

**IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY**

No. B28 of 2012

B E T W E E N:

**RCB as litigation guardian
of EKV, CEV, CIV and LRV**

10

Plaintiff

and

**THE HONOURABLE JUSTICE
COLIN JAMES FORREST,
ONE OF THE JUDGES OF THE
FAMILY COURT OF AUSTRALIA**

20

First Defendant

and

**DIRECTOR-GENERAL,
DEPARTMENT OF COMMUNITIES
(CHILD SAFETY AND DISABILITY
SERVICES)**

30

Second Defendant

and

LKG

Third Defendant

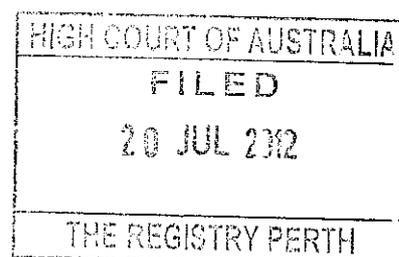
and

TV

40

Fourth Defendant

**INTERVENER'S SUBMISSIONS
ATTORNEY GENERAL FOR WESTERN AUSTRALIA**



Part I: Publication of submissions

1. These submissions are in a form suitable for publication on the Internet.

Part II: Basis for intervention

2. The Attorney General for Western Australia intervenes in these proceedings pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth) in support of the second defendant.

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: The applicable constitutional provisions, statutes and regulations

- 10 4. The plaintiff's statement of applicable constitutional provisions and legislation and the second defendant's statement of additional provisions are accepted.

Part V: Statement of the Intervener's argument

5. The Attorney General for Western Australia adopts the submissions of the Second Defendant and makes the following supplementary submissions about the contentions advanced by the plaintiff in her submissions at [37] and in relation to procedural fairness.

The contention at [37] of the plaintiff's submissions

- 20 6. The contention at [37] is patently erroneous. The legislative response to *De L v Director General, New South Wales Department of Community Services*¹ – the *Family Law Amendment Act 2000* (Cth), which introduced the current s 68L(3) of the *Family Law Act 1975* (Cth) (“**the Act**”) – cannot be characterised as purporting “to set aside the decision of a Court exercising federal jurisdiction”. It effected a prospective legislative change and is simply law reform.
7. That the contention advanced at [37] is misconceived is apparent from the passage in *Australian Education Union v General Manager of Fair Work Australia*² cited by the Plaintiff³:

“If a court exercising federal jurisdiction makes a decision which involves the formulation of a common law principle or the

¹ (1996) 187 CLR 640.

² (2012) 86 ALJR 595; [2012] HCA 19 at 610 [50] per French CJ, Crennan and Kiefel JJ.

³ Plaintiff's submissions [37] fn 18.

construction of a statute, the Parliament of the Commonwealth can, if the subject matter be within its constitutional competence, pass an enactment which changes the law as declared by the court. Moreover, such an enactment may be expressed so as to make a change in the law with deemed operation from a date prior to the date of its enactment.”

Procedural fairness

8. The plaintiff’s submissions on procedural fairness rely upon the propositions that a Chapter III court is required to accord a party and, in some cases, a non-party, procedural fairness; and that s 68L(3) of the Act has the effect of denying the children procedural fairness. Procedural fairness is said to be denied solely because separate legal representation of a child’s interest in proceedings under the *Family Law (Child Abduction Convention) Regulations 1986 (Cth)* (“**the Regulations**”) is a necessary condition of procedural fairness⁴.
9. *First matter:* Even if the Family Court, in dealing with the application brought under the Regulations, was required to accord procedural fairness to the children, it has long been established that the statutory framework within which a decision-maker exercises statutory power is of central importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case. If the statutory framework is not properly considered, argument about the facts and circumstances of the particular case may proceed at too high a level of abstraction and upon assumptions that are ill founded⁵. The requirements of procedural fairness vary having regard to the purpose for which the jurisdiction is conferred⁶.
10. As the welfare of the child is properly to be taken into consideration in exercising the discretion conferred by r 16(3) of the Regulations⁷ (albeit it is not the paramount consideration⁸), s 68L of the Act applied to the application before the Court. Section 68L is directed to circumstances in which the “child’s interests”

⁴ Plaintiff’s submissions [22]-[24], [35]-[36], [39(a)], [41].

⁵ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-161 [26] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at 354 [54] per French CJ.

⁶ *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J and at 633 per Deane J; *J v Lieschke* (1986) 162 CLR 447 at 457 per Brennan J.

⁷ *De L* at 661 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

ought to be independently represented, rather than circumstances in which the child ought to be represented⁹. The distinction is to be understood having regard to s 68LA of the Act¹⁰.

