

Representing children in child protection proceedings

A guide for direct instructions
and best interests lawyers



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Foreword

As Commissioner for Children and Young People, I am pleased to present this first edition of Victoria Legal Aid's *Representing children in child protection proceedings: a guide for direct instructions and best interests lawyers* (the guide).

In my work, I hear regularly from children and young people who have experienced the child protection legal system. I hear of positive experiences where lawyers have taken the time to listen to and engage children and young people in a way that supports their right to effective and meaningful participation.

Too often, though, I hear children and young people describe their experiences of the system in negative terms, as one designed for, and run by, adults. These children and young people, who have often endured abuse and/or neglect, describe the legal process as confusing, disempowering and at times, dehumanising, one where they feel reduced to the sum of protective issues used to describe them.

As the Convention on the Rights of the Child makes clear, children and young people have the right to participate in decisions affecting their lives. Lawyers in child protection proceedings play an essential role in supporting that participation at every stage of the legal process. Participation does not begin and end at the point of taking instructions – it is an ongoing and nuanced dialogue.

Participation means lawyers giving children and young people the information they need to be able to participate, and flexible options about how they want their voice and concerns to be heard.

When deciding what is in children's best interests, children's participation is inseparable from their protection.

For this reason, I am very pleased to see Child Participation Principles which set a high standard included in the guide, and I hope lawyers will use these principles as a platform for their professional work with children and young people.



This guide gives practical guidance on how to ensure meaningful participation of children in child protection proceedings. It fulfils a clear need, and I encourage all lawyers who work with children and young people to make this resource part of their everyday work practice.

A handwritten signature in black ink that reads "Liana Buchanan".

LIANA BUCHANAN
Principal Commissioner for Children and
Young People

Introduction

Children who are the subject of child protection proceedings in the Children’s Court of Victoria invariably are experiencing significant stress and upheaval in their life. Many will have experienced trauma associated with exposure to violence or other abuse. Upon entering the child protection system, decisions will be made, in the interests of promoting their safety, development and wellbeing, about where they will live, who will care for them in both the short and long term, and the extra support that they may need. These decisions will often have lasting ramifications for the relationship children have with their parents, siblings and other family members; their sense of stability and ‘home’; their ability to continue in the same school and recreational activities; and for the connections they have to friends and other important people in their lives.

Given the significance of these decisions in children’s lives and futures, it is vital that they have the opportunity to participate in the process by which the decisions are made. The importance of children’s right to have their voices heard is enshrined in Article 12 of the Convention on the Rights of the Child (CROC), which states:

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

In Victoria, the most direct and meaningful way a child can participate in child protection proceedings is through having a lawyer represent them. Under the *Children Youth and Families Act 2005* (the Act), all children aged 10 and above who are the subject of child protection proceedings are required to be legally represented on a direct instructions basis, unless the court has determined they do not have maturity to give instructions. Those under 10, or who have been assessed as not having maturity to give instructions, may only have a lawyer appointed to act in their best interests where the court determines exceptional circumstances exist.

The need for clearly documented expectations of the role and duties of children’s lawyers was a theme in consultations undertaken as part of Victoria Legal Aid’s (VLA) Child Protection Legal Services Review. The Final Report of the Review committed VLA to developing guidelines for the representation of children and young people, including for best interests representation. This document, *Representing Children in Child Protection Proceedings: a guide for direct instructions and best interests lawyers*, represents the realisation of that commitment.

This guide draws on content of existing documents, specifically:

- the *Guidelines for Independent Children’s Lawyers* (2013) for the family law jurisdiction which have been endorsed by the Family Court of Australia and Federal Circuit Court of Australia.
- the *Guidelines for Lawyers acting for Children and Young People in the Children’s Court* first developed as a project of the Victoria Law Foundation in 1999 and redrafted in 2012 by Victoria Legal Aid.

This material has been updated and supplemented with additional content

developed with the support of a reference group comprising lawyers experienced in delivering child protection legal services and representatives from the Department of Health and Human Services (the Department), the Children’s Court of Victoria (the court) and the Victoria Aboriginal Child Care Agency (VACCA). It is also informed by consultations with other lawyers, magistrates, and young people with experience of the Victorian child protection and out of home care systems.

The guide also draws on research conducted into the work of children’s lawyers in child protection and family law proceedings, and material developed by VLA staff.

The guide is not exhaustive and should be read in conjunction with:

- the *Children, Youth and Families Act 2005* (the Act)
- Victoria Legal Aid Practice Standards
- the *Legal Profession Uniform Law Application Act 2014*
- Law Institute of Victoria Code of Ethics and Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 (Solicitors’ Rules)
- rulings of the Ethics Committee of the Law Institute of Victoria

Purpose of this guide

This document is intended to provide guidance to lawyers acting for children in child protection proceedings whether on a direct instructions or best interests basis, to assist them in carrying out their role confidently and effectively. It addresses some of the issues lawyers commonly face when working with children.

While the primary audience of this guide is lawyers working in the child protection jurisdiction, it may also be of value to parents, children, child protection practitioners, Children’s Court officers and other people in

contact with the child protection system, in explaining the role of the child’s lawyer.

Terminology

The terms **lawyer** and **representative** are used interchangeably through the document. Where not specified or made clear from context, this should be taken to mean a lawyer acting either on direct instructions of a child or in their best interests.

Direct representative is used to describe a lawyer acting on the instructions of a child client, while **best interests representative** refers to a lawyer appointed under section 524(4) of the Act.

The term **child** is used throughout to refer to any person aged 0–17 inclusive who is the subject of a protection application in the Children’s Court. It is acknowledged that older children in this age bracket may identify as a young person or teenager rather than a child, however child is used consistently for readability and to remove confusion.

Overview

Direct representation

All children aged 10 and above who are the subject of child protection proceedings are required to be legally represented on a direct instructions basis, unless the court has determined they do not have maturity to give instructions.

Key functions of the direct representative are to:

- provide information and advice to help the child understand the protective concerns, the court proceedings, the lawyer's role, and their rights of participation
- elicit the child's wishes (take instructions) on all relevant matters, and facilitate the child's direct involvement in proceedings should they so wish
- with consent, gather information from external sources to understand the child's needs and circumstances and to strengthen the case in favour of their wishes
- provide advice about legal options and possible outcome of proceedings
- advocate for the child's wishes and desired outcome in court
- liaise with other parties (or their legal representatives, where represented) to obtain information and advocate for services, for the child or other parties, that will assist in achieving the desired outcome

The direct representative owes a child the same loyalty, confidentiality and competent

representation as due an adult client. The lawyer should at all times conduct their representation in a competent and professional way in accordance with the Solicitors' Rules and general legal obligations.

The lawyer should never substitute their own view for that of the child, but act on the instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

Accordingly, the lawyer must advise the child in an age appropriate way of the circumstances of the case, available options and the possible outcomes of the case, as well as reality test instructions or wishes expressed by the child.

Best interests representation

Children under 10, or who have been assessed as not having sufficient maturity to give instructions, will usually not be legally represented.¹ However, the court may decide exceptional circumstances apply that warrant appointment of legal representation. In this situation the appointed lawyer is required under the Act to:

- act in accordance with what they believe to be in the best interests of the child; and
- to the extent that it is practicable to do so, communicate to the court the instructions given or wishes expressed by the child.

Key functions of the best interests representative are to:

- provide information and advice to help the child understand, to the extent they are

¹ This has been the case under Victorian law since 2013 when the *Children, Youth and Families Act 2005* was amended to introduce 10 as the minimum age at which a child would be appointed a direct representative. Prior to the amendment it was common for children of seven and over to have representation, in line with recommendations from child development experts that children of this age were generally able to instruct. For a history of these changes to legal representation under the Act refer to the [Child Protection Research Materials](https://www.childrenscourt.vic.gov.au/legal/research-materials) on the Children's Court of Victoria website <https://www.childrenscourt.vic.gov.au/legal/research-materials>.

able, the proceedings, the lawyer's role, and their rights of participation

- elicit the child's wishes on all relevant matters where practicable, and facilitate the child's involvement in proceedings in any other way consistent with their best interests
- identify, gather and present to the court all information relevant to the determination of the child's best interests
- form a position, based on independent assessment of all relevant information and guided by the principles set out in section 10 of the Act, on the course of action that best serves the interests of the child and advocate for this to be adopted
- ensure the court is fully informed of the child's views and wishes
- communicate transparently with all parties in proceedings, by sharing information in advance of hearings where possible
- liaise with relevant professionals engaged with the child or family to understand the child's needs and promote their best interests
- liaise with other parties (or their legal representatives, where represented) to obtain information and advocate for services, for the child or other parties, that will assist in achieving the child's best interests.

The best interests representative should represent the child's best interests in a competent and professional way in accordance with the Solicitors' Rules and general legal requirements, even though the child is not the client of the representative and the representative is not bound to act on the wishes of the child.

The best interests representative must be independent of the court and the parties to proceedings.

Child participation principles

A central function of both the direct representative and best interests representative is to facilitate a child's participation in proceedings, to the extent that the child is willing and able.

