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## Report

### Getting the word out: The role of Independent Children's Lawyers in the family law system

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Independent Children's Lawyers (ICLs) are appointed to represent the best interests of children and young people in family law matters. Their role has three main, interrelated facets: to facilitate children and young people's participation in proceedings relevant to their care (the participatory function), to gather evidence and to manage the litigation and play 'honest broker' by bringing a child focus to proceedings. Recent empirical research conducted by the Australian Institute of Family Studies (AIFS) has established that the participatory function is complex and contested and that family law professionals, parents, children and young people ascribe differing levels of importance to the three facets of the ICL role. There are varied approaches among ICLs to how they conceive of, and/or undertake the participatory function. In some areas, practices in this regard do not meet the expectations of others, including judicial officers, parents, children and young people. This paper draws on the AIFS ICL Study to consider the nature and efficacy of the ICL role, with a particular focus on ICLs' participatory function and the perceptions and impact of the varying approaches to this function emerging from quantitative and qualitative data.

### Introduction

In the past decade, the role of the special legal advocate for children and young people originally known in family law proceedings as 'the separate representative' has evolved from that of a 'best interests' representative meeting expectations established in case law to a legislatively-defined Independent Children's Lawyer. The nature of this shift has been evolutionary rather than purposive<sup>1</sup> and the recent empirical evidence presented in this paper suggests that in some critical respects, the practice of ICLs is unsettled and even contested in a socio-legal context in which the demand for support for child participation in family law proceedings is gaining increasing momentum.<sup>2</sup>

The purpose of ICL direct engagement with children/young people may have either or both of two overlapping functions: a participatory rationale in the sense recognised in the United Nations Convention on the Rights of Child (UNCRC) which involves facilitating participation in proceedings relevant to the care of the child or young person, and a forensic rationale in ascertaining the child's/young person's views to put to the court.

A socio-legal examination of the role and efficacy of Independent Children's Lawyers conducted by the Australian Institute of Family Studies (AIFS)<sup>3</sup> has highlighted some controversy about the ways that ICLs do their job. The research has shown that the area in which ICL practice is most significantly contested is their approach to dealing directly with the children and young people whose interests they represent.

Before examining key aspects of the AIFS Report, this paper first considers the nature of the ICL role and the relevant duties and obligations as outlined in the Family Law Act 1975 (Cth) (FLA) and in the *Guidelines for Independent Children's Lawyers*<sup>4</sup> and the way in which this ICL role reflects Australia's ratification of the UNCRC.

The focus then turns to the recent AIFS empirical study of the role and efficacy of ICLs. After outlining the methodological approach and participant samples for the AIFS ICL study, the paper explores key issues that arise with respect to children and young people participating in proceedings relevant to their care, and the practices and rationales for engaging with children and young people in this process. Reference is made to previous Australian and international literature and research on this issue. The two broad orientations to direct contact by ICLs with children and young people that were identified in the study are then examined.

The discussion then considers the views of non-ICL professionals (judicial officers, non-ICL lawyers and non-legal professionals) and parents and children/young people on the scope of the ICL role, with particular focus on the role of ICLs in facilitating child participation. The paper then explores concerns raised by all participant groups about ICL

practice, particularly in the context of the ICL caseload (cases commonly involving family violence and child safety concerns), together with the apparent disjunction between the emphasis children/young people and their parents placed on the ICL's participation function and the significance accorded by ICLs and non-ICL professionals to the 'evidence gathering' and 'honest broker'/litigation management functions. The discussion concludes by reflecting on the various issues highlighted by the study, including concerns associated with ICLs consulting directly with children and young people, the nature of collaboration between ICLs and family consultants/single experts, the current level of direct contact between ICLs and children/young people and issues relating to ICL practitioner quality, particularly in the context of high-risk cases.

## Background

ICLs, who are legal professionals, are appointed in some federal family law parenting matters as a 'best interests' advocate for children/young people (rather than acting as their legal representative/advisor).<sup>5</sup> The court may use its discretion to appoint an ICL in matters where it is warranted (FLA s 68L), being guided by the non-exhaustive criteria in *Re K*.<sup>6</sup> These criteria include where there are allegations of sexual, physical or psychological abuse, allegations of antisocial conduct by one or both parents of a kind that seriously impinges on the child or young person's welfare (eg, family violence), or where there is a relocation proposal that would restrict or, in practice, exclude the other parent from having contact with the child/young person. In practice, the types of cases in which ICLs are appointed are narrower than the *Re K* criteria would suggest and legal aid commissions in some states limit appointments to cases where one of two or three of the criteria apply.<sup>7</sup> Although the number of cases involving children and young people that are litigated has declined since the 2006 family law reforms, the proportion of matters in which ICLs are appointed has increased. There is also some evidence that the caseload of the family law courts has become increasingly complex.<sup>8</sup>

The specific duties and other obligations of ICLs are described in s 68LA of the FLA and in the *Guidelines for Independent Children's Lawyers* (the Guidelines).<sup>9</sup> The legislative articulation of the role in the FLA accompanied the 2006 changes to the Act. Previously, the expectations of ICLs (then known as 'child representatives') were set out in practice and case law.<sup>10</sup> The ICL is described as a 'best interests' representative<sup>11</sup> rather than a child advocate and is not obliged to act on the child or young person's instructions (FLA ss 68LA(2)(b) and 68LA(4)(b)). ICLs must form an independent view based on evidence in the particular case as to what orders will be in the child's best interests (s 68LA(2)(a)) and make submissions accordingly (s 68LA(3)). ICLs are also obligated to ensure that views expressed by the child in relation to the matters at issue are put before the court (s 68LA(5)(b)) and although they may do so, ICLs are not obliged, nor can they be required, to disclose to the court any information that the child communicates to them (ss 68LA(6) and 68LA(7)).