11. As was made clear in *De L*, the Family Court’s determination of what is in the best interests of children, or most appropriate for their welfare, is one of fact, based on evidence. Relevant evidence can be put before the Court in a variety of ways that do not require separate legal representation of children, such as through the preparation and tendering of reports by a family consultant.
12. The Family Court has a broad power to order the preparation of a family consultant’s report¹¹. In this sense, control of the evidence to be adduced from children, relevant to their best interests and welfare, lies with the Court. In *Re JRL; Ex parte CJL*¹² Wilson J and Dawson J observed that this judicial involvement flowed inevitably from the requirement to consider the welfare of the child. Court involvement or control of the evidence to be adduced from children, at least where issues of their interest is involved, is not inconsistent with the exercise of judicial power. Concepts such as procedural fairness, when used other than as slogans, have to be considered having regard to the reality that issues involving the welfare of children attract processes adapted to this unique form of adjudication and judicial power, where it has been long accepted that “... the course and conduct of [custody] proceedings cannot remain wholly in the hands of the litigating parties”¹³. In custody matters, there are many departures from what might be considered a “pure” adversarial system. For instance, judges are not limited to the evidence adduced by the parties but can require additional evidence or require a particular line of questioning be pursued¹⁴. Children cannot give evidence on oath without leave of the Court¹⁵ and cannot be called as a witness

⁸ *De L* at 658 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

⁹ This may be contrasted with s 68L as it was considered in *De L* – see *De L* at 660, when the provision was concerned with circumstances in which “the child ought to be separately represented”.

¹⁰ See also the second defendant’s submissions [61]. The background to s 68L of the Act prior to its amendment by the *Family Law Amendment Act 2000* (Cth), is explained in Keough, *Child Representation in Family Law* (2000) pp 34-52. These issues prior to 1997 are also traversed in *Seen and heard: priority for children in the legal process* (ALRC Report 84) at [16.27]-[16.61].

¹¹ The Regulations r 26.

¹² (1986) 161 CLR 342 at 362-363 per Wilson J and at 373-374 per Dawson J. See also *In the Marriage of Lonard* (1976) 2 Fam LR 11,116 and *In the Marriage of Bartlett* (1994) 17 Fam LR 405 at 413.

¹³ *Re JRL* at 362 per Wilson J.

¹⁴ *Family Law Rules 2004* (Cth) r 15.71.

¹⁵ The Act s 100B(1).

without leave¹⁶. Unique processes dealing with children as witnesses in other contexts are common and do not exceed judicial power¹⁷.

13. In the application before the Family Court, Forrest J ordered and received a report by a family consultant¹⁸. There is no report of the interlocutory order identifying the scope of the matters to be reported on. However, it is clear from his Honour's judgment that the family consultant was appointed in response to a contention by the mother that the children objected to being returned to Italy, and that their objection displayed a strength of feeling beyond the mere expression of a preference or ordinary wishes¹⁹. It is also clear from his Honour's judgment that the family consultant interacted with the children about, at least, these matters²⁰. Family consultants are officers of the Family Court²¹ and no doubt have particular skills in dealing with children and eliciting from them evidence in a form and of a quality that might not be obtained were the children to be called as witnesses.
14. It would appear from his Honour's judgment that the mother did not apply to examine the family consultant on his report²² and, in this action, the plaintiff does not appear to take issue with any aspect of the family consultant's report. Nor, as Forrest J observed²³, is there any suggestion that the children's views were not accurately conveyed to the Court. Indeed, the mother adduced evidence concerning her children's views from a psychologist at the hearing before the Family Court.
15. The Family Court's intervention, to order a report by a family consultant in the application brought under r 14 of the Regulations, was within power, and the Court received evidence in the form of this report dealing with the children's interests.
16. *Second matter:* Having regard to these matters, the issue then is to ponder why the notion of procedural fairness requires that, in respect of the application brought

¹⁶ The Act s 100B(2).

¹⁷ Illustrative are ss 106A-106T of the *Evidence Act 1906* (WA) dealing with the admission into evidence of pre-trial visually recorded evidence of child witnesses. See also *J v Lieschke* at 456-457 per Brennan J, referring to an observation of Lord Evershed in *In re K (Infants)* [1965] AC 201 at 219.

¹⁸ *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485 at [114].

¹⁹ *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485 at [112].

²⁰ *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485 at [98]-[99], [114].

²¹ The Act ss 11B and 38N.

²² The mother could seek this pursuant to *Family Law Rules* R15.04.

pursuant to r 14 of the Regulations, the children have independent legal representation? Evidence as to their views about being returned to Italy was before the Court and had been elicited from them by a family consultant in a non-confronting atmosphere. The mother had also taken the opportunity to adduce evidence about the children's views.

17. Having regard to s 68LA of the Act, which deals with the role and duties of an independent children's lawyer²⁴, it is difficult to conceive that any lawyer appointed would have done more than was done in this matter by the family consultant.
- 10 18. Further, there is no suggestion that there was a conflict of views touching the welfare of the children between the children and their mother²⁵, which might require that the children have separate legal representation.
19. *Third matter*: as to the requirement of exceptional circumstances in s 68L(3), for the reasons advanced by the second defendant²⁶, the requirement of exceptional circumstances prior to the appointment of an independent lawyer does not affect the validity of the provision. In addition to the matters advanced by the second defendant in this respect, regard might also be had to the following.
20. Orders under s 68L are made by Family Court judges and Federal Magistrates Court magistrates. Both Courts are specialist courts, comprising specialist judicial officers, dealing regularly and routinely with matters that involve consideration and determination of the best interests of children of a marriage and children's welfare. Such specialist judicial officers are peculiarly well placed to determine whether their consideration of what is in the best interests of a child or children would be assisted by independent legal representation.
- 20 21. There are limits to the capacity of government to fund independent legal representation of children in matters falling within s 68L(1) (which includes

²³ Second defendant's submissions [33].

