

# LAWYERS, ADVOCACY AND CHILD PROTECTION

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*[In child protection matters, parents and children interact with the legal system at a time of great vulnerability and distress. There are significant power imbalances between parents and children on the one hand, and child protection officers on the other. This makes it difficult for parents and children to effectively advocate for themselves in child protection proceedings. This paper presents the results of empirical research undertaken with community service providers and lawyers regarding advocacy in child protection matters. In this study, both professional groups agreed that advocates are important for parents and children in child protection matters and improve court processes; however, there was no consensus regarding who should perform the advocacy work. Lawyers generally claimed that advocacy work should be undertaken by legally trained advocates, while community service providers tended to focus on the role that non-legal advocates can play in the overall process. It is concluded that both legal and non-legal advocates can make an important contribution towards ensuring that the best outcomes for children and families are achieved.]*

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## I INTRODUCTION

Throughout Australia, governments continue to struggle with how to best respond to the difficult and complex issues surrounding child protection. When the abuse and neglect of children ends tragically, it often makes the front page of

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newspapers and raises public calls for an explanation.<sup>1</sup> On the other side of this is the fundamental right to the protection of family life, the right of the child to remain with his or her parents,<sup>2</sup> and the recognition that removing a child from his or her family is generally a very traumatising event for all involved.

From a legal perspective, serious power imbalances exist between the parties in child protection matters. In most child protection cases that proceed to court, a government department has removed, or is seeking to remove, a child from his or her family unit because child protection officers believe the child is at risk of harm or otherwise in need of protection. Most parents are extremely distressed at the thought of losing their children and, in many cases, the parents will contest the intervention. Other parents will want to contest the intervention but will not know how, or feel too disempowered to do so. Even if the parents agree that their children should be in alternative care, they will often have strong preferences regarding who should care for their children and for how long. Children who are removed from their home against their will are subject to significant trauma. Those who are old enough to express their wishes often have firm views about who they would like to be responsible for their care. Those who are not yet mature enough to express their wishes may not have anyone available to make an independent assessment regarding their care needs. Parents and children involved in child protection matters are forced to interact with the legal system at a time of great distress and vulnerability.

Further to this, many parents and children involved in child protection matters experience multiple layers of disadvantage.<sup>3</sup> They are generally housed in lower socioeconomic areas, often in social housing; others are homeless.<sup>4</sup> Most are reliant on social security benefits as their main source of income, or are on low

<sup>1</sup> See, eg, the death of Ebony in New South Wales ('NSW'), which led to an investigation by the NSW Ombudsman: Bruce Barbour, NSW Ombudsman, *The Death of Ebony: The Need for an Effective Interagency Response to Children at Risk — A Special Report to Parliament under Section 31 of the Ombudsman Act 1974* (2009). See also G E Brouwer, Victorian Ombudsman, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009).

<sup>2</sup> As to the right to protection of family life, see *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 5, 8 ('CROC'). As to the right of a child not to be separated from their parents against their will except where competent authorities, subject to judicial review, determine that this is necessary, see CROC art 9(1).

<sup>3</sup> See generally David McConnell and Gwynnyth Llewellyn, 'Social Inequality, "the Deviant Parent" and Child Protection Practice' (2005) 40 *Australian Journal of Social Issues* 553; David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, 'Context-Contingent Decision-Making in Child Protection Practice' (2006) 15 *International Journal of Social Welfare* 230; Tamara Walsh and Heather Douglas, 'Legal Responses to Child Protection, Poverty and Homelessness' (2009) 31 *Journal of Social Welfare and Family Law* 133; John Frederick and Chris Goddard, 'Exploring the Relationship between Poverty, Childhood Adversity and Child Abuse from the Perspective of Adulthood' (2007) 16 *Child Abuse Review* 323; Jane Thomson, 'This is Nothing New: Child Protection Concerns and Poverty' (2003) 28 *Children Australia* 4. In the United Kingdom ('UK') context, see Val Gillies, 'Perspectives on Parenting Responsibility: Contextualizing Values and Practices' (2008) 35 *Journal of Law and Society* 95.

<sup>4</sup> See McConnell, Llewellyn and Ferronato, above n 3, 554; Walsh and Douglas, 'Legal Responses to Child Protection, Poverty and Homelessness', above n 3, 133.

incomes.<sup>5</sup> Many of the children ‘known’ to child protection authorities have witnessed family violence, most often perpetrated against their mothers, while others may have been subjected to violence or abuse themselves.<sup>6</sup> Commonly, the parents suffer from mental illness or have an intellectual disability.<sup>7</sup>

Despite the ‘protective’ nature of the child protection jurisdiction, and the vulnerability of the parties, the legal processes involved are often highly adversarial in nature. While the rules of evidence and procedure may be relaxed in court proceedings and tribunal hearings, the focus remains on ‘winning and losing’ in child protection matters, rather than on collaboration and problem-solving.<sup>8</sup> This may, in part, be due to the heavy scrutiny that child protection officers are subject to, both internally and by the broader community. They are acutely aware that any ‘failure’<sup>9</sup> on their part may be widely reported in the media.<sup>10</sup> This has understandably led to a culture of hyper-vigilance and over-cautiousness, as officers are under extraordinary pressure to ensure that their decisions guarantee the physical safety of children. In short, distressed parents and children are forced to engage in combative processes and proceedings ‘against’ a well-resourced, legalistic, emotionally detached government department with a vested interest in having its decisions vindicated. This is extremely difficult for families that are already significantly distressed and terrified.

There has been some debate regarding the role of lawyers and the legal system in other protective jurisdictions.<sup>11</sup> In legal proceedings, the existence of power imbalances between the parties often indicates that a lawyer may be needed to support the vulnerable party; criminal cases provide the best example.<sup>12</sup> However, in protective jurisdictions, lawyers’ involvement is sometimes discouraged.<sup>13</sup> With respect to matters involving children, the belief is commonly

<sup>5</sup> Walsh and Douglas, ‘Legal Responses to Child Protection, Poverty and Homelessness’, above n 3, 136; Thomson, above n 3, 4.

<sup>6</sup> Frederick and Goddard, above n 3, 329; Thomson, above n 3, 7.

<sup>7</sup> McConnell and Llewellyn, above n 3, 554; McConnell, Llewellyn and Ferronato, above n 3, 230.

<sup>8</sup> See also Tamara Walsh and Heather Douglas, ‘Lawyers’ Views on Decision-Making in Child Protection Matters’ (Working Paper, The University of Queensland, 2011).

<sup>9</sup> Of course, as Maclean and Eekelaar have written in the UK context, realistically, ‘success is more of an aspiration than a reality in most cases’: see Mavis Maclean and John Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart Publishing, 2009) 91.

<sup>10</sup> Although, as the Victorian Ombudsman has reported, while it may seem that child protection departments are subject to excessive scrutiny, in practice very few cases receive media attention: see Brouwer, above n 1, 14, 109.

<sup>11</sup> See, eg, Ian Freckelton, ‘Mental Health Review Tribunal Decision-Making: A Therapeutic Jurisprudence Lens’ (2003) 10 *Psychiatry, Psychology and Law* 44, 49–51; Bruce J Winick, ‘Therapeutic Jurisprudence and the Civil Commitment Hearing’ (1999) 10 *Journal of Contemporary Legal Issues* 37, 58; Alfred Allan, ‘The Past, Present and Future of Mental Health Law: A Therapeutic Jurisprudence Analysis’ (2003) 20 *Law in Context* 24, 39; Robin Creyke, Department of Human Services and Health (Qld), ‘Who Can Decide? Legal Decision-Making for Others’ (Report No 19, 1995); Samuel Jan Brakel, ‘The Role of the Lawyer in the Mental Health Field’ (1977) 2 *American Bar Foundation Research Journal* 467.

<sup>12</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J). In that case, Mason CJ and McHugh J said: ‘where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down’: at 301–2.

<sup>13</sup> See Winick, above n 11, 58; Allan, above n 11, 39.

expressed that children are reluctant, or practically unable, to interact with lawyers because, for example, they feel intimidated or confused by legal jargon.<sup>14</sup> Indeed, the appropriateness of the courtroom as the forum in which child protection disputes are resolved has itself been questioned. In 1997, the Australian Law Reform Commission noted in its *Seen and Heard* report that many of the submissions to its inquiry recommended that child protection matters be removed from the court system and determined instead by an expert multidisciplinary panel.<sup>15</sup>

In a system that is based on detailed legislation that involves questions of rights and interests, and that has serious consequences for children's and parents' lives, it is difficult to argue that there is no role for lawyers or a legalistic system of redress. However, the value of lawyers within the child protection system is, naturally, in the eye of the beholder.

We conducted two studies on the child protection system in Queensland. One involved focus groups with community service providers who assist mothers interacting with child protection authorities. The other involved interviews with child protection lawyers. In this paper, we examine respondents' reflections on the role of lawyers and advocates within the child protection system.

Somewhat predictably, the lawyers believed strongly in the importance of their own presence and in the unique skills and insights that they brought both to the decision-making process and to individual cases. The non-legal professionals we interviewed agreed that parents and children do require 'advocates' but they were less convinced that these advocacy tasks must necessarily be undertaken by lawyers. It will be seen that parents and children require specialist advocacy assistance in child protection matters if the best outcomes are to be achieved for each child.<sup>16</sup> What follows is an attempt to develop a model for child protection advocacy that draws on the skills of all professionals involved in child protection matters.

## II THE STUDIES

This paper draws on research undertaken in two separate studies. In the first study, five focus groups involving 32 workers (hereafter referred to as 'community service providers') from a number of community organisations in Brisbane were held to discuss disadvantaged mothers' experiences with child protection interventions.<sup>17</sup> This research focused on mothers because mothers are more

<sup>14</sup> See, eg, Rachel Zajac, Julien Gross and Harlene Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199. Although, for a more balanced appraisal, see Judith Cashmore and Kay Bussey, 'Perceptions of Children and Lawyers in Care and Protection Proceedings' (1994) 8 *International Journal of Law and the Family* 319.