Lawyers for children should be guided in their work by the following principles to ensure they are going beyond superficial approaches to support and create opportunities for genuine participation. These principles are adapted from the *Basic requirements for the implementation of the right of the child to be heard* identified by the United Nations Committee for the Rights of the Child.²

- **Transparent and informative** – children must be provided with complete, accessible, age- and culturally-appropriate information about the child protection application and proceedings, the lawyer's role, the child's right to express their views and wishes and how this will be taken into account in the decision-making process.
- **Voluntary** – while children's participation should be encouraged and supported, children should never be coerced into expressing views against their wishes. Children should be informed that they can change or withdraw their involvement at any stage.
- **Respectful** – children's views and wishes must be treated with respect, even where these differ from the lawyer's personal view or those of other professionals and seem not to serve the child's interests. Lawyers should recognise that children of even a very young age are able to form views and have a unique perspective on their own lives.
- **Relevant** – lawyers should help a child understand the real-life implications of proposals and decisions, avoiding jargon and legal terminology, to ensure the child is able to make a well-informed decision about their wishes. In order to do this effectively, lawyers need to have a good understanding of the child's life and the things that are important to them. Lawyers should also provide opportunities for children to raise matters they identify as relevant and important of their own accord.
- **Child-friendly** – lawyers should adapt their language, communication style and meeting locations (where possible) when working with children to reflect the children's capacities and preferences. Adequate time and attention should be allocated to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities.
- **Inclusive** – some children, for example those with disabilities or health issues, from diverse cultural and language groups, or who have experienced marginalisation on the basis of their gender, sexuality or other attribute, may face particular barriers to participation. Lawyers should be alert to these barriers and take particular care and effort to encourage and enable the participation of children in these situations, including drawing on the assistance and expertise of others where appropriate.
- **Continuous improvement** – effectively representing children in the child protection

² UN Committee for the Rights of the Child, General Comment No. 12 (2009) – the right of the child to be heard, <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

system requires lawyers to demonstrate specialised communication skills and knowledge in areas such as child development and the child and family service system. Lawyers should seek opportunities to maintain and improve their skills and knowledge in these areas.

- **Safe and sensitive to risk** – lawyers working with children should take steps to minimise any risk to a child associated with their participation in proceedings, and should discuss with children the real or potential risks of any wish or instruction the child expresses. Where a lawyer is concerned about risk of harm to a child, they should take steps to address in line with relevant professional standards and obligations, and where possible communicate to the child any steps they are taking and why.
- **Accountable** – a commitment to follow-up with children is essential. Lawyers should clearly communicate how they will represent a child's views in proceedings, inform the child on progress and outcomes of proceedings and how their expressed wishes influenced (or not) the outcomes. As part of a commitment to effective practice and continuous improvement, a lawyer should also provide opportunities for children to give feedback on their experience of working with the lawyer, including what worked and what could be improved.

Lawyer–child relationship

Meeting the child

Direct representation

Direct representatives need to meet with every child they represent, to be able to understand the child’s circumstances, obtain their wishes, and facilitate their participation in proceedings to the extent they are willing and able.

Face to face contact, especially at the beginning of representation, will assist in the development of trust and rapport and the child’s understanding of the lawyer’s role, which is an important foundation for the child to be able to express their view.

The lawyer should meet with the child when first appointed to act, and then often enough throughout proceedings to maintain the relationship, update the child on developments and to ensure the lawyer has a current picture of the child’s circumstances, needs and wishes.

Communication via other means such as phone calls, messaging apps and videoconferencing may be appropriate once a relationship between lawyer and child has been established, and the child has indicated a preference for these forms of communication. However, face to face contact should be preferred where there are sensitive or complex issues to discuss.

Best interests representation

Best interest representatives are required to act in what they believe is in the best interests of the child and, to the extent that is practicable, communicate to the court the instructions or wishes of the child. In order to fulfil their legislative obligations, best interests representatives should adopt a similar approach to that of direct representatives where the child is willing and able to express their wishes.

When acting for a young child with limited or no verbal communication skills, the best interests representative should still see or meet the child, as this may provide useful information for the assessment of best interests that cannot be gleaned from other secondary sources of information.

Additionally, meeting with the child promotes their right, pursuant to the Act and Article 12 of the Convention on the Rights of the Child to participate in proceedings that are about them.

In limited circumstances it may not be in the child’s best interest to meet the lawyer, for example due to a risk of [systems abuse](#). If the best interests representative forms this view, they must make a file note explaining the reasons for not meeting the child and should be aware that they may be asked to explain this to the court.

Preparing to meet the child

Upon being approached to represent a child a lawyer will usually be provided with some information about the child – usually a Child Protection summary information form (known as Form B) as a minimum, and potentially a protection report, breach report or casenotes if appointed once proceedings have already commenced. The lawyer should take care to read the information given and be alert to any issues that may require special attention in the first meeting with the child.

Issues to consider include:

- **What has immediately occurred for the child in the lead up to the matter coming to court, and how might this have impacted on them?** For example, if the child was removed from home during the night they may have had little to no sleep prior to first meeting their lawyer.
- **Has the child experienced trauma as a result of abuse or neglect?** Trauma

experiences can affect a child's behaviour, communication and cognitive abilities, which the lawyer will need to consider when engaging with the child. See [Trauma informed practice](#) for more information.

- **Does the child have a disability or impairment that might affect their ability to communicate with the lawyer?** If so, seek more information from Child Protection and/or the child's parent (via their lawyer) about any specific support or communication approaches that will assist the lawyer to interact with the child. See [Children with a disability](#) for more information.
- **Is the child Aboriginal or Torres Strait Islander?** If so, there are specific legislative provisions that the lawyer should be aware of. See [Aboriginal and Torres Strait Islander children](#) for more information.
- **Does the child speak a language other than English?** If so, consider if an interpreter is required.
- **Where and when will the meeting take place?** If it is an application by emergency care, this meeting will likely need to occur at court. Outside of these urgent situations lawyers should arrange to meet the child in advance of the hearing date.

Trauma informed practice

Children entering the child protection system will in many cases have experienced trauma as a result of abuse or neglect. Exposure to trauma can impact a child's cognitive abilities, behaviour and communication in ways that are highly pertinent to the development of the lawyer-child relationship. For example, children who have experienced trauma often find it difficult to form trusting relationships, have trouble processing information and expressing themselves, and may exhibit maladaptive behaviours such as aggressive

outbursts, or dissociation (becoming disconnected from thoughts, feelings and surroundings).

Lawyers working with traumatised children should inform themselves about the impacts of trauma, and demonstrate empathy, patience and authentic care in their interactions with children. Lawyers should take particular care when discussing traumatic events with the children, as this risks re-traumatising them. This is covered further in [What to discuss with the child](#).

Initial meeting

Often the first meeting between a child and their lawyer will occur at court, on the first hearing day of a protection application. The child may be highly stressed and confused, as a result of harm they may have experienced, and/or due to being recently removed from their parents' care and not knowing what is going to happen next.

Given this context, the lawyer should strive to put a child at ease as much as possible and not rush the first meeting. This can be a challenge on a busy court day, where the lawyer has multiple cases and there is limited opportunity for the child and lawyer to meet in a quiet, calm environment. However, a child should always be prioritised.

Sometimes a lawyer will commence acting for a child ahead of a hearing day. This will most likely occur when there is a protection application by notice; when a child turns 10 during the course of proceedings and therefore is entitled to representation; or when the court decides a child needs a best interests representative. In these cases, the lawyer acting should always endeavour to hold the first meeting in advance of the next hearing date and not at court.

The first meeting with a child should at a minimum cover the following in an age appropriate way:

- the reasons why the matter has come to court
- who the lawyer is, what they do in proceedings, and the nature of their relationship with the child (including confidentiality and the limits of this; see [Confidentiality](#))
- the role of Child Protection and the court
- where acting as a direct representative, confirmation of the child's capacity to provide instructions (see [Capacity to instruct](#))
- the child's wishes, particularly in relation to any urgent issues to be decided by the court on the day or at the next hearing
- for children being represented on a direct instructions basis, basic information about how legal aid works and completion of the application form for a grant of legal assistance (this will only require the child to mark a signature on the form; they do not need to provide proof of means)
- the arrangements for contact between the child and the lawyer after the first meeting, including the child's preferred means of contact and meeting locations
- any other pressing issues or questions that the child raises.

The above list should not be treated as a checklist to be completed in order, rather the lawyer should take a conversational approach. As a general principle lawyers should, in the first meeting, focus on the issues for immediate consideration and decision by the court. Going into too much detail early on about the stages of the court case and possible decisions that may occur months down the track may be overwhelming for a child. However, lawyers should be guided by the individual child in this regard, and endeavour to respond to any questions or concerns the child raises.

If the meeting needs to be brief, for example because the court hearing is about to occur, the lawyer should explain this to the child at the outset and make time for a follow up meeting straight after the hearing.

Meet the child alone

Children may find meeting with a lawyer – especially for the first time – an intimidating experience, and wish to have someone they know attend with them. This might be a parent, carer, child protection practitioner, school staff member or youth worker. While the presence of such a person may help the child feel at ease, it may compromise the confidentiality of discussions and impact on what and how the child communicates with the lawyer. To maintain confidentiality and ensure the child can speak freely, direct representatives should not discuss issues relevant to the case or seek the child's wishes or instructions in the presence of others.

