

# CARE AND PROTECTION WORKING WITH CHILDREN

**A GUIDE**  
TO BEST  
PRACTICE FOR  
CHILDREN'S LEGAL  
REPRESENTATIVES

**LegalAid**  
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# Introduction

## Seen and heard

### *Giving children a voice in care and protection proceedings*

The children and young people<sup>1</sup> who become the subject of care and protection proceedings have diverse stories, but common to many of these stories are experiences of disadvantage, abuse, and trauma. As a legal representative for children in these proceedings, you play an important role in helping them to participate in the decisions that will shape their lives.

This best-practice guide has been developed to help legal representatives improve these children's experience of the legal process and support them to make sense of court proceedings.

The strategies you will find in this guide will encourage you to reflect on the histories and experiences of the children for whom you are appointed, and to consider different ways of engaging with and developing your relationships with them. Ultimately, it aims to help you apply a critical lens to the way you facilitate children's participation in proceedings.

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1 *The Children and Young Persons (Care and Protection) Act 1998 (NSW)* defines a "child" as a person aged 15 or younger, and a "young person" as a person aged between 16 and 18. In this guide, we use "child" to refer to all people under the age of 18.

# 1. Your role as a representative

*The role of children’s legal representatives in care and protection cases may not be well understood by children, parents and carers.*

The role of children’s legal representatives in care and protection proceedings is different from that of children’s legal representatives in criminal or family law proceedings, though there are some common features.

*The Children and Young Persons (Care and Protection) Act 1998 (NSW) creates two distinct categories of children’s legal representative.<sup>2</sup>*

**Independent legal representatives** act on a ‘best interests’ basis for children aged 11 years or younger, who are presumed under the Act to be incapable of giving proper instructions.

**Direct legal representatives** are directly instructed by children aged 12 years or older, who are presumed under the Act to be capable of giving proper instructions. These presumptions are rebuttable on an application to the court.

The ‘best interests’ role, in particular, may not be well understood by participants in care and protection proceedings because it differs from the experiences of adults dealing with legal professionals, and from the portrayal of lawyers on television or in other media.

Importantly, an independent legal representative’s role includes asking about, and listening to, the child’s views and putting evidence before the court about the child’s wishes, but the independent legal representative is not instructed by the child and is not bound by the child’s views. If, on the evidence, the independent legal representative considers a particular outcome or course of action to be in the child’s best interests, they may recommend it to the court even where it contradicts the child’s wishes.

The ‘direct representation’ role may also be confusing to participants, because direct legal representatives must act on the instructions of the children they represent – even though the children themselves do not generally attend court.

A direct legal representative must regularly inform and advise the child they represent about their case, and regularly update their instructions. A direct legal representative should not appear without a child’s up-to-date instructions.

.....  
2 Section 99 of the Act provides that the Children’s Court may appoint a legal representative to act for a child or young person. Sections 99A, 99B, 99C and 99D of the Act set out the differences between the two categories of children’s legal representative, and the basis of representation.

Whether you appear for a child as a direct legal representative, or on a best-interests basis, you may find that the disconnect between the child's expectations and experience affects your relationship with the child. It may also affect the child's ability to participate in decision-making, or their willingness to share information that would help you determine what is in their best interests. Effective communication with the child, and regular explanations about what is happening and why, will be your most important tools in bridging the gap.

**A direct legal representative should not appear without a child's up-to-date instructions.**

### **The role of caseworkers**

All children involved in care and protection proceedings have at least one caseworker assigned to them. Caseworkers may be employed directly by the NSW Department of Communities and Justice, or by a non-government organisation – otherwise known as funded service-providers – charged with carrying out casework on behalf of the department.

Caseworkers play an important role in the lives of children in need of care and protection and are in regular contact with the children for whom they have casework responsibility. They may also share the children's views with the court through the preparation of up-to-date care plans and cultural plans.

