43/12; [2012] VSC 589

SUPREME COURT OF VICTORIA

A and B v CHILDREN'S COURT of VICTORIA and ORS

Garde J

16 October, 5 December 2012 (Revised 7 December 2012)

CHILDREN'S COURT – TWO CHILDREN AGED 11 AND 9 YEARS THE SUBJECT OF PROTECTION APPLICATIONS – INSTRUCTIONS TO LEGAL PRACTITIONERS – DIRECT INSTRUCTIONS REPRESENTATION – BEST INTERESTS REPRESENTATION – PROCEDURAL FAIRNESS – FINDING BY COURT THAT CHILDREN NOT MATURE ENOUGH TO GIVE INSTRUCTIONS – WHETHER CHILDREN DENIED PROCEDURAL FAIRNESS – WHETHER COURT IN ERROR: *CHILDREN, YOUTH AND FAMILIES ACT* 2005 (VIC), SS10, 522, 524; *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* 2006 (VIC), SS8(3), 17(2) AND 24(1); *ADMINISTRATIVE LAW ACT* 1978 (VIC), S10.

HELD: Orders of the Children's Court quashed. Remitted to the Children's Court to reconsider the legal representation of the children.

1. On its ordinary and grammatical meaning, s524(4) of the *Children, Youth and Families Act* 2005 ('Act') requires the Court to adjourn the hearing of a proceeding, to allow a child to obtain representation, if three conditions are met. Those conditions are:

(a) there are exceptional circumstances;

(b) in the Court's opinion the child is not mature enough to give instructions; and

(c) the Court determines that it is in the best interests of the child for the child to be legally represented in the proceeding.

2. The scheme of representation in ss524 and 525 provides for a child who is mature enough to give instructions to have direct legal representation. It also provides where a child is not mature enough to give instructions for the child to be represented by a legal practitioner who must act in accordance with what he or she believes to be in the best interests of the child. To the extent that it is practicable to do so, the legal representative must communicate to the Court the instructions given or wishes expressed by the child.

3. Both types of legal representation give effect to the principle that the best interests of the child must always be paramount and the need to act in the best interests of the child, to protect the child from harm and to protect the child's rights.

4. Both the context and language of the Act, and the guidance available from authority and jurisprudence demonstrate that the concept of "maturity" does not involve assumptions based on age alone. It is the concept of maturity that is found in s524 of the Act and not the age of the child alone. The Act recognises the need to have reference to each individual child's development as well as age in determining the child's best interests.

5. Approaching the construction of the expression "mature enough to give instructions" as used in ss524(2) and (4) in accordance with its ordinary and grammatical meaning, the phrase requires a court to have regard to considerations wider than the child's age alone. The phrase requires an assessment of the child's development and capacity to give instructions. This is dependent on whether the child can understand the nature of some or all of the issues in the proceeding and is able to appreciate the consequences which may follow from the instructions that are given, and the decisions being made.

6. The construction of the expression "mature enough to give instructions" as found in ss524(2) and (4) is clear and means mature enough to give instructions to a legal representative relevant to a proceeding, or to one or more issues that arise or may arise in a proceeding, having regard to the child's development and capacity. This inquiry may include consideration of a child's chronological age, but is significantly wider and includes for example, consideration of the child's general maturity, capacity, insight, and ability with language. In appropriate cases, it may also include consideration of any intellectual disability or developmental issue affecting the child.

7. The reasons for decision showed that the Court misdirected itself in law as to the meaning of the expression "mature enough to give instructions" found in ss524(2) and (4), and failed to apply the correct test. The Court confined its inquiry to the chronological age of the girls and misconceived its function as confined to a conclusion as to the maturity of the girls based on chronological age alone.

8. The Court wrongly concluded that because the girls were in its view too young to be informed of the sexual abuse allegations, they were not mature enough to give instructions on any matter. The test was of a different character and involved consideration of each child's development and capacity to give instructions including consideration of the evidence as to each child's general maturity, capacity, insight and ability with language.

9. The plaintiffs were denied procedural fairness and natural justice. In refusing leave under s524(5) the Court fell into error by failing to give consideration, or make any proper investigation as to whether or not there was a conflict of interest which would preclude a legal representative from acting for both of the girls. The girls had been directly represented by the same legal representative over the preceding five months and on five or six occasions.

10. In the circumstances it was appropriate if the Court was minded to consider withholding leave under s524(5) for the Court to have given notice of its intention to the legal representative acting for the girls, and afforded the legal representative a proper opportunity of calling evidence and making submissions to the Court so as to permit the Court to arrive at an informed view as to whether or not there was a conflict of interest.

11. By failing to do so, there was a denial of procedural fairness and natural justice. Given the reports and information that were available to the Court, it was apparent that there was evidence and material from experts and from legal advisers that could have been called and considered and would have assisted the Court in making an informed decision.

GARDE J:

Introduction and Background

1. This is an application by two children, A and B, for an order in the nature of *certiorari* quashing a decision of the Children's Court of Victoria ("the Court") that they lacked maturity to provide instructions to legal representatives and denying them leave to be represented by the same legal practitioner. Ms Leeanne Hurlston formerly of the North Melbourne Community Legal Centre is the litigation guardian of each plaintiff.

2. The plaintiffs are sisters aged 11 and 9 years. They are the subject of protection applications ("the applications") made by the Secretary to the Department of Human Services ("the Secretary") on 14 December 2011 under the *Children, Youth and Families Act* 2005 (Vic) ("the Act").

3. The grounds of the applications are the same in each case —

(a) The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.

(b) The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.

4. The brief outline set out in each protection application states:

(1) Police were called to attend the family home after mother physically assaulted [A].

(2) [A] sustained a blood nose after being physically assaulted by her mother.

(3) [B] witnessed the assault and experienced significant distress and was hyperventilating.

(4) Mother is reported by family members to be using drugs including ice, marijuana, speed however mother was not observed to be substance affected on 14/12/11.

5. Since the making of the protection applications, the children have been living with their maternal aunt ("aunt").

6. On 15 December 2011, Victoria Legal Aid ("VLA") commenced representing the plaintiffs. Ms Anna Renou, a lawyer at VLA, took instructions from each plaintiff. The Court made an Interim Accommodation Order with 14 conditions at a hearing on that day placing the plaintiffs in the care of their aunt.

7. On 25 January 2012, the proceedings were listed for mention. An application and disposition report dated 23 January 2012 was provided to the Court and the parties. The proceedings were

then adjourned for a Court Clinic report ("Clinic report") and listed for a two day hearing concerning the Interim Accommodation Order.

8. On 6 March 2012, Ms Erica Contini and Mr David Benady, solicitors of VLA took telephone instructions from the plaintiffs. The plaintiffs were assessed as having the capacity to give instructions. The instructions given by each plaintiff were to the effect that they wanted to continue living with their aunt, and did not want to have any contact with their mother. Each plaintiff separately instructed that she wanted to be able to see her maternal uncle ("C").

9. As no Court was available to hear the Interim Accommodation Order application on 8 March 2012, the proceedings were adjourned to 13 April 2012 for the release of the Clinic report. At a hearing on this day, the proceedings were adjourned to 4 May 2012 for the Department of Human Services to provide a disposition report.

10. On 2 May 2012, Ms Contini from VLA contacted the plaintiffs and spoke to each individually. She found that each was capable of providing instructions. Again, the plaintiffs instructed that they did not want to have any contact with their mother and wanted to continue living with their aunt. When asked how long they wanted to do this, each independently said for the next year.

11. On 4 May 2012, the DHS Amended Disposition and Addendum Report dated 2 May 2012 was released to the parties. The proceedings were adjourned to 11 May 2012 in order to give the mother the opportunity to obtain legal representation and advice. The report recorded that serious allegations had been made by the mother against C.

12. On 11 May 2012, the plaintiffs came to the VLA offices in Melbourne and met with two solicitors of that office. Again, the plaintiffs both instructed that they did not want to have any contact with their mother and wanted to continue living with their aunt. They individually gave instructions to the VLA solicitors to inform the Court of their position. The proceedings were then adjourned by the Court to 24 May 2012.

Hearing on 24 May 2012

13. On 24 May 2012, the applications came on for interim hearing before a magistrate ("the magistrate") of the Court. Mr Klein appeared for the applicant for protection orders. Ms Green of Counsel appeared for the plaintiffs whilst their mother appeared in person.

14. The transcript of the hearing includes a number of significant passages:[1]

> MS GREEN: Your Honour, in terms of a supervised custody order, the girls are very clear. I mean my instructions are highlighted. They do not want to have any contact with their mother. They do not want to see her, talk to her on the phone or receive any correspondence from her. And that goes to the relationship and that is from both of them and it would make any counselling difficult at this stage. And I do not want the mother to be upset by what I am putting to Your Honour; they are my instructions, they are very clear and that would seem to fly in the face of a supervising custody order.
> HIS HONOUR: [To the mother], I suppose what I am concerned about is that given what I am hearing and even given what you are telling me, I think immediate reunification is unrealistic.

15. Ms V, the Senior Child Protection Practitioner for the DHS who was present at the hearing said to the Court:[2]

> MS V: Now, I received the same instructions as what Ms Green was instructed as well, that the girls do not want to have any contact, any phone contact with [the mother]. I also raised with the girls that – I explored the options, Your Honour, and said to the girls, "Well, what if we brought mum to the office?" and I supervise the access myself or another case support worker does for even an hour and they both stepped back, "No, no, please don't make us do that" and I asked them why and they said, "We do not want to see her". [B] said, you know, "I am still scared that mummy will hurt me or [A]," and basically said that mummy said that she is going to kill [A] and I said (indistinct) as well. And even [the mother] is actually quite stunned that even ...

