

National Judicial College of Australia
5 November 2005

**IS IT BOTH APPROPRIATE AND VIABLE TO HAVE A BENEFICIAL
REPRESENTATIVE ROLE FOR CHILDREN IN CRIMINAL
PROCEEDINGS AND IF SO WHAT MODEL SHOULD BE ADOPTED?**

ARTICLE BY
ROBERT JAMES McLACHLAN
ELLIS McLACHLAN
SOLICITORS
NORTH SYDNEY

**IS IT BOTH APPROPRIATE AND VIABLE TO HAVE A BENEFICIAL
REPRESENTATIVE ROLE FOR CHILDREN IN CRIMINAL
PROCEEDINGS AND IF SO WHAT MODEL SHOULD BE ADOPTED?**

1. The purpose of this paper is to explore both the applicability and appropriateness of introducing a more beneficial role for the representation of children in criminal proceedings. The views expressed are those of the writer. There appears to be no detailed studies on this topic. The writer's views therefore are subject to the limitations of that, his own experience which must play a significant role in some of the opinions expressed and with the help of text and articles which are referred to in the course of this article.
2. The approach the writer has taken in considering the issue at hand is to consider the practice in other jurisdictions of the beneficial model both in representing children and to a more limited extent through the procedure of a Guardian ad Litem. He has then considered its applicability to criminal proceedings.
 - A. Models for Legal Representation of Children
3. The representation of children in proceedings is effected by three means:-
 - (a) Direct Representation This is where the child directly instructs and the Lawyer acts on instructions.

- (b) The Best Interest Principle This is where the child provides information and instructions and the legal representative considers those as part of the context in formulating an approach that appears to be in the best interests of that child.
 - (c) The Appointment of a Guardian ad Litem Under the model the Guardian effectively assumes the child's rights although is obliged to consult and consider the child's views. The Guardian directly instructs the legal representative largely taking into account the best interests of the child.
4. Whilst it appears that the common law reflected that children had a right to appear and to be heard in Courts the practice adopted invariably through all civil jurisdictions in which a child might appear, was to treat the child as a disabled person. This required participation in the proceedings either as a plaintiff or defendant to be conducted through the appointment of either a Next Friend or Guardian ad Litem¹.
 5. Largely, but not exclusively, the representation of children in the civil sphere has occurred through a Guardian ad Litem. Each of the civil courts operating in New South Wales have rules and practices in respect of the appointment of a Guardian ad Litem and compel their use where a child is a plaintiff or defendant. The exceptions to this practice, in the civil area have been in proceedings under the Family Law Act, care proceedings in the Children's Court (both of which will be looked at shortly) and limited in proceedings in the Supreme Court and Administrative Decisions Tribunal of New South Wales². This paper, adopting the limitations of its author and his own experiences, will not seek to explore the wider basis of representation of children in the civil law. In considering the hypotheses that representation other than direct representation for children in criminal law might be appropriate, the writer has looked to the models utilised under the Family Law Act and under the Children and Young Persons (Care and Protection) Act 1998. Each provide for the appointment of a Guardian ad Litem and in that context its use will be considered.
 6. Before turning to a consideration of these two jurisdictions and the models adopted by them in the representation of children it is perhaps fair to acknowledge the continuing tensions between the two "schools of thought" as to how children should be generally represented in welfare matters. Whilst that tension has existed for a number of decades, the agitation of views in respect of what is appropriate has grown since the adoption by the United Nations in November 1989 of the United Nations Convention on the Rights of

the Child (hereinafter referred to as the “convention”). This convention was ratified by Australia in December 1990.

7. Those who agitate for the direct representation point to the provisions of article 12 in the convention as requiring that model to be adopted. That article states:

“State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.”

Those who advocate for the best interest model rely upon Article three. Article 3(1) provides:-

“The best interests of the children are the primary consideration in all actions concerning them.”

8. Whilst the writer does not wish to inflame what can be at times, an heated area of disagreement, he would suggest that the two are not necessarily incompatible. It is suggested they perhaps reflect the hybrid model which is used in care proceedings in New South Wales. It is submitted that a proper reading of the two articles in combination reflect a balance between ensuring the views and wishes of the child are heard but the child’s best interests are served³.

