Articles

Meetings between children's lawyers and children involved in private family law disputes

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The appointment of a lawyer to represent a child's interests in a private family law dispute is often held up as a way for children's voices to be 'heard'. In Australia, these lawyers do not always meet with the children whose interests they represent. When they do, their approach to the meeting is influenced by their views about the purpose of meeting. Thus a lack of clarity about that purpose contributes to a high tolerance for individualised practices around meeting with children. While the individual discretion of lawyers is important, this can lead to lawyers making decisions about meeting based on factors other than what is best for the individual child concerned.

Introduction

In Australia, children whose parents or guardians are in dispute over their care may have an Independent Children's Lawyer (ICL) appointed by the court to represent their best interests. It has been suggested that this is one way of enabling children's voices to be heard in family law disputes.[1] The appointment of an ICL in a given case is at the court's discretion, although various persons involved in the proceedings can request one.[2]

In recent years, attention has focused on whether ICLs should, and in fact do, meet with the children whose interests they represent. Research has identified concerns about this issue among parents, other lawyers and judicial officers.[3] In 2013, a national study of ICLs conducted by the Australian Institute of Family Studies (AIFS) reported that parents and children perceived 'lack of meaningful direct contact between ICLs and children' as undermining the capability of the ICL to identify the outcome in the child's best interests.[4]

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1 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at pp x–xi, 155–156; see also Family Law Act 1975 (Cth) (FLA), ss 60CD(2), 65C(b), 100B.

2 An ICL can be appointed of the court's own motion, or on the application of the child, an organisation concerned with children's welfare or 'any other person': FLA, s 68L(4). However it is not clear how the child could request appointment without engaging a lawyer or litigation guardian to make the application: Family Law Rules 2004 (Cth), r 8.02. ICLs were appointed in approximately one-third of matters in 2008–09: R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (AIFS, 2009), p 309.

3 P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008); N Ross, 'Independent Children's Lawyers: Relational Approaches to Children's Representation' (2012) 26 AJFL 214.

4 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at p 10, see also at pp 157–158.

This article reports on qualitative interviews undertaken with 40 lawyers working as ICLs in three Australian states. The purpose of the study was to gain an in-depth and detailed picture of ICLs' work, including their meetings with children, thereby enabling comparison between official guidance for children's lawyers and actual practices. Significant inconsistencies in adherence to the national *Guidelines for Independent Children's Lawyers*[5] have been reported.[6] Anne Smith et al considered that the absence of guidelines for children's lawyers in New Zealand resulted in the personal beliefs of lawyers largely governing practices around meeting children.[7] In Australia, there is wide variation around the country as to how closely the *Guidelines* are followed, and they are generally not viewed as mandatory.[8] Rather, norms of practice in the particular legal community, notably those espoused by the state's Legal Aid Commission and local judicial officers, generally seem to prevail.[9] Thus, though the *Guidelines* presume that lawyers will meet with children unless certain circumstances apply, in some states meeting children is seen primarily as the domain of a welfare reporter who conducts an assessment of the family.[10] Hence the preponderance of ICLs in those states either do not meet with children, or engage only in a brief interaction often facilitated by the report writer.[11]

In other states, including the three studied here, it is reportedly typical for ICLs to meet with children.[12] No interviewee in this study said that he or she would never meet a child, but there was variation in interviewees' ideas about the relevance of a child's age and the nature of interactions (including frequency of meetings), their enthusiasm for meeting with children, and importantly, their perceptions of the purpose of doing so.

'Meeting' can mean very different things: a 'meet and greet' in the presence of a report writer, or a lawyer developing a relationship with a child through various means of contact over a lengthy period of time. Meeting in and of itself, even on more than one occasion, may be positive or negative, a waste of time or productive and useful: the qualitative aspects are highly important. Quality of communication, essential to establishing trust and rapport,[13] is likely to be central to the experience of both child and lawyer. It has been suggested that lawyers' communication styles influence to a great degree the kind of information provided by children.[14] The process of involvement is also relevant. Children may not wish to be

5 National Legal Aid, *Guidelines for Independent Children's Lawyers* (NLA, 6 December 2007).

6 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013); P Hemphill and J Beall, *Report on Independent Children's Lawyers' Survey* (Family Law Courts, 18 September 2012).

7 A B Smith et al, *Access and Other Post Separation Issues: A Qualitative Study of Children's, Parents' and Lawyers' Views* (Children's Issues Centre, University of Otago, 1997), at p 91; see also N J Taylor, M M Gollop and A B Smith, 'Children and Young People's Perspectives on Their Legal Representation' in A B Smith, N J Taylor and M M Gollop (eds), *Children's Voices: Research, Policy and Practice* (Longman, 2000), at pp 110–111.

8 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at p ix. Cf R Birnbaum and N Bala, 'The Child's Perspective on Legal Representation: Young People Report on Their Experiences with Child Lawyers' (2009) 25(1) Can J Fam L 11, at pp 32–33, 41–47.

9 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at pp 176–177.

10 Ibid, at p 43, 47–49, 55 (Table 3.6).

11 Ibid, at p 43.

12 Four per cent of ICLs from Victoria, 6% from New South Wales and none from Tasmania reported not 'routinely' meeting children compared to 45% from South Australia and 38% from Queensland: P Hemphill and J Beall, *Report on Independent Children's Lawyers' Survey* (Family Law Courts, 18 September 2012), at p 6.

13 See A Sherr, *Client Interviewing for Lawyers: An Analysis and Guide* (Sweet & Maxwell, 1986), at p 12; M Bell, 'Promoting Children's Rights Through the Use of Relationship' (2002) 7(1) *Child and Family Social Work* 1, at p 3; D E Prescott, 'The Act of Lawyering and the Art of Communication: An Essay on Families in Crisis, the Adversarial Tradition and the Social Work Model' (2007) 10(2) *Legal Ethics* 176; J Masson, ' "I Think I Do Have Strategies": Lawyers' Approaches to Parent Engagement in Care Proceedings' (2012) 17(2) *Child and Family Social Work* 202, at p 203.

14 N J Taylor, M M Gollop and A B Smith, 'Children and Young People's Perspectives on Their Legal Representation' in A B Smith, N J Taylor and M M Gollop (eds), *Children's Voices: Research, Policy and Practice* (Longman, 2000), at pp 112, 130; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), at pp 89–90.

decision-makers when it comes to post-separation arrangements but the experience of being able to access information and having the opportunity to express views may nevertheless be important.[15]

Thus, the study sought to go beyond an examination of whether Independent Children's Lawyers do, or do not, meet with the children whose interests they represent, by looking closely at how lawyers interpreted the *Guidelines* and their reported interactions with children.

Method

Independent Children's Lawyers are a specialised subset of family lawyers.[16] In all Australian states and territories, they are either employed directly by the Legal Aid Commission (LAC), or are lawyers in private practice who have been admitted to specialist 'panels' of ICLs maintained by the LAC and remunerated at legal aid rates.

The study involved semi-structured interviews with ICLs working in New South Wales, Tasmania and Victoria, conducted and recorded between September 2010 and July 2012.[17] Interviews were transcribed and used as the basis for qualitative data analysis. The use of interviews as the method of choice was based on the nuances and complexity of the topics to be explored. However, there may be a degree of response bias in the interviews undertaken.[18] It seemed likely that respondents were more likely to feel some interest in ICL work or believed it to have some value or benefit, and hence supported the research. This does not mean that interview narratives are atypical,[19] but that generalisations from the accounts should be made cautiously.

The sample

On average, interviewees had, at the time of interview, over ten years' experience as ICLs and 19 years' experience as solicitors. One lawyer had been an ICL for nearly 25 years, others for less than a year. The sample comprised 15 males and 25 females. The men had, on average, more years of experience (approximately 24½ years in legal practice and 12 as an ICL, compared with 16 years in practice and 9 as an ICL for females). ICLs in private practice had also been lawyers for six years longer, on average, than those at LACs.

