

Their Voice, their Views, their Best Interests

Representing Indigenous Children in care and protection proceedings – the Legal Representative for the child

The legal matrix

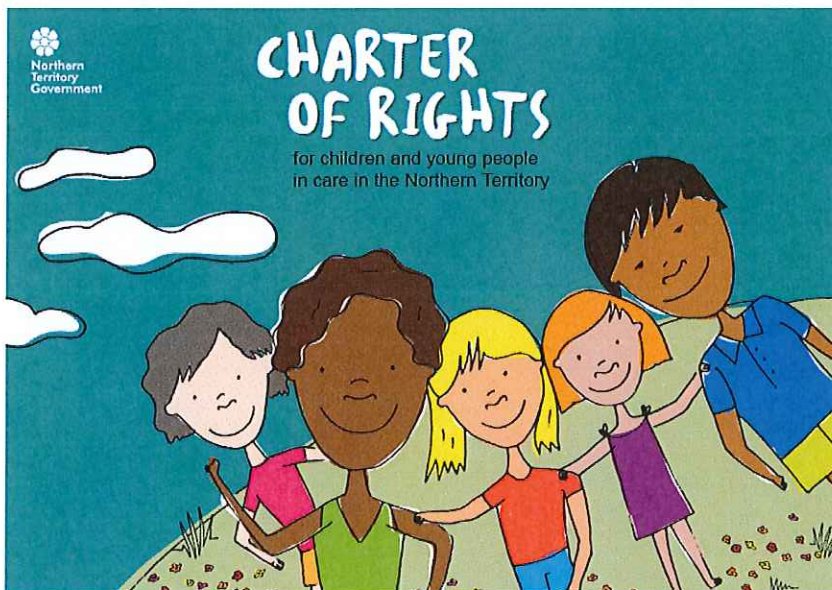
Children's Rights

Australia is one of 194 countries that in 1991 ratified the *United Nations Convention on the Rights of the Child 1989* ('UNCRC').

This international treaty aims to recognise the human rights of children by ensuring that all children:

—without discrimination in any form— benefit from special protection measures and assistance; have access to services such as education and health care; can develop their personalities, abilities and talents to the fullest potential; grow up in an environment of happiness, love and understanding; and are informed about and participate in, achieving their rights in an accessible and active manner.¹

All children in care in the NT are to be provided with a Charter of Rights



Charter of Rights for Children in Care in the NT was legislated for in the Care and Protection of Children Amendment (Charter of Rights) Bill 2013.

It is a requirement under s.68A of the *Care and Protection of Children Act 2007* (Northern Territory)² ('CAPOCA') for children and young persons to be given a copy of the Charter as soon as practicable after

coming into out of home care and explained to them in age appropriate language.

The Charter is consistent with the rights outlined in the United Nations Convention on the Rights of the Child, the National Framework for Protecting Australia's Children 2009-2020 and the National Standards for Out of Home Care. The Charter draws special attention to and helps to promote the rights of children who live in out of home care.

¹ http://www.unicef.org/crc/index_30229.html - Frequently Asked Questions - What is the Convention on the Rights of the Child?

² http://www.austlii.edu.au/au/legis/nt/consol_act/capoca269/

Children's Protection

Promoting the well-being of and protecting Northern Territory children is the obligation of the Northern Territory Government ('NT Government'), the child's parents and the community.

The NT is the only jurisdiction in Australia that mandates reporting by anyone who suspects, on reasonable grounds, a child has been harmed or likely to suffer harm or exploitation or is a victim of specified criminal offences, to the Department of Children and Families ('DCF') or the police³. It is quite unique to the rest of Australia in this respect.

To this end, the *Objects*⁴ and *Principles*⁵ underlying the Act aim to fulfil UNCRC's intent, in particular, Articles, 3, 4, 12, 13, 19-20 and 30⁶.

