The increasing demands on the role of children's lawyers in family law proceedings [Level A heading]

Miranda Kaye*

Keywords: Family law- children's lawyers- self-representation- litigants in person - qualitative research

Abstract:

In Australia, lawyers are appointed by courts to represent a child's best interests in private family law disputes. They are generally appointed in cases at the more complex end of the family law spectrum. As the complexity of matters in the family court system has increased, the caseload of children's lawyers is also becoming more complex and their role has expanded. This paper examines the ramifications for a family law system that has become more reliant on children's lawyers despite research highlighting concerns about the capacity and quality of some children's lawyers. This article draws on the author's small-scale qualitative study of the perceptions of children's lawyers particularly in relation to cases involving family violence and self-represented litigants to explore the strains placed on their role. I suggest that judges will continue to increasingly rely on children's lawyers who are being placed more in the role of "Counsel Assisting the court" as opposed to acting as the child's representative.

Introduction [level B heading]

In Australia, the possibility of appointing a separate representative for the child in private family law disputes has existed since the enactment of the Family Law Act 1975 (FLA).[1] The role originally developed in case law and has been codified in the FLA since 2006 as a 'best interests' advocate[2] and the lawyers renamed independent children's lawyers (ICLs). ICLs may be appointed by the court[3] in proceedings in which it appears that the child's interests 'ought to be independently represented by a lawyer'.[4] ICLs are not the child's legal representative although the ICL is required to put forward the child's views (if expressed) to

---

* Senior Lecturer, Faculty of Law, University of Technology Sydney. Thanks to Norman O'Dowd for his invaluable research assistance. Thanks to Jenni Millbank, Isabel Karpin and the anonymous referees for their helpful comments. Miranda is a member of the Law Health Justice Centre, UTS. Funding for this paper was provided by the UTS Research Re-establishment Grant Scheme.

[1] Indeed, even prior to the FLA, a lawyer, known as the child's representative, could be appointed under the Matrimonial Causes Act 1959 (Cth).

[2] s68LA(4) FLA. See also Guideline 4 of the court approved: National Legal Aid, 'Guidelines for Independent Children's Lawyers' (2013) www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/guidelines-independent-childrens-lawyer, last accessed 18 December 2018.

[3] Although any person involved in the proceedings, including the child may request the appointment of an ICL: s64L(4) Family Law Act 1975 (Cth) (FLA), most appointments are made by the court. F Bell, 'Meetings between Children's Lawyers and Children Involved in Private Family Law Disputes' [2016] 28 CFLQ 5; Bell notes at 5 that it is unclear how the child could request appointment of an ICL without engaging a lawyer or litigation guardian to make the application.

[4] s68L(2) FLA.

the court.[5] In 1994, in the case of *Re K*[6], the Full Court of the Family Court of Australia suggested some guidelines to assist courts when deciding whether to order what was then known as a separate representative.[7] After that decision, the number of appointments of lawyers for children increased steadily.[8] In 2004-2005, ICLs were appointed in under one fifth of family law matters involving children; [9] orders for ICL representation are now made in around a quarter to one third of cases involving children.[10] Appointments continue to rise: Victoria Legal Aid noted that in the year 2015-16 they provided 20 per cent more grants of legal aid for ICLs than they had in previous years.[11] ICLs are either in-house lawyers employed by legal aid or are private practitioners appointed to panels maintained by the relevant legal aid commission (LAC). Hence all ICLs are remunerated by the LAC.[12]

Australian legal aid has historically been poorly funded compared to that of the United Kingdom.[13] The Productivity Commission noted that Australia's funding for legal assistance services, was per capita, lower than that of other nations with similar legal systems.[14] There has not been the same drastic reduction in legal aid funding in family law matters in Australia as there has been in England and Wales since the UK Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).[15] However, Australia only spends half as much per capita as

---

[5] S68LA(5)(b) FLA.

[6] (1994) 17 Fam LR 537.

[7] These guidelines are now somewhat out of date: as Victoria Legal Aid note the guidelines do not refer to family violence and its impact on children: Victoria Legal Aid, 'Australian Law Reform Commission Review of the Family Law System - Issues Paper: Submission' (Victoria Legal Aid, May 2018) 81.

[8] Family Law Council, *Pathways for Children: A review of children's representation in family law* (2004)

[9] R Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009) 309.

[10] R Kaspiew et al, 'Family Law Court Filings 2004-05 to 2012-13' (Research Report No. 30, AIFS, 2015) 19. The authors note that proportions of ICL orders made in each court vary each year. They comment at pp.22-23 that it would be important to explore the extent to which the variations reflect availability of legal aid funding as opposed to variation in complexity and risk in court proceedings. Stephen Ralph has found that non-Indigenous family law litigant groups were almost twice as likely (62%) to have an ICL appointment compared to Indigenous litigant groups (36%). He suggests that this may be because the non-Indigenous group was more likely to be dealing with more complex issues; a more litigious attitude on behalf of the non-Indigenous participants and also that Indigenous litigants are more likely to be legally aided: S Ralph, *Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice* (Family Court of Australia, 2011).

[11] Victoria Legal Aid, 'A Better Family Law System: Submission to Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence' (2017, Submission 60), 2.

[12] A useful comparison of different models of child representation in the US, Canada, Australia and the UK is provided by K Beckhouse, 'To Investigate Legal Representation Schemes for Children in the US, Canada and the UK – Administration, Delivery and Innovation' (The Winston Churchill Memorial Trust of Australia, 2014) 95.

[13] Mary Anne Noone, 'Challenges Facing the Australian Legal Aid System' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 20, 24.

[14] Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report 72, Productivity Commission, 2014) 734.

[15] S Choudhry and J Herring, 'A Human Right to Legal Aid? – The Implications of Changes to the Legal Aid Scheme for Victims of Domestic Abuse' (2017) 39(2) J Soc Welfare & Fam L 152; C Bevan, 'Self-Represented Litigants: The Overlooked and Unintended Consequence of Legal Aid Reform' (2013) 35(1) J Soc Welfare & Fam L 43; S Wong and R Cain, 'The impact of cuts in legal aid funding of private family law cases' 41(1) J Soc Welfare & Fam L 3.

Britain on legal aid, even after LASPO[16]; access to legal aid for family matters in Australia 'has become increasingly limited - often vulnerable to budget deficits in Legal Aid Commissions, Commonwealth government funding cuts and the failure of Commonwealth funding to keep up with demand.'[17] Commonwealth funding is used for Commonwealth law matters, the majority of which is for family law matters.[18] The Commonwealth's contribution to legal aid commission funding has fallen to its lowest level in 20 years and the projected forecast is for the contributions to fall further. The areas of family violence and separation 'have emerged as two areas of growing unmet legal need'[19] and 'the legal needs of some complex families are not being met in family law disputes.'[20] This shortage in Commonwealth legal aid funding has taken place amid a failure of the Commonwealth to adequately resource the family law system itself.[21]This lack of funding has serious implications in a system where, as I will argue, there is increasing reliance on LAC funded ICLs to assist the courts.

This article draws on semi-structured interviews with Australian ICLs. The original purpose of the qualitative interviews was to gain ICLs' perspectives on the intersection of self-representation[22] and family violence in family law matters.[23] However, it became clear as the interviews progressed that ICLs were commenting more generally on their perceptions and practices and that issues of family violence and self-representation were just two of the many intersecting complexities in ICLs' caseloads. Although it is not possible to generalise from the small sample size, the findings reveal the increasing complexity of the ICLs' workload, their

---

[16] D Neal SC, *Federal budget must increase Legal Aid funding* (4 May 2018) Law Council of Australia, www.lawcouncil.asn.au/media/news/federal-budget-must-increase-legal-aid-commission-funding, last accessed 17 February 2019.

[17] P Mutha-Merennege, 'Insights into Inequality: Women's Access to Legal Aid in Victoria' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 256.

[18] Productivity Commission, n 14 above, 677. In 2012-2013, 94% of Commonwealth-funded grants of legal aid were for family law matters.

[19] Mutha-Merennege, n 17 above, 255; D Weber, *National Legal Aid calls for more funding after new figures reveal domestic violence a factor in 79pc of family law cases* (18 April 2016) ABC News< http://www.abc.net.au/news/2016-04-18/domestic-violence-a-factor-in-79pc-of-family-law-cases:-audit/7333368>

[20] Productivity Commission, n 14 above, 855.

