Independent Children’s Lawyers: Relational approaches to children’s representation

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This article focuses on the complex role of the Independent Children’s Lawyer (ICL) in family law proceedings in relation to contact with children. ICLs are best interests representatives, with responsibility to bring evidence relevant to a child’s best interests before the court and to broker a resolution of disputes. They are not bound by children’s instructions, but are expected to meet with children and play a key role in ensuring children’s views are heard by the court. Given ICLs’ critical role, there is surprisingly little evidence about how they perform these roles or relate to children in practice; in addition, there is evidence that children do not always feel they have been heard, even when they have an ICL. The article presents findings from qualitative research which highlight (i) differences in reported approaches of ICLs related to their ethical orientations as ‘relational lawyers’ and/or ‘responsible lawyers’; (ii) obstacles to ICLs forming professional relationships with children; and (iii) the need to review the preparation, training and selection of ICLs to support their work with children. The research concludes that there are important differences in ICLs’ approach to this work that affect their receptivity to work with children.

Introduction

This article is concerned with how ICLs implement their discretion to involve children in proceedings. It presents research about ICLs’ reported practice in New South Wales. ICLs appear to take different approaches with some taking a relational approach focusing more on children’s participation. There are significant variations in how ICLs define participation that are likely to result in varied practice.

In family law proceedings judges are required to hear and consider children’s views when they make decisions about children’s lives.\(^1\) Although judges rarely hear directly from children,\(^2\) they may ascertain children’s views through expert reports from family consultants and other child experts and/or through the appointment of ICLs who represent the best interests of the children involved.\(^3\) It is also possible for a child to apply to intervene in a

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3 Section 60CD of the FLA.
proceeding through the appointment of a litigation guardian. Although ICLs are well placed to play a role in proceedings that goes beyond ensuring that there is an expert report about a child’s views before the court, research suggests that children often do not feel as though they have been heard, even when they have been seen both by a family consultant or other expert, and are represented by an ICL. This reflects a central concern for family law: how to hear children’s voices, give their views appropriate weight in the decision-making process and ensure that children feel that they have actually been heard. Taking account of children’s perspectives can have beneficial effects on children’s mental health, coping capacity and development and can contribute to better, more realistic decisions being made.

A related concern involves procedural fairness and Australia’s obligations under Art 12 of the Convention on the Rights of the Child (the convention) to ensure children have opportunities to express a view and have it taken into account. While the development of the convention has been influential in Australia, international human rights treaties and conventions are not automatically incorporated into domestic law, despite the ostensible commitments given as a result of ratification. However, several new developments make a discussion of this issue timely. First, the UN Convention

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4 Section 92 of the FLA allows the court, on application, to make an order entitling ‘any person’ to intervene as a consequence of which the person will be ‘deemed to be a party with all the rights, duties and liabilities of a party’. Part 6.3 of the Family Law Rules 2004 facilitates a child’s intervention in and subsequent conduct of a proceeding by a case guardian unless ‘the court is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case’. See Transcript of Proceedings, RCB as Litigation Guardian of EKV, CEV, CIV and LRV and the Hon. Justice Colin Forrest [2012] HCA Trans 178 (7 August 2012).


8 While the convention operates to bind the state which ratifies it, and on ratification (by the Executive arm of government in Australia) the government indicates its full commitment to observe its treaty obligations, it is up to the Commonwealth Parliament to implement the convention by legislation, which it has not done. The convention is required to be observed by Australia at the level of international law, but only has direct legal effect upon Australian
has recently been inserted into the objects of the Family Law Act 1975 (Cth).\footnote{9} Given the key importance of Art 12 as a general principle of the convention, there should be a greater emphasis on ensuring children’s participation rights are upheld through professional practice. Second, the Commonwealth Attorney-General recently commissioned the Australian Institute of Family Studies to carry out research into the effectiveness of ICLs’ representation of children in family law cases.\footnote{10} Third, the Chief Justice of the Family Court has established a Children’s Committee to examine research on children’s involvement in proceedings, including practices around ICLs interviewing children to ascertain their views.\footnote{11}

The United Nations Committee on the Rights of the Child states that if the obligation to hear children is to be implemented, children’s views not only need to be considered and taken into account, but children need to know that this has occurred and, preferably, be given feedback about how it has occurred.\footnote{12} According to Chisholm, the question of support for individual children’s participation in legal processes is an important one for parents and professionals to address prior to a hearing:

I suggest that how the children are treated, what they are told, how their concerns are addressed, are all important issues, highly relevant to their best interests.\footnote{13}

The limited empirical research about how ICLs approach children’s participation in family law matters concludes that lawyers demonstrate varying levels of support for children’s participation and may take different approaches to working with children.\footnote{14} Family lawyers, including ICLs, tend to emphasise children’s protection from the litigation process over children’s participation.\footnote{15} These factors shape how they approach contact with children.
How ICLs define their role, think about children’s participation, and are prepared for this work is critical to how they practise.

**Children’s right to be heard and the ICLs role in facilitating this right**

The appointment of an ICL in family law proceedings is at the discretion of the court; they are appointed in approximately one in three children’s matters. In *Re K* the Full Court of the Family Court listed 13 circumstances in which an ICL should be appointed; these matters represent the most complex and sensitive cases concerning arrangements for children who are the subject of family law proceedings. They include cases where: there are allegations of family violence and child abuse; there is intractable conflict between parents; children are alienated from one or both parents; no party is legally represented; and where a child of mature years is expressing strong views which, if followed, would change long-standing care arrangements or prevent one parent spending time with the child.

There has been much debate in Australia about whether children’s representatives in family law should be best interest or direct representatives. This debate is built on tensions between the need to assist the court to obtain independent evidence relevant to children’s best interests, concerns to protect children from involvement in harmful litigation, and the need to ensure children are given choices about expressing a view and having this taken into account in family law proceedings, as required by the convention.

The ICLs’ role was defined for the first time by legislation when it was introduced into the Family Law Act in 2006. Section 68LA of the FLA sets out this role as a best interests representative, rather than the child’s representative. The ICL must form an independent view, on the evidence, of what is in the best interests of the child, and act in the proceedings on this basis. If satisfied that a certain course of action is in the best interests of the child, the ICL must make submissions about this to the court. The ICL must analyse relevant reports and documents and bring these to the court’s attention. They must also act impartially in dealings with the parties, minimise the trauma to the child associated with the proceedings and resolve disputes where possible. Under this section they also have a duty to:

- Ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court.

More guidance about the role is provided by the *National Legal Aid Guidelines for Independent Children’s Lawyers*. The guidelines

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18 See above n 6.
19 Section 68LA(5)(b) of the FLA.
acknowledge that the ICL has discretion, within the statutory guidelines, about how they act in a case and involve children. However it provides certain guidance to ICLs about aspects of the role, as below:

4. The Role of the ICL: The best interests of the child will ordinarily be served by the ICL enabling the child to be involved in decision-making about the proceedings. The professional relationship provided by the ICL will be one of a skilful, competent and impartial best interests representative.

