

# TALKING WITH CHILDREN & YOUNG PEOPLE ABOUT PARTICIPATION IN FAMILY COURT PROCEEDINGS

A REPORT BY THE ACT CHILDREN & YOUNG PEOPLE COMMISSIONER

AUGUST 2013



**ACT CHILDREN & YOUNG PEOPLE  
COMMISSIONER**

# TALKING WITH CHILDREN & YOUNG PEOPLE ABOUT PARTICIPATION IN FAMILY COURT PROCEEDINGS



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First Edition

## INTRODUCTION

The Office of the ACT Children & Young People Commissioner (CYPC) is an independent statutory office created under the *ACT Human Rights Commission Act 2005*. The current Commissioner is Alasdair Roy, who is assisted by two part-time advisers, Brianna McGill and Gabrielle McKinnon.

The CYPC has a number of roles, including:

- Consulting with children and young people.<sup>1</sup>
- Providing advice to government and community agencies about how to improve services for children and young people.
- Resolving complaints and concerns about services for children and young people.

In undertaking the above functions, the CYPC is committed to the right of children and young people to participate in decisions and actions that affect them.

Children and young people live in our communities - they go to school, they use public transport, they shop, they make friends, and they play. And, like adults, children and young people have the right to have a say about what happens in their communities. Despite this, children and young people are frequently excluded from discussions about issues that affect them.

The participation of children and young people is not simply an abstract piece of domestic or international law, or the aspirational views of certain adults. Children and young people, themselves, are very much aware that they are excluded from mainstream decision making, and that their voice and views are frequently invisible or ignored.

In 2012, as part of Australia's National Youth Week, the CYPC undertook a brief survey of just over 250 children and young people in Canberra. Participants were asked to answer two short questions:

- What is the *best* thing about being a young person in Australia.
- What is the *worst* thing about being a young person in Australia.

In response to the first question (the *best thing* about being a young person in Australia), the overwhelming majority of children and young people wrote about the freedom and opportunities which exist in Australia, and of the excellent schools, health care and other services which they and their friends have access to. In fact, over 80% of children and young people used the words *freedom, potential, or opportunities* in their answer.

In response to the second question (the *worst thing* about being a young person in Australia), many wrote about racism, bullying, peer pressure, and the lack of things to do.

Almost a quarter of survey respondents also wrote about *not being listened to or taken seriously by adults*, with children and young people saying that the worst thing about being young in Australia was:

- *Not having adults take your opinions seriously and treating you as just a kid* (15 years).
- *Being underestimated* (17 years).
- *Not being taken seriously* (15 years).
- *Being discriminated against by adults* (15 years).
- *Not being seen as responsible* (14 years).

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<sup>1</sup> A 'child' is any person up to the age of 12 years, and a 'young person' is any person over 12 years but not yet 18. These terms are used throughout this report so as to recognise and respect the differences between the two groups.

- *Being patronised by adults (14 years).*
- *Adults think they are more important than kids (12 years).*

Or, as one 13 year old girl wrote: *People not really listening to you because you are young.*

## CONSULTATION WITH CHILDREN & YOUNG PEOPLE

In September 2012, the Honourable Chief Justice Bryant of the Family Court of Australia approached the CYPC to discuss the participation of children and young people in Family Court proceedings.

Her Honour noted that she, the Honourable Chief Judge Pascoe of the Federal Circuit Court, and the Children's Committee of the Family Court of Australia and Federal Circuit Court, were particularly interested in hearing the views of children and young people, and asked whether the CYPC might be able to undertake a consultation with children and young people about the issue.

Although there was no specific funding available, the CYPC agreed to undertake a small-scale consultation with local children and young people. In agreeing to assist, the CYPC hoped that the consultation would:

- Contribute the views of children and young people to the discussion.
- Model to children and young people that their views are important, and that adults listen to these views.
- Model to agencies that talking with children and young people about issues that affect them is worthwhile and can lead to better outcomes.

Additionally, while it was not within the scope of the consultation to make formal recommendations, the CYPC hoped that some of the views expressed by children and young people might inform changes to existing Family Court practice, or areas for further research or discussion.

Due to other priorities, the CYPC was unable to commence the project until early 2013, with the consultation sessions taking place on 25 and 27 June 2013 at an ACT public school.

The outcomes of the consultation are presented in detail later in this report. However, in summary, children and young people expressed clear views about a range of issues including *how* they would like to participate in Family Court proceedings, the *sorts of things* they would like to have a say about, the *kind of person* they would like to have represent their views to the Court, and how this person should *communicate* with them.

Overall, the consultation indicated that talking directly with children and young people about issues associated with the Family Court is a useful and feasible model, and the CYPC recommends further consultations with a larger number of children and young people to inform the Court's ongoing planning about how to best support children and young people's participation in court proceedings.

## PART I: THE PARTICIPATION OF CHILDREN & YOUNG PEOPLE IN FAMILY COURT PROCEEDINGS

In 2012, the objects of the *Family Law Act 1975* were amended to include reference to the United Nations Convention on the Rights of the Child.<sup>2</sup> While the Convention articulates clear rights for children and young people in relation to their participation in Family Court proceedings, most notably at Article 12, it is yet to be seen how inclusion of the Convention may influence how the voices of children and young people are heard by the Court.

Arguably, it presents a new opportunity to examine processes and procedures that support the right of children and young people to participate in court proceedings, and consultation exercises such as the one undertaken by the CYPC, discussed later in this report, bring the possibility of 'fresh ideas' to drive continuing debate in this area.

Discussion by the Family Court about the inclusion of children and young people has historically, and necessarily, involved weighing up the harm a child or young person may experience as a result of being involved in familial conflict, with the benefits to a child or young person of participating in decision-making about his or her life.

Traditionally, many Judges and others working within the Court have taken a 'protectionist' approach to the participation of children and young people. Adults have sought to 'shield' children from Court proceedings, concerned about their capacity to participate, the potential for them to be manipulated by those in dispute, and the 'appropriateness' of direct involvement. As Cashmore and Parkinson state, 'There is good reason for this. The consistent message of research has been that it is the parental conflict - both before and after the separation - that is most harmful to children.'<sup>3</sup> This approach is increasingly giving way to better understandings of how and why children might participate. For example, Cashmore and Parkinson aptly summarise the 'enlightenment' and 'empowerment' rationales for ensuring children's views are heard:

The enlightenment rationale is that children can provide important information about their perspectives and experience that can contribute to more informed decisions and potentially more positive and workable outcomes. The empowerment rationale is that children benefit from being involved in several ways: by learning to make decisions, by having a greater sense of control and self-esteem that comes from recognition and respect, and being acknowledged as people with interests in and perspectives on the decision rather than being the "object of concern".<sup>4</sup>

Research indicates that providing children and young people the opportunity to be 'heard' is a 'signifier of respect and recognition'<sup>5</sup>, and that the more heated the dispute between parents, the more likely children and young people will want to 'have a say' about what kind of decisions should be made.

### HOW ARE CHILDREN'S VOICES CURRENTLY HEARD?

The Family Law Act states that children's views should be considered by Judges.<sup>6</sup> At present, there are two key mechanisms through which such views are generally heard: through an Independent Children's Lawyer (ICL);

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<sup>2</sup> *Family Law Act 1975* s 60B(4) - this reference to the United Nations Convention on the Rights of the Child was included in June 2012.

<sup>3</sup> J. Cashmore & P. Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters* 15 at 15.

<sup>4</sup> *Ibid* at 15.

