

# The Independent Children's Lawyer



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Best Practice Guidelines (prepared by the Family Law Council and Family Law Section of the Law Council of Australia). Part One refers to “Best Practice: Conduct and Communication.”

***“When the children are young or immature, lawyers should ensure that a client is asked to refrain from arguing in the presence of, or within earshot of, the children.”***

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## The Independent Children's Lawyer

*“Mankind owes to the child the best it has to give”<sup>1</sup>*

### **What are children and young people saying about their participation in Family Law Processes?**

An Australian study by Cashmore, Parkinson and Single in 2008<sup>2</sup>, asked 47 children aged between 6 to 18 years, how much say they had when decisions were made about them in Family Court matters. Half of the children were involved in contested cases. 60% (mostly older children) had some input, and over half wanted more than they had (mostly younger children). Over 90% thought that children should be involved, and thought that children over 7 years old should be consulted. Interestingly, they said that it was not easy being asked (especially to make decisions), but would rather be involved than not.

In a 2006 United Kingdom study, children were interviewed about being separately represented in proceedings. They were asked what constituted a good guardian or lawyer. They wanted someone who took time to get to know them, who they could trust and who would not be patronising. They also wanted clear explanations about the guardian's role, to be kept informed about the progress of their case, and especially that the guardian would report accurately what they said. They also stressed the importance of confidentiality.

It was also noted that children who did not have a guardian they could trust, were confused, angered and depressed by the system.

Who has recently seen the Alice in Wonderland movie in 3D?

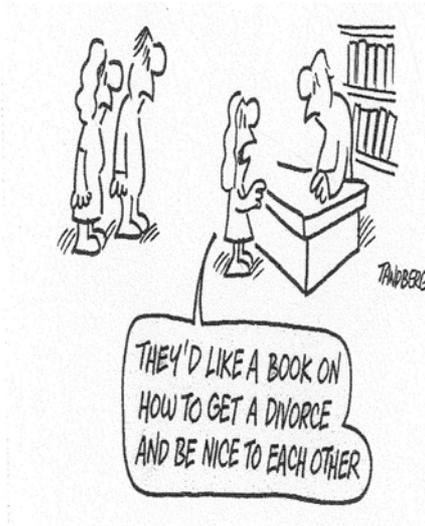
We know that when we enter a child's world, we enter a world of often extraordinary imagination. But where is such imagination located in our own adult scheme of values? Children can be wiser than many of us might imagine. I have read countless family reports. I have read children's "three wishes" and their dreams. Many of the reports reveal that the children are disturbed by the level of anger between their parents, yet they can relate to each of them positively as individuals. How often I read the reports and wish I could speak to Mum and Dad and ask them to understand more fully what it's like to be either their daughter or their son right now. The chances are they have read the report and they have not "heard" what their children are saying, and at some level, reject what their children are saying "The report writer got it wrong." The parents will continue to be distracted from their parenting responsibilities by their pre-occupation with each other and the turmoil that typically surrounds family separation.

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<sup>1</sup> Geneva Declaration, 1924, United Nations Declaration on the Rights of the Child, 1959

<sup>2</sup> Parents' and Children's Views on children talking to Judges in parenting disputes in Australia, P.Parkinson J. Cashmore and J. Single, International Journal of Law, Policy and the Family 21(2007) 84-107

## Stuck in the middle



### **A 6 year old's discussion with the Family Consultant**

She did not want to play out a scene with Mum's house and Dad's house, but told a story of sharks and her rescue by her father. Mum and Dad's house is separated by a large ocean. She and Daddy are sailing in the boat over to Mum's house. Daddy stays in the boat because he is too angry. She asked Daddy to stay in the boat, and if he goes to get out she pushes him back in and he sails back to his home. She says Mum and Dad don't like fighting and making me sad. Dad was happy and not angry that she "pushed him back in the boat" because he didn't argue with Mum.

Mum was happy that she did that because Mum was then not fighting with Dad again.

I have observed how some economically disadvantaged children actively engage with their circumstances to develop alternative ways of participating in social events. They try to protect their parents financial situation by finding ways of excluding themselves from school related activities, such as outings that involve additional expense. How often do we, as Independent Children's Lawyer, form the view that it is the desire of the children to be "fair" to both their parents and to find ways of acting on that desire.

Children's understandings and children's feelings are an important part of any equation.

### **Why should we listen to children and young people in Family Law matters? Their views heard and considered<sup>3</sup>**

Evolving social science research has found that:

- There is a link between positive mental health and perceived control over decisions;<sup>4</sup>
- Children can feel distanced from a system that does not include them in its conversations;<sup>5</sup>
- Keeping children in the dark about Family Law matters may increase children's stress levels;

<sup>3</sup> Parkinson, Cashmore & Single, 2005

<sup>4</sup> Psychological and Legal Interventions for parents and children in custody and access disputes: "Current Research and Practice", Joan B. Kelly (2002) VA.J.SOC.POL'Y, VOL. 10(1)129 at p149

<sup>5</sup> "Judges are Human too: Conversation between the Judge and a child as a means of giving effect to S6 of the *Care of Children Act 2004*", P.TAPP(2006) New Zealand Law Review at p73

- In the absence of relevant information, children may feel the gaps in their understanding<sup>6</sup> with erroneous interpretations of the changes in their family.<sup>7</sup> They may imagine for example, that the parent who left no longer love them or that they themselves caused the breakdown of the relationship;<sup>8</sup>
- Different children will choose to disclose their most important feelings to different “players” in the system. Some will choose the Judge, others the expert, and many their lawyer, especially if they have a long standing relationship<sup>9</sup>.