Where the child is accompanied by a support person, the lawyer should:

- check with the child that the person is present with their consent
- allow the person to remain during an introductory conversation in which the lawyer provides general information about their role
- take time to answer general questions and build rapport with the child
- sensitively ask the person to leave before discussing with the child issues relevant to the case, explaining the importance of confidentiality and that the court needs to be sure that the child has not been influenced by anyone else while speaking to the lawyer.

When acting in a best interests capacity, the lawyer may decide to meet with the child in the company of their parent or carer (subject to placement or contact conditions set out in any relevant court order) to help inform their

assessment of the child's best interests. However, the lawyer should also consider whether it is desirable to meet the child separately from their parent or carer to elicit their views about the matter in an environment free from the influence of any other person. This should be decided on a case by case basis, taking into account the age, maturity and communication ability of the child.

If multiple siblings are represented by the same lawyer, some discussions may be held with the siblings all together, such as the role of the lawyer, next steps in proceedings and other administrative aspects of the process. However, discussions of the children's views and wishes in relation to key issues should be undertaken individually to help ensure each child is able to express their own viewpoint free from their siblings' influence. Representing multiple siblings is covered further in [Conflicts of interest](#).

Capacity to instruct

As with representing adult clients, lawyers acting as a direct representative for a child can only proceed in this role where they are satisfied that the child is able to provide competent instructions (Solicitors' Rule 8). The Act also addresses the question of children's ability to provide instructions, stating in section 524 that 'the court may determine that a child aged 10 years or more is not mature enough to give instructions to a legal practitioner, considering:

- the child's ability to form and communicate the child's own views
- the child's ability to give instructions in relation to the primary issues in dispute, and
- any other matter the court considers relevant.'

In order to be satisfied that a child can provide competent instructions, the lawyer needs to establish that the child is able to:

- demonstrate an understanding of the role of Child Protection, the lawyer and the court
- understand the potential outcomes of the court proceedings
- communicate their wishes or preferences to the lawyer in relation to the potential outcomes (noting the child may choose not to express a preference).

While the world of lawyers and the court will often be a foreign, intimidating environment to a child, the matters at the heart of child protection decisions – where and with whom a child should live – are things that most children will understand and have a view on.

Direct representatives should start from a presumption that a child does have capacity, and support the child to express their views and wishes to the fullest extent possible, by:

- using a conversational approach, inviting an exchange of information rather than 'talking at' the child
- explaining the court process and the roles of all the parties in simple language, avoiding jargon and technical terms
- using non-leading questions, to help ensure the child is sharing their own view and not just agreeing with what the lawyer has said
- checking the child's understanding of key concepts and providing opportunities to ask question
- adjusting their language and communication style based on the child's age and language level.

For detailed advice on assessing capacity of children in child protection proceedings, lawyers should refer to the resources *Assessing capacity and taking instructions from very young, traumatised and/or intellectually disabled clients* and the

Children's Court Family Division capacity checklist on the [VLA website](#).³

Capacity is fluid and decision-specific

A child may understand and express clear wishes about certain matters before the court, and not others. In these cases the direct representative should proceed to act, restricting their advocacy to only those issues on which the child has provided competent instructions.

A child's capacity may also evolve over the course of proceedings, as the child matures and new issues emerge. Lawyers should therefore be attentive to capacity issues throughout the period of representation, especially where there has been a gap of several months in contact and/or particularly complex and sensitive issues need discussing.

Doubts about a child's capacity

Where a lawyer has doubts about a child's capacity to instruct, the first step should be to reflect on their communication approach and try to rephrase statements or questions in simpler language, or through using aids such as diagrams or drawings.

If a lawyer feels unable to establish a child's capacity at an initial meeting, for example because the child is in a heightened state at court on the first hearing day, the lawyer should seek a brief adjournment of the matter to enable a more thorough capacity assessment to be completed away from court.

Children who are diagnosed with mental illnesses may be experiencing acute symptoms that could affect their views and wishes. Lawyers should be mindful of this and consider seeking an adjournment until the

symptoms have settled to obtain more clear instructions.

If the lawyer is unsure about the presence of a disability, language difficulty or mental health issue, additional information should be sought from either Child Protection, the parents (via their lawyer), or if needed by request for a court-ordered assessment by a professional already involved with the child (such as a psychologist) or the Children's Court Clinic.

If, following a thorough assessment, a direct representative concludes that a child cannot provide competent instructions, the lawyer cannot proceed to act. In this situation, the lawyer should advise the legal representative for Child Protection and the VLA office that referred the child for legal assistance. If the assessment occurs on the day of the hearing, the lawyer should usually appear as a friend of the court to advise the Magistrate of this assessment, but then play no further role. Prior to advising the court, the lawyer should consider whether, in their view, exceptional circumstances exist which warrant the appointment of a best interest representative under section 524(4) of the Act and if so, submit this position to the court for a decision.

Best interests representation and capacity assessment

As a best interests lawyer is not bound to follow client instructions, their role in proceedings is not contingent on establishing a child's capacity in the way a direct representative's role is. Nonetheless, a best interests representative should still carefully consider a child's capacity for several reasons:

- to help gauge what information to share with the child about proceedings, and how best to do this

³ <http://www.legalaid.vic.gov.au/information-for-lawyers/practice-resources/state-children-youth-and-families-law/child-protection-in-family-division-of-childrens-court>

- to assist any assessment of the weight that should be given to the child's views
- to determine whether a child previously assessed as incapable of providing instructions does in fact demonstrate capacity during the course of the case, in which case the lawyer should advise the court with a view to having the child appointed a direct instructions representative from that point forward (only applicable for children 10 years and over).

Best interests representatives should follow the same process as direct representatives in explaining the court process and lawyer's role and checking the child's understanding, using age appropriate language and visual aids where appropriate.

Eliciting views and wishes

Eliciting the views and wishes of the child is a fundamental role of both a direct and best interests representative. It should not be viewed as a one-off task, but rather a process to be undertaken throughout proceedings, requiring conversations between the lawyer and child at sufficiently regular intervals such that the lawyer has an up to date understanding of the child's wishes on all relevant matters at each court hearing.

Depending on the stage of proceedings and the matters to be decided upon at the next hearing, lawyers will need to elicit:

- the child's views about the protective concerns
- the child's wishes about issues such as their living arrangements in both the short and long term, contact with family members and other important aspects of their life
- the child's views on any proposed conditions or rules that the child or (where relevant) parent/s must comply with.

For a child to be able to express their views and wishes in a meaningful and informed way, their lawyer needs to explain to them:

- the reasons that have brought the matter to court (ie the protective concerns that form the basis of the protection application)
- the role of the court as decision-maker and the sorts of decisions it can make
- the things that must be taken into account in these decisions, most importantly the need to keep the child safe from harm
- (if acting as direct representative) that the lawyer's role is to advocate for the child's wishes and desired outcome in court
- (if acting as best interests representative) that the lawyer's role is to:
 - consider the child's views and wishes, as well as other information to make an assessment about what is in child's best interests
 - communicate the child's wishes to the court, as well as their own assessment of best interests and, if different, explain the reasons for this
- the fact that the child's views and wishes will be considered by the court but this does not mean the decision will necessarily be what the child wants
- that the child has the right to not express a view or preference about any particular issue if they do not want to
- that if the child does want their view or preference to be put forward in court, this will be heard by the other parties, including the child's parent/s if they are participating in proceedings.

All of these conversations need to be conducted in an age appropriate manner.

Lawyers should not accept at face value all statements by the child about what they want to happen; rather they should seek to understand the child's perspective on all potential options, gently probing the reasons behind any expressed wish or preference. A child's discomfort may lead them to give the answer that they think is expected or that may

end the discussion quickly. It is important that the lawyer build rapport and then explore the issues with the client in appropriate detail.

The sensitive phrasing of questions here is particularly important, so a child doesn't feel like they are being interrogated. For example, instead of asking 'why do you want to live with mum more than dad?', consider asking 'what is it you like about living at mum's house'

Exploring the reasons behind a child's statements will help the lawyer to ascertain whether the child understands the implications of their preferred option, and is in fact expressing their own wish rather than an answer they feel obliged or have been influenced to give, by their parent/s or any other person. It also provides information that can be presented to the court to assist the court in determining what weight to give to the child's wishes.

The lawyer should advise the child on the legal and practical reasons why a certain course of action may or may not be adopted by the court. In doing so the lawyer must be careful not to impose their own value judgements of any potential options, which may have the effect of steering a child toward or away from a particular choice. This is particularly important when working with children, as they may be unused to independent decision-making and look to the lawyer for direction.

While best interests representatives do not have the same obligation as direct representatives to follow any instructions of the child, they should still follow a similar process to eliciting the child's views and wishes, as far as practicable taking into account the child's ability to communicate and understand the proceedings and role of the lawyer.

The best interests representative should seek assistance from appropriately qualified professionals in ascertaining the wishes and directions of younger children where

necessary. However, this assistance does not replace the lawyer's obligation to communicate and interact with the child.

What to discuss with the child

In the early stages of representation, where urgent decisions are to be made by the court about issues such as placement and parental contact, the lawyer's discussions with a child should centre on the child's wishes in relation to these matters and any other specific recommendations made in the protection application.

