

# Neither Seen Nor Heard: Australia's Child Protection Conundrum

## Family Law Express Full Report



## An inquiry into the experiences of parents with Independent Children's Lawyers within the Australian Family Law System

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# EXECUTIVE SUMMARY

This report examines the results of an online survey conducted by Family Law Express into the experiences of parents with Independent Children's Lawyers (ICLs) within the Australian Family Law system.

Family Law Express is a family law research hub providing family law support, information and legal supplements to parents in the midst of separation or those imminent. Family Law Express and its contributors uphold the view that ongoing legal reform is necessary to all legal systems to ensure that laws remain relevant to the times.

The subject of ICLs is of particular relevance in current family law reform debates. ICLs, assigned by the Court in certain circumstances are purposed solely and specifically towards representing the best interests of children. Whilst ICLs are endorsed by these lofty principles, the current reality of ICL practice has been routinely questioned.

This report is the result of research which aims to bring about a better understanding of this issue, particularly through the eyes of parents who have been involved with ICLs. *'Neither Seen nor Heard: Australia's Child Protection Conundrum'* is both a qualitative and quantitative review of parents who have been involved with an ICL.

It is a broad-ranging research piece which has attempted, amongst other aims, to identify existing levels of communication between ICLs, parents and children; determine parental views on the knowledge, expertise and professionalism of ICLs; evaluate parental satisfaction with ICLs; gauge the value parents place on ICLs; and explore any issues that parents have encountered as a result of their involvement with an ICL. In doing so, this research has provided parents with a forum and outlet through which they have been able to reflect on and discuss their experience.

As an ultimate goal, this research endeavours to benefit those involved in child contact dispute matters as well as the wider legal community, practitioners and recipients of legal services alike. Further, this project has endeavoured to give parents a greater voice and influence in the family law system and in family law reform.

# ACKNOWLEDGEMENTS

Family Law Express would like to acknowledge all the parent respondents of the online survey, whose openness and honesty has allowed for the effective completion of this project. Their invaluable insights have enriched this research and have added innumerable dimensions of depth and profundity to this final report.

Thanks must also be extended to Family Law Express' online publishers, to the individuals and organisations who assisted in promoting the survey and encouraged their users and visitors to participate in this research. The encouragement of these publishers has undoubtedly enriched survey participation and has been imperative to the plethora of survey responses.

The author also acknowledges the work of the Family Law Express team, whose passion, drive and abundant knowledge has been integral to this research.

Appreciation must finally be extended to all those involved in family law reform in Australia. It is those who contribute to law reform that maintain accountability, transparency, integrity, responsibility and ongoing development within Australia's family law system.

# INTRODUCTION

*“My personal experience leads me to believe that the theory of an ICL is good, but the actual practice, like other areas of the family law system, is sadly lacking.” – Respondent.*

Sections 68L and 68LA of the *Family Law Act 1975* (Cth) establish the circumstances under which the Court will make an order for the appointment of an ICL. Whilst the overriding principle upon which ICLs are purposed is independent representation of the child's best interests, questions routinely arise concerning their advocacy in practice.

Specifically, recent debate about ICLs has questioned the quality and effectiveness of representation, the knowledge and skills of ICLs, their impartiality, and their ability to separate the realities of each case from pre-conceived personal ideologies that may serve to compromise their effectiveness.

The Australian Government's response to the ICL debate was a study by the Australian Institute of Family Studies (AIFS) which culminated in the publication of their report, *Independent Children's Lawyer Study: Final Report* in May 2013. The research examined the extent to which the involvement of an ICL in family law matters improved outcomes for children.

Whilst a comprehensive study involving some 562 research participants, the nature and background of the majority of participants involved appears strikingly unbalanced. To elaborate, of the 562 research participants, only 24 were parents or carers of children involved with ICLs, and another 10 participants were children or young people directly involved with ICLs. The other 528 participants involved in the study were professionals, more specifically, 169 were ICLs, 192 were non-ICL lawyers (barristers and solicitors), 113 were non-legal family law system professionals, and 54 were judicial officers including registrars.

Whilst the intent of the AIFS study should not be doubted, concerns should be held over the fact that in a study examining the impact and effectiveness of ICLs in family law matters, only 6% of participants represented those who were actually impacted by the involvement of an ICL. In other words, given that the majority of the research participants were legal professionals in a study designed to investigate the effectiveness of legal professionals, the results were always going to be subject to the impression of a potential conflict of interest.

Despite this, the views of legal professionals should certainly be a consideration in the ICL debate, but they should not be the overwhelming consideration over the parents, children and families who are most affected by the involvement or non-involvement of ICLs.

The AIFS attempted to address the small sample size of parents and children by suggesting that this approach reflected the difficult and sensitive nature of the research topic. They further tried to justify

this by highlighting what they saw as similar narratives between the small sample of parents and children, and the larger sample of legal professionals, suggesting that this somehow underscored the validity of the data. This attempted justification only serves to reveal a troubling lack of objective accountability evident in the AIFS study, and perhaps other factors that have contributed to a distinct lack of methodological rigor.

In contrast, the 'difficult and sensitive nature' of the Family Law Express' research study yielded 89 responses from parents (to the AIFS' 24). It should be noted that the Family Law Express study was of a shorter timeframe than the AIFS, lacked the benefit of having access to referred participants, and was reliant solely on the promotional efforts of two staff on a part-time basis.

This study by Family Law Express was therefore able to address the inadequacies of the AIFS study which largely excluded families involved with ICLs. It did so by attempting to understand the experience of parents in child contact conflicts, who engaged with ICLs, principally from the perspective of the parents. As such, it offers a different perspective to the debate, a necessary perspective from those most directly impacted by the involvement of an ICL.

Family Law Express recognises the deeply emotional and sensitive nature of this subject matter and objectively represents the findings of this research as an independent body driven neither by political agendas nor by personal involvement with ICLs.

The overwhelming point made by this research is that the potential of ICLs to play a significant role in advocating for children's best interests in child custody disputes is severely limited by current ICL practice. It follows that ICL practice within Australia's family law system is an area in need of reform.