***“Amplifying the voice of the child can be a very effective catalyst in breaking up the adversarial dyad between hostile adult parties, allowing both to give in gracefully in the best interests of the child.”<sup>10</sup>***

### **The Court Orders that:-**

1. The children, Thomas Smith born 14 May 2001 and Lily Smith born 14 June 1998, be represented in these proceedings and it is requested that Legal Aid Queensland arrange such representation, and that the Independent Children’s Lawyer be at liberty to peruse and/or take copies of all documents filed in these proceedings upon the making of an appointment to do so with the Registrar of the Federal Magistrates Court of Australia at Cairns.
2. The parties are each to complete and return the Independent Children’s Lawyer’s questionnaire with seven days of receipt.

### **A hypothetical case – the Smith Family**

Thomas, aged nine and Lily, aged 12. Mum and Dad had spent a significant amount of money and time in Court and mediations. Both Mum and Dad have mutual Domestic Violence Orders. Thomas and Lily had been spending roughly 50/50 time with both parents, but this has broken down. Lily says she no longer wants time with her Dad. Thomas says he is happy to continue visiting Dad, but wanted to live predominately with Mum. Mum supported Lily in her decision to cease time with Dad, justifying this with the view that both children were distressed about going since Dad had re-partnered. Mum said that Lily felt she was being treated unfairly because Dad frequently lost his temper and would send Lily to her bedroom. Mum had made frequent calls to the Police. Dad said that the Police had been sympathetic to him, and privately indicated that Mum was wasting their time. Dad said that Mum was jealous of the new relationship. Mum said she was glad to be away from Dad and that her

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<sup>6</sup> Reference: “Through the eyes of young people: Meaningful child participation in Family Court processes”, S. Williams, International Institute of Child Rights and Developments (August 2006)

<sup>7</sup> Children’s Participation Discussion Paper, Family Relations Act Review, Ministry of Attorney General Justice Services Branch, Civil and Family Law Policy Office, April 2007

<sup>8</sup> Empowering Children in Mediation, Intervention Model, Family Court Review, Vol.42 No.3 (July 2004) 554 at p.558, citing Dunn, Davies and O’Connor (2001)

<sup>9</sup> “Judges are Human Too: Conversation between the Judge and a child as a means of giving effect to S6 of the *Care of Children Act 2004*”

<sup>10</sup> Reference: “Can we protect children and protect their rights, letting children and youth speak out for themselves”, Judith Timms Presentation at the 2001 World Congress on Family Law and the rights of children and youth.

only concern was the welfare of the children. Mum said that Dad's new partner was well known as "home breaker" and that her children were badly behaved and smelly. Mum and Dad were reluctant to spend time with each other in the same room. Dad wanted to find out whether it was Lily's genuine feeling that she no longer wished to spend time with him or whether she was being pressured to do so by Mum. Mum said that she was actively encouraging the children to spend time with Dad and this was distressing for her as they begged her not to make them go.

### **Discussions with the children with the assistance of a Family Consultant**

#### **Thomas**

Thomas appeared fairly calm, feigning an air of disinterest. There seemed to be a flatness about him, a sense of defeat, resignation and acceptance that implied he felt a change for the better was unlikely. He said to the Family Consultant "they didn't get on that well before you know, I guess it's not much worse now, but it's not better." He does a drawing, he puts himself in the middle and suggests that communication between his Mum and himself was good, things between him and his father were good, but the communication between his parents was horrible. Thomas draws a happy dream showing the whole family together on a holiday. For this three wishes, Thomas chose:-

1. For them to be happy;
2. For them to be happy;
3. For them to be happy.....then everything would be great.

Thomas says he tells other friends "If your parents fight a lot and you wake up in the night and hear them shouting, throwing things and fighting, scream out "stop!" It sometimes works."

Thomas says that the fighting sort of separates brother and sister. He wasn't seeing Lily as much. He said he worried about his sister because she is sometimes sad and scared of Dad. Thomas struggles with the question of how things might be improved.

#### **Lily**

Lily looks agitated. She is sad. She is angry, but she is keen to talk. She spoke without any prompting about how unfair her Dad was being. She seemed brittle and close to breaking down. She was angry about being unable to express fully the injustice in her life. She talked about her Dad's demands for her to spend time with him and on the other hand, gave many examples of his lack of care and interest in her. She said that her parents were always fighting, and that she would hear them yelling, fighting and throwing stuff every second night. She says now she has butterflies in her stomach and feels nervous when going to her Dad's house. She was asking why is Dad doing this? She draws a picture of her and her Dad and her Dad's back is turned to her. She says "he just leaves me. He just sends me to my room." He doesn't care, and he goes and spends time with his girlfriend. Her dream drawing shows herself, her mother and her brother in a house and an arrow pointing away with the words "no where" her Dad and his new partner.