<sup>5</sup> *Ibid* at 20.

and/or a Family Report. These mechanisms are explored briefly below. There are, however, many cases where there is neither an ICL appointed nor a Family Report prepared.<sup>7</sup> Further, there are the many families where parents reach their own agreements about arrangements for children and young people post-separation, which may or may not consider the voices of the children and young people involved.

While it is beyond the scope of this report to summarise relevant developments, we note that the Family Court has driven a large number of projects and initiatives aimed at making proceedings more ‘child focused.’ These include use of the ‘Less Adversarial Trial’, the Contact Orders Program and the Magellan Program.<sup>8</sup> We also note that the Family Court has also been active in a broad range of law reform initiatives and inquiries that bring attention to the importance of the participation of children and young people in judicial settings.

## INDEPENDENT CHILDREN’S LAWYERS

Independent Children’s Lawyers (ICLs) are appointed by the Court, generally in complex matters such as where there are allegations of family violence and/or child abuse, or in cases where neither parent has legal representation and the case involves difficult issues.<sup>9</sup> At present, we know that the Court is relying on ICLs in an increasing number of cases. For example, in 2006, one-fifth of litigated family law matters involved an ICL while in 2009, one-third of such matters involved an ICL.<sup>10</sup>

ICLs play a key role in ensuring that the views of children and young people are communicated to the Judge. That said, an ICL is *not* a direct representative, and remains focused on the primary role of assisting the Court to determine what will be in the ‘best interests’ of the child or young person.<sup>11</sup> The *Family Law Act 1975* (Cth) (FLA) requires a Court to regard the best interests of the child or young person as the paramount consideration when making a parenting order dealing with issues including where a child or young person lives and who he or she spends time or communicates with.<sup>12</sup> The FLA provides some guidance on *how* to determine what is in that child or young person’s best interests,<sup>13</sup> but provides the decision-maker with broad discretion, including the ability to consider ‘any other fact or circumstance the court thinks is relevant.’<sup>14</sup>

Theoretically, focusing on best-interests is appealing because it makes the decision about the child or young person, rather than his or her parents, or society more generally.<sup>15</sup> However in practice, determining what will be ‘best’ or ‘ideal’ for the child or young person in the circumstances ultimately requires an ICL to refer to his or her own personal values and private hierarchy of preferred outcomes.

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<sup>6</sup> See *Family Law Act 1975* (Cth) s 60CC3(a), also see s 60CD, s 62G(3A), s 68LA(5)(b).

<sup>7</sup> In 2008-09, approximately one third of matters in the Family Court and Federal Magistrates Court involved an ICL. In the same period, many cases did not involve the commissioning of a Family Report: R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009 at 303, 309-10.

<sup>8</sup> See ‘www.familycourt.gov.au’ for further information regarding these projects and initiatives.

<sup>9</sup> See the case of *Re K* (1994) 117 FLR 63; (1994) 17 Fam LR 537 for an exploration of the types of circumstances where an ICL may be appointed.

<sup>10</sup> R. Kaspiew et al, above n 7 at 309.

<sup>11</sup> Commission for Children and Young People and Child Guardian, Queensland ‘The Representation of Children and Young People’s Views in Australian Family Law Decision Making: A Discussion Paper’ (February 2009) <[http://www.ccyprg.qld.gov.au/pdf/publications/papers/Australian\\_Family\\_Law\\_Decision\\_Making.pdf](http://www.ccyprg.qld.gov.au/pdf/publications/papers/Australian_Family_Law_Decision_Making.pdf)> (accessed 30 July 2013) at 6.

<sup>12</sup> *Family Law Act 1975* (Cth) s 60CA.

<sup>13</sup> See *Family Law Act 1975* (Cth) s 60CC.

<sup>14</sup> *Family Law Act 1975* (Cth) s 60CC(3)(m).

<sup>15</sup> M. Fineman, ‘Child Advocacy and the Transformation of Custody Decision Making in the USA’ in Smart & Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 27 at 31; H Reece, ‘The paramountcy principle: Consensus or Construct?’ (1996) 49 *Current Legal Problems*, 267 at 267.

The crucial role of a decision-maker's own value system in best-interests reasoning was acknowledged by former Justice Brennan of the High Court of Australia in 1992:

[I]t must be remembered that, in the absence of legal rules or a hierarchy of values, the best-interests approach depends upon the value system of the decision-maker. Absent any rule or guidelines, that approach simply creates an unexaminable discretion in the repository of the power.<sup>16</sup>

In this sense, what is in the 'best interests' of a child or young person will be in the eye of the beholder, and the existing representational framework prioritises this subjective view over the express views or instructions of the child or young person. There is no capacity for an ICL to provide direct representation, regardless of the child or young person's capacity to provide instructions, and an ICL is required to take the child or young person's view into account as only *one of a range* of factors when weighing up what outcomes are likely to be in his or her best interests.

As noted by researcher Nicola Ross, 'there is surprisingly little evidence about how [ICLs] perform these roles or relate to children in practice.'<sup>17</sup> In summary, the complex role of the ICL appears to involve a balancing of the 'empowerment' and 'protectionist' models of participation outlined above. For example, an ICL must 'ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the Court'<sup>18</sup>, but also 'endeavour to minimise the trauma to the child associated with the proceedings.'<sup>19</sup> Ross has found: 'The literature emphasises the confusion lawyers can experience when they attempt to perform both a 'welfare' and 'voice' role in relation to children.'<sup>20</sup>

This legislative focus on trauma reflects a protectionist view about the vulnerability of children and young people, and the need to keep them out of familial disputes. The CYPC recognises that supporting children and young people to contribute to decisions about family breakdown are complex. However, it is the view of the CYPC that, all too often, adults wrongly presume that children and young people wouldn't want, or be able, to engage in difficult conversations about aspects of their lives.

In the CYPC's experience, children and young people almost always prefer to be given an opportunity to talk about difficult aspects of their lives, rather than being excluded from the decision-making process all together, or being 'spoken for' and interpreted by adults.

Similarly, adults frequently think that children and young people need protecting from certain subjects, even if a child or young person has direct and personal experience of that subject. As once expressed to the CYPC by a young person around 12 years of age, '*If my life was a film, I wouldn't be allowed to watch it*'.

In saying this, in order to have effective, safe and respectful conversations with children and young people about difficult subjects, most adults will require specialist training or experience.

It should also be acknowledged that children and young people cannot be fully protected from the impact of Family Court proceedings, and that excluding them from participation in decision making does not prevent them from being affected by the consequences of those decisions, including, for example, decisions about living arrangements or contact.

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<sup>16</sup> *Department of Health and Community Services v JWB and SMB* (1992) 106 ALR 385 at 421 (Justice Brennan).

<sup>17</sup> N. Ross, 'Relational approaches to children's representation' (2012) 26 *Australian Journal of Family Law* 214 at 214.

<sup>18</sup> *Family Law Act 1975* (Cth) s 68LA(5)(b).

<sup>19</sup> *Family Law Act 1975* (Cth) s 68LA(5)(d).

<sup>20</sup> N. Ross, above n 17 at 222.

The lack of research in this area will hopefully be addressed, in part, by the work currently being led by Dr Rae Kaspiew from within the Australian Institute of Family Studies. Dr Kaspiew's research promises to shed light on how ICLs approach their work, how their work is perceived by other players within the family law system and, most significantly, the experiences of the children and young people they represent.<sup>21</sup> However, the CYPC believes there is also much to be gained by speaking to children and young people more generally about these issues, as evidenced by this research exercise.

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## ICLS: SEEKING AND COMMUNICATING THE VIEWS OF CHILDREN?