5. Relationship with the Child: The child has a right to establish a professional relationship with the ICL.

5.1 Information which should be explained to the Child: When the ICL meets the child s/he should explain the role of the ICL including the limitations of the role and the court process . . . Despite the inability to guarantee the child a confidential relationship the ICL should, however, strive to establish a relationship of trust and respect. This is assisted by explaining the role of the ICL, including how the child can have a say and make his/her views known during the process;

5.3 Children’s Views: The ICL should seek to provide the child with the opportunity to express his or her views in circumstances that are free from the influence of others . . . The ICL should ensure that there are opportunities for the child to be advised of significant developments in his or her matter if the child so wishes.

6.2 Meeting the Child: It is expected that the ICL will meet the child unless the child is under school age; there are exceptional circumstances or significant practical limitations.

Article 12 of the Convention provides that children have the right to an opportunity to express their views and to have these views heard and taken into account in judicial and other proceedings about matters that impact upon their lives. This right is linked to their capacity to form a view, but not to a particular age, although the weight to be given to their views is linked to their age and maturity. Children’s ‘voices’ can add relevant perspectives and experience that should be considered in decision-making; the right to express a view can be considered a crucial element of children’s ‘participation’ rights under the convention. Participation rights co-exist with other convention rights, such as children’s right under Art 3 to care and protection and to have courts and other institutions act in relation to them with their best interests as a primary consideration. Roche suggests that ‘participation and the language of children’s rights presupposes and encourages children’s agency, the expression of their self-defined needs and interests’. This contrasts with the best interests principle found in Art 3 that is derived from children’s vulnerability and dependency on adults.

The United Nations Committee on the Rights of the Child asserts that...
children’s right to have decisions made in their best interests complement their right to participate in such decisions.\textsuperscript{24} It has spelt out important preconditions of children’s right to be heard that must necessarily be delivered by adults. These include an environment that enables children to exercise their right to be heard, as they cannot be heard effectively when the environment is intimidating, hostile, insensitive or age-inappropriate.\textsuperscript{25} Adults need to provide them with child-friendly information, including options and possible decisions to be taken and their consequences.\textsuperscript{26} Simply listening to children is insufficient; those working with them must take their views seriously.\textsuperscript{27} Children need to be prepared for proceedings, and informed of their right to express a view and of how their views will be expressed and taken into account in the decision-making process. They need to be informed about the weight given to their views: this ensures that the views of children are not only heard but taken seriously.\textsuperscript{28}

It is essential that children’s rights to both protection and participation are given weight in practice by professionals charged with advocating for children or securing children’s best interests. This requires children’s representatives to have sufficient knowledge and understanding of the decision-making process and experience in working with children.\textsuperscript{29} In Australia, ICLs and expert report writers each bear some responsibility for ensuring children are heard in family law proceedings.\textsuperscript{30} However ICLs have particular responsibilities associated with their role and legal training. These include explaining the proceedings and significant developments in their matter to children, presenting evidence, cross-examining witnesses and identifying the options children have to participate in proceedings.\textsuperscript{31} They play a key role in making sure children’s views and perspectives are taken into account and given due weight by the court and in giving feedback to children about the outcome of a matter and about how their views and perspectives were considered in proceedings.

The Guidelines for Independent Children’s Lawyers state that ICLs are to

\begin{itemize}
  \item \textsuperscript{24} Ibid, p 18.
  \item \textsuperscript{25} Ibid, pp 7, 12.
  \item \textsuperscript{26} Ibid, pp 10, 12.
  \item \textsuperscript{27} Ibid, p 11.
  \item \textsuperscript{28} The Committee on the Rights of the Child suggest that this should be done by the decision-maker.
  \item \textsuperscript{29} Ibid, p 12.
  \item \textsuperscript{30} There will be matters where neither ICLs are appointed nor family reports prepared: see Kaspiew, above n 16, Chs 13, 14, and pp 317–19. The evaluation noted the lesser and more limited involvement of family consultants in the Federal Magistrate’s Court (now the Federal Circuit Court) which determines the vast majority of parenting matters. In 2008–09 of 10,987 children’s matters, orders for a Family Report were made in 4444 matters. In 2010–11 88.3% of final orders matters concerning children were dealt with in the Federal Magistrate’s Court (See Annual Reports). In 2008–09 orders were made for the appointment of ICLs in 4458 matters.
  \item \textsuperscript{31} In 2004 the Family Law Council considered the skills required for the ICL role and the training that lawyers and social scientists have to carry out various aspects of the role. Clearer definitions of how each of the roles of the Family Consultant and Independent Children’s Lawyer are responsible for meeting children’s needs in this area would assist children, although it is acknowledged that the problem may be about resources as much as definitions: Family Law Council, above n 6, p 49.
\end{itemize}
determine children’s involvement with reference to the extent to which children wish to be involved and the extent to which it is appropriate having regard to the child’s age, developmental level, cognitive abilities, emotional state and views. How the ICL will work with children is largely left to the discretion of the individual practitioner. Given this discretion, research can be a valuable means of uncovering the nature of practice.

**Previous research about lawyers who represent children in family law proceedings**

Research in Australia, England and New Zealand has raised pertinent issues about lawyers’ roles and practice when they represent children in family law proceedings. There are often complex and varied reasons for appointing lawyers to these roles — differing aims may account for differences in practice.

In 2006 Douglas, Murch, Miles and Scanlan carried out research into tandem representation of children in family law matters in England. Although England and Wales has a well developed program of ‘tandem representation’ for children in public child protection proceedings, there has been very limited representation for children in private, family law proceedings. This form of representation involves a children’s guardian, (usually an independent, qualified social worker) and a solicitor of the guardian’s choosing. The guardian’s role is to meet with children, safeguard their interests and instruct children’s solicitors on behalf of children, except for rare instances where children provide direct instructions. The researchers found a lack of clarity about why tandem representatives were appointed. Three different roles or tasks were sometimes subsumed under the mantle of tandem representation, including ascertaining children’s views to assist the court in its decision-making; the use of separate representation to unlock intractable disputes between parents; and the need to give children reliable information and support to help them cope with the associated anxieties and uncertainties of proceedings. The researchers found evidence of different but interrelated approaches to making appointments, including a ‘welfare stance’, to assist the court to make a decision in a child’s best interests and a ‘voice

32 Guidelines, above n 20, at ‘4. The Role of the ICL’.
33 G Douglas et al, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs*, Cardiff Law School, 2006. Tandem Representation involves a professional social work guardian ad litem appointing and usually instructing a children’s solicitor. The children’s solicitor would normally have met certain training pre-conditions to be appointed to this role.
35 See r 9.2A of the prior Family Proceedings Rules 1991 and Rule 16.21 of the Family Procedure Rules as at 12 April 2012. Guardians are not routinely appointed in family law proceedings in England and Wales given limited funds, but are appointed in between 2–10% of matters: Douglas et al, above n 33, p 45.
stance’, to assist the court to know more about children’s views of issues in the proceedings. The rationale for appointing representation for a child was not always clear.

Other research studies have provided evidence of variation in practices. For instance, a study of the role of children’s lawyers in New Zealand in 1998 noted considerable variability in lawyers’ views about how important it was to meet with children. 36 Subsequently, the role of lawyer for the child in New Zealand was broadened by the Care of Children Act 2004. 37 The Act strengthened the view that the lawyer’s primary role was to obtain the views of children and act on those views, with obligations aimed at giving effect to the child’s right to participation. 38 In New Zealand and Australia the lawyer does not have the assistance of a guardian, but communicates directly with children.