Her three wishes were:-

1. Dad and his girlfriend go away and don't come back;
2. Mum can earn more money;
3. I want things to stay as they are.

Lily says she tells other children it's going to be really rocky, then it's maybe going to settle down. Parents are just really mean to each other and some of them do bad things to the other person. Lily said that she suspected that her Dad's new partner was on occasions nice to her only when it suited her. Lily says "Dad doesn't care about me anymore." She said that Dad sold her bike, gave all her toys away and was renting out her room. When asked if she had a message for her parents, she said "Tell my Dad to leave me alone and never ever come back, and tell my Mum I'll see you in five minutes."

In summary, Thomas seemed to be indicating that he was unperturbed by his parents conflict, but later revealed a deep sadness. Lily was seething with anger, and tended to lay all the blame on one person.

Isn't the concern for Thomas and Lily is that they might struggle in their own relationships as adults if these strategies are not reviewed while they are still young enough to learn more beneficial and effective ways of relating and thinking about conflict resolution?

The parents no longer have the money to engage lawyers and they are both self represented. I and the Family Consultant meet with the parents. They are asked to describe how they would ideally like their child to feel and to illustrate how they would like their child to grow up, level of self esteem etc. The Family Consultant suggests that perhaps what is required is an alliance between the parents that will allow them both to work together to enhance the likelihood of these wishes becoming a reality. The children have given permission to show the parents their drawings. I am hoping that the information conveyed by the Family Consultant is persuading the parents that the ongoing conflict is damaging to the child. They both stated that they wished for their children to have happy and healthy relationships and could see that the current situation did not support these wishes.

### **Alliance**

One would hope that the parents would be prepared to consider an alliance. This would ease the children's burden, but they state that they felt pessimistic about sustaining such an arrangement due to a low level of trust between them.

### **Shifting the blame**

Their past experience of the relationship leads them to believe that the likelihood of a mutual understanding is low, usually due to concerns about the good intent, or lack of it, of the other partner. They need to shift the blame. The Family Consultant asked them to explain their past and describe their life as young parents. The Family Consultant says this "It looks like your relationship was unable or ill equipped to help you adequately as young parents. It is not surprising that you both started to feel

uncared for and to wonder about each other's motivation. The parents seemed somewhat relieved by this concept, and began to volunteer further examples to illustrate how naive and unprepared they both were for parenthood. The Family Consultant asked the parents to describe their criteria for maintenance of the alliance. These are written up on a whiteboard. The examples are softened. For example "She needs to stop badmouthing me and saying that I am a bad father" is put up on the board as "I need to be described as a good father." The requirements that the parents have of each other was a request for civility, to feel respected as a good parent and to have good intent acknowledged. Dad wanted Mum to assist him in fostering his relationship with Lily. Mum wanted Dad to back pay some child support payments and to stop the Court process for spending time with Lily. Both asked for a more friendly reception from the other when there was handover. They both committed to being pleasant to each other when next interacting and suggested that they observe how the children responded to this new arrangement.

There is a follow up to the original interview weeks later. Both children looked less weighed down by their parents conflict. They both stated that their parents were being much nicer and Lily stated that she would now be prepared to consider spending short periods of time with her father, provided that she could bring a friend and they could meet at a public place and that the visits be for short period of time. Thomas stated he now found it much easier to suggest to his Dad that he wanted to spend more time at Mum's house, because "now it's not so much about what they want, but more about what's best for me."

## **Introduction**

The role of the Independent Children's Lawyer ("ICL") is unique. The Independent Children's Lawyer is expected to use his/her professional judgment and skill, subject to any directions or Orders of the Court. While many cases over the years have attempted to judicially define the role of the child representative, the Court had not, until 1994, set out guidelines as to the types of cases where it may be appropriate for a child representative to be appointed. The Court provided those guidelines in the Full Court. decision of *Re K*.<sup>11</sup>

Unfortunately, the availability of funding is a practical constraint. This is something that must be rectified if children are truly going to be heard. The delicacy of the subject demands that appropriate and adequate funding be made available to Australia's commitment to the aims of the United Nations Convention on the rights of the child to be realised.

The way in which the Independent Children's Lawyer acts may not always meet with the approval of the parties or the child, but this does not mean that the ICL has failed in his/her professional responsibilities.

## **Statement of principles**

The appointment of an Independent Children's Lawyer is one means of giving effect in Family Law proceedings to the United Nations Convention on the rights of the

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<sup>11</sup> (1994) FLC 92-461

child, which states that *“In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of Law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”* (Article 3).

### **The Role of the Independent Children’s Lawyer**

The fact sheet #5 prepared by Legal Aid Queensland for distribution to the parents of children who have an Independent Children’s Lawyer appointed to act, summarises the role.

The role of the Independent Children’s Lawyer has two distinct features:-

1. to assist the Court to make a decision in the best interests of the child; and
2. to provide a voice for the child in proceedings affecting them.