16. His Honour subsequently said:[3]

> HIS HONOUR: Well, can I just say one thing which strikes me as perhaps indicated that all is not lost is that despite what [B] has told Ms Green's instructor and Ms V, she did tell Dr Cattapan that she was keen to maintain contact with her mum.

17. Later, His Honour said:[4]

> HIS HONOUR: I am not sure that I want a big argument in court during family therapy on this issue. That is something that I see as an issue. It is there in the background. There are other issues that need to be resolved ahead of this. The biggest one is your clients' instructions, Ms Green, in the sense that the children have got different issues and I am not sure if your instructor has actually sought the leave of the court to represent both children given Dr Cattapan's instruction or comments. I am uncomfortable with both girls having the same thing.
> MR GREEN: All I can say to that is, Your Honour, that the instructions that I have from my instructor are that it is certainly the same. There is no - - -
> HIS HONOUR: Well, how old are your instructions?
> MS GREEN: Last week, my understanding is, Your Honour.

18. After Counsel reiterated that her instructions were that the plaintiffs desired absolutely no contact with their mother, His Honour said:[5]

> HIS HONOUR: The source of the issue of [the mother], as far as I am concerned, and that is an issue that really needs the children, in my view, their participation, preferably on an ICL basis rather than an instructions basis. These children are too young to have the ins and outs of sexual abuse allegations and drug abuse allegations put to them for their comment. They are not mature enough to give instructions on those issues.

19. In this passage, His Honour stated his views that:

> (a) the children needed representation on an ICL basis rather than "an instructions" basis;[6] and
> (b) the children were not mature enough to give instructions on the sexual abuse issues affecting C, and the drug abuse allegations affecting the mother.

20. His Honour then had a discussion with counsel for the children:[7]

> HIS HONOUR: ... And, Ms Green, can you address me on two points. Firstly, on what basis I should make the s.5244 order in relation to both of the girls and on what basis they should continue to be represented by the same lawyer.[8]
> MS GREEN: Yes. Your Honour, I do not have my Act with me.
> HIS HONOUR: There is a spare copy here.
> MS GREEN: Your Honour, the children are of an age, they are ten and nine years and they are certainly of an age where they can give instructions as to what ...
> HIS HONOUR: No, they can't. They can express wishes.
> MS GREEN: Well, they can express wishes, Your Honour, yes.
> HIS HONOUR: They can't give you instructions on the issue – of two issues in this case which is their uncle. ...
> HIS HONOUR: Right, well, I notice I have got five or six appearances for the girls, different lawyers each time. So much for their theory that is continuity. But the fact remains that they are not mature enough to give instructions on at least one of the really significant key issues in this case and that is their uncle.
> MS GREEN: Well, all I can say to that in response, Your Honour, is that they were very clear about wanting to see him and now the onus is on the Department to make their own independent assessments as to the safety and wellbeing of the girls and they have indicated that they would like to see him. They do not have a view about whether it is supervised. Wish, indeed, Your Honour.
> HIS HONOUR: I may as well ask them, "Do you want a chocolate frog in your morning tea tomorrow?" It is not going to assist me that they get on well with [the uncle] or they get on badly with him. Whether they like him or not is not relevant. The issue is sexual abuse issues raised by the mother and drug abuse issues that have been raised.

21. A short time later, His Honour said:[9]

> HIS HONOUR: It is all about taking instructions and the ability of a child to properly instruct their lawyer and one of the issues, rightly or wrongly; it might be a complete misunderstanding and a fabrication, it might be true and able to be substantiated. The fact remains these children can't participate in one of the two key issues in terms of instructing. They are not mature enough.
>
> There is also the circumstance, as I have indicated that it is very unusual that you have got children that want nothing to do with a parent, allegedly. And as Mr Klein has said, he has been in this court for a lot longer than I have and this is the second time that he has seen anything as extreme as that. So on my view, we are in the area of exceptional circumstances and I am not convinced that the children are mature enough to instruct on at least one aspect of the matter...

22. After referring to two issues which could not be raised with the children, His Honour then concluded:[10]

> HIS HONOUR: I am going to make a s.5244 [sic] determination in relation to each of the girls. I am not going to grant leave to seek exception 5245 [sic].

23. The orders made by the magistrate in each of the applications state under "Other Order":

> (1) S.524(4) Determination in relation to [A] and [B]. ...
>
> (3) Leave not granted pursuant to S.524(5).

24. The effect of a determination under s524(4) of the Act is to require the Court to adjourn the hearing of the proceeding to enable legal representation to be obtained. Before an order can be made under s524(4), it is necessary for the Court to be of the opinion that a child is not mature enough to give instructions, but that nonetheless it is in the best interests of the child for the child to be legally represented. Under s524(11), a legal practitioner representing a child who is not mature enough to give instructions must:

> (a) to act in accordance with what he or she believes to be in the best interests of the child; and
>
> (b) to the extent that it is practicable to do so, communicate to the Court the instructions given or wishes expressed by the child.

Relevant Law

25. Section 8 of the Act provides that the Court must have regard to the principles set out in Part 1.2 of the Act (where relevant) in making any decision or taking any action under the Act.

26. Section 10 is of great importance and provides:

> 10 Best interests principles
> (1) For the purposes of this Act the best interests of the child must always be paramount.
>
> (2) When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.
>
> (3) In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—
> (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;
> (b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child; ...
> (d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances; ...
> (g) that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child; ...
> (r) any other relevant consideration.

27. Section 522 states:

> 522 Procedural guidelines to be followed by Court
> (1) As far as practicable the Court must in any proceeding—
> (a) take steps to ensure that the proceeding is comprehensible to—
> (i) the child; and
> (ii) the child's parents; and
> (iii) all other parties who have a direct interest in the proceeding; and
> (b) seek to satisfy itself that the child understands the nature and implications of the proceeding and of any order made in the proceeding; and
> (c) allow—
> (i) the child; and
> (ii) in the case of a proceeding in the Family Division, the child's parents and all other parties

who have a direct interest in the proceeding—
to participate fully in the proceeding; and
(d) consider any wishes expressed by the child; and ...

28. The provision of legal representation is regulated by s524. It provides:

524 Legal representation
(1) If at any stage—
(a) in a proceeding in the Family Division, a child is not separately legally represented; or ...
the Court may adjourn the hearing of the proceeding to enable the child or the child's parents or the person referred to in paragraph (d) (as the case requires) to obtain legal representation.

29. In the case of a protection application or an application for an interim accommodation order, s525(1) of the Act provides that "subject to section s524, a child must be legally represented".

30. Section 527(1) provides that the Court must explain the meaning and effect of the order as plainly and simply as possible and in a way which it considers the child, the child's parents and the other parties to the proceeding will understand

31. Section 10 of the *Administrative Law Act* 1978 (Vic) provides for reasons given by an inferior court to be part of the record:

10 Reasons to be part of record
Any statement by a tribunal or inferior court whether made orally or in writing ... of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

32. The oral reasons for the Court's decision are part of the record, and are contained in the relevant parts of the transcript set out at [14] to [22] above. It is permissible to have regard to the transcript of the proceedings to improve understanding of the reasons.[11]

33. Subsections524(2)-(11) sets out the statutory tests and necessary factual circumstances in which legal representation is required or permitted. There is a clear demarcation between representation acting on instructions given or wishes expressed by a child, and acting on what a legal practitioner believes is in the best interests of the child.

34. Subsections 524(2)-(11) are as follows:

(2) If a child who, in the opinion of the Court, is mature enough to give instructions is not, subject to section 216, separately legally represented in a proceeding referred to in section 525(1) or a child is not legally represented in a proceeding referred to in section 525(2), the Court must adjourn the hearing of the proceeding to enable the child to obtain legal representation and, subject to subsection (3), must not resume the hearing unless the child is legally represented.

(3) The Court may resume a hearing that was adjourned by it in accordance with subsection (2) even though the child is not legally represented if satisfied that the child has had a reasonable opportunity to obtain legal representation and has failed to do so or, in the case of a proceeding in the Family Division, that the child is otherwise represented pursuant to leave granted under subsection (8).

(4) If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.

(5) With the leave of the Court, more than one child in the same proceeding may be represented by the same legal practitioner.

(6) The Court may only grant leave under subsection (5) if satisfied that no conflict of interest will arise.

(7) If after having granted leave under subsection (5) the Court is satisfied in the course of the proceeding that a conflict of interest has arisen, the Court may withdraw the leave previously granted.

(8) With the leave of the Court, a child (other than a child to whom a determination under subsection (4) applies) may be represented in a proceeding in the Family Division by a person who is not—
(a) a legal practitioner; or

(b) a parent of the child.

(9) A person referred to in subsection (8) who is granted leave to represent a child in a proceeding in the Family Division must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

(10) A legal practitioner representing a child in any proceeding in the Court must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

(11) A legal practitioner representing, in the Family Division, a child who is not mature enough to give instructions must—
(a) act in accordance with what he or she believes to be in the best interests of the child; and
(b) to the extent that it is practicable to do so, communicate to the Court the instructions given or wishes expressed by the child.