<sup>15</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [17.56].

<sup>16</sup> See Mavis Maclean and John Eekelaar, 'Legal Representation and Parental Autonomy: The Work of the English Family Bar in Contact Cases' in Shelley Day-Sclater et al (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, 2009) 106.

<sup>17</sup> The results of this research are reported in Heather Douglas, Tamara Walsh and Kent Blore, 'Mothers and the Child Protection System' (Research Report, The University of Queensland, June 2009).

likely to have care responsibilities for children, particularly in those cases where there is child protection intervention; but it is acknowledged that the findings of the research may apply equally to men.<sup>18</sup> The community organisations that participated are all engaged in direct service delivery, and have a client base that consists, at least in part, of mothers of children either in the care of, or 'known' to, child protection authorities. A range of community organisations were selected so that the project could capture a diversity of views. The participant organisations service a wide range of female clients including young women, criminalised women, Aboriginal women and immigrant women.

Focus groups were selected as the data collection method for this study for a number of reasons. First, community service providers generally work as a team; often more than one worker is involved in assisting individual clients. The focus group methodology allowed for a broader, group-based assessment of cases and issues. Second, a key advantage of focus groups is that participants are encouraged to discuss their ideas and responses to problems with their peers, with whom they share a common frame of reference while the researcher facilitates and listens to these discussions.<sup>19</sup> Third, there is evidence that focus groups are of value when studying pre-existing groups to encourage 'collective remembering'.<sup>20</sup> However, there are also limitations associated with a focus group approach. Naturally, responses are likely to compound, and participants may modify or exaggerate their views depending on the views of the group.<sup>21</sup>

The second study involved 21 interviews with 26 lawyers with substantial experience in child protection law (in five of the interviews there were two participants). A snowball sampling method was employed whereby interviewed lawyers recommended other child protection lawyers for interview.<sup>22</sup> All of the lawyers we interviewed commonly represented parents or children in child protection matters, and three of them had previously worked within child protection departments. At the time of the interviews, the lawyers worked either in private practice or within a legal organisation such as Legal Aid or a community legal centre in Brisbane, Townsville or Cairns. We decided to conduct interviews instead of focus groups for practical reasons. Most of the lawyers we interviewed work alone as individuals, rather than as part of organisations. The demanding schedules of these lawyers made conducting group interviews extremely difficult. The interviews involving two participants were conducted with the lawyers who worked together in the same organisation.

<sup>18</sup> See Jane Lewis and Elaine Welsh, 'Fathering Practices in Twenty-Six Intact Families and the Implications for Child Contact' (2005) 1 *International Journal of Law in Context* 81; Judith Masson, 'Research — Emergency Intervention to Protect Children: Using and Avoiding Legal Controls' (2005) 17 *Child and Family Law Quarterly* 75.

<sup>19</sup> Pamela S Kidd and Mark B Parshall, 'Getting the Focus and the Group: Enhancing Analytical Rigor in Focus Group Research' (2000) 10 *Qualitative Health Research* 293, 294.

<sup>20</sup> See, eg, Jenny Kitzinger 'The Methodology of Focus Groups: The Importance of Interaction between Research Participants' (1994) 16 *Sociology of Health and Illness* 103, 105.

<sup>21</sup> Kidd and Parshall, above n 19, 294.

<sup>22</sup> See Patrick Doreian and Katherine L Woodard, 'Fixed List versus Snowball Selection of Social Networks' (1992) 21 *Social Science Research* 216.

Based on a literature review, a semi-structured interview guide was created for each study. The guides focused on facilitating an in-depth discussion and analysis of current practices and challenges associated with working in the child protection field. Ethical approval was obtained from the Ethics Committee at the University of Queensland. Each focus group and interview ran for between 60 and 90 minutes. Focus groups and interviews were recorded and transcribed, and the qualitative data yielded was pattern coded.<sup>23</sup> The findings of both of these studies are drawn upon in this paper, allowing for the perspectives of two professional groups to be compared and contrasted.

The limitations of our approach are conceded. The findings reported on here are based on accounts of lawyers and community service providers who advocate and represent mainly parents within the child protection system in Queensland. It cannot be understood as a literal description of the system as a whole or of the workings of the child protection systems in other states.<sup>24</sup> Ideally this research should be extended to interview parents, children and child protection workers to gain insights into their experiences of child protection department interventions and ensuing court processes. Such research could also be expanded to other states.

### III CHILD PROTECTION ADVOCACY: OVERVIEW OF LAW AND PRACTICE IN AUSTRALIA

If a member of the public believes that a child is at risk of harm in their home environment they can choose, or they may be compelled, to report this belief to the relevant child protection authority.<sup>25</sup> In Australia, most notifications come from police officers, schools and medical personnel<sup>26</sup> and many of these reporters are subject to mandatory reporting requirements.<sup>27</sup> An important statutory function of child protection authorities is to make inquiries, or under-

<sup>23</sup> Pattern coding was conducted in accordance with Miles and Huberman's methods: see Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publications, 2<sup>nd</sup> ed, 1994) 69–72.

<sup>24</sup> Robert Dingwall, 'Accounts, Interviews and Observations' in Gale Miller and Robert Dingwall (eds), *Context and Method in Qualitative Research* (Sage Publications, 1997) 51, 54.

<sup>25</sup> Each Australian state and territory has its own child protection authority, within relevant government departments. There is no national child protection authority, although there is a national child protection framework: see Council of Australian Governments, *Protecting Children is Everyone's Business — National Framework for Protecting Australia's Children 2009–2020* (2009).

<sup>26</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2009–10* (2011) 18.

<sup>27</sup> As to mandatory reporting in Australia and New Zealand, see Ben Mathews et al, 'Queensland Nurses' Attitudes Towards and Knowledge of the Legislative Duty to Report Child Abuse and Neglect: Results of a State-Wide Survey' (2008) 16 *Journal of Law and Medicine* 288; Ben Mathews et al, 'Teachers Reporting Suspected Child Sexual Abuse: Results of a Three-State Study' (2009) 32 *University of New South Wales Law Journal* 772; Ben Mathews et al, 'Development in Australian Laws Requiring the Reporting of Suspected Child Sexual Abuse' (2009) 34 *Children Australia* 18; Michael Heron and Amy Jordan, 'Health Professionals and Mandatory Reporting' (2001) *New Zealand Law Journal* 139; Philip Mendes, 'The Historical and Political Context of Mandatory Reporting and Its Impact on Child Protection Practice in Victoria' (1996) 49(4) *Australian Social Work* 25.

take an investigation and assessment, based on these notifications.<sup>28</sup> In 2009–10, over 286 000 notifications were received by Australian child protection departments.<sup>29</sup> Around 162 000 were investigated and around 46 000 were substantiated.<sup>30</sup> These figures suggest that not all notifications are followed up on,<sup>31</sup> child protection authorities have complete discretion in deciding which notifications, and which children, ultimately become the subject of an investigation or assessment.<sup>32</sup> This means that certain groups and individuals may be targeted more frequently than others.<sup>33</sup>

Upon a notification being received, the first step in an investigation generally involves child protection officers conducting interviews with the child's parents or carers, and visiting the child's home. During this initial stage of the investigation, the child may be removed from his or her home and placed in 'out of home' care without a warrant or court order — in all Australian jurisdictions, child protection officers are empowered to remove a child from his or her family unit immediately in situations where they deem the child is at risk of imminent harm.<sup>34</sup> Legislation limits the amount of time that a child can be held in 'protective custody' without a warrant or a court order, ranging from eight hours to four weeks.<sup>35</sup> Legislation also limits the kinds of assessments and investigations that may be carried out without the court's approval.<sup>36</sup> Regardless, significant trauma and damage may be caused during this time.

Once the relevant time limit has expired and the child can no longer lawfully be kept within the care of the department without a court order, a child protection

<sup>28</sup> In Queensland, see *Child Protection Act 1999* (Qld) s 14, which allows the chief executive to initiate investigations into alleged harm.

<sup>29</sup> Australian Institute of Health and Welfare, above n 26, 15.

<sup>30</sup> *Ibid* 15, 19.

<sup>31</sup> Having said this, in 2009–10 Queensland's Child Safety Services received 21 885 notifications, and it reports that all of these notifications were investigated; however, only 6922 were substantiated: *ibid*.

<sup>32</sup> These decisions are generally made using risk assessment tools. Many of the respondents in our study expressed the view that these instruments were (unfairly) biased against families with low incomes, precarious housing arrangements, and prior dealings with the department: see also Douglas, Walsh and Blore, above n 17.

<sup>33</sup> Research suggests that families of low socioeconomic status and indigenous families are most likely to be targeted by child protection departments: *ibid* 40–3; McConnell and Llewellyn, above n 3, 554.

<sup>34</sup> *Children and Young People Act 2008* (ACT) ss 360–1, 406; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 30, 34, 43; *Care and Protection of Children Act 2009* (NT) ss 32, 46, 51–2; *Child Protection Act 1999* (Qld) s 18; *Children's Protection Act 1993* (SA) s 16; *Children, Young Persons and Their Families Act 1997* (Tas) ss 20–1; *Children, Youth and Families Act 2005* (Vic) s 241; *Children and Community Services Act 2004* (WA) ss 37, 41.

<sup>35</sup> *Children and Young People Act 2008* (ACT) s 384 (four weeks); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 45 (no later than the next sitting day of the Children's Court); *Care and Protection of Children Act 2009* (NT) s 53 (72 hours); *Child Protection Act 1999* (Qld) s 18(8)(b) (eight hours); *Children's Protection Act 1993* (SA) s 16(5) (child must be returned by the end of the next working day); *Children, Young Persons and Their Families Act 1997* (Tas) s 21 (120 hours); *Children, Youth and Families Act 2005* (Vic) s 242 (one day); *Children and Community Services Act 2004* (WA) s 38(4) (two to three days).