### **P & P (1995) FLC 92-615**

The origins of the role of the Independent Children’s Lawyer were outlined in P & P. The Independent Children’s Lawyer was required to:-

1. Act in an independent and unfettered way in the interests of the child.
2. Act impartially, but, if thought appropriate, make submissions suggesting the adoption by the Court of a particular course of action if it considers that the adoption of such a course is in the best interests of the child.
3. Inform the Court by proper means of the child’s wishes in relation to any matter in the proceedings, in this regard, the Independent Children’s Lawyer, is not bound to make submissions on the instructions of a child or otherwise, but is bound to bring the child’s expressed wishes to the attention of the Court.
4. Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the Court.
5. Test, by cross examination where appropriate, the evidence of the parties and their witnesses.
6. Ensure that the views and attitudes of the Independent Children’s Lawyer are drawn from the evidence and not from their personal view or opinion.
7. Minimise the trauma to the child associated with the proceedings.
8. Facilitate an agreed resolution to the proceedings.

One of the most important decisions which has to be made is whether or not to meet the child or children you are representing.

You must ensure that any wishes expressed by a child are put before the Court. Where the Independent Children's Lawyer considers other matters indicate the child's preference may not be in that child's best interest, he or she should put those matters before the Court, and the evidence is adduced in admissible form. One must always keep in mind that a child may be unwilling to express a preference for one parent over the other and therefore, they should not be pressured to do so.

### **Relationship with the child**

It is clear that the relationship between the Independent Children's Lawyer and his/her child client is different to that of a relationship with an adult client.

It is very important to remember that when the matter is finalised, the child will have to continue to exist in a world where it will, in the vast majority of cases, associate with both parents for many years to come. Care must be taken to avoid destruction of the relationship between your child client and his or her parents, as a result of your involvement. The child survived before your appointment, and will continue to do so after the event.

It is important to obtain and develop skills for your discussions with your child client. Children are not "little adults" and have specific age related differences in their needs and reactions. A knowledge of child development is important as well as their reaction at different stages of their development. The various stages of child development can loosely be categorised as infancy, toddlerhood, early childhood, middle childhood, and adolescence.

It is also necessary to be aware of the consequences of trauma on children and the emotional responses experienced by them after family breakups.

### **Information which should be explained to the child**

If you are meeting with the child, you should explain:-

1. Your role, including limitation of the role;
2. The Court process, including any interim stages; and
3. The other agencies that may be involved, and the reasons for their involvement.

If you are meeting with the child, you should strive to establish a relationship of trust and respect.

### **Limitations of the role of the Independent Children's Lawyer**

You should guard against stepping beyond your professional role, and should seek guidance from the Family Consultant when necessary (I have had some cases where the children have telephoned on a very regular basis, and it was clear that the parent with whom they were at that time, was suggesting that they ring their Lawyer. I made

arrangements to meet with the Family Consultant and we discussed with the child client what was appropriate and what was not appropriate).

It is not the role of the Independent Children's Lawyer to become a witness in the proceedings, nor to counsel the child.

### **Meeting with the child**

You may not meet with the child under the following circumstances:-

1. The child is under school age;
2. There are exceptional circumstances, eg. when there is an ongoing investigation of sexual abuse allegations and in the particular circumstances, there is a risk of systems abuse for the child;
3. There are significant practical limitations, eg. geographic remoteness.

The assessment about whether, where and how to meet the child is a matter for the ICL.

### **Relationship with the parties and their legal representatives**

The Independent Children's Lawyer is to remain independent, objective and focused upon promoting the child's best interest in all dealings throughout the proceedings.

The parties and their legal representatives should be encouraged to be non adversarial where possible and to maintain a focus on the child's best interest. The ICL should promote this approach whenever appropriate. There are occasions when the ICL may need to have direct contact with the parties during the course of the proceedings. Such contact must have the consent of the party concerned and should normally be arranged through the party's legal representative. If one or more parties are unrepresented, the ICL should communicate directly with the party and should advise the other parties of the fact of any meeting with an unrepresented party.

### **The Independent Children's Lawyer must at all times be and be seen to be independent and at arms length from any other parties to the proceedings.**

The Independent Children's Lawyer acts as an honest broker on behalf of the child in any negotiations with the other parties and their legal representatives. If there are proceedings between the other parties in respect of a contravention of an Order, generally the role of the Independent Children's Lawyer ought not to be an active one. However, if the ICL considers that such proceedings are detrimental to the best interests of the child or that the presence of the ICL may further the best interests of the child, then it is appropriate for the ICL to be present and if necessary, to seek to appear in the proceedings. I have been involved in an Application for Contravention when a mother had consented to Orders allowing time between the children and the father, and then promptly departed with the children to New Zealand. The Independent Children's Lawyer was called upon to make submissions in the event that the Judge considered a term of imprisonment to the mother.

## **Case planning**

You should develop a case plan at the earliest opportunity.

- Consult with the Family Consultant or other expert involved in the case;
- Canvass the nature of reports required;
- Develop a strategy for the involvement of the child;
- Liaise with any relevant Government departments or schools to be in a position to place before the Court relevant information to assist the Court in assessing and determining the best interests of the child (use of subpoenas);
- Be vigilant and make every endeavour to minimise systems abuse of the child;
- Develop opportunities for the matter to reach an agreed outcome, which best promotes the child's best interests.

