A practitioner is to act as the direct representative of the child except where:

- **The law clearly states that the representative shall play a different role in representing the child; or**
- **The practitioner determines that the child is incapable of giving instructions.**

Under no circumstances should the practitioner proceed to act if they are uncertain about the basis upon which they are representing the child.

Direct representative

There is sometimes confusion for practitioners in determining what their relationship should be with the child they have been appointed, or retained, to represent. Practitioners should represent a child as a direct representative unless there are reasons why this model cannot or should not apply (see Definitions and Principle E1 for further information).

Where the child is not capable of giving instructions, the practitioner cannot act as a direct representative. These guidelines provide assistance to practitioners to determine when a child is incapable of giving instructions (see Principle C1).

Best interests representative

In some matters, a practitioner will be appointed as a best interests representative, for example:

- In the Federal Circuit and Family Court of Australia, the court may appoint an Independent Children's Lawyer (**ICL**) to independently represent the child's interests: see ss 68L and 68LA of the *Family Law Act.*
- In proceedings under the *Care Act*, the relevant court may appoint an Independent Legal Representative (**ILR**) where a child is under 12, or where the child is over 12 but does not have capacity to instruct a legal practitioner: see ss 99-99D of the *Care Act*.
- In adoption proceedings before the Supreme Court, the court may appoint a legal practitioner for the child. Where the child is under 10 or does not have the capacity to instruct a legal practitioner, the practitioner is to act as a Separate Representative: see s 122 of the *Adoption Act*.

Roles and responsibilities of the legal practitioner

Where the relevant legislation provides a statutory framework for the appointment of a legal practitioner for a child (either as a best interests or direct representative), there is usually some clear guidance about the roles and responsibilities of the practitioner. Practitioners should familiarise themselves with the relevant legislation whenever they are appointed to represent a child.

However, in circumstances where the role of the practitioner is not clearly set out in relevant legislation (for example, in matters under the *parens patriae* jurisdiction of the Supreme Court), a practitioner will need to consider some preliminary issues, like whether the child has or should be joined as a party to the proceeding, whether the relevant rules require the appointment of a substituted decision maker, whether the relevant rules requiring a substituted decision maker should be complied with or dispensed with, whether the practitioner has been properly appointed to act for the child and the nature of their role.

Practitioners should also familiarise themselves with other materials relevant to the jurisdiction in which they are practising. For example, ICLs should be familiar with the *Guidelines for Independent Children's Lawyers* (2024), which provide guidance to ICLs on their roles and responsibilities in representing and promoting the best interests of a child. Practitioners representing children in care and protection matters will find the *Care and Protection: Working with Children – a guide to best practice for Children's Legal Representatives* (2020) useful. See Resources for further information and links to relevant resources.

Solicitors, whether acting as direct or best interests representatives, are also required to comply with the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (***Solicitors' Rules***).

PRINCIPLE B2 – Take appropriate steps when a child is incapable of giving instructions

Where a practitioner would ordinarily act on the child's direct instructions but considers that the child is unable to give instructions, the practitioner should ensure that the court is aware of the practitioner's concerns about the child's capacity and take appropriate steps.

It is the duty of a practitioner appointed or retained to directly represent a child to consider the available evidence about a child's capacity, and if appropriate, to obtain professional advice in the form of a report on whether the child is capable of giving instructions (see Principle C1). A child who is unable to give instructions should still be represented and/or provided with assistance.

Care and adoption proceedings

Where a practitioner would ordinarily be acting on a child's direct instructions because of the child's age (for example, in care or adoption proceedings) and there is evidence that the child does not have capacity to instruct the practitioner, the practitioner should make an application to the court to declare that the child is incapable of giving instructions and either seek to be appointed as a best interests representative for the child, or ask the court to appoint a substitute decision maker (e.g. a guardian ad litem) for the child. If a substitute decision maker is appointed, the practitioner will then act on the instructions of the substitute decision maker.

Criminal proceedings

In criminal proceedings for an accused child, the practitioner must act as a direct representative on the child's instructions. The practitioner does not act as a best interests representative. In assessing a child's capacity to provide instructions, practitioners should remember that capacity is a task specific concept and not a global assessment.[2] Practitioners should consider whether the client is able to give instructions on the relevant matters. For example, the practitioner should consider whether limited instructions could be obtained to make an application for the matter to be dismissed or, if the child has a mental health or cognitive impairment, for the court to deal with the child under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).[3]

If the above application is unsuccessful, or if the child is unable to give any instructions, there are limited ways that the matter can proceed. The practitioner will need to consider raising the issue of fitness with the court in the usual way.[4] This may include seeking a permanent stay to the proceedings.[5]

2 The Law Society of NSW, *When a Client's Mental Capacity is in Doubt: A Practical Guidance for Solicitors* (2016) <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>.

3 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 12, 14, 21.

4 See: *Police v Beth* [2014] NSWChC 8, *Police v DK* (unreported) NSW ChCt 17 Dec 2010 and *Police v AR* (unreported) ChCt 18 Nov 2009. See also: *Mantel v Molyneux* [2005] NSWSC 955 at 28.

5 The legislative framework outlined in the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) for persons unfit to be tried has application in the District and Supreme Courts only. There is no legislation providing guidance to courts hearing summary matters on how to approach cases where defendants are unfit. The common law does provide some guidance on fitness in summary jurisdictions. See: *Mantell v Molyneux* [2006] NSWSC 955, *DPP v Shirvanian* (1998) 44 NSWLR 129.

For Commonwealth matters, the Commonwealth Director of Public Prosecutions has published a National Legal Direction on unfitness to be tried or to plead: https://www.cdpp.gov.au/sites/default/files/NLD-%20Unfitness%20to%20be%20tried-to%20plead%20-%20Published%20October%202023%20%28A1381878%29.pdf

PRINCIPLE B3 – Consider all relevant evidence when determining what is in the child's best interests

Recommendations about the course of action that is in the best interests of a child should be based on evidence and the particular child's needs and preferences. Best interests representatives should proactively obtain all relevant evidence as early as possible, to ensure that each step in the case is based upon the evidence and to avoid any delay in resolving the matter.

A best interests representative is required to make recommendations to the court about what they consider to be in best interests of the child. Recommendations should be made on an objective basis, following consideration of all available information and evidence, including the preferences expressed by the child and the consequences, if any, for the child if a decision is made that is contrary to the child's known views and wishes. Best interests representatives should proactively obtain relevant evidence as early as possible in the proceeding. Evidence can be obtained in the following ways:

- In family law cases, asking the FCFCOA to make orders under the information sharing provisions in the *Family Law Act*.
- Speaking to the child's school teacher, school counsellor or Principal.
- Speaking to the child's treaters, which may require the consent of the child and/or their parents/carers.
- Obtaining treatment summaries or letters from treaters, to obtain relevant information whilst preserving the child's therapeutic relationship with that professional and ensuring sensitive information is not unnecessarily divulged to all of the parties and the court.
- Asking a court to issue subpoenas to appropriate agencies for evidence that will be *relevant* to the issues in the case, which may include police, a child protection authority, an agency working with the child or their parents/carers or a school.
- Instructing experts, such as social workers, psychologists and psychiatrists to undertake an assessment of the child, their parents/carers and other important people, and ensuring those experts have all of the information they need to undertake the assessment.

The use of independent experts and treating professionals supports practitioners in representing children's views and formulating recommendations about what is in their best interests by ensuring that the court has access to reliable, specialised, and independent evidence. These assessments provide a clearer understanding of a child's developmental stage, mental health, educational progress, relationships, and vulnerabilities. By drawing on this expertise, practitioners are better equipped to present the child's views in context, highlight the supports the child may need to express those views, and ensure that the court's decisions are informed by an accurate picture of the child's circumstances and best interests.

PRINCIPLE B4 – Avoid conflicts when acting for children

Where a practitioner has acted as a best interests or direct representative for a child, as a general rule, they will not be able to act for the child in a different capacity. A practitioner acting as a direct representative generally cannot act for any other person in the same case, even if the person is a child.

Direct representatives

Although it is common for one practitioner to act as best interests representative for a sibling group, a practitioner acting as a direct representative for a child client cannot usually act for any other person in the same proceeding (including another child). Practitioners should be mindful of Rule 11 of the *Solicitors' Rules* in the event that they propose to act for more than one party.

Where a practitioner has been appointed to act as a direct representative for a child, has established a relationship with the child and commenced to act on the child's instructions, the same practitioner cannot usually act as the child's best interests representative at a later time. If the child withdraws instructions, refuses to continue to give instructions to the practitioner, or is otherwise unable to continue providing instructions, the practitioner should generally not seek to become a best interests representative. The direct relationship between the practitioner and child client is established under a different set of circumstances and may have encouraged the child to be more open with a direct representative than with a best interests representative.

If the child withdraws, refuses or is otherwise unable to continue to give instructions, the direct representative should inform the court that they do not have instructions from the client on the matter. If the situation is such that the child's case cannot proceed, the direct representative should consider whether they should request the court to appoint a different direct representative, or ask the court to make a declaration regarding the child's capacity and appoint a substitute decision maker to provide instructions or alternatively, ask the court to appoint a different practitioner as a best interests representative. See also Principle G1.

Best interests representatives

Practitioners should be alert to the issues that can sometimes arise in public family law proceedings where the law provides for a child to move from a best interests representative to a direct representative at a certain age (for example, in proceedings under the *Care Act* or *Adoption Act*). When this happens, a child may need to have a different practitioner appointed to represent them. For example:

- Where a practitioner has acted as a best interests representative for a child who then becomes old enough to have a direct representative, in most circumstances it will be appropriate for a new practitioner to be appointed as a direct representative for the child. There may be some limited circumstances where it is appropriate for the same practitioner to continue to act, depending on the facts of the particular case, the preparatory steps that have been taken and the child's views about the practitioner continuing to represent them.
- Where one practitioner is appointed to act as a best interests representative for a sibling group in proceedings under the *Care Act* and one of the children turns 12 during the course of the proceeding, or in a further proceeding.

A practitioner acting as a best interests representative for a child who is near an age where they will be able to instruct their own lawyer should take all necessary steps to resolve any issues about the child's representation and avoid any delay in the matter being heard and determined. Such steps might include advising Legal Aid NSW, alerting the Court and/or seeking orders with respect to the child's representation.

> ***"The worst thing about lawyers is that they make decisions for you."***
>
> - male, 16 years
>
> ***"My lawyer … got me separated from my child."***
>
> - female, 18 years.[6]

6 In this case, the young person received a probation order that prohibited her from residing with her mother who had custody of her child. The young person stated that her lawyer requested that such a condition form part of the court order.

C. CAPACITY TO GIVE INSTRUCTIONS

PRINCIPLE C1 – A practitioner acting on a child's instructions must be satisfied that the child has capacity

Where the law requires a practitioner to act on a child's direct instructions, the practitioner will need to be satisfied that the child has capacity to give instructions. Where doubts arise, further information, including a cognitive capacity assessment, should be sought.

Capacity to give instructions to a lawyer requires cognitive competence, reasoning, understanding and the capacity to communicate a choice. Under the general law, there is no single test for capacity. Rather, capacity is determined in relation to the particular legal issue(s) in each case. This means that some children may have capacity to provide instructions in relation to some matters, but not others. Their ability to make decisions and provide instructions can vary depending on the complexity of the issue.

In care and adoption proceedings, children are presumed to have capacity to make decisions, and instruct a lawyer, at different ages.[7] Where there is a presumption that a child has capacity to give direct instructions, a child should be supported to directly instruct their lawyer.

Although practitioners will not be experts at assessing mental capacity, practitioners can undertake some preliminary assessment of a child's capacity by asking simple questions, asking a child to explain their understanding in their own words and observing the child. Practitioners should be mindful that socioeconomic factors can affect a child's learning and verbal skills. The practitioner should consider whether a perceived incapacity could be overcome by developmentally appropriate communication, or by adopting a different approach in taking instructions.

