



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 23

Legal Representation of Children

WORKING PAPER

MARCH 1972

INTRODUCTION

The Law Reform Committee has been 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.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by 22 May 1972.

Copies of the paper are being forwarded to -

The Chief Justice and Judges of the Supreme Court

The Judges of the District Court

The Law Society

The Magistrates Institute

The Law School

The Solicitor General

The Crown Law Department

The Child Welfare Department

The Commissioner of Police

The Public Trustee

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to this list.

The research material on which this paper is based is at the offices of the Committee and will be made available on request.

TERMS OF REFERENCE

1. "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".

MOVEMENT FOR REFORM

2. The matter was raised by the Chief Justice of Western Australia, who drew attention to two common cases where at present there is no provision for a child's interests to be protected by his being separately represented, namely -

- (a) proceedings concerning his guardianship, custody or adoption;
- (b) proceedings under the *Fatal Accidents Act 1959* brought by the executor or the widow for damages for all dependants including the child.

3. The Chief Justice contrasted these proceedings with those to which a child is a party. If a child is a party he normally acts through a next friend or guardian *ad litem* who has the responsibility of ensuring that proper instructions are given to the legal practitioner appearing for the child at the hearing.

PRESENT LAW

Protection of a child's interests by separate representation

4. The only legislative provision known to the Committee which provides expressly for the separate representation of children are the rules under the Commonwealth *Matrimonial Causes Act*. Rule 115A provides that if it appears to the court on the trial of a suit that a child of the marriage ought to be separately represented, it may adjourn the proceedings in order that a guardian *ad litem* be appointed. The guardian *ad litem* would, where proper, apply for leave to intervene in the proceedings on behalf of the child. If the court grants leave the child becomes a party with all the rights, duties and liabilities of a party (s.82 of the *Matrimonial Causes Act*). Even though the child through his guardian *ad litem* does not desire to intervene, or has been refused leave to do so, he is entitled to be represented at the further hearing by

counsel or solicitor, who may cross-examine witnesses and address the court, but not adduce evidence (Rule 115A(6)).

5. It is doubtful whether the Supreme Court has inherent jurisdiction to order the separate representation of a child in the circumstances envisaged in paragraph 2, or whether a Rule of Court can be made for this purpose. The Committee has not made an exhaustive study of the present powers in these areas. If it is considered desirable that the court should have such power, it can be expressly conferred by statute to put the matter beyond doubt.

Protection of a child's interests apart from separate representation

6. In considering the terms of reference it is relevant to take account of other provisions aimed at protecting a child's interests. In the following cases the court has access to independent information on matters affecting a child.

- (a) Under s.5(1)(8b) of the *Adoption of Children Act* the judge must, before making an adoption order, call for a report from an officer of the Child Welfare Department containing information relating to the fitness of the applicant to adopt the child and to the welfare of the child. Under s.5(1)(8c) of that Act the judge must also require the Director of the Department to give an opinion as to the fitness of the applicant to be an adopting parent. The judge himself may compel the attendance before him of any witness (s.5(1)(1)). If the child is more than 12 years old his consent to the adoption is required except in special circumstances (s.5(1)(4)).
- (b) Under s.15(2) and (3) of the *Married Persons and Children (Summary Relief) Act* the court, before making or refusing to make a provision for custody of a child, may call for a report from an officer of the Child Welfare Department, and may authorise the officer to enter and inspect the premises where the child is to be housed. Under s.99 of that Act the court may also itself call evidence. This power extends to calling a party as a witness (*R. v. Smith; ex parte Mack* [1970] W.A.R. 60);

- (c) Under s.85(2) of the *Matrimonial Causes Act* (Cth.) the court may call for a report from a welfare officer and may receive it in evidence. This power is in addition to that of directing that the child be separately represented (see paragraph 4 above).

7. The Director of the Child Welfare Department may intervene at the hearing in a Children's Court or before Justices of a complaint against, or any application concerning a child (s.121 of the *Child Welfare Act*). Section 13 of the *Guardianship of Infants Act 1926* gives the Director power to appear in proceedings on behalf of the Department for the purposes of any provision of that Act, but this power appears uncertain in scope and the present officers of the Department can recollect no case where it has been used.

