

independent
children's
lawyers



GUIDELINES FOR INDEPENDENT CHILDREN'S LAWYERS

Updated 2024

These Guidelines have been issued to provide guidance to the Independent Children's Lawyer (ICL) on fulfilling their unique role and responsibilities, as the independent lawyer appointed to represent and promote the best interests of a child in family law proceedings.

This is a public document which is endorsed by the Chief Justice (Division 1) and Chief Judge (Division 2) of the Federal Circuit and Family Court of Australia and the Chief Judge of the Family Court of Western Australia. It is made available by the Legal Aid Commissions of the Australian states and territories which fund the work of ICLs. The Guidelines will be used in the training of ICLs.

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1. THE PURPOSE OF THESE GUIDELINES

1.1 These Guidelines have been issued to provide guidance to the Independent Children’s Lawyer (ICL) on fulfilling their unique role and responsibilities, as the independent lawyer appointed to represent and promote the best interests of a child in family law proceedings. They also set out the family law courts’ general expectations of ICLs. These Guidelines may be useful for anyone involved in family law proceedings involving children.

1.2 In particular, the Guidelines set out expectations for representation of children:

- at risk of harm, including from family violence
- who are Aboriginal or Torres Strait Islander children
- from culturally and linguistically diverse families and communities
- living with disabilities and health needs
- where there are applications for the authorisation of special medical procedures and other welfare orders.

1.3 ICLs are involved in the most difficult family law cases and are appointed by an order of the Federal Circuit and Family Court of Australia or the Family Court of Western Australia. When the court makes an order for an ICL, it also requests the Legal Aid Commission in the respective state or territory to make an appointment of an ICL to the case. Legal Aid Commissions have in-house ICLs and also operate panels/lists of private practitioners who undertake this work. Whilst funding may be limited, it is expected that ICLs will comply with these Guidelines and discharge their duty to the child and the court, during the period of their appointment.

1.4 **All lawyers are subject to professional obligations, and the role of the ICL is unique.**

1.5 *A glossary of terms used in these Guidelines is provided at the end of this document. The Guidelines refer to a ‘child’, but this includes all children included in the appointment.*

2. BEST INTERESTS AND RIGHTS OF THE CHILD

Giving effect to the UN Convention on the Rights of the Child

2.1 Australia promotes and gives legal effect to the *United Nations Convention on the Rights of the Child* by providing for the appointment of ICLs in certain family law cases. The convention is referenced in the Objects of Part 7 of the *Family Law Act 1975* (Cth), which confirms that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Article 3.1)

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (Article 12.1)

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body consistent with the procedural rules of national law. (Article 12.2)

How the ICL promotes a child's best interests

2.2 The primary role of the ICL is to act independently to ensure the court has before it all the information and evidence needed to make a decision in the child's best interests, including the child's views where possible.

3. KEY EXPECTATIONS OF THE ICL

3.1 When performing their role, the ICL is to:

- (a) form an independent view, based on evidence (not personal view or opinion), about what is in the best interests of the child
- (b) meet with the child and provide the child with an opportunity to express any views (not necessarily at the same time), unless the child is under 5 years old, or the child doesn't want to meet with the ICL or express a view, or there are exceptional circumstances (see ['Meeting with the child and providing the child with an opportunity to express any views'](#))
- (c) ensure the court is fully informed of the child's views, in an admissible form (a way the court can accept as evidence) where possible. This is not the same as acting on instructions
- (d) act impartially, and remain truly independent of the court and the parties to the proceedings
- (e) work together with any Family Consultant (see ['Glossary'](#)), Single Expert (see ['Glossary'](#)) or other relevant expert involved in the case to promote the best interests of the child
- (f) help achieve a timely resolution that is in the child's best interests, whether through negotiation (as honest broker, see ['Glossary'](#)) or by judicial determination
- (g) case manage, using their best endeavours to ensure that all relevant evidence is before the court, and consider whether appropriate supports should be put in place for the child and family, such as counselling
- (h) bring to the attention of the court any facts or evidence which, when considered in context, significantly call into question whether they believe a proposed settlement to be in the child's best interests
- (i) promote the timely resolution of the proceedings that is consistent with the best interests of the child
- (j) if satisfied whether a particular proposal or suggestion is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action
- (k) seek peer and professional support and advice where the case raises issues that are beyond his or her expertise (this may involve making applications to the court for directions in relation to the future conduct of the matter)
- (l) be familiar with the case management pathway and relevant practice directions
- (m) report and account to the Legal Aid Commission in a timely manner and be aware and comply with relevant legal aid guidelines and policies, including seeking costs if requested to do so by the Legal Aid Commission having regard to the relevant costs provisions in the Act.

3.2 The ICL may make submissions based on the evidence that are not consistent with the child's (or any parental) wishes. See ['Making submissions contrary to the child's view'](#) below.

3.3 The ICL is expected to use their professional judgment and skill, subject to any directions or orders of the court.

4. RELATIONSHIP BETWEEN THE CHILD AND THE ICL

Professional relationship

- 4.1 The child has a right to a professional relationship with the ICL, who acts as an impartial, best interests advocate.
- 4.2 Where possible, the ICL should strive to establish a relationship of trust and respect, including by communicating and meeting with the child about how the child can have a say and make their views known, during the ICL's involvement, and how the child can contact the ICL.
- 4.3 During the relationship, the ICL should be alert and sensitive to the risk of a child becoming dependent upon them and be willing to seek peer or professional advice if this occurs.
- 4.4 The ICL should explain to the child that their relationship is limited to the duration of the court proceedings.