But it is the children's legal representative who has responsibility under the Act for representing a child in care and protection proceedings. Children's legal representatives are not involved in casework decision-making, and do not have ongoing relationships with family members or carers. This puts them in the unique position of being able to represent children with complete independence.

Proceedings in the NSW Children's Court are to be conducted in a non-adversarial manner, and with as little formality as the case permits.<sup>3</sup> Maintaining a courteous, professional relationship with caseworkers and other legal representatives is an important part of this and will help you provide a better service to the children you represent.

<sup>3</sup> See section 93 of the Act, which sets out the general nature of proceedings.

## 2. Meeting with children

*Building warm, trusting relationships will help you to represent children's unique interests in proceedings*

Your first meeting with a child is an important opportunity for you to begin earning their trust.

In all but the most exceptional circumstances, it is best to meet children face-to-face, at least initially. This is true even for young children, who also have a right to be spoken with, and to be heard. In care matters, children have a right of appearance in any proceeding that relates to them.<sup>4</sup>

If you are acting as an independent legal representative and decide not to meet with a child you represent, you should make a comprehensive file note setting out your reasons. If you are acting as a direct legal representative, you must meet with the children you represent to obtain and to update your instructions. At a minimum, your first meeting should be held face-to-face.



*I represent lots of children. Until I meet them in person, they're just names I am reading about. Once I meet them, I remember them, I remember things they have said to me and details about them. I don't forget the child I am representing when I have met them in person.*

*An independent legal representative*

Sometimes, meeting a child with their siblings can help the child feel more comfortable. But you should ensure you also meet with the child alone, since the views children express may be influenced by the presence of others. Spending time with the child one-on-one also provides an opportunity for you to explain your role in a way the child understands and start to build a relationship with them.



### TIP

Legal Aid NSW produces a range of resources to help children and their families understand what happens in care and protection proceedings, and the role of children's legal representatives. Visit [www.bestforkids.org.au](http://www.bestforkids.org.au) to find videos adapted for younger children, older children and Aboriginal children, as well as links to further resources.

<sup>4</sup> See section 98 of the Act.



## Before the first meeting

Your aim is to ensure that children feel comfortable telling their story, asking questions about the process and about their rights, and expressing their views or providing instructions. Always read the material that has been filed in proceedings or is otherwise available to you, for example subpoenaed material, before meeting with the child. It will provide important context and help you make decisions about suitable arrangements for your first meeting. You may also wish to speak to other professionals involved in the child's life, for example health professionals.

- Consider how you can draw on the material available to you to ask questions that are sensitive to the child's circumstances, using words that feel authentic to you. Children are often delighted when you can tell them things about themselves, such as where they go to school, or about their siblings or pets – but always be thoughtful when approaching these topics. Some children may not attend school regularly, for instance, or they may have been separated from their siblings or pets.
- Ask yourself what information is already available to you about the child's needs, wants and circumstances, and how this may affect arrangements for your meeting. If the child has a disability, what arrangements can you make to ensure the child's needs are met during the meeting? Do you need more information about the child's disability, and if so, how will you obtain it?
- Think about the most appropriate place to meet with the child. This might be your office, a Department of Communities and Justice office, or an office of the funded service-provider with casework responsibility for the child. You might also consider meeting the child at the courthouse, at their school, or at some other location. Consider how various meeting locations will be perceived by or will affect the child or other parties to the proceedings. For example, it may not be appropriate to meet a child at their home or out-of-home care venue as it may be uncomfortable for the child to speak freely, and there is a risk that you could be called as a witness in the proceedings.
- If it is possible, and appropriate, ask the child where and when they would feel most comfortable meeting. School is a neutral location, but keep in mind that it may also be the only place a child is free from having to think about their care arrangements. Meeting the child at school may also expose the child to unwelcome questions from peers or school staff, so you might consider arranging a meeting outside school hours.
- How is the child likely to get to the meeting? How long will it take the child to travel to the meeting location, and who will bring them? These factors may influence what the child shares with you and how comfortable they feel. Asking yourself these questions will also help you to identify needs that the child may have on arrival, such as access to a toilet, or a drink of water.

