

**RESPONSE OF THE**  
**VIOLENCE AGAINST WOMEN AND CHILDREN WORKING GROUP OF THE**  
**FEDERATION OF COMMUNITY LEGAL CENTRES**  
**TO THE FAMILY LAW COUNCIL DISCUSSION PAPER ON**  
**"INVOLVING AND REPRESENTING CHILDREN IN FAMILY LAW"**

**Model Proposed by Violence Against Women and Children Working Group**

The Violence Against Women and Children Working Group of the Federation of Community Legal Centres after some consideration of the issue, has decided to reject the model presented in the Family Law Council Discussion Paper.

The model in the discussion paper assumes that the primary person appointed to represent the child should be a lawyer who has been given some training in dealing with children. The role of coordinator as proposed in the discussion paper is given a secondary role simply to assist the representative and would not in any way "undermine the capacity of the separate representative to present the child's case to the Court". We believe that the role of child's advocate or representative should not be given to someone whose primary training is legal.

Ideally the Child's Representative would have training and experience in working with children as well as training and experience in family law ie a law degree and a degree in child counselling. However, such a person would be rare if not impossible to find, let alone enough such people to fulfil all the positions needed.

Therefore there seems to be two options available for the qualifications of children's representatives. These are:

1. A qualified and experienced child counsellor with some significant training in Family Law issues; or
2. A legally qualified Family Law practitioner who has undergone some significant training in working with children.

With the paramount object of Family Court proceedings being to promote the best interests of the child, the Violence Against Women and Children Working Group believes the first option best protects and caters for the interests of the child; that someone whose primary interest and training is with children is the best person to guide a child through the Family Court proceedings.

Following on from this we believe that it is very important that one person be the primary contact point for the child. This allows that person to then become a consistent figure in the child's life, able to understand and treat the child's feelings, as well as convey the child's wishes to the Court and/or the legal representative.

Our proposal is that where representation is considered necessary that child counsellor be appointed. If the matter proceeds to hearing then a legal advocate would also be appointed. If the matter proceeds to a hearing then a legal advocate would also be appointed. for the purposes of this submission we employ the term "Child's Representative" when referring to the role of the co-ordinator/counsellor and "legal representative" when referring to the role of legally trained advocate.

### Some Reasons for Primary Role Given to Child's Representative:

1. We believe that experience of children in Family Court proceedings is a very sensitive and delicate issue. Accordingly, in order to genuinely put the child's needs and best interests first, we believe it is essential to place the care and contact of children with the Family Court system with someone who will assist the child rather than compound their trauma. To assume that lawyers are capable of adapting to this role successfully we believe requires an unfounded faith in talents of the legal profession.
2. We also believe that if the Child's Representatives are employed by the Court, they will then be able to have an ongoing relationship with the child should that prove necessary, as outlined above.
3. We believe it is difficult for a child to understand how "their lawyer" won't take their views on, but interpret their views to decide what they believe is in the best interests of the child. This is especially so when you are looking at a person who is primarily trained in legal issues, and not primarily trained in understanding the thoughts and feelings of children. We believe that a Children's Representative trained in child development would be able to have a broader role in the child's life.

The person the child is dealing with will treat the child holistically, rather than approaching them simply as a legal problem. The person trained in dealing with children will be better able to explain the processes to the child, will have a better understanding of the experiences and effect of those experiences upon the child, and will be better able to establish a trusting relationship with the child. Such a person is able to provide more support and therefore reduce the scarring that the child feels at the hands not only at their family but of society as a whole.

### *Role of the Child's Advocate*

We would perceive at least some of the roles of the Child's Advocate as being the following:

1. Support for the child
2. Investigative role into the child's life
3. To instruct the legal representative of the child's instructions and what the Child's Representative believes to be in the best interests of the child
4. To liaise/coordinate the child's input into the Family Court proceedings

As far as possible we believe that the child should be able to advance their own views and instruct whoever is responsible directly. This means if they wish to communicate directly with the legal representative they should be able to do so. This does not obviate the need for the Child's representative as we still see a clear facilitating and support role for them. We also believe that even if a child does not wish to communicate their views directly, their views should always be conveyed even if the Child's representative does not believe this is in their best interests. The Child's representative would be given the opportunity to state what they believe to be in the child's best interests. The role we would ascribe to the legal representative would be akin to the role played by a barrister, being instructed both by the "solicitor", in this model a role fulfilled by the Child's representative as well as the "client", here the child.