[21] R Powell, *Family Court Underfunded, Letting People down, Chief Justice Says* (30 April 2017) ABC News www.abc.net.au/news/2017-04-30/family-court-letting-families-down-chief-justice-says/8483858, last accessed 18 December 2018; *Law Council Applauds Senate's Call for an End to Court Funding Crisis* www.lawcouncil.asn.au/media/media-releases/law-council-applauds-senate-s-call-for-an-end-to-court-funding-crisis-, last accessed 18 December 2018.

[22] This article uses the term self-represented litigant to refer to a person who conducts legal proceedings without legal representation. There are a wide range of terms used to describe such people. Differences in terminology can reflect preferences in different jurisdictions or distinctions between people who are without legal representation through choice or circumstance. This article uses the term self-represented litigant because it is the term most frequently used in Australia. For the purposes of this article, self-represented litigant is broadly defined to encompass all litigants without legal representation at some time during the conduct of their family law proceedings, regardless of the reason.

[23] This research will inform a larger project that the writer is undertaking with Dr J Wangmann and Dr T Booth which is funded by Australia's National Research Organisation for Women's Safety, *Self-represented litigants in family law proceedings involving allegations of family violence*.

expanded and crucial role in cases involving self-represented litigants and the passion and dedication of the interviewed ICLs, but also their concerns about the passion, dedication and quality of other ICLs. The findings suggest that ICLs are being relied on by judges to assist the court at the expense of their role of representing children and that ICLs have become more akin to "counsel assisting the court" than to lawyers representing the best interests of the child.

Method, Sample and Analysis [level B heading]

This article reports on qualitative interviews[24] undertaken with 31 lawyers working as ICLs in the most populous Australian states of Victoria and New South Wales. Australian family law is federal and so the legislation governing ICLs is the same in all states as are the National Legal Aid Guidelines for Independent Children's Lawyers.[25]

19 ICLs from NSW and 12 ICLs from Victoria were interviewed.[26] 13 of the ICLs were in-house LAC and 18 were private practitioners.[27] 11 of the ICLs were from regional or rural areas. The majority of the ICLs (16) had over 20 years of post-admission experience in family law and the average years of experience in family law was 21 years. Minimum national prerequisites to be on an ICL panel include five years of post-admission experience in family law. Hence, interviewees' years of experience as an ICL did not necessarily correlate proportionately with years of family law experience. For example, one interviewee had only 1 year experience as an ICL, but had practised as a family lawyer for over 18 years. The interviewees' years of ICL experience ranged from 1 to 25 years with an average of 10 years. Six of the 31 ICLs

[24] Ethics approval to conduct this research was obtained through the University of Technology Sydney Human Research Ethics Committee (Reference Number: ETHI 18-2106). Legal Aid NSW and Victoria LA were asked to distribute details of the study to their in-house ICLs and private practitioners on their ICL panels. The ICLs then contacted the author if they were interested in being interviewed. Interviews were conducted by telephone between April 2018 and September 2018. Interviews were transcribed and qualitative data analysis undertaken by the author. A key frame for this research was thematic issues that have emerged from previous research on SRLs and family violence. However, the author was attentive to new themes that emerged from the data itself. Interviews were anonymised after transcription and identifying features were edited out so that interviewees are generally described by gender, state and whether they are in-house (LAC) or private practitioners (Private).

[25] National Legal Aid, n 2 above. This article does not consider the role or perspectives of children's lawyers in state and territory care and protection proceedings although many of those interviewed had experience of such a role. For a comparison of the roles see N Ross, 'Children's Lawyers: "Seeing" Children' (2013) *New Zealand Law Review* 409; N Ross, 'Different Views? Children's Lawyers and Children's Participation in Protective Proceedings in New South Wales, Australia' (2014) 27 *International Journal of Law, Policy and the Family* 332

[26] This is approximately 11% of ICLs from Victoria and NSW combined: in NSW there are currently 87 in-house LAC ICLs and 129 private panel ICLs; in Victoria there are 14 in-house LAC ICLS and 55 private panel ICLs. Information was obtained from LAC staff in email responses.

[27] Four of the 18 private practitioners had previously worked as family lawyers in LACs whilst one had previously worked at a community law firm. Nine of the 13 in-house lawyers had worked in private practice before working for the LAC whilst one had previously worked at a community law firm.

interviewed were male.[28] Lawyers working in-house within the LACs reported carrying out a higher proportion of ICL work than those in private practice.[29]

General thoughts on practising as an ICL [level B heading]

Previous empirical research conducted by the Australian Institute of Family Studies (AIFS) into ICLs in 2014 (the AIFS ICL study) examined the role of ICLs from multiple perspectives, including court professionals, parents and children.[30] The study identified three main functions in the role: facilitating children's participation in proceedings, gathering evidence and managing litigation, and playing 'honest broker' by bringing a child focus to the proceedings. The AIFS ICL study found that both ICLs and judicial officers considered that ICL's evidence gathering and litigation-management functions were of more significance than their role in facilitating children's participation.[31] The study and later research, have found that varying approaches are taken to the child participation function.[32] Despite the national *Guidelines for Independent Children's Lawyers* presuming that ICLs will meet with children in most cases, research has demonstrated that practices around meeting with children vary between different states and amongst individual practitioners with many practitioners exercising caution in directly meeting with children. For example in 2012, high rates of ICLs from both Victoria and New South Wales reported that it was their usual practice to meet with children, but this was not the case in states such as Queensland and South Australia at the time. [33] The AIFS ICL research also showed that consulting with children was less likely to occur in Queensland and South Australia than in NSW and Victoria.[34] AIFS concluded that the "community of practice to which the ICL belongs" has a large influence on ICL practice.[35] This research did not expressly ask ICLs about their practices as opposed to their perspectives, but it is important to note that any comments are limited to a small number of ICLs based in the states of Victoria and New South Wales.

---

[28] It is unclear whether this reflects the gender balance of ICLs practising in these States. Of the 129 private practitioners on the NSW ICL panel, 32 (25%) are male. However, this may not be reflective of the gender balance of Legal Aid ICLs in NSW or ICLs in Victoria generally.

[29] Bell, n 3 above, 7, had similar findings in her interviews with ICLs and noted that private practitioners did substantially less ICL work than those in-house.

[30] R Kaspiew et al, 'Independent Children's Lawyers Study: Final Report' (AIFS, 2014).

[31] Ibid xi.

[32] Bell, n 3 above; F Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30(3) *International Journal of Law, Policy and the Family* 225; K Beckhouse, 'Laying the Guideposts for Participatory Practice: Children's Participation in Family Law Matters' (2016) 98 *Family Matters* 26; D Anderson et al, 'Independent Children's Lawyers: Survey of Children and Young People.' (Legal Aid NSW, Southern Cross University, 2016).

[33] P Hemphill and J Beall, *Report on Independent Children's Lawyers; Survey* (Family Law Courts, 18 September 2012) 6-8. The survey found that 45% of ICLs from South Australia and 38% of ICLs from Queensland reported that they did not routinely meet with children compared to 4% and 6% in Victoria and New South Wales respectively.

[34] AIFS ICL study above n30, 44.

[35] AIFS ICL study above n30, 52.

All of the ICLs interviewed talked about being passionate about their work as ICLs despite finding it extremely demanding, perhaps financially unrewarding and challenging. For example, one ICL with 29 years' experience as a family law practitioner and 10 as an ICL said:

> 'I'm passionate about it. I suppose, being an ICL is probably the highlight of my career - the thing I'm most proud of. And, the thing I most enjoy doing even though it is exhausting at times, but I get a profound amount of personal and professional satisfaction out of it.' (#9, Male, Private, NSW).

The challenges of the role were described as particularly onerous in cases involving family violence allegations:

> 'As ICL it's a really difficult position, because you're looking at the risk of harm, obviously, and the meaningful relationship, and the impact that any family violence exposure has had on the kids and any impact that's going to have on their relationship with that parent, and is it manageable or is it too traumatic. And it's sort of like, if you make a decision or you're recommending something, either way, if you make an error, it's a pretty horrible outcome then for those kids.' (#8, Female, LAC, Vic).