35. An important issue in this proceeding is whether the Court acted correctly in determining that best interests representation should be ordered rather than direct legal representation in accordance with "any instructions given or wishes expressed by the child".

Charter of Human Rights and Responsibilities

36. The plaintiffs contend that the proper interpretation of s524 of the Act stands to be determined in the context of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter").

37. The Equal Opportunity and Human Rights Commission ("the Commission") which intervened in the proceedings contended that s32 of the Charter required s524 of the Act to be interpreted compatibly with human rights so far as it is possible to do so consistently with its purpose. It agreed with the plaintiffs that the Charter rights that are engaged and relevant to the interpretation of s524 were:

(a) the right to equality before the law;[12]

(b) the right of a child to protection as is in his or her best interests;[13] and

(c) the right to a fair hearing.[14]

38. The Commission contended that s6(2)(b) of the Charter places a direct obligation on the Court requiring it to ensure that the parties receive a fair hearing in accordance with s 24(1) of the Charter and have equal treatment before the law in accordance with the right to equality in s8(3).

39. The Secretary contends that it is not apparent that s32 of the Charter has any significant effect on the tests found in s524:[15]

> The right in s17(2) of the Charter, based on article 24(1) of the *International Covenant on Civil and Political Rights*, focuses on the right of the child to "such protection as is in his or her best interests and is needed by him or her by reason of being a child". The Act itself must be understood to be a "measure of protection" (the language used in article 24) enacted by Victoria to meet Australia's obligations. But it is not immediately apparent how s17(2) of the Charter requires children to be directly represented in proceedings.

40. The Secretary also contends that s32 of the Charter cannot be understood to necessitate any different construction of the statutory provisions in this case than would be required by application of common law principles.[16]

Legislative History of Legal Representation of Children
Before the Carney Report

41. The evolution of child protection legislation shows the development of thinking in Victoria about the nature of a child whose family cannot care for him or her. Early legislation criminalised neglected children, and tried to reform or correct them.

42. On 5 September 1849, An Act to provide for the Care and Education of Infants who may

be convicted of Felony or Misdemeanor was enacted in New South Wales. The preamble was "it is expedient that every facility should be offered for the improvement and better education of infants under the age of nineteen years who have been or may be convicted of felony or misdemeanor". It empowered the Supreme Court of New South Wales to assign the care and custody of a convicted child to any person willing to take charge of him or her.

43. The *Neglected and Criminal Children's Act* 1864 (Vic) replaced and repealed the earlier NSW Act. The preamble said "it is expedient to provide for the care and custody of "neglected" and "convicted" children and to prevent the commission of crime by young persons." A child was deemed to be "neglected" if he or she fell within criteria specified in s13. These included, among others, any child: found begging or receiving alms, found wandering or homeless, who resided in any brothel or associated or lived with any person known or reputed to be a thief, prostitute or drunkard or with any person convicted of vagrancy, any child whose parent said that he (or she) was unable to control the child and wished him (or her) to be sent to an "industrial school" and could give security to pay maintenance. A "neglected child" could be "apprehended" by a constable, brought before a court, and "charged"[17] with being a "neglected child". If the charge was established, the court could order that the child be sent to an "industrial school". Children could also be sent to a "reformatory school" as part of a sentencing order.

44. The *Neglected Children's Act* 1887 (Vic) provided for proven "neglected children" to be committed to the care of the Department for Neglected Children; a child committed to the Department's care became a ward of the Department, and the Secretary of the Department became the child's guardian.

45. The *Children's Court Act* 1906 (Vic) was the first Act to establish the Court. The purpose was explained in the second reading speech:[18]

> The object of this measure is to cure an evil which undoubtedly exists at the present time. Children of immature age commit certain offences against the law, and at present they are hauled before the Courts, and get accustomed to the Courts and the Court procedure, and they also get that atmosphere about them which unquestionably results to their disadvantage in after life. What is felt is that while a boy or a girl under the age of seventeen may commit a breach of the law, the intention or the mind of the child is to be regarded in a totally different way from that of a person of mature age.
>
> A person of mature age has greater deliberation, and is capable of greater control over himself than in the case of a child, and hence it is that the treatment should be altogether different.

46. The Court was given exclusive criminal jurisdiction over children,[19] but also jurisdiction to hear all applications about neglected children.

47. Section 19 stated that the parent of a child charged with being a neglected child was "entitled to be heard on his or her behalf either personally or by barrister and solicitor and may cross-examine witnesses for the prosecution and examine and re-examine witnesses testifying on behalf of the [child]". If the parent was not present, the Court could hear the matter in the parent's absence, or could order a summons for the parent's attendance and adjourn the hearing of the case in the meantime. A similar provision was considered by the High Court in *J v Lieschke*.[20] Wilson J observed that this kind of provision would have been regarded as removing the right of a child to be separately represented in neglected child proceedings.[21]

48. Probation officers could be appointed, whose functions were essentially to investigate the child's circumstances and report back to the Court. Section 9(2) stated:

> Every Probation Officer may appear in the Children's Court to represent the interests of any child, and when a child is not represented by a barrister and solicitor the Probation Officer may be heard in Court on such child's behalf.

49. These or equivalent provisions were subsequently included in Children's Court Acts of 1915, 1926, 1956, 1958 and 1973. The Court continued to have jurisdiction to hear applications under the *Neglected Children's Acts*, which were replaced by the *Children's Welfare Act* from 1926 and then the *Social Welfare Act* from 1970.

Direct Representation Model – The History: The Carney Report

50. In 1982, the Cain Government appointed a Committee to review and reform Victoria's legislation on child welfare and children's rights. In 1984, the Committee produced the Carney Report, which annexed a draft Bill.[22]

51. The Committee recommended significant reforms to legislation governing both child protection and young offenders, and the processes that should be adopted in proceedings in the Court. Critical to the reforms was the separation of Divisions of the Court into the Family Division and the Criminal Division.

52. In respect of separate representation for children in Family Division proceedings, the Committee said:[23]

> In a number of cases, the interests of children and parents will not necessarily coincide, and the child should have a right to separate representation when a potential conflict exists.
>
> The role of the separate representative is to convey to the court the wishes of the child, rather than an assessment of their "best interests". The latter is more properly the responsibility of the court (the issue of separate representation is discussed in detail in Chapter 5 of in Part IV).
>
> Recommendation: Where there is a potential conflict between the child and the parents, the child should have a right to separate legal representation.

53. The Committee noted that legal representation of young people in the Court had once been a rarity, but had increased over the preceding ten years.[24]

54. Part V of the draft Bill dealt with proceedings in the Family Division:

> Representation.
> Any person appearing before the Family Division may be represented by a lawyer or other advocate.
> Representation of children.
>
> Where, in proceedings in the Family Division—
> (*a*) a child is not separately represented by a lawyer; and
> (*b*) it appears to the Court that the child should be represented—
> the Court may, of its own motion or on the application of any person (including the child), order that the child be separately represented by a lawyer, or other advocate, and the Court may make such other order as it thinks necessary to secure that separate representation.
>
> The function of a child's representative.
> (1) In proceedings before the Court the representative of a child shall, as far as practicable having regard to the maturity of the child, act on the instructions of the child.
> (2) To the extent that it is not practicable to act on the instructions of a child (in accordance with sub-section (1)), the representative of a child in proceedings before the Court shall act in accordance with his or her assessment of the best interests of the child.
>
> Next friend of child.
> (1) The Court may, if it thinks it to be in the best interests of a child to do so, and if the person consents, appoint a person (including the child's representative, if any) to be the next friend of the child.
> (2) The next friend may, on behalf of the child, bring any proceedings in the Family Division that the child might have brought and act and appear on behalf of the child in relation to proceedings in the Family Division.
> (3) An order for costs may be made in favour or against a next friend in the same circumstances as the order might have been made with respect to the child.

55. Division 7 of Part IX dealt with hearings in criminal matters:

> Representation of the child.
> (1) In proceedings against a child who is not legally represented, the Court shall order that the child be legally represented in the following cases:
> (*a*) in proceedings against a child who has been remanded in custody;
> (*b*) where the alleged offence is so serious the Court believes the child, if guilty, is likely to be sentenced to detention in custody; and

(*c*) in other prescribed proceedings.

(2) In proceedings against a child who is not legally represented, the Court shall give consideration to ordering, and may order, that the child be legally represented in the following cases:
(*a*) where there is likely to be a conflict between the child and the child's parents;
(*b*) in proceedings for a sexual offence; and
(*c*) in other prescribed proceedings.

(3) In any proceedings (other than those mentioned in sub-sections (1) and (2)) against a child who is not legally represented—
(*a*) if the child has pleaded guilty—the Court shall satisfy itself that the child has been offered, but has rejected, legal representation; and
(*b*) whether or not the child has pleaded guilty—the Court shall satisfy itself that the child understands that legal representation is available.

(4) For the purposes of this section, the Court may adjourn proceedings to enable a child to obtain legal representation.

(5) An order or decision by the Court shall not be invalid or defective because of failure to comply with this section.

The function of a child's legal representative.
(1) In proceedings before the Court the legal representative of a child shall, as far as is practicable having regard to the maturity of the child, act on the instructions of the child.

(2) To the extent that it is not practicable to act on the instructions of a child (in accordance with sub-section (1)), the legal representative of a child in proceedings before the Court shall act in accordance with his or her assessment of the best interests of the child.