²⁴ Relevant perhaps is National Legal Aid *Guidelines for Independent Children's Lawyers* (2007) which is available on the National Legal Aid website (recently printed copy is attached). It would appear from cl 6.3 of the *Guidelines for Independent Children's Lawyers* that they do not contemplate legal representation where a family consultant has provided a detailed report to the Family Court dealing with the particular views of the children as to the specific issue before the Family Court.

²⁵ Unlike the situation contemplated by Wilson J in *J v Lieschke* at 452.

²⁶ Second defendant's submissions [62]-[64].

s.68L(3)) of the Act. As was held in *Re JJT; Ex parte Victoria Legal Aid*²⁷, Legal Aid bodies cannot be required to fund independent legal representation of children. Monahan FM has noted that, in Victoria, *Victoria Legal Aid* cannot fund all such applications and now imposes a quota²⁸.

22. On this understanding, and having regard to this reality, it is prudent for government to restrict the circumstances in which independent legal representation pursuant to s 68L(1) can be ordered. That matters falling within the Regulations can sensibly be so restricted is, as a matter of “policy”, prudent, where the Family Court has available to it power to appoint a family consultant who liaises with children and reports to the Court. Further to this, it must be recognised that, in applications under the Regulations, a child or children have been abducted by one parent, inevitably not seen by the other parent for some time and inevitably lived in Australia with the abducting parent and separate from the other parent for this time. These inevitabilities are relevant to the “policy” underlying s.68L(3). No doubt any child’s objection to being returned is coloured by these inevitabilities and affect the utility of independent legal representation.
- 10
23. Were the Court to order independent legal representation and a legal aid body not have capacity to fund that representation, staying the application²⁹ is not a consequence that could properly be ordered. A stay simply defeats the purpose of the application by ensuring that abducted children are not returned, and is contrary to Australia’s international obligations under the *Convention on the Civil Aspects of International Child Abduction* (“**the Convention**”).
- 20
24. In this case there are four children. It seems to be contended by the plaintiff that one independent lawyer would act for all. But as the judgment of Forrest J discloses, different children had different views at different times³⁰. The plaintiff’s contention in this matter would, as a matter of logic, require separate independent legal representation of each of the four children³¹. The cost of this in every matter would be extreme.

²⁷ *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184.

²⁸ Monahan “Autonomy v Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings” (2008) 8 *QUTLawJl* 392 at 398 fn 39.

²⁹ See *Dietrich v R* (1992) 177 CLR 292.

³⁰ *Department of Communities (Child Safety Services) & Garning* [2011] FamCA 485 at [115].

³¹ See *White v White* (1995) FLC 92-648 as to difficulties that can emerge with multiple children.

25. *Fourth matter:* When regard is had to the Convention and the Regulations and to the limited issues raised by proceedings under the Regulations, the statutory framework established by the Regulations does not render separate legal representation an indispensable part of according procedural fairness. As the plurality said of the Convention in *De L*:

10 “the Convention is concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and of access. This entails preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to ‘its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case’”³².

26. Consistently with this understanding of the Convention:

20 “The Regulations reflect the objects of the Convention to settle issues of jurisdiction between the Contracting States by favouring that forum which has been the habitual residence of the child. The underlying premise is that, once the forum is located in this way, each Contracting State has faith in the domestic law of the other Contracting States to deal in a proper fashion with matters relating to the custody of children under the age of sixteen.”³³

27. This underlying premise³⁴ is reflected in the limited circumstances under the Regulations in which the court’s discretion to refuse to order that a child be returned is enlivened. Where, as in this case, a person opposing the return of a child seeks to rely upon the child’s objection to being returned under r 16(3)(c) of the Regulations, what is relevant is not the views or wishes of the child generally but rather the matters identified in r 16(3)(c)³⁵. Those matters can ordinarily be addressed without the need for the children concerned to have separate legal representation and through the avenues, such as a report by a family consultant, referred to above.
- 30

28. If, as the plaintiff asserts, separate legal representation is an indispensable part of according procedural fairness in proceedings under the Regulations (irrespective

³² *De L* at 648-649 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (footnote omitted).

³³ *De L* at 658 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

³⁴ Which must be approached in light of the observations of Gaudron, Gummow and Hayne JJ in *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at 413-417 [32]-[40].

³⁵ *De L* at 659 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

of whether it is necessary to address the matters that are relevant), the Convention's first object³⁶ of securing "the prompt return of children wrongfully removed to or retained in any Contracting State"³⁷ is liable to be frustrated.

Part VI: Estimate of the time required for the presentation of oral argument

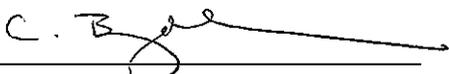
29. It is estimated that 15 mins will be required for the presentation of oral argument on behalf of the Attorney General for Western Australia.

DATED the 20th day of July 2012

10



 G R DONALDSON SC
 Solicitor General for
 Western Australia
 Telephone: (08) 9264 1806
 Facsimile: (08) 9321 1385



 C S BYDDER
 Senior Assistant State Counsel
 State Solicitor's Office
 Telephone: (08) 9264 1159
 Facsimile: (08) 9264 1652

³⁶ To which regard is to be had in construing the Regulations: see the Regulations, r 1A(2)(a).
³⁷ The Convention, Art 1(a), as set out in the Regulations, Sch 1.

