

Independent Children's Lawyers and their role in Family Law proceedings



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alex Wearne on Monday 16 September 2014. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- What is an ICL?
- When are they appointed
- What is their role?
- How does the ICL support a child's participation?
- Who pays for the ICL?

What is an Independent Children's Lawyer (ICL)

- The ICL is a lawyer appointed by the Family Court or Federal Circuit Court to represent the child's interests in parenting order cases
- The ICL's job is to act in a child focused way and to look at all of the evidence in the case and tell the Court what they think is in the best interests of the child

What criteria leads to an appointment of an ICL?

In 1994, the case of **Re K** set out the guidelines for when an ICL should be appointed:

"...Appointments should normally be made where:

- Cases involve **allegations of child abuse**, whether **physical, sexual or psychological**....*
- Cases where there is an apparently **intractable conflict** between the parents....*
- Cases where the child is apparently **alienated** from one or both parents....*
- Where there are real **issues of cultural or religious difference** affecting the child....*
- Where the **sexual preferences of either or both of the parents** or some other person having significant contact with the child are likely to impinge upon the child's welfare....*
- Where the **conduct of either or both of the parents or some other person** having significant contact with the child is alleged to be **anti-social** to the extent that it seriously impinges on the child's welfare....*
- Where there are issues of **significant medical, psychiatric or psychological illness or personality disorder** in relation to **either party or a child or other persons** having significant contact with the children....*
- Any case in which, on the material filed by the parents, **neither seems a suitable custodian**....*
- Any case in which a **child of mature years** is **expressing strong views**, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent....*
- Where one of the parties proposes that the child will either be **permanently removed from the jurisdiction** or permanently removed ...within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child....*
- Cases where it is **proposed to separate siblings***
- Custody cases where **none of the parties are legally represented**...*
- Applications in the Court's welfare jurisdiction relating in particular to the **medical treatment of children** where the child's interests are not adequately represented by one of the parties....*

A **child's aboriginality** is also a factor, which warrants the appointment of an ICL (*B and R and the Separate Representative* (1995) FLC 92-636)



The role of the ICL

- The role and responsibilities of the ICL are set out in National Legal Aid's Guidelines for ICLs
- The 2006 amendments to the *Family Law Act* legislatively defined a number of important aspects of the ICL's role
- This part of the legislation closely echoes the role of ICLs as set out in the Legal Aid Guidelines, however, the Guidelines are far more detailed
- The ICL's role is to always work in the best interests of the child

The role of the ICL under the *Family Law Act 1975*

- Section **68LA** sets out the role of the ICL. This includes:
 - To form an independent view, based on the evidence available
 - To act in the best interests of the child
 - To make submissions to the court on what actions they believe would be in the best interests of the child
- Section **68LA(4)** makes it clear that:
 - The ICL is NOT the child's legal representative; and
 - The ICL is NOT obliged to act on the child's instructions in relation to the proceedings
- Section **68LA(5)** sets out the ICL's duties:
 - To act impartially
 - To ensure the views expressed by the child are put before the court
 - To analyse significant reports and documents relating to the child
 - To try to minimise trauma to the child
 - To facilitate an agreed resolution that is in the best interests of the child

How does an ICL support children's participation?

- There is a positive obligation on an ICL to ensure each child's views (assuming they want to express views) are placed before the Court, preferably in admissible form
- Upon appointment, the ICL Guidelines require ICLs to meet with children they represent, except in exceptional circumstances
- In the Family Law system, there is no age based distinction in relation to how children are to be represented and their views are to be treated
- One ICL is appointed for an entire sibling group
- It is open to the ICL to make recommendations which are contrary to the expressed wishes of a child, as their obligation is to promote an outcome which accords with the best interests of the child

Practicalities of meeting with children

- ICLs meet with children –they don't interview them
- Focus of the meeting:
 - Development of an age appropriate professional relationship
 - Making sense of the Court proceedings
 - Explaining opportunities for participation
 - 3 options with respect to their views (**s 68LA**):
 - Express no views to the ICL or court (see also, **s 60CE**)
 - Express their views to the ICL, but that communication is to remain confidential (unless the ICL decides it needs to be expressed to the court – breaking confidentiality is extremely rare)
 - Express their views to the ICL and make their views known to the court
 - Explaining the role of Family Consultant / Court expert
 - Making participation safe



- ICLS are mandatory reporters: **s 67ZA Family Law Act**

Participation: maintaining contact with the children

The ICL should maintain contact with the child throughout the case and at a minimum:

- Before major Court events such as interim and final hearings
- If it appears likely that the Court will make an order inconsistent with the child's expressed views
- Explain any orders (interim or final) made to the child

Communication may be face-to-face, by telephone, email, SMS or letter, depending on the information which needs to be conveyed or discussed

Evidence gathering

- The role of the ICL should be an active, not a passive one
- An ICL makes enquiries regarding the welfare of the child(ren) and should ensure that all relevant evidence is before the Court
- Often an ICL will speak to schoolteachers, welfare workers, police officers, counsellors, doctors and other significant people involved in the lives of the children. They often obtain reports or Affidavits and / or issue subpoenas for notes and records
- The ICL must liaise with the Family Consultant who conducted the Child Dispute Conference

Case planning

- After information has been gathered and the children met, the ICL should formulate a case plan
- A good ICL "runs a case" for the children they represent
- There should be a (flexible) strategy about:
 - What evidence that needs to be presented, the report(s), that need to be prepared
 - The case management of the matter, including consideration of appropriateness and timing of referral to FDR processes
 - The level of involvement of the children in proceedings
 - Orders which will best meet the children's needs

Obtaining assessments

- Assessments are how children's views are reported to the Court
- Ensuring that relevant evidence is before the Court includes having a family assessment undertaken by:
 - A Family Consultant in the form of a Family Report
 - A single expert report by a Child and Family Psychologist or Psychiatrist
 - Both a Family Consultant and an expert addressing a particular issue

Unrepresented litigants & the ICL

- ICLs cannot give legal or personal advice
 - But should be honest and transparent in dealings with unrepresented litigants
- ICL can give procedural information:
 - Forms that need to be filed
 - Case management pathways
- ICL can help with management of expectations:
 - Why we are at Court today...
 - Providing a minute of orders & directions sought
- ICL can assist with some, but not all, evidence gathering for the unrepresented litigant



ICL in family violence cases

- Evidence gathering & testing
- Using negotiations and reality testing to circuit break the controller / appeaser dynamic that can sometimes accompany family violence cases
- Appropriate referrals to FDR

Who pays for the ICL?

- Legal Aid NSW funds ICLs, both in-house and private practitioners
- The ICL will seek a contribution to their costs from those who can afford to pay it
 - Those who cannot afford to contribute can apply for a waiver
 - Note: the test is lower than for Legal Aid means testing, encourage clients to apply
- An ICL will seek a contribution from non-legally aided parties to the costs of the expert report (note that the cost of the expert report is separate from the cost of the ICL)