According to the Family Law Council, in Australia ICLs are appointed to assist the court to make decisions in the best interests of children and to provide a ‘voice’ for children in proceedings affecting them. 39 These roles are largely welfare roles that have been developed to assist the court, but they have also evolved in response to greater awareness of children’s right to be heard in proceedings affecting them. This has sometimes created confusion and challenges for lawyers. 40 There is room for significant variation in practice when roles have complex objectives. In a similar vein to the research in New Zealand mentioned above, research carried out in Australia in 2012 indicated that ICLs’ practice varied in relation to whether they usually met with children. 41

Canadian, US and Australian research all suggests that children’s lawyers are gatekeepers in relation to participation. 42 As part of a broader Australian study of how children are heard in family law proceedings reported in 2008, Parkinson and Cashmore interviewed 42 family lawyers, including 19 who had

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37 This Act provided children with the right to reasonable opportunities to express their views and have them taken into account in decisions (s 6(2)) and requires lawyers to meet with children in all but exceptional circumstances (s 7(3)). Lawyers are appointed in all matters involving children’s day to day care or contact, which are likely to proceed to a hearing (s 7(2)). The lawyer for the child is the primary means by which the court hears of children’s views: N Taylor, P Tapp and M Henaghan, ‘Respecting Children’s Participation in Family Law Proceedings’ (2007) 15 International Journal of Children’s Rights 61 at 73.
39 Family Law Council, above n 6, p 23.
40 Ibid; Douglas et al, above n 33, pp 23–9.
41 82% of 175 ICLs who responded to an ICL National Survey carried out by the Children’s Issues Committee of the Family Court of Australia indicated that they usually met with children, although there was variation both within and across states: P Hemphill, ‘Hearing Children’s Voices in Children’s Matters’, paper presented at the Doing Justice for Young People: Issues and Challenges for Judicial Administration in Australia and New Zealand Conference, Brisbane, 23–25 August 2012, at <http://www.aija.org.au/Youth%20Justice%202012/Programme.pdf> (accessed 1 October 2012)
experience as ICLs. They found that their rationale for listening to children focused on children’s perceived competence to make decisions and their possible contribution to realistic decisions that could be implemented. Lawyers echoed the law’s discourse of rationality — children’s views were more likely to be taken account of if they appeared to be more mature and competent to make their own decisions. This rationale sits comfortably with the ICLs role to assist the court to make decisions about children’s best interests.

In contrast, counsellors interviewed in Parkinson and Cashmore’s study suggested different reasons for listening to children; either because children had ‘something important to tell us that may change the decisions we make on their behalf’; or because empowering them benefitted them, in that it allowed them to be active agents and not merely passive spectators in the process of making decisions. These rationales appear to be more consistent with the aim of supporting children’s ‘voice’ and right to be heard in proceedings.

In the same study, lawyers were not confident that children could always make a judgment about their own interests, due to such things as loyalty conflicts to parents. Children’s participation was seen as risky and this was consistently emphasised over any benefits of participation. Lawyers’ concerns with protecting children from parental conflict and the burden of the responsibility for making decisions, dominated their concerns with participation. Lawyers tended to focus on court outcomes and the available choices rather than children’s views of their own situations. Only a small group of lawyers raised the need to respect children’s views because they were an important stakeholder in the decision. This suggests lawyers may not appreciate the rationale for children’s participation stemming from the convention.

The literature emphasises the confusion lawyers can experience when they attempt to perform both a ‘welfare’ and ‘voice’ role in relation to children. There is a dearth of empirical studies in Australia that help us understand how lawyers approach and make sense of these roles, particularly in relation to their role in facilitating children’s participation in proceedings. The following study aims to address this gap.

43 Of the 42 lawyers, 20 had no experience as ICLs and 3 had very limited experience: Parkinson and Cashmore, above n 14, p 92.
44 Section 60CC(3)(a) of the FLA echoes Art 12 of the Convention on the Rights of the Child. It provides that the court must consider the child’s views and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views.
45 Parkinson and Cashmore, above n 14, p 92.
46 Ibid, p 139. Lawyers preferred children’s voices to be heard through professionals to ensure that involvement in parental conflict was limited. However, the researchers expressed concern that some lawyers saw children’s participation in terms of children expressing choices between their parents’ competing positions, rather than participation offering an opportunity to children to express their unique perspectives on their situation. They also thought it was possible that the way lawyers spoke with children might suggest to children that they needed to make a choice between their parents, and thus exacerbate loyalty conflicts. The concern that this could occur has also been raised by other commentators: L E Shear, ‘Children’s Lawyers in California Family Law Courts: Balancing Competing Policies and Values Regarding Questions of Ethics’ (1996) 34(2) Family Court Review 256 at 266; Warshak, above n 7, at 372.
The qualitative research study

The current research addresses the question of how the reported approach, values and preparation of ICLs influence their practice with children in relation to children’s participation. This qualitative research was undertaken in 2006 with 18 experienced ICLs in New South Wales, as part of a larger study undertaken with 35 lawyers who represent children in family law, child protection and juvenile justice matters. It considered how ICLs in family law matters understood their role in relation to children’s participation in legal decision-making processes. Given the limited number of ICLs involved, it is not possible to generalise the results of the study, but qualitative in-depth research of this kind has real strengths in providing deeper insights into participants’ worldviews. The study throws light on the variety of ways in which lawyers construct their practice — and considers what this might mean for children’s involvement in family law proceedings through ICLs.  

Methodology

The study is based on qualitative data collected through in-depth semi-structured interviews. The study is unique in two ways. First, the interviews included questions, vignettes and an in-depth case study question that provided information about lawyers’ views as well as their reported practice with children. Second, the research had a comparative aspect in looking at how children’s lawyers approached their practice across the jurisdictions of family law, child protection and crime. This revealed some striking differences between the values and approaches of lawyers who represented children on either a ‘best interests’ model of representation or who represented children on their instructions, depending on the particular jurisdiction.

The sample allowed a detailed comparison between the various approaches and practices of these lawyers, and the development of theoretical propositions about this practice. Qualitative research can shed light on processes, meanings, complexities and multiple realities of professional relationships.

Most of the 18 ICLs had completed the 2 day national training; 10 were accredited family law specialists and one was an accredited children’s law specialist. They were very experienced ICLs — all had at least 5 years of experience.

47 A related and important question was not specifically investigated in this study. This involves the way in which ICLs interact with other key people in the family law system, including family consultants, who play an equally important role in children’s participation.

48 12 lawyers answered all questions about their work as ICLs and a further 6 answered some questions. In the broader study from which this sample is drawn, participants also represented children on a best interests or direct basis in child protection and represented children on instructions in criminal proceedings in New South Wales.


50 All ICLs are solicitors. The Law Society of NSW offers accredited specialist status to eligible lawyers who have worked in the field for a set period of time (for instance, 5 years)
experience and 13 had 12 to 26 years experience. While it cannot be claimed that the lawyers who were interviewed comprise a representative or randomised sample, an attempt was made to include both male and female lawyers, and those who were specialists, and practise across metropolitan, regional and country areas. The sample included equal numbers of male and female lawyers and slightly more lawyers from the Sydney metropolitan area, than regional and country areas. They practised in one, two or three of the jurisdictions, in metropolitan, regional and country areas. There were three Legal Aid in-house lawyers and 15 lawyers in private practice on specialist Legal Aid panels. The interviews took place between April and December of 2006.