The Guidelines provide further guidance with respect to the nature and operation of the ICL role, including the nature of the relationship between the ICL and the child/young person, such as the information an ICL should explain when meeting a child or young person, the limitations of the ICL role and the treatment of the views of the child/young person (Guidelines 4 and 5), the role of the ICL from a case planning and litigation perspective (Guidelines 6.5, 6.8-6.11) and guidelines for consultations between the ICL and the family consultant,<sup>12</sup> as well as the parties and their legal representatives (Guidelines 6.3, 6.4). While the Guidelines provide that 'the child has a right to establish a professional relationship with the ICL' (Guideline 5), and that the ICL is expected to meet the child/young person (Guideline 6.2), the Guidelines do specify exceptions to this expectation. These exceptions are where the relevant child is not of school age; cases involving 'exceptional circumstances, for example where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of system's abuse for the child'; and cases where there are 'significant practical limitations, for example geographic remoteness' (Guideline 6.2). The Guidelines also provide that 'the assessment about whether to meet with the child and the nature of that meeting is a matter for the ICL' (Guideline 6.2). In fulfilling their duties and obligations, the ICL's tasks may also include identifying and obtaining any relevant documentation, including relevant reports (including Family/Expert Reports), facilitating parents' and children/young people's attendance on the family consultant/expert, ensuring any evidence of the views of the child/young person is before the court, issuing subpoenas to relevant individuals or organisations to give evidence or produce documents to the court and making submissions to the court with respect to the orders that would accord with the best interests of the child or young person.

The use of ICLs is an important measure of Australia's fulfilment of the obligations that arise through ratifying the UNCRC, which recognises the right of children to participate in proceedings relevant to their care (Art 9) and to make their views known in judicial and administrative proceedings affecting them (Art 12).<sup>13</sup> However, concerns have been

expressed by a number of bodies in recent years about the extent to which the current ICL model and funding arrangements satisfy Australia's obligations.<sup>14</sup>

## The research

The research on which this paper is based examined how ICLs operate in the family law system. The research comprised four main studies and was commissioned and funded by the Federal Attorney General's Department. A mixed-method approach was applied to examining the central research question for this project: To what extent does having an ICL involved in family law proceedings improve outcomes for children? A series of further research questions examining issues pertinent to understanding how practice and organisational approaches impinge on this question were formulated to guide data collection for the four core studies in the methodology described below. They cover: allocation and utilisation of ICLs, the role and responsibilities of ICLs, the effectiveness of ICLs from the perspective of parents and professionals, and whether improvements need to be made to systems and processes. Obtaining data to address these research questions involved a number of separate but complementary studies incorporating quantitative and qualitative approaches. This mixed-methods strategy allowed for triangulation among the studies, with most research questions being addressed on the basis of more than one source of data.

The core quantitative study, Study 1, involved a national, multidisciplinary survey of ICLs ( $n = 149$ ), non-ICL legal professionals (lawyers acting in family law matters other than ICLs) ( $n = 192$ ), non-legal professionals [including family consultants, single expert witnesses and family relationship sector professionals (including mediation and family dispute resolution [FDR] professionals and professionals working in children's contact services or post-separation support programs, such as parenting programs)] ( $n = 113$ )<sup>15</sup> and judicial officers from the Family Court of Australia (FCoA), the Federal Magistrates Court (FMC)<sup>16</sup> and the Family Court of Western Australia (FCoWA) ( $n = 54$ ). Study 1 provided an important means of examining the views of the main stakeholders on key aspects of, and expectations in relation to, ICL practice. The surveys were available online for completion from 18 September 2012 to 16 November 2012.

In-depth insights from a practitioner perspective were derived from qualitative interviews with ICLs ( $n = 20$ ). The experiences of parents/carers ( $n = 24$  from 23 interviews) and children/young people ( $n = 10$ ) in cases involving ICLs further informed this analysis of ICL practices from the perspective of those who are directly affected by them. The qualitative interviews with ICLs were undertaken between November 2012 and January 2013 and those with parents/carers and children/young people were undertaken between February 2013 and April 2013. A fourth study comprised an examination of the organisational context in which ICLs operate (in particular legal aid policy and practice in relation to ICLs) that was undertaken via a formal request for information (detailing policy, procedural and budget information), together with interviews with representatives from each state and territory legal aid commission. These data were collected between December 2012 and January 2013. Interviews with child protection department representatives in each state and territory also provided information about arrangements for interaction between ICLs and these departments. These interviews were undertaken between December 2012 and February 2013.

## Participation by children and young people

The concept of participation is multidimensional, subjective and context-sensitive. It arises from a number of articles in the UNCRC, including Art 12.1, recognising the right of children and young people to make their views known in judicial and administrative proceedings relevant to their care, and Art 9, upholding the right to participate in proceedings relevant to their care. Participation has been conceptualised in a number of different ways: empirically, theoretically and operationally.<sup>17</sup> In a UNICEF Fact Sheet (2005) on the right to participation, the following explanation is provided:

Respecting children's views means that such views should not be ignored; it does not mean that children's opinions should be automatically endorsed. Expressing an opinion is not the same as taking a decision, but it implies the ability to influence decisions. A process of dialogue and exchange needs to be encouraged in which children assume increasing responsibilities and become active, tolerant and democratic. In such a process, adults must provide direction and guidance to children while considering their views in a manner consistent with the child's age and maturity. Through this process, the child will gain an understanding of why particular options are followed, or why decisions are taken that might differ from the one he or she favoured.<sup>18</sup>

There are four noteworthy aspects of this explanation: (a) recognition that children/young people's capacity to participate increases with age and maturity; (b) it involves the capacity to influence decisions, not make them; (c) the capacity to influence decisions needs to be supported by adults through information and dialogue; and (d) children and young

people are entitled to have information that assists them to understand why decisions have been made, including decisions inconsistent with their views.

Analytic literature on the ways in which participation may be operationalised suggests participation may occur across a continuum reflecting the extent to which the child/young person's engagement in a decision-making process affects the outcome. Shier's (2001) five-stage model, for example, is based on: listening to children and young people, supporting them in expressing their views, taking their views into account, involving them in decision-making processes, and sharing power and responsibility for decision-making.<sup>19</sup> The fifth stage arguably goes further than the level of responsibility implied in the UNICEF explanation.