# METHODOLOGY

This research required in-depth, insightful analysis and responses from as wide a parental audience as possible. The intention to appeal to as many parents as possible in an easily accessible manner favored an online questionnaire approach (see Appendix).

The methodology adopted throughout this research is both a qualitative and quantitative questionnaire approach. This has entailed a comprehensive online survey involving a mix of closed and open ended questions, comprising a total of 20 questions. A review of current legal provisions concerning ICLs and an evaluation of relevant reports has also contributed to the consummation of this research.

Family Law Express promoted the questionnaire on its own family law online portal at [familylawexpress.com.au](http://familylawexpress.com.au), as well as through social media such as Facebook and Twitter. More importantly, Family Law Express reached out to various family law related groups, including single-mother groups, fathers-rights groups, gay-parenting groups, anti-domestic violence support groups, and legal aid & self-representative litigant support groups. Support was sought from each of these groups in the promotion of the ICL survey on their respective websites and/or social media pages, as well as by posting a link to the online questionnaire prominently on all their digital assets.

Considerable effort was made to ensure that the privacy of the survey respondents was respected, while also ensuring that the survey was not subject to exploitation by heavily vested participants resulting in disproportionate representation of views. As a verification of identity, all participants were required to supply a first name, a functioning email address and a mobile phone number, which required confirmation before their survey submission could be verified and included in the sample data.

The subject matter of ICLs is inevitably a sensitive and personal one, particularly given the extenuating circumstances for which an ICL is appointed to a family law matter. Given this delicate and complex subject matter, a combination of qualitative and quantitative questions was favored. While the closed quantitative survey questions appealed to the private and emotional nature of parental experiences with ICLs, the open ended qualitative questions gave respondents the opportunity to further express the particulars of their experience.

The survey remained open online for three weeks after which time survey results were analyzed and summarized as they appear in the following report. The online survey yielded 89 responses from parents who have been involved in family law matters within which an ICL has been appointed. Such respondents had engaged in legal proceedings involving an ICL between 2001 and 2014. The online questionnaires allowed us to reach 87 respondents indicating that their legal proceedings were located within Australia. A further 2 respondents indicated legal proceedings outside of Australia, but have been included in the analysis of results under the assumption that their involvement with an ICL has been within Australia.

# BACKGROUND – Independent Children's Lawyers in the Australian Family Law System

The *Family Law Act 1975* (Cth) (*FLA*), the 2007 *Guidelines for Independent Children's Lawyers*, as endorsed by the Chief Justice of the Family Court of Australia and by the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia), and the criteria set out in *Re K* (1994) 14 Fam LR 537 establish the position of ICLs within Australia's family law system.

The existence of ICLs within Australia's family law system is highly significant and gives effect to the 1989 *United Nations Convention on the Rights of the Child*. Specifically, it realises Article 3 and Article 12 of the *United Nations Convention on the Rights of the Child*. Article 3 maintains the best interests of the child as the primary consideration in all actions concerning children. Similarly, Article 12 upholds the right for children to freely express their views where they are capable of doing so, and the right for them to be provided with every opportunity to be heard, directly or through representation, in any judicial and administrative matters affecting them. ICLs are the means through which the Australian legal system aims to uphold these rights.

*Section 68L* of the *FLA* firmly establishes the child's best interests, or a child's welfare as the paramount, or a relevant, consideration for a Court order to appoint an ICL. This section further establishes that such an appointment may be made on the basis of the Court's own initiative (s 68L(4)(a)), or on the application of the child concerned (s 68L(4)(b)(i)), the application of any organisation concerned about the child's welfare (s 68L(4)(b)(ii)), or on the application of any other person (s 68L(4)(b)(iii)).

Upon appointment, an ICL must act in accordance with the legislative framework within *Section 68LA* of the *FLA* which dictates the role of the ICL. As such, an ICL must form an independent view of the child's best interests based on relevant evidence (s 68LA(2)(a)), act in relation to their belief as to these best interests (s 68LA(2)(b)), and, if satisfied that a particular course of action fulfils these best interests, the ICL must make a submission to the Court suggesting adoption of that course of action (s 68LA(3)).

Whilst maintaining that the ICL is not the child's legal representative (s 68LA(4)(a)) and therefore not obliged to act on the child's instructions (s 68LA(4)(b)), the ICL is responsible for a number of specific duties. These duties involve their impartial action in relation to the proceedings (s 68LA(5)(a)), assurance that any views of the child in relation to proceedings are put before the court (s 68LA(5)(b)), and analysing any relevant reports or documents and presenting their findings to the court (s 68LA(5)(c)(i) and (ii)). In addition, the ICL has a duty to attempt to minimise proceeding related trauma



to the child (s 68LA(5)(d)) and facilitate a resolution purposed towards the best interests of the child (s 68LA(5)(e)).

The *Guidelines for Independent Children's Lawyers (Guidelines)* go further in articulating the Court's expectations of ICLs and are employed in current ICL training. Whilst comprehensive in nature, the *Guidelines* main points of emphasis are that the ICL will serve the best interests of the child through involving the child in decision-making about proceedings, and in doing so must have regard to a number of factors.

Such factors include the extent to which the child wishes to be involved and the extent of involvement appropriate to their age, developmental level, cognitive abilities, and the child's views and emotional circumstances. While a number of other factors come into consideration– differing emotional, cognitive and intellectual developmental levels; family structures, dynamics and relationships; and religious and cultural backgrounds of children – these key factors emphasise the differing contextual and circumstantial to which ICL's are appointed.

Thus, as specifically articulated in the *Guidelines*, the role of an ICL is extremely unique and must be considered within the larger context of each individual case. Moreover, in fulfilling their principal responsibility to represent the best interests of the child, an ICL is expected to act impartially, independently of the Court and parties, and in a professional relationship with the child.

In accordance with the *Guidelines* it is expected that ICL's work together with any experts involved, bring any relevant evidence to the attention of the Court, inform the Court of the child's views, submit to the Court suggested courses of action that are in the child's best interests, assist parties to reach a timely resolution, and seek peer and professional advice in the event that a case raises issues beyond their expertise.

