

Best practice guidelines framework

Working with children and
young people

CEO foreword

I am pleased to present the first edition of Legal Aid Queensland's *Best practice guidelines for working with children and young people*. Our organisation recognises children and young people under 18 are especially vulnerable in their interactions with the legal system.

These guidelines aim to help Legal Aid Queensland staff and preferred suppliers work effectively with children and young people. The framework and guidelines cover the theoretical underpinnings for working effectively with children and young people, but also include practical tips for:

- managing communication
- conducting interviews and meetings
- managing expectations and setting professional boundaries
- referrals
- managing interactions with family members and support people.

I'd like to take this opportunity to thank everyone who participated in our consultation process for this project, including members of the judiciary, youth justice agencies, the legal profession and of course, Legal Aid Queensland staff. Your input and feedback was greatly appreciated.

I encourage everyone who works with children and young people to make these resources part of their everyday work practices.



Anthony Reilly
Chief executive officer
Legal Aid Queensland

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Background

Legal Aid Queensland is a key agency in delivering legal services to children and young people in Queensland especially those from disadvantaged socio-economic backgrounds.

Legal Aid Queensland provides legal information, advice and representation to children and young people in a range of legal areas including youth justice, child protection and family law.

Legal Aid Queensland recognises children and young people under 18 are especially vulnerable in their interaction with the legal system because:

- they may not be aware of their legal rights or how to access legal services that can help them
- they often find it hard to identify and explain their legal problems
- they may not be able to effectively advocate for themselves
- legal systems do not always appropriately recognise or support their participation.

Our *Best practice guidelines for working with children and young people* are designed to help Legal Aid Queensland staff and preferred suppliers provide a high quality service to children and young people and to ensure the assistance we are providing is appropriate and respectful. In doing so, it is hoped children and young people feel they have been given an opportunity to be heard and meaningfully participate in the legal processes affecting them.

This framework outlines why it is important to have *Best practice guidelines for working with children and young people*. It also explores some relevant threshold issues of which Legal Aid Queensland staff and preferred suppliers who work with children and young people should be aware before applying the guidelines.

Legal Aid Queensland’s best practice response to working with children and young people

The *Best practice guidelines for working with children and young people* apply to all Legal Aid Queensland staff including client information officers (who answer the legal information line and work on the front counters at our offices), grants officers, litigation support officers and legal officers.

The guidelines are also intended to apply to lawyers from private law firms working as preferred suppliers for legally aided children and young people.

These guidelines are necessarily broad to ensure they are applicable across all areas of law including criminal, child protection and family law matters.

The guidelines are integrated into our case management standards. The case management standards set the minimum standards for the conduct of files for Legal Aid Queensland lawyers. Preferred suppliers who provide legal services on our behalf are also required to comply with these case management standards.

Solicitors and barristers (referred to as lawyers in these guidelines) are also ethically bound to follow established professional rules as set out in the *Australian Solicitor Conduct Rules 2012* and *Barrister’s Conduct Rules 2011* (Queensland).

Why “children and young people”?

The United Nations Convention on the Rights of the Child defines a ‘child’ as a person under 18. In both child protection and family law, a child is a person under 18. In Queensland, under the criminal law a ‘child’ is a person under 17. The *Family and Child Commission Act 2014* increases the age for young people transitioning out of the child protection system from 18 to 21. The youth services sector considers a young person to be under 25.

The Australian Institute of Health and Welfare (AIHW) Report *Young Australians: their health and wellbeing* defined the term ‘youth’ as:

*“...12–24 years, includes the three main stages of adolescence—early, middle and late—in which physical, intellectual, emotional and social changes take place. While the actual age of each stage is different for each individual, youth is the period when the balance of influences on young people’s behaviour shifts from the decisions and actions of their parents and guardians to their own and that of their peers. The environment and experiences of childhood years, however, are still important in youth development...”*¹

1. AIHW 2011 *Young Australians: their health and wellbeing* p.1



The term ‘young person’ has been adopted in these guidelines to recognise the increasing maturity and capacity of children and young people to make decisions that develops over time. It also recognises young people can come to Legal Aid Queensland for assistance when they are parents themselves or parties to litigation such as applying for a domestic violence order.

When is a child or young person old enough to instruct a lawyer?

This is a common question posed to lawyers who work with children and young people.

There is no legislation in Queensland that sets a specific chronological age for when a child or young person is considered competent to instruct a lawyer.

Lawyers acting as direct representatives are required to assess an individual child or young person’s capacity to instruct a lawyer. In conducting that assessment the English House of Lord’s decision commonly known as *Gillick*², which considered a child or young person’s capacity to consent to medical treatment, provides a useful practice framework.

In that case Lord Scarman found:

*Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child—custody, care, and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.*³

His Lordship also said:

*The underlying principle of the law...can be seen to have been acknowledged in the case law. It is that parental right yields to the child’s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.*⁴

2. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 113; [1985] 3 All ER 402.

3. *Ibid.*, p.183-184.

4. *Ibid.*, p.186.