B. The Family Law Act “Best Interests Model for Representation of Children”

9. Section 65E of the Family Law Act directs the court to regard the child’s best interests as “the paramount consideration”. Section 68F(2)(a) identifies a number of factors to be considered which include the views and wishes of the child. Child representatives are appointed by the court under Section 68L. Their role is mandated to represent and promote the best interests of the child. Whilst there is provision for the appointment of a Next Friend the writer is unaware of that practice currently being adopted. Indeed, whilst children are rarely parties to family law matters, where they are parties there appears to be

no requirement that they must institute proceedings by a Next Friend where the party was a 14 year old and the court determined there was no need for a next friend).

10. Unlike in care proceedings in New South Wales the representation of children in family law proceedings is not universal. The areas (which are fairly extensive) where a Court might appoint such a representative, however have been considered and applied by the Court on a number of occasions⁴. An interplay of the various sections and authorities referred to direct the use of the best interest model in the representation of children under the Family Law Act. That appears to apply even if those children may be in their mid-teens when their competence to express and consider their views on the matters being litigated would be thought to be both clear⁵.
11. It is the writer's understanding of the practice of those that represent children under the Family Law Act, that greater weight is attributed to views and wishes, the older and more mature the child may be. However, that does not derogate from the ultimate representation being an evaluation of the best interests for that child by the representative appointed.
12. The best interests model provided for under family law proceedings, however specifically requires the views and wishes of the child or children to be placed before the Court even where the representative takes a contrary view in representing the best interests of the child.

C. The Hybrid Model Under the Children and Young Persons (Care and Protection Act) 1998 as Amended

13. Section 98 of this Act provides for a right of appearance of the child or young person the subject of the proceedings. The basis of legal representation is divided into two categories. Section 99 deals with the appointment of those representatives. Section 99(3) provides that:-

“There is a rebuttable presumption that a child who is not less than 10 years of age, and a young person, is capable of giving proper instructions to his or legal representative. This presumption is not only rebutted because a child or young person has a disability”.

14. For those children who are less than 10 years of age or are otherwise found by the Court of not being able to give proper instructions then the appointment is as a separate representative. While there remains an obligation to present the

child's views and wishes, the ultimate role is the best interest model (see Section 99(6)).

15. The creation of an arbitrary chronological point at which the legal representative becomes a direct representative as distinct from a separate representative appears to give effect to the dichotomy referred to earlier under articles 3 and 12 of the United Nations Convention for the Rights of Children.
16. This divided system of representation has only been in effect for the last 4½ years. The writer's experience, reflected by most of those other practitioners who appear for children on a regular basis, is that the arbitrary use of the age 10 does not necessarily reflect the capacity of a child to understand and thoughtfully instruct on the complex issues that may be involved in such proceedings. Indeed the experience is that children even into their early teens can often have a strong disinterest of taking a role directly in the proceedings and giving clear instructions. That disinterest could be because of lack of maturity, lack of comprehension, a fear of the system, a fear of others, a fear of the Lawyer or a combination of all.
17. There is also a flavour in a number of cases where direct instructions occurs that largely the children are being used as a conduit for one or both of the parents to direct the course they should take and accordingly the instructions that the lawyer should act on. This, of course does not mean that the child may not genuinely wish to return to one of the parents, but the degree of influence and the effect upon the child's expression of will is questionable.
18. The role of direct representation is further made more difficult because of the range of issues that are normally traversed are both wide, complex and can often be very harrowing in their detail. They can talk about very personal conduct of the parents and they can involve abuse both physical and sexual of the child or siblings of the child. Without derogating from one's responsibility, there is always at the back of one's mind the need not to be part of an abuse of a child by the process of obtaining instructions.
19. The simple facts are that for any child their development and cognitive understanding and maturity can vary as a combination of both biological and environmental circumstances. Practitioners have seen 10 year olds who are quite clear and direct in what they have to say and appear to have a comprehension and understanding of the general issues and the implications for them. Practitioners have seen up to 14 year olds who either exhibited disinterest in the proceedings or a lack of understanding of the effect of what they may wish to do⁶.