Objects

Promoting the well-being of children by protecting them from harm and exploitation and maximising the opportunities to realise their full potential; assisting families to achieve this; and ensuring anyone who has responsibilities for children consider these in fulfilling those responsibilities.

Principles

List specific socio-legal assumptions underpinning CAPOCA:

- **Responsibility of the NT Government** for promoting & safeguarding children's well-being & supporting families in their role;
- **Role of the family** - primary responsibility for the care, upbringing and development of children is by their family, in any language or tradition to foster cultural, ethnic, religious values;
- **Intervention by the NT Government** – The Chief Executive Officer of DCF will only intervene and remove children where there is no other reasonable way to safeguard their well-being, and if removed ensuring they have contact with their family and being eventually returned to their family.
- **Treating children with respect** – each child is a valued member of society and is entitled to be treated with respect and any decisions involving children, amongst others, should be with the informed participation of the child.
- **Best interests of child** – any decisions involving the child should be in their best interest which is the paramount concern.

³ S.26

⁴ S.4

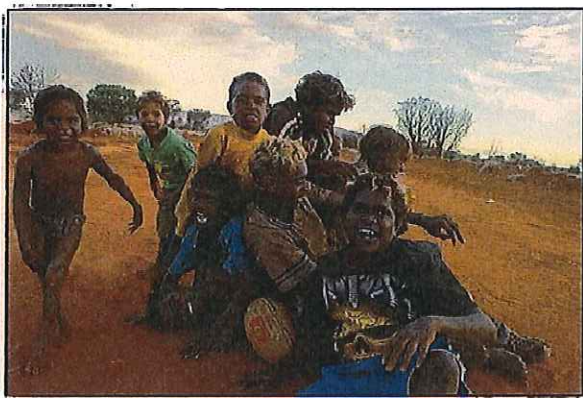
⁵ SS.6-12

⁶ http://www.unicef.org/crc/files/Rights_overview.pdf

In determining a child's best interest, consideration should be given to factors such as:

- protecting children from harm and exploitation,
 - the capacity and willingness of the child's parents or other family members to care for the child,
 - the child's relationships with family and others,
 - wishes and views of the child,
 - the need for permanency in living arrangements and for stable & nurturing relationships,
 - the child's needs (including physical, emotional and educational);
 - the child's characteristics and background;
 - how change will affect the child.
- **Child participation** - decisions involving a child should only be made when the child: has been given adequate information and explanation; given the opportunity to respond to the proposed decision; has had the opportunity to express their wishes and views; and has been given assistance to express them, with their wishes and views being taken into account having regard to their maturity and understanding.
- **Aboriginal children** – recognition of kinship groups, communities and others in playing a major role, through self-determination in promoting the well-being of aboriginal children, particularly participation in decision making.

And where a removal of an Aboriginal child is necessary, there is a placement priority to ensure, as far as practicable, a child is placed: firstly with a member of the family or, an Aboriginal person in the child's community or, an Aboriginal person, or a non-Aboriginal person who is sensitive to the child's needs and is able to promote the child's connection to the culture (and if possible contact with the child's family). As far as practicable, the child should also be placed in close proximity to their family and community.



Court process & children's representation / participation

To achieve these objects, CAPOCA provides *measures* for the safeguarding of children's wellbeing⁷ through:

1. mandatory reporting;
2. powers of NT Government to intervene; and
3. powers of the Courts to make orders for the wellbeing of children.

It is under this third measure, that the role of the legal representative for the child arises and assumes significance in particular under the 5th principle, of '*child participation*'.

This principle is directly aligned with *Article 12* of UNCRC:

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 appropriate body, in a manner consistent with the procedural rules of national law.*

How proceedings are conducted and the role of the child's legal representative

Where it is necessary to seek court orders for the protection of a child, the proceedings must focus on the best interests⁸ of and rights of the child particularly where there is a conflict with the rights of an adult.⁹ The proceedings themselves must be conducted with little formality and legal technicality as possible where the Court is not bound by the rules of evidence¹⁰. This however, does not mean that they do not apply.