Practitioners should also be mindful of the ways in which cultural or language differences can impact on a child's understanding of the issues and the way in which they communicate. It is important to consider these matters when assessing capacity. In some cases, it might be helpful for the practitioner to use an interpreter when meeting the child. In other cases, it might be helpful if a capacity assessment is undertaken by someone who better understands the child's language and culture.

It is also important for practitioners to focus on assessing the child's decision-making ability – and not the decision itself. An assessment of capacity does not focus on whether the child is exercising good judgment (or judgment the practitioner agrees with) or the child's level of maturity.

Where a practitioner is concerned that a child may not have the capacity to make decisions, further information should be sought, or a cognitive capacity assessment should be undertaken. The Law Society guide *When a client's mental capacity is in doubt* (2016) is a helpful resource for solicitors assessing their client's capacity and, when necessary, obtaining an expert's advice on the child's capacity.

Criminal law proceedings

In NSW, a child under the age of 10 years cannot be held criminally responsible for an offence.[8] The common law presumes that children between the ages of 10 and 14 do not possess the necessary knowledge to have criminal intent, that is, it is presumed the child is incapable of committing a crime due to a lack of understanding of the difference between right and wrong. This is the common law presumption of *doli incapax*.[9] *Doli incapax* can be rebutted if the prosecution can prove beyond reasonable doubt that the child knew their actions were seriously morally wrong.[10] This must be proven by the prosecution in addition to proving all the elements of the offence.

7 For example, in proceedings under the Care Act, children are presumed to have capacity to instruct a lawyer when they turn 12. However, in proceedings under the Adoption Act, children are presumed to have capacity to instruct a lawyer when they turn 10. In adoption proceedings children aged 12 or over, who are capable of giving consent, must consent to their adoption.

8 *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Crimes Act 1914* (Cth) s 4M.

9 For Commonwealth matters, the common law presumption of *doli incapax* is incorporated into s 4N *Crimes Act 1914* (Cth).

10 *RP v The Queen* [2016] HCA 53.

In determining capacity, practitioners must not assume that a child's capacity is that of an "average" child of that chronological age. Children in contact with the criminal justice system are often particularly disadvantaged. These disadvantages include difficulty with school (including poor attendance and performance), drug and alcohol abuse, parental incarceration, parental substance abuse, homelessness or unstable accommodation, reduced cognitive ability, experiences of maltreatment and neglect (including engagement with the out of home care (**OOHC**) system), poor mental health and poor physical health.[11] Children with cognitive disabilities (often previously undiagnosed) are particularly susceptible to contact with the criminal justice system.[12] These factors can affect the child's capacity to give instructions and participate meaningfully in the proceedings. Practitioners are encouraged to be aware of these disadvantages when assessing the child's capacity and consider referral to an appropriate expert for a cognitive capacity assessment if necessary.

11 Australian Institute of Health and Welfare (2022) *Children under youth justice supervision,* available at <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/justice-safety/children-youth-justice-supervision>.

12 See: Stewart Boiteux and Suzanne Poynton, NSW Bureau of Crime Statistics and Research, *Offending by young people with disability: a NSW linkage study* (2023).

PRINCIPLE C2 – Practitioners should enhance a child's capacity

The practitioner should seek to enhance the child's capacity to provide instructions by structuring all communications to take into account the child's age, level of education, cultural context and degree of language acquisition.

Practitioners should be mindful that a child's capacity to give instructions will depend to a significant degree on the practitioner's skills in interviewing children and the child's stage of cognitive development. Adults frequently underestimate the knowledge and understanding of children, and their capacity to work through problems and provide a cogent view as to what they want to happen.

Practitioners taking instructions from children should consider the following approaches:

- If appropriate, let the child know in advance what you would like to discuss at the appointment. It is likely that the child is feeling stressed about the proceedings, or the meeting, or both. It can often help to tell the child what the purpose of the meeting is and what will be discussed.
- Begin the interview by explaining who you are and asking the child simple questions, including if the child knows why you are meeting with them. Simple questions can help develop rapport, while enabling the practitioner to assess the child's understanding of the subject matter.
- Conduct the interview at a slower pace and encourage the child to ask questions and guide the discussion. Ensure the child has time to process and digest information at their own pace.
- Break information into smaller, manageable segments by discussing one issue at a time. Make sure to introduce each new topic or issue to the child. For example, "Thank you for speaking to me about X. That was very helpful. I am now going to ask you some questions about something different, about Y. Would it be alright if we speak about Y?"
- Repeat, paraphrase, summarise, and check periodically for accuracy of communication and comprehension, by asking the child to explain their understanding of what you have said. For example, the practitioner might say to the child client: "I've just explained in a lot of detail what is going to happen at court tomorrow. I know it's quite a lot to think about. Can you explain to me, in your own words, what will happen tomorrow?" If information is not understood, incompletely understood, or misunderstood, provide corrected feedback and check again for comprehension.
- Use visual aids or drawings. Both the practitioner and the child may benefit from using visual aids. For example, it may assist the child to understand advice or information if the practitioner draws a family tree or the layout of the courtroom. Children should also be encouraged to use visual aids (such as drawings or toys) to communicate with the practitioner, if this assists.
- Provide time for rest and bathroom breaks.
- Schedule multiple, shorter appointments rather than one lengthy appointment. As a general guideline, try to ensure appointments do not go over 30 or 40 minutes. Be aware of signs the child is becoming disengaged, tired or distressed.
- Consider the best time of day to schedule the appointment with the child, bearing in mind the child's usual routine and the effects of any prescription medication that the child might be taking.

Practitioners should also consider the practical arrangements when arranging interviews with a child client, such as time of day, venue and whether the child may wish to have a support person present for some of the interview (see Principle D4).

PRINCIPLE C3 – Practitioners should act on instructions when possible

Limited instructions

Where the client is capable and willing to provide instructions in relation to some, but not all, issues, the practitioner should directly represent the child in relation to those issues in which instructions have been received. In such cases, the practitioner should make procedural decisions with a view to advancing the child's stated position and elicit whatever information and assistance the child is willing and capable to provide.

Practitioners should be alert to factors that may temporarily limit a child's capacity to provide instructions, for example if the child is affected by drugs, alcohol, fluctuating mental health, medication, suffering from trauma or is in a distressed, emotional state. In these circumstances, it may be appropriate for the practitioner to seek an adjournment to ensure that the short-term needs of the child are addressed.

Where reluctance to instruct appears to be due to shyness, nervousness or fear, the practitioner should make further efforts to make the child feel comfortable and safe. For example, the practitioner may keep the first meeting brief, and then organise to meet with the child again, at a location where the child feels comfortable. It may assist for the practitioner to take the time to speak with the child about other light-hearted topics, such as the child's favourite movie or television show, before eventually discussing more difficult topics on which the practitioner requires instructions.

Practitioners should be aware that, in some matters, a child may have the capacity to give instructions in relation to some aspects of the case but not others. If the client is incapable of, or unwilling to, provide instructions on a particular issue or issues, the practitioner should inform the court that instructions are limited to certain issues. This may happen because some of the legal issues before the court are too complex for the child to understand, yet the child is able to instruct on their preferences relevant to some issues, for example, where they should live or who they want to spend time with. In other circumstances the child may be reluctant to give instructions on a particular issue, but willing to instruct on other relevant issues. For example, a child may provide instructions about the frequency of contact, but not the time, date or venue.

Disability

An ongoing, pre-existing condition may affect a child's capacity to give instructions, or it may affect a child's ability to communicate instructions clearly. Practitioners should seek help from appropriate service providers.

Where a disability makes it difficult for the child to provide or communicate instructions, the practitioner should seek appropriate professional assistance to enhance the child's ability to give clear instructions. For example, a practitioner may find it helpful to speak with professionals who already work with the child, know them well and can provide some guidance and support in relation to communicating with the child. The Intellectual Disability Rights Service (**IDRS**) delivers the Justice Advocacy Service (**JAS**), which may be able to support a child living with an intellectual disability to understand criminal law proceedings.

Criminal proceedings

When representing an accused child, the practitioner must act as a direct legal representative on the child's instructions. The practitioner never acts as a best interests representative in these matters. If the child is unable to give instructions, there are limited ways that the matter can proceed (see Principle B2).

"I like it when my lawyer builds my confidence." - male, 17 years

"They don't take disabilities into account."
- female, 17 years

"The boys in here they can barely read and write let alone understand what's being said in court with section this and section that… so yeah everything just needs to be slowed down"
- 19 years

"Talk about more than the legal issue. Like how the young person is feeling, their sleep patterns, their mental health because it's a much more involved experience for us… it would be good if there was a mental health check up because the behaviour might be a trauma response"
- 22 years

D. TAKING INSTRUCTIONS AND PREFERENCES

PRINCIPLE D1 – Practitioners should meet with children

Other than in exceptional circumstances, practitioners should meet with children who are of school age or any child they are acting for as a direct representative. The practitioner should meet the child as soon as possible after being appointed to appear in their matter, and depending on the matter, before the first hearing or any substantive hearing.

Direct representatives

Direct representatives should meet with a child client as soon as possible after their appointment or retention. During the course of proceedings, the practitioner and child might establish other, more convenient, ways of communicating, such as by video, phone or messaging. Practitioners should seek the child client's views about the best way to communicate and discuss issues around confidentiality with the child.

The direct representative should not hurry a child client to give instructions. Sufficient time should be set aside to ensure that the interview can proceed at the child client's pace.

As with any client, the direct representative may counsel against the pursuit of a particular position sought by the child. The direct representative should recognise the power dynamics inherent in adult/child relationships, and that the child may be manipulated, intimidated, or overly dependent upon the views of an adult, including the views put forward by the direct representative. Therefore, the direct representative should ensure that the decision the child ultimately makes reflects their actual position. The direct representative must also be prepared to allow the child to change course or even withdraw instructions.

While the child is entitled to determine the overall objectives to be pursued, the direct representative may make certain decisions with respect to the manner of achieving those objectives, the same as when representing an adult, particularly in relation to procedural matters or forensic decisions. Rules relating to the practitioner's duty to the court apply to all practitioners in all roles (see Rule 19, *Solicitors' Rules*).

Where a practitioner is acting as a direct representative in care and protection proceedings, the need to receive instructions will not, by itself, require the attendance of the child at court for care proceedings (see s 96(2A) of the *Care Act*).

Best interests representatives

There is an expectation that best interests representatives will meet with all school aged children. Practitioners may also choose to meet with a child younger than 5, particularly if the child is part of a sibling group. Best interests representatives should aim to meet with children (particularly younger children) in person whenever possible.

Best interests representatives should meet with the child shortly after being appointed to explain their role and provide the child with the opportunity to ask questions. Representatives should then meet with the child at appropriate points throughout the proceedings (such as prior to mediation, before a meeting with an expert and before a substantive hearing). The frequency of meetings will depend on the child's age, level of understanding, the nature of the proceedings and the child's needs.

Where appropriate, a practitioner should explain to the child what is happening in the proceedings in a child friendly way. They should ensure that the child has an opportunity to express their views and ensure that their views are put before the Court, if the child wants that to happen (see Principle D2).

A best interests representative should be guided by the child, their circumstances and the particular issues in the case when considering the frequency of meetings and level of information provided.

A best interests representative will usually meet with the child at the conclusion of the case, to explain the outcome and answer questions.

Criminal law proceedings

In criminal matters, the first meeting often occurs via Audio Visual Link (**AVL**), especially if the child is arrested and denied police bail on a weekend or public holiday. In such cases, it is usually more important to promptly apply for the child's release than to delay proceedings to arrange an in-person meeting.[13]

However, other than in urgent circumstances, in-person meetings are often preferable. They can enable better communication, and help the practitioner to establish trust and rapport with the child.

Practitioners should make every effort to meet with the child before each court date to prepare them for what can be an often confusing and frightening experience. Changes in placement, school suspensions, hospitalisations, and other significant changes may also warrant additional meetings with the child.

