Independent Children’s Lawyers Study

Final report

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Executive summary

This report presents the findings of a mixed-methods research project examining the use and efficacy of Independent Children’s Lawyers (ICL) in the family law system. The research, commissioned and funded by the Attorney-General’s Department (AGD), examines the extent to which having an ICL involved in a family law matter improves outcomes for children. A range of different aspects of ICL practice was examined on the basis of quantitative and qualitative data from ICLs, judicial officers, non-ICL lawyers, non-legal family law professionals (e.g., family consultants) and parents, children and young people who have been involved in a matter with an ICL. Overall, 528 professionals across the various groupings contributed to the data collections, in addition to 24 parents/carers and ten children/young people.

Background

ICLs, who are specially trained legal professionals, are appointed in some federal family law children’s matters as a “best interests” advocate for children (rather than acting as a legal advisor). The Court may use its discretion to appoint an ICL in matters where it is warranted (s68L Family Law Act 1975 (Cth)) (FLA), being guided by the non-exhaustive criteria in Re K (1994 17 Fam LR 537). These criteria include matters where there are allegations of sexual, physical or psychological abuse, allegations of antisocial conduct by one or both parents of a kind that seriously impinges on the child’s welfare (e.g., family violence), or where there is a relocation proposal that would restrict or, in practice, exclude the other parent from having contact with the child.

The specific duties and other obligations of ICLs are described in s68LA of the Family Law Act 1975 and the legal aid commissions’ Guidelines for Independent Children’s Lawyers (Family Court of Australia [FCoA] & Federal Magistrates Court of Australia [FMC], 2007; see Attachment A). The ICL is described as a “best interests” representative rather than a child advocate and is not obliged to act on the child’s instructions (FLA s68LA(2)(b) and s68LA(4)(b)). ICLs must form a view based on evidence in the particular case as to what orders will be in the child’s best interests (s68LA(2)) and make submissions accordingly (s68LA(3)). ICLs are also obliged to ensure that views expressed by the child in relation to the matters at issue are put before the court (s68LA(5)(b)).

The use of ICLs is an important measure of Australia’s fulfilment of the obligations that arise through ratifying the United Nations Convention on the Rights of Child (UNCRC), which recognises the right of children to participate in proceedings relevant to their care (Article 9) and to make their views known in judicial and administrative proceedings affecting them (Article 12) (e.g., McIntosh, Bryant, & Murray, 2008). However, concerns have been expressed by a number of bodies in recent years about the extent to which the current ICL model and funding arrangements satisfy Australia’s obligations (Australian Law Reform Commission, 1997; Child Rights Taskforce, 2011; United Nations Committee on the Rights of the Child, 2005).

The research

The findings presented in this research are based on data collected in four main studies:

- Study 1: Multidisciplinary surveys of ICLs (n = 149) and other professionals, including non-ICL lawyers (barristers and solicitors) (n = 192), non-legal family law system professionals (n = 113), and judicial officers (including registrars) (n = 54). The surveys were predominantly administered online and participants were recruited with the assistance of legal aid commissions, the FCoA, the FMC, the Family Court of Western Australia (FCoWA), the Family Law Section of the Law Council of Australia, state and territory law associations and bar associations, the
Women’s Legal Services in each state and territory, Family Relationship Services Australia, and the Australian Psychological Society Family Law and Psychology Interest Group.

- **Study 2: Interviews with parents and children/young people** who had been involved in a family law matter (in which an ICL was appointed) that was finalised in 2011 or 2012. Interviews focused on the parent’s or child’s experience of the ICL and were conducted by phone (parents) and in person (children). Twenty-three interviews with twenty-four parent/carers and 10 interviews with children/young people were conducted.

- **Study 3: Interviews with ICLs** focusing on substantive practice issues in relation to representing children, procedural questions, the strengths and weaknesses of the ICL role as formulated in legislation, and the qualifications, accreditation and training needs of ICLs. ICLs were invited to express interest in participating in an interview at the conclusion of the multidisciplinary survey. We conducted 20 telephone interviews with ICLs.

- **Study 4 and 4a: An examination of legal aid policy and practice** in relation to ICLs, based on a formal request for information (detailing policy, procedural and budget information) and interviews with representatives from each state and territory legal aid commission and child protection department.

**Main findings**

**Variations in policies and approaches**

The evaluation findings underline the complexities involved in the practice of ICLs. These complexities are evident in several ways. First, while the *Guidelines for Independent Children’s Lawyers* (FCoA & FMC, 2007) and statutory framework operate across the states and territories, there are often substantial differences in the policies of each legal aid commission.

Practices in relation to participation are also varied, particularly in relation to the extent to which ICLs have direct contact with children/young people. The purpose of direct contact may be for familiarisation (of the ICL and child), explanation (before during or after proceedings, for example about processes and outcomes) or consultation. “Consultation” is the term applied in this report to engagement aimed at seeking the child’s or young person’s views on outcomes or processes in relation to the family law matter. This research has highlighted variations in approach, particularly in relation to consultation. Some ICLs, particularly in Queensland, Western Australia and South Australia, adopt an approach in which this is seen as a collaborative function, with family consultants (Qld) or single experts (WA and SA) acting primarily as the conduit for ascertaining and interpreting children’s views, facilitated by the ICL. Under the other approach, consultation occurs as part of the ICL’s engagement with children, and this may occur in parallel with the children being seen by family consultants.

There are also considerable variations in the funding of ICLs across each state and territory. Nationwide, over the period 2009–10 to 2011–12 (three years), ICL grants totalled just over $65 million, averaging some $5,371 per grant. However, at a state and territory level, the total ICL grants of aid ranged from just over $395,000 in the Northern Territory to just under $23 million in Queensland over the three-year period. This compares with funding allocations of $263 million over the same period toward general family law grants (averaging $1,700 per grant).
ICL role and functions

The role of the ICL is multifaceted. The data suggest three dimensions of the ICL role that may be relevant to varying extents, depending on the factual issues involved in a case, the age of the children and the representation status of the other parties. These are:

- facilitating the participation of the child in the proceedings;
- evidence gathering; and
- litigation management—playing an “honest broker” role in case management and settlement negotiation.

Importantly, the data suggest that from the perspective of ICLs themselves—and to a lesser extent, judicial officers, non-ICL lawyers and non-legal professionals—the ICL’s role in facilitating a child’s participation is of less significance than the evidence-gathering and litigation management functions. As noted, practices in relation to participation are particularly varied, with differences in approach being driven both by different policies among some state and territory legal aid commissions and by different approaches adopted by individual practitioners. A key area where approaches differ is in relation to whether ICLs consult with children directly or whether they view this as primarily a function of the family consultant/single expert. From the perspective of parents and children, lack of meaningful direct contact between ICLs and children leads to concern about their capacity to understand and advocate for a best interests outcome.

A valued role

Overall assessments as to the effectiveness of ICL practice generally reflected positive assessments among judicial officers and ICLs, but less positive assessments from non-legal professionals and non-ICL lawyers. It is clear that the role of the ICL is valued, particularly by judges, for bringing an independent, impartial and child-focused perspective to the way in which a matter is litigated, especially from an evidence-gathering perspective. Importantly, ICLs (who are largely publicly funded) make independent judgments about the conduct of a case that can ameliorate the tendency for family law proceedings to be conducted bilaterally, in a parent-focused way.

Some concerns

The research identifies some significant concerns, based on data from all professional stakeholders, including some ICLs themselves. These concerns revolve broadly around the adequacy of accreditation, training and ongoing professional development arrangements in equipping ICL practitioners to deal directly with children and perform optimally in matters involving family violence and child abuse. There is also recognition that current funding arrangements place constraints on the level of service that ICLs can provide, with some private practitioners indicating that their ICL workload is extremely under-funded, meaning much of this work is performed pro bono. More narrowly, data from all stakeholders indicates that the performance of some ICL practitioners falls short of the required standard, primarily in terms of acting independently, impartially and with professional rigour.

Experiences of parents and children

The data also show that the circumstances of the families for whom an ICL is appointed are complex. Most of the families who participated in this study had been involved in lengthy family law proceedings, often over several years. Many of the parents had prior or current safety concerns for themselves or the child, and a large number indicated that they had concerns about sexual abuse or child injury at the hands of the other parent before or during their court case. In respect of the
children and young people interviewed, the issues in the case (in varying ways) revolved around the question of whether they were living in conditions in which they were safe or unsafe. In this context, “safety” refers to circumstances involving a risk of physical or emotional harm through abuse, injury or neglect. While the experiences of the parents and children/youth examined in this study cannot be assumed to be typical of the experiences of all families involved in a matter with an ICL, they do illustrate the personal effect an ICL can have on families where the system’s ability to address complex situations effectively and expeditiously has heightened importance.

A very significant theme in the data from parents, children and young people is their understanding that the focus of the role of the ICL emphasises functions supportive of participation. This contrasts with the views of many ICLs and judicial officers, who place greater emphasis on the case management and evidence-gathering aspects of the role. Perhaps as a consequence of this disjunction, many parents and children/youth described unmet expectations and disappointment in this regard. Most of the children and young people interviewed conveyed feelings of disappointment and even betrayal in relation to their experiences with the ICL. The accounts of these children and young people indicate that often they were uncertain about what the ICL did, were disappointed by little or no contact with the ICL, and were uncertain as to how their views fed into the decision eventually made.

Insights from participating parents, children and young people also highlight other concerning aspects of family law processes. Crucially, the accounts of many parents and children/youth indicate that their exposure to professional approaches that at best may be described as insensitive where child safety is a concern, and suggest that the approach is based on a prima facie assumption that no violence or abuse has occurred. Considered in light of evidence showing that being exposed to violence and subjected to abuse causes children trauma, and the extent to which these issues are germane to families who use the family law system, such methods may lead to increased trauma.

Summary

This report has examined the role of ICLs in the family law system. The findings indicate that considerable value is placed on the role, especially by judges. There are three overlapping aspects to the ICL role, relating to participation, litigation management and evidence gathering. In fulfilling the litigation management and evidence-gathering role, ICLs are seen to bring a child focus to proceedings that would otherwise be conducted bilaterally and adversarially. The capacity of many ICLs is recognised to be excellent. It is also clear from the range of responses across participant groups that there are concerns about the capacity and commitment of some practitioners. Although it is apparent that there are various individual and systemic issues that have an impact on effective ICL practice, questions as to the level of independence, impartiality and professional rigour were raised in responses to the survey and interviews. Respondents also considered that mechanisms for selection, training, monitoring performance and ensuring accountability needed to be strengthened.
1 Introduction and methodology

1.1 Introduction

This report sets out the findings of research examining the role and efficacy of Independent Children’s Lawyers (ICLs) in the family law system. The research, carried out between June 2012 and April 2013, comprised several different studies designed to examine the core research question, namely: To what extent does having an ICL involved in family law proceedings improve the outcomes for the child? The studies involved quantitative and qualitative approaches to collecting data from professional stakeholders—judicial officers, ICL practitioners, non-ICL lawyers, and non-legal family law system professionals (including family consultants), with a total of 528 professionals contributing to the research. Importantly, the perspectives of parents and children involved in a matter with an ICL have contributed to the findings, through a study based on 23 interviews with 24 parents/carers and 10 interviews with children/young people.

The Attorney-General’s Department (AGD) commissioned the Australian Institute of Family Studies (AIFS) to conduct the research after a competitive tender process initiated in December 2011.

In the process of developing and implementing the project methodology, the research team has worked closely with National Legal Aid and has had the support of the three family law courts (the Family Court of Australia (FCoA), the Federal Magistrates Court (FMC) and the Family Court of Western Australia (FCoWA)), the Family Law Section of the Law Council of Australia and Family Relationship Services Australia. Consultation with all of these organisations reinforced the need for, and timeliness of, this research.

Other developments in law have also highlighted questions and debates about the role of child representation in family law and other proceedings. In *RCB as litigation guardian of EKV, CEV, CIV and LRV v. The Honourable Justice Colin James Forrest, one of the judicial officers of the Family Court of Australia & Ors* [2012] HCA 47 (*RCB*), the High Court held the absence of an ICL in matters dealing with applications arising under the Convention on the Civil Aspects of International Child Abduction (the Hague Convention) did not constitute a denial of procedural fairness (see Box 1).

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1 Twenty of the ICLs participating in Study 1 also participated in the interviews for Study 3.

2 The Federal Magistrates Court of Australia is now known as the Federal Circuit Court of Australia and the title of “federal magistrate” is now “judge”, following the passage, assent and proclamation of the *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth).

3 These are matters where a child has been removed or retained in an overseas country without one parent’s consent (where parental responsibility for deciding where a child should live has not been removed from or modified with respect to the non-consenting parent). The Hague Convention governs decisions about the jurisdiction in which the substantive parenting matter (and other associated legal proceedings) will be heard.
Box 1: Role of ICLs in Hague Convention matters

The court may request the appointment of an ICL to represent a child who has experienced international abduction by a parent if there are "exceptional circumstances that justify" the appointment (s68L(3)) in proceedings brought under the Hague Convention. What constitutes exceptional circumstances is at the discretion of the court, but is often treated as something more than "unusual". The Senate Legal and Constitutional Affairs References Committee (2011) recommended a reconsideration of the exceptional circumstances test, noting in particular the evidence of the Chief Justice of the Family Court that Hague matters are complex and do not always proceed in the summary nature originally contemplated by the legislation and regulations (p.42).

In a recent decision of this nature from the FCoA, Bennett J justified a decision seeking the appointment of an ICL for reasons that could be broadly characterised as case management and evidence gathering. The decision also contemplated a role for the ICL in ascertaining the children's views: “depending on the age and competency of the children, it is also appropriate for the independent children's lawyer to go through the process of obtaining the children’s views”. Bennett J indicated the expectations of an ICL in a Hague Convention matter would encompass facilitating discussion between the parents, arranging mediation, testing and researching proposed conditions on return, and seeking contact between the distant parent and the child:

I envisage that an independent children's lawyer would inform a child, who is able to converse sensibly although who may not be Gillick-competent, that he or she will tell the court (and the parties) what the child wishes to say with the necessary qualification that, in a Hague abduction case, the child’s views cannot be given the same consideration as is mandated by s60CC(3)(a) of the Act. I expect that the independent children's lawyer would also, responsibly, canvass with the child the possibility that the court may decide to send the children back to their habitual residence, contrary to views of the child and the abducting parent, for the purpose of hearing what the child says about such things as immediate arrangements to see the left behind parent or to go back to school upon his or her return to the other jurisdiction. The purpose of this discussion is to inform the parties as well as the court in the consideration of conditions to return which may be imposed to ameliorate an alleged grave risk of harm or an alleged intolerable situation within the context of Regulation 16(3)(b) or as to stand alone conditions and/or orders under Regulation 15. [68]

Table 2.6 in this report suggests that ICLs are very infrequently appointed to Hague matters (only 2% of ICLs stated that they were “often” or “always” appointed). The open-ended survey responses of a number of ICLs suggest that many feel this is appropriate; that is, that Hague matters are not concerned with best interests arguments, but the proper jurisdictional forum for resolving the substantive parenting issues. One ICL cautioned that the appointment of ICLs to Hague matters could have the dual effect of altering the nature of the proceedings and increasing the risk of systems abuse of the child:

Having an ICL to put the views of the children forward in relation to forum will turn what is essentially a forum hearing into a mini-trial. If children are then returned to their country of origin for the substantive proceedings, they may well be required to see further experts and we risk systems abuse of the child. [ICL, private practice, survey]

Another ICL noted that, while they had reservations about the involvement of ICLs in Hague matters generally, there might be scope for the ICL to assist parties to settle the matter:

I have a concern about the appointment of ICLs in Hague matters, as it is not a best interests argument and simply a forum argument. There is limited value or role an ICL can play. However, in a matter recently … the ICL played a vital role … to assist the parties to settle the matter. [ICL, LAC, survey]

However, echoing the reasoning of Bennett J above, some ICLs also suggested that ICLs could play a valuable evidence-gathering and case management role by helping to ensure that the necessary information is before the court:
When it is a Hague matter, [the] ICL can be of assistance for the purposes of getting information before the court, not just from the point of view of subpoenaed material but, for example, cultural information, and where there may be arguments as to whether, for example, the court should look at the views of the child in accordance with the specific legislation. [ICL, private practice, survey]

One ICL recognised the role of the ICL in facilitating the child’s participation by ensuring the views of the child are before the court. However, this ICL also reflected the importance of other functions that could be better characterised as case management:

I believe an ICL can play a valuable role in [Hague] proceedings, in ensuring that the views of the children are placed before the court. The ICL can also play an important role if mediation is appropriate in the matter ... The ICL could provide valuable liaison with the Central Authority. [ICL, LAC, survey]

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Refer to the discussion in Garning & Department of Communities, Child Safety and Disability Services and anor [2012] FamCA 639 [19–22].

State Central Authority & Best (No 2) [2012] FamCA 511 [64–68, 79–82]. The decision also canvasses the importance of the ICL where parties are self-represented.

State Central Authority & Best (No 2) [2012] FamCA 511 [67].

The Gillick test is the test of competence established by the House of Lords’ in Gillick v West Norfolk and Wisbech Area Health Authority and Another [1986] 1 AC 112. In delivering the House’s leading judgment, Lord Scarman noted “parental right yields to the child’s right to make his own decisions when he reaches sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision” [p. 186].

1.2 Background

ICLs are appointed in some federal family law children’s matters to assist courts in resolving disputes involving children and represent the child’s best interests. Courts have the discretion to order that a child’s interests be independently represented in cases where they form a view that this is warranted (Family Law Act 1975 (Cth) s68L). ICLs are specially trained legal professionals who are appointed to ICL panels by legal aid commissions (LACs) in each state and territory.4 Their appointment in a matter is funded by legal aid, although in some states and territories a contribution towards costs may be sought from the parents (if the parents are not eligible for legal aid). The use of ICLs is considered to be an important element of Australia’s obligations as signatory to the United Nations Convention on the Rights of Child (UNCRC), which recognises the right of children to participate in proceedings relevant to their care (Article 9) and to make their views known in judicial and administrative proceedings affecting them (Article 12) (e.g., McIntosh, Bryant, & Murray, 2008).

Over the last decade, however, concerns have been expressed about the extent to which current resourcing arrangements and practice models fulfil Australia’s obligations as a signatory to the UNCRC in relation to children’s participation in decisions affecting them (Child Rights Taskforce, 2011; United Nations Committee on the Rights of the Child, 2005). Concerns had also previously been raised by the Australian Law Reform Commission (ALRC; 1997), which noted in the Seen and Heard report that “the court, rather than the child, may best be considered the client of the best interests representative” (¶ 13.34).5

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4 A complete list of legal aid commissions in Australia appears at the conclusion of this report.

5 Concerns that Australia may be in breach of its obligations to the UNCRC as a result of restrictions on funding ICLs were also raised in evidence by the FCoA, the FMC and the Law Institute of Victoria to the Senate Legal and Constitutional Affairs References Committee, Access to Justice Inquiry (Senate Legal and Constitutional Affairs Committee, 2005).
In making decisions about what parenting arrangements may be in a child’s best interests, courts have an obligation to consider any views expressed by the child (FLA s60CC(3)(a)). The appointment of an ICL is one of three co-existing and potentially concurrent mechanisms whereby children’s views may be conveyed to the court in Australian family law proceedings. The other mechanisms are Family Reports and interviews with judicial officers.\(^6\)

Prior to 2006, the role of the ICL (referred to then as a “child representative”) was articulated in practice instruments (e.g., *Guidelines for Child Representatives*, Family Court of Australia, 2003), which expressed the principles enunciated in case law.\(^7\) Criteria for appointments were also outlined in case law (the leading case is Re K (1994) 17 Fam LR 537). In 2004, the Family Law Council expressed concern about the lack of legislative recognition of the child representation role and made a range of recommendations, including for legislative reform and further research (Family Law Council, 2004).\(^8\)

Legislative articulation of the ICL role occurred as part of the 2006 reforms to the family law system.\(^9\) These reforms maintained the existing formulation of the role as that of a “best interests” representative rather than a child advocate, essentially codifying pre-existing practice. The ICL is not the child’s legal representative (FLA s68LA(4)(a)) and is not obliged to act on the child’s instructions (FLA s68LA(4)(b)). However, ICLs must form a view on the basis of the evidence of what is in the best interests of the child (FLA s68LA(2)), and if they form a view that a particular course of action is in the child’s best interests, make submissions accordingly (FLA s68LA(3)). They are also obligated to ensure that any views expressed by the child that relate to the matters at issue in the proceedings are put before the court (FLA s68LA(5)(b)). ICLs are required to act impartially in dealings with the parties to the proceedings (s68LA(5)(d)).

A further recent legislative amendment arguably places more emphasis on the importance of child representation in family law proceedings, with the introduction of a provision specifying that an “additional” Object of Part VII of the FLA is to “give effect” to UNCRC (s60B(4)).\(^10\) No significant juridical consideration of the implications of this change has yet occurred, but some

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\(^{6}\) Views among the judiciary vary as to the desirability of undertaking interviews with judicial officers (see Fernando, 2012; Hunter, 2007; and Parkinson & Cashmore, 2007). Children may also be party to proceedings in their own right (with instructions potentially given through a “next friend”) (FLA s65C(b)), but this is uncommon (see, e.g., *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 31 Fam LR 339).

\(^{7}\) The leading case was *In the Matter of P and P* (1995) 19 Fam LR 1, but see also *In the Marriage of Bennett and Bennett* (1991) 17 Fam LR 561; *DS v DS* (2003) 32 FamLR 352 and R and R: *Children’s Wishes* (2000) 25 Fam LR 712. Additionally, the decision of Fogarty and Kay JJ in *In the Marriage of Harrison and Woolard* (1995) 18 Fam LR 788 identifies that the weight to be given to a child’s wishes/views “will depend upon the children’s cognitive age and level of maturity in each particular case. The research supports a rebuttable presumption that children of the age of seven are capable of making a considered decision, a decision in which reason is employed” [p. 823] and sets out the premise that the right of a mature minor to make their own decisions is subject to the best interests principle. Around this time, the FCoa (1995) also issued a discussion paper, *Representing the Child’s Interests in the Family Court*. On the role of the ICL more recently, see: RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest, one of the Judges of the Family Court of Australia and Others [2012] HCA 47; *State Central Authority & Best* (No. 2) [2012] FamCA 511; *State Central Authority and Young* [2012] FamCA 843; *Knibbs and Knibbs* [2009] FamCA 840; McKinnon and McKinnon [2005] FMCA Fam 516; *T v S* (2001) 28 Fam LR 342; and *T v N* (2003) 31 Fam LR 257.


\(^{9}\) *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), amending the *Family Law Act 1975* (Cth), Division 10 of Part VII. The *Guidelines for Independent Children’s Lawyers* (FCoa & FMC, 2007) were also updated.

\(^{10}\) *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).
commentators (e.g., Parkinson, 2012) have argued that this change does not create any additional need for child representation.

Concern has also been expressed about funding for ICLs and different practices in different states and territories, as recorded in the report of the Access to Justice Inquiry (Senate Legal and Constitutional Affairs References Committee, 2009). There has been particular concern about the situation in Victoria—where ICL appointments have recently been restricted to matters that meet criteria 1, 3 and 7 of the non-exhaustive Re K (1994) 17 Fam LR 537 criteria—but there is also evidence of a strain on resources elsewhere. In Western Australia, for example, funding is only available for ICLs in matters that meet criteria 1 and 6 of the non-exhaustive Re K criteria. Criterion 1 concerns cases involving allegations of sexual, physical or psychological abuse; criterion 3 concerns cases where the child is apparently alienated from one or both parents; criterion 6 concerns alleged antisocial conduct by one or both parents (of a kind that “seriously impinges on the child’s welfare”, including family violence); and criterion 7 concerns instances of a significant medical, psychiatric or psychological illness or personality disorder affecting a parent, a child, or another person with whom a child has significant contact.

The remaining, non-exhaustive Re K criteria indicate that ICLs may be necessary in cases where these issues are present:

- there is a “high level of long-standing conflict between the parents (‘intractable conflict’)”;
- “there are real issues of cultural or religious difference” affecting the child;
- the sexual preferences of either, both or another person with whom the child has contact, are likely to impinge on a child’s welfare;
- a child of mature years is expressing strong views that would, if given effect to, result in changes to longstanding living arrangements or the cessation of contact with one parent;
- a relocation proposal would greatly restrict or, in practice, exclude the other parent from having contact with the child;
- it is proposed to separate siblings;
- no party has legal representation; and
- an application under the court’s welfare jurisdiction (s67ZC) for medical treatment is involved and the child’s interests aren’t adequately represented by one of the parties.

More specifically, the current test for the appointment of ICLs to represent children who have experienced international abduction by a parent has recently been criticised. The Senate Legal and Constitutional Affairs References Committee (2011) recommended a reconsideration of the exceptional circumstances test in which the appointment of an ICL is made in cases of parental separation involving the abduction of children to and from Australia. The recommendation was based on persuasive evidence to the Inquiry from the Chief Justice of the Family Court that indicated the test “may now be too restrictive” given the complexity of abduction proceedings (Senate Legal and Constitutional Affairs Committee, 2011, p. 42).

An additional notable aspect of the policy environment is the priority placed on legal services to children and ICL services under the National Legal Aid (2011) Strategic Plan 2011–2013 as one of

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11 For example, Law Institute of Victoria (2009). Comments have also been made in judgments: see, e.g., Dardelell and Brent [2010] FamCA 4 ¶15–17.

12 ICLs are part of the overall Magellan case management model, which is used in the Family Court of Australia for matters where sexual abuse or serious physical abuse allegations are raised. Higgins (2007) reported that stakeholders referred to ICLs as one of the key features in the success of the program through their identification of relevant issues and bringing the information to the attention of the parties and court in a timely manner.
three key priority areas for review of funding consistency (the other two priority areas are mental health and low income). The National Legal Aid guidelines were released in 2007 and serve to inform the practice of ICLs by describing the role of the ICLs, the nature of their engagement with children and the management of cases.

1.3 Research methodology

As noted at the outset, the core research question for this project is: To what extent does having an ICL involved in family law proceedings improve the outcomes for the child? A series of further research questions examining issues pertinent to understanding how practice and organisational approaches impinge on this question were formulated to guide data collection for the four core studies in the methodology. They cover: allocation and utilisation of ICLs, the role and responsibilities of ICLs, the effectiveness of ICLs from the perspective of parents and professionals, and whether improvements need to be made to systems and processes. Obtaining data to address these research questions involved a number of separate but complementary studies incorporating quantitative and qualitative approaches. This mixed-methods strategy allowed for triangulation among the studies, with most research questions being addressed on the basis of more than one source of data.

The AIFS Human Research Ethics Committee provided ethical review for each of the studies. No incidents occurred during the studies that required reporting to the committee. The nature of this research, and the involvement of professional participants working in cases with complex family dynamics, and parent/carer and child/young person participants presenting with past and/or current high levels of conflict within the family, raised significant ethical complexities for the research team, including:

- the need to ensure that data from a potentially vulnerable population, who may have experienced significant levels of trauma, were collected sensitively, without causing further trauma;
- the need to be vigilant about the possibility that information disclosed in interviews may trigger a reporting obligation if a participant or their child was revealed to be at risk of harm or abuse;\(^\text{13}\) and
- the need to maintain the confidentiality of a relatively confined group of professional and parent/carer and child/young person participants and report data in a way that means no participant who provided information on a confidential basis could be identified.

Several strategies were adopted in order to address these complexities. Firstly, the research team comprised researchers with substantial experience in pertinent areas, including three researchers with experience in interviewing children and three researchers with legal qualifications and a history of family law research. All members of the research team have significant experience working with vulnerable participants on subjects such as family violence, sexual violence and child abuse. The research team also engaged expert consultants to provide advice (Professor Patrick Parkinson and Associate Professor Judy Cashmore, both at the University of Sydney) and assist with some of the interviews with children and young people (Dr Nicola Ross, University of Newcastle).

Secondly, an intensive level of supervision and debriefing occurred as the data collections proceeded, especially for the interviews involving parents/carers and children/young people. The

\(^{13}\) The protocol concerning obligations to report disclosures suggesting a child or young person might be at risk of harm to child protection authorities was invoked in the course of fieldwork.
procedures adopted for these interviews are detailed at section 1.3.2 as part of the description of the specific methodology adopted.

In order to maintain confidentiality, significant care has been taken to ensure data are used in a way that maintains the anonymity of the informant. In some instances, findings are presented in a way that reflects high-level conclusions without detailed discussion of the data. This approach was adopted to avoid breaching confidentiality. This concern also informed the selection and presentation of quotations and the accounts of children and young people used in this report. Particular care has been taken to ensure that the identity of parents/carers, children/young people and professional participants (where they did not give permission to be identified) cannot be gleaned from the quotations. In accordance with ethics requirements, all interview transcripts were de-identified, and the original transcripts and recordings destroyed.

The following sections set out the particular approaches taken for each study.

1.3.1 Study 1: Multidisciplinary survey of ICLs, judicial officers and other practitioners

This study involved an online survey with each of the following professional groups in each state and territory:

- ICLs—those appointed as an ICL in four or more cases per year;
- non-ICL lawyers (solicitors and barristers)—their appointment as an ICL was limited to between 0 and 3 cases per year only;
- non-legal professionals—including family consultants/single experts, psychiatrists, psychologists and family relationship sector professionals (including mediation and family dispute resolution [FDR] professionals, and professionals working in children’s contact services or post-separation support programs, such as parenting orders programs); and
- judicial officers from the FCoA, FMC and the FCoWA.

In addition to demographic and professional background questions, each survey used structured questions to collect quantitative data on the views of each professional group about the operation of ICLs in the federal family law system. Survey questions covered the areas of ICL appointments, the work undertaken by ICLs, the effectiveness of ICLs in family law proceedings, the professional development and training of ICLs, professional relationships and cooperation between ICLs and other family law system professionals, and the funding of ICLs.

Each professional group was also provided with the opportunity to answer open-ended questions regarding various issues, including the ICLs’ direct consultation with children/young people, the most/less significant aspects of the ICL role, the areas in which ICLs were most/less helpful, the available pool of ICLs, training and qualification requirements, the interaction/cooperation between ICLs and other family law system professionals and the legal aid funding model. These qualitative data complemented the insights generated through the structured survey questions.

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14 Family consultants are psychologists and/or social workers and are defined in FLA s11B as being appointed by the FCoA (pursuant to s38N), by the Federal Circuit Court (pursuant to the Federal Circuit Court Act 1999 (Cth)), or appointed pursuant to the regulations (specifically Regulation 7 of the Family Law Regulations 1984 (Cth) or by a law of a state, and their primary functions are set out in FLA s11A. The primary function of a family consultant is to provide services in relation to proceedings under the Act, including assisting and advising people involved in the proceedings, helping the parties to resolve disputes, assisting and advising the court, and giving evidence and reporting to the court under s55A and s62G. Practitioners who provide services under Regulation 7 are based in private practice, are not employed by the court, and are engaged when an internal family consultant is not available.
The draft survey instruments were developed by AIFS, with extensive consultation undertaken with the AGD and National Legal Aid. The survey was programmed in LimeSurvey, and was piloted by 16 AIFS researchers (including 10 researchers outside of the family law team) and two external pilot testers (currently practising as lawyers). The survey instruments were updated to incorporate the feedback provided.

The surveys were available online for completion from 18 September 2012 to 16 November 2012, with invitations to participate circulated via numerous organisations, including National Legal Aid, the FCoA, the FMC, the FCoWA, the Family Law Section of the Law Council of Australia, state and territory law associations and bar associations, Women’s Legal Services in each state and territory, Family Relationship Services Australia, and the Australian Psychological Society’s Family Law and Psychology Interest Group.

Usable data were received from each professional grouping as follows:

- **Survey 1: ICLs**—149 respondents across all Australian states and territories, including 62 ICLs employed by legal aid commissions and 81 ICLs operating as private practitioners appointed to the panel of ICLs. The employment details of 6 respondents were missing in this category.

- **Survey 2: Non-ICL lawyers**—192 respondents across all Australian states and territories, comprising 169 solicitors and 21 barristers, with the profession details missing for 2 respondents. The non-ICL lawyers included private practitioners (n = 151) solicitors employed by legal aid commissions (n = 19) and solicitors practising at community legal centres (n = 12), with the employment details missing for 10 respondents in this category.

- **Survey 3: Non-legal professionals**—113 respondents across all Australian states and territories, comprising family consultants (n = 55), FDR practitioners (n = 14), children’s contact services professionals (n = 11), post-separation services managers (n = 8) and service level coordinators/managers (n = 2), with 23 responses listing other occupations including other professional experts (for example counsellors, psychologists, single expert witnesses and family report writers (n=18) or missing with respect to occupation. Survey responses from this category will generally be reported as an aggregate, although where it is relevant in the context of the discussion to differentiate between the categories of non-legal professional, we have done so.

- **Survey 4: Judicial officers**—54 respondents across all Australian states, comprising judicial officers from the FMC (n = 25), the FCoA (n = 17) and the FCoWA (n = 11), with one missing response with respect to the relevant court.

### 1.3.2 Study 2: Views of parents and children

This study examined the views of parents/carers and children/young people who had been involved in family law matters where an ICL was appointed.

**Research methodology**

A semi-structured interview schedule was developed for the interviews with parents covering key themes, including the nature of the ICL’s involvement in their matter, whether and why the ICL involvement was positive and/or negative, the tasks undertaken by the ICL in their matter (including consultation with their son/daughter/children), the ICL’s understanding of their children’s needs, and any effects from the ICL’s involvement in their matter. A semi-structured interview schedule was also developed for the interviews with children/young people and included questions relating to their contact (if any) with the ICL, their understanding of the role of the ICL and their experience of having an ICL appointed to represent their best interests.
Comments were sought from other AIFS researchers and from the AGD in relation to each interview schedule and the interview instruments were updated to incorporate their feedback.

Initially, recruitment of parents and children/young people was intended to be principally through legal aid commissions in three jurisdictions (Victoria, NSW and Queensland), with each of these legal aid offices selecting eligible files and then sending our letter of invitation and information sheet to up to 150 eligible parents in late January and early February 2013. Parents were initially eligible to be interviewed where their family law matter (in which an ICL was appointed) was finalised during the 12-month period from 1 July 2011 to 30 June 2012, and where no proceedings (such as an appeal) remained on foot. The eligibility period was subsequently extended to the two-year period between 1 January 2011 and 31 December 2012, in response to sampling requirements.

Children/young people aged between 10 and 17 years were recruited via their parent(s), and their participation was dependent on obtaining both their consent and the consent of one of their parents.

Interviews with the parents/carers were conducted primarily by telephone, and interviews with the children/young people were conducted in person, at a location nominated by the child/young person (in consultation with the parent/carer).

Two issues influenced the initial recruitment strategy: the first was resources and the second arose from insights emerging from surveys and interviews with ICLs concerning the different approaches to participation adopted in different jurisdictions.

The strategy was also intended to ensure that the invitation to participate in the research reached a large proportion of potentially in-scope parents to ameliorate the sample bias that may arise through a less systematic approach to reaching potential participants.

Shortly after commencing recruitment activities, the research team made a decision to augment the sampling strategy in two ways. This was in part because recruitment activities through the legal aid commissions in NSW and Victoria did not result in a sufficient number of eligible parents/carers expressing interest in participating, in addition to a large number of parents wanting to participate who made direct contact with the research team after becoming aware of the study through media articles and subsequent discussion in social media.

Firstly, after additional ethics approval, the research team made a decision to interview the parents/carers who made direct contact with the team where that parent met the eligibility criteria and was assessed in accordance with the project protocols as being sufficiently resilient to undertake the interview.

Secondly, the research team made a decision to identify additional parent and child/young person participants in NSW and Victoria by taking out an advertisement in local media publications in target locations and by utilising AIFS social media outlets. A single advertisement was run in local papers in Newcastle (Newcastle Star), Sydney (Sydney MX), Melbourne (Melbourne MX, Berwick/Pakenham Cardinia Leader, Knox Leader, Melton/Moorabool Leader, Whitehorse Leader and Whittlesea Leader) and Geelong (Geelong Echo and Geelong News) in mid-March 2013. Time and budgetary constraints meant it was not possible to place further advertisements. These newspapers were identified on the basis that they were the local newspapers within the research area and, in the case of Melbourne, the local newspapers were selected from areas across Melbourne with a higher proportion of families in their readership.

All parents/carers and children/young people who were considering taking part in an interview were provided with an information sheet about the study. Information sheets with age-appropriate language for children and for young people were developed, as well as an information sheet for parents.
The interviews with parents/carers and children/young people commenced in early February 2013 and concluded in early April 2013.

On most occasions, two team members jointly conducted each telephone interview with parents, with one conducting the interview and the second taking notes. All interviews with children were conducted in person by one member of the family law team at AIFS or a specialist consultant, in the presence of a second family law team member. As well as recording notes about dialogue between researchers and a participant, the presence of a second researcher enabled non-verbal expressions and cues to be recorded that would otherwise not be captured by digital audio recordings, especially during interviews with children. Interviews with parents averaged 34 minutes and interviews with children averaged 23 minutes in length.

The study aimed to recruit a sample of up to 20 children/young people and up to 40 parents/carers. Following the comprehensive recruitment activities described above, in total, 23 interviews with 24 parents/carers and 10 interviews with children/young people were realised. The smaller sample size reflects the difficult and sensitive nature of the research topic. However the number of themes that were replicated even within this small sample size provides an assurance of the validity of the data. Significantly, key themes evident in the parent data also emerged from the data from professionals.

Approximately 330 parents/carers in Queensland, NSW, and Victoria were individually invited to participate in an interview, in addition to the general call to parents made through target media advertising, social media and word of mouth. Ten parent interviews were achieved via the invitations sent out through legal aid commissions, and 13 parent interviews were achieved from other means, such as social media, advertising and word of mouth.

There was diversity across the sample of parents/carers and children/young people in terms of geographic location, gender, and the type of court through which their matter had proceeded. Ten parent/carer interviews and four child/young person interviews were conducted in Queensland, seven parent interviews and five child/young person interviews were conducted in NSW and six parent interviews and one child/young person interview were conducted in Victoria. These interviews were conducted with families residing in a mix of metropolitan and regional locations (14 parents/carers and three children/young people resided in metropolitan locations and eight parents/carers and seven children/young people resided in regional locations). The majority of parents interviewed were female (n = 17) with a smaller number of fathers (n = 5) and one extended family carer couple. Most matters had been heard in the FMC (n = 14) with a further five matters heard in both the FMC and FCoA, and four cases heard in the FCoA only.

**Additional ethical considerations for parent and child interviews**

In preparation for the interviews, arrangements were made for one of two registered psychologists employed by AIFS to be available in case significant levels of distress or difficulty emerged during the interviews with participants. The initial eligibility criteria for conducting interviews with parents, children and young people was that their family law matter was finalised in 2011 or 2012, with no further matters currently on foot. Parents/carers and children/young people who expressed interest in undertaking an interview were first screened to ensure that the circumstances of their matter met the initial eligibility criteria. A large number of parents who expressed interest in the study were ineligible because they did not meet these initial criteria. Potential participants were then assessed in respect of their general wellbeing and resilience to take part. This determination was based on a participant’s willingness to participate in the research, the level of emotion displayed in discussing their case (in order to establish that the circumstances of their matter met the other eligibility criteria), and the researcher’s experience in determining whether the potential for causing
additional distress was too high. In a very small number of cases the research team decided not to proceed with arranging an interview with a parent/carer or a child/young person in order to minimise participant burden. Several parents who were not eligible for inclusion in the study by reason of being out of scope or not sufficiently resilient were referred to services that could be of assistance to them.

In many of the parent/carer and child/young person interviews, emotional distress on the part of the participant was evident. In anticipation of this, the research team developed protocols for responding appropriately to distress. In order to equip interviewers to respond appropriately, a range of potential response strategies were identified in the protocols. The interviewer identified the appropriate strategy to adopt as the interview proceeded and this was subsequently reviewed with other team members to determine whether further follow-up was necessary. The team provided details of services that could be of assistance to around one-third of the parent participants, and on three occasions the team re-contacted a parent following an interview to follow up on matters relating to their interview. The contact details of appropriate support services (Kids Helpline and like services) were given to all children/young people prior to and at the conclusion of their interview, irrespective of whether they presented as distressed. There were no participants who were assessed as requiring one of the AIFS on-call psychologists to make follow-up contact.

Finally, the research team implemented comprehensive protocols for managing disclosures concerning a risk of violence or abuse that could trigger a reporting responsibility. After parent interviews, the two staff members would discuss the interview and data collected, and after most interviews would debrief with other members of the research team to discuss whether any reportable information had been disclosed and whether the interviewer had handled sensitive issues appropriately. The debriefing also addressed any distress or concern that arose for the interviewer. The nature of the circumstances and experiences of the participant group meant that the protocols were of critical importance to the study.

1.3.3 Study 3: In depth-interviews with ICL practitioners

This study involved individual, semi-structured interviews with 20 ICLs to enable the views and experiences of the professionals who are the subject of this study to be examined in greater depth. An expression of interest form regarding potential participation in the individual interviews was included at the completion of Survey 1, with selected participants approached to make arrangements for the interview to take place by telephone with a member of the family law team at AIFS. Of the 63 survey respondents expressing an interest in participating in the semi-structured interviews, just under one-third (n = 20) were interviewed.

A semi-structured interview schedule was developed and implemented covering key themes, including substantive practice issues arising in relation to representing children’s best interests (such as consulting with children and forming a view as to their best interests), procedural issues (such as appointment practices and their approach to undertaking ICL work), the strengths and weaknesses of the ICL role as it is currently formulated and as it operates in practice, and any changes to the ICL system/process (such as any accreditation, training and funding needs). Comments were sought from other AIFS researchers and from the AGD in relation to this interview schedule and the interview instruments were updated to incorporate their feedback.

Data collection for this study was undertaken during November 2012—January 2013, with interviews conducted by telephone with ICLs from each Australian state and territory.

The sample comprised five ICLs from each of Queensland, Victoria and New South Wales, and one participant in each of the remaining states and territories: South Australia, Western Australia, Tasmania, Northern Territory and the Australian Capital Territory. Maximum variety selection was
used to target ICLs from all states and territories, with the geographic distribution of interview participants reflecting the national scale of the ICL survey undertaken as part of Study 1. Larger samples were drawn from Queensland, Victoria and New South Wales to capture the variety of practice approaches (as informed by preliminary survey findings from Study 1). Maximum variety selection was also used to target ICLs from central business district (CBD), suburban, regional and rural locations, and to select ICLs of varying ages, levels of practice experience, and a mix of “inhouse” and private practitioners. The interview sample also comprised 12 female ICLs and eight male ICLs.

Taking this approach provided wide-ranging, descriptive data about typical and atypical ICL practices and experiences from a broad range of geographic locations, albeit with a heavier weighting in favour of eastern states.

1.3.4 Study 4: Examination of legal aid policy and practice

This study examined the policies and practices concerning ICLs of each legal aid commission. Information was sought from each commission through a formal request for information and supplementary telephone interviews with the section manager of each commission’s family law practice or another nominated representative. The written information request focused on administrative and budgetary information as well as the policies and procedures in place in each jurisdiction. The request for information also asked that commissions nominate the most appropriate person to participate in a telephone interview. Those telephone interviews focused on broader strategic questions and provided context for the request for information.

The sum of this information allowed the following questions to be examined:

- What are the policies of each legal aid commission regarding the funding of ICLs?
- What proportion of legal aid funds have been applied to funding ICLs in the family law jurisdiction in the last five years?
- How are funding determinations made on a case-by-case basis?
- How many matters have received ICL funding in the past three years?
- Does each legal aid commission have a policy regarding seeking contributions for ICL costs? How is this policy effected in day-to-day practice?
- What qualifications, training and accreditation are required for ICLs? Do senior managers believe these are adequate? If not, how can they be improved?

The request for information was developed in consultation with National Legal Aid to ensure it reflected the appropriate language and terms used within and across jurisdictions. National Legal Aid also assisted by liaising with each jurisdiction to distribute the request and monitor response compliance. The semi-structured interview schedule was developed in consultation with other AIFS researchers and with AGD.

The request for information was formally made to the Chair of National Legal Aid, and circulated to the head of the commission in each state and territory in early December 2012. Following receipt of each commission’s response to the request for information, interviews with section managers or their nominated representative from all eight jurisdictions were completed in January 2013.

1.3.5 Study 4a: Interviews with child protection practitioners

This study sought to understand the interface between the family law and child protection systems in each jurisdiction, as they relate to the work of ICLs. Contact was made with the department responsible for child protection in each state and territory and nominations were sought and
received for appropriate practitioners to participate in a telephone interview. In most jurisdictions, the nominated practitioner was the head of the work unit responsible for managing the department's child protection legal matters, but in some jurisdictions, interviews were also conducted with the department's court liaison officer.

An interview schedule for these interviews was developed in consultation with other AIFS researchers and with AGD. The schedule focused on understanding the departmental structure and the points of engagement between the family law system and the child protection system in each jurisdiction. Other themes included the type and volume of interaction between child protection practitioners and ICLs and the nature of the information exchanged, perspectives on interdisciplinary cooperation, and understandings about the role of the ICL and their training and accreditation requirements.

Interviews for this study were conducted between December 2012 and early February 2013.

1.4 The value of having multiple perspectives

The interests of each of the professionals and individuals in the stakeholder groups that contributed to the research are affected by ICLs in different ways, and each has distinct expectations and experiences arising from their interactions with ICLs. Judges bring a perspective based on their observations from the bench of ICL performance. It is clear that the ICL role, as the court's assistant, is viewed very positively by the majority of judges who responded to the survey. Non-ICL lawyers have the opportunity to observe ICL practice from a different vantage point, as settlement negotiations and, potentially litigation, unfolds. In contexts where the interests of their respective clients (loosely put, in the case of children) may or may not coincide, it is clear that non-ICL lawyers are close and sometimes critical observers of ICL practice. Non-legal professionals bring yet another perspective, in a practice context where close collaboration with ICLs occurs on a day-to-day basis. ICLs, of course, have a unique understanding of their own strengths and limitations, which they have reflected on honestly and frankly when engaging with this research.

In the forthcoming discussion, an interesting pattern of relativities is often evident in the survey data, with judges being most positive in key areas, closely followed by ICLs. Non-ICL lawyers are frequently the most negative of the three groups, with non-legal professionals often falling into a mid-line position between ICLs and non-ICL lawyers. These data clearly demonstrate the implications of each groups' different positioning vis-à-vis ICLs in the way they view ICL practice.

In Chapter 7, some very critical observations of some ICLs—made by ICLs, judges, non-ICL lawyers and non-legal professionals—are reported. The tenor of the comments reported, the consistency of the types of concerns among the different groups, and the strength of feeling in the comments provide evidence that significant concerns are relevant. Taken together, the quantitative and qualitative data suggest that while the ICL role is valued and respected, the calibre of some professionals raises significant concerns.

The parent/carer and child/young person data reported in Chapter 8 add yet another dimension to the understanding of ICL practice. In particular, as the people whose lives are most significantly affected by ICLs, children have a critically important perspective to contribute. The small number of the children/young people involved, and the very specific nature of their circumstances (cases involving safety issues), means that the findings from these data cannot be generalised. However, the concordance between the themes that emerged from the interviews with parents/carers and children/young people, and the issues considered in Chapter 7, contribute to the broader picture, as discussed further in Chapter 9.
1.5 Structure of this report

This introductory chapter has discussed the rationale for and methodology of the Independent Children’s Lawyers Study. The next chapter sets out the organisational, policy and practice context for ICLs. The role and functions of ICLs are examined in Chapters 3 (participation) and 4 (“honest broker” and evidence gatherer). Further chapters examine the collaboration between ICLs and other professionals in the family law and child protection systems (Chapter 5) and arrangements for accreditation, training and accountability (Chapter 6). Chapter 7 sets out concerns about the performance of some ICL practitioners as well as concerns about the adequacy of funding arrangements, and the experiences of parents, children and young people in matters involving an ICL are considered in Chapter 8. The final chapter brings together the main findings of the research and addresses the key research question.
2 Independent Children’s Lawyers: Organisational, policy and practice context

This chapter will provide an introduction to the organisational, policy and practice context in which ICLs operate. The first section describes the organisational setting, including each legal aid commission’s approach to accrediting and training ICLs. The second section discusses the policy and funding environment, and details each commission’s policies in relation to the criteria for appointing an ICL and the funding model. The final section considers the practice context and provides some initial insights as to the formulation of the ICL role, common ICL case characteristics and practitioner perspectives on the core ICL functions. Later report chapters will consider a number of the issues contained in this chapter in greater depth.

The information contained within this chapter is based on data obtained from legal aid commission staff in written and telephone interview responses. Additional insights have been gleaned from the responses of various professionals to surveys and interviews.

2.1 Organisational context

ICLs are funded as a Commonwealth legal aid priority under the National Partnership Agreement on Legal Assistance Services. The agreement is between the Commonwealth Government and each state and territory government to fund legal aid commissions for Commonwealth priorities.

Each legal aid commission manages the ICL program within their family law division. Practitioners who undertake ICL work may be employed directly by the legal aid commission in a state or territory (as an inhouse ICL) or may operate as a private practitioner who is appointed to a particular commission’s ICL panel to receive work on a grant basis. Table 2.1 shows the differences in the number of ICLs, and a comparison between the number of inhouse ICLs and panel ICLs, in each state and territory.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Inhouse ICLs</th>
<th>Private panel ICLs</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>70</td>
<td>127</td>
<td>197</td>
</tr>
<tr>
<td>Victoria</td>
<td>19</td>
<td>53</td>
<td>72</td>
</tr>
<tr>
<td>Queensland</td>
<td>30</td>
<td>80</td>
<td>110</td>
</tr>
<tr>
<td>South Australia</td>
<td>13</td>
<td>14</td>
<td>27</td>
</tr>
<tr>
<td>Western Australia</td>
<td>8</td>
<td>38</td>
<td>46</td>
</tr>
<tr>
<td>Tasmania</td>
<td>6</td>
<td>16</td>
<td>22</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>2</td>
<td>12</td>
<td>14</td>
</tr>
<tr>
<td>ACT</td>
<td>5</td>
<td>21</td>
<td>26</td>
</tr>
</tbody>
</table>

Note:  
- Victoria Legal Aid employs 15 dedicated ICLs, with 4 dedicated ICLs located in Melbourne and 11 lawyers located in regional offices who conduct ICL files.  
- Legal Aid WA employs 5 lawyers who work largely on ICL matters and 3 other lawyers do some ICL work.  
- Legal Aid ACT is in the process of establishing a special ICL panel to commence in 2013. Currently there are 21 ICLs on the general panel.

With the exception of South Australia, the family law division within each commission also has responsibility for matters falling within the care and protection jurisdiction. In South Australia, family law and care and protection matters are managed in separate divisions. In all states and territories, youth justice matters are also managed separately within the criminal division.
ICLs employed within each of the legal aid commissions generally manage a mixed caseload of ICL matters and general family law matters. In written responses Legal Aid NSW and Legal Aid WA specifically noted that senior practitioners will conduct proportionally more ICL matters and less senior practitioners will conduct proportionally more general family law matters. Other commissions are understood to apply a similar approach.

Except for South Australia, a number of legal aid practitioners in other states and territories who undertake ICL matters also practise in the care and protection jurisdiction. In South Australia, ICLs only practice in the family law jurisdiction and a different panel of practitioners handles care and protection matters. In Queensland and Victoria, some practitioners who undertake ICL work also appear in youth justice matters. The extent to which this occurs varies between commissions; for example, Victoria Legal Aid indicated that although dedicated ICLs only work in the family law jurisdiction, a small number of regional practitioners would conduct matters in each of the family law, care and protection, and criminal jurisdictions.

Each of the commissions broadly takes the same approach to allocating ICLs; that is, where there is no conflict of interest, an ICL will be appointed from the pool of inhouse practitioners. If there is a conflict, the appointment will be made from the commission’s private ICL panel. Some commissions also identified additional considerations:

- Legal aid in Victoria, Tasmania and the Northern Territory noted that other factors—such as where the child lives, the availability of the ICL and the number of ICL files they currently hold—may also be relevant in determining which ICL would be offered the appointment;
- Where there is sufficient information about the matter available, as noted by legal aid in WA and the ACT, the particular facts of the case might result in the matter being allocated to a more senior ICL; and
- Legal Aid Queensland noted that if an ICL has been previously appointed in the matter, the same ICL would be allocated, unless specific circumstances prevented the reappointment. Other commissions are understood to take a similar approach to reappointments.

The Northern Territory also emphasised that one of the difficulties of being a smaller commission is that inhouse practitioners are subject to conflicts of interest in a high proportion of matters, which means a large volume of ICL work is conducted by private panel practitioners. This has implications for a smaller commission in relation to how much capacity there is to have input into how the matter is handled, which has subsequent consequences for costs.

In NSW, a unique electronic system is used to manage grant offerings to private panel ICLs. Grants Division staff ascertain where the children live and then make an offer to panel ICL practitioners in the region where the children live. The offer is made electronically via the Legal Aid NSW Grants online system. Where the matter is urgent, Grants staff will telephone practitioners in the relevant region.

### 2.2 Policy and funding context

#### 2.2.1 Legal aid funding priorities

As detailed in Chapter 1, the provision of legal and ICL services to children is one of three key priority areas for review of funding consistency under the National Legal Aid (2011) Strategic Plan.