Nature of involvement

- 4.5 The ICL must consider the extent of involvement a child has in their case.
- 4.6 The ICL must consider the child's age, developmental level, cognitive abilities, psychological state, and views, including any view the child has about their participation including cultural considerations and geographical location. These factors may change over the course of the ICL's appointment.
- 4.7 Where a child of sufficient maturity indicates that they would like to have a direct representative who will act on their instructions, the ICL should give information to the child about their right to apply to become a party to the proceedings, and other options.
- 4.8 The ICL must:
 - (a) provide evidence of matters relevant to the child's best interests and in particular the relationship of the child and the parties
 - (b) meet with the child and provide the child with an opportunity to express any views (not necessarily at the same time), unless the child is under 5 years old, or the child doesn't want to meet with the ICL or express a view, or there are exceptional circumstances (see [Meeting with the child and providing the child with an opportunity to express any views](#)), and
 - (c) act in accordance with the Family Violence Best Practice Principles issued by the Federal Circuit and Family Court of Australia, any family violence best practice principles issued by the Family Court of Western Australia, and other relevant best practice guidelines and applicable protocols for dealing with matters involving family violence. No process should be pursued which departs from these guidelines.

Opportunity for child to express their views

- 4.9 The ICL should seek to provide the child with the opportunity to freely express their views, without influence or pressure from others.
- 4.10 If a child is unwilling to express a view, the ICL must respect this. The ICL must reassure the child that they do not have to express a view, even if another member of their sibling group does wish to do so.
- 4.11 The ICL should ensure that there are opportunities for the child to:
 - (a) be advised about significant developments in their matter if the child so wishes, and
 - (b) express any further view or refine or change any views they have previously expressed.
- 4.12 The ICL is expected to be familiar with case law on the issue of the weight to be given to a child's view, which depends on several factors.

4.13 See [‘Meeting with the child and providing the child with an opportunity to express any views’](#)

Limits of the ICL role

4.14 The ICL has a professional relationship with the child, which is not a therapeutic relationship.

4.15 There are circumstances where the ICL cannot guarantee the child a confidential relationship, for example where it is identified that there is an immediate risk of harm to the child or another person.

4.16 In addition to explaining the limits of confidentiality when the ICL first meets the child, it may be necessary to remind the child of this throughout the engagement.

4.17 The ICL should also explain that while they must give the child an opportunity to express a view, and that they must ensure the court is aware of this view, they may recommend something that is different to what the child seeks. If this is anticipated, where appropriate they must advise the child of this beforehand, or otherwise soon afterwards.

4.18 It is not the role of the ICL to:

- (a) conduct disclosure interviews (see [‘Glossary’](#))
- (b) become a witness, or
- (c) conduct therapy or counselling with the child.

Family Reports and other expert involvement

4.19 The ICL should, where possible, explain to the child what the expert’s role is and that all parties and the court will see the expert’s report.

4.20 If the ICL anticipates that they need to share information provided by the child, and there is a Family Consultant, Single Expert or other expert involved in the case, they may liaise with that expert to decide how this is communicated to the child, to minimise risk to the child.

Resources

[Court Child Experts - FAQ | Federal Circuit and Family Court of Australia \(fcfcoa.gov.au\)](#)

[Family Consultant FAQs | Federal Circuit and Family Court of Australia \(fcfcoa.gov.au\)](#)

[Expert witnesses in family law | Federal Circuit and Family Court of Australia \(fcfcoa.gov.au\)](#)

5. SKILL IN REPRESENTING VULNERABLE CHILDREN

- 5.1 It is expected that an ICL will have expertise in and a thorough understanding of family law, child development and the particular vulnerabilities a child has where their parents or other carers are in dispute about the arrangements for their care and wellbeing. Many children whom ICLs are appointed to represent have additional vulnerability, due to their exposure to violence or harm and/or their disability and other health needs.
- 5.2 ICLs must appreciate that the children they represent will be at different stages of emotional, cognitive, and intellectual development, relevant to their age, life experiences and other factors. They must also be sensitive to the variety of family structures children live within, and the associated dynamics, including between siblings. ICLs must treat each child sensitively and respectfully as an individual, with their own identity including gender, religion, and culture.

Representing children at risk of harm from family violence, neglect, and abuse

- 5.3 Children who have experienced or are experiencing family violence, neglect, and abuse are particularly vulnerable, and allegations or indications of such harm must always be taken seriously.

Familiarity with relevant law and best practice guidance

- 5.4 Like all family law practitioners, the ICL is expected to be familiar with the relevant provisions of the *Family Law Act 1975* (Cth), *Family Court Act 1997* (WA), the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, *Family Court Rules 2021* (WA) and the *Family Violence Best Practice Principles of the Federal Circuit and Family Court of Australia*, as well as any processes the courts have put in place to manage cases involving family violence and harm to children.
- 5.5 The ICL must also be familiar with other relevant best practice guidelines and any relevant protocols between the court and state and territory departments responsible for the investigation of harm to children. It is important that ICLs are trauma-informed in their practice.
- 5.6 Where there is a risk of family violence or harm, the ICL must ensure the court has before it any relevant evidence of this risk, and its potential impact, where practicable. Where one or more of the parties is unrepresented, fulfilling this responsibility can be challenging.
- 5.7 The ICL must also consider if a Section 102NA Order *Family Law Act 1975* (Cth) (Section 219AK *Family Court Act 1997* (WA)) (cross examination) is required for a party and, if so, will proactively seek that an Order be made.