To what extent do ICLs fulfill the Court's expectation that they will provide the views of the child or young person? ICLs will generally have had at least five years post-admission experience and have completed the two day Independent Children's Lawyer National Training Program run by the Law Council of Australia.<sup>22</sup> However, a particular ICL may not necessarily have undertaken any further specific training in working with children and young people, child development, or the dynamics of separated families.<sup>23</sup> They are first and foremost, 'officers of the court' whose foundational training is in the law and legal processes. This raises the obvious question of how well a lawyer is placed to seek and consider the views of children and young people.

Additionally, ICLS are usually only appointed by the Court for complex matters, and it is possibly these matters, which usually involve complicated human and social dynamics, that are least likely to be successfully understood or resolved within a strictly legal framework.

Further, the work of ICLs must be viewed in the context of their appointment, specifically, they are funded through a grant of Legal Aid. Accordingly, ICLs undertake their complex and demanding work for a fraction of private commercial rates, with related resource pressures.<sup>24</sup> Even for an experienced ICL, their skill in interviewing and working with children and young people may be compromised by the limited time and resources available to build rapport, seek a child or young person's, and 'report back' as proceedings progress to clarify any changes and inform the child or young person *how* their views have been communicated to the Court. These were all significant issues raised by the children and young people consulted in this exercise.

A Victorian Legal Aid factsheet on ICLs states that 'Children should be free to contact the independent children's lawyer at any time in private'<sup>25</sup>, yet the practicalities of providing such access are necessarily resource-limited. In this exercise, a number of children and young people had clear views about where, and how many times, they would want to meet their ICL. However, the ICL Guidelines arguably set a low bar in

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<sup>21</sup> This research, commissioned by the Attorney-General's Department, examines how ICLs are used in the family law system and what it's like for children and young people to be involved in a case with an ICL. See <<http://www.aifs.gov.au/icl/index.html>> for further details (accessed 30 July 2013).

<sup>22</sup> For example, see the pre-requisites for being appointed to the Victoria Legal Aid ICL panel, and the NSW Legal Aid ICL Panel: <<http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/panels/opening-of-icl-panel/faq>>; <<http://www.legalaid.nsw.gov.au/for-lawyers/panels,-audit-and-practice-standards/panel-information-packages>> (both accessed 30 August 2013).

<sup>23</sup> For further discussion of this issue see N. Ross, above n 17 at 237-238.

<sup>24</sup> The 2002 National Legal Aid Survey of Private Family Law Practitioners indicated that at that time, average professional fees were at least double that of hourly legal aid rates. See <<http://www.nationallegalaid.org/assets/Family-Law/FamilylawPractitionersurvey.pdf>> (accessed 30 July 2013). 2008 reports regarding Legal Aid in Victoria allege that lawyers were being paid grants of aid that were only around 15 per cent of private fees. See: <<http://www.theage.com.au/national/lawyers-threaten-legal-aid-ban-over-pay-rates-20081120-6cvl.html>> (accessed 30 July 2013).

<sup>25</sup> Victoria Legal Aid, 'The role of an independent children's lawyer' (August 2008) available at <<http://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/role-of-independent-childrens-lawyer>> (accessed 30 July 2013) at 2.

relation to meeting with children and young people, stating: 'It is expected that the ICL will meet the child unless the child is under school age; there are exceptional circumstances or significant practical limitations.'<sup>26</sup>

Not only is the assumption that children 'under school age' would be unable, or unwilling, to express their views to an ICL unfounded, this approach is significantly different to the engagement expected of representatives who act on a child or young person's instructions in other jurisdictions, such as in child protection matters.

Judy Cashmore has reported extensively on the frustration children and young people experience when adults make assumptions made about what they want. She has found that it helps when ICLs 'check back' with a child or young person before presenting his or her views to the Court. She also says that good ICLs report back to children and young people after proceedings, to explain the process and ensure they know what's happening.<sup>27</sup>

The importance of confidentiality was another theme raised by participants in the CYPC's consultations (and also identified in Cashmore's research).<sup>28</sup> This issue must be considered in light of the fact that, at present, the ICL's duties regarding confidentiality within a 'best interests' model are far from simple. For example, the legislation provides that the ICL is not under an *obligation* to disclose any information that the child or young person communicates to them, but the ICL *may* disclose any information that the child or young person communicates, if they consider the disclosure to be in the best interests of the child or young person. This right applies even if the disclosure is made *against* the wishes of the child or young person<sup>29</sup>, a situation that would be unthinkable in a professional relationship between a lawyer and an adult.

It is the view of the CYPC that the issue of confidentiality in this context should be further examined, including, specifically, exploring what is important to children and young people, and whether the Court's current approach actually supports the ICLs in their job to engage with and present the views of the child or young person.

## FAMILY REPORTS

The other key method through which the voices of children and young people are heard is a Family Report, generally written by a Family Consultant. In contrast to ICLs, Family Report writers have training in either psychology or social work, and speak to family members and other significant people. A family report provides expert recommendations about issues affecting the child or young person.

The Honourable Chief Justice Bryant of the Family Court of Australia, has described Family Reports as 'an extremely important "window" into the family's relational dynamics and, most importantly, provides great insight into the child's life, past experience, family relationships, abilities and problems, needs, attitudes and wishes as they relate to the dispute before the Court.'<sup>30</sup>

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<sup>26</sup> National Legal Aid, 'Guidelines for Independent Children's Lawyers' (2007) available at <<http://www.nla.aust.net.au/res/File/PDFs/ICL%20guidelines-6-12-07.pdf>> (accessed 30 July 2013) at Guideline 6.2.

<sup>27</sup> Judy Cashmore speaking on ABC Radio National 'The Voices of Children in Family Law Cases' The Law Report, 26 June 2012 (Anita Barraud). Transcript available at <<http://www.abc.net.au/radionational/programs/lawreport/law-report-26-june-2012/4093414#>> (accessed 3 August 2013).

<sup>28</sup> Ibid.

<sup>29</sup> *Family Law Act 1975* (Cth) ss 68LA(6)-(8).

<sup>30</sup> D. Bryant, *The role of the Family Court in promoting child-centred practice* (2006, May). Paper presented at the Contact and Relocation: Focusing on the Children Conference, Centre for Children and Young People, Byron Bay at 5.

Family Report writers are, theoretically, experts in engaging with children and young people. However, as noted by former Judge, Richard Chisholm 'Family Reports have always been affected by questions of resources'.<sup>31</sup> Again, opportunities to meet, build rapport and stay in touch with children and young people as a matter progresses are resource-limited. Significantly, there are often substantial delays between the time when a child or young person is interviewed and provides his or her views, and the time when the Judge makes a decision. Children and young people have reported being unhappy about the Court relying on their 'one off' view, reflecting a particular point in time, without the opportunity to clarify or amend their interview.<sup>32</sup> This model is particularly problematic given that a period of several months is often a significant period in a child or young person's development.

The CYPC understands that children and young people are not generally given the opportunity to 'check' and correct or change the parts of Family Reports that purport to convey their views. Accordingly, a child or young person will not know if his or her views were 'translated' incorrectly by the report writer, just as a child or young person's absence in the Court (and minimal opportunities for post-trial feedback) make it difficult for a child or young person to know whether their ICL has correctly 'interpreted' their views. These issues raise important questions about the effectiveness of Family Reports as an accurate, timely mechanism for communicating a child's views to the Court, as well as questions about natural justice in the sense that a child or young person may never know how their views have been presented to the Court.