The instruments that guide ICL practice establish a prima facie position in favour of direct contact with children. The legislation and Guidelines noted above suggest direct contact with children and young people should occur unless there are sound reasons -- related, for example, to the age of the child or because of an ongoing investigation of sexual abuse allegations and a risk of systems abuse in the particular circumstances -- for no contact to occur. Further, the objective of giving effect to Australia's obligations under the UNCRC was included in the most recent raft of amendments to the FLA, which focussed mainly on family violence.<sup>20</sup>

### **Engaging with children and young people: practices and rationales**

As noted earlier, engaging with children and young people may have a participation-related purpose or a forensic purpose: there is some tension in this area that leads to a lack of clarity in practice about the role, purpose, function and impact of ICLs having direct contact with children and young people. In part, this may be attributable to the fact that in practice, the lines between these purposes are inevitably blurred and that practice decisions in this area are influenced by the age of the child/young person and the circumstances of the case. In addition to, and perhaps because of, this conceptual and practical complexity, the research has also highlighted significant divergence in practice concerning whether ICLs have direct contact with children and young people and for what purpose. Direct contact may serve: (a) as a mutual familiarisation opportunity, (b) to develop the child or young person's understanding of the proceedings and what the ICL will do (or, at the conclusion of proceedings, an opportunity to explain the outcome) and (c) an opportunity to consult the child or young person on their views about the process and outcome of the proceedings. This third purpose, consultation, reflects participation at the higher levels described earlier, and may be a forensic exercise. From a forensic perspective, the views of children and young people are a question of fact, which courts must consider (FLA s 60CC(3)(a)) (where they are expressed) and which ICLs must put before the court. Children and young people are, however, not obliged to express a view (FLA s 60CE).

The dynamics surrounding the opportunity for children and young people to express a view have generated significant debate in the literature on research and practice. On one view, the opportunity to express a view potentially raises a loyalty conflict and may put children and young people in the uncomfortable position of having to express positions that may go against the intentions of either or both parents.<sup>21</sup> The alternative view positions children and young people as active agents in their own lives, whose views on their needs and interests are a valid and important consideration in making parenting arrangements. There is an increasing body of research indicating that from the perspective of children and young people, the opportunity to inform decisions about their living arrangements is of considerable significance.<sup>22</sup>

### **Two practice orientations**

The quantitative and qualitative data from the AIFS ICL study indicated that the extent to which ICLs have direct contact with children and young people, especially for consultation related purposes, differed among practitioners and that the policies of legal aid commissions varied in this respect.

Broadly, two orientations to direct contact were identified in the research, and specifically in the interviews and survey responses of ICLs. The majority orientation was cautious in relation to direct contact. The position associated with this view was that, where such contact occurs, it should usually be for the purpose of familiarisation and explanation of processes and outcomes. On this view, consultation with children and young people was seen as the preserve of the family consultant or single expert witness, the implication being that this is a primarily forensic exercise.<sup>23</sup> The main reasons for relying on family consultants or single expert witnesses in this respect were fourfold. First, as social scientists, these professionals were regarded as having the appropriate training to elicit and interpret the views of children and young people.<sup>24</sup> Second, they may also be called to give evidence and be cross-examined on their findings in relation to the children's/young people's views and circumstances. Third, some ICLs expressed a concern to avoid subjecting children and young people to repeated engagement with different types of professionals and to reduce the potential trauma of

legal proceedings, particularly in circumstances involving ongoing investigations of sexual abuse allegations, concerns that are reflected in the exceptions to the expectation of direct contact in Guideline 6.2.<sup>25</sup> Fourth, some ICLs were concerned that a child or young person may make disclosures of child abuse to them that may necessitate the ICL making a notification to the prescribed child welfare authority, relinquishing their role in the case and being called to give evidence as a witness.<sup>26</sup>

The research raised two fundamental questions about this cautious orientation to the ICL participatory function. The first was the extent to which children's and young people's participation is supported by the more cautious approach outlined above and the understandings that all interested parties -- lawyers, children/young people, parents and decision-makers -- apply to this question. The second was the nature of the collaborative relationship between family consultants and ICL practitioners and the extent to which this operates effectively to serve children's/young people's consultation needs, from both a forensic and participation perspective. The significance and benefits of cooperative and collaborative relationships between ICLs and family consultants/experts was a clear theme emerging from the quantitative and qualitative data collected via the multi-disciplinary professional surveys and in the ICL interview data. The benefits identified by ICLs included the exchange of information and the gathering and assessment of evidence by the family consultant/expert that in turn informed and facilitated ICLs' identification of parenting arrangements that accord with the child or young person's best interests.<sup>27</sup> Some ICLs also described their ability to liaise with the family consultant/single expert and/or the provision of their report as assisting from a dispute resolution perspective.<sup>28</sup> Collaborative practices when engaging with children and young people, such as co-joint meetings, were also identified by ICLs and non-legal professionals as beneficial because they reduced multiple interview effect (or systems abuse), facilitated the cross-checking of information and impressions and enabled the ICL and other professional to debrief.<sup>29</sup>

The less common orientation identified in the research was termed a high participation orientation. In this orientation, direct contact was commonly undertaken by ICLs for all three of the potential purposes outlined earlier. ICLs with this orientation evinced confidence in speaking to children and young people for a range of purposes -- including familiarisation, explanation and consultation -- and a view that best interests outcomes are often allied to children's/young people's views.<sup>30</sup> Some ICLs with this orientation indicated that they consulted older children particularly on some procedural aspects of the case. For them, the participation function was as important, if not more important, than the evidence gathering and litigation management aspects of the role.<sup>31</sup> This approach also reflects the interrelated nature of the ICL functions, with this participation function informing the evidence gathering aspect of their ICL role in that it facilitated ICL access to information about a child's/young person's views and experiences. The barriers to direct contact raised by cautious orientation practitioners were not seen as insurmountable by the 'high participation' orientation. ICLs and the role of the family consultant was seen as separate and distinct (though complementary) from that of the ICL.