In addition to the provisions of the *FLA* and the *Guidelines*, the landmark ICL case of *Re K* (1994) 14 Fam LR 537 serves as precedent for determining circumstances in which an ICL may be appointed. In its judgment the Full Court submitted guidelines pertaining to the situations in which ICL appointments should be made. Whilst a non-exhaustive list, the situations established by the Court as warranting an ICL appointment include where allegations of sexual, physical or psychological abuse exists and where there are allegations of anti-social conduct by one party to an extent that seriously and detrimentally affects a child's welfare. A further situation held by the Court as warranting an ICL appointment is where there is a relocation proposal that potentially and severely restricts or excludes one parent or party from having contact with the child.

It is clear that there are substantial statutory and ethical frameworks behind the purpose and role of ICL's. These frameworks positively affirm the importance of ICL's within the family law system and reveal an incredible potential for ICL's to make a positive impact to children involved in family law matters. However the reality of ICL's in practice and the realisation of this potential is a markedly different matter, one which this report hopes to address and understand.

# BACKGROUND – Australian Institute of Family Studies 2013 *Independent Children's Lawyers Study: Final Report*

Whilst Family Law Express holds the aforementioned reservations about the AIFS Report, some of its findings are notable and should be considered. The AIFS Report importantly recognised existing trepidations regarding the extent to which the current ICL model and its related funding arrangements fulfill Australia's obligations under the *United Nations Convention on the Rights of the Child*. Moreover, the AIFS' key findings highlight the complexities that are involved in the practice of ICL's.

Amongst its chief findings, the AIFS Report revealed that consistency in statutory frameworks regarding ICLs does not necessarily translate to consistencies in practice. Whilst both the statutory framework of the *FLA* and the *Guidelines* operate across all Australian states and territories, the Legal Aid commission policies of individual states and territories are not uniform, and substantial policy differences often prevail.

Different policy frameworks can mean differences in the practice of ICL's between Australian states and territories which serve to diminish the credibility and accountability of ICL's within the Australian family law system.

Moreover, current ICL practice has been found to differ not only between states and territories but between ICL's in general. The AIFS study reported that this is particularly the case in relation to participation, that is, the extent to which ICL's have direct contact with the children or young people to whom they are appointed. The AIFS recognise the purpose of direct contact to be familiarisation, explanation and consultation, and report that the most prominent variations exist in ICL approaches to consultation.

The AIFS study reveals that considerable variations between ICL practice are further manifested in state and territory approaches to the funding of ICL's. They report that over the three year period from 2009 to 2012, ICL grants totaled just over \$65 million nationwide, averaging \$5,371 per grant.

On first appearance this figure sounds encouraging, particularly when compared to the average grant of \$1,700 for general family law matters over the same period. However, inconsistencies arise when the nationwide costs are scaled down to state and territory levels.

Of the \$65 million nationwide given to ICL grants between 2009 and 2012, just under \$23 million of these grants were given in Queensland, compared to a total of just over \$395,000 given to grants in the Northern Territory. Whilst there are undoubtedly a number of factors affecting these figures, most specifically the number of grant applications made, it is deplorable that such a huge disparity in these

figures exists. The findings of the AIFS report in relation to funding make it unassailably clear why costs have proven to be such a contentious issue within the ICL debate.

The AIFS Report does make a useful contribution to the ICL debate in highlighting the multifaceted role of ICL's. AIFS data suggests three dimensions of the ICL role, the relevance of which are said to vary dependent on the circumstances of individual cases.

1. The first dimension identified is a facilitative role, with the ICL facilitating the participation of the concerned child or children in the proceedings;
2. The second dimension identified is evidence gathering, and;
3. The third, litigation management, being involved in both case management and settlement negotiation.

The key point here, relevant to this current study, is the disparity between ICL and parent and child views regarding these dimensions.

The AIFS study revealed that ICL's themselves regarded their key functions to be evidence gathering and litigation management, attributing less significance to their role in facilitating the child's participation in the proceedings. On the other end of the spectrum, parents and children regarded a lack of meaningful interaction with the ICL with great concern, maintaining that this lack of contact undermined the ICL's ability to understand and advocate for a best interests outcome for the child.

These AIFS findings reveal not only clear disparities between ICL and parental and child views regarding the role of the ICL, but also worrying differences between the legal frameworks that establish the role of ICL's and ICL's perspective of what their role is purposed towards.

Moreover, the AIFS study revealed a number of key concerns relating to the capacity and commitment of some ICL practitioners, and to the practice of ICL's more generally. On a broad level, these concerns included adequacy of ICL training, accreditation and ongoing professional development.

A further concern revolved around funding arrangements and the appearance that current funding arrangements constrain levels of service provision by ICL's. Equally important to concerns about variations in ICL practice, the AIFS reported that the performance of certain ICL practitioners fell short of the required standards, especially in regards to requirements to act independently, impartially and professionally.