<sup>36</sup> The power to make orders of this kind is vested in the court rather than officials: see, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 36(1)(c), 43(2)–(3); *Child Protection Act 1999* (Qld) ss 28, 45, 51AF; *Children, Youth and Families Act 2005* (Vic) s 232.

officer may apply for either a temporary order to allow for further assessments to be undertaken or a child protection order placing the child in out of home care for a period of time.<sup>37</sup> Child protection orders may be of short duration, or they may endure until the child reaches adulthood. In Australia, most children who are placed on child protection orders are in the care of the department for over one year — indeed nine per cent are on orders for eight years or more.<sup>38</sup>

If a child protection order is made, legislation often requires that a case plan be put in place by the department with respect to the child.<sup>39</sup> Where the ultimate goal is that the child be reunified with his or her parents, the case plan will detail the nature of any services, treatment or counselling the parents will need to receive before the child can be returned home. The case plan also includes all arrangements regarding the amount of contact the child is to have with his or her parents whilst the order is in place. In Queensland, case plans are formulated in ‘family group meetings’, which are mediation conferences convened by child protection officers and attended by parents, carers and other concerned individuals, including the child where appropriate.<sup>40</sup>

The idea of ‘family group meetings’ is to bring about consensus regarding how the child is to be cared for and protected, with maximum family involvement in those decisions. In practice, however, this form of decision-making may not be collaborative. While many of the decisions made by child protection officers are subject to judicial review, or merits review by the relevant tribunal, in reality, review of any kind is rarely sought. Parents and children are often unaware of their rights to appeal or contest a decision, and are often in practice unable to navigate the relevant systems.

As will be seen, parents and children can benefit from an advocate at all stages of the process — at the notification and investigation stage, in court proceedings and in family group meetings. Respondents to our studies outlined many situations in which they considered that an advocate was necessary to achieve the best outcomes for children and families. Their reasoning is detailed below.

<sup>37</sup> See, eg, *Children and Young People Act 2008* (ACT) ss 406, 410, 433, 464; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 43, 45–6, 69, 71; *Care and Protection of Children Act 2009* (NT) ss 46, 51, 54, 105, 128; *Child Protection Act 1999* (Qld) ss 18(5), 27, 44, 62; *Children’s Protection Act 1993* (SA) ss 16, 38; *Children, Young Persons and Their Families Act 1997* (Tas) ss 21(2), 22, 26, 42; *Children, Youth and Families Act 2005* (Vic) ss 242(2), 262, 274, 319; *Children and Community Services Act 2004* (WA) ss 38, 45.

<sup>38</sup> Across Australia in 2009–10, 58 per cent of children who were discharged from an order had been continuously on an order for one year or more; 9 per cent had been continuously on an order for eight years or more: Australian Institute of Health and Welfare, above n 26, 35.

<sup>39</sup> See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38; *Child Protection Act 1999* (Qld) ss 51B–51C; *Children, Youth and Families Act 2005* (Vic) s 167.

<sup>40</sup> See *Child Protection Act 1999* (Qld) ss 51G–51J. Equivalents in other Australian jurisdictions are called ‘family group conferences’, ‘family care meetings’, ‘mediation conferences’ and ‘dispute resolution conferences’: see below n 46.



## IV ADVOCACY FOR PARENTS

*A Parental Distress*

The community service providers and lawyers we interviewed agreed that the vast majority of parents are unable to effectively advocate for themselves when interacting with child protection authorities. Three main reasons were offered for this. First, the respondents said that parents whose children have been removed, or are at risk of removal, are extremely distressed, emotional and traumatised, which means their capacity to speak for themselves is seriously compromised. As two of the lawyers said:

Most parents are distressed, angry and upset ... I don't know how a severely depressed person is able to rationally advocate.

Just given the emotional context, it's inappropriate to expect people to be able to advocate effectively on their own in that situation, because they are — particularly mothers if kids are to be taken and they're in that investigation phase — you just think, [expletive], how could you ever be anything other than frantic?

Second, and related to this, parents generally feel completely disempowered when dealing with child protection departments. While this is true of most parents, both lawyers and community service providers reported that Aboriginal families are particularly vulnerable.<sup>41</sup> As one lawyer said:

Sometimes the first hurdle you have to overcome is to persuade them that there is [sic] ways of addressing these issues. That they're not automatically defeated just because a government department and a court is involved. You can understand the sense of despair given the history.

Third, respondents believed that parents generally lacked the skills to negotiate with the Child Safety department ('Department') and to speak for themselves in formal meetings and proceedings. It is well-established that the parents of most children of interest to child protection authorities are members of marginalised groups — they are often of low socioeconomic status, under-educated or illiterate, and many suffer from intellectual impairment or mental illness.<sup>42</sup> Aboriginal and immigrant parents may not speak English as their first language; but even without these language barriers, many of the lawyers we interviewed felt that parents needed them to 'interpret' or 'translate' what was going on during court proceedings and in meetings with the Department. One of the lawyers said:

I'd say 90 per cent of our clients could not do it on their own because they don't have the literacy skills, they're not sort of streetwise about how departments

<sup>41</sup> In 2009–10, Aboriginal children were around eight times more likely to be subject to a child protection order than non-Aboriginal children: Australian Institute of Health and Welfare, above n 26, 28. As to Aboriginal families and child protection, see Heather Douglas and Tamara Walsh, 'Child Protection Interventions and Indigenous People' (Working Paper, The University of Queensland, 2011).

<sup>42</sup> See above n 3 and accompanying text.

operate, they don't have that culture that tells them how best to get what they want from a government department ... Usually the ones that have child protection involved are the most vulnerable in so many respects. They're often the least educated, the most marginalised, the poorest; often people who are homeless, who have domestic violence situations going on. So they're vulnerable in just so many respects. Without the support of an organisation, but particularly without the support of a lawyer, they're just not going to be able to fight their case adequately.

Thus, the lawyers and community service providers agreed that the vast majority of parents who are forced to interact with child protection authorities are in need of an advocate to speak for them, and to assist them to feel empowered to participate in the process.

### B *Admissions and Consent Orders*

According to the community service providers and lawyers that we interviewed, parents without an advocate can unwittingly compromise their case during the initial stages of an investigation. For example, during informal interviews with child protection authorities, parents may unknowingly make admissions or provide information that is prejudicial to themselves. Many of the respondents in our studies stated that because parents are so distressed, angry and terrified that their children will be removed from their care, they may be willing to comply with any request for information or access, without considering their legal rights or how it might affect their case in the future. As one of the lawyers said:

They want to fix it up. They want to make it okay. They'll do anything. They think if they tell the Department everything and work with the Department that it will be good for them, but quite often it has the other effect because they've admitted to something that the Department then says, 'oh, okay. We're going to write that down.'

The community service providers we interviewed provided many examples of situations in which their clients had permitted child protection officers to enter their home for a 'chat', and the officer proceeded to search their house and collect evidence against the parents. The 'evidence' gathered can then be taken out of context. One community worker said, in relation to refugee families under investigation by child protection authorities:

I've heard of people going into the houses of new arrivals, and opening the fridge — there's no food, the house is dirty, but she's got eight kids ... The assumptions, the stereotypes. The fridge is always empty because people come in and eat. Whoever comes by has something to eat and gets offered something. It might not appear to be enough but there is enough.

Another way in which parents may unknowingly prejudice their chances of retaining care of their children is by signing a 'consent order'. In the initial stages of an investigation, child protection officers may try to convince parents to sign an agreement consenting to the removal of their child for a period of time. In Queensland, this is termed an 'intervention with parents' agreement', or

an 'IPA'.<sup>43</sup> Removal of children by parents' consent can occur in all Australian jurisdictions.<sup>44</sup> While this appears to be a useful alternative to court proceedings in certain circumstances, such as where parents admit they are in need of respite, the community service providers and lawyers we interviewed raised numerous concerns in relation to these 'agreements'. They noted that, from the point of view of a child protection officer, obtaining an order 'by consent' presents itself as an 'easy' alternative to court proceedings, particularly where the Department lacks a strong case. Comments from the lawyers along these lines included:

I just think that a lot of times Child Safety want to consent to orders because their evidence is crap, really. They can't meet the threshold or their evidence is poor.

My perception of the consent order path is: it's easy; it doesn't get judicially tested; it doesn't involve them having to deal with lawyers or other people. There is no requirement for independent legal advice.

Many of the lawyers in our study expressed the view that informed consent was often not obtained from parents in these situations. One lawyer described situations in which parents had signed 'consent' orders when they were visibly intoxicated. Indeed, some lawyers argued that parents' 'consent' was, at times, obtained by duress:

The fellow said, 'right, well I'm here with a safety plan — you're going to sign it now.' She went, 'no, I have a solicitor, I want to ring [solicitor's name]. I would like him to have a look at the safety plan.' ... He said, 'right, you're not signing it now, I'm putting your children in the car and I'm taking them back to the service centre.' She's on an IPA, she's not even on an order ... They're just bullying, over the top, and they use children as the axe over the head all the time.

It's not just unethical. It's bloody well bordering on criminal conduct some of the things they're doing — forcing people under duress, hand over their children, lying to them, deliberately lying to them as a public servant ... There's malice in there — malicious conduct — purposefully designed to make this staff member's life a little bit easier on the paperwork.

The community service providers agreed. One said:

[Child Safety officers are] going to try and railroad — I don't care what you want to call it — the client into signing it so it saves them work.

Many of the lawyers we interviewed were concerned because parents were not being encouraged to seek legal advice before signing these orders. They said that once an order has been signed it is very difficult to have it revoked, or to

<sup>43</sup> See *Child Protection Act 1999* (Qld) ch 2 pt 3B.