THE LAW ELSEWHERE

8. **Matrimonial Causes:** In England and New Zealand the powers of the court to order representation or to call for welfare reports are similar to those given in the Commonwealth *Matrimonial Causes Act*.

9. **Adoptions :** In England the court must appoint a suitable person to act as guardian *ad litem* on the hearing of an adoption application. That person has the duty of making a report to the court and generally of safeguarding the interests of the child.

In New Zealand and other Australian jurisdictions (except Queensland) the court must call for a report from the Department concerned on an adoption application, and the officer in charge of the Department is given the right to appear, cross-examine and call evidence. In Queensland, adoption applications are heard by the Director of the State Children Department himself.

10. **Custody (other than in matrimonial causes) and guardianship:**

In New Zealand the court is empowered to appoint a barrister or solicitor to assist it or to represent a child, and the appointee may cross-examine and call evidence. The court may call for a child welfare report.

COMMITTEE'S PROVISIONAL VIEWS

11. It seems clear that in cases where the interests of a child are directly affected the court should be in possession of the fullest information to enable it to take these interests into account. Broadly speaking, there are two methods of achieving this. The first involves inquisitorial type procedures, where the court itself is given power to call and examine witnesses. The second, based on adversary type proceedings, involves the appointment of a suitable person to act for the child and placing on him the responsibility of ensuring that the child's claims are adequately presented to the court.

12. The advantages and disadvantages of the inquisitorial and adversary methods were discussed by the Full Court in *R. v. Smith; ex parte Mack* [1970] W.A.R. 60. The magistrate of the Summary Relief Court, acting under s.99 of the *Married Persons and Children (Summary Relief) Act*, had called the defendant husband as a witness at the hearing of an application by the wife for maintenance. He had wished to ascertain what amount of maintenance would be sufficient to take care of the children adequately. Although the Full Court conceded that the section gave the magistrate the right to call a party as a witness, Hale J., with whom the Chief Justice agreed, emphasised the dangers likely to arise when judges call and examine witnesses and stressed that the power should be exercised with the utmost discretion.

13. The Committee is of the view that in as much as the adversary procedure is the basic system of our courts, it seems preferable to use it in the case where the interests of a child are affected, and therefore to empower the courts to order the separate representation of the child in cases where they may now be unable to do so. This may overcome the need to combine the inquisitorial and adversary types of procedure, which do not always sit happily together.

The power given the courts to call for a report (see paragraph 6 above) should be retained as a useful adjunct: in some circumstances a report may be all that is required.

14. Separate representation of children could be provided for either by enacting general legislation to this end, covering proceedings in all courts where children are involved, or by enacting legislation dealing with specific areas. The Committee is of the view that the former course is preferable.

15. If the latter course is followed, the courts should be empowered to order the separate representation of children in the following areas -

(a) **Applications concerning the guardianship, custody or maintenance of a child:**

This would involve amendments to the *Guardianship of Infants Acts* and the *Married Persons and Children (Summary Relief) Act*.

(b) **Adoption:**

The better course may be to give the Director of the Child Welfare Department the right to appear in adoption proceedings in the child's interests, as is now the case in other jurisdictions. The Director already has wide responsibilities under the Adoption of Children Act and this would be a natural extension.

(c) **Applications under the Fatal Accidents Act:**

The child's interests may not be identical with those of the person bringing the action. Although the power to order separate representation would probably be most useful at the stage when a question of apportionment arises, it may in some instances be of value at an earlier stage.

(d) **Applications under the Child Welfare Act:**

There are certain applications under this Act, such as those dealing with destitute, neglected or uncontrolled children (ss. 30, 32 and 33), where it may be desirable that the child (as distinct from the parents) be separately represented.

16. Whichever course is followed, the question of the costs of the separate representation of the child will arise. The Committee's provisional view is that the courts should be empowered to order that costs be paid by any party to the proceedings, or be paid out of any fund in which the child has an interest, or, if the court thinks fit, out of the Suitors' Fund (an amendment to the *Suitors' Fund Act* would be required).