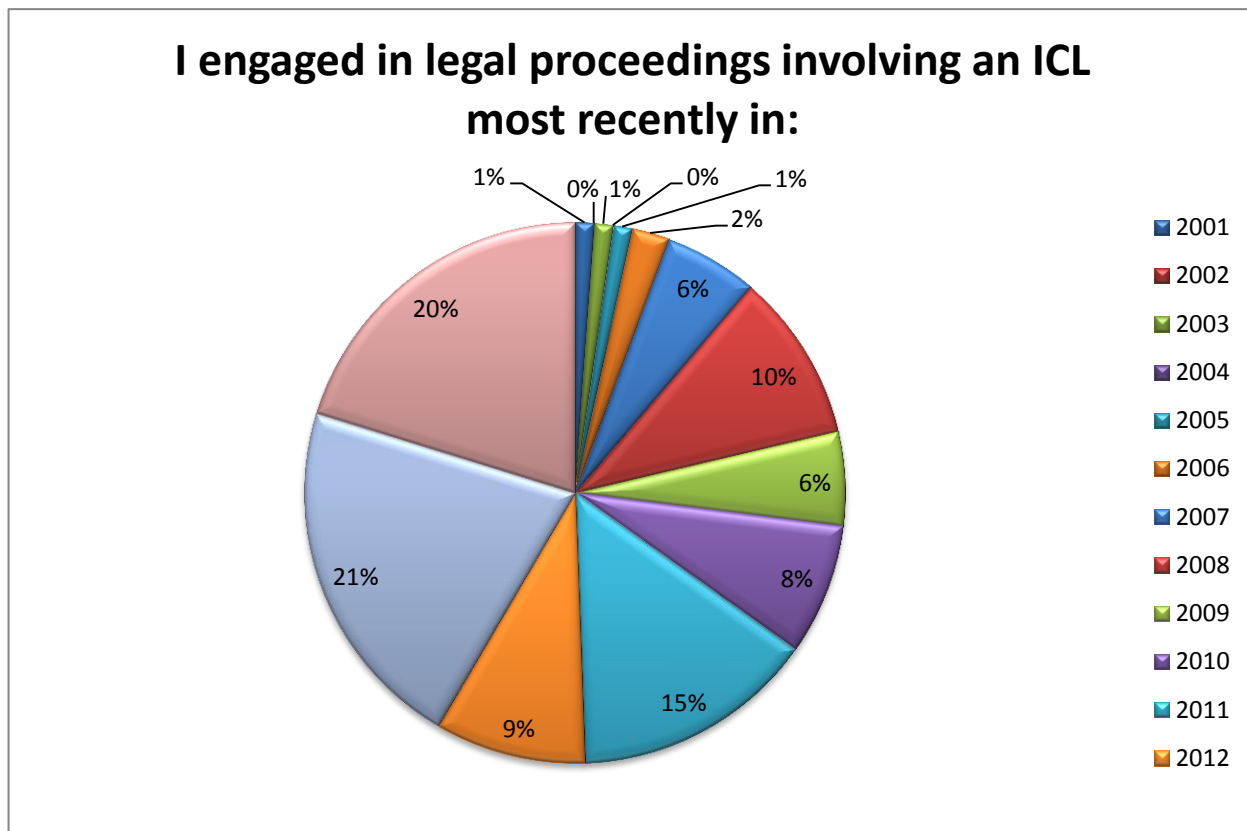
A final and important articulation of the AIFS report was recognition that the circumstances of families for whom an ICL is appointed are complex and varied, this predicating that the ICL be not only aware of, but empathetic and responsive to such varied circumstances.

Whilst an inherent political bias and agenda may underlie the AIFS study and final report, there are evidently some significant and valuable findings to be drawn from it. Perhaps the biggest issue to take from the AIFS study is the apparent lack of uniformity amongst ICL practice.

Whilst the changing circumstantial nature of individual family law matters dictates difference, difference should not exist in ICL practice in terms of professional standards, or so drastically in funding frameworks. But most importantly, lack of uniformity should not exist in regards to the role and responsibilities expected of, or enacted by, ICL's.

# RESEARCH FINDINGS – Background of Research Respondents and Legal Proceedings

All respondents engaged in legal proceedings with ICL's between 2001 and 2014, with the majority of respondents being involved with ICL's more recently, 15% engaging in legal proceedings involving an ICL in 2011, 9% in 2012, 21% in 2013, and 20% in 2014. Notably, 9% of respondents' cases had been settled out of Court, while 27% of respondents' cases were not yet finished at the time of survey submission.

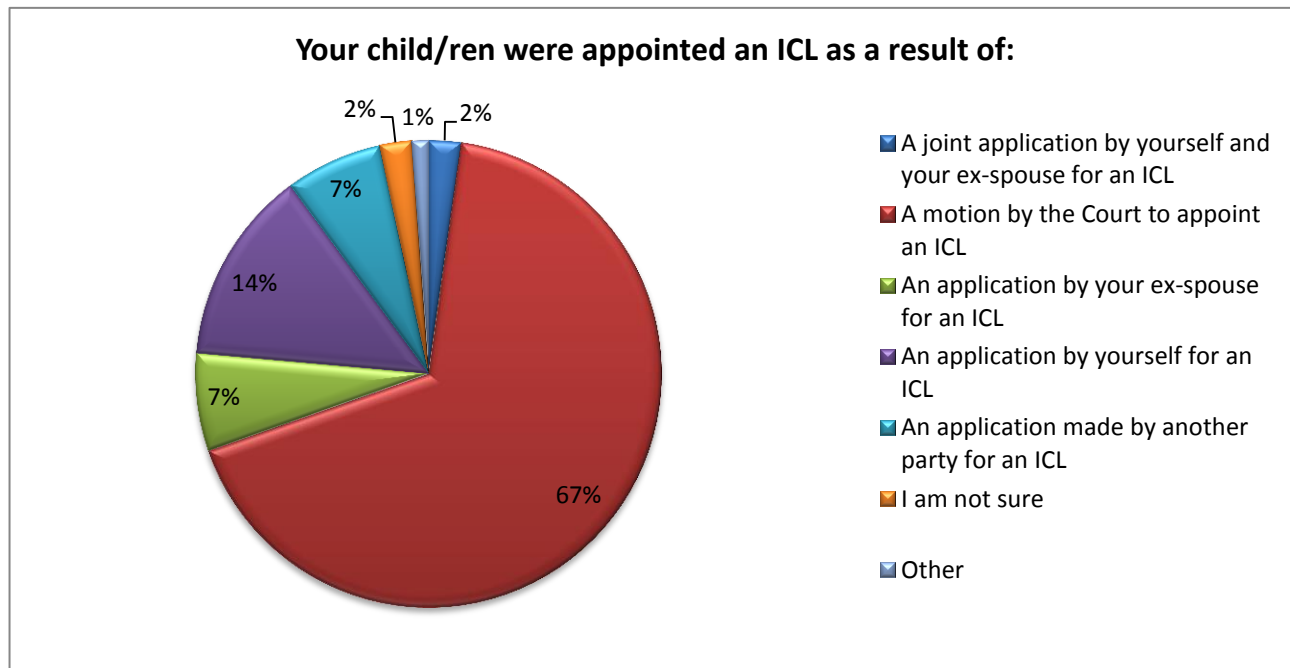


The locations of respondents' legal proceedings were, or are, in those cases still continuing, as follows. Of 89 respondents:

- 22 respondents were engaged in legal proceedings in Queensland,
- 30 in New South Wales,
- 3 in the Australian Capital Territory,
- 13 in Victoria,
- 3 in Tasmania,
- 8 in South Australia, and
- 6 in Western Australia.