The lawyer will then need to discuss with the child the protective concerns that form the basis of the protection application, and seek their views about what has been alleged, to inform submissions to the court as to whether the child is in need of protection.

Any discussion of protective concerns may be highly distressing for a child, and lawyers should make every effort to ensure their interactions with the child do not cause them further stress or trauma (see [Systems abuse](#)). To this end, the lawyer should not rush the discussion, should use language that is age appropriate and should provide sufficient detail about the protective concerns to elicit the child's views, without going into extensive detail about incidents of alleged abuse or neglect unless absolutely necessary. For further guidance on discussing Child Protection reports with children, see [Access to Documents](#).

Systems abuse

'Systems abuse' describes the traumatic effect on children that may result from their involvement with systems (including child protection and legal systems) intended to help them.

In the child protection context, systems abuse may occur when a child is subject to extensive and/or repeated questioning about personal

matters, especially those of a traumatic or distressing nature.

It may also result where a child is referred for multiple assessments or support services, without appropriate coordination, or where a child's needs or wishes are not adequately taken into account in planning interventions that affect them.

Over the course of proceedings, the lawyer should also explore with the child their needs and wishes regarding their life more broadly. The best interests principles set out in section 10 of the Act require the court, and Child Protection, to consider a number of factors relating to the child's health, wellbeing, education, social, cultural and family context in making decisions regarding a child's best interests. In the interests of comprehensive representation, the lawyer should pro-actively seek the child's wishes in relation to all of these areas, whether or not they are explicitly addressed in the protection application or subsequent court reports.

Lawyers should not take a one-size-fits-all approach to discussions with children; they need to be mindful of the needs and circumstances of each individual child.

Lawyers also need to consider what resources or services may be drawn upon to address any issues identified in discussions with the child. Refer to [Children's Needs](#) for further guidance on this.

Lawyers may find questioning children challenging as it may feel like unnecessary probing into personal areas of a child's life. However, it is important to give the child the opportunity to share their perspective on what is most important to their life, for example, their ability to continue in the same school or sporting activities. The child may also have ideas or information about possible placement options that will assist the court in its decision-making.

Confused, inconsistent or limited wishes

It is common for a child to change their wishes, or only express wishes about certain matters before the court and not others. This may be because they feel conflicted or disloyal to a parent or family member if they express a particular view or wish, or because they do not understand certain complex aspects of the proceedings and do not have capacity to instruct on these issues.

Where a child's wishes are confused or inconsistent, the lawyer should:

- confirm they have understood the child correctly to ensure this is not due to miscommunication or misunderstanding
- explore with the child why their wishes have changed, and explain that the court will want to know the reasons for the change to help its decision-making
- put the child's wishes and their reasons for any inconsistency with previous instructions to the court, taking care not to impose any rationale that the child has not articulated.

Lawyers must never pressure a child to express a wish where they are unable or reticent to do so. Where a child has expressed wishes only on certain matters before the court, the lawyer should put the wishes as given and not make any independent conclusions about what the child's view might be on other matters.

For detailed guidance on how to structure discussions and elicit wishes from children see the resource *Assessing capacity and taking instructions from very young*,

traumatised and/or intellectually disabled clients on the [VLA website](#).⁴

Contact with other parties

Children involved in child protection proceedings are likely to be dependent into the future on one of the others involved in the proceedings, such as a parent, carer or Child Protection.

Lawyers, therefore, should be vigilant when acting for children not to place unnecessary additional strain on these relationships. Discussions with children about their family members or Child Protection practitioner should be approached with tact and diplomacy, and every effort should be made to avoid unnecessarily adversarial interactions with the other parties.

Any such actions should only be taken consistent with the lawyer's overriding responsibility to represent the child's wishes, or best interests as applicable.

Direct representatives must take particular care, in all communications with other parties, not to breach the duty of confidentiality which is owed to the child.

Children's lawyers involved from the initial hearing of a protection or breach application will be able to advise other parties that they are acting on this day. However, best interests representatives and direct representatives who commence acting for a child after proceedings have started (for example, because the child has only recently turned 10) will need to advise the court and all other parties that they are acting as soon as possible after they commence in the role.

Throughout proceedings, best interests representatives should communicate with all parties in a transparent manner, and where possible share in advance of hearings any

information gathered relevant to their assessment of the child's best interests.

Issues between lawyer and child

At times issues may arise in the relationship between the lawyer and the child they are working with. Reasons for this may include a child perceiving that their lawyer is not representing their wishes (or interests in the case of a best interests representative) adequately; difficulties in communication; or disagreements about the best way to run the case. Taking time to clearly explain the lawyer's role at the outset and maintaining regular contact throughout proceedings are critical steps to avoid issues arising wherever possible.

Where an issue does arise, lawyers should seek to resolve this directly with the child in the first instance. Children who are directly represented have the right to end the relationship with their lawyer and seek alternative representation if issues cannot be resolved. Direct representatives should advise their client of this right and assist in linking the child to another lawyer, by contacting the relevant VLA office that initially referred the child for legal assistance.

Children represented on a best interests basis do not have the same ability to dismiss their lawyer, as the appointment is made by court order under section 524(4) of the Act. Nonetheless, best interests representatives should take any concerns raised by a child seriously, and consider whether the issues, if they cannot be resolved, compromise the lawyer's ability to undertake their role. If the lawyer believes the child's best interests would be served by the appointment of a different representative, they should raise this with the court.

⁴ <http://www.legalaid.vic.gov.au/information-for-lawyers/practice-resources/state-children-youth-and-families-law/child-protection-in-family-division-of-childrens-court>

Any child represented by a lawyer employed by VLA or funded by a grant of legal assistance is entitled to make a complaint to VLA if their concerns about the lawyer's conduct cannot be resolved with the lawyer directly. Lawyers should make children aware of this entitlement and the process for making a complaint, which is explained on the [VLA website](#).

Information gathering and analysis

Gathering information

In addition to eliciting the wishes of the child, lawyers acting for children will need to gather information from other sources to prepare a comprehensive case.

The purpose of the information gathering, and the lens that the lawyer adopts when considering such information, will differ depending on whether they are operating on a direct instructions or best interests basis.

For a direct representative, the purpose of gathering information is to assist the lawyer to advise the client about all available options and/or to strengthen the legal case in favour of the child's expressed wishes. The lawyer needs to advise the child why such information may be helpful to the case and seek their consent before contacting any third party.

For the best interests representative, the purpose of information gathering is to enable them to develop a comprehensive, evidence-based view of the child's best interests and the course of action that would best serve these. Therefore, the lawyer must not only seek out information that supports one position (for example the child's wishes or the Child Protection recommendation), but rather assess all relevant information before arriving at a view of the child's best interests.

Common elements of the information gathering process include:

- reviewing protection and disposition reports
- requesting and reviewing Child Protection case notes (through subpoena where necessary)
- requesting information from people and services with knowledge of the child, such as carers, family members, school,

counsellors, and health services (through subpoena where necessary)

- reviewing written material relevant to identified protective concerns, for example police records, intervention orders and hospital records
- liaising with Aboriginal Community Controlled Organisations regarding cultural support for Aboriginal and Torres Strait Islander children
- requesting information (via a parent's lawyer) regarding the parent's progress in addressing protective concerns, for example undertaking drug screens and engaging with counselling
- identifying the need for any expert assessments of the child or other parties, and working with the other parties or court where necessary, to ensure such assessments occur.

Lawyers will commonly need to issue subpoenas to obtain relevant information where it cannot be obtained by an informal request; in such cases subpoenas should be issued as early as possible to minimise delays to proceedings.

Child protection proceedings are to be conducted in an informal manner and adherence to rules of evidence is not required (section 215 of the Act). Formal calling of evidence will usually only occur if a matter progresses to a contested hearing. Nonetheless, lawyers should be mindful when gathering information about the manner in which it is provided to the court, to avoid any challenges to the veracity or strength of the information. Wherever possible, lawyers should seek written reports clearly identifying the source of the information and relationship to the child, so that they may be relied on as evidence if required.

This is particularly important for best interests representatives, who need to put all relevant evidence before the court and demonstrate impartiality in their conduct at all times.

Best interests lawyers should share any information collected with all other parties (via their legal representatives, where represented) in advance of hearings.

Analysing information

To be able to critically analyse information obtained (especially expert assessments and reports), challenge the basis of any conclusions made, and use it to advance or oppose a particular course of action, lawyers need to have a good working knowledge of important concepts in child protection. These include:

- child and adolescent development
- theories of children's best interests
- attachment theory, including the importance of secure attachment to a primary caregiver on children's wellbeing and the impact of removal from the primary attachment figure
- the impact of trauma, including exposure to violence, on children's development and attachment.
- For Aboriginal and Torres Strait Islander children, the importance of having a meaningful connection to culture to the child's identity and formation of a positive self-image.

Best interests lawyers particularly must be wary of overstepping the limits of their expertise when assessing information to determine a child's best interests, so they do not draw conclusions that are not supported by evidence. Lawyers should consult directly

with relevant experts to check their interpretation of material wherever possible.