## **Reports**

Remember the ICL's communications with the Family Consultant or Expert are not privileged. Evidence of these communications may be included in a report. The ICL is not bound to make submissions which adopt the recommendations made by the Report Writer or any expert called in the proceedings. Evidence given by an expert or Family Consultant is one part of the total evidence and must be evaluated within that context.

## **Interim Hearings**

Because of time constraints, the ICL may not have had the opportunity to fully investigate the child's circumstances for an Interim Hearing. Subpoenas should have been issued to the relevant agencies and the schools. Where the Court is to make interim or procedural Orders, the ICL should consider whether they adequately promote the best interests of the child and make submissions as appropriate.

## **Final Hearing/Trial**

- Ensure that you have all of the reports ready.
- Comply with all procedural and timetable requirements.
- Be proactive with any community based organisations involved with the family.
- It may be that on day one of the Final Hearing, the ICL has formed a preliminary view as to the outcomes which will best promote the child's best interests and it may be appropriate to inform the Court of those views, and where appropriate provide details of draft orders.

## **Conclusion of proceedings**

In appropriate circumstances, the Independent Children's Lawyer has the responsibility to explain to the child or arrange for a Family Consultant to explain to the child:-

1. The Orders made by the Court;
2. The effect of those Orders;
3. If the submissions were made by the ICL that were contrary to the child's wishes, the reasons for so doing.

### **Standing of the ICL to appeal**

The standing of an Independent Children's Lawyer to institute an appeal is in direct contrast with the Independent Children's Lawyer's lack of standing to institute originating process. An Independent Children's Lawyer cannot institute originating processes. Once appointed, the Independent Children's Lawyer can make application to the Court for Orders that are directed at advancing the welfare of the child. Such rights give the Independent Children's Lawyer standing to institute an appeal.

### **Costs**

An Independent Children's Lawyer has standing to seek an Order for costs in appropriate circumstances, although in such cases it is questionable as to whether the Independent Children's Lawyer in seeking a costs order is acting in the best interests of the child.

### **Family violence and abuse**

Family violence and abuse are serious issues whenever they have occurred and should always be presented as being so. They are considerations pursuant to Section 60CC of the Act, of which a Court must take account. The ICL is expected to be alert to any risk of harm to a child that may arise from the other parties, or the physical environment in which the child may be. It would usually be inappropriate for the Independent Children's Lawyer to bring the child into proximity with an alleged perpetrator of harm. You need to carefully consider interview arrangements and the physical setting needs to be structured in particular ways in order to protect the child and/or accompanying family members.

### **Cross cultural and/or religious matters**

The ICL needs to take particular care in matters involving cross cultural and religious issues. You should obtain a cultural expert's report.

With religious matters, the Independent Children's Lawyer should be aware of Article 14 of the United Nations Convention on the rights of the child, which states "*Parties shall respect the right of the child to freedom of thought, conscience, and religion.*"

### **Cultural Diversity**

Roughly one in three marriages in Australia will end in divorce, and when you consider that over 40% of those divorces will involve couples where one or both partners was born overseas, the issue of cultural diversity is very real indeed.

The most treasured institution for us all – no matter where we come from, or whatever diverse views we may hold – is the family and all it represents. Of course “family” may include extended members and non blood relatives with whom we celebrate significant occasions and can share both good and sad times. Families – however defined – can hold the key to our sense of happiness, belonging and wellbeing.

There is, of course, a dark side to the lives of many family members, and the Family Court/Federal Magistrates Court deals with the sad and all too often destructive aspects of family life. Relationships break down for a variety of reasons, and there are often serious consequences once they do – particularly for children.

How much more difficult is it when English is not a first language? We must not forget that many people who have migrated to this Country may have experienced repressive regimes, and sometimes torture, and retain a fear of the law which remains with them to this day.

The family is ordinarily a very private institution, but it becomes the subject of public scrutiny once a family member comes to Court. Aboriginal families have a similar reluctance – but their concerns are usually as a result of the treatment many have received at the hands of the white legal systems over previous decades, even centuries.

### **Aboriginal and Torres Strait Islander children**

The Court must consider the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture) and the likely impact any proposed parenting order will have on that right. The ICL should be aware of Article 30 of the United Nations Convention on the rights of the child which states that an indigenous child: *“Shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”*

The ICL should be familiar with reports in relation to indigenous issues ie. the April 1997 report of the Human Rights and Equal Opportunity Commission “Bringing them home” which is the report of the National Enquiry into the separation of Aboriginal and Torres Strait Islander children and their families. To effectively represent the interests of any indigenous child, the ICL must have a clear understanding of the importance of the indigenous child’s connection to culture and understand the means by which this connection can be maintained and enhanced in the context of the case before the Court.