In response to the "Issues on which the Council is seeking comment", we make the following submission:

1. **Appropriate involvement of children in the processes associated with family breakdown.**

(a) *Relevant research on the effects of family breakdown on the child:*

The Violence Against Women and Children Working Group believes that it would be useful to conduct research into the long term effects on children of forcing them to have access with their non-custodial parent against their wishes. This is in light of the current culture within the Family Law system of access being a "right" of the non-custodial parent. Such research should be contrasted with research on children who did not want access and for whatever reason were not forced to have access, be it that the non-custodial parent was simply not available, or pursuant to Family Court Orders. This research would be in the light of questioning any sense of loss or regret that the child might have at not having the opportunity to have access with their non-custodial parent.

(b) *The effects of the United Nation "Convention on the Rights of the Child":*

The Violence Against Women and Children Working Group would seek to query the emphasis the Convention on the Rights of the Child placed on "Family" and the primacy of the role given to biological parents. We would seek to ensure the definition of family was made in its broadest terms to allow for the inclusion of non-traditional models, and the changing role of the family in our society. We recognise that there is an inherent bias against non-biological parents in the Family Law Act as it currently stands, with the requirement that there be counselling whenever a custodial order is made to a non-biological parent, be they a grandparent or other primary caregiver. This also parallels, although raises different issues, with the inherent bias against homosexuals, be they biological or non-biological parents.

Further we would question the criteria set out by the Court in *Re K* for the appointment of a separate representative. We believe that the criteria in point (v), as listed on page 37 of the discussion, directly discriminates against homosexuals. The criteria is not even couched in terms of "significant harm to the child". All that needs to be shown is that the person's sexual preferences "are likely to impinge upon the child's welfare". We cannot conceive of a situation where a persons sexuality is "likely to impinge upon the child's welfare" if it does not come under the other criteria of, for example, a parents behaviour being anti social or they are not considered a suitable custodian. All that the criteria does is to emphasise homophobic and discriminatory prejudices about sexual preference and parenting ability. We do not believe that the sexual preferences of either or both parents should be singled out as having the ability to impinge on a child's welfare except in circumstances where it would be discriminatory on the basis of the parents sexual preference.

We believe that other criteria set out in the *Re K* decision are also potentially discriminatory e.g. parents with a psychiatric illness. Precautions should be taken to ensure that a persons ability to parent not be confused with other prejudices about a persons lifestyle or health.

(c) *Giving Children the Opportunity to Express Their Wishes:*

The Violence Against Women and Children Working Group believes that giving children the opportunity to express their wishes is of obvious importance so as to ensure that the experience of those involved, namely the children, are heard and taken into account. However, we believe that this must be tempered with an awareness of the enormous stress that this places on the child and ensure that there is not a compulsion on the child to express their wishes, especially in circumstances where they feel like a pawn in the battles of their parents.

We believe that there would be a benefit in developing a system whereby a child was able to write down an expression of their wishes and address it to the Judge, and for there to be the ability for the Court to receive such written expression of the child's wishes. This of course would only be available for a child old enough to make a written expression of their wishes, however the use of drawings may also provide the avenue of communication for a younger child. The child would need to be advised that their wishes may not necessarily be adopted by the Court, but it would allow for a direct line of communication from the child to the Court without the fear by the child that their wishes shall be interpreted and/or twisted by one of the many people that they are required during the investigation by the Family Court into their fate. It would of course not prevent there being interpretation and submissions and evidence to the Court from the various experts who would have interacted with the child.

In those cases where separate representation is considered desirable it would clearly be the child representative role to advise the child about this procedure. Even in those matters where there has been no order for separate representation, the role of the child's representative could be extended in order to be available to fulfil this need.

(d) *The involvement of children in the process of the Court:*

The Violence Against Women and Children Working Group believe that any direct involvement of the child in the Court processes should be kept to a minimum and only in exceptional circumstances should they be called upon to give evidence either by way of affidavit or as witnesses. Most parties to Family Court procedures find the proceedings confusing, baffling and disempowering and this result would only be increased for a child. It is recognised that the child is under an enormous pressure in being the subject of Family Court disputes, and to literally place them in the spotlight of Court proceedings we believe would be an unbearable burden.

(e) *Ensuring that children do not have a sense of exclusion from decisions on matters directly affecting them:*

The Violence Against Women and Children Working Group believe that it is essential that proceedings are explained to the child, that the Court's decisions and the reasons for the decisions are also fully explained to the child. It is important that they are informed as to what the judge heard about their wishes, and why they were or were not taken into account. We believe that the symbolic and practical importance to a child in the midst of a Family Court battle, of the Child's Representative and legal representative are crucial as being an anchor for a child.