GUIDELINES FOR INDEPENDENT CHILDREN'S LAWYERS

(6 December 2007)

These Guidelines have been endorsed by the Chief Justice of the Family Court of Australia, and also by the Federal Magistrates Court of Australia

1. The Purpose of these Guidelines

This document is intended to provide guidance to the Independent Children's Lawyer (ICL) in fulfilling his/her role.

The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the Family Courts, with information about the Courts' general expectations of ICLs. The Guidelines set out these expectations as they relate to children in circumstances of family violence, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Strait Islander children, and where applications arise for the authorisation of special medical procedures and other orders relating to the welfare of children.

This is a public document which is endorsed by the Family Court of Australia and the Federal Magistrates Court of Australia and is made available by the Legal Aid Commissions of the Australian States and Territories which fund the work of ICLs. In addition, the Guidelines will be used in the training of ICLs.

2. Introduction

The role of the ICL is unique. The lawyer appointed to represent and promote the best interests of a child in family law proceedings has special responsibilities.

Decisions in particular cases as to how the ICL progresses the case and how s/he involves the child in the case are ultimately, subject to the statutory requirements in Division 10 Part VII, in the ICL's discretion.

The ICL is expected to use his/her professional judgment and skill, subject to any directions or orders of the Court. The availability of funding is a practical constraint.

The way in which the ICL acts may not always meet with the approval of the parties or the child, but this does not mean that the ICL has failed in his/her professional responsibilities.

A glossary of terms used in the guidelines appears at the end of this document to assist readers in understanding them.

3. Statement of Principles

The appointment of an ICL is one means of giving effect in family law proceedings to the United Nations Convention on the Rights of the Child which states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (Article 3)

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

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

4. The Role of the ICL

The best interests of the child will ordinarily be served by the ICL enabling the child to be involved in decision-making about the proceedings. However, this does not mean that the child is the decision maker. Among the factors that indicate the appropriate degree of involvement in an individual case are:

- the extent to which the child wishes to be involved; and
- the extent that is appropriate for the child having regard to the child's age, developmental level, cognitive abilities, emotional state and views.

These factors may change over the course of the ICL's appointment.

The ICL is to act impartially and in a manner which is unfettered by considerations other than the best interests of the child.

The ICL must be truly independent of the Court and the parties to the proceedings.

The professional relationship provided by the ICL will be one of a skilful, competent and impartial best interests advocate. It is the right of the child to establish a professional relationship with the ICL.

The ICL should seek to work together with any Family Consultant or external expert involved in the case to promote the best interests of the child.

The ICL should assist the parties to reach a resolution, whether by negotiation or judicial determination, that is in the child's best interests.

The ICL should bring to the attention of the Court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.

The ICL is to promote the timely resolution of the proceedings that is consistent with the best interests of the child.

The ICL does not take instructions from the child but is required to ensure the Court is fully informed of the child's views, in an admissible form where possible.

The ICL is to ensure that the views and attitudes brought to bear on the issues before the Court are drawn from and supported by the admissible evidence and not from a personal view or opinion of the case.

The ICL is expected and encouraged to seek peer and professional support and advice where the case raises issues that are beyond his or her expertise. This may involve making applications to the Court for directions in relation to the future conduct of the matter.

The ICL must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.

5. Relationship with the Child

The child has a right to establish a professional relationship with the ICL.

In considering any views expressed by the child and the steps to be taken in a matter the ICL is to be aware:

that each child will have different emotional, cognitive and intellectual developmental levels, family structures, family dynamics, sibling relationships, religious and cultural backgrounds; and

that children are vulnerable to external pressures when caught in disputes involving their parents.

5.1 Information which should be explained to the child

When the ICL meets the child, s/he should explain to the extent that is appropriate for the child:

the role of the ICL including the limitations of the role;

the Court process (including any anticipated interlocutory stages); and

the other agencies that may be involved and the reasons for their involvement.

The ICL is to ensure that the child is aware that information provided by the child to the ICL in some circumstances may have to be communicated to the Court, the child's parents or other persons or agencies. A strategy should be developed in consultation with any Family Consultant involved in the case and with the child as to the manner in which this is done. The aim is to minimise the potential for any adverse reaction towards the child.

Despite the inability to guarantee the child a confidential relationship, the ICL should, however, strive to establish a relationship of trust and respect. This is assisted by explaining the role of the ICL, including:

how the child can have a say and make his/her views known during the process;

that where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the ICL should inform the child of the possibility of applying to become a party to the proceedings;

the involvement of any report writer, the nature and purpose of the report, the use to which the report will be put and that all parties will see the report; and

how the ICL can be contacted by the child.

5.2 Limitations of the Role of the ICL

The ICL should guard against stepping beyond his or her professional role and should seek guidance from a Family Consultant or other professional when necessary.

While the Family Law Act provides some basis for a confidential relationship between the ICL and the child, there are circumstances where the ICL cannot guarantee the child a confidential relationship. In addition to explaining this limitation at the commencement of the relationship, it may be necessary to periodically remind the child.

It is not the role of the ICL to:-

conduct disclosure interviews;

become a witness in the proceedings; or

conduct therapy or counselling with the child.

The ICL should be alert and sensitive to the risk of a child becoming over dependent upon him or her and should consider seeking peer or professional advice in responding to such a situation.