Many of the ICLs who also acted for parents in party matters commented that the experience of acting as an ICL impacted on their work when they acted as a party representative and made them more child-focused when in that role.[36] As one private ICL said, 'I think the ICL work has certainly meant, regardless which role I'm doing, I probably do think about what's best for the child and not necessarily, in a party matter, my client.' (#23, Female, Private, Vic). Another commented that it had affected her whole approach to all family matters:

> 'I think having been an ICL for so long has really infected my capacity to act for parents in parenting matters. So that I tend to do all the stuff an ICL would do in terms of subpoenaing and, you know, investigations. And I also have zero tolerance for crap from my clients because I think, I hope, I'm more child focussed as a result…..I guess you have this empathy for the child's predicament in all of this. It doesn't always work, let me tell you, but you know, you always try and bring your client back to a child focus. What do you think it's like for them to experience this? And I mean I will refuse to do things on behalf of clients and I'm really... For instance I will not write offensive letters or rude letters or even highhanded ones because my view is what if a child ever sees that?' (#13, Female, Private, NSW).

Complexity of cases dealt with by ICLs [level B heading]

It has long been recognised that family violence is the 'core business' for Australian family courts.[37] AIFS evaluated the 2012 reforms to the FLA which made a number of important

[36] See further on the ethical duties of lawyers for parents to ensure that the children's interests are appropriately taken into account: N Bala, P Hebert and R Birnbaum, 'Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer' 95 *Canadian Bar Review* 35.

[37] T Brown et al, 'Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes in the Family Court' (1998) 36(4) *Family Court Review* 431, 433; L Moloney et al, 'Allegations of Family

changes in relation to family violence including attempts to improve reporting of family violence to the court. They sought to identify the proportion of cases post the reforms in which allegations of family violence were made. They found that with regard to judicially determined cases, 65% raised allegations about family violence; in terms of those cases where consent orders were reached after the commencement of proceedings 53% alleged family violence; and in the cases where consent orders were reached without litigation only 4.1% contained such allegations.[38]

ICLs are 'involved in cases that are by and large at the more complex end of the family law spectrum, frequently involving concerns about family violence and abuse.'[39] The AIFS ICL study commented that the caseload of an ICL is generally 'dominated by concerns about family violence and abuse'.[40] As one interviewee commented, 'when I get a case as an ICL that has no risk, I ask, "why I am an ICL on this case?" It stands out.' (#19, Female, LAC, NSW).

It was not surprising therefore when asked, what proportion of their current ICL cases included allegations of family violence, 35% of interviewees (n=11) answered either 'all of them' or between '99 to 100%'; 58% (n=18) answered 'almost all of them' or simply said 'the majority' or estimated a percentage over 75%; whilst 3% (n=1) estimated about half of their ICL matters included 'clear domestic violence, so there's intervention orders or police involvement'. The difference between the majority of responses and the last response may simply reflect a difference between most interviewees who defined family violence widely in terms of coercive controlling behaviours[41] as opposed to the last interviewee describing family violence constituted of discrete proven acts of physical or visible violence.[42]

Many of the interviewees commented that their cases would often involve more than one risk factor:

> 'I mean, [ICL] matters are always complex, and it's very rare that I have a violent, alleged perpetrator of violence on one side without some form of mental health issue or drug issues on the other side, or for both. So, as an ICL we're often left in a, really, it's a least worst option that we're looking at.' (#26, Female, LAC, Vic).

This finding is supported by a small-scale study looking at the prevalence of allegations of family violence conducted by Judge Joe Harman, a sitting Federal Circuit Court of Australia judge. He noted that, 'Few cases involved an allegation of family violence in isolation' and

---

Violence and Child Abuse in Family Law Children's Proceedings : A Pre-Reform Exploratory Study' (Australian Institute of Family Studies, 2007) 47; Productivity Commission, n 14 above, 862; L Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Attorney-General's Department, 2014) 157.

[38] R Kaspiew et al, *Court Outcomes Project* (Australian Institute of Family Studies, 2015) 45–46.

[39] AIFS ICL study n 30 above, 29.

[40] Ibid 145.

[41] See s4AB FLA.

[42] J Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2016) 34(4) *Sydney Law Review* 695.

‘nearly one-third of cases involve all four allegations [family violence, abuse, mental illness and drug or alcohol misuse] being raised in combination’.[43]

Interviewees generally believed that their ICL caseload was becoming more complex. This was particularly interesting given the high average length of experience of the interviewees and that all of the interviewees endorsed this view in some form. Some of the interviewees attributed the increased complexities to delays in the system.[44] For example, one interviewee commented:

> ‘The people who are a little bit more functional are sorting their matters out, so we’re left with the ones that are a bit more awful that are getting to that point of hearing. I think that when I first started I wouldn’t have had anywhere near the same percentage of my practice with DV and child abuse matters … But it seems to be more and more now because people are accepting the court delays and using FDR a lot more …. So, the matters we’re left with, as ICLs because often you don’t come into the mix until it’s beyond that point where things can be sorted another way are becoming a bit more awful, with mental health issues and complex backgrounds to the families.’ (#10, Female, LAC, NSW).

Due to the increased complexity of cases, ICLs have taken on roles that would not have been as common in the past. Victoria Legal Aid has commented that:

> In the absence of a dedicated case management function at the family law courts, and exacerbated by the increasing complexity of family law matters requiring judicial determination and the number of self-represented litigants in the family law courts, VLA has observed that the role of the ICL has expanded to include case management duties, such as coordinating support services, expert reports, expert witnesses to give evidence and other key documents.[45]

This view was certainly supported by the interviews with ICLs; tasks undertaken by ICLs included commissioning experts where ‘in the old days you’d just get a family report or a psychologist, but so many now, because of the overlap between mental health and drugs, you know parental incapacity for whatever reason, you need a psychiatrist’ (#30, Male, Private, NSW). This involves the ICL finding an expert that the parties agree upon who is

---

[43] J Harman, ‘The Prevalence of Allegations of Family Violence in Proceedings before the Federal Circuit Court of Australia’ (2017) 7 *Family Law Review* 3, 14. See also Family Court of Australia, Annual Report, 2017-2018, 34.

[44] Delays in the Australian family law system are substantial. The Law Council of Australia advised the House of Representatives Standing Committee on Social Policy and Legal Affairs, that delays between filing and commencement of trial can be as high as 36 months in both the Family Court of Australia and the Federal Circuit Court of Australia: House of Representatives Standing Committee on Social Policy and Legal Affairs et al, *A Better Family Law System to Support and Protect Those Affected by Family Violence Recommendations for an Accessible, Equitable and Responsive Family Law System Which Better Prioritises Safety of Those Affected by Family Violence* (Parliament of the Commonwealth of Australia, 2017) 56 .

[45] Victoria Legal Aid, n 7, 81.

available[46], applying for a Legal Aid extension to pay for the report, circulating proposed terms of reference for the assessment, sending the expert the subpoenaed material and any orders and affidavits, ensuring hearing dates suit the expert and becoming the 'de facto secretary or the intermediary in between the expert and the court.' (#30, Male, Private, NSW). The same ICL mentioned that the judge in his local circuit would make 'a supervised urinalysis order' to screen for drugs 'in almost every case'. The ICL would be the 'gatekeeper' of such orders in that the order would state that testing was to be done 'within 48 hours of being requested by the ICL. So the ICL is sort of like the unpaid agent of the court' (#30, Male, Private, NSW). One ICL said she 'had a matter where I had to book a child's dental appointment because for some bizarre reason these parents just couldn't make it happen. And his Honour just said can you just do it because this kid needs to see a dentist.' (#10, Female, LAC, NSW). It would appear that this increasing complexity of the role means that the courts are relying on the ICL more as an assistant to the court than as a child representative.

