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Centre for Children  
and Young People



**DISCUSSION PAPER:**  
*Facilitating the Participation of Children in  
Family Law Processes*

FAMILY LAW-LEGAL AID NSW

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This Discussion Paper was prepared as part of a larger research project, *Facilitating the Participation of Children in Family Law Processes*, being conducted by the Centre for Children and Young People at Southern Cross University in partnership with Legal Aid NSW.

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# 1. INTRODUCTION

Legal Aid NSW has engaged the Centre for Children and Young People at Southern Cross University to conduct research aimed at developing a model of good practice for child representatives. The project seeks to identify practices and approaches to child representation that potentially enhance children's experience of participating in family law and care and protection matters. The first stage of the project involves undertaking a literature review, presented in the form of a Discussion Paper. An examination of key issues raised in the brief follows.<sup>1</sup>

This Discussion Paper reviews the research literature on children's participation in family related proceedings and specifically, children's relationship with their lawyers in those proceedings. While there is debate about the precise role that the lawyer for a child should play in various contexts, the review does not engage in depth with these issues save where they require explanation in order to give context to other findings.

A note on terminology: For brevity, the paper refers to 'children' rather than 'children and young people' and to 'parents' rather than 'parents and carers'.

## 1.1. RULES & LEGISLATIVE GUIDANCE

The background to this review is child representation occurring in two different contexts in New South Wales: family law, and care and protection proceedings.

It is important to note that in most cases, prior to parental separation or State intervention, it is the child's parents who determine how much 'say' children will have within the family.

In matters pursuant to the *Family Law Act 1975* (Cth) (**FLA**) parents will, in many instances, similarly decide how much input children have into post-separation arrangements, which may or may not reflect how the family operated pre-separation. In some cases, children may participate in child-inclusive family dispute resolution processes prior to any court filing.<sup>2</sup> Once

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<sup>1</sup> Centre for Children and Young People, 'Legal Aid NSW Project Proposal: Facilitating the Participation of Children in Family Law Processes'.

<sup>2</sup> See Jennifer E McIntosh, Caroline Long and Lawrie Moloney, 'Child-focused and child-inclusive mediation: A comparative study of outcomes' (2004) 10(1) *Journal of Family Studies* 87; Felicity Bell et al, 'Choosing child-inclusive mediation' (2012) 23 *Australasian Dispute Resolution Journal* 253. On the 'ambiguity' surrounding this participation see Robyn Fitzgerald and Anne Graham, 'The changing status of children within family law: From vision to reality?' (2011) 20(2) *Griffith Law Review* 421, 438-439.

court proceedings have been commenced, children may also be involved in a Child Inclusive Conference.<sup>3</sup> Yet even after parents are involved in court processes, children's participation is not automatic. Children may attend upon a family report writer or expert witness for the preparation of a family report.<sup>4</sup> They may have an Independent Children's Lawyer (ICL) appointed to represent their interests.

Whether or not an ICL is appointed is at the discretion of the court.<sup>5</sup> There is legislative direction about the role of the ICL.<sup>6</sup> The role is a 'best interests' one (s 68LA(2)) though the ICL is also required to put forward the child's views (if expressed) to the court. In addition there are court-approved *Guidelines* about the ICL's role.<sup>7</sup>

In child protection proceedings pursuant to the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (CCPA) the court may also appoint a legal representative for the child.<sup>8</sup> The representative may be either an Independent Legal Representative with a best interests role or a Direct Legal Representative who acts on instructions. Presumptions operate so that a child of 12 years and above will be assumed to be able to instruct a lawyer 'directly', though this can be rebutted.<sup>9</sup> The Local Court Bench Book indicates that children should always be represented in care proceedings.<sup>10</sup>

The NSW Law Society has published *Representation Principles for Children's Lawyers* which refer both to ICLs and Children's Court representatives.<sup>11</sup>

## 1.2. POLICY BACKGROUND

Various government reports dealing with children's involvement in legal processes have been produced in Australia.

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<sup>3</sup> FLA s 11F.

<sup>4</sup> FLA s 62G.

<sup>5</sup> FLA s 68L.

<sup>6</sup> FLA ss 68L, 68LA and 68M.

<sup>7</sup> National Legal Aid, *'Guidelines for Independent Children's Lawyers'* (National Legal Aid, 2007).

<sup>8</sup> CCPA ss 99 and 99D.

<sup>9</sup> CCPA ss 99A, 99B and 99C.

<sup>10</sup> Judicial Commission of NSW, *Local Court Bench Book*, 47-260.

<sup>11</sup> New South Wales Law Society, *Representation Principles for Children's Lawyers* (3<sup>rd</sup> ed, September 2007).

In 1997 the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission published *Seen and heard: priority for children in the legal process*. This wide-ranging law reform report was published after the release of two Issues Papers (one specifically aimed at children and young people), public hearings, meetings with legal practitioners, medical professionals and youth workers, focus groups, surveys, consultations and the provision of statistical information by a number of entities. It includes chapters on children's legal representation and children's involvement in family law. This report is now over 15 years old; nevertheless it gives a broad overview of children and the law and identifies some issues which remain unresolved today.

Some years later, the Family Law Council produced *Pathways for Children: A Review of Children's Representation in Family Law* (2004). This report responded to an urgent Federal Government directive, and followed the Family Law Pathways Advisory Group's report *Out of the Maze: Pathways to the Future for Families Experiencing Separation* and also the Council's earlier report *Involving and Representing Children in Family Law* (1996). *Pathways for Children* was not the product of a consultation process, although the authors carried out a small survey of judicial officers and family court counsellors (as they were then called). Ultimately the report recommended no major changes be made to the existing system of family law representation, namely, that child representatives remain a best interests role, and that the child's representative continue to be a lawyer rather than a social science professional.

Nevertheless, *Pathways for Children* made recommendations 'to clarify and strengthen the role' of the child's lawyer. Some of these recommendations were later implemented by the family law reforms which came into force in 2007.<sup>12</sup> Of particular significance however are the reforms that were *not* implemented and research not carried out. For example, research was recommended into the reasons for appointment of children's representatives and the growing number of appointments being made.

Kaspiew et al (2013) conducted research specifically on Independent Children's Lawyers. Kaspiew et al surveyed ICLs, other lawyers and barristers, non-legal family law professionals, and judicial officers,<sup>13</sup> and also conducted interviews with 24 parents/carers, ten young people,

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<sup>12</sup> Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

<sup>13</sup> Rae Kaspiew et al, *Independent Children's Lawyers Study: Final report* (Australian Institute of Family Studies, 2013) viii-ix: 508 surveys in total.

and 20 ICLs.<sup>14</sup> This report found divergence in practice amongst ICLs, as well as widespread dissatisfaction with ICLs, primarily from non-ICL lawyers and non-legal professionals.<sup>15</sup> The report also found that ‘the ICL’s role in facilitating [children’s] participation is of less significance than the evidence-gathering and litigation management functions’.<sup>16</sup>

As this section suggests, there has been a greater research focus on ICLs than children’s representatives working in the Children’s Court, which is reflected in the following discussion.

## 2. IDEAS AND ASSUMPTIONS ABOUT CHILDREN AND CHILDHOOD

This section deals with children’s ability to understand the role of the child representative and the desirability of encouraging such understanding.

There is now a substantial body of literature dealing with theories about children and childhood in various ways and across different disciplines, such as education, psychology and sociology, as well as law.

It is impossible not to recognise that children of different ages are not the same in terms of their needs, desires, abilities and capacity: consider an 18 month old compared to a 4 year old, a 7 year old or a 13 year old. Guggenheim has observed the difficulties inherent in making rules about the legal representation of children when dealing with a group ranging in age from infant to adolescent.<sup>17</sup> Studies have also found that children’s understanding of legal concepts increases with age.<sup>18</sup>

Therefore, it is hard to avoid fundamental concepts from developmental psychology when thinking about meetings with children: many texts on working with children begin with such an overview.<sup>19</sup> Nevertheless, an overly deterministic or rigid account of children’s development

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<sup>14</sup> Ibid ix.

<sup>15</sup> Ibid x.

<sup>16</sup> Ibid.

<sup>17</sup> Martin Guggenheim, 'The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective' (2009) 22(2) *Journal of the American Academy of Matrimonial Lawyers* 251.

<sup>18</sup> Jodi A Quas et al, 'Maltreated children's understanding of and emotional reactions to dependency Court involvement' (2009) 27 *Behavioral Sciences and the Law* 97.

<sup>19</sup> Often these texts invoke the work of Jean Piaget: see for example Judicial Commission of NSW, *Children’s Court of NSW Resource Handbook* (2000) [1-0075]; Lani Blackman, *Representing Children and Young People: A Lawyer’s Practice Guide* (2002) 38-39.

has been challenged, not least by theories referred to as the 'new sociology of childhood'. This perspective has been influential particularly in research on children's participation for two reasons. Firstly, it focuses solely on childhood in and of itself (rather than as adjunct to other socio-cultural concerns). Secondly, it propounds the idea that childhood is socially constructed (or at least that there is an aspect of social construction in addition to actual developmental differences and structural constraints operating on children). How children are 'seen' in social life is a concern of this work, but also the ways in which children are social actors who participate in constructing their own worlds.<sup>20</sup> Accordingly, this perspective rejects a focus on rigid ideas about children's lack of competence. However, as Lawrence has observed, at times this critique overlooks the more nuanced understandings of current developmental psychology. She explains:

Anti-developmental criticisms that see practitioners as locked into viewing children as intellectually incompetent can now be considered out-of-date, due to the wide agreement among developmentalists that most children are more competent at an earlier age than Piaget's stage classifications suggested. Developmentalists also mostly acknowledge the unevenness of children's progressions across different forms and levels of change. Innovative methods of presenting tasks and asking questions, and greater attention to cultural meanings and the familiarity of the materials, tasks and situational demands all point to varied progressions in children's cognitive abilities that once were assumed to move forward in tight stepwise stages.<sup>21</sup>

There is also greater understanding now that nature and nurture in fact go together, as human brain development continues into early adulthood, thus 'the nature versus nurture question is misleading because it forces us to choose between influences that are interdependent'.<sup>22</sup> In

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<sup>20</sup> Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Polity, 1998); Liz Trinder, 'Competing Constructions of Childhood: children's rights and children's wishes in divorce' (1997) 19 *Journal of Social Welfare and Family Law* 219; Pia Christensen, 'Difference and similarity: how children's competence is constituted in illness and its treatment' in Ian Hutchby and Jo Moran-Ellis (eds), *Children and Social Competence: Arenas for Action* (Falmer, 1998) 186; Bren Neale and Carol Smart, 'Agents or Dependents?: Struggling to listen to children in family law and family research', Working Paper 3 (Centre for Research on Family, Kinship and Childhood, Leeds, 1998); Bren Neale, 'Introduction: young children's citizenship' in Bren Neale (ed), *Young Children's Citizenship* (Joseph Rowntree Foundation, 2004) 6.

<sup>21</sup> Jeanette Lawrence, 'The Developing Child and the Law' in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (2008) 83, [4.16].