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15 For example, in data reported by the legal aid commissions, 64 ICLs employed within Legal Aid NSW, 26 in Legal Aid Queensland ICLs, 3 in Legal Aid WA, 3 in the NT Legal Aid Commission and all in the Legal Aid Commission of Tasmania also regularly undertake child protection matters.
2011–2013. This sits alongside the emphasis given to matters concerning the wellbeing of children in the National Partnership Agreement, which identifies the provision of legal assistance services in relation to children at risk, including the appointment of an ICL, as a funding priority. In responding to the request for information in Study 4 and in interviews, each of the commissions reiterated that funding ICLs was a priority, although many tempered this enthusiasm with a reminder of the funding constraints within which they operate and the effect these constraints have on decisions about grants of aid.

All of the commissions noted the difficulties associated with the scale of fees for ICL matters, compared to how expensive ICL matters are to conduct. In particular, commissions pointed to the challenges that arise where the grant of aid does not adequately provide for the amount of work involved in conducting many ICL matters and meeting the expectations and/or directives of the court seeking the ICL appointment. This is especially problematic with respect to private panel practitioners.

Most commissions also raised concerns about the costs of engaging experts where these are necessary and the difficulties of maintaining a pool of suitable experts who are prepared to work within the remunerative constraints of the grant of aid.

Most ICLs, judicial officers and other legal and non-legal professionals also raised similar concerns about funding and these will be explored in more detail in Chapter 7.

### 2.2.2 Legal aid criteria for appointing an ICL

Grants of aid in relation to ICLs are not assessed in relation to the financial circumstances of the parent, and many of the commissions take the same approach in determining whether an ICL is to be funded in relation to a particular matter. That is, in all states and territories, apart from Victoria and Western Australia, the commissions will, in practice, provide a grant of aid in relation to a substantial majority of judicial requests for an ICL to be appointed, subject to sufficient funding being available. Responses from the Northern Territory and the ACT made particular reference to their commissions’ Family Law Guidelines, which provide that assistance may be granted for the independent representation of children’s interests if a court makes an order that a child’s interest be independently represented by a lawyer, asks the commission to arrange the appointment, and the commission decides that it is reasonable to provide a grant of legal assistance for an ICL. Other commissions are understood to have similar guidelines.

This general policy position is supported by the administrative data provided by the commissions, which shows that the majority of requests for an ICL appointment made to legal aid were provided a grant of assistance. Over the period 2009–10 through to 2011–12, 96% of all requests for ICL appointment were given a grant. However, there were differences in this proportion across each state and territory. In Western Australia and Victoria over this time period, 87% and 88% respectively of such requests were provided an ICL grant. In the remaining states and territories, over 99% of ICL requests were given a grant of assistance.

In Victoria, the policy since May 2012 has been to provide a grant of aid for an ICL only where the following Re: K factors are present:

- allegations of physical, sexual or psychological abuse that apparently have/have not been reported to the state welfare authorities and the police; or
- the child is allegedly alienated from one or both parents; or
- there are issues of significant medical or psychological illness or personality disorder in relation to either party or any other person having significant contact with the child.
This system of restricting appointments was imposed as a means of working within the commissions’ funding constraints while prioritising funding for ICLs (in accordance with the commission’s guidelines). The particular Re: K factors that are given priority have been identified as being present in the most difficult cases and, as such, enable a form of merit-based assessment to be applied. Prior to using the Re: K factors to determine when a grant of aid will be made, the commission had relied on a quota system for ICL appointments since 2008.

Similarly, in Western Australia, appointments are made only where the following Re: K factors are present:

- there are allegations of physical, sexual or psychological abuse that apparently have/have not been reported to the state welfare authorities and the police; and/or
- the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be antisocial to the extent that it seriously impinges on the child’s welfare.

As in Victoria, Legal Aid WA states these assessment criteria are applied as a means of trying to manage the commission’s budget, while still enabling appointments to be made in what are considered to be the most difficult matters. Legal Aid WA has applied a merit assessment using the Re: K factors since the mid-1990s.

In the remaining states and territories the reasons why a request for an ICL appointment might be refused vary:

- In NSW, there were 22 refusals in the three years prior to December 2011. The main reasons for refusing a request for the appointment of an ICL were that the request was made by a judicial officer in the incorrect jurisdiction or made in the incorrect forum, the matter was proceeding undefended or ex parte, or where the period between the request for appointment and final hearing was too short and it was determined that no useful purpose would be achieved by the appointment.
- In Queensland, only around two or three requests for an ICL are refused each year and these are usually where there are exceptional circumstances and it is determined that little value would be added if an ICL were appointed.
- In South Australia, a minimal number of grants of assistance have been refused, either because the orders have been discharged or the matter is settled before a grant of legal assistance is made.
- In Tasmania, there have only been two occasions in the last six years when an ICL appointment has been refused. Those matters were dependent on their particular facts.

ICLs are commonly appointed at an early stage in the proceedings in each state and territory. All commissions, apart from the ACT and the Northern Territory (who could not/did not identify a trend in appointments), indicated that an ICL would usually be funded from the first return/interim hearing date.

### 2.2.3 Legal aid funding models

Each commission typically applies a stage-of-matter funding model to determine grants of aid in relation to ICL matters. ICLs may also make an application for a grant extension to cover disbursements (for example to obtain family reports or other expert reports) at any time. Each of the commissions, apart from Victoria Legal Aid, also allows ICLs to make an application for additional funding where a matter is especially complex. This additional funding is generally paid at a standard hourly rate in accordance with a scale of fees. In Victoria, the threshold for additional
aid appears to remain linked to the stage of the matter (such as final hearing preparation and witness and trial costs), rather than the complexity of the matter.

Despite the variations between commissions, it seems usual that an ICL would receive an initial grant of aid to fund the first stage of proceedings, and further applications would then be required in relation to each subsequent stage. However, the commissions’ descriptions of their funding models, and the stages of review of a grant of aid, differ.

**New South Wales**

In NSW, grants are funded in three main stages:

1. procedural hearing to listing for hearing;
2. preparation for final hearing; and
3. final defended hearing stage.

Where appropriate, additional approvals may be given at any time for discrete interim hearings, legal aid family law conferences, applications for appointment of single experts and post–final order attendances (in exceptional circumstances). Grants for counsel’s fees are available for the final defended hearing where this is warranted by the complexity of the facts or legal issues.

It is rare for legal aid funding for an ICL to cease during the appointment. However, ICLs (inhouse solicitors or panel solicitors) who are seeking an extension to cover the next stage of funding must certify that the matter satisfies Legal Aid NSW policies and guidelines.

There are some occasions where disbursements are reviewed, including:

- applications for expert reports (including update reports);
- applications for counsel to be briefed to appear; and
- requests to expend money beyond the usual grant of legal aid for such a disbursement (e.g., for transcripts).

A grant of aid will also be terminated if Legal Aid NSW is no longer satisfied that the ICL will make a difference to the outcome of the proceedings or the welfare of the child.16

**Victoria**

In Victoria, an ICL receives an initial broadband grant that covers preparation and the first return date, and three subsequent hearing fees. The first grant also covers basic disbursements for paying service fees on serving subpoenas. The ICL may seek additional aid as appropriate, including for final hearing preparation and witness and trial costs. The ICL may also request aid for special disbursements for reports from a contact centre, psychiatrists and other disbursements as and when required.

Requests for a grant of aid are considered as they are received, and reviewed at each request for an extension to that grant.

**Queensland**

In Queensland, the initial grant for ICLs is for perusal of the court file, and subsequent stages for ICL grants mirror standard family law stages:

- family dispute resolution (within proceedings);

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16 Any decision by Legal Aid NSW to terminate a grant will be made in consultation with the ICL and will involve the ICL making an application to the court to have the order for appointment discharged.
- interim hearing;
- preparation for trial; and
- appearance at trial and appeal.

Grants of aid for counsel (including reading fees) are available but would usually be approved for complex matters only at the interim hearing stage. Disbursement requests—for example, for family or expert reports—are subject to separate grants of aid and assessed against a merits test. The ICL may also seek additional funding for complex matters (allocated as additional hours at the standard hourly rate).

Matters are reviewed at the completion of each stage when new funding is requested. Disbursement requests are subject to a merits test. ICL matters are also subject to a funding cap of $20,000. Once this cap is reached, a submission is forwarded to a senior officer to determine if the cap will be extended. This provides an opportunity for a review of funding for the ICL and any related files. All files (inhouse and those assigned to a private panel practitioner) are subject to the cap.

**South Australia**

In South Australia, funding grants are made using a mixture of lump sums for specific work—for example, reading the file, preparing for trial, attendances at court—and work costed on an hourly basis.

Grants of aid are reviewed as each application for an extension of funding is made by the ICL.

**Western Australia**

In Western Australia, an initial ICL grant is made and stage-of-matter extensions are considered when requested by the ICL (Legal Aid WA, 2006). There are various additional clauses to deal with extra or unusual work required as a result of the FCoWA process.

Another key difference in Western Australia is that almost all reports that are prepared in relation to families are prepared by single expert witnesses rather than family consultants and, as a consequence of the limited number of available single expert witnesses, the cost of the associated disbursements are significant. The disbursements are calculated on a sliding scale and there are fixed rates for travel and other incidental costs. Travel costs and costs associated with in situ interviews in regional and remote areas are all dealt with on a case-by-case basis.

There are set fees in relation to single expert witness fees, depending on their qualifications (social worker, psychologists, psychiatrists). Additional costs can be paid in circumstances where there are multiple parties and other children. These costs are negotiated with the single expert witness at the time at which they are contracted.

ICL grants are reviewed at the time of engagement of the single expert witness—when they report issues and again when a request for trial funding is made, at the discretion of the ICL assessor.

**Tasmania**

In Tasmania, an initial ICL grant is made, and stage-of-matter extensions are considered when requested by the ICL.

There is also a cap on expenditure on ICL matters, and any grant that would exceed that cap must be approved by the Director.
The Legal Aid Commission of Tasmania also has a strong emphasis on the use of dispute resolution processes in the early stages of court proceedings and, where it is appropriate, will fund the ICL to hold a mediation conference and attempt to broker an agreement between the parties.

**Australian Capital Territory**

In the ACT, an initial ICL grant is made and stage-of-matter extensions are considered when requested by the ICL.

ICL funding is re-considered when a new stage in proceedings is reached; for example, following receipt of the expert report, upon completion of any interim proceedings, or when the cap that is included in the guidelines has been reached (though review at this stage does not lead to termination of the grant).

**Northern Territory**

In the Northern Territory, an initial ICL grant is made and stage-of-matter extensions are considered when requested by the ICL.

ICL funding is re-considered when a new stage in proceedings is reached; for example following receipt of the expert report, upon completion of any interim proceedings, or when the cap that is included in the guidelines has been reached (though review at this stage does not lead to termination of the grant).

The Northern Territory Legal Aid Commission also has a strong emphasis on the use of dispute resolution processes in the early stages of court proceedings, and encourages ICLs to work with the parties to come to an agreement.

**2.2.4 ICL funding costs**

The legal aid commissions from each state and territory provided data on the total cost of grants for family law and ICL matters. This cost information was further broken down into amounts spent on professional legal fees and other disbursements. Data covering the number of requests for ICL appointments and the number of ICL grants of assistance made, along with the total number of family law grants of assistance were also collected. For each of these data items, information was available covering the 2009–10, 2010–11 and 2011–12 financial years.

Across all states and territories, almost two-thirds (63%) of all ICL grants of assistance over the period 2009–10 to 2011–12 were to private ICLs. As Table 2.2 shows, there were quite distinct differences in this proportion across the jurisdictions, which ranged from 85% in the Northern Territory to 42% in South Australia.
Table 2.2  Proportion of grants to private ICL lawyers as percentage of all ICL grants of assistance, 2009–10 to 2011–12, by state and territory

<table>
<thead>
<tr>
<th>State or territory</th>
<th>Private ICLs (%)</th>
<th>Total ICL grants of assistance (n)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Territory</td>
<td>84.6</td>
<td>78</td>
</tr>
<tr>
<td>Queensland</td>
<td>80.2</td>
<td>2,862</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>73.3</td>
<td>236</td>
</tr>
<tr>
<td>Western Australia</td>
<td>68.7</td>
<td>1,231</td>
</tr>
<tr>
<td>Tasmania</td>
<td>67.7</td>
<td>186</td>
</tr>
<tr>
<td>New South Wales</td>
<td>58.2</td>
<td>3,898</td>
</tr>
<tr>
<td>Victoria</td>
<td>54.1</td>
<td>2,690</td>
</tr>
<tr>
<td>South Australia</td>
<td>41.6</td>
<td>1,005</td>
</tr>
<tr>
<td>Australia</td>
<td>62.8</td>
<td>12,186</td>
</tr>
</tbody>
</table>

Australia-wide, over the period 2009–10 to 2011–12, the total cost of ICL grants was a little over $65 million (GST exclusive). As Figure 2.1 shows, there was considerable variation between the states and territories in the total amount of ICL grants made, and the difference between the amount of ICL funding and general family law funding, in that period. The lowest expenditure was in the Northern Territory, with ICL grants totalling just over $395,000 for the three-year period. The highest spending state over the three-year period was Queensland (with just under $23 million in ICL grants of aid), followed by NSW (just over $16.5 million in ICL grants of aid). Western Australia expended the highest proportion of funding on ICL matters compared to family law matters (just over $8 million on ICL grants compared to just under $17 million on family law grants).

Notes: All figures are exclusive of GST. Figures provided by legal aid commissions in responses to the request for Information and include total professional fees (including counsel fees) and disbursements for inhouse and private practitioner matters.

Figure 2.1  Total family law and ICL grants of assistance, 2009–10 to 2011–12, by state and territory

$21.9 million was allocated towards ICL grants in 2009–10, $21.2 million in 2010–11 and $22.2 million in 2011–12.
As shown in Figure 2.2, the average funding per ICL grant was $5,371 Australia-wide, made up of an average of $4,060 of professional legal fees and $1,311 in other disbursements. But there was again considerable variation in the funding of ICLs across each state and territory. In Queensland, the average funding per ICL grant was almost $8,000, consisting of an average $5,911 for professional legal fees and $2,007 in other disbursements. In Western Australia, the average funding per grant was a little over $6,500. The average funding per ICL grant was lowest in Tasmania ($3,171) and the ACT ($3,407). In the other states and territories, the average funding per grant was between $4,238 and around $5,000.

Notes: All figures are exclusive of GST. Professional legal fees include fees for counsel.

Figure 2.2  Average funding per ICL grant of assistance, 2009–10 to 2011–12, by state and territory

As a point of comparison, over the same time period, legal aid commissions in Australia allocated $263 million (exclusive of GST) towards family law grants of assistance. As shown in Figure 2.3, the average funding per family law grant Australia-wide—$1,700 (GST exclusive) —was lower than the average funding for ICL grants ($5,371). Queensland has been excluded from the analysis reported in the figure, as data covering the number of family law grants during this period were not available.

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18 $89.0 million was allocated towards family law grants in 2009–10, $87.2 million in 2010–11 and $86.7 million in 2011–12.
Notes: All figures are exclusive of GST. Data not available for Queensland. Family law funding grants include grants for lawyer assisted dispute resolution processes.

Figure 2.3 Average funding per family law grant of assistance, 2009–10 to 2011–12, by state and territory

2.2.5 Approaches to cost recovery

Legal aid cost recovery policies

Each of the commissions has a policy in relation to seeking an order for costs from the parties. Although these policies are largely uniform across the states and territories, again each commission describes the process differently.

Where an order for ICL costs is made, most commissions have policies in place to support debt recovery action against a party who fails to make payment in respect of that order, but has an assessed capacity to pay. The exception is the ACT, where there are currently no steps to monitor compliance; however this practice was under review at the time of writing.

New South Wales

Legal Aid NSW requires ICLs to seek costs in appropriate matters. When an ICL is appointed, the ICL must write to each party seeking an upfront contribution (initially $1,650).

A party who is in receipt of a grant of legal aid is not required to contribute to the costs of the ICL. A party who is not in receipt of a grant of aid is required to contribute to the costs unless Legal Aid NSW waives the contribution or considers that it is not appropriate to recover costs. Where the party’s contribution is not waived, and full payment is not made, the ICL must seek a costs order at an appropriate point in the proceedings.

A party who is not required to contribute towards the ICL’s costs may nevertheless be ordered to contribute towards the costs of a single expert.

In the event that ICL costs are not waived, it is a condition of each practitioner’s grant of legal aid that the practitioner seek an order for costs at legal aid scale at each stage of the proceedings, to be paid for by either parent, or both parents in equal shares.
Victoria

Victoria Legal Aid expects that the ICL will seek costs where section 117 of the *Family Law Act 1975* warrants such an application. Section 117 sets out the considerations for making an order for costs and, in respect of proceedings in which an ICL has been appointed, precludes the court from making an order if:

- a party to the proceedings has received legal aid in respect of the proceedings; or
- the court considers that a party to the proceedings would suffer financial hardship if the party had to bear a proportion of the costs of the ICL.

In practice it is understood that Victoria Legal Aid will seek a voluntary means tested contribution to the costs of the ICL from the parties at the commencement of the ICL appointment.

Queensland

Legal Aid Queensland will seek costs from non-legally aided parties. Upon appointment, the ICL will send a letter to the party seeking a contribution towards the cost of the ICL. The cost is set at an average amount of $6,600 per case (pro-rated between parties), but on finalisation, an additional contribution may be sought or a refund processed, depending on the final costs amount.

Where the party does not contribute to the costs as requested, the matter is referred to the ICL to make a determination as to whether it is appropriate to seek an order for costs against the parties. The ICL will determine the likelihood of success of the application. Where the ICL determines it is appropriate to make an application for costs, Legal Aid Queensland will fund this application.

South Australia

The Legal Services Commission of South Australia requires parties to contribute to the costs of the ICL if they can. Parties who are not legally aided are invited to contribute or to apply for a waiver of these costs.

If the costs are not waived, the ICL is instructed to make an application to the court for costs at an appropriate stage, provided it is their view that there is a reasonable likelihood of success in the court granting the application.

Western Australia

Legal Aid WA seeks a contribution from parties where they can afford to pay or agree to a memorial over real estate in relation to the costs of any single expert witness fees. The commission actively seeks to recover expert fees from parties who can afford to contribute.

Tasmania

The Legal Aid Commission of Tasmania will seek costs from parties when the commission has formed a view that the parties should bear the costs and have some capacity to do so, and where they have been asked to contribute to the costs but declined to do so.

Australian Capital Territory

Legal Aid ACT expects the ICL to seek an order for costs in relation to any expert report to be shared by the parties, where the parties have financial capacity to do so. Financial information is sought from non-legally aided parties to assess their ability to make a contribution. Under the new ICL Practice Standards, ICLs are required to include details for payment of the expert costs in orders for costs where practicable.
Northern Territory

The Northern Territory Legal Aid Commission follows the commission’s Family Law Guidelines. The decision to seek costs is left to the discretion of the ICL in each matter.

**Perspectives on cost recovery**

Some commissions noted that some judicial officers take an inconsistent policy view in relation to cost recovery and are often reluctant to make an order for costs. ICLs are also sometimes hesitant to seek costs. This view is reinforced by our survey data from legal aid professionals. Table 2.3 shows that only 34% of ICLs often or always made submissions seeking their costs be met by one or both of parents.

<table>
<thead>
<tr>
<th>Frequency of submissions/orders</th>
<th>ICL (%)</th>
<th>Judicial officers (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Often/always</td>
<td>33.6</td>
<td>18.5</td>
</tr>
<tr>
<td>Sometimes</td>
<td>24.8</td>
<td>29.6</td>
</tr>
<tr>
<td>Rarely/never</td>
<td>23.5</td>
<td>45.6</td>
</tr>
<tr>
<td>Cannot say/missing</td>
<td>18.1</td>
<td>9.2</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
<td>54</td>
</tr>
</tbody>
</table>

Notes: Percentages may not total exactly 100.0% due to rounding.

The table also shows that judicial officers regularly do not support an ICL’s submission that an order for costs be made against one or both of the parents (only 19% of judicial officers state they will often or always make a costs order, compared to 34% of ICLs), and are much more likely to rarely or never make an order for costs (46%, compared to 24% of ICLs). This is supported by ICL survey data, which show that, of those ICLs who reported making submissions, only 22% indicated that their applications for costs were often or always accepted by the court (data not shown).

Interestingly, some state-based differences emerged in the proportions of submissions for costs, with 58% of NSW respondent ICLs answering that they often or always made submissions for costs, as opposed to only 7%, 8% and 12% of ICL respondents from South Australia, Victoria and Queensland respectively (data not shown).

The survey data also suggest that there is confusion with regard to whether and to what extent parents are expected to contribute to the ICLs costs, variation in state and territory practices, and variation between inhouse legal aid ICLs and private practitioner ICLs with regards to cost recovery:

I thought that parties were asked to contribute if they could afford to. I have had ICLs ask me to make orders that parties pay legal aid a certain amount of money. If this is to occur, it should be a national approach. It is different to ordering costs. I don’t really think our court should be issuing orders for money owed to legal aid unless it is decided by our court to do so. [Judicial officer, survey]

There is a dichotomy in cost recovery between inhouse legal aid lawyers and private practitioners. The latter are required as a condition of their appointment to seek a costs order against all parties, unless legal aid have granted a party an exemption. Inhouse lawyers are under no such requirement. Thus, private practitioners are forced...
to make applications whether there is any basis for doing so or not (and in most cases there is no basis for a costs application at all, which means that it is an abuse of process to make the costs application), while inhouse legal aid lawyers in my experience rarely apply for costs orders. [Judicial officer, survey]

[Legal aid] pursues costs from parties independently, so it is rare we need to make formal orders. [Judicial officer, survey]

The divergence of views on ordering parties to meet the costs of an ICL is reflected in the open-ended survey responses from judicial officers. In general, judicial officers seem to hold one of two contrasting positions, which are illustrated by the following comments. The first takes a more conceptual position in support of public funding for ICLs:

We need to see that the public funding of ICLs is very important. [Judicial officer, survey]

While the second viewpoint relates to assessments of a parent’s capacity to pay costs:

If parties are not aided and have the capacity to pay, there should be a presumption in favour of private contribution. [Judicial officer, survey]

I also think that privately funded litigants who pass some sort of means test and are genuinely able to afford to do so, should be asked to pay. I note that sometimes privately funded parties resist having an ICL appointed as they don’t want to have to pay. This is more important to them than having the child’s interests separately represented. [Judicial officer, survey]

I believe that it is important that parents contribute something to the costs of the ICL if they can, because legal aid funding is so scarce. [Judicial officer, survey]

However, some ICLs and judicial officers did not consider the making of applications to recover ICL costs from parties feasible or appropriate:

It is rare for parents to have sufficient resources to fund an ICL privately. [Judicial officer, survey]

Only a minority of high-risk cases involve parents having financial capacity to pay ICL or single expert fees. [Judicial officer, survey]

The commissions said that the difficulty of obtaining a costs order had a number of implications for practitioners. In Western Australia, the commission stated ICLs are very reluctant to make applications for their costs because of their awareness of the court’s attitude and their concern that such applications may adversely affect the parties’ perceptions of their impartiality and independence. The Legal Aid Commission of Tasmania echoed this concern. Legal Aid NSW suggested that a judicial hesitance to issue costs orders affects practitioner quality because experienced private practitioners will not undertake ICL work as it is not commercially viable.

One judicial officer suggested that simplifying the requirements for making a costs order could help improve the frequency with which submissions, and therefore orders, are made:

The costs are generally modest. An amendment to s117 so that an application for costs by an ICL does not require justifying circumstances would be appropriate. [Judicial officer, survey]
2.3  Practice context

2.3.1  Formulation of the ICL role in legislation and guidelines

The specific duties and other obligations of ICLs are described in s68LA of the Family Law Act 1975 and the national Guidelines for Independent Children’s Lawyers (the practice guidelines; FCoA & FMC, 2007). Survey and interview data indicate that most ICLs were generally satisfied with the formulation of the ICL role in the legislation and the practice guidelines. As Tables 2.4 and 2.5 illustrate, a majority of ICLs (69%) agreed or strongly agreed that both the legislation and the practice guidelines allow ICLs to operate effectively.

In addition, Table 2.4 shows that ICLs in NSW and Victoria were the most satisfied with s68LA (with 71% and 77% respectively agreeing or strongly agreeing) as a source of practice guidance. The majority of ICLs who responded from South Australia also felt the legislation is effective (67%). However, fewer than half of the ICLs in Queensland (47%) agreed with the proposition. Furthermore, almost a quarter of ICLs in Queensland (24%) and one in five (20%) in South Australia responded neutrally. Only a very small proportion of ICLs (3%) disagreed that the legislation is effective, and these were all located in NSW.

Table 2.4  Agreement that s68LA of the Family Law Act allows ICLs to operate effectively, by state and territory

<table>
<thead>
<tr>
<th></th>
<th>NSW (%)</th>
<th>Vic. (%)</th>
<th>QLD (%)</th>
<th>SA (%)</th>
<th>ACT, NT, Tas, WA (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strongly disagree</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Disagree</td>
<td>2.8</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>1.3</td>
</tr>
<tr>
<td>Neither agree or disagree</td>
<td>9.7</td>
<td>7.7</td>
<td>23.5</td>
<td>20.0</td>
<td>6.3</td>
<td>11.4</td>
</tr>
<tr>
<td>Agree</td>
<td>55.6</td>
<td>65.4</td>
<td>41.2</td>
<td>46.7</td>
<td>56.3</td>
<td>53.7</td>
</tr>
<tr>
<td>Strongly agree</td>
<td>15.3</td>
<td>11.5</td>
<td>5.9</td>
<td>20.0</td>
<td>18.8</td>
<td>14.8</td>
</tr>
<tr>
<td>Can not say</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>6.3</td>
<td>0.7</td>
</tr>
<tr>
<td>Missing</td>
<td>16.7</td>
<td>15.4</td>
<td>29.4</td>
<td>13.3</td>
<td>12.5</td>
<td>18.1</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>72</td>
<td>26</td>
<td>17</td>
<td>15</td>
<td>16</td>
<td>149</td>
</tr>
</tbody>
</table>

Note: ICLs were asked the following question: “Please indicate the extent of your agreement with the following propositions in relation to your practice as an ICL: The obligations specified in s68LA of the Family Law Act allow me to operate effectively”. Data are not reported by state for 3 responses where state was not indicated: these data are, however, included in the Total column. Percentages may not total exactly 100.0% due to rounding.

As Table 2.5 demonstrates, a majority of ICLs in each of the four reported jurisdictions also agreed or strongly agreed that the ICL practice guidelines are effective. However, it is worth noting that ICLs in NSW responded more positively, with 74% of these ICLs agreeing or strongly agreeing the practice guidelines are effective, than Victoria (62%), Queensland (59%) and South Australia (60%). Additionally, a much higher proportion of responses in Victoria (27%), South Australia (20%) and Queensland (18%) were neutral compared to NSW (7%). As with the responses in relation to the effectiveness of the legislation, only a very small proportion of ICLs (3%) disagreed that the practice guidelines are effective, and these were all located in NSW.

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19  See the background discussion in Chapter 1 for a discussion on s68LA.
The ICL interview data also indicate that ICLs are generally supportive of, or at least are unconcerned by, the formulation of the ICL role in the legislation and the practice guidelines. For a number of ICLs, the statutory framework and the practice guidelines offer a sense of security and protection to individual practitioners, as reflected in the following comments:

I think that they’re very good to protect the ICL. I think often when you’re the messenger, it’s easy for people to criticise you, particularly if you’re not going the way that a parent would like you to. You become a pretty awful person. So I think in a lot of ways it’s about best practice and communication, being as open and transparent as possible. If you haven’t formed a view, don’t tell people that you have, or don’t try and be persuaded to do so. So I think a lot of those are about good practice things. I don’t necessarily think that they constrain me. [ICL, private practice, interview]

In general, I think that the guidelines in the legislation assist us to kind of maintain our independent role and our boundaries with parties. [ICL, LAC, interview]

Moreover, one ICL held a strong view that adherence to the practice guidelines is an important foundation for performing the ICL role to a high standard:

I can do my biz and go about my biz perfectly adequately within the current legislative framework, and indeed the ICL Guidelines, which are just fabulous, frankly, from my perspective. I think there are other issues, I mean, I don’t know, I think the problems with ICLs relate to a failure to adhere to those guidelines and discharge their role properly in terms of the court’s expectations. I think that there are some really problematic ICLs out there, mainly lazy bastards that don’t do anything. But if you actually follow the legislation and the guidelines to the letter, you will discharge your role beautifully, do the right thing by the child and their family and assist the court properly. [ICL, LAC, interview]

However, this view contrasts with that held by other ICLs, perhaps reflecting the neutral responses in the survey data, which placed more emphasis on experience and judgment. These ICLs were cautious about imposing a stringent approach, and suggested that maintaining flexibility and
discretion was important if the framework was to appropriately support them in discharging their role:

I think perhaps if it’s not specific, it’s not so constrained, if the court actually appoints us with the view of trusting us to have the experience. Because obviously we need perfect experience to get where we are, and to trust us to use our professional judgment and our experience to actually do the things that we need to do or in effect to happen to have that ability. [ICL, private practice, interview]

The ICL guidelines, I treat them as really—as just that. As I was saying before, I don’t like the formulaic approach that the guidelines suggest. I’ve been an ICL for 10 years. I’ve been a practitioner for 30 years. That brings its own issues relating to children when I’m at the age I am—you know, they are more intimidated by me. But it does bring a level of experience that means that I am able to see a strategy that I think is the best way or approach to take in these particular matters, and that may not be following the guidelines directly. I follow them substantively, and I’m aware of them. [ICL, private practice, interview]

I’ve never really had an issue with the guidelines that were drafted because I think they give enough riders in them to suggest that, you know, [it’s not] the only way of doing things. It depends on the professional judgment of the ICL as much. [ICL, LAC, interview]

Another ICL seemed to find the guidelines helpful, but also suggested that having more clarity around who was responsible for monitoring ICL performance against the practice guidelines would be beneficial:

I think it’s a little unclear about whose responsibility the quality of ICLs are when complaints are made and things like that. I think it’s a great deal of difficulty between the legal aid commission and the court and, you know, the [Law Society], and things like that. They don’t know exactly who’s responsible for policing, I suppose, the role and the performance of the role of the ICLs. That’s inordinately difficult because commissions generally say that they’re responsible for making sure that the ICLs conform with the guidelines and generally meet the guidelines as set out, but if parties really seek that the ICL be discharged, then ultimately that’s a matter for the court through an application. So I think there’s a little bit of fogginess, greyness about where responsibilities probably lies [sic]. [ICL, LAC, interview]

I think perhaps someone could take ownership of them. It’d be great if the court could, because a lot of people, the court is seen by the participants and parents as being in charge of the process. So it would be good if the court could take ownership of them. [ICL, LAC, interview]

Although the majority of ICLs appear to take the view that s68LA and the practice guidelines allow them to operate effectively, as the discussion in Chapters 3 and 4 will highlight, there is a lack of consensus about the ICL role in practice. This may in part be a disjuncture between an apparent clarity in the framework and the variety of interpretations of the ICL role. However, it may also reflect the inherent discretion built into this framework and the ICL’s perceptions that s68LA and the practice guidelines are not inhibiting but rather allow a wide scope for practice.

2.3.2 ICL case characteristics

This research has highlighted the complexity of the context in which ICLs practice. The first aspect of the complexity of the ICL practice context is grounded in the typical ICL case. The data
illustrate that ICLs are involved in cases that are by and large at the more complex end of the family law spectrum, frequently involving concerns about family violence and abuse.

Overall, the caseload of ICLs tends to be dominated by matters involving allegations of family violence, child abuse and/or entrenched conflict. Table 2.6 shows the estimates provided by ICL respondents of the frequency with which key issues occur in cases where they are appointed. The particular types of issues represented in the question were based largely on the Re K criteria discussed in Chapter 1, with the addition of Hague Convention matters and Magellan matters, and with the omission of the Re K criterion referring to sexual orientation.
### Table 2.6 Key issues “often” or “always” reflected in ICL caseloads, ICL reports, by state and territory

<table>
<thead>
<tr>
<th>Key issues in ICL cases</th>
<th>NSW (%)</th>
<th>Vic. (%)</th>
<th>QLD (%)</th>
<th>SA (%)</th>
<th>ACT, NT, Tas, WA (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allegations of other family violence/abuse</td>
<td>91.7</td>
<td>88.5</td>
<td>88.2</td>
<td>93.3</td>
<td>81.3</td>
<td>88.6</td>
</tr>
<tr>
<td>High/intractable conflict between the parents</td>
<td>91.7</td>
<td>84.6</td>
<td>88.2</td>
<td>93.3</td>
<td>75.0</td>
<td>87.3</td>
</tr>
<tr>
<td>Allegations of child abuse/neglect</td>
<td>69.5</td>
<td>84.6</td>
<td>88.2</td>
<td>88.7</td>
<td>87.5</td>
<td>77.2</td>
</tr>
<tr>
<td>Medical illness/mental health issue/ substance abuse in relation to either parent or the child/young person</td>
<td>69.5</td>
<td>61.5</td>
<td>82.4</td>
<td>86.7</td>
<td>68.8</td>
<td>70.5</td>
</tr>
<tr>
<td>History of child protection concerns with the family</td>
<td>44.5</td>
<td>69.2</td>
<td>47.1</td>
<td>86.7</td>
<td>25.0</td>
<td>51.0</td>
</tr>
<tr>
<td>Apparent alignment of child/young person against one or both parents</td>
<td>37.5</td>
<td>42.3</td>
<td>41.2</td>
<td>53.3</td>
<td>18.8</td>
<td>37.6</td>
</tr>
<tr>
<td>No parties are legally represented</td>
<td>36.1</td>
<td>23.1</td>
<td>35.3</td>
<td>46.7</td>
<td>37.5</td>
<td>34.2</td>
</tr>
<tr>
<td>Proposal to exclude or significantly limit parenting time between child/young person and parent</td>
<td>32.0</td>
<td>34.6</td>
<td>29.4</td>
<td>40.0</td>
<td>25.0</td>
<td>32.2</td>
</tr>
<tr>
<td>Magellan case</td>
<td>23.6</td>
<td>11.5</td>
<td>29.4</td>
<td>26.7</td>
<td>25.0</td>
<td>22.8</td>
</tr>
<tr>
<td>Views of the child/young person against spending any time with one parent or favouring change in arrangements, including overnight stay and/or supervision arrangements</td>
<td>16.7</td>
<td>19.2</td>
<td>5.9</td>
<td>33.3</td>
<td>12.5</td>
<td>16.8</td>
</tr>
<tr>
<td>No parent/party is suitable</td>
<td>13.9</td>
<td>15.4</td>
<td>11.8</td>
<td>40.0</td>
<td>6.3</td>
<td>16.1</td>
</tr>
<tr>
<td>Relocation of child/young person that will greatly restrict or exclude parenting time between child/young person and one parent</td>
<td>12.5</td>
<td>3.9</td>
<td>23.5</td>
<td>6.7</td>
<td>–</td>
<td>10.7</td>
</tr>
<tr>
<td>Proposal to separate siblings</td>
<td>8.3</td>
<td>7.7</td>
<td>5.9</td>
<td>20.0</td>
<td>–</td>
<td>8.7</td>
</tr>
<tr>
<td>Issues of cultural or religious difference affecting child/young person</td>
<td>4.2</td>
<td>11.5</td>
<td>5.9</td>
<td>13.3</td>
<td>–</td>
<td>6.0</td>
</tr>
<tr>
<td>Application in court’s welfare jurisdiction (e.g., medical treatment of child)</td>
<td>4.2</td>
<td>3.9</td>
<td>5.9</td>
<td>–</td>
<td>–</td>
<td>3.3</td>
</tr>
<tr>
<td>Hague Convention cases</td>
<td>2.8</td>
<td>–</td>
<td>5.9</td>
<td>–</td>
<td>–</td>
<td>2.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>72</td>
<td>26</td>
<td>17</td>
<td>15</td>
<td>16</td>
<td>149</td>
</tr>
</tbody>
</table>

Note: ICLs were asked: ‘Thinking about your ICL caseload, in the past 12 months, please indicate how often you have been appointed in the following circumstances’. Data are not reported by state for 3 responses where state was not indicated: these data are, however, included in the Total column. The proportion of missing responses ranged from: NSW, 1.4–8.3%; Vic., 0–11.5%; QLD, 0–5.9%; SA, 0–13.3%; and ACT/NT/Tas/WA, 2.3–9.0%. Percentages do not sum to 100% as not all response categories are presented and multiple responses could be chosen.

Across each state, matters involving family violence and child abuse were nominated most frequently by most respondents. These are the kinds of matters where forensic evidence is of particular importance. Mental health issues/substance abuse and a history of child protection concerns were also commonly reported as issues in ICL cases.

Other key issues—such as neither party being legally represented, or whether it was a Magellan case—were reported as matters that occurred less commonly in the caseloads of ICLs. Other less
frequently nominated categories of matters (less than 20% of respondents opting for “often” or “always”) include relocation matters (in most states except Queensland), matters where culture or religion are significant, Hague Convention matters and cases where children are expressing views opposing time with one parent or favouring a significant change in arrangements (in most states except South Australia). Some differences between response patterns from participants in different states were evident, most notably in relation to South Australia.

Some other issues related to ICL case characteristics that were revealed in the AIFS Evaluation of the 2006 Family Law Reforms case file analysis are explored in Box 2.
Box 2: Insights into ICL cases from the file analysis in the AIFS Evaluation of the 2006 Family Law Reforms

As part of the AIFS evaluation, data for the file analysis in the Legislation and Courts Project were collected from a sample of court files involving children's matters dealt with in the FCoA, FMC, and FCoWA. Data were collected from a sample of 985 cases filed after 1 July 2006, and determined by November 2008. Along with basic demographic data about the parties and children, extensive data were also gathered on the orders made by the court relating to parental responsibility and care-time arrangements, including any special conditions (such as supervision when a parent spends time with a child). In cases, where a Form 4 (Notice of Child Abuse, Family Violence or Risk of Family Violence) had been filed (an allegation of family violence and child abuse), this information was also captured. Whether an ICL was appointed and whether a family report was on file were also covered in the data collection. Due to the very small proportion of ICLs appointed in “pure consent” cases, the analysis that follows is restricted to cases that were either finalised by judicial determination or by consent after proceedings had been initiated.

Case profiles and legal representation of parties

The court file sample data show that ICLs were appointed in around one-third (34%) of FCoA cases that were judicially determined or settled by consent after proceedings were initiated. The corresponding proportions were similar in the FMC (22%) and FCoWA (23%). Perhaps reflecting the more complex nature of matters in which ICLs are involved, the data show that matters where an ICL was present took longer to finalise. The average length of a case where an ICL was appointed was 7.4 months, compared to 4.8 months for cases with no ICL.a There was little difference in the average age of children—8 years in cases where an ICL was appointed, and 7.7 years in cases without an ICL.

The file analysis data indicate that there was little difference in the appointment of an ICL by legal representation of the parties.b In 24% of cases where one or both parties were legally unrepresented, an ICL had been appointed, compared to 27% of cases where neither party was unrepresented.

Family reports

In around one-fifth (23%) of cases that were judicially determined or settled by consent after proceedings, a family report was on file. In more than half the cases (52%) where there was a family report on file, an ICL was also appointed. Only 19% of cases where there was an ICL had no family report.

Family violence and state protection orders

Additional indications that ICLs were more likely to be appointed in complex cases are evident from data on Form 4s and state protection orders. As can be seen in Box Table 1, 55% of cases where a Form 4 was filed had an ICL. In comparison, 24% of cases where a Form 4 had not been filed had an ICL. In over 33% of cases where either an interim or final state protection order was on the court file, an ICL was appointed, compared to 25% where such orders were not on the file.

The file analysis data collection also included information on a set of “factual issues” from key documents, including affidavits, family reports and judgments. Patterns in the appointment of ICLs have been further analysed with reference to factual issues relating to family violence and child abuse (Box Table 2). ICLs were most commonly appointed in cases where allegations of both family violence and child abuse were contained in the file (51% of such cases), followed by cases where there was an allegation of child abuse in the absence of other family violence (46% of cases). In contrast, only 13% of cases that had no allegations of either violence or child abuse had an ICL assigned.
### Box table 1: Proportion of cases where ICL appointed, by whether Form 4 or state protection order on file, cases finalised by judicial determination or consent after proceedings initiated

<table>
<thead>
<tr>
<th>Appointment of ICL?</th>
<th>Form 4 on file?</th>
<th>Interim state protection order on file?</th>
<th>Final state protection order on file?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes (%)</td>
<td>No (%)</td>
<td>Yes (%)</td>
</tr>
<tr>
<td>ICL appointed</td>
<td>55.1</td>
<td>24.0</td>
<td>36.8</td>
</tr>
<tr>
<td>No ICL appointed</td>
<td>44.9</td>
<td>74.9</td>
<td>63.2</td>
</tr>
<tr>
<td>Missing</td>
<td>–</td>
<td>1.1</td>
<td>–</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of cases</td>
<td>52</td>
<td>605</td>
<td>73</td>
</tr>
</tbody>
</table>

Note: Form 4 filed at any stage of proceedings. Weighted percentage.

### Box table 2: Proportion of cases where ICL appointed, by factual issues of alleged violence or abuse raised during proceedings, cases finalised by judicial determination or consent after proceedings initiated

<table>
<thead>
<tr>
<th>Appointment of ICL?</th>
<th>No allegations (%)</th>
<th>Family violence only</th>
<th>Child abuse only</th>
<th>Both family violence and child abuse</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes (%)</td>
<td>No (%)</td>
<td>Yes (%)</td>
<td>No (%)</td>
</tr>
<tr>
<td>ICL appointed</td>
<td>12.7</td>
<td>19.3</td>
<td>28.1</td>
<td>45.8</td>
</tr>
<tr>
<td>No ICL appointed</td>
<td>86.1</td>
<td>78.3</td>
<td>71.2</td>
<td>54.2</td>
</tr>
<tr>
<td>Missing</td>
<td>1.1</td>
<td>2.4</td>
<td>0.7</td>
<td>–</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of cases</td>
<td>318</td>
<td>128</td>
<td>529</td>
<td>95</td>
</tr>
</tbody>
</table>

Note: “Family violence” is defined as a parent’s assertion of: family violence—sexual; family violence—physical; family violence—emotional/psychological/threatened; or family violence order. “Child abuse” is defined as a claim of: need to protect child from physical harm; need to protect child from sexual harm; need to protect child from emotional/psychological harm; need to protect child from neglect; or need to protect child from witnessing family violence. Weighted percentage.

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2.3.3 Perspectives on the functions of the ICL

The second aspect of the complexity of the ICL practice context arises from the multidimensional role of an ICL, which varies according to the nature of the matters in which they are involved and the dynamics of each particular case. Three broad aspects of the ICL role are identifiable on the basis of the legislation, guidelines and data collected for this research. These are: the ICL’s role in

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a The Magellan evaluation (Higgins, 2007) found that Magellan cases took 7.3 months to finalise in a sample of cases finalised prior to 1 July 2006.

b Legal representation at time of final order.

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20 Other researchers have noted different functions of the ICL role and have conceptualised them differently. Parkinson and Cashmore (2008) discussed “a welfare role, a counsel assisting role and a role in giving the child a voice in the proceedings” (p. 51). Ross (2012a) referred to three aspects of the role of ICLs: a counsel assisting role, a child
facilitating the participation of the child(ren) in the proceedings (the participation aspect), the ICL’s role as an evidence gatherer (the forensic aspect),\(^{21}\) and the ICL’s role in balancing and managing the litigation—including assisting to facilitate agreements between parties—especially in cases where other parties may be unrepresented (the litigation management aspect). The extent to which these functions are relevant in any particular case depends on the factual issues involved, the age of the children and the representation status of the other parties.

The professional groups surveyed were asked to nominate how important each aspect of this range of ICL functions is (see Table 2.7). An important point to appreciate from these data is that, from the perspective of ICLs themselves and to a lesser extent judicial officers, non-ICL lawyers and non-legal professionals, the participation function was of less significance than the evidence gathering and litigation management functions.

Compared with the other three functions, lower proportions of all the professional groups indicated facilitating participation as being significant or very significant. ICLs were the least likely of all the groups to rate this as being significant or very significant, with 55% doing so, compared with 65% of judicial officers, 63% of non-ICL lawyers and 62% of non-legal professionals.

\(^{21}\) In this report, the term “forensic” is used broadly to describe functions and responsibilities concerned with evidence gathering and testing, and more narrowly to denote issues that are resolvable in legal processes as questions of fact, through scrutiny and analysis of evidence.
<table>
<thead>
<tr>
<th>ICL function</th>
<th>ICLs</th>
<th>Judicial officers</th>
<th>Non-ICL lawyers</th>
<th>Non-legal Professionals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Significant (%)</td>
<td>Very significant (%)</td>
<td>Total (%)</td>
<td>Significant (%)</td>
</tr>
<tr>
<td>Facilitate children's/young people's participation in proceedings relevant to their care</td>
<td>38.9</td>
<td>16.1</td>
<td>55.0</td>
<td>29.6</td>
</tr>
<tr>
<td>Assist court by evidence gathering and testing</td>
<td>14.8</td>
<td>68.5</td>
<td>83.3</td>
<td>7.4</td>
</tr>
<tr>
<td>Assist court in management of litigation where parents are unrepresented</td>
<td>22.8</td>
<td>49.7</td>
<td>72.5</td>
<td>24.1</td>
</tr>
<tr>
<td>Facilitate agreement in the best interests of the child/young person and avoid trial where possible</td>
<td>31.5</td>
<td>49.0</td>
<td>80.5</td>
<td>16.7</td>
</tr>
<tr>
<td>No. of respondents</td>
<td>149</td>
<td></td>
<td>54</td>
<td></td>
</tr>
</tbody>
</table>

Notes: Professionals were asked: “In your view, what aspects of the role of an ICL are very/less significant?” Percentages do not sum to 100% as not all response categories are presented. The proportion of “cannot say”/missing responses for the judicial officer, non-ICL lawyer and non-legal professional surveys ranged from 2.6% to 7.4% and for the ICL survey from 15.4% to 16.1%.
2.4 Summary

This chapter has described the organisational setting and practice context for ICLs. It has provided an overview of the organisational, policy and practice context in which ICLs operate. The chapter has also provided insights from ICLs and judicial officers on some key aspects of that policy and practice setting, based on their responses to the survey and in-depth interviews.

A significant theme arising from these data is the complexity of the environment in which ICLs practice. While the practice guidelines and statutory framework operate across the states and territories, this chapter illustrates the often substantial differences in policies between each legal aid commission. The data also offer insights into the funding structures in place in each state and territory and the considerable variation in the funding of ICLs across each state and territory.

The complexities arising from variations at a policy level are compounded by the characteristics of the typical ICL case and the multidimensional nature of the ICL’s core functions. Later report chapters will consider in greater depth a number of the issues that arise in relation to the ICL role and practice approaches, commencing in the following two chapters with a detailed exploration of the functions of the ICL.
The ICL role: Participation function

The concept of participation is multidimensional, subjective and context-sensitive. It arises from a number of articles in the UNCRC, including Article 12.1, recognising the right of children to make their views known in judicial and administrative proceedings relevant to their care, and Article 9, upholding the right to participate in proceedings relevant to their care. Participation has been conceptualised in a number of different ways: empirically, theoretically and operationally (e.g., Bilson & White, 2005; Hart, 1992). In a UNICEF Fact Sheet (2005) on the right to participation, the following explanation is provided:

Respecting children’s views means that such views should not be ignored; it does not mean that children’s opinions should be automatically endorsed. Expressing an opinion is not the same as taking a decision, but it implies the ability to influence decisions. A process of dialogue and exchange needs to be encouraged in which children assume increasing responsibilities and become active, tolerant and democratic. In such a process, adults must provide direction and guidance to children while considering their views in a manner consistent with the child’s age and maturity. Through this process, the child will gain an understanding of why particular options are followed, or why decisions are taken that might differ from the one he or she favoured. (p. 1)

There are four noteworthy aspects of this explanation: (a) recognition that children’s capacity to participate increases with age and maturity; (b) it involves the capacity to influence decisions, not make them; (c) the capacity to influence decisions needs to be supported by adults through information and dialogue; and (d) children are entitled to have information that assists them to understand why decisions have been made, including decisions inconsistent with their views.

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

The participation concept arising from the UNCRC is recognised to have particular relevance to legal proceedings involving children and young people, including those in criminal, civil (e.g., family law) and child protection proceedings. A range of research and commentary has drawn attention to the ways in which participation is different in each of these contexts. One of the most obvious differences is that in criminal proceedings, and in some child protection proceedings (depending on the jurisdiction and the age of the child), legal representation is based on a direct instructions model where the child is the client of the lawyer. In family law, in contrast, the best interests model applies to ICL practice, meaning, as discussed in Chapter 1, that the lawyer represents the best interests of the child/young person and does not take instructions from the child/young person. Parkinson and Cashmore (2008) observed that differences between these two models may not, in practice, be as great as some commentary implies, since best interests representation may involve advocating for the preferences of a child/young person: “the older the children, the greater weight needs to be placed upon their preferences out of respects for their choices, having due regard to their age, their stage of cognitive development and the nature of the choices to be made” (p. 53).

The analysis by Ross (2012a), based on research examining the practices of children’s lawyers across criminal, civil and child protection jurisdictions in NSW, highlights some significant differences in
the dynamics involved in these arenas. In both criminal and child protection contexts, the
proceedings are brought on behalf of the state, through prosecutorial authorities in the criminal
context, and child welfare departments in the child protection context. In the criminal context, the
child/young person is directly the subject of prosecutorial action. In the child protection context,
the child is the subject of proceedings through departmental action against parents or carers. In
private law proceedings in family law, the dynamics are significantly different: the child is the
subject of proceedings involving a dispute between their parents. Ross suggested that the
“dominance of best interests models in family law (compared with child protection) may be partly
explained by the dominance of norms valuing family integrity, meaning children in family law
remain largely submerged within their families (whereas it is perceived to be more legitimate to
disaggregate children from their parents in child protection)” (p. 83).

Three interrelated concepts are relevant to the discussion in this chapter. The first is the broad
notion of child focus, meaning the extent to which approaches and practices centralise the interests
of children in family law proceedings. The second is the concept of participation, which relates to
the ways in which engagement with children occurs in family law processes. The third, direct
contact, is a means of effectuating participation and refers to the extent to which professionals,
particularly ICLs, meet with children.

The following discussion establishes that a range of issues impinges on the ways in which the
participation aspects of the ICL role are fulfilled. These include the age of the child, the nature of
the case, the “community of practice” to which the ICL belongs, and the ICL’s personal
orientation to their role and to the question of participation. The notion of communities of practice
has two main dimensions in this discussion. One concerns practice approaches in particular states
and territories, and encompasses participation being viewed as a collaborative task involving shared
responsibility between the ICL and the family consultant (or single expert witness). The second
concerns the practice context of the ICL and whether they also practise in child protection settings
dual-function ICLs) or whether they practise exclusively in family law. The discussion draws on
data from ICLs and other professionals from the surveys, as well as from in-depth interviews with
ICLs and child protection department representatives to develop an understanding of how
participation is approached by ICLs and the professionals who work with them.

3.1 Legal aid policy guidelines in relation to meeting with a
child

The national Guidelines for Independent Children’s Lawyers provides guidance for ICLs in relation to
meeting with children. These guidelines set out an expectation that an ICL will meet with a child, unless:
- the child is under school age; and/or
- there are exceptional circumstances, for example, where there is an ongoing investigation of
  sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for
  the child; and/or
- there are significant practical limitations, for example geographic remoteness.

The guidelines stipulate that an assessment about whether, where and how to meet the child is a
matter for the ICL. An assessment may be made in consultation with a family consultant or other
expert involved in the case.

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22 A range of socio-legal research has examined how legal practice is influenced by the context in which practice occurs.
In relation to ICL practice, this issue received some attention in Ross (2012a) (see further, Ross, 2012b).
Each of the legal aid commissions endorses the National Guidelines as the general policy position. Some commissions indicated that they have additional expectations of ICLs practising within their jurisdiction:

- **Legal Aid NSW** provides additional policy guidance to ICLs, which states that, as a matter of best practice, all ICLs should meet with the children whom they represent unless certain exceptions apply. It would normally be the case that a child who is of school age would meet with the ICL on several occasions. There is a presumption that the child has a right to be involved in the proceedings. Depending on the age of the child, an ICL may have regular face-to-face meetings to keep the child involved in the process. With older children, there can be a preference by them to communicate with the ICL by telephone and/or email.

  It is the view of Legal Aid NSW that meeting directly with children provides an invaluable opportunity for the child to gain an understanding of the court process, and that this meeting also provides the ICL with insight into what is important to the child, what is happening to them and how their best interests can be represented in the legal process.

  Legal Aid NSW specifically states that it is not the commission’s policy to ensure that a third person is in attendance during the meeting because ICLs in NSW are trained and capable of meeting the child alone, and the presence of a third person can inhibit rapport-building and confuse a child.

- **Legal Aid Queensland** (2012) provides additional advice to ICLs through its *Best Practice Guidelines for Independent Children’s Lawyers*, which supplements the National Guidelines. These best practice guidelines state that it is expected that arrangements will be made, where practical and appropriate in each case, for the ICL to meet with the children. However, Legal Aid Queensland prefers that ICLs meet with children in the presence of the family consultant, the Family Report Writer or other professional already involved with the children. As such, in practice, most ICLs in Queensland seek to meet with children together with a family consultant or other expert retained to undertake an assessment report.