56. As to the nature of legal representation, the Committee said:[25]

(b) Wishes or Best Interests of the Child: The Role of the Legal Advocate
In recent times there has been much discussion about the proper role of a child's legal representative. On the one hand it has been argued that the usual obligation of a lawyer - that is to represent the wishes of their client - must be modified in relation to a juvenile client, who in many cases may be too young or immature to "instruct" their lawyer as to how the case should be presented. It is argued that the immaturity of young people requires a more paternal role for their legal representative, who should represent the young person in accordance with the lawyers assessment of what is in "the best interests" of the child - even if this may not accord with the expressed views of the young person. This issue is especially relevant in welfare cases ...

On the other hand, many argue that the role of the lawyer representing a young person should be the same as if an adult were being represented - that is, the lawyer should act only in accordance with the wishes or "instructions" of their client, in this case, a young person. The proponents of this view argue that to do other than act in accordance with the wishes of the young person is to abandon the role of advocate for that of "judge" – for the lawyer is, in effect, pre-judging the case when deciding what is in the "best interests" of the child. This is more properly the role of a guardian ad litem (or "best friend" of the young person).

It is the view of the Committee that it is the role of the lawyer, as in adult courts, to act in accordance with the wishes of the young person, and this is clarified in section 166 of the draft Bill.

Recommendation: Legal representatives should represent the wishes or instructions of the young person.

Implementation of the Carney Report

57. On 8 May 1985, the Carney Report, and the draft Bill attached to it, was tabled in the State Parliament.[26]

58. The *Children's Court (Amendment) Act* 1986 (Vic) which amended the *Children's Court Act* 1973 (Vic) implemented some of the fundamental recommendations of the Carney Report, including the separation of the Family and Criminal Divisions, but it did not implement the provisions about representation.

59. The *Children and Young Persons Bill* 1987 (Vic) was a more comprehensive attempt at

implementing the recommendations of the Carney Report. Clause 19 was the predecessor of s20 of the *Children and Young Persons Act* 1989 (Vic), and was in similar form. Clause 19(6) stated:

> Counsel or a solicitor representing a child in any proceeding in the Court must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.

60. The *Children and Young Persons Bill* 1988 (Vic) became the *Children and Young Persons Act* 1989 (Vic). In the second reading speech, the Minister for Community Services explained that "[c]onsistent with rights which have been established in the adult jurisdiction and are equally important in the Children's Court, the Bill establishes the right of the child to legal representation in certain classes of matters".[27]

61. The approach to representation considered desirable by the Committee, and reflected in cls 45 – 47, 165 and 166 of the draft Bill, did not find its way into the 1989 Act.

62. Parliament appears to have intended that child legal representatives would act on the direct representation model in accordance with the Committee's recommendations as in adult courts. If having regard to the child's maturity, it was not practicable to do so, legal representatives would not be instructed.

History of Best Interests Representation: Best interests model in Commonwealth legislation

63. The best interests model of representation has prevailed in Family Court proceedings.

64. The history of best interests representation is set out by the High Court in *RCB v Forrest*.[28]

65. In 2004, the two models of representation were discussed in a report of the Family Law Council entitled "Pathways for Children: A review of children's representation in family law".

66. Chapter 4 contained an analysis of the best interests and direct representation models of advocacy. The Council summarised the two models in this way:[29]

> The 'direct representation' model is the one most familiar to lawyers and nonlawyers alike. Advocacy under this model is undertaken on the instructions of the client. No distinction is made between the role of the lawyer representing an adult party and the lawyer representing a child. The lawyer acts on the instructions of the child.
>
> The 'best interests' model is one in which the representative assists the court to come to a decision that is in the best interests of the child. The lawyer does not take instructions from the child and, in appropriate cases, advocates for an outcome that is not necessarily in accordance with the child's wishes.

67. The Council summarised the arguments in favour of each model, noting that the benefits and weaknesses of each had been discussed at length by the Australian Law Reform Commission in a report.[30] Some of those arguments were derived from the United Nations Convention on the Rights of the Child.[31]

Extrinsic Materials

68. As to the insertion of s524(4) and (11) in 2005, the Minister for Children said in the Second Reading Speech:[32]

> Legal representation of children
> ... the bill makes an important change to the model of legal representation of children within the Children's Court. As is the case now, children who are sufficiently mature to provide instructions will be entitled to separate legal representation, in order to have their views and wishes communicated to the court. For children who are not sufficiently mature to provide instructions, the bill now empowers the court – in exceptional circumstances – to appoint a lawyer to represent the child's best interests. This legal representative will also have a responsibility to communicate the child's views and wishes to the extent possible.

69. The explanatory memorandum stated in respect of clause 524:[33]

> The clause ... provides that, in exceptional circumstances, a child who, in the opinion of the Court, is not mature enough to instruct a legal representative may be legally represented. The legal representative acting on behalf of a child in this case must act in accordance with what he or she believes to be the best interests of the child and may also communicate the instructions given and wishes expressed by the child if that is possible.
>
> The inclusion of this provision enables children who would otherwise be unrepresented by a legal practitioner to be represented on a "best interests" model. The Bill limits the availability of this form of representation to only those individual matters when the Court considers there are exceptional circumstances.

Common law

70. In 1987, the High Court considered a practice that had developed in New South Wales whereby duty solicitors acted for unrepresented children in child protection proceedings. Brennan J stated the position at common law with respect to such a practice:[34]

> It seems that under some arrangement, familiar to those who practise in the Court, children who are brought before the Court as neglected children are represented by solicitors who attend the Court to provide that representation pursuant to arrangements made by legal aid agencies. No doubt the arrangement is born out of an honourable recognition of the need of disadvantaged children for legal representation but it gives rise to problems relating to the acceptance of instructions to act professionally and the function and duty of a solicitor purporting to act for a child in non-criminal proceedings ... In the absence of a guardian *ad litem* or a tutor appointed for the purpose, the parents or other guardians of a child have authority to appoint solicitors to act for the child in noncriminal proceedings, and instructions to act cannot be assumed by a solicitor if they are not forthcoming from a person with authority to give them. By s65 of the *Family Law Act* 1975 (Cth), the Parliament conferred a special power on the Family Court to order legal representation for a child. Although it is often undesirable for the appointment of a solicitor for a child to be left solely to the parents or other guardians – especially when the fitness of the parents or guardians to exercise their custodial authority is in issue – it is difficult to perceive the source of legal authority for a solicitor to represent a child in non-criminal proceedings when no order has been made by a court of competent jurisdiction appointing some other person to give the necessary instructions. In this case, a solicitor who was not instructed by the parents to act for the appellant's children purported to represent the girls in the hearing before the Court and to state what "plea" would be made on their behalf.

71. It is clear that the later legislation was intended to overcome the restrictions and difficulties which existed at common law.

Statutory Interpretation – Principles

72. Interpretation of the Act must begin and end in consideration of the ordinary and grammatical meaning of the text of the relevant provisions,[35] having regard to their context and legislative purpose.[36] The natural and grammatical meaning of almost any given phrase may alter by virtue of its context in a sentence, a section or an Act.[37] The provisions of the Act must be construed on the basis that they are intended to give effect to harmonious goals.[38]

73. A construction which promotes the purpose or object underlying the Act should be preferred to a construction which would not.[39] This "may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. [But] the purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction".[40]

74. The context, general purpose, policy and fairness of a statutory provision are all guides to its meaning.[41] Context includes the existing state of the law and the mischief to which the legislation is addressed,[42] the legislative history[43] and structure of the legislation,[44] judicial decisions about antecedent legislation,[45] and extrinsic materials.[46] But context can only be used to interpret, not to depart from, the text of the statute.[47]

Section 524(4) – A duty Enlivened When 3 Conditions Are Met

75. On its ordinary and grammatical meaning, s524(4) of the Act requires the Court to adjourn the hearing of a proceeding, to allow a child to obtain representation, if three conditions are met. Those conditions are:

(a) there are exceptional circumstances;

(b) in the Court's opinion the child is not mature enough to give instructions; and

(c) the Court determines that it is in the best interests of the child for the child to be legally represented in the proceeding.

76. The scheme of representation in ss524 and 525 provides for a child who is mature enough to give instructions to have direct legal representation. It also provides where a child is not mature enough to give instructions for the child to be represented by a legal practitioner who must act in accordance with what he or she believes to be in the best interests of the child. To the extent that it is practicable to do so, the legal representative must communicate to the Court the instructions given or wishes expressed by the child.

77. Both types of legal representation give effect to the principle that the best interests of the child must always be paramount.[48] Both types of legal representation give effect to the need to act in the best interests of the child, to protect the child from harm and to protect the child's rights.[49]

78. Section 525(1)(b) provides that a child in a protection application in the Family Division must be legally represented.[50] As s525 is expressly subject to s524, the manner in which this is to be done is addressed in s524.

79. Section 524(1) empowers the Court to adjourn proceedings in the Family Division to enable the child to obtain legal representation. If a child who, in the opinion of the Court, is mature enough to give instructions, is not legally represented or separately legally represented, s524(2) provides that the Court must adjourn the hearing of the proceeding to enable the child to obtain legal representation and subject to sub-s(3) must not resume the hearing unless the child is legally represented.

80. Section 524(4) provides that if in exceptional circumstances the Court determines that it is in the best interests of a child who, in the opinion of the Court, is not mature enough to give instructions, for the child to be legally represented in a proceeding before the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.

81. If more than one child in the same proceeding is to be represented by the same legal practitioner, s524(5) requires that leave of the Court is to be obtained. The Court may only grant leave if satisfied that no conflict of interest will arise.