<sup>22</sup> Theodore P Beauchaine and Lisa M Gatzke-Kopp, 'Genetic and Environmental Influences on Behavior' in Theodore P Beauchaine and Stephen P Hinshaw (eds) *Child and Adolescent Psychopathology* (2013) 111, 112.

other words, experiences in childhood affect the way that the brain develops physically.<sup>23</sup> Accordingly, deprivation in early childhood years can have lasting impacts.<sup>24</sup> Levitt writes that:

both genes and early environmental factors (e.g., malnutrition, infection, opportunities, and challenges in learning, depth of exposure to language, interpersonal interactions, and so forth) can introduce differences amongst individuals in their initial brain architecture (Knudson 2004) as well as in later synapse formation, with regard to how they respond to a particular experience (ibid).<sup>25</sup>

In a legal setting, sociological ideas about childhood are used to critique legalistic views of children as incompetent, in need of protection, or delinquent.<sup>26</sup> This also calls up issues about children's powerlessness and the desirability of 'empowerment' for children. Much recent literature has promoted a new view about competence: that children's capacities are variable and context-dependent; and that children can be assisted or enabled to participate.

The decision of the House of Lords in *Gillick*, later approved by the High Court in *Marion's Case*, adopted a sliding scale test of individual competence rather than a purely biological or age-based one.<sup>27</sup> Nevertheless, age-based laws and rules abound, not least in the presumption of capacity to instruct contained in the CCPA. Solicitors' alarm at potentially carrying out assessments of children's competence is not a new phenomenon.<sup>28</sup> Sawyer (1994) conducted a study with 18 Children Panel solicitors in England, responsible for representing children in

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<sup>23</sup> Pat Levitt, 'Structural and functional maturation of the developing primate brain' (2003) 143(4 Suppl) *Journal of Pediatrics* S35; Jennifer E McIntosh, 'Enduring conflict in parental separation: Pathways of impact on child development' (2003) 9(1) *Journal of Family Studies* 63.

<sup>24</sup> Lawrence, above n 21, [4.15].

<sup>25</sup> Pat Levitt, 'Building Brain Architecture and Chemistry: A Primer for Policymakers' in Alvin R Tarlov and Michelle Precourt Debbink (eds), *Investing in Early Childhood Development: Evidence to Support a Movement for Educational Change* (Palgrave Macmillan, 2008) 3; citing E Knudsen, 'Sensitive periods in the development of the brain and behavior' (2004) 16 *Journal of Cognitive Neuroscience* 1412.

<sup>26</sup> See Ezra Hasson, 'Seen but not really heard? Testamentary guardianship and the conceptualisation of children in English law and practice' (2013) 27(2) *International Journal of Law, Policy and the Family* 216; quoting Felicity Kaganas and Alison Diduck, 'Incomplete citizens: changing images of post-separation children' (2004) 67(6) *Modern Law Review* 959, 961. Citing also Julia Brannen and Margaret O'Brien, 'Childhood and the Sociological Gaze: Paradigms and Paradoxes' (1995) 29(4) *Sociology* 729; Alan Prout and Allison James, 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in Alan Prout and Allison James (eds), *Constructing and reconstructing childhood: contemporary issues in the sociological study of childhood* (Routledge, 2<sup>nd</sup> ed, 1997); David Archard, 'Philosophical perspectives on childhood' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001); A James, 'Responsibility, children and childhood' in Jo Bridgeman, Heather Keating and Craig Lind (eds), *Responsibility, Law and the Family* (Aldershot, 2008) 145.

<sup>27</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

<sup>28</sup> See Caroline Sawyer, 'The competence of children to participate in family proceedings' (1995) 7 *Child and Family Law Quarterly* 180, 182; NSW Law Society, above n 11, 10 (Principle B3); 12 (Principles C1 and C2).

care proceedings,<sup>29</sup> in order to see how they went about assessing children's competence. This was necessary due to similar presumptions about the type of representation accorded: the dual nature of children's representation in England means that there are typically two people involved in representing the child: the guardian *ad litem*, who is usually a qualified social worker and acts on a best interests basis, and a solicitor appointed by the guardian.<sup>30</sup> Though the general *process* or lines of reasoning adopted by solicitors were similar, their conclusions were quite different. Sawyer ultimately saw problems with solicitors continuing to act for children without a guardian (i.e., where there was a clash between the child's views and the guardian's ideas about best interests).

## 2.1. PARTICIPATION

Since the 1990s, there has been a growing academic focus on the importance of children's 'participation' in social life but what precisely is meant by participation is not always clearly defined. Lansdown refers to the 'ladder of participation' theorised by Hart,<sup>31</sup> from which many spin-off models have been derived.<sup>32</sup> However, the linear or hierarchical implications of a ladder or stepped model have also been disavowed by some such as Shier who espouse a more contingent and contextual approach.<sup>33</sup> Fitzgerald and Graham have also noted the contingent nature of children's participation:

Children's experience of participation, and its representation in debates concerning their place in social and political life, is increasingly characterized as ambiguous, uncertain and contested.<sup>34</sup>

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<sup>29</sup> Sawyer, above n 28, 185.

<sup>30</sup> The solicitor acts upon the instructions of the guardian, unless the child's wishes are in conflict with the guardian's opinion and the solicitor forms the view that the child is capable of instructing him or her directly. In that case, the solicitor can represent the child directly and the guardian must find another solicitor. The authors noted differing views amongst solicitors as to whether their 'client' was the child or the guardian.

<sup>31</sup> Gerison Lansdown, '*Promoting Children's Participation in Democratic Decision-Making*' (UNICEF Innocenti Research Centre, 2001); referencing Roger Hart, '*Children's Participation: From Tokenism to Citizenship*' (1992) UNICEF Innocenti Essays 4; adapting the model of S Arnstein, '*The ladder of citizen participation*' (1969) 35(2) *Journal of the American Institute of Planners* 216.

<sup>32</sup> Ruth Sinclair, '*Participation in practice: Making it meaningful, effective and sustainable*' (2004) 18(2) *Children and Society* 106; Neil Spicer and Ruth Evans, '*Developing children and young peoples' participation in strategic processes: the experience of the Children's Fund initiative*' (2006) 5(2) *Social Policy and Society* 177.

<sup>33</sup> Harry Shier, '*Pathways to participation: Openings, opportunities and obligations*' (2001) 15 *Children and Society* 107.

<sup>34</sup> Anne Graham and Robyn Fitzgerald, '*Progressing children's participation: Exploring the potential of a dialogical turn*' (2010) 17(3) *Childhood* 343, citing Anne Trine Kjørholt, '*Small is powerful: Discourses on 'children and participation' in Norway*' (2002) 9(1) *Childhood* 63; Sirkka Komulainen, '*The ambiguity of the child's "voice" in social research*' (2007) 14(1) *Childhood* 11; Michael Wyness, Lisa Harrison and Ian Buchanan (2004)

In part, this derives from uncertainty about the particular justification or motivation *for* children's participation. Differing rationales have been identified:

- Enlightenment: children can make valuable contributions to decision-making about matters affecting them because they have a unique perspective on their own lives
- Empowerment: children have capacity to participate and the right to participate
- Citizenship: according children respect based on their status in society where they are located somewhere between current and future citizens.<sup>35</sup>

Child participation is given a moral impetus by some: Smart, Neale and Wade have suggested that it is 'ethical' to understand children's viewpoints as different and unique.<sup>36</sup> In terms of legal impetus, Article 12 of the United Nations Convention on the Rights of the Child (**UNCROC**) is frequently invoked (and sometimes also Article 13). Article 12 specifies that children should have the right to participate in decisions affecting their lives; Article 13 deals with freedom of expression. The remainder of UNCROC, however, is concerned with rights to protection and to provision.

The means by which children's voices are "heard" in disputes concerning their family have remained unchanged for a number of years. The FLA has always made provision for children's views to be heard whether via legal representative, family report, or by speaking directly to the judicial officer.<sup>37</sup> Of course, these mechanisms are available only when litigation has been commenced. Prior to litigation, 'hearing' the child's voice is a matter to be determined within the family. In care proceedings, it is also intended that children's views be expressed either directly or via the legal representative.<sup>38</sup>

The focus on children's participation in legal disputes concerning their families has led to a number of studies examining children's views about this. These range from studies of children's relationship with legal practitioners or care workers, to broader sociological works

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'Childhood, politics and ambiguity: Towards an agenda for children's political inclusion' (2004) 38(1) *Sociology* 81.

<sup>35</sup> Graham and Fitzgerald, 'Progressing children's participation', above n 34; Judy Cashmore, 'Children's participation in family law decision-making: Theoretical approaches to understanding children's views' (2011) 33(4) *Children and Youth Services Review* 515; Spicer and Evans, above n 32, 178-79.

<sup>36</sup> Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity, 2001) 156.

<sup>37</sup> FLA ss 55A(2), 62G and 68L.

<sup>38</sup> Judicial Commission of NSW, above n 19, [2-0200].

such as that of Smart, Neale and Wade (2001) on children's post-separation family life.<sup>39</sup> A scoping review of 35 qualitative studies of children's experiences with parental separation and divorce was published by Birnbaum and Saini (2012).<sup>40</sup> These authors conclude that '[a] common theme expressed by the children in these studies is that they want to have a voice and input into decision making regarding parenting plans post separation and/or divorce'.<sup>41</sup>

As Birnbaum and Saini note, it is widely understood and accepted (at least in academic circles) that children desire some involvement in post-separation planning. The issue is the nature of involvement and how it ought be facilitated or supported. Typically, 'voice' is distinguished from 'choice': children may wish to have a say but this is distinct from wishing to be a decision maker.<sup>42</sup> However, despite a discursive shift toward viewing children's competence as 'malleable' and from the *assessment* of competence to supporting and hence enhancing participation,<sup>43</sup> there is a lack of more direct and practical guidance as to how this ought to be undertaken by legal professionals.

Identifying conflicting policy messages about children's participation in family disputes, Fitzgerald and Graham observe:

There is also a growing realisation that while listening to the voices of children represents an important start, actually *engaging* adequately and authentically in the listening (and responding) in family law contexts is challenging.<sup>44</sup>

The idea of 'scaffolding' children's participation is often espoused.<sup>45</sup> Horsfall describes scaffolding as 'what lawyers can *do* to facilitate children's participation'.<sup>46</sup> Lawrence writes:

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<sup>39</sup> Smart, Neale and Wade, *The Changing Experience of Childhood*, above n 36.

<sup>40</sup> Rachel Birnbaum and Michael Saini, 'A Qualitative Synthesis of Children's Participation in Custody Disputes Research on Social Work Practice' (2012) 22(4) *Childhood* 400.

<sup>41</sup> Ibid 407; see also Judy Cashmore et al, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department*, Sydney (Commonwealth of Australia, 2010) 137.

<sup>42</sup> Bren Neale, 'Dialogues with children: children, divorce and citizenship' (2002) 9(4) *Childhood* 455; Harriet Bretherton, 'Because it's me the decisions are about' – children's experiences of private law proceedings' (2002) 32 *Family Law* 450; Judy Cashmore, 'Children's participation in family law matters' in Christine Hallett and Alan Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (Routledge/Falmer, 2003) 157.

<sup>43</sup> Jessica Cherry, 'The child as apprentice: Enhancing the child's ability to participate in custody decisionmaking by providing scaffolded instruction' (1999) 72(2&3) *Southern California Law Review* 811, 813.