NT model for representing children

The parties to the proceedings include the child¹¹ and arguably, the child has the right of representation as a party to those proceedings in their own right¹², if the child's maturity and level of understanding were such to allow the child to exercise that right. The relationship would be one of lawyer/client. It is not uncommon, particularly in other Australian jurisdictions, for children to seek their own legal representation in child welfare proceedings and legal aid commissions are able to arrange that representation.

⁷ S.5(a)

⁸ S.10

⁹ S.90

¹⁰ S.93

¹¹ S.94(1)(a)

¹² S.101(1)

Alternatively, the Court may appoint a legal representative to represent the child if it considers this to be in the child's best interests¹³. The model of child representation in the Northern Territory prior to 2013, was based on the best interests principle where the legal representative, although required to put the child's wishes and views before the Court, was not bound by them nor by any instructions from child.

Following the amendments in 2013¹⁴ on the legal representation of children, a dual model was introduced¹⁵ with the basis of representation being either:

- *Acting on the child's instructions* –where the child is of sufficient maturity and understanding to give instructions and to the extent the child gives instructions. There is a rebuttal presumption a child aged 10 years will be able to give instructions;
- *Acting in a child's best interests* - regardless of any instructions from the child but with a requirement to present the child's views and wishes to the Court.

Duties & Role of the Legal Practitioner

Legal representation of children is contained in Division 6A (ss. 143A-143E) of CAPOCA.

It is the duty of the legal representative to inform the court whether they are acting on instructions or in the best interests of the child.¹⁶ This requires an assessment of the child's capacity by the legal representative.

Once appointed, it is argued that the legal representative is someone who is performing a function under the Act and must therefore uphold the principles underpinning it¹⁷.

The Legal Representative also has specific duties¹⁸ to take all reasonable steps to:

- ascertain whether the child can give instructions; and
- obtain instructions; or
- ascertain the child's views and wishes if acting in their best interests; and
- actively and professionally represent the child as if the legal representative had been engaged by the child.

While the Act provides for the enactment of Regulations to regulate the eligibility criteria for appointment as a legal representative and the responsibilities and standards to be met, these Regulations are yet to be enacted. The Law Society of the NT, is currently drafting Guidelines for the Legal Representative in this jurisdiction.

¹³ S.143A(1)

¹⁴ Care and Protection of Children Amendment (Legal Representation and Other Matters) Act 2013

¹⁵ S.143B(1)-(3)

¹⁶ S.143B(4)

¹⁷ S.6(2)

¹⁸ S.143C (1)-(2)

Legal framework and functions of the Legal Representative

The legal framework in which the legal representative discharges their duty is set out in s.129 of CAPOCA where the Court **must** make orders in relation to children. This is a dual process being an inquiry into whether:

- (a) a child is in need of protection, or would be but for being in the care of the Chief Executive Officer of DCF; and
- (b) the order is the best means of safeguarding the wellbeing of the child.

In the NT, these two inquiries are usually considered together although a finding needs to be made in respect of the first (sometimes conceded to by parent parties), after which the focus shifts to whether the order will be the best means of safeguarding the child's wellbeing. The Act, however, is silent in relation to which inquiry the Legal Representative will be involved in.

The role and function of the Legal Representative in this framework will be determined by whether they act on instructions or in the child's best interests. Whichever model, the requirement is to '*actively and professionally*' represent the child.

Actively and Professionally Represent

While this amendment is relatively new and lacks clarification by the superior courts, it is conceivable that the Legal Representative, like the other legal representatives in the proceedings, will take instructions (if a direct representative), present evidence (or present evidence about the child's best interests, views and wishes), test evidence, make applications and submissions to the Court and lodge an appeal against the decision of the Court¹⁹.