Expert assistance

- 5.8 Experts such as mental health professionals and family violence specialists can assist the ICL to determine how issues of risk and harm should be assessed and managed, including practical issues such as arranging meetings with the child, to ensure they (and any accompanying family members) are safe and comfortable, and not exposed to risk of harm.

References

- [Family Violence Best Practice Principles | Federal Circuit and Family Court of Australia \(fccoa.gov.au\)](https://www.fccoa.gov.au)
- [Family Violence Law Help | Domestic & Family Violence and the Law](#)
- [Guide for an Independent Children's Lawyer in the Evatt List | Federal Circuit and Family Court of Australia \(fccoa.gov.au\)](https://www.fccoa.gov.au)

Respecting children's culture and religion

5.9 ICLs should be sensitive to a child's culture and religion, noting Article 14 of the *United Nations Convention on the Rights of the Child*, which states:

States Parties shall respect the right of the child to freedom of thought, conscience and religion.
(Article 14.1)

States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. (Article 14.2)

Liaising with experts and community members

5.10 The ICL should seek advice as to how best to ensure issues of culture and religion are addressed, including obtaining input from relevant experts.

5.11 In many cultures, community members (such as elders) and extended family members play an important role in raising children. In making assessments about what is in a child's best interests, the ICL should consider the child's extended family members and others significant to them, and the capacity of those individuals to promote that child's interests. This may include consulting with extended family and community members where appropriate.

5.12 The ICL should integrate a child's culture and religion in their case management plan. Throughout a case, the ICL must:

- (a) be aware that the child's English language skills may be in early stages of development and/or they may be unfamiliar with Australian legal and social concepts
- (b) use an appropriately qualified interpreter during meetings, at court and otherwise, where the child or any party requires this to fully participate
- (c) seek to identify service options that are appropriate to the culture and/or religion of the child and the child's needs, and make recommendations to the parties and the court
- (d) understand that the child may be fearful that their community will become aware of the legal proceedings, with negative consequences for the child or their family
- (e) be aware that the child may be fearful of courts, government departments and authorities, and
- (f) be mindful that the child may be fearful of expressing wishes based upon (or contrary to) their religious or cultural beliefs and background.

Recognising the needs of Aboriginal and Torres Strait Islander children

Rights of Aboriginal and Torres Strait Islander children

5.13 When ensuring their approach responds to the child's particular cultural and family needs, the ICL has additional responsibilities when representing Aboriginal and Torres Strait Islander children.

5.14 These are articulated in Article 30 of the *United Nations Convention on the Rights of the Child* which states:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

5.15 Section 60CC of the *Family Law Act 1975* (Cth) (Section 66C *Family Court Act 1997* (WA)) confirms that the court must consider the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture by having the support, opportunity and encouragement to connect with family, community, culture,

country and language; to explore the full extent of and develop a positive appreciation of that culture; and the likely impact any proposed parenting order will have on that right.

Liaison with Aboriginal and Torres Strait Islander organisations

5.16 In cases involving an Aboriginal or Torres Strait Islander child, the ICL should liaise with an appropriate Aboriginal and Torres Strait Islander organisation where possible. They may be referred to a relevant organisation if a Family Consultant, Single Expert or other relevant expert is involved. Part of the ICL's role is to facilitate liaison between the organisation and any Family Consultant, Single Expert, or other relevant expert retained in the case. This liaison is for the purpose of assisting the ICL to consider the child's connection to family, culture and country and how this can effectively be maintained.

5.17 The ICL should liaise with the Indigenous Family Liaison Officer at the court, if there is one in the state or territory, in relation to the matter and ensure that the family and child is linked to appropriate supports.

Cultural competence

5.18 It is important that ICLs develop cultural awareness and competence in working with Aboriginal and Torres Strait Islander families. This can include through cultural competency training, as well as a familiarity with relevant judgments, articles and reports, including the April 1997 Human Rights and Equal Opportunity Commission's *Bringing Them Home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.

5.19 To effectively represent the interests of any Aboriginal and Torres Strait Islander child, the ICL must have a clear understanding of the importance of that child's connection to their particular culture, country and family and how this connection can be maintained and enhanced, in the context of the case before the court. This includes the ICL's consideration of, and consultation with, where possible, members of the child's extended family and community network.

References

- [Indigenous list | Federal Circuit and Family Court of Australia \(fcfcoa.gov.au\)](https://www.fcfcga.gov.au/)
- [Best practice guidelines for lawyers providing services to Aboriginal and Torres Strait Islander clients - Legal Aid Queensland](#)
- [Working with Aboriginal and Torres Strait Islander Clients.pdf \(lawsociety.com.au\)](#) – Law Society NSW
- [Protocols-for-Lawyers-with-Aboriginal-or-Torres-Strait-Islander-Clients-in-Western-Australia.pdf \(lawsocietywa.asn.au\)](#) – Law Society WA
- [Working with Indigenous children, families, and communities: Lessons from practice \(aifs.gov.au\)](#) – Child Family Community Australia

Representing children living with disability

5.20 Article 23 of the *United Nations Convention on the Rights of the Child* confirms that:

States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. (Article 23.1) See also Article 7(3) on expressing views and these being given equal weight. ICLs must be sensitive to the needs of a child living with disability (which may be physical, intellectual, or otherwise) and other health conditions (such as mental health issues), including the supports they may need to participate in the case wherever possible, as much as the child wishes to and is able.