- **The Legal Aid Commission of Tasmania** expects that ICLs will meet with a child, apart from exceptional circumstances. While the commission regards this as best practice, it reports that this is also expected by the Family Court that ICLs will meet with children in most instances where appropriate.

### 3.2 Approaches to participation

There are a number of approaches that are taken to reflect the participation aspect of the ICL’s role. To provide an opportunity for the child to share their views, the ICL could make direct contact with the child (to varying degrees), not meet directly with the child but collaborate with other professionals (such as family consultants or expert witnesses) or, most commonly, employ a combination of these methods, as circumstances dictate.

This research has identified varying views, attitudes and practices in relation to the direct contact aspect of the ICL role.23 The complexity of the issue of child participation and the varying

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23 Previous Australian and international research in the family law context has identified that participation—in the sense of having an opportunity to have their views heard in decision-making that affects their lives—is important to children and young people. See, for example, Birnbaum, Bala, and Cyr (2011); Birnbaum and Bala (2009); Cashmore (2011); Cashmore and Parkinson (2008); Parkinson and Cashmore (2008); Parkinson, Cashmore, and Stigle (2005); Bagshaw, Brown et al (2010); Campo, Fehlberg, Millward, and Carson (2012); Graham and Fitzgerald (2006, 2010); Lodge and Alexander (2010); McIntosh (2009); Sheehan and Carson (2006); Sheehan, Carson, Fehlberg, Hunter, Tomison, Ip, and Dewar (2005); Smart, Neale, and Wade (2001); Neale (2002); O’Quigley (2000); Smith, Taylor, and Tapp (2003); Taylor (2006); Taylor, Gollop, and Smith (2000). See also Fitzgerald and Graham (2011) and McIntosh, Wells, Smyth, and Long (2008).
interpretations and expectations of the ICL role in this context are clearly evident in the data. A number of participants referred to the fact that practices surrounding the ICL having direct contact with children are currently the subject of debate and, to some extent, controversy. One ICL said:

> It’s really vexed quite frankly and extremely fraught, partly because I’m a lawyer. That means that my training and my skills … are not in working with kids. So it’s one thing to, I guess, work in an area of law, an area of practice where the welfare of children is imperative. It’s another thing to have the ability to spend half an hour with a child talking through what their wishes are and trying to get a gauge of their maturity. It’s another thing to understand what influences might have been brought to bear on that child, especially given we don’t have a direct instructions model. [ICL, LAC, interview]

Another practitioner referred to debates among practitioners about the best interests model and direct instructions models as a “philosophical war” [ICL, private practice, interview], attributing the genesis of the controversy to different training approaches in legal aid commissions in different states. Reasons for not meeting with children are explored more fully in section 3.5.

### 3.2.1 Perspectives on ICLs and children’s participation

Table 3.1 demonstrates strong support across professional groups of the ICL function of best interests advocacy, which epitomises the independence and child focus that ICLs are expected to bring to the process. The ICL’s functions of providing an independent view of best interest outcomes and ensuring a focus on best interests in proceedings were each rated as being significant or very significant by more than 80% of the survey participants in each professional group.

Less consistency was evident in levels of support reported for ICL tasks associated with the more direct contact aspects of participation. Particularly notable in this regard were divergences between the views of ICLs and judicial officers in relation to the significance of three functions:

- Informing the child/young person of the nature of proceedings and their options for involvement was rated as being significant or very significant by 78% of judicial officers, compared with 59% of ICLs.
- Informing the child/young person of potential outcomes and seeking their feedback was rated as being significant or very significant by 74% of judicial officers and 56% of ICLs.
- Informing the child/young person of the outcomes of the process and the implications of court orders was seen as being significant or very significant by 80% of judicial officers and 62% of ICLs.

Some of these differences between ICLs and other professionals may be due to there being a higher level of uncertainty on these issues among ICLs, as shown by the higher proportion of “cannot say”/missing responses from ICLs (15–16% cf. 3–7% among other professionals). Overall, these responses point to a discrepancy between judicial expectations of ICLs and the ICLs’ construction of their role in relation to functions involving direct contact with children/young people.
### Table 3.1  Professionals' ratings ("significant" or “very significant”) of ICL participation tasks

<table>
<thead>
<tr>
<th>ICL participation tasks</th>
<th>ICLs (%)</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facilitate children's/young people’s participation in proceedings relevant to their care</td>
<td>55.0</td>
<td>64.8</td>
<td>63.0</td>
<td>61.9</td>
</tr>
<tr>
<td>Provide the court with independent view on orders that would be in the best interests of the child/young person</td>
<td>83.2</td>
<td>92.6</td>
<td>87.5</td>
<td>93.8</td>
</tr>
<tr>
<td>Inform the child/young person of the nature of proceedings and options for their involvement</td>
<td>59.3</td>
<td>77.8</td>
<td>69.8</td>
<td>63.7</td>
</tr>
<tr>
<td>Inform the child/young person of potential outcomes and obtaining their feedback</td>
<td>56.4</td>
<td>74.1</td>
<td>67.7</td>
<td>67.3</td>
</tr>
<tr>
<td>Inform the child/young person of the outcomes and implications of court orders</td>
<td>61.7</td>
<td>79.6</td>
<td>78.1</td>
<td>71.7</td>
</tr>
<tr>
<td>Ensure focus is on best interests of child in proceedings</td>
<td>80.5</td>
<td>94.5</td>
<td>85.5</td>
<td>95.6</td>
</tr>
<tr>
<td>No. of respondents</td>
<td>149</td>
<td>54</td>
<td>192</td>
<td>113</td>
</tr>
</tbody>
</table>

Notes: Professionals were asked: “In your view, what aspects of the role of an ICL are very/less significant?” Percentages do not sum to 100% as not all response categories are presented. The proportion of “cannot say”/missing responses for the judicial officer, non-ICL lawyer and non-legal professional surveys ranged from 2.6% to 7.4% and for the ICL survey from 15.4% to 16.1%.

### 3.2.2 Purpose of ICLs having direct contact

The quantitative and qualitative data from engagement with the ICLs indicate a spectrum of approaches in relation to their having direct contact with children. In this context, direct contact may have three core purposes: familiarisation (between the ICL and child/young person), explanation (of, for example, processes and outcomes, before, during or after the proceedings), and consultation (on views about outcomes or processes, and for the purpose of gaining insight into the child’s perspective on their situation).24

It is important to note that consultation has a forensic role as well as a participatory one. Evidence of children’s views must be put before the court where they are available, in which case ICLs may rely on the family consultant to produce a report on which the consultant may then be cross-examined.

A further result of direct contact with children is a deeper understanding of the child’s circumstances. This outcome was acknowledged repeatedly by ICLs in a range of ways, even when they indicated that they adopted a cautious approach to direct contact, as the following quotations show.

One ICL noted that discussions with children under school age could be of limited value, but there was still sense in seeing children even in this age group:

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24 See the discussion of the ICL’s role in child participation in Ross (2012a, p. 150). For an international perspective, see also, for example: Douglas, Murch, Miles, and Scanlon (2006).
Sometimes I will say I want to just have the opportunity to see the children, just to see how they are presented. [ICL, private practice, interview]

Another ICL, who indicated they did not routinely meet with children, nonetheless spoke of a number of instances where seeing children/young people facilitated a more profound appreciation of their situation:

It’s enlightening, because you’re able to, I guess, try to match up what children say to you and what they’ve allegedly told each of their parents or other people. I recall one case in particular where it was alleged that [a young person] had written a letter, and [after speaking to them], I was certain there was no way he could have written that letter, even if he wanted to. [ICL, LAC, interview]

The following ICLs indicated that direct contact allowed them to understand the child or young person better:

My main purpose of meeting with the children is to introduce myself to them, and to put a face to a name and get a feel of what type of child they are (shy, reserved, at ease, relaxed, etc.). It is not an interview, nor do I seek to elicit information from them about the issues of the case. That is for the expert reporters to do. [ICL, private practice, survey]

I don’t sit down with a list of preconceived questions in my head and interview children. I like to encourage them just to talk about their lives and their experiences and how they’re feeling about things, without directly asking them what they like or what they think is best for them. I find that really helpful as well, and kids talk to you about how their life is and what’s good for them and what’s not so good for them. That’s very instructive, particularly in the early stages of the case when you don’t yet have any expert evidence. [ICL, private practice, interview]

3.2.3 Adapting practice

An overarching point repeatedly made by ICLs is that the approach they adopt depends on the nature of the matter and the age and maturity of the child or young person, as this comment illustrates:

There should not be a blanket practice without a consideration of all factors involved, including and most importantly, what benefit will the child derive from meeting the ICL, in the context of their experiences in the family law system. [ICL, LAC, survey]

Data from the file analysis in the Legislation and Courts project discussed in Chapter 2 establish that the average age of children in ICL matters in that dataset was 8 years. In relation to age, two sets of distinctions were often made in the interview data. For some ICLs, the key distinction for the purpose of direct contact was between children of school age and under school age. For other ICLs, direct contact was more likely to occur with children aged over 8 years. In either case, the purpose of direct contact with younger age groups was primarily for familiarisation, and some ICLs expressed a preference for not having direct dealings with children in this age group. For children/young people aged over 8 years, explanatory and introductory purposes were emphasised, with a consultative orientation adopted by some ICLs, particularly as the age of the child/young person increased. Varied views on the age at which consultation was an appropriate function of direct contact were evident from discussions, with lower estimates of 8–10 years and upper estimates of 10–13 years. After the age of 13, discussions suggest significantly greater weight is put on consultation, although again varying approaches are evident. Some responses suggested children’s views might be determinative from 13 years up, others from 15–17 years. Cross-
disciplinary perspectives on the weight that should be placed on children’s views at various ages are discussed in section 3.3.1.

Most ICLs (in interviews) described an approach based on indirect discussion with children of their background and views, unless the circumstances of the case made a more direct approach essential (e.g., cases where other material suggested that the children were expressing strong preferences one way or another). Even in such instances, ICLs mostly described a process of engagement where views emerged from general discussions, rather than indicating that they set out to elicit these directly. ICLs also repeatedly emphasised the point that children were under no obligation to express their views. Some ICLs considered that obtaining information on this question was the preserve of a family consultant or single expert witness, and described how they would liaise with these professionals to obtain the relevant evidence (see further below). This approach appears more common in Queensland, South Australia and Western Australia than elsewhere. Where ICLs indicated that they considered it their responsibility to ascertain views if the child or young person wished to express them, most indicated an approach of meeting with the child/young person and having a general discussion to provide an opportunity for views to emerge from the discussion.

3.2.4 Practice orientations to fulfilling the ICL participation function

Within the parameters discussed in the preceding section, the survey and interview data suggest two broad practice orientations to the question of child participation. The key distinction between the two orientations is the extent to which direct contact with children/young people will have a consultative focus and will be considered the responsibility of the ICL. More broadly, the orientations reflect differing conceptualisations of the ICL’s role, and the extent to which professionals emphasise the three ICL functions: participation, evidence gathering, and litigation management.

A cautious, multipronged approach: The dominant orientation

Characteristics of using a cautious, multipronged approach, the dominant orientation, include exercising caution in any direct dealings with children and young people. In interviews with the ICLs, some respondents indicated they did not routinely speak to younger children and would mainly restrict any direct contact with children/young people of most ages to a familiarisation and (less often) an explanation focus. A few indicated that they rarely spoke to children or young people at all. Most considered that evidence of the child’s views should be obtained through a family consultant or single expert witness. These professionals were concerned to protect children/young people from pressure and repeated engagement with multiple professionals. They were more often inclined to perceive a divergence between best interests outcomes and children’s views, and to indicate that they relied on other evidence to assess what a best interests outcome would involve. They emphasised their role as a best interests advocate in the traditional sense and saw their contribution mainly in terms of evidence gathering and litigation management. Some indicated that, as lawyers, they did not have sufficient training to elicit and, more importantly, interpret children’s views.

The purpose of meeting children for familiarisation, and exercising caution in doing so where the children/young people have already had contact with multiple professionals, is illustrated by these comments:

I think that’s very important, but I guess bearing in mind the first issue is the age of the child, and that will depend a lot in terms of their involvement. I meet with children usually over the age of about 8, but it depends on the child, it depends on the case. Obviously there’s circumstances where I don’t meet the children, particular
where there’s ongoing investigations, for example, by the Department for Child Protection or the police, or where there’s a concern about systems abuse, or I can see they’ve already been [interviewed] by several other professionals. I don’t see it as an interview, anyway; I see it as really a meeting in my role, so I think, dependent on the case, very important the level of weight that that then has in terms of the forming of my views. I think every case is very different in that regard. Sometimes it’s absolutely crucial to the case and forms the centre of it, and other times it really doesn’t hold much weight at all, [ICL, LAC, interview]

The following comment from a practitioner in Queensland explains an approach of collaborative practice involving family consultants or other experts in ascertaining the views of children and young people:

It’s our duty to always tell the court what the children’s wishes are and my experts are very familiar with that. So when they do their assessments, if children have a wish, children don’t have to enunciate what their wishes are, but if they do, the experts always record that in their report. When I come up before the court, I always draw that to the judge’s attention. Now if, though, having said that, the end result, the recommendation of the expert and myself is no, I know he wants to do that, but no.

I go there and the report writer generally introduces me to the children. I go in there with them. I never stay in there on my own. I go in with the report writer and it’s quite informal and I just say my name and, depending on their age and level of understanding, explain who I am and what I do. If they’re very young children, I’ll sit on the floor and just chat to them. If they’re older children, teens, then again it depends on the set up—the expert’s room, if it’s like lounge chair stuff, then I’ll be sitting in one lounge chair, they sit in the other one. [ICL, LAC, interview]

Approaches to conflicts between children’s views and their best interests are illustrated in the following quotation:

I probably place less weight on the children’s wishes until they become a teenagers, and more weight on why they have those wishes. If there is really something going on or if it’s just an alignment issue, then that’s something that we should look at trying to fix rather than just making orders in line with their wishes, because their wishes may not always be healthy. [ICL, private practice, interview]

Collaborative practice in this context is explored further in Chapter 5.

**High levels of direct contact: A minority orientation**

An orientation that involves a high level of direct contact reflects an ICL’s confidence in speaking to children and young people for a range of purposes—including familiarisation, explanation and consultation—and view that best interests outcomes are often allied to children’s views. Some ICLs indicated that they consulted older children particularly on some procedural aspects of the case. For these ICLs, the participation function was equally as important, if not more important, than the evidence gathering and litigation management aspects of the role. The following quotations from an interview with an ICL demonstrate these characteristics.

In relation to the first meeting and subsequent engagement, this interviewee from NSW described how they engaged with the child to explain the process and their role in it. This ICL indicated they consulted children/young people where appropriate on procedural issues:

I leave it to the kids really … to determine how they want to use their ICL. I see the purpose of the first meeting with the child to give them information about the
process, about what’s happening for them in court, because often parents don’t give children neutral or accurate information about what’s happening at court … to give them an opportunity to ask me stuff, to find out information and determine too their level of input into this process … With an older child, for instance, I might talk to them around the kind of report they want to be involved in. [ICL, LAC, interview]

The following comments illustrate this professional’s approach to eliciting and working with children’s views:

I give all the children I meet the opportunity to express a view if they want to, but they don’t have to, and I am always clear to advise them … that they have options not to express a view at all … I don’t actually question children about their views. I give them the opportunity to share that with me, if that’s what they would like to do. [ICL, LAC, interview]

This interviewee also raised the issue of best interests representation (as compared with direct instructions), indicating it did not raise tensions in their practice because:

Generally speaking, 90 per cent of cases, the views expressed by a child are directly in line with their best interests. Kids are pretty smart characters. [ICL, LAC, interview]

This comment further illustrates the consultative focus adopted by some ICLs in their dealings with children:

Prior to a hearing, I will ask the child if they wish me to say anything to the court (ensuring they know that will also be in the presence of their parents), and we will agree on a written statement that I read back to them. And I assure them that that message will be delivered verbatim. [ICL, private practice, survey]

3.3 Expectations and practices of ICL direct contact

The following sections explore in some depth practices and attitudes to children’s direct consultation and participation, beginning with a discussion on cross-disciplinary attitudes on children’s ages and the weight that should be placed on their views.

3.3.1 Age-appropriate practice: Cross-disciplinary views and experiences

Responses to a survey question on the level of emphasis that should be placed on the views of children and young people at different ages reveal some interesting differences between the views of legal and non-legal professionals in the survey data, as shown in Figure 3.1. There is near consensus across all professional groups that the views of 15–17 year olds should be accorded high importance, with very large majorities of all professionals (78—81%) also indicating that high importance should be placed on the views of 12–14 year olds. In relation to younger age groups, however, substantially greater proportions of non-legal professionals than legal professionals suggested that children’s views should be accorded high importance. For example, 42% of non-legal professionals indicated that the views of 8–11 year olds should be given high importance, compared to 20% of non-ICL lawyers and 15% of ICLs and 16% of judges. In relation to children in the 3–4 and 5–7 year age groups, a higher percentage of ICLs than any other respondents indicated that children’s views should be given no or limited importance.
Professionals were asked: “More specifically, what weight do you generally give to the views of children/young people at varying ages when forming a view as to what parenting orders accord with the best interests of the child/young person?” The proportion of missing responses ranged from 9.4% to 11.1%. ICL survey, n = 149. Non-ICL lawyers survey, n = 192. Judicial officers survey, n = 54. Non-legal professionals survey, n = 113. Percentages do not sum to 100% as not all response categories are presented.

Figure 3.1  Weight given to children’s views, at various ages of children, by type of professional
3.3.2 Frequency and expectations of ICL direct contact

Two broad orientations in ICL approaches in relation to direct contact were discussed in section 3.2.4. Survey responses in relation to expectations and practices in relation to direct contact are discussed in this section. This material establishes, as suggested in the preceding section, that the cautious multipronged orientation is the dominant approach, but that this approach is not necessarily consistent with the expectations of other professionals, particularly judicial officers.

Most ICLs surveyed indicated that meeting with children or young people was not necessarily a routine part of their practice. Table 3.2 shows that just over half (54%) of ICLs surveyed indicated that they “rarely or sometimes” had such contact, when asked to reflect on their last three ICL cases. Greater frequency in direct contact was reported by just over one-third (35%) of the sample, with 8% saying they never had direct contact. It should be noted that the question was designed to elicit a more easily accessible response to indicate recent practice approaches rather than a less specific indication of general practice approaches.

Table 3.2 Frequency of ICL direct contact with children/young people

<table>
<thead>
<tr>
<th>Frequency of contact</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>8.1</td>
</tr>
<tr>
<td>Rarely/sometimes</td>
<td>54.4</td>
</tr>
<tr>
<td>Often/always</td>
<td>34.9</td>
</tr>
<tr>
<td>Missing</td>
<td>2.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

No. of responses 149

Note: ICLs were asked: “Thinking about the last three cases in which you have acted as an ICL, how frequently did you have direct contact (in person or on the telephone) with the child/young person?” Percentages may not total exactly 100.0% due to rounding.

As Table 3.3 shows, among non-ICL survey respondents, close to two-thirds indicated they believed that ICLs should meet with children/young people in each case. Interestingly, non-legal professionals were marginally less likely to see a need for this (64%) than judicial officers (69%) and non-ICL lawyers (68%).

Table 3.3 Whether ICLs should have direct contact with children/young people in each case, non-ICL professionals reports

<table>
<thead>
<tr>
<th>ICL should contact</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>68.5</td>
<td>67.7</td>
<td>63.7</td>
</tr>
<tr>
<td>No</td>
<td>25.9</td>
<td>25.5</td>
<td>29.2</td>
</tr>
<tr>
<td>Not sure</td>
<td>1.8</td>
<td>4.2</td>
<td>3.5</td>
</tr>
<tr>
<td>Missing</td>
<td>3.7</td>
<td>2.6</td>
<td>3.5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

No. of responses 54 192 113

Notes: Non-ICL professionals were asked: “Do you consider that ICLs should consult directly (in person or by telephone) with the relevant child or young person in each case where that child/young person is of sufficient maturity?” Percentages may not total exactly 100.0% due to rounding.
Considerable variation in practice concerning the purpose of meeting with children and young people is highlighted in the survey and interview data. Where direct contact does occur, it is most frequently undertaken to familiarise the child/young person with the ICL (86%), explain the ICLs role (86%), and explain the family court process to the child/young person (71%). Purposes associated with consultation—discussing the child’s situation and ascertaining their views—were nominated as being undertaken often or always by a lower proportion (60%) of ICLs. Purposes associated with ensuring that children/young people understood the outcomes of the legal process were nominated as being undertaken often or always by the lowest proportions of survey participants—51% for explaining court orders and 56% for explaining outcomes more generally.

This is an area where differences were evident in the responses of ICLs who also practice as separate representatives in the child protection (CP) jurisdiction and those who do not. The most substantial differences in response patterns between the two groups of ICLs are apparent in relation to explaining processes and post-proceedings engagement. Markedly higher proportions of dual-function ICLs than family-law-only ICLs said the purpose of meeting children/young people was often or always to explain their role (97% cf. 80% respectively), explain court orders (66% cf. 41%) and explain court outcomes more generally (60% cf. 48%).

Table 3.4 Main purposes (“often” or “always”) of ICL direct contact with children/young people, by whether ICL also represents children in state child protection matters

<table>
<thead>
<tr>
<th>Reason for contact</th>
<th>ICLs who also represent children/young people in state CP matters (%)</th>
<th>ICLs who do not represent children/young people in state CP matters (%)</th>
<th>All ICLs (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To explain ICL’s role</td>
<td>96.9</td>
<td>79.5</td>
<td>85.9</td>
</tr>
<tr>
<td>To introduce ICL</td>
<td>93.8</td>
<td>81.9</td>
<td>85.9</td>
</tr>
<tr>
<td>To explain the family law process</td>
<td>81.2</td>
<td>65.1</td>
<td>71.2</td>
</tr>
<tr>
<td>To explain the court orders that were made</td>
<td>65.6</td>
<td>41.0</td>
<td>51.0</td>
</tr>
<tr>
<td>To discuss the child’s/young person’s situation and ascertain their views</td>
<td>63.3</td>
<td>59.0</td>
<td>59.7</td>
</tr>
<tr>
<td>To explain the outcome of the family law process</td>
<td>60.4</td>
<td>48.2</td>
<td>55.7</td>
</tr>
<tr>
<td>No. of responses</td>
<td>64</td>
<td>83</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes: The following question was asked: “What is/are the main purpose(s) of your direct contact (in person or by telephone) with the relevant child or young person?” Data for two cases where CP representativeness status was not indicated is not included in the first two columns. The proportion of “cannot say”/missing responses ranged from 1.6% to 4.8%. Percentages do not sum to 100% as not all response categories are presented.

3.3.3 Influences on approaches to ICL direct contact

Legislative, guideline and personal factors

As explained in Chapter 1 and 2, there are a number of legislative and non-legislative instruments that inform ICL practice in key areas. In order to understand the influence that such instruments and other factors (including individual practice orientations and the preference of the child/young person) have on decisions in relation to participation, the ICL survey asked participants to indicate how important various issues were in informing their decisions about whether or not to meet with children/young people.
In Table 3.5, response patterns suggest that a personal preference for meeting with children/young people is the most influential factor, particularly among dual-function ICLs, with 79% of all participants and 92% of this sub-group (cf. 70% of family-law-only ICLs) indicating that this was important or very important.

Also of significant influence is the expectation set out in the guidelines (78% of all ICLs rated this as important or very important), particularly for dual-function ICLs. Of this sub-group, 86% rated this instrument as important or very important, compared with 72% of family-law-only ICLs.

Next most influential was a request by the child/young person to meet with the ICL, with 74% of all participants indicating that this was important or very important. Only small differences (77% cf. 73%) between dual-function and family-law-only ICLs were evident in relation to this point.

The legislative framework that sets out ICL duties, FLA s68LA, imposes a duty on ICLs to inform the court of any views expressed by the child, but does not specify what steps the ICL should take to ascertain these views. This section of the FLA was rated as important or very important by 69% of survey participants, with negligible differences between the two sub-groups.

Table 3.5 “Important” or “very important” factors influencing ICL direct contact with children/young people, by whether ICL also represents children in state child protection matters

<table>
<thead>
<tr>
<th>Factor</th>
<th>ICLs who also represent children/young people in state CP matters (%)</th>
<th>ICLs who do not represent children/young people in state CP matters (%)</th>
<th>All ICLs (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I prefer to meet in person with the child/young person</td>
<td>92.2</td>
<td>69.9</td>
<td>79.2</td>
</tr>
<tr>
<td>The guidelines for ICLs have an expectation that ICLs will meet with children/young people</td>
<td>85.9</td>
<td>72.3</td>
<td>77.9</td>
</tr>
<tr>
<td>The child/young person requested to meet in person</td>
<td>76.6</td>
<td>73.3</td>
<td>73.8</td>
</tr>
<tr>
<td>I consider meeting the child/young person enables me to fulfil my obligations pursuant to s68LA of the FLA</td>
<td>70.3</td>
<td>68.7</td>
<td>69.1</td>
</tr>
<tr>
<td>No. of responses</td>
<td>64</td>
<td>83</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes: The following question was asked: “Please indicate how important the following issues are in informing your practice with regards to meeting children/young people in person?” Data for two cases where CP representativeness status was not indicated is not included in the first two columns. The proportion of missing responses ranged from 2.7% to 4.0% Percentages do not sum to 100% as not all response categories are presented.

Communities of practice in states and territories

The discussion in the preceding section highlights the influence that personal orientation and the practice context (in the sense of whether the ICL practises in family law only or also as represents children/young people in state child protection proceedings) have on approaches to having direct contact with children/young people. Some of the discussion also refers to variations due to the differences in legal aid commission policies described in section 3.1, and these are examined in more depth in this section, particularly in relation to where responsibility for ascertaining children’s views lies.

The survey and interview data suggest that a range of issues contributes to the ways in which different practices develop in different areas. Most obviously, the historical and contemporary policies and approaches of individual legal aid commissions are influential in this regard. Also
significant are the dynamics between and practices and expectations of various professionals—judicial officers, ICL practitioners and family consultants. This excerpt from an interview with an ICL illustrates the dynamics at play in the development of communities of practice in the direct contact context:

It’s a bit of a goldfish environment that I operate in … I have dealt with the [social science] professionals probably for some years. They’ll know who I am, I’ll know who they are; so you generally can have more candid discussions with them than may be the case if they are not familiar with me or me not familiar with them. [ICL, private practice, interview]

Table 3.6 suggests that when reflecting on their last three ICL cases, consulting directly with children/young people was less likely to occur among ICLs in Queensland (12%) and South Australia (27%) than ICLs in NSW (39%) and Victoria (54%). Notably, 82% of respondent ICLs in Queensland reported that they rarely (41%) or sometimes (41%) had contact with children/young people, and 27% of respondent ICLs in South Australia indicated that they never engaged in such contact.

Table 3.6 Frequency of ICL direct contact with children/young people

<table>
<thead>
<tr>
<th></th>
<th>NSW (%)</th>
<th>Vic. (%)</th>
<th>Qld (%)</th>
<th>SA (%)</th>
<th>ACT, NT, Tas., WA (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>5.6</td>
<td>11.5</td>
<td>5.9</td>
<td>26.7</td>
<td>–</td>
<td>8.1</td>
</tr>
<tr>
<td>Rarely</td>
<td>9.7</td>
<td>7.7</td>
<td>41.2</td>
<td>20.0</td>
<td>18.8</td>
<td>14.8</td>
</tr>
<tr>
<td>Sometimes</td>
<td>43.1</td>
<td>26.9</td>
<td>41.2</td>
<td>26.7</td>
<td>65.5</td>
<td>39.6</td>
</tr>
<tr>
<td>Often</td>
<td>27.8</td>
<td>34.6</td>
<td>5.9</td>
<td>20.0</td>
<td>12.5</td>
<td>24.2</td>
</tr>
<tr>
<td>Always</td>
<td>11.1</td>
<td>-</td>
<td>5.9</td>
<td>6.7</td>
<td>–</td>
<td>10.7</td>
</tr>
<tr>
<td>Missing</td>
<td>2.8</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>6.3</td>
<td>2.7</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>72</td>
<td>26</td>
<td>17</td>
<td>15</td>
<td>16</td>
<td>149</td>
</tr>
</tbody>
</table>

Note: ICLs were asked: "Thinking about the last three cases in which you have acted as an ICL, how frequently did you have direct contact (in person or on the telephone) with the following people?" Data are not reported by state/territory for 3 responses where state/territory was not indicated; these data are, however, included in the Total column. Percentages may not total exactly 100.0% due to rounding.

More specifically, the ICL interviews and open-ended survey responses of ICLs (in Queensland and South Australia in particular) suggested a preference against consulting with children/young people for the purpose of obtaining their views because they considered this to be outside the scope of their role as an ICL and/or beyond their expertise. Practitioners in these areas, especially Queensland, indicated that participation was facilitated through a collaborative approach, with family consultants/single experts obtaining information about the circumstances and views of children and young people, as required by Legal Aid Queensland policy.

While there were insufficient survey responses from professionals in Western Australia to analyse this issue on a quantitative basis, interview data suggest that in this state also, the more common practice is to rely on social science experts to provide evidence of the views of the child or young person.

A further relevant factor to affect the frequency with which ICLs indicated having direct contact with children/young people was whether they were also a child representative in state child
protection matters, as shown in Table 3.7. For example, 14% of dual-function ICLs reported that they never or rarely directly contacted children, compared to 30% of family-law-only ICLs.

Table 3.7  Frequency of ICL direct contact with children/young people, by whether ICL also represents children in state child protection matters

<table>
<thead>
<tr>
<th>Frequency of direct contact</th>
<th>ICLs who also represent children/young people in state CP matters (%)</th>
<th>ICLs who do not represent children/young people in state CP matters (%)</th>
<th>All ICLs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>3.1</td>
<td>12.1</td>
<td>8.1</td>
</tr>
<tr>
<td>Rarely</td>
<td>10.9</td>
<td>18.1</td>
<td>14.8</td>
</tr>
<tr>
<td>Sometimes</td>
<td>45.3</td>
<td>36.1</td>
<td>39.6</td>
</tr>
<tr>
<td>Often</td>
<td>28.1</td>
<td>20.5</td>
<td>24.2</td>
</tr>
<tr>
<td>Always</td>
<td>10.9</td>
<td>10.8</td>
<td>10.7</td>
</tr>
<tr>
<td>Missing</td>
<td>1.5</td>
<td>2.4</td>
<td>2.7</td>
</tr>
<tr>
<td>No. of ICLs</td>
<td>64</td>
<td>83</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes: ICLs were asked: “Thinking about the last three cases in which you have acted as an ICL, how frequently did you have direct contact (in person or on the telephone) with the following people?” ICLs were also asked to indicate if they also acted as a child representative in state child protection matters: this information was not provided in 2 responses. Percentages may not total exactly 100.0% due to rounding.

When the data were further examined by state/territory, in NSW, 49% of dual-function ICLs reported that they often or always had direct contact with children/young people in a case, compared to 29% of family-law-only ICLs (data not shown). Across the other states, sample sizes were insufficient to enable a similar analysis to be undertaken.25

The data from interviews with ICLs indicate that in the dominant approach to participation, ICLs place significant reliance on family consultants (or single expert witnesses at times) in a range of ways. They indicated that meetings with the child/young person would take place in the presence of family consultants/single experts and that significant collaborative thought and discussion would occur in relation to the child’s circumstances and views, as these quotations from practitioners in Queensland and Western Australia indicate:

Well, I was just thinking I know that a lot of times that they expect that they will get to have their say and I ensure that … I pick my family report writer as appropriate to what I think the children need as well. I know some family report writers are there with young children and making young children feel heard, even if they don’t make recommendations in line with them. [ICL, private practice, interview]

But our general practice … has always been that we don’t engage with children almost at all. If we do engage with children, it would only be older children and it would only be 10 years or older and it would only be with the family report writer during the family report writing process. [ICL, private practice, interview]

Always with the family report writer. Then we discuss a little bit of how we’re going to approach our little session. Then with that all sorted out between us, we go in. They bring me in and I meet the child, baby or whatever. If they’re very young children, it’s not very long at all. “Hello”. You don’t even need to say to them, “I’m a solicitor” or

25 A total of 149 ICLs participated in the survey. NSW: n = 72; Vic.: n = 26; Qld: n = 17; SA: n = 15; WA: n = 7; ACT: n = 5; NT: n = 2; Tas.: n = 2; and no information was provided on state/territory in 3 responses.
“I’m a lawyer” or anything like that. You just, “This is [name removed]”, report writers will say, “Oh she works with me”, that sort of stuff. The older kids, yes, 10 upwards, maybe even seven upwards it’s then you tell them, “I’m a lawyer and do you know what a lawyer does”, and this sort of stuff. All of them already, mum and dad aren’t talking, aren’t getting on. I often say to them that my job is to work with the report writer to tell the court or the judge what the children want, what’s best for the children, to help mum and dad sort out their issues, that sort of stuff. So we keep it quite general without being too specific. [ICL, LAC, interview]

I have met children with family consultants before, and again it depends on assessing. It’s important to know the purpose, I guess, of what you’re meeting with the child for, and if it’s because someone’s wanting immediate feedback in relation to views or things, then I’ve met with the family consultant. So the child only has to have one meeting. I get to say, this is me, this is my role, this is what I do, and then the family consultant is the one who can provide the evidence to the court, because obviously that’s not my role. And I’m very kind of mindful of that in terms of purpose when meeting with children. [ICL, LAC, interview]

Collaborative practice with family consultants/experts concerning children’s views was also a feature of the minority orientation to participation but, in this approach, responsibility for ascertaining views was seen to be as much a responsibility of the ICL as of the family consultant/expert. For example, this NSW-based ICL described how liaising with family consultants at various points fed into their decision about how to progress the case:

Where the family consultants don’t always—I guess they mostly meet with the kids early on. What I like to do is say, “Well, look, this is what I’m hearing from the children. This is what the evidence is suggesting that I’ve been able to get to the court on subpoena or otherwise”. I like to bounce that off them and see what their own observations were as our social scientist. [ICL, private practice, interview]

3.4 Concerns of ICLs regarding direct contact

The discussion in the preceding section established that engaging directly with children/young people on a routine basis is not uniform practice, and a range of issues influence ICL approaches in this regard. The discussion in this section examines concerns expressed about the direct contact aspects of participation. Two themes in ICL practice are particularly pertinent to the material on this section. The first is how the forensic issues that arise in family law cases, and the ICL’s role in dealing with them, complicate practices concerning participation in some matters. The second is the philosophy embedded in ICL practice and family law practice more generally that children should be shielded from engagement in conflict between their parents. Some ICLs expressed the concern that, as lawyers, they did not have the appropriate disciplinary training to elicit and interpret children’s views.

3.4.1 Family violence and abuse cases

The interview data establish that ICL practitioners have particular concerns about engaging directly with children/young people in cases that involve child abuse in particular, and family violence to a more limited extent. Two key concerns were evident. The first was the possibility that speaking with the child/young person may result in disclosures of child abuse being made that would mean the ICL would have to provide evidence to the court about them and relinquish their ICL
position. The second concern was that direct contact with an ICL may be (at best) redundant or (at worst) damaging in cases where children/youth are involved in dealings with multiple professionals.

**Disclosure of violence and abuse**

In relation to concerns about receiving disclosures, varying views were expressed on the extent to which this was a reason to limit direct contact. For some ICLs, the possibility meant that they formed the view that direct contact with children/youth people should not occur. For others, they felt that direct contact had to be managed carefully. These ICLs indicated they would limit their consultation to a “meet and greet” and/or an explanatory discussion about the ICL role and relevant aspects of the legal process. The following quotations illustrate the ICLs’ views:

> Another issue is to make sure that you as an ICL are protected, that you don’t become a witness … My general rule is no matter how old the child is, if there are allegations of serious abuse of that child and there’s a police investigation going on, I might [not] speak with that child until the investigation is concluded. Even then, I’ll make it clear when I speak to the child that that’s not what I’m talking to them about. I’ve had cases with very, very serious sexual abuse of children and I’ve chosen not to see them at all. [ICL, private practice, interview]

> If there are issues of abuse or criminal actions, then you need to be very cautious about speaking with the child because of the potential to be a witness. [ICL, private practice, survey]

> In a roundabout way to test the allegations made by one party; i.e., if allegations of physical abuse to the child, [I] might ask them questions about how it is in one household, to see whether there might be truth in some statements, without directly asking them, unless age-appropriate in the circumstances. [ICL, private practice, survey]

> I am aware that ICLs in some other states have concerns about receiving information from children or being put in a position of [being a] potential witness, but I have never experienced any such difficulties at all. [ICL, LAC, survey]

**Interviews with multiple professionals**

Several ICL practitioners who participated in surveys or interviews indicated that they exercise particular caution in matters where children/youth are involved in processes with multiple professionals and agencies, usually because of concerns about child abuse. There were three related reasons for avoiding direct contact in such instances. The first was that direct contact is redundant where other professionals are already engaging with the child/youth person, and information about the child’s views and experiences can be obtained from these sources. The second was that, in such cases, if the ICL makes direct contact with the child, they become one more confusing professional for a child or young person at a time of stress and difficulty. The third was that engaging directly with the child in such cases would expose the child to systems abuse, which is defined 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

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26 The extent to which the risk of an ICL becoming a witness is a live issue is not ascertainable from the data collected in this study. However, in responding to this issue in the request for information, Legal Aid NSW advised that “we cannot recall this occurring at all over the past few years and we rarely find ourselves in a situation where a notification needs to be made due to a disclosure”.

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security are undermined by the actions of individuals or by the lack of suitable policies, practices or procedures within systems or institutions (Cashmore, Dolby, & Brennan, 1994, p. 11).

The following quotations illustrate ICLs’ views in relation to these questions:

In most of my cases, I don’t engage directly with children. I think in many of my cases, there are so many other agencies; whether they’re the state welfare authorities, whether they’re psychologists, whether they’re family therapists, school welfare officers, etc. There’s a real risk that children are just—they’ve spoken to enough people. [ICL, LAC, interview]

But I find it very difficult to try and explain my role to kids who’ve been interviewed by at least three or four other people, and expect them to understand what’s going on … I just think it’s unfair on the kids frequently, to try and expect them to meet with me, and probably not see me again through the process until the very end, and sometimes not even then. I’d prefer to meet them more often and I’d prefer to meet them with a counsellor or a professional, if that was available, more often. [ICL, LAC, interview]

3.4.2 Intensifying pressure

The aims of shielding children and young people from pressure and protecting them from engagement in their parents’ legal dispute is a further rationale ICLs raise for not directly engaging with children/young people, or adopting a cautious approach in this regard. Such concerns have broad and narrow dimensions. More broadly, concerns about the implications of engaging children/young people directly in legal processes were expressed by several ICLs. More narrowly, the potential for ICL involvement to directly lead to pressure being brought to bear on the child or young person by either or both parents was also raised, sometimes in connection with cases where arguments about one parent undermining the child’s relationships with the other were relevant. For some ICLs, such concerns underpinned decisions not to engage directly with children/young people, while for others they led to direct involvement being carefully managed:

I think there is a lot of pressure to involve children in disputes or involve them in the proceedings, and I get a little concerned that we’re sometimes just ticking off a box saying, “We’ve done this”, to ratify a convention rather than look at the particular needs of the child that they’re representing, and seeing how, involving them, interviewing them, will assist the court [to] make orders that assist their best interest. It sounds like a thing where it’s too easy to just tick a box and say, “Well yes, I’ve met the child now. I’ll tick off that part of my role. I don’t have to worry about that or I don’t have to worry about the impact on the child or getting them out of school, disrupting their routine, bringing them into the city or in other ways”. [ICL, LAC, interview]

I’ve had a number of matters where—you’ve got five- or six-year-old children come in and frequently you have a very strong suspicion that whoever’s brought them in has—one of the last things they’ve said before they’ve walked in the door is: “Now you tell them that you want to live with your mum”. Again, I think that’s one of the aspects where I think it’s so unfair on the children in an environment where normally one or other party is bringing them in to have the—and it’s human nature for people to place great store on what they think their children want—so they’re trying to ensure that the kids are telling the ICL exactly what they think they ought to be being told. Again, unless it’s in an environment where there’s a fairly lengthy period of time where
someone can build up trust with a child to be able to get them to open up and to talk freely, I think just a single one or two meetings with an ICL is not really the best way to go about that. I normally prefer to get the wishes of the child through a consultant doing a family report or a s62G(2) report. [ICL, LAC, interview]

The interview data show that ICLs give careful consideration to how, when and where they meet with children/young people, to reduce opportunities for the meeting to lead to pressure being applied to the child or young person:

So I’ll let the principal know when I’m coming, obviously a few days in advance, but I don’t want them to tell the child until that morning—so that there’s no suggestion that either parent’s going to be in their ear. You try and minimise that as much as possible and take the pressure off the child that this person’s coming in to visit you, you’ve got to tell them this or tell them that. [ICL, private practice, interview]

My office is fairly small and the waiting room area where the parents would then sit is just out the door, and the children are close to the door. [I] have my back to the wall, if you like, at the back of the office, so they can open the door and leave at any time. They don’t feel under pressure at all and that’s very important, but they know that I’m here to try and help. [ICL, private practice, interview]

3.4.3 Lawyers, not social scientists

Limitations in the training and expertise on the part of ICLs to consult with children/young people was also identified by ICLs as a concern, even among those ICLs who identified it as a central, albeit challenging, aspect of their job:

[It is the] most difficult part of my practice. Takes planning and preparation to ensure it is worthwhile and purposeful for the child/ren I represent the interests of—to ensure I communicate as clearly as possible and developmentally appropriate, and not overstep or outside step role … So [in] most cases [I] will meet with the child/ren I represent, but if I believe will not be of benefit to them or in fact likely detriment and will not advance my representation/performance of role or court’s information, then won’t meet. [ICL, LAC, survey]

Some ICLs also identified a tension in engaging in direct consultation with children/young people on the one hand and discharging their duties as an ICL in accordance with the best interests model on the other. These ICLs were careful to delineate their role from that of the social science expert, and considered that consultations with children are a task more appropriately undertaken by such an expert:

I think it is important to emphasize that ICLs are lawyers, and that whilst our role sometimes enters a grey area where law and social science overlap, our role in terms of directly interacting with children needs to be carefully thought through. It is admirable, and perhaps politically appealing, to have ICLs having a high level of interaction with children, but one must be careful not to undermine the good work of an ICL by asking—or requiring—them to go beyond the scope of their expertise. [ICL, LAC, survey]
3.5 Concerns of non-ICL professionals regarding ICL direct contact

3.5.1 Views of non-ICL survey participants

The complexity demonstrated by ICL discussions about direct contact is also reflected in the views expressed by respondents in the other survey groups. Responses recognised the importance of direct contact in the fulfilment of the ICL role and of the ICL child participation and evidence-gathering functions. Lack of contact between some ICLs and children was raised as a concern by judges, non-ICL lawyers and family consultants; however, a number of concerns were also raised about direct consultation, some mirroring those of ICLs themselves.

ICLs attracted criticism for failing to take a proactive approach in relation to consulting with children and young people:

The provision of the child’s views are not at the level which I consider sufficient. Sometimes an ICL can get carried away with the fact finding and forget about the impact of some aspects on the child, such as requiring a therapeutic health provider to supply information which may [then] undermine the child’s relationship with that provider. [Judicial officer, survey]

I think it should be standard practice [for ICLs] to meet [the] children they are representing. [Judicial officer, survey]

It should be mandatory unless the child is not of an appropriate age or it is not recommended by a family consultant for risk of systems abuse. [Non-ICL lawyer, survey]

Upon the child obtaining an appropriate age, the ICL should deal and consult directly [with the child]. The ICL’s position has an extremely heavy weight in the courtroom. In most cases, the judge will not go against what the ICL recommends, and therefore they should speak directly with the child. [Non-ICL lawyer, survey]

I feel very strongly about this. You cannot represent the interests of a young person or child without meeting them. [Non-ICL lawyer, survey]

In many ways, [the ICL’s] position as a lawyer acting for the interests of children/young people is compromised by not speaking to … the person in whose interest they are seeking to protect. [Non-ICL lawyer, survey]

You can represent a person’s view only if you have listened to the person. [Non-legal professional, survey]

The UN Convention on the Rights of the Child stipulates the child’s right to have a voice and be represented in a child-focused way. In the current system, the ICL has been appointed to uphold these rights, thereby making it critical that they consult directly with the child. From a micro individual practice perspective, I think that ICL practitioners who directly engage with children are more capable of upholding the children (and their best interests) as the primary focus through court proceedings. It is hard to ignore the lived experiences of a child who tells us their story directly, as opposed to reading their stories from other adults (who are often incapable of accurately understanding the child’s experiences at these times). [Non-legal professional, survey]
ICLs should consult with children so that the child can tell their story directly to the lawyer. That way, it is unbiased. [Non-legal professional, survey]

If the ICL hasn’t seen the child, they are representing a client they know nothing about. The danger is that the case they put forward may be either hearsay and information may have been obtained from someone who has only seen the child once. If a child is seen, then ICLs have information firsthand and can properly represent the child’s best interests. [Non-legal professional, survey]

It is hard to understand how a child could be adequately represented by an ICL throughout legal proceedings if the ICL has never met with and consulted with the subject child. [Non-legal professional, survey]

Feedback from children with less child-focused ICLs sometimes mentions that they were never spoken to directly by the ICL and that they did not understand what their role was. [Non-legal professional, survey]

Not having direct contact with children was identified by some non-ICL lawyers as being particularly problematic where this failure was associated with a lack of independence (see Chapter 7 for further discussion):

Invariably, my experience is that the ICL refuses to speak to the child even when the child is over 12 and wants to express a view. Especially in sexual abuse allegation cases, the ICL invariably sides with the accused parent … by speaking exclusively to the accused person. I have seen several cases over the last two years where there is objective evidence of sexual interference, but the ICL strongly recommends that the child be left with the alleged abuser … The usual order is: Child taken away from mother and mother cannot contact child for one month. Mother forced to undergo psychological/psychiatric treatment with reports going to ICL. If ICL [is] satisfied, then mother allowed limited contact … and yet the ICL never sees/talks to the child or mother. I consider the ICL system to be a very nefarious part of the Family Court system, with the ICL having far too much influence on the outcome, without the ICL having the necessary independence of mind or knowledge of what the child is thinking/feeling. [Non-ICL lawyer, survey]

In my experience, ICLs are inconsistent in their approaches and often out of their depth when it comes to actually engaging with the child as a client. They tend to align with one parent’s views, and most appear to me to misunderstand the independence of their role. Quite frankly, some are very lazy, they are paid by legal aid, seem to belong to a “club”, and their clients cannot complain about the service they provide. [Non-ICL lawyer, survey]

Indeed, the capacity of ICLs to consult with children/young people was also the subject of criticism:

Engaging and determining a child’s view requires a personality and a capacity to establish an understanding and trust with the child that ICLs generally seem to lack, and the resulting ICL views are informed from views from others in the process, rather than from the child. As a result, the views of the child are seldom identified. [Non-ICL lawyer, survey]

The difficulty is that ICLs are invariably young and/or inexperienced, lacking the skills etc. to properly consult with young people and determine when they should and should not [make direct contact]. [Non-ICL lawyer, survey]
An ICL who did not understand child development or communication would be at risk of not understanding what the child was trying to communicate. [Non-legal professional, survey]

I've only experienced limited disadvantage, and this was specifically when an ICL took the lead role to explain the order, without proper understanding of the child and the child’s stage of development. [Non-legal professional, survey]

By virtue of being lawyers, ICLs inadvertently encourage legalistic views and approaches to considering “children’s interests” and frequently miss the complexity of each child’s experiences. [Non-legal professional, survey]

Some non-ICL lawyers also described the difficulties ICLs could experience if they did not meet with the children/young people whose interests they represented, both in relation to dealing with (or having credibility with) parents, and in terms of facilitating the progression of a matter:

Reassuring children and explaining appropriately what is happening can be enormously beneficial for children. I think it is very difficult for ICLs to have credibility with parents if they do not talk to sufficiently mature children, and it diminishes their ability to help resolve matters. [Non-ICL lawyer, survey]

The parents are far more satisfied with ICLs involvement if they take the time to speak with the children and find out their views. They also feel like their children aren’t just “names on a page” and that the ICL’s views are somehow more valid having met the children. [Non-ICL lawyer, survey]

I believe [consultation with the child/young person] should be done more frequently as I often have clients very frustrated that the child is expressing views to them and asking them questions and they do not know what they can say, particularly when there are orders restricting the parent discussing the proceedings with the child. [Non-ICL lawyer, survey]

### 3.5.2 Views of child protection professionals

Data from interviews conducted with child protection department representatives indicate that the majority supported the role of ICLs in ensuring that children and young people have opportunities to be directly heard. For some of the representatives, this support was contextualised as being related to the role of ICLs independently gathering evidence about best interests:

Their most important task—well, for younger children—is to assess the best interests of the children independently of the conflict of the parents. As children are older and more able to have a voice, then I think one of their very important roles is to bring that voice to those proceedings. [Child protection department representative, ACT]

My understanding is that they don't have very much contact at all with the child, and I'm unclear on how they can make an assessment at all as to what the best thing for the child is if they don’t actually know that person. [Child protection department representative, SA]

Well, ultimately presenting to the court their perception of what’s in the best interests of the child. Hopefully that will also take into account the wishes of the child as well as any other dynamics they’ve picked up about the child and their relationship with the parties. So they act as a monitoring role between the proposals being put up by either parent and testing that. [Child protection department representative, NSW]
The NSW child protection department representative further elaborated that the ICL role was also important for shepherding or guiding the child through the process of family law proceedings:

So the ICL gives that buffer but also is able to keep the child informed about what’s happening and get those wishes and other perspectives put to the court so that the court’s able to understand that dynamic. [Child protection department representative, NSW]

Caution in relation to having direct contact between an ICL and a child/young person was indicated by child protection department representatives in two areas, reflecting the concerns raised by ICLs themselves that were explored earlier in this chapter. First were concerns about children/young people having been interviewed multiple times or having had contact with multiple services:

Where a kid has gone through a forensic experience, I think the facts are often before the court without necessarily having to talk to the child. But that’s not to say that the child might not have a particular view about the perpetrator, which also may need to be canvassed. [Child protection department representative, WA]

Second, was the concern about lawyers not being well trained to speak with children/young people or social science specialists, as expressed by the following child protection representative:

So I think what is needed is a very careful assessment that’s personalised to the individual circumstances of that particular child at that particular point in time. I think that ICLs should take advice from the professionals who are trained in child development and training in family dynamics and trained in offender theory, and take advice from those people as to the suitability or not of them directly engaging with the child. [Child protection department representative, WA]

3.6 Summary

The discussion in this chapter has focused on the role that ICLs play in facilitating the participation of children and young people in family law proceedings. This is an area where significant divergences in views are apparent among ICLs and between ICLs and other professionals. The analysis recognises that the notion of participation is context-dependent and multidimensional. In the family law context, a distinction may be made between child focus and child participation. Although child focus may involve participation, it is often conceptualised as referring to the approaches that centralise children’s best interests in decision-making. In this conceptualisation, child focus may occur in the absence of participation. The more specific notion of child participation arises from Articles 12.1 and 9 (among others) of the UNCRC and encompasses the idea that children need to be engaged, through information and discussion, in decisions relevant to their care, and should have the opportunity to express their views in relation to such decisions. This involves directly engaging with children about such decisions but does not necessarily extend to making decisions consistent with their views. It also involves facilitating the child’s understanding of why decisions have been made and how their engagement influenced them.

This analysis identifies a range of ICL practices in relation to engaging with children and young people to support child focus and participation. It is evident that there is a spectrum of practice in this regard, particularly in the extent to which ICLs have direct contact with children/young people. Three main purposes of direct contact have been identified—familiarisation, explanation, and consultation. It is apparent that considerable variation occurs in the extent to which ICLs engage with children and young people for these purposes. Practice decisions about this are influenced by the age of the child and the nature of the case. Cases in which particular concerns about direct
contact arise include those involving family violence and/or child abuse. These concerns relate to subjecting children/young people to multiple interviews with professionals and the implications of an ICL receiving disclosures about abuse from a child.

Two broad variations in approach to direct contact have been identified. The first and dominant approach is characterised by a cautious, multipronged approach to direct contact, with this occurring mainly for the purpose of familiarisation and, to a lesser extent if at all, explanation. Direct contact for consultative purposes, or ascertaining children’s views, is often seen by ICLs as being the primary responsibility of the family consultant/single expert, and active collaboration between ICLs and family consultants/single experts takes place for these purposes. The minority approach is one in which there is a high level of direct contact, where the ICLs engage with children/young people for all three purposes—familiarisation, explanation, and consultation—and will in some circumstances consult them on procedural decisions.

Apart from the age and nature of the case, it is apparent that other factors also influence ICL practice in relation to direct contact. These include the community of practice to which the ICL belongs. Among ICLs from Queensland, South Australia and Western Australia, the dominant approach is particularly evident, with consultation for ascertaining views being seen as the responsibility of the family consultant in Queensland and the single expert in South Australia and Western Australia. Practice context is also relevant, with dual function ICLs—that is, those who also represent children in child protection proceedings—being more likely to demonstrate a high level of direct contact than ICLs who practice exclusively in family law.