Interviews explored ICLs’ knowledge, beliefs, approaches and practice in relation to their role and to children’s participation in family law proceedings. A semi-structured interview format was used, including two vignettes concerning children, asking ICLs how they approach their practice in these circumstances. They were also asked to discuss, in their own words, a recent matter or case involving a child. Their perceptions and implementation of the two models of legal representation was also a focus of interviews. The interviews were transcribed and transcripts analysed and coded using the Nvivo7 qualitative data management software program.

In the following analysis and discussion, all respondents are referred to by pseudonyms.

Research findings

The ICLs all met with older children when performing these roles. When they met with children, they did so on at least one occasion. ICLs met more frequently with certain children, as indicated in the case studies they related. Fourteen ICLs also had exposure to children through their experience as parents.

Relational and responsible lawyers

While legislation, guidelines, practice directions and professional standards provide ethical guidance and constrain the actions of ICLs, they do not define

and who have completed assessment that may include mock files, take home exams, written assessment, a resume of work, a simulated client interview, a peer interview and a mock hearing. This status differentiates practitioners as specialists in a particular area.

51 An interview guide of approximately 30 generic open-ended questions was used, with one or two questions specific to the jurisdiction being included. One question all ICLs were asked was: ‘Briefly, how would you describe your role as a child’s representative?’ Lawyers were informed that ‘the aim of this research is to gain greater understanding of how child representatives implement different models of legal representation with children and young people. The study has the potential to assist the development of the models and support for the role of the child’s representative in facilitating children’s participation in legal decisions.’


53 ICLs said they usually met with children at different ages. Three met with or visited all children, 5 met children more than 3 years, 4 met children more than 4 years, 5 met children more than 5 years and one met children over the age of 10 years.

54 Some ICLs commented that exposure to children as parents had greatly enhanced their practice but most thought this was not essential to being effective in the role. There was general agreement that exposure to children in some form was important.
According to Christine Parker and Adrian Evans, lawyers adopt different ethical approaches to their work. They describe various approaches, including an ‘ethics of care’ or ‘relational lawyer’ approach that focuses on the lawyers’ responsibility to clients, their relationships and to the community. Parker and Evans also describe an approach which they call a ‘responsible lawyer’ approach to legal ethics. These lawyers look mainly towards their role as an officer of the court to inform their approach to practice. Cate Banks used this framework in 2007 to investigate how family lawyers understood what it meant to practise in a ‘child focused’ way. She found that more than half of the lawyers in her study adopted a ‘relational’ approach to their work.

The data collected from participants in this study likewise suggests that they may be divided into those who take a ‘responsible lawyer’ approach to legal ethics, who look mainly towards their role as an officer of the court and those who combine this approach with a more relational approach, focused on a responsibility to children (even though they are not the ICLs’ clients), their families and relationships.

When asked to describe their role, ICLs with a ‘responsible lawyer’ orientation tended to emphasise their role as counsel assisting the court to retain a focus on children’s best interests. They were less likely to refer to having a professional relationship with children and supporting children’s participation in proceedings. This contrasted with lawyers who mentioned both their role in assisting the court to determine the best interests of children and the aspect of their role that involved relating to children and supporting their involvement in proceedings: these lawyers were ‘responsible’ and ‘relational’ in their approach. While the data were nuanced, lawyers’ responses to the interview questions, vignettes and discussion of an individual matter, indicated that ICLs tended to fall into two groups: both took a ‘responsible’ lawyer approach, but one group combined this with a ‘relational’ orientation.

‘Responsible lawyers’

ICLs who took a primarily ‘responsible’ lawyer approach emphasised their role in advocating on behalf of the best interests of children. Nina described it as:

59 Banks, above n 55, at 39. In her research she attempted to build an understanding of what family lawyers thought it meant to be child focused. She noted the tension that more than half of the lawyers experienced when they adopted a ‘relational’ approach to their work, which required a blending of the practice of law with personal ethics. Half of her sample of 42 adopted this approach, which is consistent with Parker and Evans’ relational approach to legal ethics, as opposed to approaches of the ‘adversarial advocate’, ‘responsible lawyer’ and ‘moral activist’.
being quite similar to counsel assisting a coroner in a coronial inquiry in that in your role as children’s representative, you are trying to ensure that the court has evidence before it that neither of the parties may have brought forward.60

Erica said:

I endeavour to ensure that the participants in the litigation program, sometimes including the court [are] focused on what the issue is in terms of what is beneficial for the child.

Warren commented about his role to children in these words:

You try to explain what’s happening — it’s usually something to do between their parents — and that my role is very much to try to help the Judge, because it’s not appropriate for them to have to go into court and speak to the Judge. And apart from anything the Judge hasn’t got time to speak to all of the children.

Comments about assisting the court were also made by relational lawyers. One difference was that responsible lawyers tended not to stress the need to meet with children for the purpose of supporting opportunities for children to participate, as distinct from meeting the court’s needs for information. Alan said:

Often I see the purpose of the interview as just getting my own idea about the child and about the issues in the case, but where the children are mature enough (for instance) a late primary school early high school, if there are bigger issues I may ask them what their views are.

Responsible lawyers sometimes expressed the need to keep children out of the legal process and to minimise contact with children. This may have caused them to focus primarily on their duties to the court. A variety of reasons were given for this perspective, including the damage children’s participation might cause to children’s relationships with their parents. For instance, Denis, Erica and Lincoln all expressed concerns about children’s participation being in conflict with their best interests. Denis and Erica saw a conflict in the National Legal Aid Guidelines for the ICL that promoted both children’s participation and the best interests of children. Denis said:

I’m still not convinced that for the majority of children [participation] is best for them . . . I think it’s got the capacity to destroy whatever relationships exist. The legislation now talks about significant time, substantial time, equal time. These kids have to be able to have a decent relationship with both of their parents.

Lincoln did not think children’s participation was important as children simply could not understand court processes or what was happening in a matter, no matter how he tried to explain this. He tried to meet with children late in the process and like Damien, was concerned to ensure that children did not develop unrealistic expectations of what he could achieve for them. Damien had difficulty defining what he meant when he referred to children’s

60 Nina’s comment reflects a statement made by the Full Court of the Family Court in Bennett and Bennett (1991) FLC 92-191 at 78,259; (1990) 102 FLR 370; (1990) 14 Fam LR 397 per Nicholson CJ, Simpson and Finn JJ, about the role of the separate representative (the name given to the ICL role at this time). The Court said that the role is ‘broadly analogous to that of counsel assisting a Royal Commission’.
participation. He stated that children thought they had rights to participate. Even though he didn’t agree they should have such rights, he accepted that they did. Damien said:

The difficulty [in developing professional relationships with children] is balancing that between dragging them in to talk to a lawyer, which is not something they’re keen on doing.