<sup>44</sup> *Children and Young People Act 2008* (ACT) pt 12.3 (voluntary care agreement); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38A (parent responsibility contract); *Care and Protection of Children Act 2009* (NT) s 46 (temporary placement arrangement); *ibid* ch 2 pt 3B (intervention with parent's agreement); *Children's Protection Act 1993* (SA) s 9 (voluntary custody agreements); *Children, Young Persons and Their Families Act 1997* (Tas) s 11 (voluntary care agreement); *Children, Youth and Families Act 2005* (Vic) ss 135–156 (short-term child care agreement and long-term child care agreement); *Children and Community Services Act 2004* (WA) s 75 (negotiated placement agreement).

negotiate more generous contact arrangements, and that it is critical that parents have access to legal advice and assistance prior to signing anything:

It's difficult when the clients aren't aware that they have a right to seek assistance prior to signing off on anything and particularly if they're feeling pressured and they're given the perception by the Department that if they don't sign off on this, it's going to be much worse for them and they basically won't get to spend time with their children.

The clients are signing these documents which I've seen prepared by Child Safety and it's normally a one page document saying that the client has read the orders, they're consenting to them, they understand them, and once they're signed off on there and placed, the client comes to us. It's a bit too late then for us to be able to intervene.

The general tactic is to put the heavies on a client right from the outset and to put the heavies on them to the point where the person actually believes that an order will be made ... 'Why don't we just make a 12 month agreement and see how it goes?' Child Safety gets to tick all its boxes; the child is now under protection and care; the child is now safe; blah, blah, blah. They haven't had to go through any of the rigorous detail of actually proving the complaint. It doesn't get scrutinised by any independent third parties and for the most part, people do not take advice on signing an agreement.

Even where the parents have a lawyer, perhaps because they have interacted with child protection officers in the past, they may be actively discouraged from seeking advice from their lawyer regarding the agreement. At least 10 of the lawyers we interviewed made comments to this effect. One said:

In certain circumstances [the Department has] tried to bypass my advocacy altogether and try to deal directly with my client ... I've had similar feedback from my colleagues where they have tried to bypass the representation of the solicitor and try to deal with the client or with the parent directly, and sometimes they've even managed to coax the parent to come to an agreement and settle the matter without referring it to the parent's solicitor.

Thus, the lawyers and community service providers we interviewed strongly believed that parents required access to an advocate as early as possible in the process so that they did not unwittingly compromise their chances of retaining care of their children, and to ensure that they did not sign any 'agreements' without first receiving comprehensive, independent advice.

### *C Strategy and Argument*

Decision-making in child protection is shared between many different individuals and forums — decisions are made by child protection officers, courts and tribunals, and in family group meetings.<sup>45</sup> Both the lawyers and community service providers we interviewed emphasised that parents require assistance from an advocate regardless of who is making the decisions.

<sup>45</sup> As to decision-making in child protection matters, see Walsh and Douglas, 'Lawyers' Views on Decision-Making in Child Protection Matters', above n 8.

### 1 Family Group Meeting

Many important decisions including decisions regarding the amount of contact parents will have with their child during the life of an order, as well as the goals that will need to be reached by parents before they are reunified with their child, are made within family group meetings.<sup>46</sup> These determinations make up the child's 'case plan'.<sup>47</sup> The legislative goal of family group meetings is to reach consensus, with maximum participation from all concerned individuals, including parents. Yet, both the community service providers and lawyers we interviewed were adamant that parents needed to be supported by an advocate at these meetings; they agreed that parents invariably need someone to sit alongside them at these meetings to assist them to participate. One lawyer commented:

I don't think I have ever been to a [family group] meeting where the parent hasn't said 'I need my lawyer to talk' because they get distressed.

Most of the lawyers and community service providers we interviewed emphasised that in many of their cases, child protection officials spoke down to parents and did not assist them to participate in proceedings. Lawyers felt that when an advocate was present to support the parents, some of the power imbalances were addressed:

The atmosphere and the whole way in which a family group meeting happens changes where there's a lawyer not present. I found out when I began to go to family group meetings where lawyers hadn't previously taken part that very often the convenor would try to operate the meeting on the basis of the agenda that the Department have [sic].

The lawyers reported that when they became involved in child protection matters, and began attending family group meetings, the behaviour of the child protection officers involved would often change. Two lawyers commented:

The Department would always get a little bit, 'oh, we've got to do things right now that a lawyer is involved'. I often got that comment.

Often we've found in the past that the Department of Child Safety have talked down to our clients, they haven't really shown a lot of respect to our clients and the clients have felt powerless to put their view across ... With a lawyer present, we find that it's a totally different situation. Everyone understands that the lawyer knows what's been going on, the lawyer knows the rights of the family members, the lawyer will stand up and advocate and if there is a complaint to

<sup>46</sup> Family group meetings are conferences convened by child protection officers and attended by the parents, and other persons with an interest in the safety and well-being of the child, with the aim of reaching collaborative decisions regarding the care and protection of a child who is the subject of a child protection order: *Child Protection Act 1999* (Qld) ss 51G–51P. There are equivalents in most other Australian jurisdictions: 'family group conferences' in the ACT (*Children and Young People Act 2008* (ACT) ch 3) and Tasmania (*Children, Young Persons and Their Families Act 1997* (Tas) ss 30–3); 'family care meetings' in South Australia (*Children's Protection Act 1993* (SA) ss 27–30); 'mediation conferences' in the Northern Territory (*Care and Protection of Children Act 2009* (NT) s 49). See also *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 37–8.

<sup>47</sup> See *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 38; *Child Protection Act 1999* (Qld) ss 51B–51F; *Children, Youth and Families Act 2005* (Vic) s 167.

be made, the lawyer will make the complaint and is able to make the complaint and has the skills to make a valid and well set out complaint.

In particular, our respondents felt that parents needed help negotiating the child's case plan so that it was realistic and achievable. One of the lawyers said:

What I see quite often, when people aren't represented, is they're so desperate to get their children back, they'll agree to everything. They set themselves up to fail because they haven't got a hope of achieving all the things they promise to do. Then the case plan, of course, doesn't — the goals don't get met, so the Department says, 'well, you didn't meet the case plan outcome so therefore ...'

Related to this, the community service providers emphasised the importance of ensuring that everything discussed in family group meetings was put in the case plan. They noted that, at times, discussions at family group meetings could be misrepresented in the case plan document, compromising parents' chances of being reunified with their children:

[Community service provider 1:] You gotta make sure on behalf of your client, that [everything discussed is] in the case plan, it *has* to be in the case plan, because if it isn't ... they have no right to reunification ... If we can get [a plan for reunification] in the family group meeting, and part of that process, and legally, and make sure that the Department — and you see with this you've got a level playing field, whereas if it's not there, they're having a field day. So it's about making sure in that case plan that there is something about the mother having reunification with her children. Because if it goes to court or goes to a hearing and none of that stuff's there, then ... [Community service provider 2:] it may never happen.

A surprising finding of this research was the level of involvement that the lawyers have in ensuring that parents are able to achieve the goals set for them in the case plan. In 16 of the 21 interviews we undertook with lawyers, the respondents said that they actively referred parents to community services — including drug and alcohol treatment, counselling, and housing and welfare services — to ensure that they had support in place that would assist them to address the child protection concerns of the Department and ultimately regain parental control of their children. The lawyers said:

I keep a list of housing agencies, Salvation Army — there is a place a few streets away that gives out bags of clothing to homeless people — just referring them to various counselling agencies and where they can get assistance with homing [sic]. So it's not really work, it's just an aside thing.

I actually do a lot of referrals. I've got a good little network of — I've got good relationships with a lot of the agencies. Just built up over the years.

## 2 Courts and Tribunals

In Queensland, where a parent appears unrepresented in the Children's Court in respect of an application regarding their child the court may only continue with proceedings if it is satisfied that the parent has had reasonable opportunity

to obtain legal representation.<sup>48</sup> Yet, many parents appear in the Children's Court without legal representation despite the fact that the lawyers we interviewed agreed that it was practically impossible for a parent to advocate for themselves in that Court. Two of the lawyers we interviewed said:

They are too emotionally charged. I mean they absolutely loathe the Department so they are not presenting well on their own in court and that is the difficulty ... they are just so angry. So they do need someone to be there to be objective, just to put what the facts are before the court.

Many parents feel intimidated by the court process. A lot of them would have opted out and, you know, would have been forced to settle. Or would have just backed away altogether and the Department would have seen that as another example of the parents not engaging with the system or the Department and being dysfunctional to the point where they couldn't even cope with that particular process.

Lawyers overwhelmingly believed that court processes in child protection matters were too adversarial for a parent to be able to navigate the system effectively on their own. When compared with family law proceedings, child protection proceedings were described by the lawyers as more 'extreme'. Pitted against a well-resourced government department that has legal representation, our respondents considered that parents 'did not stand a chance'. They made comments including:

Without a lawyer being present, (a) the parents wouldn't know what orders the court can make because they don't know the law and (b) there would just be no way that they would be able to put their evidence or their case or their argument coherently and cogently to the court. That's why it's absolutely fundamental that they get their representation.

[We can] present everything to the Magistrate to say, this is why the Department's application is flawed. Otherwise it's one side of the story. My clients don't have the capacity to put in their own affidavits ... They're illiterate, or literacy is minimal ... Affidavits have to follow the rules and non-lawyers don't know what the rules are.

As noted above, many of the decisions made by child protection officers, including the contents of the case plan, are reviewable by a tribunal.<sup>49</sup> These tribunals have been established deliberately to provide an accessible and inexpensive merits review, and legal representation is often discouraged. Yet, the lawyers we interviewed strongly believed that parents required an advocate in tribunal hearings:

A lot of people on these tribunals have a law degree. The client sitting before them is sometimes lucky to have got through grade nine. Using quite complicated terminology with the clients, trying to tell them it's this in the Act and it's that in the Act. Not showing them, not talking to their level. They intimidate clients — sorry, but they do intimidate clients unless the client is represented. Then the tribunal is reluctant to allow representation. I don't know why. That's

<sup>48</sup> *Child Protection Act 1999* (Qld) s 109(1).