Interviewees were predominantly family lawyers, with approximately 70 per cent (n = 28) describing themselves as doing solely family law work: eight Legal Aid solicitors and 20 private practitioners. The remainder (including two barristers) practised a mix of family law and other work, including child protection and crime.

Lawyers working within the LACs reported doing a higher proportion of ICL work than those in private practice.[20] Six described themselves as doing solely ICL work, with the remainder doing a high proportion (at least 50 per cent) of ICL work as well as Children's Court work[21] (representing parents and/or child representation). As might be expected, private practitioners did substantially less ICL work: most estimated it to be 10 to 15 per cent of their total workload.

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15 J Kelly and R Emery, 'Children's Adjustment Following Divorce: Risk and Resilience Perspectives' (2003) 52(4) *Family Relations* 352; R Birnbaum and M Saini, 'A Qualitative Synthesis of Children's Participation in Custody Disputes' (2012) 22(4) *Research on Social Work Practice* 400.

16 As at December 2012 there were 514: R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at p 14.

17 Sydney University Human Ethics Committee, Protocol No 13018.

18 M J Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice* (University of Michigan Press, 1994), at p 231.

19 J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart, 2013), at p 77.

20 Interviewees were asked: 'What proportion of your work is ICL work?'.

21 In Australia, child protection matters are heard in the state Children's Courts, as opposed to private family law matters which are heard in the federal family law courts.

Analysis

Interviews were transcribed with major fluency disruptions included for completeness, and without corrections or use of sic. They were anonymised at the time of transcription with pseudonyms assigned and identifying features such as names edited out. The transcripts were imported into QSR NVivo and coded using that program. NVivo enables textual extracts to be selected and grouped in 'nodes' which denote categorisation.

This thematic categorisation allowed for detailed narratives about lawyers' practice to emerge, enabling comparisons to be made with official guidance about the ICL role. Simple counts are included in text or footnotes where statements are made concerning the prevalence of similar narratives.[22] This is done both for clarity and to counteract the possibility of 'anecdotalism'[23] or over-reliance on single extracted interview quotations. In many cases, interview quotes are included where they are representative of similar comments made by multiple participants.

This kind of thematic or content-driven coding was necessary both to organise the data and to obtain a general picture at a relatively simple level, of the work of ICLs. Eventually this largely topic-driven coding gave way to a more interpretive analysis. Firstly, six entire interviews (selected at random) were coded using the line-by-line technique explicated by Kathy Charmaz.[24] Using this method allowed a close reading and holistic examination of the interview. This analysis went beyond an aggregation of responses to a particular question, to consider not just the issues but the ways in which they were described.[25] Themes arising from this coding method were then coded in other interviews, permitting a greater depth of analysis.

The lawyer's initial decision to meet a child

It has been suggested that 'hearing' children's voices within the family law system is primarily motivated by an 'enlightenment' rationale – the belief that children can provide useful information which assists in the decision-making process.[26] This impulse was reflected in interviewee descriptions, as many lawyers discussed the importance of learning about the child and picking up 'clues' or information. As discussed in the following section, interviewees also described explaining things to children, answering questions and giving the child an opportunity to express views. Before any of these purposes could be acted upon, however, lawyers had to make an initial decision about whether to meet the child. This decision was referable primarily to the child's age, though as noted below, other factors such as the issues in the dispute, and whether any expert report had been prepared, might also be considered.

As the role is a best interests one, ICLs are not legally required to make any assessment of children's 'competence'.[27] The weight to be accorded a child's views, however, is expressed in

22 See M Sandelowski, 'Real Qualitative Researchers Do Not Count: The Use of Numbers in Qualitative Research' (2001) 24(3) *Research in Nursing & Health* 230.

23 K Charmaz, 'Grounded Theory: Objectivist and Constructivist Methods' in N K Denzin and Y S Lincoln (eds), *Handbook of Qualitative Research* (Sage, 2nd edn, 2000), at p 514; D Silverman, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (Sage, 2nd edn, 2001), at pp 222–223.

24 See K Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage, 2006), at p 42.

25 D Silverman, *Doing Qualitative Research* (Sage, 3rd edn, 2010), at p 225.

26 R A Warshak, 'Payoffs and Pitfalls of Listening to Children' (2003) 52(4) *Family Relations* 373; J Cashmore, 'Children's Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children's Views' (2011) 33(4) *Children and Youth Services Review* 515; G Mannion, 'Going Spatial, Going Relational: Why "Listening to Children" and Children's Participation Needs Reframing' (2007) 28(3) *Discourse: Studies in the Cultural Politics of Education* 405, at pp 406–409.

27 Cf C Sawyer, 'The Competence of Children to Participate in Family Proceedings' [1995] CFLQ 180.

the legislation as subject to the maturity and understanding of the child.[28] Though age is not specifically included in this directive, it unsurprisingly continues to be a reference point for family law professionals in determining questions about children's participation,[29] being closely connected to maturity and understanding.[30] Children's reports of their own competence to make decisions has been found to also correlate to age, with older children more likely to see themselves as able to make some decisions.[31]

Caroline Sawyer has suggested, based on her study of Children Panel solicitors in Britain, that determinations about a child's maturity in a family law context unavoidably reflect the personal beliefs of the children's lawyer.[32] Sawyer argued that the assessment of a child's competence involves a shift from viewing a child as an object to a 'speaking subject'.[33] How this shift occurs is, to a large extent, unique to the solicitor and his or her personal values:

> 'The transition from the child being the object of the legal process to that of speaking subject has implications, particularly in private law, which go beyond the mere capacity and competence of the individual child, and involve judgments which are not scientific but which necessarily reflect social and cultural values.'[34]

In a sense, this is to recognise what is now well-accepted: that children's capacities are biologically, socially and culturally constituted.[35] Since the 1990s, more nuanced views about childhood and children's capacity have ostensibly gained currency, including in government policy.[36]

Assumptions about children's 'competence' may either over- or under-estimate abilities in relation to different activities or areas.[37] Although criticism is often directed at under-estimation, one US study found that legal professionals 'consistently' over-estimated the level of understanding of older children,[38] suggesting any kind of assumption carries problems.[39] On

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28 FLA, s 60CC(3)(a). Yet precisely what the child should understand is not specified: C Sawyer, 'One Step Forward, Two Steps Back – The European Convention on the Exercise of Children's Rights' [1999] CFLQ 151, at pp 155–156; J Fortin, Children's Rights and the Developing Law (Cambridge University Press, 3rd edn, 2009), at p 303.

29 C Crosby-Currie, 'Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals' (1996) 20 *Law and Human Behaviour* 289; M Murch et al, *Safeguarding Children's Welfare in Uncontentious Divorce: A Study of s 41 of the Matrimonial Causes Act 1973* (Report to the Lord Chancellor's Department, Research Series 7/1999); G Davis and J Pearce, 'The Welfare Principle in Action' (1999) 29 Fam Law 237; J Cashmore and P Parkinson, 'Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce' (2008) 46(1) *Family Court Review* 91, at p 100; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), at p 116.

30 See, for example, J Lawrence, 'The Developing Child and the Law' in G Monahan and L Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008).

31 I Butler, M Robinson and L Scanlan, *Children and Decision Making* (Jessica Kingsley, 2005), at pp 17–18.

32 C Sawyer, 'The Competence of Children to Participate in Family Proceedings' [1995] CFLQ 180, at p 185 (involving 18 lawyers).

33 Ibid.

34 Ibid, at p 182. See also E E Sutherland, 'Listening to the Child's Voice in the Family Setting: From Aspiration to Reality' [2014] CFLQ 152.