## **Direct contact between ICLs and children and young people**

ICL practices were gauged through responses (a 5-point frequency scale) to the question: Thinking about the last three cases in which you have acted as an ICL, how frequently did you have direct contact (in person or on the telephone) with the child/young person?<sup>32</sup> The most common responses were rarely/sometimes (54%), with 35% of ICLs choosing 'often/always' and 8% choosing never.<sup>33</sup> The attitudes of other professionals, including judicial officers, non-ICL lawyers and non-legal professionals working in the family law system, provide further insight into the extent to which divergent views on questions related to children's/young people's participation, and the role of ICLs in supporting this, were held by various professionals. Around two-thirds of other professionals (69% of judges, 68% non-ICL lawyers, 64% non-legal professionals) indicated that they believed that ICLs 'should consult directly (in person or by telephone) with the relevant child or young person in each case where that child/young person is of sufficient maturity'.<sup>34</sup>

As the concerns underlying the cautious orientation to direct contact indicate, some ICLs have particular reservations about meeting with children/young people in cases involving issues relating to family violence and child safety. In this context, it is relevant to reiterate, that such cases make up the majority of the caseload of the family law courts and the ICL caseload as well. Indeed, the evidence indicates that most ICL cases involve such concerns at the more severe end of the spectrum.<sup>35</sup> The findings of the research relating to ICL training and professional development indicate a need for training to better equip ICLs for practice in this caseload.<sup>36</sup>

Findings based on data generated from interviews with parents/carers, children and young people suggest significant disappointment when ICLs have minimal contact with children/young people and their parents. Almost all of the parents or carers (the number interviewed was 24 in 23 interviews) had been involved in complex cases, with some extending over several years. Most involved a history of family violence and concerns about child safety were also relevant to the

majority.<sup>37</sup> The circumstances of the 10 children/young people interviewed for this research indicate that they all fell into a very particular sub-group: issues concerning their own safety were at the core of the proceedings their families were involved in.<sup>38</sup> From the perspectives of the children and young people, their cases (in varying ways) revolved around the question of whether they were living in conditions in which they were safe or unsafe. In this context, safety refers to circumstances involving a risk of physical or emotional harm through abuse, injury or neglect. The children's and young people's views reveal little or no ambiguity about the optimal outcomes in the court proceedings from their perspective. Given the small sample size, and the specificity of the circumstances of the children and young people, the insights derived from these data must be considered to be exploratory in nature. However, these interview data yield particularly rich insights into the practices that are helpful or unhelpful from the standpoint of the children and young people who are affected by family law decision-making processes generally and ICL practices in particular. The ages of the children/young people varied from 10 to 16 years of age. Two were 10-11 years, five were 12-14 years and three were 15-17 years.<sup>39</sup>

### **Stakeholder expectations and experiences of ICL practice**

Most of the children and young people interviewed indicated that they expected the ICL would convey their views to the court, stand up for them in court and protect their interests in the proceedings.<sup>40</sup> Some of these interviewees demonstrated uncertainty about what the ICL would do and discussion that indicated an awareness of the evidence-gathering and 'honest-broker' functions was absent from most answers.<sup>41</sup> Most children/young people indicated they had a positive response to the appointment of the ICL.<sup>42</sup> For most of the children and young people interviewed, their experience with the ICL proved disappointing.<sup>43</sup> Although most had met the ICL, the majority also indicated that the extent and nature of their dealings with the ICL were unsatisfactory. The reasons for this varied. Children/young people indicated that they found their contact with the ICL to be limited, cursory, delayed or insufficiently frequent given the nature of the proceedings.<sup>44</sup> Although some of the discussion in the interviews was intended to focus on the extent to which children and young people felt their views had been taken into account, the responses provided by the children and young people interviewed suggested they were not well-informed about this question. Some interviewees indicated the outcome of the process was consistent with their view, but they were uncertain as to how this came about. Other children/young people described a more clearly negative experience in various ways, including not being listened to and not having their views about their experiences, concerns and preferred outcomes taken into account.<sup>45</sup>

Questions inviting these interviewees to describe the best and worst parts of having an ICL elicited many more negative than positive reflections. The negative responses focussed on disappointment with the level, nature and timeliness of contact with the ICL and lack of information about what the ICL was doing, perceptions that the ICL was not taking the child/young person's view into account, a sense that the ICL was unnecessary and a view that the ICL had not looked after the interviewee's rights.<sup>46</sup> The few positive responses raised issues about ICLs that were abstract rather than actual: the notion that ICLs were educated in a way that would allow them to communicate effectively and the idea of having an ICL.

Only one of the young people interviewed, (given the pseudonym Sarah), reported an almost wholly positive experience.<sup>47</sup> Significantly, her matter involved concerns that necessitated the involvement of police and the child protection department and resulted in a change of residence. Her story indicates engagement with a high participation orientation ICL. Sarah's account of this practitioner's approach indicates Sarah had a sense of engagement in the proceedings, arising from the way the ICL interacted with her. She indicated that the ICL explained what was going on to her, both in the context of their interactions, and in relation to the proceedings more generally. Sarah recounted how the ICL had consulted her in drawing up the 'dot points' that were the basis of her submissions to the court. She summed up her experience with the ICL in this way:

It was nice to have an Independent Children's Lawyer ... 'cos if my word didn't get out properly ... I don't think I would be where I am now ... I'm happy here.

Sarah's experience of 'getting her word out' through the ICL was not shared by the other children and young people interviewed.