82. The rights of a child are importantly affected by the decision of the Court as to whether a child is, or is not, mature enough to give instructions. In the event that a child is mature enough to give instructions, a legal practitioner representing the child must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.[51]

83. By contrast, if in the opinion of the Court the child is not mature enough to give instructions, the legal practitioner must act in accordance with what the legal practitioner believes to be in the best interests of the child.[52] The legal practitioner must also communicate to the Court the instructions given or wishes expressed by the child.[53]

84. The nature of direct legal representation and of best interests legal representation is very different. In the first, the child gives the instructions and the legal practitioner must act in accordance with them so far as it is practicable to do so. In the second, the legal practitioner acts in what he or she considers to be the best interests of the child. The obligation of the legal representative to the child is fundamentally different in the two cases. Nonetheless even in best interests legal representation, the legal practitioner to the extent that it is practicable to do so must communicate to the Court the instructions given or wishes expressed by the child.

85. Subsection 524(11) describes what best interests representation involves. It adds to the rights of a child, because in the absence of such a provision, a legal practitioner cannot act for

a child on a best interests basis. However, it lacks two of the hallmarks of the lawyer – client relationship: the duty to obtain and adhere to instructions, and the confidentiality of privileged communications. The role is essentially one of representing the child in accordance with what the legal representative believes are the best interests of the child.

Construction of s524(4) of the Act

86. The Secretary submitted that it was not possible to say whether a person was "mature" without further context:[54]

> That is because maturity is contextual.[55] For this reason, the question "is this child mature enough to give instructions?" must be answered "about what?" It is not a question that can be answered in the abstract without knowing about the age of the child, the facts of the case, and the key issues about which instructions are needed.

87. The Secretary submitted that:

> (a) the magistrate had all the information he needed to reach an informed opinion about whether the children were mature enough to give instructions. The task of forming that opinion was conferred by s524(4) of the Act on the Court, not the children's legal representative; and
>
> (b) the magistrate formed the requisite opinion on the basis of all the material before him.[56]

88. The plaintiffs submitted that the expression "maturity to give instructions" required:

> (a) An individualised assessment of a child's development and capacity to give instructions focused on whether the child can understand the nature of the proceedings and is able to appreciate the short and long term consequences of the decisions being made;
>
> (b) A recognition that a child need not be able to give instructions on all issues relevant to a proceeding. The absence of the maturity to give instructions on some issues does not render the child generally not mature enough to give instructions. Section 524(10) of the Act recognises that a child with a direct instructions lawyer may only be able to express wishes on some topics and that a legal representative acts on instructions or wishes "so far as it is practicable to do so having regard to the maturity of the child"; and
>
> (c) An approach to the threshold question of maturity that recognises the strong statutory presumption in favour of direct instructions representation.

89. They relied without objection from the other parties on an advice from Dr Pat Brown entitled, "Assessing the Young Person's Capacity to Provide Instructions" dated 29 May 2000. This advice is referred to on the Court website in these terms:[57]

> On general advice from the Children's Court Clinic, the usual cut-off point below which a child is normally not mature enough to give instructions is the child's7th birthday. That is not to say that in any particular case a younger child ought not be represented or an older child ought be represented for the relevant protocol emphases maturity rather than the specific age of the child. However, the rule of thumb is the 7th birthday. Though younger children are generally not represented, from time to time the presiding judicial officer does request that a young child be spoken to by an experienced legal practitioner to determine whether the child is mature enough to give instructions.

90. The Commission referred to the Committee on the Rights of the Child ("CROC"), and contend that there can be no correct application of Article 3 (best interests) without allowing the child to be heard in accordance with Article 12 of the Convention.

91. Article 12 of the CROC provides that a child has a right to have an opinion, to have that opinion listened to, and to have it taken seriously; and specifically to be provided the opportunity to be heard in any judicial proceedings affecting him or her, directly or through a representative:

> (a) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (b) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

92. The relationship between Articles3 and 12 of the CROC has been highlighted by the UN Human Rights Committee:[58]

> One establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

93. The Commission relies on the requirements of Article 12, which they say requires in summary that:

> (a) States are to presume that children have the capacity to form autonomous opinions and that children have a right to express those opinions.[59]
>
> (b) The right to be heard should not be limited due to the age of a child and it is not necessary for a child to have a comprehensive understanding of all aspects of the matter impacting him or her but merely a sufficient understanding to be able to form their views on it.[60]
>
> (c) Children must have the opportunity to be heard directly in proceedings.[61]
>
> (d) Where the "hearing of the child is undertaken through a representative", the Committee emphasises that "it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative".[62]
>
> (e) The child's views have an important status: "the representative must be aware that she or he represents exclusively the interests of the child and not the interest of other persons... Codes of conduct should be developed for representatives who are appointed to represent the child's views."[63]

94. In *ZN v YH*, Nicholson CJ acknowledged that the Family Court of Australia needed to be mindful of Article 12.[64] The decision highlights the significance of taking into account the wishes of the children as mandated by the *Family Law Act* 1975 (Cth) as well as having regard to the maturity of the children, and the wishes of each of them. His Honour cited with approval the views of authors Doogue and Blackwell,[65] noting that they argue that:[66]

> ...much greater emphasis should be given to obtaining the views of the child and they discuss means as to how this can be achieved. In particular, they emphasise the dual requirements of art 12 of the United Nations *Convention on the Rights ofthe Child 1989* ... namely that children have a right to be heard and also to have their views taken into account in the decision-making process. As they point out, there is nothing inconsistent between this Article and the law in both Australia and New Zealand.
>
> They also stress that the views of quite young children should not be ignored and, cite the following conclusion from "Access and Other Post-Separation Issues – a Qualitative Study Research Report" Children's Issues Centre, University of Otago, July 1997:
> "One of the most important conclusions to be drawn from our study is that children do have views about their lives after parental separation and that they are highly capable of expressing their views. Even children as young as five years' of age can talk about their feelings and what situations mean to them despite the complexity of the experiences . . . the view that children's capacities to understand and participate have been underestimated (Mayall, 1994; Simpson, 1989) is reinforced for us by this study."

95. The United Kingdom Supreme Court in *ZH (Tanzania) v Home Secretary*,[67] recently confirmed the relationship between Articles 3 and 12 of the CROC highlighting the necessity for a child's views to inform what is in their best interests, in light of the risk of taking for granted that their interests may be the same as their parents or other representatives.[68]

96. The plaintiffs rely on the presumption of statutory interpretation that provisions should be interpreted consistently with international law, given the presumption that Parliament intends to comply with Australia's international treaty obligations.[69]

97. The diminished nature of best interests representation as a form of ensuring that children are heard has been recognised in other jurisdictions. The English Court of Appeal in *Mabon v Mabon*[70], preferred direct instructions representation over best interests representation in cases where children were articulate or capable of participation in the proceedings.

98. Wall LJ referred to the impossibility of the guardian (whose representation would be akin to best interests representation) to advance the boys' views given that the views advanced might be directly opposed to what they were actually saying:[71]

> The judge, it seems to me, was motivated by two particular considerations. The first was his laudable desire to protect the three children from the effects of the litigation. The second was his belief that the children were not, in reality, expressing their own views, but those of their father. In those circumstances, the strength and validity of their views were, in the judge's eyes, substantially if not entirely devalued, and could be advanced by the guardian.
>
> My difficulty with that approach is that the judge seems to me, with all respect to him, to have perceived the case from the perspective of the adults. From the boys' perspective, it was simply impossible for the guardian to advance their views or represent them in the proceedings. He would, no doubt, faithfully report to the judge what the boys were saying, but the case he would be advancing to the judge on their behalf would be (or was likely to be) directly opposed to what the boys were actually saying.
>
> In these circumstances, I do not agree with the judge that the only advantage from independent representation was "perhaps the more articulate and elegant expression of what I already know". That analysis overlooks, in my judgment, the need for the boys on the facts of this particular case to emerge from the proceedings (whatever the result) with the knowledge that their position had been independently represented and their perspective fully advanced to the judge.

99. Thorpe LJ, with whom Latham and Wall LJJ agreed, acknowledged the greater appreciation and weight that must now be attached to children's autonomy and consequential right to meaningfully participate in decisions affecting their lives, stressing that "the right to freedom of expression and participation outweighs the paternalistic judgment of welfare."[72]

100. In my opinion, both the context and language of the Act, and the guidance available from authority and jurisprudence demonstrate that the concept of "maturity" does not involve assumptions based on age alone. It is the concept of maturity that is found in s524 of the Act and not the age of the child alone. The Act recognises the need to have reference to each individual child's development as well as age in determining the child's best interests.[73]

101. This is recognised in *Sanding*, where Bell J described that the best interests of the child principle recognises children as autonomous rights-bearers whose views are entitled to be given proper consideration.[74]

Construction of ss524(2) and (4) of the Act

102. In *Slaveski v Smith*,[75] the Court of Appeal considered whether the Charter operated to afford an enforceable right to legal representation to persons eligible upon criteria of the *Legal Aid Act* 1978 (Vic).