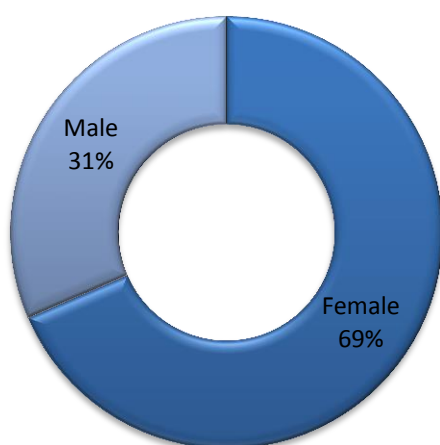
Whilst no respondents reported legal proceedings in the Northern Territory, a further 2 respondents specified only that their legal proceedings were within a city location. An additional 2 respondents identified legal proceedings outside Australia but have been included in the data under an assumption that at some point within their proceedings they experienced the involvement of an ICL within Australia.

A majority of 67% of respondents reported that their child or children were appointed an ICL as a result of a motion by the Court. A further 14% reported that ICL appointment was a result of an application by them, 7% reported appointment as a result of an application by their ex-spouse, 2% reported appointment as a joint application by themselves and their ex-spouse, and 7% reported ICL appointment as a result of an application made by another party. A further 2% of respondents were unsure of where or from whom ICL appointment resulted from, and 1% of respondents listed other reasons for appointment.



# RESEARCH FINDINGS – Background of Respondents – Gender, Parental Relations and Racial Background

**Sex of Respondents**



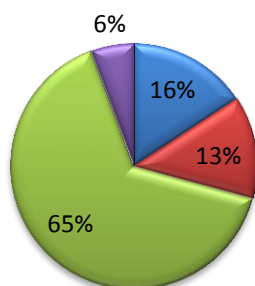
58% of respondents identified as male and 42% as female. Of these respondents 30% of respondents had a female child or children, 26% had a male child or children, and 44% had both female and male children.

When respondents were asked if they believed that they were treated differently because of their gender, 71% of respondents believed that they were treated differently because of their gender, while 13% percent believed they weren't treated and 16% were not sure.

## *Gender Discrimination*

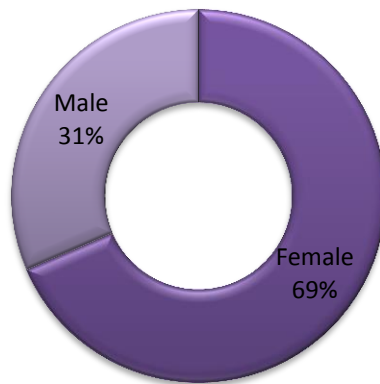
**Do you believe the ICL treated you differently because of your gender?**

■ I am not sure ■ No ■ Yes, in a negative way ■ Yes, in a positive way



Of the 71% of respondents that believed that their gender had a bearing on their treatment by the ICL, a startling 65% believed that their gender led them to be treated in a negative way while only 6% believed they were treated differently in a positive way.

### The ICL was:



This is certainly of particular concern and is further understood when considering that 69% of respondents reported that their ICL was female while 31% reported that their ICL was male.

On closer observation one may conclude that gender bias was negatively felt by respondents where their ICL was of the opposite gender, but this is not

absolute for all cases. Whilst not a conclusion applicable to all cases, the supposition of gender bias from ICLs of opposite genders is supported by the fact that the majority of respondents identified as male and felt they were treated differently in a negative way because of this, and the fact that the majority of ICLs were identified as female.

Furthermore, this data raises a wider issue regarding ICLs within Australia's legal profession. Recent 2014 statistics from the Law Council of Australia reveal that only 46% of those practicing law are female (Hlubucek, E (2014) *Addressing attrition and encouraging re-engagement of women lawyers*, Law Council of Australia), and yet within this study 69% of ICLs were identified as female. Given that Australia's legal profession is male dominated it seems incompatible that the ICLs are predominately female.

Surely this is saying something about the presumptions attached to ICLs?

It perhaps reflects the traditional gender roles and familial concepts of the nuclear family which still appear to dominate family law practice. On the other hand it could reflect that female lawyers have a greater interest in the matters to which an ICL is appointed. Either way, the ICL role surely warrants gender neutrality, both within the profession and in the approach and practice of ICLs. The fact that this is not currently the case clearly needs to be addressed.

Regarding the nature of respondents' parental relationship with their ex-partner involved in proceedings with an ICL, 79% of respondents identified that their relationship was a heterosexual and once married or once de facto relationship, 9% of respondent's identified that they were in a heterosexual relationship but never married or de facto, and 12% of respondents identified their past relationship to be a combination of these or another, unspecified relationship.

Respondents were asked if they felt that the nature of their parental relationship with their ex-partner affected the way in which they were treated by the ICL. In response, 59% percent of respondents felt that they were treated differently, 26% of respondents felt that they were not treated differently, and



15% were not sure. Of the sizeable number of respondents that felt that their parental relationship with their ex-partner affected their treatment by the ICL, only 3% of respondents felt it affected their treatment in a positive way, while a huge 56% of respondents felt it affected their treatment in a negative way.

Similar to the apparent gender bias in the approach of ICLs, this reveals apparent pre-conceptions in ICL approaches to familial structures and circumstances. Whilst ICLs should certainly consider parental relationships, they should do so only in the context of the child and the effect of these relationships on the child. Moreover, ICLs should advocate parental arrangements based purely on the welfare and interests of the child and not discriminate against parents on the basis of their parental relationships with each other.