The data generated from interviews with most parents/carers showed that, like the majority of the children and young people interviewed, parents were disappointed in the ICLs performance, particularly in regard to the level of contact that occurred between the parents and the ICL and the ICL and the children and young people.<sup>48</sup> From the perspective of parents and carers, this meant that the ICL did not have the level of understanding of the child/young person and their

circumstances that would equip them to make an informed judgement about the arrangements that would be in the best interests of the child. Like the data from the interviews with children and young people, the parent/carer interviews indicated that ICL practices in matters involving family violence and child safety were a particular source of concern. The nature of concern expressed varied and encompassed concerns that ICLs did not have sufficient training to deal with family violence and child safety effectively, views suggesting that evidence in relation to family violence and child safety was not gathered thoroughly and in some instances impartially.<sup>49</sup> There were also reports of feeling pressured to settle on unsafe arrangements for time and resource reasons.<sup>50</sup>

In some instances, mothers' accounts indicated a lack of competence on the part of the ICLs, mirroring concerns about the professional adequacy of some ICL practitioners expressed by all of the professional groups involved in the research. More specifically, all of the mothers who reported a history of family violence and/or safety concerns ( $n = 15$ ) indicated that they did not feel their concerns had been taken seriously enough.<sup>51</sup> Some indicated that the ICLs in their case supported unsupervised contact despite evidence of family violence or child safety concerns.<sup>52</sup>

The response patterns to questions asked of professional groups regarding the effectiveness of ICL practice generally reflected positive assessments among judicial officers and ICLs and less positive assessments from non-legal professionals and non-ICL lawyers.<sup>53</sup> When asked about the ability of ICLs to identify circumstances when children and young people are at immediate risk of harm, 72% of ICLs and 73% of judicial officers indicated that ICLs' ability in this regard was 'good' or 'excellent', as compared to 47% of non-ICL lawyers and 55% of non-legal professionals providing this response.<sup>54</sup> ICL and judicial officers' ratings of ICL assessments of allegations of family violence and child abuse or neglect were more positive (80% and 76% respectively), with 51% of non-ICL lawyers and 50% of non-legal professionals rating ICLs as 'good' or 'excellent' at this task.<sup>55</sup> ICL self-assessments of their ability to detect and respond to safety issues for children and young people (69%) were less positive than the judicial officers ratings of ICLs' capacity in this regard, as compared to 40% of non-ICL lawyers and 53% of non-legal professionals rating ICLs as 'good' or 'excellent' at this task.<sup>56</sup> The ability of ICLs to detect and respond to safety issues for parents was rated as 'good' or 'excellent' by 56% of ICLs, 72% of judicial officers, but by only 30% of non-ICL lawyers and 33% of non-legal professionals.<sup>57</sup> Consistent with the reports of participating mothers discussed above, these data identify professionals' concern, particularly among non-ICL lawyers and non-legal professionals, about the capacity of ICLs to respond appropriately in cases involving family violence and safety concerns.

In summary, from the perspective of the parents/carers and children/young people interviewed, the experiences of many were largely negative due to unmet expectations that the ICL would work more closely with the child/young person and the parent to form a view of a best interests outcome that was influenced by direct knowledge of the child or young person and their situation. The data from parents/carers and children/young people also indicate that approaches to ensuring that they are living in safe conditions and that the trauma of proceedings is minimised, fell short of their expectations.

Bearing in mind that the situations of the children and young people interviewed all involved issues related to safety, the data from their interviews suggest that being subject to drawn-out proceedings and not being consulted about their needs and circumstances has the potential to heighten rather than reduce the negative effects of family law proceedings. While legal processes were running their course, the children and young people interviewed often reported experiencing unsafe parenting/care arrangements.

## Discussion

The findings indicate that each of the three overlapping functions of the ICL involves challenges, but the area where practice is most variable and contested is in relation to the function of supporting child participation. An important finding is that all professional stakeholders, especially ICLs, placed less emphasis on the participation function than the other two functions of 'evidence gathering' and 'honest broker'.<sup>58</sup> The UNCRC recognises the rights of children to participate in decisions relevant to their care (Art 9) and to make their views known in administrative and judicial proceedings affecting them (Art 12). Recent amendments to the FLA specify that giving effect to the UNCRC is an object of Pt VII, which deals with parenting proceedings (s 60B(4)). The ICL study data discussed in the previous section reflect an apparent disjunction between the emphasis children/young people and their parents placed on the ICL's participation function and the greater level of significance accorded to the 'evidence gathering' and 'honest broker'/litigation management functions by ICLs and non-ICL professionals.

Of the legal aid commissions that have specific policies in relation to direct contact with children, the Legal Aid NSW policy is compatible with a high level of direct contact, while Legal Aid Queensland's policy reflects a cautious and

multipronged approach to direct contact.<sup>59</sup> A key concern underlying the cautious orientation is that, as lawyers, ICLs may not have the appropriate disciplinary training to consult with children and young people and interpret their views. There are also concerns about the ICL adding to the burden of children/young people, particularly in cases involving concerns about child abuse, where multiple professionals and agencies may already have engaged with the child/young person. This approach also accommodates the necessity to have evidence of the children's/young people's views in the appropriate admissible form for the court.

Each of the orientations to direct contact entails a different approach to the way in which the ICL and family consultant/single expert work together. Further research is needed to examine more thoroughly the role of family consultants and single experts in the family law system generally, and in relation to direct contact in particular. The present research suggests that where a cautious orientation is applied, the quality of the collaboration between the ICL and the family consultant or single expert would be critical to the efficacy of this approach and the extent to which it reflects a coherent experience from the child's/young person's perspective. While both approaches rely on collaboration, the cautious approach involves a greater level of sharing of responsibility for direct contact, necessitating a closer level of engagement between the family consultant/single expert and ICL. Some of the data from professionals examined in Ch 5 of the final research report<sup>60</sup> suggest there are complex dynamics relating to inter-professional understandings of responsibilities and role boundaries between these professionals, including uncertainty as to how the relationship should actually be managed.

Third, in addition to identifying the different orientations in approach, this research has highlighted a number of concerns about ICLs and direct contact. Data from judicial officers in particular indicate that current approaches to direct contact with children/young people fall short of expectations.<sup>61</sup> Disappointment with the extent and nature of this direct contact was also powerfully evident in the data from interviews with parents and children/young people.<sup>62</sup> These data suggest that the expectations of parents/carers, children and young people interviewed in relation to ICLs focus on the ICL function of participation, while the other functions -- those most emphasised by judicial officers and ICLs -- may have little visibility for parents/carers or children/young people.