103. The Court described the application of ss32(1) and 7(2) of the Charter:[76]

> The operation of ss32(1) and 7(2) was recently considered by the High Court in *Momcilovic v R*. So far as s32(1) was concerned, French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgments that s32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*.
>
> Their Honours did not achieve the same degree of consensus as to the effect of s7(2). The Court of Appeal in *Momcilovic* held that the interpretative task under s32 does not involve the application of s7(2), which needs to be considered only for the purposes of making a declaration of inconsistent interpretation under s36. In the High Court, French CJ, Crennan and Kiefel JJ concluded that s7(2) 'cannot inform the interpretative process which s32(1) mandates' but is engaged only when and if 'the statutory provision under consideration imposes a limit on its enjoyment'. '[I]t cannot be interpreted into the content of the rights and freedoms set out in the Charter'. In contrast, Gummow, Hayne and Bell JJ held that s7(2) does inform the interpretative task to the extent that it will usually be appropriate for a court first to consider whether under s7(2) there is scope for a justified limitation of the right in issue. It followed, as Gummow J put it, that '[s]ection 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Part 2, including, where it has been engaged, s7(2). Heydon J observed that, if

> s7(2) were valid, it would inform the interpretative task, but his Honour held that both s7(2) and s32(1) were invalid.
>
> Hayne and Heydon JJ both dissented with respect to the final orders and Heydon J also dissented on the question of whether the appeal should be allowed. It is unnecessary to decide whether, in these circumstances, the Court of Appeal is bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong.
>
> Putting aside the disparity of views as to the application of s7(2), it nonetheless emerges from *Momcilovic* that the effect of s32(1) is limited. It requires:
>
> statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application...
>
> Consequently, if the words of a statue [sic] are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment. (Citations omitted)

104. Approaching the construction of the expression "mature enough to give instructions" as used in ss524(2) and (4) in accordance with its ordinary and grammatical meaning, I am of the opinion that the phrase requires a court to have regard to considerations wider than the child's age alone. The phrase requires an assessment of the child's development and capacity to give instructions. This is dependent on whether the child can understand the nature of some or all of the issues in the proceeding and is able to appreciate the consequences which may follow from the instructions that are given, and the decisions being made.

105. The dangers of an assessment solely based on chronological age are well illustrated by the Court's view that neither of the plaintiffs had sufficient maturity to give instructions, despite the fact that:

> (a) they had been represented on the direct representation basis on five or six previous occasions over a period well over five months;
>
> (b) counsel stated that instructions had been taken from each of them on a number of occasions in the manner required of a child;
>
> (c) each of the girls significantly exceeded the age of 7 years stated in the advice published on the Court's website;
>
> (d) there was no evidence that either of the girls had any intellectual disability or other developmental issue; and
>
> (e) in a comprehensive report of January 2012 provided to the Court by an officer of the Department of Human Services, the girls had been described as appearing "to be mature for their years in terms of the language they use and their insight into their childhoods".

106. It is not necessary for the purposes of ss524(2) and (4) that the child be mature enough in the opinion of the Court to give instructions to a legal practitioner on all issues. This would be to impose a limitation or gloss on the operation of ss524(2) and (4) that is not supported by the statutory context, or the principle that the best interests of the child are paramount. It is sufficient that the child be mature enough to give instructions on one or more issues that arise or may arise in the hearing or proceeding. Section 524(10) requires a legal practitioner representing a child in any proceeding in the Court to act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child.[77]

107. It is the case in many types of proceedings that a party may be able to give instructions to a legal representative as to a limited number of issues which arise in a proceeding. Some issues may be outside the knowledge of the party, or may require expert assistance. An interpretation of ss524(2) and (4) which required the child to be able to give instructions on all issues would be contrary to the best interests principles, the nature of the duty imposed on legal representatives by s524(10), and difficult if not impossible of practical implementation.

108. The construction of the expression "mature enough to give instructions" as found in ss524(2) and (4) is clear and means mature enough to give instructions to a legal representative relevant to a proceeding, or to one or more issues that arise or may arise in a proceeding, having regard to the child's development and capacity. This inquiry may include consideration of a child's chronological age, but is significantly wider and includes for example, consideration of the child's general maturity, capacity, insight, and ability with language. In appropriate cases, it may also include consideration of any intellectual disability or developmental issue affecting the child.

Effect of the Charter and International Law

109. If I were of the view that the words of ss524(2) and (4) were capable of more than one meaning, it would have been appropriate to consider which of those meanings best accords with the human rights in question. It might also have been necessary to consider, as the Commission submitted, whether Articles3 and 12 of the CROC should be taken into account and given weight in determining the ultimate construction to be adopted.[78]

110. Consideration of the human rights sought to be relied on by the plaintiffs and the presumption of statutory interpretation that provisions should be interpreted consistently with international law only serve to provide further reasons why the construction of ss524(2) and (10) that I have preferred should be adopted. Such a construction is consistent with the best interests principles generally and the principle that the best interests of the child must always be paramount.

Reasons and the Record

111. The magistrate made observations about the orders he ultimately made. The Secretary accepts that, to the extent the Court's observations can be said to constitute a "statement of its reasons", they will form part of the record.[79] Where the transcript does not reveal an intention to state the whole of the reasons, and where reasons have not been sought under s8 of the *Administrative Law Act* 1978 (Vic), the plaintiffs must establish that the decision cannot be explained on any basis consistent with the valid exercise of the power to make it.[80]

112. Having regard to the orders made by the Court on 24 May 2012, to the transcript of proceedings on that day, and distinguishing between what may fairly be regarded as argument or discussion from the reasons given by the Court, the reasons for decision may be discerned as follows:

> (a) the children were too young to have the ins and outs of sexual abuse allegations and drug abuse allegations put to them for their comment;
>
> (b) they were not mature enough to give instructions on those issues;
>
> (c) the children were not of an age where they could give instructions – they could only express wishes;
>
> (d) they were not mature enough to give instructions on at least one of the really significant key issues concerning their uncle;
>
> (e) it was very unusual that you have got children who want nothing to do with a parent; and
>
> (f) the magistrate was uncomfortable with both girls having the same representation and leave should not be granted under s524(5).

Grounds of Review

113. The plaintiffs ultimately relied on nine grounds of review. It is only necessary to set out Grounds 1 and 2, and 6 to 8:

> Ground 1:

The First Defendant made an error of law that appears on the face of the record – and which amounts to a jurisdictional error – in that he misconstrued the phrase "maturity to give instructions" in section 524(4) of the Act by:
a. Finding that "maturity" is determinable by chronological age only rather than by an individualised assessment of the child's developmental stage; and
b. Setting the threshold for "maturity to give instructions" erroneously high given:
i. the statutory presumption in favour of 'direct instructions' representation including the requirement to protect a child's rights pursuant to section 10(2) of the Act;
ii. the nature of 'direct instructions' representation under section 524(10) of the Act; and
iii. the rights protected in section 8 (equality before the law), section 17(2) (protection of children) and section 24 (right to a fair hearing) of the Charter as he was required to do pursuant to section 32 of the Charter.

Ground 2
As a result of the errors particularised in Ground 1, the First Defendant made a finding about "maturity to give instructions" in the absence of any evidence permitting that finding to be made.

Ground 6:
The First Defendant denied the Plaintiffs procedural fairness in that he acted contrary to the reasonable expectation of the Plaintiffs that he would operate in accordance with *Guidelines for Lawyers Acting for Children and Young People in the Children's Court* endorsed by the President of the Children's Court and with advice from the Children's Court Clinic published by the Children's Court to the effect that:
a. A child aged 7 or over will ordinarily be mature enough to give instructions.
b. In any particular case what is required is an individualised, in person, assessment of the child's stage of development and maturity.
c. The fact that a child can give instructions on some issues but not others does not mean that the child generally "lacks the maturity to give instructions".
d. The task of doing that assessment primarily falls to the lawyer assigned to act for the child.

Ground 7:
The First Defendant made a jurisdictional error in that he refused leave under section 524(5) of the Act for the Plaintiffs to be represented by the same legal practitioner without assessing whether a conflict of interest existed pursuant to s524(6) of the Act when such an assessment is an essential precondition to the exercise of the power under s524(5).

Ground 8:
In circumstances where the Plaintiffs had previously been represented in the proceedings by Victoria Legal Aid on a direct instructions basis in accordance with s524(10) of the Act, the First Defendant denied the Plaintiffs procedural fairness by failing to give the Plaintiffs sufficient notice of his intention to:
a. make a determination pursuant to s524(4) of the *Children, Youth and Families Act* 2005; and
b. refuse leave pursuant to section 524(5) of the *Children, Youth and Families Act* 2005,
thereby depriving the Plaintiffs of an adequate opportunity to present information about those matters.

Grounds 1 and 2

114. *Certiorari* lies to correct an error of law that appears on the face of the record even where that error is not jurisdictional. In *Korp v Deputy State Coroner* it was said that:[81]

> [i]f an order is sought in a judicial review proceeding on the basis that there is an error on the face of the record, then the Court is obliged to confine itself to the record. On the other hand, if the judicial review seeks to attack the decision on the ground of want of jurisdiction, then the Court may consider all the evidence before it, in order to determine whether or not there has been jurisdictional error.

The advantage of a ground that there is an error on the face of the record is that the plaintiff does not have to prove jurisdictional error. The point is made by Professor Wade in Administrative Law, where the learned author said:

> "A decision which is erroneous on its face, perhaps because it reveals some misinterpretation of the law, can be quashed even on the assumption that it is within jurisdiction and therefore involves no excess of power."

115. Before the Court can make an order under s524(4), it is necessary for the Court to find that:

(a) in the opinion of the Court the child is not mature enough to give instructions;
(b) it is in the best interests of the child for the child to be legally represented; and
(c) there are exceptional circumstances.