Erica limited her contact with younger children:

I would tend to steer clear, particularly if there is a court appointed report writer I would most often avoid having direct contact if there are say, between 5 or 10, because the process of the litigation is confusing enough for adults . . . ICLs with a responsible orientation were often suspicious of children expressing a need to meet with them. Alan said:

I think, and I’ve learnt this over the years, you’ve got to be very careful about what you accept from children.

ICLs with a responsible lawyer approach said they gave children information about the process and their participation options, which were mainly through expressing their views to a family consultant or to an ICL. However, some only offered information about the legal process ‘to the extent that children ask for that information’. Often they did not tell children about options that the ICLs disliked, such as talking to the judge, reflecting their gate-keeping role in relation to children’s participation options.

ICLs responded to a vignette where a 12 year old child in the Family Court asked to speak to the judge. They were evenly divided about whether they would or would not pass on this request to the judge. This needs to be put into context. It was clear that even where lawyers would raise the matter with the judge, their experiences of the reluctance of family law judges to allow children to participate were powerful influences. Most ICLs envisaged contact with court as involving children directly witnessing hostile cross-examination of witnesses about their parents’ dispute. With one exception, responsible lawyers would not pass on the 12 year old child’s request to speak to a judge; whereas all but one lawyer who had a relational orientation would do so (despite some expressing misgivings about this process). This seemed to be related to the strength of the lawyers’ regard for the child’s expressed view — and how important they thought it was to provide children with opportunities to participate. Responsible lawyers also tended to treat children’s views with a greater degree of suspicion, although most lawyers, regardless of orientation, were aware of the dangers of putting children into the middle of their parents’ dispute and of the potential for parents influencing children’s views. Most responsible lawyers met with

61 6/12 ICLs who answered all the family law questions would pass on the request. From July 2006, Practice Direction 2/2006 of the Family Court provided that ICLs were to apprise the judge of any request by a child to speak to the judge — this was a voluntary decision for ICL’s before this time. Cases in the Federal Magistrate’s Court were not subject to the Practice Direction.

62 One ICL related a situation where a Federal Magistrate had refused to allow a 17 year old girl into an ex-parte application for a change of name. Others raised concerns about the attitude of judges to such a request.
children from the age of five years old; this contrasted with those who also had a relational orientation, who were more inclined to meet all children, or meet younger children (for instance, from the age of 3 years).

Responsible lawyers talked in much less detail about how they developed rapport with children. Those ICLs who also had a relational approach provided detailed insights into how they developed rapport: this is considered further below.

**Relational lawyers**

Relational lawyers emphasised their responsibilities to the child as well as the court, even though the child was not their client. Their descriptions of their role included assisting children to ‘have a voice’ or ‘to feel involved’. Edward said:

>certainly in relation to older children, I think that it is very important to reassure them that you are their mouthpiece in court.

This incorporated a sense of having duties to the child and needing to establish rapport and a relationship with the child, for the benefit not only of the court, but for the child.

Children require certain conditions to be met before they can participate in proceedings through ICLs. Opportunities are affected by the way children are prepared for meetings with ICLs and the context and environment in which it occurs, as the Committee on the Rights of the Child has commented.

ICLs determined where they met with children; this was usually at their office and occasionally in children’s homes or at court. Relational lawyers often modified the environment to make it more child-friendly, setting up their offices with toys and drawing equipment. Others met children together with other professionals, for their own and children’s comfort and protection. Environments may support or impede the development of relationships. Children may not always feel free, at a first meeting with a professional, often in a strange office, to discuss private and personal matters about themselves and their families. Those ICLs who valued the importance of a relationship with children talked about giving children choices about how they participated, both in terms of what they told the ICL, and about whether they participated at all. They thought effective ICLs needed good communications skills and to be able to relate to children of all ages.

Children are not able to speak openly and honestly with lawyers if they are anxious or there is no rapport. These ICLs thought it was important to build rapport with children and were able to describe how they did it. They adopted

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63 These include the opportunity and choice of ways to participate, access to information, a trusted advocate or mentor, policy and legislation that support participation, ways to complain and means of evaluating how effective participatory processes are: J Cashmore, ‘Promoting the Participation of Children and Young People in Care’ (2002) 26(8) Child Abuse and Neglect 837; P Treseder, ‘Involving and Empowering Children and Young People: Overcoming the Barriers’ in C Cloke and M Davies (Eds), Participation and Empowerment in Child Protection, Pitman, London, 1995, p 207.


65 Blackman, above n 6, at 52.
a variety of approaches to meeting with children: the common theme was the care which they took to put children at ease. Erin explained how she did this:

Then you get the four- or the five-year-old that you've got to set up with the colouring in and get them very relaxed and slowly build them around to a discussion. Maybe get them to draw their family or do a genealogy tree with them, which is a good way of getting them to talk about their family and getting some insight as to who is important in their lives and that sort of stuff. Teenagers can be difficult, but I found the best way to deal with teenagers is not be patronizing or talk down to them and really go straight at them. They seem to respect you for that a lot.

Edward always had someone younger with him when he met children. This might have been a law student on placement. Alternatively he met with children in the office of a Family Court consultant, with whom the child already had a relationship, to break the ice. He would discard his tie, and sit on the floor and talk to children. Erin and Edward, like other lawyers with a relational approach, stressed the importance of the process of involving children and linked this to achieving a good outcome in the matter.

Relational lawyers exhibited great sensitivity to children’s predicament, indicating their awareness that children were often feeling caught between their parents’ agendas, with conflicting loyalties. This sensitivity allowed these ICLs both to respect the need to offer children opportunities to be involved, but also to respect their wishes not to be involved. Nicholas had a particularly rich comprehension of how children coming to see him might be feeling, and reflected carefully on how to best put them at ease and begin to build rapport:

And then what comes back from them you’ve got to be sensitive to . . . some kids, especially when I first meet them are very uncomfortable, even kids of ten, eleven, twelve, realise, from what they’ve been exposed to, that it’s a danger zone for them; talking about it. So you don’t push them into that the first time. [O]ne of the first things I tell kids who are old enough to understand the concept is you can’t say anything in here that’s wrong and you can’t do anything in here that’s going to get you into trouble. And it’s okay to tell me anything because first up, whatever you tell me stays in here and, you know, I’m not here to find out if you’ve done anything naughty.

The need to be sensitive to the difficulty which children in conflicted families may be experiencing is supported by research studies done with children whose parents have separated.66 These ICLs saw their role as involving children in proceedings in a way that was sensitive to these difficulties. However, the children’s difficulties did not cause ICLs to shy away from involving the children. They discussed how they applied their understanding of child development. Erin said:

You’ve got to sort of be sensitive to the facts that like they’ll offer themselves as a token or consolation prize or Dad’s lonely or everybody says horrible things about Dad and I feel sorry for him.