Payment and Quality of ICLs [level B heading]

Australian LACs provide legal services through a mixed model of service delivery of in-house employed solicitors and assigned legal practitioners. Hence, ICLs are either private practitioners or are directly employed in-house by the LAC. After the court makes an order appointing an ICL in proceedings, an ICL may be appointed to a case by the LAC in the relevant state or territory. In the 2013-2014 financial year, Legal Aid NSW appointed 1,490 lawyers to appear as ICLs in family law matters in that jurisdiction.[47] In 2016-2017, Victoria Legal Aid made 1,345 grants of assistance for the appointment of an ICL.[48] The LACs administer the funding for ICLs, and are themselves funded by state, territory and Commonwealth governments. Grants for ICLs are funded by the Commonwealth as part of Commonwealth law matters. National Legal Aid has observed that funding for LACs, and aligned with this payments to private practitioners on ICL panels administered by LACs, has remained fairly static for many years.[49] In a submission to the Legal Aid NSW fee review process in 2018 the Law Society of NSW stated that 'Feedback from our members indicate that often they lose money in taking on a legally aided family law matter….The Law Society is of the view that without an immediate increase in funding to allow for proper remuneration to attract private practitioners of sufficient skill and expertise, Legal Aid will struggle to continue to provide a

[46] This is harder if the parties are legally aided; not all experts are prepared to work at Legal Aid rates.
[47] Beckhouse, n 12 above, 12.
[48] Victoria Legal Aid, n 7 above, 80.
[49] National Legal Aid, 'Submission to Australian Law Reform Commission: Review of the Family Law System Issues Paper 48' (National Legal Aid, 2018) 88. Current payment rates for family law matters in Victoria and NSW can be found at: www.handbook.vla.vic.gov.au/handbook/24-payments-to-lawyers-and-service-providers/costs-payable-in-commonwealth-family-law-and-child-support-matters, last accessed 19 December 2018; www.legalaid.nsw.gov.au/for-lawyers/fee-scales/commonwealth-matters/family-matters-practitioner-fees, last accessed 19 December 2018.

mixed service delivery model.'[50] This was certainly a message reiterated by both LAC and private practitioners in these interviews. One LAC ICL when commenting on the mentoring, training and peer support that LACs are able to provide to in-house ICLs said:

> 'Panel practitioners don't have that luxury. They're often isolated, they're often the only lawyer in their firm doing that work, they're often getting pressure from their firm to not do as much of it because it pays so little. They are often pressured to do less because it's just not cost effective, and so I think they have a lot of challenges in really doing that job as best as it could be done.' (#14, Female, LAC, NSW).

Many of the 18 private ICLs (n=12) talked of their ICL work as being 'pro bono' work or how they didn't do it for the money and one spoke of ICL work as being 'money out the door'. This same private practitioner from a boutique specialist family law firm would routinely put all her ICL time into the firm billing sheets just to 'see how much I'm bleeding when I get paid by Legal Aid'(#5, Female, Private, NSW). She worked out that she would be paid about the same for a day's work at a final hearing as an ICL as she would bill per hour for her private work. Another, in a similar firm, calculated that, for her time up to a final hearing, she would earn less than 3% of what she would earn for a similar matter if paid privately (#12, Female, Private, NSW). This conceptualisation of legally aided work as underpaid or unpaid is supported by the finding of a National Pro Bono report that one of the reasons for the seeming lack of pro bono legal work in the family law area was that, in fact, family law practitioners are actually doing so much extra unpaid work for their legal aid or reduced-fee family law clients that they have little capacity to take on additional pro bono legal work.[51] One private practitioner commented that the reasons for not wanting to do ICL panel work were both 'financial and … they're pretty demanding matters. Drug and alcohol, family violence, a whole lot of mental health, because that's what you got to have to be able to get a grant today. The issues that you're dealing with are really significant, and the financial reward, really, is not that great if you're running a private practice' (#3, Female, Private, Vic).

Private practitioners also found the applications to Legal Aid at each stage of a matter, for example, for grants for a particular report, disbursement or mediation, to be burdensome.

> 'And time-consuming you know and when your life is all about billing for your time, every single time you come up against a brick wall at Legal Aid, it's money that you're not making from somebody else. Because you're getting paid little anyway, if they make it difficult as well… That's why I just formed a view that I just don't do it. I will only take on three or four at a time because I like to think that I still do the work properly unlike

[50] www.lawsociety.com.au/sites/default/files/2018-06/Letter%20to%20Legal%20Aid%20NSW%20-%20Legal%20Aid%20NSW%20review%20of%20fees%20-%2010%20April%202018.pdf, last accessed 18 December 2018.

[51] National Pro Bono Resource Centre, 'Pro Bono Services in Family Law and Family Violence: Understanding the Limitations and Opportunities' (Final Report, National Pro Bono Resource Centre, 2013) 17. www. probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf, last accessed 18 December 2018.

some other private practitioners and therefore I can only afford to do a few at any one time.' (#5, Female, Private, NSW).

This view that only some practitioners are doing the work 'properly' permeated interviews with all the ICLs. The current funding appears to place constraints on the level of service that private ICLs are able or willing to provide.[52] This was particularly the case when self-represented litigants were involved:

> 'I spend a lot of time with [self-represented litigants] actually at court events, going through things. So, it does… It can then take a lot of time. It makes longer court events and I think a lot of people are resistant to doing that because there's not a lot of money in it.' (#9, Male, Private, NSW).

The ICLs in this study all described being passionate and motivated about their work, but all (n=31) commented on the fact that there are ICLs doing the work who are not equally passionate, capable or dedicated.[53] The fact that the ICLs chose to give their time and be interviewed about their ICL work for the project may mean that there is a degree of response bias in the interviews. This means that generalisations from the interviews should be made cautiously.[54] It is likely that interviewees were more likely to believe the work and perspectives of ICLs had value. One private practitioner explained:

> 'You do not do it for the money. …Well, some people do it for the money, because you can, you could take on a matter and ignore it until final hearing, I guess and issue a couple of subpoenas, and you know, get away with doing it. But, you know, if you're going to do the job properly, and really think about the matter, and think about how best to represent the children. And collate information together, and make suggestions to the parties about, you know, how they can make the set up work for the kids, and do all that. …And try and resolve it, from time to time, you know, whether it's via a legal aid conference or something else. It can be quite time consuming, but quite rewarding as well. So, it depends what your motivation is, but for the most part our motivation is just because, you know, we think we can do… We can assist a family.' (#12, Female, Private, NSW).

Another LAC ICL said:

> 'Some, [private ICLs] are very proactive and very engaged. Some of them are in it because they think it's easy money, ... And they're quite happy to take the appointment through Legal Aid, and be on the panel, but they're not prepared to do the work. And then they are very disparaging about the level of money that we pay. And I accept that it's a low rate of pay, but don't take the job if you're not prepared to do it properly.' #15, (Female, LAC, NSW).

[52] AIFS ICL study n 30 above, xi, 115–117.
[53] See also: ibid, xii.
[54] Bell n 3 above, 7.

Most of the interviewees considered that the greatest variability in the quality of work was in relation to private practitioners and the main reason for this was financial:

> 'I think that the calibre of ICLs is quite variable. … In particular, well, internally within Legal Aid and externally outside of Legal Aid it is a bit variable, but more so on the outside of Legal Aid. And you've got a very dedicated crew of people who are private practitioners who do ICL work, and it's essentially pro bono work because you're not paid a whole lot for it.' (#12, Female, Private, NSW).
>
> 'I've been in matters where people turn up to court having not interviewed the children, haven't issued a subpoena to a school or [child protection authorities] or whatever. That I suspect is simply a matter of, well, I'm not getting paid for any of that work so I'm not going to do it.' (#5, Female, Private, NSW).[55]

Similarly another private practitioner commented:

> 'I think you would attract more capable lawyers if you... If the remuneration was better. Because it's probably the hardest job in the room. You know, when you've got a difficult matter. ….The time that I take, I might as well be working a McDonalds, you know? If you divide the work by the pay, or the pay by the hours that you do, you know, it'd be less than what I pay my staff.' (#30, Male, Private, NSW).

However, there were also comments from the small number of ICLs (n=4) who had previously worked in-house and were now private practitioners that there were 'lazy' in-house ICLs who probably 'wouldn't do the same level of damage' as a bad panel ICL and would always turn up at trial because to do otherwise would be 'inexcusable', but also showed a 'shocking lack of proactivity'. A large number of the ICLs were clearly exasperated that, 'once you're on the panel it's almost impossible to winkle somebody off' even where judges have complained in judgments about an ICL's performance. One NSW private practitioner stated that 'the lack of will at Legal Aid to actually do anything about it is gobsmacking' (#13, Female, Private, NSW). Similarly a Victorian private ICL stated, 'when you see some of the work done by ICLs, it's clear that nobody's checking that they're doing the right thing' (#27, Female, Private, Vic). A NSW LAC ICL commented that the LAC Panel has options to audit ICLs 'but auditing picks up compliance issues. It doesn't necessarily pick up competence issues or laziness issues' (#15, Female, LAC, NSW).[56]

---

[55] This view that in-house ICLs are generally of higher standard than private practitioners is also given in survey responses from judicial officers, non-ICL lawyers and non-legal professionals reported in the AIFS ICL study n 30 above, 107.