20. Clearly the only way of appropriately identifying the basis upon which a child can properly understand and reflect upon the instructions they wish to give is for each child to be assessed on those issues. That would be both invasive and not necessarily productive due to the other influences that effect the conduct of the proceedings, some of which have been referred to.
21. Those practitioners acting for a child of 10 and over the ambit of those instructions may be very broad indeed. It can be based not on a consideration of the minutia of the varied detailed issues that impact upon where a child may wish to be placed but simply “I wish to go home.” Care proceedings of their very nature canvass a variety of issues dealing with the physical, emotional and psychological care of children. They can raise diverse issues over many years about acts of violence, sexual abuse, drug usage, neglect and general abuse. Many children understandably do not wish to respond to enquiries on those matters. Some wish to block them out. Some wish to disregard them and some find them confronting. There is a strong question mark that in purporting to obtain their direct instructions in those circumstances on such a complex and myriad set of issues and abuse is being perpetrated upon the child by the legal representative. Except where the issue in contention is limited to one or two specific events, it would be fair to say that the conduct of the proceedings are generally effected by the legal representative acting on the broad approach that the child wishes to go back to one or both of the parents or does not.
22. In that context the role of a separate representative in the complexities of care proceedings requires a greater evaluation based on experience and training of the legal representative to evaluate what is the best interests. That assistance is usually garnered from the following sources:-
 - (a) A consideration and discussion of the child’s views and wishes, of the general issues raised and most importantly about where the child wishes to be placed.
 - (b) Consideration of any expert evidence touching upon the weight to be given to those wishes.
 - (c) Consideration of any expert or related evidence touching upon the impact on the child physically, emotionally and psychologically of giving effect to those wishes such as placing them back with one parent or the other.

- (d) The viability of the alternate being suggested.
 - (e) An evaluation of risks and benefits in respect of the alternate placements.
23. Largely therefore the practice of a separate representative is to evaluate risk and benefit. Determinations of black and white issues as to whether the child has been sexually abused or physically abused do not count large in that. There may be a significant issue but does not require a determination of whether it is made out or not. The fact that there is an allegation, the credibility of that allegation and the weight to be attributed to it may have a significant impact upon the evaluation but is not determinative of it. It would be fair to say that in such proceedings the considerations are more grey than black and white in determining issues. It is the broader effect of consideration of each of the discrete issues that impacts upon the role that the separate representative takes.

D. Guardian ad Litem

24. As indicated above, and with the limited exceptions noted, the usual practice for a child or young person under the age of 18 years to participate in litigation is by the appointment of a Guardian ad Litem. Reference has been made to the power to appoint a Next Friend under the Family Law Act and the approach adopted in Pagliarella. Under the Care Act specific power is given to the court to appoint a Guardian ad Litem and/or amicus curae pursuant to the provisions of Section 101. The principle of amicus curae is broadly known as assisting the Court without reflecting necessarily the instructions of the child and is perhaps more akin in care proceedings to that of a separate representative. In that circumstance, one would wonder why such an appointment would occur for a child over the age of 10 given the capacity of the court to appoint a separate representative if there is an incapacity to instruct.
25. The issue of an appointment of a Guardian ad Litem is regularly considered in care proceedings. The writer's understanding of when they have been appointed is where the child is suffering a significant disability, which impacts upon the capacity to properly instruct. Under the existing legislation and its predecessors the Supreme Court has taken a very stringent view that the appointment of a Guardian ad Litem should only occur in the most exceptional circumstances and where there is a high degree of satisfaction that the child cannot otherwise instruct properly^{7 & 8}.

26. As a consequence, a large group of children are excluded from consideration. While, because of the unfortunate prevalence of children suffering a mental illness or a developmental disability been the subject of care proceedings, the vast majority are represented through the process of a legal or separate representative previously discussed. On those occasions that a Guardian has been appointed, such Guardian has usually had experience in social sciences and dealing with children. They invariably speak to the children to obtain their views and wishes, however, it is the writer's evaluation that subject to legal advice, they adopt a similar practice in evaluating the course to be taken on behalf of that child as does a separate representative in the way previously canvassed. This group of children would be the group under care proceedings who would be separately represented in a beneficial way because of their properly perceived developmental and cognitive maturity in properly understanding and instructing on issues.

E. Representation of Children in Criminal Proceedings

27. The perspective of this paper must necessarily be a New South Wales one being the basis of the writer's experience and knowledge. Ultimately, without the specific reference to particular provisions of governing New South Wales legislation, the writer believes that the general principles that he refers to and the conclusions he has reached would generally be applicable to other jurisdictions exercising criminal law for children.

28. Unlike family law proceedings, children under 10 cannot be the subject of the criminal jurisdiction. Since May 2000, all Australian jurisdictions, including the federal jurisdiction have the age of criminal responsibility at 10. This is consistent with most other common law countries. The presumption is irrebuttable⁹.