### *Racial Discrimination*

Respondents were further asked if they felt that their racial background affected the way in which they were treated by the ICL. An overwhelming majority of 71% of respondents did not feel that their racial background had any impact on their treatment by the ICL. Of the remaining 29% of respondents, 1% declined to answer, 12% were unsure, 14% felt that their racial background caused them to be treated differently by the ICL in a negative way, and 2% felt that it caused them to be treated differently in a positive way.

The fact that a majority of parents did not feel that their racial background affected their treatment by the ICL may be an unreliable marker of racial discrimination, given the expectation that only a small number of respondents would have been of a recognizably minority race.

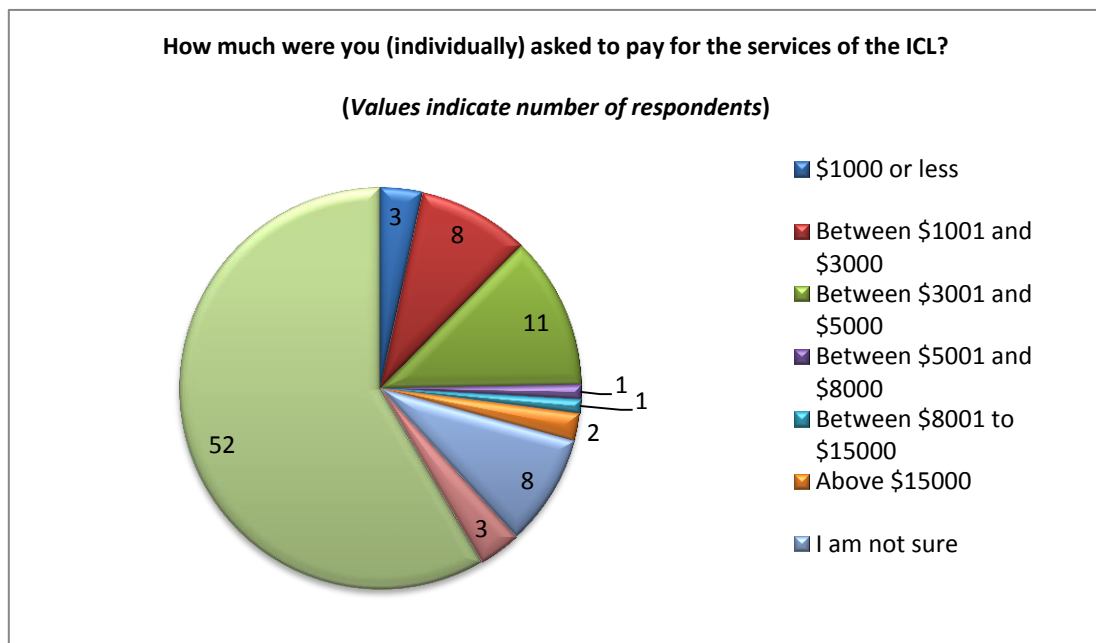
The fact that a minority of respondents did feel racially discriminated against does open the door to concerns as to such a practice. Just as parental relationships should be considered only in the context of the best interests of children, the racial background of parents should only be considered in terms of the importance of the related culture and its beliefs and practices to the child. In the case that culture is considered it should be considered in a positive light and in its relation to the child or children involved.

The overall notion to take from these findings is that discrimination in current ICL practice exists in relation to gender, parental relations and racial background, albeit to varying extents. Despite the variance in extent, the fact that discrimination exists in any form in ICL practice is of extreme concern and warrants serious responsiveness by Australia's family law system.

## RESEARCH FINDINGS – Costs

*“THESE IMPORTANT LAWYERS should be totally state funded and should not require fees from the parties so that no preoccupation, influence or impression can develop.” – Respondent.*

Whilst costs relating to ICL's has previously been an important issue within the ICL debate, a significant 58% of respondents reported that individually they were not asked for any payment for the services of the ICL.



Outside of this, the largest group of respondents was 12% of respondents who were individually asked to pay between \$3001 and \$5000 for the services of the ICL. Whilst a significant proportion of respondents' did not incur direct fees for the services of the ICL those that did incurred substantial costs. Coupling this with the AIFS finding that significant variations exist between state and territory funding arrangements indicates that greater cost uniformity is needed in relation to ICL service provision.

Beyond the costs related directly to the services of the ICL, 57% of respondents reported that their legal proceedings were self-funded or partly self-funded, with 24% of respondents' proceedings receiving full or part Legal Aid funding. Just 5% of respondents' legal proceedings were done on a pro bono basis, with another 2% of respondents being fully or partly funded by another form of free or funded legal support. Of the remaining 12% of respondents, 11% reported that proceedings were funded or partly funded with the support of family and friends and 1% declined to answer.

The representation of respondents during their legal proceedings appears to be particularly diverse and quite equally spread amongst the different forms of representation. 22% of respondents were represented by a solicitor during their legal proceedings, 29% by both a solicitor and a barrister, 18% were self-represented, and 24% of respondents had mixed representation during their proceedings. Outside of this, a direct brief barrister accounted for only 5% of representation while 2% of respondents were represented through other means.