5.21 The ICL should seek guidance from the child's specialist support professionals, as well as information from their parents or carers, when assessing the child's capacity to understand and participate in the process, and how their wishes can effectively be communicated and conveyed, as well as to understand any other relevant needs the child may have, in considering their best interests.

Representing children in special medical procedures and other *parens patriae*/welfare jurisdiction cases (Section 67ZC Family Law Act 1975 (Cth), Section 162 Family Court Act 1997 (WA))

5.22 The general principles stated above also apply in *parens patriae*/welfare jurisdiction cases. The ICL should be familiar with cases in which the Full Court has dealt with the issue and also of applicable court guidelines and protocols relating to special medical procedures.

5.23 In special medical procedure cases one of the ICL's primary duties is to present to the court expert evidence to assist it to determine whether or not the child represented is Gillick competent (see '[Glossary](#)'), to 'achieve a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.

5.24 Where the evidence indicates that a child is Gillick competent, the ICL should list the matter for the court to determine whether the child is to be given an opportunity to present their own case to the court.

5.25 Where the evidence indicates that a child is not Gillick competent, the ICL cannot consent to the proposed procedure. The ICL should ensure the matter is listed before the court as quickly as possible.

5.26 The *parens patriae*/welfare jurisdiction is not an adversarial jurisdiction. The ICL is to gather and file material indicating what options are available to the court and make submissions about the benefits and detriments for the child of each available option.

Hague Convention cases

5.27 ICLs may also be appointed in Hague return proceedings, in which the return of a child to another convention country is sought. This includes applications under:

- (a) *Family Law (Child Abduction Convention) Regulations 1986* (the Regulations) which implement the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (the 1980 Convention), and/or
- (b) Part XIII A – Division 4 – International protection of children of the *Family Law Act 1975* (Cth), and the *Family Law (Child Protection Convention) Regulations 2003* (the Protection Regulations) which implement the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Convention).

5.28 The ICL is expected to be familiar with the relevant legislation, regulations, case law, and procedures, and undertake steps such as liaising with the Family Consultant, Single Expert or other relevant expert assessing risk and safety of the child, exploring electronic communication between the child and left behind parent, Hague mediation processes, researching issues such as cost of return, holding of passports and supports available to the family, and otherwise assisting the court.

6. RELATIONSHIP BETWEEN THE ICL, THE PARTIES AND THEIR LAWYERS

6.1 The ICL must ensure they remain independent, objective and focused upon promoting the child's best interests in their dealings with all others throughout the case. The actions of the ICL should be transparent to the parties and their lawyers.

6.2 The ICL should as soon as practicable inform the parties of their role and use their best endeavours to ensure the parties understand the ICL's role within the proceedings.

Communication with parties

6.3 Where parties are legally represented, communication between the ICL and the parties should normally be through any lawyers acting for the parties.

6.4 Where the ICL may need to have direct contact with parties during the case, this should normally be arranged through the parties' lawyers, with the parties' consent.

6.5 The ICL may communicate directly with any unrepresented party, while also advising the represented party that such communication or meeting is occurring, including sending copies of any correspondence, where appropriate.

6.6 The ICL is not required to communicate to the other parties the substance of their conversations with the child.

6.7 The ICL is expected to communicate and respond in a timely way, but is not expected to respond to every communication, particularly those requiring no input or action by the ICL and/or which are harassing or abusive.

Promoting a non-adversarial approach

6.8 The ICL is to encourage parties and their lawyers to be non-adversarial, child focused, and act as 'honest broker' (see '[Glossary](#)') on behalf of the child in any negotiations they undertake.

6.9 An ICL should promote this approach throughout the proceedings and may encourage parties to attend family dispute resolution where it is assessed that this may help to resolve the dispute or narrow issues in dispute.

Advising of any preliminary view

6.10 If the ICL forms a preliminary view as to the outcomes which will best promote the child's best interests, it is expected that the ICL will consider the child's expressed views (if any), as may be appropriate in the circumstances.

6.11 The ICL is then to communicate their views and details of proposed orders to the parties and their lawyers, where possible.

7. GENERAL PROCESS ONCE AN ICL IS APPOINTED

7.1. Advising parties of the appointment and requesting information

- 7.1.1 When appointed, the ICL must file and serve a Notice of Address for Service to advise the court and the parties of their appointment.
- 7.1.2 The ICL should also provide information to the parties about the role of the ICL, such as by directing them to publications for parents and children at the Independent Children’s Lawyer website, at www.icl.gov.au, as well as the family law courts’ information on ICLs.
- 7.1.3 The ICL must request copies of all documents filed with or produced to the Court, including any reports from an information sharing agency, Child Impact Report, Family Report, Single Expert Report, or other report where available, and the details of any Family Consultant, Court Child Expert, Single Expert or other relevant expert involved in the case.
- 7.1.4 The ICL should seek signed authorities from parents and carers to contact professionals and agencies for information about the child.