These ICLs approached children individually, as social persons, rather than thinking about children as a homogenous group, or a group divided into rigid

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age and stage boundaries.\textsuperscript{67} While developmental issues were important, there appeared to be a greater willingness to engage with individual children. This meant listening to the child well enough to discern and respect the choices they might make about participation.\textsuperscript{68} This opportunity was not always offered to children by ICLs who did not have a relational approach, but who were primarily focussed on assisting the court to determine children’s best interests. ICLs with a relational approach said explaining the options children had to participate helped to diffuse any confusion or anxiety a child might have. Several of these ICLs thought more laterally about participation. They suggested various forms of contact with Court (apart from talking to judges) which could support children’s participation in proceedings in a way that did not cause them harm. Anna, for instance, discussed how she was able to familiarise children with the court building, when Court was not sitting. Edward talked about a ‘shuttle’ form of advocacy where children were at court, in a separate room with a family consultant, during a conciliation conference involving their parents; he also suggested a video that would assist children to understand the legal process, similar to videos produced for parents as part of the Children’s Cases Program. Nicholas and Erica thought that children’s views could be heard more through mediators working in the new Family Relationship Centres, as part of pre-filing processes.\textsuperscript{69}

ICLs with a relational approach also tended to see either all children, or most children, not just older, school aged children. They seemed to try to understand the ‘child in context’ where the child was very young, as a means of grounding their practice.\textsuperscript{70} Yvonne echoed the sentiments of other relational ICLs when she said:

\begin{quote}
I like to know who I’m acting for. I would like to have some sort of a visual of who this child is and whether he’s got a very boisterous personality or not . . . just viewing them and seeing them gives you a sense of their humanity and that they are one of these people enmeshed in this problem.
\end{quote}

Relational lawyers spoke of being willing to extend their role to meet the needs of children, when, for example, a child contacted them after legal proceedings had been finalised. These ICLs were often prepared to use their knowledge and skills to assist the child in these circumstances even though this was not strictly in accordance with Legal Aid guidelines. Anna stated:

\begin{quote}
67 See the discussion in Smart, Neale and Wade, above n 49, Ch 1.
68 Ibid, p 122, and also see Professor C Lyons, E Surrey and J E Timms, \textit{Effective Support Services for Children and Young People when Parental Relations Break down: A Child Centred Approach}, The University of Liverpool, 1998. Both these studies show that children want information and the choice of whether or not to participate.
\end{quote}
You’ve got to prepare them for the end of your role. But I always make sure they still have my card and that they can get in touch with me if they need to. And I explain to them that I may not be able to do all the things I’ve been able to do for you now, but I’ll try and figure out a way to help you. Sometimes there’s not much you can do other than figure out a way to give Mum or Dad a prod to re-list it or something. You’re a bit confined, but you can’t just leave them high and dry.

In contrast, ICLs with a responsible lawyer approach often did not recall a child trying to contact them after a matter had finalised. Like many ICLs, Naomi spoke of limiting her contact with children because of concern they were being coerced to talk to her by their parents. Her relational approach, however, was evident in this comment:

I used to think it was cruel to see kids too often, so I would limit my dealing with them as much as possible and see them at the beginning of the proceedings and then see them at the end and have that basically as part of my protocol. I’m much more flexible with that now, because some kids require a different experience of their involvement with me. I eventually recognised, [because of] kids banging away at the door, and with the assistance of some training and speaking to social scientists, that kids aren’t always asking to see me because a parent is. But sometimes that’s right.

Obstacles to ICLs forming professional relationships with children

Time and the need to develop a trusting relationship

Children’s access to information is likely to be enhanced in the context of a trusting relationship with a lawyer, who can scaffold their understanding of the legal proceedings and ability to participate in them. In order to develop a trusting relationship, ICLs have to be prepared to meet with children, must have the skills and time to develop a relationship and think that children’s views are worth listening to. The research shows that ICLs’ commitment to developing rapport and a professional relationship with children varied. Limited funding meant that time to develop such relationships was not always available. Some ICLs who also represented children on instructions in child protection matters, said they generally had less contact with children when they did not have to seek instructions from them.

While some ICLs developed rapport to find out what the child’s views were, for the court’s purposes, ICLs with a relational approach thought it was essential to develop a relationship with children for the court, as a means of allowing them to participate in the legal process. Anna thought that relationships could benefit both children and the court. She felt that if lawyers performed the role according to the guidelines, that was good, but it was optimal if they developed a good relationship with children, as it met children’s needs to know they were involved in the process:

And then there’s the other aspect to being a good child rep which is just going through the guidelines and making sure you have discharged all your duties and responsibilities as well, which is trainable. But equally it’s really optimal if they

71 Taylor, above n 7, at 160.
could have a good relationship with their lawyer as well and a trust, because that will obviously enhance their appreciation of the outcome.

Building a trusting relationship requires time, regular contact, consistency and continuity.72 One Legal Aid ICL noted that economic and time pressures in private practice limited the opportunity to develop trusting relationships with children. Lawyers in private practice raised the link between time and poor financial rewards for their work. Even when lawyers took time to develop rapport, the court process itself did not always allow this. Nicholas commented that one meeting with children for 10 or 15 minutes before an interim hearing meant that he had no opportunity to develop rapport before being asked to contribute to decision-making. The snapshot he got of the situation could be flawed in many ways.

Many factors appeared to inhibit lawyers developing the kinds of relationships with children that would allow children to participate more meaningfully in proceedings. These included powerful discourses operating in the family courts that coloured ICLs’ definition of children’s participation, including their perceptions about whether this was beneficial or harmful for children. These discourses influenced ICLs’ understanding of the rationales underlying children’s participation. ICLs particularly drew upon knowledge and values from child development and welfare perspectives. Human rights and children’s rights perspectives were less evident in ICLs’ accounts, but were emphasised more by relational lawyers.

**Discourses operating in the Family Courts**

Analysis of the interviews with ICLs identified that three discourses influenced practice. Child development and protective welfare discourses were dominant; a children’s rights discourse can best be described as nascent.

ICLs consistently made reference to a child development perspective that guided their practice and communication with children. This perspective is also evident in the case law where greater account is taken of children’s views as they become more mature and capable of making what are regarded as ‘rational’ or mature and intelligent decisions on their own behalf.73 As a result, some lawyers tended to view children younger than 8 years of age, as rarely able to provide meaningful input about specific arrangements. Alan put it this way:

I don’t think children should participate when they’re young, because I don’t think they know what’s best for them.

Some lawyers believed only very articulate older children with no serious issues or parental pressure could provide meaningful input.74 This was evident in Nina’s comment about when she felt able to respond to children’s requests:

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72 Cashmore, above n 63, at 843.
73 See, for instance, specific references to the psychological model developed by Piaget in Secretary, Department of Health and Community Services v JWB and Another Secretary, Department of Health and Community Services v JWB and Another (Re Marion) (1992) 175 CLR 218 at 238; 106 ALR 385; (1992) 15 Fam LR 392; [1992] HCA 15.
74 In other words, the children who were most like adults. B Neale, ‘Dialogues with Children: Children, Divorce and Citizenship’ (2002) 9(4) Childhood 455 at 456.
I suppose it’s in cases where the kids have communicated very well and are very well spoken about what they want, very clear, concise with their thoughts and um, and I suppose they’re also not kids who have been traumatized, you know they’re certainly not cases where there’s been sexual abuse allegations or anything like that; they’re different types of matters . . . And they are older kids too and that might be because when they’re a bit older they’re better at expressing what they want.