35 J Lawrence, 'The Developing Child and the Law' in G Monahan and L Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008); P Christensen and A James (eds), *Research with Children: Perspectives and Practices* (Falmer, 2000); L Alanen and B Mayall (eds), *Conceptualising Child–Adult Relations* (Routledge Falmer, 2001).

36 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, Australian Law Reform Commission, 1997), para 13.84 (Recommendation 70); Law Society of New South Wales, Representation Principles for Children's Lawyers (3rd edn, September 2007), Principle C1; Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (August 2004), at p 38.

37 See D Duquette, *Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates* (Lexington Books, 1990), at pp 32, 150; cf S Billick, 'Developmental Competence' (1986) 14 *Bulletin of the American Academy of Psychiatry & Law* 301, at pp 306–307.

38 S Eltringham and J Aldridge, 'The Extent of Children's Knowledge of Court as Estimated by Guardians ad litem' (2000) 9 *Child Abuse Review* 275; see also C Lennings, 'Communicating with Children Over 10: If Wishes Were Horses, Beggars Would Ride' (2004) 5 *Children's Law News* 24.

the other hand, best interests representation and concern to protect children may lead to incorrectly presuming that children are incapable.

The *Guidelines* posit that the ICL shall meet with children 'of school age',[40] although there is some ambiguity in precisely what is meant by this term.[41] Most interviewees (n = 33) explained they would not meet children below a certain age but the actual age supplied varied.[42] All interviewees who specified a minimum age indicated that there was 'no point' in meeting children younger than this, but while some drew the line at 'babes in arms', others thought children would have little understanding until they were considerably older. Half would meet children who were school aged or at least five years old, though none explicitly referred to the *Guidelines* in saying this. Eight were open to meeting with children under five (three or four years and above) and four preferred to meet with all children regardless of age. The ICLs who met with younger children, when they were not strictly required to do so, generally found meeting with children enjoyable, and had a broad understanding of the reasons to meet children.

Meanwhile, seven interviewees would only meet with older children and gave a range of ages – typically 7 or 8 upwards, but including as old as 10 or 12. This group included several lawyers who found meeting, particularly with young children, a difficult or uncomfortable task. (Another two lawyers held similar views, but considered themselves obliged to meet with children, even though they disliked doing so and did this reluctantly). This group tended to emphasise the importance of eliciting information from children, and saw this as the role of an expert, rather than a lawyer. Some felt that they lacked the necessary skills to meet young children and hence this task was better carried out by a social science professional. Others were concerned about the legal relevance of what children had to say, as one explained:

> 'There's some pretty switched on five and six year olds, but again, in terms of overall what the court can do with the information that they give me, very little, the court's going to put very little weight as to what their view is.'

Thus, despite his own perception of the capabilities of individual children, this lawyer felt that the court would not necessarily give their views much legal weight.

A general exception to these 'rules of thumb' about age was where a group of children were involved in a matter: some interviewees would vary their practice and meet with younger children who formed part of a sibling group.[43] This was in order to avoid a child feeling left out, or for completeness.

Several interviewees explained how their practices had evolved or were evolving as they met more children and gained new insights. Others described times when their preconceptions about children were altered or challenged by their experience of meeting with children. Seven commented that age was an imperfect guide to predicting what would transpire at the meeting, particularly how much children would want to know and how much input they would seek:

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39 L Trinder, 'Competing Constructions of Childhood: Children's Rights and Children's Wishes in Divorce' (1997) 19 J Soc Welfare & Fam L 219.

40 National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at [6.2].

41 Schooling becomes compulsory when children are six: see, for example, Education and Training Reform Act 2006 (Vic), s 2.1.1; Education Act 1990 (NSW), s 21B(1); Education Act 1994 (Tas), s 4(1); Education (General Provisions) Act 2006 (Qld), s 9(1).

42 Noting that seven were asked this question specifically, and one interviewee did not specify an age. This has been the finding of other research: C Sawyer, 'The Competence of Children to Participate in Family Proceedings' [1995] CFLQ 180; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), at pp 133–134; R Birnbaum and N Bala, 'The Child's Perspective on Legal Representation: Young People Report on Their Experiences with Child Lawyers' (2009) 25(1) Can J Fam L 11, at p 11.

43 N = 16.

> 'Before I started meeting kids I thought that I would vary it depending on their ages, but – I don't know why, I didn't assume that the kids would surprise me – but of course you get the younger ones who are all ears and really understanding what you're saying and very interested, and then you get the older ones who are like *mumbling* "Yeah okay".'

Four lawyers noted that rather than behaving more like 'adult' clients, adolescents could be uncommunicative and apparently disinterested, or weary of the dispute. Another lawyer explained that she generally felt that it was not worthwhile to meet with very young children, who 'really don't understand'. Yet later in the interview she gave an example of a five-year-old with a clear message for his parents:

> 'I don't normally see kids that young but there was a sibling group and I couldn't sort of leave him out. But [he was] absolutely gorgeous, we just sat down and I gave him the spiel and we were talking about things. "Do you want to tell me what you want so that I can tell the judge?" "Yes! I want Mum and Dad to stop being silly and stop fighting." . . . Out of the mouths of babes!'

Thus, lawyers' actual experiences with children could contrast with their expectations of how children would behave. Nevertheless, age retains a powerful hold as a mediating factor in determining children's participation. Lawyers' variable ideas about age and understanding align with Sawyer's finding that they reflect the personal beliefs of the lawyer. All interviewees justified their own cut-off point by reference to the child's lack of understanding and reasons to meet a child were seen as increasing in importance commensurate with the child's age. Many thought it was especially important to provide older children an opportunity to express their views.[44]

The purpose of meeting

The *Guidelines* indicate that ICLs should meet with children and that children should be involved in proceedings to the extent this is desired by and appropriate for the individual child.[45] Yet the *Guidelines* are not particularly clear on the purpose of meeting. They contain a Statement of Principles comprised of Articles 3 and 12 of the United Nations Convention on the Rights of the Child 1989,[46] which refer to the best interests of the child; and the child's right to express views and be heard in 'all matters affecting the child', including judicial proceedings, respectively. This provides limited practical assistance to ICLs who must actually weigh up these potentially competing considerations. Perhaps reflecting this, no interviewee actually referred specifically to children's rights to participate, and few explicitly discussed their role in assisting children to make informed choices or express themselves.[47]

Yet clarity of purpose is important to give meaning to the exercise of meeting. Powell has explained in the context of training for investigative interviewers of children that '[a]n underlying philosophy or set of beliefs that is compatible with best-practice interview guidelines is also critical for long-term retention of information and for motivating participants to engage in effortful learning'.[48] Currently, the *Guidelines* do not necessarily encourage lawyers to turn their minds to the purpose of meeting with a child.

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44 N = 17. See also B Neale, 'Dialogues with Children: Children, Divorce and Citizenship' (2002) 9(4) *Childhood* 455.

45 National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at [4].

46 United Nations Convention on the Rights of the Child, opened for signature 30 November 1989, 1577 UNTS 3 (entry into force 2 September 1990).

47 Three referred to 'hearing children's voices'.

48 M B Powell, 'Designing Effective Training Programs for Investigative Interviewers of Children' (2008) 20(2) *Current Issues in Criminal Justice* 189, at p 190.

Nevertheless, an ICL is unlikely to meet a child with only a single aim or purpose in mind, as there are a number of possible reasons to meet with children.[49] It may be to ascertain the child's views, to observe a child's behaviour, to provide the child with information, to show respect, to put a face to a name, to placate the parties or to please the judge. Certainly most interviewees thought that they should meet children in order to explain certain information or simply so that the child knew of their existence.[50] Lawyers also referred to what they could learn from meeting children: this ranged from vague descriptions of 'getting a sense of' a child, to offering children the opportunity to express views, and seeking information to pass on to the court.