### **Children with disabilities**

The ICL should be aware of Article 23 of the United Nations Convention on the rights of the child which states that: *“The parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self reliance and facilitate the child’s active participation in the community.”*

### **Special medical procedures and other parens patriae – welfare jurisdiction cases (Section 67ZC)**

These apply to sterilisation and other parens patriae – welfare jurisdiction cases. In special medical procedure cases, a primary duty of the ICL is to present to the Court expert evidence to assist in a determination of whether or not the child in question is Gillick competent. Where the evidence indicates that a child is not Gillick competent, the ICL cannot consent to the proposed procedure. The ICL should ensure the matter comes before the Court as quickly as possible.

There is an interesting case that involved a teenager code named “Alex” who was on a Court ordered hormone medication from the age of 13 to prevent menstruation and breast development. “She” returned to the Court in December 2007 asking for a double mastectomy to make it easier for her to pass as a boy. The Chief Justice of the Family Court, Diana Bryant, decided it was in the teenager’s best interests to have the surgery immediately rather than wait until turning 18. The Judge had the support of experts and the Independent Children’s Lawyer.

### **Definition of “Gillick competent”**

Before a child reaches the age at which he or she could consent to medical treatment under the relevant legislation, the child may be lawfully competent to consent to at least some procedures. This depends on whether the child is a “mature minor” under the Gillick Test, a test which was approved by the High Court of Australia in 1992. This means that the person has “achieved a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.”

### **Question – *What is the purpose of having the child represented?***

**Answer – *The purpose of the Independent Children’s Lawyer is to ensure that proceedings involving the welfare of children remain child focused.***

### **Obtaining a preliminary profile of the child and avoiding systemic abuse**

Usually, once an ICL is appointed, we obtain copies of all of the relevant Court documents, questionnaires are sent out to the parents and the ICL obtains a very basic profile of the child from reading those documents. For the Independent Children’s Lawyer to provide due diligence to the child’s case, the Independent Children’s Lawyer should liaise with the child’s kindergarten or school teachers, and any other professional involved with the child.

If the material filed by the parties reveals concerns about a child’s behaviour or allegations as to improper conduct on the part of their parent, it is the duty of the ICL to speak with as many people as possible about these concerns or allegations. It is the

duty of the ICL where possible to avoid the multiple interviewing of the child. When you decide to meet with the child, you should ensure that you communicate sensitively with the child and ensure throughout the discussion that you have full regard to the child's needs. The ground work performed by the Independent Children's Lawyer in the rapport building stage will be of extreme value. If a good rapport is established early, the greater the likelihood that the discussion will be less traumatic for the child than would otherwise be the case.

### **Establishing rapport**

The first 5-10 minutes of the discussion is crucial to the success or failure of the meeting. Children cannot function cognitively, socially or emotionally at an adult's level, so the Independent Children's Lawyer should go the child's level if there is to be effective communication between the two.

When talking to the child, think about your posture, your movements, your speed of talking, your voice tone and volume. You cannot hope to establish a rapport if the Independent Children's Lawyer talks down to a child. When meeting with younger children, remember that an adult is a powerful person who could intimidate a child. Especially if the child has been abused in some way by an adult using their power wrongly. Give the child choice which would help equalise the relationship. Ask him or her where he wants to sit. With an older child, you need to show respect. In summary, the goal of the rapport building process is to reduce the child's anxiety and to allow for a relationship based on confidence to develop between the child and the Independent Children's Lawyer.

The Independent Children's Lawyer who gets involved with the child, as opposed to remaining a vehicle upon which the child can get involved in the proceedings, is doing the child, the Court and the practice of Independent Children's Lawyer's a disservice.

### **Systems abuse**

A prudent Independent Children's Lawyer should watch out for circumstances where it appears that a child might be the subject of multiple interviewing and assessments. The Independent Children's Lawyer should be ready to argue that any attempt to subject the child to repeated interviews and assessments constitutes a form of abuse within the framework discussed by the Full Court in *Re P*. It would be appropriate for an Independent Children's Lawyer to proceed with an Application in a Case for an Order restraining the relevant party from having the child seen by any one or a number of professionals without the prior written consent of the Independent Children's Lawyer.

Effective child representation can go a long way towards safeguarding children from the problems associated with multiple interviewing and assessment in cases where allegations of abuse have been made. A diligent Independent Children's Lawyer should endeavour to get involved in the child's case almost immediately upon appointment. The Independent Children's Lawyer should be diligent and attempt to maintain control of the case on behalf of the child and protect the child wherever possible.

## **The requirement to fully investigate a child's case**

It is axiomatic to say that an Independent Children's Lawyer should investigate a case fully on behalf of a child. It is submitted that it is an integral function of an Independent Children's Lawyer to conduct a plenary investigation into the various aspects of the child's case. This requirement to conduct a comprehensive investigation and collection of evidence on the part of a child has been described by the Court's as an absolute duty on the part of the Independent Children's Lawyer. It is appropriate for the Independent Children's Lawyer to conduct an investigation into the personal background of the parties (eg. criminal history and the like).

## **Briefing and working with Counsel**

The primary role and aim of the Independent Children's Lawyer in relation to the trial preparation is to arm counsel with the necessary information to enable the child's case to be put before the Court. It is important to recognise at this point the differing roles of solicitor and Counsel in the Independent Children's Lawyer process.