<sup>49</sup> In Queensland, the relevant tribunal is the Queensland Civil and Administrative Tribunal.

an unequal playing field. [The Department] turns up with a solicitor — why can't the client be represented? It's grossly unfair. That tribunal approach really needs to be thought about again.

A number of the lawyers we interviewed mentioned the importance of strategy; they said that the child protection system was adversarial in nature and required an adversarial approach.<sup>50</sup> The lawyers stated that effective arguments based on the legislation were often available, and that superior skills in argument were often required to respond to the Department's 'evidence'. The lawyers noted that, often, the 'evidence' of the Department was open to interpretation.

One poignant example that was raised by both lawyers and community service providers was the way in which a parent's distress at their child's removal could be used against them. Most parents are extremely distressed at the time of removal, especially since children are often removed in a traumatic manner — child protection officers may be accompanied by police officers, parents may be physically restrained, children may be forcibly removed, and there may be an altercation between parents and the officers involved. Lawyers stated that parents' aggression in these circumstances acted as a 'mark' against them:

They're at home having dinner and [the Department] will come along and remove their children and one of the parents gets really angry and frustrated and upset as anybody would. That's held against them. That person has an anger management problem. What do you want them to do? Stand there and say, 'oh please take my children'?

When your client becomes aggressive, that's a mark against them. How can that be a mark against a person where the very core of child safety is whether a person can meet the protective needs? Here is a parent spitting the dummy, trying to meet the protective needs, but then at a later — that's utilised against them. Doesn't make a great deal of sense ... The Department says, you know, your display that day confirms these notifications. And you're thinking, well, you know, that's just crap.

[The parents] are freaking out. You get the Department then saying we are really worried about mum because she is depressed. We don't think it's the right environment to send the children back to. Mum needs to have some counselling.

Ironically, if the parents are not visibly distressed, this too can work against them. One lawyer said:

I've seen two [departmental] affidavits last year one of which said, you know, that they went to remove the baby, the mother became angry and emotional and was — swore at the departmental workers and threatened them. Then in another one, in another affidavit that arrived across our desk, probably within weeks of that one, the Department was saying the woman showed no particular distress about having the baby removed and so therefore there's no attachment. You just think, well how much emotion is the right amount of emotion to show about having your child removed?

<sup>50</sup> The importance of strategy in child protection proceedings was also emphasised by the lawyers observed by Maclean and Eekelaar in a UK context: see Maclean and Eekelaar, *Family Law Advocacy*, above n 9, 98, 101, 104.



## V LAWYERS SUPPORTING CHILDREN WHO ARE THE SUBJECT OF CHILD PROTECTION MATTERS

In Queensland, children can be represented by a 'separate representative' in child protection matters.<sup>51</sup> A separate representative is a lawyer who must act in the child's best interests, regardless of any instructions from the child, but also must, as far as possible, present the child's views and wishes to the court or tribunal.<sup>52</sup> A child who is sufficiently mature may also be represented by a 'direct representative'.<sup>53</sup> A direct representative acts under instructions from the child, and supports the child to express his or her views and give evidence.<sup>54</sup>

In Queensland, if the Children's Court considers it necessary that a child be *separately* represented, the Court may make an order to this effect.<sup>55</sup> In these circumstances, Legal Aid will be asked to allocate a lawyer to the child.<sup>56</sup> In reviews of child protection decisions at tribunal level, the Queensland Civil and Administrative Tribunal ('QCAT') must consider whether it would be in the child's best interests to be separately represented by a lawyer and, if it considers this to be the case, it must order that the child be so represented.<sup>57</sup> There is no explicit requirement that the court or tribunal consider, or make directions regarding, whether a child should have a *direct* representative.

Many of the lawyers who participated in our study said that the Children's Court and particularly QCAT were often reluctant to appoint a representative for the child. Most felt that this was unfortunate because children and young people were often in need of someone to put forward their views and wishes. This is particularly true in the context of reduced legal aid funding for representation of parents in child protection matters. Many young people feel their wishes would be adequately expressed if there was a lawyer working with the family but, if their parents are not represented, they may be more desirous of a separate representative or direct representative.<sup>58</sup> In other situations, parents' representation will make no difference because the child believes that their interests are different to those of their parents.<sup>59</sup> As one community service provider said:

<sup>51</sup> *Child Protection Act 1999* (Qld) s 99Q(3).

<sup>52</sup> *Ibid* ss 99Q(6), 110(3). This is sometimes termed 'best interests representation'. See also Gregg Herman, 'Lawyers for Children in a Perfect World' (2008) 21(4) *American Journal of Family Law* 110; Rachel Birnbaum, 'Hearing the Voices of Lawyers and Clinical Agents Who Represent Children in Child Custody and Access Disputes' (2005) 24 *Canadian Family Law Quarterly* 281.

<sup>53</sup> *Child Protection Act 1999* (Qld) ss 99S(2), 108(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)(b)(i).

<sup>54</sup> *Child Protection Act 1999* (Qld) ss 99U, 99V(2)(b), 99W(2)(b), 112(2)(b).

<sup>55</sup> *Ibid* s 110(1).

<sup>56</sup> *Childrens Court Rules 1997* (Qld) rr 20–1.

<sup>57</sup> *Child Protection Act 1999* (Qld) ss 99Q(3)–(4).

<sup>58</sup> Gottlieb and Pitchal note that the reverse may also be true — if the child is represented, the interests of the parents may also be advanced: see Chris Gottlieb and Erik S Pitchal, 'Family Values: How Children's Lawyers Can Help Their Clients by Advocating for Parents' (2007) 58(1) *Juvenile and Family Court Journal* 18.

<sup>59</sup> Indeed, some have argued that children have distinct interests that cannot be represented by their parents or the state: see LaShanda Taylor, 'A Lawyer for Every Child: Client-Directed Representation in Dependency Cases' (2009) 47 *Family Court Review* 605.

Often the child's wishes were lumped in together with the family's. And often they can be very separate.

Children and young people generally want information about their case, an explanation as to how the process works, to be listened to, and to have their views advocated for. However, many do not want to participate in proceedings for various reasons.<sup>60</sup> Both the lawyers and the community service providers we interviewed believed that children needed advocates within the child protection system, and that without separate or direct representation, children and young people generally lacked a voice in proceedings.<sup>61</sup> Two community service providers commented:

The thing that I think is really missing from [the child protection system] is really good children's advocates, and a system that looks at the age of children and whether they can [have] input into the decisions.

Our primary motivation is that voices of children and young people need to be heard and their views and wishes need to be adhered to. Often within formal processes that can't happen. So it's about having somebody there who can advocate for them. Directly saying what they want. I think there is a really strong need for legal representation of children and young people in care and it's the direct rep or separate rep.

The lawyers noted the strategic disadvantages for children who lacked a lawyer to represent them. They emphasised that, without a lawyer, children would often be unaware of their rights within the system, particularly their right to maintain contact with their family, their right to challenge the evidence before the court, and their right to have their wishes made known:

A young person might request contact with a family member and the Department says, 'oh no, we're not able to do that.' It's just about knowing that extra process of being able to say, 'well, who makes that decision, and can you put it in writing to us?' One recent example of that was exactly that situation where the Department said 'we can't provide contact because we can't provide anybody to supervise it.' We said, 'well, put the reasons in writing why you can't do that' and by the end of the week the contact had been organised ... Some of that is just being able to promote and articulate those rights for young people without actually preventing them from participating and having their ideas heard.

They do want to have a say and they want to be heard, sometimes because they believe that inaccurate information has been given to the court and sometimes because they want to know what is being said about them and they want to feel that they have a say in what happens.

<sup>60</sup> Cashmore and Bussey, above n 14, 332–4. See also Megan Giles, 'The Separate Representation of Children in Child Protection Proceedings' (2001) 21(1) *Proctor* 18. In respect of family law proceedings, see Rachel Birnbaum and Nicholas Bala, 'The Child's Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers' (2009) 25 *Canadian Journal of Family Law* 11.

<sup>61</sup> Research in other jurisdictions concurs with this: see Eva Ryrstedt and Titti Mattsson, 'Children's Rights to Representation: A Comparison between Sweden and England' (2008) 22 *International Journal of Law, Policy and the Family* 135, 140, 144; Taylor, above n 59; Stephen Hardy, 'The Voice of the Child: A Legal Voice?' (1999) 13 *Journal of Social Work Practice* 204, 207.

The question as to which kind of representative is appropriate will, of course, depend on the characteristics of the individual child. The Queensland legislation suggests that a child who is 12 years of age or older should be assumed to be competent to express their views and wishes,<sup>62</sup> but in other Australian jurisdictions children as young as seven may be considered mature enough to instruct.<sup>63</sup> This would imply that they should have a direct representative rather than a separate representative.<sup>64</sup> However, one of the lawyers we interviewed believed that there is often a role for both kinds of representatives in child protection matters. She said:

Traditionally, if there has been a direct representative, then Legal Aid has been reluctant to fund a separate representative, and similarly I don't think that they fund a separate representative where a direct representative has been appointed ... But there is clearly real benefits in having both. Often I will become involved in matters where a separate representative had been appointed and the young person felt that they didn't agree with the recommendations that were being made by the separate representative. Or the separate representative was saying that they were going to wait until the trial to form a position and so the young person felt, well, I don't know what the separate representative is going to say.

The manner in which the separate representative conducts the child's case will, in many cases, determine whether a child feels they need a direct representative. The role of a separate representative is a subject of debate within the literature,<sup>65</sup> and was discussed within the interviews we conducted. Many of the lawyers and community service providers we interviewed believed that a separate representa-

<sup>62</sup> *Child Protection Act 1999* (Qld) ss 99V(3), 112(2).