29. The writer has already commented upon the anecdotal experience of those who appear in care proceedings in New South Wales under the current legislation and their perception that the arbitrary use of the age of 10 does not necessarily delineate in the specific case at hand the fact that the child has the capacity in a real sense to properly instruct. Whilst not legislatively confirmed, the common law principle of Doli Incapax has not been excluded and is still applicable and must be considered by the Court¹⁰. That principle establishes a legal presumption that a child or young person under the age of 14 years does not know that his or her criminal conduct is wrong. This presumption of course is rebuttable if the prosecution can prove that the child or young person did have the necessary mental element.

30. This principle represents in criminal proceedings a safeguard that can be utilised by an appointed legal representative to argue for the dismissal of charges where the issue can be properly raised based on the age and other features of the child. In a sense the legal representative, based on matters obtained in an interview, perhaps information received from family and material contained in the prosecution's evidence, is evaluating a capacity of the child to form the requisite intent. In that sense they are not being instructed but evaluating in a beneficial way, in the interests of their client whether a "defence" exists. Whilst the writer's practice has always been to explain to the child the point to be taken and to confirm that the child is happy for that process to be followed, there is a large component of beneficial evaluation and determination in pursuing that course.
31. Should a child or young person who is before the court present as suffering a significant intellectual disability or mental illness then the advocate can consider whether he or she should obtain appropriate evidence to bring an application under either Section 32 or Section 33 of the Mental Health (Criminal Procedure) Act. The court has various discretions under both sections as to disposition of the proceedings if it is satisfied that the criteria is met.
32. Again in the process of bringing such an application the legal representative for the child is undertaking a partial beneficial approach. That would be tempered by the need to obtain corroborative evidence from a professional witness to evaluate the child's responses in interview, to consider the prosecution case and evidence that may be corroborative, although the test is at the time the matter is before the Court not when the offence occurred. In that position the writer would always speak to the child and explain the process to be followed but ultimately the decision to proceed is an evaluation on benefit by a determination of the practitioner on those criteria that the child may satisfy either of the sections referred to. The writer is unaware of a situation where a child has declined or opposed a legal representative making such an application. The dilemma created by that would be difficult to resolve given the basis of representation. It is one thing to evaluate, advise and counsel of the need to act beneficially, it is another thing to go against direct instructions to pursue that course.
33. In respect of such applications the saving grace would be that the Court itself can determine whether the matter should be disposed of under those provisions if there is evidence to satisfy it. Given the primary duty of an advocate to assist the court, the writer would see no conflict in information or evidence being placed before the court touching upon those matters so that the

court may or may not determine that process. Again, I can see that others may not be totally comfortable with that approach. There is a degree of beneficial interpretation taking place but in a limited and specific way balancing the rights and instructions of the child against the need to assist the court flowing from the duty of the legal representative to the court.

34. It is suggested that by a process of elimination that the preceding paragraphs under this topic would leave few children who do not have a capacity, ability and willingness to instruct on the particular charge or charges that are before the Court. On those rare occasions where a child, notwithstanding the absence of any disability of the kind that could use those procedures to deal with the matter, the legal representative is not prevented or prohibited from acting. It would be proper to tell the court that the young person or child declines to instruct on the issue. In that circumstance, the court must enter a plea of not guilty. The representative would be duty bound to examine the prosecution case and test it to see if a finding of guilt can be made out. The limitations to that representation would prevent the advocate running an affirmative defence because of the absence of instructions to base it upon¹¹.
 35. To the extent that there is a need to follow the course outlined in the preceding paragraph. It is no different than the circumstances that may confront a legal representative in acting for an adult client. The failure to instruct limits but does not preclude that representation.
- F. Should an Alternate Model Other Than Direct Representation be Available in Criminal Proceedings
36. Under the previous topic I considered the availability of alternate action a legal representative might take that would avoid or negate a prosecution. These options commence with limiting the range of children that may be the subject of proceedings to the age of 10 and provide a number of alternatives where disabilities or difficulties in obtaining instructions arise.
 37. In the conduct of criminal proceedings there is an affirmative obligation by the legal representative in New South Wales to ensure the child understands the nature of the charge or charges brought and the facts upon which it might be based¹². Such a principle of course is no more than one would have thought are the basic requirements of proper representation.
 38. For the vast majority of criminal charges the matters must be proved to find the offence proven, are usually reasonably clear and capable of definition to a child or young person. The usual course is to explain what the charge means

and what the prosecution must prove. To refer to the facts that will have been provided which appear to identify if correct the sufficient evidence to prove that and to obtain instructions on the accuracy or not of those facts. In matters where the instructions reveal the basis of a defence such as self defence to a charge of assault then those matters can be explored and clarified. The writer's own experience is that children who are taken to these matters are usually fairly clear in identifying whether a defence exists and whether the proceedings should be contested.