- Ensure that the person who is bringing the child to the meeting understands that you will be meeting with the child one-on-one. Having this conversation in advance can help manage the person's expectations or worries and avoid any misunderstandings.

## **Developmental and cultural considerations**

- Consider creating a more child-friendly meeting space with colouring pencils and paper, a chalk board, soft toys or cushions, or interactive toys such as building blocks. Drawing materials may help younger children communicate what they think or would like to happen.
- Think about the clothing you will wear to the meeting. Will the child feel more at ease if you remove your tie or jacket, or wear casual shoes in which you feel more relaxed?
- Learn about the child's cultural background in preparation for the meeting. Find out about the child's language and communication skills. Are there supports that might help to facilitate the meeting?
- Consider ways that you can acknowledge the child's culture and sensitively explore with them how they express their culture, such as through faith-based practices or, in the case of Aboriginal and Torres Strait Islander children, through relationship with community and Country.



## At the first meeting

It is important to help put children at ease early on about what the meeting will involve, and its purpose. Regardless of a child's age, you should regularly check that the child understands and wants to continue. You can 'give permission' for the child to be sad or angry by reflecting back what they tell you in a non-judgmental way. Have tissues to hand. You might say: "You sound angry about that, which is okay," or "Does grandma know you feel so sad about that?"

The tips below are good to keep in mind at every meeting you have with children, but they are especially important when you are meeting with a child for the first time.

Whether you are acting as an independent legal representative or direct legal representative, you should consider:

- your body language
- choosing words that will be easily understood by the child you are meeting
- asking the child what they prefer to be called
- telling the child what they can call you
- explaining clearly at the start what you would like to cover in the meeting
- using engaging statements, like "I have been looking forward to meeting you," and "Sometimes it can be hard to talk to someone you don't know – what would you like to know about me?"
- asking if they know why they are meeting with you
- asking questions, you can be sure they know the answer to, like "Who lives at home with you?" or "What have you been doing today?"
- asking if there is anything about the meeting they are worried about, and if there is anything they are not allowed to say, or that they have been told to tell you
- reassuring the child that they can speak freely and do not need to keep secrets from you, while being clear about the limits of confidentiality
- letting the child know that they can end the meeting at any time if they have had enough,
- telling them about the role of the magistrate, and that they want to know what the child thinks and what they would like to happen, and
- explaining why you are taking notes. You might say: "This helps me remember what we talked about. It goes on your file, which no one else sees. If you would like to draw me a picture, that might help me too."





## TIP

Note down some of the child's personal interests or memories. When next you meet with the child, talk about the things that were important to them, or show them the picture they drew for you to show that you remember them.

As an independent legal representative, you might tell the child:



*My job as your lawyer is to help the magistrate work out what the best plan for you is. I need to tell the magistrate what you think as well. But first I need to find out a bit more about you.*

*Today, I'll tell you a bit about me and we'll also talk about why you're here. Then, if you want to, you can ask me some questions or tell me what you would like to happen. At the end I'll check in with you about what we've talked about. Does that sound okay with you?*





As a direct legal representative, you might tell the child



*My job as your lawyer is to help you to understand what is happening at court and to answer questions you might have. I also listen to what you want and talk to you about your options. You don't have to say anything if you don't want to – it is okay to say, 'These are adult decisions and I don't want to be involved'. It's also okay to change your mind about what you want.*

*I'll help you work out if the magistrate is likely to agree to what you want, and if not, whether there are other things you could ask for until you have more information. I will also tell you if I agree that what you want is a good decision for you, and tell you why I think that. But at the end of the day, it does not matter whether I agree with you – it's my job to tell the court what you want.*

*Remember, the magistrate does not have to do what you want. The magistrate's job is to listen to all the evidence and then decide what they think will be best for you.*

### **Practical questions to ask yourself**

- Do you need to rearrange the seating so there is a comfortable distance between you and the child and any physical barriers such as a desk have been considered?
- Can you help the child to navigate the space where you are meeting, for example, by asking the child which chair they would like to sit in?
- How do you feel about managing a child's expressed feelings or thoughts? Are there any supports or tools that you will need?
- Will the child feel safer if you tell them where the person who brought them will be waiting, and reassure them they will return to them afterwards?
- Does the child know where to find the bathrooms?
- Would the child like a drink?