<sup>63</sup> See, eg, *Children, Youth and Families Act 2005* (Vic) s 524(2), which provides that 'a child who, in the opinion of the Court, is mature enough to give instructions' must be enabled to obtain representation by an adjournment of proceedings. On advice from the Children's Court Clinic (pursuant to s 546(2)) the 'rule of thumb' is that the cut-off point is the child's 7<sup>th</sup> birthday: Children's Court of Victoria, *Research Materials: Family Division — General* (24 October 2011) <<http://www.childrenscourt.vic.gov.au/CA256CA800011129/page/Research+Materials>>. See also Andrew McGregor, 'The Representation of Young Children in the Family Division of the Children's Court in Victoria' (2000) 24 *Australian Children's Rights News* 19; John Fogarty, 'The Representation of Young Children in Court Proceedings in Victoria' (2000) 24 *Australian Children's Rights News* 16. But see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99B, which provides that a child under 12 is presumed incapable of giving proper instructions.

<sup>64</sup> See Sarah H Ramsey, 'Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity' (1983) 17 *Family Law Quarterly* 287, 320. Indeed, some researchers have argued that since a lawyer will never have known a child for very long, they cannot be in a position to know what is best for the child, and the child should always be listened to directly: see Ann M Haralambie, 'Humility and Child Autonomy in Child Welfare and Custody: Representation of Children' (2008) 47 *Judges' Journal* 23, 25.

<sup>65</sup> In Australia, see Dominica Whelan, 'The Wishes of Children and the Role of the Separate Representative' (1979) 5 *Monash University Law Review* 287. Elsewhere, see Donald N Duquette, 'Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required' (2001) 34 *Family Law Quarterly* 441; Judith Larsen, 'Does the Child's Lawyer Owe "the whole truth" to the Court in Neglect-Abuse Cases?' (1996) 47 *Juvenile and Family Court Journal* 49; Katherine Hunt Federle, 'The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client' (1996) 64 *Fordham Law Review* 1655, 1679–84; George M Thomson, 'Eliminating Role Confusion in the Child's Lawyer: The Ontario Experience' (1983) 4 *Canadian Journal of Family Law* 125, 126–7.

tive should get to know the child, establish rapport, and meet with important people in the child's life including parents, school teachers and other involved adults, as well as order standardised assessment tools to be administered where appropriate.<sup>66</sup> This requires the lawyer to have the skills of both a caregiver and an agent.<sup>67</sup> Yet, many of our respondents felt that separate representatives often did not undertake their role in this manner:

One of the great issues for a lot of young people is that they don't meet their separate representative and that still happens even in the child protection system.

The government can save themselves a lot of money, get rid of the sep reps because all they do is read the Department's reports. They don't go and talk to my kids, my client's kids, or my clients.

Ventrell notes that acting as a separate representative places a lawyer in a 'substituted judgement role' for which they are often not adequately trained.<sup>68</sup> It is perhaps in response to this type of concern that some lawyers acting as separate representatives undertake their work at arm's length from the child and family. Indeed, two of the lawyers we interviewed who acted as separate representatives stated that this is how they conduct their own cases. One lawyer said:

I would be ordering social assessment reports so I have got some sort of independent assessment. I don't go out and investigate. I don't go talking to the parents about it. I get an expert to go and do that.

While the deficits in lawyers' experience, qualifications and skills are apparent, it is understandable that, from the point of view of the child, this kind of 'advocacy' might be considered inadequate.

## VI LAWYERS SUPPORTING JUDICIAL OFFICERS — SYSTEM BENEFITS

In addition to the benefits to individuals that are associated with assisting parents and children to advocate for themselves and participate in the decision-making processes affecting them, the lawyers we interviewed spoke of the benefits to the system of having lawyers involved in child protection matters. Many of the lawyers mentioned the difficulties magistrates experience when making decisions in such matters. The lawyers said that without clear and coherent evidence from parents and children in response to child protection

<sup>66</sup> This is consistent with Ross's views on the role of a separate representative: see Nicola M Ross, 'Legal Representation of Children' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 544, 568.

<sup>67</sup> See Peter Margulies, 'The Lawyer as Caregiver: Child Client's Competence in Context' (1996) 64 *Fordham Law Review* 1473.

<sup>68</sup> Marvin Ventrell, 'Legal Representation of Children in Dependency Court: Toward a Better Model — The ABA (NACC Revised) *Standards of Practice*' in National Association of Counsel for Children (ed), *NACC Children's Law Manual Series* (1999) 167, 172. See also Quebec Bar Committee, 'The Legal Representation of Children' (1996) 13 *Canadian Journal of Family Law* 49, 110–28.

concerns of the Department, it is very difficult for magistrates to make determinations that will bring about the best outcomes for children. Lawyers' comments to this effect included the following:

If [parents] are not represented ... very rarely will they file affidavits with their sworn evidence that the magistrate or tribunal member can rely on. Whatever they say is going to be in response to something else that the Department may have in their material ... It's just very, very hard for a magistrate to be able to gauge what the parent's case really is or what their evidence is or what they need to do.

Without representation it makes it very hard for the magistrate ... the whole court process becomes meaningless without an advocate, without members of the community that can help with interpreting, without some bridge to assist with that communication.

Evidence from parents regarding their parenting capacities, and outlining the ways in which they will protect their children from further harm, is crucial to magistrates' decision-making. Without such evidence, only 'one side of the story' is being presented. Magistrates may understandably err on the side of caution when deciding whether a child should be placed in out of home care, or whether a child should be reunified with his or her parents. If they lack convincing evidence that parents are willing and able to care for and protect the child, this tendency may be compounded. As one lawyer said:

When the parents have had an opportunity to address a piece of evidence that the Department has relied upon and put it more into context, it's taken a completely different tone. It gives the magistrate or judicial officer an opportunity to then see that particular piece of evidence in a different light. You know, it then changes the weight that might otherwise be attached to that particular piece of evidence as in the light that is being presented by Child Safety.

Likewise, magistrates can be assisted in their decision-making if reliable evidence regarding the wishes of the child is available to them. One lawyer said, in her experience:

[Reports of separate representatives] have provided significant insight into the issues of risks in relation to the children and on the dynamics of the family and on the relationship that the children have with that family or extended family. The reports would be very good also in teasing out what the real care and protection concerns of the Department are.

Further to this, the lawyers we interviewed overwhelmingly believed that legal representation of families facilitated the speedy, fair and appropriate resolution of disputes in child protection matters. Some lawyers commented that without legal representation, matters are more likely to be adjourned multiple times at the Department's request. Many of the lawyers we interviewed believed that lawyers' presence in Children's Courts was required as a form of check and balance on the executive. One lawyer said:

There aren't many watchdogs. There aren't many checks and balances for the Department so unless there's going to be a legal system, a legal service,

lawyers — unless those people are there, the Department is very aggressively pursuing what they see as their mandate.

Others made comments regarding the injustice of a situation in which a parent must combat a number of highly trained government lawyers. One lawyer said:

Power imbalances in court are never good. They're always embarrassing especially to the court and it's never good if litigants in any court maybe at the end of the day go away not understanding what has happened or feeling worse, feeling that an injustice has taken place because of their failure to understand or because of a failure to be able to get their views and their points across.

#### VII NON-LEGAL OR PEER ADVOCATES

While the lawyers we interviewed were strongly convinced of the need for lawyers' involvement in child protection matters at the earliest possible opportunity, our non-legal respondents were less certain. The community service providers we interviewed undertook a significant amount of advocacy themselves on behalf of the mothers they worked with. All of the organisations that participated in our study said that one of their primary roles was to work alongside these mothers to assist them to negotiate with the Department, most often with the goal of bringing about the reunification of mothers and children. This work involved providing services to mothers with the aim of increasing their capacity to care for and protect their children, or referring them to other appropriate services, particularly housing, drug and alcohol, and mental health treatment. It also involved assisting mothers to prepare for family group meetings and court proceedings and, often, attending with mothers. The community service providers we interviewed described a variety of quasi-legal tasks they undertook as part of their case management role, both for and on behalf of mothers:

It's fairly easy for us to keep a bit of a paper trail, but for the women it's not. I try to do a lot over the phone and by email and record everything.

We wrote to the manager of the Department and the Minister, with a demand that 'if you don't respond to this within two weeks you will leave us with no option but to take this matter to a higher level.' But it's a lot of work and you really have to advocate for the client.

The community service providers often considered their aim to be informing and empowering mothers, so that the mothers could better interact with the Department on their own behalf. However, the community service providers related many situations in which they felt their client needed someone to speak for them, particularly at family group meetings, and explained that this was a role they often undertook:

You can advocate at family group matters and actively ask [mothers] 'are you aware of the distinction between this and this?' when they usually would be too intimidated to speak up and ask.

The community service providers we interviewed were mostly confident in their role as advocates for mothers, although some believed that additional

training of a legal nature would be helpful to them. Overall, they firmly believed that their involvement improved outcomes for parents and children, and that their advocacy was desperately needed. They also noted that they felt able to judge when a lawyer was required to step in and that, at that point, they took steps to secure a lawyer for their clients.

In comparison, when the lawyers were asked whether certain aspects of their advocacy role could be undertaken by a non-legal or peer advocate, they were very protective of their own role within the system. Most believed that since there was 'always the possibility of a legal outcome', a legally trained advocate was required at every stage of the process. One lawyer said:

The thing about a lawyer is that you can always argue the legal points whereas an advocate will argue it from a sort of meritorious position but not a legalistic position. Reality is you're dealing with the piece of legislation. So it's important to be involved from the very beginning. It's also important to be there for the client at the family group meeting because an awful lot can be achieved there in terms of how reunification is going to be achieved, what the Department's obligations are — they often ignore that.

Many of the lawyers conceded that after reunification has occurred, peer advocates and social workers are needed to assist with counselling and parenting support to avoid further child protection intervention in the future. They also noted that case management — including providing support, follow-up and active referral to services — was needed in cases where the child was placed in alternative care and reunification was a future goal. Many of the lawyers stated that transport was often a problem for clients, and that it would be useful if a community service provider could pick them up and transport them to meetings, to court, and to contact visits.