From the perspective of the parents we interviewed, the approaches to direct contact applied in their case meant that the professional who was representing the best interests of their children had little or no personal contact with them. The theme of disappointment and distress was even more powerfully evident in the interviews with children/young people. All of the children and young people had been involved in cases in which their safety was compromised. They expected ICLs to be focused on listening, protection, advocacy and help. For most children and young people interviewed, these expectations were not met.<sup>63</sup>

The interviews with children/young people yielded one powerful example of where, in the context of a case that also involved a child protection department, a high level of direct contact took place, notwithstanding the protection issues. This young person described a very positive experience with her ICL, which suggests that an approach incorporating a high level of direct contact can be applied in such circumstances when due care and sensitivity is exercised.<sup>64</sup> This is not to suggest that the concerns expressed by experienced professionals are without foundation, but it indicates that the question of how ICLs can facilitate participation in these circumstances warrants further examination. Establishing how professionals can coordinate their engagement with children and young people to fulfil complementary roles that are supportive of the children and young people would be a fruitful line of inquiry.

The interviews with children/young people suggest they have an acute need for someone to be looking after their interests in, and facilitating their understanding of, the processes affecting them, particularly in circumstances where safety concerns and family law proceedings are unfolding in parallel. This evidence suggests a need for further examination of how this need could most effectively be met and which professionals have the most appropriate disciplinary background to meet it.<sup>65</sup>

Another issue highlighted by the research is the diffuse nature of the mechanisms applied in the family law system to support child participation. The varying approaches to ICL practice have been identified in this research, but conclusions on the effectiveness of the particular approaches could not be drawn without further examination of how the collaborative approach works in the context of the cautious orientation approach. An ideal research design may involve multiple measures, including measures of the experiences of children and young people, in randomly assigned processes involving family consultants (including those operating under Reg 7 of the Family Law Regulations 1984 (Cth))<sup>66</sup> working with ICLs, the use of ICLs alone, the use of family consultants alone, and the involvement of neither professionals.<sup>67</sup>



The interviews with the parents, carers, children and young people highlight the personal effects of two other areas where important findings have emerged. The first is in relation to matters involving risk. The second is in relation to practitioner quality.

The evidence shows that the ICL caseload is dominated by matters involving concerns about family violence and child abuse.<sup>68</sup> It is also clear that ICLs can, when operating effectively, make significant contributions in these kinds of matters, particularly from a forensic perspective. However, the evidence shows a clear need for a stronger focus on equipping ICLs to operate in this context through initial training, accreditation and ongoing professional development processes. This need, acknowledged by ICLs themselves and other stakeholders, is strongly illustrated in the disparity in responses between ICLs and judicial officers to questions seeking assessments in relation to ICLs' ability to work with parents and children/young people at risk of harm.<sup>69</sup> As noted in the previous section, in relation to the ability to detect and respond to safety issues for children and young people, positive assessments of efficacy (good or excellent) were made by 69% of ICLs and 76% of judges. In relation to detecting and responding to safety issues for parents, the disparity was wider, with 56% of ICLs nominating their ability as good or excellent, compared with 72% of judicial officers.<sup>70</sup>

## Conclusion

The role of the ICL as originally developed in case law and as codified in the FLA is that of a 'best interests' advocate assisting the court in its determination of the arrangements that accord with the best interests of the relevant child or young person. The recent AIFS ICL study highlights three overlapping functions of the ICL -- a 'participation' function, an 'evidence gathering function', and an 'honest broker/litigation management' function. Although each of these functions involves challenges, the AIFS research and the discussion in this paper highlight the contested nature of the participation function, particularly with respect to rationales for, and impact of, ICLs having direct contact with the children and young people whose interests they represent. The research identifies the variability in both the practice approaches and purposes for direct contact, with mutual familiarisation, explanation (of the ICL role, legal processes and outcomes) and consultation (for the purpose of ascertaining the child or young person's views) nominated as purposes served by direct contact. The majority orientation is cautious in approach and where direct contact occurs, it is usually for the familiarisation and explanation purposes. The less common, high participation orientation involves direct contact for each of the identified purposes. Notwithstanding reservations among ICLs about meeting with children and young people in cases involving family violence or child safety concerns, the responses of many non-ICL professionals and most parents, carers and children and young people reflected an expectation that ICLs would engage in direct contact with the children and young people in their cases.

The research found greater emphasis was placed on the evidence gathering and litigation management functions by professionals (particularly judicial officers and ICLs), while the parents, carers, children and young people interviewed emphasised the participation function. For these parents, children and young people, the ICL in their case was representing the best interests of the child/young person in the context of little or no direct contact. Many ICLs expressed concerns about having direct contact with children and young people, particularly in cases involving child abuse concerns. However, ICL practices involving little or no contact with children and young people emerged in the research as giving rise to unmet expectations, disappointment and distress. A lack of clarity about the role of the ICL and issues associated with the effective communication of this role to parents, carers, children and young people has contributed to the disappointment and distress experienced by these families. Shortcomings identified in ICL training, accreditation and continuing professional development, particularly in relation to dealing with families characterised by family violence and child abuse concerns, also require consideration.

Further research examining what constitutes effective ICL practice and means of communication with parents, carers, children and young people would enhance the family law system's ability to both provide appropriate and responsive practice models and manage the expectations of families engaged in the system. This research might involve an examination of collaboration between ICLs and family consultants and further investigation of the perspectives and experiences of children and young people involved in family law proceedings where an ICL had been appointed. Although ethically complex, engagement with children and young people as they progress through the family law system would be most effective.

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castle) who acted as consultants on the ICL Study. This study was commissioned by the Australian Government Attorney-General's Department.

1 The Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) amended Div 10 of Pt VII of the Family Law Act 1975 (Cth) (FLA) to articulate the role of the ICL (formerly 'child representative'). More recent amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) also arguably reflect greater acknowledgment of the significance of representing children and young people in proceedings that affect them with the identification of an 'additional object' of Pt VII as giving effect to the Convention on the Rights of the Child: FLA s 60B(4).