The practitioner should consider having the child excused from attending court for procedural listings. Unnecessary court attendance should be avoided. If a child is enrolled in school, it is preferable for them to attend school rather than procedural court listings, as long as their lawyer can obtain fulsome instructions prior to the court date.[14]

Where there is urgency in representing a child client (for example, appearing in a duty capacity for several children in custody), best efforts should be made to proceed at the child's pace, balancing what is required to advance the child's proceedings and secure their release, and the taking of more substantive instructions. Where there is simply not enough time allowed for an appropriate client conference, further time should be sought from the court.

"I usually met with my lawyer in person beforehand but when I was coming from custody she was just there at court."

- male, 19 years

"When I was under 18, I would speak to my lawyer once for about 2 seconds before I went into court and then never again."

- male, 18 years

"I hate doing it over the phone."

- female, 18 years

"I'd rather meet in person – I like to speak to people face to face."

- male, 20 years, on meeting by way of AVL

"When I meet the lawyer by AVL I don't actually know who's in the room, even if the lawyer has told me. I prefer to meet face to face."

- male, 19 years

"I met her once … We shook hands. She said her name and left"

- female, aged 15 -17, on ICL in Family Court[15]

"It was a bit, um, worrying, but, like, you didn't know what was going to happen, because I know for a long time that she wasn't doing much … Because it was a long time before I finally met her. When I met her, I remember she, like, explained what she did to, like, help me, but then … she really didn't do much after that. I didn't really remember her doing anything."

- male, aged 12 – 14, on ICL in Family Court[16]

13 *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 3A; *Bail Act 2013* (NSW) s 74(3)(d).

14 See, for example: *Children (Criminal Proceedings) Act 1987* (NSW) s 6(c).

15 Kaspiew et al (2014), *Independent Children's Lawyers Study Final Report (2nd edition)*, p 133, available at <https://aifs.gov.au/sites/default/files/2022-06/IndependentChildrensLawyerStudyFinalReport.pdf>.

16 Ibid, p 133-134.

PRINCIPLE D2 – Children should be given an opportunity to express their views and evidence of their views should be placed before the court if the child wants that to happen

Practitioners representing children in public and private family law proceedings should ensure that children have an opportunity to express their views in relation to some or all of the issues that will have a direct impact on them. Where children do want to express their views, practitioners will need to consider how best to place evidence of their views before the court.

Irrespective of whether a practitioner is acting as a best interests or direct representative, an important part of the role is to ensure that children have an opportunity to express their views, and that the court has evidence of the child's views, if the child wants that to happen. However, children cannot be compelled to express their views if they do not wish to do so.

Children's views can be placed before the court in a number of different ways. Generally, the views of children are set out in the report of an independent expert. For example, in the FCFCOA, the views of children are usually recorded in a report prepared by a Court Child Expert (a social worker or psychologist who works at the Court Children's Service) or in a Family Report prepared by a single expert. In the Children's Court, children's views are often set out in reports prepared by a Clinician (a social worker, psychologist or psychiatrist who works for the Children's Court Clinic) or by an independent expert.

Depending on the type of case, and the court, children's views may also be placed before the court through:

- Records prepared by caseworkers;
- A "Views and Wishes" statement prepared by their legal representative (see below);
- A letter or drawing prepared by the child; or
- A video prepared by the child and/or their carers.

Although it is not common practice in public or private family law cases in NSW, there may be some circumstances where it might be appropriate for a child to attend court and/or meet with the judicial officer. Where children are to attend court, there should be clear communication between the legal practitioner and the court about the child's attendance, and in some cases the leave of the court will need to be sought.

When discussing a Views and Wishes statement with a child, practitioners should explain the following:

- While a Judge will consider the child's views, the Judge might make a decision that is not in accordance with their expressed views and wishes.
- A best interest representative will present evidence of the child's views to the Judge but may ultimately make recommendations to the Judge which are different to what the child wants to happen.
- As their lawyer, a practitioner does not have to prepare a Views and Wishes statement, nor can they be compelled to disclose or divulge their views and wishes.
- If a Views and Wishes statement is filed with the court, a copy will be provided to the other parties in the case, which may include their parents, carers or other important people.

Practitioners should remember that:

- Any direction to file a Views and Wishes statement is seen to be an invitation, and not a requirement.
- Any Views and Wishes statement filed in the court represents the child's views at a single point in time and may need to be updated during the course of proceedings.
- A direct representative must not file a statement or otherwise disclose the child's views and wishes without the express and informed consent of the child. Informed consent requires the practitioner to explain to the child what will happen with the Views and Wishes statement and who will see it, including, for example, parents and carers.
- A best interests representative should carefully consider the appropriateness of obtaining and disclosing the child's views and wishes in circumstances where doing so may increase the risk to a child, may entrench family conflict, or where the determination of the court is unlikely to be affected by the views and wishes of the child.
- Any Views and Wishes statement that is filed should clearly reflect the views of the child and should not stray into observations about the child, carer, relationships or other commentary. Views and Wishes statements are not an opportunity to make submissions to the court or provide opinions about the weight that the court should place on these views.

Practitioners should consider the evidentiary weight (if any) of a Views and Wishes statement filed as an aide memoir. If the views of the child are a pivotal element in the proceedings proper evidence of the views should be obtained in admissible form, such as via a Children's Court Clinic Assessment as set out above.

PRINCIPLE D3 – Meetings should be arranged in a child focussed way

Contact with the child should occur where and when it is comfortable and convenient for the child, not merely where and when it is convenient for the practitioner.

Practitioners should think carefully about where to meet with a child client. The office of a practitioner is not always the best place to meet with a child, although it may be the most convenient for a practitioner. Other options should be considered, such as their placement, a youth centre, a cultural centre, or the office of another professional that the child is already comfortable with. Where appropriate and practical, a practitioner should talk to a child about when and where they will meet. Confidentiality and privacy issues should especially be considered when determining where the interview will take place. The practitioner should also be mindful of their own safety, and the appropriateness of seeing a child at another location.

During conferences, the practitioner should concentrate on facilitating openness and putting the child at ease. It is important for the practitioner to communicate with the child at the child's level. Where it is necessary to conduct the interview in a practitioner's office, consider the office layout and use the least formal room available. Practitioners with a number of child clients might consider decorating their rooms to incorporate child-friendly images and providing age-appropriate activities for siblings who may also be in attendance. Practitioners need to be flexible with seating arrangements and should try to remove obstacles such as desks and computers from between the practitioner and client, although consider that some clients may appreciate having a 'safety' desk in front of them. Practitioners may also need to consider other forms of communication, such as whether having pencils and paper, toys, visual cues or cards might allow the child to express themselves more comfortably.

Every effort should be made to accommodate the convenience of children. Keeping child clients waiting for a long time will only add to their anxiety. Older children may have to come alone to appointments, but may face difficulties in remembering appointment times, finding an address, having access to transport or navigating busy reception areas. Practitioners representing older children may need to remind children about upcoming appointments and the purpose of the appointment by phone, text, email, or other agreed method of communication.

"Lawyers should come talk to you earlier."
- female, 14 years

"They put pressure on you to be quick."
- female, 15 years

"Never for very long. It's pretty pointless - they don't sit with you long enough to get your side of the story." - male, 19 years

"My lawyer took me out for coffee, it was a good experience… he was very chill, and he was funny. I mean it sucked having to be in that situation, but it was nice to be able to make a good time of it." - 17 years

"They don't really understand my case before they get into court – sometimes they're still reading over the brief when they're talking to the judge. They should just talk to me for longer before they get in there."
- male, 19 years

"I had phone calls from my lawyer straight after court … he explained what had just happened in the court hearing… Yeah he would call within a couple of hours after court." - 19 years.

PRINCIPLE D4 – Practitioners should explain the implications of having a support person present during a meeting and ensure that the child consents

Depending on the type of matter, a child might benefit from the support of a trusted adult during the interview process. Practitioners will need to manage this carefully, in accordance with the guidance set out below.

Direct representatives (including criminal matters)

There is no requirement to have an adult or support person present when conferencing a child client. It is the child client's choice whether to allow their parents or carers in, and no-one else's.

Sometimes children might benefit from having another adult with them during an interview with a practitioner. A practitioner should not invite another adult to be present unless the child has given their specific consent or made the request.

A support person should be someone who is not involved in the proceedings or have a personal interest in the outcome (other than to support the child). There may be situations where it is inappropriate for a particular person to be the child's support person regardless of the wishes of the child. An example is where the proposed support person is either a complainant or witness in criminal proceedings (this often arises in domestic violence proceedings). If this situation arises, the child should be asked if they would like an alternative support person and the practitioner should actively assist the child in this regard. A youth worker, community elder, school counsellor, disability support worker, pastoral care person or older peer might be suitable support persons. For further information, particularly in relation to domestic violence proceedings, see guidance from the Law Society of NSW.[17]

Where a support person accompanies a child to an appointment, the practitioner should check whether the child wants the support person to remain throughout the conference. Depending on the circumstances, it may be practical to begin the conference by introducing each person and their role and establishing rapport. Once the child is comfortable, the practitioner can then advise the child and support person that they need to talk to the child alone, at least initially to meet obligations of confidentiality. Once speaking with the child in private, you can advise them about the lack of legal professional privilege between the child and their support people (see below) in an age-appropriate way and seek their informed instructions about whether to have the support person join them in the conference. This conversation should take place at the start of the conference where a direct conflict is identified (for example, where the parent accompanying the child is the complainant or witness in a criminal matter).

Practitioners should also explain to the child that they have the right to ask the support person to leave the room at any time. This issue may become particularly relevant when giving instructions on sensitive issues. Practitioners should be alert for signs of uneasiness in the relationship between the child and the support person and tactfully suggest that the support person leave the room if this would benefit the child. The practitioner should also ensure that the support worker has a clear understanding of their role.

Best interests representatives

In public and private family law matters, the practitioner should meet with the child alone, although there might be circumstances where a family member or carer is present for a brief period to allow introductions to take place and for the child to feel comfortable with the practitioner. In some cases, practitioners may see siblings together, but children should generally be given an opportunity to meet with a practitioner on their own. Practitioners need to be mindful that parents, carers or other family members may be a witness or a party to a case and for this reason it is not appropriate for them to be present during any meetings with the child.

17 The Law Society of NSW (2017) *Guidelines for Contact with the Complainant in Apprehended Violence Matters,* <https://www.lawsociety.com.au/sites/default/files/2018-03/Domestic%20Violence%20and%20Crim%20LAw.pdf>.

Confidentiality

Where a support person is to be present with the child, the practitioner should ensure that the child understands that the support person may not be subject to the same confidentiality requirements as the practitioner. In criminal matters, practitioners need to be aware that there is no confidentiality between a child client and their support person.[18] The practitioner must consider the fact that the presence of the support person will affect client legal privilege, and ensure the child understands the effect this will have on their legal rights and protection of confidential information they may wish to disclose to the direct representative. In some cases, a support person may be a mandatory reporter in circumstances where the practitioner is not (see Principle F2).

"They should ask you first, 'Do you want your mum in the room?'" - female, 14 years

"Sometimes my caseworker was with me, but my lawyer always asked if she wanted them to be there. They have to ask that don't they?"

- female, 18 years

"They sometimes assume you want the support person there, but I don't actually mind."

- male, 19 years

"My sister translated what the lawyer was saying into words that I could understand – she simplified what the lawyer was saying because the lawyer didn't do that. It was alright because my sister was there, but the lawyer used words I didn't understand."

- female, 20 years

"My first lawyer she wasn't rude but she was a bit like brushing off, wanted to get it done, wasn't talking to me about it, a bit iffy, she looked like she didn't want to be there. I asked if I can call my Mum into the room. She rolled her eyes a bit." - 17 years

18 See: *JB v R* [2012] NSWCCA 12. If the prosecution seeks to rely on admissions made to a support person, then the support person will need separate independent advice. Depending on the circumstances, the child may wish to challenge the admissibility of this evidence including challenging the compellability of the witness under the *Evidence Act 1995* (NSW).