<sup>44</sup> Fitzgerald and Graham, *The changing status of children*, above n 2, 441 (emphasis in original).

<sup>45</sup> This concept is typically attributed to Lev Vygotsky's 'zones of proximal development'.

<sup>46</sup> Briony Horsfall, 'Breathing life into children's participation: Empirical observations of lawyer-child relations in child protection proceedings' (2013) *New Zealand Law Review* 429, 433.

The adult provides the child with a supporting framework that allows the child to proceed where it would be difficult alone. The adult may ask a question and supply the words that help the child to say what is on the tip of the tongue. The adult may also give encouragement for the child to go on to express the next thought.<sup>47</sup>

The NSW Law Society's *Representation Principles for Children's Lawyers* advise that lawyers 'should consider whether a perceived incapacity could be overcome by developmentally appropriate communication, or a different approach in taking instructions'.<sup>48</sup> Yet it is not necessarily straightforward to apply this advice to interactions with children in a legal context.

## 2.2. CHILDREN'S UNDERSTANDING OF THE ROLE OF A CHILD REPRESENTATIVE

As noted above, prior to separation or intervention by the state welfare department, how children are 'heard' within their family is usually a matter for the family itself. Studies which have asked children about their parents' separation have reported that children are frequently not consulted about what will happen and often have difficulties in obtaining information.<sup>49</sup>

Gollop, Smith and Taylor (2000) carried out a study involving 107 children in 73 families in New Zealand.<sup>50</sup> The study largely focused on children's participation in post-separation care arrangements both within their families and for some, via court processes, including with a lawyer to represent their interests. Overall, only a minority of children reported having a say about the nature of arrangements: children of 13 or over were more likely to have had some input.<sup>51</sup> Butler et al (2003) found that children generally understood the idea of divorce as a

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<sup>47</sup> Lawrence, above n 21, [4.8]; citing Nicola Taylor, 'What do we know about involving children and young people in family law decision making? A research update' (2006) 20 *Australian Journal of Family Law* 154.

<sup>48</sup> NSW Law Society, above n 11, 12.

<sup>49</sup> Rachel Birnbaum, Nicholas Bala and Francine Cyr, 'children's experiences with family justice professionals in Ontario and Ohio' (2011) 25(3) *International Journal of Law, Policy and the Family* 398, 409-10; Megan M Gollop, Nicola J Taylor and Anne B Smith, 'Children's perspectives of their parents' separation', in Anne B Smith, Nicola J Taylor and Megan M Gollop (eds), *Children's voices: Research, policy and practice* (Pearson Education, 2000); Mervyn Murch et al, *Safeguarding children's welfare in uncontentional divorce: A study of s 41 of the Matrimonial Causes Act 1973 - Report to the Lord Chancellor's Department* (Cardiff Law School, Cardiff University, 1998) (finding that amongst surveyed parents, about one-third reported discussing post-separation care arrangements with children).

<sup>50</sup> Megan M Gollop, Anne B Smith and Nicola J Taylor, 'Children's involvement in custody and access arrangements after parental separation' (2000) 12(4) *Child and Family Law Quarterly* 383, 386.

<sup>51</sup> *Ibid* 387 and 397.

legal process, but reported that 78% of children in their study (of 104 children interviewed) had not been told about the legal aspects of divorce by their parents.<sup>52</sup>

Though it is suggested by some research findings that it is better for children when they are informed about what is happening in the family and consulted about arrangements,<sup>53</sup> the legal system has no role to play here. This context is nevertheless important when it comes to involvement in legal processes. Parents are often in the role of gatekeepers when it comes to children's involvement in family law disputes.<sup>54</sup> But this influence can also be more subtle, as Mantle et al (2007) explain:

If someone has no experience of giving their authentic wishes and feelings, or participating in decision making, is it sensible to expect them to be able to do so, in the absence of adequate preparation? The fact that a third of Britain's children and young people live in poverty points to significant levels of disempowerment in a wider sense.<sup>55</sup>

In other words, if children's participation in family decision-making or other settings has not been encouraged, we should not assume that children will automatically be able to do this without 'preparation' or support. Lawrence makes a similar point about children and young people's desire to participate in legal processes, saying 'ingrained reliance on adult initiative does not easily change, and not without some facilitating scaffolding by the adults concerned'.<sup>56</sup> Moreover, one American research study found that legal professionals 'consistently' overestimate the knowledge and understanding of older children.<sup>57</sup>

In addition to these problems, parents or others involved in the dispute may not be the best people to explain what is happening to children, either because they themselves do not have a

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<sup>52</sup> Ian Butler et al, *Divorcing Children: Children's Experience of Their Parents' Divorce* (Jessica Kingsley, 2003) 171.

<sup>53</sup> Judy Cashmore, 'Children's participation in family law matters' above n 42; Joan Kelly, 'Psychological and legal interventions for parents and children in custody and access disputes: current research and practice' (2003) 10 *Virginia Journal of Social Policy and the Law* 129; Jennifer E McIntosh, 'Four young people speak about children's involvement in family court matters' (2009) 15(1) *Journal of Family Studies* 98; Amanda Wade and Carol Smart, *Facing Family Change: Children's Circumstances, Strategies, and Resources* (York, 2002).

<sup>54</sup> Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 62.

<sup>55</sup> Greg Mantle et al, 'Whose wishes and feelings? Children's autonomy and parental influence in Family Court enquiries' (2007) 37 *British Journal of Social Work* 785, 792 (reference omitted).

<sup>56</sup> Lawrence, above n 21, [4.24].

<sup>57</sup> Simon Eltringham and Jan Aldridge, 'The extent of children's knowledge of court as estimated by guardians ad litem' (2000) 9 *Child Abuse Review* 275.

good understanding of the process, or they find it difficult to explain or explain appropriately.<sup>58</sup> As a result, it is suggested that children whose families are involved in litigation require an individualised source of information from a neutral third party.<sup>59</sup>

Studies have generally found mixed views amongst children when asked about their lawyers in family proceedings, both in terms of understanding the lawyer's role and in children's evaluation of their lawyer. Masson and Winn Oakley (1999) carried out a study of children, children's guardians and solicitors involved in the care and protection jurisdiction in England (typically, with both a guardian and a solicitor appointed).<sup>60</sup> Masson and Winn Oakley's study involved observations of interactions between children ( $n = 20$ ), guardians ( $n = 12$ ) and solicitors ( $n = 12$ ) and these participants were also interviewed, along with three additional guardians (although the children they were appointed for were not able to take part). Children's understanding of the role of the guardian and the solicitor was not a key focus of the research, though satisfaction and dissatisfaction with various aspects of being represented were discussed.

Smith, Taylor and Gollop's (1998) study in two Family Court districts in New Zealand in which 20 children and twelve lawyers appointed to represent them were interviewed, had a greater focus on relationships between children and lawyers.<sup>61</sup> Of the children, twelve were involved in guardianship (custody and access) proceedings and eight in care and protection proceedings. Children were asked about many aspects of their relationship with their lawyer, about their first meeting, subsequent meetings, what they thought the lawyer had done or said in court, how they could contact their lawyer, and their relationship with the lawyer. Children's views were mixed. Over half were positive but others were neutral or even negative.<sup>62</sup> Some felt that the lawyer had not listened to their side of the story, or worse had broken a confidence or simply hadn't really made much of a difference to the whole matter. In their later study, Gollop, Smith

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<sup>58</sup> Gillian Douglas et al, *'Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991'* (Department for Constitutional Affairs, 2006) 187; citing Butler et al, above n 52, 186.

<sup>59</sup> Ibid 188.

<sup>60</sup> Judith Masson and Maureen Winn Oakley, *Out of Hearing: Representing Children in Care Proceedings* (Wiley, 1999). See above n 30.

<sup>61</sup> Taylor, Gollop and Smith, 'Children's perspectives of their parents' separation', above n 49; Megan Gollop, Nicola Taylor and Anne Smith, 'Children and young people's perspectives on their legal representation' in Anne B Smith, Nicola J Taylor and Megan M Gollop (eds) *Children's Voices: Research, Policy and Practice* (Pearson Education, 2000).

<sup>62</sup> Taylor, Gollop and Smith, 'Children and young people's perspectives on their legal representation', above n 61, 130.

and Taylor (2000) commented that children reported more negatively about their experience with legal professionals than they had in the earlier research:

It was ... disappointing to find that, on the whole, the children in this study reported rather negatively on their contact with family court professionals. This contrasts with our earlier study of children's perceptions on the role of counsel for the child, where over half of the children surveyed were satisfied with their legal representation. Very few children in the current study mentioned feeling heard and listened to by lawyers ... The majority of the children who could recall their interactions with legal professionals made negative comments such as: not feeling able to talk with the professional; feeling confused; not understanding the role of the professional; finding the contact distressing; not feeling listened to; not receiving any feedback; and experiencing breaches of confidentiality.<sup>63</sup>

The authors concluded that the second study supported their original conclusions about the importance of good communication between children and lawyers.<sup>64</sup> Clearly, at a base level effective communication is essential for children to be able to understand the role of the lawyer.

In an Australian study of children's participation in family law, Parkinson and Cashmore (2008) interviewed children, parents, lawyers, judges and family court counsellors.<sup>65</sup> Like Smith, Taylor and Gollop, they found children to be quite ambiguous about the ICL appointed to represent their interests in family law proceedings.<sup>66</sup> Many were unclear about what their lawyer's role was or what the lawyer had done. In Ontario, Canada, Birnbaum and Bala (2009) also found mixed feelings about the lawyer amongst the eleven children they interviewed in a qualitative study.<sup>67</sup> Ten children interviewed by Kaspiew et al (2013) had predominantly negative views about their ICLs.<sup>68</sup>

#### A. DO LAWYERS UNDERSTAND THEIR ROLE? DO PARENTS?

Lawyers cannot explain their role to children unless they themselves have clarity about precisely what the role is and what it entails.<sup>69</sup> Amongst children's lawyers, Parkinson and

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<sup>63</sup> Gollop, Smith and Taylor, 'Children's involvement in custody and access arrangements', above n 50, 394-95.

<sup>64</sup> Gollop, Smith and Taylor, above n 50, 398-399. Communication is discussed further below.

<sup>65</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54.

<sup>66</sup> *Ibid.*

<sup>67</sup> Rachel Birnbaum and Nicholas Bala, 'The child's perspective on legal representation: young adults report on their experiences with child lawyers' (2009) 25(1) *Canadian Journal of Family Law* 11, 54-61.

<sup>68</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 165. Though note the comments about selection bias below at n 80.

<sup>69</sup> Here, the different roles of the Independent Children's Lawyer and Direct/Independent Legal Representative may assume greater significance. See NSW Law Society, above n 11, 9 (Principle B1).

Cashmore found a great divergence of approaches and beliefs about the role, as did Ross.<sup>70</sup> There were also significantly differing attitudes between the family court counsellors and lawyers in Parkinson and Cashmore's study concerning the way each group interacted with children and their opinions about children's participation. Smith, Taylor and Gollop in New Zealand also found a disparity of views amongst lawyers about key aspects of their role,<sup>71</sup> and Kaspiew et al (2013) reported wide differences in ICL practice around Australia, particularly in terms of meeting children.<sup>72</sup>

Though it has been made clear in New South Wales that there is an expectation children's lawyers will meet with children,<sup>73</sup> there is still discretion attached to this. Further, lawyers may have differing ideas about how they will report children's views to the parties and to the court, and confidentiality. Lawyers need to be clear about the key elements of their role that they wish to communicate to children, and how this may vary with context. Further, as is discussed below, communication is not a one-way exercise.