#### INDEPENDENT CHILDREN'S LAWYERS & FAMILY REPORT WRITERS - KEY DIFFERENCES IN APPROACHES TO HEARING THE VOICES OF CHILDREN & YOUNG PEOPLE

Cashmore and Parkinson's research also points to some significant differences in the way that ICLs and Family Consultants approach the views of children and young people. This research prompts reflection on how the views of children and young people may be sought, interpreted and communicated to the Court by different types of professionals. Cashmore and Parkinson's interviews suggested that lawyers are more likely to be focused on 'protecting' children or young people from the 'harm' associated with participating in litigation than parents or the children or young people themselves: 'While most lawyers were generally supportive of children 'having a say' in the process, they consistently emphasised the risks of harm from children's participation, especially in the litigation process, rather than any benefits that might flow from it.'<sup>33</sup>

Lawyers were more likely to see the participation of children and young people in terms of 'children expressing choices between the competing positions of the parents.'<sup>34</sup> This meant that lawyers focused on concerns about the extent to which parents were trying to influence their child, and the risks to children and young people of making them choose between their parents' polarised positions. In contrast, Family Report Writers were more likely to approach interviews as an opportunity for the child or young person to say what issues were important to them, recognising that the thoughts of children and young people about this often differ from those of their parents. Further, interviews with children were seen as an important chance for the report writer to gain 'insights on how the children experienced family life and what could make it better.'<sup>35</sup>

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<sup>31</sup> Judge R. Chisholm, 'The role of experts in assisting Courts in Children's Cases: A Judicial View Paper' (2002) available at: <<http://www.familycourt.gov.au/wps/wcm/resources/file/ebac6249e0d5823/chisholm2002.pdf>> (accessed 30 July 2013) at 3.

<sup>32</sup> R.M. Fitzgerald, 'Children having a say: a study on children's participation in family law decision making' (2009) PhD thesis, Southern Cross University, Lismore, NSW available at <<http://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1165&context=theses>> (accessed 12 August 2013) at 62.

<sup>33</sup> J. Cashmore and P. Parkinson, above n 3 at 19.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid at 21.

At present, the Family Court relies on specific 'independent' adults - primarily ICLs and Family Report Writers - to interpret and present the views of children and young people, rather than hearing directly from a child or young person, or inviting submissions based on a child or young person's instructions. This is, arguably, disrespectful to children and young people, and may also raise questions about the 'accuracy' of the story being told to the Court.

Cashmore and Parkinson's research provides important food for thought about how the views of children and young people may be 'lost in translation' before they reach the Court. At the very least, this research prompts serious consideration of how the role and approach of different adults may impact on the questions children and young people are asked, and how their views are recorded and presented to the Court.

## WHAT OTHER OPTIONS HAVE BEEN CANVASSED FOR LISTENING TO THE VOICES OF CHILDREN & YOUNG PEOPLE?

### JUDICIAL INTERVIEWS

Family Court Judges may undertake interviews with children and young people but such interviews rarely occur in Australia and when they do, they are often for purposes other than determining the views of the child or young person.<sup>36</sup> In a recent survey by Michelle Fernando, nearly 50 per cent of Judges interviewed agreed that meeting with children and young people might give them better evidence.<sup>37</sup> Further, almost 40 per cent agreed that 'meeting with a child or young person may give judges greater understanding of an individual child or young person's needs and best interests than other methods of hearing children's views.'<sup>38</sup>

However, the study found that Judges have a range of concerns about meeting with children and young people, particularly regarding the possibility of such meetings encouraging parents to manipulate or pressure their children. Only eight of the 42 Judges interviewed agreed that they would meet with children and young people to hear their views in the future.

Of the 47 children and young people that Cashmore, Parkinson and Single interviewed in their study, around 85% were generally keen to talk to the Judge, even though most also had an ICL and had been interviewed by Family Report Writer.<sup>39</sup> They found that:

[M]any children and young people who have been involved in contested matters, especially where there have been allegations of abuse and violence, are keen to see the judge so that they can say what they want directly to the person making the decision. This is despite, or possibly because of, their experience of having their views 'interpreted' in an expert or family report, and presented to the court by a lawyer 'representing' what the lawyer sees as being in their best interests.<sup>40</sup>

This evidence suggests that some, perhaps many, children and young people would take up an opportunity to speak to the Judge, if it were available. The CYPC believes this option would be an interesting issue to 'road test' directly with children and young people.

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<sup>36</sup> R.M. Fitzgerald, above n 31 at 64.

<sup>37</sup> M. Fernando, 'Children's direct participation and the views of Australian judges' *Family Matters* (2013) No. 92, 41 at 44-45.

<sup>38</sup> *Ibid* at 45.

<sup>39</sup> P. Parkinson, J. Cashmore & J. Single, 'Parents and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21(1) *International Journal of Law, Policy and the Family* 84 at 89.

<sup>40</sup> *Ibid* at 104.

There is, however, no evidence to suggest that Judges would presently be well-placed to undertake direct interviews with children and young people. As highlighted above, effectively interviewing children and young people requires particular skills, skills that judicial officers may have in varying degrees depending on their professional training and experience. That said, there appears to be a real possibility that children and young people *want* to talk with Judges, and that judicial interviews, framed by appropriate guidelines and professional support, could be a useful mechanism for making children's voices heard.

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## DIRECT REPRESENTATION BASED ON CAPACITY

As noted above, adhering to a model of 'best interests' representation regardless of a child or young person's capacity to provide instructions is at odds with approaches to representation of children and young people in other child-focused proceedings. Notably, child-protection jurisdictions in several states and territories require a lawyer to act on a child or young person's instructions *if they are capable of providing them*.

While this approach is more inclusive than simply acting on best interests, it depends upon the lawyer's ability to relate to the child or young person and to assess capacity on an individual basis. The CYPC considers that all but the very youngest children may be able to provide at least some level of 'instruction,' as long as they have been engaged in an age-appropriate manner.

The concept of 'capacity to instruct' requires critical examination to ensure that children and young people are not excluded from direct representation on the arbitrary basis of their age, or because of the personal assumptions or beliefs of individual practitioners. The age at which children and young people are able to articulate informed opinions is substantially lower than many adults think.

In NSW, the relevant guidelines contain a *presumption in favour* of direct representation.<sup>41</sup> If a lawyer directly represents the child or young person, he or she 'owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult client.'<sup>42</sup>

The Law Societies of NSW, the ACT and South Australia have gone to great lengths to provide guidance on best interests and direct representation of children and young people. In important parts, these guidelines explicitly demand different things to those required of ICLs by National Legal Aid's 'Guidelines for Independent Children's Lawyers'.

For example, in NSW, the representative is required to make an assessment of the child or young person's capacity to provide instructions. In doing so:

[T]he child's willingness to participate and ability to communicate should guide the practitioner rather than any assessment of the 'good judgement' or level of maturity of the child...Child development literature suggests that the skills required to be capable of giving instructions are regularly attained by age six or seven.<sup>43</sup>

The NSW Guidelines also place an obligation on the practitioner to *enhance* the child or young person's capacity to provide instructions by 'structuring all communications to account for the child's age, level of education, cultural context and degree of language acquisition.' Practitioners are reminded that:

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<sup>41</sup> The Law Society of New South Wales, 'Representation Principles for Children's Lawyers: 3<sup>rd</sup> Edition' (September 2007) available at < <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026517.pdf>> (accessed 12 August 2013) at 9.

<sup>42</sup> Ibid at 6.

<sup>43</sup> Ibid at 12.