PRINCIPLE D5 – Communication should be child focussed and compassionate

The practitioner should use language appropriate to the age, maturity, level of education, cultural context and language proficiency of the child. They should be compassionate and non-judgmental.

It is important that practitioners are prepared and informed before any meeting with the child. Children should always be treated with respect. This involves listening and giving the child the opportunity to express themself without interrupting, addressing the child by their preferred name and preferred pronouns, and accepting that the child is entitled to their own views.

Practitioners should explain the reason why they are asking questions of the child. At the same time, they should be alert to sensitive matters.

For example, be careful about asking unnecessary questions or asking questions about matters that are fully covered in file briefing notes or other available material and do not require confirmation with the child.

In family law matters, there may be topics that a best interests representative should avoid asking the child about. The most obvious example is where there is an allegation that the child has been sexually, physically or emotionally abused. In these cases, invariably the child will be interviewed by a court appointed expert and may have already been interviewed by other adults, such as police. The best interests representative questioning the child may contaminate the child's evidence. Multiple interviews may also re-traumatise the child.

Best practice for communication with children includes the following:

- Ensure you have sufficient time to speak with the child so the communication is not rushed.
- Explain your role and how the meeting will be conducted.
- Provide an overview of the meeting so the child knows what to expect.
- Start by asking open questions that help the child feel at ease.
- Speak slowly. Use short sentences and simple, everyday vocabulary.
- Pause often to allow the child time to process what you are saying, to ask questions, or to interrupt. Provide information in short segments, rather than all at once. Take breaks when it seems that the child's concentration has faded.
- Invite the child to ask questions regularly. This includes inviting them to interrupt you if they do not understand what you are saying or want to ask a question. Prompt them to indicate their understanding.
- Be aware that a child may not recognise that they have not understood what you have said.
- Before asking questions, you should inform the child that it is acceptable to answer with "I don't know". You should explain that if you repeat a question, this does not mean you think the child's answer was wrong.
- Be aware that a child may interpret what you say literally. Provide concrete examples when explaining concepts or legal strategies. Avoid the use of metaphors and figures of speech.
- Respond constructively to the child's suggestions or instructions.
- Be aware of cultural or religious sensitivities.
- Be friendly, open and authentic. Do not be overly formal.
- Be aware of the special communication needs of children with disabilities. Consider non-verbal methods where the child is developmentally disabled, very young or has problems verbalising, e.g. using diagrams, pictures and videos.
- Be aware of and sensitive to relevant factors in the child's family background or other circumstances that may affect the child's ability to communicate. This includes any form of abuse or trauma that the child has suffered.
- If a child is going to court, explain the role of everyone in the courtroom and what is likely to occur.
- Seek further assistance from others (being careful to preserve confidentiality) if necessary.
- Let the child know when/if you will be seeing them again.
- Let the child know how they can contact you – this might be through a parent, carer, caseworker or directly, depending on the child's age and circumstances.

"The best thing about a lawyer is when they talk in a way that you can understand."
- female, 14 years

"In my case there were long stretches of time where nothing was happening, but the lawyer still called just to say nothing new was happening" - crime client, 19 years.

"The worst thing about my lawyer was that she asked really personal questions."
- female, 15 years

"They talk down to us and don't speak our language." - female, 15 years

"They can be very businessman like – lawyers should be more friendly. I know I'm going to get treated like that in court, so I want my lawyer to be more personable."
- male, 19 years

"Sometimes I feel like I couldn't talk to my lawyer as much as I wanted. When I had [name] I didn't have their contact number and I could only see them when they wanted to see me. I found it hard to get in touch with them" - male, 19 years

"My lawyer gave me a lot of respect. She didn't judge me, she just listened." - male, 21 years

"She had this, I think, air about her that she had more important things to do, um, she – she didn't really – she clearly doesn't think we have a clue, um, and I - I'm very smart … The worst bit would be her not listening, I suppose, disregarding what we had to say and then representing the wrong – representing views that weren't actually ours."
- male, 15 – 17 years, on ICL in Family Court[5]

"We both decided what should happen in court." - female, 16 years

"He wouldn't say what he thought, I think he wanted me to come to my own decision, but I just wanted to know what the possible outcomes were each way… my other lawyer he was straight up and honest and told me what he thought." - 19 years

"Boys like us we can spot anyone who is saying something off. Like the energy and the vibe changes. When we knew she was being herself that's when we knew we could trust her… so yeah don't create a fake persona and don't change yourself or use slang"
- 17 years

"It's hard to talk about your case and your experiences when it does feel so formal. Let the young person know something about you. She told me she was getting married so that meant I knew something about her and it made it easier" - 17 years

"They just need to be more open and mindful about kid's situations, we don't live the best lives, we do steal for food, and we do steal for clothes because it's not cheap you know" - 22 years

"Checking in would be good. Cos they only speak to me when something is happening with the case, and then its these hard conversations… But they don't know me. They don't know anything about me." - 18 years

E. DUTIES OF REPRESENTATION

PRINCIPLE E1 – Direct representatives must comply with their professional obligations

A direct representative should represent the child in a competent and professional way in accordance with the *Solicitors' Rules,* general legal requirements and best practice. A child client is owed the same duties of competence, loyalty, confidentiality and professional representation as an adult client.

Best practice as a direct representative may require you to:

- Actively advocate the child's position.
- Advise the child concerning:
  - the subject matter of the litigation,
  - their rights and options,
  - the court system,
  - the proceedings,
  - the practitioner's role,
  - the role of other parties,
  - the relationship of confidentiality,
  - what to expect in the legal process, and
  - the possible outcomes and their consequences.
- Obtain copies of all court documents and evidence relevant to the case.
- Participate in all pre-trial hearings or conferences, hearings, negotiations, alternative dispute resolution processes, and discovery that affect the child's case.
- Inform other parties and their legal representatives that they are representing the child and, where authority has been obtained, that the representative should be notified prior to any changes in circumstances of the case or the underlying social situation that affect the child and the child's family and therefore the outcome of the Court proceedings.
- Attempt to reduce case delays.
- Identify appropriate family and professional supports or services for the child.
- Consider and discuss with the child client the desirability and possibility of appeals or further applications.

In some jurisdictions the child may choose to attend court but is not required to do so. The practitioner should discuss the option to attend court with the child client throughout the proceedings. Practitioners should be proactive in exploring the possibility of a child attending court where the child is expressing a desire to do so. Practitioners should work with the court and other practitioners involved in the matter to develop a child focused strategy for this attendance.

The direct representative's attendance at, and active participation in, all conferences and hearings is critical, unless the hearing involves issues completely unrelated to the child. Although the child's position may overlap with the position of one or more other parties (e.g. parents, third-party caretakers or a government agency), the direct representative should be prepared to participate fully in any joint proceedings and not merely defer to other parties.

The direct representative should actively advocate in accordance with the child client's instructions and preferences. Where the child client is in court, the direct representative should help the child client to understand the progress of proceedings and explain the submissions being made. Before closing submissions, the direct representative should consult with the child client to ensure that all relevant aspects of the child's instructions have been put to the court.

Practitioners should be sensitive to the child client's expectations of progress in a matter and the disruption that may be caused by adjournments. Delays can be harmful, particularly where the child is at risk or their living environment has been adversely affected by the case (including being in custody or in OOHC). Delays can also impact adversely on the child's evidence. However, there may be some circumstances when delay may be beneficial to the child. The direct representative should always consider the effect that delay will have upon the child client's case and well-being. In cases where the child is giving evidence (in civil cases, this would only occur if the child consented and the court granted leave), the direct representative could request that such cases be given priority in case listings or seek a fixed hearing date for the child to give evidence. The direct representative should also consider the use of settlement negotiations and other dispute resolution mechanisms where these would be appropriate.

Part of the direct representative's role is to consider referrals to appropriate (including culturally appropriate) non-legal services and resources which may assist the child client, including counselling, cultural support, educational and health services, drug and alcohol programs, housing and other forms of assistance for which the child client may qualify. Support persons, such as family members, friends, neighbours, teachers, or services such as educational support or recreational opportunities may also be considered. The desirability of obtaining reports from experts or calling expert witnesses should also be considered. In all cases the direct representative should discuss suggestions with the child client and should not make referrals or share confidential information without the child client's authorisation.

The direct representative should explain to the child client the possibility and merit of an appeal or alternative or further applications. The practitioner should explain the ramifications of filing an appeal or further applications to the child client, including the potential for delaying implementation of services or other court orders, and what would happen pending the outcome of the appeal or further application.

Criminal law proceedings

The role of a criminal lawyer representing a child client extends beyond the courtroom. It includes advocating for the child client during the investigation phase, exploring diversionary options and considering the impact of the criminal proceedings on other areas of the child's life. Children who are defendants in criminal proceedings have a right to be heard and participate in processes that affect them.[19]

When a child is in police custody, arrested and/or charged by police, the practitioner's role also includes providing advice to the child on any relevant police procedures, including their rights while in police custody, obtaining the child's instructions on the police version of events where appropriate, explaining their right to silence and, if applicable, explaining diversionary options under the *Young Offenders Act 1987* (NSW) (**Young Offenders Act**).

Children who are in OOHC are particularly vulnerable. They often have a history of trauma and are overrepresented in the criminal justice system. Research has shown that these children are often in contact with police as a result of behaviour in their home environment that (if they were not in OOHC) would ordinarily result in a disciplinary response from parents and not a criminal justice response from police.[20]

19 *Children (Criminal Proceedings) Act 1987* (NSW) s 6(a)-(b).

20 Erin Gough (2011) *The Drift from Care to Crime: a Legal Aid NSW Issues Paper*.

A Joint Protocol has been developed between DCJ, NSW Police and Legal Aid NSW in an attempt to address this issue.[21] The Joint Protocol aims to reduce police involvement for young people in OOHC and try and reflect more closely what would happen if a child was living at home with family. It encourages a flexible and proportionate response by OOHC providers and the police.

OOHC providers have a responsibility to develop behaviour support plans and bring in supports before involving police. When police are involved, the Joint Protocol encourages police to consider taking no further action or a *Young Offenders Act* response, and to only consider arresting or charging the child after those options have been considered.

Direct representatives of criminal law clients in OOHC should be aware of these dynamics and seek relevant information regarding a child's care status and preferences for their care. Direct representatives should seek the consent of their client before sharing confidential information with the child's DCJ carer or caseworker.

It is important for practitioners who are representing children who have concurrent care and protection proceedings to seek instructions to liaise with their care lawyer. This can provide practitioners with important background information about the child's circumstances and placement.

"Lawyers should give their legal advice and own opinion on your charges." - male, 17 years

"My lawyer would tell me all of my options, even the ones that could impact me negatively. They gave me the choice. I never felt forced." - 17 years

"They say stuff in court which I didn't tell them to." - male, 17 years

"He was good at speaking to me and the judge." - female, 16 years

"Why do they adjourn all the time?" - lots of participants

"I didn't know what happened in court – the escorts told me." - male, 17 years

"Some of them do explain it all after court – they turn the big words into little words." - male, 17 years

"A lot of them didn't want to listen. They wanted to be in and out. Have the matter just dealt with and be in and out…That's the problem. You should be able to fight a bullshit charge and at least be heard. They shouldn't tell you to just plead guilty. If you are not guilty, then you are not guilty" - 23 years

"The first time I spoke to my lawyer I said I'm just gonna plead guilty, but the lawyer put out his hand and said "Woah slow down let's get the material first" which made me feel like he wasn't judging me, that he was looking out for me", *- 19 years.*

"I spoke up in court because my lawyer wasn't representing me properly - I felt like only the prosecutor was standing there paying attention and listening to me." - male, 19 years

"My lawyer said I could appeal but I didn't want to because I didn't get locked up. I should've gone ahead with the appeal, I realise now that I'm a bit older." - male, 21 years

"They done good for me. Every time. They didn't do nothing wrong. They spoke up and said everything. I'm glad they helped. If they didn't, I probably would have been on a different path to what I am now" - 19 years

Clearly outline what it is that I did, what laws I broke and what I need to do now … I don't know why lawyers do this but they just say 'well you could get a warning or you could go to jail'…that just creates anxiety. Tell me what the reality is for me" - 16-22 years

21 NSW Government (2016) *Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system* <https://dcj.nsw.gov.au/children-and-families/joint-protocol.html>.