Concerns have also been expressed that parents do not well understand the role of the child representative. Particularly when the representative is a 'best interests' one, parents may not realise that the lawyer will not be adopting the child's views or acting on instructions, as their own lawyers (if they have them) do. Parental misunderstanding may cause further confusion for children about the lawyer's role, as Buss explains:

Already bewildered about why and how he has a lawyer in the first place, a child is often introduced to his lawyer (or debriefed after speaking to his lawyer) by an adult, such as a foster mother, social worker, therapist, or peer, who, herself, misperceives the lawyer's role.<sup>74</sup>

Butler et al (2003) found that children were often 'resourceful' in seeking out information about the legal aspects of divorce, observing their parents doing paperwork, overhearing parts of

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<sup>70</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54; Nicola Ross, 'Independent Children's Lawyers: Relational approaches to children's representation' (2012) 26 *Australian Journal of Family Law* 214.

<sup>71</sup> Taylor, Gollop and Smith, 'Children and young people's perspectives on their legal representation', above n 61, 110-111.

<sup>72</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13.

<sup>73</sup> National Legal Aid, above n 7, [6.2]. In October 2013 NSW Legal Aid also increased the time which ICLs are permitted to claim by two hours reflecting time taken to meet with children: 'Notification of Legal Aid Fee Scale Changes', 5 September 2013; Legal Aid News, 'New developments for independent children's lawyers (February 2014).

<sup>74</sup> Emily Buss, "'You're my what?'" The problem of children's misperceptions of their lawyers' roles' (1996) 64 *Fordham Law Review* 1699, 1710.

adult conversations, or referencing television shows or movies.<sup>75</sup> Sometimes, however, this lead to misunderstanding rather than clarification, which unfortunately increased children's anxiety.<sup>76</sup>

Parents in Parkinson and Cashmore's research generally held rather negative views about the ICL regardless of the actual outcome of the case.<sup>77</sup> Interestingly, many parents expressed support for the role of an independent lawyer for their child/ren, but were disappointed with the way the job was carried out by the lawyer in question.<sup>78</sup> There also appeared to be misunderstandings about the lawyer's role, for example one mother in family law proceedings explained that having a child representative had saved her sons from having to go into court to give evidence in front of their father.<sup>79</sup>

This was reiterated in Kaspiew et al's most recent findings about dissatisfaction with ICLs, although the authors noted that parents who had had negative experiences were more motivated to take part in the research.<sup>80</sup> Only 3 of 23 parents thought that their experience with the ICL was mostly or wholly positive.<sup>81</sup> Kaspiew et al suggested that this was in part due to mismatched expectations, noting that few parents had a good understanding of the ICL's role.<sup>82</sup>

#### B. HOW TO EXPLAIN THE ROLE?

Children are unlikely to have been given a choice about meeting with a legal representative (or indeed necessarily much warning).<sup>83</sup> They will have varying degrees of knowledge and understanding about the role already, dependent upon previous encounters with the system, information received from parents and other sources. Some children may have been told very little; others may have been misinformed. Children may have already encountered

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<sup>75</sup> Butler et al, above n 52, 171-73.

<sup>76</sup> Ibid.

<sup>77</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54, 145-148.

<sup>78</sup> Ibid 145.

<sup>79</sup> Ibid 148.

<sup>80</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 153.

<sup>81</sup> Ibid 154. (Note that the report refers to interviews with 24 parents/carers but numbers provided add up to 23).

<sup>82</sup> Ibid 155.

<sup>83</sup> Birnbaum, Bala and Cyr, above n 49; Neale, 'Dialogues', above n 42, 466.

professionals such as counsellors, Department workers and even lawyers, or they may have no experience of this at all.<sup>84</sup>

Buss has suggested that children simply ‘lack the context and experience to make sense of’ the lawyer-client relationship.<sup>85</sup> She explains that children generally gain understanding of social roles between ages three and eight.<sup>86</sup> However, cognitive capacity is only one element and the child will still lack familiarity and experience of the role of a lawyer, hindering understanding about what the person actually does. Thus, Buss explains,

talking *at* children, particularly about matters divorced from their experience, is unlikely to advance children's understanding ... For children truly to understand what it means to have a lawyer, and what that lawyer does, they need to experience the process, as participants and as observers.<sup>87</sup>

Accordingly, Buss suggests that absent experience, young children’s understanding of the lawyer’s role will be incomplete, regardless of how clear an explanation the lawyer provides.

This claim is supported to some extent by the early study of Cashmore and Bussey (1994) of how children conceptualised the role of the lawyer representing them in care and protection proceedings, comparing this to how lawyers viewed their own role.<sup>88</sup> Thirty children were interviewed, and fifteen lawyers, while five additional lawyers completed a questionnaire.<sup>89</sup> Despite general satisfaction with their lawyer, when re-interviewed after the hearing, children were less likely to see the lawyer as being on their side. Thus, the children’s perception of the lawyer’s role changed after having seen the lawyer in action.

Cashmore and Bussey posited a number of reasons for this, including children’s lack of understanding of court proceedings, particularly the reliance on papers which have been received beforehand, and lawyers’ disinclination to explain things to children. Importantly, there were subtle interactions at play which were not necessarily captured by measuring children’s satisfaction or dissatisfaction with their lawyer, which encapsulated children’s

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<sup>84</sup> Judy Cashmore, 'Problems and solutions in lawyer-child communication' (1991) 15 *Criminal Law Journal* 193; Quas et al report that greater exposure (a longer time involved in the ‘dependency’ system) did not correlate with greater understanding on the part of children: above n 18, 99.

<sup>85</sup> Buss, “‘You’re my what?’”, above n 74, 1749.

<sup>86</sup> Ibid 1750.

<sup>87</sup> Ibid 1755

<sup>88</sup> Judith Cashmore and Kay Bussey, ‘Perceptions of children and lawyers in care and protection proceedings’ (1994) 8(3) *International Journal of Law and the Family* 319.

<sup>89</sup> These 20 lawyers constituted almost the whole group working regularly in the particular Children’s Courts of metropolitan Sydney where the study took place.

understandings, expectations, and the unspoken cues they picked up from their lawyer, without the lawyer necessarily being aware.

Despite the limitations suggested by Buss, it seems clear that children's understanding of the lawyer's role will be assisted by meeting the lawyer face-to-face. Some parents in Kaspiew et al's research whose children had not met with the ICL reported that their children were unaware of the ICL's existence.<sup>90</sup>

Importantly, increasing children's understanding about the role of the lawyer and the process in which the separated family is engaged is likely to be beneficial to children. This might be through the need for the child to have accurate information, particularly about their own involvement – Butler et al found that many children were concerned about their parents' and potentially their own appearance in court, for example<sup>91</sup> – and also through giving children an option to participate. Gollop, Smith and Taylor refer to an 'information exchange' rather than a one-way conversation or series of questions and answers:

An important part of consultation is therefore information exchange. This includes children knowing how and why the custody and access decisions were made. Thus, not only do adults need to listen to children's views, they also need to explain to the children what is happening and why. Children can feel disempowered and isolated if they lack information about the family transitions in which they are embroiled.<sup>92</sup>

Kaspiew et al, who interviewed ten children about their experiences with ICLs in family law proceedings, describe the criticism that a group of siblings had of their lawyer, who had reportedly:

- told them what the outcome of the case would be on first meeting with them, as they construed this as meaning the outcome had been decided even before the judge heard the matter (this outcome was contrary to the arrangements the children wanted and the way in which the matter was eventually resolved after the children experienced a temporary change of residence);
- did not discuss their views and experiences with them prior to formulating her position;
- left the court prior to the conclusion of the day's events; and
- behaved in a way the children perceived was dishonest.<sup>93</sup>

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<sup>90</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 156.

<sup>91</sup> Butler et al, *Divorcing Children* above n 52, 176.

<sup>92</sup> Gollop, Smith and Taylor, 'Children's Involvement' above n 50, 398.

<sup>93</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 167.

Based on this discussion, information which would seem to be important might include:

- Why the child is there;
- Who the lawyer is and what the lawyer does in the proceedings;
- That the lawyer *can* tell the court how the child is feeling or what the child is thinking about the proceedings, but the child does not have to say anything;
- When acting as a best interests representative, that the lawyer (may) also tell the court what the lawyer thinks is best for the child, even if that is not what the child wants;
- What (if anything) the lawyer is currently considering telling the court about the child's best interests;
- The limits of confidentiality – that the lawyer can keep some things to him/herself, but not all;
- If a child has *not* been through a report process, the lawyer may need to explain that process and what the child can expect. If the child has already been through that process, the lawyer may wish to explain the differences between the report writer and the lawyer;
- That the child can contact the lawyer if s/he needs to, and how. Sending a text message or email might be easier for children than making a phone call;
- When and if the child will see the lawyer again.

This is discussed further below in relation to communication between lawyers and children.

### C. WILL THE “REAL” CHILD PLEASE STAND UP?

An ongoing concern for lawyers is not only ascertaining what a child's views might be but determining whether those views are genuinely held, or whether a child has been ‘coached’, pressured or unduly influenced as to what to say.<sup>94</sup> This may occur both in family law<sup>95</sup> and in child protection proceedings – for example, Sheehan reported that children were often berated by parents for bringing the family to the attention of welfare authorities.<sup>96</sup>

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<sup>94</sup> Ross, above n 70, 233-34; Parkinson and Cashmore, above n 54, 94-95.

<sup>95</sup> Kaspiew et al found that this was also a concern of parents in their study: *Independent Children's Lawyers Study*, above n 13, 146-147.

<sup>96</sup> Rosemary Sheehan, 'The marginalisation of children by the legal process' (2003) 56(1) *Australian Social Work* 28, 32.

The potential for parents to pressure children whether intentionally or not contributes to a general wariness on the part of lawyers when it comes to interpreting children's views, which may also be contested by parents.<sup>97</sup>

At times this may relate to lawyers' preconceptions about the capabilities of children (for example, based on age). Neale explains that

adult judgements about children's innate intellectual and emotional abilities and their limited moral integrity may not predispose them to respect children's views. In a climate where it is presumed that children may lie, fabricate, fantasize or manipulate (or, alternatively, be manipulated by others), their views are inevitably viewed as untrustworthy.<sup>98</sup>

Neale suggests that the closer children come to approximating adult clients, both in terms of articulateness and the perceived reasonableness of the child's wishes, the more weight their views will be given.<sup>99</sup> On the other hand, if lawyers judge children not to be speaking in their own words or behaving in a developmentally appropriate way, this may be construed as over-involvement in the process or the dispute. Wilson and Powell suggest this is not necessarily the case, explaining that (in the context of allegations of abuse):

[T]he use of adult language by the child... does not necessarily mean that the account is fabricated as this information could have been obtained subsequent to a spontaneous disclosure. Behaviour that is consistent with a parent's accusations could be the result of "brainwashing" but some divorces are the result of abuse allegations, not vice versa.<sup>100</sup>

Some children (6.5%,  $n = 7$ ) in Gollop, Smith and Taylor's study reported not wishing to be placed in a decision-making role because of concerns about pressure from parents to express a particular view.<sup>101</sup> Two children in this study also reported coming under pressure from their lawyer to express a view. On the other hand, an almost equal number of children ( $n = 6$ ) were

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<sup>97</sup> Mantle et al, above n 55, 786; citing B Lindley, M Richards and P Freeman, 'Advice and advocacy for parents in child protection cases: An exploration of conceptual and policy issues, ethical dilemmas and future directions' (2001) 13(3) *Child and Family Law Quarterly* 311, 323.