[A] child's capacity to give instructions will depend to a significant degree on the practitioner's skills in interviewing children and the child's stage of cognitive development. Adults frequently underestimate the knowledge and understanding of children, and their capacity to work through problems and provide a cogent view as to what is in their interests.<sup>44</sup>

In the context of a protectionist approach to the representation of children and young people, a purely 'best interests' model may be considered the ultimate way of 'protecting' children and young people from familial conflict. However, the unavailability of direct representation for *any* child or young person in the Family Court seems out of step with contemporary research, natural justice, and significant developments in other jurisdictions, including proceedings where deeply sensitive issues relating to a child's relationships with his or her parents, allegations of abuse and neglect, and conflicting views on living arrangements, are in heated dispute.

The CYPC would encourage law and policy makers to reconsider the availability of direct representation of children in Family Court proceedings. This may include further exploration of the Family Law Council's 2004 finding that it would be 'appropriate to have some mechanism within the family law system to facilitate direct representation of competent children in appropriate cases.'<sup>45</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Family Law Council, 'Pathways for Children: A review of children's representation in family law' (August 2004) available at <<http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Pathways%20for%20children.pdf>> (Accessed 12 August 2013) at 7.

## PART II: TALKING WITH CHILDREN & YOUNG PEOPLE

In early 2013, the ACT Children & Young People Commissioner (CYPC) approached Kingsford Smith School to seek their assistance for the CYPC to conduct a consultation with high school students about the participation of children and young people in Family Court matters. Kingsford Smith School is a government school in Holt ACT, with students from pre-school to year 10. The CYPC has developed a strong relationship with the school, with Kingsford Smith students involved in consultations arranged by the CYPC for the recruitment of the National Children's Commissioner, and in a project on bullying and disability.

In developing the consultation plan, the CYPC had useful discussions with the School Principal, Jan Day, and Pastoral Care Coordinator, Nghi Perrim, to refine the scope and methodology of the consultation, and to identify an appropriate group of students who might participate. It was agreed that students from Year Seven would be targeted for the pilot research. The CYPC provided a detailed consultation proposal and the school sought consent from parents to allow students to participate in the consultation.

### THE CONSULTATION

The ACT Children & Young People Commissioner, Alasdair Roy, and his Senior Adviser, Gabrielle McKinnon, facilitated the consultation over two sessions on 25 and 27 June 2013 at Kingsford Smith School.

Fifteen Year Seven students participated in the consultation. Fourteen attended the introductory session on 25 June 2013 (7 male and 7 female), with another female student joining the group for the substantive consultation session on 27 June 2013. Participants ranged in age between 11 and 13 years old, with the majority of participants being 12 years old.

Pastoral Care Coordinator, Nghi Perrim, who did not participate in the discussions but was available to provide support to the students if needed, attended both sessions.

The sessions were not audio recorded, but facilitators took detailed notes during the session, and written comments and notes from activities were collected.

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### INTRODUCTORY SESSION

The first session (1 hour) was intended to explain the purpose of the consultation, and to allow participants and facilitators to get to know each other.

The session began with a number of general icebreaker games to learn more about participants and their interests. The facilitators then gave an overview of the issues to be explored, and how the consultation would be conducted. The facilitators explained that participation in the consultation was completely voluntary, and that students could leave the sessions at any time. It was emphasised that the consultation aimed to seek views of students on the issues generally, not to explore details of personal experiences students may have had in Family Court matters.

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### CONSULTATION SESSION

The consultation session (2.5 hours) was based around two short films produced by Legal Aid NSW on the role of Independent Children's Lawyers (ICL) in Family Court proceedings - one aimed at young children, and the other at parents. The films are available on the website [www.bestforkids.org.au](http://www.bestforkids.org.au). These films provide an introduction to Family Court proceedings, and touch on issues such as the ICL advocating for the best interests of the child, rather than acting on instructions.

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## FIRST FILM & DISCUSSION

After a brief introduction, the group watched the first film, aimed at children. The group were asked for their initial reactions to the film. The facilitators then led a discussion on the questions:

- Should children and young people have a say in decisions in the Family Court?
- What kind of decisions might it be important for children and young people to have a say in?

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## THOUGHT BUBBLE ACTIVITY

Participants were then given paper 'thought bubbles' and asked to write down what they thought might be the 'good' and 'bad' things about having a say in Family Court matters.

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## SECOND FILM & DISCUSSION

The group then watched the second film, aimed at parents, which provides more detail and a different perspective on the issues of children's participation in Family Court proceedings.

The facilitators led a group discussion on the questions:

- What did you think about the independent children's lawyer in the video?
- What might they mean by best interests?
- Is it better for the lawyer to tell the Court what is in the child's best interests or to tell the Court what the child or young person wants?

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## FACES ACTIVITY

Participants were each given blank silhouettes of faces and asked to write about or draw the sort of person who they would want to talk to in Family Court matters. Participants then spoke about what they had written or drawn.

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## SMALL GROUP ACTIVITY

Participants then broke into three groups of five students and were given questions to consider as a group, as follows:

- Group 1: What would be the best way for a person to talk to children and young people to get their views? Where should this happen?
- Group 2: Should a person who talks to children and young people be able to talk to other people, like their doctor or school teacher to get information? Should they have to get permission from the child or young person to do this?
- Group 3: Should the person have to tell the child or young person everything they are going to say about them in court?

Participants reported back on the thoughts of their small group, and discussed each issue as a broader group.

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## SURVEY

Finally, students were provided with an anonymous survey regarding any previous contact with the Family Court. No names were recorded on the survey and participants were reminded that completing this survey was voluntary. Surveys were placed in a sealed survey box.

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## FOLLOW UP

The facilitators thanked the students for their participation in the consultation and noted that they would follow up with a further session to discuss the results of the consultation.

Participants were also given a gift voucher to thank them for their time and contribution to the consultation. The school had approved this, but participants and parents were not informed about the vouchers before completing the consultation, in order to avoid this influencing their decision to participate.

## PART III: THE VIEWS OF CHILDREN & YOUNG PEOPLE

From the anonymous survey, 6 of 15 participants reported having contact with the Family Court. While facilitators reminded participants that we were not seeking to explore personal experiences of the Family Court, some students did share aspects of their own experiences, and had a particular interest in these issues. Interestingly, many of the participants who did discuss their own story appeared to have had unfavourable experiences with the Court, and to have not received, or not understood, information about what was happening.

Regardless, all participants, including those who had not had direct contact with the Court, appeared enthusiastic and engaged with the consultation, and offered many thoughts and insights.

Overall, most participants thought that it was important for children and young people to have a say in Family Court matters, particularly where decisions would affect relationships with family members. They recognised a need for nuanced participation mechanisms reflecting the age and maturity of the child or young person. Participants identified a number of potential concerns for children and young people participating in court proceedings, and focused particularly on concerns about confidentiality, and how information they provide might be used. They expressed clear preferences regarding the type of person they would be comfortable speaking to about Family Court matters, and how this person should communicate with children and young people. Participants also raised broader issues about the role of the ICL and other ways in which children and young people might have their voices heard, or how matters could be resolved outside the court system altogether.

### SHOULD CHILDREN & YOUNG PEOPLE HAVE A SAY?

Participants overwhelmingly (13 of 15 in a show of hands) felt that children and young people should have a say in Family Court matters. Reasons given were to ensure fairness for all those affected by the decisions (*"It's not right not to give us a say"*), and so that children and young people would be more satisfied with the outcome of proceedings:

*"If they don't take our views into account we won't be happy in the end."*

Two participants stated that they were unsure about children having a say, but in elaborating explained that this was dependent on the age of the child or young person:

*"I said unsure because, it depends on your age. Over twelve, yes."*

*"It should be at a certain age, like if you are four [years old] and you don't love your dad and just your mum, it may change when you get older."*

Participants discussed the relevance of age, and a number suggested that all children and young people should have an opportunity to have their say, but that the weight given to these views should increase with the maturity of the child or young person:

*"You should be asked, but they shouldn't give your views as big an impact as when you are older, like twelve or thirteen."*

*"Some kids would be really dumb, especially if they are young. Others would be sensible."*

It is notable that participants identified young people of approximately their own age (12 years old) and older as capable of giving sensible and mature views. It would be interesting to ask younger children the same questions to see if they also tend to identify their own age group as mature and capable.