A useful summary of relevant social science concepts is contained in Children's Court [Research Materials](#)⁵ prepared by Magistrate Power, and in the [Specialist Practice Resources](#)⁶ produced by DHHS as part of their Best Interests Case Practice Model.

Expert assessments

Where a direct representative considers that an assessment by a medical practitioner, psychologist or other relevant expert will advance the child's position, they should advise the child about what the assessment involves and its likely benefits, and obtain consent before commissioning any assessment.

Where a best interests representative considers that an expert assessment of a child, parent or family unit will assist them in forming a view of the child's best interests, they should inform each party of this and seek for Child Protection to arrange the assessment by consent of the parties, or via Court order if parties do not agree.

In either case, before deciding to request or arrange an assessment a lawyer should balance the likely benefit of obtaining additional information against the potential for such an assessment to constitute systems abuse of the child and the impact of any delay to proceedings caused by waiting for assessments to occur. The lawyer should also consider the specific purpose of the assessment to ensure that a referral is made to an appropriately qualified professional.

Where an assessment (for example, a Children's Court Clinic assessment) has been ordered by the court, the lawyer should:

⁵ <https://www.childrenscourt.vic.gov.au/legal/research-materials>

⁶ <http://www.cpmanual.vic.gov.au/our-approach>

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- advise the child why the assessment was ordered and the court's expectation that they participate
 - assist with arrangements for the assessment to occur, and
 - advocate for it to be conducted in a way that causes the least disruption to the child (for example, for the appointment to occur locally so that a child living in regional Victoria does not need to travel to Melbourne).

Where a best interests representative is appointed, they should take a lead role in coordinating arrangements to ensure assessments occur in a timely manner, and in identifying and resolving any issues causing a delay.

Court hearings

Preparation for court

Lawyers should prepare for each hearing by:

- reading all available material in advance of the hearing, and
- speaking to the child to explain the next stage of proceedings, confirm their current circumstances and seek up to date wishes.

Best interests lawyers should also, where possible, provide to other parties all relevant information gathered before each hearing date along with an indication of the lawyer's position regarding the outcome that they assess as being in the child's best interests, and any draft proposed orders. Where the best interests lawyer has formed a preliminary view as to the outcomes which will best promote the child's best interests, it may be appropriate to inform the court at the commencement of the first day of hearing of those views and where appropriate, provide details of draft orders.

Lawyers can often end up having rushed discussions on the day of court, when Child Protection produces reports containing information and/or recommendations that have not been provided to the child or lawyer in advance. This at times may be unavoidable, but lawyers should take steps to reduce the need for rushed, last minute discussions with children through:

- checking with Child Protection in advance of the hearing date as to whether they are proposing orders or conditions substantively different to what has previously been proposed.
- maintaining regular contact with the child between hearing dates.

Advance preparation by lawyers will assist in reducing unnecessary delays and adjournments to proceedings, which can

cause uncertainty for children about their future living arrangements.

Role in court

Common to the roles of both the direct representative and the best interests representative is the need to participate fully in all hearings relevant to the case, including conciliation conferences.

At times the position of the direct or best interests representative may overlap with the position of other parties in the case. Nevertheless, the lawyer should be prepared to comprehensively argue their position and not merely defer to or endorse another party's position, except where this endorsement is adopted as a strategic approach to advance the child's interests.

Direct representatives must not stray from the child's expressed wishes in their submissions to the court. This does not mean the lawyer is required to present every statement of the child verbatim; the lawyer may exercise independent judgement about how best to present the child's wishes to advance their case, consistent with Solicitors' Rule 17.

The submissions of best interests representatives must be supported by evidence and not merely reflect the personal view or opinion of the representative or any other person.

Before outlining their position on the course of action that best serves the child's interests, the best interests representative should:

- present to the court all relevant information, not only that which supports the representative's position on the child's best interests
- canvass the merits of all possible courses of action, including the proposals of all other parties
- present the child's wishes to the court.

At times the best interests representative may be required to appear at an interim hearing shortly after their appointment, without having had the opportunity to fully investigate the child's circumstances, wishes and best interests. In such cases the representative should not feel compelled to make a submission as to the child's best interests, and rather present a preliminary analysis of the available options to the extent this is possible.

Where the court is to make interim orders the representative should consider whether they adequately promote the best interests of the child and make submissions as appropriate.

Lawyers need to be prepared to advocate for services and supports for the child and, where necessary to achieve the desired outcome, for other parties. For example, the lawyer acting for the child may need to advocate for services or support to be provided to a parent that will address protective concerns and make it appropriate for the child to return to the care of that parent.

Making submissions contrary to a child's wishes (best interests representatives only)

If a best interests representative considers that the available evidence indicates that the interests of the child will be promoted by orders which are contrary to the child's views, the best interests representative is to:

- advise the child that they intend to make submissions contrary to the child's wishes and the reasons for this, in advance of the hearing
- ensure that the child's views are made known to the court, together with the arguments which promote the adoption by the court of the child's wishes
- make submissions as to why they have formed the view that the child's wishes are not in their own best interests

- make submissions in support of the course of action the lawyer has assessed as being in the child's best interests and the evidence relied on to arrive at this determination, with reference to section 10 of the Act.

Continuity of representation

Continuity of representation is especially important for children, as they may take time to build trust in a lawyer and will not want to meet with, or have their story shared with, another person that they do not know. For this reason, lawyers for children should minimise the use of agents.

Where a lawyer does need to engage an agent or brief counsel, they should speak with the child in advance of the hearing, to ensure they have an up to date picture of the child's wishes or instructions and to inform the child that another lawyer will be appearing in court.

When not present for a court hearing, a child's lawyer should where possible make sure they are contactable by the counsel (or agent) acting, in case confirmation of instructions is required.

Child's attendance at court

In 2013, the Act was amended (s. 216A) to provide that a child subject to child protection proceedings is not required to attend at Court for any proceeding unless the child wishes to do so or is ordered to by the court. This amendment was made to minimise the disruption and stress to children caused by child protection proceedings. However, lawyers should not interpret this provision as a rule that children cannot attend; it remains a child's choice whether they attend at court or not.

In order for a child to make an informed decision about attendance at any hearing, the lawyer should discuss the following with the child:

- what the hearing in question will involve and the likely length of time it will take
- potential disruption to the child's daily routine, for example, school, employment
- the practicalities of the child getting to court, such as mode of transport
- the likelihood of the child being distressed by being in the courtroom or seeing family members at court
- any other good reason for non-attendance, for example, fear of seeing another party at court
- that the Magistrate can exclude anyone from the courtroom at any time (section 523(2) of the Act).

Lawyers must not rely on the child attending court to ascertain their wishes about the matters to be dealt with in that hearing. Every effort must be made to speak with the child in advance of the hearing, even when they are planning to attend court.

If the child indicates they wish to attend court but is intimidated by or afraid of another person who will be present, arrangements must be made to ensure that the child feels safe. For example, the child may remain in an interview room (or safe witness room if one is available) with a child protection practitioner or another person with whom they feel safe. The lawyer should consult with Child Protection in making these arrangements, and alert court security to any potential risks.

Where a child does attend court, the representative should help them to understand the progress, explain submissions being made, and further clarify any wishes as may be necessary.

Child giving evidence

It is rare for children to be called to give evidence in child protection proceedings, but a lawyer may occasionally need to consider whether this is necessary. The decision

should include careful consideration of the following:

- the availability of other evidence which may substitute for direct evidence from the client
- the value of the child's direct evidence to the case
- the child's need or desire to give evidence
- any possible repercussions from giving evidence
- the availability of video-conferencing or remote facilities for the giving of evidence
- the child's developmental ability to provide direct evidence and withstand possible cross-examination.

Where a child does give direct evidence, the lawyer should consider who may be present and where appropriate ask the court to restrict entry to the courtroom while the child gives evidence.

Questioning a child witness

As noted in the [Child giving evidence](#) section, it is extremely rare for children to be called to give evidence in child protection proceedings. If a lawyer is in a position where they must question or cross-examine a child in the witness box, the lawyer should seek to ensure that questions put to the child are phrased in a way that they can understand.

When the lawyer's own child client is being cross-examined by another lawyer, it is also important to be vigilant about how questions are phrased. Objections to inappropriate questioning should be raised where necessary, consistent with section 41 of the *Evidence Act 2008*. To this end, it is important that lawyers are familiar with the current law and empirical knowledge about children's competency, memory and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child. See [Capacity to instruct](#).

Confidentiality

Direct representation

A lawyer acting as a direct representative owes their child client the same duty of confidentiality as would be owed to an adult client. The relationship is protected by legal privilege which can only be waived by the child.

Direct representatives should explain the confidential nature of the lawyer-client relationship to a child at the first meeting, using language the child can understand. They also need to explain the limits of confidentiality, including that:

- views and wishes expressed by the child will be heard by their parent/s (and/or the parents' lawyers) if shared in court, and
- the child's information may be shared with lawyers from the same firm, or with barristers who are briefed to act during the proceedings.

Lawyers should not assume that a child will understand that the confidential relationship extends to other lawyers in the same firm without this being made explicit. If the child does not know the lawyer's colleagues and has not been informed why they have the child's sensitive information, the child may see this sharing of information as a breach of trust by their lawyer.