Eight lawyers described themselves as selective about meeting children (particularly young children), or generally reluctant, though as noted, some of these nevertheless did meet with children as this was expected of them. Some had been directed by judges to meet with children whom they would ordinarily have considered to be too young to meet.[51] Others did not wait to be directed. One explained that she was not keen to meet children but knew that judges would expect the ICL to have done so:

> 'I prefer not to, but – it's my personal view, that I don't like doing it – but I feel compelled to because I'm always worried about turning up to a trial and the judge saying "Have you met these children?" and that worries me if I have to say "No I haven't".'

All interviewees made reference to at least some of the purposes described above, but varied in how important they thought they were and how they applied to children of different ages. The primary reasons that interviewees gave for meeting with children are discussed below.

Providing information to the child

The *Guidelines* state that the ICL's role (and its limitations), court process and 'other agencies that may be involved and the reasons for their involvement' should all be explained to children.[52] This might include explaining procedure or specific issues in the dispute and answering questions. Explaining the ICL role may be complicated as the ICL is responsible for conveying the child's views but also making submissions about best interests.[53] Unlike a representative who acts on 'direct instructions', the ICL may need to explain the possible disjuncture between providing information to the court, passing on the child's views, and telling the court what the lawyer thinks is best for the child. The ICL should also advise children that they do not have to express a view at all.[54]

Interviewees' attitudes to providing children with information were based on how well they thought children would comprehend the information and whether they thought this could be in any way harmful. If lawyers thought that children were too young to understand, they might not attempt to explain. However, most lawyers gave descriptions of explaining their role to children,[55] and the majority seemed to imply that this should be explained, though only four referred to an obligation to do so. Descriptions followed a broadly similar format, in which the lawyer made reference to the child's parents not getting along; the court being asked to make a

49 A M Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (American Bar Association, 1993), at pp 66–67. Of course, lawyers may also have no particular purpose in mind when meeting with children.

50 See R Kaspiew et al, *Independent Children's Lawyers Study* (Australian Institute of Family Studies, May 2013), at p 156.

51 N = 5. Ibid, at p 60; Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (August 2004), at para 1.53.

52 National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at [5.1].

53 N J Taylor, M M Gollop and A B Smith, 'Children and Young People's Perspectives on Their Legal Representation' in A B Smith, N J Taylor and M M Gollop (eds), *Children's Voices: Research, Policy and Practice* (Longman, 2000).

54 FLA, s 60CE (children cannot be required to express a view); National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at [4] (the child should be involved to the extent he or she desires to be).

55 N = 35, noting 23 were asked this specifically.

decision; the judicial officer needing to know about the child, in order to make the best decision; and the fact that the lawyer could pass on the child's views to the judicial officer, if the child chose this:

> '[I explain that the] problem is, that the judge hasn't met them, their Mum and Dad know them and love them better than anyone else but the judge is a stranger making a very important decision. And that as, because of that, the judge has asked me, who is another lawyer, to help the judge make a decision that's best for them, and also to get information to the judge so that the judge understands them and has a picture of who they are before making that decision. So then I explain that not only do I want to meet them and find out what they have to say about this but that also I've got to find out things about them, I might talk to their school teachers or their doctors or their counsellors …'

Over one-third of interviewees mentioned the need to explain the difference between acting on instructions and acting in a child's best interests.[56] To do so with younger children, four lawyers mentioned using analogies that they thought children could relate to, such as having to go to bed at a certain time even if you want to stay up, or wanting to eat chocolate for dinner but knowing that was not good for you. While a few lawyers mentioned they found it challenging to explain their role as ICL to young children,[57] it could be difficult too with older children when the lawyer had to explain why he or she did not think that what the young person wanted was in his or her best interests.[58] Older children could be frustrated by the best interests role, especially if the lawyer had different views about what was best.

Perhaps the most important aspect of meetings between lawyers and children is to provide an opportunity for children to ask questions about things that are concerning them. As other research has found, children are often left in the dark about the family dispute which can reduce their capacity to cope with associated change.[59]

Though many lawyers thought that children seldom asked them many questions,[60] those asked could be particularly pertinent:

> What sort of things do children ask you?
>
> 'Oh look it runs the whole, the whole thing. So, sometimes they ask things like "What's going to happen if Dad wins this case?" or "What's going to happen if Mum wins this case?" Um, sometimes they – often they don't ask any questions at all . . . Yeah sometimes they'll ask about particular things. I had one, some kids recently, one of them was worried about whether there was an intervention order[61] that stopped them seeing one of their parents. So they wanted me to find that out because they were finding it difficult to actually know. One of them asked me for example what "substantial attendance" means, because, you know – one of the parents had told them that it means this and another had told them it means that, and they'd really like to know. So that was definitely about [court] orders . . . I've had a really complex matter . . . and I'd gotten there late because I'd followed the map wrong and the only question that kid had was "How did you get lost?".'

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56 N = 15.
57 N = 7.
58 Thirteen lawyers referred to this.
59 R M Fitzgerald, *Children Having a Say: A Study on Children's Participation in Family Law Decision Making* (PhD Thesis, Southern Cross University, 2009), at pp 202–206; C Smart, 'Towards an Understanding of Family Change: Gender Conflict and Children's Citizenship' (2003) 17 AJFL 1, 15.
60 N = 14/21 who discussed this.
61 A civil protective order that may include children as protected persons. Breach is a criminal offence: see, for example, Personal Safety Intervention Orders Act 2010 (Vic).

As this ICL described, how much children wish to know does not correspond to the apparent complexity, difficulty or even seriousness of a matter from the ICL's point of view. Thus, it is fallacious to assume that the lawyer can judge this based on 'the nature of the case' alone. These examples also indicate how important it is for some children to have a third party to ask questions of, as whether an intervention order is in place, or what 'substantial attendance' means, are questions to which a child would likely struggle to find an accurate answer. Six female interviewees thought that children often seemed relieved when they were given information about the litigation process; for example, learning they did not have to attend court or meet the judge.[62] These narratives thus illustrate the clear benefits for children of receiving accurate information.

Collecting information

One of the least clear aspects of the ICL's role in representing children's interests is whether the ICL should seek information from children and if so, how this ought to be done and how the information should be used. The *Guidelines* provide that ICLs 'should seek to provide the child with the opportunity to express his or her views in circumstances that are free from the influence of others'.[63] If children do express views to the ICL, the lawyer has some leeway to convey them to the court, but this is not, strictly speaking, evidence. A lawyer cannot 'give evidence from the bar table'[64] and parties' evidence must generally be in affidavit form supported by the giving of oral evidence.[65] Hence, the reliance on experts to put forward children's views and give evidence about how children are feeling.

It is relatively typical in family law disputes for a report to be prepared to evaluate or assess family relationships and children's views, though Kaspiew et al found that in about one-fifth of cases in which an ICL was appointed there was no report.[66] Two types of expert appear regularly in parenting proceedings: family consultants and independent experts.[67] Family consultants are usually based within the courts.[68] They are psychologists or social workers specialising in post-separation family issues, who may undertake child and family assessments and, if directed by the court, prepare 'Family Reports'.[69] If a case raises issues that are beyond the expertise of a family consultant, an independent expert, such as a psychiatrist or other specialist, may be engaged to prepare a report in addition to, or instead of, a Family Report.[70] While family consultants are allocated to a matter, independent experts are usually agreed upon by the parties and the ICL and appointed by consent. The use of a single expert is now common, thus avoiding the use of 'competing' experts except in complex cases.[71]

62 Note however the comments of children in other research that they would have liked to meet the judge: G Douglas et al, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991, Final Report to the Department for Constitutional Affairs* (2006), at pp 52 [3.7], 59 [3.15], 70–71 [3.28].

