

Legal Representation of Children

Terms of Reference

In 1971, the Committee was asked to consider in what circumstances the law should provide for the separate representation of children in court proceedings in which their interests are affected, but to which they are not parties.

Background of Reference

The reference arose from problems evident in court proceedings concerning a child's guardianship, custody or adoption, which were drawn to the attention of the Committee by the Chief Justice. It was pointed out that in those proceedings, and also in proceedings taken under the *Fatal Accidents Act 1959* (WA), protection of a child's interests by separate representation was lacking. The Chief Justice contrasted these situations with proceedings where a child is a party and acts through a next friend or a guardian ad litem.

In March 1972, the Committee issued a working paper examining the issue of, and alternatives to, legal representation for children. After considering both the inquisitorial¹ and adversarial² approaches to presenting evidence on behalf of a child, the Committee reached the provisional view that the adversarial method was preferable.³ The Committee suggested that courts should be empowered to order the separate representation of children and that general legislation, rather than amendments to specific legislation, should achieve this. Finally, it was suggested that courts should have the discretion to order costs to any party in the proceedings, any fund the child has an interest in, or the Suitors' Fund.

Nature and Extent of Consultation

The Committee forwarded copies of the working paper to interested parties including the Chief Justice and judges of the Supreme and District Courts; the Crown Law Department; the Child Welfare Department; the Law Society of Western Australia; the Commissioner of Police and the Magistrates' Institute. The Committee received a number of detailed submissions in response to the working paper. All parties agreed in principle with the Committee's preliminary proposals, however, the Crown Solicitor suggested that the Suitors' Fund should only bear costs where there is no appropriate party or fund. The Committee's attention was also directed to welfare reports as a useful source of information for courts in deciding guardianship, custody and adoption cases.

The Committee released its final report on the subject in June 1972.⁴

Recommendations

Following consideration of the responses to the working paper, the Committee endorsed the provisional views in the working paper and recommended:

- That courts be empowered to order the separate representation of children.
- That a statute of general application be enacted empowering a court to order the appointment of a suitable person as guardian ad litem for a child when the court is of the view that the interest of the child is involved.

¹ Where the court has the power to call and examine witnesses.

² Where the court has the power to appoint a suitable person to act for the child.

³ The Committee referred to the decision of the Full Court of the Supreme Court of Western Australia in *R v Smith; ex parte Mack* [1970] WAR 60 (Jackson CJ, Hale and Burt JJ) where the dangers of the inquisitorial approach were stressed.

⁴ Law Reform Committee of Western Australia, *Legal Representation of Children*, Project No 23 (1972).

- That where a court wishes the separate representation of a child in relation to only part of the proceedings, it be empowered to limit the functions of the guardian ad litem accordingly.
- That a provision be enacted empowering courts to order the costs of the representation to be paid, where appropriate, by a party to the proceedings or out of any fund in which the child has an interest, or, failing this, out of the Suitors' Fund.
- That the power of the courts to call for a welfare report be retained as a useful adjunct.

A comprehensive outline of recommendations may be found at pages 2–3 of the Committee's final report.

Legislative or Other Action Undertaken

The Committee's recommendations were substantially implemented⁵ by the *Legal Representation of Infants Act 1977* (WA). This was complemented by the *Suitors' Fund Act Amendment Act 1977* (WA), which enabled courts to order costs from the Suitors' Fund for the representation of children.

⁵ The Committee's cost recommendation was not faithfully implemented. Rather, the provisional view of the working paper, that the court should have the discretion to order costs to any party, fund or the Suitors' Fund, was implemented. Further, due to a concern that a court may duplicate guardians where the Director of Child Welfare was already a child's guardian, sub-s 5(5) was introduced to the *Legal Representation of Infants Bill 1977* (WA) requiring that an appointment not be made until notice had been given to the Director of the Department of Community Welfare and the Director had had an opportunity to respond.