The data in this chapter demonstrate a divergence between judicial officer expectations of ICLs in relation to direct contact and ICL practices. Although 35% of ICLs reported meeting with children/young people “often or always” when reflecting on their last three ICL cases, 69% of judicial officers indicated they believed ICLs should meet with the children/young people in every case. Qualitative data from judges indicate significant concerns about the lack of direct contact between ICLs and children/young people. Both ICLs and other practitioners raised a number of concerns about direct contact with children and young people, including ICLs being inadequately trained for this task, the possibility of disclosures being made that mean the ICL may become a witness in the case, and the increasing the burden placed on children/young people by having to take part in interviews with multiple professionals.
4 The ICL role: “Honest broker” and evidence gatherer

This chapter examines the two other aspects of the ICL role that were introduced in Chapter 2. It begins by discussing what’s often referred to as an “honest broker” (litigation management) function, and then examines their evidence-gathering function.

4.1 Litigation management

4.1.1 Views of ICLs and non-ICL professionals

As indicated in Chapter 2, ICLs are seen to have an important role in managing litigation or playing an honest broker role.27 This role has several aspects, including ensuring that the litigation is conducted in a child-focused manner (including from a forensic perspective, see further below), encouraging settlement of a matter where appropriate, and keeping the litigation on track.

In relation to the honest broker role, as with the others, the demands placed on the ICL vary according to the dynamics of the case and the court in which it is being heard. A number of different types of dynamics were raised in the data, including matters where one or both parties are self-represented and where complex issues are pertinent. In relation to both the litigation management and forensic functions (see further below), it is apparent that the ICL role is important in influencing the focus of proceedings that would otherwise be conducted bilaterally in an adversarial manner. This issue is encapsulated neatly in this comment:

[ICLs] focus the parents on the best interests of the child, and direct the court to the best interests, where this is often not represented by either parent. [Non-ICL lawyer, survey]

The data in Table 4.1 show that, as would perhaps be expected, a high proportion of judicial officers consider various tasks relating to litigation management to be significant or very significant. This is particularly the case in the importance placed by judicial officers on the role of the ICL in assisting the court to manage litigation where parents are unrepresented (83%), and in facilitating agreements in the child’s best interests to avoid trial (91%). The responses of ICLs, non-ICL lawyers and non-legal professionals suggest they also consider these aspects of the role to be very important, although this theme emerges a little less strongly than in the judicial officer’s responses.

Interestingly, the litigation management tasks that may improve court efficiency and reduce the burden on court resources (i.e., assisting the court to manage the litigation and facilitating agreements) seem to be of greater significance among ICLs, non-ICL lawyers and judicial officers than the task of promoting a less adversarial approach. However, non-legal professionals place much less significance on assisting the court and much more significance on the role of the ICL to facilitate agreements and promote a less adversarial approach.

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27 The FCoA and FMC (2007) Guidelines for Independent Children’s Lawyers provide that “the ICL is to act as an ‘honest broker’ on behalf of the child in any negotiations with the other parties and their legal representatives” (Guideline 6.4). See also the recent decision of Knibbs and Knibbs [2009] FamCA 840, per Murphy J, who held that: “As both the Guidelines and decisions of this Court recognise, an important aspect of the proper exercise of responsibilities by an ICL is to act as an ‘honest broker’, often between highly-conflicted parties each of whom raise contentions based, presumably, on their own perceptions as to the best interests of their children. That role can involve ICLs playing an active part in having parties attempt to resolve their dispute” (para. 56).
Table 4.1  
ICL litigation management tasks considered “very significant” or “significant” by professionals

<table>
<thead>
<tr>
<th>ICL litigation management task</th>
<th>ICLs (%)</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assist court in management of litigation where parents are unrepresented</td>
<td>72.5</td>
<td>83.4</td>
<td>77.6</td>
<td>67.3</td>
</tr>
<tr>
<td>Facilitate agreement on the best interests of the child/young person and avoid trial where possible</td>
<td>80.5</td>
<td>90.8</td>
<td>81.8</td>
<td>86.7</td>
</tr>
<tr>
<td>Promote a less adversarial approach in proceedings involving children/young people</td>
<td>67.1</td>
<td>68.5</td>
<td>66.2</td>
<td>86.7</td>
</tr>
</tbody>
</table>

No. of respondents: 149 54 192 113

Notes: Professionals were asked: “In your view, what aspects of the role of an ICL are very/less significant?” The proportion of “cannot say”/missing responses for the judicial officers, non-ICL lawyer and non-legal professional surveys ranged from 2.6% to 7.4% and for the ICL survey from 15.4% to 16.1%. Percentages do not sum to 100% as not all response categories are presented.

In responses to an open-ended question asking judicial officers to comment on the areas in which ICLs are most helpful, the role of an honest broker, who facilitates settlement and appropriately manages the case progression and its presentation where it proceeds to court, was often referred to:

- Having an honest broker for the child adds considerable value in a number of spheres. The importance is at the front end: gathering evidence that the parties overlook, engaging with the child, providing preliminary views against which the parties can reality test, and assisting with litigation planning to create opportunities where settlement negotiations are more likely to succeed. During the trial, the ICL is very important if the parties do not have competent lawyers or are unrepresented, to ensure a fair trial. [Judicial officer, survey]

- A competent ICL’s ability to maintain a child focus; to be an honest broker between the parties to promote settlement, including identifying appropriate therapeutic interventions to address underlying causes to the parenting dispute. [Judicial officer, survey]

- Assisting the parties to see what is in the best interests of their children and put those interests above their own. [Judicial officer, survey]

ICLs demonstrated strong awareness of the expectations of judicial officers in their survey comments and the ICL interviews. For example:

- The ICL is often called upon to actively case manage a matter and ensure that the representatives of the parties are submitting evidence necessary to determine the case. [ICL, private practice, interview]

Comments from non-ICL legal practitioners reinforce the value placed on this aspect of the role:

- The honest broker role is often extremely helpful, especially when one or both parties are unrepresented. Their “leverage” as a person whose views … carry weight often assists in the early and child-focused resolution of matters. [Non-ICL lawyer, survey]

- Kids can be easily overlooked, and the presence of an ICL can help to remind everyone in the courtroom what it’s all about. [The ICL is a] conduit to enable
children to participate more actively in decisions about their lives. [Non-ICL lawyer, survey]

When there is a good ICL that actively participates in the case, has turned their mind to appropriate experts and evidence gathering, and is fully communicative with all the parties and works collaboratively with the family report writer or other experts, then this can assist in decision-making in the best interests of the child. [Non-ICL lawyer, survey]

4.1.2 Facilitating settlement

According to estimates from ICLs, it is uncommon for a matter involving an ICL not to be settled prior to trial. ICL survey respondents indicated that a minority of cases end up proceeding to court for a judicial determination of all or most issues: only 11% of ICLs indicated that half or more of their cases were resolved in this way (Table 4.2). Consistent with insights from the qualitative data suggesting that family reports and single expert witness reports are also influential in promoting settlement, 48% of ICLs who answered this question estimated that half or more of their matters in the past 12 months resolved after the release of such reports.

Table 4.2 Proportion of disputes involving ICLs where a majority of cases at each stage were resolved, past 12 months, ICL reports

<table>
<thead>
<tr>
<th>Stage of case resolution</th>
<th>Majority of cases resolved (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled by consent between parents and ICL following release of family or Single Expert Witness report</td>
<td>48.3</td>
</tr>
<tr>
<td>Out-of-court negotiations, leading to consent orders</td>
<td>15.5</td>
</tr>
<tr>
<td>Settled at mediation of protracted negotiations</td>
<td>13.5</td>
</tr>
<tr>
<td>Negotiations at court, leading to consent orders</td>
<td>23.5</td>
</tr>
<tr>
<td>Mainly or wholly decided by court</td>
<td>11.4</td>
</tr>
</tbody>
</table>

Notes: ICLs were asked the following question: “Thinking about the resolution of the cases where you were the ICL, please estimate the proportion of parenting disputes you have dealt with over the past 12 months that have been resolved in the following ways”. The proportion of “cannot say”/missing responses ranged from 16.8% to 29.5%. Percentages do not sum to 100% as not all response categories are presented and each of the items were asked individually.

The ICL’s capacity to encourage settlement was seen to have several different bases arising from their core role of representing children’s best interests.28 As the following quotations illustrate, the main issues are independence, child focus, and the ability to test the parents’ positions against the evidence:

[ICLs are helpful] in providing opportunities for parents to resolve disputes [and] in providing a mirror to parents to see how their behaviour impacts on [the] child. [Judicial officer, survey]

Parties feel that their child is being “heard” if an ICL is appointed. Many feel there is more justice to the process if there is an ICL appointed. More matters resolve because the ICL’s view is often listened to … The ICL does not “take sides” and can therefore

28 Note that the Guidelines for Independent Children’s Lawyers (FCoA & FMC, 2007) states that: “The ICL should assist the parties to reach a resolution, whether by negotiation or judicial determination that is in the best interests of the child” (para. 4). See further discussion of the ICL’s dispute resolution role “emphasising the lawyers role in actively assisting to resolve the dispute before the court” in Ross (2012a, p. 148 and 151-152).
play a more significant role in assisting matters to either resolve or to narrow the issues. [Non-ICL lawyer, survey]

Once we do have a report from a single expert witness [on the children’s perspective], we then go back and have a meeting with the family consultant armed with the recommendations of the expert, and that really is the point where a lot of agreements are reached. [ICL, LAC, interview]

If the ICL is an objective, thorough practitioner, then their role is crucial in helping the parties see the weaknesses in their own case to bring about an earlier resolution. They can also help parents’ practitioners gain an insight into the particular characteristics of a subject child which they could not otherwise obtain, which also aids settlement. [Non-ICL lawyer, survey]

An ICL can be useful to break a deadlock between the parties. Their opinion can often be used to either confirm or refute an opinion on an issue in the proceedings that can significantly advance resolution. [Non-ICL lawyer, survey]

4.1.3 Supporting self-represented litigants

Some ICLs suggested that the court’s increasing dependence on the ICL to facilitate the progress of cases correlated with a perceived increase in litigants in person.29 The data suggest a number of different issues arise in the dynamics of these cases. Where both parties are unrepresented, the ICL plays a significant role in shaping the litigation and encouraging settlement. Where one party is unrepresented, or represented by inexperienced lawyers (some stakeholders raised the issue of incompetence as well), the ICL can ameliorate the imbalance that occurs in these instances:

I think that where you’ve got a party that is unrepresented and another party that is represented, one of the most important roles that you bring to the proceedings is a level of balance in the proceedings. For example, I had a case recently where mum had an awful case, but she had a lawyer because … she managed to qualify for legal aid … The father had an excellent case that had no lawyer. And you could just see through the proceedings before the ICL came along that he was being [disadvantaged. That’s] the point of it—just level that out a bit and created a bit of balance in power between parties. [ICL, private practice, interview]

Recently I shot an email to two unrepresented parents saying we have a hearing coming up … The first thing the court will do is ask you what orders do you want the court to make. It would be really helpful if you could articulate [that now] so that I know and so that the other party knows and so that you have the chance to think about that. [ICL, private practice, interview]

ICLs also indicated that unrepresented parents’ claims and expectations could be more difficult to work with in the absence of the reality checking provided by legal representation.

Balancing multiple obligations in cases involving self-represented litigants raised considerable challenges for ICLs. Among these were fulfilling ICL obligations simultaneously with monitoring procedural fairness and natural justice for the unrepresented parties. Dealing with unrepresented parties, and maintaining the fine line between providing legal and procedural information but not legal advice was also regularly raised. In these contexts, adhering to the obligation to maintain

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29 This perception is not reflected in data reported in the respective annual reports of the FCoA and FMC, which show little or no change in the number of finalised matters involving at least one self-represented party (FCoA, 2012; FMC, 2010, 2011, 2012).
impartiality was seen as being particularly important, but also challenging. Finally, dealing with issues (such as mental illness) that are sometimes pertinent in matters involving self-represented litigants was also seen to add to the difficulties encountered in these matters. The following comments illustrate these points:

They don’t pay us enough for having to navigate the litigants in person. Because you’re trying to ensure there’s natural justice, but at the same time you’ve got your responsibility as an ICL, and at the same time you’re trying to navigate these people who don’t have representation through the case. So you’re wearing all these different hats but trying not to merge your independence and become biased or whatever. [ICL, LAC, interview]

[I try to be really clear about] what’s my job and what’s not my job. My job is to represent the best interests of your child or children. It’s not to run your case. It’s not to get evidence from your witnesses. It’s not to issue the subpoenas that you want. It’s to issue the subpoenas that I want. My job might be to liaise with the experts, but it’s not to tell them what to do. My job might be to make recommendations to the court, but it’s certainly not to decide your case. So it’s about—as best I possibly can—setting out really clearly the boundaries of my job and my role. Sometimes that works. It doesn’t always, but that’s the theory. [ICL, LAC, interview]

Look, you’re always going to find—I think probably the hardest parents to deal with, sadly, are the ones with mental health issues, not so much even with schizophrenia and not so much even bipolar because you can medicate, and they can remain medicated and they can live a normal life whilst they’re medicated. It’s the ones with the narcissism and the personality disorders that are just so, so difficult to deal with. These kids grow up, of course, in these homes with these parents and to them, it’s normal. That’s just what life is. But for people on the outside, people in the court, ICLs, either inhouse or outside, it’s really, really difficult. It’s difficult, then, for the child to come to the realisation that, perhaps, it isn’t quite normal how we’ve been living but, at the same time, being cautious to say, “Well, yeah, that’s dad and that’s mum; that’s what they’re like”. We all just have to accept it, blah, blah, blah. Yeah, sometimes it’s a delicate tightrope we have to walk not to alienate the parents. The ICL has to be very careful, has to be totally and remain totally independent, and sometimes it can be so hard when it’s so obvious which party is the one who’s not acting appropriately, but you can’t show it. You’ve still got to be and remain independent. [ICL, private practice, interview]

### 4.2 Evidence gathering

As foreshadowed in Chapter 2, the function of ensuring that the necessary evidence is obtained and put before the court is seen as a critical aspect of the ICL role across the survey participant groups, but especially by judicial officers. In the context of both the evidence gathering function and the litigation management function, the data indicate that the ICL is seen to play a particularly important role in shifting the dynamics of litigation to ensure a focus on the interests of children. Earlier discussion (in Chapter 2) about the nature of the cases involving ICLs, with a concentration

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30 Paragraphs 6.8 and 6.9 of the *Guidelines for Independent Children’s Lawyers* (FCoA & FMC, 2007) identify the importance of the evidence-gathering aspect of the ICL’s role in the context of the interim hearing and final hearing respectively. See also McKinnon and McKinnon (2005) FMCAfam 516, referring to *In the matter of P and P* (1995) 19 Fam LR 1 and *DS v DS* (2003) 32 Fam LR 352 noting the vital role of an ICL as an “evidence gatherer and negotiator” (*DS v DS* (2003) 32 Fam LR 352, para. 32 per Ryan, FM.)
of matters involving child abuse and neglect and family violence in the case-load, reinforces the importance of the ICL’s forensic function.

4.2.1 An independent actor in an adversarial context

As private law matters—where decisions about the conduct of litigation are influenced by strategic decisions made by the parties and their lawyers, and the capacity of the parties to fund the litigation—the ability of the largely publicly funded ICL to influence the evidence put before the court can have a significant effect on the way in which a matter is litigated. Many survey participants from across the different professional groups referred to this factor, together with the issue of the ICL’s independence and objectivity. This excerpt from an ICL interview summarises the way in which, by presenting the range of evidence available on all relevant issues, the ICL’s evidence-gathering function contributes to the court gaining a fuller picture of the child’s circumstances than it might otherwise:

I think first and foremost is to try and distil what the actual issues are from as much corroborative evidence that there is available. So, for example, school teachers, medical practitioners, children’s contact centres, what else? I suppose anyone else who has any involvement with the children in particular rather than just the mother and the father. [ICL, LAC, interview]

A significant aspect of the evidence-gathering task is the exercise of considered judgment about the type of evidence necessary in any particular case, in the context of the resources available to support the process. An issue frequently raised was the importance of ensuring that appropriate evidence was gathered, particularly in relation to expert evidence, where issues relating to mental health (of either or both parents, or carers or the child) or child abuse were relevant, as these comments demonstrate:

To be child-focused, promote the best interests of the children that I represent and, I guess, to go to investigate everything … I mean you do have to use your judgment as to whether you’re going to investigate, spend any resources investigating something or whether it’s, “Ah, that’s just a furphy or red herring”. But apart from that, I think that funding has a lot to do with how much, and … sadly, I feel, does as well. I think it’s important that [the] ICL properly discharges their function. [ICL, LAC, interview]

The role of the Independent Children’s Lawyer, if I can put it this way, is one of an evidence gatherer. An Independent Children’s Lawyer has to: (a) know immediately what the issues are, has to know how to go about obtaining expert reports or subpoenaed material and all that sort of thing, and then putting all of that information before the court so the court has this independent view. [ICL, private practice, interview]

In terms of the expert that I liaise with, if there’s no family report and I think that one’s needed … Family report writers can be social workers or psychologists. So I actually turn my mind to: “Do I need to have a social worker do it or do I need to have a psychologist do it?” The reason I turn my mind to that is, in a sexual abuse case, for example, I may want a sexual risk assessment, in which case, I want a psychologist to do the report. [ICL, LAC, Interview]

After you read a file, you can tell whether or not there’s issues relating to—whether there should be some psychometric testing. If there’s something wrong somewhere; you just can’t put your finger on it, so you’d go more then to a psychologist, rather than a social worker. And whether or not there’s any—I mean, if there’s a history,
when you get the file—of somebody being in some sort of mental health institution, then obviously we would be getting a psychiatric assessment done as well. You’ve just got to fill all gaps. You can’t go into court with a report that’s either not good enough or reports that just fall short because you need other reports. [ICL, private practice, interview]

In response to an open-ended question asking judicial officers to nominate the most helpful aspects of the ICL role, most judicial officers nominated the evidence-gathering aspect of the ICL role (with some also describing the benefits of evidence testing by ICLs). This perspective is reflected in the following quotes:

To ensure production of relevant medical, child protection, police and education records; to identify the area of expertise required for appropriate expert evidence and the issues on which they are to report; to test the witnesses from an independent, child-focused perspective at trial; to formulate appropriate orders. [Judicial officer, survey]

An experienced ICL can assist in evidence gathering and, in the hearing, focusing on the issues in dispute, particularly when litigants are unrepresented. [Judicial officer, survey]

[The] collection of relevant evidence, including by way of subpoena and by way of ensuring the necessary expert reports (including but not limited to family reports, psychiatric assessments and other psychological assessments) are prepared in a timely and efficient manner. [Judicial officer, survey]

Non-ICL lawyers and non-legal professionals also identified the importance of the impartiality of the ICL in discharging their forensic obligations:

If the ICL is sufficient[ly] objective, and reviews and reads all the evidence, and issues the subpoenas needed to be issued, and forms a balanced view without personal or social bias, an ICL can present a view to the court that neither parties would be able to present owing to their subjectivity. [Non-ICL lawyer, survey]

An independent perspective is given and all evidence gathered, as opposed to two one-sided arguments. [Non-legal professional, survey]

Child protection department representatives from Queensland emphasised ICLs having an independent role in the following way:

Independent, impartial information-gathering of all relevant information to ensure that there is a balanced and comprehensive evidence before the court to assist the court in making a decision that’s in the best interests of the child. [Child protection department representative, Queensland, interview]

4.2.2 Most common evidence-gathering tasks

Responses to a series of questions aimed at assessing which evidence gathering tasks are routine and less routine show that arranging subpoenas for documents or witnesses were undertaken “often” or “always” by almost all ICLs (97%; see Table 4.3). Three other tasks were also nominated as being undertaken often or always by high proportions of ICLs: conducting criminal history checks (92%), gathering information about personal protection orders relevant to people involved with the child (91%), and obtaining family reports or reports by single expert witnesses (91%). Of note are the low proportions of ICLs (19%) who indicated that they made formal applications for information under FLA s69ZW, which empowers family law courts to request that state and
territory agencies (child protection departments and police services) make information available to them about notifications and investigations. It would appear that more informal avenues for obtaining such information are preferred, with 75% of ICLs saying they often or always made informal inquiries of these agencies. Very small proportions of ICLs (14%) indicated that they often or always sought to enlist the support of child protection departments for young people.

### Table 4.3 Proportion of ICLs who “often” or “always” undertook specific evidence-gathering tasks

<table>
<thead>
<tr>
<th>ICL evidence-gathering tasks</th>
<th>ICL (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applied for subpoena of documents and/or witnesses and inspected documents</td>
<td>97.3</td>
</tr>
<tr>
<td>Conducted criminal history checks of a parent, family member or other adult</td>
<td>92.0</td>
</tr>
<tr>
<td>Enquired about history of protective intervention orders against a parent</td>
<td>91.3</td>
</tr>
<tr>
<td>Applied for family report/Single Expert Witness report</td>
<td>90.6</td>
</tr>
<tr>
<td>Convened/participated in conferences/informal negotiations (before or at</td>
<td>78.5</td>
</tr>
<tr>
<td>court)</td>
<td></td>
</tr>
<tr>
<td>Appeared in court proceedings (including examining/cross-examining witnesses, where applicable)</td>
<td>77.9</td>
</tr>
<tr>
<td>Made informal enquiries about history of contact with statutory child</td>
<td>74.5</td>
</tr>
<tr>
<td>protection services</td>
<td></td>
</tr>
<tr>
<td>Obtained written reports from a child's/young person's school, kindergarten,</td>
<td>68.5</td>
</tr>
<tr>
<td>child care provider, children's contact service</td>
<td></td>
</tr>
<tr>
<td>Briefed counsel/instructed in court proceedings</td>
<td>65.8</td>
</tr>
<tr>
<td>Requested assessments of the parents (e.g., psychological)</td>
<td>60.4</td>
</tr>
<tr>
<td>Attended mediation/family dispute resolution</td>
<td>58.8</td>
</tr>
<tr>
<td>Prepared court documentation (e.g., affidavit material)</td>
<td>45.6</td>
</tr>
<tr>
<td>Requested assessments of the child/young person (e.g., medical, psychological, attachment assessments)</td>
<td>34.9</td>
</tr>
<tr>
<td>Made formal applications for s69ZW FLA (or s202K FCA) information a</td>
<td>18.8</td>
</tr>
<tr>
<td>Advocated for statutory child protection services to take action/provide</td>
<td>14.1</td>
</tr>
<tr>
<td>support for the child/young person</td>
<td></td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
</tr>
</tbody>
</table>

Note: ICLs were asked: “In your work as an ICL, how often have you …?” a Protective intervention orders can include family violence orders (FVO), apprehended violence orders (AVO), intervention violence orders (IVO), or violence restraining orders (VRO) b Refers to information and documentation from prescribed state and territory agencies (including child protection departments), relating to one or more of the following: (a) any notifications about suspected abuse of a child or family violence relating to a child to whom the proceedings relate; (b) any findings or assessment by the agency of investigations into a notification of the kind referred to in (a); and (c) any reports commissioned by the agency in the course of investigating a notification. The proportion of missing responses ranged from 2.0% to 4.7%. Percentages do not sum to 100% as not all response categories are presented and each of the items were asked individually.

Further analysis of the data presented in Table 4.3 (data not shown) aimed at discerning any differences in practice according to practice context (legal aid commission or private practice) and years of experience, highlights some interesting differences in relation to some tasks, namely:

- Legal aid commission ICLs were more likely to indicate often or always attending mediation (76%) than private practice ICLs (51%); and
- ICLs who had practised as an ICL for more than 5 years were more likely to make an s69ZW FLA application (22–25%) often or always, compared to ICLs with 5 years or less experience.
ICLs with longer experience as an ICL were also slightly more likely to have prepared court documents often or always (55% if more than 10 years’ experience, 47% if 5–10 years’ experience, and 38% if 5 years’ or less experience). There were no other discernible differences based on years of experience.

### 4.2.3 Divergent expectations

As noted earlier, the professionals’ survey asked all respondents about the significance of evidence-gathering tasks to the ICL role. As Table 4.4 indicates, a large majority of survey responses from ICLs, judicial officers, non-ICL lawyers and non-legal professionals suggested that assisting the court by evidence gathering and evidence testing was a significant element of the ICL role. The response patterns set out in Table 4.4 highlight some divergences in expectations in specific areas that merit attention.

<table>
<thead>
<tr>
<th>ICL evidence-gathering and support tasks</th>
<th>ICLs (%)</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assist court by evidence-gathering and testing</td>
<td>83.3</td>
<td>94.4</td>
<td>87.5</td>
<td>85.8</td>
</tr>
<tr>
<td>Work with family consultant or external expert</td>
<td>75.2</td>
<td>68.5</td>
<td>67.2</td>
<td>86.7</td>
</tr>
<tr>
<td>Liaise with statutory child protection services to obtain child protection history and advocate for their involvement as appropriate</td>
<td>66.4</td>
<td>81.5</td>
<td>79.2</td>
<td>89.4</td>
</tr>
<tr>
<td>No. of respondents</td>
<td>149</td>
<td>54</td>
<td>192</td>
<td>113</td>
</tr>
</tbody>
</table>

Notes: Professionals were asked: “In your view, what aspects of the role of an ICL are very/less significant?” The proportion of “cannot say”/missing responses for the judicial officer, non-ICL lawyer and non-legal professional surveys ranged from 2.6% to 7.4% and for the ICL survey from 15.4% to 16.1%. Percentages do not sum to 100% as not all response categories are presented and each of the items were asked individually.

In relation to working with family consultants or external experts, lower proportions of judicial officers (69%) and non-ICL lawyers (67%) awarded this task significance than did ICLs (75%) and non-legal professionals (87%). The adoption of a collaborative approach to direct contact with children—examined in depth in Chapter 3—is likely to underpin these differences.

A lower percentage of ICLs (66%) placed significance on liaising with child protection departments than did judicial officers (82%), non-ICL lawyers (79%) and non-legal professionals (89%). Some of these differences between ICLs and other professionals may be due to a higher level of uncertainty among ICLs, as shown by their higher proportion of “cannot say”/missing responses (15–16% cf. 3–7% among non-ICL professionals). This data is considered further in the text accompanying Table 5.2.

### 4.2.4 Challenges of evidence gathering

A range of challenges was identified by ICLs in fulfilling their evidence-gathering role. Some of these challenges are particularly pertinent to cases involving child abuse allegations and, to a lesser extent, family violence. Others seem particularly acute in certain locations. The evidentiary issues that arise in relation to child abuse and family violence are outlined first, followed by a discussion...
of a range of other challenges identified by ICLs. Chapter 7 includes an examination of cross-disciplinary perspectives on the efficacy of ICLs in dealing with a range of issues, including working with parents and children/young people at risk of harm.

**Family violence and child abuse**

The data from ICL interviews permit a deeper examination of the challenges ICLs experience when acting in matters involving family violence and child abuse. Most ICLs indicated that they sought to manage risks in relation to violence or abuse of children by making an assessment of the child’s safety based on evidence. However, in almost all interviews, ICLs identified the problem of sourcing evidence in order to make that assessment and either support or dispel an allegation, as a significant challenge.

One of the greatest difficulties is assessing how real that risk is, because very often you’re faced with countering allegations of risk; both parents alleging there’s risk to the child from the other. Very often, though, in those sorts of cases there’s been a report to the welfare authorities and there’s been some assessment, and our judicial officers here, both Family Court and Federal Magistrates Court are very open to and find very useful having a report from the welfare authorities where there have been reports or allegations made to those authorities. [ICL, private practice, interview]

Unfortunately—it’s an allegation often made, and it’s often difficult to obtain evidence one way or the other. [ICL, private practice, interview]

You just don’t know whether you’ve got real abuse occurring or whether you’ve got made-up allegations because someone doesn’t want the children to spend time with someone else. [ICL, private practice, interview]

A number of ICLs suggested that they felt significant responsibility in making decisions about risks to children and on occasion found that balancing the right of the child to have a relationship with their parents with ensuring the child was safe was a difficult task:

The main challenge is trying to get the information for the judge to make the decision. A Magellan matter, frequently they’re either easy or they’re very hard in that if you’ve got abuse confirmed and you’ve got kids that are old enough to convince child protection and/or police that … there’s been either sexual assault or physical assault, then they’re relatively easy. What you’re looking at then is trying to—if the perpetrator is wanting to resume a relationship with the child—whether it’s appropriate to do that and, if so, how best to do that with counsellors or whatever for the child and to ensure that it’s in a safe environment for the child. The more difficult ones are the ones where you’ve got a suspicion that there may have been abuse but nothing’s been confirmed. Then you’re looking at the issue of unacceptable risk and what can be done in those matters. They’re the very hard matters and, thankfully, as ICL, I don’t have to make that decision, that’s up to the judge. [ICL, LAC, interview]
A real risk assessment on both sides. What is the risk to the child, having a relationship with this parent, and what is the risk for the child in not having the relationship with the parent. I think that only comes with experience, but it needs experience of particular cases where—jumping to mind—where a parent is in gaol for an abusive crime and acknowledging that’s not necessarily a bar to a relationship with the child. But it has to be unpinned and looked at and examined in heavy detail. [ICL, private practice, interview]

I think the highly conflicting nature of evidence; I think my biggest challenge … is balancing—coming back to the legislation—balancing the right for a child to have a meaningful relationship with one parent versus protecting them from harm. I think finding that balance, and finding the appropriate orders in cases where there’s risk, I find that very challenging, because it’s all about weighing up the evidence. It’s very rarely a clear-cut answer. There’s usually a lot of conflicting evidence, and I find that quite difficult in cases particularly where it’s a matter of a no contact case, for example. [ICL, LAC, interview]

Many ICLs also suggested that in addition to the challenges of gathering the evidence, there could be difficulties associated with having that evidence admitted to the court, particularly when it is drawn from a number of different sources. This difficulty is reflected in the following comment:

The trick is to line all the evidence up and then to clearly be able to point out the strengths and the weaknesses in all of them and the conclusions that the court should draw from that. It is quite tricky because police will work, conduct investigations in their own way, to a different standard of proof. Child protection will do it in a different way as well, and they are acting in their own little silos, I suppose, in terms of how they are conducting investigations. But if you have had all the agency involvements and they could make various conclusions, in a family law jurisdiction you will have, I suppose, the whole picture before you. So it’s actually making some sort of sense out of all the involvement of all those agencies and investigations that have been carried out to assist the court in finally forming its own view. [ICL, LAC, interview]

Interface with child protection departments

Data from interviews with child protection department representatives provide further insights about the interface between the ICL evidence-gathering function and child protection concerns and about the challenges arising in this context. First, was the importance placed on an ICL in providing independent evidence about the history of harm that a child may have experienced. This was exemplified in the following quote from the WA child protection department representative interview:

Obviously with the current family violence amendment to consider the protection of the child over the benefit of a meaningful relationship with both parents; so to place the child’s needs ahead of everybody else in the matter. [And that it is most important] to really familiarise themselves thoroughly with any prior departmental history of involvement with the family. Our current premise is that past harm is best predictor of future harm, and to be able to thoroughly appraise the court of any history with us or police or a local medical—a children’s hospital, whatever the case may be—and to place the child’s views and needs totally ahead of the parents at all times in court. [Child protection department representative, WA, interview]
Second, when a child protection department was not intervening in a matter because their investigation had concluded that there was a sufficiently protective parent, the child protection department then depended on the ICL to convey any ongoing safety concerns to the court. However, this relied on communication being maintained by both the ICL and the child protection department during the course of proceedings. This dilemma is illustrated in the following quotes from Victorian and NSW child protection department representative interviews:

There’s definitely a lot more scope in terms of communication relationship-building with the ICL, because at the moment a lot of cases the department potentially—there are cases in which the department makes a decision there is a protective network, there’s a safety network there for the child, therefore the child doesn’t proceed further in terms of child protection proceedings and we leave it for the Family Court to make the decision around more permanent orders for the child, for example with the protective parent. The department may not have a direct involvement beyond that phase, so the only link then becomes between the ICL and the department in terms of being able to present our assessment. [Child protection department representative, Vic, interview]

So if [we] haven’t intervened, it usually means that we don’t have any ongoing role with the family, but it doesn’t mean that there aren’t any child protection issues. It just means that there’s nothing there that we need to do with that family at this point in time [Child protection department representative, NSW, interview]

**Obtaining expert evidence**

The data indicate that sometimes funding is insufficient to cover the cost of either any report at all or of a report that the ICL considers is necessary, particularly where more specialised evidence is required. Some ICLs indicated that they had to settle for second-best in the area of expert evidence due to funding constraints. Others indicated that reports funded at legal aid rates would be accorded lower priority by experts, and therefore take longer to complete, because legal aid work is less lucrative than private work:

I've now had a number of cases where I will have very serious allegations made against the parent. Then you ask for funding to get a sexual risk assessment done and its denied. I mean there’s no way I can make a submission to the court to say the parent poses a risk to the child if I can’t have them assessed by a professional. [ICL, private practice, interview]

In cases increasingly where the budgetary constraints mean that you can’t get a child psychiatrist and you fall back on psychologists I get very concerned about the quality of assessment that’s being done in court. [ICL, private practice, interview]

I’m an absolute believer that you choose the expert that has the specific skills for this particular fact situation but you can’t always get that because we’re just left to, of course, the one that aren’t very competent and who are still prepared to do things on legal aid rates. [ICL, LAC, interview]

In some areas, particularly Queensland, ICLs observed that there was a shortage of professionals, particularly psychiatrists and other mental health professionals, willing to provide expert reports. This comment illustrates the issues:

There’s a lot of them [independent experts] are dropping off the system because they’re asked to come and help a child and then their lives are put through the ringer. They’re not given the respect they should be or the appointed independent experts in
their field. I suppose it’s the prevalent culture isn’t it that scientists are not given—it’s happening in lots of fields, but in my lifetime in the profession that’s been a big change. There’s this general lack of respect for these people who are very learned, they give up their time for the sake of kids and then lawyers attack them, often with very little understanding of what the evidence is that they’re hearing. [ICL, private practice, interview]

Although most ICLs spoke very positively of their relationships with family consultants, some ICLs also commented on the variable quality of some Regulation 7 consultants (these are family consultants who are based in private practice, are not employed by the court, and are engaged when internal family consultants are not available). This quote highlights the nature of the concerns:

Trying to find out who your Reg. 7 is beforehand is almost an impossible task. Liaising with them about what other material they might need to complete their assessment almost impossible. They refuse to read subpoena documents even when you tell them they are relevant. I mean this isn’t all of them but a lot of them do because again they’re not getting paid enough. [ICL, LAC, interview]

Obtaining information from the court

A small number of ICLs highlighted some of the challenges of obtaining evidence that had been filed with the court. One ICL described the difficulties of obtaining these documents from the court directly and the effect this has on their ability to adequately perform their role:

Courts provide us, as the ICL, with documents. We don’t get them from the parties; we get them from the court directly. Lately I’ve noticed that the court is only providing us with limited material and we’re having to try and find out what other material is there … I got material two days before an interim hearing the other day, in a matter that had already been in court for probably nine months. It had hundreds of pages of affidavits filed. By the time I managed to figure out what I was missing and get them, I was basically standing at the bar table and I had to say to the court unfortunately I’ve just received the material today and I haven’t read it and I really can’t help you. So it was a waste of everyone’s money to have me appointed and not give me the material. I think that it was really just—there’s no other reason except that it’s a money saving technique; give only the material required. But how do they know what’s required. The thing is I didn’t even have the standing past orders. So I didn’t even know what contact the child was having with the parent. [ICL, private practice, interview]

4.3 Summary

This chapter has examined the “honest broker” and evidence-gathering functions of ICLs. As noted in Chapter 2, ICLs—and to a lesser extent judges, non-ICL legal professionals and non-legal professionals—place greater significance on these functions than on the participation function. In each of the “honest broker” and evidence-gathering functions, the independence and impartiality of the ICL is seen to be critical to bringing child focus to proceedings that would otherwise be conducted bilaterally from the parents’ perspectives. Importantly, the publicly funded ICL brings evidence before the court that may otherwise be unavailable if either or both parties made strategic or resource-driven decisions not to agitate certain issues in the litigation.

It is clear that the “honest broker” and evidence-gathering roles are mutually supporting. By developing an evidence base, the ICL can encourage settlement by testing the parents’ positions against a best interests outcome, particularly in light of reports from family consultants or single
expert witnesses. Based on ICL estimates, it appears to be uncommon for a case involving an ICL to proceed to trial.

The ICL role in matters involving self-represented litigants is particularly highly valued by judicial officers, though this is an area where ICLs themselves report experiencing considerable challenges.

It is clear that matters involving family violence and child abuse raise significant challenges. These include obtaining evidence to substantiate or dispel concerns and assist the court to consider what orders would achieve the appropriate balance between protecting a child from harm and maintaining a meaningful relationship with each parent.

Data from ICLs also indicate that there are some concerns relating to expert evidence, including funding constraints and lack of available experts.
5 Cooperation and collaboration: ICL practices in dealing with other professionals

This chapter examines ICL practices in dealing with other professionals, including other legal practitioners, such as parents’ legal representatives, and non-legal professionals, such as family consultants. This discussion begins with the consideration of arrangements for communication and cooperation made at a policy level that affect ICLs. This is followed by a discussion of the views of ICLs, judicial officers, non-ICL lawyers and non-legal professionals regarding current cooperation and collaboration practices between ICLs and other family law system professionals. This includes consideration of the frequency of contact between ICLs and other professionals, the significance and benefit of cooperative and collaborative practices, and positive reflections on the current levels of cooperation and collaboration. Finally, the views on factors impeding cooperative and collaborative practices between ICLs and other family law system professionals will be considered from the perspectives of ICLs, judicial officers, non-ICL lawyers, and non-legal professionals.

5.1 Policy-based arrangements for communication and cooperation

The various legal aid commissions provided insight into the level of cooperation between ICLs, the courts and child protection authorities via our request for information and through their in-depth interview responses. At a policy level, approaches to interactions ranged from formal memoranda of understanding (MOU), through to informal meetings.

Most commissions described strong and positive relationships with relevant courts, fostered by ongoing and regular case management or practice meetings (NSW, Vic., Qld, SA, Tas. and WA), together with informal dialogue (ACT, NSW, Qld) covering issues such as ICL practice and funding:

- We have a good working relationship with both the Federal Magistrate’s Court and the Family Court, and we have regular, semi-regular, formal and informal meetings with them about issues that come up from time to time. [Legal Aid Queensland, interview]
- Well I think we have a very good relationship with the court … Our director has a regular meeting with the court to talk about court-related, practice-related issues … ICLs are raised regularly … in that process. Also we’re on various court-related committees as well within the Law Institute [Victoria Legal Aid, interview]

We have regular meetings and ICL appointments are constantly on the agenda for the meetings with the federal magistrates … They are constantly inquiring whether we are experiencing a funding issue, or whether they’re making too many appointments … They’re quite interested in it from our point of view … They don’t just sit down there blithely making orders without having [an] appreciation that there may be a flow-on of problems for other people. But again, that’s something that we’ve put in train and that really works very well, I think. [Legal Services Commission of South Australia, interview]

The Legal Aid Commission of Tasmania reflected on their friendly and positive working relationships with the relevant courts, and Legal Aid NSW described their regular informal contact with the judiciary as enabling matters to be dealt with immediately rather than deferring for discussion at scheduled meetings.
Support of ICL training programs was also reported by various legal aid commissions:

Certainly both courts are very supportive of the ICLs, the training that is put on for ICLs. A couple of times—we have again, semi-regular ICL panel meetings—probably three or four times a year—when we link up everybody from around the state by phone, or they come into our Brisbane office. Whenever we’ve asked judicial officers from either court or the registry manager or people like that to come along and speak to the panel, they’ve always been happy to do so, just to talk through any changes that might have happened, or hear from the ICLs about the impact of changes on their practice. [Legal Aid Queensland, interview]

We do joint training with them … Just before Christmas we did some joint training with the family consultants and the ICLs in our section so I think that’s indicative of the relationship that we have with the court. [Victoria Legal Aid, interview]

Practical support by the courts of ICLs in practice was also reflected in the observations of legal aid commissions:

[Our registry will] go out of their way to help ICLs or provide stuff that they need. They give us free photocopying—I don’t know if they do that everywhere. When I say free photocopying, I mean of the relevant files. They’re incredibly respectful of ICLs. Consequently, if someone is [unhappy] then they also feel able to push their complaint. We don’t need [protocols]. Every time stuff comes up about protocols, we’re like, “Oh, just ring them up”. [Legal Aid ACT, interview]

Efforts to establish close working relationships between the legal aid commissions, courts and the child protection authorities were also evident in various states through the adoption of MOUs or protocols. According to representatives interviewed from child protection departments and the legal aid commissions, protocols were in place between the child protection department and legal aid commissions and/or the courts to govern the relationships between ICLs and child protection practitioners in New South Wales, Victoria, Western Australia, and Queensland. There were no protocols in place or respondents were otherwise uncertain about protocols or any MOUs in Northern Territory, Australian Capital Territory, or South Australia (except for the MOUs relating to the Magellan case management processes). Protocols that were in place were described as serving to formalise procedures for contact between child protection practitioners and ICLs, and provide guidance about information sharing, referral between jurisdictions, and collaboration. For example, the Legal Aid NSW participant described this aspect in the MOU between Legal Aid NSW and the Department of Family and Community Services:

The MOU and our internal policies and procedures require an ICL to write to FACS [Department of Family and Community Services] at an agreed email address to determine whether the child is known to FACS. This enquiry allows us to determine whether there are child protection concerns and/or active investigations. It also provides an authority for an ICL to make direct contact with a case work manager as a matter progresses. [Legal Aid NSW, interview]

In Queensland, there is a protocol between the child protection department and the family courts. The legal aid commission collaborated in the development of the protocol, but is not a signatory. The protocol does cover interaction and exchange of information between the department and ICLs, and there is a dedicated chapter about the role of ICLs in matters where the child protection department are involved (Child protection department representative, Qld, interview; Legal Aid Queensland, interview).
Victoria has had an MOU between the child protection department and the FCoA since 1995, recently revised as a protocol in May 2011. The protocol also applies to the FMG (now Federal Circuit Court). However, our interviews with child protection practitioners suggest that there is no formal protocol in place between the child protection department and Victoria Legal Aid.

In Tasmania, there appears to be a protocol supporting the recent ICL/Separate Representative training program and regional monitoring but no formal policy in place between child protection practitioners and the courts. However, the child protection department representative who was interviewed indicated that contact is usually through the child protection team leader on a case-by-case basis. It was also reported that there was no MOU in place between the child protection department and family courts.

In Western Australia, in addition to attending the FCoWA Reference Group meetings, Legal Aid WA reported that they engaged in meetings with the court to monitor the MOU between the court, Legal Aid WA and Child Protection and Family Support (CPFS) and the Department of Child Protection and the MOU between the Magistrates Court, the AGD and Corrective Services in Western Australia regarding family violence issues. Both MOUs cover ICLs:

We’ve got a very close working relationship with the court and with the Department for Child Protection as well. In terms of issues around the work of ICLs … we have an MOU between the court, legal aid and the Department for Child Protection around information sharing concerning children who might be at risk. We have a regular working group meeting that currently is quarterly, that talks about issues arising in respect of those information-sharing arrangements. The work of ICLs is often the subject of discussion in those meetings. Between times, when necessary, we communicate with the court, with the department, with our Family Law Practitioners Association around developments. They are any developments that happen, any policy changes and those sorts of things. By virtue of the fact that … we administer the money and appoint the ICLs, both the court and DCP understand that legal aid’s role in discussion around policy and process is integral because we’re the people who … make what needs to happen, happen. For example, more often than not, if we’re talking about information-sharing issues with the department, it’s Independent Children’s Lawyers who are seeking the information. So they need to be clear about what the issues are for ICLs and if they are—if there is a perception that there’s a particular issue arising in respect of the provision of information they know if they bring it back to legal aid, we’ll ensure that that issue is communicated to everybody who’s working as an ICL and it’s addressed. Whether that be through some professional development that we might offer, whether it’s just a communication by issue, whatever, depending on what the issue is, then we’re more placed to ensure appropriate relevant communication to all the ICLs doing the work. [Legal Aid WA, interview]

Most child protection department representatives interviewed from each of the states and territories indicated they have a specialist legal unit within the department comprised of a dedicated practitioner or team of staff for handling family law matters and contact with ICLs. These provide a single point of contact with the child protection departments for the courts and ICLs, and could coordinate department involvement in family law matters. In brief, these include the following:

- NSW has a Care Legal Support team within the department’s legal services division;
- ACT, although being a smaller jurisdiction, has a team with a coordinator;
- WA has a dedicated person from the child protection department situated at the FCoWA;
SA has a Principal Court Liaison Officer with a specialist Court Interface Team within the Policy and Practice Directorate;

Victoria has legal officers within the Child Protection Litigation Office who work across Children's Court and family law cases. Similar to WA, there is a dedicated role of Practice Leader in the Family Law division, collocated between child protection and the FCoA; and

Queensland has a specialist unit in the Operations Division that includes a family law team and dedicated Magellan project officer.

Exceptions to this were the Northern Territory and Tasmania. The interview respondent for the Northern Territory indicated that the status of a policy for child protection and ICLs may have been affected somewhat by transitions with having a new government. At the time of the interview, their organisational structure comprised a CEO, with directors, managers and practice managers in each geographical region. It was not clear how the contact between ICLs and the child protection department or practitioners was managed. For Tasmania, being a small jurisdiction, it was indicated that contact occurs on a case-by-case basis and is infrequent between ICLs and the child protection department. In cases with a current or history of child protection involvement, contact would usually be through the child protection team leader, not the individual worker involved in a case.

With most jurisdictions having a specialist practitioner or team within the child protection department, they usually managed contact with ICLs. Direct contact between ICLs and child protection practitioners involved in a case was then facilitated by the specialist child protection practitioner or team in some jurisdictions but discouraged in others. For example, the child protection representative interviewed for the ACT indicated:

> They won’t contact the frontline workers at all. We don’t allow legal practitioners to contact our frontline workers. They come through my team. So it would depend on the ICL. We’ve got—given the joys of a small jurisdiction—we’ve got fairly good relationships with all of the ICLs. So they will usually contact us to get a sense of what our involvement is and then go from there. [Child protection department representative, ACT, interview]

### 5.2 Cooperation and collaboration in practice

#### 5.2.1 Frequency of contact between ICLs and other professionals

ICLs were asked in the survey to estimate their level of contact with relevant family law system professionals when reflecting on their last three ICL cases. Table 5.1 indicates that more than three-quarters of ICLs reported that they “often” or “always” had contact with the legal representative of a parent/extended family member or with a family consultant or external expert in a case. Only 19% of ICLs indicated they often or always had contact with child protection case officers.
Table 5.1 Proportion of ICLs who “often” or “always” had contact with relevant professionals in their last three cases, by whether ICL also represents children in state child protection matters

<table>
<thead>
<tr>
<th>Professionals contacted</th>
<th>ICLs who also represent children/young people in state CP matters (%)</th>
<th>ICLs who do not represent children/young people in state CP matters (%)</th>
<th>All ICLs (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal representative of a parent or family member</td>
<td>89.1</td>
<td>90.4</td>
<td>88.6</td>
</tr>
<tr>
<td>Family consultant/external expert</td>
<td>73.4</td>
<td>78.3</td>
<td>75.8</td>
</tr>
<tr>
<td>Child’s schoolteacher or child care professional</td>
<td>35.9</td>
<td>33.7</td>
<td>34.2</td>
</tr>
<tr>
<td>Contact service staff</td>
<td>34.4</td>
<td>36.1</td>
<td>35.6</td>
</tr>
<tr>
<td>Extended family (e.g., grandparent)</td>
<td>28.1</td>
<td>30.1</td>
<td>28.9</td>
</tr>
<tr>
<td>Child’s doctor or regular health professional</td>
<td>20.3</td>
<td>20.5</td>
<td>20.1</td>
</tr>
<tr>
<td>Child protection case officer</td>
<td>18.8</td>
<td>19.3</td>
<td>18.8</td>
</tr>
<tr>
<td>No. of responses</td>
<td>64</td>
<td>83</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes: ICLs were asked: “Thinking about the last three cases in which you acted as an ICL, how frequently did you have direct contact (in person or on the telephone) with the following people?” The proportion of “cannot say”/missing responses ranged from 1.6% to 4.8%. The column “All ICLs” also includes responses where information on whether the ICL acted in CP matters was not provided (n = 2). Percentages do not sum to 100% as not all response categories are presented.

Although the highest response rate for ICL interaction with family law system professionals emerged in relation to ICL contact with the legal representatives of parents/family members, the significance and benefits of cooperative and collaborative relationships emerged most clearly in relation to their interaction with non-legal professionals, as the discussion in the next section demonstrates.

### 5.2.2 Significance and benefits of cooperation and collaboration with non-legal professionals

The significance placed on ICLs liaising with family consultants/experts and child protection services was identified by each response group in our professional surveys and is reflected in Table 5.2. This table shows that 75% of ICLs, compared to 87% of non-legal professionals (including family consultants and external experts), identified working with family consultants or external experts as significant or very significant. Slightly lower percentages of responding judicial officers (69%) and non-ICL lawyers (68%) placed this level of significance on this task. Interestingly, Table 5.2 also shows that a markedly lower proportion of ICLs than each of the other respondent professionals attached significance to the task of liaising with statutory child protection services. Some of these differences between ICLs and other professionals may be due to there being a higher level of uncertainty among ICLs, as shown by their higher proportion of “cannot say”/missing responses (15% cf. 4–7% of non-ICL professionals).

These findings are of particular interest in the context of recent Australian research identifying the significance and benefits of strong inter-professional relationships in the family law context.31

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31 Kaspiew, De Maio, Deblaquiere, and Horsfall (2012) identified inter-professional collaboration as challenging but critical to the efficacy of the Coordinated Family Dispute Resolution (CFDR) program (p. 86), with professionals
Table 5.2 Communication/collaboration with other non-legal professionals considered to be “significant” or “very significant” by professionals

<table>
<thead>
<tr>
<th>ICL task</th>
<th>ICLs</th>
<th>Judicial officers</th>
<th>Lawyers</th>
<th>Non-legal professionals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Significance (%)</td>
<td>Very Significance (%)</td>
<td>Significance (%)</td>
<td>Very Significance (%)</td>
</tr>
<tr>
<td>Work with family consultant or external expert</td>
<td>40.3</td>
<td>34.9</td>
<td>38.9</td>
<td>29.6</td>
</tr>
<tr>
<td>Liaise with statutory CP services to obtain CP history and advocate for their involvement as appropriate</td>
<td>36.2</td>
<td>30.2</td>
<td>31.5</td>
<td>50.0</td>
</tr>
</tbody>
</table>

No. of respondents: 149, 54, 192, 113

Notes: Professionals were asked: In your view what aspects of the role of an ICL are very/less significant? Percentages do not sum to 100% as not all response categories are presented. The proportion of Cannot say/Missing responses for the Judicial Officer, Non-ICL Lawyer and Non-legal Professional Surveys ranged from 3.5–7.4% and for the ICL Survey from 15.4% for these two statements.

Cooperation and collaboration with family consultants/experts

The significance and benefits of ICL cooperation and collaboration with family consultants/experts were clear themes emerging in both the open-ended survey responses and interview data of ICLs and the open-ended survey responses of non-legal professionals.