## **Capacity to give instructions**

One reason it is important to meet with children face-to-face, at least initially, is that it will help you assess whether a child has capacity to give instructions.

As a direct legal representative, if you form a view that the child does not have capacity to give instructions, you have a duty to make an application for the child to be independently represented.

You can also make an application that a guardian ad litem be appointed for the child.<sup>5</sup> It is important to remember that if these types of applications are granted, you will be taking away the child's right to instruct you, so they should be informed by independent psychological or medical evidence where possible, and should never be made unless you have met the child.



## TIP

When you are appointed for a child nearing their 12th birthday, or who will turn 12 during proceedings, you should consider making an application to the court to act as their direct legal representative. This avoids the possibility that you will need to transfer the matter to a direct legal representative when the child turns 12.

## Meeting remotely with children

There may be times when it is not practical, or possible, for you to meet the children you represent face-to-face—for example, where children live in very remote locations. Even when you cannot meet a child in person, you can and should communicate with them.

Many children are very familiar and comfortable with technology, and many older children have access to their own devices. When deciding whether it will be appropriate to meet with a child via technology, you should consider:

- the child's age, stage of development and maturity
- the child's access to technology, including limitations relating to internet access or data costs
- whether the child can speak to you privately, without being overheard
- the most appropriate location for the child during the meeting
- whether the child will need support using the chosen technology platform
- the extent to which the child's carers or other adults, such as teachers, are able and willing to facilitate the remote meeting, and
- any potential risks to the child.

Meetings that take place using video-conferencing platforms, such as Skype, FaceTime or Microsoft Teams, where available, are generally a better option than phone calls. Video-conferencing technology:

- allows the child to see your face and body language
- offers visual cues that will aid in your communications with the child
- may enable you to see if there is a carer or sibling in the same room as the child

5 Sections 98(2A) and 100 of the Act provide that, where the court is of the opinion that a child is incapable of giving proper instructions, it may appoint a guardian ad litem for the child. A guardian ad litem stands in the shoes of the child. They safeguard and represent the interests of the child, and the child's legal representative must act on the guardian ad litem's instructions.

- may help you get a better sense of the environment the child is in, and
- has novelty value, which the child might enjoy.

When planning a remote meeting, remind the child and any adult who is helping to set up the meeting that the meeting is confidential and that you will need to speak with the child alone. Make sure you have a mobile phone number for the child's carer or another adult who will be responsible for the child's welfare at the location where the meeting is to take place. This will be important if the technology fails, you need to quickly end the meeting, or the child becomes distressed and needs support. You should also be alert to anything in your location that might be visible to the child, such as files and folders marked with client names.

At the start of a remote meeting:

- check that the child can see and hear you well, and before discussing any confidential information, check that you can hear the child without the need for the child to raise their voice
- ask the child to switch off any other devices around them to avoid distractions, and
- consider agreeing to a non-verbal signal that the child can give you if they begin to feel uncomfortable or wish to end the meeting.

Throughout the meeting, remember to check in with the child regularly to make sure they are comfortable, and regularly reflect and check that you understand what the child is saying – but without overdoing it.

You may find it more challenging to build rapport in a remote meeting than in a face-to-face meeting. You might try:

- using an interesting digital background, if this is an option in the platform you are using, and encouraging the child to try doing the same, then chatting about their choice
- setting up some interesting pictures in your office that the child will be able to see on their screen—if you want the child to let you into their world, consider sharing something from your world
- asking the child to give you a 'tour' of the room they are in, and
- using objects in the child's environment, such as any musical instruments or sporting memorabilia that might be on display, to learn more about the child's interests.