7.2. Enquiring about child welfare agency involvement

- 7.2.1 The ICL should seek signed authorities from parents and carers to contact professionals and agencies for information about the child.
- 7.2.2 The ICL must also comply with any relevant local protocols in relation to the co-located child protection or police officials, and the obtaining of information. This may involve contacting a co-located official to ascertain:
 - (a) whether there is any child protection or police involvement with the child or family, in particular, any abuse or neglect notifications and investigations, and
 - (b) if there has been any such involvement, whether the child welfare authority intends to become involved in the family law proceedings or is considering the initiation of other legal proceedings.
- 7.2.3 In circumstances where the ICL becomes aware that a co-located agency holds information relevant to the court’s assessment of risk, including any information about a abuse, neglect or family violence, the ICL may seek an order under Sections 67ZBD or 67ZBE of the *Family Law Act 1975* (Cth) (or Section 202K *Family Court Act 1997* (WA)) to allow this information to come before the court.
- 7.2.4 The ICL will use their judgement in the investigation of historical involvement by any child welfare agency.
- 7.2.5 The ICL is to be familiar with mandatory reporting obligations in different states and territories and the requirements under Section 67ZBA(1) *Family Law Act 1975* (Cth) (Section 160(1)(f) and s160(2) *Family Court Act 1997* (WA)) where the ICL suspects child abuse.

7.3. Liaising with Family Report writers or other experts

- 7.3.1 The ICL may liaise with any Family Consultant, Single Expert or other relevant expert appointed to provide a report in the case.
- 7.3.2 If a Family Consultant or Single Expert is involved in a case, both that professional and the ICL are responsible for clarifying their respective roles with each other as required, and identifying any particular needs of the child.

7.3.3 The ICL may also decide that they need to advise other individuals and organisations of their appointment, such as the child's school or therapists. They must consider the impact of this on the child, and any views of the child (relevant to their maturity and understanding) about this information being provided.

7.3.4 See [‘Consultation’](#), [‘Case planning’](#), [‘Reports’](#) below.

7.4. Meeting with the child and providing the child with an opportunity to express any views

7.4.1 Under section 68LA, the ICL must meet the child and provide the child with an opportunity to express any views (not necessarily at the same time) unless:

- (a) the child is under 5 years of age; or
- (b) the child does not want to meet the ICL or express their views; or
- (c) there are exceptional circumstances.

7.4.2 Exceptional circumstances include but aren't limited to where it would:

- (a) expose the child to a risk of physical or psychological harm that cannot be safely managed; or
- (b) have a significant adverse effect on the wellbeing of the child.

7.4.3 If the ICL considers that there are exceptional circumstances, the court must decide before making final orders whether exceptional circumstances exist. If not, the court must make an order that the ICL meet with the child or provide the child with an opportunity to express any views, as the case requires.

7.4.4 If the child is non-verbal, the ICL may need to consider if this is an exceptional circumstance, or whether the ICL should observe the child rather than meeting the child. The ICL may meet with or observe the child in person or by technological means, as is appropriate.

7.4.5 The ICL will use their professional judgement in planning the child's participation including the frequency, timing, and location of the meeting or opportunity to express any views, and the meeting attendees. The ICL may consult with any Family Consultant, Single Expert, or other relevant expert involved in the case, to guide these decisions.

7.4.6 When the ICL meets the child, they should explain the following, as appropriate for the individual child:

- (a) the role of the ICL, including the limits of the role, and what best interests means
- (b) that they do not have to express a view but if they do how the child's views will be considered
- (c) the court process (including any anticipated interlocutory stages)
- (d) the limits on confidentiality, that some information they provide may be shared (and the reasons for this) see also [Limits of the Role](#)
- (e) that different professionals or agencies may be involved and the reasons for their involvement, and
- (f) that the role is limited to the appointment by the court and will end when ordered by the court or when final orders are made.

7.4.7 The ICL should also use the resources available on the National ICL website to assist with meeting with children.

References

- [ICL-Aide-Memoire-Final.pdf](#)
- [Tools - Independent Childrens Lawyers \(icl.gov.au\)](#)

7.5. Consultation between the ICL and Family Consultant, Single Expert Witness and other experts

- 7.5.1 ICLs may seek expert advice, including liaising with a Family Consultant, Single Expert Witness or other relevant expert where involved, to ensure a child's particular needs are considered throughout the process.
- 7.5.2 If they have already been involved in a court event in the case, the Family Consultant or Single Expert may be able to provide the following information to the ICL:
- a preliminary overview of the dynamics of the separated family and the way this is impacting on the child
 - other agencies involved with the family
 - recommendations for case management
 - whether the child should be involved in further counselling and/or whether therapy is indicated
 - whether there are any urgent issues to be addressed, and
 - details of any child abuse notifications made.
- 7.5.3 The ICL should consider which expert may be appropriate to provide advice and/or a report in the case.
- 7.5.4 See '[Working with family, Single Expert and other report writers](#)'