63 National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at para [5.3].

64 See, for example, Australian Bar Association, Barristers Conduct Rules (1 February 2010), r 63; Australian Solicitors' Conduct Rules (June 2011), r 17.3; Demetriou (1976) FLC ¶90–102, 75,468–469.

65 See, for example, Federal Circuit Court Rules 2001 (Cth) div 4.1.

66 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at p 36 (Box 2).

67 The generic term 'expert' is used to denote both unless otherwise specified.

68 Federal Circuit Court Rules 2001 (Cth), rr 15.09, 23.01A; Family Law Rules 2004 (Cth), pt 15.5; FLA s 11B. Private counsellors or psychologists may also be appointed to fill this role pursuant to the Family Law Regulations 1984 (Cth), reg 7.

69 FLA, ss 62G or 55A(2). See also s 11A; M Foster, 'The Powers and Responsibilities of the Family Consultant' (2011) 21(3) *Australian Family Lawyer* 16.

70 Family Law Rules 2004 (Cth), pt 15.5; Federal Circuit Court Rules 2001 (Cth), r 15.09.

71 See P Rose, 'The Expert Witness in Court' (2008) 20(2) *Australian Family Lawyer* 41. Once a report has been prepared by a single expert, a party may not adduce a further report on the same topic without leave of the court: Family Law Rules 2004 (Cth), rr 15.44, 15.45, 15.49, 15.51; Federal Circuit Court Rules 2001 (Cth), r 15.12.

Interactions between parties or children and family consultants are not therapeutic, or confidential, and are admissible.[72] An expert meets with a child in order to collect information: there is no confidentiality in such meetings, as the purpose is for the expert to report to the court. Some interviewees thus distinguished between their own meeting with a child, which might have a range of purposes; and what is often termed a 'forensic' interview conducted by an expert.

As noted above, in some states, ICLs either do not meet children, as this is viewed as the exclusive province of the expert, or meet children only in the expert's presence, without engaging in any substantial independent interaction with children. The perception that it is preferable for children to meet an expert instead of the ICL was iterated by five interviewees:

> '[A] lot of the time . . . children are seeing the expert that you've entrusted to get the information, and I sort of think well if you're entrusting the expert to do it, then why do you need to see the child as well?'

Assuming that both types of meeting fulfil essentially the same purpose reflects a narrow approach focused on obtaining 'useful' information from children. It also overlooks the fact that there may not be any expert involved in proceedings (particularly not at an interim stage, or early on), and that the ICL is obliged to 'test' the expert's views where a report is produced.[73] If there is no expert report available, for example at an interim hearing, it may be important that the ICL tell the court about the child's views:[74]

> '[I]f I'm told something by a child in an interview that I think is in the interests of the child to disclose to the court, such as the child says well "Dad's been bashing me and I don't want to see Dad", without cross-examining the child about the circumstances of all of that, you put that before the court, it's not in proper form, but it's the best you can do at that early stage of the proceedings. And clearly later on what you're talking about is either an expert's report or a Family Report. But, you're still obliged on an interim hearing to consider a child's views and wishes and perceptions …'

As this lawyer explained, meeting with a child can present clues to the ICL about where to turn to seek evidence (for example, by engaging an expert, or contacting child care centres, teachers or doctors), or suggest questions or guidance that the ICL might ask of the expert.

Most interviewees (n = 34) referred to ascertaining children's views, or to children expressing views. A majority of these (n = 20) spoke about giving children the opportunity to express their views, though not necessarily through asking direct questions:

> 'I don't sit down with a pen and paper and go "So . . .", you know and write down every word they say. I barely even have a piece of paper. I sit down and talk and I kind of pretend like I don't know anything about their life, so I'm asking them to tell me what's gone on, and I almost never ask, you know, "Do you want to live with Mum? Do you want to live with – ". You know the big questions that everyone wants you to ask, I actually rarely raise that issue in a first meeting with a child.'

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72 FLA, s 11C.

73 FLA, s 68LA(5)(c); R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at pp 87–88.

74 P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), at p 148; *Lyons and Boseley* (1978) FLC ¶90–423. The ICL should endeavour to put evidence in admissible form of the child's views before the court at an interim hearing: National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at [6.8].

The remainder referred to asking questions, or putting scenarios to children in a 'menu of options' approach:[75]

> '[I] try and present to them an idea I have for compromising the dispute between their parents and see how they'd participate in it. Like a child reluctant to go on contact visits or see a parent. Say "Look, will you just try it once, and then if I meet with you again afterwards you can tell me how you went. We'll make sure you're safe", and stuff. So I try to set up a – consult the child in a process …'

This latter group of lawyers were clear that they had an obligation to elicit information, particularly if they had a specific parenting arrangement in mind as a proposed settlement, or wanted to find out how children felt about the parties' proposals.

Some interviewees articulated a further element of collecting information that related to picking up clues simply from meeting and interacting with children. Some lawyers emphasised the value of just seeing children or getting to know them.[76] These ICLs referred to 'getting a sense of' a child, or viewing the child as a person. Even if they did not expect to obtain 'evidence' as such, they felt this assisted them in carrying out their role. But at times, it did serve a 'forensic' purpose when the ICL had to make judgments about the evidence:

> 'May not seem important at the time, whatever the child's told you, but in the course of the conduct of the case, and cross-examination of a witness, suddenly takes on a difference importance, what you've been told.'

This could be especially useful when the ICL needed to contrast his or her own impressions with those of an expert.

Demonstrating respect

A less clearly articulated reason for lawyers to meet children was to demonstrate respect for children and sometimes also for the child's parents or family members. However, there were divergent views among the interview cohort about whether briefly meeting or seeing a child was respectful or disrespectful. Some perceived it as courteous to see a child, but others thought that simply 'eyeballing' a child conferred no benefit on the child, and should therefore be avoided. Some children interviewed by Rae Kaspiew et al did report negatively on brief interactions with ICLs which took place in the presence of a report writer.[77] Superficial meetings may only engender confusion.[78]

Eleven lawyers suggested that meeting children was part of being respectful, regardless of whether the lawyer would be able to either provide or gather any information from the child.[79] For example, one said:

> 'A lot of the time if the children are anything under about 7, then usually I won't [meet]. I even have a little bit of a, um, scepticism about meeting with kids round 7, 8. Sometimes I will if I think that they would benefit from knowing that there is somebody there batting for them.'

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75 N = 14. See Family Justice Review Panel, *Family Justice Review: Final Report* (Ministry of Justice, Department for Education, and the Welsh Government, November 2011), at pp 6, 48.

76 N = 12.

77 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at p 166.

78 E Buss, ' "You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles' (1996) 64 Ford LR 1699; see also G Douglas et al, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991, Final Report to the Department for Constitutional Affairs* (2006), at pp 51 [3.6], 66 [3.24], 71 [3.29], 74 [3.33], 86 [3.53], 113 [3.84].

79 See also A Graham and R Fitzgerald, 'Progressing Children's Participation: Exploring the Potential of a Dialogical Turn' (2010) 17(3) *Childhood* 343, at p 346.

This ICL thought it could be important for children to know of her existence, and the fact that she was looking out for their interests, even if she did not think that a young child could really understand her role. Meeting younger children with their older siblings, as some lawyers did, was also connected to being respectful of the younger children and sending a message that they were treated the same and not excluded because of their age.

Some lawyers thought that they gained something valuable through seeing children.[80] One commented that she could not act for someone 'faceless', and thought that not meeting a child would be 'like not meeting your client when you're representing them'.

At the same time, a number of lawyers emphasised that they would only meet if they thought this would benefit the child, and some rejected the idea of 'just seeing' a child as self-indulgence on the lawyer's part, or worse, treating the child as a specimen:[81]

> '[Some] meet the child in the sense of, they shake their hand and say "Hi, I'm Betty." That's what they say is meeting a child. And then – "here's a Family Report writer, tell your story." Which I find offensive, because what if the child doesn't want to tell their story? Who tells the child about their right to confidentiality? Who tells them about that? I just find that appalling.'