2 See also for example the following Australian research: N Ross, *The hidden child: How lawyers see children in child representation* (Unpublished doctoral dissertation) University of Sydney, Sydney, 2012; J Cashmore and P Parkinson, 'Children's and parent's perceptions on children's participation in decision-making after parental separation and divorce' (2008) 46(1) *Family Court Review* 91; P Parkinson and J Cashmore, *The voice of a child in family law disputes*, Oxford University Press, Sydney, 2008. See also more recent evidence of demand for and support of child participation in family law proceedings in A Roy, G McKinnon and H Yates, *Talking with Children and Young People About Participation in Family Court Proceedings*, Office of the ACT Children and Young People Commissioner, Canberra, 2013, which reports on the ACT Children and Young People Commissioner's (CYPC) consultation with high-school students about children and young people's participation in family law proceedings. This report identifies the significance of court practices that provide 'greater opportunities for children and young people to participate in decision-making' (p 26). The CYPC also 'encourage(s) law and policy makers to reconsider the availability of direct representation of children in Family Court proceedings' (p 13).

3 R Kaspiew, R Carson, S Moore, J De Maio, J Deblaquiere and B Horsfall, *Independent Children's Lawyers Study Final Report*, Australian Institute of Family Studies and Australian Government Attorney-General's Department, Canberra, 2013, at <<http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Pages/Familylawpublications.aspx>> (accessed 17 March 2014). Note that references to page pinpoints cited in this article are from the first edition of this publication released on the Australian Government Attorney-General Department website on 22 November 2013 and were current at the time of writing.

4 National Legal Aid, *Guidelines for Independent Children's Lawyers*, (enforced by the the Family Court of Australia, Family Court of Western Australia and the Federal Circuit Court of Australia, Canberra, 2013.

5 FLA s 68LA(4)(a) states that the ICL is not the child's legal representative and FLA s 68LA(4)(b) states that the ICL is not obliged to act on the child's instructions in relation to the proceedings.

6 (1994) 17 Fam LR 537; 117 FLR 63; (1994) FLC 92-461.

7 For example, at the time of writing, ICL appointments were restricted in Victoria to matters falling within criteria 1, 3 and 7 of the non-exhaustive *Re K* criteria and criteria 1 and 6 in Western Australia. Criterion 1 relates to cases involving allegations of sexual, physical and psychological abuse; criterion 3 relates to cases where the child is apparently alienated from one or both parents; criterion 6 relates to alleged antisocial conduct by one or both parents (of a kind that 'seriously impinges on the child's welfare', including family violence) and criterion 7 relates to instances of a significant medical, psychiatric or psychological illness or personality disorder affecting a parent, child/young person or another person with whom the child has significant contact.

8 R Kaspiew, M Gray, R Weston, L Moloney, K Hand, L Qu and the Family Law Evaluation Team, *Evaluation of the 2006 family law reforms*, Australian Institute of Family Studies, Melbourne, 2009.

9 National Legal Aid, above n 4.

10 For example., *In the Matter of P and P* (1995) 19 Fam LR 1; 126 FLR 245; (1995) FLC 92-615; *In the Marriage of Bennett and Bennett* (1991) 17 Fam LR 561; (1994) FLC 92-463; *DS v DS* (2003) 32 Fam LR 352; (2003) FLC 93-165; [2003] FMCAfam 365 and *R and R: Children's Wishes* (2000) 25 Fam LR 712; 155 FLR 29; (2000) FLC 93-000; [2000] FamCA 43.

11 See Guideline 4 of National Legal Aid, above n 4.

12 In family law matters where an ICL has been appointed, it would be most likely that a family consultant or single expert would also be involved in the matter.

13 J McIntosh, D Bryant and K Murray, 'Evidence of a different nature: The child responsive and less adversarial initiatives of the Family Court of Australia (2008) 46(1) *Family Court Review* 125.

14 Australian Law Reform Commission, *Seen and heard: Priority for children in the legal process ALRC Report 84*, ALRC, Canberra, 1997; Child's Rights Taskforce, *Listen to children: 2011 child rights NGO report Australia*, Child's Rights Taskforce, Sydney, 2011 and United Nations Committee on the Rights of the Child, *Concluding observations: Australia. Considerations of reports submitted by states parties under Article 44 of the Convention, 40th Session* (UN Doc CRC/C/15/Add.268) Committee on the Rights of the Child, New York, 2005.

15 Note that family consultants are psychologists and/or social workers and are defined in FLA s 11B as being appointed (pursuant to either the FLA s 38N, the Federal Circuit Court Act 1999 (Cth) or Regulation 7 of the Family Law Regulations 1984 (Cth). Their primary functions are set out in FLA s 11A and include the preparation of family reports in family law matters.

16 The Federal Magistrates Court of Australia is now known as the Federal Circuit Court of Australia (FCC) and the title of 'federal magistrate' is now 'judge': Federal Circuit Court of Australia Legislation Amendment Act 2012 (Cth).

17 For example, A Bilson and S White, 'Representing children's views and best interests in court: An international comparison' (2005) 14(4) *Child Abuse Review* 220 and R Hart, *Children's participation: From tokenism to citizenship*, UNICEF International Child Development Centre, Florence, 1992.

18 UNICEF, *The right to participation* (Fact Sheet) UNICEF, Paris, retrieved from <www.unicef.org/crc/files/Right-to-Participation.pdf>, p 1.

19 H Shier, 'Pathways to participation: Openings, opportunities and obligations: A new model for enhancing children's participation in decision-making in line with Article 12.1 of the United Nations Convention on the Rights of the Child' (2001) 15 *Children in Society* 107.

20 As discussed in n 1 above, the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) introduced an 'additional object' of Pt VII in FLA s 60B(4) namely that an additional object of Pt VII is to give effect to the UNCRC.