The *Gillick* decision has been accepted as part of Australian common law by the High Court decision of *Secretary, Department of Health and Community Services V JWB and SMB* (commonly known as Marion’s case)⁵. The majority of the High Court in Marion’s case found a child or young person:

*“...is capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.”*⁶

Beyond determining capacity to instruct a lawyer, a child or young person’s age and maturity are relevant to the substantive areas of law that affect them. For example:

- In criminal law the legislation is solely focused on determining whether a child or young person is criminally responsible. Section 29 of the *Criminal Code* (Qld) provides that a child under 10 cannot be held criminally responsible. The doctrine of ‘doli incapax’ presumes a child under 14 is not criminally responsible. This presumption can be challenged by the prosecution if it can prove beyond reasonable doubt that, at the time of the offence, the accused child had the capacity to know what they had done was wrong.
- By contrast, in child protection and family law, no fixed chronological age determines the application of the law to a child/young person’s circumstances:
 - In child protection, the *Child Protection Act 1999* defines a child/young person as a “party for the purposes of proceedings”⁷. Section 108 of the *Child Protection Act 1999* provides that a child/young person may be represented by a lawyer during proceedings.
 - In family law, s. 65C of the *Family Law Act 1975* provides that a child can make an application for a parenting order. Rule 6.08 (2) of the *Family Law Rules 2004* provides that a child or young person does not require a case guardian if the court is satisfied the child understands the nature and possible consequences of the case and is capable of conducting the case.

In child protection and family law, each matter involves the decision maker weighing up all the relevant factors to be considered. The child or young person’s views and wishes are only one of those relevant factors. In practice, greater weight may be placed on the child or young person’s views and wishes as they mature.

Determining the capacity to instruct a lawyer is a separate issue. However, many of the circumstances that inform the assessment of a child or young person’s capacity to instruct a lawyer will also be relevant to determining these substantive legal issues.

5. (1992) 175 CLR 218
6. *Ibid* p.219.
7. See Schedule 3 Dictionary



Parkinson and Cashmore, who both write extensively about the legal representation of children and young people particularly in the area of family law, argue:

- children’s development is dynamic, interactional and profoundly affected by their experiences and relationships with those that are significant in their lives and by their perceptions of and reactions to those experiences and relationships
- their capacities are affected by context and depend on the support they receive in developing that capacity and the extent to which they are allowed to participate in making decisions.⁸

In certain jurisdictions there are specific rules dealing with the evidence of children and young people.⁹

Lawyers who work with children – direct and best interests representatives

It is important to recognise lawyers working with children or young people may have different professional relationships and obligations depending on the nature of their role.¹⁰

Direct representatives are lawyers who receive and act on instructions that come directly from the child or young person, regardless of what the lawyer considers to be in their best interests.

A direct representative owes the same duties of confidentiality and competent representation to the child or young person as is due to an adult client and the relationship is subject to legal professional privilege.

A direct representative commonly appears in youth justice matters. They can also appear in child protection matters and less commonly in family law disputes.

A direct representative must make an initial and ongoing assessment of the child or young person’s capacity to instruct a lawyer.

8. Parkinson and Cashmore (2009) *The Voice of a Child in Family Law Disputes* Oxford University Press, p.4.

9. For example see s. 100B of the *Family Law Act 1975*

10. Please note that the *Public Guardian Act 2014* created a role of child advocate mainly for relevant children as defined by that Act in child protection. These positions are with the Office of the Public Guardian.



Best interests representatives are lawyers who are appointed by a court or tribunal to act impartially and make submissions in the best interests of the child or young person. They are not bound to act on the child or young person's instructions but they must put the child or young person's views before the court or tribunal.

A best interests representative commonly appears in child protection matters (known as separate representatives) and private family law disputes (known as independent children's lawyers).

Legal Aid Queensland's case management standards provide guidance to lawyers acting as best interests representatives about meeting with children and young people during the course of litigation, explaining the legal processes and the options for presenting children and young people's views and wishes to the court or tribunal. In family law matters, Legal Aid Queensland's case management standards refer to National Legal Aid's *Guidelines for Independent Children's Lawyers* (2013) which have been endorsed by the Chief Justice of the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia.

Using the best practice guidelines

The guidelines encompass three overarching best practice principles that form the basis of a holistic service delivery approach to working with children and young people as clients:

1. Understand the child or young person

This principle acknowledges each child or young person is a unique individual with their own social and cultural context. To work effectively with them you need to find out about the issues that may impact on their ability to engage with you and the legal system.

2. Communicate effectively

This principle focusses on how to appropriately adapt your communication to engage with individual children and young people.

3. Deliver quality legal services

This principle highlights the importance of maintaining professional standards and boundaries when working with children and young people.

The three best practice principles are supported within the guidelines by practical tips for working with children and young people for Legal Aid Queensland staff and preferred suppliers.



Making a compliment or complaint

If a client would like to provide feedback about a service they received from Legal Aid Queensland, there is a compliments and complaints process. The client, or an advocate on their behalf, can call us on **1300 65 11 88** or email complaints@legalaid.qld.gov.au. Staff can process the compliment or complaint over the phone or via email, and will forward the feedback to a senior staff member in the appropriate area for action and response.

Feedback can be given anonymously. However, if the client would prefer a response to their feedback, and/or to be notified of the outcome, contact details will need to be provided. We encourage feedback from our clients and members of the public to ensure business excellence and best practice for our clients.