A protective discourse dominated ICLs’ accounts and explanations of their roles. In constructing their practice with children ICLs drew heavily on generally accepted welfare/social science knowledge about how being caught up in parental conflict or court proceedings, or being interviewed multiple times, could harm children. This orientation was reinforced by the legislation and guidelines that directed ICLs to endeavour to minimise the trauma to the child associated with the proceedings and to prevent ‘systems abuse’. Given that ICLs are only appointed in matters where there are significant, sensitive and difficult issues to be resolved, ICLs were very sensitive to the harm caused to children by being caught up in their parents’ conflict, especially if that involved hostile court proceedings. ICLs wanted to protect children in a number of ways: from the harmful court environment (that might harm children or their relationships with parents) and from the harmful (including physically harmful) behaviour of some parents. They wanted to protect children’s future options and the innocence of children’s childhoods. Some thought this could be achieved by limiting children’s contact with welfare and legal professionals and protecting children from systems abuse. Concerns about systems abuse affected ICLs’ decisions to meet with children. While the cases support the need for lawyers to consider systems abuse when deciding how often to see children, the research with children suggests that children in the most conflicted cases may express the strongest needs to be heard.

Best practice may involve offering children choices about whether they wish to meet with the lawyer. Warren said:

I explain that I’ll probably only be seeing them on a limited number of occasions, because you are always conscious of systems abuse.

As discussed above, ICLs were sensitive to the possibility that children’s views were influenced by parents, either consciously or unconsciously. Most ICLs commented on the way in which parents influenced their children’s views. This caused difficulties for ICLs in communicating with children, and


76 Section 68LA(5)(d) of the FLA. See also the National Legal Aid Guidelines, above n 20, at 6.2 and 6.5 which alert the ICL to ‘systems abuse’. Systems abuse has been described as ‘preventable harm [that] is done to children in the context of policies or programs which are designed to provide care or protection. The child’s welfare, development or security are undermined by the actions of individuals or by the lack of suitable policies, practices or procedures within systems or institutions’: J Cashmore, J Dolby and D Brennan, Systems Abuse: Problems and Solutions, NSW Child Protection Council, 1995, p 11.

trusting that they knew what children’s ‘real’ views were. Lawyers’ strong support for children’s rights to protection, as illustrated by the strength of the protective welfare paradigm, may have inhibited their support for children’s participation, particularly where these rights were perceived to be in conflict. While certain lawyers stressed participation rights, primarily for older children, some lawyers, such as Denis and Damien, openly disagreed with the notion that children had rights, or should have rights.

A discourse of children’s rights as expressed in the convention was most evident in some ICLs’ comments about participation. These comments echoed some of the reasons for listening to children given by counsellors in Parkinson and Cashmore’s study. A children’s rights discourse recognises children as active, not passive actors in their own lives — thus any determination of children’s best interests should take account of their perspectives. ICLs who had a relational approach commented that children needed to feel their views had been heard, as it was their lives which were being affected. Edward stated: ‘I think children are stakeholders the same as any other stakeholder.’ This reason for hearing children aligns with the convention, seeing children as being entitled to express a view about their own interests as part of the decision-making process.

These lawyers referred to participation variously as being: ‘critical’; ‘extremely important’; ‘very important’; ‘important for some and not for others’ and ‘quite important’. Nicholas commented:

I think it’s important that the children have got a sense that their views are being taken into account in decisions that are after all about them . . . their world’s changing. Their world’s been sort of torn apart and a decision is being made that impacts on their future for a long time to come and maybe a lifetime. [I think it’s important that] these kids think they’re being taken notice of and not just moved backwards and forwards like the TV and the stereo and the video player.

ICLs with a relational approach tended to be more supportive of children’s participation rights, even where they also had protective concerns about children. A number of ICLs related case studies involving adolescent children, which showed their support for children’s participation, within a framework that also took account of their need for protection. One of these case studies was provided by Anna. This was a matter involving a 15 year old girl and her two younger siblings, where there had been multiple proceedings in the Family Court. The parents had separated and both had re-partnered. Neither of the parents’ homes offered an ideal situation for the children. Anna described her first meeting with this young woman:

She cried most of the meeting, because she was so unhappy with her living arrangements. She never ever disobeyed orders. That was what was so extraordinary. The girl was living with her mother and stepfather: they had physically assaulted her when she expressed her views to a Family Court counsellor. Because the father of the girl appeared to have a child support agenda, the

78 Neale notes that in a climate where it is presumed that children may manipulate or be manipulated, their views are inevitably viewed as untrustworthy: Neale, above n 74, at 457.
79 See comments of Denis and Damien, under heading ‘Responsible lawyers’.
80 See above n 14.
family reports had not supported his application to have the child reside with him. The girl was terrified of her stepfather. Anna worked very cautiously and carefully with the girl to support her wish to live with her father. She ensured the girl’s protection by making careful arrangements about where, when and to whom a third family report was to be released. She discussed these arrangements with the girl prior to the report being released:

so I foreshadowed those arrangements to her beforehand and I promised her that I would do those things for her so she participated freely in the family report assessment and then, thank God, I was able to keep my promise to her and make sure that she was protected.

Anna learnt, from one of the family reports, that the girl’s mother and her stepfather had been banned from membership of a community service organisation for cruelty to some of the children in their care. Anna was able to subpoena damning evidence of this incident. This clinched the matter and the girl was able to achieve her wish of living with her father and his new partner. Anna commented that through her work, she had secured the girl’s and her siblings’ participation:

If I hadn’t been appointed the third time there would have been another report, because the court would have ordered it because of the age of the kids, but they wouldn’t have spoken, because they’d been physically punished.

Relationships with children where there are allegations of violence and child abuse

As the example above shows, ICLs are often appointed in cases where there are allegations of family violence and child abuse. Some of the limited research into this aspect of their role has raised questions about how effectively ICLs manage these circumstances, in relation to both younger and older children. In 2005, Kaspiew raised concerns about the very limited extent to which child representatives in the Melbourne registry were able to maintain a focus on children’s interests in cases where violence was concerned. This issue was illustrated vividly by the case of T v N. In this case Moore J refused to allow unsupervised contact agreed to by the ICL for two very young children, given the gravity of the risks presented by the behaviour of their father.

Hay also studied the effectiveness of children’s representatives (ICLs) in family court proceedings involving family violence and child abuse in Western Australia. In 2003, she interviewed children involved in these cases

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82 Without Anna’s intervention on her behalf in this manner, it appears likely this girl would have remained living in this situation.
83 R Kaspiew, ‘Violence in Contested Children’s Cases: An Empirical Exploration’ (2005) 19(2) AJFL 112. This was in the period after the Family Law Reform Act 1995 (that first emphasised the importance of contact with both parents). The research referred to was an analysis of 40 files taken from the Melbourne registry of the Family Court: violence was evident in over half of these matters.
and found that less than half of them could remember meeting with the ICL; only one of five children who had met with the ICL was positive about the experience. Five of these children’s protective parents stated that the ICL had not met with the children and these parents, all women, were generally dissatisfied with the role that the ICL played. Laing’s recent NSW study of women’s experience of negotiating the family law system in the context of domestic violence included parents’ comments about ICLs who had not met with children. The report also included a parent’s comment about how helpful it had been to her son for him to meet with the independent children’s lawyer. It is very important to recognise that parents’ own agendas may colour their comments about ICLs. However, their reasons for dissatisfaction are of interest. Seventeen parents of children who had an ICL appointed in the Parkinson and Cashmore study were generally negative about ICLs, because they ‘did not do anything’, did not seem to be prepared or did not speak to the children.