Direct representatives should revisit the matter of confidentiality each time they seek instructions throughout proceedings, so the child can make an informed choice about what information they wish for the lawyer to keep to themselves, and what can be shared in court.

Best interests representation

Where a lawyer is appointed as a best interests representative, the child is not the lawyer's client. Therefore, the lawyer-child relationship is not protected by legal privilege and the lawyer cannot guarantee

confidentiality to the child. Nonetheless, the best interests lawyer should strive to maintain confidentiality, except where this is not in the best interest of the child. It is essential the lawyer explains the nature and limits of confidentiality to the child at the outset, so the child understands the potential implications of speaking with the best interests lawyer and that they do not have to speak with the lawyer if they do not want to.

If the child wants to disclose information to the best interests lawyer that they haven't shared with another person, the lawyer should consider engaging a third party such as a counsellor to interview the child, to avoid the potential for the best interests lawyer to be called as a witness in proceedings.

Disclosure of confidential information

On occasion, a child may share information with a lawyer that indicates the child is at serious risk of harm. In these cases, the lawyer should where possible discuss with the child the advantages of bringing the matter to the attention of Child Protection and seek permission to report the issue or allegation. The lawyer should also discuss with the child other steps that may be taken to alleviate the risk, and make referrals as needed to relevant community services. Such referrals should be made with the child's knowledge and, in the case of a direct representative, explicit consent.

Where the child does not authorise disclosure, the lawyer should consider carefully whether to proceed with notifying Child Protection. This is permitted in strict circumstances under the Solicitors' Rules, namely where the law permits or compels disclosure (clause 9.2.2), or for the purpose of preventing imminent serious physical harm to the client or to another person (clause 9.2.5).

Lawyers are not compelled to report protective concerns to Child Protection under Victorian law. However, the Act permits any person to report protective concerns and provides protection against any action for unprofessional conduct or breach of professional ethics if the report is made in good faith (see sections 183 and 189 of the Act).

Where a lawyer is unsure of their obligations, they should urgently seek assistance from a senior colleague or manager. They may consult their professional body which may be able to assist in determining what steps to take. VLA staff should consult their manager or the Internal Legal Services team.

Where a lawyer acting as direct representative makes a report to Child Protection about a child client without their consent, the lawyer should notify the court and arrange for a new representative to be appointed via Victoria Legal Aid. This is because the nature of the relationship has changed and the lawyer could be potentially called as a witness in the case.

Access to documents

Lawyers must be familiar with sections 552, 556, 559 and 561 of the Act concerning access to reports, the relevant Solicitors' Rules on client access to documents, and DHHS policy on service of documents. The DHHS Child Protection Manual states that protection application documents will be served on children aged over 12 years.

A direct representative is generally under a duty to allow a child access to any relevant document the lawyer holds, subject to any court order restricting dissemination of a document. However, lawyers must be careful about showing documents to children, taking into account the child's capacity to read and comprehend a document's contents and the potential for causing distress.

A best interests representative should apply the same considerations as to the potential

emotional impact of a document, and a child's capacity to comprehend when deciding whether to share it with them. The best interests representative must have regard to court orders and any legislative requirements governing disclosure in these situations.

Many reports contain highly sensitive information likely to upset a child, such as the details of abuse involving the child and/or their family members. Lawyers should check with the author of a report whether there are matters in the report of which the child is unaware. Generally, this information should be imparted to the child by the author directly. However, lawyers will often need to discuss the contents of the report with the child as part of the process of eliciting the child's views on the protective concerns that form the basis of a protection application, and the actions recommended by Child Protection to protect the child.

To minimise distress to the child, lawyers should discuss the contents of a document or report only in the level of detail required to obtain the child's views and wishes on key issues. This will often mean the lawyer can provide a summary of the relevant sections of a report, rather than going through it line by line with a child. But, lawyers should consider the age, maturity and literacy of a child and the nature of a report's contents on a case by case basis to inform their decision about the level of detail to discuss with the child.

If there are sections of a report that the author does not wish the child to have access to, then they should seek a court order suppressing that section. Some reports are regularly prepared with warnings in relation to dissemination, for example, Children's Court Clinic reports. These warnings are usually related to the distress which may be caused to the child or parents involved in the Children's Court Clinic assessment. Lawyers must follow any court-ordered restrictions placed on dissemination.

Where a report is only made available on the day of a court hearing, lawyers should consider seeking an adjournment of the matter to enable a proper discussion with the child of their wishes in relation to any issues raised in the report.

Conflicts of interest

Lawyers for children in child protection proceedings should be guided by the Solicitors' Rules concerning conflicts of interest.

Representing multiple children

Often a protection application will involve more than one child from the same family who requires legal representation. Usually siblings will be referred to the same lawyer unless there is a real or potential conflict of interest that would prevent the lawyer from carrying out their duties of representation for each child.

Section 524(5)-(6) of the Act provides that the court permits lawyers to act for more than one child in the same proceeding where no conflict of interest will arise.

It is particularly important to anticipate any conflict as early as possible where children are involved, as they may find changing lawyers during proceedings confusing and unsettling.

Sometimes sources of conflict will be apparent from the outset and inappropriate referrals will be avoided. But, both direct and best interests representatives need to independently consider whether conflict issues exist before proceeding to act for multiple children.

When siblings are referred to the same lawyer, the lawyer will need to consider any indicators that the children have competing interests or wishes. Such indicators include:

- information provided by child protection about the protective concerns and/or the children's needs or wishes suggest conflict
- the siblings do not have both parents in common
- the applications have been made on different grounds or there are substantially different facts relating to the siblings

- the applications involve allegations of conflict or abuse between the children
- the applications have been made on the same ground but relate to actual harm for one or more siblings and likelihood for others
- the children have been placed in different care settings.

Direct representatives will need to confirm that each sibling referred to them is capable of instructing a lawyer. Where only one child has capacity, only that child can be represented and no conflict will arise.

At times, it may be possible for a best interests representative to act for children with different interests or wishes, as they are not bound to act on instructions and the requirements of client legal privilege and confidentiality do not apply in the same way as they do for a direct representative.

A best interests representative must, in each case, carefully consider whether the nature of the issues involved and the wishes of the children make it possible for the lawyer to form a position that serves the best interests of each child. If not, the lawyer should advise the court of the conflict, and arrange through VLA for separate representation for one or more of the children.

Where a lawyer is confident no conflict exists between siblings, they must then seek permission from the court to represent the siblings as required by the Act.

Conflicts emerging during proceedings

If a conflict arises between children represented by the same lawyer, the court may withdraw the permission previously granted to act for multiple children.

Separate to the decision of the court, the lawyer must consider whether their

professional obligations permit them to continue to act for any of the children involved in the light of information already received.

In some instances the lawyer will need to withdraw completely – even on the first day – if they have obtained confidential information which creates a conflict of interest.

Child developing capacity to instruct

Occasionally a child represented on a best interests basis under section 524(4) will develop capacity to instruct during the course of a case, or will turn 10 and thus be entitled to direct representation.

In such cases, the best interests representative needs to consider whether they can continue to act for the child, on a direct instructions basis. This would only be possible where the lawyer:

- has conducted the case in a way that is consistent with the child's expressed wishes, and
- the child consents to the same lawyer continuing to act.

Where this isn't the case, the lawyer must withdraw and request the child be referred to a different lawyer.

Children's needs

When working with children, lawyers should seek to understand the individual life experience, and perspective of each child and not make assumptions about their needs or difficulties. However, lawyers should be careful that they don't consider the child's experience or wishes in isolation from their family, social and cultural context.

Factors relating to a child's physical and mental health, cultural and religious identity, family and peer relationships, education, disability, housing situation, or sexuality will impact on a child's experience of the world around them and of the child protection system. In some cases they may indicate the child is at particular risk of disadvantage or marginalisation, has certain entitlements to services or resources, or may need special assistance to participate in proceedings.

All lawyers should consider how these factors impact a child they are acting for and identify the strategies, services and resources that may assist the child and promote their best interests. This means lawyers need to have a working knowledge of the child and family service system, and of policies, initiatives or legislative entitlements relevant to children involved with child protection.

Depending on the nature and urgency of a child's needs, the services required and any other relevant considerations (such as availability and cost of services), the lawyer should advocate for Child Protection to put services in place, and/or consider making a direct referral.

Direct representatives should discuss the benefit of any proposed services with their child client and only pursue these with the child's explicit consent. Best interests representatives should also consult with the child where possible, and advise other parties before taking further steps to address the child's needs.

The sections that follow outline specific resources and considerations for good practice in working with Aboriginal and Torres Strait Islander children, children with a disability, education needs, cultural and religious diversity and LGBTIQ+ young people.

Aboriginal and Torres Strait Islander children

Lawyers representing Aboriginal and Torres Strait Islander children need to focus on the needs and wishes of the individual child as they would with any child, but in addition must be aware of and advocate for the cultural rights of the child, which are enshrined in *The Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The Charter recognises that Aboriginal persons hold distinct cultural rights, and must not be denied the right with other members of their community:

- to enjoy their identity and culture
- to maintain and use their language
- to maintain their kinship ties
- to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Aboriginal children in the child protection system have a fundamental right to preserve and enjoy their Aboriginal culture in connection to family and community. This connection is often disrupted when an Aboriginal child enters the child protection system. It is important that a child's Aboriginal status is identified as early as possible to ensure that proper consideration can be made of their cultural and legal rights. Lawyers should ask children directly about whether

they identify as Aboriginal and/or Torres Strait Islander, and not make assumptions.