116. Each of these findings is a jurisdictional or threshold fact in that it is necessary for the Court to be of the requisite opinion or view before the power contained in s524(4) can be exercised.[82]

117. In the event that the Court misdirects itself as to the proper construction of the threshold requirements of s524(4), there may also be error of law on the face of the record.

118. Such an inquiry is confined to that part of the judgment and reasons including the transcript that form part of the record.

119. The reasons for decision show that the Court misdirected itself in law as to the meaning of the expression "mature enough to give instructions" found in ss524(2) and (4), and failed to apply the correct test.

120. The Court confined its inquiry to the chronological age of the girls and misconceived its function as confined to a conclusion as to the maturity of the girls based on chronological age alone.

121. The Court wrongly concluded that because the girls were in its view too young to be informed of the sexual abuse allegations, they were not mature enough to give instructions on any matter. The test was of a different character and involved consideration of each child's development and capacity to give instructions including consideration of the evidence as to each child's general maturity, capacity, insight and ability with language.

122. The Court also erred in law for the reason set out in Ground 2. The Court made a finding of insufficient maturity to give instructions in the absence of any evidence permitting that finding to be made.

123. Grounds 1 and 2 are upheld.

Grounds 6 and 8

124. In *RCB v Forrest and Others*, five members of the High Court said:[83]

> Determination of an application for a return order and, in particular, determination of any issues about the strength of a child's objection to return and the maturity of that child will affect the child's interests. Deciding issues about strength of objection and maturity of the child in a way that is procedurally fair to all who are interested in or affected by their decision – the parents, the child or children concerned and the Central Authority – presents an essentially practical issue. How is the court to be sufficiently and fairly apprised of what the child concerned wants, how strongly that view is held, and how mature the child is?

125. I am of the opinion that the plaintiffs were denied procedural fairness and natural justice for the following reasons:

> (a) The plaintiffs had previously been directly represented before the Court on five or six occasions over a period exceeding 5 months.
>
> (b) The issue under consideration at the hearing on 24 May 2012 was whether an Interim Accommodation Order should be made.
>
> (c) The hearing was adjourned to 24 May 2012 from 11 May 2012 in order to give the mother (not the plaintiffs) the opportunity to obtain legal representation.
>
> (d) The plaintiffs were directly represented by a legal representative at the hearing on 11 May 2012 and at preceding hearings.
>
> (e) It was not suggested at the hearing on 11 May 2012, or any previous hearing, that the status of the plaintiffs' legal representation at the hearing on 24 May 2012 was at risk. No notice was given to the plaintiffs or their legal representative that their capacity to be represented was at risk.
>
> (f) When the matter of legal representation arose at the hearing on 24 May 2012, no sufficient opportunity was given to the legal representative of the plaintiffs to call evidence or present a case as to why the plaintiffs were mature enough to give instructions to a legal representative.

(g) Evidence was available to the Court from a Departmental officer to the effect that both girls appeared mature for their years in terms of the language they used and their insight into their childhood, but no opportunity was given to the plaintiffs to call or present evidence to the Court.

(h) Evidence could have been called as to the actual instructions taken or given by the plaintiffs to their legal advisers on a number of occasions over the previous five months, but no opportunity was provided to call or present that evidence.

(i) The Court arrived at its own decision without providing counsel who appeared for the plaintiffs any or any adequate opportunity to present evidence or disabuse the Court of the conclusion that it had arrived at.

126. Grounds 6 and 8 are upheld.

Ground 7

127. Section 524(5) gives the Court power to give leave to permit more than one child in the same proceeding to be represented by the same legal practitioner. Proceeding is defined in s3 to mean "any matter in the Court". Section 524(6) provides that the Court may only grant leave under sub-s(5) if satisfied that no conflict of interest will arise.

128. In considering whether or not to grant leave under sub-s(5), it was necessary for the Court to consider whether there was any conflict of interest.

129. The order refusing leave to allow the plaintiffs to be represented by the same lawyer was the subject of almost no consideration at the hearing. The Court noted that the plaintiffs "have got different issues".[84] The magistrate requested submissions both on the s524(4) issue and on whether leave should be granted under section 524(5).[85] No submissions were received but an order refusing leave was made.[86]

130. A conflict of interest does not exist simply by virtue of clients "having different issues". A lawyer will not have a conflict of interest in acting for two clients in the same proceeding unless the interests of each client genuinely come into conflict,[87] or can reasonably be anticipated to come into conflict, so that the independent judgement of the solicitor in relation to one client is compromised by an obligation in relation to a second client.[88]

131. There is no evidence supporting the conclusion that the duty of loyalty owed to each client (arising from the special fiduciary relationship between a legal practitioner and client)[89] was compromised in this case.

132. I am satisfied that the Court in refusing leave under s524(5) fell into error by failing to give consideration, or make any proper investigation as to whether or not there was a conflict of interest which would preclude a legal representative from acting for both of the girls. The girls had been directly represented by the same legal representative over the preceding five months and on five or six occasions.

133. I am also satisfied that in the circumstances it was appropriate if the Court was minded to consider withholding leave under s524(5) for the Court to have given notice of its intention to the legal representative acting for the girls, and afforded the legal representative a proper opportunity of calling evidence and making submissions to the Court so as to permit the Court to arrive at an informed view as to whether or not there was a conflict of interest.

134. By failing to do so, there was a denial of procedural fairness and natural justice. Given the reports and information that were available to the Court, it is apparent that there was evidence and material from experts and from legal advisers that could have been called and considered and would have assisted the Court in making an informed decision.

135. Ground 7 is upheld.

Relief

136. The parties have submitted that in the event that I am of the view that there has been non-compliance with procedural fairness, it is appropriate to order that orders 1 and 3 as appearing

under Other Order in the Court Orders relating to each of the plaintiffs be quashed. I will make orders to this effect.

137. This will permit the Court to reconsider the legal representation of each of the plaintiffs when the proceedings resume on or after 6 December 2012.