<sup>98</sup> Neale, 'Dialogues', above n 42, 457, citing Murch et al, *Safeguarding Children's Welfare in Uncontentious Divorce: A Study of s 41 of the Matrimonial Causes Act: Report to the Lord Chancellor's Department* (Cardiff Law School, 1998) and Liz Trinder, 'Competing constructions of childhood: children's rights and children's wishes in divorce' (1997) 19 *Journal of Social Welfare and Family Law* 219.

<sup>99</sup> Neale, 'Dialogues', above n 42.

<sup>100</sup> Clare Wilson and Martine Powell, *A Guide to Interviewing Children: Essential Skills for Counsellors, Police, Lawyers and Social Workers* (Allen & Unwin, 2001) Ch 1; Michelle Aldridge and Joanne Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners* (Wiley, 1998) Ch 1; Erna Olafson, 'Children's Memory and Suggestibility' in Kathleen Coulbourn Faller (ed), *Interviewing Children About Sexual Abuse: Controversies and Best Practice* (Oxford University Press, 2007) 10.

<sup>101</sup> Gollop, Smith and Taylor, 'Children's Involvement', above n 50, 393. Fifteen children said they did not want to make a decision; seven of these attributed this to parental pressure.

unhappy that they had *not* been consulted or had not felt listened to even when they were ostensibly consulted,<sup>102</sup> describing negative experiences with lawyers or court appointed psychologists.<sup>103</sup> Cashmore and Parkinson found that 70 per cent of children in their study reported that “‘being asked” ... put them in a difficult position’<sup>104</sup> though over 90 per cent said that they should be involved in decision-making post-separation.<sup>105</sup>

Placing children in a position of conflict with one or both parents is clearly something to be avoided. Other research has identified the problems for children from being involved in or overly exposed to parental conflict.<sup>106</sup>

This may be dealt with in part by treating this as a communication issue (see the following section). For example, changing the location of the meeting so that it takes place at school, rather than having one parent bring the child to see the lawyer. Resources that supplement parental understanding of the role may also assist, given the misunderstandings identified above.<sup>107</sup>

### 3. COMMUNICATION WITH CHILDREN

The *Guidelines* for ICLs state that the lawyer should meet with children of school age.<sup>108</sup> For Children’s Court representatives, the *Representation Principles* state:

Other than in exceptional circumstances, his or her independent children’s representative must see every child. The practitioner should see the child as soon as possible and, where possible, well before the first hearing.<sup>109</sup>

This is expressed to apply to all children, even those who are ‘non-verbal’.<sup>110</sup>

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<sup>102</sup> Ibid 394-95.

<sup>103</sup> Ibid 395-96 (figures not provided).

<sup>104</sup> Judy Cashmore and Patrick Parkinson, 'Children's and parents' perceptions on children's participation in decision making after parental separation and divorce' (2008) 46(1) *Family Court Review* 91, 95.

<sup>105</sup> Ibid 94.

<sup>106</sup> Smart, Neale and Wade, *The Changing Experience of Childhood*, above n 36, Ch 2; Andrew Schepard, *Children, Courts and Custody: Interdisciplinary Models for Divorcing Families* (Cambridge University Press, 2004) Chs 1–3; Richard A Warshak, 'Payoffs and Pitfalls of Listening to Children' (2003) 52(4) *Family Relations* 373.

<sup>107</sup> See above n 82.

<sup>108</sup> National Legal Aid, above n 7, [6.2].

<sup>109</sup> NSW Law Society, above n 11, 14 (Principle D1).

<sup>110</sup> Ibid 14.

Face-to-face communication is espoused generally as the most appropriate way for lawyers to meet (at least initially) with children.<sup>111</sup> Supplementary methods which may be utilised include phone calls, text messages, email or letters. Lawyers may also give children information brochures or direct them to online resources, such as NSW Legal Aid's 'Best for Kids' informational videos.<sup>112</sup>

Although some techniques are discussed below, the most important thing is likely to be making children feel comfortable, which is also connected to the lawyer's demeanour. If lawyers feel awkward asking particular questions or undertaking certain activities, this is likely to transmit to the child who will also feel uncomfortable.<sup>113</sup> Therefore, lawyers are better off finding styles and questions that work for them rather than attempting to follow a script or use the techniques of others which do not feel natural. Children in Taylor, Smith and Gollop's study in New Zealand who had been represented by a lawyer ( $n = 20$ ) suggested that lawyers need to:

- Listen more carefully to children
- Talk on children's level
- Take time to get to know children
- Be friendly
- Respect children's confidentiality.<sup>114</sup>

As far as possible, lawyers should be familiar with the case before meeting the child as this is part of deciding whether or not to meet. Any information about family history and the individual child will be important such as schooling, medical or psychological issues, previous interventions and so on (this is discussed further below in relation to systems abuse). Clearly in a duty context in child protection matters this may not be possible. For lawyers acting as ICLs in family law proceedings it should be feasible.

Depending on the circumstances, it is likely that lawyers will wish to try and find out about significant relationships in the child's life and the strength or importance of those

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<sup>111</sup> See above n 73. See also Blackman, above n 19.

<sup>112</sup> <http://www.bestforkids.org.au/>

<sup>113</sup> Cashmore, 'Problems and solutions', above n 84, 113.

<sup>114</sup> Paraphrased by Birnbaum, Bala and Cyr, above n 49.

relationships.<sup>115</sup> In both family law and child protection matters, assessing any safety risks to the child may also be important.

### 3.1. WHAT FORMS OF COMMUNICATION WORK BEST FOR CHILDREN?

Children's lawyers are in a specialised position in that they are not conducting a 'forensic' interview with children in which they are seeking to obtain evidence, the way that an expert report writer or custody evaluator is. Thus, issues about contamination of evidence are somewhat less heightened, though clearly still not desirable. The lawyer should have less of a focus on, for example, asking children to recall and discuss specific events. Even amongst 'experts' there is no unitary interviewing method espoused when it comes to talking to young children.

Noting this, much of the literature about specific interactions with children is produced in the forensic or psychological evaluation context, and some of these messages can still be of use to lawyers. Research suggests that lawyers' communication skills and interactions with the children are extremely important to children's experience as well as influencing the quality of information provided by children.<sup>116</sup> Accordingly, improving communication skills has great utility. Communication necessarily entails an interactive process rather than the lawyer 'talking at' the child.<sup>117</sup>

As a starting point, many texts on forensic interviewing of children begin with a comment about the importance of understanding how children think and use language, and how this may differ to adults.<sup>118</sup> One aspect of this which may be important to lawyers concerns truth and lies. Wilson and Powell observe that very young children (under two) have not yet learned to lie, but suggest that 'around the age of four to six years ... a child is able to detect and convincingly tell lies ... A more adult-like understanding of lying begins to develop around the age of eight'.<sup>119</sup> They note that keeping secrets develops similarly, and children between seven and nine years old are developing an understanding of when it is appropriate to tell a secret and

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<sup>115</sup> Mantle et al, above n 55.

<sup>116</sup> Taylor, Gollop and Smith, 'Children and young people's perspectives on their legal representation', above n 61, 130-131; Cashmore, 'Problems and Solutions', above n 84.

<sup>117</sup> Blackman, above n 19, 35.

<sup>118</sup> Wilson and Powell, above n 100, 87.

<sup>119</sup> Ibid 14; citing M E Pipe and J C Wilson, 'Cues and secrets: Influences on children's event reports' (1994) 30 *Developmental Psychology* 515.

to whom, and suggest that false allegations 'rarely emerge until eleven or twelve years of age'.<sup>120</sup> However, Wilson and Powell note further that:

Most adults think that they can tell when a child is lying, but the truth is that adults are very poor judges ... There is little we can do during an interview that can accurately detect a lie told by a child.<sup>121</sup>

They observe that behaviours which may be taken by adults for indicators that a child is lying are often simply a result of nervousness. In addition, as noted above, abuse or neglect can negatively impact children's language development.

Although the interview is not a forensic one, given it is an unknown situation for a child,<sup>122</sup> it is worth suggesting to the child how the lawyer thinks the meeting should proceed, and whether this course is acceptable to the child. This might include:

- The lawyer introducing him/herself, suggesting where the child should sit, asking if the child would like a drink, and if necessary, reassuring the child as to where their parent is and that they will return to the parent after the meeting;
- The lawyer advising what s/he would like to cover in the meeting (e.g. *I will tell you a bit about me and why you're here, then you can ask me some questions or tell me about what you're thinking or feeling about things. Or if you don't want to talk about it, we'll just do some drawing together. At the end I'll check with you about what we've talked about*);
- If the lawyer wants to take notes, to explain why (*So that I can remember later what we talked about*) and ask if that is okay with the child;
- The lawyer asking the child to tell him/her if the child doesn't understand something the lawyer is saying;
- Advising the child that if they decide they have had enough at any time they can end the meeting;
- The lawyer asking the child if that sounds okay to them.<sup>123</sup>

Typically interviewing texts emphasise the importance of building rapport with children to increase trust and relax the child, usually through asking open questions about school, pets,

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<sup>120</sup> Ibid 17; citing Kathryn Kuehnle, *Assessing Allegations of Child Sexual Abuse* (Professional Resource, 1996).

<sup>121</sup> Ibid 14; citing Kay Bussey, 'Children's lying and truthfulness: Implications for children's testimony' in Stephen J Ceci, Michelle DeSimo Leichtman and Mary Elizabeth Putnick (eds), *Cognitive and Social Factors in Early Deception* (Lawrence Erlbaum, 1992) 89.

<sup>122</sup> M Siegal and K Beattie, 'Where to look first for children's knowledge of false beliefs' (1991) 38 *Cognition* 1; Neil Hall, 'Eliciting children's views: the contribution of psychologists' in Ronald Davie, Graham Upton and Ved Varma (eds), *The Voice of the Child: A Handbook for Professionals* (Falmer, 1996) 69.