PRINCIPLE E2 – Best interests representatives must comply with their professional obligations

A best interests representative should represent the child's best interests in a competent and professional way in accordance with the *Solicitors' Rules,* general legal requirements and best practice, even though the child is not the client of the practitioner and the practitioner is not acting on the instructions of the child.

Best practice as a best interests representative may require you to:

- Explain to the child what the case is about, who the parties are, what issues are in dispute, how decisions will be made and the possible outcomes.
- Explain what happens in court, including procedural steps, meetings with experts, mediation and what happens at a hearing / trial.
- Explain to the child how they can participate and the ways in which the Judge will be informed about their views (see Principle D2).
- Explain the likely timeframes, including that a Judge may reserve their decision at the end of the hearing / trial.
- Obtain copies of all court documents and proactively obtain evidence relevant to the case.
- Participate in all pre-trial hearings or conferences, hearings, negotiations, alternative dispute resolution processes.
- Inform other parties and their legal representatives that you are acting as the best interests representative for the child.
- Attempt to reduce case delays where these delays are not in the best interests of the child.
- Identify appropriate family and professional supports and services for the child.
- Explain the outcome of the case to the child and the effect of any court orders.
- Consider and discuss with the child the possibility of an appeal.

The overriding duty of the best interests representative is to ensure that the child's long term best interests are served by the decision of the court. The court is only able to reach this decision by having all relevant evidence before it. It is therefore the duty of the best interests representative to ensure that all relevant evidence is presented to court. This includes undertaking relevant investigations (for example, this may include speaking to the child's school-teachers or other relevant people and obtaining departmental or court files), issuing subpoenas, instructing experts and cross-examining witnesses.

Children should have an opportunity to have their views heard in court and administrative proceedings. Where a best interests representative has been appointed, it is an important part of the best interests representative's duty to seek the preferences of the child and, if the child consents, ensure that these are placed before the court. The best interest representative must place the child's views before the court, even where they do not align with the submissions that they may ultimately make to the court about the outcome that is in the child's best interests.

The best interests representative should ensure that relevant and appropriate, but not excessive, interviews and reports are conducted, attempting to balance the need for information and the best interests of the child. In this regard the representative should consider not only those interviews and reports undertaken on their request, but also those requested by other parties or the court. Adequate briefing of third parties preparing reports may assist to reduce the details the child is required to provide. The guidance on delays in Principle E1 also applies here.

While the best interests representative does not directly represent the child, it is the role of the best interests representative to ensure that the child understands the outcomes of court hearings, including the effect of an interim or final orders. Wherever possible the best interests representative should explain orders to the child on the same day as the order or judgment is delivered, or shortly after.

In the matter of *P and P (1995)* FLC 92-615, the Court said that a best interests representative should:

- Act in an independent and unfettered way in the best interests of the child.
- Act impartially, but if thought appropriate, make submissions suggesting the adoption by the court of a particular course of action if they consider that the adoption of such a course is in the best interests of the child.
- Inform the court by proper means of the child's wishes in relation to any matter in the proceedings. In this regard, the representative is not bound to make submissions on the child's instructions but is bound to bring the child's express wishes to the court's attention.
- Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the child's welfare is before the court.
- Test by cross-examination where appropriate the evidence of parties and their witnesses.
- Ensure that the views and attitudes brought to bear on the issues before the court are drawn from the evidence and not from a personal view or opinion of the case.
- Minimise the trauma to the child associated with the proceedings.
- Facilitate an agreed resolution to the proceedings.

"The best thing about my lawyer is that she gave me choices." - female, 15 years

"Yes, she ran through things, but it didn't happen like that in court." - female, 16 years

"Um, I probably would have told her that it probably would be better had she just actually represented me … I still don't know where she got her facts from, but I think it would have been better if she had actually represented me … [She could have done that by] taking my viewpoints and not making decisions about what was best for me before actually meeting with me. And stating them and getting a chance to know me … Like, not meeting me prior to that, I think that was very dodgy, 'cos she already made the viewpoint. I don't know where that came from that she had, and at least doing that to see my point of view."

- male, 15–17 years[22]

*"**My legal aid, she's great, she has that fight in her. She knows what she's talking about. She listens to my directions. She understands the pain, understands what I'm going through, that's what's great about her**" – 21 year old.*

22 Kaspiew et al (2014), '8.5 Experiences of young people', *Independent Children's Lawyers Study Final Report (2nd edition)*, p 138.

PRINCIPLE E3 – Practitioners should consider the use of alternative forms of dispute resolution to resolve matters

Practitioners representing children should consider whether it would be appropriate to use alternative forms of dispute resolution, including negotiation, to try and resolve some or all of the issues in the case.

Practitioners should consider the appropriateness of mediation, negotiation (through legal representatives or otherwise) and other forms of dispute resolution. In some jurisdictions, dispute resolution services may be required or provided as part of the proceedings.

While practitioners should seek to minimise delays and promote stability and permanency for the child, the practitioner should consider the potential benefits for, and the possible detrimental effects on, the child participating in alternative forms of dispute resolution.

Factors to consider include:

- The legislative requirements for alternative dispute resolution.
- The nature of the power dynamics between the child and other parties.
- The existence or allegations of abuse.
- The relationships between the parties.
- The need for an authoritative decision from a court.
- The advantages of early resolution of the issues in question including the likelihood of greater compliance by the child's parents or caregivers with a mediated outcome as opposed to a judicially determined one.
- The advantages and disadvantages of involving the child and members of their family, extended family and other carers in decision making.
- The likelihood that issues in the proceedings could be narrowed or resolved through alternative dispute resolution.
- The issues in dispute and the significance of having the child's direct input in their resolution.

Best interests representatives should ensure that all relevant information is available prior to mediation, particularly before agreeing to any final orders.

PRINCIPLE E4 – Practitioners should carefully consider whether an accused child should give evidence

In care and protection proceedings, children cannot be called as witnesses unless they consent, and the court has granted leave. Likewise, in family law proceedings, children cannot be present in court, or witnesses in a case, unless the court has granted leave.

In criminal proceedings, in deciding whether to call a child client as a witness, practitioners should consider:

- **The child's need or desire to give evidence.**
- **The necessity of the child's direct evidence.**
- **The availability of other evidence which may substituted for direct evidence from the child.**
- **The child's developmental ability to provide direct evidence and withstand possible cross-examination.**
- **The best way for the child to give their evidence having regard to the case and their particular circumstances.**

This principle is limited to a situation where the practitioner is acting for a child client in a criminal proceeding, who will necessarily be aged 10 or older. Outside the scope of this commentary are broader issues including calling another child as a witness in your child client's case, cross examining child complainants, calling children to give evidence as a prosecutor, acting for child clients in specialist proceedings (for example to assert sexual assault communications privilege) and the Child Sexual Offence Evidence Program. A starting point for these topics can be found in the Judicial Commission's Bench Books.[23]

Giving evidence may help a child client to feel actively involved in court proceedings and their voice heard. However, it is often a stressful experience for children and may risk re-traumatisation.

Children are presumed to be competent to give evidence.[24] Behavioural science experts can provide guidance on what questions a child may have capacity to understand. In deciding whether to call a child client to give evidence, the same underlying principles apply as when representing an adult client. As with adult clients, the practitioner must first identify the issues in the matter and develop a case theory before deciding whether to call the child client. At this point, the practitioner can ascertain what evidence, if any, is needed from the child client. If the child does not want to give evidence, it may be possible for the parties to agree on facts, pursuant to s 191 of the *Evidence Act 1996* (NSW), in relation to the child's evidence so that the child need not give evidence in court.

Every child defendant has a right to silence. The decision whether to call the client is an important forensic decision, and the pros and cons must be weighed carefully. These include what relevant evidence the child client will give, whether this evidence can be adduced from another source, what the credibility of their evidence will be and whether the evidence they give under cross examination could assist the prosecution. In order to make an assessment on these matters, it will be necessary to have conferenced the child client. Practitioners must remember that they have ethical obligations not to "coach" any witness, including child clients.[25]

The final decision whether to call the child client should be made after the prosecution closes its case, as there are often differences between how the practitioner expects the hearing to play out and how it actually plays out.

Although this section is limited to child clients, it should be noted that all child witnesses should be prepared for and understand the purpose and process of the trial. Where the witness is not the client of the practitioner, the practitioner should ensure the child witness understands the practitioner's role and their relationship. This will not only help to minimise the stress on the child but will assist them to give better evidence.

> ***"I was in the witness stand and it was extremely confronting knowing everyone in the room was judging me."*** – male, 19 years

23 See Judicial Commission of NSW Bench Books on the Children's Court and Sexual Assault Trials.

24 *Evidence Act 1995* (NSW) ss 12-13.

25 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 24.

PRINCIPLE E5 – Protecting a child witness giving evidence

When a child client is being cross-examined by another party, practitioners should monitor the phrasing of questions and object to inappropriate questioning, particularly where such questioning might confuse or intimidate the child.

The language and formalities of the courtroom are incomprehensible to most children and can intimidate and confuse child witnesses. Practitioners often use complicated sentence structures during cross-examination, which may confuse the witness, or ask narrow questions to retain tight control over the testimony. It should be noted that children are particularly vulnerable to confusing cross-examination.

All practitioners are required to comply with section 41 of the *Evidence Act 1995* (NSW) and should not ask impermissible questions. Practitioners representing child clients need to be cognisant of section 41 and should object, when necessary, to improper questions put to their client child during cross-examination, including questions that are misleading, confusing, repetitive, belittling or insulting. When considering whether or not a question is disallowable, the court must take into account relevant characteristics of the child including their age, education, level of understanding and intellectual capacity.

> ***"It was definitely intimidating. A lot of the time the opposition would confuse you and get you to say something you didn't want to say. It's a daunting thing to do."*** - female, 21 years (2013)

PRINCIPLE E6 – Practitioners should ensure the safety of children when attending appointments

The practitioner should minimise risk to the child client and ensure that they are safe when required to attend appointments, interviews or court events.

The practitioner should consider any risk posed to the child during appointments, interviews and court events. Risks to a child can arise in a number of different ways, for example, because of the nature of information being provided to the child, or from other people.

When arranging meetings with the child or interviews with experts, practitioners should carefully consider the venue, the timing of appointments and who should be given information about the arrangements that have been made. This is particularly important in regional and rural settings, where a practitioner might be easily identifiable to other community members. Practitioners should be mindful of the child's right to privacy and how this may be compromised by meeting in a public space or venue.

In some cases, a child being seen with or communicating with a practitioner can present a safety risk. Practitioners should be familiar with or inquire about safety planning measures available at the court or other locations, and check the physical environment, such as the layout of hearing rooms, to minimise adverse effects to the child's well-being. If such risks cannot be avoided, the practitioner should inform the court and seek appropriate orders.

> ***"They keep away the baddies from us."*** -
> female, 10 years

PRINCIPLE E7 – Practitioners should provide continuity of representation

The practitioner should be consistently available to represent the child or ensure that incoming practitioners are properly briefed.

Practitioners should strive to ensure consistency of representation, which is particularly important to children.

However, this may not always be possible. Practitioners should explain to the child client that other practitioners may appear on duty days or for procedural matters. The child should be reassured that, wherever possible, the practitioner will be the one who will represent them at hearings and whenever important decisions are made.