7.6. Case planning

- 7.7.1 The ICL should develop a case plan/strategy at the earliest opportunity after appointment, in consultation with any Family Consultant, Single Expert or other expert who may be engaged in the case. In the case plan, the ICL should:
- consider the need for an expert report
 - canvass the nature of any reports or examinations of the parties and/or the child
 - develop a strategy for the involvement of the child in any examination/assessment process
 - liaise with any Family Consultant, Single Expert or other expert involved in the case, relevant government departments, contact centres, schools and agencies to bring together relevant information (including via subpoena) to assist the court in assessing and determining the best interests of the child
 - consider the evidence available to the court in relation to any allegations of child abuse or family violence raised in a *Notice of child abuse, family violence or risk* and identify and gather as appropriate relevant evidence in admissible form
 - develop opportunities for the matter to reach an agreed outcome which best promotes the child's safety and best interests
 - provide targeted referrals for the child and the family such as counselling and support services including parenting support
 - provide information, and recommendations as required for or requested by the child during the process of litigation, whether directly or by way of appropriate referral

- (i) be vigilant and make every endeavour to minimise systems abuse of the child, and
- (j) consider whether it is appropriate to obtain a Single Expert report. In some Division 12A cases (Division 11A in the *Family Court Act 1997 (WA)*), a direction or order from the court in which the issues have been settled may be required before the expert is engaged to prepare the report.

7.7. Ongoing review of the ICL appointment

- 7.7.1 The ICL should continue to review the usefulness of the order for representation of the child during the course of a case, and ask to have the case relisted and seek an order from the court to discharge their appointment if they have the opinion that:
 - (a) there is no useful purpose or further purpose served by the order for their representation of the child
 - (b) the ICL's relationship with the child has broken down irretrievably so that it is not possible to represent their best interests
 - (c) continuing would be adverse to the best interests of the child, or
 - (d) practical circumstances make it impractical to represent the best interests of the child.
- 7.7.2 The appointment of an ICL for sibling groups can present special difficulties. It may be that the ICL needs to request that the court consider appointing another (or additional) ICL.
- 7.7.3 The ICL should ensure that arrangements are made to inform any child of any alterations to the arrangements, as appropriate for that child.

7.8. Contravention applications

- 7.8.1 During the period of the ICL's appointment, if there are contravention proceedings between the parties, generally the ICL does not play an active role.
- 7.8.2 However, the ICL may be present, subject to legal aid funding, and may seek to appear if they consider that:
 - (a) such proceedings are detrimental to the best interests of the child, or
 - (b) that the presence of the ICL may further the best interests of the child.
- 7.8.3 The ICL must first be served with the application and any supporting material, as well as being notified by the parties of any findings and sanctions imposed by the court.

7.9. Working with Family Consultants, Single Experts and other expert report writers

Obtaining reports

- 7.9.1 The ICL needs to consider the nature of any necessary expert report, including the need to obtain a report from psychiatrists, treating specialists, counsellors etc. and to be mindful of who will be responsible for the payment of such report.
- 7.9.2 Where the report is not being conducted by a Family Consultant (i.e. is not subject to an order made under Section 62G *Family Law Act 1975 (Cth)*), the ICL should::

- (a) liaise as appropriate with the other parties concerning the nature of the report, the identity of the report writer, the terms of reference, the persons who should participate in the assessment, and the material to be provided to the report writer
- (b) satisfy themselves that the report writer has the appropriate qualifications, experience and sensitivity to conduct the assessment, prepare the report and give evidence in the particular case, particularly in relation to issues of risk, culture (including Aboriginal and Torres Strait Islander culture) and disability
- (c) facilitate the participation of the child and other relevant persons in the assessment as appropriate
- (d) ensure that the report writer is provided with the information and documentation necessary to complete the assessment, including any order concerning the parameters of the report
- (e) liaise with the report writer and facilitate the timely release of the report, and
- (f) convene a conference of experts where appropriate and seek an agreed statement as to the outcomes of that conference.

7.9.3 It is not the role of the ICL to direct the methodology to be used by the family report writer or Single Expert. The methodology must be based upon the author's sound clinical experience.

Expert evidence

7.9.4 The Family Consultant, Single Expert or other relevant expert retained in the case may also assist in the ICL's adducing evidence before the court.

7.9.5 The ICL's communications with a Family Consultant, Single Expert or other relevant expert are not privileged. Evidence of these communications may be included in a report or given in oral evidence.

7.9.6 Where the report is a Family Report prepared by a Family Consultant or a Single Expert, the writer is the court's witness. The ICL is not bound to make submissions which adopt the recommendations made by the report writer or any expert called in the proceedings. Evidence given by a Single Expert or Family Consultant or other expert is one part of the total evidence and must be evaluated within that context.

7.10. Ensuring the child's views are before the court

Making submissions about the child's views

7.10.1 The ICL is to ensure that any views expressed by the child are fully put before the court in admissible form, where possible, at any hearing, interim or final.

7.10.2 In preparing to make submissions on the evidence as to the weight to be placed on the views of the child in a hearing, the ICL may consult with the Single Expert, Family Consultant, or other relevant expert about:

- (a) the content of the child's views
- (b) the contexts in which those views both arise and are expressed
- (c) the willingness of the child to express views, and
- (d) any relevant factors associated with the child's capacity to communicate.

7.10.3 The ICL should where possible also arrange for evidence to be before the court as to how the child would feel if the court did not reach a conclusion which accorded with the child's wishes.