Lawyers should be mindful that a child's identity develops over time and a child who does not identify as Aboriginal at one point in time may identify as Aboriginal at a later point in time. Lawyers should also be aware that it is the practice and policy of Child Protection to identify a child as an Aboriginal child if one or both of a child's parents identify as Aboriginal. Child Protection accepts self-identification and does not require proof of Aboriginality.

Lawyers must proactively advocate for the child's rights to be met and for services to be provided in a culturally safe way.

Culture

'Culture is about family networks, Elders and ancestors. It's about relationships, languages, dance, ceremony and heritage. Culture is about spiritual connection to our lands and waters. It is about the way we pass on stories and knowledge to our babies and children; it is how we greet each other and look for connection. It is about all the parts that bind us together.' (Andrew Jackomos PSM, Former Commissioner for Aboriginal Children and Young People in 'Always was, always will be Koori children' p. 9).

Cultural safety

Cultural safety has been described as an environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience of learning, living and working together with dignity and truly listening ('Always was, always will be Koori children' p. 9).

In order to provide comprehensive, culturally safe legal representation to Aboriginal children, lawyers need to understand:

- the cultural rights held by all Aboriginal people including children, as articulated in the Charter
- the positive impact for children arising from a strong connection with culture
- the historical and current impact of government child protection policies on Aboriginal children and families, including the forcible removal of Aboriginal children from their families and culture over decades resulting in 'stolen generations', and the ongoing significant over-representation of Aboriginal children in child protection and out of home care.
- the legal requirements in the Act pertaining to child protection decisions about Aboriginal children, including:
 - consideration of the need to protect and promote a child's Aboriginal cultural and spiritual identity and development in the determination of best interests (section 10)
 - the Aboriginal Child Placement Principle (sections 13 and 14)
 - cultural planning for Aboriginal children in out of home care (section 176)
 - involvement of Aboriginal family members, community members and agencies in decision making (section 14)
 - restrictions on the making of a permanent care order in respect of an Aboriginal child (section 323)
- the provisions of section 18 of the Act, which enables Aboriginal Community Controlled Organisations (ACCOs) to be authorised to exercise the powers and perform the functions of the Secretary of DHHS in relation to a protection order in respect of an Aboriginal child. This program

is known as Aboriginal Children in Aboriginal Care (ACAC)⁷

- the role of the Aboriginal Child Specialist Advice and Support Service (ACSASS), which is funded by DHHS to provide expert advice and case consultation to child protection about culturally appropriate intervention in respect of all reports regarding the abuse or neglect of Aboriginal children and regarding significant decisions in all phases of child protection.

A lawyer acting for an Aboriginal child on either a direct or best interests basis should:

- consider each of the above points in relation to the child in question
- explain all relevant legal provisions to the child in clear, simple language
- sensitively explore with the child their family and cultural connections, to help identify support and potential placement options (where required)
- seek the child's views and wishes on all relevant matters
- identify cultural and family support that could be put in place for the child through consultation with a local ACCO or other Aboriginal service provider (with consent of the child, in the case of direct representation)
- advocate strongly for the child's legal and cultural rights to be met, including but not limited to the completion and

implementation of cultural plans, involvement of ACSASS and application of the Aboriginal Child Placement Principle where relevant (noting that such advocacy must be consistent with the child's wishes in the case of direct representatives).

Useful resources:

[Deadly Story](http://www.deadlystory.com/)⁸ has extensive information on Aboriginal identity, culture and history, a directory of Aboriginal services in Victoria and material on cultural support planning in child protection.

[VLA Checklist – Aboriginal Child Placement Principle](https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-checklist-aboriginal-child-placement-principle.docx)⁹

[Aboriginal Child Specialist Advice and Support Service \(ACSASS\)](https://providers.dhhs.vic.gov.au/program-requirements-aboriginal-child-specialist-advice-and-support-word)¹⁰ provides more information on the role and scope of this service.

[Aboriginal Children in Aboriginal Care](https://dhhs.vic.gov.au/publications/aboriginal-children-aboriginal-care-program)¹¹ provides more information about the ACAC program.

[Always was, always will be Koori children](https://ccyp.vic.gov.au/assets/Publications-inquiries/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf)¹² report of the Commission for Children and Young People's 2016 systemic inquiry into services provided to Aboriginal children and young people in out of home care in Victoria.

[DHHS Child Protection Manual – Aboriginal children policies and procedures](https://dhhs.vic.gov.au/publications/aboriginal-children-aboriginal-care-program) sets out the way in which Child Protection will work with Aboriginal children and families.

⁷ At the time of writing, authorisation had been granted to the Victorian Aboriginal Child Care Agency and the Bendigo and District Aboriginal Co-operative for a limited number of Aboriginal children on final orders in defined catchments.

⁸ <http://www.deadlystory.com/>

⁹ <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-checklist-aboriginal-child-placement-principle.docx>

¹⁰ <https://providers.dhhs.vic.gov.au/program-requirements-aboriginal-child-specialist-advice-and-support-word>

¹¹ <https://dhhs.vic.gov.au/publications/aboriginal-children-aboriginal-care-program>

¹² <https://ccyp.vic.gov.au/assets/Publications-inquiries/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>

Children with a disability

Where a child has a physical, mental or intellectual disability or health issue, a lawyer should take particular care to help realise the child's right to participate in proceedings insofar as he or she is able. This will often mean lawyers need to undertake more detailed preparation and demonstrate flexibility and creativity. As a first step, lawyers should seek to understand as much as possible about the nature of the disability (or disabilities) before meeting the child, to help inform their approach. Other actions include:

- arranging meetings in locations that are accessible and comfortable for the child
- identifying goals, a clear outline on what needs to be discussed, and an appropriate sequence to deliver the information ahead of each meeting or discussion
- modifying language and communication style for the child, and using repetition as a tool to maximise capacity
- presenting information in a range of formats (eg verbal, written, visual) to meet diverse learning needs
- taking regular breaks (if required) when explaining abstract concepts, and increasing the difficulty of the concepts over time
- keeping distractions and transitions to a minimum.

The lawyer should be mindful to reflect the language a child uses to describe any condition they have, as referring to a disability or a particular diagnosis may be confusing or upsetting for them.

To strengthen their advocacy for the child's wishes or best interests (as applicable), the lawyer should be familiar with the common features of any disability affecting a child they are acting for, how these impact on the individual child, and support options available through the National Disability Insurance Scheme, school or other service.

When expert assessments are ordered or services put in place, the lawyer should enquire as to the experience or specialty of any practitioner working with the child, and advocate as needed to ensure that practitioners engaged are knowledgeable in working with children with a disability.

Useful resources:

[National Disability Insurance Scheme](#)¹³

[Raising Children: guide to disabilities](#)¹⁴

[Raising Children: children with autism spectrum disorder](#)¹⁵

[Program for Students with a Disability](#)¹⁶
(Victorian government schools)

Education needs

All children in Victoria are required to attend school until they turn 17, unless they have completed Year 12 or equivalent. Engagement and success in education is strongly associated with positive outcomes in adulthood.

The educational needs of children in the child protection system require close attention by lawyers and the court, as the placement of children in out of home care and regular moves between multiple placements can cause significant disruption to a child's education. Children in out of home care tend

¹³ <https://www.ndis.gov.au/people-disability/access-requirements.html>

¹⁴ <https://raisingchildren.net.au/disability/guide-to-disabilities>

¹⁵ <https://raisingchildren.net.au/autism>

¹⁶ <https://www.education.vic.gov.au/school/teachers/learningneeds/Pages/psd.aspx>

to have poorer educational achievement than their peers, and are less likely to complete school and continue in further study. Maintaining educational engagement and stability for a child where possible is important both for helping to maintain a sense of normalcy in their life and to support their long-term economic and social wellbeing.

In seeking a child's views on possible options regarding placement and other decisions before the court, lawyers should enquire directly about their experience of education and be alert to any issues – such as poor attendance, struggling in class, suspension or expulsion or delays in transition to a new school – that might suggest the child's education needs are not being met. Where a proposed placement is likely to involve a change of schools, lawyers should explicitly seek the child's view on this.

Specific policies and initiatives have been developed to identify and respond to the education needs of children in out of home care. The *Out of Home Care Education Commitment* is a partnering agreement between the Department of Health and Human Services, the Department of Education and Training and other education and welfare peak bodies that sets out strategies for supporting children's education and the responsibilities of different parties, for example the school and the child's case manager.

Under the partnering agreement, all children in out of home care are entitled to priority learning needs assessments, an individual education plan that outlines how their education needs will be met, and a learning mentor in their school to provide extra help if needed.

The partnering agreement also sets out the responsibilities for ensuring a smooth and quick transition between schools when this is necessary due to placement changes.

Lawyers should familiarise themselves with the partnering agreement to help inform any necessary advocacy on education issues, as well as to help with connecting clients to available support.