## IN WHAT KINDS OF DECISIONS IS IT IMPORTANT TO HAVE A SAY?

In this discussion, participants consistently focused on fundamental issues of relationships with family members. Decisions identified as important for children and young people to have a say in included:

*“Who you live with.”*

*“Who you like in your family.”*

*“About your siblings, like step brothers and sisters and what will happen with them.”*

*“When you live with one parent and when you get to go over to the other parent’s place.”*

*“If you want to live with or see one part of the family and not the other, like you might not want to live with dad, but you might want to see dad’s side of the family.”*

*“To give a statement to the court about one parent, so they know what they are really like.”*

*“To work out what happens after court, where you are going to stay?”*

*“What happens if neither parent wants you, or you don’t want to live with them?”*

Other issues raised by the facilitators, such as decisions about choice of school, religious upbringing, opportunities and participation in extra-curricular activities were generally not seen as so important by participants, although the issue of moving away from friends was relevant. One participant suggested it would be important to have a say in this case:

*“Like if you go to live with one parent and you would have to move and leave your school and your friends.”*

Participants felt that children and young people would have clear preferences about which parent they wanted to live with, and how (and if) they would have contact with the other parent, and other family members.

Some participants felt that the Court did not necessarily receive full or accurate information about their parents, and that they would like the opportunity to tell the Court how they saw their parents, to ‘set the record straight’. One participant noted that parents may present themselves differently while there is a court case on:

*“Parents can act differently around the time of the court - both parents are suddenly extremely nice, but then change back again afterwards to how they usually are.”*

Overall, participants suggested that children and young people have a strong interest in maintaining relationships with the people they love and care about, and avoiding contact with those they consider harmful or abusive, and that *they* are the experts on these issues in their own lives.

## THOUGHTS & CONCERNS ABOUT HAVING A SAY

In the ‘thought bubble’ activity, participants were asked to think about what might be ‘good’ or ‘bad’ about having a say in Family Court proceedings.

The most common concern, identified by seven of the 15 participants, was about parents finding out what they said, and being hurt, upset or angry. While participants saw value in children and young people having a say, they perceived a lack of control over what use might be made of any information they provided, and concern about damaging relationships with parents if their views were not kept confidential:

*“You might be thinking that you will upset your parents if you speak out and you say the wrong thing”*

*“I don’t want to hurt their feelings.”*

*“Are they going to tell anyone else? I don’t want to pick sides, but I really want to live with my mum.”*

*“I think my parents will find out what I said.”*

Some participants also described thoughts and concerns about the process of being involved in Family Court matters, and the difficulties of talking to strangers about family issues:

*“I think that Court shouldn’t exist and that parents and children should make decisions by themselves.”*

*“It is really embarrassing talking to someone about my parents.”*

*“I would feel more comfortable at home being questioned, rather than the court room.”*

In discussion, one young person noted that *“going to court makes you feel like a criminal”*. Another stated that *“it’s annoying to be questioned all the time”*.

While courts are intimidating places for many adults, these comments highlight the particular concerns and negative associations that children and young people may have about courts, and the difficulty reconciling the involvement of lawyers and formal processes in their family lives.

A further issue raised by several participants was the concern that the final decision would not reflect the wishes of the child or young person, or that the decision would not be fair:

*“What if I don’t agree with the final decision?”*

*“What if I don’t like the final decision? What if the court doesn’t like my decision?”*

*“How is it fair if you end up with a parent that you don’t want to live with?”*

For these participants, particularly those with personal experience of the Family Court, there was uncertainty about whether their views and wishes would really be taken seriously and respected by the Court in the final decision. This made them question the value of participating in the process.

Others reiterated the importance of children and young people participating in court proceedings: *“you should have a say on most things happening in Court”*.

## ROLE OF THE INDEPENDENT CHILDREN’S LAWYER

After watching the short films, participants made a number of observations about the role of the ICL.

Some participants who had been involved in Family Court proceedings commented that the film did not reflect their experience, as they had not had an ICL appointed, but had instead spoken to a Family Consultant, or to their parent’s lawyer. Others stated that they felt they had had no say at all in the proceedings, and that they would have liked an opportunity to provide their views.

*“I didn’t have a lawyer, they wouldn’t let me speak for myself. My brother wrote a statement to the court but they wouldn’t accept it.*

*“The court asked me, they do ask kids, but they don’t fully listen. Two people came out and saw me at home. Most of the stuff I said I wanted didn’t happen.”*

The perception of a participant that the Court asked for but did not ‘fully listen’ to his views indicates the lack of transparency for children and young people who are interviewed, but who then receive little feedback about how their views have been presented or taken into account, apart from the final decision.

Unexpectedly, a number of participants formed a negative impression of the ICL in the films. These impressions appeared to relate to the tone of voice used (which perhaps may have been more appropriate for

younger children), and the discussion around the role of the ICL in advocating for best interests and not acting for children and young people:

*"I found that girl really mean in a way, it seemed like she didn't care."*

*"Her voice was annoying! Really high and soft or something."*

*"It was funny when the lawyer just said 'No' that she wouldn't do what the kids tell her."*

*"You can tell she's acting. She just looked like a mean person."*

While these views were only strongly expressed by a small number of participants, it does suggest that further audience testing of the films on children of different ages may be useful. We note that in this case the participants watched both films, but that these comments primarily related to the first film, intended for children.

Participants discussed the role of the children's lawyer, and noted some concerns about the interview process conducted by the lawyer, in terms of building trust in a single interview session, and getting to the key issues concerning the child or young person:

*"Is there more than one meeting with the lawyer? You need more than one meeting to get trust and give them information. A one off meeting is not that good."*

*"I didn't like how she just asked them about what activities they liked to do. I would want them to ask about the real questions about what is happening, otherwise it just builds up in your mind."*

Participants discussed concerns about changing lawyers if a child or young person did not like the lawyer who had been appointed, and who they could talk to in this situation

*"What if you don't trust them, what can you do?"*

*"So if you were in that situation and you didn't like them but they didn't tell you about who to complain to, then what could you do?"*

These concerns highlight the lack of choice and control that children and young people have regarding an ICL who may be appointed for them. It is not clear that there would be any clear or accessible mechanisms for a child or young person to complain about an ICL or to request a different ICL be appointed.

## BEST INTERESTS VS ACTING ON INSTRUCTIONS

Participants discussed the idea of the ICL forming their own view about what is in a child's best interests. There was some support for this role, particularly for younger children. One participant suggested that the lawyer should:

*"Talk to all family and add their own bias to what they think is best for the children and the parent(s)."*

However, for older children and young people, participants suggested that the ICL should present their views and wishes directly to the Court, as well as possibly indicating the lawyer's own views on best interests. One participant stated:

*"The lawyer should talk about the best interests AND what the kids actually say."*

However others emphasised the need for the Court to hear the views of children and young people directly.

## DESIRABLE CHARACTERISTICS FOR A CHILDREN'S REPRESENTATIVE

In the 'faces' activity and discussion, participants identified a range of characteristics that would be desirable for a person who talks to children and young people in Family Court matters. A number of strong and consistent themes emerged from participants' written answers.