Where it is necessary that another practitioner represent the child for an extended period of time or for the remainder of a matter, the reasons for the change in representation should be explained to the child, and, wherever possible, the child should be introduced to the new practitioner. A direct representative should seek the child's consent to refer the matter to another practitioner.

Practitioners should ensure that file notes properly record both the legal issues and matters of importance in relation to the child.

"I hate it when you get a different lawyer every time you go to court." - male, 17 years

"Sometimes you get the worst one and then different ones." - female, 15 years

"One time I had 4 different lawyers. It feels like they're abandoning you and you just end up with a fill-in who doesn't understand the case from the start. It's good to have one solicitor who you know and like because then you can trust them." - male, 18 years

"I hated having different lawyers. That person may not have had time to go through your file, they don't know you or your circumstances, you have to explain everything again. It's unprofessional." - female, 21 years

F. CONFIDENTIALITY

PRINCIPLE F1 – Practitioners should explain the limits of confidentiality to children

A practitioner representing a child as a direct representative owes the same duty of confidentiality as would be owed to an adult client. The practitioner must not disclose any confidential information without the authorisation of the child, unless the practitioner is permitted or compelled by law to disclose or in other circumstances required to do so by the Solicitors' Rules.

A practitioner representing the child as a best interests representative also has a relationship of confidentiality with the child, but there are some limits to this relationship which should be explained, early on, to the child in an age-appropriate way.

> ***"They shouldn't speak about my charges in front of my mum."*** - female, 15 years
>
> ***"They should ask me first if it's OK to tell."*** - female, 9 years
>
> ***"He should tell the judge everything. [If I don't want my lawyer to tell], well, it's the judge so [my lawyer] should tell him everything."*** - female, 10 years

Direct representatives

Rule 9 of the *Solicitors' Rules* sets out the duty of confidentiality, which a practitioner owes to the client. A child client is entitled to the same protection provided by these provisions as any other client and has a right to confidentiality in communications with their legal representative. Rule 9.2 specifies circumstances in which disclosure of confidential information is permitted. Rule 10, which restricts a practitioner acting against a former client, is also applicable to child clients.

The duty of confidentiality means that practitioners should not discuss information about the proceedings with anyone without the authority of the child. This includes parents and guardians. This can be difficult for parents and guardians to comprehend, particularly for young children.

Best interests representatives

Best interests representatives share a confidential relationship with the child, to the extent that the child should be encouraged to ask questions and express their views to the practitioner, knowing that the practitioner will not readily share that information with others without the child's knowledge or consent.

A best interests representative should clearly explain to the child the limits to their confidential relationship at the start of their first meeting with the child. A practitioner should explain, for example, that if the child discloses information that would cause the practitioner concern for the child's or someone else's safety, they may need to make a report to the relevant child protection authority or the Police. Further information is contained in Principle F2 below.

If appropriate, practitioners may also remind other adults, such as parents, carers or caseworkers, about the confidential relationship between the child and their lawyer, when arranging appointments.

PRINCIPLE F2 – Practitioners should be aware of their obligations to report information

It is not unusual for a practitioner to be told information by a child that will result in the practitioner needing to consider whether they are required to, or should, disclose confidential information to others.

In all cases, practitioners should provide children with as much autonomy as possible with respect to making disclosures. The practitioner may warn the child that the information they are disclosing, or seem to be about to disclose, may be within the category of information that may require a disclosure by the practitioner. A practitioner may ask the child whether they wish to continue to share that information, knowing it is likely to result in a disclosure.

Where a practitioner is obliged to, or considers it necessary, to disclose confidential information shared by a child client, the practitioner should explain this to the child. The practitioner should also explain the reason why the disclosure should or must be made. In all cases, the minimum amount of information necessary to relieve the practitioner's obligations should be disclosed.

Practitioners should be aware of their obligations in relation to reporting responsibilities for each of the jurisdictions in which they practice. The reporting responsibilities are summarised below.

Independent Children's Lawyers (ICL)

In the family law jurisdiction, there are different reporting responsibilities depending upon the nature of the disclosure. An ICL, who has reasonable grounds for suspecting that the child has been abused,[26] or is at risk of being abused, *must* notify the relevant child protection authority. In cases where the ICL has reasonable grounds for suspecting that the child has been ill-treated, or is at risk of being ill-treated, or otherwise exposed to psychological harm, they *may* make a notification: *Family Law Act* s 67ZA. The notification must be made to a "prescribed child welfare authority". In New South Wales, this is the Department of Communities and Justice.

Best interests and direct legal representatives

A best interests representative (other than in the family law jurisdiction), who has reasonable grounds to suspect that a child is at risk of significant harm, is not a mandatory reporter within the meaning of s 27 of the *Care Act*. A direct legal representative is also not a mandatory reporter for the purposes of this section.

However, if the practitioner is concerned about the immediate safety of the child they should consider making a report. This is particularly so in cases where the practitioner might be the only person who holds the information. Careful consideration should be given to Rules 9.2.4 and 9.2.5 of the *Solicitors' Rules* and advice can be sought from the Law Society's ethics assistance line on (02) 9926 0114.

Depending upon the age and maturity of the child or young person, the practitioner should discuss, with the child, the advantages of bringing the matter to the attention of relevant authorities or other relevant persons.

A direct representative should always seek permission to disclose any information. If the child refuses to authorise disclosure, the practitioner may proceed to disclose only in situations where the law permits or compels disclosure (see *Solicitors' Rules* 9.2 and specific circumstances set out in these principles). The child should be advised of a practitioner's intention to disclose despite the child's refusal to authorise.

Practitioners also need to remember that where a child has a support person present, that person may have a professional responsibility to report information.

26 "Abuse" is defined in s 4 of the *Family Law Act* 1975.

Compelling a disclosure

Children have a right to confidentiality in their communications with their legal representative. This right is fundamental to ensuring that children can express their views freely and without fear.

Generally, a court will not compel a practitioner to disclose communications between a child and their representative, reflecting the importance of protecting the child's right to privacy and participation. In family law, s 68LA(6) of the *Family Law Act* makes this clear.

In family law, an ICL may disclose information that the child has communicated to them, even against the child's wishes, if they consider the disclosure to be in the best interests of the child. Where this occurs, the ICL should consider whether it is appropriate to:

- explain to the child, in age-appropriate language, why the disclosure is being made;
- advise the court and the parties of the child's views with respect to the disclosure of the communication, and
- provide feedback to the child on how their views were considered in the process.

"They should ask me before telling anything about me in court." – female, 15 years

"Sometimes they just open their trap and then ask, 'Was I supposed to say that?'"

– male, 16 years

PRINCIPLE F3 – Direct representatives should explain client legal privilege

Client legal privilege applies to confidential communications between child clients and their direct representatives.

As with general rules relating to confidentiality, the direct representative should advise the child client of the existence of client legal privilege, and the fact that disclosure of confidential information to a third party by the child client may result in the loss of client legal privilege Direct representatives should consider the existence of client professional privilege and refrain from conducting joint interviews with child clients or providing information to third parties. The presence of support persons during an interview with a child client will also affect client legal privilege.

The need to balance the value of a support person being present for a child and the protection of a child client's legal privilege can be complex. Consider whether a support person can be present for parts, but not all, of a client conference and explain the reasons for this to both the child and support person.

G. CONFLICT OF INTEREST

PRINCIPLE G1 – Practitioners must avoid conflicts of interest

The Solicitors' Rules in relation to conflict of interest and the duty to avoid conflicts of interest owed by a legal representative to a client apply to all practitioners representing children.

Rule 10 of the *Solicitors' Rules* prohibits a practitioner from acting where it would lead to a conflict between duties owed to a former client and a current client except in certain limited circumstances. Prior to acting in a matter where a former client is involved, a practitioner should consider Rule 10.2 and whether the practitioner or their firm is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed.

If the practitioner or their firm is in possession of such information, they must obtain informed written consent from the former client to act for the new client, or create an effective information barrier.

In criminal law matters, information to which Rule 10 relates may include knowledge of a former client's criminal history, including matters relevant to credit or propensity to act in a manner in dispute in present proceedings, or subjective information which may be relevant to credit, such as mental health or drug and alcohol issues.

Rule 11 of the *Solicitors' Rules* also requires a practitioner to consider whether there would be any conflict of interest in acting for more than one party. These rules apply to practitioners representing children. It is particularly important where children are involved to anticipate conflict, as a change of practitioner can be unsettling for a child.

Situations where the practitioner represents more than one party should be continuously monitored for conflict of interest situations. For example, a care and protection matter involving two siblings both aged less than 12 may commence with one practitioner for both siblings, but if one or both children turn 12, the practitioner cannot continue to represent both siblings. In such cases, a different practitioner would be appointed to act for the child who turns 12. If both children turn 12, it is likely that both children would have new practitioners appointed to represent them. The situation and any required actions or options as a result of the conflict should be explained to the children.

In criminal law matters, particular care should be taken when considering representing two or more co-accused, due to the high potential for conflict. Informed consent is always required and should be recorded in writing, including steps taken to ensure consent is informed. Criminal lawyers should be particularly conscious of the potential for conflict that may emerge mid-proceedings, as a result of the disclosure of additional evidence and evidence that may emerge mid-hearing or trial. It is advisable to avoid acting for two or more co-accused in all but the most straight-forward of criminal matters, particularly contested matters.

A practitioner should not undertake to represent a child as a direct representative and a best interests representative at the same time. See also Principle B1 and B4.

H. ACCESS TO DOCUMENTS, REPORTS AND INFORMATION

PRINCIPLE H1 – Practitioners should carefully consider how they facilitate the child's access to court documents, reports and information

A child who is directly represented is entitled to access documents that have been created or received by the direct representative for the purposes of the child's matter or information obtained by the direct representative in their capacity as the child's representative. Direct representatives should ensure that any legal or court-ordered restrictions in relation to documents are followed and otherwise consider the impact of accessing case-related documentation on the child client.

As a general principle, clients are entitled to access documentation prepared or filed during the course of proceedings, subject to any orders made by the court. This applies equally to children.

The direct representative in civil proceedings should talk to the child about the use of documents in their case, and the ways in which information in documents can best be shared with them. Depending on the case, the direct representative might:

- summarise the key information for the child,
- read out or show the child some or all of a document, or
- in some circumstances, might give copies of some or all of the documents to the child if the child wants that to happen and there are no orders preventing that from happening.

Practitioners need to give very careful thought to how information is provided to children given the confidential nature of proceedings involving children and the potential emotional impact on the child of receiving the information or documents.

Many documents and reports contain information likely to distress the child. Depending on the contents of the documents, the direct representative could consider consulting with the author of a document or report about whether the information in the document is already known to the child and if not, whether the information is likely to cause distress. If appropriate, such information could be imparted to the child by the author of the document, who could also explain any matters that are not addressed in the document, or answer any questions the child may have. Consideration could also be given to asking the author of the report to prepare a summary of the report and recommendations that is age appropriate. It may also be appropriate to arrange for the child to have support if the contents of a document are likely to cause distress. Where it is necessary to arrange for the support of a person not involved in the proceedings, orders should be sought permitting disclosure of material to the support person.

In some cases, it may be appropriate for the Court to make orders restricting the provision of documents to a child.

Direct representatives should discuss with children the issues around safe keeping of court documents. It may be appropriate for the direct representative to keep copies of documents for the child, rather than provide them with copies. Where a child is to be given a copy of a document, they should be properly advised about the restrictions on sharing the document and discussions should be had with respect to safekeeping of documents.

For children in custody, consider obtaining instructions to notify caseworkers and psychological staff if particularly distressing information has been disclosed or accessed to ensure the child client is given appropriate support.

Where a best interests representative makes the decision that it is appropriate to provide a child with access to documents or reports, the same considerations as to the capacity of the child to comprehend the information and the potential emotional impact on the child should be applied. In addition, the best interests representative must have regard to court orders and any legislative requirements governing disclosure in these situations.

I. INTERACTIONS WITH THIRD PARTIES

PRINCIPLE I1 – Practitioners should talk to children before involving third parties

Where a direct representative considers it necessary to involve other services or professionals in the case, they should explain this to the child and seek their instructions.