39. Without suggesting that the conduct of criminal proceedings are either straight forward or lacking complexity, the essential issues which are in contest in terms of proof of the charge are usually limited. This position can be contrasted to the myriad number of issues that may be relevant and raised in care or family law proceedings which in combination or in totality may lead a court to determine the ultimate issue of placement or contact in a specific way. The writer's experience is that there is a larger area of grey then the more precise black and white issues that criminal proceedings tend to raise.
40. The capacity to explain and obtain instructions on these specific issues or elements of the offence together with the limitations prescribing the ability to bring a prosecution such as age and disability leads the writer to the conclusion that the need for an alternate model of best interest is not made out or warranted in representation of children in criminal proceedings. The use of the beneficial model in those proceedings where it is most found is justified because of both the capacity of the child to understand, because of maturity issues and the complexity and width of the issues to be determined. In criminal proceedings the law itself has provided an avenue for those that would otherwise be under a disability to properly instruct to be removed from the process or dealt with in a way reflective of that disability. The role of the legal representative in each case is an important conduit to achieving that result. The absence of the capacity to act as a separate representative does not in the writer's view limit that role or ability.
41. It is acknowledged that in discussing the criminal jurisdiction the writer has highlighted areas where aspects of beneficial representation are utilised in the role of the legal representative. It might be argued that in that circumstance the legal representative having crossed a line and interpreted matters on behalf of his client that there should be a formalisation of that process so it is governed by rules and practices.
42. There is some merit in that suggestion. The writer's first response would be that the limitations in the way in which that beneficial role is conducted as

outlined above does place checks and balances on the role of the legal representative. The primary focus of acting on instructions is complimented by that beneficial role but not excluded. The writer would also respond to the assertion that in all criminal proceedings there is an element of beneficial interpretation. The legal practitioner is exercising judgment in both the advice he gives and the conduct of the proceedings. As long as the legal practitioner remembers that he acts for a client and acts on those client's instructions then the writer would contend the practitioner acts as a legal representative for the child.

43. The question of whether a Guardian ad Litem could bring an arms length position to then instruct the legal representative and remove that dilemma is one that merits some consideration. The Guardian ad Litem, of course speaks to the child and obtains the child's views and wishes, evaluates all other matters and then taking into account the best interests of the child, instructs the legal practitioner.
44. The difficulty with utilisation of that procedure in criminal proceedings is that an evaluation of benefit and risk which forms part of the determination of best interest may lead to considerations beyond whether the child is guilty or not. A good example of that is frequently seen when one discusses a particular allegation with the child. As part of the process of advising and counselling, one identifies the process of contesting a charge, the delays, the need to give evidence and the pressures and tensions that that brings. The practitioner also explains the process of conducting the matter on a plea and the high likelihood, especially in the case of a first offender or in relation to an offence where the criminal gravity is not too high, that the child will have no conviction and may in fact have no penalty at all imposed.
45. One could see in the exercise of a beneficial interpretation with no guarantee of a finding of not guilty, with the necessary delays and pressures of pleading not guilty a person acting as Guardian ad Litem might evaluate that for that particular child the risks of conducting a defended case against a plea of guilty suggests that it is in the interests of the child to plead guilty.
46. The concern the writer would have for that practice is that the child's voice that he did not do the offence is lost in the evaluation of the benefits to the child in pleading guilty. It is not suggested that a Guardian would lightly follow the course referred to but the course that the role of the Guardian is required to embark upon clearly would suggest a Guardian would have to consider carefully whether that is the course that he or she should instruct the legal representative to take.

47. It is for those reasons that the writer would see firstly a very limited area in which a beneficial role formalised either as a separate representative or through the process of Guardian ad Litem could be utilised. In those areas where it might, it is the writer's contention that the application of the beneficial approach may indeed not be in the best interests of the child or certainly reflective of the child's wishes.