Sweeny<sup>12</sup> argues that Counsel is invariably engaged on behalf of the Independent Children's Lawyer to present the child's case at trial. As such, Counsel is not the Independent Children's Lawyer but obtains his or her instructions **from** the Independent Children's Lawyer. Counsel representing the Independent Children's Lawyer does not receive his or her instructions from the child. As such, Counsel is in a unique position during the trial. He or she owes no duty to the child and is not breaching any duty by mounting arguments contrary to the child's instructions. He or she is at large to probe issues involving the child's welfare. Accordingly, a person in that role can, if appropriate, make submissions contrary to the child's wishes. Counsel is under a duty to rigorously pursue a line of argument that is consistent with the child's best interests. Counsel should concentrate on the significant issues and place them before the Court.

Care should be taken by the Independent Children's Lawyer in instructing Counsel in cases where one or both of the parties are unrepresented in order to avoid creating the impression of partiality towards one of the parties.

The provision of as much information as possible about the child is crucial to the proper briefing of Counsel. The Full Court commented in *Lyons v Boseley*<sup>13</sup> that "it is not an easy task for the legal representative to undertake a Brief on behalf of a child whom he or she has not seen, and of whom he or she has no impressions."

Be prepared to debate Counsel as to your views in relation to the child's case. You should meet with Counsel to discuss in detail the response to the Trial Judge if asked to convey the ICL's position. You should also discuss in detail the contents of the Affidavits.

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<sup>12</sup> F Fox and D Sweeny "Separate Representation of children: The differing roles of Counsel and Solicitor" Southern Solicitors Conference, Launceston, Tasmania, June 1995

<sup>13</sup> (1978) FLC 90-423, page 77,138

An Independent Children's Lawyer should guard against repetitive cross examination of witnesses.

**It is vital to remember that long after we have been involved in the lives of litigants and their children, they have to get on with the job of living.**

If the cross examination has been unnecessarily destructive it may not have been appropriate. You ought to be aware that you should have a higher degree of decorum and etiquette in the Court room and avoid any behaviour which the parties may construe as amounting to a show of favouritism towards one party. The Independent Children's Lawyer must remember at all times that no matter how impartial an Independent Children's Lawyer may be, both in terms of the view of the case and his or her conduct, litigants soon perceive the representative as being partisan towards one or the other. Parties tend to scrutinise every move the Independent Children's Lawyer makes, looking for a sign of favouritism. It is important to bear in mind at all times that the Independent Children's Lawyer's conduct, however innocent, will often be perceived differently. This particularly also applies to Counsel for the Independent Children's Lawyer. Accordingly, Counsel should observe at least the following conduct:-

- Avoid spending time chatting, laughing etc with one parties Counsel and not the other;
- Avoid having lunch with one Counsel and not the other;
- Watch your body language when talking with your colleagues, particularly at the bar table;
- If possible, the three Counsel at the bar table should be separated by three instructing solicitors.

The relationship between the Independent Children's Lawyer and Counsel is crucial to the delivery of effective child representation. Care should be taken by the Independent Children's Lawyer to ensure that Counsel is properly briefed and appropriate dialogue is established with Counsel in order that any differences of opinion as the child's case is ironed out and Counsel is free to argue the child's case.

### **Accountability**

The position of the Independent Children's Lawyer is different to that of other advocates that appear before the Family Court/Federal Magistrates Court for the following reasons:-

1. The Independent Children's Lawyer is not appointed by the person whom he or she represents.
2. The Independent Children's Lawyer may not be removed by such person.
3. The Independent Children's Lawyer does not necessarily advance what the child wants, but what in the view of the Independent Children's Lawyer is in the best interests of the child and to that extent exercises an independent judgment quite out of character with the position ordinarily occupied by an advocate.

Notwithstanding such differences, the Independent Children's Lawyer is not above accountability.

### **Removal of the Independent Children's Lawyer**

A unique feature of the Independent Children's Lawyer is that the practitioner who fulfils the role cannot be removed by the child that he or she represents. The Independent Children's Lawyer can only be removed by Order of the Court.

### **Children's views**

When it comes to views expressed by young children, it may well be that Court's place too little weight on them. The Children's Issues Centre at the University of Otago, New Zealand, concluded from a study they conducted in 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 5 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."*

The Former Family Court Chief Justice Alastair Nicholson addressed the Law Asia Conference in Brisbane in 2003 on children and children's rights in the context of Family Law. Interestingly enough, he made this comment *"I have little doubt that many children – and particularly older children – feel disempowered by Court proceedings."*

The Former Family Court Chief Justice Alastair Nicholson further stated:

*"Sometimes a judicial officer will see children during the course of the hearing, possibly because they indicate that they would like to express their views directly to the Judge, or because there is some apparent limitation in the evidence being presented at the Trial. Judges should possibly consider doing this more often, especially in cases involving older children, although I cannot see it becoming a mandatory requirement as it is in some overseas jurisdictions, such as Quebec. There are usually good reasons for caution."*

In the case of *ZN and YH and Child Representative* (2002) FLC 93-101 The Former Family Court Chief Justice Nicholson invited the children through their legal representatives to meet with him, should any of them want to speak to him directly. They accepted the invitation, and His Honour met with each of the three individually in the presence of the Child Representative. The Judge made it clear to the children that he would not necessarily act on the views they expressed to him, but that he would take them into account. The reasons for this approach in that case included the age of the older children, and because some time had elapsed since the counsellors report. As a result of the counsellors evidence, His Honour also had some concerns about whether the children's views, recorded by the counsellor, represented their real views, and whether they might have changed with passage of time.