In particular, the lawyers felt that support workers were required for their Aboriginal clients — they felt that indigenous support workers were needed to work alongside lawyers to assist clients to understand the process, and to provide practical assistance where needed. One lawyer said that, in respect of Aboriginal clients, the main gap in service delivery was not legal but 'just a matter of how do I do this, what's the mechanics of doing something that involves government bureaucracy which they need some independent advice on.'

Thus, the lawyers believed that support workers were required to deal with many of the non-legal issues that arise in child protection matters, but the vast majority of the lawyers we interviewed did not support the idea of training non-lawyers to act as advocates. Most agreed that for matters requiring an advocate, 'there is no substitute for good representation'.

## VIII DISCUSSION

The community service providers and the lawyers that we interviewed all agreed that advocates are desperately required in child protection matters for both parents and children. They differed, however, in their views on the kind of advocacy that was required and who was best to undertake that role. While the lawyers agreed that there was a need for support workers for their clients, they

generally did not agree that those support workers could or should undertake advocacy functions.

While the ideal scenario might be that a qualified lawyer undertake all advocacy-related work in child protection matters and that there be a clear delineation between social and legal work, the community service providers interviewed in our study emphasised that one must be realistic regarding the availability of resources.<sup>69</sup> The community service providers and lawyers we interviewed said that there are insufficient lawyers available who are willing to undertake child protection work. This is mainly the result of the paucity of legal aid that is available in child protection matters. Of course, *Dietrich v The Queen* established that criminal defendants charged with 'serious crimes' are entitled to a stay of proceedings in circumstances where their lack of legal representation would result in an abuse of process,<sup>70</sup> but there is no equivalent entitlement in civil matters 'no matter how serious the consequences for the individual concerned.'<sup>71</sup> The bulk of legal aid funding is, therefore, allocated to criminal defendants, leaving little for civil cases including family and child protection matters. For those matters for which legal aid grants are available, detailed fee structures apply, and lawyers will only be funded for a certain number of hours. The community service providers stated that some lawyers they had dealt with had tried to resolve the matter quickly, or had left in the middle of proceedings, because they had reached the maximum number of hours they were funded for:

You need a *really* good lawyer. At family group meetings they get paid a certain amount per group meeting, so [for] a lot of lawyers, it'll be much easier to sit in there and agree to some points, and advocate for some points. Whereas, you need a really good lawyer who's committed to staying there for four hours even though it's the same pay, and who's willing to advocate very difficult positions. You need a lawyer like that. I only really know of one who'll do that.

The lawyers agreed; one lawyer commented:

If you get a child protection matter, it is almost 80 per cent pro bono work because you put a lot of work in. You just accept that if you are going to do child protection work that's the way it has to be.

As was noted above, many lawyers find themselves making active referrals to community organisations and engaging in other welfare-type work to assist parents to regain parental control of their children.<sup>72</sup> Thus, the time they spend on any one case often involves both legal and non-legal tasks. The community service workers, and those respondents who worked for community legal

<sup>69</sup> Other studies have noted the need for rationing resources: see, eg, John Murphy, 'Children in Need: The Limits of Local Authority Accountability' (2003) 23 *Legal Studies* 103.

<sup>70</sup> (1992) 177 CLR 292, 311–12 (Mason CJ and McHugh J).

<sup>71</sup> *Nguyen v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 20, 26 (Sackville, Marshall and Lehane JJ). See also *New South Wales v Canellis* (1994) 181 CLR 309, 328 (Mason CJ, Dawson, Toohey and McHugh JJ). Specifically in relation to child protection cases, see *RT v An Officer of the Department for Community Development* [2007] WASC 40 (21 February 2007) [17]–[23] (Blaxell J).

<sup>72</sup> See above Part IV(C)(1).



centres, including the lawyers, believed that much of this work could be done (and perhaps done better) by community service providers. Community legal centres provide an enviable model of service delivery to marginalised groups because responsibilities are shared amongst a team of lawyers and social workers, and the work is sensibly and appropriately divided based on the professional's expertise.<sup>73</sup> Yet, for community legal centres, child protection work is just one legal need that their client base experiences, and their resources are seriously stretched. In recognition of this, one of the lawyers we interviewed, a community lawyer, did support the idea of training non-lawyers to act as peer advocates in situations where a lawyer was not available:

There could be collaboration between the advocate, the client and ourselves in terms of helping them do the preparation. If we can't be there on the day and they have got their peer advocate, then I think that is fantastic.

Clearly, there are some benefits that only a lawyer can offer, and this was acknowledged by the community service providers we interviewed. As noted above, they recognised that their capacity to advocate effectively for their clients is limited in many cases:

[Community service provider 1:] We encourage every woman to get legal aid or a good lawyer, simply because [Community service provider 2:] legally we don't have the expertise or experience in that area [Community service provider 1:] and it's sometimes better for the lawyer to play the hardline approach.

[Community service provider 1:] I think it comes down to a little bit of the expertise of the lawyer ... and someone who's prepared to bully the Department a little. [Community service provider 2:] We've had a couple of bullies like that who are just great.

Work in the child protection field requires good interdisciplinary collaboration and communication. As the Director of Family Youth and Children's Law Services at Victoria Legal Aid has recently commented:

pitting lawyers and social workers against one another in the child protection debate does a disservice to both professions. It is particularly unhelpful at a time when each profession is working together to break down the barriers that have historically arisen between them.<sup>74</sup>

Both lawyers and community service providers need to be able to work collaboratively to assist families. This may require specific training so that the different professions are able to fully understand the skills each can bring to the particular case. In most matters different kinds of support, advocacy and representation will be required by families at different times during the progress of their case. Flexibility, responsiveness and collaboration are imperative if appropriate advocacy and safe outcomes for children are to be achieved.

<sup>73</sup> This type of model has been recommended elsewhere: see Gregg Herman, 'Lawyers for Children in a Perfect World' (2008) 21 *American Journal of Family Law* 110, 111.

<sup>74</sup> Judy Small, 'Victoria Legal Aid Responds to Child Protection Claims in the Media' (Press Release, 20 October 2010) <<http://www.legalaid.vic.gov.au/3142.htm>>.

Once it is acknowledged that legal representation will not be available free of charge to every parent in need of an advocate, alternatives must be considered. One option that was discussed with the lawyers in this study was the capacity of duty lawyers to undertake the parent advocate role in child protection matters. There were mixed views. Some of the lawyers stated that duty lawyers would be ineffective because they would have insufficient time to prepare and would be unable to get to know the client and the complexities of their family situation within the short amount of time allocated to each case. They considered duty lawyers to be a 'bandaid solution' to appropriate legal representation. However, those who acted as duty lawyers could see the benefits. While acknowledging that duty lawyers operated under significant constraints, they believed that lawyers had an important role to play in cases where a parent or child had been unable to secure legal representation on their own. One said:

I reckon they all walk out about a foot higher because we've just given them a little — we've empowered them to be able to deal with this and not be terrified.

In respect of children, our respondents seemed to suggest that there was no shortage of lawyers. They felt that the problem was that parents and children were unaware that free legal assistance and representation was available to children. One of the lawyers we interviewed said:

My sense is that young people are still not being given the appropriate notices under the *Child Protection Act [1999 (Qld)]* to notify them of their right of appeal and to properly explain to them how to do that. So even if they do get notified that they can make an application to the Tribunal and even if they do make it, there isn't really a guide that's being provided to them about how to do that and how they might get legal representation and what might be available to them ... They might be told they can have a lawyer. What they may not be told is that it won't cost them any money and that it is free and that it will be easy for them to access and that their child safety officer or someone could facilitate for them to get to and from those appointments if it was necessary.

For those who are unaware that there may be legal assistance available, discouraged from seeking it, or unable to secure it, the availability of a duty lawyer must certainly be considered better than no support at all in the same way that it is within the criminal courts.

The problem is that it is not just at court that advocacy assistance is required. As noted above, at the notification stage many parents unknowingly compromise their chances of preventing the removal of their children by making admissions, or consenting to interviews without legal advice or assistance.<sup>75</sup> As is the case in respect of criminal charges, parents should be informed by the Department that legal assistance is available to them and be provided with contact details for

<sup>75</sup> The same problems have been noted with respect to welfare fraud amongst a similar cohort. Walsh and Marston noted that most people, including single mothers, accused of welfare fraud often consented to interviews with Centrelink's fraud investigation team, despite the fact that attendance at such interviews is not mandatory. Often, they substantially compromised their case by making admissions. With legal advice, a different outcome could have been negotiated. See Tamara Walsh and Greg Marston, 'Benefit Overpayment, Welfare Fraud and Financial Hardship in Australia' (2010) 17 *Journal of Social Security Law* 100, 120–1.

community legal centres and other organisations that may be able to assist them before the Department asks them to sign a 'consent' order.<sup>76</sup>

Certainly, the system requires additional checks and balances. In Queensland, the Commission for Children and Young People and Child Guardian was established, in part, to undertake these functions. However, the Commission has also been charged with all duties associated with criminal record and suitability checks for those who work, or have close contact, with children other than their own. The respondents to this study, both community service workers and lawyers, felt that oversight of the child protection system was not a priority for the Commission, perhaps because the resources of the Commission were insufficient to enable both of these functions to be undertaken comprehensively. The Public Advocate in the Australian Capital Territory ('ACT') provides a good model of a statutory authority that successfully undertakes all these functions.<sup>77</sup> However, given the smaller size of the ACT in comparison to the larger Australian states, it is unclear to what extent this model could be replicated. This presents itself as an area for future investigations.