The ICL should prepare the child for the end of the professional relationship before the end of the proceedings. They should discuss the fact that the ICL's role will soon be over, and determine what contact, if any, they will continue to have.

5.3 Children's Views

The ICL should seek to provide the child with the opportunity to express his or her views in circumstances that are free from the influence of others.

A child who is unwilling to express a view must not be pressured to do so and must be reassured that it is his or her right not to express a view even where another member of the sibling group does want to express a view.

The ICL should ensure that there are opportunities for the child to be advised about significant developments in his or her matter if the child so wishes, and should ensure that the child has the opportunity to express any further view or any refinement or change to previously expressed views.

The ICL must take into account that the weight to be given to the child's views will depend on a number of factors, and is expected to be familiar with case law on the subject.

In preparing to make submissions on the evidence as to the weight to be placed on the views of the child, the ICL may consult with the single expert, Family Consultant or other relevant expert in relation to:

the content of the child's views;

the contexts in which those views both arise and are expressed;

the willingness of the child to express views; and

any relevant factors associated with the child's capacity to communicate.

The ICL is to ensure that any views expressed by the child are fully put before the Court and so far as possible, are in admissible form. This includes views that the ICL may consider trivial but the child considers important.

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

5.4 Making submissions contrary to the Child's views

If the ICL considers that the evidence indicates that the best interests of the child will be promoted by orders which are contrary to the child's views, the ICL is to:

advise the child that s/he intends to make submissions contrary to the child's views;

ensure that the child's views are before the Court, together with the arguments which promote the adoption by the Court of the child's views;

make submissions which promote the adoption by the Court of orders which are in accordance with the child's best interests;

provide clear and cogent submissions as to why the child's views do not promote the child's best interests; and

explain to the child at the conclusion of the proceedings why he/she made a submission that was contrary to the child's views (if there has not been an opportunity to do so prior to the conclusion of the proceedings).

6. General procedures to be followed when an ICL has been appointed

6.1 Who should be advised?

The ICL must file and serve an Address for Service to advise the Court and the parties of his/her appointment.

The ICL is to advise all necessary agencies, for example the Family Court Child Dispute Section and the State Welfare Authority, of his/her appointment.

The ICL is to make contact with the State Welfare Authority and seek information about:

the extent of any child protection involvement with the child or family, in particular, any abuse or neglect notifications and investigations; and

if there has been any such involvement, whether the Authority intends to become involved in the family law proceedings or is considering the initiation of other legal proceedings.

Where the ICL considers it is necessary to advise other individuals and organisations of the appointment, such as the child's school or therapists, the ICL shall seek (if appropriate to the age and degree of understanding of the child) and take into account any views of the child.

The ICL is to advise the parties of his/her role in the presence of the parties' legal representatives.

The ICL and any Family Consultant involved in the case have a mutual responsibility to initiate liaison to clarify roles and to identify any particular needs of the child.

6.2 Meeting the Child

It is expected that the ICL will meet the child unless:

- the child is under school age;
- there are exceptional circumstances, for example where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child;
- there are significant practical limitations, for example geographic remoteness.

The assessment about whether, where and how to meet the child is a matter for the ICL. An assessment may be made in consultation with any Family Consultant or other expert involved in the case.

6.3 Consultation between the ICL and Family Consultant

A Family Consultant may be in a position to provide information to the ICL of the following if they have been involved in a Court event:

- a preliminary overview of the dynamics of the separated family and the way this is impacting on the child;
- other agencies involved with the family;
- recommendations for case management;
- whether the child should be involved in further counselling and/or whether therapy is indicated;
- whether there are any urgent issues; and
- details of any child abuse notifications made.

The ICL should liaise with any Family Consultant or other expert appointed to provide a report in the case.

6.4 Relationship with the Parties and their Legal Representatives

The ICL is to remain independent, objective and focused upon promoting the child's best interests in all dealings throughout the proceedings.

The parties and their legal representatives should be encouraged to be non-adversarial where possible and to maintain a focus on the child's best interests. The ICL should promote this approach whenever appropriate.

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

Where parties are legally represented, communication between the ICL and the parties should normally be through the legal representatives.

The ICL may need to have direct contact with the parties during the course of the proceedings. Such contact must have the consent of the party concerned and should normally be arranged through the parties' legal representatives. If one or more parties are unrepresented, the ICL is to communicate directly with the party and should advise the other parties of the fact of any meeting with an unrepresented party.

The ICL is not required to communicate to the other parties the substance of his or her conversations with the child.

The ICL must at all times be and be seen to be independent and at arm's length from any other party to the proceedings.

The ICL is to act as an "honest broker" on behalf of the child in any negotiations with the other parties and their legal representatives.

Once the ICL has formed a preliminary view as to the outcomes which will best promote the child's best interests, the ICL will consult with the child and take into consideration any expressed views of the child, as may be appropriate in all the

circumstances. The ICL will then communicate his/her views and details of proposed orders to the parties where possible.

If during the period of appointment of the ICL there are proceedings between other parties in respect of contravention of an order, generally the role of the ICL ought not be an active one. However, this is subject to the proviso that where the ICL considers (a) that such proceedings are detrimental to the best interests of the child or (b) that the presence of the ICL may further the best interests of the child, then it is appropriate for the ICL to be present and, if necessary, to seek to appear in the proceedings. The ICL must, however, be served with the application and any supporting material, and be notified by the parties of any findings and sanctions imposed by the Court.