Be aware that some video-conferencing platforms may allow you to be recorded without your consent. Familiarise yourself with the user guidelines and privacy terms of your preferred technology platform before suggesting or agreeing to it. At the start of the meeting, tell the child or responsible adult that you do not consent to the meeting being recorded and that it is against the law for them to record you without your permission.







## 3. Communicating effectively with children

Beyond the basics of body language, tone and word choice, there are three elements of communication that are critical to improving children's experiences:

- explaining the legal process in a way that is clear and age-appropriate,
- ensuring children are and feel heard, and
- having an ongoing relationship with children.



*Children need to know who will know what they say, and what the information will be used for. And they need to know whether they can veto. I find that children like to know how I will present their views in court, especially if they have expressed a view they think might upset their parent.*

*A children's legal representative*

### Explaining the legal process

Children need simple, neutral explanations about the legal processes their families are involved in and why. You might say: "At the moment, Community Services don't think it's safe for you to live at home, so they have asked the court to decide where the safest place for you to live will be and who is going to take the best care of you. While the court is deciding, how do you feel about staying where you are?" Keep checking in with the child to assess their understanding. You may need to find different ways of expressing information to ensure the child has understood.

Children also need accurate information about what their own involvement in the legal process is or can be. Remember that an important part of your role is to give the child the opportunity to participate in proceedings, to the extent that they wish to do so. You might consider meeting the child at the court after arranging with the registrar to show them the courtroom, or they could attend at a mention. Any such arrangement needs to be managed sensitively, with consideration given to the child's relationship with parents and caseworkers, and any risks to the child taken into account.

As an independent legal representative, some of the things you should usually explain to the child include:

- what your role is, and that you are there to help the child with the matters that the court has to consider, for as long as their case is before the court
- why the child is meeting with you

- that you are independent of everyone else and just there to look after them in court
- who the magistrate is, using age-appropriate analogies – you might explain how magistrates resolve disagreements between people who can't agree, in the same way that teachers sometimes resolve disagreements between children at school
- that you can tell the magistrate how the child is feeling or what the child thinks, but that the child does not have to say anything if they do not want to. You might say: "Imagine the magistrate is sitting on this chair. What do you think they should know?"
- that the other parties will also hear what you tell the magistrate
- that you will tell the magistrate what you think is best for the child, even if that is not the same as what the child wants
- what you are currently thinking of telling the magistrate about what is in the child's best interests, and why
- the limits of what you can keep confidential
- if a Children's Court Clinic assessment or another expert report has been ordered, that the child will meet the person writing the report to help the court decide what is best for the child
- that usually, the parties will get to read the expert report and that you will speak to the child about what can be shown to them after you have read it and talked to the report writer
- that you can provide a photo of the child to the magistrate, if the child agrees
- when the child should expect to see you again and discuss who they can talk to if they are worried about anything, and
- how the child can contact you in the meantime.

**As a direct legal representative, some of the things you should usually explain to the child include:**

- what your role is, and that you are there to help the child while their matter is in court
- why the child is meeting with you
- that you are independent of everyone else and just there to look after them in court
- what it means to "instruct" you
- the limits of what you can keep confidential
- that the child can make choices about whether and how much they participate in the proceedings, and the different ways they can participate
- the options available to the court in making decisions at each stage of proceedings, and the options the child has in giving instructions
- your legal advice about those options

- where the court process is up to, and
- depending on how the court considers the child's instructions and other matters, what is likely to happen next.

As a direct legal representative, you might also:

- confirm the child's understanding of your role and what is happening in court
- confirm the child's instructions and emphasise that the child can change their mind or ask further questions if they need to
- let the child know how to contact you if they need to
- confirm your understanding of how the child wants to participate in proceedings, and
- let the child know when you will see each other again and discuss who they can talk to if they are worried about anything.