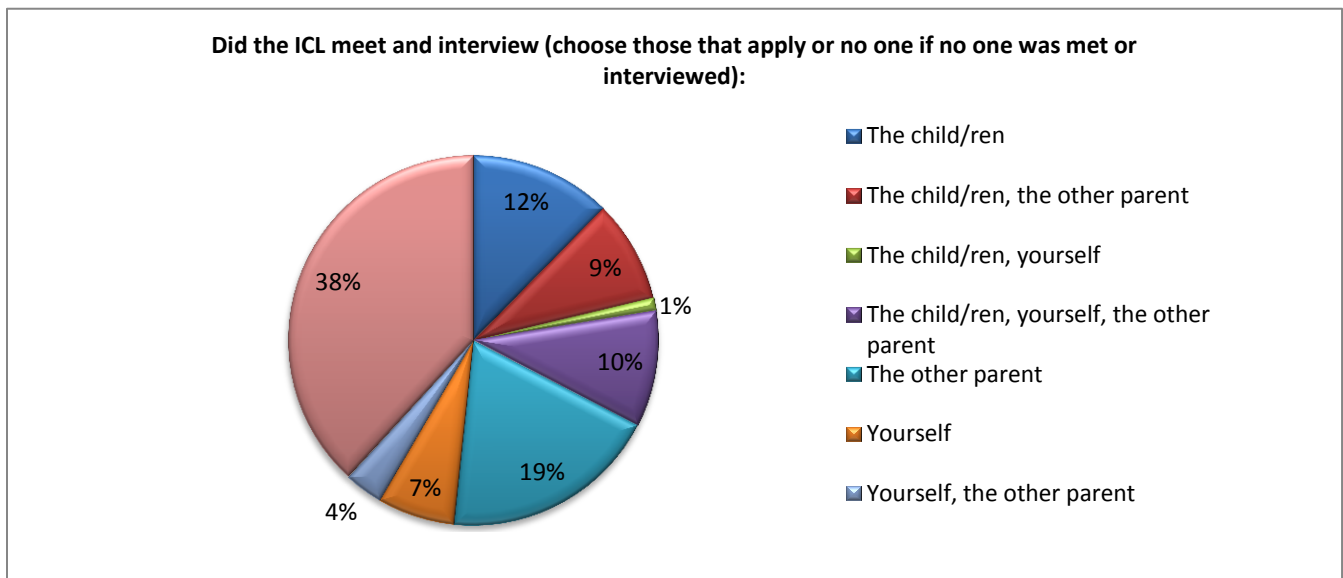
The outcome of respondents' cases is mentioned in this section and not in later sections for the main reason that respondents' contentment with case outcomes rests on a number of factors and not merely on the involvement of an ICL. Whilst the involvement of an ICL may significantly impact the outcome of cases for a number of respondents, the contextually specific nature and background of each case also has a very substantial bearing on the outcome. The sensitive nature of family law proceedings and the emotional investment of respondents in their individual legal matters also have a great bearing on respondents' feelings towards the outcome of their case.

Importantly, 27% of respondents' cases are not yet finished at the time of respondents' research participation and thus they were unable to comment on its outcome. Of the 73% of cases that had been settled, 42% of respondents were not pleased with its outcome, 8% were pleased, 11% commented that it was a mixed result, 9% commented that the case was settled out of Court, and 3% listed other outcomes. The findings to follow regarding ICL experiences may certainly contribute to the reasons for which 42% of respondents' were not pleased with their outcome, but as mentioned, are not necessarily the ultimate reason for discontentment with case outcomes.

## RESEARCH FINDINGS – ICL Practice

Respondents were asked whether or not, upon ICL appointment, the ICL appropriately explained their role to both them and their child or children. A shocking 76% of respondents answered this question negatively with only 15% of respondents advised submitting that their ICL did appropriately explain their role to them and their child or children.

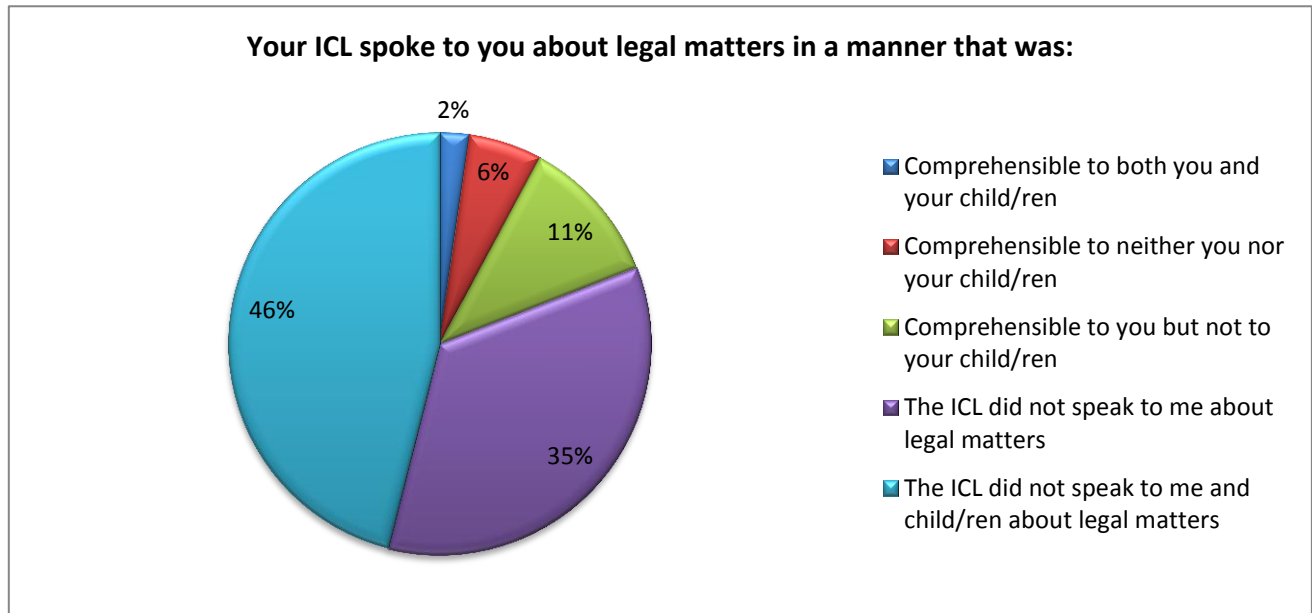
The remaining 9% of respondents were unsure. The act of ICL's explaining their role to both parents and children, but particularly children, is crucial to ICL's achieving their purpose. If children are unaware of the purpose and role of the ICL then the child may be less inclined to communicate their views and interests to the ICL. This strictly compromises the ability of the ICL to understand the child's views and to act as an honest broker and best interests advocate for the child within their individual circumstances.



In a further question related to ICL practice and procedure, respondents were asked who the ICL met and interviewed. Despite the supposed role of the ICL to determine and advocate for the child's best interests, only 12% of respondents indicated that the ICL solely met with and interviewed their child or children, 30% reporting that the ICL did not meet or interview the child but rather met and interviewed the other parent (19%), themselves (7%), or both themselves and the other parent (4%). Another 9% indicated that the ICL met and interviewed the other parent and the child or children and 1% indicated they met and interviewed themselves and their child or children.