6.5 Case Planning

The ICL is to seek to develop a case plan at the earliest opportunity, where appropriate, in consultation with any Family Consultant or other expert involved in the case.

In the case plan, the ICL should:

- canvass the nature of any reports or examinations of the parties and/or the child;

- develop a strategy for the involvement of the child in any examination/assessment process;

- liaise with any Family Consultant involved in the case, relevant government departments, contact centres, schools and agencies to bring together relevant information to assist the Court in assessing and determining the best interests of the child;

- develop opportunities for the matter to reach an agreed outcome which best promotes the child's best interests;

- provide information, support, and assistance as required for or requested by the child during the process of litigation, whether directly or by way of appropriate referral;

- be vigilant and make every endeavour to minimise systems abuse of the child; and

- consider whether it is appropriate to obtain an expert report. In some Division 12A cases a direction from the court in which the issues have been settled may be required before the expert is engaged to prepare the report.

The strategy outlining the involvement of the child in the examination/assessment process has the following primary aims:

- to ascertain the level of involvement that the child wishes to have in the court proceedings;

- to provide the child with opportunities to express his or her views in relation to with whom they live and who they see, to the extent that the child wants to express any view;

to provide evidence of matters relevant to the child's best interests and in particular the relationship of the child and the parties;

to prevent the systems abuse of the child as a result of the child being over-interviewed; and

to be in accordance with the Family Violence policy issued by the Chief Justice of the Family Court, other relevant best practice guidelines and applicable protocols for dealing with matters involving family violence. No process should be pursued which departs from these guidelines.

6.6 Changing, Reviewing or Terminating the Appointment of the ICL

The appointment of an ICL for sibling groups can present special difficulties. Cases may arise where the ICL may need to give consideration to the Court making a further assessment as to whether the proceedings require another ICL to be appointed.

The ICL should consider the usefulness of the order for representation of the child from time to time during the course of a case. The matter should be relisted and an order sought from the Court discharging the appointment if the ICL is of the opinion that:

there is no useful purpose or no further purpose served by the order for the representation of the child;

the ICL's relationship with the child has broken down irretrievably to the extent that it is not possible to represent his or her best interests;

continuation of the appointment would be adverse to the best interests of the child; or

practical circumstances make it impracticable to represent the best interests of the child.

The ICL should ensure that arrangements are made to inform the child or children of any alterations to the arrangements affecting their representation in accordance with their age, developmental level, cognitive abilities and emotional state.

6.7 Reports

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

If a Family Consultant or other expert is requested to prepare a report, the ICL should, to the extent that the issue is not the subject of an order by the Court:

liaise as appropriate with the other parties concerning the nature of the report, the identity of the report writer, the terms of reference, the persons who should participate in the assessment, and the material to be provided to the report writer;

satisfy him/herself that the report writer has the appropriate qualifications and experience to conduct the assessment, prepare the report and give

evidence for the particular case;

facilitate the participation of the child and other relevant persons in the assessment as appropriate;

ensure that the report writer is provided with the information and documentation necessary to complete the assessment, including any order concerning the parameters of the report;

liaise with the report writer and facilitate the timely release of the report;
and

convene a conference of experts where appropriate and seek an agreed statement as to the outcomes of that conference.

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

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

6.8 Interim Hearings

Time constraints and the circumscribed nature of interim hearings may result in the ICL not having the opportunity to fully investigate the child's circumstances. However where possible, the ICL should have issued subpoenas to relevant agencies and be in a position to tender relevant material. Such evidence is particularly helpful to the Court where allegations of unacceptable risk are present in the case.

In circumstances where little is known about the child's situation the ICL should be circumspect and should not feel compelled to make a submission as to the child's best interests, presenting rather an analysis of the available options to the extent possible. Where the Court is to make interim or procedural orders, the ICL should consider whether they adequately promote the best interests of the child and make submissions as appropriate.

The ICL should ensure so far as is possible, that the child's wishes are made known to the Court in admissible form.

6.9 Final hearing (The Trial)

If the matter proceeds to trial, the ICL should comply with all procedural and timetable requirements. The ICL should identify and obtain relevant documentation, organise the preparation of appropriate reports and arrange for relevant witnesses such as State Welfare Authority officers, police officers, school teachers or similar persons to give evidence. The ICL should be proactive in matters heard under Division 12A and be familiar with community based organisations which can provide continuing assistance to the child and the child's family.

The ICL is to promote the timely resolution of the proceedings that is consistent with the best interests of the child. The ICL should be proactive and bring to the

court's attention matters which might hinder the court's capacity to determine the matter on a final basis (for example, a family report not being progressed).

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

The ICL is to arrange for the collation of all relevant and reasonably available evidence including expert evidence where appropriate, and otherwise ensure to the extent possible, that all evidence relevant to the best interests of the child and the considerations set out in section 60CC of the *Family Law Act* is before the Court. The ICL is not responsible for adducing evidence to establish the case of a party.

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

The ICL is to make submissions evaluating the evidence and the proposals of each party and in doing so it is expected that the ICL will consider any practical problems associated with, and possible solutions for, such proposals. In appropriate cases the ICL will also make submissions as to the proposed terms of orders.