<sup>123</sup> See for more detail/comparison Wilson and Powell, above n 100, 35-36.

favourite activities and so on.<sup>124</sup> It is important to be guided by children, however. If the child wants to get straight into the purpose of the meeting, the lawyer should follow the child's lead.<sup>125</sup> Aldridge and Wood note that this can particularly be the case for children over ten.<sup>126</sup> As noted below, there may also be limited time for the meeting, curtailing the chance for relaxation or chat.<sup>127</sup>

#### A. WHO THE LAWYER IS

As noted, children have almost no control over whether a lawyer is appointed to represent them, let alone who that lawyer is. However, the lawyer's gender, age and cultural background may be significant for the child, depending upon the child's particular circumstances. Masson and Winn Oakley reported that some guardians appointed for children in their study gave consideration to the child's age and gender when appointing a solicitor.<sup>128</sup> If the child was female and the guardian male, the guardian might consider appointing a female solicitor, for example. One male guardian had previously stood down from acting for a female child as the case concerned issues of sexual abuse by a male relative.<sup>129</sup> Masson and Winn Oakley's study participants also noted that it could be difficult if both guardian and solicitor were Caucasian and the child had a different ethnic background, but guardians generally were not informed about this when receiving their appointment.<sup>130</sup> The shortage of guardians from minority ethnic backgrounds contributed to this problem.<sup>131</sup> Similarly, only two children in Bell's study had been offered a choice of the gender and race of their social worker.<sup>132</sup>

A report by the ACT Office of the Children and Young People Commissioner, in research with 15 children, noted that children generally had a preference for a representative of the same

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<sup>124</sup> Aldridge and Wood, above n 100, Ch 2.

<sup>125</sup> Ibid 41-42.

<sup>126</sup> Ibid.

<sup>127</sup> Blackman, above n 19, 36.

<sup>128</sup> Masson and Winn Oakley, above n 60, 57-61.

<sup>129</sup> Ibid 55.

<sup>130</sup> Ibid 52-55.

<sup>131</sup> Ibid 55.

<sup>132</sup> Margaret Bell, 'Promoting children's rights through the use of relationship' (2002) 7(1) *Child and Family Social Work* 1, 4.

gender as the child.<sup>133</sup> Other qualities which children wanted in their lawyers included being kind and caring, trustworthy and honest, having a relaxed attitude, being able to listen, be non-judgmental and relate well to young people.<sup>134</sup> This last quality was connected by some children to the lawyer being young (or at least ‘not old’).<sup>135</sup> A quality of caring in their advocates was identified as very important by young people engaging with children’s rights services in Barnes’ English study,<sup>136</sup> while young people in Bell’s study had similar views about their social workers:

Helpful personal qualities included being listened to, treated with respect, ‘being nice, friendly ... taking us seriously’, as well as kindness, humour and being non-judgemental.<sup>137</sup>

Following her research with children ( $n = 11$ ) and protective parents about their experiences in the Family Court of Western Australia, Hay (2003) recommended that children be able to choose their own child representative.<sup>138</sup> These children identified as victims of abuse, and hence, who their lawyer was might have been particularly important. However, some of the children’s strongest criticism was reserved for a representative of the same gender.<sup>139</sup> It may be more important that lawyers are skilled at communicating with children, non-prejudiced, and familiar with the issues affecting the child than necessarily ‘matching’ the child. On the other hand, where an allegation of abuse is made, a lawyer’s resemblance to the alleged perpetrator is probably to be avoided.

## B. PHYSICAL SETTING AND TIME

Lawyers may be constrained in the location where they meet children, the length of time available for the meeting, and how frequently the lawyer meets with the children over the course of proceedings. Children in the study by the ACT Office of the Children and Young People Commissioner expressed a preference for meetings to take place at the child’s home,

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<sup>133</sup> Alasdair Roy, Gabrielle McKinnon and Heidi Yates, *Talking With Children and Young People About Participation in Family Court Proceedings* (ACT Children and Young People Commissioner, 2013) 22.

<sup>134</sup> *Ibid* 22-23.

<sup>135</sup> *Ibid* 23-24.

<sup>136</sup> Vivienne Barnes, ‘Young people’s views of children’s rights and advocacy services: A Case for ‘Caring’ Advocacy?’ (2007) 16 *Child Abuse Review* 140, 147.

<sup>137</sup> Bell, ‘Promoting children’s rights’, above n 132, 5.

<sup>138</sup> Alison Hay, ‘*Child Protection and the Family Court Of Western Australia: The Experiences of Children and Protective Parents*’, Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Australian Institute of Criminology (Adelaide, 1-2 May 2003) 29.

<sup>139</sup> *Ibid* 14.

but without their parents present.<sup>140</sup> The authors note that this ‘highlight[s] the importance of a safe and familiar environment’ for children.<sup>141</sup>

As noted above, Buss considers that without seeing the lawyer ‘in action’, young children will struggle to understand the lawyer’s role.<sup>142</sup> For this reason, she counsels against deviating too far from a lawyerly role, into (for example) activities which are too much like play. On the other hand, research suggests that making children feel comfortable is an important part of facilitating good communication.<sup>143</sup> Many texts on interviewing emphasise the importance of building rapport, but this may be difficult for lawyers in a time-limited and stressful setting.

There may be a relatively limited choice of settings for lawyers to meet with children. Horsfall (2013) reported that lawyers practising in the Children’s Court in Melbourne typically had to meet with children at the court, and ‘off-site’ visits were difficult to arrange.<sup>144</sup> The Law Society’s Representation Principles advise that ‘Contact with the child should occur where and when it is comfortable and convenient for the child, not merely where and when it is convenient for the practitioner’.<sup>145</sup>

Family law child representatives are likely to have more flexibility as to where the meeting will occur, subject to time constraints. If meeting in an office, lawyers should be aware of the formality of the setting and whether this could be intimidating for a child. Lawyers might need to evaluate their office from a child’s point of view and consider, for example, whether facing each other across a desk can be avoided.<sup>146</sup> Wilson and Powell advise interviewers to try and be seated at the same level as the child, neither directly facing the child nor next to the child, but at an angle.<sup>147</sup>

Lawyers may prefer to travel to schools to meet with children. This may be a more familiar and comfortable environment for the child, and lawyers may consider there is less chance of a parent influencing the child than if the parent brings the child to a meeting with the lawyer. On

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<sup>140</sup> Roy, McKinnon and Yates, above n 133, 24.

<sup>141</sup> Ibid.

<sup>142</sup> Buss, above n 74.

<sup>143</sup> Gollop, Smith and Taylor, ‘Children’s Involvement’, above n 50.

<sup>144</sup> Horsfall, above n 46, 440-41.

<sup>145</sup> NSW Law Society, above n 11, 16 (Principle D4).

<sup>146</sup> Ibid 16.

<sup>147</sup> Wilson and Powell, above n 100, 29.

the other hand, a school visit may be embarrassing or invasive for children. If a lawyer intends to visit a child at school, care should be taken to arrange the visit at a time convenient for the child when he or she will not have to be pulled out of class or alternatively have free time interrupted.

The lawyer needs to have some awareness of where children will have to travel from in order to meet with the lawyer. If the lawyer's office is not nearby, the children may have had a lengthy trip to get there. If the meeting is after school, children may be tired and hungry. Lawyers in the care jurisdiction may be seeing children soon after a recent distressing event such as removal by the State welfare department. All of these things will impact on how children are feeling during the meeting.

Setting will also affect the resources available to the lawyer in the meeting. Psychologists or social workers conducting interviews with children may use various aids such as bear cards,<sup>148</sup> figurines or drawing exercises in order to assist children to express how they are feeling about their family situation. These techniques may also be useful for lawyers wishing to get a sense of how children are feeling or just to help children relax and make the meeting less stressful. Wilson and Powell comment:

The usefulness of toys, puzzles and stationary depends on how distracting they are and what they are being used for. Allowing a child to play with toys can be a good way to ease her into the strange interview environment. However, if the toys are too exciting, they may distract her ... For a nervous child, doing a quiet and relatively easy task together (e.g. a jigsaw puzzle or a card game) may help her to talk by deflecting the main focus of attention away from herself. However, make sure the activity is age-appropriate. The child may be offended if she is invited to play a game that she considers herself too old for ... Drawings can also be helpful, as most children like to draw ...<sup>149</sup>

Aldridge and Wood also note that children may be distracted by large amounts of toys,<sup>150</sup> accordingly, it may be preferable to avoid (for example) child minding rooms at the court.

The time-limited nature of children's meetings with lawyers may not be conducive to 'rapport building', particularly in the care jurisdiction.<sup>151</sup> Family lawyers may have more time to spend in putting children at ease. However, Parkinson and Cashmore found that some lawyers in their

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<sup>148</sup> <http://www.qcards.com.au/the-bear-cards>

<sup>149</sup> Wilson and Powell, above n 100, 30-31. Aldridge and Wood, above n 100, make a similar point at 45-46.

<sup>150</sup> Aldridge and Wood, above n 100, 43

<sup>151</sup> Blackman, above n 19; Horsfall, above n 46; Sheehan, above n 96, 32 (noting that children often met their lawyer for the first time immediately prior to the Children's Court hearing).

study appeared not to value attempts to put children at ease, seeing this as a perfunctory task to be accomplished before getting to the ‘real’ issues of the meeting.<sup>152</sup> This was contrasted to the more flexible approach of non-legal professionals such as family report writers, who did not make the same distinction between ‘useful’ and non-useful interactions with children.

### C. LANGUAGE

Using ‘child-friendly’ or ‘age appropriate’ language is a key issue for lawyers when communicating with children but may be difficult for a number of reasons. Firstly, lawyers may not have much experience with children (or children of a certain age – for example if the lawyer has infant children but not necessarily experience in talking to adolescents) or may speak to children only rarely. Parkinson and Cashmore (2008) reported that some children in their study found their lawyer patronising or awkward, as if they weren’t used to talking with children.<sup>153</sup> Secondly, even if lawyers are used to talking to children in social or familial contexts, this will be very different to legal setting where concepts may need to be explained or sensitive information discussed, and which may be stressful for the child. Thus, experience in interacting with children in other settings may not necessarily be helpful in a child representation context. Thirdly, lawyers must negotiate their way between using age-appropriate language for younger children yet avoiding patronising or talking down to older children.

Again, children’s developmental progress will influence the best way to talk to children, though this will not necessarily have close correlation to age, as children learn language skills at different times.<sup>154</sup> Children also use language in different ways and may not ascribe the same meanings to words and phrases as adults.<sup>155</sup> Lawyers should be aware of differences in children’s ability to understand concepts, grammar, sentence structure and question forms.<sup>156</sup> Young children tend to be literal in their use of language and children are generally not able to discern ambiguity in a question until the age of about twelve.<sup>157</sup> Children may also require

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<sup>152</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54, 150-153.

<sup>153</sup> *Ibid* 153.

<sup>154</sup> Wilson and Powell, above n 100, 18.

<sup>155</sup> L L Gilstrap, R L Fraser-Thill and Stephen J Ceci categorised 34.6% of questions as suggestive: ‘Children’s source monitoring’ (2001) 21 *Imagination, Cognition and Personality* 176; cited by Jonathan W Gould and David A Martindale, *The Art and Science of Child Custody Evaluations* (Guildford, 2007) 111.

<sup>156</sup> Wilson and Powell, above n 100, 19-22.