Best interests representatives should consult children when appropriate to do so, particularly where the child will be required to meet with a third party, such as a counsellor, therapist or expert.

In some cases, it will be necessary to seek the involvement of other professionals or service providers, such as doctors, counsellors, therapists or experts.

In a direct representation situation, children should be consulted about any proposal to involve a third party and be provided specific advice about the relative merits of engaging the third party. In most cases, third parties should become involved only where the child consents. There may be some cases where the court orders the involvement of a third party, even where the child does not consent, for example when appointing an expert. Where a child does not consent to the involvement of a third party, the direct representative should ensure that the child's views are known to the court. In all cases, the practitioner should explain the need for the third party and the role that third party will play, including the information the third party will provide and what service they will perform. Where the third party must be provided with confidential information to enable performance of their services, the practitioner can only provide this information with the child's authority or an order from the court.

In all cases, child representatives should ensure that any third party is properly briefed to avoid having the child provide sensitive information again, unless this is necessary. Practitioners should also ensure that any assessments of children are necessary and appropriate, taking into account the information already available to the court, the issues in dispute and the child's views about participating in further assessments.

The involvement of support persons is discussed in Principle D4.

> ***"The best thing about my lawyer is that she had a social worker to help her and me."***
> - female, 14 years
>
> ***"Sometimes I didn't have a call – the lawyer and the judge had decided between them who I should see."*** - male, 19 years

Criminal law proceedings

In criminal proceedings it may be desirable to obtain expert reports at varying points in the proceedings. In addition to seeking the child client's consent, it will be necessary to brief the report writer on areas to cover and areas not to cover. It will also be necessary to advise the child client on these same issues. For example, a medical expert preparing a report prior to plea may need to be instructed not to discuss the circumstances surrounding the allegation with the child client. Similarly, the child client should be advised not to discuss the alleged offending.

If a report is ordered by the court before a plea has been entered, the practitioner should raise these same issues with the court and request that any such report does not address the circumstances surrounding the allegation.

J. ENDING THE RELATIONSHIP

PRINCIPLE J1 – Practitioners should prepare children for the end of the relationship

The practitioner should prepare the child for the end of the relationship before the end of the case. The practitioner and child should discuss the fact that the practitioner's role will soon be over, and determine what contact, if any, they might have after that.

As a professional, the practitioner should follow a child-focused practice for ending any practitioner-client relationship, including debriefing with the child client, explaining any orders or outcomes, and advising about the potential for appeals or further applications. This should ideally be done both orally and in writing.

As a child's representative, the practitioner must also consider the personal relationship with the child. In some cases, the child may regard their lawyer as the last champion while others may have had a problematic or difficult relationship with them. Practitioners must exercise caution and a great degree of sensitivity when ending their professional relationship with the child.

Practitioners should inform the child that the practitioner can be contacted if the child has any questions arising from the case. However, it is important to remember that for best interests representatives, the role will end when the case has finished. Best interests representatives may consider it appropriate to speak with children about who can support them (for example, school teachers or counsellors).

Practitioners may consider appropriate referrals to other non-legal services or provide information to the child about available services, including youth services, clubs, health facilities, counselling services and telephone help lines. Much of this will depend on the child's age and needs, and the practitioner should ensure that all referrals and explanations are age appropriate.

While a practitioner should endeavour to ensure continuity of representation, this may not always be possible. Where it is necessary that another practitioner represent the child for a period of time or for the remainder of a matter, the reasons for the change in representation should be explained and, wherever possible, the child should be introduced to the new practitioner. A direct representative should consult with the child client prior to referral of the matter to another practitioner.

"After court my lawyer comes to see me and explains." - male, 16 years

"I think that your lawyer should stay in contact, especially if you are homeless and you don't know other people who can help you, or if you have more court dates." - male, 16 years

"They should check in on you or if you are in lock up." - male, 17 years

"I don't want any contact – there are enough other people in my life." - male, 18 years

PRINCIPLE J2 – A child has the right to complain about their legal representative

Whether they have a direct representative or a best interests representative, a child has the right to complain about their lawyer and where a complaint has been raised, steps may be taken to resolve the issues.

As a best interests representative is not the legal representative for the child and does not act upon the child's instructions, the child cannot dismiss the best interests representative even if unhappy with the performance or the recommendations made by their representative.

If a best interests representative becomes aware of the child's dissatisfaction, they should try to resolve these issues. If the issues cannot be resolved, the representative should consider whether to bring this difficulty to the attention of the Court, or the Legal Aid Commission, particularly if the child's dissatisfaction with them impacts on the representative's ability to undertake their role (for example, meeting with the child and obtaining their views about the issues in dispute).

Similarly, if a child expresses dissatisfaction with their direct representative and the issues cannot be resolved, the child should be provided with information about how to make a complaint, or advised that they can dismiss their lawyer.

PRINCIPLE J3 – A child client has the right to dismiss their direct representative

A child client has the right to dismiss their direct representative, regardless of how or by whom the direct representative was appointed. This right should be explained to the child at the commencement of the representative's appointment.

Just as an adult client has the right to dismiss their legal representative, a child client is entitled to express dissatisfaction with the services provided by their direct representative and/or dismiss their direct representative. If the child dismisses the representative, the representative should advise the court that they no longer appear as the child's representative in the proceedings and comply with any rules regarding the filing of a notice of ceasing to act including contact details for the child and/or their new representative.

K. REPRESENTING INDIGENOUS CHILDREN

Indigenous children and their families come into contact with the OOHC and criminal justice system far more frequently than other children. The reasons for this are varied and include (but are not limited to):

- the ongoing effect of colonisation,
- cultural dispossession,
- the forced removal of children,
- harmful assimilation policies,
- discriminatory policing and government intervention, and
- intergenerational trauma and disadvantage.

Due to this, children who become involved in the child protection system are more likely to engage in offending behaviour or come under the supervision of youth justice services.[27] Often described as a "care-to-custody pipeline", this over-representation peaks in youth detention centres, where more than half of the children detained are known to child protection services,[28] and more than half of the children detained are Aboriginal or Torres Strait Islander children.[29] It is important for practitioners to understand this "nexus between care and crime"[30] when working with children in OOHC, and in particular how this impacts Indigenous children.

Increased awareness of the vulnerability of child-protection involved youth to criminal justice system contact has contributed to the development of protocols such as the *Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system*[31] and the Children's Court of NSW Bail Guidelines.[32]

In March 2025, NSW Bureau of Crime Statistics and Research (**BOCSAR**) reported that Aboriginal young people make up 60.7% of the youth detention population in NSW.[33] The overrepresentation of Indigenous youth in the criminal justice system extends across Australia. Of the 722 young people aged 10–17 in detention in the June quarter of 2024, about 2 in 3 (65%, or 471) were First Nations young people. This is despite First Nations young people only being 6.6% of the total Australian population aged 10–17.[34] In 2022-23, Aboriginal and Torres Strait Islander children were 5.6 times more likely than non-Indigenous children to be subject to a child protection notification and 10.8 times more likely than non-Indigenous children to be in out-of-home care or subject to a third-party parental responsibility order.[35]

The over representation of Indigenous children in both care and crime proceedings means that it is very likely practitioners will work with Indigenous children. It is important that practitioners working with Indigenous children understand their obligations and undertake their role in a trauma informed and culturally safe way.[36] To this end, practitioners will find the Law Society's *Working with Aboriginal and Torres Strait Islander Clients: Resources for solicitors in NSW* a critical resource.[37]

In this chapter we use the word "family" in the broadest sense, and intend "family" to include relatives, kin, carers and other people important to the child.

27 See: Australian Institute of Health and Welfare, *Young people under youth justice supervision and their interaction with the child protection system* (2022-2023).

28 Australian Institute of Criminology, Susan Baidawi and Rosemary Sheehan, *'Crossover kids': Offending by child protection-involved youth* (2019), 2.

29 NSW BOCSAR, *NSW Custody Statistics Quarterly update March 2025* (21 May 2025).

30 Peter Johnstone, *Cross-over kids: the drift of children from the child protection system into the criminal justice system* (2016).

31 NSW Government, Version 2 (July 2019), available at: <https://dcj.nsw.gov.au/documents/children-and-families/NSW-Joint-Protocol-2019.pdf>.

32 The Children's Court of New South Wales, "Bail Guidelines", available at: <https://childrenscourt.nsw.gov.au/documents/guidelines/Childrens_Court_Bail_Guidelines.pdf>.

33 NSW BOCSAR, *NSW Custody Statistics Quarterly update March 2025* (21 May 2025).

34 Australian Institute of Health and Welfare, *Youth detention population in Australia in 2024* (13 December 2024).

35 SNAICC – National Voice for our Children, *Family Matters Report* (2024), 16.

36 See also: Stephen Ralph (2022) 'Child Protection and Indigenous Children', prepared for Legal Aid NSW in 2022.

37 The Law Society of NSW, Indigenous Issues Committee, *Working with Aboriginal and Torres Strait Islander Clients: Resources for solicitors in NSW* (2021).

PRINCIPLE K1 – Practitioners should be aware of the relevant legislative requirements specific to Indigenous children.

When representing Indigenous children in public or private family law matters, practitioners should be aware of the relevant legislative requirements that have been put in place to guide decision makers and safeguard the interests of Indigenous children.

In proceedings under the *Care Act*, the *Adoption Act* and the *Family Law Act*, specific legal principles apply to Indigenous children. These principles are intended to guide decision makers in relation to the placement of Indigenous children and safeguard the interests of Indigenous children in terms of connection to family, culture and community. The principles are also aimed at ensuring that community is involved in and consulted about decisions regarding their children. It is important that practitioners representing children are familiar with the applicable principles and ensure that they are properly applied in every matter.

Importantly, practitioners should be aware that Indigenous children have a right to be raised in their own culture, learn and use the languages of their communities, and take part in cultural activities: see Article 30 of UNCROC.

United Nations Convention on the Rights of the Child

Article 30: In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Many aspects of UNCROC have been implemented into Australian domestic law. For example, Part 1 and 2 of Chapter 2 of the *Care Act* sets out the *Principle of making "active efforts",* the *Permanent Placement Principles* and the *Aboriginal and Torres Strait Islander Child and Young Person Placement Principles*. Those principles aim to ensure that efforts are made to prevent Indigenous children from being removed from their families, that Indigenous people participate in decision making about their children with as much self-determination as possible and that Indigenous children are brought up within their own family, community and culture.

Some similar principles can be found in Divisions 1, 2 and 3 of Part 2 of the *Adoption Act*. Other important provisions pertaining to Indigenous children can be found throughout both the *Care* and *Adoption Acts*, including provisions in relation to cultural planning.[38]

The Aboriginal and Torres Strait Islander Children and Young Persons Principle consists of the following five elements:

a) **prevention**—recognising that a child or young person has a right to be brought up within the child's or young person's own family, community and culture,

b) **partnership**—recognising that Aboriginal and Torres Strait Islander community representatives should participate in the design and delivery of services for children and young persons and in individual decisions about children and young persons,

c) **placement**—recognising that, if a child is to be placed in out-of-home care, the child's placement is to be in accordance with the placement principles for Aboriginal and Torres Strait Islander children and young persons,

d) **participation**—recognising that a child or young person, and the child's or young person's parents and family members, should participate in decisions about the care and protection of the child or young person,

e) **connection**—recognising that a child or young person has a right to be supported to maintain connections to family, community, culture and country.

38 See: *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 78(2A) and 83A(3); *Adoption Act 2000* (NSW), s 46.

When representing Indigenous children in criminal law matters, practitioners should be aware of the relevant legislative requirements specific to Indigenous children.