Children rarely give evidence in proceedings. However there may be cases where consideration is to be given to what direct role the child might have in giving evidence to the Court. If the ICL believes that it may be appropriate for the child to give evidence, the ICL should consult with the Family Consultant or single expert. Where a child of sufficient maturity wishes to give evidence, the child should be appropriately advised and the opportunity to apply to give direct evidence canvassed. The purpose of section 100B should be explained to the child.

6.10 At the Conclusion of Proceedings

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

In appropriate circumstances the ICL has a responsibility to explain to the child, or to facilitate an explanation by a Family Consultant or other appropriate expert who has provided a report in the case:

the orders made by the Court;

the effect of those orders;

if submissions were made by the ICL that were contrary to the child's wishes, the reasons for so doing; and

whether leave has been sought to provide copies of the orders, reasons for judgment of the Court and for any other material, including expert reports, to any relevant professional involved with the family and to whom the ICL intends to forward such material.

In consultation with a Family Consultant or an appropriate expert in the case, the ICL should determine who is the most appropriate person to explain the orders, taking into account their current respective relationships with the child.

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

The ICL does not monitor final orders unless there are exceptional circumstances and there is an order to this effect.

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

6.11 Appeals

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

The ICL should consider whether an appeal is appropriate. An appeal should only be lodged where the interests of the child would be promoted by such a procedure and after taking the views of the child into account.

If one of the other parties appeals, the ICL should inform the child and explain the process involved unless there are particular reasons not to do so. Where appropriate the ICL should participate in the hearing of the appeal.

7. Family Violence and Abuse

Like all practitioners, the ICL is expected to be familiar with the relevant provisions of the *Family Law Act 1975* (Cth), the Family Law Rules and the Chief Justice's Family Violence Policy for dealing with matters involving alleged family violence. The ICL must also be familiar with other relevant best practice guidelines and where relevant, the protocols between the Court and State and Territory departments responsible for the investigation of child abuse.

Family violence and abuse are serious issues whenever they have occurred and should always be presented as being so. They are considerations pursuant to section 60CC of the Act of which a Court must take account. Their degree of relevance in a particular case should be considered with the assistance of a counsellor or other mental health professional who has knowledge of family violence and abuse issues. In appropriate cases a full assessment should be conducted by such a counsellor or other mental health professional prior to the matter being settled or heard by a Court.

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

The ICL is expected to be alert to any risk of harm to a child that may arise from the other parties, or the physical environment in which the child may be. It will usually be inappropriate for the ICL to bring the child into proximity with an alleged perpetrator of harm. Where this does occur, visual or verbal contact with a party may be harmful and it will be necessary to carefully consider whether interview arrangements and the physical setting need to be structured in particular ways in order to protect the child and/or accompanying family members.

8. Cross-cultural and/or Religious Matters

The ICL needs to take particular care in matters involving cross-cultural and religious issues.

The ICL should be aware of Article 14 of the United Nations Convention on the Rights of the Child which states:

State Parties shall respect the right of the child to freedom of thought, conscience and religion.

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

Strategies that are sensitive to culture and religion need to be developed as part of a case management plan for the child within the context of the proceedings. Any Family Consultant in the case should provide valuable assistance in this area, in particular in advising on appropriate referrals to relevant experts. During the course of a matter the ICL needs to:

be aware that the child's English language skills may be in early stages of development;

be aware that the child may be unfamiliar with the social and legal concepts involved in the proceedings;

seek to identify service options that are appropriate to the culture and or religion of the child, make these known to the child, and assist the child to access them if requested;

utilise the expertise of any Family Consultant involved in the case as may be appropriate;

be mindful of the need to use interpreter services during meetings and throughout the proceedings where either the child or a party is not proficient in the English language;

understand that the child may be fearful of isolation by his or her community or fearful of his or her community becoming aware of the proceedings;

be mindful that the child may be fearful of courts, government departments and authorities; and

be mindful that the child may be fearful of expressing wishes that are based upon or contrary to religious or cultural beliefs and background.

The ICL is to consider the broader community and extended family support available to the child in recognition of the important role that may be played by extended family members in the raising of the child. That is, the ICL needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

In obtaining a single expert's report, the ICL should inquire as to the report writer's training and experience in working with families of the child's culture and their capacity to relate to such families in a sensitive and appropriate manner prior to allocating the report to that individual. The ICL must be satisfied that the report writer has the necessary training, knowledge and experience to produce a

report that comprehensively covers (amongst other matters) the cultural issues pertaining to the case. The single expert, Family Consultant or other relevant expert retained in the case may assist with adducing this evidence before the Court.

9. Aboriginal and Torres Strait Islander Children

In representing indigenous children, there are clear and specific issues that the ICL must consider. Foremost of these is section 60CC of the *Family Law Act* that specifies that in considering the best interests of a child, the court must consider the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and the likely impact any proposed parenting order will have on that right;

The ICL should be aware of Article 30 of the United Nations Convention on the Rights of the Child which states that an indigenous child:

"shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."

In cases involving an Aboriginal or Torres Strait Islander child, the ICL should liaise with an agency to which they are referred by the Family Consultant, and as appropriate, facilitate liaison between the Consultant or agency with any single expert, family report writer or other relevant expert retained in the case. This liaison is for the purpose of assisting the ICL to consider the need of the child to maintain "a connection to culture" and how this can most effectively be achieved in considering the case before the Court.