For ICLs, the significance of engaging with experts was a feature of the open-ended survey responses and interview data of ICLs. While the importance of the family/expert report for ICLs from an evidentiary perspective (including for the evidence of the child/young person’s views to be put before the court) was examined in Chapter 4, these data also provide more detailed insight into the benefits arising from collaboration between ICLs and appropriately qualified family law system experts. The benefits of engaging with experts (such as a family consultant or single expert witness) were identified by ICLs as facilitating the exchange of information and the gathering and assessment of evidence, which in turn allow the ICL to ascertain the parenting arrangements that accord with the best interests of the child/young person:

"It’s an area that really does require close collaboration or partnership between the social worker/psychologist and the ICL. The ICL should be free to be able to gather and assess all evidence possible to put before the court. [ICL, LAC, survey]"

"[It is more helpful to] get a family report writer, then to read the subpoenaed material and then be able to provide a more detailed analysis of what they think is in a child’s best interest. [ICL, private practice, interview]"

reflecting positively about working together and developing cooperative relationships and working constructively with other professionals (p. 90). This qualitative data in the CFDR evaluation identified the importance of “reciprocal trust, professional respect and mutual understanding of organisational and practice frameworks” as contributing to effective collaborative relationships (p. 92). See also an earlier study by Rhoades, Astor, Sanson, and O’Connor (2008), which also reflected on the significance of “inter-professional respect to good collaborative relationships”, identifying a “complimentary services approach” whereby professionals “valued and respected the different (relationships versus advocacy) skills and expert (child development versus legal) knowledge base of the two professions” (p. 27). Also, Higgins (2007) identified that an important issue emerging in that study’s interviews with key stakeholders was the importance of inter-agency cooperation, communication and collaboration (pp. 13 & 171).
Where the family consultants don’t always—I guess they mostly meet with the kids early on. What I like to do is say, “Well, look, this is what I’m hearing from the children. This is what the evidence is suggesting that I’ve been able to get to the court on subpoena or otherwise”. I like to bounce that off them and see what their own observations were as our social scientist. [ICL, private practice, interview]

Some ICLs also described important benefits for dispute resolution arising from their ability to liaise with the family consultant or single expert and/or arising from the provision of the family/expert’s report:

Experience is that once the parents have seen a child psychiatrist’s report on their family, they often for the first time get clarity as to what is actually happening in their family. So that’s when I really drive dispute resolution conferences in the cases. I don’t [do] them before I’ve got the evidence, but after I’ve got the expert evidence I would normally ask permission to conduct one of those conferences. [ICL, private practice, interview]

The approach to ICL practice in Western Australia may involve close interaction with the family consultant at the case assessment conference stage:

It’s quite rare for our family consultants to do family reports. They will have met with the parties … sometimes I’ve been at that meeting as well, at the case assessment conference where they do a detailed type risk assessment which is speaking to each of the parents. So I usually have that, which is like a memorandum; it’s not really a family report … The children would not have usually been spoken to by any independent professional for the purposes of the court proceedings at that point. Although what often happens is, once we do have a report from a single expert witness, who we usually use to get that information, we then go back and have a meeting with the family consultant armed with the recommendations of the expert, and that really is the point where a lot of agreements are reached, in terms of, “Okay, these are their recommendations; let’s see if we can put in place some steps”, and at that stage the risk issues have usually been investigated as much as possible, if nothing else has cropped up in the meantime. [ICL, LAC, interview]

For non-legal professionals, the significance of cooperation and collaboration between ICLs and other family law system professionals emerged as a clearly significant factor (particularly for family consultants) in their open-ended survey responses to a question seeking comments about the nature of their contact with ICLs:

The role of the family consultant and the ICL should be [undertaken] in a collaborative manner. [Non-legal professional, survey]

The contact is very important—the relationship is collaborative. While the roles are different, the two people can work together in the child’s best interests. [Non-legal professional, survey]

Collaboration, collaboration, collaboration! We are both on the same page here, aren’t we—representing the best interests of the child. [Non-legal professional, survey]

It is vital—we live in a multidisciplinary world and the relationship between the ICL and the social scientist needs to reflect this. [Non-legal professional, survey]

Cooperation/case discussion is crucial between ICLs and [family consultants]. ICL training should emphasise this requirement. [Non-legal professional, survey]
Non-legal professionals clearly articulated the benefits arising from collaboration as enabling both the ICL and the family consultant to be abreast of all relevant and up-to-date information/evidence and for there to be a free exchange of professional assessments. Thus, between both the ICL and family consultant, the “needs and views” of the relevant child/young person will be heard:

The communication between family consultants and ICLs provides an extra opportunity to ensure the needs and views of the child are being heard. It has largely been very helpful. This is especially so in matters involving significant family violence and risk of harm to an adult or child. [Non-legal professional, survey]

I find it helpful to have two-way interaction with the ICL—either of us may have information that the other does not have or a different opinion regarding the issues. [Non-legal professional, survey]

A team approach in which advice and discussion can lead to clarification of issues … seem[s] to me to be most useful. [Non-legal professional, survey]

I believe the best practice model would have the ICL and family consultant working closely together … I would support the concept of ICLs consulting with family consultant[s] should additional significant information come to light when that information could be submitted to the court by an supplementary report to the initial family report. [Non-legal professional, survey]

Collaborative approaches between ICLs and family consultants in relation to speaking with children/young people were identified by ICLs and non-legal professionals as being beneficial. The earlier discussion in Chapter 3 describes an approach of collaborative practice involving family consultants or other experts in ascertaining children’s views. Family consultants and external experts emerged from their survey responses as being particularly significant for ICLs. When ICLs were asked about whether they considered that they had sufficient experience to consult with children/young people, 37% answered “no” or “not sure” (n = 41). Of these respondents, 41% of legal aid ICLs and 35% of private practitioner ICLs indicated that the support of another professional when speaking with children would facilitate consultations with children. All ICLs providing answers to an open-ended question regarding the type of “other professional” that would be of support when speaking with children/young people, nominated family consultants or similar professionals, including single expert witnesses, psychologists, counsellors and social workers with the skills/expertise in working with children (n = 12).

For non-legal professionals, a collaborative approach to consultation emerged as a means of facilitating greater insight from ICLs’ interactions with children/young people:

Working with a therapist when consulting with a child and debriefing with them after an interview would provide greater insight. [Non-legal professional, survey]

I am unsure what training they receive but, certainly, understanding child development and some basic child counselling skills would assist if the role is to speak directly with the children. Otherwise, teaming up with another professional who has such training would be ideal. [Non-legal professional, survey]

Family consultants were specifically surveyed for their reflections on situations where both they and the ICL spoke with the relevant children/young people. Most family consultants reflected positively on these practices, with some comfortable for co-joint meetings to take place:

When this occurs jointly it has been of great value, the ICLs come to the meetings with a different viewpoint and it has been interesting to “value-add” to the interviews by being alert to when the questions or information from the ICL to the child need
clarification, or when the answer needs that. I think we are well-trained communicators and that allows us to assist in such interviews. Having said that, I have always been impressed at how well ICLs do relate to the children, much better than they express confidence in doing. The discussions that we have after the interviews are of as much value as the meetings themselves. I don’t have any problem with ICLs seeing children in their own offices as long as they regard it as a meet ‘n’ greet rather than an information-gathering interview. [Non-lawyer professional, survey]

More specifically, a number of family consultants identified joint interviews as positive in their reduction of multiple interview effects, their facilitation of the cross-checking of information and impressions, and their facilitation of debriefing between the professionals. For example:

ICLs are always welcome to attend interviews with the child conducted by the family consultant and are permitted to take notes and to ask their own questions. They are then able to discuss issues such as developmental needs, the impact of family violence or (drug and alcohol) abuse or even parental mental health issues with the family consultant—with particular reference to how these may have impacted on the child. The family consultant should be able to ask the ICL to subpoena material that would be useful in the family report and to follow up leads such as talking to teachers etc. It can work very well and it helps to avoid systems abuse, as the child will not have to go over the same ground again. The ICL can also take advantage of the facilities available, such as the child care room where there are lots of toys and the children are likely to feel more relaxed, particularly if they have been there before. It can also be useful in cases where the child reports back to the parent as to how the interview went and the parent is left with a false impression or believes that things were said that were not actually the case—if one person is doing the interviewing and the other the note taking, then it is possible to have a record of what both the child and the interviewer have discussed. [Non-legal professional, survey]

Some family consultants considered that joint interviews were preferable and enabled the family consultant to assist the ICL if the child became distressed. They identified the positive effects from adopting a collaborative approach to discussions with children to explain court orders:

This collaboration most commonly occurs at the conclusion of trial, to explain outcomes that may prove unexpected or difficult for the child to deal with. In my experience, this has usually been a very successful way of communicating the court’s intentions and expectations in relation to parental behaviour, as well as that of the child. [Non-legal professional, survey]

While recognising the benefits of co-joint meetings, some family consultants nevertheless preferred the ICL and family consultant to meet children/young people separately as the standard:

I think collaborative discussions with children/young person can be extremely useful in situations such as the explanation of orders, as well as in situations where there is a risk of systems abuse to a child/young person. Given the different roles between the family consultant and ICL, as well as the different disciplinary approaches, I do not think such practice should occur standardly (i.e., ICLs always participating in family consultant’s interviews with children). In fact, I think that there is benefit in distinct practices (when the child is not at risk of systems abuse). [Non-legal professional, survey]

I think it helps if children can meet with the ICL on the day they attend for a family report, as it prevents the practical difficulties involved in court attendances and minimises stress and apprehension on a child. In these situations I would generally
suggest separate meetings. Joint ICL and family consultant explanations of orders to children can be very effective, especially if orders are contrary to a child’s expressed desire. [Non-legal professional, survey]

The two roles are different and sometimes it is important that both professionals speak with children/young people. In other circumstances, it is not so important. Where the [family consultant] and ICL speak together with a child, this should probably only be post-final orders if explaining orders or something similar is necessary. [Non-legal professional, survey]

A small number of family consultants relayed negative experiences of joint meetings, with one describing it generally as “meaningless and perfunctory”, another criticising the ICL for “taking over”, and another reflecting on the lower quality of information derived from meeting children in the presence of the ICL:

I have found it to be useful—particularly in terms of reducing systems abuse for children—but also in the ICL and the family consultant having access to the same information. Having said that, the quality and depth of the information I gather from children seems to be less when a lawyer is present. On some occasions I feel that this is due to the ICL having less of an ability to “connect” with the children and/or child development knowledge is lacking. On other occasions it seems like the “flow” is interrupted, e.g., if I have to explain larger words used by the ICL, however this may be an area that I need to develop better skills in co-working with ICLs. [Non-legal professional, survey]

Some family consultants also expressed concerns about multiple interviews (with both ICLs and family consultants) raising confusion for the child and/or complicating matters for the parents and court where the ICL and family consultant’s views conflict:

I have not encouraged the [family consultant] and ICL speaking to children at the same time, since the interviews/observations are conducted from different frameworks, so children ought not be confused. I have had one matter where the ICL formed a particularly strong view against the father after observation of the children with their mother, a view which was in sharp contrast to the observation findings I had come to after observing children with each parent. This contrast led to undue difficulties, I believe, for the children and parents. [Non-legal professional, survey]

In contrast, other family consultants suggested that children/young people were unlikely to be confused by such an approach:

I don’t think this is too much of a concern, as children generally understand the difference between the roles and in most cases it works well. I think it is important for the ICL to develop a picture of the child and understand their needs and be able to place them within the context of the evidence. [Non-legal professional, survey]

Regardless of whether they preferred joint or separate meetings, some family consultants conceived of ICL discussions with children/young people as being limited to introducing themselves and explaining the ICL role, and they reflected positively on those ICLs who cooperated well and took a flexible approach as to whether or not to speak with the child/young person, depending on the family consultant’s advice in each case.

**Cooperation and collaboration with child protection professionals**

As noted at Table 5.1, only 19% of ICLs indicated they had contact with child protection case officers when reflecting on their last three ICL cases. Nevertheless, interviews with ICLs identified
the importance of obtaining information (usually by subpoena) from child protection departments in relevant cases, with some describing the benefits of communications with the relevant child protection case officer as a means of informing the evidence-gathering process. Some child protection department representatives highlighted the benefits of multidisciplinary, shared training and formal collaboration opportunities with ICLs. These were valued particularly as a way to improve working relationships with both ICL private practitioners and legal aid lawyers. For example:

> The department has quite good relationships with our ICLs. We conduct the Signs of Safety conferences, we do mutual training together, we’re very involved with legal aid as well. So many of the ICLs, not only legal aid but the ones that are funded by legal aid, we—the department—will be conducting training with them, so we have quite close relationships with our ICLs. [Child protection department representative, WA, interview]

According to child protection department representatives interviewed, the main purpose for contact between ICLs and child protection was to subpoena the file in cases where there had been or was currently a child protection intervention, or an FLA s69ZW/FCA(WA) s202K report (containing evidence regarding family violence or child abuse). Overall, there was preference expressed for a subpoena to be in place to protect the child protection department in information sharing with ICLs.

### 5.2.3 Positive reflections on current levels of cooperation

Positive reflections on the level of cooperation between ICLs and other family law professionals emerged most clearly in the open-ended text responses of judicial officers, but were also present in the reflections of non-legal professionals and non-ICL lawyers.

In their open-ended survey responses, numerous judicial officers described the cooperation between ICLs and other family law system professionals as being “excellent” or “good” or at a “high-level”. One judicial officer described communications between ICLs and family consultants as not only helpful but necessary, and roundtable dispute mediation conferences were identified as invaluable by another judicial officer. Smaller jurisdictions identified high levels of cooperation between ICLs and other family law system professionals.

Some non-legal professionals described the level of cooperation existing between ICLs and a range of other family law system professionals as “reasonable”, while many others reflected more positively:

> The ICLs that I have worked with have been very cooperative and have allocated significant time to understanding my perspective of the child and family. [Non-legal professional, survey]

> ICLs are generally easy to access and discuss issues with. [Non-legal professional, survey]

> ICLs generally cooperate extensively with other professionals. [Non-legal professional, survey]

> I routinely contact the ICL in matters where I am preparing a report. ICLs often contact me as matters proceed, especially in interim matters. I appreciate the professionalism and courtesy we show each other and have never had a problem. We don’t have to agree and sometimes I think that worries the ICL and they might be reluctant to speak to us, but they always should. [Non-legal professional, survey]
My experience is that most ICLs communicate well with [family consultants]. [Non-legal professional, survey]

ICLs and [family consultants] in the court have an excellent working relationship. [Non-legal professional, survey]

If I encounter a situation where the best interest of the child is not served and I am aware that an ICL has been appointed, I will call and discuss the matter. In dealing with the ICLs I have always had a fast, adequate response. [Non-legal professional, survey]

Experienced ICLs and [family consultants] in my registry have very positive working relationships. [Non-legal professional, survey]

These cooperative relations emerged not only in relation to ICLs’ dealings with family consultants but also in relation to other professionals, including contact service staff:

I think it is fair to say that there is a very strong level of cooperation between child contact services and ICLs. Many are really helpful and approachable. [Non-legal professional, survey]

The cases that I have been involved in indicate there is cooperation between ICL and other professionals, particularly other lawyers. [Non-legal professional, survey]

It seems that [ICLs] are in a fortunate position to liaise fairly freely with involved parties. They are able to gather a lot of information. [Non-legal professional, survey]

Consistent with some judicial officers, some non-legal professionals also identified working in smaller localities as facilitating positive cooperative practices:

I have found the ICLs in my local area to be open to and actively participate in cooperative processes. [Non-legal professional, survey]

Here there is a relatively small pool of professionals who work well together and who support each other when needed, professionally and personally. [Non-legal professional, survey]

In our registry, it’s very high and very positive. [Non-legal professional, survey]

More specifically, many family consultants reported positive experiences, in the main, when asked to comment in open-ended responses on the nature of their contact with ICLs. The responses of these family consultants included descriptions of generally experiencing good communication/cooperation ($n = 18$) and collaborative discussions ($n = 6$) with ICLs, and identified ICLs as providing assistance with information provision and exchange ($n = 15$). Fewer responses emerged of a negative ($n = 10$) or mixed ($n = 2$) nature from this category of non-legal professional, with only two responses referring to the rarity of their contact with ICLs.

Non-ICL lawyers were less positive than other groups when describing interactions with ICLs, although there were some who did reflect positively:

Most of the ICLs are fantastic to deal with. [Non-ICL lawyer, survey]

I believe the level of communication and willingness to communicate (both the legal reps for the parties and the ICLs) is very good. [Non-ICL lawyer, survey]

My observation is that there is a great deal of cooperation between ICLs and other family law practitioners in this state, as it is a relatively small community. [Non-ICL lawyer, survey]
In our local area of practice, the ICLs and other professionals have a high level of interaction, cooperation and information sharing to assist in progressing matters. [Non-ICL lawyer, survey]

In a small community, the cooperation has been quite high, with protocols developed with [the Department of Child Protection] and other agencies. [Non-ICL lawyer, survey]

Inhouse legal aid ICLs were singled out for their readiness to work cooperatively:

Cooperation is usually never a problem when legal aid ICLs are appointed. [Non-ICL lawyer, survey]

### 5.2.4 Factors impeding cooperation and collaboration

The positive experiences described above contrasted with those of some ICLs, judicial officers, non-ICL lawyers, and non-legal professionals who were less positive about the current level of cooperation and collaboration between ICLs and family law system professionals.

#### Perspectives of ICLs

The discussion in Chapter 4 at section 4.2.4 detailed the difficulties relating to obtaining expert evidence, including social science reports from family consultants and other experts. These difficulties also emerged as being relevant factors impeding ICL cooperation and collaboration. When ICLs were asked to comment (in open-ended responses) on factors that affected their ability to operate effectively, access to relevant experts (both due to cost and availability) emerged as a significant issue. For example:

I struggle to access expert reports in a regional area on the funding available. Few experts will travel to our area for the money available. Otherwise, I do worry that I am only a lawyer, not trained to deal one-on-one with kids (but perhaps it is better, so I don’t fall into a quasi-counsellor role). I also worry that because I have limited in-person contact with the family, I am not able to perceive safety issues and therefore need to rely on other people, like the parties’ lawyers or other engaged professionals, to ascertain day-to-day risk during proceedings. [ICL, private practice, survey]

We need to engage more appropriately with child psychiatrists before we lose all of them as they down tools and refuse to participate in the family court arena. [ICL, private practice, survey]

Some ICLs also identified a need for greater collaboration with child protection authorities to facilitate their own ability to operate effectively:

What would make our job a lot easier, I think, will be if there can be an easier flow of information. … The police and department [in] child protection matters have this very wonderful relationship where the police will provide to them what they want or what they need. We don’t have that. It makes it very difficult for us as we seem to be the enemy everywhere and we need to [seek information] by subpoena material … it’s like I said before, people will verbally tell you something but they won’t put something in writing for you. [ICL, private practice, interview]

In the country areas it’s a bit different … we have a working relationship. But in the main …, the department [here] is pitiful at liaising with ICLs. We can do the issue of subpoena, and when you get their file full of blank pages, and they won’t disclose—in my experience, “I won’t talk to ICLs about what they know about the case. They say
issue a subpoena, you issue the subpoena with nothing there”. [ICL, private practice interview]

Probably my main issue of concern is the lack of a cohesive structure between state child protection matters and the Family Court and the Federal Magistrates Court and the way they can deal with things. [ICL, LAC, interview]

A lack of assistance and failure to receive relevant documentation from parties’ legal representatives were also nominated as relevant factors:

More onus should be placed on practitioners acting for parents to assist the ICL and provide the ICL with information needed. Courts should enforce this. [ICL, LAC, survey]

Greater cooperation between ICLs and the courts was a further factor identified by ICLs:

We are effectively officers of the court but we’re not treated that way. Queuing to use one photocopier to copy orders. Waiting for hours to search subpoenaed documents. Sitting on phone for hours to speak to a court officer to obtain access to a file. Not being allowed to have family consultants’ direct numbers. No back-up when threats to personal safety made. [ICL, private practice, survey]

**Perspectives of judicial officers, non-ICL lawyers and non-legal professionals**

The survey responses suggest that judicial officers, non-ICL lawyers and non-legal professionals are in broad agreement about the factors that impede effective interaction between ICLs and other professionals in the family law system. In particular, two issues—ICL experience and expertise, and their funding and resources—were consistently identified as being most likely to hinder effective cooperation. As shown in Figure 5.1, around 70% of all professionals reported that these two factors were significant or very significant in impeding effective interaction between ICLs and other professionals. Perhaps most noteworthy is that almost half of all judicial officers (48%) indicated that funding and resources were very significant in impeding effective interaction. ICLs’ availability to interact with other professionals was also acknowledged as an important issue, with 65% of non-ICL lawyers and 61% of judicial officers indicating this was significant or very significant. Of all the professional groups, judicial officers were most likely to report “cannot say” in response to these statements, with this answer given for between 11% and 19% of responses across the five statements (data not shown).
Notes: Professionals were asked: “Thinking about cooperative work practices involving ICLs and other family law professionals, to what extent do the following factors impede effective interaction?” The proportion of “cannot say”/missing responses ranged from 5.2% to 18.5%.

Figure 5.1 Cooperative work practices considered “significant” or “very significant” by non-ICL professionals

The open-ended survey responses (particularly of non-ICL lawyers and non-legal professionals) provide further insight into these factors impeding effective cooperation and collaboration.

Lack of availability or attention to the case

Non-ICL lawyers and non-legal professionals were more pronounced in their criticism of ICLs for their lack of availability and/or lack of attention to the case. These issues were identified as impeding effective interaction:

Some ICLs don’t respond to letters and phone calls, and the first you hear from them is at trial. [Non-ICL lawyer, survey]

There are some ICLs who will not accept service of documents by email or fax. In urgent cases, this means that the process can be delayed because the ICL seeks to apply the rules of court regarding their notice of address for service. In all other courts, a party can be served by fax or email as long as they have an email address or a fax number. ICLs can’t afford to be precious about such methods of communications in the current technical age. [Non-ICL lawyer, survey]
Poor-quality ICLs who do not make themselves available to anyone and do not do their job, such as issuing relevant subpoenas at all or in a timely manner. [Non-legal professional, survey]

Some are very difficult to contact. [Non-legal professional, survey]

It depends on the individual ICL and practitioners. I have dealt with ICLs that are impossible to contact or engage with, and others that are very proactive and accessible. Ultimately, I think it comes down to training and resources provided, as well as the motivation of the individual ICL. [Non-ICL lawyer, survey]

In contrast to the negative experiences reflected in the preceding quotes, some non-legal professionals clearly specified that the onus to cooperate is a mutual one:

It is important for the ICL to take a cooperative approach, particularly in gathering information and ongoing case planning/management. It is also very important for other professionals to initiate contact with the ICL, rather than expect the ICL to do everything. [Non-legal professional, survey]

Consultants need to be proactive in contacting ICLs in each case in which they are involved. [Non-legal professional, survey]

Failure to communicate views to parents/parents’ legal representatives

Non-ICL lawyers were particularly critical of ICLs’ failure to communicate their views adequately or appropriately to the parents (including through their lawyers):

An effective ICL communicates well with both parties through their solicitors. There are ICLs who act in such a superior way that their conduct gets in the way of cooperation. [Non-ICL lawyer, survey]

Some ICLs I have worked with seem reluctant to interact with the parties’ lawyers. [Non-ICL lawyer, survey]

Some ICLs in our area do not cooperate with the other practitioners by informing them of what they intend to do in relation to the matter, and at times believe that what they say is final, and often put pressure on the parents to agree to something which is sometimes unreasonable. [Non-ICL lawyer, survey]

I would like to see ICLs make more effort to tell parents what their children are saying. This might help parents become more focused on their children’s wishes. [Non-ICL lawyer, survey]

Better interaction between the parties’ solicitors and the ICL would help resolve matters overall. The ICLs being more candid about their views would assist also. [Non-ICL Lawyer, survey]

Particular concerns were raised by non-ICL lawyers regarding the need for ICLs to engage in communications prior to the end stages of proceedings, especially where no indication had been provided of the ICLs’ position as to the arrangements according with the child’s best interests:

It is usually difficult to promote dialogue with ICLs, to the point that it is often not until court hearing day that you discover their thoughts and intentions … This is clearly unsatisfactory. [Non-ICL lawyer, survey]

ICLs should make themselves more available and not just towards the end of the court proceedings, i.e., hearings. [Non-ICL lawyer, survey]
It is no good just giving the reports to the parties without any discussion about the way forward. Some of the protracted proceedings could be shortened if the ICL gave indications early as to what their recommendations may be, rather than waiting ‘til the court door or the day before at 4:45 p.m. [Non-ICL lawyer, survey]

I often experience situations where it is very difficult to communicate with the ICL, in that they do not return phone calls or answer correspondence, and are unwilling to express a view on a matter prior to attending at court. This makes it very difficult to prepare your client’s case and to manage client expectations. [Non-ICL lawyer, survey]

This issue of the failure on the part of the ICL to inform the parties of their position in an adequate and timely manner is also considered in Chapter 7.

Partisan approach

Some non-ICL lawyers and non-legal professionals criticised ICLs for a lack of even-handed interactions with the parties’ lawyers. Some non-ICL lawyers described the “premature … alignment of [the] ICL to one parent, in spite of the fact that evidence has not been tested” as important factors affecting cooperation. The following non-legal professional identifies the importance of the ICL focusing on advocating for the child rather than the parents:

There does appear to be significant interaction between the parents’ legal rep and the ICLs as they attempt to negotiate contact issues. I believe the ICL should be advocating on behalf of the child and not be involved in which parent gets what or what is fair for each parent. [Non-legal professional, survey]

This issue of partisan behaviour on the part of the ICL is considered in greater detail in Chapter 7.

Personality issues

Some non-ICL lawyers identified “personality issues”, “general lack of communication” and sometimes “downright rudeness” on the part of ICLs as inhibiting cooperation. For example:

You have probably gathered that I am not a fan of the current system. Generally, the ICL takes over the running of the matter and many do not see the need for courtesy and respect when it comes to other practitioners in the matter. The ones from legal aid are a mixed bag, with a few being excellent, and most being lazy and bossy. [Non-ICL lawyer, survey]

Other non-ICL lawyers considered that ICLs should (and do) exercise their role in a more proactive and collaborative manner, and are more open-minded in their approach, particularly with respect to questions of family violence:

Some are more interventionist than others. I like ICLs who are not afraid to be interventionist when it counts. [Non-ICL Lawyer, survey]

They should be prepared to take a more proactive role when the parties are unrepresented. If an issue of harm to a child is raised by an unrepresented party during proceedings, they should be prepared to have the child re-interviewed by the family report writer, or they should be prepared to meet with the child themselves, and if necessary file an application in a case to bring the matter back before the court. They should provide their experts with a full brief of all the court material, and copies of the subpoenaed material. They should be in contact with legal aid, if they consider that a self-represented party who has been refused funding, does in fact have merit and should be funded. They should never assume that mothers are not telling the truth, when allegations of [domestic violence] and/or sexual abuse are raised. They
should acknowledge that by its very nature, evidence of these allegations are difficult to provide. Even if there is not a risk to children, ICLs should acknowledge that a history of [domestic violence] should result in the presumption of [equal shared parental responsibility] being rebutted. They should support sole [parental responsibility] orders more. [Non-ICL Lawyer, survey]

More specifically, some non-ICL lawyers were very clear in their indication that there needed to be a greater preparedness for cooperation and/or collaboration between ICLs and family consultants/single experts:

I think there is a greater need for cooperation and interaction between family consultants and ICLs. [Non-ICL Lawyer, survey]

More interaction with family consultants and independent experts would assist. [Non-ICL Lawyer, survey]

Consistent with non-ICL lawyers, some non-legal professionals were also negative in their reflections on their interactions with ICLs and specifically their difficulties in relating on a professional level with ICLs:

ICLs don’t know what they don’t know about children and working with them. Each case requires persuading each ICL of the potential developmental/psycho-emotional consequences for each child of proposed courses of action, often to be dismissed because not understood. [Non-legal professional, survey].

ICLs are highly decisive and some do not take into account the information, recommendations, suggestions of other professionals, especially when this runs counter to “their hypothesis”. [Non-legal professional, survey]

They are bullies that do not listen. My experience in the Family Court by [lawyers] has been abusive and the court appears to find this acceptable … I think family law legal representative should stop promoting complaints against psychologists as a legal strategy when they have no other defence. The judges should not allow the abuse of professionals to occur. It is not just “if it is too hot in the kitchen”; this is legalised abuse, and the child and their needs are impacted significantly. Most psychologists I know will not see family law clients, as they know they are risking a complaint. This means children are not getting the care they need at a very risky time for them. [Non-legal professional, survey]

Occasionally an ICL will just send me a bundle of documents and say “good luck”. I much prefer to work collaboratively, be thoroughly briefed and be able to pick up the phone and talk to an ICL, knowing that they have seen the children, gathered the evidence and know the matter well. [Non-legal professional, survey]

Inexperience was also nominated by some non-legal professionals as posing an issue for ICLs in their ability to cooperate with other family law professionals:

It is more problematic with new ICLs, those based outside the main cities and those who do not do regular ICL work. [Non-legal professional, survey]

ICL workload and resource limitations

Consistent with the results described in Figure 5.1, ICLs’ heavy workload (and in some cases a failure to attend to a matter) was identified in the open-ended survey responses of non-ICL lawyers as an issue impeding their cooperation with other professionals:
ICLs spend a lot of time in long trials and are very hard to contact. This impedes their ability to negotiate and discuss matters. [Non-ICL lawyer, survey]

Some ICLs are so busy they are unavailable to discuss matters until the day of court, which leaves little time to negotiate or rectify any problems they may take issue with. [Non-ICL lawyer, survey]

Non-legal professionals also identified the problem of resource and time constraints affecting ICLs. For example:

They play a vital role, but funding and availability can hamper the process significantly. [Non-legal professional, survey]

ICLs seem to be very busy, so it can be difficult at times to reach them and you have to rely on them getting back to you in a timely manner. [Non-legal professional, survey]

Often the biggest issue is getting them to return calls or respond to communication, which can be frustrating at times, although I recognise this is often due to resource limitations and time constraints [Non-legal professional, survey]

I would appreciate time being built in for a structured discussion after the release of the family report and before any hearing. Sometimes it would be helpful for the ICL’s preparation for either preparing consent orders or preparing for trial if they were to have some active input from [family consultants]. [Non-legal professional, survey]

Again, consistent with the survey responses detailed in Figure 5.1, some non-ICL lawyers explained that “underfunding means that communication is usually between the lawyer and the [personal assistant]; even via email it is slow and not that responsive”:

The lump sum funding model means that [they] can’t do what they might want to do. [Non-ICL lawyer, survey]

Interaction is mostly good to excellent. Funding seems to be the biggest hurdle to better interaction, and the number of ICLs available is small so the workload is large, creating time deficits for individual matters to be attended to more readily, inclusive of lack of funding to do so. [Non-ICL lawyer, survey]

A lack of funding was identified as compounding the constraints of current legal practice approaches:

The main difficulty arises from client confidentiality and the lack of funding for ICLs to spend significant time between court events in negotiating with other parties. [Non-ICL lawyer, survey]

Cooperation across professional boundaries can be very important in obtaining information, understanding and creating good advocacy. When it is done well it can be crucial. When it is done poorly it is telling. Too often it is poorly done. In part this is because there are too many professionals involved for them to have the necessary trust to speak freely about issues. In part it is lack of understanding of how critical collaboration can be, and in part it is because both professionals are time poor and relatively poorly paid for this work. [Non-ICL lawyer, survey]
Variability among ICLs

Consistent with observations by judicial officers and non-ICL lawyers in respect of the pool of ICLs (see Chapter 7), respondents referred to variability in the levels of cooperation between ICLs and other family law system professionals:

[Cooperation] varies with appointment. For some, it’s an income and they do the very least. Others go above and beyond. [Non-ICL lawyer, survey]

Consistent with non-ICL lawyers, the comments of some non-legal professionals suggested that the level of cooperation depended more on the individual than the professional grouping or institution:

A lot depends on how motivated and committed the ICL is to doing this part [cooperation] of their job. [Non-legal professional, survey]

It is extremely variable—in some cases excellent, in some cases ICLs appear to be quite standoffish and not wanting to sway or influence (or be seen to do so) the expert’s opinion. [Non-legal professional, survey]

Cooperation depends largely on who the ICL is. Sharing of information is seen as important by many agencies where there is a focus on the wellbeing of the child, but not always supported by ICLs. [Non-legal professional, survey]

Some ICLs are very willing to discuss cases and feedback from and to services; however, there are many that use the fear of “biasing” a service not to provide relevant feedback that then puts the child at risk, and are not willing to hear feedback from services that may dispute their findings. [Non-legal professional, survey]

It seems to rely heavily on the personal relationships built up over time. Some ICLs are unwilling to communicate at all, while others are far more relaxed. The [family consultant’s] role has changed over the years too, and there is little opportunity to engage with the legal profession in order to build such useful relationships now. When there were case assessment sessions with all the new filings, the consultants met with the legal profession and [were] able to assist with their experience from early in the lawyer’s career in family law. This does not happen now. [Non-legal professional, survey]

Confidentiality, independence and conflicts of interest

A factor identified by non-legal professionals as impeding cooperative and collaborative practices, arose from the constraints of obligations of confidentiality to be observed by some family law system professions:

Counsellors [funded under AGD’s Family Support Program] are unable to share any information with other professionals, except in the matter of serious physical harm. [Non-legal professional, survey]

It is frustrating when a child has provided information about their views to a counsellor outside the court system and this information cannot be provided to the court, and the child then has to be re-interviewed by a family consultant or an ICL. It seems unfair to involve a child on so many levels. [Non-legal professional, survey]

Sometimes ICLs don’t appear to fully understand the implications of admissibility on the ability of post-separation services to share information; i.e., they want information in writing … The current system of information sharing between confidential and inadmissible services and ICLs (as prescribed in the legislation) is adequate as long as ICLs have a good understanding of why these provisions are necessary to the effective
engagement with court ordered parties and the necessity to prevent the perception of alignment with either party (the maintenance of a neutral stance). [Non-legal professional, survey]

This was nevertheless an issue that some non-legal professionals considered they were able to work with:

It works fairly well in practice … but sometimes involves tacit agreement to work “alongside” family court rules about communicating. [Non-legal professional, survey]

I find the ICLs generally cooperative; however, there are times when they cannot disclose information and that is appropriate. [Non-legal professional, survey]

Navigating professional obligations with respect to confidentiality while enabling appropriate collaboration and information sharing has been a significant issue emerging in the context of research regarding family dispute resolution. This research has identified the need for “positive personal contact and information sharing” (Rhoades et al., 2008, p. 61) in order to enhance effective collaboration between professionals, by sharing insight, expertise and enabling “a more comprehensive picture” (Kaspiew et al., 2012, p. 96) to emerge.

Despite the existence of s10D(4) and s10H(4) of the Family Law Act 1975 (Cth),32 some non-ICL lawyers also suggested that greater communication should be permitted between ICLs and non-legal professionals where information pertinent to the best interests of the child was not accessible to ICLs for reasons of confidentiality:

I feel confidentiality needs to be reviewed to allow professionals who see children or [family dispute resolution practitioners] to interact more freely with ICLs and the courts. [Non-legal professional, survey]

There are real issues about the ICL’s ability to access material and information that would assist the court or the ICL in forming views. For example, if the child has attended a child-inclusive mediation program, why would the [Family Relationship Centre] not be prepared to have a discussion with the ICL on what happened and what the child’s views were? I know they talk about the confidentiality of therapeutic involvement, but it just means we can’t all work together to get an outcome that is in the child’s best interests. I appreciate their objection to producing that material under subpoena, but there has to be a halfway point to allow ICLs to do their job. [Non-ICL lawyer, survey]

It is a great disadvantage that there are restrictions on family dispute resolution material and counselling material being able to be accessed by subpoena. I understand the public policy regarding confidentiality; however, it is not actually relevant when parties are the point of litigation. It simply means the court is less informed. [Non-ICL lawyer, survey]

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32 These sections permit family counsellors (FLA s10D(4)) and family dispute resolution practitioners (FLA s10H(4)) “to disclose a communication if the counsellor or Family Dispute Resolution Practitioner reasonably believes that the disclosure is necessary for the purpose of: (a) protecting a child from the risk of harm (whether physical or emotional); or (b) preventing or lessening a serious and imminent threat to the life or health of a person; or (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or (d) preventing or lessening a serious or imminent threat to the property of a person; or (e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or (f) if a lawyer independently represents a child’s interests under an order under s68L—assisting the lawyer to do so properly.”
The independence of the ICL role was identified by one non-legal professional as a potential barrier to communication between ICLs and family consultants:

I have had minimal contact with ICLs. I think they want to appear separate from the report and do not want to insert their opinions. [Non-legal professional, survey]

**Adversarial rather than collaborative practice**

The quotes extracted directly above, point to legal obligations such as client confidentiality as playing a role in the observed lack of cooperation. More broadly, other non-ICL lawyers identified collaborative work practices as not being part of lawyers’ adversarial approach to practice:

Lawyers are not trained to be collaborative or to work in a collaborative way with other professionals. [Non-ICL lawyer, survey]

Because they are partly in the role of “judge and jury”, ordinary frank and reciprocating cooperation is impossible, which is a very frustrating and complicating factor for the two lawyers who are required to deal with an ICL, and have (virtually) no say as to whether one should be appointed in the first place. If an ICL is proposed/requested by anyone, it seems that the court automatically appoints one. [Non-ICL lawyer, survey]

Family law professionals should be taught how to be less suspicious and less hostile towards ICLs. [Non-ICL lawyer, survey]

One judicial officer identified not only lack of funding as stifling a collaborative approach, but also the influence of the adversarial underpinnings of our legal system, together with the “individual commitment” of ICLs:

The legislation allows ICLs a far greater freedom and ability to interact than any other lawyer (in some cases allowing information release that is precluded to all others), yet such powers and lines of enquiry are rarely used. This is, no doubt, partly related to funding, but also individual commitment. Litigious lawyers do not interact with (nor appreciate the importance of interacting with) other professions and thus have no place on the roster. [Judicial officer, survey]

More broadly, but consistent with these views, some non-legal professionals suggested that ICLs’ training and experience as lawyers did not support or encourage working cooperatively with professionals from other disciplines and identified cooperation between ICLs and other family law system professionals as an “ongoing developmental goal”:

ICLs do not appear to be trained to cooperate outside of the legal system. [Non-legal professional, survey]

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33 Challenges relating to inter-professional collaboration were identified in Kaspiew et al. (2012) as arising from varying practice philosophies, the level of “interdisciplinary understanding and a commitment to working in a collaborative and interdisciplinary manner and in relation to information sharing” (p. 93). Consistent themes have emerged in the context of an increasing focus on building collaborative relationships between family dispute resolution practitioners and family lawyers: Rhoades et al. (2008) identified successful collaborative relationships but also “significant misunderstandings and tensions” between lawyers and FDR practitioners (pp. 186–187). See also earlier work by Rhoades, Sanson, and Astor, with Kaspiew (2006). Note also that interdisciplinary tensions were also identified in the AIFS evaluation (Kaspiew et al., 2009), with support expressed for “initiatives designed to promote a shared commitment to responsible FDR between lawyers and FDR professionals, and between lawyers and other service sector professionals, [as] likely to improve the efficacy of … FDR in particular, and the family law system in general” (p. 110).
There seems to be some variance in the way that ICLs approach their role, with some taking an adversarial role, with others taking a more advocacy role. Role clarification for all concerned would be helpful. [Non-legal professional, survey]

In highly litigious cases, some (not all) barristers seem to view their role in [family dispute resolution] as strongly adversarial, i.e., negating the ICL’s views. However, in fairness, I have also witnessed some barristers in high-conflict cases who appear to be quite keen to listen to the ICL’s views. More work is needed with the Bar, Family Law Section, to educate on the role of ICLs in high-conflict cases. [Non-legal professional, survey]

A few have been helpful and competent, but they have been the exceptions. There is not a strong collaborative approach, which is a great pity, and a significant number have limited insight into the complex and sensitive nature of working with children and young adults. It is not believed [to be] the area of expertise of lawyers. [Non-legal professional, survey]

5.3 Clearer pathways/guidelines for cooperation/collaboration

Confusion about the nature and level of cooperation and collaboration permissible between ICLs and other family law system professionals, was a factor clearly emerging for some non-legal professionals:

I am not entirely clear what the guidelines actually are about communication between the family consultant and the ICL. I have never received any formal training in how family consultants and ICL should/should not communicate or work together. I am often given conflicting information about what is an acceptable/unacceptable level of communication between the [family consultant] and the ICL. A training package for new family consultants would be helpful. [Non-legal professional, survey]

Clarity for all [regarding] who can discuss issues with an ICL if appointed and what information is confidential or privileged. But no guidelines as to when they would, and clarity that this is the professional’s judgment, not a demand from the ICL. Same for [family dispute resolution practitioners], but no mention of [children’s contact service] or post-parenting order program. [Non-legal professional, survey]

Clearer expectations or guidelines regarding cooperation and collaboration between ICLs and other professionals appear warranted, according to some open-ended survey responses from ICLs, non-ICL lawyers and non-legal professionals:

Setting expectations as to how the professionals should be collaborating could be done better, including by way of 3-way conferences with lawyers, excluding parties, so that each can fully ventilate how they the case [is] going. [Non-ICL lawyer, survey]

The court should give a clear direction upon the appointment of an ICL that all correspondence sent between the parties in order to resolve a parenting issue be copied to an ICL. [Non-ICL lawyer, survey]

In our practice there does not seem to be a formal protocol of cooperation between ICL and other family law system professionals, save for other family lawyers. [Non-ICL lawyer, survey]

The professional standards and obligations sometimes are in direct opposition to those of legal aid. [Non-ICL lawyer, survey]
I would dearly love to see more formally established pathways for collaboration with child protection authorities and more funding for family consultants to work early and closely with ICLs. [ICL, private practice, survey]

While variability in the level of cooperation was identified on an individual ICL level, at a policy level, cooperation was described positively, with education and training mechanisms in place:

There is a high level of cooperation at agency level. This does break down to a degree in practice, due to individual ICLs, [family consultants] or other external service providers in the non-government organisation sector [who] do not value the effectiveness of collaborative work practice. There is always work being done across the sector, often through the Family Pathways network and other interagency training and events to promote the collaborative working relationships that is generally and increasingly valued and recognised. This is well recognised by the judiciary. [Non-legal professional, survey]

Nevertheless, more opportunities to network and greater clarification and structuring of cooperation was similarly recommended by some non-legal practitioners:

More opportunities for us to formally network and meet from time to time would be good. [Non-legal professional, survey]

The demarcation between [the] normal family law practice role (i.e., individual representation of one parent’s interest) and the specific role as an ICL in the same court circuit and location (representing the children as ICL) is sometimes a bit blurry. ICLs need support in ensuring the ICL role is distinct from “regular” legal roles. ICL interaction with other family law system professionals needs to be well-structured and highly professional, with lots of support from [the] magistrate and local circuit, as well as [legal] practices that release staff to become ICLs. [Non-legal professional, survey]

In addition, non-legal professionals indicated that there was potential to improve clarity in legislation and information-sharing principles with regard to ICL interaction with child protection professionals, as well as providing training to ICLs to improve these interactions:

Do I share information with the ICLs? Don’t I? Does it have to be subpoenaed? Doesn’t it? Even if the file’s subpoenaed, can I still verbally? So there’s a lot of uncertainty in terms of what child protection can and can’t share. [Child protection department representative, Victoria]

Training for ICLs on the interface with child protection services and police is required. [Non-legal professional, survey]

In relation to communicating with child protection professionals, child protection department representatives (e.g., from SA and WA) described the need to consider alternative ways to share information with ICLs (such as using more electronic communication), citing the issues raised by the subpoena process in terms of the time and resources required to reproduce the large paper files. Avoiding duplication of entire files was reported to be a benefit of having an FLA s69ZW/FCA(WA) s202K report, although this method was yet to have a strong take-up among ICLs. Another strategy reported by the child protection department representative from WA was encouraging ICLs to request specific documents from a file, such as the latest report, rather than subpoenaing the whole file.

It is of note that the current national Guidelines for Independent Children’s Lawyers (FGoA & FMC, 2007) envisage and provide guidance for a collaborative relationship between the ICL and relevant experts, identifying that, as part of the ICL’s role, “the ICL should seek to work together with any
family consultant or external expert involved in the case to promote the best interests of the child” (Guideline 4). Guideline 5.2 also provides that an ICL “should seek guidance from a family consultant or other professional when necessary”. More specifically, guideline 5.3 provides that the ICL may consult with the family consultant, single expert or other relevant expert regarding “the content of the child’s views; the contexts in which those views both arise and are expressed; the willingness of the child to express views; and any relevant factors associated with the child’s capacity to communicate”. In relation to deciding whether, where and how to meet with a child/young person, guideline 6.2 provides that the ICL may make this assessment in consultation with the family consultant or other relevant expert in a case. Guideline 6.3 provides further specific guidance regarding the consultation between the ICL and family consultant/expert with regard to the information that the family consultant/expert may provide to an ICL and states that “the ICL should liaise with any family consultant or other expert appointed to provide a report”. Further specific guidance with respect to the ICL liaising with the family consultant or other experts in the context of facilitating the provision of their report is also provided in guideline 6.7.34 Improved awareness of these guidelines may facilitate effective collaborative relationships between ICLs and non-legal professionals. Previous research evaluating the Coordinated Family Dispute Resolution (CFDR) program has identified protocols that guide information-sharing practices as significant in supporting “clarity and mutual understanding to exist between professionals and between professionals and clients” (Kaspiew et al., 2012, p. 101).

5.4 Summary

This chapter examined ICL practices in dealing with other professionals, including other legal practitioners (primarily parents’ legal representatives) and family consultants. The chapter also considered policy arrangements affecting ICLs’ communication and cooperation, and current practices involving cooperation and collaboration between ICLs and other family law system professionals and assessments of these interactions.

The discussion identified that a range of formal and informal arrangements or policies were in place that covered ICLs’ interactions with family law professionals (including those in courts and child protection departments). The discussion about frequency of ICL contact with other family law system professionals identified that although more than three-quarters of ICLs reported that they often or always had contact with the legal representative of a parent/extended family member or with a family consultant or external expert when reflecting on their last three ICL cases, only 19% reported the same level of contact with child protection case officers. The significance of having cooperative and collaborative practices between ICLs and other family law professionals (in particular, family consultants/experts) emerged clearly from both the closed and open-ended survey responses of ICLs, non-ICL lawyers, non-legal professionals and judicial officers. Specifically, 75% of ICLs identified working with family consultants or external experts as significant or very significant, compared to 67% of non-legal professionals, 69% of judicial officers and 68% of non-ICL lawyers. Positive reflections about current levels of cooperation and collaboration with ICLs emerged in all respondent categories; however, non-legal professionals were, in the main, the most positive in their reflections.

Various factors impeding cooperative and collaborative practices between ICLs and other family law system professionals were also identified from the perspectives of ICLs, judicial officers, non-ICL lawyers and non-legal professionals. From the perspective of ICLs, the inability to access relevant experts by reason of lack of funds or locality, was a significant issue, as was the perceived

34 See also, for example, McKinnon and McKinnon (2005) FMCA fam 516, para. 23.
lack of cooperation from child protection departments and legal representatives of the parties. From the perspective of non-legal professionals, and more particularly from non-ICL lawyers, difficulties with cooperative and collaborative practices were seen to stem from various factors. These included ICLs’ lack of availability or attention to the case, their failure to communicate their views in an adequate or timely manner, ICL workload, and limited resources, together with significant among ICL personalities and practice approaches. A number of practitioners suggested that clearer guidelines or pathways would go some way towards ameliorating impediments to cooperative and collaborative practices. A particular need for training resources for new family consultants to guide their engagement with ICLs was also raised. Further avenues for addressing the factors impeding cooperation and collaboration among ICLs and other family law professionals will be addressed in the Chapter 6, which considers the selection, accreditation, training, professional development and supervision of ICLs.
6 Effective practice: Training, selection, professional development and supervision

Survey and interview questions concerning ICL training, selection, professional development and supervision elicited substantial feedback from ICLs, judicial officers and other professionals. This chapter examines these issues. It begins by setting out the organisational approaches to both the training and selection of ICLs and the ongoing professional development strategies in place in each state and territory as described by the legal aid commissions. Second, insights from the survey and interview data concerning these issues are considered. The chapter ends with a discussion regarding professional supervision arrangements.

6.1 Training and selection of ICLs

6.1.1 National training program

Each of the legal aid commissions has a basic requirement that lawyers who conduct ICL matters will have completed the Independent Children's Lawyer Training Program, presented by the Family Law Section of the Law Council of Australia, in conjunction with National Legal Aid. ICLs are also expected to have a minimum of five years of post-admission experience.

6.1.2 Appointment to ICL panel

In addition to requiring ICLs to have completed the national training program, each of the states and territories has implemented a process for managing appointments of private practitioners to the ICL panel. Each commission described the requirements for appointment to the panel in written responses and telephone interviews. The minimum requirements are similar across the states and territories, but each commission differs in their description of the process for making an application for appointment, as well as the formality of that process.

New South Wales

The process for appointing ICL lawyers is governed by Part 3, Division 2 Legal Aid Commission Act 1979 (NSW). In NSW, individual lawyers are appointed to panels, not firms.

Practitioners wishing to be appointed to the ICL panel in NSW are required to complete an application for appointment to the panel. In addition to demonstrating they meet the national prerequisites, practitioners must also address the selection criteria for the panel and provide the details of two referees.

A selection committee—comprised of nominees from each of the Law Society of NSW and the NSW Bar Association, as well as nominees of the Legal Aid NSW Executive Director, Family Law, and Executive Director, Grants and Community Partnerships—considers applications for appointment to the ICL panel.

The selection committee makes recommendations for each applicant. The Legal Aid NSW CEO makes the final decision. Applicants who are not to be appointed are given reasons and an opportunity to make further submissions before the final decision is made, as required by the Legal Aid Commission Act 1979 (NSW).

Solicitors appointed to the panel are required to enter into a service provision agreement with Legal Aid NSW and to agree to adhere to practice standards. The practice standards incorporate the practice guidelines for ICLs. They are also subject to audit by Legal Aid NSW.
Victoria
Members of the ICL panel in Victoria are appointed according to the requirements set out in section 29A of the *legal aid Act 1978* (Vic.). In addition to the completion of the national ICL training course and having at least five years of post-admission experience, practitioners must submit an expression of interest addressing the key selection criteria.

Queensland
Practitioners wishing to be appointed to the ICL panel must, in addition to meeting the national prerequisites, make a written application and undergo an accreditation process that includes interviews and referee checks. Three members of the Selection and Review Panel—which is made up of two members from legal aid (who are both experienced ICLs), an experienced ICL in private practice, an experienced report writer and a representative of Queensland Law Society—conduct the interviews. Following referee checks with professional associates and colleagues, the Selection and Review Panel makes a recommendation as to whether the applicant should be appointed to the ICL panel.

ICLs appointed to the panel enter into a contractual relationship with Legal Aid Queensland. This is usually for a two- to three-year period. The contracts include a requirement to adhere to the *Best Practice Guidelines for Independent Children’s Lawyers* (Legal Aid Queensland, 2012).

South Australia
Practitioners who meet the Legal Service Commission of South Australia’s requirements (which appear to reflect the national prerequisites) may contact the commission to request that they be placed on the ICL panel. The number of practitioners who will be appointed to the panel is capped to ensure that ICLs receive a reasonable amount of ICL work. ICLs are replaced on the panel from time to time, usually at their own request.

Western Australia
Practitioners who wish to be appointed to the ICL panel in WA must make a formal application to the legal aid commission, demonstrating they meet the national prerequisites.

Tasmania
A family law practitioner wishing to be appointed to the panel may request appointment. If they satisfy the national prerequisites for appointment, the Director will appoint them to the panel.

Australian Capital Territory
Under the new ICL panel arrangements, practitioners wishing to be appointed as ICLs will, in addition to meeting the national prerequisites, be required to submit a written application addressing the selection criteria and provide two independent professional references. Applications will be considered by an advisory committee, with representation from the private practice profession and family law courts, who will make appointment recommendations to the Commission’s CEO.

Northern Territory
The Northern Territory Legal Aid Commission advertises through the Law Society of the Northern Territory and calls for expressions of interest. Interested applicants are required to address selection criteria for the appointment, in addition to meeting the national prerequisites.
6.1.3 Professional perspectives on ICL training and selection

Survey and interview data illustrate that ICLs and judicial officers in particular feel that improvements to the selection process could enhance the expertise of practitioners who are appointed as ICLs.

In respect of qualifications, some judicial officers described the importance of ICLs having social science qualifications, family law accreditation or suggested the development of a national ICL accreditation program:

- Accreditation, preferably national. [Judicial officer, survey]
- I think there should be a specific Grad. Cert. or Grad. Dip. (with option to progress to LLM [Master of Laws]) containing a significant social science component (skills-based and to provide sufficient specialist knowledge for identifying and assessing issues—but not for treating or generating response options). [Judicial officer, survey]
- Regular updating is required, nationwide accreditation should be considered. [Judicial officer, survey]
- I would like to see the qualifications to be more of a specialist practitioner nature. [Judicial officer, survey]
- Require ICLs to hold qualifications as accredited family law specialists. [Judicial officer, survey]

Some ICLs similarly suggested that qualifications in both law and in a social science field were of benefit:

- ICLs should have some other qualification—the best ones have been social workers, teachers, nurses, etc. Maturity helps!! [ICL, private practice, survey]
- I doubt that a law degree and ICL training equip younger solicitors to consult with children. Many ICLs have been other things first, e.g., psychologists, social workers, parents, that probably provides a better background. [ICL, LAC, survey]

Likewise, some non-lawyer professionals also recommended that a background in social science could help improve ICL quality:

- Anyone who is going to practice as an ICL should have a strong background in some form of social service or family work, e.g., dual degree in law and psychology or social work or social science etc. [Non-legal professional, survey]

In contrast, a number of ICLs were concerned about the ICL role developing in a direction where social science qualifications would be required to facilitate consulting with children/young people to ascertain and interpret their views. For example:

- We need to be careful we don’t continue a growing culture of lawyers thinking they are trained to interpret kids’ responses to questions about their circumstances. These cases involve very complex dynamics, and unless lawyers want to have dual qualifications as social scientists, we should stop meeting kids to do anything other than explain role[s] and explain orders. [ICL, private practice, survey]

Some ICLs also suggested that ICL training was a means by which greater consistency in ICL practice could be encouraged, particularly regarding the purposes of direct contact with children/young people:
I recently took part as a trainer in a training course for new ICLs, and there seems to be a misunderstanding about the role of the ICL being an expert rather than a lawyer. I have noticed that some practising ICLs take a view that they are there to find a way to facilitate a child’s wishes and appear to communicate that to the child. There needs to be training made available about the impact on a child of being given false expectations, and also how to explain to a child that they have actually been heard but the reasons they have not been granted their wishes. [ICL, private practice, survey]

One ICL suggested that rather than teaching lawyers a range of other skills, perhaps there were more benefits to be found in ensuring that ICLs were ultimately good lawyers:

> I think fundamentally, as lawyers, we need to be very careful not to try to be something we’re not. Whilst training on everything from attachment theory to psychiatric illnesses to the psychopathology of sexual abuse is valuable because it helps to inform the way we approach evidence and the way we conceive arrangements for children, I don’t think that any amount of training fundamentally alters the fact that an ICL is a lawyer. If there is a desire for us to spend more time working with children—directly working with children—there would need to be a huge amount of work … I think if you’re looking at how you train lawyers and how you improve the ability of a lawyer to deliver that service, what you do is you look at two things. You look at how to make them better lawyers, because chances are they’re going to do their job better if they’re better at being lawyers. Whether that’s advocacy or evidence, whether that’s drafting documents, whether that’s understanding the law, whether that’s introduction to some of the more difficult areas of the law or whether that’s in the more social science camp of, as I said, things like attachment theory and how to read a psychiatric assessment. [ICL, LAC, interview]

This perspective is also reflected in the following comment from a non-legal professional, who was conscious of the need to ensure that assessments being made in relation to children should be made by the professional with the most appropriate expertise:

> I am not sure [ICLs] need to know all … things—I am the expert and I would expect that I would be making an assessment of many of those matters [for example, identifying, assessing and responding to risks of abuse, violence or other harm/safety concerns]. [Non-legal professional, survey]

More generally, some ICLs suggested that there were elements of the ICL role that were difficult to teach; for example, good judgment and a sense of the dynamics of different family situations. In that context, some ICLs suggested that a more comprehensive selection process could help with ensuring that lawyers who become ICLs have those important personal characteristics. To this end, the training, experience and qualification requirements informing the selection criteria were identified by ICLs as issues requiring further consideration. For example:

> In my experience, there are still a lot of ICLs that do not have the right approach in dealing with children or understanding them. It is quite specific. The criteria should not just be that a person has practised in family law for a particular period that might qualify them. It doesn’t follow that they will make a good ICL. ICLs need a range of skills that isn’t just about practising the longest. Not enough stringent criteria is applied and there is not enough ongoing scrutiny. There is also not enough support for ICLs from other ICLs. Legal aid needs to move more active in this regard and I think in recent times, there has been much better leadership on this issue. [ICL, LAC, survey]

The importance of an ICL’s personal characteristics was also reflected in the following comments from non-ICL lawyers:

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[It] might also be extremely helpful to undertake tests on applicants for ICLs to ensure they are empathetic to their clients and parents; that is, not just the legal qualifications to perform the job, but also the disposition to handle this sensitive work. [Non-ICL lawyer, private practice, survey]

Many of the best ICLs seem to have a “feel” for the work in terms of attitude and personality for the job. Training is of limited assistance. [Non-ICL lawyer, private practice, survey]

A number of legal aid commissions also acknowledged the challenges of the ICL selection process and, in particular, the difficulties of maintaining a pool of practitioners who meet the formal qualifications as well as possess a suitable array of personal qualities to perform the role well. The following comment from Legal Aid NSW is indicative of this challenge:

[It] is quite difficult in a large state to work out, to assess, people’s capacity in terms of them being appropriate as ICLs … They would undertake the national training program and [may possess significant post-admission experience]. Now we have started interviewing in some processes, and interviews are a way of trying to make sure people have adequate communication skills, because communication skills are a really big part of the role … It’s actually much more difficult than you think to cull people out and say to them … “Look, you know, we don’t think your communication skills are up to scratch”. [Legal Aid NSW, interview]

6.2 ICL ongoing professional development

6.2.1 Legal aid framework for professional development

Unlike the national training program for ICLs to initially be accredited, there are no uniform ongoing professional development requirements in the states and territories for practitioners who undertake ICL work. Consistent with other aspects of managing ICLs, the approach taken by each of the legal aid commissions in relation to professional development differs significantly between jurisdictions. Each of these approaches is described below.