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### **Just wondering**

The suggestions offered here may help you address the issues that children commonly worry about, but do not always voice.

- Am I in trouble?
- Will I have to go to court myself?
- Can I go to court if I want to?
- Is my lawyer going to tell my parents everything I've just said?
- Do I have to see anyone else?
- When can I go home again?
- Can I see my pet?
- Why can't I see more of my siblings or parents?
- When will all this be over?
- What happens if I am unhappy about what the court decides?

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It is important to be clear about the limits of confidentiality. Your child client should know what sort of information cannot be kept confidential. Depending on the age and capacity of the child, you may want to warn the child prior to any disclosure that what they are telling you sounds like the sort of information that you cannot keep confidential. The child should always be aware of when you are going to share confidential information and why, and if possible, you should obtain their permission to share the information.

## Ensuring children are and feel heard

When communicating with children, it is important to really listen – not just to the words they are saying, but also to what they are not saying. A key concern for children’s legal representatives is whether children are speaking from a script or otherwise influenced by a parent, sibling, caseworker or carer. Children may also try to give what they think will be the ‘right’ answer to a professional adult.

As a direct legal representative, it can be important to challenge instructions that sound scripted or influenced. You might ask the child, “What do you think your mum is hoping will happen?”

Think about whether you can rely on the instructions after only one meeting, or whether the child needs more time to consider their instructions.

Open-ended questions can help. They offer the child the opportunity to construct a narrative from their own perspective. Examples of open-ended questions include:

- I was wondering if you could tell me why you are here today?
- Can you tell me something about your sister?
- I am interested to hear about when your Nana takes you to see your Dad. Can you tell me about that?
- Can you help me to remember the names of the people in your family?
- I was wondering if you can tell me if there are times when you feel safe or people who you feel safe with?

This kind of questioning allows children to elaborate further, or correct themselves, as needed. At the end of the meeting, repeat what the child has told you, or their instructions, to check that you have understood what they have said. Explain whether and how the information the child has provided will influence any decisions made. Ask the child if there is anything else they would like the magistrate to know, or if there are any questions they want to ask.



Describing a fictional client might help prompt discussion for some children. It can also remind them that you represent children in similar situations all the time, and that they are not alone in their experiences.

You might say, “I saw a girl about your age last week, and we talked about different ways that we could tell the magistrate that she does not feel safe when her parents yell. Can you help me to think of some ways I could tell the magistrate that you feel safer at Nan’s than at home for the time being?” Or you might say, “I saw a boy recently who was also 13. He said that he wanted to live with his Dad, but he thought it was better for his little sister to live with their Nan because his Dad got angry when he drank beer. It reminded me a little bit of your situation.”



*I always try to tease out some of the things that are working well for kids when it comes to contact with their parents. So I might ask, ‘What is your dad good at, do you think?’ and the child might say, ‘Oh, we used to play darts and he’s the best at darts.’ And then that is something that I can take back to court, you know, ‘child’s name used to play darts with her father every Friday night and really enjoyed it, and is there a way we can continue that?’*

*An independent legal representative*

## **Having an ongoing relationship with children**

Children’s legal representatives are often concerned about the impact on children of repeated interviews. However, children can sometimes feel disillusioned with only one meeting. Research suggests most children want an ongoing relationship with their lawyer and that they may not be ready to disclose some things during the first meeting.

It is important that the child can contact you if they need to ask questions, share information they consider important, or change their mind about instructions they have provided in the past. Discuss different options for contacting you with the child, including who might be able to help them contact you if they are too young to do so by themselves, for example, a trusted teacher. Think about writing to introduce yourself to significant adults in the child’s life, include your notice of address for service. Explain your role and that you will be contacting the child during the proceedings.

Consider whether the following options are appropriate in the child's circumstances:

- The child could contact you via their carer, depending on the child's relationship with the carer.
- The child could contact you by phone call, or text message. Check whether the child has a phone they can use, or whether they would be contacting you using a carer's phone.
- The child could email you. Check whether anyone else uses or could access the email account the child plans to use.
- You could talk to the child's school about facilitating contact between the child and you.