In this sense we believe it is very important that some mechanism be established whereby at the end of the proceedings the child is informed that person X is available to them should they have major problems with the effects of the Court Order. This may also be in the form of ongoing

support to the child if the child so wishes for some period after the decision is made. Whilst we acknowledge that this is a drain on resources, in most cases we believe it would be a symbolic gesture that gives the child the knowledge that there is someone that they can in fact turn to that understands their history and their situation. It would of course need to be made clear that the person's ability to solve any problems is limited.

In the event that the model proposed in this submission is adopted it would be the function of the child's representative to provide this support.

## 2. Protection of the best interests of the child

### (a) *The shared responsibilities of State and Federal Agencies:*

The Violence Against Women and Children Working Group recognises that this is a problematic issue which cannot easily be resolved. We however make the recommendation that there be a greater ease of access to information from the State agencies for all parties, but in particular for the Child's Representative.

### (b) *Identification of the child's need and timing of the response to that need:*

The Violence Against Women and Children Working Group believes that the appointment of a Child's Representative and legal representative at a pre-hearing conference stage is too late in the proceedings and simply serves to delay the process. However, we also recognise that the immediate appointment of a Child's Counsellor at the first return date would appear too early for many circumstances where the issues are not able to be easily identified. Given that there is requirement under the Act for compulsory confidential counselling for the parties, unless this has already been undertaken before the first return date, then we suggest that the question of a separate appointment be made at the second return date once such confidential counselling has been undertaken.

## Funding

### *Legal Representative*

The Violence Against Women and Children Working Group would support the continuing funding of the child's legal representative to remain with the Legal Aid Commissions. They would need to have a list of the Accredited legal representatives for children and continue to fund it on the same basis as they currently do. In our model we propose a reduced role of a child's legal representative, and therefore we would envisage a reduction in the call for resources from the Legal Aid Commission.

### *Child's Representative*

We would envisage that the child's representative would be situated within the Family Court Counselling Section, and be paid employees thereof, and therefore resourcing would come from this section. This would of course necessitate an increase in funds to the Counselling Sections of the Family Court to enable the appointment of these Child Representatives.

## Training

### *Legal Representative*

We would envisage that the child's legal representative would be required to undergo training in order to give them an understanding of the issues which affect children when undergoing family breakdown, and an understanding of the way children react in such situations, including training around the effect of violence and abuse in families upon children, whether they are the direct victims or not. We also believe that they should undergo training around the role of the child counsellor, and the techniques used by such counsellors, and some rudimentary understanding of the training that a child counsellor has undergone.

We believe that such training should be developed by academic institutions with courses in child counselling and development, in conjunction with the Institute of Family Studies and the Family Court. We would propose that any lawyers wishing to become accredited would pay for their own training.

We would also envisage that any practitioners wishing to become a child's legal representative would have a minimum of three years practice in family law. We suggest that the course be run over a semester, in order to ensure a fair degree of commitment by participants, that re-accreditation occur every five years, and that the course be run once a year.

### *The Child's Representative*

We believe they should undergo a comprehensive training around family law, but also with basis training around legal foundations and concepts, and then building onto this an understanding of the family legal system.

We believe that this training should be developed by either the Leo Cussens Institute or the Legal Aid Commission of Victoria, as well as maybe involving the TAFE sector at a later stage.

## Accrediting Body

### *Legal Representatives*

We believe that the accrediting body should be at least auspiced by the Law Institute in consultation, or with representatives from the Legal Aid Commission of Victoria and the Family Court. In terms of the examining body we believe that there should be a range of disciplines involved and oral examination being a crucial part in order to ensure that applicants do not merely have a technical understanding of the concepts involved, but also have the sensitivity and emotional depth to apply them. Therefore we would suggest that the examining body have a representative from the Family Court Counselling Section, the Family Law Section of the Law Institute of Victoria, the Legal Aid Commission of Victoria, and an academic involved in child development.

### *Child's Representative*

We believe that the accrediting body for this should encompass the Law Institute of Victoria, Leo Cussens, a Registrar of the Family Court, and possibly someone from the TAFE sector dealing with legal studies.

*Titles*

For the legal representative we would suggest that the title be either the Child's Legal Representative or possibly Counsel for the Child.

For the child's counsellor, we would suggest either the words Child's Representative or Child's Advocate.

15th August, 1995