New South Wales

Legal Aid NSW outlined an ICL professional development program that is available for both inhouse and private panel practitioners. Examples of learning and development opportunities provided by the commission include conferences (including an annual family law conference with ICL-specific presentations), training workshops and seminars held around NSW, and a number of activities hosted through the NSW Pathways network.

ICLs who are employed within Legal Aid NSW are also required to nominate a learning and development focus every two years. There are eight streams available to staff at all levels, including a stream on child representation. There are eligibility criteria for entry into these streams, and staff are required to nominate milestones to meet over the two-year period. As well as milestones, a range of structured support options is made available to staff, such as coaching and mentoring by a senior ICL, or undertaking observations of child interviews and hearings.

Victoria

Victoria Legal Aid provides ongoing training for ICLs. It is a requirement of membership of the ICL panel that practitioners attend and complete the training provided.
Queensland

The Family Law Practitioners Association Queensland and Queensland Law Society provide family law training, often with children’s streams or children-specific training. ICLs, along with other private-practitioner-preferred suppliers are invited to continuing professional development opportunities offered by Legal Aid Queensland. The commission also facilitates statewide ICL/Separate Representative Panel meetings three or four times a year, which provide an opportunity for practitioners to discuss practical and other issues.

South Australia

Apart from the ICLs’ own mandatory continuing professional development responsibilities, which include specific requirements for family lawyers, the Legal Services Commission of South Australia holds regular forums during the year for all ICLs. A key element of these forums is the opportunity for ICLs to engage with judicial officers in an informal development setting. The commission also facilitates the distribution of relevant material to ICLs via email.

Western Australia

Legal Aid WA provides training for ICLs as the need is identified. Additionally, a range of experts (e.g., single expert witnesses) and professional bodies provide periodic training or seminars, and other professional development opportunities are offered by professionals and agencies through the WA Family Pathways Network. Often, these seminars have continuing professional development points attached and are provided free of charge to panel members, which is a means of providing some non-monetary compensation to practitioners and incentive to attend (the commission acknowledges private panel members do not receive much remuneration for taking on ICL work).

The commission has recently conducted a review of the panel arrangements and is in the process of considering changes in response to that review, including the introduction of a formal mentoring framework and more formalised links between ongoing membership of the panel and specialised training attendance.

Tasmania

The Legal Aid Commission of Tasmania provides continuous training to ICLs. An annual ICL conference is offered to all ICLs on the panel, at no cost, in addition to colleagues from other related disciplines.

At a commission level, weekly meetings occur, providing regular training and mentoring. This is in addition to daily informal meetings and mentoring. In addition, the Practice Manager and inhouse counsel are part of the National Legal Aid working group, which regularly discusses and reviews best practice in the provision of ICL services, including the ongoing training of ICLs and the sharing of resources to do so.

Australian Capital Territory

The ACT Law Society sets out the mandatory continuing professional development requirements for legal practitioners. Legal Aid ACT does not have any additional professional development requirements for practitioners undertaking ICL matters.
Northern Territory

All ICLs in the Northern Territory are required to meet the mandatory continuing professional development requirements that apply generally to legal practitioners. Training opportunities for ICLs are also provided to ICLs through seminars, training days and conferences arranged by a variety of service providers. These include the Northern Territory Legal Aid Commission, the Family Law Pathways Network, the Law Society of the NT, private for-profit agencies, and local and national organisations. The commission also facilitates distribution of relevant material to ICLs via email.

6.2.2 Professional perspectives on ICL training and ongoing professional development

Survey and interview questions elicited some significant feedback from ICLs and other professionals about ICL training and professional development. As Table 6.1 indicates, more non-ICL survey participants did not agree than agreed that ICL training and qualifications were adequate. Almost one-half (46%) of non-legal professional respondents reported they were not sure about the adequacy of ICL training.

<table>
<thead>
<tr>
<th>Are the training and qualifications of ICLs adequate?</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>27.8</td>
<td>26.6</td>
<td>19.5</td>
</tr>
<tr>
<td>No</td>
<td>40.7</td>
<td>40.6</td>
<td>31.0</td>
</tr>
<tr>
<td>Not sure</td>
<td>24.1</td>
<td>28.7</td>
<td>46.0</td>
</tr>
<tr>
<td>Missing</td>
<td>7.4</td>
<td>4.2</td>
<td>3.5</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>54</td>
<td>192</td>
<td>113</td>
</tr>
</tbody>
</table>

Notes: Professionals were asked: “Do you think the training and qualifications of ICLs are adequate?” Percentages may not total exactly 100.0% due to rounding.

By comparison, in data not shown in the table, 77% of ICLs agreed or strongly agreed they had sufficient training to operate effectively. The question of ICL capacity in particular areas is considered in more detail in Chapter 7.

More specifically, 77% of ICLs reported they had undertaken training to be an ICL with legal aid, and 36% reported they had undertaken other training to be an ICL. Most ICLs interviewed indicated that the national ICL training was generally good and provided an adequate basis for conducting ICL matters. For example:

I thought the training was really good and from knowing that the people that have applied to get on the panel and … and haven’t made it, I think they’re fairly rigorous in that. [ICL, LAC, interview]

The ICL survey data also show that ICLs undertake additional training on a variety of other topics. Table 6.2 illustrates that almost a third to half of the ICLs have in the past undertaken formal training in mediation, family violence/child abuse, family dispute resolution or child development/psychology.

35 These measures are not mutually exclusive; that is, an ICL could have undertaken both forms of training.
Table 6.2 Other formal training undertaken by ICLs

<table>
<thead>
<tr>
<th>Type of formal training</th>
<th>ICLs who had undertaken training (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation</td>
<td>47.7</td>
</tr>
<tr>
<td>Family violence/child abuse</td>
<td>45.6</td>
</tr>
<tr>
<td>Family dispute resolution</td>
<td>35.6</td>
</tr>
<tr>
<td>Child development/psychology</td>
<td>30.9</td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes: ICLs were asked: “Have you received any formal training in …?” Percentages do not sum to 100% as multiple responses could be chosen and not all responses are shown.

In other data not shown, 71% of ICLs had received formal training in either mediation, family violence/child abuse, family dispute resolution or child development/psychology. Of this 71% of ICLs, 79% had received between one and three types of training and 21% had received four or five types; however, data did not indicate when this training had occurred.

Likewise, ICLs reported that they had participated in continuing legal education on a range of topics. Table 6.3 illustrates that a large proportion of ICLs had undertaken some form of training on identifying and assessing family violence (85%) and children’s developmental needs (67%). More than half of the ICLs (56%) completed training on communicating with children and more than a third had completed training on child-focused practice (35%) and child-inclusive practice (34%).

While it is important to note that the data do not enable a distinction to be made between topics covered as short seminars and as more comprehensive formal training, other survey and interview data suggest the training on offer may not be adequate. Chapter 7 includes a more detailed discussion about concerns arising from the data in relation to the capacity and efficacy of ICLs, and notes the disjuncture between the training ICLs indicate they have completed (in Table 6.3) and the self-assessments of their capability in respect of those same topics (see Table 7.2).

Table 6.3 Continuing legal education or training undertaken by ICLs in the past two years

<table>
<thead>
<tr>
<th>Type of legal education or training</th>
<th>ICLs who had undertaken training (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identifying and assessing family violence and abuse</td>
<td>84.6</td>
</tr>
<tr>
<td>Understanding the best outcomes for children of separation and divorce</td>
<td>78.5</td>
</tr>
<tr>
<td>Impact of shared parenting arrangements and outcomes for children</td>
<td>77.9</td>
</tr>
<tr>
<td>Children’s developmental needs</td>
<td>67.1</td>
</tr>
<tr>
<td>Communicating with children</td>
<td>55.7</td>
</tr>
<tr>
<td>Child-focused practice</td>
<td>34.9</td>
</tr>
<tr>
<td>Child-inclusive practice</td>
<td>33.6</td>
</tr>
<tr>
<td>Mediation skills in children’s cases</td>
<td>27.5</td>
</tr>
<tr>
<td>Negotiation skills in children’s cases</td>
<td>24.8</td>
</tr>
<tr>
<td>The 2006 family law reforms</td>
<td>59.7</td>
</tr>
<tr>
<td>The 2011 family law reforms</td>
<td>75.2</td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
</tr>
</tbody>
</table>

Notes: ICLs were asked: “In the past two years, have you undertaken any continuing legal education or training in relation to the following?” Percentages do not sum to 100% as multiple responses could be chosen.
Notwithstanding the existing training ICLs reported having undertaken, most ICLs nevertheless expressed a need for more ongoing training on a regular basis, including making suggestions for mandatory periodic training:

I think that ICLs should have ongoing training in relevant issues about children: trauma, abuse issues, effects of violence, stages of development. Even experienced people need constant reminders and refreshers. [ICL, LAC, survey]

I think ongoing training is really important, and I think some kind of ongoing monitoring or—what’s the word I’m looking for—audit or something. I’m talking from my observations of ICLs in private practice who don’t work here at legal aid. [ICL, LAC, interview]

A number of non-ICL lawyers also suggested that ICLs could benefit from ongoing training, particularly training dealing with a broad range of non-legal topics. The diversity of additional training topics recommended by non-ICL lawyers is demonstrated in the following comments:

Additional and ongoing training is required in relation to a range of topics, including family violence, particularly how violence impacts on a victim’s capacity as a caregiver; child abuse; children’s developmental needs; communicating with children; working with Aboriginal, CALD and LGBTQI communities; and referral to appropriate community-based services. [Non-ICL lawyer, CLC, survey]

A lot more training and focus needs to be on giving feedback to children, interviewing children. [non-ICL lawyer, private practice, survey]

Increased training in [domestic violence] and sexual abuse cases, and how a history of violence can cause power imbalance and make equal shared [parental responsibility] impossible. Increased training on maintaining neutrality—often mothers who raise issues of safety are not believed and are criticised by the ICL for not facilitating time with the father. [Non-ICL lawyer, CLC, survey]

Similarly, judicial officers providing feedback on ICL training generally described the importance of providing more training for ICLs (and investing more heavily in this training), and for this training to be of an ongoing nature. More specifically, although most of the ICLs providing open-ended survey responses on this issue considered that they had sufficient training and experience to consult directly with children/young people, more advanced training of a practical nature, including training to provide assistance with interviewing children/young people was suggested by several ICLs:36

It is always good to have training available that is practical and deals with difficult issues, such as when to interview in cases with systems abuse or risk-of-harm allegations. Too often the training is aimed at issues like where to interview, developing rapport, etc. This is good and develops as part of your practice anyway. However, there should be “advanced” practical training. [ICL, private practice, survey]

By and large the training we get seems to be—if you don’t have kids—borrow some from friends or family to practise on. I would appreciate a family consultant or experienced ICL offering training (more frequently) on how to chat to kids and language that can be appropriate for various age groups. I don’t have kids, nor do

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36 See also Ross (2012b), where all ICLs with a “relational lawyer” approach in Ross’ sample, together with some ICLs with a “responsible lawyer” approach identified a need for more training, “particularly in interviewing” children/young people and with regard to “developing rapport and professional relationships with children” (p. 237).
many of my friends, so I get stuck with finding some to practise on. [ICL, private practice, survey]

Child development was also an area where some ICLs identified the need for further training. (Parents and children also identified similar training needs for ICLs, and their views will be considered in Chapter 8.) For example:

More training would be good. We have received some about child development, ways to interview children … but more is always good. It’s an area that is quite outside our official expertise! [ICL, LAC, survey]

I feel most lawyers need far more formal training in child and adolescent development and in the acquisition of communication skills, such as active listening. [ICL, private practice, survey]

Perhaps not surprisingly, non-legal professionals who work with ICLs also commonly suggested that training for ICLs in how to engage with children and young people would be of benefit. For example:

Training in areas of speaking with children based on child’s development; more awareness of children’s reactions to family separation, conflict, violence; still more emphasis on the best interest of the child, not equity between the parents. [Non-legal professional, survey]

Judicial officers also identified more training that would be of benefit to ICLs, with some judicial officers making specific reference to training in child development and in issues affecting Indigenous and culturally diverse families:

More training in social sciences interaction with children brain development, of children basic psychology. There needs to be a re-accreditation process on regular occasions. [Judicial officer, survey]

Those wishing to do Indigenous work should have to undergo training and read the Bringing Them Home report. Otherwise, they should not be doing it. I think they need training in how to read and analyse the subpoenaed material—often there is so much important information in there. The training should include how to manage multiple ICL matters, and how to audit the files to ensure that they are not left for months. [Judicial officer, survey]

More ongoing training would be good, not just a one-off course. Greater training in issues affecting Aboriginal and culturally diverse clients would be useful—for us all. [Judicial officer, survey]

While all of the legal aid commissions supported the national ICL training program as a prerequisite for conducting ICL matters, some commissions also suggested that more specific training for ICLs could be beneficial. However, the challenge of providing this training, especially in smaller jurisdictions, is highlighted by the following comment from the Northern Territory Legal Aid Commission:

I suppose, from my perspective and working in more regional areas, there really isn’t enough specific training being offered, I think, by the Commonwealth for ICLs. A lot of it’s been left to the individual commissions to do it themselves. Some of the bigger commissions, of course—and better funded commissions—are better able to deliver ICL-specific type training. But the smaller commissions just don’t have the resources or the capacity to do that, even though the need is really there. [Northern Territory Legal Aid Commission, interview]
However, as this comment demonstrates, some non-ICL lawyers were mindful of the potential consequences if additional training provided to ICLs was poor or ill considered:

Not sure legally trained people can do a crash course, so to speak, to equip them with the responsibility that the position of ICL carries and the ramifications of their recommendations. [Non-ICL lawyer, private practice, survey]

### 6.3 Professional supervision arrangements

Judicial officers, ICLs and some non-ICL lawyers also identified a need for greater professional supervision of ICLs, particularly when they are newly appointed.37 As the following comments indicate, some ICLs suggested that more structured peer support is required in conjunction with increased training:

I think there needs to be more training for ICLs, with perhaps a regular meeting, say monthly, with all ICLs in your area invited to discuss issues that are arising and minutes sent out after to all ICLs for them to read as to what issues are arising. A buddy system when you first start ICL'ing would be good, though really we do do that informally. [ICL, private practice, survey]

A more formalised network between ICLs would be appreciated, including a list of professionals. [ICL, private practice, survey]

Some judicial officers also recommended peer supervision and mentoring as a means of improving ICL quality:

It is not only a matter of training. Experience in family law generally would greatly enhance the benefits new ICLs would receive from the training currently offered. Suggest that a review of process of engaging and training ICLs is undertaken, including appropriate and thorough mentoring within the firm/organisation in which the ICL works. Would benefit from a commitment by all specialist and experienced family law departments/firms to undertaking a proportion of legal aid ICL work (in conjunction with private work) in which experienced principals take the principal role and assist by mentoring younger practitioners in the role. [Judicial officer, survey]

One non-ICL lawyer also reflected this recommendation by suggesting that a form of apprenticeship could be of benefit by supplementing the more theoretical elements of the ICL training program:

There could be a period of a type of apprenticeship, or otherwise some immediate work experience following the training. The training is very theoretical, but it could be years before you are actually appointed as an ICL. [Non-ICL lawyer, private practice, survey]

Another non-ICL lawyer recommended that, in particular, mentoring was an effective tool for teaching the “things [that] cannot be trained”:

The capacity to treat people who are disadvantaged, drug-affected, suffering mental illness etc. with dignity, respect and care while being a professional is hard to train. It needs to be learned by mentoring and has more to do with values than training. [Non-ICL lawyer, LAC, survey]

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37 On the issue of mentoring, see also Ross (2012b, p. 238) and National Legal Aid and the Law Council of Australia 2012 Independent Children’s Lawyer Training Program, which identify the benefit of seeking advice from colleagues.
One judicial officer suggested an extension of the national training program and, consistent with the views of some ICLs, the inclusion of a mentoring component as a means of raising the quality of ICLs across the board:

> It is important that the national training program for ICLs not become a sausage machine that just spits out ever increasing numbers. We need to strive for greater quality. Perhaps the training could be spread out over a year, with in-depth module work interspersed by residencies or face-to-face meetings, then augmented by mentoring and the “shadowing” of high-quality existing ICLs in all aspects of their appointment. [Judicial officer, survey]

Further, some judicial officers favoured a review of the current training requirements and appointment system and suggested that the selection process be tied more closely to merit, and involve a period of probation and review (including peer review) and periodic assessment.

A number of ICLs also nominated collaboration with an appropriately qualified expert from whom they could seek advice or assistance or with whom they could undertake consultations, as an approach that could facilitate their direct consultation with children:

> ICL training in the future could also include how best to engage with children from a psychologist’s point of view when we are appointed as ICLs and are meeting with them “face-to-face”, to assist us in asking the right questions and ascertaining the important information from the children we meet. [ICL, private practice, survey]

Similarly, a number of non-ICL lawyers suggested that a form of peer review or peer support could assist in improving ICL quality:

> Regular peer review and feedback. [Non-ICL lawyer (Barrister), private practice, survey]

> Judicial “report cards” to legal aid and the ICL may assist in encouraging ICLs to perform at higher levels to ensure ongoing appointments. [Non-ICL lawyer, private practice, survey]

This suggestion of judicial “mentoring” via more formal feedback from the bench was also made by several of the legal aid commissions, who felt that responsibility for providing support and review to ICLs could be shared between professionals from different parts of the family law system.

### 6.4 Summary

This chapter has considered the key themes arising from the significant volume of feedback received from ICLs, judicial officers and other professionals about ICL training, selection and professional development. This chapter has also highlighted the considerable variation in panel selection practices and the ongoing professional development opportunities available to ICLs practising in each of the states and territories.

It is clear from the data that many professionals, particularly non-ICL lawyers and non-lawyer professionals, perceive the eligibility requirements for practice as an ICL as inadequate. The data also show that the professional development opportunities afforded to ICLs are generally considered by non-ICL professionals to be not sufficiently regular and often do not satisfactorily prepare ICLs to perform the key elements of their role. This is particularly the case in respect of equipping ICLs to engage effectively with children and young people, the importance of which was examined in Chapter 3.
The data also highlight an apparent disjuncture between the amount of training in which ICLs reported they participated (and their level of confidence that it supports them to operate effectively), and the concerns about the quality and efficacy of some ICLs, as discussed in Chapter 7.

A number of professionals also suggested that more “hands-on” training or peer support between new and experienced ICLs and more supportive relationships between ICLs and other professionals could help to improve ICL quality. Importantly, many professionals, as well as the legal aid commissions, observed in a variety of ways that responsibility for developing a pool of appropriately qualified and skilled ICLs should be shared between different elements within the family law system.

A number of outcomes that can, at least in part, be linked to inadequate ICL training, selection and professional development practices are explored in more depth in the following two chapters.
7 Perspectives on ICL efficacy, quality and funding

This chapter focuses on issues relevant to the efficacy with which the role of ICL is fulfilled. It begins by considering data that provide overall assessments on the efficacy of ICLs from the perspectives of judicial officers, non-ICL lawyers and non-legal professionals. This is followed by a discussion of views on ICL capacity in particular areas, including their capacity to assess and respond to risks of harm and risks to safety. After considering the current approaches of legal aid commissions to monitoring ICL quality, particular concerns about ICLs from the perspectives of judicial officers, non-ICL lawyers and non-legal professionals are discussed. Finally, the effects of funding constraints on the performance of ICLs is considered.

7.1 Efficacy of ICLs

7.1.1 Overall views of the family law system and the ICL role

In order to gain perspectives on some overarching issues that impinge on the question of the needs of children and young people and participation in family law proceedings, each of the groups involved in the multidisciplinary survey were asked to indicate their level of agreement with four propositions, namely:

- whether the needs of children and young people are adequately considered in family law proceedings;
- whether family law system processes allow adequate priority to be placed on the best interests of children and young people;
- whether the present model for ICLs allows sufficient opportunities for the views of children and young people to be heard and considered in family law matters; and
- whether Australia is presently meeting its obligations under the UNCRC by giving children/young people the opportunity to participate and be heard in proceedings affecting them.

The response patterns, reflecting the level of agreement or strong agreement (combined for simplicity in Table 7.1) suggest some important trends. Notably, judicial officers were the most positive of the professional groups in relation to all of the propositions except the one in relation to the UNCRC, with positive responses ranging from 80% in relation to the ICL model to 89% regarding the best interests of children and young people. Although slightly less positive than judicial officers, a substantial majority of ICLs were also positive, with no fewer than three-quarters of ICL respondents offering positive responses in relation to three of the propositions. Non-legal professionals were less positive and non-ICL lawyers least positive of all in their responses to the propositions. More specifically, non-legal professionals and non-ICL lawyers were less positive than judicial officers and ICLs, in all four areas, with just over half agreeing that the current ICL model allows adequate opportunity for the views of children and young people to be considered in family law matters.

Responses to the question regarding participation rights under the UNCRC were consistently low, with judges’ positive responses (54%) being uncharacteristically lower than those of the ICLs (58%), and non-ICL lawyers being lowest of all (43%).
Table 7.1  Professionals who “agree” or “strongly agree” that aspects of the family law system are adequate

<table>
<thead>
<tr>
<th></th>
<th>ICLs (%)</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children’s/young people’s needs and views are adequately considered in family law proceedings</td>
<td>79.9</td>
<td>87.0</td>
<td>63.5</td>
<td>66.4</td>
</tr>
<tr>
<td>Family law system processes allow adequate priority to be placed on children’s/young people’s best interests</td>
<td>76.5</td>
<td>88.9</td>
<td>71.9</td>
<td>73.5</td>
</tr>
<tr>
<td>The present model of ICL’s provides sufficient opportunities for children’s/young people’s views to be heard and considered in family law matters</td>
<td>75.8</td>
<td>79.6</td>
<td>51.0</td>
<td>57.5</td>
</tr>
<tr>
<td>Australia is presently meeting its obligations as a signatory to the UNCRC by giving children/young people the opportunity to participate and to be heard in proceedings affecting them</td>
<td>58.4</td>
<td>53.7</td>
<td>42.7</td>
<td>51.3</td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
<td>54</td>
<td>192</td>
<td>113</td>
</tr>
</tbody>
</table>

Note:  Professionals were asked: “More generally, to what extent do you agree or disagree that the following statements describe your view?” In the ICL survey, missing responses were 16–17%, and “cannot say” responses were 0–2% for the first three statements and 12% for the fourth statement. In the judicial officers survey, missing responses were 16–17%, and “cannot say” responses were 0% for the first three statements and 13% for the fourth statement. In the non-ICL lawyers survey, missing responses were 16–17%, and “cannot say” responses were 2–4% for the first three statements and 14% for the fourth statement. In the non-legal professionals survey, missing responses were 1–5%, and “cannot say” responses were 1–9% for the first three statements and 19% for the fourth statement. Percentages do not sum to 100% as not all response categories are presented.

There was an increase in the disagree/strongly disagree responses to the UNCRC statement (compared with the other three statements), particularly for non-ICL lawyers (36%), judicial officers (26%) and non-legal professionals (24%) (data not shown). Twelve per cent of ICLs disagreed or strongly disagreed with this statement.

In considering these data, it is important to note that, unlike the other three questions, the UNCRC statement did not specifically refer to family law.

These relative response patterns recur regularly throughout the data, as the forthcoming discussion will demonstrate. This illustrates the point made in Chapter 1, that different professional groups in the system may have substantially different views and experiences, depending on the role they play in the process and the way in which the work of ICLs affect their practice.

7.1.2 Assessments of general ICL efficacy

The response patterns to questions examining the effectiveness of ICL practice generally reflected positive assessments among judicial officers and ICLs, with less positive assessments from non-legal professionals and non-ICL lawyers.

All survey respondents were asked for their views on whether the present ICL model provides sufficient opportunities for children’s/young people’s views to be heard and considered in family law matters. The responses of judicial officers and ICLs were most positive, with 80% and 76% respectively stating that they mostly or strongly agreed with this proposition, as opposed to 51% of non-ICL lawyers and 58% of non-legal professionals (data not shown).

Table 7.2 sets out the responses from judicial officers, non-ICL lawyers and non-legal professionals to a question asking them to indicate their level of agreement with the proposition that “having an
Independent Children’s Lawyer involved in a case improves outcomes for children/young people”. Judicial officers’ responses were the most positive (89% either agreeing or strongly agreeing) and non-ICL lawyers were the least positive (62%). The vast majority of non-legal professionals were positive (83%). Non-committal responses (neither agree or disagree) were provided by substantially more non-ICL lawyers (20%) than non-legal professionals (5%) and judicial officers (4%). Almost 12% of non-ICL lawyers provided clearly negative responses (disagree/strongly disagree), compared to only 2% of judicial officers and 2% of non-legal professionals. These responses confirm the theme evident throughout the data of the wide differences in views between the various respondent groups, with a particularly marked gap between judicial officers and non-ICL lawyers. The discussion in the following section examines in more depth views about the capacity of ICLs in particular areas.

<table>
<thead>
<tr>
<th>ICL involvement improves outcomes for children/young people</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree/strongly agree</td>
<td>88.9</td>
<td>61.5</td>
<td>83.2</td>
</tr>
<tr>
<td>Neither agree or disagree</td>
<td>3.7</td>
<td>19.8</td>
<td>5.3</td>
</tr>
<tr>
<td>Disagree/strongly disagree</td>
<td>1.9</td>
<td>11.5</td>
<td>1.8</td>
</tr>
<tr>
<td>Cannot say/missing</td>
<td>5.6</td>
<td>7.3</td>
<td>9.7</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>54</td>
<td>192</td>
<td>113</td>
</tr>
</tbody>
</table>

Notes: Non-ICL professionals were asked this question: “To what extent do you agree or disagree with the following proposition: Having an ICL involved in a case improves outcomes for children/young people.” Percentages may not total exactly 100.0% due to rounding.

7.1.3 Assessments of ICL ability in particular areas

All professionals surveyed were asked for their views on whether sufficient weight was given to children/young people’s views by different parties/professionals, including by ICLs. Consistent with the response patterns described above in relation to the current ICL model, 78% of judicial officers and 72% of ICLs stated that sufficient weight was often or always accorded to the views of children/young people by ICLs (data not shown). This contrasted with 56% of non-ICL lawyers and 67% of non-legal professionals. Practices, expectations and views concerning consultation with children and young people were considered in Chapter 3.

The response patterns to questions examining views on the ability of ICLs to undertake a range of other tasks (see Table 7.3) also largely maintain the pattern of relativities reported in relation to previous questions.
### Table 7.3 Professionals who rate ICLs’ ability to undertake particular tasks as “good” or “excellent”

<table>
<thead>
<tr>
<th>Ability of ICL to undertake the following tasks</th>
<th>ICLs (%)</th>
<th>Judicial officers (%)</th>
<th>Non-ICL lawyers (%)</th>
<th>Non-legal professionals (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify issues of family violence and child abuse or neglect</td>
<td>82.6</td>
<td>77.8</td>
<td>59.9</td>
<td>63.4</td>
</tr>
<tr>
<td>Assess allegations of family violence and child abuse or neglect</td>
<td>79.9</td>
<td>75.9</td>
<td>51.0</td>
<td>49.6</td>
</tr>
<tr>
<td>Make referrals to the appropriate service for children/young people in cases involving family violence and child abuse or neglect</td>
<td>76.5</td>
<td>66.7</td>
<td>40.6</td>
<td>41.6</td>
</tr>
<tr>
<td>Work with children/young people who are at risk of experiencing family violence or child abuse or neglect</td>
<td>59.7</td>
<td>53.7</td>
<td>25.0</td>
<td>35.6</td>
</tr>
<tr>
<td>Identify circumstances where children/young people are at immediate risk of harm</td>
<td>71.8</td>
<td>72.2</td>
<td>46.9</td>
<td>54.9</td>
</tr>
<tr>
<td>Identify circumstances where children/parent/caregiver may be suicidal or at immediate risk of self-harm</td>
<td>51.7</td>
<td>63.0</td>
<td>24.0</td>
<td>31.0</td>
</tr>
<tr>
<td>Detect and respond to safety issues for parents</td>
<td>55.7</td>
<td>72.2</td>
<td>30.2</td>
<td>32.7</td>
</tr>
<tr>
<td>Detect and respond to safety issues for children/young people</td>
<td>69.1</td>
<td>75.9</td>
<td>40.1</td>
<td>52.2</td>
</tr>
<tr>
<td>Ensure that evidence regarding the child’s/young person’s developmental needs is gathered in the process</td>
<td>77.7</td>
<td>75.9</td>
<td>55.2</td>
<td>56.6</td>
</tr>
<tr>
<td>Ensure that evidence allowing the child’s/young person’s perspective to be understood is gathered in the process</td>
<td>77.9</td>
<td>75.9</td>
<td>47.9</td>
<td>63.7</td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
<td>54</td>
<td>192</td>
<td>113</td>
</tr>
</tbody>
</table>

Note: ICLs were asked: “Please rate your ability to do the following in your work as an ICL”. Non-ICL professionals were asked: “Please indicate your view, on average, of the ability of ICLs practising in your area to do the following”. In the ICL survey, the proportion of “cannot say”/missing responses ranged from 16.1% to 22.1%. In the judicial officers and non-ICL lawyers surveys, the proportion of “cannot say”/missing/not applicable responses ranged from 6.3% to 24.1%. In the non-legal professionals survey, the proportion of “cannot say”/missing/not applicable responses ranged from 12.4% to 25.7%. Percentages do not sum to 100% as not all response categories are presented.

Although ICLs self-assessments were slightly more positive here than the largely very positive assessments of judicial officers, the assessments of non-ICL lawyers were substantially more negative than those of either the ICLs or judicial officers. Non-legal professionals maintained a mid-line position between the other groups.

However, the response patterns of ICLs and judicial officers went against this trend in three areas. The ICL self-assessments were more negative than the judicial officers’ assessments in assessing and responding to risks of harm and risks to safety. This suggests that in these circumstances, the confidence of judicial officers may be misplaced. In one area, that of detecting and responding to safety issues for parents, the disparity is particularly marked, with 56% of ICLs indicating their ability is “good” or “excellent” compared with 73% of judicial officers. In a second area, identifying circumstances where a parent may be suicidal or at immediate risk of self-harm, positive ICL self-assessments stood at 52% compared with 63% of judicial officers. In the third area—detecting and...
responding to safety issues for children/young people, there was a disparity of seven percentage points between the positive responses of ICLs (69%) compared with judicial officers (76%).

There may be a variety of explanations for the discrepancies between ICL and judicial officer ratings. Each of the areas in question relates to risk, and ICLs may well not view risk assessment as being part of their role or a professional responsibility that they are trained for, particularly ICLs who emphasise the legal character of their role. Some may see it as a question of clinical judgment requiring social science expertise that is the primary responsibility of others in the system, possibly family consultants/single experts. In relation to the two areas related to risks pertinent to parents, they may also consider that primary responsibility for monitoring risks to parents lies with the legal representatives for parents, if such a responsibility is viewed as being within the mandate of legal professionals at all. Overall, judicial officer responses in relation to this question reflect their many and varied expectations of ICLs. The two sets of responses taken together also suggest a need for greater clarity within the family law system and among professionals about the level of responsibility different groups should assume for monitoring risk. Setting questions of disciplinary training aside, it may well be that ICLs are in possession of information indicative of risk (in isolation or in the context of other material) before any other professionals involved in the case.

The data in Table 7.3 indicate that the areas of ICL strength were perceived by judicial officers and ICLs themselves to be those of identifying and assessing issues and allegations relating to family violence and child abuse and neglect, which reinforces the primacy of this aspect of the ICL role discussed previously (see section 2.3.2, regarding ICL caseload). These responsibilities have a character that is based in gathering and analysing evidence, rather than exercising clinical judgments that may be considered outside the scope of the legal role. While a large majority of ICLs and judicial officers estimated ICLs’ ability to assess allegations of family violence and child abuse or neglect to be good or excellent, only half of the non-legal professionals (50%) and non-ICL lawyers (51%) agreed with this proposition. These assessments arose despite data in Table 6.3 showing that 85% of ICLs identified that they had completed continuing legal education or training in the area of assessing family violence and abuse.

### 7.2 Quality of ICLs

The discussion in this section begins with a consideration of the state and territory legal aid commissions’ approaches to monitoring ICL quality and dealing with complaints. Consideration is then given to concerns and complaints about ICL performance from among survey respondents. These qualitative data indicate that despite the consistently positive responses provided by judicial officers, there are concerns among even this group about the practices and performance of some ICLs. The qualitative responses from non-ICL lawyers and non-legal professional respondents provide further insights into the reasons behind some of the equivocal or negative response patterns among these professionals.

#### 7.2.1 Legal aid commission approaches to monitoring ICL quality

As illustrated in Chapter 2, the legal aid commission in each state and territory has responsibility for managing ICLs. There are significant differences in the approaches taken by each commission to auditing the practice of ICLs, managing quality and dealing with complaints about an ICL. The most significant of these differences is whether a commission relies on only informal feedback or has implemented a formal mechanism for quality and/or complaint management. Other differences stem from different approaches being taken in relation to managing practitioners who are inhouse legal aid ICLs compared to private panel ICLs. The following information reflects the relevant data provided by each state and territory in the Request for Information.
New South Wales

All lawyers appointed to Legal Aid NSW panels are subject to audit. Under section 52B of the *Legal Aid Commission Act 1979* (NSW), audits may be carried out with respect to:

(a) claims for payment;
(b) compliance with practice standards;
(c) compliance with the terms and conditions of a service provision agreement;
(d) compliance with the Commission’s guidelines, policies and delegations; and
(e) substantial or unresolved complaints concerning service delivery.

Panel lawyer audits are prioritised in accordance with the commission’s audit strategy. This audit strategy is currently under review.

Serious complaints about panel lawyers, including ICLs, are referred to the Professional Practices Branch of Legal Aid NSW. These are investigated and assessments made about whether or not the lawyer appears to have breached their panel service agreement. If so, the lawyer is referred to the Monitoring Committee, which is established under section 52A of the *Legal Aid Commission Act 1979* (NSW). The Monitoring Committee is comprised of nominees of the Law Society of NSW and the New South Wales Bar Association who are senior members of the legal profession, and senior staff of Legal Aid NSW.

The Monitoring Committee makes recommendations to the CEO of Legal Aid NSW concerning panel lawyers who appear to have breached a service agreement. They may make the following recommendations:

(a) that the legal practitioner be removed from the panel; or
(b) that no work be assigned to the legal practitioner for a period of between 3 months and 2 years; or
(c) that no further action be taken.

Recommendations may be made subject to conditions. Panel lawyers are given reasons as well as an opportunity to make further submissions before the committee makes its recommendations, as required by the Act. The CEO of Legal Aid NSW considers these recommendations and makes the final decision. If the CEO is considering the suspension or removal of a lawyer from a panel, the lawyer is given reasons and a reasonable opportunity to be heard before the final decision is made, as required by section 51(5)(b) of the Act.

In addition to the formal audit process, Legal Aid NSW receives feedback directly from judicial officers about issues concerning ICLs, particularly where the ICL is an inhouse practitioner. Complaints about ICLs may also be made to the Legal Services Commission in NSW through the formal complaints process.

Victoria

Victorian Legal Aid does not have a formal mechanism for auditing ICL practice. There is a formal complaints mechanism for ICLs and they are investigated pursuant to those requirements, but the commission does not independently monitor the work of practitioners on the ICL panel. At present, all private practitioners must reapply for entry to the panel when their period of membership expires, usually after five years. However, Victoria Legal Aid is understood to be instituting a new practitioner panel in August 2013 which is intended to place greater emphasis on quality and enable Victoria Legal Aid to audit files and to independently monitor the work of practitioners on the panel.
Queensland

Legal Aid Queensland appoints ICLs to the panel for a three-year term, which is subject to re-application and consideration of re-appointment at the expiry of each term. This is a contractual relationship and includes an expectation that ICLs will comply with Legal Aid Queensland’s case management standards for ICLs. There is no formal feedback arrangement in relation to specific panel members, but an array of informal mentoring arrangements have developed over time that allow a number of quality issues to be managed in a collegiate way.

Both inhouse and private practitioners on the ICL panel are subject to grants audits, which are audits against the case management standards of a certain percentage of files per practitioner over a period of time, conducted by non-lawyers.

Legal Aid Queensland also conducts quality audits in respect of matters conducted by inhouse ICLs, which are file reviews by senior practitioners with a mix of practice experience.

South Australia

The Manager of the Family Law Practice Division, Legal Services Commission of South Australia, monitors and approves all grants of legal assistance made to ICLs, either inhouse or external. This provides a quality check on the work of the ICLs. Meetings with Federal Magistrates and the Federal Magistrate’s attendance at ICL training sessions held by the commission also provide the opportunity to monitor the quality of ICLs.

Western Australia

Legal Aid WA has a formal audit program through which 10% of panel practitioners each year are audited for file compliance.

Legal Aid WA is currently considering a range of challenges associated with auditing and managing underperforming ICL practitioners, as part of a broader panel review.

The Director of the Family Law Division manages complaints about inhouse ICLs, and the Director of Client Services (who is responsible for the assignment of external grants of aid) manages complaints about ICLs on the private practitioner panel.

Tasmania

The Legal Aid Commission of Tasmania does not have a formal audit program, but the commission receives feedback on the performance of ICLs on a regular basis and raises that feedback with practitioners informally.

Complaints about an ICL may be made to the Legal Profession Board of Tasmania.

Australian Capital Territory

Legal Aid ACT is currently implementing new ICL panel arrangements. Under those new arrangements, ICLs will be required to comply with the national Guidelines for Independent Children’s Lawyers (FCoA & FMC, 2007) and the ICL Panel Practice Standards. The commission will monitor compliance by means of standard grants monitoring processes and compliance audits, similar to those undertaken with respect to General Panel practitioners in the ACT.

Complaints about ICLs may be made to the ACT Law Society.
Northern Territory

ICLs are required to provide regular reports for their matters. This includes a report in relation to the merit (whether there are reasonable prospects of success) of what the parties are seeking.

The Northern Territory Legal Aid Commission complaints policy is followed if a party (with or without legal aid support) has a complaint in relation to an ICL. The commission also relies on the regulatory/compliance role of the Law Society of the NT.

7.2.2 Views of the overall quality of the pool of ICLs

A clear theme emerging from the open-ended survey responses of non-ICL lawyers, non-legal professionals and judicial officers was the variability in competence and approach among individual practitioners in the pool of ICLs. Comments from all respondent groups indicated that some ICL practitioners performed to a high standard, whereas the capacity of others was average or deficient.

No clear patterns were evident from a geographical perspective, as small cell sizes prevent meaningful comparisons between states and territories.

Judicial officers

When compared to non-ICL lawyers and non-legal professionals, judicial officers were generally more positive in their descriptions of the pool of ICLs. They described the pool, for example, as being “generally very good”, “predominantly of a very high standard” and “for the most part … committed to their role and perform their duties well”.

Of the 40 judicial officers responding to an open-ended survey item seeking comments about the pool of ICLs in their area, five judicial officers provided positive/very positive responses and eleven provided generally positive responses:

- Almost without exception, committed, caring, industrious volunteers. [Judicial officer, survey]
- [The pool of ICLs] are excellent. They consist largely of [state] legal aid lawyers especially trained for the task, or very experienced lawyers accredited as specialist in family law (who do the task out of a sense of duty rather than for fees). [Judicial officer, survey]
- Predominantly of a very high standard. [Judicial officer, survey]
- Generally excellent, subject to some exceptions. [Judicial officer, survey]
- Most of the ICLs in our region are very good. [Judicial officer, survey]
- In my experience, the children represented in greater [city/towns] have been generally well served by the pool of ICLs. [Judicial officer, survey]
- ICLs are generally very good at what they do. [Judicial officer, survey]

38 Here and subsequently, where these classifications are used in this chapter, responses were coded as “generally positive” where the response content was generally positive in nature but included a negative aspect in the response content. These contrast with responses coded as “positive”, which do not include a negative aspect in the response content, or “very positive” where the response content was emphatic in its positive assessment. Where the response content was generally negative in nature but included a positive aspect in the response content, they were coded as “generally negative”. These contrast with responses coded as “negative” when they did not include a positive aspect in the response content, or “very negative” where the response content was emphatic in its negative assessment. The coded responses do not add up to the total numbers of respondents in each professional category because not all comments could be coded as belonging to one or other of the positive, negative or mixed response classifications.
However, many judicial officers still described the variability and “marked difference in the levels of competence” in the pool of ICLs, with 15 respondents to this question providing mixed comments. For example:

- Varies widely. Some very good, some at the other end of the spectrum. [Judicial officer, survey]

- The range of competence is wide. There are some ICLs who you know when you see their name on the appearance sheet that the case will be well prepared and that they will have given careful consideration to the issues. Others are of little or no assistance. In some cases, the ICLs are not particularly competent and lack judgment. [Judicial officer, survey]

- Overall, there are more good ones than bad, and some who are really excellent. That is why I average out the assessment … to “good”. In reality, in specific cases the assessment would go from “wonderful” in relation to some, and “woeful” in relation to others. [Judicial officer, survey]

- There is a huge discrepancy between the most competent and those going through the motions or [who are] even incompetent or uninterested. [Judicial officer, survey]

- They vary greatly. Some are excellent, most are at least very good, but some are too casual about the process, and when it coincides with two self-represented litigants, it makes the matter very difficult. [Judicial officer, survey]

Other judicial officers (n = 4) were less positive in their general assessment of the pool of ICLs, particularly where tasks were delegated to junior lawyers:

- The available pool of ICLs ranges from a very few excellent practitioners to a large group of very ordinary, ranging to utterly incompetent. [Judicial officer, survey]

- The standard is low, and the dozen or so excellent and hardworking and holistic practitioners stand out. Less than excellence is a waste of resources. [Judicial officer, survey]

- We unfortunately have some rather incompetent ICLs, usually working with more experienced ICLs, but without sufficient training and/or supervision. [Judicial officer, survey]

- A handful of say 5 to 10 are outstanding, the remainder are at best average. Those at the Legal [Aid] commission are generally of a higher standard than those in private practice, where junior lawyer[s] are often sent along, which is of no use to the children or the court. [Judicial officer, survey]

**Non-ICL lawyers**

Again consistent with response patterns emerging in previous questions, non-ICL lawyers were more critical than judicial officers in their comments about the pool of ICL lawyers. Of the 113 non-ICL lawyers providing a response to this question, 24 provided generally negative responses and 11 provided negative/very negative responses. Some non-ICL lawyers were generally positive (n = 18), or positive/very positive (n = 7) about the pool of available ICLs:

- In [this city], there is a very good pool of ICLs. [Non-ICL lawyer, survey]

- We are lucky enough to have a fairly good pool at the moment. [Non-ICL lawyer, survey]

- Excellent and very committed in the main. [Non-ICL lawyer, survey]
Most of [the ICLs] are excellent. [Non-ICL lawyer, survey]

Very good. [Non-ICL lawyer, survey]

The majority of them are competent and some are excellent. [Non-ICL lawyer, survey]

However, variability was again a common theme, with 37 mixed responses:

Generally the ICLs are a mixed bag. Some are good, but several are lazy and do nothing or very little. [Non-ICL lawyer, survey]

The quality and skills vary dramatically between good to poor. [Non-ICL lawyer, survey]

I think 50% are fantastic. The other 50% are appalling. It is a bit like lotto waiting to receive your appointment letter to find out if the ICL will do a good job or not. [Non-ICL lawyer, survey]

They vary in quality. Some are excellent. Some are bone idle. [Non-ICL lawyer, survey]

There are some good ICLs who are of value to the case. There are some very poor ICLs. It is a lucky dip. If … one of the poor ICLs [are appointed] then the battle is on, and the stress and pressure for the party I represent increases. [Non-ICL lawyer, survey]

[The] quality of ICLs varies considerably. A good ICL is an asset—a poor one makes everyone’s task more difficult. [Non-ICL lawyer, survey]

Some are outstanding, particularly legal aid staff, but they are overworked and lack the support of oversight and career development. Private practitioners are more varied and many are very inexperienced. They are even more at risk of burnout and lack of support. [Non-ICL lawyer, survey]

The responses of non-ICL lawyers suggest a common perception of a lack of competent, experienced ICLs in the available pool, with some identifying a lack of funding as meaning that fewer experienced and competent practitioners were undertaking ICL work. Some non-ICL lawyers also suggested that the pool was too small/limited (n = 13).

Non-legal professionals

Of the 80 responses provided to this question seeking comments about the pool of ICLs, 37 non-legal professionals described the pool of available ICLs in generally positive terms (n = 29) or positive/very positive terms (n = 8):

Generally they are very good. [Non-legal professional, survey]

Generally excellent. [Non-legal professional, survey]

Generally very good and experienced. [Non-legal professional, survey]

Five provided generally negative responses and two were very negative in their responses. Of the remaining responses, 24 were mixed in their assessment of ICLs, with variability among ICLs emerging as a common theme:

Some appear to be excellent … in working with children, and others have caused high levels of distress to children and their parent(s). [Non-legal professional, survey]

Variable, particularly those employed in private practice. [Non-legal professional, survey]
The pool of ICLs is varied. You have some great ones that are really collaborative and supportive and are willing to work with services, but then there are ones that really have no benefit in being appointed, and in fact the child would be better off without an ICL. [Non-legal professional, survey]

Highly variable and idiosyncratic engagement by different ICLs with me, … ranging from ICLs asking me for comment on information which was irrelevant to the child’s interests, through to no engagement (which is sadly common), and on to one ICL being outright rude by dismissing me as having nothing relevant to say about [the] kids, despite working with them for over two years! [Non-legal professional, survey]

There are some excellent ICLs in my area. However, I would say that these are few. [Non-legal professional, survey]

7.2.3 Specific ICL quality issues

**Inhouse vs private practitioner ICLs**

Although it is clear that in each jurisdiction there are some very highly regarded private practitioners, the survey responses suggest that, generally, inhouse legal aid ICLs are considered to be of a higher standard than private practitioners on legal aid panels. For example, of the 40 judicial officers responding to the open-ended question seeking comments on the pool of ICLs, ten reflected positively on the capacity and performance of inhouse legal aid ICLs and three were expressly critical of private practitioner ICLs. As the comments in this section indicate, the higher regard accorded to inhouse legal aid ICLs was consistent among judicial officers, non-ICL lawyer respondents and non-legal professionals:

As a general rule, the inhouse ICLs with legal aid are of a consistently higher standard than external ICLs. [Judicial officer, survey]

The ones from LAC are excellent. Some outside the LAC are excellent. However, there are some private practitioners who are completely unsuitable and are still appointed. [Judicial officer, survey]

The inhouse legal aid solicitors are invariably excellent. Most senior or experienced private practitioners also do a good job. [Judicial officer, survey]

Unfortunately, what legal aid will pay a private practitioner for ICL work is insufficient to attract enough competent private practitioners. There is a growing gap in the competence of ICLs who are inhouse legal aid lawyers and those appointed from the private profession. This was not always the case. Some private practitioners who are appointed as ICL now are ineffectual and a few do more harm than good. [Judicial officer, survey]

With the expansion of the pool, more inexperienced ICLs are getting appointed. Some should not be allowed to do the work at all. Over the past 5 years the overall quality of private practice lawyers appointed has declined. The good remain very good. The remainder are adequate or worse. Inhouse legal aid ICLs are of a higher quality, except when compared to the very good private practitioners and then they are comparable. [Judicial officer, survey]

Similarly, non-ICL lawyers reflected more positively on inhouse legal aid ICLs \(n = 9\) with express criticism of private practitioner ICLs \(n = 6\):
Legal aid ICL lawyers are generally excellent with few exceptions. [They] are more “independent”, less aggressive and more keen to mediate if they identify an opportunity to do so. [Non-ICL lawyer, survey]

The ICLs from legal aid … are fantastic. Years of experience, committed to their roles, engaged with the need to facilitate the participation of children and young people, proactive and well trained. But the standards of some of the ICLs on the panel are not as good. [Non-ICL lawyer, survey]

The legal aid practitioners tend to be more objective and balanced. Some of the privately obtained ICLs are not thorough in their preparation and are not [as] good at brokering settlements compared with the legal aid practitioners. [Non-ICL lawyer, survey]

Some non-legal professionals also reflected particularly positively about the capacity of inhouse legal aid ICLs (n = 8), with some explicitly critical of those on the panel (n = 4). For example:

Some of the privates are a bit slack. The legal aid ICLs are top-shelf. [Non-legal professional, survey]

Incompetence and inactivity

Several participants across a range of professional roles (judicial officers, ICLs, non-ICL lawyers, and non-legal professionals) raised concerns relating to the quality of the performance of some ICL practitioners. They made negative comments and referred to a range of issues, including incompetence, lack of experience or preparation and failure to do the work warranted in a matter, described by some participants as “laziness”. It is clear that deficient ICL performance has significant consequences, as these comments illustrate:

I think that there are some really problematic ICLs out there, mainly lazy [ICLs] that don’t do anything. (ICL, LAC, interview)

…my view is that in the main judicial officers very much welcome senior ICLs. I know they’ve got some real concerns at the moment about the quality control of the process because they get this varying quality between those that do the work really thoroughly, those that don’t and so it frustrates them. I think they see that there’s a different variable quality because a good ICL makes there job so much easier. (ICL, PP, interview)

An experienced, dedicated ICL makes an enormous difference. A lazy ICL makes little difference. An inexperienced or incompetent ICL may make the parties’ and children’s lives even worse. [Non-ICL lawyer, survey]

If the ICL does not become adequately involved and has merely a passing interest in the case … then the ICL is almost completely ineffectual and a waste of time. [Non-ICL lawyer, survey]

A lazy, poorly informed, poorly qualified, inexperienced ICL is a waste of public resources. [Non-ICL lawyer, survey]

If [the] ICL [is] not competent or [is] inexperienced, [it] can be quite damaging because they carry so much weight [and] … may make recommendations which are not in the best interests of the children. [Non-ICL lawyer, survey]
The ICL’s [view] carries weight in the system. If the role is not carried out effectively and information is not shared, bad decisions can be made, with dire consequences. [Non-legal Professional, survey]

Some ICLs don’t do the work or have limited insight into what work should be done. [Judicial officer, survey]

We also have some ICLs who appear lazy and uninterested and who antagonise parents rather than working with them. [Judicial officer, survey]

Some ICLs are so lazy they do nothing and you don’t hear from them. [Non-ICL lawyer, survey]

Comments from judicial officers made it clear that from the perspective of many, the personal capacity of the ICL involved determined whether or not they make a useful contribution:

It is not aspects of their function in which I find them less helpful, but the level of their competence. A competent ICL is invaluable. [Judicial officer, survey]

Some of these ICLs … have a practice of only doing ICL work. I think some of them take on too many files, it all gets boring, and they get laid back about the whole thing. [Judicial officer, survey]

Some non-ICL lawyers and non-legal professionals identified the appointment of an ICL as potentially causing problems or preventing settlements in cases where a proactive approach was not adopted:39

If the ICL is not properly up-to-date with the matter or hasn’t undertaken steps required, such as speaking with the child or seeking to obtain independent evidence, then this can impinge on prospects of settlement. [Non-ICL lawyer, survey]

Some ICLs don’t do anything until court day, which means their lack of preparation provides no guidance for negotiations. [Non-ICL lawyer, survey]

[Disadvantages arise] if you have one who does not do their job and sits on the fence. Proactive ICLs are generally the best [Non-legal professional, survey]

[ICLs] need to be actively involved and not wait for court events. [Non-legal professional, survey]

[Disadvantages arise] if they do not prepare adequately and end up delaying proceedings. [Non-legal professional, survey]

[Disadvantages arise] when they do not take a proactive approach or understand the complexity, [and are] disorganised and do not follow through. [Non-legal professional, survey]

The failure to take a proactive approach was also identified more specifically in several judicial officer and non-ICL lawyer responses concerning situations in which the ICL was slow to form a view as to what the outcome in a matter should be (and/or slow or failing to communicate this

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39 Guideline 6.5 of the Guidelines for Independent Children’s Lawyers (FCoA & FMC, 2007) provides that: “The ICL is to seek to develop a case plan at the earliest opportunity, where appropriate, in consultation with any family consultant or other expert involved in the case”. Guidelines 6.8 and 6.9 envisage that the ICL will take an active approach to evidence gathering and to preparation for hearings. See also, for example, T v N (2003) 31 Fam LR 257, where Moore J expressed concern at the ICL’s support for the proposed consent orders (which were not approved by the court) in the context of alleged and conceded behaviour “that had the potential to place these children in serious jeopardy” [para 40].
view to the parties). This was perceived to be unhelpful, a waste of resources and an impediment to the resolution of matters by negotiation or timely resolution:

Most ICLs are not independent lateral thinkers and do not think outside the square and so many of them do not offer an opinion and just sit on the fence, which is pointless. [Non-ICL lawyer, survey]

[Disadvantages arise when ICLs give] no indication of a view … until final hearing. Often [they give] little or no assistance in this regard throughout [the] conduct of a matter, even where evidence/event requires a view to be given or it would be of assistance. [Non-ICL lawyer, survey]

[ICLs] are only unhelpful when they take the view that they will do nothing and offer no preliminary view until after the evidence at trial is over. The value-adding is mainly prior to the final addresses (except where the parties are unrepresented). [Judicial officer, survey]

But less helpful [issues] can arise if the ICL is not proactive and/or prepared and not in a position to make submissions to advance the matter in the child's best interests when the matter comes before the court for mention at interlocutory stages in the time before a hearing. [Judicial officer, survey]

Evidence-gathering skills

The failure to undertake necessary evidence gathering was a factor also identified by respondents:

It depends on the calibre of the ICL. Some are not very helpful because they do not do the evidence-gathering work. [Judicial officer, survey]

Some do not have good forensic skills, i.e., they don’t read the subpoenaed material properly or join the dots. [Judicial officer, survey]

An inexperienced or incompetent ICL can do much damage. They fail to properly gather evidence, they put views to the court that are not in the child’s best interests, they increase conflict between the parties and fail to identify when children are at risk. [Non-ICL lawyer, survey]

There have been occasions when the ICL has failed to provide the level of assistance to the court … for example, not issuing relevant subpoenas etc. [Non-legal professional, survey]

[Disadvantages arise] where they did not obtain all the necessary information for the court (and family consultant) to come to a properly informed view. [Non-legal professional, survey]

[Disadvantages arise if] the ICL does not do their job properly, does not gather all the evidence and get all information or takes sides with one parent over the other. [Non-legal professional, survey]

Guideline 6.4 of the Guidelines for Independent Children’s Lawyers (FCoA & FMC, 2007) provides that: “once the ICL has formed a preliminary view as to the outcomes which will best promote the child’s best interests, the ICL will consult with the child and take into consideration any expressed views of the child, as may be appropriate in all the circumstances. The ICL will then communicate his/her views and details of proposed orders to the parties where possible”.