This lawyer was one of only a handful of interviewees who referred to children's rights, and the only one who emphasised the importance of the child understanding the lack of confidentiality in the report writing process.

This raises the issue of the ethics of seeking to elicit children's views if the child does not understand how the information he or she divulges may be used. There are problems with assuming that providing children with a legal representative, or even enabling children to express 'views', appropriately facilitates children's participation if children are not informed about the purpose of expressing such views and what use will be made of them.[82] The *Guidelines* say that the ICL cannot 'guarantee a confidential relationship'[83] and that ICLs should 'ensure' that children understand this.[84] The drafting of this section suggests that the motivation is primarily a protective one: to ensure that children are not stung by their views being disclosed to parties and causing adverse effects for the child.[85] This is a valid concern: children in other studies have described negative consequences when lawyers reportedly conveyed their comments to parents or to the court.[86] Child participants in Bren Neale's research in England also identified the problem of telling information to professionals which then either did not make its way into reports, or was used selectively, so that children felt its original meaning had been changed.[87] Gillian Douglas et al concluded from interviews with 15 children:

> 'They particularly wanted the guardian to report accurately to the court what they had told them. They were upset if it appeared to them that the CAFCASS reporter and/or guardian

80 N = 12.
81 N = 14.
82 C Smart, B Neale and A Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity, 2001), at pp 161–165.
83 National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at para [5.1].
84 Ibid.
85 'The aim is to minimise the potential for any adverse reaction towards the child': ibid, at 3 [5.1].
86 M M Gollop, A B Smith and N J Taylor, 'Children's Involvement in Custody and Access Arrangements after Parental Separation' [2000] CFLQ 383, at pp 394–395; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), at p 155.
87 B Neale, 'Dialogues with Children: Children, Divorce and Citizenship' (2002) 9(4) *Childhood* 455, 465–467.

> had promised to respect confidences but then had breached this in the report to the court. Perhaps more than anything else this appeared to be the strongest criticism that children levelled at guardians.'[88]

Though ten ICLs said that they would explain the role of the family consultant to the child, or the significance of the report if that meeting had already occurred, no others mentioned this issue. Five were doubtful that young children could understand the concept of confidentiality at all, and therefore did not always try to explain it – yet all made reference to attempting to ascertain children's views.

There was a split in the interviewees' views about confidentiality: while most said that they attempted to explain confidentiality to children, their explanations were varied.[89] The majority of these considered the meeting to be confidential but subject to exceptions if there were indications that the child might not be safe – for example, if the child told the lawyer that a parent had hurt them.[90] On the other hand, six lawyers presumed that what transpires in the meeting is not confidential, and therefore emphasised this.

Interpreting information

It is sometimes suggested that child representatives should have an understanding of child psychology.[91] Handbooks for children's lawyers advise on approaches to talking with children: the importance of good preparation, building rapport, maintaining respect and having recourse to toys and drawing materials.[92] It is unlikely that children have previously met with a lawyer acting in a professional capacity and the prospect of a meeting may be intimidating.[93] Thus techniques to help children relax and engage are important skills for ICLs. Conferences, seminars and training sessions which bring together family and children's lawyers and social scientists are also likely to be useful for lawyers, particularly given that new ICLs may have little experience either of children in general or of meeting a child in a representation context.

Yet while it is recognised that lawyers can benefit from such practical skills, they are also warned against over-stepping the mark. Charlesworth et al have explained:

> 'While the [child] representative's task calls for sensitivity to children's needs and aspirations, *it does not involve assessing or putting an interpretation* on children's expressed views … *which is the task of a qualified counsellor*.'[94]

Concern about lawyers being over-eager to 'analyse' children was evident in comments that non-legal professionals made to Kaspiew et al, indicating they preferred ICLs to adopt the 'meet and greet' approach described above.[95] Some interviewees did feel that they lacked the skills to meet with young children, due to their inability to 'read' the child:

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88 G Douglas et al, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991, Final Report to the Department for Constitutional Affairs* (DCA, 2006), at pp 113 [3.84]. See also at 69 [3.27] ('Elizabeth'), 108–9 [3.76] ('Olivia'); and A Buchanan et al, *Families in Conflict: Perspectives of Children and Parents on the Family Court Welfare Service* (Policy, 2001), at p 66.

89 N = 27, noting that 19 were asked specifically about confidentiality.

90 Of 15 lawyers who said this, 14 were from NSW (7 interviewees did not elaborate sufficiently to be categorised).

91 'Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham' (2006) 6 Nev LJ 592, at p 596; W J Keough, *Child Representation in Family Law* (Law Book, 2000), at pp 87–88; R B Burkholder and J M Baker, 'Child Development and Child Custody' in A M Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (American Bar Association, 1993), at pp 145–146.

92 W J Keough, *Child Representation in Family Law* (Law Book, 2000), ch 7; P King and I Young, *The Child as Client: A Handbook for Solicitors who Represent Children* (Family Law, 1992); A M Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (American Bar Association, 1993).

93 See N Hall, 'Eliciting Children's Views: The Contribution of Psychologists' in R Davie, G Upton and V Varma (eds), *The Voice of the Child: A Handbook for Professionals* (Falmer, 1996).

94 S Charlesworth, J N Turner and L Foreman, *Disrupted Families: The Law* (Federation, 2000), at p 56 (emphasis added).

95 R Kaspiew et al, *Independent Children's Lawyers Study* (AIFS, May 2013), at p 90.

> 'I get the impression that a lot of [children] know exactly why they're here. And that's why I don't think – I'm not trained to interpret what they say. And to look at the way that their body language is. That's why I feel very inept at it and I don't like doing it.'

The interviewees who discussed this issue (n = 16) expressed contradictory ideas about collecting information from their interactions with children without crossing the line into 'assessing' or 'interpreting' a child's behaviour. The following description was typical:

> 'Why I'm cautious with views is because I'm not a social scientist, I'm not a psychologist or a psychiatrist. And, um, although you know, I've got, you know, a finely tuned interpersonal radar that doesn't mean I'm skilled enough to be able to interpret everything that's going on. And I think a psychologist . . . or a social worker or a psychiatrist who's seen Mum, Dad, who's seen an interaction, got a view of the story and taken that, then they're going to be in a much better position to get a more accurate view, because not every young person or child is just going to say "yes well I want this that and the next thing".'

This ICL emphasised his lack of training to decode other people's behaviour, notwithstanding his 'finely tuned interpersonal radar' (indeed, he had a psychology degree and some 25 years' experience in family law practice). He accordingly differentiates between his own ordinary understanding of a child's behaviour and the specialised knowledge of an expert. Moreover, he acknowledges the broad nature of what an expert can interpret, indicating his awareness of the necessity to look beyond what is vocalised, as a young person may not necessarily express things straightforwardly. He emphasises his curtailed exposure compared with the expert, who will not only see children but interview the parties and observe parents and children together. Thus, he presents his experience as limited in both time and depth by comparison. However, he still had a preference to meet all children, even babies – yet was careful not to take these meetings on face value.

In contrast, another experienced lawyer thought it was only worthwhile to see children who were slightly older. He explained the problem of what he could do with a child's views as expressed to him:

> 'And even if . . . a child's sitting there and tells me something, that's not evidence. I can't put that before the court.[96] So the only way I could put that before the court would be to subsequently ask for an order that there be some sort of report done, whether it be a single expert psychiatrist or they go to the counselling service . . . And somebody with that expertise can get that information out of them and put it into a report which is going to be admitted into evidence.'