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[1] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 9 lines 4-18.
[2] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 11 lines 23 to page 12 line 6.
[3] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 15 line 31 to page 16 line 4.
[4] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 28 lines 20-29.
[5] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 29 lines 20-27.
[6] This is a reference to representation on a best interests of the child basis under s524(11)(a) of the Act rather than an instructions basis under s524(10) of the Act.
[7] The reference to five or six appearances for the girls is a reference to the fact that the girls had been legally represented on five or six previous occasions. Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 30 lines 13-26 and page 31 line 2-20 (underlining added).
[8] This is a reference to s524(4) of the Act.
[9] The reference to exceptional circumstances is taken as a reference to s524(4) of the Act. Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 32 line 19 to page 33 line 3 (underlining added).
[10] These are references to s524(4) and s524(5) of the Act.
[11] *Frugtneit v Victoria Legal Aid* (Unreported, Supreme Court of Victoria, Hedigan J, 11 September 1997); *Marks v Buick* [2003] VSC 488.
[12] Section 8(3) of the Charter.
[13] Section 17(2) of the Charter.
[14] Section 24(1) of the Charter.
[15] Secretary to the Department of Human Services, 'Second Defendant's Outline of Submissions in Reply', 11 October 2012, 2 [4].
[16] *Momcilovic v R* [2011] HCA 34; (2011) 245 CLR 1, 37 [18]; (2011) 280 ALR 221; (2011) 85 ALJR 957 (French CJ); *Slaveski v Smith* [2012] VSCA 25; *Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91; and *WBM v Chief Commissioner of Police* [2012] VSCA 159.
[17] In *J v Lieschke* [1987] HCA 4; (1987) 162 CLR 447, 453; (1987) 69 ALR 647; (1987) 61 ALJR 143; 11 Fam LR 417, Brennan J commented, by reference to NSW legislation, that "[i]t is inaccurate and offensive to speak of a child who is brought before a court as being "charged" as a neglected child". See also Deane J at 464.
[18] Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 1906, 3201.
[19] Section 12(1) of the *Children's Court Act* 1906 (Vic).
[20] [1987] HCA 4; (1987) 162 CLR 447; (1987) 69 ALR 647; (1987) 61 ALJR 143; 11 Fam LR 417.
[21] Ibid 452.
[22] Victorian Child Welfare Practice and Legislation Review Committee, 'Equity and Social Justice for Children, Families and Communities' (1984) ('the Carney Report').
[23] Ibid (emphasis in original).
[24] Ibid 430.
[25] Ibid 434-5.
[26] Victoria, *Parliamentary Debates,* Legislative Council, 8 May 1985, 6.
[27] Victoria, *Parliamentary Debates,* Legislative Assembly, 8 December 1988, 1151.
[28] [2012] HCA 47 [33]-[35].
[29] Family Law Council, 'Pathways for Children: A review of children's representation in family law' (August 2004) [4.7] and [4.8].
[30] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) Ch 13.
[31] Victorian Law Reform Commission, *Protection Applications in the Children's Cour*, Final Report No 19 (2010) Appendix N.
[32] Victoria, *Parliamentary Debates,* Legislative Assembly, 6 October 2005, 1374 (Sheryll Garbutt).
[33] Explanatory Memorandum, *Children, Youth and Families Bill* 2005 (Vic) 104, cl 524.
[34] *J v Lieschke* [1987] HCA 4; (1987) 162 CLR 447, 455-6; (1987) 69 ALR 647; (1987) 61 ALJR 143; 11 Fam LR 417 (Brennan J, with whom Mason, Deane and Dawson JJ agreed; see also Wilson J at 451-2).
[35] *R v Getachew* [2012] HCA 10; (2012) 286 ALR 196, 198 [11]; (2012) 86 ALJR 397 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[36] *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 285 ALR 27, 34 [26]; (2012) 86 ALJR 217 (French CJ, Hayne, Kiefel and Bell JJ).
[37] *WBM v Commissioner of Police* [2012] VSCA 159 [31] (Warren CJ).
[38] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 381-2; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41 [70] (McHugh, Gummow, Kirby and Hayne JJ).
[39] *Interpretation of Legislation Act* 1984 (Vic), s35(a); *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390, 398 [10]; (2011) 281 ALR 694; (2011) 85 ALJR 1233; (2011) 46 Fam LR 1.
[40] *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573, 592 [44]; (2011) 275 ALR 646; (2011) 85 ALJR 508 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[41] *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390, 398 [10]; (2011) 281 ALR 694; (2011) 85 ALJR 1233; (2011) 46 Fam LR 1, citing *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390, 397 (Dixon CJ).
[42] *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390, 398 [10]; (2011) 281 ALR 694; (2011) 85 ALJR 1233; (2011) 46 Fam LR 1, citing *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCATrans 242; (1997) 187 CLR 384, 408; (1997) 141 ALR 618.
[43] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 658-61 [46]–[59] (French CJ and Crennan J), 664-71 [73]–[104] (Gummow and Hayne JJ).
[44] *H v Minister for Immigration and Citizenship* [2010] FCAFC 119; (2010) 188 FCR 393, 406-7 [50]-[51]; (2010) 272 ALR 605; (2010) 117 ALD 293; (2010) 53 AAR 1 (Moore, Kenny and Tracey JJ).
[45] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 660-1[53]–[59] (French CJ and Crennan J) 664-71 [73]–[104] (Gummow and Hayne JJ); *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* [2007] HCA 57; (2007) 234 CLR 96, 98-9; (2007) 241 ALR 67; (2007) 82 ALJR 202; [2008] ASC 155-088; 2 BFRA 454 (DJ O'Callaghan SC) (during argument), 108-9 (Gleeson CJ, Gummow, Hayne and Crennan JJ); *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390, 398 [10]; (2011) 281 ALR 694; (2011) 85 ALJR 1233; (2011) 46 Fam LR 1.
[46] *Acts Interpretation Act* 1901 (Cth), s15AB; *Interpretation of Legislation Act* 1984 (Vic), s35(b); *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 286 ALR 466, 472 [22] and 480 [52] (French CJ, Crennan and Kiefel JJ); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, 521-2 [50]-[53]; (2009) 252 ALR 471; (2009) 83 ALJR 327; 192 A Crim R 501 (French CJ).
[47] *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390, 398 [10]; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 264-5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 224 CLR 193, 206-8 [30]–[34]; (2005) 221 ALR 448; (2005) 79 ALJR 1850; 65 IPR 513; [2005] AIPC 92-140 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *H v Minister for Immigration and Citizenship* [2010] FCAFC 119; (2010) 188 FCR 393, 406 [50].
[48] Section 10(1) of the Act.
[49] Section 10(2) of the Act.
[50] Emphasis added.
[51] Section 524(10) of the Act (emphasis added).
[52] Section 524(11)(a) of the Act.
[53] Section 524(11)(b) of the Act.
[54] Secretary to the Department of Human Services, 'Second Defendant's Outline of Submissions', 27 September 2012, 26 [107].
[55] See, eg, *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7; [1986] 1 AC 112; [1985] 3 All ER 402; [1985] 3 WLR 830; *Secretary, Department of Health and Community Services v JMB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218; (1992) 106 ALR 385; [1992] FLC 92-293; (1992) 15 Fam LR 392; 66 ALJR 300; *Re Harrison and Woollard* [1995] FamCA 30; (1995) 126 FLR 159.
[56] A different way to express this submission is that the opinion could be formed by a reasonable man who correctly understands the law: *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* [1944] HCA 42; (1944) 69 CLR 407, 430 (Latham CJ).
[57] Magistrate Peter Power, *Family Division – General* (17 October 2011) Children's Court of Victoria, [4.7.3] <http://www.childrenscourt.vic.gov.au/CA256902000FE154/Lookup/Research_Materials_Chapters/$file/Research_Materials_4_FD_General.pdf> .
[58] UN Committee on the Rights of the Child, *General Comment No 12: The right of the child to be heard*, CRC/C/GC/12 (2009) [74] (emphasis added). See also [68], where the Committee states that compliance with Article 12 is essential to the realisation of the rights in the Convention, which "fully implemented if the child is not respected as a subject with her or his own views on the rights enshrined in the respective articles."
[59] UN Committee on the Rights of the Child, *General Comment No 12: The right of the child to be heard* (2009) at [20].
[60] Ibid [21].
[61] Ibid [35].
[62] Ibid [36].
[63] Ibid [36].
[64] [2002] FamCA 453; [2002] FLC 93-101; (2002) 167 FLR 366, 378-9 [112]-[113]; 29 Fam LR 20.
[65] J Doogue and S Blackwell 'How do we best serve children in proceedings in the Family Court?' (2000) 3(8) *Butterworths Family Law Journal* 193.
[66] *ZN v YH* [2002] [2002] FamCA 453; (2002) 167 FLR 366 [112]-[113]; [2002] FLC 93-101; 29 Fam LR 20 (footnotes omitted).
[67] [2011] UKSC 4; [2011] 2 AC 166; [2011] 2 WLR 148; [2011] All ER (D) 02; [2011] Imm AR 395.
[68] Ibid [34]-[37].
[69] *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273, 287; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 39 ALD 206; [1995] EOC 92-696; [1996] 1 CHRLD 67; (1995) 7 Leg Rep 18 (Mason CJ and Deane J); *Royal Women's Hospital v Medical Practitioners Board* [2006] VSCA 85; (2006) 15 VR 22, 39 [75] (Maxwell P).
[70] [2005] 3 WLR 460.
[71] Ibid 469-70 [42]-[44].

[72] Ibid 467 [28].
[73] See s10(2) of the Act.
[74] *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 [11].
[75] [2012] VSCA 25 (Warren CJ, Nettle and Redlich JJA).
[76] Ibid [20]-[24] (citations omitted).
[77] Emphasis added.
[78] In addition to the relevance of Article 12 of CROC in interpreting "best interests" in both the Act and the Charter, it is, as an established principle of international law, relevant of itself by reason of the presumption of statutory interpretation that provisions should be interpreted consistently with international law, given the presumption that Parliament intends to comply with Australia's international treaty obligations.
[79] *Wilson v County Court of Victoria* [2006] VSC 322; (2006) 14 VR 461, 469-70 [35]; (2006) 164 A Crim R 525; (2006) 46 MVR 117 (Cavanough J). As to the position at common law, see *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 577; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[80] See *Johnson v Moyne Shire Council* [2012] VSC 393, [48] (Dixon J).
[81] [2006] VSC 282 [48]-[49] (Gillard J) (citation omitted).
[82] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 574; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437; *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 177-8; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[83] [2012] HCA 47 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[84] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 28 lines 20-1.
[85] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 30 lines 13-7.
[86] Transcript of Proceedings (Children's Court of Victoria, 24 May 2012) page 38 line 17 and page 45 lines7-8.
[87] It is where a lawyer seeks to act for clients with competing interests that a conflict of duty exists: see *Bolkiah v KPMG* [1998] UKHL 52; [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215; *Kallinicos v Hunt* [2005] NSWSC 1181 [76] (Brereton J).
[88] See *Kallinicos v Hunt* [2005] NSWSC 1181 [63]-[64]; (2005) 64 NSWLR 561 referring to *Holborow v Macdonald Rudder* [2002] WASC 265, [23]-[28], (Heenan J); *McVeigh v Linen House Pty Ltd* [1993] 3 VR 394, 398 (Batt JA); *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543 [555]-[556]; (1988) 81 ALR 417; [1988] Aust Torts Reports 80-217; [1988] ANZ Conv R 541; (1988) 35 A Crim R 1; (1988) 62 ALJR 611. In *Kallinicos v Hunt* [2005] NSWSC 1181; (2005) 64 NSWLR 561, the test for conflict of interest (to ground the Court's inherent jurisdiction to restrain solicitors from acting in a particular case) was "whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice" at [76]. Note that this test has been balanced against "the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause" at [76]; See also *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446. As to the law as it applies to conflict of interest in the family law jurisdiction, see *McMillan v McMillan* [2000] FamCA 1046; (1999) 159 FLR 1; [2000] FLC 93-048; (2000) 26 Fam LR 653.
[89] See *Kallinicos v Hunt* [2005] NSWSC 1181; (2005) 64 NSWLR 561 referring to *Holborow v Macdonald Rudder* [2002] WASC 265, [23]-[28] (Heenan J); *McVeigh v Linen House Pty Ltd* [1993] 3 VR 394, 398 (Batt JA).

APPEARANCES: For the first and second plaintiff A & B: Mr S Holt and Ms R Hamilton, counsel. Ms E Contini, Victoria Legal Aid. For the second defendant: Mr E Nekvapil and Ms N Blok, counsel. Legal Services Branch, Department of Human Resources. No appearance for the first, third, fourth and fifth defendants. For the Intervener: Ms C Harris, counsel. Victorian Equal Opportunity and Human Rights Commission.