<sup>157</sup> *Ibid* 18; Cashmore, ‘Problems and solutions’, above n 84, 198-200.

more time than adults to process questions and formulate answers.<sup>158</sup> As a child in Birnbaum, Bala and Cyr's study commented: 'Be patient and just listen. It is hard for kids'.<sup>159</sup>

How to elicit information from children? Authors generally suggest that asking open-ended questions and allowing the child to construct his or her own narrative is the preferable way to elicit information.<sup>160</sup> Mantle et al write:

Open-ended and indirect questions may allow the child to say what they want to without feeling pressured and to feel safe. In family court interviews, a general statement, such as 'some people say that children should always live with their mother' then asking the child to comment, can prevent any suggestion of having to choose between their parents.<sup>161</sup>

These authors also suggest that:

there are ways of phrasing questions to younger children: Garbarino and Stott (1989) suggest that interviewers (i) use people's names rather than pronouns – e.g. 'aunty Mel' rather than 'she'; (ii) use the child's terms, e.g. 'gramma' rather than 'grandmother'; (iii) avoid giving the impression that the child has given the wrong answer...<sup>162</sup>

As noted at point (iii), repeating a question is to be avoided as it may give children the impression that their first answer was not correct and that a different answer is required.<sup>163</sup>

Wilson and Powell advise that misunderstanding is minimised by keeping sentences short and simple.<sup>164</sup> Reporting on her study of children and lawyers in the Children's Court in Victoria, Horsfall explains:

Lawyers sought to facilitate children's understanding about what was happening and the matters being decided that had implications for them. Lawyers asked simply worded questions as a strategy to invite children to speak freely, such as "can you tell me about why you're here?" (Peter, solicitor, with Amy, 6–9 years). This was often enough to prompt conversations about recent events or any ongoing problems in the family *from children's perspectives*.<sup>165</sup>

In a 2012 survey conducted by the family law courts, it was reported that:

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<sup>158</sup> Gould and Martindale, above n 155, 129; citing A G Walker, *Handbook on questioning children: A linguistic perspective* (American Bar Association Center on Children and the Law, 1999).

<sup>159</sup> Birnbaum, Bala and Cyr, above n 49, 412.

<sup>160</sup> Gould and Martindale, above n 155, 118; Wilson and Powell, above n 100.

<sup>161</sup> Mantle et al, above n 55, 789, citing James Garbarino and Frances Stott, *What Children Can Tell Us* (Jossey-Bass, 1989).

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Wilson and Powell, above n 100, 19-20.

<sup>165</sup> Horsfall, above n 46, 436 (emphasis added).

the vast majority of ICLs ... did seek information about the child's preferred living arrangements, particularly from older children, but primarily using indirect questions, or gave the child the option, or provided the child with an opportunity to express their views.<sup>166</sup>

The ICL is not conducting a forensic interview nor seeking to gather evidence. Nevertheless, inappropriate forms of questioning such as using leading or suggestive questions should be avoided. That this is difficult is confirmed by studies of forensic interviewers which found that even after training there was a tendency both to ask suggestive questions or use an inappropriate question format.<sup>167</sup>

Lawyers must be aware that conversation is a two-way street and children are likely to be 'reading' the lawyer's demeanour as much as lawyers are scrutinising children. Other aspects of the interview which may influence children's behaviour are the lawyer's tone and status as perceived by the child. The lawyer should avoid sounding emotional (whether accusatory, upset, angry or bored).

#### D. CONFIDENTIALITY AND WHO SHOULD BE PRESENT

Independent Children's Lawyers can disclose information provided by a child if the lawyer feels it is in the child's best interests, and *must* disclose if the lawyer has reasonable grounds to believe the child has been abused or is at risk of abuse.<sup>168</sup> The *Representation Principles* state:

Practitioners should explain, in terms appropriate to the child, the confidential nature of the relationship between the practitioner and child client. This includes explanation of the circumstances in which the practitioner may disclose confidential information. This explanation should be undertaken before commencing to interview and/or take instructions, and be repeated as often as is necessary.<sup>169</sup>

Generally, it is not appropriate to see older children together with parties or other family members involved in the dispute, and is preferable for the lawyer to see children on their own. Similarly, it is worth seeing siblings separately from one another, at least for some portion of the meeting. The lawyer may wish to see a group of siblings together and get a sense of group

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<sup>166</sup> Pam Hemphill and Jacqueline Beale, 'Report on Independent Children's Lawyers' Survey' (Family Law Courts, 18 September 2012) 14.

<sup>167</sup> Michael E Lamb, et al, 'Is ongoing feedback necessary to maintain the quality of investigative interviews with allegedly abused children?' (2002) 6 *Applied Developmental Science* 35; cited by Gould and Martindale, above n 155, 111.

<sup>168</sup> FLA ss 68LA(6)-(8) and 67ZA (unless a notification has already been made).

<sup>169</sup> NSW Law Society, above n 11, 31 (Principle F2).

dynamics and/or explain information about the lawyer's role, etc. to children, before seeing individual children on their own.

Children in various studies described above were unhappy when their views were reported or reported insensitively to parents.<sup>170</sup> For example the confidentiality of what was discussed with the lawyer was an issue for some children in Gollop, Smith and Taylor's study.<sup>171</sup> They describe a 13 year old child who

had been subjected to conflicting pressures from his parents. He talked about how his parents had tried to influence him but he had resisted: 'One of them wanted me to say one thing and the other one wanted me to say the other thing, so I just shut up and just didn't say anything'. Things hadn't changed as a result: 'A waste of time. That's what I said in the first place. They wouldn't listen'. He had experienced repercussions from the information he shared with his lawyer being disclosed to others, as he was then pressured by his parents...<sup>172</sup>

Similar problems were reported by children in Neale's research in England.<sup>173</sup> Children also identified the problem of telling information to professionals which then either did not make its way into reports, or was used selectively, so that children felt its original meaning had been changed.<sup>174</sup>

In contrast, Horsfall reported that lawyers in the Victorian Children's Court (nearly all of whom were acting on a 'direct instructions' basis) generally checked their understanding of what the child wanted before the conclusion of the meeting by referring to their notes and repeating back to the child.<sup>175</sup> Blackman advocates a similar process in her handbook for children's lawyers.<sup>176</sup> She further notes that if the lawyer is acting on instructions, s/he cannot make decisions on behalf of the child.<sup>177</sup>

This is less of an issue for best interests representatives. However, how should lawyers react if the child expresses a strong view to the lawyer but asks the lawyer not to disclose this to the child's parents? The lawyer has some scope to protect the child through presenting the view as his or her own. For example, if a child says that they do not like having to speak to a parent on

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<sup>170</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54; Neale and Smart, above n 20.

<sup>171</sup> Gollop, Smith and Taylor, 'Children's involvement' above n 50, 394.

<sup>172</sup> Ibid.

<sup>173</sup> Neale, 'Dialogues', above n 42.

<sup>174</sup> Ibid 465-67.

<sup>175</sup> Horsfall, above n 46, 436.

<sup>176</sup> Blackman, above n 19, 57.

<sup>177</sup> Ibid 61.

the phone for twenty minutes, as this is too long, the lawyer might present this in generalised terms by suggesting that sometimes young children would struggle to talk on the phone for such a long time. If the lawyer is not able to do this, s/he needs to be very clear to children about what the lawyer intends to report back to the parties and the court.

#### E. HOW MUCH SHOULD THE LAWYER DISCLOSE TO THE CHILD ABOUT THE PROCEEDINGS?

To some extent, this depends on the individual child and how much s/he wishes to know. As part of explaining their role, lawyers need to refer to what is happening. Any further detail is likely to depend on how much children desire involvement. Birnbaum, Bala and Cyr (2011) report that a piece of advice one child in their study had for lawyers was ‘I want lots of details about what is going on.’<sup>178</sup> Meanwhile, Butler et al (2003) found that children in their study (whose parents had separated, but not necessarily participated in a court process) did not always want to know any more about the legal aspects of their parents’ separation.<sup>179</sup>

Generally, children have reported experiencing proceedings which largely involved reliance on papers which the children cannot or have not seen as disempowering.<sup>180</sup>

It is an issue for Children’s Court lawyers more so than ICLs whether they allow children to see information relating to their case and their family, such as copies of orders. Some lawyers feel this to be a child’s right while others consider it more appropriate to shield children. The NSW Law Society’s *Representation Principles* suggest that children are entitled to access documents about their case.<sup>181</sup>

Masson and Winn Oakley reported that the 20 children and young people in their study had little involvement in preparation for the court hearings. Only one solicitor provided a parent’s statement to a child in order to seek the child’s views.<sup>182</sup> Due to the dual system of child representation in England, the guardian ad litem for the child is responsible for producing a report to the court about the case and the child’s wishes. The authors report that guardians

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<sup>178</sup> Birnbaum, Bala and Cyr, above n 49, 412.

<sup>179</sup> Butler et al, above n 52, 177-181, reporting that 51% of children expressed interest in the legal process and 46% said that knowing more would have helped them.

<sup>180</sup> Kaspiew et al, *Independent Children’s Lawyers Study*, above n 13, 167; Cashmore and Bussey, above n 88; Masson and Winn Oakley, above n 60, 102.

<sup>181</sup> NSW Law Society, above n 11, 34 (Principle H1).

<sup>182</sup> Masson and Winn Oakley, *Out of Hearing*, above n 60, 102. The authors note that the Solicitors Family Law Association discouraged solicitors from allowing children to become overly involved.

sometimes allowed older children to read the whole report though they were also concerned about children learning new and distressing information through doing so. Solicitors and guardians agreed that children should not be given a copy of the report.<sup>183</sup> Masson and Winn Oakley reported that ‘many’ children ‘wanted to be able to read the whole report, and ... were not satisfied with having parts read to them’.<sup>184</sup> This referred to the reports of the guardian ad litem. They noted that interest in the report was not confined to older children and conclude that

[the reports] do contain detailed information which may help the child understand events that have shaped their lives ... withholding the report means that young people are denied access to accounts which could assist their understanding.<sup>185</sup>

However, the authors also noted that no child commented on whether reading the report might be distressing. Instead, children focused on the right to know and have information.

Blackman suggests that lawyers consider carefully whether reports are disclosed to children, and to consult with the report’s author if in doubt.<sup>186</sup> If necessary, the lawyer can seek a court order suppressing part of a report.<sup>187</sup>

#### 4. “SYSTEMS ABUSE” ISSUES

A report for the NSW Child Protection Council titled *Systems Abuse: Problems and Solutions* (1994) defines systems abuse as ‘abuse that is “perpetuated not by a single person or agency but by the entire child care system stretched beyond its limits”’.<sup>188</sup> The *Guidelines* for ICLs define systems abuse by quoting from this report, stating:

Systems abuse occurs when a child is further traumatised by the systems (courts, child protection or other State Welfare Authority), which he/she encounters or which are appointed to make decisions about the child.

“Systems abuse can be characterised as involving one or more of the following: the failure to consider children's needs; the unavailability of appropriate services for children; a failure to

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<sup>183</sup> Ibid 105. Note the authors suggest this to be contrary to the Court Rules which made children parties to proceedings.

<sup>184</sup> Ibid 106.

<sup>185</sup> Ibid 107.

<sup>186</sup> Blackman, above n 19, 140-141.

<sup>187</sup> Ibid 141.

<sup>188</sup> Cashmore et al quoting J L Powers, A Mooney and M Nunno, ‘Institutional abuse: A review of the literature’ (1990) 4 *Journal of Child and Youth Care* 81; citing also M Moss, *Abuse in the care system: A pilot study by the National Association of Young People in Care* (NAYPIC, 1990).

effectively organise and coordinate existing services; and institutional abuse (i.e. child maltreatment perpetrated within agencies or institutions with the responsibility for the care of children)."<sup>189</sup>

For Independent Children's Lawyers in the family law context, the possibility of 'systems abuse' may be a reason for the lawyer not to meet with a child, and seems often to be used as shorthand for 'over-interviewing' in an investigative context. It should be recalled that the definition of systems abuse was also developed at a time when the use of competing experts in family law proceedings was much more common than it is now (where the convention is to have a single expert appointed by the court). Accordingly, some of the concerns about over-interviewing may have arisen in the context of parents 'shopping' for experts.