**Research suggests most children want an ongoing relationship with their lawyer.**

## **Legal professional privilege**

All communications arising from your appointment as a children's legal representative should be treated as sensitive and kept confidential, except in circumstances where disclosure is necessary for a child's safety or wellbeing.

As a direct legal representative, your communications with a child are subject to legal professional privilege and you must obtain the child's consent to waive that privilege. It is important to explain to a child that privilege may be lost if they talk about what you have discussed with another person. You might say something like:

You are my client and I am your lawyer. The things that you tell me will be kept confidential. This means that I will not tell anyone else what you tell me, unless I have your permission or I am worried about your immediate safety.

The advice I give you is also confidential, and you don't have to tell anyone else what I have told you, even if they ask you to tell them. This is called "client legal privilege". If you do discuss my advice with other people, it is no longer confidential and it will become difficult to keep our conversations just between us.

If someone asks you about what you have said to me, or what I have said to you, and you are not sure what to do, you can talk to me about it.

As an independent legal representative, you do not hold privilege on behalf of the child. Rather, your role is a privileged role and you may waive that privilege at your discretion.



## 4. Guiding children through the legal process

### Attending court

In most care and protection proceedings, children are not required to attend court, and most will prefer not to. Courts sit on school days and lists can involve children waiting at court for long periods of time.

If a child wants to participate in proceedings by attending court in person, you must consider how to facilitate this. For instance, if the matter is listed for a dispute resolution conference it might be appropriate for the child to attend part of the conference. The children's registrar facilitating the conference can help you consider the best way to facilitate a child's participation, as can the clinician, if there is a Children's Court Clinic assessment.

### Giving children access to evidence

Views differ about what evidence should be provided to children, and in what form. In particular, some argue that where children are giving instructions directly, their legal representatives should give them access to all materials relevant to them in the proceedings, just as they would for adult clients. Others give more weight to protective considerations, since children in care and protection proceedings have particular vulnerabilities that adults generally do not.

When considering how best to support children's participation in proceedings, you must consider what information to provide to the child, including whether to provide the child with copies of written materials. Providing evidence to a child may mean they learn highly sensitive information about siblings and significant adults in their lives. Consider the impact that any material you provide to a child will have on them, and what supports are in place to help the child.

You also need to consider whether the child will be able to keep the material private. Children living in a shared residential facility, for instance, may find it difficult to keep material private.

It is often the case that carers and non-departmental caseworkers do not have access to evidence filed in proceedings. This means that providing a child with evidence may place them in the difficult situation of having information their carer or caseworker does not have.

If you decide to read parts of the materials to the child but not give them copies, you need to explain why. You should also consider what supports the child will have access to after speaking with you.

Some things to consider before providing evidence to children include:

- the age of the child
- the child's capacity to understand the evidence



- what information the child already knows
- where and with whom the child lives
- how the evidence can be kept safe and confidential
- whether there is a trusted adult who can help the child secure and manage the evidence
- what supports the child has to manage any impact the evidence might have on their wellbeing, and
- whether the evidence contains sensitive information about a parent or sibling that might adversely affect the child, or that the child might disclose inadvertently.

## **Evidence of children's views in proceedings**

Children are often concerned who else might hear what they disclose to you. They can also feel disillusioned or angry if it appears to them that what they want has not been taken into account by decision-makers.

As an independent legal representative, you must be very clear with children about whether and how their views will be reported to the magistrate and to other people involved in the proceedings. When you speak with a child, you should discuss with them what you intend to recommend to the court, and why. It is important to be honest if you intend to make a recommendation that contradicts what the child has said they want, or what they think a parent, sibling or carer wants.

Research shows that children may resent being 'interpreted' without any opportunity to 'correct the record'. Even if you don't agree with the position the child is taking, be sure to let them know you have heard what they have said. Read your notes back to them, and give them a chance to repeat their point. Make sure they understand that what they have said will go on the court record, even if it is not what you will argue for is the best outcome for them.