### GENDER

Most female participants expressed a strong preference for a female representative. Male participants generally preferred a male representative, although in subsequent discussion one young man noted a preference for a female representative *"because women are easier to talk to about personal stuff"*. A number of participants suggested that the (female) representative should be "pretty" which may relate to the way the activity was structured, in using silhouettes of faces, and thus prompting participants to envisage the physical as well as personal characteristics of an 'ideal' representative. It may, however, be that these participants associate 'prettiness' with approachability and kindness.

### KIND & CARING

Most participants emphasised personal attributes relating to kindness and caring, for example that the person should be *"kind", "friendly", "caring", "nice", "smiley", "supportive"*.

One participant noted that the person should be *"someone who really cares and who isn't just there for the money"*.

### TRUSTWORTHY & HONEST

Trustworthiness and honesty was a strong theme in many responses, and this was also related to the idea of respecting information given in confidence:

*"Someone I can trust, honest."*

*"Trustworthy, honest."*

*"Honest and won't lie to me."*

*"Trustworthy, keeps my personal stuff personal."*

*"Respecting (my privacy)."*

*"Straight up."*

*"Someone with no criminal record."*

In discussion afterwards, participants acknowledged that information may need to be disclosed to others, but felt that it was important that a representative be very clear up front about what would happen with any information provided by the child or young person, and that they did not make promises that they could not, or would not, keep.

The focus on honesty and transparency was a strong theme throughout the consultation. Participants did not consider that a person was necessarily trustworthy simply because they were a lawyer, rather trust was developed through honesty and integrity in their dealings with the child or young person, particularly regarding the use of their sensitive information.

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## RELAXED ATTITUDE

Several participants suggested that it was important that the representative has an easy-going manner, and did not pressure them for answers:

*"Doesn't pressure you, not strict (easy going)."*

*"Not that official, they don't make you stressful, they don't make you say something."*

*"Cool, funny, gentle, calm."*

*"Not mean, funny, not stressful."*

*"They don't make you feel uncomfortable - chilled out, doesn't pressure me to speak about things I don't want to say."*

These comments are consistent with the concerns raised by participants about the formality of the court system, and the desire to maintain control over the information they choose to provide.

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## LISTENING

A number of participants emphasised the need for a representative to really listen to what they have to say:

*"Someone who will listen to me."*

*"Someone who listens to you."*

*"Can listen."*

In discussion participants suggested that listening was not about simply extracting accurate or relevant information from them, but really taking time to get to know them, to let them talk, and caring about what they had to say.

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## NON JUDGMENTAL

Several participants noted that it was important that a representative is *"not judging"* and that *"they would respect your opinion"*, while another emphasised that a representative should have *"NO attitude"*.

Participants suggested that they would not be confident in talking openly with a representative who talked down to them, made assumptions about them, or questioned their views and wishes.

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## ABLE TO RELATE TO YOUNG PEOPLE

Answers also contained a number of references to a representative understanding and being able to relate to children and young people. Several participants suggested that the representative should themselves be *"young"*. Another specified a preference for a person *"aged 20-25"*, while another simply stated *"not old"*. In discussion, one participant suggested that:

*"They should get really smart kids to be the lawyers, they would be easier to talk to."*

It appears that these participants envisaged that a younger person would be less intimidating and more likely to understand them and relate to them.

Others focused more directly on capacity to understand and develop a relationship with them:

*"Familiar to me...gets me, know how I talk."*

*"Someone that is willing to get to know me."*

*"Non-family but knows me."*

*"Speaks my language, understands what I have to say."*

*"Can relate to my situation."*

*"You would get to know the lawyer."*

In discussion, participants reiterated the importance of developing rapport and trust with the representative, and that this required time and commitment to getting to know them, rather than simply obtaining information from them.

## INTERVIEWING CHILDREN & YOUNG PEOPLE

In the small group activity, one group considered how and where interviews should take place.

The group emphasised the need for interviews to take place in familiar surroundings, uninfluenced by parents, and in a way that allows the interviewer to get to know the child or young person face to face:

*"[The] ICL should make it at home or a familiar place to the child (or children). They should get to know them individually. The parents shouldn't be around the children when the interview is happening because it could influence the child's decision. It shouldn't be over the internet or telephone, it should be in person."*

In discussion, participants suggested that interviews could take place at home (without parents present) or at school:

*"I think it is good to have it at home because it is calm and comfortable. It could be at a school with just you."*

*"They should talk to you at home or school where you feel safe."*

These comments highlight the importance of a safe and familiar environment in allowing children and young people to fully participate in interviews. While conducting interviews in an office may be more convenient for an ICL, participants' comments suggest that the formality and unfamiliarity of this environment is likely to be a barrier in developing trust and rapport.

One participant stated that *"they should have a family meeting, not at court first, with lawyers and your parents"*. Another participant felt that the representative should *"be supportive and talk to all family"* to work out what is *"best for everyone"*. Another suggested that *"the whole court hearing should happen at home, rather than in the court room"*.

Others raised the possibility of talking directly to the Family Court Judge, alone, or in the Court:

*"You should get to talk to the judge if you want to."*

*"Can you talk to the judge in a room by themselves? That would be better."*

*"Older children should be able to choose to go to court and talk for themselves if they want to. It should be their choice."*

*"Kids should be there face to face at court so they can have a say."*

It appeared to the facilitators that participants who had reported contact with the Family Court, and who had not generally had positive experiences, were more likely to favour talking to a Judge directly. These participants identified the benefits of knowing that their voices would be heard accurately and without interpretation.

## GETTING INFORMATION FROM OTHER SOURCES

One group considered whether an ICL should be able to obtain information from other sources (eg: a teacher or doctor) about the child or young person, and if so, how this should happen.

This group suggested that it is important for an ICL to have all relevant facts, but that the child or young person should always be asked for permission to contact others about them:

*“Yes, they must know everything.”*

*“They have to ask you before the ICL goes and asks teachers or doctors, they should get permission in case the teacher/s tell the lawyer something too personal.”*

*“Ask the children [first], not the teacher etc.”*

In discussion, participants emphasised that the child or young person should be the first, and most important source of information about their own lives and their wishes, and other sources should be secondary and only used where necessary. They acknowledged that sometimes information may need to be sought and disclosed against a child or young person’s wishes, where there are serious issues or safety involved:

*“They should get permission to talk to teachers and people about you. But if you say no they sometimes might need to talk to them anyway, depending how serious it is.”*

*“If you don’t want something you told the ICL to be used they shouldn’t tell, unless it is about safety.”*

*“They should try to get the information from the child first before they ask other people.”*

Participants considered that where it was necessary to disclose information against the wishes of a child or young person, it was very important for the ICL to be honest and tell them that this would happen and to explain why.

## COMMUNICATION WITH THE CHILD OR YOUNG PERSON ABOUT WHAT HAPPENS IN COURT

This group considered whether the ICL should have to tell the child or young person what they intend to say in court. The group felt strongly that the ICL should be clear and honest with the child or young person and tell them what they are going to say:

*“The person should tell the child what they’re going to say to the judge at court.”*

*“The person should use words that the child would understand.”*

*“The lawyer shouldn’t be having secrets behind your back, they should be honest with you.”*

In discussion, a number of participants suggested that the child or young person should have a choice about speaking for themselves in court if they think the ICL will not adequately represent their views.

They also noted the importance of an ICL reporting back to the child and young person what had actually happened in the Court.

## UNANSWERED QUESTIONS

Throughout the consultation it was notable that participants asked many questions relating to the outcome of Family Court proceedings in which they had been involved, and what might happen to them if their circumstances changed in the future.