The starting point, after the Court has ordered the legal representation of a child, is for the legal representative to assess whether the child has sufficient maturity and level of understanding to:

- 1. give instructions; and
- 2. wishes to give those instructions.

Meeting the Child

This contemplates a meeting with the child in order to assess the child's capacity and willingness to give instructions, or possibly speaking with significant people involved in the child's care or education (extended family members, health care provider, teachers and counsellors). Children living in remote Aboriginal communities who may have English (if they can speak it) as a second, third or fourth language, presents financial, geographical, cultural and linguistic challenges. The Legal Representative will either

¹⁹ As contemplated by the repealed section 146(7) of CAPOCA for the appointment of a Legal Representative

need to travel to the community or arrange for the child to travel to see the Legal Representative. If that assessment cannot be made for reasons, for example, of the abuse and trauma suffered by the child despite the child being 10 years or older, the Legal Representative will need to make submissions about the child's inability to give instructions in relation to the proceedings and the desirability to represent their best interests.

It is important, therefore, for the Legal Representative to read all the material filed in Court and possibly the CEO's file, to acquire knowledge of the relevant facts and form a foundation for a meeting with the child. In particular, it is essential for the Legal Representative to have some knowledge and understanding of the protection issues²⁰ forming the basis of the CEO's application.

During the meeting with the child, the Legal Representative should be in a position to form a view whether the child is *Gillick Competent*²¹ and therefore having sufficient maturity and understanding to provide instructions and participate in the proceedings despite the rebuttable age presumption (of 10 years), if the contrary can be proved²².

Representation of the child / acting in the child's best interests during proceedings

Once that assessment has been made, the Legal Representative should, and this is by no means exhaustive:

- Explain their role in an age appropriate way, describing what happens in court, the stage of the matter and likely progression.
- either seek instructions from the child if the Legal Representative is to act on instructions; or
- Obtain the views and wishes of the child (if acting in the best interests) and consider how to best present those views and wishes to the Court.

thereby giving efficacy to the principle of child participation in both s.11 of CAPOCA and Article 12 of UNCRC.

A note on:

Confidentiality of matters discussed or information given by the child will depend on the type of representation. If the Legal Representative acts on instructions, privilege would attach to the traditional lawyer/client relationship.

²⁰ See sections 15 and 16 of CAPOCA which defines 'harm' and 'exploitation' underpinning section 20 'when a child is in need of protection'.

²¹ Formulated in a UK case considering medical treatment and "...whether or not a child is capable of giving the necessary consent will depend on the child's maturity and understanding and the nature of the consent required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly and fairly described as true consent." http://www.nspcc.org.uk/Inform/research/briefings/gillick_wda101615.html

²² S.143B(3)

Privilege does not attach if the Legal Representative is representing the child's best interests, however the Legal Representative does have a duty of confidentiality to the child.

The duties in either representation model creates a potential conflict with the Legal Representatives' obligation to report harm, exploitation or risk thereof pursuant to the mandatory reporting obligations of CAPOCA.

- Consider how best to discuss the child protection issues with the child, having regard to the nature of the 'harm' or 'exploitation' alleged and limiting any further trauma that might be caused to the child through this process. Depending on the nature of the harm or exploitation alleged, it is appropriate to draw on the expertise of a social scientist to gather information in relation to the child's views and wishes and to avoid the Legal Representative being involved in a *disclosure interview*²³ and placing at risk the lawyer/client relationship or best interests relationship despite the immunity offered under the Act²⁴. This is particularly problematic given the mandatory reporting obligations under the Act and the tension between this and the confidentiality of the lawyer/client relationship.
- Consider whether the order sought is the best means of safeguarding the child's well-being.
- Consider the adequacy of the Care Plan proposed by the CEO in:
 - o Identifying and addressing the child's needs;
 - o How decisions for the child's day-to-day care and control will be made (such as where the child will be placed and if this accords with the placement priorities for Aboriginal children); how the child will maintain contact with their family and connection to their culture.
- Consider whether and how the child can participate in both the proceedings and in framing the proposals for their current and future care. Notably, the CAPOCA facilitates a child's participation in the court process by allowing a child to attend the proceedings or providing a written statement from the child or report which the Court may receive in evidence²⁵.
- If acting in the child's best interests, it is important for the Legal Representative to be mindful of the context in which the child is expressing their views and wishes. Views and wishes of children will depend on the nature of the alleged abuse, their loyalty to their parents and the collateral trauma or distress they may be suffering from having being removed from their family and placed in temporary out-of-home care. Social / family assessment expert reports prepared by a social scientist, are particularly useful in these circumstances because they provide