Making submissions contrary to the child's views

- 7.10.4 If the ICL considers that the evidence indicates that the best interests of the child will be promoted by orders which are contrary to the child's views, where the child has sufficient maturity, the ICL is to:
- (a) advise the child that they intend to make submissions contrary to the child's views and the reasons why
 - (b) ensure that the child's views are before the court, together with the evidence which promotes the acceptance by the court of the child's views
 - (c) make submissions which promote the adoption by the court of orders which are in accordance with the child's best interests
 - (d) provide clear and cogent submissions as to why the child's views do not promote the child's best interests, and
 - (e) explain to the child why they made a submission that was contrary to the child's views (this should be done at the conclusion of the proceedings if there has not been an opportunity to do so prior).

Children giving evidence

- 7.10.5 Children rarely give evidence in proceedings. However, there may be cases where consideration is to be given to what direct role the child might have in giving evidence to the court. If the ICL believes that it may be appropriate for the child to give evidence, the ICL should consult with the Family Consultant, Single Expert or other relevant expert.
- 7.10.6 Where a child of sufficient maturity wishes to give evidence, the child should be appropriately advised and the opportunity to apply for orders for the child to give direct evidence canvassed. The purpose of Section 100B *Family Law Act 1975* (Cth) (Section 214A *Family Court Act 1997* (WA)) should be explained to the child.

7.11. Interim hearings

- 7.11.1 The ICL must present all relevant evidence to the court at the interim hearing. The ICL may not have the opportunity to fully investigate the child's circumstances due to the restricted nature of interim hearings and related time constraints. However, where possible, the ICL should have issued relevant subpoenas and be in a position to tender relevant material. Such evidence is particularly helpful to the court where allegations of unacceptable risk are present in the case.
- 7.11.2 The ICL should have made relevant enquiries with relevant professionals such as the child's school and counsellor, and where possible the ICL should meet with the child before the hearing.
- 7.11.3 In circumstances where little is known about the child's situation the ICL should be cautious and should not feel compelled to make a submission as to the child's best interests, presenting rather an analysis of the available evidence and options, to the extent possible. The ICL should identify all the evidence that is available and the evidence that is still required to be gathered. The ICL must consider all of the evidence and inform the court of the relevant evidence and what further evidence may be required. Where the court is to make interim or procedural orders, the ICL should consider whether they adequately promote the safety and best interests of the child and make submissions as appropriate. The ICL must also seek appropriate interim orders such as preparation of expert reports and relevant injunctions.

7.11.4 The ICL should not sign consent orders unless they are satisfied that they are in the child's best interests. If the ICL is not prepared to sign consent orders the ICL should advise the court of their concerns and why they do not consider the orders to be in the best interests of the child.

7.12. Final hearing (the trial)

Preparing for trial

- 7.12.1 If the matter proceeds to trial, the ICL should comply with all procedural and timetable requirements. The ICL should identify and obtain/subpoena relevant documentation, organise the preparation of appropriate reports and arrange for relevant witnesses such as State welfare authority officers, police officers, school teachers or similar persons to give evidence.
- 7.12.2 The ICL is to arrange for the collation of all relevant and reasonably available evidence, including expert evidence where appropriate, and otherwise ensure to the extent possible, that all evidence relevant to the best interests of the child and the considerations set out in Section 60CC of the *Family Law Act 1975* (Cth) (Section 66C *Family Court Act 1997* (WA)) is before the court. The ICL is not responsible for adducing evidence to establish the case of a party.
- 7.12.3 The ICL should be proactive in matters heard under Division 12A *Family Law Act 1975* (Cth) (Division 11A *Family Court Act 1997* (WA)) and should be aware of relevant supports that may be required for the family and the child following final orders being made.

Promoting resolution

- 7.12.4 The ICL is to promote the timely resolution of the proceedings that is consistent with the best interests of the child, including through negotiations, and consider family dispute resolution at each stage of the case. Such an approach is consistent with the overarching purpose of the Federal Circuit and Family Court of Australia and the Family Court of Western Australia.
- 7.12.5 The ICL should consider if a legal aid dispute resolution conference, court-based dispute resolution conference, or private mediation is appropriate for the case, as well as when this process would best support resolution of the dispute. The ICL must participate in any dispute resolution conference ordered by the court. During any dispute resolution process, the ICL should work with the mediator to promote a child focused approach, reality test the parties and encourage the parties to narrow the issues in dispute and, where possible, reach a final resolution in the child's best interests. The *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA) specifically allow for a Family Dispute Resolution Practitioner to disclose confidential communications to an ICL, if this would assist the ICL to represent a child's interests properly.
- 7.12.6 The ICL should be proactive in managing cases prior to hearings, in particular, and bring to the court's attention matters which might hinder the court's capacity to determine the matter on a final basis (for example, a Family Report or Single Expert report not being progressed).

Preliminary views

- 7.12.7 Where the ICL has formed a preliminary view as to the outcomes which will best promote the child's best interests, it may be appropriate to inform the court at the commencement of the first day of trial of those views and where appropriate, provide details of draft orders.

Testing evidence and making submissions

- 7.12.8 The ICL is to test by cross-examination or other processes where appropriate, the evidence of the parties and other witnesses, including witnesses who are called by the ICL.

7.12.9 The ICL is to make submissions as to the weight to be given to the evidence and the proposals of each party to assist the court to make findings of what is in the child's best interests. In doing this it is expected that the ICL will consider any practical problems, and possible solutions, associated with effecting such proposals. In appropriate cases the ICL will also make submissions on the proposed terms of orders.

7.12.10 The ICL should not sign consent orders unless they are satisfied that they are in the child's best interests. The ICL should advise the court of any concerns with the proposed orders and why they do not consider them in the best interests of the child.