It appeared to the facilitators that a number of these young people had not received adequate information about the proceedings that affected them, and did not know how to contact anyone to get further information about issues that concerned them.

Facilitators answered as best they could all questions asked by participants, and had a private discussion with one participant after the session to provide personal support and referral points.

## PART IV: WHAT CAN WE DRAW FROM THE CONSULTATION?

In designing and implementing this consultation we anticipated that participants would take the task seriously, as it has been the consistent experience of the CYPC that when children and young people are asked for their views, they frequently give the process more mature consideration than many adults. This is not surprising, as children and young people are so used to being 'taught' or 'talked to' by adults, that when adults take the time to 'listen' and 'talk *with*' children and young people, the children and young people are generally pleasantly surprised, receptive and engaging.

We were not sure whether children and young people who had not been involved in Family Court proceedings would have clear opinions on issues to do with the Family Court. This, however, proved not to be a problem, with most participants in the consultation contributing ideas and opinions on all topics.

This consultation confirms that children and young people of this age group are readily able to understand and engage with the issues relating to family law matters, and express strong and thoughtful views and preferences about how they would want to participate in Family Court proceedings - regardless of any previous involvement with the Court.

## HOW COULD THESE VIEWS INFORM PRACTICE?

Although this was a pilot consultation with only a small group, the views they expressed are consistent with those found by researchers, and provide insight into ways that participation in Family Court proceedings could be improved for children and young people.

Participants affirmed the desirability of children and young people having a say in Family Court decisions that affect their lives, and suggested that it is particularly important for them to participate in decisions about who they live with and who they will have ongoing contact with.

These views confirm the importance of the efforts being made by the Family Court to introduce practices which offer greater opportunities for children and young people to participate in decision making, including cases where decisions are made through mediation, or where an ICL is not appointed.

It was notable that a number of participants had a negative reaction to the lawyer depicted in the educational film about the role of the ICL. While the film is clearly intended to help children and young people understand the role of the ICL and reassure them about participating in an interview, the children and young people we spoke with did not view the lawyer as sympathetic or engaging. For these participants, the film may not have been so effective in allaying concerns about an interview with the ICL. It may, however, be that the film might be more effective for younger children, and that they would have a more positive reaction to the film. Regardless, it would be useful to show the film (and other educational materials) to more children and young people of a range of ages to identify if the effectiveness of the materials could be improved.

Participants' views on more specific issues may also be useful in improving the training and practice of ICLs and Family Consultants, and in on-going judicial education.

A very clear theme emerging from this consultation was participants' desire to have an understanding of, and some control over, what happens with information and views they provide. This theme emerged in concerns about parents finding out what they had said and being upset, and teachers finding out about their personal issues. It was also apparent in their emphasis on a good ICL being trustworthy and respecting their privacy. Participants showed a mature understanding of the issues involved, recognising that in some cases the confidentiality of sensitive information could not be preserved, such as where there were concerns about safety or other serious issues, however they pointed to the need for very clear and transparent communication about when this might occur.

Current guidelines for Independent Children's Lawyers do consider the issue of trust and confidentiality. The Guidelines state that:

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.<sup>46</sup>

Comments from participants in this consultation suggest that it will be difficult to establish a relationship of trust and respect where the child or young person has concerns about confidentiality. It may be that the Guidelines could be further elaborated to provide more specific guidance about establishing transparent processes with the child or young person, so that they retain a sense of control over the information they choose to share with the ICL, knowing what use will be made of it.

Ensuring that the child or young person is told exactly what the ICL is going to say to the Court, and to other people, would also assist to build confidence and trust, as well as giving the child or young person a better understanding of what is happening in the proceedings.

Other aspects of participant' comments may be useful in recruitment and training of ICLs, including their comments about the importance of kindness, genuine listening, being relaxed, calm and non judgmental, and having the ability to establish a real rapport with children and young people.

Participants' strong preferences for an ICL of the same gender (particularly for young women) also highlight the desirability of children and young people having some choice in relation to an ICL. While recognising that there may be resource implications in giving children and young people an opportunity to express a view on the allocation of an ICL, it would be beneficial for them to at least have input into the selection of a male or female representative. Ideally, children and young people should also have the ability to seek another ICL if they feel that the ICL appointed is not able to establish a rapport with them. This may be problematic within the current constraints of the ICL model.

Participants' comments also suggest that further thought be given to the way ICLs interview children and young people. Rather than a single interview in the lawyer's office, participants strongly felt that ICLs should meet children where they feel safe and comfortable (eg: at school or at home), and that they should spend time just getting to know them, rather than immediately seeking information from them. While more time consuming, and thus resource intensive, this additional time spent with children and young people is likely to help them to participate more fully in decision making.

## CONTRIBUTION TO MORE SIGNIFICANT REFORM

This consultation also provides some support for more significant rethinking of the role of the ICL and other ways in which children and young people might participate in Family Court proceedings.

Although increasing the transparency of communication of ICLs may improve perceptions of trustworthiness, the real issue of the lack of control discussed by participants is largely a function of the 'best interests' model of the ICL. Under this model the ICL does not act on the instructions of a child or young person, even where that child or young person has sufficient maturity and understanding to provide those instructions. This differs from the role of the children's representative in care and protection proceedings in many jurisdictions, which is based on direct representation rather than best interests, even though the issues covered in Family Court and Children's Court proceedings are very similar.

Further consultations with children and young people of a variety of ages may shed further light on how children and young people perceive the best interests model, and whether direct representation would be more conducive to effective participation by children and young people who are mature enough to provide instructions.

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<sup>46</sup> National Legal Aid, above n 25 at Guideline 5.1

An alternative suggested by participants in this consultation is to allow children and young people the choice of speaking directly to the Family Court Judge, in Court or in chambers. Participants who had had contact with the Family Court generally favoured this model as they could see the advantages of expressing their views directly to the decision maker, rather than trusting a representative to interpret and convey these messages. While this consultation does not provide conclusive support for judicial interviews, it suggests that this issue should be explored in more detail with a range of children and young people.

## WHERE TO FROM HERE?

This pilot consultation confirms the value of speaking to children and young people about participation in Family Court proceedings, for the genuine and unique perspectives they provide. This consultation was conducted utilising the skills and existing networks of the CYPC and was able to be conducted relatively quickly and for minimal cost. While such consultations do not have the structure and rigour of academic research, they complement formal studies and have the advantage of gaining qualitative data without such an extensive commitment of time and resources.

We consider that this pilot consultation could be developed into a more extensive consultation process and replicated with larger numbers of children and young people from different backgrounds. While this consultation was targeted at high school students, in our view it is likely that younger children would also be able to provide useful input on some issues, although a consultation would need to be structured with their developmental stages and vulnerabilities in mind.

The CYPC appreciates the interest and support of the Chief Justice of the Family Court, the Chief Judge of the Federal Circuit Court, and the Children's Committee of the Family Court of Australia and Federal Circuit Court, as an audience for this pilot consultation, and the CYPC would welcome the opportunity to discuss with Her Honour or the Committee the possibility of further direct consultations with children and young people. These consultations could simply replicate this one, with a larger number or different demographic of participants, or could look at additional topics including, for example, what children and young people think about talking directly with Judges.

Similarly, the CYPC may be able to develop a more extensive consultation resource to be used in multiple jurisdictions.

The CYPC would like to sincerely thank Kingsford Smith School, including, in particular, the students who were so engaged and thoughtful throughout the whole process, and who provided us with invaluable insights into Family Court processes. The facilitators very much enjoyed spending time with these students, and we look forward to returning to the school to provide feedback about the results and outcomes of the consultation.

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