40 Guideline 6.4 of the Guidelines for Independent Children’s Lawyers (FCoA & FMC, 2007) provides that: “once the ICL has formed a preliminary view as to the outcomes which will best promote the child’s best interests, the ICL will consult with the child and take into consideration any expressed views of the child, as may be appropriate in all the circumstances. The ICL will then communicate his/her views and details of proposed orders to the parties where possible”.
A related criticism of ICL practice raised by non-ICL lawyers was ICL over-reliance on family reports in the face of other distinguishing evidence or in the absence of appropriate evidence gathering:41

Too often the ICL takes the easy way out and follows the recommendations of the family report writer, whereas it should be a further, more sustained, independent assessment. I have rarely seen a matter where the ICL has disagreed with the family report writer. [Non-ICL lawyer, survey]

Others spoke of the perceived disadvantages that arise from ICLs being over-reliant on the opinions of other experts:

[A disadvantage is] the over-reliance of [the] ICL on the opinions of the family consultant/reporter/expert. There is a real issue with the ICL treating the expert as the client, and the apparent championing of the expert’s views without an independent critique … Further, the bench is frequently deferring to the views of the ICL. [Non-ICL lawyer, survey]

It concerns me that it is the family consultant’s report that carries so much weight in children’s matters. The consultant often spends only a few hours with a family and then effectively determines the outcome of that families’ future. As a barrister, if the consultant’s report is favourable, your client is in a very strong position; however, if the consultant’s report is unfavourable, even with extensive cross-examination and new evidence raised in that cross-examination, both the ICL and the judicial officer are reluctant to move against the original family consultant’s report. There should be two family consultant reports, i.e., two experts, so that both the ICL and the judicial officer can assess the evidence and make an independent decision—not one that is usually based solely upon the decision of one family consultant. [Non-ICL lawyer, survey]

In my opinion, too often the ICLs base their opinions on what is contained in reports rather than forming their own views. [Non-ICL lawyer, survey]

Too often the ICL solely relies on the recommendations of the family report writer and refuses to advise the parties of their view until the day of the trial. [Non-ICL lawyer, survey]

[ICLs are less helpful] where they are just a mouthpiece for organising an expert’s report. [Judicial officer, survey]

Too often I hear from parents that the family report writer did not speak of this or that and that the child’s wishes don’t reflect what they hear. The ICL often places too much emphasis on the report writer’s findings and does not speak to the child themselves, where appropriate in the circumstances, to clarify these concerns against the report findings. [Non-ICL lawyer, survey]

41 Note that both Guideline 6.7 of the Guidelines for Independent Children’s Lawyers (FCOA & FMC, 2007) and the National Legal Aid and Law Council of Australia’s 2012 Independent Children’s Lawyer Training Program make it clear that ICLs are not required to follow the recommendations of any expert report, that “the report is one part of the total evidence” and is to be “evaluated within that context”, but that the ICL does need to make submissions on all of the evidence.
Priorities and funding issues

Some judicial officers and numerous non-ICL lawyers (as identified at the outset of this section) were critical of “lazy or disinterested” ICLs [Judicial officer]. ICLs were also identified as being less helpful by judicial officers and non-ICL lawyers where they tailored their work to what they were paid by legal aid and undertook tasks in a manner one judge described as “by rote rather than applying an independent analysis to the issues and a skill set that assists both the court and the parties” [Judicial officer, survey]:

I get the sense that too many are not sufficiently interested or involved. Often there seems to be a formulaic approach and an unhelpful reliance on the solicitors for the parties to do all the work. [Non-ICL lawyer, survey]

Very poor. Most are lazy and sit on the fence. They will not work beyond their grant of aid. [Non-ICL lawyer, survey]

I find ICLs in general worse than useless. They do very little, can be biased, often just provide commentary on the documents, i.e., affidavits, family report, and do nothing to improve the outcome for children. Funding is an issue. They aren’t paid enough to travel to visit children. I have had quite a few cases recently where I desperately needed the ICL to talk to the children, as the father in each case seemed to be suborning and pressuring and alienating the child/ren from the mother. In each case, the ICL would not talk to the children, did not attend the family report and just made a superficial recommendation that has left the child/ren in a difficult situation … Their active participation may have avoided the currently ugly situation where the mother feels the court system has let her down and the child is unhappy. [Non-ICL lawyer, survey]

Some non-ICL lawyer comments imply that some practitioners give legal aid work, specifically ICL work, a lower priority. By inference, the following comments, as with some of the foregoing comments, refer to private practitioners on legal aid panels:

Most, unfortunately, are lazy and look for an easy answer. There is a tendency, particularly in larger firms, for a junior solicitor and, in one case, a secretary, [to] have responsibility for the role. [Non-ICL lawyer, survey]

Lazy and headstrong ICLs do little to assist and can create additional conflict/tension in matters … Sadly, many ICLs seem to have an attitude that the appointment is an “easy” income source, one which will pay with minimum work required. [Non-ICL lawyer, survey]

In [my] area, the quality of the ICLs are [sic] very poor indeed. I have only come across one who takes it seriously and does everything he/she is supposed to do, and she/he is relatively new to being an ICL. Some, i.e., most, do nothing, and I mean nothing. [Non-ICL lawyer, survey]

The adequacy of the funding of ICL work is considered in greater detail in section 7.3.

Another cost-related issue raised in several responses from non-ICL lawyers indicates a perception that where an ineffective ICL practitioner is appointed, the cost of the litigation increases, placing financial burdens on the other parties and delaying the resolution of the matter:

They often make proceedings worse by escalating matters with their own letters or opinions. They seem to do very little and leave it up to the parties to do most of their work. They make proceedings take longer, as they are like any other party. They increase costs to the parties. [Non-ICL lawyer]
For clients who are not legally aided, having an ICL adds substantially to their costs. An experienced and dedicated ICL is worth the increase in costs, the others are not. [Non-ICL lawyer]

A disorganised or ineffective ICL can significantly delay the court process. [Non-ICL lawyer]

Extra cost with little benefit … they often unnecessarily complicate and protract a matter, with little benefit to the parties or the children. They are often a complete waste of time and money. [Non-ICL lawyer]

If they are not well trained and resourced, then they can make the process more difficult, particularly in cases where there are serious allegations made against one party. [It] adds to the costs for the party, in an already costly jurisdiction … If they are not resourced properly (… generally overworked and do not have sufficient time to devote to a case) then it’s not beneficial and can be a hindrance to resolving a matter. [Non-ICL lawyer, survey]

A small number of non-legal professionals also identified the potential for ICLs to increase the costs of proceedings, although they were circumspect in their criticism of ICL appointments on this basis. For example:

[ICLs] can add expense to the proceedings; however, this may mean that a more suitable outcome is obtained, with incalculable cost savings later for other government agencies. [Non-legal professionals, survey]

**Engagement with the parties**

Some non-legal professionals also identified an ICL’s involvement as something that could “further polarise the parents, particularly if they have limited understanding of the role of the ICL” and raising “unfair expectations for the child” and as sometimes overstepping their role and “controlling the process of dispute resolution”. Some judicial officers also described ICLs as being unhelpful, where they did not engage with parents or where “they consider their role to be harshly critical, and equally so, of both parents (or all parties)”:

[When] managing difficult parents, [ICLs] frequently seem to not engage with them and this causes that person to feel that the ICL is biased against them. However, they are not sufficiently funded to spend as much time talking to the parents in such cases as is probably required to manage them better. [Judicial officer, survey]

Both non-ICL lawyers and non-legal professionals identified issues arising, particularly for parents, where ICLs took (or appeared to take) a partisan approach in the negotiation process and more generally in their dealings with the parties:

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42 Note, for example, *Knibbs & Knibbs* [2009] FamCA 840 per Murphy J, which indicates that an ICL’s impartiality does not prevent the ICL from “taking an active role in meaningful settlement negotiations”, or expressing their view (or challenging the views held by parties) where “based on a proper evidentiary foundation” (para. 118–121).

43 For a discussion of this issue see, for example, *Bookhurst and Bookhurst* [2011] FamCA 16, where Fowler J rejected the father’s allegations that the ICL had colluded with the mother’s lawyer on the appointment of the expert psychiatrist (para. 19), that the ICL had organised meetings so as to favour the mother’s position (para. 30), that the ICL “had aligned herself with the position of the mother” (para. 37) and that the ICL had lied to the father (para. 29). Fowler J, held that “an Independent Children’s Lawyer is entitled to form a view which may be different to that held by a party or both parties and may hold a view which is aligned to that of one party and can pursue that view in the proceedings. There is no requirement for the same view to always be put. The change of position of parties in this Court is commonplace and is permitted as the issues unfold. This is similarly the case for an Independent Children’s Lawyer” (para. 38). The father had also alleged that the ICL had failed to fully inform the court of the children’s views and that
They are often biased towards one parent and not impartial. They are often rude to parties … and this inflames situations. [Non-ICL lawyer, survey]

If the ICL has not read subpoenaed materials or consulted the subject child in an appropriate and balanced manner, then they can be perceived as biased by parties and practitioners. And by that conduct they can inflame the parties’ emotions and cause the proceedings to become protracted. [Non-ICL lawyer, survey]

A big problem is the appointment of an inactive ICL, which is unfortunately not uncommon. This is particularly concerning in cases where the parties are not represented and the ICL has not actively sought and assessed the evidence. If there is a power imbalance between the parties and the ICL is swayed by a charming yet violent parent, the potential for further risk to the children and the other parent can be minimised. [Non-ICL lawyer, survey]

The ICL sometimes loses the ability to be independent when they have contact with the parents. [Non-legal professional, survey]

Some ICLs can become partisan for or against a parent. When this occurs, it seems to taint their contribution towards the child’s best interests being achieved. [Non-legal professional, survey]

[Disadvantages arise] when the ICL sides with one of the parents. Sits near that parent in court. After court, talks to that parent and not the other parent. I hear this a lot after the family has gone to court. [Non-legal professional, survey]

[Disadvantages arise] where the ICL does not present as impartial or does not provide clear information to all parties about their role and the opportunities for parties to be involved in the process, particularly where parties are self-represented. [Non-legal professional, survey]

Approach towards issues in dispute

Another difficulty with approaches adopted by ICLs was identified (by non-legal professionals and non-ICL lawyers) and involved ICLs acting according to their own beliefs (and perhaps prejudices) and/or taking a fixed and rigid view rather than formulating a position based on an objective assessment of the evidence, which in turn was identified by some respondents as leading to a partisan approach:

Sometimes ICLs have entrenched views and it is difficult to dissuade them. [Non-ICL lawyer, survey]

Sometimes ICLs develop a stance and appear to have decided the case before the evidence has been tested. [Non-ICL lawyer, survey]
Many ICLs form a set view too early and take the approach of “dictating” an outcome to parties, to the point that they become critical of parties and lose their impartiality. [Non-ICL lawyer, survey]

Occasionally the ICL will allow their own biases to intrude, making it more difficult to settle matters. [Non-ICL lawyer, survey]

If the ICL forms a view that is opposing your client’s position, then legal aid funding is often refused, despite the client still having reasonable grounds to pursue the matter to trial. [Non-ICL lawyer, survey]

Some ICLs form early fixed views and ignore evidence suggesting that they are wrong. Others feel they have special insight into a case and can be quite condescending towards anyone who expresses a conflicting opinion or view. This tends to push parties further apart, not closer together. It is also frustrating to the party and their legal rep., who might easily perceive bias on the part of the ICL. [Non-ICL lawyer, survey]

The main disadvantage resides in the ICL where they are either ill-informed on child developmental issues or take a pre-emptive decision about best interests. [Non-legal professional, survey]

[Disadvantages arise] if they are seen as pursuing matters in a rigid manner according to their legal views, rather than taking a child-focused pragmatic view. [Non-legal professional, survey]

Similarly, a non-ICL lawyer suggested that “out of date views in relation to parenting and child care” were unhelpful. Indeed a small number of respondents (judicial officer and non-ICL lawyers) were critical of ICLs encouraging a “pro-contact” approach, irrespective of whether such arrangements were in the best interests of the child:

Like many of us in the family law field, there has been an over focus [on] the need to preserve child/parent relationships, sometimes at the risk of minimising other issues of concern. To be fair to our local ICLs, this has been a failing with some report writers, which is then carried on by the ICL. [Judicial officer, survey]

Get off the panel, ICLs who cannot or will not see a situation for what it is … if the father or mother are just no good, then for God’s sake say so … Stop ICLs who only want to ensure children spent more time with a parent who, simply put, is no good, e.g., drug or alcohol user or someone who really does not care one way or the other … [or] just trying to make the other parent’s life a misery. [Non-ICL Lawyer, survey]

As discussed in Chapter 6, concerns were raised by some non-legal professionals who also identified issues arising from ill-informed ICLs, particularly in the area of child development:

The main disadvantage resides in the ICL where they are either ill-informed on child development issues or take a pre-emptive decision about the best interests. In some cases, the ICL appears quite unsure of the child, and child’s wishes or needs. [Non-legal professional, survey]

[Disadvantages arise] when they have no knowledge of the child, have not seen or consulted with them and are playing “catch up” the entire case because they don’t see the role as being important/well paid enough. [Non-legal professional, survey]
A continuum of ICL practice

The discussion in this section suggests a continuum of ICL practice, with poor practice evident in a range of ways. Criticisms of ICL practice include ICLs not acting proactively, pre-judging the outcome of a case, consulting with children and young people where that may be considered to be inappropriate in the circumstances, not consulting enough, relying too heavily on the reports of family consultants/single expert witnesses, and not communicating with the relevant experts where required. However, what also emerged from the data is that preferred practice involves an ICL being appropriately proactive in their approach to a case, while not pre-judging the outcome (Chapter 4), communicating with the relevant child/young person to the extent directed by the best interests of the individual child/young person in the particular circumstances of their case (Chapter 3), as well as recognising that family/expert reports are just one piece of evidence (albeit an important one) in any given case (Chapter 4).

The individual circumstances of a case, the jurisdiction in which an ICL is practising, and the practitioner discretion supported by s68LA and the current guidelines, will inevitably give rise to a certain level of heterogeneity in ICL practice. However, it is also clear that professional respondents to the research were able to make distinctions, on the basis of reasoned professional judgments, between appropriate/effective ICL practice and deficient ICL practice.

Clear features of effective ICL practice are identifiable, namely: undertaking the ICL role in a proactive manner, while not pre-judging the outcome; consulting with children/young people to the extent directed by the best interests of the individual child/young person in the particular circumstances of their case; and applying independent analysis to the family consultant and other expert reports.

7.3 Adequacy of funding

As alluded to in the previous section, the adequacy of ICL funding provided by legal aid emerged as a significant issue, particularly for ICLs and judicial officers. Table 7.4 shows that only 10% of ICLs and 2% of judicial officers surveyed considered the level of remuneration to adequately reflect the work required of an ICL. Of all ICLs, inhouse legal aid ICLs were more likely than private practice ICLs to agree that remuneration was adequate (23% compared to 1% respectively) (data not shown). Table 7.4 also shows that 54% of ICLs and 70% of judicial officers considered the remuneration to be inadequate. More specifically, 68% of private practice ICLs and 37% of inhouse legal aid ICLs identified ICL remuneration to be inadequate (data not shown).

Table 7.4 Adequacy of remuneration received by ICLs

<table>
<thead>
<tr>
<th>Does level of remuneration adequately reflect the work required of an ICL?</th>
<th>ICLs (%)</th>
<th>Judicial officers (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>10.1</td>
<td>1.9</td>
</tr>
<tr>
<td>Somewhat</td>
<td>12.8</td>
<td>13.0</td>
</tr>
<tr>
<td>No</td>
<td>54.4</td>
<td>70.4</td>
</tr>
<tr>
<td>Not sure/missing</td>
<td>22.8</td>
<td>14.8</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>No. of responses</td>
<td>149</td>
<td>54</td>
</tr>
</tbody>
</table>

Notes: ICLs and Judicial officers were asked: “Does the funding of the ICL program and/or the remuneration you received adequately reflect the work you/ICLs are required to undertake?” Percentages may not total exactly 100.0% due to rounding.
Most ICLs (in both their interviews and open-ended survey responses) described the legal aid funding provided in their grants of aid as inadequate and not reflective of the work required to fulfil the role. For example:

- Funding is inadequate—the workload and responsibility is enormous. [ICL, private practice, survey]

- The funding from legal aid does not adequately cover the amount of time, work and resources involved for ICLs to fulfil our role properly and to do what the court asks of us. [ICL, LAC, survey]

- Funding restrictions make adequate investigations and preparation difficult without doing a large amount of unpaid work. I do the work in those circumstances. That is neither fair [n]or appropriate. [ICL, private practice, survey]

- Legal aid is insufficient to properly discharge the role as ICL. In complex cases, there are often enormous amounts of subpoenaed material and a large number of people to contact about the welfare of the children. ICLs as a general rule undertake many more hours than is allocated in the ICL grant and consider the work to be pro bono work. [ICL, private practice, survey]

As foreshadowed in the preceding quote, a clear theme emerging from the responses of private practitioners who undertook ICL work was that, as a matter of practicality, ICLs were undertaking work that was required by their role on a pro bono basis. Considerable concern was identified by these participants at the level of pro bono work that ICLs were required to undertake, and regarding the shortcomings associated with grants of aid comprising a lump sum figure for each stage of proceedings: For example:

- There’s the obvious limitations that you always—because you’re funded by legal aid—you always feel a bit constrained in terms of how much effort you can sometimes put into things. I basically view it as pro bono work now. I think the fees you get paid just don’t justify the work that you put in. You waste more time arguing with legal aid about funding than it’s worth it. [ICL, private practice, interview]

- [Funding is] totally inadequate and viewed by me as pro bono work. [ICL, private practice, survey]

- I have written off work of about four or five times the grant in ICL matters (i.e., $8–10,000 per file on average). If legal aid needs private practitioners to keep doing legal aid work, then there may need to be some recognition of the cost to the private practitioner in performing the work. [ICL, private practice, survey]

- ICL work, if it’s done properly, is time-consuming and challenging. There is insufficient remuneration from the legal aid commission for the amount of work done. We keep a record of time spent on ICL matters, and on average would write off about $50–60K on any ICL matter compared to the same time on a private matter. [ICL, private practice, survey]

- Legal aid is granted in stages. There is significant difficulty whereby the matter is getting ready for trial, and trial preparation is required to be completed by particular dates, but legal aid will not fund the trial preparation until the family report or other expert report is available. Frequently, such reports are not available until close to trial (as all parties seek to put the most up-to-date information before the trial judge), which means funding is not granted until close to trial. But the court will not set a trial
date until trial preparation is complete. Catch 22 for the parties and for the court. [Judicial officer, survey]

Consistent with ICLs, judicial officers also raised significant concerns about the inadequacies of ICL funding, which then fails to reflect the importance of the ICL role, giving rise to difficulties in evidence gathering and testing, and unfairly requiring ICLs to undertake significant work on a pro bono basis. For example:

It is clear that there is insufficient funding in relation to the complex children work in the Family Court. This is particularly evident where expert psychiatrists are required, and they generally make a very significant difference to the outcome. Where funding has been insufficient for essential follow-up work after final orders have been made, some private solicitor [ICLs] have undertaken the work pro bono, because they take a serious view about their professional responsibility. But this is unfair to them. [Judicial officer, survey]

The amount of funding is too low. The lawyers are not adequately recompensed for the significant role and effort. More appointments could be made if there was more funding. [Judicial officer, survey]

ICLs generally bring a high level of expertise and assistance to the Court process and should be funded accordingly, not at a minimal rate. [Judicial officer, survey]

My impression is that the funding is a token remuneration for the work that is expected and is usually undertaken. Unfortunately, ICL work by private practitioners has become part of the pro bono commitment of most practitioners. [Judicial officer, survey]

I am not sure why legal aid won’t fund an ICL to travel to court if they live some hours from court. Not all matters can be done on the phone. [Judicial officer, survey]

More specifically, in their open-ended survey responses, some ICLs and judicial officers described the grants of aid provided for the preparation phase, the negotiation phase and for court hearings as insufficient to meet the tasks required and the professional time expended during these phases. The failure to provide grants of aid for post-settlement tasks was also raised as an issue of concern. A small number of ICLs similarly described the difficulties arising from grants of aid made “on a one child basis” in cases involving multiple children. Some judicial officers were also critical of legal aid funding policies and their effects on outcomes for children/young people:

Legal aid [in certain jurisdictions], by currently restricting the Re K test, is putting children at risk. The best interests of children should not be compromised by legal aid funding issues. [Judicial Officer, survey]

The interviews and open-ended survey responses of ICLs also highlighted the significant challenges of securing experts to prepare family and other expert reports (such as psychiatric assessments) that arise from having insufficient funds allocated to this task. For some ICLs, these challenges manifested in the process of obtaining funding approval for the relevant report to be commissioned:

I get sick and tired of having to fight with my legal aid grant [manager]. For money for a psych report. I [dislike] having to justify why I need to request a … doctors file. Legal aid won’t give me money to subpoena the doctor’s file. [ICL, private practice, interview]

There is also then difficulties in finding the appropriate expert who will do a report on legal aid rates. This can sometimes mean delays before a report can be obtained, or a
less-than-ideal report, as there is no money to fund the most appropriate expert … This can make complex and difficult matters even harder, and sometimes you are not able to get the best evidence before the court simply because there is no funding to do so. [ICL, LAC, survey]

For other ICLs, there seemed to be difficulties in securing the services of experts who would perform the work at the legal aid fee rate:

We have [only] so many people that are prepared to do reports for legal aid, and a lot of the guys will say I’m only prepared to do—if you phone them up and say, “I need a report done”, they’ll immediately say, “Is it legal aid or private?” If you are prepared to pay for it privately, their fees, you might get an appointment next month. If it’s legal aid, you might look at March next year. [ICL, private practice, interview]

Some judicial officers also made similar observations:

Another funding limitation on the effectiveness of ICLs is the funding policies of legal aid in relation to court experts. There are two aspects of this. First, refusing to approve funding for a court expert where there are significant forensic issues beyond the expertise of a family consultant (e.g., mental health issues) and [second], the amount legal aid will pay for a court expert to prepare a report, significantly limiting the number of forensic experts prepared to do the work. [Judicial officer, survey]

It is disappointing that an ICL will report that they are not funded to appoint a psychiatrist, when one is recommended by a family report writer, or won’t fund a single expert where a child has autism or something like that. I think the decision to fund … ICL work should be made by a lawyer, not an administrative person. [Judicial officer, survey]

One judicial officer clearly explained the distinction between the ICL and family consultant/expert role and the importance of both to the case:

An ICL is not a substitute for [a] family report and a family report is not a substitute for an ICL. An ICL is not a witness in a case and cannot give evidence as does a family report writer, who observes the child and all the relevant adults in an interview process … and then, after making observation[s] of their interactions can, based upon their training and expertise, make [a] recommendation for the judge. A family report writer is not a lawyer and cannot represent a child in a court setting. The roles are unique, separate and complementary. [Judicial officer, survey]

The broader consequences described in the ICL survey and interview data arising from what the respondents saw as the current inadequate funding situation were significant.

A number of ICLs who were involved in the research suggested that a key outcome may be a differentiation of work practice quality between ICLs employed by legal aid and private practitioners who do ICL work. The constraints under which panel ICLs operate compared to their inhouse legal aid counterparts also emerged in the open-ended survey responses of ICLs:

I work in a legal aid organisation where time can be expended on ICL files because we are not as driven by billable hours. It would be extremely difficult for a private practitioner to routinely expend the same amount of time on this work, given time and cost constraints. [ICL, LAC, survey]

Another consequence identified was the decrease in panel practitioners prepared to undertake ICL work. For some ICLs on the panel (particularly those with greater experience), their response to
perceived poor and inadequate funding of ICL work was to reduce the number of ICL cases taken on:

The level of funding has caused me to reduce the number of ICL matters I take on, as I simply cannot afford to maintain the same level of matters. The result of this is that more and more of the ICLs are inexperienced (both as ICLs and in family law) and the poor performance of such ICLs has a significantly detrimental effect on the process. [ICL, private practice, survey]

I am seriously considering leaving the ICL panel, as it is severely underfunded and I am frequently having to use my personal funds to enable the proper and appropriate evidence to be subpoenaed. I also find it very difficult to work to proper standards when the costs of attending all court dates is not covered by legal aid and the opportunity to obtain medical and expert reports is severely hampered … I love the ICL work, but it is very difficult emotionally simply due to the nature of the cases and the issues raised. But to add a severe lack of funding to that has just made it too difficult for me to do the job properly, and so I have decided to not do the job at all … The problem is that the good practitioners are leaving as they are not prepared to do a half-hearted job and cannot afford to keep subsidising these difficult and very time-consuming matters. [ICL, private practice, survey]

As foreshadowed above, this lack of funding was identified by some ICLs, judicial officers and non-legal practitioners as giving rise to an ICL pool that was “younger and less experienced” [ICL, private practice, survey] and comprising poorer quality ICLs. For example:

Remunerating the work consistent with its high value and the special personal skills required to do it well would, in my view, go a long way to increasing the pool of competent practitioners available to do the work. [Judicial officer, survey]

The poor funding is reflected in the poor ICL lawyers from the private profession. [Judicial officer, survey]

Due to the low fees paid, children do not obtain the best representation. [Judicial officer, survey]

You pay peanuts, you get monkeys. Monies paid by legal aid are 1/4 of the level I charge privately. You want very senior accredited specialists to do ICL work, you need to pay them properly. [ICL, private practice, survey]

Some ICLs and judicial officers also suggested that greater funding would encourage experienced family law practitioners to undertake or return to ICL work, with remuneration reflecting their skills:

Greater funding needs to be available to encourage experienced private practitioners to return to or undertake this work. [Judicial officer, survey]

There is a current risk that senior practitioners in the private profession will do less and less ICL work and any cuts to current funding would increase that risk. [Judicial officer, survey]

As this work should only be undertaken by experienced family lawyers, the remuneration should reflect their skill. [Judicial officer, survey]

Interestingly, some judicial officers discussed more broadly the importance of having publicly funded ICLs, with the adequacy of that funding signifying the importance attached to this goal:
We need to see that the public funding of ICLs is very important. [Judicial officer, survey]

Funding is not at all generous. It is disappointing that the role of ICL has shifted over the years from a professional accolade (in part compensating for low financial reward) to another area of work from legal aid. The legal aid organisations should be asked to reflect upon how their management of the ICL system of funding and appointment has allowed this to occur, and thus have significant upward pressure on improving funding of ICLs. [Judicial officer, survey]

7.4 Summary

This chapter has considered the issues relevant to the efficacy of the ICL role. The assessments of the general effectiveness of ICL practice (Tables 7.1 and 7.2) tended to reflect positive assessments among judicial officers and ICLs, with less positive assessments from non-legal professionals and non-ICL lawyers. The response patterns to questions examining views on the capacity of ICLs to undertake particular tasks (Table 7.3) largely maintain the patterns of relativities reported in relation to the general assessment responses. Differences in this general pattern were identified with respect to ICLs’ ability to assess and respond to risk of harm and risks to safety. In this area, ICLs’ self-assessments were considerably more negative than judicial assessments, suggesting that the confidence of judicial officers in these areas may be misplaced.

The qualitative data provided insight into the views of the overall quality of the pool of ICLs held by judicial officers, non-ICL lawyers and non-legal professionals. Comments from judicial officers in particular indicate that there are very highly regarded ICLs whose competence and dedication is beyond question. However, concerns about practitioner quality also emerged quite strongly, regarding their capacity and preparedness to undertake relevant tasks, their impartiality, and their engagement with children, parents and professionals. Considerable variability in quality was noted by judges and non-ICL lawyers.

Part of the context for these concerns are the funding constraints under which ICLs operate, which was noted by all professionals groups involved in the research.

The next chapter explores the perspectives of parents/carers and children/young people who have been involved in a matter with an ICL.
8 Perspectives of parents and children

8.1 Insights from research with children and young people

The experiences of children and young people regarding their interactions with professionals in the family law context are described in international and Australian research, including Douglas and colleagues; Kay, Tisdall and colleagues; Smart, Neale and Wade and O'Quigley (United Kingdom); Birnbaum and Bala (Canada); Taylor, Gollop and Tapp (New Zealand); and Parkinson and Cashmore (Australia).

In the United Kingdom, positive reflections of children/young people’s interaction with legal representatives were identified by Douglas et al. (2006) and Kay, Tisdall et al. (2004). Douglas et al.’s recent research reflected positive experiences of some children/young people regarding their representation in family law matters by the children’s guardian (usually a social worker) or by their appointed solicitor, and that “for some of the older children, the solicitor emerged as the key figure” (p. 189), with the provision of reliable information being of significant importance (pp. 187–188). While Douglas et al. found that “a number of children had only a hazy idea of the distinction between a CFR [Children and Family Reporter], a guardian and a specially appointed solicitor … for all that, they generally understood and approved of the idea of having someone to help them have a say in proceedings” (p. 190). What emerged from this research as being crucial to the effectiveness of professionals in the family law system in meeting children’s/young people’s needs was the “skill in direct work with children” and the sensitivity and experience of the person appointed, rather than their title (p. 190).44

O’Quigley’s (2000) earlier meta-analysis of prior research suggested that children and young people who had met with professionals felt that “professionals tended to interrogate them rather than have open discussions with them”, “found them to be judgmental and intrusive” and were troubled by the lack of confidentiality of discussions, which was identified as leading to a lack of trust (p. vi). Successful interactions between children/young people and professionals were identified as involving the provision of greater access to information, explaining the limits to confidentiality at the outset, ensuring that intrusive interviewing and trick questions are not employed as techniques, and allowing children to tell their story.45

In the Canadian context, in Birnbaum and Bala’s (2009) qualitative study of the experiences of 11 young people who had been represented by an Ontario Office of the Children’s Lawyer (OCL) identified that while most young people expressed some satisfaction with having an OCL represent them, concerns were expressed by some about the legal representation that they received, including confusion as to the role of their lawyer, having limited time with their lawyer, feeling that they had not been heard or that their lawyer was not responsive, and needing more information about the process and outcome in a manner that could be readily understood (pp. 54–59). Birnbaum and Bala concluded that what young people wanted from their lawyer was for them “to listen, provide information and most significantly, to put forward their views in court” (p. 60). More recently, Birnbaum et al.’s (2011) larger study involving interviews with 32 children between the ages of 7 and 17 years emphasised the importance of professionals listening to children and young people and the importance of providing the “choice, opportunity and availability” to be part of the decision-making process (p. 414).

44 See also Butler, Scanlan, Robinson, Douglas, and Mureh (2003).
45 See also Smart, Neale, and Wade (2001) and Neale (2002).
In the Australian context, Parkinson and Cashmore’s (2008) study of 47 children and young people aged from 6 to 18 years, including 17 children who had had an ICL appointed to represent their best interests, identified mixed views about their interaction with professionals in the family law process. While about half of the children and young people were “quite positive” about their ICL, negative views also emerged regarding their interactions with their ICLs, including whether they felt that they had been listened to and whether they felt their confidentiality had been betrayed (see also Cashmore & Parkinson, 2008). The earlier New Zealand study of Taylor, Gollop, and Smith (2000), which included interviews with 20 children aged between 8 and 15 years, identified mixed experiences of having a lawyer represent them in family law proceedings. The clear message that emerged was that lawyers need to listen more closely to the children that they represent and to understand their views, to communicate with them on their level, to take the time to get to know them, to keep them informed (including advising them of outcomes) and to advocate for them (see also Smith, Taylor, & Tapp, 2003; Taylor, 2006).

8.2 Interviews with parents and children/young people

This chapter examines perceptions about the experience of being involved in a matter with an ICL, gathered from 23 interviews with 24 parents or extended family member carers (17 mothers, five fathers and one couple who were members of an extended family who had successfully obtained residence orders) and 10 children (six girls and four boys, including two sibling groups).46 In total, the families where parents/carers were interviewed involved 41 children/young people in these age ranges: 0–2 years = 1, 3–4 years = 9, 5–11 years = 20, 12–14 years = 8.47

As explained in some depth in Chapter 1, various methods were used to recruit the adult participants, including asking legal aid commissions to send letters on behalf of AIFS to potentially eligible parents (yielding 10 parent interviews) and via targeted advertising in local media, social media (n = 13). Children and young people were recruited through their parents, rather than independently. This approach was adopted for two reasons. First, given the complex nature of the cases involving ICLs and the significant proportion that involve family violence and child abuse, it was decided that parental support for their children’s participation in the research would provide safeguards against children and young people engaging with the research team and re-living difficult experiences without having access to family (or other) support to assist them to deal with any issues or questions that may arise through being interviewed. Second, the data obtained from parents provided context for the interviews with children and young people. This obviated the need for seeking factual clarification and permitted the focus of the discussions with the children to remain primarily centred on their experiences.

The approach of selecting a defined sampling frame (parents and children who had been involved in a matter with an ICL in Victoria, NSW and Queensland between 1 January 2011 and 31 December 2012) and issuing an invitation through legal aid commissions was intended to ensure that, at the very least, the invitation to participate in the research reached a significant proportion of potentially in-scope parents. Although this was intended to ameliorate the potential for sample biases that might arise through a less systematic approach to reaching potential participants, it is nonetheless clear that the participants whose experiences were quite negative were motivated to take part by a desire to be heard and a wish to see an improvement in the practices of ICLs.

46 Some data were missing or unknown from the interviews. Consequently, the numbers presented in this chapter do not always sum to the expected number. Information was received from 23 interviews with parents/carers in and 10 interviews with the children. Pseudonyms have been assigned to parents and children in the discussion in this chapter. The terms “carers”, “parents”, “participants”, and “interviewees” are used interchangeably in this chapter.

47 Age data were missing for three children.
The accounts from 23 interviews with 24 parents/extended family carers and 10 interviews with 10 children/young people examined in this chapter cannot therefore be assumed to be representative of the experiences of all parents and children/young people involved in matters with an ICL. Rather, they provide insight into the lived experience of being involved in a matter with an ICL in the particular circumstances of each individual interviewed. These experiences nonetheless provide illustrations of the personal effects of those more problematic approaches and practices of some ICLs that were apparent from Chapter 7. Though the extent of the problem cannot be accurately gauged, their experiences reinforce the need, discussed in Chapter 6 and 7, for more effective training of ICLs and an improved system-wide approach to meeting the needs of children and parents at risk of harm.

That said, it will be seen also that a minority of interviewees reported positive, even empowering experiences, with ICLs, providing some evidence of the potentially beneficial effects that ICL practitioners can have.

This chapter begins with an overview of the circumstances of and outcomes for the families that participated in this aspect of the project. It then examines parents’ perceptions of the nature and consequences of the ICL’s involvement in their particular cases. The discussion of the data generated through interviews with parents/carers establishes, in broad terms, the context for the discussion of the children’s interview data. The important focus of the analysis of the data from the interviews with children/young people is each child’s/young person’s experience of the way in which critical issues in their lives were dealt with in the family law process. Specifically, to what extent does it appear that children’s/young people’s knowledge about their own lives and circumstances feed into their understandings of decisions made about them?

### 8.3 Overview of family circumstances

Parents’ descriptions of their parenting dispute show that most families in the sample were involved in very complex cases. Most interviewees indicated that their case had taken more than two years to resolve. Eleven indicated that it had extended over a timeframe of two to four years, and a further six reported a litigation period of five or more years.

Most parents (n = 14) reported that their case had been heard in the FMC; four were dealt with in the FCoA; and a further four matters had been dealt with in both courts. Just over half the parents (n = 13) indicated that the situation had ultimately resolved by consent, and nine reported resolution by judicial determination.

Eight parents said that the case they were being interviewed about was not the first set of parenting proceedings involving their children. A minority of parents interviewed (n = 5) indicated that they had been self-represented throughout the proceedings. Fourteen indicated having legal representation throughout the proceedings and four had been self-represented for part of the proceedings.

The information collected in the parent interviews reveals that ICLs were most commonly appointed early in proceedings (first 6 months) (n = 18). The most common reasons parents indicated that ICLs were appointed included dealing with the presence of family violence (n = 14), child abuse (n = 8), and high conflict (n = 7), and to represent the best interests of children (n = 6). Other reasons for ICL appointments identified by parents included the child wanting reduced time with one parent, a request for an ICL by the parties, and international relocation issues. Ten parents indicated that the ICL was employed by legal aid and six reported the ICL was in private practice. Other participants were unclear about this dimension.
The interview data explicitly indicate that the families had had involvement with child protection departments in 13 cases, while eight parents indicated having current safety concerns for their children as result of contact with the other parent at the time of interview. Ten parents reported that they had concerns about sexual abuse or child injury at the hands of the other parent before or during their court case. Of the 14 interviewees who had indicated that a history of family violence was relevant, seven also indicated that personal protection orders had been obtained. More mothers than fathers who participated in our study raised concerns about family violence and child safety and abuse (12 out of 14 participants reporting family violence and 8 out of 10 participants reporting safety concerns for children were mothers). In 18 cases, there were reports of safety concerns for a parent or child, though four of these were not accompanied by reports of family violence. Out of the five fathers interviewed, two indicated that child abuse related concerns were relevant. Issues related to child safety and abuse were pertinent in the case involving the extended family carers.

In terms of the parenting arrangements before the case, the most common arrangement was for children to spend most/all time with their mother (n = 12). In three cases, shared cared arrangements were in place. Arrangements after the case were broadly similar, although there were fewer cases (n = 9) where children spent most/all time with their mother. Only a few cases had supervised contact arrangements prior (n = 2) and after the case (n = 3).

8.4 Parents' views of the role and efficacy of ICLs

As foreshadowed in the introduction to this section, parents were largely negative in their overall assessments of the effect that the ICL had in their case. Almost all the parents rated the work of the ICL negatively (n = 14) or more negatively than positively (n = 6). Only three parents indicated that their experience of the ICL was mostly or wholly positive.

Most parents (n = 18) did not feel the ICL worked in the best interests of their children, with a further four parents indicating a mixed response on this issue. One parent indicated they felt the ICL had clearly assisted the court to understand the best interests of their child(ren). Nine parents made comments about the ICL that had both positive and negative elements, though the overall tenor tended to be more negative than positive. Nine participants said the outcome was consistent with their own position, while eight reported it was consistent with the other parents’ position and three indicated an outcome consistent with neither party’s position.

8.4.1 Expectations of ICLs and child participation

Very few parents in the sample demonstrated high levels of awareness of the multi-dimensional nature of the ICL’s role. Most recognised that the ICL was appointed to represent the best interests of their children. This raised an expectation that the ICL would meet with the child, even among some parents who had children under eight. The emphasis in the parents’ discussions of their expectations was on the ICL’s role as a representative for the child, including in some cases, as a “voice” for the child. While parents referred to ICL activities related to evidence gathering and case-management functions—sometimes in negative terms (see further below)—in their accounts of how their matter unfolded, their discussions of what they thought ICLs were appointed to do showed little awareness of these aspects of the ICL role.

This mother’s explanation of what she thought the ICL role would entail in relation to her under-school-age son demonstrates the emphasis in many parents’ accounts of what they thought the ICL would do:

I assumed that the children’s lawyer would be, um, working for the child, like, would do what was best of the child … My son was pretty young, so she—I know that she
Parents’ understandings of the ICL role, and their consequent expectations of ICLs as a source of child focus in the proceedings, underpin the powerful theme of disappointment and negativity in the interview data. A common observation made by parents was that initial positive expectations of the ICL’s involvement evolved into less positive or wholly negative experiences as the proceedings developed.

These responses encompass a spectrum from expressing disappointment to very significant concerns about the way in which the ICL discharged their professional responsibilities (see further below). At the level of disappointment, parents’ responses to ICL involvement reveal three main areas where expectations were not met: contact with and accessibility to the child; contact with the parent; and playing a role in the case that focused attention on the child.

From the perspective of parents, the interview data suggest that an absence of contact with parents and children raises a significant question about knowledge: if the ICL has not met the parents or the child, how can they know what is in the child’s best interests? Even parents whose children were less than school age expressed disappointment with a lack of contact between the child and the ICL, although two (including Tessa, quoted above), were accepting of this, given their children were under four:

Um, well, I guess it’s the role of the Independent Children’s Lawyer which concerns me, is where they don’t actually interview parents. So I’m unsure of how they ascertain the case for the child when they don’t speak to the child. They don’t speak to the mother that cares for the child … There’s absolutely no interviews conducted or to see, um, from a welfare perspective or a safety perspective that the child is actually in a good or a bad environment. And there’s no follow-up. [Megan, mother of a child under school age]

Another interviewee with a child under eight said her son’s communication skills were of a standard that would have made a discussion with the ICL a useful exercise, even though this did not occur:

I felt—thought—that he was ready at an age to even have a chat or an interview with … the Independent Children’s Lawyer and also the report writer. I mean he was only [age omitted] at the time but, you know, they can probe in a way that they can get an understanding of how the child is even feeling at the moment. I think that they should have been interviewed, um, just to gauge an idea. [Felicity]

Similar views have also been expressed by some professionals who participated in this research and these are described in section 3.3.1.

### 8.4.2 Views on ICLs and direct contact

About a third of parents (n = 8) indicated that the ICL met with their children, and in four cases such contact occurred on two or more occasions. Children’s experiences of having direct contact with an ICL are described in section 8.5.2.

Of the 16 interviews in which parents commented on how the children felt about the ICL, nine parents indicated that the children didn’t know about the ICL and only one parent reported that the child was more positive than negative about the ICL. In relation to the question of ICL contact with children, three themes are prominent. The first is the ICL’s level of competence in dealing with children; second is the effect such contact had on the children; and the third is the effect that the lack of such contact had on the children.
Dealing with children

Nine interviewees expressed doubt about whether ICLs were adequately equipped to work with children. Some parents saw this as an issue relating to training and raised concerns that lawyers did not have the appropriate disciplinary background to have direct dealings with children. Other parents were concerned about the personal attributes of the ICLs in their matter. The following quotations illustrate these concerns.

I’m kinda glad he didn’t, though [have contact with the children], because he lacked the requisite skills to talk to a child … He was, well, arrogant, impatient, and frustrated with the pay rate … [Children] are the ultimately disempowered people in our society, so if you don’t get that, then you’re not going to be good with kids. [Christine]

[ICLs] are just lawyers, solicitors, and one of the things that I found in my case is that the reason that they just follow the independent, um, the single expert is ’cos they have absolutely no specialisation or understanding or psychology background regarding the welfare of children. They don’t even have any children services background. So here they are representing children, [but] they haven’t even spoken or even seen the child in question. And here they are making life decisions for them and they have absolutely no clue whether the single expert is even giving an accurate report or not. [Megan]

Effect of contact with the ICL

One mother explained that her daughter (aged 5–11 years) became very distressed during her dealings with the ICL because of the ICL’s lack of understanding of her feelings towards her father in the context of a history of family violence, and abusive behaviour directed at the child as well. On the basis of the mother’s observation of the ICL’s reaction, she concluded:

No understanding. No understanding or empathy. No, not the right person in the job. [Gillian]

In relation to contact with parents, most interviewees (n = 15) indicated that they found the ICL to be inaccessible and uncommunicative in general, with a further six indicating this was sometimes the case. Only one parent indicated that it was easy to obtain information about the activities of the ICL. The rest of the sample was split evenly, either assessing this as difficult (n = 9) or neither easy or difficult (n = 9).

Effect of lack of contact with the ICL

A number of parents reported significant disappointment over their children’s and their own lack of contact with the ICL. According to the parents, two inter-related consequences flowed from this: disillusionment with the system over the lack of meaningful opportunities for child participation, and feeling that decisions were being made without understanding the child’s perspective:

[The ICL] didn’t appear to represent the children. They didn’t seem to even know what the children wanted or how they felt. They didn’t seem to have any understanding of what had gone on in the past. There was a long, long history of domestic violence. The children had suffered injuries. I had suffered injuries … The Independent Children’s Lawyer … just ignored all the evidence that was obviously there that showed that the children were frightened of their father. [Nicole]
We said there was going to be an Independent Children’s Lawyer. [Child’s name] said, “Oh good, someone will talk to me”, and then we said, “No, that’s not the role apparently” … This has made him very frustrated with court. [Greg]

My daughter has held the view [for some years that] she doesn’t want to spend much time with her father. Never once has that ever been brought up by the ICL, and even when it has been brought up by the report writers, and the psychiatrists, it’s been dismissed by the ICL quite, um, openly each time. So my daughter’s views—yes, she was [aged 5–11 years] at the time, she was [a year older at each hearing]—still didn’t hold any weight at all … The ICL never once brought that part to the magistrate. She has been quite emphatic in that … It was as if there was, um, domestic violence, therefore “I don’t want to get involved. I don’t want to be swayed by, like, you know, anything that the kids say to me, so we’ll just keep them right out”. [Phillipa]

But you know, um, I mean she didn’t even speak to the children with regards to, you know, anything as to what they wanted … Putting the kids through supervised visitation … You know, the children still feel, you know, like they—they’ve spoken about it, you know. They have certainly hated having to do it. [David, children aged 5–11 and 12–14 years].

Mirroring the concerns held by ICLs themselves about the manipulation of children by their parents (see Chapter 3), some parents raised concerns that the involvement of the ICL could support and extend any influence being exerted by the other parent. This concern was raised by four parents in the context of a history of family violence. One indicated that the concern was based on their observation of the effect of the ICL appointment on the child. One mother indicated that she was relieved that the ICL did not make contact with her child: “The ICL was so heavily influenced by what my ex-husband was doing to him [i.e., the mother believed the ICL was being manipulated by her ex-husband] … it was just a nightmare, the worst situation”. Other parents who said their children were being manipulated by the other parent indicated that the appointment of the ICL exacerbated their child’s defiance of them in relation to contact arrangements.

Where parents are represented, the legal representative should be the conduit for communications of a legal nature; however, direct discussions between the ICL and the parent about their circumstances and the child may still be appropriate and informative. Yet, several parents indicated having no contact with the ICL until the court hearing.

8.4.3 ICL involvement in cases of family violence and child abuse

Perceptions of ICL impartiality

As explained in Chapter 4, the ICL role is in theory meant to be fulfilled with impartiality and independence. A particularly strong theme in the parent interview data was a perception that the ICLs did not maintain a position of impartiality and that this in turn influenced the stance adopted in relation to their evidence-gathering role. These perceptions are particularly pertinent in cases involving concerns about family violence and child abuse. All of the mothers who reported a history of family violence and/or safety concerns (n = 15) indicated that they felt their concerns were not taken seriously enough. Some reported limited or selective forensic examination occurring in the proceedings. Others indicated that the ICLs maintained a stance in favour of contact despite evidence of family violence or child protection concerns. A few reported twists in the trajectories of their cases as professionals (ICLs, their own legal representatives or the judges) changed or the body of evidence developed.
The data from these interviews indicate that these participants felt that the ICL was not impartial, and viewed (on an initial or sustained basis) the concerns raised by mothers as insubstantial and unimportant, and/or as an attempt to interfere with the father’s relationship with the child. The accounts of some mothers indicated a perception that the ICL was aligned with the father, while others suggested the lack of impartiality reflected a more systemic emphasis on the importance of fathers. Some mothers indicated that their experience suggested that the ICLs involved in their case did not have sufficient skills, understanding and training in relation to child abuse and child safety. One father perceived that the ICL in their case was not impartial. 48 However, the other father whose matter involved serious safety concerns was satisfied that his safety concerns were taken seriously.

A mixture of case outcomes was reported by mothers who perceived that the ICL was aligned with the father and who also reported a history of family violence or concerns about child safety. Four of these mothers reported a case outcome consistent with their own position, three indicated they had reluctantly agreed to a compromise outcome, and a further three indicated an outcome by judicial determination inconsistent with their own position. A further two indicated the determination was consistent with the positions adopted by neither party. This pattern of outcomes suggest the dynamics involved when parents perceive a lack of impartiality on the part of ICLs are complex. There is not a simple correlation between lack of success in their case and dissatisfaction with the ICL.

The women interviewed provided a number of examples concerning a perceived lack of impartiality in discharging their obligations on the part of ICLs. Gillian described her ex-husband’s ability to charm the ICL:

And the ICL would talk directly to my ex-husband, and at times I felt that the ICL … may not be fully detached from the situation enough to purely filter the information … I do, yes, and, yeah, my ex-husband is very eloquent, very loud and a very good storyteller. Then if you listen to only his part, obviously which the ICL should not do … [Gillian]

Another interviewee, Claire, described the dynamics that developed between her self-represented ex-partner and the ICL:

I also found that being a self-represented litigant meant that my ex-partner could have direct contact with the ICL. And actually developed a relationship with the ICL, which no longer made them independent … And this was evident in correspondence that we received, and also evidenced in the correspondence we didn’t receive, um, which was withheld from my side, as well as, um, you know, to the court … The solicitor actually said, “Why have you not passed on if you’ve had that communication from the father? Why have you not shared that with us?” Um, none of those conversations that were held between, um, my ex-partner as a self-litigant and the ICL were ever forwarded to us. [Claire]

Phillipa described events at court unfolding in this way:

They would be locked in a room, the three of them—his barrister, the ICL barrister and the ICL solicitor—for three hours straight while we paced outside … And each

48 “David’s” interview indicated the presence of family violence and child protection concerns. He reported agreeing reluctantly to consent orders. He considered his ICL was aligned with the other party. “Bill” also indicated agreeing reluctantly to consent orders providing for no contact with his child(ren). He indicated that allegations of abuse had been made against him and expressed disappointment with the ICL, whom, he said, seemed supportive of his case up until the trial was due to start.
Catalan barrister knocked on the door to come in, he woul d be asked to leave and remove himself. [Phillipa]

Case examples of mothers’ experiences with ICLs

Most women who were interviewed and whose matters involved a history of family violence and/or concerns about child safety expressed dissatisfaction with the ICL, and in several cases, the family law system more generally. Common features of the experiences of these women included that:

- the focus of the ICL (and other professionals) was on the mother’s attitude to the father rather than on the implications of the family violence and child safety concerns;
- the ICL was selective in some instances in their approach to gathering and/or relying on evidence in relation to family violence and concerns about child safety;
- time and resource pressures affected the conduct of the case, causing some women to feel under pressure to settle;
- the ICL tended to communicate more with the father and their legal representative than with the mother; and
- long-running cases and multiple engagements with courts and authorities were, for several women, an extension of abusive relationships, inducing high levels of frustration and distress.