21 J Cashmore, P Parkinson, R Weston, R Patulny, G Redmond, L Qu, J Baxter, M Rajkovic, T Sitek and I Katz, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department*, Social Policy Research Centre, University of New South Wales, Sydney, 2010; Parkinson and Cashmore, above n 2; Cashmore and Parkinson, above n 2; Ross, above n 2; G Sheehan, R Carson, B Fehlberg, R Hunter, A Tomison, R Ip and J Dewar, *Children's contact services Expectation and experience: Final report*, Australian Institute of Family Studies, Griffith University, University of Melbourne and Australian Government Attorney-General's Department, Canberra, 2005; M Campo, B Fehlberg, C Millward and R Carson, 'Shared parenting time in Australia: Exploring children's views' (2012) 34(3) *Journal of Social Welfare and Family Law* 295; B Neale, J Flowerdew and C Smart, 'Drifting towards shared residence' (2005) 17 *Australian Family Lawyer* 12; J Fortin, J Hunt and L Scanlan, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth*, Sussex Law School, Brighton, 2012.

22 J Cashmore, 'Children's Participation in family law decision-making: Theoretical approaches to understanding children's views' (2011) 33 *Children and Youth Services Reviews* 515; Cashmore, Parkinson, Weston, Patulny et al above n 21; Parkinson and Cashmore, above n 21; Cashmore and Parkinson, above n 21; Ross, above n 21; Campo et al, above n 21; Fortin et al above n 21; J Lodge and M Alexander, *Views of adolescents in separated families: A study of adolescents' experiences after the 2006 reforms to the family law system*, Australian Institute of Family Studies, Melbourne, 2010; R Fitzgerald, *Children having a say: A study on children's participation in family law decision making*, PhD Thesis, Southern Cross University, Lismore, 2009; R Fitzgerald and A Graham, 'The changing status of children within family law: From vision to reality?' (2011) 20(2) *Griffith L Rev* 421; G Sheehan and R Carson, 'Protecting children's rights in contact disputes: the role of children's contact services in Australia' (2006) 44(3) *Family Court Review* 412; Sheehan and Carson et al, above n 21; R Birnbaum, N Bala and F Cyr, 'Children's experiences with family justice professionals in Ontario and Ohio' (2011) 25(3) *International Journal of Law, Policy and the Family* 398; Neale, Flowerdew and Smart above n 21; B Neale, 'Dialogues with children: Children, divorce and citizenship' (2002) 9(4) *Childhood* 455; C Smart, B Neale and A Wade, *The changing experience of childhood*, Polity Press, Cambridge, 2001; G Douglas, M Murch, C Miles and L Scanlan, *Research in to the operation of Rule 9.5 of the Family Proceedings Rule 1991: Final report to the Department for Constitutional Affairs*, Cardiff Law School, Cardiff, 2006; A O'Quigly, *Listening to children's views: The findings and recommendations of recent research*, Joseph Rowntree Foundation, York, 2000; A Smith, N Taylor and P Tapp, 'Rethinking children's involvement in decision-making after parental separation' (2003) 10 *Childhood* 201; N Taylor, 'What do we know about involving children and young people in family law decision-making? A research update' (2006) 20(2) *AJFL* 154; N Taylor, M Gallop and A Smith, 'Children and young people's perspectives on their legal representation' in A Smith, N Taylor and M Gallop (Eds.) *Children's Voices: Research, policy and practice*, Pearson Education New Zealand, Auckland, 2000. Note also J McIntosh, B Smyth, M Kelaher, Y Wells and C Long, *Post-separation parenting arrangements and developmental outcomes for infants and children Collected Reports*, Family Transitions, North Carlton, 2010.

23 Kaspiew et al, above n 3, pp 45-6.

24 Ibid, pp 45-6, 57 and 82-6.

25 Ibid, pp 45-6 and 55-7.

26 Kaspiew et al, above n 3, pp 54-5.

27 Ibid, p 82.

28 Ibid, p 83.

29 Ibid, pp 84-5.

30 Ibid, pp 46-7.

31 Ibid.

32 It should be noted that this survey question (directing participants to the last three cases where they have acted as an ICL) was designed to elicit a more easily accessible response to indicate recent ICL practice approaches rather than a less specific indication of general practice approaches.

33 Kaspiew et al, above n 3, p 49, Table 3.2.

34 Ibid, Table 3.3.

35 Ibid, pp 30-5 and 167.

36 Ibid, pp 119-20, 167.

37 Ibid, pp 143-4.

38 Ibid, p 154.

39 Kaspiew et al, above n 3, p 154

40 Ibid, pp 154-5.

41 Ibid.

42 Ibid.

43 Ibid, pp 155-6.

44 Ibid.

45 Ibid, pp 155-7.

46 Kaspiew et al, above n 3, p 154.

47 Ibid, pp 158-9.

48 Ibid, pp 161-2.

49 Ibid, pp 145-51.

50 Ibid, pp 151-2.

51 Kaspiew et al, above n 3, p 147.

52 Ibid, pp 147-51.

53 Ibid, p 117.

54 Ibid, p 119, Table 7.3.

55 Ibid.

56 Ibid.

57 Ibid.

58 Kaspiew et al, above n 3, p 37.

59 Ibid, pp 41 and 46-7.

60 Ibid, p 77-102.

61 Kaspiew et al, above n 3, p 49.

62 Ibid, pp 145-7 and 155-6.

63 Ibid, p 166.

64 Ibid, pp 158-9.

65 In 1996, the Family Law Council called for a coordination mechanism to meet the needs of children/young people, which it recognised were wider than the services provided by what were then known as 'separate representatives'. This research indicates that the analysis underlying this recommendation remains pertinent (Family Law Council, 1996).

66 Family consultants appointed pursuant to Reg 7 of the Family Law Regulations 1984 (Cth) are based in private practice, are not employed by the court and are engaged when a court-based family consultant is not available.

67 Approval of this, or a related design, would be subject to careful ethical considerations.

68 Kaspiew et al, above n 3, pp 30-5 and 167.

69 Ibid, p 119, Table 7.3.

70 Ibid.

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