[56] There has been a recent audit of NSW panel ICLs to ensure that meeting with children was a part of their practice, and remedial action for those who failed to do so: National Legal Aid, n 49 above, 101.

Expanded role of an ICL in cases involving self-represented litigants [level B heading}

ICLs are frequently appointed when one or both parties are unrepresented.[57] Approximately one-third of ICLs in the AIFS ICL study reported that their caseload often or always involved matters where 'no parties are legally represented'.[58] Private practitioners interviewed in this study reported that their ICL caseload included much higher proportions of cases where one party was a self-represented litigant compared with their party matters. For example, one interviewee commented, 'I suspect it's about 70%, might be 60% where I'm dealing with litigants in person, certainly over half my matters [where I'm appointed as an ICL]. I guess maybe 5-10% [where I'm a party rep].' (#6, Male, Private, Vic). Harman J found that the rate of appointment of ICLs in his study was a little over one-third in cases involving allegations of family violence, but that this increased to almost 90% of cases where there were allegations of family violence and one or both parties was self-represented.[59]

Rates of self-representation, at some point during proceedings, in Australian family law matters currently sit at around 30%.[60] Various studies have shown that the reasons for self-representation are 'multiple and overlapping'[61], but it is clear that the most prevalent reason for self-representation is financial. That is, the person cannot afford to pay a private legal representative, had been represented but has run out of funds, does not qualify for legal aid, or the legal aid when provided was insufficient to cover the entirety of the proceedings. If an individual does not qualify for a grant of legal aid, they may turn to community legal centres or duty lawyer services, but such services are 'often only able to provide legal advice and assistance with limited tasks' as opposed to full representation.[62]

---

[57] In *Re K* (1994) 17 Fam LR 537 one of the Full Court of the Family Court of Australia guidelines to assist courts when deciding whether to order independent representation for a child was 'custody cases where none of the parties are legally represented'.
[58] AIFS ICL study n 30 above, 27.
[59] Harman, n 43 above, 18.
[60] The Family Court of Australia which deals with the most complex family law cases provides data on the extent of self-representation in its Annual Reports; the rate of self-representation has remained relatively steady in first instance proceedings since 2012, but has been increasing in appeal proceedings: Family Court of Australia, above n 43, 32-33. The Federal Circuit Court of Australia, which handles 87% of all family law matters (excluding Western Australia) does not provide information about self-representation, but a recent Parliamentary inquiry stated that 52% of family law trials in 2014–15 involved at least one party who was unrepresented and in 20% of these cases, both parties were unrepresented: House of Representatives Standing Committee on Social Policy and Legal Affairs, n 44 above, 4.166.
[61] G McKeever et al, 'Litigants in Person in Northern Ireland: Barriers to Legal Participation - Final Report' (2018) 83. See also: ; R Moorhead and M Sefton, 'Litigants in Person: Unrepresented Litigants in First Instance Proceedings' (Discussion Paper 2/05, Department for Constitutional Affairs, 2005); J Macfarlane, 'The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants' (2013); L Trinder et al, 'Litigants in Person in Private Family Law Cases' (Ministry of Justice, 2014); B Toy-Cronin, *Keeping up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person* (PhD Thesis, University of Otago, 2015); N Knowlton et al, 'Cases without Counsel: Research on Experiences of Self-Representation in U.S. Family Court' (Institute for the Advancement of the American Legal System, May 2016); E Richardson, G Grant and J Boughey, 'The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice' (Australian Centre for Justice Innovation, 2018).
[62] National Pro Bono Resource Centre, n 51, 52.

The AIFS ICL study noted that '[b]alancing multiple obligations in cases involving self-represented litigants raised considerable challenges for ICLs'.[63] ICLs were asked specifically about their perspectives on cases where at least one of the parties is self-represented. Recent Canadian research by Rachel Birnbaum and her colleagues has surveyed lawyers who represent children in relation to self-representation but that is the only other known study asking lawyers representing children their perspectives specifically in relation to self-representation.[64] All of the ICLs (n=31) agreed with the view that where there were SRLs their role usually became more challenging and expansive. For example, one ICL commented:

> It just adds complexity and everybody pays for it, if I can put it that way. Like, it takes time in the courtroom, it takes time with the registry staff, it increases the workload of the solicitors in the matter because, you know, you don't just send things off, you send them off with an explanation (#4, Female, Private, NSW).

The impact of self-represented litigants on the ICL workload was noted by interviewees mainly in relation to litigation management and evidence gathering duties, but ICLs also commented that the presence of a self-represented litigant meant the ICL was carrying out a greater proportion of the cross-examination than might otherwise be the case; that more time would be spent dealing with the self-represented litigant and providing them with procedural advice whilst also balancing their duty of impartiality; that time and effort would be involved attempting to balance the vulnerabilities between the self-represented litigants and other parties whilst staying impartial; all in the overall goal of ensuring that children's best interests are protected. ICLs generally found that acting in cases involving self-represented litigants was more work and more stress:

> 'It's a lot more stressful, because people, self-represented litigants tend to be suspicious of everybody involved in the system, and they often think that you're part of the system, whatever the system might be.' (#31, Male, Private, NSW).

Litigation Management and Evidence Gathering [level C heading]

When self-represented litigants are involved in proceedings the ICL plays a very large role in assisting the court to manage and shape the litigation.[65] One ICL explained:

> 'I think especially where there's self-represented parties, [the ICL] is usually, pretty invaluable in terms of keeping the court case progressing and the procedural type side of things.' (#10, Female, LAC, NSW).

ICLs noted that judges relied heavily on ICLs in matters where one or both of the parties is self-represented. One ICL commented 'I think some of [the judges] put a little bit too much burden on the ICLs in terms of preparing joint chronologies and basically making them do a lot of work especially if there's a self-represented litigant.' (#5, Female, Private, NSW)

[63] AIFS ICL study n 30 above, 56.
[64] Birnbaum, Saini and Bala, Growing Concerns about the Impact of Self-Representation in Family Court: Views of Ontario Judges, Children's Lawyers and Clinicians' (2018) 37 *Canadian Family Law Quarterly* 121.
[65] AIFS ICL study n 30 above, 56; see also National Legal Aid, n 49 above, 103.

Additionally, ICLs commented that judges were expecting the ICL to prepare the tender bundle (bundle of subpoena material to be relied upon at hearing) in cases where a party was a self-represented litigant. One LAC ICL commented:

> ‘I think a lot more courts are requiring us to do tender bundles and things like that. Massive amounts of work. I’m fortunate enough I can do that and I have help from people, but those doing it externally really need, I think, to be paid better.’ (#20, Female, LAC, NSW).

Interviewees commented that there was even more work for the ICL if both parties are self-represented litigants:

> ‘there is a responsibility as perhaps the only lawyer before the court.... it’s not the role of the court to take on the parties’ respective jobs. Of course, it’s neither the child representative’s, but someone’s got to do it (#6, Male, Private, Vic).

> ‘So I have a matter coming up in about two months' time where both parties are self-represented and it’s listed for final hearing. So ultimately the matter will fall on the ICL ensuring that mum's case is put before the court, dad's case is put before the court and our view in respect to both of them. So there will be a significant amount of work in that respect.’ (#17, Female, ICL, NSW).

The function of ensuring relevant evidence is obtained and put before the court is a central aspect of an ICL’s role.[66] This is particularly important when parties are self-represented litigants and do not understand the evidence gathering process:

> ‘So you know, [self-represented litigants] don’t issue subpoenas... I mean, a lot of the time you see this in unrepresented parties, the burden does fall on the part of the ICL. So we have to sort of punch above our weight and do stuff that their lawyer would have done. An injustice would happen [if an ICL wasn’t appointed in a case]. The judge would still have to do their best because at the end of the day it’s best interests jurisdiction. So the judge might say, well I need to know these things. But the court can only look at the evidence that’s before it.’ (#30, Male, Private, NSW).