The following examples illustrate these themes. In the first case, that of Phillipa, the court eventually made orders largely consistent with her position. In Megan’s case, the outcome was inconsistent with her position. Like Jane, whose experience is examined after Megan’s, Megan felt scrutiny was applied to her attitude to the father by the ICL and other professionals, rather than the father’s parenting capacity and the child’s needs. Jane’s case involved long-running proceedings that she experienced as an extension of her ex-partner’s abuse. Elise described an experience in which her concerns about child abuse were initially considered by the ICL as an indication that she was mentally ill, until the ICL changed and the matter was determined by the court and her concerns were upheld. The themes evident in the cases described were also present in the accounts of other women interviewed.

Phillipa

In Phillipa’s case, the court made orders for sole parental responsibility in her favour and for limited contact with the father after a long-running case that included appeal proceedings. These orders were largely consistent with Phillipa’s position, and inconsistent with that of the father and the ICL, who sought shared care and parental responsibility. Phillipa reported a significant history of family violence during the relationship and safety concerns for the children arising from contact with the father. There had been a history of police and child protection involvement, and a child had been severely injured when in the father’s care, while the proceedings were on foot. Phillipa had a personal protection order against her ex-partner. Like some other female participants in this research, she described a violent ex-partner having significant powers of persuasion in the context of court proceedings and having the ability to sway the views of professionals in his favour. According to Phillipa, the ICL was selective in subpoenaing evidence, overlooking police and child protection sources, but obtaining information from schools, doctors and expert sources suggested by the father. In relation to the personal protection order, she said:

[The ICL] actually stood up [in court] and maintained that was just vindictiveness on the mother’s behalf. [Phillipa]
Phillipa indicated that she felt the ICL was mostly interested in obtaining a consent-based outcome to end the litigation and save resources, and that she at times had to resist pressure to settle:

I got quite jaded. It seemed that, um, it was more important to the ICL that the matter gets wrapped up quickly, because that would decrease the cost to legal aid, rather than actually trying to find what’s best for the kids. [Phillipa]

**Megan**

Megan’s account has some similarity to Phillipa’s, but an important point of difference is that the eventual outcome (reached by judicial determination) was inconsistent with her own position and consistent with that of the ICL. Prior to the court outcome, Megan had been the primary carer of the child and had never lived with the father and child as a family. The father had had regular contact with the child. The court outcome meant that her child, who was under five, lived with the father, with Megan having care of her child on alternate weekends and an evening every second week. Megan, who was legally represented, said there had been child protection involvement related to her concerns about the father’s treatment of the child before the family law proceedings. According to Megan, this history was not independently scrutinised by the ICL but treated as an indication that she was not supportive of the child’s relationship with the father. Megan indicated that in her case, the ICL adopted the position put forward by the single expert witness (appointed by the court). She described the attitude of the single expert witness and the ICL in this way:

They basically made the case around whether I was a risk to the child because I had [put forward] those [child protection] concerns. [Megan]

Megan noted that the case was prepared in the context of significant time pressures and that the ICL did not have any contact with her or the child:

[The ICL] didn’t even get any information from me at all and I had the child in my full-time care. [Megan]

Like other participants in the research, Megan questioned the ICL’s capacity to deal with issues related to child development and child safety.

**Jane**

Five other mothers reported case outcomes involving significantly diminished contact between them and their children. One of these women reported a history of family violence and three had a history of family violence and safety concerns about the child in the father’s care.

Jane’s experience illustrates several of these concerns. She was involved in long-running proceedings with an ex-partner she describes as being psychologically abusive, dominating and manipulative. She was self-represented for part of the proceedings. From her perspective, none of the professionals (family report writer, single expert witness, lawyer and judge) she encountered were equipped to deal with the psychological abuse and manipulation engaged in by her ex-partner. In common with four other interviewees, she indicated that this lack of understanding allowed her abusive ex-partner to use the legal proceedings to perpetuate further abuse and to get his own way. She describes the ICL’s response to her concerns about family violence and child abuse in this way:

[The ICL] obviously just decided we were as bad as each other, which wasn’t the case. There was a controlling freak and there was a victim of domestic violence, but um, that wasn’t accepted. [Jane]

She said this about her experience with the family report writer:
Whenever I explained the domestic violence, she said, “Oh you’re just bagging the husband, I’m not asking you to tell me about [that]”. [Jane]

Following the proceedings, she no longer had a relationship with the child who was the subject of the child abuse allegations.

Elise

Almost all of the women who reported a history of family violence or concerns about child safety identified the ICL as having had a negative effect on the case, from their perspective. Two women indicated a mixed effect, with one suggesting the ICL had provided a buffer between her and her partner. Elise’s response was typical of the more negative experiences. She summed up the influence of one ICL (who was subsequently replaced by another) in this way:

Terrible impact … It had it going in a direction that was bad for everybody involved. [Elise]

Elise indicated that the direction in her matter changed dramatically when the ICL was replaced, additional professionals became involved, and evidence salient to her protective concerns was brought to the attention of expert witnesses and the court. Ultimately, the original ICL’s position that she had a mental illness was abandoned, and the court made orders for sole parental responsibility to Elise and restricted parenting time with the father. According to Elise, counsel briefed by the ICL made a critical difference to the proceedings:

He really, really, really did a good job. So there was nothing left unsaid. [Elise]

Elise also explained that the second ICL made a positive contribution to the outcome because:

She didn’t let, you know, lack of funding or anything else get involved in her … need to do the right thing for the kids. [Elise]

Elise’s account of the earlier part of her experiences shares common elements with experiences described by three other mothers. They reported that the ICL’s initial position turned out to be significantly off the mark. Particularly concerning in these instances is the fact that abuse concerns were eventually upheld by the court, in the face of sceptical positions adopted by ICLs at the outset. The mothers’ accounts indicate that this resulted in protracted proceedings and further trauma caused to both themselves and their children:

It has been [a trauma], but I feel much better now since there’s much less contact with my ex-husband. But it’s been, like, dreadful there for—but this year is the ninth year, which is almost my entire daughter’s life. [Gillian]

Given the evidence of the damage caused by abuse, these examples are extremely concerning. Not only do they point to an inappropriate and potentially damaging response to these issues in some cases, they also indicate that engagement with the family law system may be a further source of trauma. The women in these cases indicated that the initial stages of the cases were marked by hasty and superficial engagement on the part of ICLs.

8.4.4 Settlement dynamics

Seven women reported an outcome reflecting a compromise in the face of advice being provided by lawyers and statements made by ICLs. Some of these women indicated that they had ongoing concerns for the safety of their child under the arrangements made by consent. A common theme in their accounts was that they were told, either by their own lawyer or the ICL, that if they did not agree to the consent arrangements, going to court could produce a worse outcome, from their perspective.
Sylvia, for example, said in the interview that she had ongoing concerns, which she had reported to authorities, about her children’s contact with their father. She said there had been a separate investigation into his alleged abuse of other children “but my solicitor said, it’s really not enough to go on”. The consent orders provided for a staged increase in contact with the father, resulting in an equal shared care arrangement. She had this to say about the dynamics of her agreement with her ex-partner, in the context of an abusive pre-separation relationship in which he “brainwashed me”:

> I still beat myself up about it every day … You know, it just felt like everyone was working for him … Everything was rushed... [My solicitor] said, “Oh, if you go to court, it’s like a lottery”… That’s why I locked it in, because what choice did I have? [Sylvia]

Nicole, who indicated she wanted her child to have supervised time with the father and a psychiatric assessment in light of concerns about the child when in his care, said she felt pressured to settle for arrangements providing for alternate weekends with the father after the ICL formulated a position in favour of such arrangements. She described the advice she received in this way:

> The way the magistrates work in court, if you don’t agree to what the father’s wanting and what the Independent Children’s Lawyer is recommending—which is that both parents have equal parental responsibility—if you don’t agree to all this, um, you’re taking a risk of losing your children. Because I’ve seen this happen before, where the magistrates can view the mother as being a difficult parent and just reverse the whole access and say, “Right, the children aren’t living with you any more, they’re going to live with the father and you’re going to have access” … It was almost like I was being threatened with losing my children if I didn’t agree to what the lawyers had decided in private that they wanted to happen. [Nicole]

Another interviewee, Trudy, said the orders endorsed by the court were those formulated by the father’s legal team because the ICL had failed to draft orders that reflected the agreed position he had been involved in negotiating. Asked how the current situation was working out, Trudy said:

> I’m very uncomfortable but I wasn’t in the mental state at the time to appeal. Um, I was very, very unhappy. [The child] is still very, very unhappy. We have a lot of trouble, a lot of problems. [Trudy]

Lucy reluctantly agreed to orders for an arrangement where the father has five nights a fortnight (previously she had majority care) of an early school-age child. In an earlier matter she had raised protective concerns about the child in her father’s care. In the matter she was interviewed about, she described how the ICL influenced the settlement negotiations, playing a role “like he was the father’s solicitor”. She observed the dynamics of the settlement in this way:

> It was easy money for them and they just wanted to, I guess, use bullying tactics towards me to make me give in … It wasn’t investigated into how my daughter felt or what her views were. [Lucy]

### 8.4.5 Positive reflections

The experience of Steven provides a counterpoint to the themes just described. He obtained the residence of his two children after long-running proceedings during which concerns about the treatment of the children in the mother’s household emerged. The family had involvement with the police and child protection services and an ICL was appointed. While Steven initially felt frustrated because the ICL did not immediately make contact with the children, this contact eventually occurred and Steven indicated that:
It was very important for me that the children have a spokesperson in the trial … Someone there to represent what they wanted, not what my lawyer or my ex-wife’s lawyer thought was best for them … What I need was someone to listen to them … and get their point. [Steven]

Steven indicated that it was only during the course of the trial that the ICL’s position emerged, with a “cloak-and-dagger” game up to that point. The child protection concerns were upheld in the court process and Steven indicated that the ICL’s position was the linchpin in the case:

If it was against what we were trying to get, we’d have no hope, but if it was for what we were trying to achieve then we’d probably—we had a 90% win rate. [Steven]

Two other interviewees reported experiences that were wholly positive or more positive than negative, in addition to Elise, whose negative experience with one ICL and positive experience with a second ICL is referred to above. The positive aspects of their comments related to the personal characteristics of the ICL and the contribution they made to the case.

A father provided a positive example of a flexible and helpful approach by the ICL. Frank’s case centred on his attempts to revive his relationship with his children. He knew the children had had direct contact with the ICL and also with a child consultant connected with the court who prepared a report on their views. Because Frank was not seeing his children, he had little information about the children’s engagement with the process. However, he indicated that he lost confidence in the court process after a family report and decided not to maintain his attempt to re-establish his relationship with his children.

Although Frank expressed disappointment and frustration with the system’s inability to support his aims, he commented on the ICL’s courteous treatment of him and indicated a particular appreciation of the ICL’s role in arranging a meeting between the family consultant and his children to explain (with the ICL present) why he was withdrawing his applications:

[The ICL] did the right thing there, I mean, and the biggest thing … to me, like, I … wanted to get my point across to the children and she made sure that went through … The children were allowed to come to the actual family report guy and be able to be … provided [with] my reasons why I wasn’t going to take it further. [Frank]

Frank noted that the ICL “made sure that I was always in the loop” and commented that:

Out of all the lawyers, I think she was the most ethical of all the lawyers I dealt with. [Frank]

Another parent interviewed, Sally, indicated that the appointment of the ICL in her case was a response to a disagreement about how her child (who was under school age) should be involved in proceedings concerning her ex-partner’s application for equal time with the child. Sally indicated she thought that the ICL appointment was “a little bit over the top”, but saw the involvement of the ICL as ultimately positive. The consent-based outcome was consistent with her position and the recommendation of the family report. She explained the contribution that the ICL made in this way:

I think that outcome would have arisen anyway, but it put that avenue of, you know—the lengthening and drawing it out—it stopped, without getting out of control. All the mud-slinging, that was, it put all that to rest. [Sally]
8.5 Experiences of children and young people

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

Only one child described her dealings with the ICL as being mostly positive. Another indicated she was happy because the court outcome was consistent with what they wanted, but at no stage had she had direct dealings with the ICLs. The rest of the children in the sample described experiences that were largely negative, because they were not listened to respectfully and their interests were not considered expeditiously. The features of the one mainly positive experience are examined in section 8.5.5 to highlight the key aspects of effective ICL practice from this young person’s experience. The themes arising from the other interviews are set out in the following sections, commencing with a discussion of children’s reactions upon the appointment of an ICL.

8.5.1 Understandings and expectations of the ICL role

The substantive discussion in the interviews began with a question asking the child/young person to share their understanding of why the ICL became involved in the case. The answers convey a range of ideas related to the notion that the ICL would act in the children’s interests in court. They also suggested a certain amount of uncertainty about what the ICL would do. Most answers indicated expectations related to conveying children’s views, standing up for them in court and protecting them in court:

- Ah, I am not quite sure but, um, I’m guessing the Independent Children’s Lawyer was there because, um, of the whole custody thing, you know. They were fighting over custody and they didn’t know who to choose, so they had to call in the children’s lawyer to try and help. [James]
- I’m not quite sure … To stand up for me in court? [Sophie]
- Ah, I thought they were there to protect us and, um, help us get along, but they didn’t. [gets upset and cries] [Zoe]

Zoe’s initial response reflects experiences with the family law and child protection systems that have clearly been traumatic. Her distress was manifest throughout the interview. She was repeatedly provided with opportunities to stop the interview but chose to continue speaking with the interviewer.

Lachlan’s comments illustrate his construction of the meaning of the title “Independent Children’s Lawyer”:
Well, before I didn’t really know there was an Independent Children’s Lawyer, but when I was made aware, I suppose it was “independent” and it was a “children’s lawyer”. So it was independent from either party, I guess, and was a lawyer for the children’s perspective. [Lachlan]

Lachlan’s comment indicates his understanding of the distinction between a lawyer for the children and a lawyer for the children’s perspective. Other children in the sample spoke more simply of a “children’s lawyer” or “their lawyer”.

As with the parents’ reactions reported in the preceding section, most children reported a positive response to news of the ICL appointment. For example:

I thought it sounded pretty cool. [Hannah]

I was really happy, and I thought … yay, finally he was gonna be on our side. [Zoe]

Before, I guess I thought it was beneficial because … I would actually have my views portrayed in some way, which has to be a starter. [Lachlan]

8.5.2 Views on contact with the ICL

Seven of the 10 children and young people interviewed indicated that they had had some level of contact with the ICL. For most, this occurred on one occasion and seemed to be mostly concerned with familiarisation. Such contact mostly occurred in the ICL’s office, though one sibling group described meeting the ICL at court on the day of the hearing. Two described meeting the ICL together with the family report writer. One of these young people perceived the family report writer to be “running the meeting”. This description captures the cursory nature of the contact described by some participants:

I met her once … We shook hands. She said her name and left. [Hannah]

Another young person, Dylan, who noted the proceedings went over two and half years and involved many hearings, referred to the anxiety created by lack of timely contact by the ICL. This young person’s situation involved significant safety issues that he ultimately addressed himself by ringing the authorities and having himself removed from the home at a time of crisis. He had this to say about his contact with the ICL:

It was a bit, um, worrying, but, like, you didn’t know what was going to happen, because I know for a long time that she wasn’t doing much … Because it was a, like, fairly long time before I actually met her … When I met her, I remember she, like, explained what she did to, like, help me, but then … she really didn’t do much after that. I didn’t really hear of her doing anything. [Dylan]

Dylan described how a turning point in the proceedings came when the original judge was replaced by another.

But there was a new judge. They did switch judges like three-quarters through the whole process. And I think my [extended family carers] came home and they are like, “The judge said he wants to listen to my point of view” … [It was] just like a ton’s just been lifted off my shoulders, pretty much. [Dylan]

It was evident that some of the young people interviewed had experiences with a range of professionals (see further below) that left them perplexed and in some cases untrusting. One young person who reported meeting the ICL three or four times, described her engagement with the ICL in this way:

Stuff was written down on sheets of paper. [Sophie]
Sophie’s demeanour throughout the interview and the way in which she communicated her experiences—reflected in the brief, impersonal and passive phrasing of her description—underline the unsatisfactory nature of her engagement with the ICL and other professionals.

A further scenario described by a sibling group, all of whom were interviewed, involved meeting the ICL for the first time at court on the day of the hearing. Overall, these young people described their disappointment with an ICL who:

- told them what the outcome of the case would be on first meeting with them, as they construed this as meaning the outcome had been decided even before the judge heard the matter (this outcome was contrary to the arrangements the children wanted and the way in which the matter was eventually resolved after the children experienced a temporary change of residence);
- did not discuss their views and experiences with them prior to formulating her position;
- left the court prior to the conclusion of the day’s events; and
- behaved in a way the children perceived was dishonest.

The interviews with the three young people who did not meet with the ICL indicate varying views on the implications of this.

James indicated that he did not feel very engaged with the proceedings, which resulted in a negotiated outcome whereby he lived with his mother. When asked how he felt about the lack of contact with the ICL, he said, “I honestly just didn’t understand it”. James reported speaking to the family report writer, but did not have much to say about this either. He indicated he would have liked to have seen the ICL “a couple of times”, like other children who also indicated that more than one meeting would have been preferable to no or little contact. From James’ perspective, the eventual outcome was the only one that was feasible:

Well I didn’t really, um, understand why we needed one, ’cos, um, honestly, to me the answer was really quite obvious. [James]

For Georgia, the lack of contact with the ICL was in itself, not significant. From her viewpoint, it “wouldn’t have made any difference”, as long as “they, like, knew that I didn’t want to really be with my dad”. Georgia indicated she had relied on her mother to convey her views in the proceedings. She noted that she felt free to share her views with her mother, but was afraid that if her views were shared with her father, he would become angry.

Zoe conveyed a deep sense of disappointment in the lack of contact with the ICL. She indicated that they would have liked the ICL “to [have] helped us in different ways … like tell[ing] people this stuff shouldn’t go on”. Elaborating on this comment, Zoe referred to, among other things, being “attacked” and called a liar:

People ignored us and, um, um, [child protection services] and stuff, and just kept ignoring us. And we’d give them, um, information and thought they were going to help us and they changed the truth into lies. [becomes quite upset] [Zoe]

8.5.3 Children’s perceptions of ways in which their views affected case outcomes

Further discussion in the interviews focused on whether the young people believed their views had been taken into account in the outcome and how they felt about this. Some young people who had little or no contact with the ICL indicated that the outcome was consistent with their views, and demonstrated little concern with, or knowledge of, how the court may have come to take their views into account, if in fact this had occurred.
Hannah, whose parents came to a consent agreement after the trial started, said she “kind of” felt her views had been communicated to the court. Asked how this may have happened, she said:

Um, my mum probably did … There were like a few police videos that were shown in court. [Hannah]

Georgia (who also never met the ICL) believed her views “might have” influenced the decision: “’Cos I don’t have to be with my Dad now”. Asked what the ICL could have done better, she said: “Get me to stop going to my dad’s sooner”. Georgia was not the only young person who suggested the eventual outcome should have been arrived at earlier.

Other young people described how it felt not to be listened to:

So she didn’t actually listen to what we were saying. She just went off what she wanted to do. [Alex]

Well, I would have actually liked for her to represent my views, ’cos I didn’t know where she got hers from. But I thought an Independent Children’s Lawyer would actually be a representation of what’s best—what’s best for the child—and I think a large proportion of that is what the child actually wants, and their points of view. But I don’t think that was actually taken into consideration at all. I think it would have been beneficial if she actually thought that I was capable of making a decision … She knew that we didn’t want to see our father but … I don’t think she took that into consideration or really expressed that as our view. [Lachlan]

8.5.4 Perceptions of “best” and “worst” parts of having an ICL

In a part of the discussion where young people were asked to identify the best and worst parts of having an ICL, most children found it difficult to identify a “best part”. The few comments identifying advantages revolved around issues that were somewhat abstract in the context of the young person’s experience:

They have to study to be lawyer, so they know how to get an opinion across better. [Georgia]

The best bit was probably when I found out that I had a children’s lawyer … and that was probably it. [Dylan]

A sense of disappointment, and in some cases anger and distress, were conveyed in responses in relation to the “worst bit” about having an ICL. The themes in these responses relate to not being listened to, not being helped and not being “stuck up for”.

Well, kind of, like, they weren’t listening to anything we were saying. Like, they didn’t care. [Hannah]

That she didn’t fight for our rights as much as she, um, should have. [Sophie]

Well, I feel it was quite a waste of time really. I don’t think she was actually necessary and that she caused more problems than if she hadn’t been there … Probably that she just didn’t listen … And she ignored what we said. [Alex]

I think the worst bit was probably being told that this person is having the best interest for you when they don’t actually represent your viewpoint. I think it creates an idea that your viewpoint is therefore not in your best interests and … it kind of sets you up to think that therefore your viewpoint is not actually what’s best for you and you can’t think straight, you’re not like old enough or you’re not mature enough to
have … that, um, mental understanding. That … they can make the decision for you … I reject that seriously, that she thought I could not make a decision. [Lachlan]

Me not knowing what she was doing … And her not getting in touch to help me on more occasions. [Dylan]

It was all pretty bad … Probably that she just didn’t listen. Like, she would ask us questions and we’d tell her, but then she just didn’t care what we said. And she ignored what we said. [Samantha]

8.5.5 Insights into effective practice from the experience of one child

Sarah was 12–14 years old at the time of interview and 5–11 years old at the time of the court case. Her situation involved circumstances that led to contact with child protection agencies and police. Her account of her experiences with the ICL was very positive overall, and she made some very insightful observations about how practice could be improved.

Sarah’s direct engagement with the family law system began in a not very promising way. She described a meeting with a professional, whose role she could not identify for certain, but who probably was a family report writer:

She wasn’t nice, she made me feel very uncomfortable … She was mean … She wasn’t comforting at any stage and she was pressuring me. [Sarah]

At about the same time, Sarah had her first meeting with the ICL:

I remember she introduced herself very clearly … She said, … “Right, well you understand that your parents are doing this, and I’m this person, and I’m gonna ask you a few questions”, and so she did … Some of it was OK, and some of it wasn’t. [Sarah]

From Sarah’s perspective, the positive aspects of the way in which the ICL treated her included:

- negotiating seating arrangements that meant Sarah felt physically comfortable talking to her;
- listening to her concerns about and experiences of her living arrangements;
- meeting with her on more than one occasion;
- engaging with Sarah in developing the summary of her submission to the court; and
- checking with Sarah what she wanted her to share with the judge.

Sarah also highlighted some aspects of the process that were uncomfortable for her and could have been approached differently. Some of them relate to the circumstances that led to contact with child protection:

- her first meeting with the ICL took place in eyeshot of the parent in whose home she felt unsafe;
- she felt conflicted about sharing information with the ICL about her lack of safety in this parent’s home. Initially, she agreed to have this information shared with the court, but would have liked an opportunity to revise this position;
- she would have liked to know what was said to the judge and whether this influenced the outcome: “It would have been nice to know if my message had gotten through”.

49 With the exception of one sibling group who described unsatisfactory contact with the ICL at the conclusion of the case, none of the children said they had seen the ICL at the end.
she felt some of the questioning by the ICL was tedious: “If I was a little kid and she was asking me questions, I would fall asleep”; and

she overheard other professionals (not the ICL) talking about the circumstances of her unsafe parent, but nothing was said to her directly: “I would have liked to know”.

Sarah had some reflections on how the ICL process could be made more child-friendly. Several suggestions relate to relationship-building:

- the process of engagement with the ICL could be made “funner”, perhaps by the use of a reward and the young person should be offered a drink;
- the young person should be provided with the ICL’s card and know that they can initiate contact;
- several meetings would allow a more trusting relationship to develop and provide the young person with an opportunity to consider more deeply what information should be shared with the court. The young person should be asked how much information they want to share at the first meeting: “Do you want to have more sessions with me to tell me or do you want to let it all out at once?”; and
- the ICL should explain the length and nature of the meeting at the outset and provide indications of how much time is left part way through.

Sarah also suggested that the young person should have a say on the gender of the ICL: “some girls might not want a boy to talk to about this stuff and boys might not want to talk to boys about this stuff”. Sarah also suggested that:

- there could be mechanisms to ensure she did not have to repeat her story to different professionals; and
- ICLs could ask the young person at the end of the case whether they could have done anything better.

Sarah summed up her experience with her ICL in this way:

> It was nice to have an Independent Children’s Lawyer … ’cos if my word didn’t get out properly … I don’t think I would be where I was now … I’m happy here … And not [her] having to tell sometime, ’cos it can be very nerve-wracking if you’ve got one person who you don’t like … and you’re telling them. [Sarah]

### 8.5.6 Young people's views of ICLs and other professionals

As outlined above, the young people who were interviewed reported some unfortunate experiences with professionals. Zoe reported that child protection officials had called her a “liar”. Sarah found one professional (likely to have been the family report writer) “mean” and described overhearing discussion among other professionals of her parent’s distressing circumstances.

Dylan described his experience of distrust and not being heard by other professionals in this way:

> [Regarding reportable counselling with the family consultant], I didn’t really want to talk about stuff because, um, after the first meeting I didn’t really trust them … And they were all for me, like, to go back to Mum, and they didn’t really listen to me anyway. [Dylan]

> Like, the children’s lawyers and the psychiatrists are as equally bad as each other … There was one psychiatrist that I went to, um, I forgot his name, but … he was shocking … He wouldn’t trust me … He would always go on [my parents’] side …
And he always listened to Mum. I was like, “Hey, listen to me”. He’s like, “No, your Mum’s talking, I’m listening to her”. [Dylan]

Two children described their ICL as “uncaring”, including Alex.

I don’t think there was a best bit. She wasn’t particularly nice either … She had this, I think, air about her that she had more important things to do, um, she—she didn’t really—she clearly doesn’t think we have a clue, um, and I’m—I’m very smart … The worst bit would be her not listening, I suppose. Disregarding what we had to say … and then representing the wrong—representing views that weren’t actually ours.
The formal interviews concluded with each child and young person being asked what they would like to tell the ICL if they had the opportunity. The way the question was asked made it clear that this was a “pretend opportunity” only. The responses encapsulate the young people’s concerns and are reproduced here.

Gosh, I don’t know. Some colourful phrases come to mind … I don’t know, I think that if she just listened, that would’ve made a difference, but she didn’t and, yeah. [Samantha, 12–14 years]

It would be a lot better if we had contact with her and was able to give our side of the story across … And she could give our side of the story in court. [Hannah, 15–17 years]

That I’d want to stay here like, um, that I’d, um, I’d say I’d never really want to be anywhere else but here. [James, 12–14 year]

I like the way how you guys gave me the choice of like “Did you want to do this?” and … let me know what was gonna happen and that you told me at the end what I [or you] was gonna say. [Sarah, 12–14 years]

I would’ve said that, something like, um, “You could’ve done better or you’re a terrible children’s lawyer. You barely helped me.” [Dylan, 12–14 years]

Probably that it was—which she did was a waste of time. [It would have been a positive experience] if she had represented … what we actually asked her to do and actually, I think, taken into consideration what we were saying. Then it would have been a lot better … [The ICL was] representing views that weren’t actually our views … I don’t think she actually cared what we actually wanted. [Alex, 15–17 years]

Um, how come you didn’t just get me to stay with my mum earlier? Get me to stop going to my dad’s sooner. [Georgia, 5–11 years]

What I would ask is, well, if she could give us more time with our mum and less time with our dad … to whenever we want to. [Sophie, 12–14 years]

Um, that they should have helped us and, um, that it would have been much, much, better if they helped. [Zoe, 5–11 years]

Um, I probably would have told her that it probably would be better had she just actually represented me … I still don’t know where she got her facts from, but I think it would have been better if she had actually represented me … [She could have done that by] taking my viewpoints and not making decisions about what was best for me before actually meeting with me. And stating them and getting a chance to know me … Like, not meeting me prior to that, I think that was very dodgy, ’cos she already made the viewpoint. I don’t know where that came from that she had, and at least doing that to see my point of view. [Lachlan, 15–17 years]

8.6 Summary

This chapter has examined the perspectives of parents and young people on ICL practice. Any interpretation of these insights, based as they are on interviews with 24 parents or extended family carers, and interviews with 10 children/young people, must be regarded as tentative and exploratory in nature. With this qualification in mind, there are strong and common themes found across the data.

A very significant theme in the data from parents/carers and children/young people is their understanding that the role of the ICL is meant to support participation. Many interviewees described unmet expectations and disappointment in this regard. The data suggest that these
parents and children/young people were generally not provided with information that allowed them to understand the role of the ICL in the family law system more broadly. A significant disjuncture was evident between the understandings of professionals, particularly ICLs and judges, with their emphasis on the case-management and evidence-gathering aspects of the role, and the understandings and expectations of parents and children/young people. From the perspective of parents, the case-management and evidence-gathering roles are ancillary to an ICL function that should be about understanding the child and the child’s perspective, and understanding the circumstances of the family.

The children and young people interviewed had understandings of the ICL role that encompassed protection, advocacy and understanding of their perspectives and interests. Most also indicated feeling disappointed and even betrayed when these understandings weren’t reflected in what actually happened. Some children described experiences with ICLs and other professionals that left them with the impression that their perspective was not important and their honesty and intelligence was in question. Engagement with the legal system produced feelings of marginalisation, potentially compounding the trauma of abusive experiences within their families.

One young person described a largely positive experience, with an ICL whose practices appear reflective of the orientation with high levels of direct contact as described in Chapter 3. The accounts of the other children and young people in the sample illustrated the operation of a system where responsibility for facilitating children’s participation is diffuse. These accounts indicate that the young people were uncertain about what the ICL did, were disappointed by having little or no contact with the ICL, and were uncertain as how their views fed into the decision eventually made.

The circumstances of most of the parents and all of the children/young people involved issues related to family violence and/or child safety. The accounts provided by the children and young people reinforce concerns about the system’s ability to address these situations effectively and expeditiously. Some of the children/young people in the sample had clearly had traumatic experiences with child protection and family law professionals. From their perspective, it was difficult to understand why it took so long and was so hard to reach outcomes that protected them and were in their best interests. In some of these instances, it is highly likely that the ICL’s evidence-gathering and case-management functions were at the fore, out of view of the children. However, the accounts of these children/young people suggest that the right answer would have been obvious should anyone have asked them. Some indicated circumstances in which they felt very unsafe while a resolution was being reached.

In addition to providing insight from parents and children/young people on the participation-related aspects of family law processes, the data highlight some other concerning aspects of family law processes. The young people’s accounts indicate exposure to professional approaches that at best could be described as insensitive where child safety is a concern. Many of the accounts of the mothers and several of the accounts of the children and young people seem to suggest an approach based on a prima facie assumption that no violence or abuse has occurred, or that if it had occurred, it was not significant. In light of the evidence of the trauma sustained by children who are exposed to violence and subjected to abuse, and the evidence of the extent to which these issues are pertinent to families who use the system, such approaches are likely to compound or exacerbate trauma.
9 Conclusion

This research has examined how Independent Children's Lawyers operate in the family law system. A mixed-method approach was applied to examining the central research question for this project: To what extent does having an ICL involved in family law proceedings improve outcomes for children? The research was commissioned and funded by the Attorney General's Department.

The core quantitative study—a multidisciplinary survey of judicial officers, ICLs, non-ICL legal professionals and non-legal professionals—provided an important means of examining the views of the main stakeholders on key aspects of, and expectations in relation to, ICL practice.

In-depth insights from a practitioner perspective were derived from qualitative interviews with ICLs. The experiences of parents/carers (n = 24 from 23 interviews) and children/young people (n = 10) in cases involving ICLs further informed this analysis of ICL practices, from the perspective of those who are directly affected by them.

The organisational context in which ICLs operate was described, based on information (derived from interviews with section heads and a request for information) from the eight Australian legal aid commissions that fund ICLs and manage their accreditation. Interviews with child protection department representatives provided information about arrangements for liaison between ICLs and these departments.

Many aspects of ICL practice have been examined from multiple perspectives in this report. The discussion in this chapter brings together the key findings from the data to examine how and in what circumstances ICLs do and don’t contribute to better outcomes for children in family law cases. It is apparent from the empirical evidence that views on this question are strongly informed by the way in which the different groups of participants in the research—judicial officers, ICLs, non-ICL lawyers, non-legal professionals, parents and children—engage with the family law system.

The effect that ICL practice has on the interests of these groups collectively and individually also varies considerably. Evidence of this can be clearly seen, for example, in the very different views of judicial officers and the non-ICL lawyers on some core questions about the efficacy of ICLs. In responding to the proposition that having an ICL in a case improves outcomes for children/young people, a substantially higher proportion of judicial officers (89%) agreed or strongly agreed than non-ICL lawyers (62%). On this same question, however, the responses of non-legal professionals (83%) were closer to those of judicial officers than non-ICL lawyers.

The views of professional and organisational stakeholders cannot be considered in isolation from the evidence of those most directly affected by ICL practice: children and parents. The analysis that follows reflects a synthesis of the empirical evidence to present core findings on the main issues. Elements of ICL practice and organisational context that influence the effectiveness of the ICL role are canvassed in order to provide an understanding of the context for the findings.

The discussion suggests that the involvement of a competent ICL can contribute to better outcomes for children and young people to an extent that is difficult to quantify, and varies depending on expectations and perspectives. The most important qualification to this statement is competence: the data from all stakeholders indicates that in some cases practitioner quality means that the service delivered falls short of effective practice. Other qualifications also apply. These relate to the assumptions that inform expectations that others have of ICLs and views about what “best interests” outcomes are and the extent to which such outcomes should be informed by the participation of children/young people in the process by which decisions are made.

From the perspective of the parents and children/young people interviewed, the experiences of many were largely negative due to unmet expectations that the ICL would work more closely with
the child and the parent to form a view of a best interests outcome that was influenced by direct knowledge of the child and their situation. The data from parents and children/young people also indicate that approaches to ensuring that children are living in safe conditions and that the trauma of proceedings is minimised, fall short of expectations. Bearing in mind that the situations of the children and young people interviewed all involved issues related to safety, the data from their interviews particularly suggest that being subject to drawn-out proceedings and not being consulted about their needs and circumstances has the potential to heighten rather than reduce the negative effects of family court proceedings. While legal processes were running their course, the children and young people interviewed were experiencing unsafe parenting arrangements.

9.1 Organisational context

The role of the ICL—originally developed by the Family Court of Australia in case law50 and codified in legislation in 2006—is that of a “best interests” representative. The way in which this role has been enshrined in legislation, guidelines and practice places emphasis on the expectation that ICLs will assist the court to decide what arrangements will be in the best interests of the child, acting not as the child’s representative but as the court’s assistant, with independence and impartiality. Courts may make orders for ICL involvement in a particular matter where this is considered warranted. Case law originally specified 10 separate, non-exhaustive grounds on which an ICL appointment may be ordered, but this research has highlighted that in practice funding for such appointments are generally considered necessary and justified on three main grounds. Matters involving family violence and child abuse make up the bulk of the workload of ICLs.

Legal aid commissions in each state and territory are responsible for accrediting ICLs and administering grants of legal aid to ICLs. In 2009–10 and 2011–12, ICL grants totalled just over $65 million nationally (GST exclusive), averaging some $5,371 per grant. This compares with funding allocations of $263 million (GST exclusive) in the same period toward general family law grants (averaging $1,700 per grant). Across Australia, 361 ICLs are in private practice and 153 are inhouse legal aid lawyers. Both pools of practitioners are maintained so that private practice ICLs are available when legal aid lawyers have a conflict of interest (these may arise when legal aid has previously acted or is currently acting for a party). The legal aid commissions in each state and territory are administered independently (they are statutory bodies) and are primarily funded out of state and territory government funds and funds derived from Public Purpose Funds (i.e., the interest earned from solicitors trust accounts) (Senate Legal and Constitutional Affairs References Committee, 2009). Policies and practices in relation to ICLs, who operate in a federal jurisdiction51 and are Commonwealth-government funded, vary in some respects from commission to commission. Important areas of variation highlighted in the research include mechanisms for accrediting and monitoring the performance of ICLs, and policies in relation to meeting with children.

9.2 ICL role and functions

This analysis has highlighted three overlapping functions in the ICL role: facilitating child participation, evidence gathering and litigation management (being an “honest broker”). In relation to the “honest broker” and “evidence-gathering” functions, the publicly funded ICL brings


51 This statement is slightly qualified in relation to Western Australia, where the Family Court Act 1997 (WA) applies to disputes involving ex-nuptial children. This act essentially mirrors the Family Law Act 1975 (Cth).
independence and impartiality to proceedings that would otherwise be conducted bilaterally. It is apparent that the ICL role is valued from the perspectives of most professionals and organisations in the family law system, especially judges and courts. This is clearly illustrated, for example, by the responses of the different professional groups to a question eliciting views about whether the present ICL model provides “sufficient opportunities” for the views of children and young people to be heard and considered in family law proceedings. Affirmative responses (strongly agree, agree) were provided by 80% of judicial officers and 76% of ICLs, but by comparatively smaller proportions of non-legal professionals (58%) and non-ICL lawyers (51%).

The findings indicate that each of the three overlapping functions of the ICL involves challenges, but the area where practice is most variable and contested is in relation to the function of supporting child participation. An important finding is that all professional stakeholders, especially ICLs, place less emphasis on the participation function than the other two functions of “evidence gathering” and “honest broker”. The UN Convention on the Rights of Child, to which Australia is a signatory, recognises the rights of children to participate in decisions relevant to their care (Article 9) and to make their views known in administrative and judicial proceedings affecting them (Article 12). Recent amendments to the Family Law Act 1975 (Cth) specify that giving effect to the UNCRC is an object of Part VII, which deals with parenting proceedings (s60B(4)).

9.3 ICL participation function

The analysis in this report recognises that in carrying out the participation function, ICLs’ direct contact with a child may have three aspects: familiarisation (of the ICL and the child), explanation (of outcomes and processes), and consultation for the purposes of ascertaining views about outcomes and processes.

Three important findings arise from the data in the report in relation to the participation function. First, the data establish that having direct contact with children is not necessarily routine practice among ICLs. Decisions in relation to direct contact are based on the age of the child and the circumstances of the case. They also reflect the practice orientation of the ICL and the policy and approach of the legal aid commission in which the ICL is based. The research identified two broad approaches to participation among ICLs. The dominant approach is a cautious, multipronged approach to direct contact, with this mainly occurring for familiarisation and less commonly explanation. Consultation is conducted collaboratively with family consultants. The less common approach involves a high level of direct contact where all three purposes of direct contact are undertaken by the ICL.

Of the legal aid commissions that have specific policies in relation to direct contact with children, the Legal Aid NSW policy is compatible with a high level of direct contact, while Legal Aid Queensland’s policy reflects a cautious and multipronged approach to direct contact. A key concern underlying the cautious orientation is that, as lawyers, ICLs may not have the appropriate disciplinary training to consult with children and interpret their views. There are also concerns about the ICL adding to the burden of children, particularly in cases involving concerns about child abuse, where multiple professionals and agencies may already have engaged with the child. This approach also accommodates the necessity to have evidence of the children’s/young people’s views in the appropriate admissible form for the court.

Second, each of the orientations to direct contact entails a differing approach to the way in which the ICL and family consultant/single expert work together. Further research would be warranted to more thoroughly examine the role of family consultants and single experts in the family law system generally, and in relation to direct contact in particular. This research suggests that where a cautious orientation is applied, the quality of the collaboration between the ICL and the family consultant or
single expert would be critical to the efficacy of this approach and the extent to which it reflects a coherent experience from the child’s perspective. While each approach relies on collaboration, the cautious approach involves a greater level of sharing of responsibility for direct contact, necessitating a closer level of engagement between the family consultant and ICL. Some of the data from professionals examined in Chapter 5 suggest there are complex dynamics relating to inter-professional understandings of responsibilities and role boundaries between these professionals, including uncertainty as to how the relationship should actually be managed.

Third, in addition to identifying the different orientations in approach, this research has highlighted a number of concerns about ICLs and direct contact. Data from judicial officers in particular indicate that current approaches to direct contact with children/young people fall short of expectations. Disappointment with the extent and nature of this direct contact is also powerfully evident in the data from interviews with parents and children/young people. These data suggest that the expectations of parents, children and young people interviewed in relation to ICLs focus on the ICL function of participation, while the other functions—those most emphasised by judicial officers and ICLs—may have little visibility for parents or children. From the perspective of the parents we interviewed, the approaches to direct contact applied in their case meant that the professional who was representing the best interests of their children had little or no personal contact with them. The theme of disappointment and distress was even more powerfully evident in the interviews with young people. All of the children and young people had been involved in cases in which their safety was compromised. They expected ICLs to be focused on listening, protection, advocacy and help. For most children and young people interviewed, these expectations were not met.

The interviews with young people yielded one powerful example of where, in the context of a case that also involved a child protection department, a high level of direct contact was applied, notwithstanding the protection issues. This young person described a very positive experience with her ICL, which suggests that an approach incorporating a high level of direct contact can be applied in such circumstances with due care and sensitivity. This is not to suggest that the concerns expressed by experienced professionals are without foundation, but it indicates that further consideration of how ICLs can facilitate participation in these circumstances warrants further examination. Establishing how professionals can coordinate their engagement with children and young people to fulfil complementary roles that are supportive of the young people would be a fruitful line of inquiry. The interviews with young people suggest they have an acute need for someone to be looking after their interests in, and facilitating their understanding of, the processes affecting them, particularly in circumstances where safety concerns and family law proceedings are unfolding in parallel. This evidence suggests a need for further examination of how this need could most effectively be met and which professionals have the most appropriate disciplinary background to meet it.52

Further research examining what constitutes effective ICL practice from the perspective of children and young people would strengthen the system’s ability to provide appropriate and responsive practice models. The experience in relation to recruiting participants for this research suggests that a methodology based on data collection engagement with young people as they are going through the family law system would be most effective, though ethically complex.

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52 In 1996, the Family Law Council called for a coordination mechanism to meet the needs of children/young people, which it recognised were wider than the services provided by what were then known as “separate representatives”. This research indicates that the analysis underlying this recommendation remains pertinent (Family Law Council, 1996).
Another issue highlighted by the research is the diffuse nature of the mechanisms applied in the family law system to support child participation. The varying approaches to ICL practice have been identified in this research, but conclusions on the effectiveness of the particular approaches could not be drawn without further examination of how the collaborative approach works in the context of the cautious orientation approach. The experiences of children in processes where family consultants (including those operating under Regulation 7) are involved in the absence of ICLs, and of children in matters where neither of these professionals is involved would also be worthy of examination.

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

### 9.4 Working with families at risk

The evidence shows that the ICL caseload is dominated by matters involving concerns about family violence and child abuse. It is also clear that ICLs can, when operating effectively, make significant contributions in these kinds of matters, particularly from a forensic perspective. However, the evidence shows a clear need for a stronger focus on equipping ICLs to operate in this context through initial training, accreditation and ongoing professional development processes. This need, acknowledged by ICLs themselves and other stakeholders, is strongly illustrated in the disparity in responses between ICLs and judicial officers in questions seeking assessments in relation to ICLs’ ability to work with parents and children at risk of harm. In relation to the ability to detect and respond to safety issues for children and young people, positive assessments of efficacy (good or excellent) were made by 69% of ICLs and 76% of judges. In relation to detecting and responding to safety issues for parents, the disparity was considerably wider, with 56% of ICLs nominating their ability as good or excellent, compared with 73% of judicial officers.

A broader issue raised by the findings of this research concerns the system’s ability to deal with complex cases, which almost always involve concerns about family violence and/or child abuse. The AIFS Evaluation of the 2006 Family Law Reforms highlighted the fact that cases involving these issues were taking longer and using more services to resolve matters (Kaspiew et al., 2009, p. 232). The data from parents and children in this study is consistent with this point and provides some indications of the effects that this can have at a personal level, with years of children’s lives (varying from two to more than five) being spent in engagement with legal processes, and in some instances with multiple professionals associated with child protection, police and family law processes. In some cases, the children were clearly in unsafe and inappropriate parenting arrangements, as eventually shown by the outcome of the family law proceedings, during this time.

Some of the parents interviewed described circumstances in which inept approaches on the part of professionals, including ICLs, contributed to prolonging the resolution of the matter.

### 9.5 Practitioner quality and efficacy

The findings clearly demonstrate the relevance of concerns about practitioner quality to the question of the efficacy with which ICLs operate. These concerns were voiced clearly in interviews with ICLs themselves and in open-ended survey responses by judicial officers, non-ICL lawyers and non-legal professionals. Insights from the interview data with parents/carers and children/young people reinforce the concerns expressed by professionals. Before examining the nature of the concerns in more depth, however, it is critical to acknowledge that most ICL practitioners are held in very high regard by their professional peers and by judicial officers. They operate in a complex context and are required to balance the demands and expectations from multiple stakeholders with
varied interests in the system. The ICL role is valued, and most practitioners who fulfil it are recognised to be highly skilled and effective operators. The experience of “Sarah”, described in Chapter 8, illustrates the positive effects that a skilled ICL can have.

It is apparent that a range of individual and systemic issues is pertinent to the question of the extent to which ICLs have the personal and professional attributes to operate effectively. The adequacy of training is clearly an issue. Areas where a need for improvement has been identified include knowledge of child development, skills in dealing directly with children (including in the context of collaborative practice with a social science professional), and skills in understanding and responding to family violence and child abuse (Chapters 6 and 8). In some instances, underdeveloped practices and understandings relating to inter-professional cooperation and collaboration are pertinent (Chapter 5). Progress in developing relationships and processes to support contact between ICLs and child protection departments is uneven. The evidence also suggests that in some instances, inter-professional understandings of the practice interface between ICLs and family consultants require refinement.

The discussion throughout this report establishes that the individual circumstances of a case, the jurisdiction in which an ICL is practising and the practitioner discretion supported by s68LA and the current guidelines, will inevitably give rise to a certain level of heterogeneity in ICL practice. The diversity in relation to approaches to participation has already been discussed. In other areas, it was clear that the findings concerning ineffective practice (Chapter 7 and 8) do not simply reflect subjective responses to diversity in practice. Professional respondents to the research were able to make distinctions, on the basis of reasoned professional judgment, between appropriate and effective ICL practice and deficient ICL practice. Clear features of effective ICL practice were identified as including undertaking the ICL role in a proactive manner, consulting with children/young people where possible and appropriate, and applying independent analysis to the family consultant and other expert reports.

In Chapter 7, we also identified issues in the funding environment that create pressures. Across the various participant groups, ICL work was generally considered to be under-funded and under-remunerated. ICLs who operate in a private practice context carry out at least some of their work on a pro bono basis because of the discrepancy between the complexity of the work and the funding that is provided.

In addition to and beyond the systemic issues just summarised, it is also clear that some practitioners do not meet the professional standards required of them. A number of stakeholders indicated that not only was a poorly performing ICL a waste of resources, but such a practitioner could make matters worse for the child and parties, including by prolonging the litigation and increasing its cost. Concerns raised by stakeholders in all of the groups that contributed to this research cover two main areas (Chapter 7):

- a lack of independence, impartiality and professional rigour in the way in which some ICLs discharge their obligations; and
- a failure to perform adequately and exercise a proactive and comprehensive approach in their role as ICL, including applying a thorough approach to gathering and analysing evidence.

The mechanisms by which ICL performance is monitored were described in Chapter 7. Legal aid commissions apply varying approaches to monitoring performance and have varying approaches to dealing with complaints. The level of concern about ICL quality identified in this research demonstrates that these mechanisms need to be strengthened. The empirical evidence provides some important insights into the question of accountability in a context where the operation of ICLs affects the interests of multiple stakeholders. The stakeholder who is most directly affected by the ICL’s actions, the child, is in the weakest position to assess ICL performance and exercise
agency through a feedback or complaints mechanism. Other stakeholders also directly affected by ICL performance—judicial officers and courts—are in the most powerful position in this regard, due to their capacity to observe and assess performance, and their position of authority within the court system. The data from other professionals—non-legal professionals and non-ICL lawyers—establishes that they are also close, critical and informed observers of ICL performance. These insights suggest that a shared approach to monitoring performance and maintaining accountability is required. The perspectives of children and young people should be consciously considered in this approach.

9.6 Key points

This report has examined the role of ICLs in the family law system. The findings indicate that considerable value is placed on the role, especially by judicial officers. There are three overlapping aspects to the ICL role relating to participation, evidence gathering and litigation management. In fulfilling the evidence-gathering and litigation management roles, ICLs are seen to bring a child focus to proceedings that would otherwise be conducted bilaterally. There is a need to focus ICL training, accreditation, and continuing professional development programs more particularly on dealing with families where family violence and child abuse concerns are pertinent, including where questions of risk are live.

Practices in relation to child participation are varied, particularly in relation to the extent to which ICLs have direct contact with children. The purpose of direct contact may be for familiarisation, explanation or consultation. This research has highlighted variations in approach, particularly in relation to consultation. Some ICLs, particularly in Queensland, Western Australia and South Australia, adopt an approach in which this is seen as a collaborative function, with family consultants (Queensland) or single experts (Western Australia and South Australia) acting primarily as the conduit for ascertaining and interpreting children’s views, facilitated by the ICL. Under the other approach, consultation occurs as part of the ICL’s direct engagement with children and young people, and this may occur in parallel with the children being seen by family consultants/single experts.

Many ICLs have concerns about having direct contact with children and young people, particularly where child abuse concerns are pertinent. However, the data from parents and children indicate that current practices of having no or little contact between the ICL and the child or young person result in disappointment and unmet expectations. Judges also have indicated a view that more direct contact should occur. Further research on effective ICL practice from the perspective of children and young people, including the approach involving close collaboration with family consultants, would generate deeper understandings of the features of helpful approaches. More detailed consideration of how ICLs should engage with children and young people, even when child abuse concerns are pertinent, is required. This question involves significant forensic and therapeutic complexity, requiring engagement from all stakeholder perspectives, including experts in child protection.

The capacity of many ICLs is recognised to be excellent. It is also clear from the range of responses across participant groups that there are concerns about the capacity and commitment of some practitioners. Although it is apparent that there are various individual and systemic issues that have an impact on effective ICL practice, questions as to the level of independence, impartiality and professional rigour were raised in responses to the survey and interviews. Respondents also considered that mechanisms for selection, training, monitoring performance and ensuring accountability needed to be strengthened.
10 References

10.1 Cases

*Bookhurst and Bookhurst* [2011] FamCA 16

*Dardelwill and Brent* [2010] FamCA 4 ¶15–17

*DS v DS* (2003) 32 Fam LR 352

*Garning & Department of Communities, Child Safety and Disability Services and Anor* [2012] FamCA 839

*Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 AC 112

*In the Marriage of Bennett and Bennett* (1991) 17 Fam LR 561

*In the Marriage of Harrison and Woodard* (1995) 18 Fam LR 788

*In the Matter of P and P* (1995) 19 Fam LR 1

*Knibbs & Knibbs* [2009] FamCA 840

*Mckinnon and Mckinnon* [2005] FMCAfam 516


*RCB as litigation guardian of EKV, CEV, CIV and LRV v. The Honourable Justice Colin James Forrest, one of the judicial officers of the Family Court of Australia & Ors* [2012] HCA 47

*Re K* (1994) 17 Fam LR 537

*State Central Authority & Best (No.2)* [2012] FamCA 511

*State Central Authority and Young* [2012] FamCA 843

*T v N* (2003) 31 Fam LR 257

*T v S* (2001) 28 Fam LR 342

10.2 Legislation

*Family Court Act 1997* (WA)

*Family Law Act 1975* (Cth)

*Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth)

*Family Law Regulations 1984* (Cth)

*Legal Aid Act 1978* (Vic.)

*Legal Aid Commission Act 1979* (NSW)

10.3 Other material


Family Court of Australia. (1995). Representing the child’s interests in the Family Court: Discussion paper. Canberra: FCoA.


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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AGD</td>
<td>Attorney-General’s Department</td>
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<td>Australian Institute of Family Studies</td>
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<td>AVO</td>
<td>Apprehended violence orders</td>
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<td>CP</td>
<td>Child protection</td>
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<td>Family Court of Western Australia</td>
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<td>FLA</td>
<td>Family Law Act</td>
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<td>FMC</td>
<td>Federal Magistrates Court (now Federal Circuit Court)</td>
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<td>Family violence orders</td>
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<td>Independent Children’s Lawyer</td>
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<td>legal aid Commission</td>
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<td>United Nations Convention of the Rights of the Child</td>
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<td>VRO</td>
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Legal aid commissions in Australia

Legal Aid ACT
Legal Aid Commission of Tasmania
Legal aid New South Wales
Legal Aid Queensland
Legal Aid WA
Legal Services Commission of South Australia
Northern Territory Legal Aid Commission
Victoria Legal Aid