7.13. At the conclusion of proceedings

Seeking leave to provide information to professionals

7.13.1 The ICL should consider whether leave should be sought to provide copies of the orders, reasons for judgment of the court and any other material, including expert reports, to any relevant professional involved with the family.

Explaining court orders to the child

7.13.2 Where possible or by Order of the Court, the ICL has a responsibility to explain to the child, or to facilitate an explanation by a Family Consultant, Single Expert or other relevant expert who has provided a report in the case:

- (a) the orders made by the court
- (b) the effect of those orders
- (c) if submissions were made by the ICL that were contrary to the child's views, the reasons for so doing, and
- (d) whether leave has been sought to provide copies of the orders, reasons for judgment of the court and for any other material, including expert reports, to any relevant professional involved with the family and to whom the ICL intends to forward such material.

7.13.3 In consultation with a Family Consultant, Single Expert, or an relevant expert in the case, the ICL should determine who is the most appropriate person to explain the orders, including by seeking an order if required, considering their current respective relationships with the child.

7.13.4 Where the ICL is appointed for a sibling group, consideration should be given to whether explanations are best provided on an individual or group basis.

Monitoring final orders

7.13.5 The ICL will not monitor final orders unless there are exceptional circumstances and there is an order requiring them to do so.

7.13.6 The ICL should ensure that their file contains a record of outcomes of proceedings so that it is informative to any subsequent ICL that may be appointed and easily understood by the child if they are able to access it in later life.

7.14. Appeals

7.14.1 The ICL has a right to appeal orders made by the court on behalf of the child.

- 7.14.2 The ICL should consider whether an appeal is appropriate. An appeal should only be lodged where the interests of the child would be promoted by such a procedure and after considering the child's views.
- 7.14.3 If one of the other parties appeals, the ICL should inform the child and explain the process involved, unless there are reasons not to do so. Where appropriate and subject to legal aid funding, the ICL should participate in the hearing of the appeal.

8. GLOSSARY OF TERMS

Court events

Court events include conferences, hearings and other court appearances before judges, senior judicial registrars, judicial registrars or deputy registrars.

Disclosure interviews

Interviews conducted for the purpose of forensic assessment of any allegations made in the proceedings of abuse or risk of abuse to a child or family violence involving the child made in the proceedings.

Family Consultant

To undertake the role of Family Consultant, as defined in the *Family Law Act 1975* (Cth), a practitioner must hold a statutory appointment to the role. There are three types of practitioners who hold such an appointment:

- a social worker or psychologist who is employed by the Federal Circuit and Family Court of Australia, within the Court Children's Service, and has the position title of Court Child Expert
- a social worker or psychologist who is engaged by the Federal Circuit and Family Court of Australia, through the Court Children's Service, and is referred to as a Regulation 7 Family Consultant
- a social worker or psychologist who is employed by the Family Court of Western Australia, within the Family Court Counselling and Consultancy Service, and has the position title of Family Consultant.

A private family report writer is considered a Single Expert (see definition below).

Family Dispute Resolution

Family dispute resolution is a particular type of mediation, where a Family Dispute Resolution Practitioner (FDRP) helps people to resolve some or all of their disputes, including about children or property, after separation. When advising people about making parenting agreements, FDRPs must tell them that decisions should be made in the best interests of the child.

Family Report

A Family Report is a written report about the family for use in court. Family report writers generally have qualifications in social work or psychology. They speak to family members and other significant people.

A Family Report usually includes recommendations about arrangements for the children. It gives the judge an expert's opinion about the issues affecting the child.

Any party involved in a case can ask for a court order for a Family Report to be prepared. Either the court, or the ICL and the parties can arrange the report. See also definition of Single Expert below. In Western Australia where there is an ICL in a matter and a Family Report is required a Single Expert Witness is usually appointed to prepare the report.

Family Violence Best Practice Principles

The family law courts have acknowledged that there are many circumstances where families are attending court where violence is a factor. To assist parties in the resolution of disputes, and to promote the safety of litigants, the Federal Circuit and Family Court of Australia and the Family Court of Western Australia have articulated policies to guide litigants, practitioners and others of the approach taken by these courts in circumstances of family violence.

Gillick competent

Before a child reaches the age at which he or she could consent to medical treatment under the relevant legislation, the child may be lawfully competent to consent to at least some procedures. This depends on whether the child is a 'mature minor' under the Gillick test, a test which was approved by the High Court of

Australia in 1992. This means that the person has 'achieved a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.

Treatment may be provided to a child if the parent or guardian consents or, if the child consents and:

- (a) the medical practitioner is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and wellbeing, and
- (b) that opinion is supported by the written opinion of another medical practitioner who has examined the child.

Honest broker

A person who has accepted the role of negotiator in the dispute because their impartiality is unquestioned by either side.

Single Expert

A professional (such as a social worker, psychologist, or psychiatrist) who has been appointed under the Family Law Rules (either by court order or by agreement of the parties) to be involved in the case. Single Experts do not complete Family Reports pursuant to Section 62G *Family Law Act 1975* (Cth).

A private family report writer is considered a Single Expert.

State welfare authority

State welfare authorities are the government departments which deal with child protection issues in States and Territories. They are usually notified by counsellors, teachers, or others with responsibility for a child, where a concern about child abuse is raised.