This description of the process is a legalistic one – the expert is the person who extracts information from the child and renders it into a form digestible by the court. The apparent authenticity or directness of the child's communication is irrelevant: even if the child is 'sitting there and tells me', the result is not evidence and is therefore discounted. For this ICL, his inability to 'interpret' was a reason not to meet young children at all.

A third lawyer struggled to explain how she was not 'interpreting' children's behaviour in meetings:

> 'And I mean I've met little babies as well but because I think when you're representing a kid it does help to actually have a visual of them. But that's just me, and sometimes it's important to see the behaviour and the way that they are. Not that I'm a psychologist or I'm not interpreting that behaviour, I think it is, sometimes does assist us in our

96 Note that what a child says in this context is admissible: FLA, s 69ZV, though this would require the ICL to withdraw from representing the child and become a witness in the case.

> representation to understand where that kid is at. Not that we're analysing it because someone else does that, the family consultant does that . . . You do have to have a very distinct line *taps the table* we're a lawyer, you know that's our job to make sure that all of the evidence is in there and everything …'

This ICL wanted to meet with children for a variety of reasons; she emphasised the individuality of each child and the importance of children's participation. She was also keen to, as she put it, 'see the behaviour and the way that they are' and could not help noticing a child's behaviour. Yet each time she made a comment to this effect she pulled back, correcting herself and reiterating that it was the ICL's role only to marshal the evidence.

Despite the efforts of some ICLs to draw a 'distinct line' between the interpretation of an 'expert' and the information-gathering of an ICL, it was apparent that practice was less clear cut. Even interviewees who explained they were 'not a psychologist' or had no special skill, also gave examples of interpreting a child's behaviour.[97] For example, it was quite common for interviewees to mention that they could tell when children were being pressured or manipulated by parents, which usually involved analysis of a child's language and demeanour.[98]

Our perceptions of others are a central part of human existence: 'everyday life revolves around persons interpreting and making judgments about their own and others' behaviours and experiences'.[99] This is likely to be especially so in lawyer–client interactions. A certain amount of interpretation is likely unavoidable, and need not be a negative aspect of meeting. Further, the ICL is obliged to question and test the report of a family consultant or expert, and a child's presentation or views may assist in doing this.

Practical aspects of meeting

Of significance for the research were the ways that interviewees' views about the purpose of meeting influenced their approach to the pragmatic aspects of the meeting: how meetings were arranged, their location, if or how the lawyer sought to build rapport, and how frequently lawyers thought it was desirable to meet. These practical aspects reflected lawyers' understandings of the purpose of their role, and in turn their perceptions of the children for whom they were appointed.

The concept of 'scaffolding' is sometimes used to describe 'what lawyers can *do* to facilitate children's participation'.[100] Attributed to educational psychology and Lev Vygotsky's 'zones of proximal development',[101] it refers to the fact that children can achieve more with structured assistance from an adult than they can alone. Thus '[t]he adult provides the child with a supporting framework that allows the child to proceed where it would be difficult alone'.[102] As Smith argues, 'in order to be able to formulate and express a view, children should receive

97 N = 11.

98 23 interviewees said this. Yet this is a complex task: C Smart and B Neale, *Family Fragments* (Polity, 1999), at pp 95–97.

99 N K Denzin, *Interpretive Interactionism* (Sage, 1989), at p 11.

100 B Horsfall, 'Breathing Life into Children's Participation: Empirical Observations of Lawyer–Child Relations in Child Protection Proceedings' (2013) (3) NZ L Rev 429, p 433 (emphasis in original). See also J Cherry, 'The Child as Apprentice: Enhancing the Child's Ability to Participate in Custody Decision-making by Providing Scaffolded Instruction' (1999) 72(2&3) S Cal L Rev 811, at p 813.

101 L S Vygotsky, *Mind in Society: The Development of Higher Psychological Processes* (Harvard University Press, 1978), at p 90; D Wood, J S Bruner and G Ross, 'The Role of Tutoring in Problem Solving' (1976) 17(2) *Journal of Child Psychology and Psychiatry* 89, cited by A B Smith, 'Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory' (2002) 10 *International Journal of Children's Rights* 73, 78.

102 J Lawrence, 'The Developing Child and the Law' in G Monahan and L Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008), at p 83, [4.8], citing N Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20 AJFL 154.

appropriate support'.[103] In relation specifically to children's lawyers, Smith explains that in the context of family disputes, 'sensitive lawyers' can facilitate children's participation, and children were able to make decisions 'after active discussion and consideration of the alternatives with their counsel'.[104]

Some lawyers in the current study described practices which did seem to conform to this approach. For example, some tried to present children with a range of options and explore their views on each. Four female ICLs gave lengthy descriptions of their meetings with children which included the lawyer explaining that children had a choice about whether or not to talk to the lawyer, sensitive means of ascertaining how a child was feeling, and checking with children what could and could not be shared.[105] Three of these lawyers had been ICLs for over ten years; the fourth lawyer had been an ICL for four years but was experienced in talking with children, having previously been a school teacher.

There was a clear link between lawyers' feelings about meeting with children, such as whether they enjoyed this part of their role, or not, their understandings of the purpose of meeting; and the practices they described when meeting. For example, those who emphasised the importance and value of meetings tended to give far more detailed descriptions of their meetings than those who harboured uncertainty about whether meeting was really worthwhile.

Location and activities

Most interviewees reported typically seeing children at their workplace, either in their personal office, or a meeting room.[106] The layout and décor of lawyers' offices varied considerably.[107] Some had armchairs or couches, toy boxes, photos and children's drawings; others were more formal, with large, imposing desks and shelves of files.

Three ICLs routinely met with children at school; another three indicated a preference to do this, but felt restricted by funding constraints, as travelling to schools could be time-consuming.[108] Ten had met children at school in particular circumstances but it did not represent their usual practice. Three thought it was generally inappropriate to attend a child's school as this created embarrassment for the child, and school should be a child's 'safe haven', separate from family problems. A further three described themselves as without a fixed practice but meeting children in a range of different locations.

Sometimes it is not practically feasible for ICLs to see children face-to-face.[109] In country areas, children might live several hours away. Some lawyers had strategies to minimise travel time for children by themselves travelling, or fitting in with children's existing appointments – for example, meeting children the same day as family report interviews were taking place. Some lawyers working in or travelling to regional areas reported greater flexibility as to where their

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103 A B Smith, 'Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory' (2002) 10 *International Journal of Children's Rights* 73, at p 75.

104 Ibid, at p 80.

105 Parkinson and Cashmore noted that lawyers in their study also reported 'checking back': *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), at p 138.

106 N = 29. See N J Taylor, M M Gollop and A B Smith, 'Children and Young People's Perspectives on Their Legal Representation' in A B Smith, N J Taylor and M M Gollop (eds), *Children's Voices: Research, Policy and Practice* (Longman, 2000), at p 116; P Hemphill and J Beall, *Report on Independent Children's Lawyers' Survey* (Family Law Courts, 18 September 2012), at p 9; A M Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (American Bar Association, 1993), at p 68; cf E Buss, ' "You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles' (1996) 64 Ford LR 1699, at p 1707, n 22.

107 Most research interviews (n = 37) took place at the lawyer's office.

108 Cf P Hemphill and J Beall, *Report on Independent Children's Lawyers' Survey* (Family Law Courts, 18 September 2012), at p 9 (reporting that a 'significant number' of ICLs Australia-wide met children at school).

109 See National Legal Aid, *Guidelines for Independent Children's Lawyers* (6 December 2007), at [6.2].

meetings with children occurred, using rooms at the court, community centres or parks.[110] Those in urban areas also commented that it was sometimes necessary to adjust to extenuating circumstances in particular cases by meeting in a different location.