One of the major reasons for caution is that information given in an interview with a Judge is inadmissible in any Court and as a result, a Judge may act on information that is unknown and untestable by the parties.

Where the children are content for the information to be known to the parties, such natural justice concerns can be addressed by seeking a subsequent report that would be put into evidence.

Children may feel intimidated by the process of judicial interview. If this is to occur, the views of the counsellor and submissions from the Independent Children's Lawyer should be obtained. It is also important that the interview be offered to children in appropriate circumstances, but no pressure be exerted on them to attend.

The Former Family Court Chief Justice Alistair Nicholson in his address on "Children and the Law: Issues in the Asia-Pacific Region" made this comment "*I wonder if it is not time to rethink the approach of never calling children as witnesses. They give evidence in other Courts. Methods have been developed to protect them, including the opportunity to give evidence by video link from a location other than the Court room. There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them doing so. To refuse them this right, may well be a breach of their entitlements under UNCROC and may effectively prevent the Court from ascertaining their wishes. Possible problems include cases where a parent has coached or placed undue pressure on a child, but experience allows such difficulties to be identified and managed.*"

However obtaining the children's view by judicial interviews with the children is only sparingly used in the Family Court.<sup>14</sup>

*Painter v Morley*<sup>15</sup> is an example of how judicial interviews can work well in practice. In that case, the four children involved were given an opportunity to express their views directly to the Court. The interview with the children took place in the Courtroom and was recorded. The only people present were the Family Consultant, the ICL and the Judge. Questions were generally asked by the Family Consultant and were in the form of having the children confirm what they said to the Family Consultant in the last family report. The children were informed that they did not have to be in Court if they did not want to; they did not have to express any view and there would be no difficulties if they did not do so; that the decision was that of the Judge and not of the children, and that it was simply an opportunity to ascertain their views if they wished to give them. At the conclusion of the interview, the Family Reporter gave evidence of what had occurred and what was said. A Transcript of the interview was also available to the Court and the parties.

In the Parkinson and Cashmore Study referred to previously, 85% of the children interviewed said they should have the option of talking to a Judge. The reasons given for wanting to talking to the Judge were that the children wanted their views heard by

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<sup>14</sup> Children both seen and heard, Chief Justice Diana Bryant, Reform: A Journal of National and International Law Reform, Winter 2008 Issue 92 p 21-24

<sup>15</sup> (2007) FAM C A 283

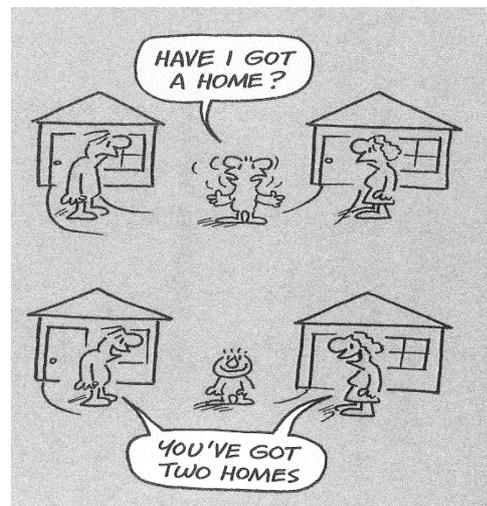
the person making the decision. They also wanted to avoid mixed messages and any misinterpretation of their wishes through the Court process.

The process of having the child interviewed by an experienced counsellor does seem to be the solution in most cases. Care must be taken to ensure that the wishes that have been expressed are still current.

Courts are not bound to accept the Family Reporter's recommendations. It must be realised that they carry considerable weight. Very often, the decision whether or not to extend Legal Aid in a particular case is dependent upon the content of the counsellors report, and many cases are settled out of Court as a result of these recommendations. The future of the children in question may thus be determined by what appears in the report, and the responsibility of the counsellor is thus a heavy one.

*“Research carried out in Australia and elsewhere over the past two decades has constantly shown the psychological benefits to children in maintaining the links with both parents, regardless of the fact that the adult relationship has broken down. Increased self esteem, psychological resilience and better educational performance are some of the outcomes.”<sup>16</sup>*

*“However, where parents are abusive, dysfunctional or unwilling to maintain contact, the research shows that the consequences for the children can be damaging, and contact inappropriate.”<sup>17</sup>*



<sup>16</sup> N.Bella “The best interests of the child in the post modernist era: A central but elusive and limited concept” paper presented at the Special Lectures 2000: Family Law, A colloquium on best interests of the child: perspectives on the resolution of custody disputes, Toronto, Canada.

<sup>17</sup> JB Kelly, “Current research on children’s post divorce adjustment: no simple answers.”