The gathering of evidence is particularly important when there are allegations of abuse or violence which may not be substantiated without further evidence. As Richard Chisholm wrote in his significant report, *The Family Courts Violence Review*:

> ‘The importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence. Where one or both parties are unrepresented, even with the benefits of increased judicial involvement arising from Division 12A, it can be almost impossible for the court to

[66] AIFS ICL study n 30 above, 57.

receive the sort of evidence and argument that can lead it to make an informed decision about the child's best interests.'[67]

However, when the parties are unrepresented in cases involving issues of family violence, it would appear that the burden falls upon ICLs, where appointed, to make sure the court has the necessary evidence. Family courts require 'episodes of FV and risk to be set out in supporting affidavit material' which may be beyond the capabilities of many self-represented litigants.[68] The 2013 *Guidelines for Independent Children's Lawyers* under the heading of family violence and abuse say:

> 'Particular difficulties can arise for the ICL where one or more of the parties is unrepresented. While it is not expected that the ICL will present the case for an unrepresented party, the ICL should ensure that as far as practicable, evidence concerning family violence and abuse that is relevant to the best interests of the child is put before the court.'[69]

One ICL commented that 'a good ICL should be able to get the things that the child wants or needs' and that she would attempt to 'achieve a good child focussed outcome' even if the outcome is not what the parties would 'necessarily want':

> 'I mean it might be a little bit disingenuous, but if you've got information from a child or you formed the view as a result of your engagement with a child that there is some serious family violence concerns but there's no corroboration about that. You might be able to finesse an outcome in different ways, I mean there's 101 ways of skinning a cat.' (#13, Female, Private, NSW).

Encouraging (and Discouraging) Settlement [level C heading]

The AIFS ICL study recognised that the 'ICL role is important in influencing the focus of proceedings that would otherwise be conducted bilaterally in an adversarial manner'.[70] This role becomes even more important when one of the parties is self-represented. Research has found that self-represented litigants are 'significantly less likely than fully represented litigants to have their cases disposed of by means of agreement and consent orders'.[71] Dewar et al found that self-represented litigants 'do not have a feel for the reasonable settlement range of their case, with the result that they either settle too easily, or refuse to settle at all out of suspicion of being taken for a ride.'[72] In cases of violence, a perpetrator's refusal to

[67] R Chisholm, 'Family Courts Violence Review' (Attorney General's Department, 2009) 168–9.
[68] Mutha-Merennege, n 17 above, 258.
[69] National Legal Aid, n 2 above, 12.
[70] AIFS ICL study n 30 above, 53.
[71] R Hunter, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Law and Justice Foundation of NSW, 2002) 71–2; Australian Law Reform Commission, 'Review of the Federal Civil Justice System' (Discussion Paper 62, Australian Law Reform Commission, 1999) 393.
[72] J Dewar, J Giddings and S Parker, 'The Impact of Legal Aid Changes on Family Law Practice' (1999) 13 *Australian Journal of Family Law* 33, 48; R Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156, 158.

settle may be a form of legal systems abuse.[73] One ICL talked about a case where a perpetrator of violence was self-represented. The ICL believed that the self-represented litigant had taken 'enjoyment in forcing [the other party] to go to trial' and that the matter was 'never ever going to not run for trial though, based on the personality [of the self-represented litigant]' (#27, Female, Private, Vic).

Rosemary Hunter has written that self-represented litigants 'are perhaps more willing and determined to go to court, and less aware of non-litigation options, than those who have received legal advice'.[74] Lawyers can manage a client's expectations and provide advice in relation to how a court might view the child's best interests. As one ICL explained, 'I think it is a bit of an obstacle to resolve just because there's not a trusted person there who can give realistic advice and I think that can be very difficult for the self-represented person.' (#9, Male, Private, NSW). Another said '[self-represented litigants] don't get told that their expectations are way outside the realm of possibility' (#30, Male, Private, NSW). In the UK, Trinder et al found that without 'settlement – orientated guidance [SRLs] were unaware that they were expected to engage in pre-court negotiation and other professionals within the family justice system or other information sources were left to emphasise the expectation of settlement'.[75] When one of the parties is self-represented in Australia, ICLs are the professionals who step in, under their core role of representing the child's best interests, to encourage and facilitate settlement.[76] As one interviewee noted:

> 'And I think a lot of the time the ICL really drives settlement negotiations, because you're the only one with no, sort of, real vested interest in that sense other than the child.' (#10, Female, LAC, NSW).

A number of ICLs believed that with increasing delays in the Australian family law system, their role in encouraging settlement had become more important. As one ICL commented:

> 'My experience has been, especially recently with the court delays, that ICLs are being really, really helpful in helping resolve matters where they can …., really narrowing down what are the issues and resolving, so it can progress efficiently as possible.' (#10, Female, LAC, NSW).

With increasing delays in the system, one ICL commented that cases can get 'resolved simply by attrition, not because they've had assistance really by the court. Parties settle, because there is no other option' (#1, Female, Private, NSW). Of course, despite opportunities and pressures to seek agreement at all stages of the litigation pathway, including from ICLs, settlement is not always in the best interests or safety of the children or parties.[77] A 2009 AIFS

[73] H Douglas, 'Legal Systems Abuse and Coercive Control' [2017] *Criminology & Criminal Justice* 1.
[74] Hunter, n 72 above, 169.
[75] Trinder et al, n 61 above, 37.
[76] AIFS ICL study n 30 above, 55–56.
[77] House of Representatives Standing Committee on Social Policy and Legal Affairs, n 44 above, 68–72; A Barnett, 'Contact at All Costs: Domestic Violence and Children's Welfare' [2014] 26 CFLQ 439, 445–46; Hunter, n 72 above, 171.

evaluation of the 2006 family law reforms found that legal professionals reported that 'women felt pressured to agree to outcomes in negotiations that they didn't feel were in their children's best interests' and that this was exacerbated in two contexts: matters in which there was a 'history of family violence' and cases in which there was either no legal representation or an 'imbalance in the quality of the legal representation'[78]. In their survey of lawyers who work with self-represented litigants, Birnbaum and Bala found that only 44 percent of respondents believed that self-represented victims of family violence got 'adequate protection' when their case settled without a judicial order.[79] The AIFS ICL study found that all of the interviewed mothers who reported a history of family violence and/ or safety concerns indicated that they did not feel that their concerns had been taken sufficiently seriously by ICLs.[80] Their concerns included pressures to settle the case together with the focus of the ICLs (and other professionals) being on the mother's attitude to the father rather than on the implications of the family violence. ICLs' encouragement and driving of settlements in parenting matters may involve advising mothers to agree to unsafe contact. The ICL may not consider that they may be compromising their impartiality by recommending settlement in such circumstances, but this encouragement may call into question their construction of the child's best interests in that it is possible that their notion of best interests necessarily involves post-separation contact, narrow notions of the relevance of family violence and avoiding the harm of litigation.[81] This is particularly concerning when ICLs' self-assessments of their ability to respond to risks of harm and safety have been found to be more positive than the assessment of ICLs' ability by others in the system.[82]

Interestingly, some of the ICLs in this study commented that an important aspect of their role is to prevent a settlement which would be unsafe for either the child or one of the parties. Indeed one ICL described herself as being prepared to be the 'scapegoat' if it meant avoiding unsafe parenting orders. She described a case where the mother was 'the victim of chronic family violence and the father was electing to self-represent'. The mother's lawyer had organised a safe room for the victim, but 'just dad's presence or the thought of being in the same courtroom with him was intimidating enough to deter her completely. And she kept putting proposals that of course as ICL I couldn't consent to, but they were basically just to make it all go away.' (#29, Female, LAC, Vic).

[78] Kaspiew et al, n 9 above, 221.

[79] R Birnbaum and N Bala, 'Views of Ontario Lawyers on Family Litigants without Representation' (2012) 63 *University of New Brunswick Law School Journal* 99, 113.

[80] AIFS ICL study n 30 above, 127.

[81] Barnett n 77 above, 462.

[82] AIFS ICL study n30 above, 101.

Cross-examination [level C heading]

In Australia, at the time of the interviews a self-represented party was able to personally cross-examine the other party in family law cases even in matters involving allegations of family violence. In 2019 this position will change.[83]

Being directly questioned in court by a former partner, or having to test their evidence personally, can be traumatising and intimidating. Cross-examination in these circumstances is highly unlikely to produce high quality evidence on which a judicial officer must base their decision.[84] Some judges attempt to manage direct cross-examination by relying on what the Family Law Council has described as 'court craft'.[85] Interviews with ICLs confirmed that when a self-represented litigant was present, even in cases which did not involve violence, a judge might run a trial differently than they would otherwise. In particular, a judge may request that the ICL undertake cross-examination first so that many of the questions have already been asked and answered and so the self-represented litigant sees what cross-examination might look like. This is an attempt to avoid personal cross-examination as much as possible. As one ICL commented:

> 'And it's often the case that the ICL, when there's a self-represented litigant, is expected to do more cross-examination in terms of factual matters. Which otherwise they wouldn't necessarily be asked to do.' (Female, LAC, NSW).