About half the lawyers described ways that they tried to make children feel comfortable during meetings.[111] Some mentioned sitting on the floor or repositioning chairs to avoid being face-to-face,[112] and having things for children to do, typically providing materials for drawing or colouring-in.[113] This was purely to occupy children; some thought that drawing relieved the intensity of the meeting for the child:

> 'This is my technique, the colouring books and the pencils and – the kids, the primary school kids they still tend to like colouring-in – I find once they start doing this, they're sort of pretending they're doing this, but they're listening to you and then they're starting to talk to you and then it just flows much more comfortably.'

The interviewees who described their efforts to engage children included all but one of those who met children under five, and half of those who met with children of school age, but only one lawyer who specified an older age.

Ten lawyers chose not to provide activities for children. This was for varying reasons: two wanted to 'engage' children but preferred to make use of their existing office space – thus one let children try on his wig, but considered toys 'artificial'. Others thought that it was unnecessary, as meetings were short, or they only met older children. Some thought it was important to retain an element of formality:

> 'I tend to keep [my meetings] reasonably, I was going to say – formal. I've spoken to a few people about it, and I'm a lawyer. And that is actually what I'm doing when I'm representing them, so . . . So no I don't, I don't have games or drawings.'

Four interviewees thought that if children were more interested in 'playing', the purpose of the meeting would be lost on them anyway, indicating they viewed the 'play' and 'business' aspects of meeting as clearly demarcated.

The number of meetings

Again reflecting local norms of practice, interviewee reports of how many times they typically met with children varied by state. Those in New South Wales were most likely to describe their usual practice as involving multiple meetings, including a final meeting to explain the outcome.[114] Victorian and Tasmanian ICLs tended to describe one meeting as the norm and any more as exceptional.[115]

Multiple meetings are likely to be necessary, especially if there are significant changes in the child's life over the course of the proceedings (such as to living arrangements, schools, children's activities, family relationships). If a matter is proceeding to a final hearing, it will usually be important that children know what is going on and have had a chance to express their views based on current circumstances, which will likely require a further meeting. Thus, most interviewees saw themselves as obliged to meet children multiple times in complex cases, as there were changes which might need children's feedback or in order to keep children informed of what was going on.

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110 N = 7.
111 N = 22. Others (n = 7) did not discuss the environment in which they met children at all.
112 N = 12.
113 N = 14.
114 N = 22/25.
115 2/5 Tasmanian lawyers and 0/10 Victorian lawyers referred to multiple meetings as routine.

Some ICLs (n = 12) implied that meeting more than once was a necessary evil, their starting point being that meetings should be kept to a minimum. In contrast, others (n = 16) had no particular aversion to multiple meetings: some saw the development of a relationship as positive. One ICL who enjoyed meeting children and did so readily, for example, described meeting as laying the foundation for an ongoing relationship:

> 'If they need to ask questions along the way, often it is just that they've met you, they've built up at least a very small amount of rapport, to be able to, if they have a really burning question later on down the track they don't feel they can ask Mum or Dad 'cos they might get a bit of flack, I feel that they are more likely to pick up the phone and ring me and say "What about this" or tell me "I don't like this" or "I want this to happen" or whatever. And then I can take it from there what I need to do.'

Another ICL had facilitated three siblings (aged approximately 6, 8 and 10) meeting the judge and seeing the courtroom where their parents' matter would be heard. He thought that the children had appeared interested and unfazed by this experience, but continued:

> 'But whether that was ultimately good for them, I don't know. They were clearly involved in the process. The fact is they are. They are moving between two people that are trying to sort out their life.'

These lawyers clearly identified the dispute as the source of problems and anxiety for children, and distinguished this from their own interactions with the child. Rather than damaging or harming the child, the lawyer could in fact be a source of support: one ICL saw herself as a resource which children could draw on if and when they needed to, while the other recognised that it was essentially too late to keep the children completely removed from the legal proceedings and chose instead to provide them with information about the process. Though he could not be sure whether this would ultimately have a positive impact, nor did he assume it would be negative.

Lawyers' perceptions of children

If lawyers thought that children were not able to understand their role, they were less likely to meet in the first place, but also less likely to carry out the meeting in a way which might assist children's understanding, such as by making children feel comfortable. This may result in a self-fulfilling prophecy: if the ICL meets children only because he or she feels compelled to, but cannot see the purpose in doing so, the lawyer is unlikely to feel that he or she gains anything from meeting. Those lawyers who saw the purpose of meeting as being primarily in order to elicit a child's views, were concerned that they were not equipped to do this as they lacked the necessary skills. A small number seemed to assume that if they felt uncomfortable, children must also, and hence it was preferable not to meet. Thus lawyers may be making the decision about whether or not to meet a child based on factors other than what is best for the child. This may be exacerbated when it is difficult or impossible for the lawyer to know what is best for the child, or what the child wants, in the absence of meeting.

By taking a narrow view of the purpose of the meeting centred on collecting information, some ICLs thought it better to leave this to an expert. Those with a more holistic approach understood meeting with a child to be about, not collecting evidence, but gathering information which constitutes another piece of the puzzle or forms a counterpoint to other evidence in the case, including any expert report.

Although it is preferable that lawyers are comfortable with the methods they use when talking with children,[116] best practice is not about an individual lawyer's preference. Mantle et al have articulated the idea of seeing children as individuals as a key aspect of facilitating children's participation in family proceedings.[117] They connect the idea of a child's individuality to a move away from stereotypical understandings of children or fixed ideas about children's ability. Interviewees here recalled times when their preconceptions about children based on age, for example, proved incorrect. Meeting children may reinforce the lawyer's understanding or sense of the uniqueness of each child and encourage a diminution in the importance attached to age and other factors. That is, the more children a lawyer meets, the greater his or her understanding of the uniqueness, different needs and views of each child. Routinely meeting with children also allows lawyers to develop a better idea of what works and what does not.

Conclusion

Interviewee reports suggest that despite a general acceptance of the need for lawyers to meet with children within the three states studied, individualised practices around the actual meeting are prevalent. In itself, this is not necessarily a negative: the absence of formal constraints (such as presumptions based on age) allows ICLs the discretion to treat each child as a unique individual and understand and interact with that child as such. Yet individualised practice may become problematic if this results in ICLs having their own personally preferred practice as regards meeting, rather than tailoring their practice to suit the circumstances of individual children. The result can be a high tolerance for a range of practices not necessarily conforming to evidence-based 'best practice'.

A lack of clarity about the purpose of meeting children contributes to this inconsistency in practices around meeting children.[118] Although the *Guidelines* prescribe certain action, they do not explain why it is deemed preferable. Thus in critical respects, key internal conflicts, such as the ICL's role in collecting information from children, confidentiality, and the role of any 'expert', remain unresolved. This is not assisted by differences in the practices publicly endorsed by different Legal Aid Commissions. Yet the disparate practices of ICLs in relation to interacting with children, stem in part from a lack of cohesive understanding about the purpose of interactions and hence about the role itself.

It is clear that meeting with a lawyer can provide many benefits for children, related to being provided with information about the process – including the ICL's evidence-gathering activities, and the role of the report writer – having an opportunity to express views, and having a person involved in proceedings who always has their welfare in mind. Yet for all children to get the most benefit from having an ICL appointed to represent their interests, greater clarity, consistency and openness on the part of lawyers about what can be achieved through meeting is required. The findings suggest that lawyers' practices will only change if their views about the purpose of those practices (and about children) also change.

116 J Cashmore, 'Problems and Solutions in Lawyer–Child Communication' (1991) 15 Crim LJ 193, at p 193.

117 G Mantle et al, 'Beyond Assessment: Social Work Intervention in Family Court Enquiries' (2008) 38(3) *British Journal of Social Work* 431, at p 506.

118 See R F Kelly and S H Ramsey, 'Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children' (1988) 40(4) Rut LR 1217, at pp 1218–1219.