²³ where the child discloses abuse not disclosed previously

²⁴ S.293F

²⁵ S.147

insight into the child's circumstances after a thorough assessment of the child, the child's family, observations of the child with their family (if possible but certainly preferable), the protection issues, the child's view and wishes and consideration of what order, if any, will best safeguard the well-being of the child.

- Consider whether instructions from the child, or information obtained from the child, may benefit from further investigation by the Legal Representative which may assist in possible mediation or cross-examination of witnesses. Care needs to be taken however, that the source of this information is not attributed to the child for fear of reprisal by the parent/s or alleged perpetrator of the harm/exploitation. An identification of possible witnesses who could assist the Court in determining the child's best interests should also be canvassed with the child.
- Exercise discretion about the manner in which evidence contained in Affidavit material regarding the protection issues is presented to the child if taking instructions or explaining the nature of the issues if a representing their best interests.
- Consider what further evidence is likely to assist the Court such as expert reports (cultural, social/family assessment or evidence of child's views and wishes), affidavits from lay & other witnesses (eg. teachers, treating health care professionals) or what subpoenaed documents might assist the Court in its deliberations. To this end, the Legal Representative may avail themselves of the Information Sharing provisions of the Act²⁶ to obtain information relevant to the child.
- Consider whether there is some merit in facilitating a negotiated outcome through mediation whether CEO instigated or Court Ordered²⁷. The Act provides for the Court to make orders consistent with any agreement reached at mediation²⁸. Due to the perceived impartiality of the Legal Representative for the child, their presence at mediation and acting as 'honest broker', can create a more child focused environment and re-direct the otherwise partisan and adversarial nature of the proceedings towards a more cooperative and collaborative approach, with parties accepting the evidence and need for the order or a plan for the eventual return of the child to their family thereby providing focus and hope for the future. Mediation would also be more consistent with Aboriginal cultural practices in resolving family disputes.
- If the matter does require final judicial determination, the Legal Representative, whether acting on instructions or best interests, like the other parties' representatives, will have an opportunity to present evidence (including in relation to the child's view and wishes), test evidence through cross-examination and make submissions to the Court consistent with the child's instructions or best interest considerations, about what orders, if any, will best safeguard the well-being of the child.

²⁶ Ss.239A-293J

²⁷ SS. 49 & 127

²⁸ S.128(2)

- The child, as a party to the proceedings, also has the right of appeal to the Supreme Court of the NT²⁹ from the original decision. The Legal Representative acting on instructions is required to advise the child of this right and the best interests' representative should consider whether an appeal is in the best interests of the child.
- Once proceedings have finalised, the outcome and orders should be explained to the child by the Legal Representative, in addition to the appeal rights.
- Consideration should also be given about what referrals, ongoing or future counselling the child may need and ensure this is provided for in the Case Plan.

Conclusion of the Legal Representative's

The role of the Legal Representative will end³⁰ upon either:

- o Conclusion of or discontinuance of the proceedings;
- o The Legal Representative has withdrawn with the leave of the Court or the appointment is revoked by the Court;
- o Upon expiration of the appeal period or the conclusion of the appeal.



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²⁹ S.140

³⁰ S.143D