Similar concerns were raised by ICLs in the present study. Some ICLs spoke of their concerns about lawyers who did not turn up for proceedings, or turned up but had not met with the children. They commented that barriers to children’s participation included ICLs who did not meet with children, did not listen to them or did not take notice of their views.

Nicholas commented:

I’ve seen some cases with child reps and I’ve thought . . . that they’d decided what the result was or should be . . . according to their own values, their own reading of the documents before they even got to meet the kids, if they met with them at all. They didn’t really try and find out what the kids want or if the kids told them, they didn’t listen.

ICLs pointed to limited time, limited funding and the complex demands of meeting the court’s needs as contributing to this practice. Although the interconnected problem of limited funding and time weighed heavily for all lawyers, relational lawyers emphasised that this would not compromise their practice, while responsible lawyers were more inclined to acknowledge impact on their practice with children. For instance, Alan said:

Maybe I could see the child more often, but you are just conscious of financial constraints.

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86 Ibid, p 18.
88 Ibid, p 83.
89 Parkinson and Cashmore, above n 14, at 145–8.
90 Parkinson and Cashmore also raised concerns about lack of time constraining ICLs’ ability to build trusting relationships with children: above n 14, at 156. See also Douglas et al, above n 33, who comment on pressure of time as a reason why children might perceive their guardian or reporter as an impersonal interrogator rather than someone who would listen to them in a supportive, empathic way: at 188–9.
This issue needs further research. However, the research suggests that lawyers need to evaluate the advantages, not just the disadvantages, of meeting with children, particularly in cases where children are at risk of family violence and other forms of abuse.91

ICLs lack of agreement about the meaning of children’s participation

One obstacle to ICLs developing professional relationships with children is that there is currently little agreement about how they define children’s participation.92 For instance, Erica, who took a responsible lawyer approach to the role, said that children ‘do not participate at all other than through the interview for the family report’. She did not view contact with an ICL as a form of participation for children. This contrasted with the views of other ICLs who took a more relational approach, acknowledging that one way children participated was through discussions with them. Only one lawyer articulated a vision of participation that included direct participation in court in family law proceedings. It was clear that the model of best interests representation influenced how lawyers thought about participation. Most lawyers defined participation as the process whereby children, who were old enough, had an opportunity to have their views indirectly heard by the judge, either through the family report process or expert reports, or through the child representative advising the court as to what was in children’s best interests. Even though the National Legal Aid Guidelines provided guidance that this was part of the ICL’s role, only a small number of ICLs defined participation as including explanations that supported children’s understanding about court proceedings.

Training, selection and preparation for these roles

In the Family Court Violence Review undertaken in 2009, Chisholm commented on the need for training of legal practitioners to go beyond reading material and lectures, to include video, role playing and other interactive methods of dealing with violence.93 Similar concerns arose for ICLs in relation to their work more generally. All the ICLs with a relational lawyer approach and some of those with a responsible lawyer approach in this study agreed that they needed more training, particularly in interviewing and in how to develop rapport and professional relationships with children. Glesner Fines,

91 Chisholm notes the tendency for those involved in family law proceedings to emphasise the disadvantages but not the advantages of children’s participation: Chisholm, above n 13.
92 Responses by children’s lawyers in family law (and child protection) to the request to define ‘participation’ for children ranged from: something children could not do as they were too damaged and not rational; being ‘looked out for’ if they were babies; the lawyer advising the child what is best for them; being heard, listened to and sighted; being able to express themselves and to ask for help; being informed about decision making, court processes and the main issues for the child, and having the court/judge know what they want (for instance through reports); having their views heard and contributing to significant decisions; having some control of the process; getting an independent voice through best interests or direct representation; giving instructions to their lawyer; and attending court.
an American academic, comments that there are three components to the training that lawyers need in communicating with children.\textsuperscript{94} These include information about how their communication with children is affected by each child’s development; cultural competency, which is necessary as lawyers are likely to come from a vastly different cultural context than their clients; and interpersonal communication skills. Glesner Fines suggests that integrating these skills requires modelling, practice, and opportunities for feedback and re-practice in context.\textsuperscript{95}

Mentoring is also an important means of ensuring appropriate skill development.\textsuperscript{96} The training currently available (primarily the 2 day national training for ICLs and ongoing professional development days) is not always focused on skills that lawyers need to engage and work with children. Some ICLs in this study felt they needed time to practice, under appropriate professional supervision, the skills required to develop facilitative relationships with children of different ages, ability, maturity and backgrounds. Other professions work with children and there are well developed resources that could assist ICLs to know how to engage in the kind of dialogue that research indicates children want. Training might include opportunities to benefit from the dissemination of social science research and to take part in training with other social science professionals. Lawyers’ professional education tends to emphasise outcome at the expense of process. New training might assist ICLs to appreciate and balance the importance of a good process for involving children, as well as the need to achieve a good outcome.\textsuperscript{97}

There was broad agreement among ICLs that to be effective in the role lawyers needed good communication skills and a warm personality that allowed them to develop rapport with children. Personal attributes and skills are recognised in some legislation dealing with selection of children’s lawyers.\textsuperscript{98} Researchers have made similar suggestions that selection for these roles needs to take account of lawyers’ capacity to work with children.\textsuperscript{99}

\textbf{Conclusion}

This research found that a discourse of children’s rights that would support children’s participation was in its infancy in the family law courts. This


\textsuperscript{95} Ibid, at 422.


\textsuperscript{97} I am indebted to one of the anonymous reviewers for noting this tension between process and outcome.

\textsuperscript{98} See the Children, Young Persons and Their Families Act 1989 (NZ) s 159(1) and (3): So far as possible, this barrister or solicitor should be suitably qualified by reason of his or her personality, training, cultural background and experience to represent the child or young person.

\textsuperscript{99} Douglas et al, above n 33, at 387: ‘Those selected for guardian and children’s solicitor work need to be skilled and, in the eyes of the child, experienced as trustworthy persons with clear aptitude to relate to children.’
affected ICLs’ practice with children. Preparation for lawyers wishing to work as ICLs could address this issue through exposing them to the debate about children’s participation. Including social science research about how children can participate, and how they experience legal representation of their interests in such preparation may make a difference. Dialogue to develop a more informed understanding of the nature and implementation of children’s participation rights would benefit all involved, including those currently working in these roles.

ICLs are not the only professionals with responsibility for ensuring the family courts hear children’s voices. However, ICLs are well placed not only to assist the courts to hear children, but to help to meet the broader goals of children’s participation, which requires taking account of children’s perspectives on being heard. The research presented in this paper suggests that the approaches taken by some ICLs who practice in a relational manner are more likely to facilitate children’s participation and are more congruent with what children say they need from those who represent their interests.

It is possible for ICLs to maintain a focus on the courts’ needs without losing sight of children’s needs, and on children’s right to be protected without losing sight of their right to participate in decision making processes. More attention to this issue could enhance what is achieved by lawyers carrying out this important role, for families, courts, ICLs and the children whose interests they serve.

100 See Fitzgerald and Graham, above n 5, for arguments about what is required to realise a family law system that takes account of children’s need and desire to participate in decision-making processes more generally.