You should also explain to the child what has been said in any assessment or expert report that may have been prepared for the case. This is often a missing piece for children who participate in and are interviewed for reports. The content of assessments or reports, or their recommendations, can be upsetting and children may hear about them anecdotally, just as they may hear about orders of the court anecdotally. It is important to inform the children you represent about important aspects of proceedings in an age-appropriate way. You can ask the Children's Court Clinic to provide a version of its assessment or recommendations suitable for the child.

For older children, where an expert report has been prepared, the most ethical approach may be to allow them to read relevant sections of the report. You should only do this after careful consideration and consultation with the report writer and any other professional who may have a therapeutic relationship with the child, such as a counsellor.



*Sometimes what children imagine could be in an expert report is more upsetting to them than what is actually there. But it's a 'proceed with caution' situation. It would only be very rarely that a child should actually be given a copy of the report.*

*An independent legal representative*

Consider approaching confidentiality issues with the child by telling them what you understand about the information they have shared with you and discussing whether and how you should share that information with the court.

You might also help the child understand that their parents or other people involved in the proceedings may already know about some of the things they share with you. You might say, "Okay, you told me that Dad yelling at your Mum really upsets you. Do you think Dad already knows that you have heard him yell at Mum? Do you think he knows it upsets you? If I tell the magistrate although Dad will hear, maybe its ok because he already knows. What do you think?"

Together, you might be able to come up with ways to share important information with the court without disclosing more details than the child wants.

Where there is information that you consider must be shared with the magistrate, you should be clear about this. You might say, "I know you don't want me to share it, but I think it is important for the magistrate to know what happened. How about I say it like this?"

Always be clear and upfront with children about your role, and its limits. As a direct legal representative, you might say, "I'm going to tell the court what you want and do my best to convince the court it is the best outcome for you, but it is the magistrate who makes the decision."

## **Court outcomes**

In care and protection proceedings, orders will be made at each key stage in the legal process, and it is common for children to learn about court orders through comments made in passing by their carers or caseworkers.

If you are acting as an independent legal representative, it is important to communicate directly with children about the outcome of each key stage in the legal process, as this is an important way to support them to participate more effectively in the legal process that is affecting their lives.

If you are acting as a direct legal representative, it is essential to do so, since you will need to obtain further instructions.

At each stage, you should:

- explain what orders have been made, in language that the child will understand
- explain why certain decisions have been made
- explain how the child's instructions or views were taken into account
- let the child know whether their parents or other parties agreed with the orders
- discuss what the orders mean for them, and what will happen next
- obtain instructions (if you are acting as a direct legal representative)
- relay any positive comments the magistrate made about the child, and
- offer the child an opportunity to ask questions, and ensure the child knows how to reach you if they need further information or did not understand something.

Relaying positive comments made by the magistrate about the child can reassure the child that the magistrate is aware of what is happening in the child's life, and is trying to make orders that will help the child

The magistrate talked about how things must be tough for you but she is glad you have settled in with your new carers, and hopes you like your new school.

The magistrate said to tell you how great it is that you have started going to school and says to keep up the good work.

## 5. Additional resources

Anderson, D. (2016). *Legal Aid NSW Independent Children's Lawyers: Survey of children and young people. Report of key findings*. Lismore: Southern Cross University.

Bell, F. (2015). *Discussion paper: Facilitating the participation of children in family law processes*. Lismore: Southern Cross University.

Hollingworth, A. (2015). 'A modest proposal for treating children with respect in care proceedings.' *Communities, Children and Families Australia*, 9(1).

COVID-19: Good practice guide for lawyers – meeting with children via technology This Legal Aid NSW factsheet, available on the Legal Aid website at [www.legalaid.nsw.gov.au/publications](http://www.legalaid.nsw.gov.au/publications) provides guidance for lawyers about meeting with children via technology