In proceedings under the *Bail Act 2013* (NSW), the *Children (Criminal Proceedings) Act 1987* (NSW), the *Young Offenders Act 1997* (NSW) and the *Children (Detention Centres) Act 1987* (NSW), specific legal principles apply to Indigenous children. These principles are intended to safeguard the interests of Indigenous children in terms of connection to family, culture and community, account for their specific cultural needs and in some cases, address the over-representation of Indigenous children in the criminal justice system. It is important that practitioners representing children are familiar with the applicable provisions and ensure that they are properly applied in every matter.

For example, practitioners should be aware that Aboriginality is a mandatory consideration for courts considering whether a child presents an unacceptable risk if granted bail,[39] and that addressing the over-representation of Indigenous children in the criminal justice system through the use of diversionary processes, such as youth justice conferences, cautions and warnings, is an explicit principle underlying the *Young Offenders Act.*[40]

39 *Bail Act 2013* (NSW), s 18(1)(k).

40 *Young Offenders Act 1997* (NSW), s 7(h).

PRINCIPLE K2 – Practitioners should support Indigenous children and their families through the court process.

Practitioners should be aware of the barriers to Indigenous children and their families participating in the court process and consider ways in which they can be best supported through the process.

Practitioners should be aware of some of the life experiences common to Indigenous children and their families that may impact on their ability to engage with the court process, including mistrust of government and the justice system and intergenerational trauma.

Practitioners representing Indigenous children should consider what, if any, specialist Indigenous lists are available in their jurisdiction. If there is a Specialist Indigenous List, it may be more appropriate for the matter to be dealt with in that list. Specialist Indigenous Lists operating in NSW include:

- The Youth Koori Court for criminal proceedings in some Children's Courts.
- The Winha-nga-nha List for care and protection matters in Dubbo.
- The Indigenous List in some registries of the FCFCOA.

In addition, many registries of the FCFCOA have an Indigenous Family Liaison Officer who can provide support for parents and carers involved in the court process.

Practitioners should also consider whether the child or their family would benefit from the support of an Aboriginal Community Controlled Organisation or culturally appropriate service to support them to participate in the court process, or to provide therapeutic, parenting or other support. In criminal proceedings, express instructions should be taken from the child regarding what Aboriginal Community Controlled Organisation or culturally appropriate services the child could be referred to.

Practitioners should be familiar with the relationship between public and private family law and make recommendations to the parties about the ways in which disputes about children could be best resolved.

PRINCIPLE K3 – Practitioners should ensure that Indigenous children maintain their connection to family, culture and Country

In care proceedings, practitioners should take an active role in ensuring cultural plans for Indigenous children are meaningful, effective and appropriate.

Wherever possible, Indigenous children should grow up within their family, or in a culturally appropriate placement. Where this has not occurred, the child's care arrangements need to be supportive of the child's cultural connection. To this end, cultural planning is very important.

The *Care Act* and the *Adoption Act* require the preparation of a cultural plan for an Indigenous child in certain circumstances.[41] In care proceedings, the Children's Court must be satisfied that permanency planning for the child has been appropriately and adequately addressed before it can make a final care order.[42] Where the court is concerned about the adequacy of the cultural plan, it may reject the permanency plan.[43]

Cultural plans should be developed in consultation with the child, their family and relevant Indigenous organisations. Practitioners representing Indigenous children should, wherever possible, strive to ensure that cultural care planning enables Indigenous children to enjoy, learn about and participate in their culture, and maintain a meaningful connection with their family, community and Country. This may involve, for example:

- Ensuring cultural plans have been carefully and thoughtfully prepared in consultation with the child, relevant people and organisations.
- Ensuring that there are plans in place for the child to spend time with their family and kin, particularly siblings who are not placed together.
- Ensuring that there are plans in place for the child to learn about and be immersed in their culture, including living on or travelling to Country.
- Ensuring that there are plans in place to support the child to attend Sorry Business with their family and community.

It is important that Indigenous children are encouraged to engage with their culture and community in a way that is positive and supported, and specific to the child.

Cultural plans should be developed in accordance with the child's wishes and views, and also recognise that a child's views may change over time. If possible, there should be provision for a cultural plan to be reviewed as the child gets older.

In criminal proceedings, practitioners should take an active role in advocating for bail conditions and other court orders that are appropriate to Indigenous children and allow them, as far as possible, to remain connected to their family, Country and community.

Practitioners should be aware of the impact of bail conditions and court orders on Indigenous children and their connection to family, Country and community. This includes making appropriate submissions regarding the richness of many Indigenous family and kinship structures and emphasise how connection to family and culture can be protective for children involved in the criminal justice system.

For example, this may include seeking bail conditions that do not require the child to live at a single residence or address, in circumstances where the child is supported by a large family or kinship network across different addresses. It may also involve resisting blanket bail conditions prohibiting the child from entering an area that may be of familial or cultural significance.

Thought should be given to conditions that both mitigate any risk posed by the child and allows the child to maintain their connection to culture and community. Where a court seeks to impose a condition that may jeopardise this connection, submissions should be made, where appropriate, to alert the court to the impact this may have on the child and their family.[44] Reliance may be placed on relevant sections of the *Equality Before the Law Bench Book*.[45]

41 *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 78(2A) and 83A(3); *Adoption Act 2000* (NSW), s 46.

42 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 83(7)(a).

43 See for example *DFaCS re Boyd* [2013] NSWChC 9 [35]. See also: Peter Johnstone, *Children's Court: driving a paradigm shift* (2016), paper presented at Legal Aid NSW Care and Protection Conference 2016.

44 See, for example, submissions that a residence condition for an Indigenous child may be so onerous as to be non-compliant with section 20A of the *Bail Act 2013* (NSW).

45 See: Judicial Commission of NSW, *Equality before the Law Bench Book* 'First Nations people', available at <https://www.judcom.nsw.gov.au/publications/benchbks/equality/section02.html>.

PRINCIPLE K4 – Practitioners should ensure relevant evidence about the child's identity, culture and community is before the court

The identification and de-identification of Indigenous children

The *Care Act* and the *Adoption Act* place obligations on the Secretary of the NSW Department of Communities and Justice to make reasonable enquiries as to whether or not a child is Indigenous. In *care* matters, the obligation arises when a report is received by DCJ in relation to a child, and there is reason to believe that the child might be Indigenous. In *adoption* matters, there is an obligation to make reasonable enquiries *prior* to the placement of a child for adoption.

The *Care Act* and the *Adoption Act* contain similar definitions of "Aboriginal" and "Torres Strait Islander".[46] Where it is accepted that a child meets the statutory definition, certain safeguarding provisions will apply.

Where there is a question about a child's Indigenous status, practitioners should ensure that appropriate steps are being taken to investigate the child's background, and where appropriate, this involves proper consultation with the child's family and community.

Practitioners should be aware that investigations of family history can be difficult given how historical policies and practices in Australia have, in some circumstances, affected the ongoing connection that some Indigenous people have with their culture, Country and kin, and their ability to demonstrate that connection.

In some cases, a decision maker may be asked to make a decision that a child is not Indigenous, within the meaning of the legislation.[47] A decision that a child is not Indigenous may have far reaching consequences for the child and their family and should not be taken lightly.

Evidence about background, culture and community

In public and private family law matters involving Indigenous children, it is important to ensure that all relevant evidence about a child's background, culture and community is placed before the court. This is particularly important where children are not placed with family or kin and/or not going to live on Country. In most cases, this evidence will be put forward by DCJ, or by the child's parents.

Where this does not happen, practitioners representing children should consider whether it is appropriate to take steps to place evidence before the court. This may involve issuing subpoenas and/or adducing evidence from cultural experts. This type of evidence will, amongst other things, inform the child's cultural plan. It is important that practitioners representing Indigenous children ensure that there is information about a child's identity and culture, and that meaningful cultural planning has occurred, even in cases where one or both of the child's parents are not engaging in the proceeding, or where the parties otherwise agree to the making of final orders.

Criminal law proceedings

Practitioners should ensure relevant information is placed before the court regarding the child's background, culture and community, particularly where this may be relevant to interpreting a child's actions in the context of contested proceedings (such as the diverse reasons an Indigenous child may run from police) or moral culpability in sentencing proceedings. Practitioners should also consider how cultural strength and connection can inform a court's assessment of the child's prospects of rehabilitation.[48]

Experts should be culturally competent

Practitioners considering appointing an expert in a matter involving an Indigenous child should ensure the expert has the appropriate level of cultural knowledge and competency.

Practitioners should also consider whether additional evidence should be presented where an Indigenous child is subject to a mandatory assessment (such as a Youth Justice Background Report) where there may be a concern about an adverse misunderstanding or conclusion being reached about an Indigenous child arising from cultural difference.

46 In *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 the NSW Court of Appeal considered the definition of "Aboriginal child" in the *Adoption Act* and found that it was unnecessary to identify that the child had an ancestor that met the three limb test, and sufficient to show that the child was descended from people who lives in Australia before colonization.

47 See, for example, *The Adoption of John (a pseudonym) and William (a pseudonym)* [2025] NSWSC 109 and *Secretary, Department of Communities and Justice and Levi and Riley (No 2)* [2025] NSWChC 5.

48 See: Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (2021), available at <https://bugmybarbook.org.au/publications/significance-of-culture-to-wellbeing-healing-and-rehabilitation/>.

PRINCIPLE K5 – Practitioners should ensure that meetings with Indigenous children are as culturally safe and appropriate as possible

Practitioners should ensure that meetings and communication with Indigenous children are conducted in a culturally safe and appropriate manner. What is culturally safe and appropriate will differ from matter to matter, child to child. In some matters, this may involve meeting on Country. In other matters, a child might feel safest with a support person from their community or an Indigenous Elder present (see Principle D4).

In all instances, the child should be asked where they feel most safe to meet and speak with the practitioner and what steps can be taken to mitigate concerns the child may have. Mitigation of harm is particularly critical where a child is in a location that may cause them cultural harm or distress, such as a police station or detention centre.

L. RESOURCES

Resources for practitioners representing children:

- *Family Law: Working with Children - A Good Practice Guide* (2017), by Anne Graham, Judy Cashmore, Julia Truscott, Felicity Bell, Donnah Anderson, Kylie Beckhouse and Mary Alex.
- *Care and Protection: Working with Children – A guide to best practice for Children's Legal Representatives* (2020), by Nicola Callander, Judy Cashmore, Sue Foley and Daniel Kennard, available at https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/family-law-resources-and-tools/family-law-resources-care-and-protection.
- *Guidelines for Independent Children's Lawyers* (2024), endorsed by the Chief Justice (Division 1) and Chief Judge (Division 2) of the Federal Circuit and Family Court of Australia and the Chief Judge of the Family Court of Western Australia, available at https://www.fcfcoa.gov.au/fl/pubs/icl-guidelines.
- Kids' Corner website, by the Federal Circuit and Family Court of Australia, available at https://www.fcfcoa.gov.au/kids
- Independent Children's Lawyers website, available at: https://icl.gov.au/
- Law Society of NSW, *When a client's mental capacity is in doubt: a practical guide for solicitors* (2016), available at: https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf
- Law Society of NSW, *Working with Aboriginal and Torres Strait Islander clients: resources for solicitors in NSW* (2021), available at: https://www.lawsociety.com.au/sites/default/files/2021-09/Working%20with%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf
- Legal Aid NSW *Best for Kids* website: https://www.bestforkids.org.au/index.html
- Legal Aid NSW *Adoption info for kids: what is a separate representative?* available at: *https://www.legalaid.nsw.gov.au/ways-to-get-help/publications-and-resources/adoption-info-for-kids-what-is-a-separate-representative*
- Legal Aid NSW *Adoption info for young people: working with a lawyer*, available at: *https://www.legalaid.nsw.gov.au/ways-to-get-help/publications-and-resources/adoption-info-for-young-people-working-with-a-lawyer*
- The Shopfront Youth Legal Centre, *Legal information for young people and youth workers*, available at: https://www.theshopfront.org/legal-information-for-youth-workers
- Criminal CPD *Children's Court*, available at: https://criminalcpd.net.au/childrens-court/

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