However, whether judges changed court practice in this way was variable and dependent on the discretion of an individual judge[86]:

> 'It can sometimes be a bit of a Russian roulette as to which way it's going to go and you, sort of, get to know judges' preferences and whether or not, you know, you can have a number of different permutations. If you have got self-represented litigants then there will be some judges absolutely who will invite the independent children's lawyer to go first, to cross. You can have some who will say no, I am not going to alter the normal course and this is how we'll run.' (#14, Female, LAC, NSW).

Most of the ICLs had no concerns with changing the order of cross-examination in the majority of cases and even saw it as part of the ICL's role to ensure relevant evidence is put before the court:

> 'Because it's fairly clear that the litigant in person has got no real ability to cross examine, yeah why not - I don't have a problem with that. I think that's one of the ICL's

[83] An Act recently passed Federal Parliament to address this issue - Family Law Amendment (Family Violence and Cross-Examination of Parties) Act 2018 (Cth). See further on this issue: M Kaye, J Wangmann and T Booth, 'Preventing Personal Cross-Examination of Parties in Family Law Proceedings Involving Family Violence' (2017) 31 *Australian Journal of Family Law* 94.

[84] Ibid, 99.

[85] Family Law Council, *Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report - June 2016 (Terms 3, 4 & 5)* (Attorney-General's Department, 2016), 114.

[86] Victoria Legal Aid, n 11 above, 18.

roles, because the main role is to make sure all the evidence gets before the court and if it's not going to get before the court by relying on the cross examination of the person with no legal training then it's not going to happen.' (#22, Male, Private, Vic).

However, almost all of the ICLs had concerns about the practice of ICLs undertaking cross-examination first, particularly in cases in which allegations of sexual or physical abuse against the child or a parent are a critical issue in the case. As one ICL explained, when the ICL cross-examines first it can be 'annoying because then you hear stuff when mum cross-examines, and normally you'd go in and mop up or ask further questions. But you've had your go. So you know, it's sort of... In the interests of, you know, protecting or sort of putting a bubble around an unrepresented party, it means the ICL has to sort of compromise their role in some way' (#30, Male, Private, NSW). One ICL was of the opinion that sometimes it was fine for the ICL to cross-examine first, but she had 2 hearings coming up where 'there's polar opposite competing allegations with sexual abuse and physical abuse' and she would be 'quite concerned' if asked to cross-examine first in those cases. She thought it would cause the parties to 'lose that perception of impartiality' (#10, Female, LAC, NSW). Other ICLs preferred 'it better when everyone runs in order, but… I think you can still maintain your impartiality' (#23, Female, Private, Vic). Some of the ICLs had had experience of the judges 'getting shirty' with them for refusing to cross-examine first. However, they felt quite strongly that there were cases where they should hold their ground. One ICL explained, 'you've got to be so careful about your ethical and professional position about what you can and can't put to somebody. …And often I will refuse to go first in a family violence case for that very reason, I'll say I don't have a source of instructions about critical issues in this case so, you know, I want to go second' (#13, Female, Private, NSW).

Providing advice but not legal advice/avoiding appearance of partiality [level C heading]

ICLs reported that dealing with self-represented litigants usually required more time and attention than might be required if the parties are both represented. ICLs commented that the time spent increases where self-represented litigants have other vulnerabilities such as being victims of violence, needing interpreters, being illiterate, not having access to a computer or having mental health issues. One ICL commented:

> 'Well, as a starting point, I try to make myself more available to discuss administrative process, court procedure, court documents, which takes time at court and in the office. You know, they'll drop in because I have a public office and they'll want to talk to you right then. So, that increases my workload. I'll often be providing copies of documents to them because they won't, unless you actually say here it all is, they'll pretend they haven't received it, or they won't have received it, or they won't accept current address. And then, you know, depending on who they are in the proceedings, you know, a perpetrator, a victim, the role expands.' (#4, Female, Private, NSW).

ICLs reported that they spent a lot of time explaining their role to self-represented litigants 'because they're often misguided, and they'll think that you're [directly] representing the

children' (#11, Female, Private, NSW). One explained that 'you'll get a lot more correspondence from a self-represented litigant. There's also a feeling that because you act for the child they're adamant they know what the child wants. So therefore they're telling you what you should be doing.' (#16, Female, LAC, NSW). One ICL commented that judges would rely on him to 'ease the pain' for self-represented litigants, which was not necessarily his job, 'but it sort of goes with the territory' (#31, Male, Private, NSW). ICLs were very conscious that self-represented litigants needed advice and assistance but were also conscious that they should not provide self-represented litigants with legal advice and must maintain the perception of impartiality.

> 'It is part of the culture that you're very careful about talking to litigants, and I think that's a real pity because I think that, it's actually really important. Not to give people legal advice, you can't do that, but to steer people realistically in a direction that's not going to lead to a really harmful outcome.' (#9, Male, Private, NSW).

> 'When there are self-represented litigants, we end up doing a much bigger job, and probably not the job that we are supposed to be doing in fixed terms. It does become a little unbalanced, and I think that leads to some perception of bias sometimes.' (#12, Female, Private, NSW).

Despite trying to avoid the perception of bias, all of the ICLs had dealt with self-represented litigants who were very difficult to deal with:

> 'I've had litigants in person write me unbelievably abusive emails, because they perceived that something that I've said is biased. Unfortunately, some of these litigants in person perceive you disagreeing with them as bias and that creates a problem because you have to strictly enforce the rule that any correspondence with the ICL has to be CC'd in to the other party.' (#22, Male, Private, Vic).

It appears that abuse and verbal threats from self-represented litigants are not uncommon. One ICL said:

> 'But also, there are self reps that are very abusive and horrible, and we give them an outlet for that. So, they let it rip with us, and that's pretty unpleasant, but that's something that can often happen, and then they'll turn their focus onto us….I suppose maybe 60% of the time they're respectful, they're polite, but you get the ones that are just really nasty, abusive, unrestrained.' (#26, Female, LAC, Vic).

One ICL commented that 'It can be a pretty dangerous job' while another said:

> 'I'd certainly say it is more problematic managing male self-represented litigants than female self-represented litigants.
>
> *Why do you say that?*
>
> Just because of the level of the aggression in my experience. For instance, in 30 years, no woman has ever threatened to kill me, but I've had lots of men who have as litigants. And, I mean, that's a pretty brute way of measuring it, but that certainly, that's my

experience. I've had lots of women who've been deeply unhappy with me and none of them threatened to kill me.' (#9, Male, Private, NSW).

Balancing vulnerabilities [level C heading]

The AIFS ICL study noted that, 'where one party is unrepresented, or represented by inexperienced [or incompetent] lawyers, the ICL can ameliorate the imbalance that occurs in these instances.'[87] This was echoed by one interviewee who stated:

> 'I think particularly where there's a more vulnerable parent that having an ICL is really useful, particularly if that person's not represented. That also goes the other way, like where the other parent is self-represented and they're a brute, that the other party doesn't have to deal with them directly.' (#3, Female, Private, Vic).

Another ICL went further, saying, 'But if you don't have an ICL, the unrepresented party's hung out to dry. It's such an uneven contest.'(#30, Male, Private, NSW).

Added burdens to the ICL's role in cases of violence where the alleged perpetrator is a self-represented litigant involve ensuring that subpoenaed material does not disclose the whereabouts of the victim. As one ICL commented:

> 'If dad was represented we would deal with that very easily, which is just the lawyers would inspect the material. But because dad's not represented he needs to have access to all the material that all the parties have, and the family consultant has, because he needs to know the case that's being put before the court. But at the same time we're trying to balance that against mum's need for protection and safety and security. And that's just such a small example but it's actually quite complex and time consuming trying to get around all of those considerations.' (#29, Female, LAC, Vic).

There are limits to the protection that an ICL is meant to provide to the parties in cases of violence. The Family Law Council 2016 report on families with complex needs noted that it is not the role of an ICL to 'advocat[e] for appropriate protections to be put in place during examination of a party who has experienced family violence where the other party is unrepresented. Nor is it within the scope of the Independent Children's Lawyer's role for them to implement safety plans for vulnerable self-represented parties.'[88] Indeed, only two of the 31 interviewees had ever requested special arrangements in their role as ICL to protect a witness from personal cross-examination. Most of the interviewees commented that they had never seen a request for special arrangements be made to protect a self-represented litigant either by a party representative or an order made on the court's own motion.