It is important that the ICL be familiar with relevant judgments, articles and reports in relation to indigenous issues, in particular the April 1997 report of the Human Rights and Equal Opportunity Commission "Bringing Them Home", which is the report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children and their families.

To effectively represent the interests of any indigenous child the ICL must have a clear understanding of the importance of the indigenous child's "connection to culture" and to understand the means by which this connection can be maintained and enhanced in the context of the case before the Court.

The ICL also needs to consider the broader community and extended family support available to the child in recognition of the important role played by extended family members in the raising of indigenous children. That is, the ICL needs to be aware of the capacity of the extended family and community network to promote the best interests of the child. This is likely to entail consultation with extended family members and significant others from within the child's broader family and cultural group.

In obtaining an expert's report, the ICL should inquire as to the report writer's training and experience in working with indigenous families and their capacity to relate to indigenous families in a sensitive and appropriate manner prior to allocating the report to that individual. The ICL must be satisfied that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the cultural issues pertaining to the case. The single expert, Family Consultant or other relevant expert retained in the case may assist with adducing this evidence before the Court.

10. Children with disabilities

Particular sensitivity is needed to ensure that children with physical, intellectual, mental and/or emotional disabilities can participate in the decision-making process involved in the proceedings to the extent of the child's abilities and wish to participate.

The ICL should be aware of Article 23 of the United Nations Convention on the Rights of the Child which states that:

State Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

The ICL will be assisted by liaison with the existing specialist supports to the child in ascertaining the child's capacity to communicate his or her views, how the expression of such views can be facilitated, and any other relevant needs the child may have.

In obtaining an expert, the ICL should inquire as to the report writer's training and experience in working with children with disabilities prior to allocating the report to that individual. The ICL must be satisfied that the report writer has the necessary training, knowledge and experience to produce a report that comprehensively covers (amongst other matters) the disability issues pertaining to the case. The single expert, Family Consultant or other relevant expert retained in the case may assist with adducing this evidence before the Court.

11. Special medical procedures and other parens patriae/welfare jurisdiction cases (section 67ZC)

The principles stated above apply so far as sterilisation and other parens patriae/welfare jurisdiction cases are concerned.

In special medical procedure cases, a primary duty of the ICL is to present to the Court expert evidence to assist in a determination of whether or not the child in question is Gillick competent.

The ICL should be familiar with cases in which the Full Court has dealt with the issue and also of applicable Court guidelines and protocols relating to Special Medical Procedures.

Where the evidence indicates that a child is Gillick competent, the ICL should list the matter for the Court to determine whether the child is given an opportunity to present his or her own case to the Court.

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

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

12. Glossary of Terms

Case Assessment Conference

The first major event most people have at the Family Court after documents have been filed is called a Case Assessment Conference. The Case Assessment Conference provides an early opportunity to identify issues in dispute, reach an agreement, identify dispute resolution events to be undertaken by the parties and adopt a case management pathway.

Case Management Directions

A set of procedural orders about the steps required to progress the matter through the court.

Case Manager

A member of the Court's administrative staff who manages individual case files and is the primary contact person for parties and lawyers in respect to a case file.

Child Mediation

This occurs outside the Court system and involves discussing difficulties experienced (as an individual or as parents) regarding the arrangements for children during or after separation. The goal is to achieve an agreement which is in the best interests of children.

Court Events

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

Family Consultant

Family Consultants have qualifications in psychology or social work and work within the court to assist and advise people involved in the proceedings, to assist and advise courts, to give evidence about the proceedings, to help people involved in the proceedings to resolve their disputes, to provide reports to the court and to advise the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which people involved in proceedings can be referred

Family Violence Policy

The Family Court has acknowledged that there are many circumstances where families are attending the Court where violence is a factor. To assist parties in the resolution of disputes, and to promote the safety of litigants, the Family Court has articulated its policy to guide litigants, practitioners and others of the approach taken by the Court in circumstances of family violence.

Gillick Competent

Before a child reaches the age at which he or she could consent to medical treatment under the relevant legislation, the child may be lawfully competent to consent to at least some procedures. This depends on whether the child is a 'mature minor' under the Gillick test, a test which was approved by the High Court of Australia in 1992. This means that the person has 'achieved a sufficient

understanding and intelligence to enable him or her to understand fully what is proposed'.

Treatment may be provided to a child if the parent or guardian consents or, if the child consents and (a) the medical practitioner is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and wellbeing, and (b) that opinion is supported by the written opinion of another medical practitioner who has examined the child.

Honest Broker

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

Resolution Event

These are events such as mediation that take place during the period between the commencement of proceedings to the point at which it is decided that the matter should be prepared for trial.

Single expert

A professional (such as a psychologist or psychiatrist) who has been appointed under the Family Law Rules (either by Order of the Court or by agreement of the parties) to be involved in the proceedings.

State Welfare Authority

State Welfare Authorities are the government departments which deal with child protection issues. They are usually notified by counsellors, teachers or others with responsibility for a child, where a concern about child abuse is raised.

Systems Abuse

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 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)."*

*Cashmore, J., Dolby, R. and Brennan, D. (1994), *Systems Abuse: Problems and Solutions*, NSW Child Protection Council, Sydney.