The Queensland Commission is also charged with maintaining a 'community visitor' program, which aims to 'promote and protect the rights, interests and wellbeing' of children in out of home care.<sup>78</sup> Under this program, the Commissioner must arrange for out of home care sites to be visited regularly, and subsequently reported upon, by a community visitor.<sup>79</sup> Community visitors are members of the public appointed by the Commissioner to fulfil this role, who are independent in the sense that they cannot be an approved carer, police officer or an employee of the Department.<sup>80</sup> In Queensland, community visitors have significant powers in relation to entry, inspection and the sighting of documents at these sites.<sup>81</sup> The community service providers we interviewed were ambivalent about the effectiveness of the community visitor program; predictably, there is significant variability in the personalities and approaches of the various community visitors. They also agreed that what children and young people most often needed was an advocate, and that since this was not the role of community visitors, the resources could be better allocated.

<sup>76</sup> Note that elsewhere we have argued that discussions between child protection officers and parents should be recorded, for the same reasons that discussions between police officers and accused persons are recorded: see Heather Douglas and Tamara Walsh, 'Mothers and the Child Protection System' (2009) 23 *International Journal of Law, Policy and the Family* 211.

<sup>77</sup> Trish Mackey and Donnita Medway, 'Promoting the Rights and Best Interests of Children and Young People Involved in Care and Protection Proceedings in the ACT Children's Court — The Significance of Public Advocacy' (Paper presented at the Australasian Institute for Judicial Administration Child Protection in Australia and New Zealand Conference, Brisbane, 5–7 May 2011).

<sup>78</sup> *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 17(1)(o), 86. See generally at ch 5. For a general overview of the role of commissioners and guardians throughout Australia, see Alister Lamont and Prue Holzer, 'Children's Commissioners and Guardians' (Resource Sheet, Australian Institute of Family Studies, National Child Protection Clearing House, July 2011) <<http://www.aifs.gov.au/nch/pubs/sheets/rs15/rs15.pdf>>.

<sup>79</sup> *Commission for Children and Young People and Child Guardian Act 2000* (Qld) ss 89, 92.

<sup>80</sup> *Ibid* s 107.

<sup>81</sup> *Ibid* ss 40–7.

One recommendation that is often made in the literature, and that has been implemented in other jurisdictions, is that courts make greater use of guardians *ad litem* in child protection proceedings.<sup>82</sup> A guardian *ad litem* is a person appointed by the court who carries on proceedings on behalf of a person who lacks legal capacity, and acts in the best interests of the protected person.<sup>83</sup> In the United Kingdom and United States, ‘child guardians’ often work in tandem with lawyers to provide holistic representation of children. In some circumstances, the guardian will instruct the lawyer; in other situations, the guardian will assist the child to put forward their views and wishes to the court.<sup>84</sup> In the United States, many child guardians are lawyers with specialist training in child welfare, but in Australia, guardians *ad litem* are generally laypeople, often a family member or social worker, who act as a support person during court proceedings.

The precise role of guardians *ad litem* varies between jurisdictions and individual cases. In the child protection context, some commentators have suggested that guardians *ad litem* should be independent of parents and should have qualifications in child services, as well as a good understanding of the court system — that is, they should be a special expert rather than a ‘mere’ support person.<sup>85</sup> Regardless, they remain an untapped resource in Australia and are infrequently utilised.<sup>86</sup> Instead, the court will generally appoint a separate representative, which in turn will prevent the appointment of a direct representative, meaning that a child’s views and wishes are not adequately put before the court.<sup>87</sup> The model of a child guardian and lawyer working together has been mooted but not systematically implemented.<sup>88</sup> Bao-Er suggests that in all cases involving indigenous children, an indigenous guardian *ad litem* should be appointed to the child even if the child has legal representation, because ‘the very visible sight of a non-Indigenous independent legal representative perform-

<sup>82</sup> In the United States, see Ventrell, above n 68, 171–2. See also Stephen Wizner and Miriam Berkman, ‘Being a Lawyer for a Child Too Young to be a Client: A Clinical Study’ (1989) 68 *Nebraska Law Review* 330. In the UK, see Jane Fortin, *Children’s Rights and the Developing Law* (Butterworths, 2<sup>nd</sup> ed, 2003) 211–13. In Ireland, see Geoffrey Shannon, ‘Giving a Voice to the Child — The Irish Experience’ (2000) 14 *International Journal of Law, Policy and the Family* 131, 138–43.

<sup>83</sup> See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 100–1. A guardian *ad litem* is otherwise known as a ‘tutor’ (*Uniform Civil Procedure Rules 2005* (NSW) rr 7.14–7.18); ‘litigation guardian’ (*Uniform Civil Procedure Rules 1999* (Qld) rr 93–5); or ‘next friend’ (see, eg, *Re Taylor’s Application* [1972] 2 QB 369; *Rhodes v Swithenbank* (1889) 22 QBD 577, 579 (Bowen and Fry LJJ)).

<sup>84</sup> See Ventrell, above n 68; Fortin, above n 82.

<sup>85</sup> See especially Shannon, above n 82, 144–5.

<sup>86</sup> In New South Wales, guardians *ad litem* are infrequently appointed, and are only called upon in situations where ‘special circumstances’ exist: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 100(1)(a). As to what constitutes ‘special circumstances’, see *Groth v Secretary of the Department of Social Security* (1995) 40 ALD 541, 545, where Kiefel J said that special circumstances ‘would require something to distinguish [this case] from others, to take it out of the usual or ordinary case.’

<sup>87</sup> See above nn 65–68 and accompanying text.

<sup>88</sup> See Australian Law Reform Commission, above n 15, [13.42]–[13.48].

ing such a pivotal role can only serve to reinforce the negative perceptions Indigenous people have of the Children's Court process'.<sup>89</sup>

One study has suggested that well-trained laypeople, including law students, can act as effectively as 'best interests' advocates for children as lawyers.<sup>90</sup> Thus, expanding the use of trained guardians *ad litem* for children in court proceedings, and non-legal advocates for parents in other settings, where legal representation is unavailable, might be something Australian law schools could practically support.

#### IX CONCLUSION

In child protection matters, as in many other matters that are protective in nature or that involve vulnerable people, community service providers and lawyers both have important roles to play if the best outcomes are to be achieved for their clients. Community service providers and lawyers can best assist their marginalised clients by working as a team, allocating roles between them as appropriate and as resources dictate. With the shortage of lawyers who are willing and available to act in child protection matters, community service providers may be required to take on some advocacy tasks in situations where lawyers are unavailable. Further training of a legal nature may be helpful to enable them to fulfil this role.

Bearing in mind the power wielded by child protection departments compared with the educational, literacy and emotional deficits experienced by many of the parents, some form of advocacy support is necessary. For children, there may not be a shortage of legal representatives, at least in well-populated areas; further, if their parents are adequately represented, then many of the concerns of children will be adequately represented also. Whether a separate or direct representative should be appointed will depend on the individual child concerned. A guardian *ad litem* may be capable of fulfilling many of the functions of a separate representative, since both are charged with determining what the best interests of the child are, and presenting this to the court. Indeed, a suitably qualified and resourced guardian *ad litem* might be better placed to undertake best interests assessments. Either way, an advocate needs to be available to make an independent assessment as to what is in the best interests of the child, taking into account the child's wishes and the views and observations of parents and other important adults in the child's life. This role might be taken on by a separate representative, but it could also be undertaken by a suitably trained non-lawyer.

<sup>89</sup> Bao-Er, 'Indigenous Guardians *Ad Litem* Are Needed in the Children's Court' (2009) 47(11) *Law Society Journal* 64. His recommendations have not been sympathetically received by the NSW Children's Court: see *Department of Human Services and 'Kieran', 'Siobhan' and 'Robert Isaac'* (Unreported, Children's Court of New South Wales, Judge Marien, 11 November 2009). Ventrill argues that guardians *ad litem* may also be useful where a child gives their direct representative a directive that the direct representative believes is not in the child's best interests: Ventrill, above n 68, 171–2.

<sup>90</sup> Donald N Duquette and Sarah H Ramsay, 'Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation' (1987) 20 *University of Michigan Journal of Law Reform* 341.

Regardless of whether the child has his or her own advocate or not, representation is essential for parents who wish to contest an application for a child protection order in respect of their child. It is clear from the comments of the lawyers and workers above that parents are unable to navigate the system on their own. If a case proceeds to court, parents will need a lawyer. In the earlier stages, they will require sound legal advice but, armed with this advice, they could be accompanied by a non-legal advocate at departmental meetings. It seems that community service providers and lawyers could work effectively as a team in these early stages, as was suggested by one of our lawyer participants.

Less adversarial and more problem-solving focused Children's Courts would perhaps be better equipped to act as a check and balance on the executive's powers to remove children.<sup>91</sup> This might also reduce the need for lawyers — if judicial officers take an inquisitorial approach to proceedings, rather than merely adjudicating between two opposing sides, collaboration is more possible.<sup>92</sup>

While there appear to be some positive developments in the child protection field, including the Commonwealth government's adoption of the *National Framework for Protecting Australia's Children* and various state-based interventions,<sup>93</sup> the findings reported in this article underscore a number of ongoing issues relating to advocacy and representation. The studies reported here are limited in scope with small samples, and ideally further research should be undertaken to broaden the scope of these findings. This could be achieved by incorporating the views of child protection workers and of parents and children. This research should be extended beyond Queensland so that comparisons can be made between states.

The question of cost-effectiveness is another that might be explored in future research. Potential solutions to problems within the child protection system are often scrutinised (and rejected) on the grounds of fiscal viability. However, if the current combative approach to child protection matters persists, it is our view that the presence of lawyers should be encouraged, regardless of the financial implications for legal aid departments. As one of our respondents said:

These are cases which are serious matters, they involve the welfare and future of children, and for that reason no expense should be spared.

<sup>91</sup> We have discussed this elsewhere: see Walsh and Douglas, 'Lawyers' Views on Decision-Making in Child Protection Matters', above n 8.

<sup>92</sup> See further Robert Kelly and Sarah Ramsey, 'Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation under Conditions of High Judicial Intervention' (1983) 21 *Journal of Family Law* 405.

<sup>93</sup> See, eg, Council of Australian Governments, above n 25. See also the new approach proposed to be taken in NSW relating to sharing responsibility following the Wood Inquiry: James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008).