From Best Interests representatives to Counsel Assisting? [level B heading]

The interviews revealed the strains and increased demands placed on ICLs in recent years. ICLs all commented that judicial officers were relying on them to alleviate the burdens on the

[87] AIFS ICL study n 30 above, 56.
[88] Family Law Council, n 85 above, 134.

court in matters where parties are not represented. Birnbaum et al have concluded that there are 'financial costs to publicly funded services when parents disputing child custody or access are self-represented'.[89] This also seems to be the case in the Australian context although some of the financial and emotional costs are clearly being borne by the ICLs themselves. Private ICLs are undoubtedly under-funded for their work, meaning much of their work is currently performed pro bono.[90] The current position is unsustainable; without change, dedicated private practitioners prepared to undertake ICL work will continue to decrease.[91]

The findings that ICLs caseloads have become more complex and that assigned legal practitioners paid by LACs are underpaid are not new. National Legal Aid, in a recent submission to Australian Law Reform Commission, *Review of the family law system* commented on the increased complexity of the cohort of families using the family court system and noted the wide range of tasks that ICLs are expected to perform. This 'stretching' of ICLs together with the increased expectations of many players placed on the ICL role have led to general community disappointment with ICLs.[92] As has been seen, matters may become even more complex for ICLs where one or both parties are self-represented. In Canada, Birnbaum et al have questioned the 'extent to which advocates for children, …, are mitigating the effects of parental self-representation'.[93] It became very clear during these interviews that in cases involving self-represented litigants the role of the ICL is crucial to shaping the matter, smoothing the proceedings[94] and encouraging settlement, but it is not clear that they are able to carry out all these roles and ensure that the best interests of children are truly paramount, not just in legal doctrine, but in practice.[95]

This combination of caseload complexity, underfunding, criticism of the lack of children's involvement in legal proceedings, juxtaposed with increasing judicial reliance on ICLs has led to some recent tentative reimagining of the current ICL model. National Legal Aid has suggested that the ICL model be 'enhanced' through 'the greater availability of social science professionals to work with ICLs [throughout the court process] to improve participation in the family law system and the assessment of the child's best interests'.[96] The Australian Law Reform Commission (ALRC) responded in its Discussion Paper by suggesting a new professional role, 'the children's advocate', who confusingly would not be a legal advocate, but rather a social science professional with expertise in child development to support children's participation. ICLs (to be called 'separate legal representatives') would then focus

---

[89] Birnbaum, Saini and Bala, n 64 above, 121.
[90] AIFS ICL study, n 30 above, 115–119.
[91] Ibid 118; A Patty, *Lawyers Threaten to Walk Away from Legal Aid* (27 May 2018) The Sydney Morning Herald www.smh.com.au/business/workplace/lawyers-threaten-to-walk-away-from-legal-aid-20180523-p4zgzn.html, last accessed 18 December 2018.
[92] National Legal Aid, n 49 above, 88.
[93] Birnbaum, Saini and Bala, n 64 above, 129.
[94] Thank you to an anonymous referee for making this point.
[95] N Semple, 'Whose Best Interests? Custody and Access Law and Procedure' (2010) 48 *Osgoode Hall Law Journal* 287.
[96] National Legal Aid, n 49 above, 88.

on their evidence-gathering and litigation-management functions although it is not yet clear in which cases both a children's advocate and a separate legal representative (presumably together with a family report writer) would be appointed.[97] It is also unclear how the various "advocates" for children would interact with one another. Victoria Legal Aid has alternatively suggested that the ALRC consider a 'Counsel Assisting model' be incorporated into the ICL role.[98] The Family Law Council has previously suggested a pilot of a 'Counsel Assisting model' in the family courts to address the limited capacity of self-represented litigants to gather and present relevant evidence to the courts in cases where there are safety concerns for the child.[99] The Family Law Council envisaged that this may be in addition to an ICL appointment in appropriate cases, particularly those involving an unrepresented party who has experienced family violence, and recommended that the viability of a pilot scheme be explored.

All of these tentative suggestions are acknowledgments that the role of the ICL has expanded beyond that originally envisaged and now encompasses the job of two people in some cases. All of the suggestions have significant resource implications which make it less likely that the role will be remodelled in the near future. After all some of the current problems emerge from ICLs being overstretched and underpaid. However, splitting the ICL role into two may be a way forward: one representative would act as a children's advocate whose role is to represent children's interests, assist children express their views, and navigate the system. The other representative would be appointed where at least one of the parties are unrepresented and/ or the case involves family violence or other safety concerns for a child; they would explicitly carry out a 'counsel assisting' role to 'smooth proceedings'. Their role would be to assist an unrepresented party to narrow the issues in dispute, arrange for special arrangements and safety plans to be put in place to protect a party who has experienced family violence, and to generally support the judicial officer in their inquiries.

Conclusion [level B heading]

The proportion of matters in which ICLs are appointed has increased.[100] Lawyers for children were originally appointed in relatively exceptional cases[101], but are now appointed in around one third of all parenting matters. Given the increasing complexity of cases dealt with by the family courts together with the high levels of self-representation, it appears judges will continue to make orders for appointments in even greater proportions of cases in the future. This small snapshot of ICLs' perspectives exposed an increasing dependence by judicial

[97] Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper*, (ALRC, 2018), proposals 7-8, 7-9, 7-10.

[98] Victoria Legal Aid, n 7 above, 81.

[99] Family Law Council, n 85, 67, 134.

[100] R Kaspiew et al, 'Getting the Word out: The Role of Independent Children's Lawyers in the Family Law System' 28 AJFL 29, 32.

[101] W Keough, 'The Separate Representation of Children in Australian Family Law - Effective Practice or Mere Rhetoric' (2002) 19 *Canadian Journal of Family Law* 371, 383 historically, separate representation of children was 'only ordered in cases that involved serious allegations of physical, emotional or sexual abuse'.

officers on ICLs in parenting matters, particularly those involving self-represented litigants.[102] It has been argued that if parties are not represented then children should be.[103] However, my study suggests that in practice such representation can be more for the benefit of the legal system than the child.

Self-representation has 'long been a focus of policy concern in many jurisdictions'.[104] Self-represented litigants are, arguably, seen as 'problems in themselves' as opposed to 'people with problems to be solved'.[105] One way for judges to 'solve' this problem in parenting matters is to appoint an ICL. As such, a reason for the appointment may be, as one ICL commented:

> 'more to help with the process rather than because the matter is one that needs an ICL. And I can understand the sense in that because it does help. But, you know, in the same breath it's not really the role of the ICL to be doing that' (#19, Female, LAC, NSW).

This increased requirement to focus on the evidence gathering and litigation management functions of ICLs as opposed to the facilitation of children's participation function is of concern without further changes. Research has identified concerns of parents and children about lack of meaningful contact between ICLs and children[106] and the subsequent lack of empowerment of children in the system.[107] There is a danger that ICLs are being asked to focus on smoothing proceedings, and on being the system's solution to the difficulties caused by self-represented and difficult litigants as opposed to focussing on safe outcomes for children. The time is ripe for a reimagining of the ICL role with a split of the role into one expressly assigned to assist the court and one focussing on representing the children who are the subject of the proceedings.

---

[102] See also: AIFS ICL study n 30 above, 53–64.
[103] Chisholm, n 67 above, 170.
[104] Trinder et al, n 61 above, 5. See also; J Dewar, B Smith and C Banks, 'Litigants in Person in the Family Court of Australia' (Family Court of Australia Research Report 20, Family Court of Australia, 2000); R Hunter et al, n 71 above; Knowlton et al, n 61; R Birnbaum, M Saini and N Bala, n 64 above; M Mansfield, 'Litigants Without Lawyers: Measuring Success in Family Court' (2016) 67 *Hastings Law Journal* 1389.
[105] A Barnett, 'Family law without lawyers – A systems theory perspective' (2017) 39(2) J Soc Welfare & Fam L 223, 234.
[106] AIFS ICL study above n30 157-158; R Carson et al, *Children and young people in separated families: Family law system experiences and needs* (AIFS, 2018) 48, 51-53.
[107] Bell n 32 above, 225.