Useful resources:

[Out of Home Care Education Commitment](#)¹⁷

[LOOKOUT Education Support Centres](#)¹⁸ have been established in each Department of Education and Training region to support schools to meet the educational needs of children in out of home care.

[Raising expectations](#)¹⁹ is an initiative of the Centre for Excellence in Child and Family Welfare providing resources, support and services to help young people in care and care leavers access higher education.

Cultural and religious diversity

Decision makers in the child protection system are required to consider a child's cultural and religious identity when determining whether a course of action is in their best interests. Therefore, lawyers need to seek a child's perspective on their cultural and religious needs, and how these may be affected by various child protection decisions, such as placement with a carer of a different culture or religion. Lawyers should incorporate arguments about these matters into their advocacy where relevant.

In working with children of diverse cultural and religious backgrounds, lawyers need to:

¹⁷ <https://www.education.vic.gov.au/Documents/school/teachers/health/PartneringAgreement.pdf>

¹⁸ <https://www.education.vic.gov.au/about/programs/Pages/lookout.aspx>

¹⁹ <https://www.cfecfw.asn.au/raisingexpectations/>

- not make assumptions, and instead seek to understand the child’s perspective on their cultural and religious identity and the role this plays in their life
- tailor their language and use interpreter services where necessary when working with children not proficient in English
- be aware that the child may be unfamiliar with the social and legal concepts involved in the proceedings, and may possibly be fearful of courts, government departments and authorities
- understand that the child may be fearful of isolation by his or her community or fearful of his or her community becoming aware of the proceedings
- be mindful that the child may be fearful of expressing wishes that are based upon or contrary to religious or cultural beliefs and background
- pay particular attention where the child is being placed in out of home care, to ensure that their cultural needs are being considered in placement decisions.

Lawyers may consider consulting with extended family or community members to understand their capacity to support the child, however this should only be done after speaking with the child (and obtaining explicit consent in the case of a direct representative).

In reviewing relevant reports or obtaining expert assessments, the lawyer should enquire as to the expert’s knowledge and experience in working with children from the same culture and their capacity to address relevant cultural issues.

Useful resources:

[Centre for Multicultural Youth](https://www.cmy.net.au/)²⁰

[Australian Institute of Family Studies](https://aifs.gov.au/cfca/publications/working-culturally-and-linguistically-diverse-cald-adolescents/export)²¹ has a comprehensive resource of research and practice information for people working with culturally and linguistically diverse (CALD) young people, including those in out of home care.

LGBTIQ+ young people

Sexual identity is included as a factor to be considered by the court and Child Protection when making decisions in the best interests of a child.²² The needs of lesbian, gay, bisexual, transgender, intersex, queer and gender diverse (LGBTIQ+) children and young people in the child protection system warrant special attention, due to the particular challenges they may experience, including:

- poor mental health due to discrimination and abuse regarding their sexual or gender identity or intersex status
- rejection by family members
- not feeling accepted or safe in out of home care, and
- difficulty engaging with services that may not acknowledge or support their identity or status.

Lawyers should understand and be alert to these challenges, and supports available, so they can comprehensively advocate for the needs of LGBTIQ+ young people they represent to be considered in child protection decision-making.

To provide supportive representation to LGBTIQ+ young people, lawyers should:

²⁰ <https://www.cmy.net.au/>

²¹ <https://aifs.gov.au/cfca/publications/working-culturally-and-linguistically-diverse-cald-adolescents/export>

²² Sexual identity is the term used in section 10 of the Act. While gender identity and intersex status are not expressly mentioned, lawyers should also consider the needs of children who are trans or gender diverse and children with an intersex variation.

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- be familiar with key terms and concepts related to sexual and gender identity and intersex status, and services and support for LGBTIQ+ young people
 - recognise that it is the right of LGBTIQ+ young people to choose whether they disclose their sexual or gender identity or intersex status, and never force someone to disclose their identity
 - ask the child which name and pronoun they would prefer the lawyer to use, and consistently use these in communication with and about the young person
 - where a young person discloses their sexual or gender identity or intersex status, discuss with them how this may be relevant to the court's decision-making, and whether it is something they wish to be shared with the court (noting that this would mean their parent/s and Child Protection would be told)
 - only disclose the young person's sexual or gender identity or intersex status to the court, other parties, and other professionals where the young person has given consent
 - explore with the young person whether they would like to be connected to LGBTIQ+ support services, and take steps to refer them directly if the young person does not want their identity or status to be shared with other parties
 - recognise that a young person may change how they identify their gender or sexuality, including their preferred name and/or pronoun, and respond supportively if this occurs.

Useful resources:

[QLife](https://qlife.org.au/)²³ provides anonymous and free peer support and referral for LGBTIQ+ people

[Rainbow Network](http://rainbownetwork.com.au/)²⁴ includes resources and a directory of youth groups and services for LGBTIQ+ people in Victoria

[Minus18](https://www.minus18.org.au/)²⁵ is a nationwide information and support network for LGBTIQ+ young people

[CREATE Foundation](https://create.org.au/resources/lgbtq/)²⁶ have produced a video and brochure of 'Do's and Don'ts' for working with LGBTIQ+ young people in out of home care.

²³ <https://qlife.org.au/>

²⁴ <http://rainbownetwork.com.au/>

²⁵ <https://www.minus18.org.au/>

²⁶ <https://create.org.au/resources/lgbtq/>

Ending the relationship

The lawyer's relationship with a child will usually formally come to an end at the time a final order is made by the court.

The lawyer should prepare a child for the end of the proceedings and the lawyer-child relationship in advance of this occurring, using their knowledge of the child to determine how best to approach this conversation. For some children, their lawyer might be one of many professionals in their life and/or contact was limited or difficult during the case. For others, the lawyer may have become a consistent, supportive adult presence in their life. In this case, the lawyer should be particularly sensitive to the needs of the child and discuss what contact, if any, they will continue to have. The lawyer should discuss with the child any support needs they have and who best to talk to about these if needed; this process may require the lawyer to follow up with Child Protection or other relevant services.

While some best interests representatives may have established only a limited relationship with a child due to their age or particular circumstances, they should still give consideration to how they will end the relationship with the child, so that this does not come as a surprise or create distress for the child and/or their family or carer.

Communicating the order to the child

The lawyer should review all written orders to ensure that they conform to the court's verbal orders. The lawyer should discuss the order and its consequences with the child, and check that the child understands what is to happen next. The lawyer should also always communicate the outcome of the case to the child verbally and then in writing, taking care

not to introduce any important points that have not already been discussed with the child.

Where the decision of the court is not in line with what the child wants, the lawyer should take extra care with this conversation as the child may be distressed and even angry at the lawyer. The lawyer should take time to discuss with the child the court's decision and any issues causing the child distress, and establish the child has someone to support them following the discussion.

Appeal or review of decisions

If the decision of the court (either a final order or an Interim Accommodation Order) does not reflect the child's wishes, the direct representative should consider and discuss with the child:

- the positives and negatives of an appeal (or application to revoke in the case of a family reunification order)
- the likelihood of it resulting in a different outcome, and
- whether or not aid is likely to be granted.²⁷

If after such consultation, the child wishes to appeal or revoke the order, and the lawyer considers there is merit in doing so, the lawyer should take all steps necessary to apply for a grant of aid, run the appeal (if aid obtained), and maintain regular contact with the child leading up to and during the appeal process.

Similarly, where a best interests representative assesses that the outcome of proceedings does not reflect the child's best interests, they may seek to appeal the order. In this case the decision to appeal rests with the lawyer not the child, however the lawyer should advise the child that an appeal is being pursued and the reasons for this. Best

²⁷ Guidelines for the funding of appeals and applications to revoke orders in child protection matters are set out in the [VLA Handbook for lawyers - State family guidelines](http://handbook.vla.vic.gov.au/handbook/6-state-family-guidelines) <http://handbook.vla.vic.gov.au/handbook/6-state-family-guidelines>

interests representatives will also need to ensure the proposed appeal meets conditions set out in the VLA Handbook for a grant of legal assistance.

During the course of proceedings, or following the making of a final order where Child Protection remains involved with a family, a child may wish to seek a review of a case planning decision made by Child Protection. The child may seek an internal review, and where unsatisfied by the outcome of this, may seek further review through the Victorian Civil and Administrative Tribunal. However, only in certain circumstances will a child be eligible for a grant of legal assistance to help them with these processes. The eligibility criteria for legal aid funding for case plan reviews is set out in the VLA State family guidelines, [Guideline 4 – review of case planning decisions](#).

Lawyers should make sure children are aware of their right to seek a review of case planning decisions, the nature of the process, and whether they are entitled to legal assistance.

For more information on case plan reviews, refer to:

- [DHHS Child Protection Manual](#)²⁸
- VLA toolkit on [Child protection case planning and reviews](#)²⁹

Review

This guide will be reviewed 12 months following its publication in March 2019. VLA welcomes feedback or questions about the guide at any time.

Please contact Child Protection Transformation on childprotectiontransformation@vla.vic.gov.au

²⁸ <http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/case-planning/internal-review-decisions>

²⁹ <https://www.legalaid.vic.gov.au/information-for-lawyers/practice-resources/state-children-youth-and-families-law/child-protection-case-planning-and-reviews>