The *Guidelines* refer to not meeting children in 'exceptional circumstances', such as 'where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child'.<sup>190</sup> Further, it is a primary goal of the ICL's case management role 'to prevent the systems abuse of the child as a result of the child being over-interviewed'.<sup>191</sup> The Law Society's *Representation Principles* state:

In family law matters there are topics which the Independent Children's Lawyer should avoid talking to the children about. The most obvious example is where there is an allegation of abuse. In these cases invariably the child will be interviewed by a court appointed expert and may have already been interviewed by the other adults such as Police. The Independent Children's Lawyer could contaminate the child's evidence and multiple interviews could amount to further abuse for the child.<sup>192</sup>

Reporting on interviews with 18 ICLs, Ross notes:

In constructing their practice with children ICLs drew heavily on generally accepted welfare/social science knowledge about how being caught up in parental conflict or court proceedings, or being interviewed multiple times, could harm children. This orientation was reinforced by the legislation and guidelines that directed ICLs to endeavour to minimise the trauma to the child associated with the proceedings and to prevent 'systems abuse'.<sup>193</sup>

For lawyers working in the child protection jurisdiction, systems abuse may likewise refer to over-interviewing. It may also refer more broadly to other aspects of state or system

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<sup>189</sup> National Legal Aid, 'Guidelines', above n 7, 16; citing Cashmore, Dolby and Brennan, above n 188.

<sup>190</sup> Ibid [6.2].

<sup>191</sup> Ibid.

<sup>192</sup> NSW Law Society, above n 11, 18.

<sup>193</sup> Ross, above n 70, 233.

intervention such as harm befalling children whilst in care, contact with the Department and court system or medical intervention.

The *intentions* of those involved in such processes are irrelevant to how they may be experienced by children, as Neale has noted, explaining:

One of the significant factors about the cases reviewed above was that the children had been referred to the various agencies without any choice on their part. Consequently, they saw professional involvement not so much as 'support' but as 'intervention', almost to the point of 'interrogation'. This was so even where the purpose of the encounter was therapeutic rather than investigative.<sup>194</sup>

Unfortunately, in some cases, children will have been subjected to far too many interventions which have either not been conducted appropriately or where interviewers were simply not aware of the number of other interventions the child had already experienced.<sup>195</sup> It can be distressing for children to be interviewed multiple times.<sup>196</sup> Part of the lawyer's role is to compile information and identify whether there is a risk that the child continuing to take part, or meeting another new person (the lawyer), could possibly be distressing or detrimental to the child. If in doubt, it might be appropriate for the lawyer to contact a professional who has previously seen the child and seek that person's opinion about a meeting. The lawyer also needs to be able to identify when investigative interviews have been carried out inappropriately, for example, if (from transcript or audio/video recordings of interview) it is apparent that children have been questioned using leading questions, suggestion, repetition or offered rewards for giving the answer the interviewer is seeking (e.g. 'You can play with the toys once you tell me what Daddy did to you').

As noted, the lawyer's role is not to investigate nor provide therapy. If the lawyer suspects the child has been subject to 'over-interviewing' or investigation, it may be especially important for the lawyer to meet with the child in order to impart certain information, such as whether the child can refuse to undertake further interviews or assessments with others, or the status of the child's communications with others in terms of confidentiality.

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<sup>194</sup> Neale, 'Dialogues', above n 42, 466. Ann O'Quigley's meta-analysis of earlier studies also found this: *Listening to Children's Views: The Findings and Recommendations of Recent Research* (Joseph Rowntree Foundation, 2000).

<sup>195</sup> See for example *Davidson and Davidson* [2010] FamCA 5.

<sup>196</sup> V Prior, M Lynch and D Glaser, *Message from Children: Children's Evaluation of the Professional Response to Child Sexual Abuse* (NCH Action for Children, 1994), cited by Wilson and Powell, above n 100, 68.

Lawyers may be fearful of meeting with children where allegations of violence or child abuse have been made in proceedings, due to concerns about causing children distress and/or muddying the waters in terms of investigation. However, one of Parkinson and Cashmore's (2008) findings was that children tended to want to participate to a greater extent where violence or abuse was a feature of the cases.<sup>197</sup> These children had stronger opinions and were more vocal about not wanting to live with or have contact with the perpetrator of the violence or abuse. Where violence or abuse was not present, children tended to be more ambiguous about expressing a strong opinion about one parent or the other. Neale (2002) reports a similar finding, saying

the children in our study who had experienced neglect or disrespect from a parent were forceful in insisting that children should be able to choose residence and contact arrangements. In these contexts, specialist support, an independent voice and legal representation were seen as crucial to a child's well-being. Children will clearly assert their rights to self-determination where their family relationships are oppressive or abusive.<sup>198</sup>

Where an investigative process is ongoing, it may be preferable to delay a meeting until it is concluded or refrain from meeting altogether. It is not appropriate for lawyers to attempt to carry out investigation themselves nor attempt to test children's stories. However, lawyers should not make a blanket assumption that it is preferable *not* to meet children in cases where violence or abuse is alleged. This may further silence and disempower children. As discussed above, the lawyer can try to give the child some control over the meeting, including what topics are discussed or not discussed, and ending the meeting when the child chooses.

The children interviewed by Kaspiew et al (2013) ( $n = 10$ ) were all involved in family law proceedings where their safety was in issue, and had predominantly negative views of the ICL in their matter.<sup>199</sup> In contrast to lawyers' concerns about repetitive interviewing, they found that some children wanted to see the ICL several times, and were dissatisfied with only one meeting.<sup>200</sup> One child thought that children might want to choose whether they saw the ICL once and told everything at that meeting, or let things out gradually over more meetings.<sup>201</sup>

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<sup>197</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54; Judy Cashmore and Patrick Parkinson, 'Children's and parents' perceptions on children's participation in decision making after parental separation and divorce' (2008) 46(1) *Family Court Review* 91, 94.

<sup>198</sup> Neale, 'Dialogues', above n 42, 469.

<sup>199</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 165.

<sup>200</sup> *Ibid* 167.

<sup>201</sup> *Ibid* 170.

Lawyers may be fearful of upsetting children, but avoiding contact with the child is unlikely to be the preferable option. Wilson and Powell opine:

If the child breaks down and cries, it is important to remain calm and show that you are listening and accepting of her feelings. Further, you need to show that you have the patience and respect to allow her to express her experiences in her own time.<sup>202</sup>

It may be appropriate to offer the child a drink, a tissue, change the topic, or ask if the child would like to end the meeting.

## 5. FEEDBACK FROM CHILDREN

An overarching aim of the brief is to obtain feedback from children and incorporate this into development of best practice for lawyers. This requires thinking about both what children might want from meetings and what lawyers wish to learn/impart.

Generally, children have virtually no opportunity to give feedback about their experience of being represented either during or after proceedings. The nature of child representation means that children are relatively powerless to control interactions with their lawyer, including to complain or obtain new legal representation.<sup>203</sup>

Birnbaum, Bala and Cyr have reported on a study of children's views about participating in processes associated with their parents' separation which had a slight retrospective element, as they note that in some cases several years had elapsed between the court file closing and the research interview.<sup>204</sup> These authors found there was little, if any, feedback to those involved in court processes about children's longer term outcomes.<sup>205</sup>

Handbooks produced for children's lawyers as well as various research studies discussed above provide some guidance as to what children might be wishing to learn from the meeting with the lawyer, including:

- Who is the lawyer?
- What is the lawyer's job, what will she do for me/my family?
- Will I have to go to court?

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<sup>202</sup> Wilson and Powell, above n 100, 79.

<sup>203</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 180.

<sup>204</sup> Birnbaum, Bala and Cyr, above n 49 (no further details are provided).

<sup>205</sup> *Ibid.*

- If I tell the lawyer something that I don't want him/her to tell anyone else, what control do I have over this?
- Who is making the decision?
- Who will listen to me?
- What do I have to do? Who will I have to talk to? Do I have to see this lawyer again/what if I want to see the lawyer again? Do I have to see anyone else?
- How will I know what is happening with my family/where I am going/who I am seeing?
- What if I don't want to go/do something?
- When will all of this end/be resolved?

Finding out whether children feel that their lawyer has provided answers to various of these questions may therefore be relevant feedback to obtain.

In addition, children's feelings about their lawyer as a person will also be relevant, including whether the lawyer was friendly, a good listener and someone the child felt could be trusted. A ten year old child in Taylor, Gollop and Smith's research commented of her lawyer in custody proceedings:

Well, she's always really kind and stuff and like she always listens really hard and she's really good at what she does. So, she listens really hard and we get everything out and we know that we can trust her so it makes it easier.<sup>206</sup>

In contrast, Kaspiew et al reported that the experiences of children they interviewed were 'largely negative, because they were not listened to respectfully and their interests were not considered expeditiously'.<sup>207</sup> Parkinson and Cashmore quote a child who thought his lawyer seemed uncomfortable with meeting:

It was pretty silly really. Because he took a long time to answer, I mean, like talk. And he kept going 'Um, er, er....' like he didn't know what to say .... and he only asked about one question.<sup>208</sup>

Accordingly, there are various things lawyers might wish to know about the experience of the meeting from a child's point of view, including:

- How are children feeling during the meeting? Are they feeling uncomfortable, scared, anxious? How can I tell?

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<sup>206</sup> Taylor, Gollop and Smith, 'Children and young people's perspectives on their legal representation', above n 61, 128.

<sup>207</sup> Kaspiew et al, *Independent Children's Lawyers Study*, above n 13, 165.

<sup>208</sup> Parkinson and Cashmore, *The Voice of a Child*, above n 54, 153.

- How is my behaviour/demeanour/speech either contributing to or alleviating negative feelings children have? If I am *contributing* to negative feelings, how can I prevent/manage this?
- There is information I would like to find out, what is the best way of eliciting this?
- Is there a way I can check with children that I have understood their views correctly?
- I want children to feel comfortable during the meeting, how can I help children relax *but also* focus/stay on message?
- How should I manage a situation where a child is telling me a lot of information but I believe their parent/carer has put them up to it?
- How far should I push if children seem upset/evasive/reluctant to speak?
- When might it be appropriate to terminate a meeting?
- Should I follow up with children after proceedings are concluded (e.g. to explain orders)? How will I know when it might be appropriate to do this?

Gollop notes that ‘when children’s views are sought they should ideally be obtained directly from the children themselves’.<sup>209</sup> A general limitation of research studies involving children, as noted above, is the difficulty of recruiting large numbers of research participants. Though extremely useful information can nevertheless be gleaned, this tends to result in findings which are not necessarily representative. Larger scale surveying may be a means of overcoming some of these problems, as well as normalising the provision of feedback by children in this context.

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<sup>209</sup> Megan Gollop, ‘Interviewing children: a research perspective’ in Anne B Smith, Nicola J Taylor and Megan M Gollop (eds) *Children’s Voices: Research, Policy and Practice* (Pearson Education, 2000) 18, 18.

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