More astonishingly, only 10% of respondents reported that the ICL met and interviewed all parties, that is, the child or children, themselves and the other parent. But the most inconsonant finding is the indication by 38% of respondents that the ICL did not meet or interview anyone, neither the children, themselves, nor the other parent involved in the proceedings.

This is further articulated through 46% of respondents reporting that the ICL did not speak to them or their child or children about legal matters, while a further 35% of respondents indicated that the ICL did not speak to them about legal matters. Of the 19% of respondents whose ICL's did speak to both them and their children about legal matters, only 2% reported that the ICL spoke in a manner comprehensible to both the respondent and their child or children, while 11% reported that they spoke in a manner comprehensible to them but not their child or children, and 6% reported that the ICL spoke in a manner comprehensible neither to them nor their children.



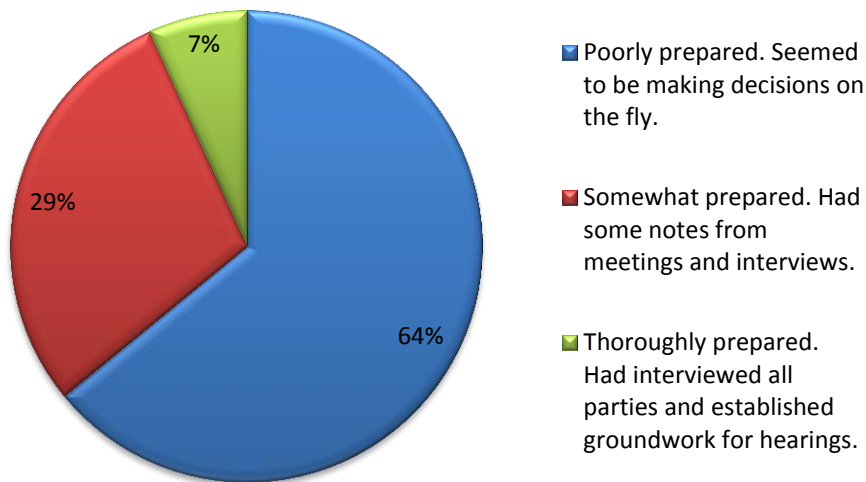
The inadequacies and inconsistencies of current ICL practice are further induced through the finding that throughout proceedings 91% of respondents and their child or children were not regularly updated of the ICL's progress. Only 7% of respondents were confident that they were regularly updated, while the remaining 2% were unsure. From this evidence one can deduce that there are clear communication barriers between ICL's, children and parents.

This indicates a complete lack of logic and poses a dire threat to the effectiveness of ICL's. It makes it extremely questionable how an ICL can actually understand the best interests of a child if they rarely, or never, communicate with the child and involved parties.

A lack of consultation, involvement and participation with the child to whom they are appointed compromises every aspect of the ICL's role. It drastically challenges their ability to understand the circumstances of the case and the child's situation within this case. Further, it undermines the child's ability to express their views to the ICL and thus for the ICL to understand the views of the child. With these aspects so severely challenged, a lack of communication and interaction virtually negates the ICL's ability to advocate and present to the Court the child's best interests. It is quite simply put by the below quote from a research respondent.

*"I fail to understand how someone can represent the wishes of the children to the Court if they have, (a) never met the children, and (b) never asked their children what their wishes are." – Respondent.*

### How well do you feel the ICL prepared for hearings?



Another startling finding relating to ICL practice is that 64% of respondents felt that the ICL they were involved with was poorly prepared for hearings and appeared to be making decisions on the fly. A further 29% felt that ICL's were only somewhat prepared with some notes from meetings and interviews, while just 7% of respondents felt that ICL's were thoroughly prepared having interviewed all parties and established groundwork for hearings.

This unpreparedness of ICL's can certainly be regarded as a consequence of failing to meet, interview, and communicate with the involved child and parents. A cumulative downfall is inevitable; a failure to explain

their role leads to a lack of awareness, a lack of awareness contributes to a lack of interaction and communication, and the failure of the ICL to regularly and consistently maintain contact leads to unpreparedness for hearings.

Again the question that repeatedly arises is: how can an ICL advocate for a child's best interest, and in essence play a pivotal role in their future, if they are not prepared for hearings. The reality is that they can't, as majority of respondents experienced.

# RESEARCH FINDINGS – Satisfaction with ICL experience

*“Some are good and honestly have children’s interests at heart, some are not and I have experienced both.” – Respondent.*

Respondents were asked to rank the ICL’s knowledge of the *Family Law Act* on a scale of 1 to 10, 1 being least and 10 being most. The response was an average ranking of 4.7 and a median ranking of 4, with 45% of respondents ranking the ICL’s knowledge of the *FLA* between 1 and 3, 25% ranking it between 4 and 7, and 30% ranking it between 8 and 10. An average ranking of 4.7 is certainly concerning given the weight of the *FLA* in family law proceedings and in proceedings involving ICL’s.

ICL’s should be able to be relied on by children and parents when it comes to legal knowledge but the experiences of respondents suggest that this reliance may be tarnished.

Respondents were also asked to rank the ICL’s knowledge of the Court process on the same scale. The results yielded were a notably higher average ranking of 6 and a median of 7. As such, 25% of respondents ranked the ICL’s knowledge of Court processes between 1 and 3, 35% ranked it between 4 and 7, and 40% ranked it between 8 and 10.

This suggests greater confidence in the ICL’s knowledge of Court processes than in their knowledge of the *FLA*. Whilst this is a more hopeful response, it is still concerning that a quarter of respondents had very little confidence in the ICL’s knowledge of Court processes.

Again, ICL’s are legal professionals and should be proficient in legal principle and procedure. In saying this, their priority should remain with the best interests of the children whom they are representing and should not be overly concerned with details of legal procedure. A number of respondents unfortunately expressed that this was the case in their experience and that details of legal procedure were given preference over the best interests of the child or children concerned.

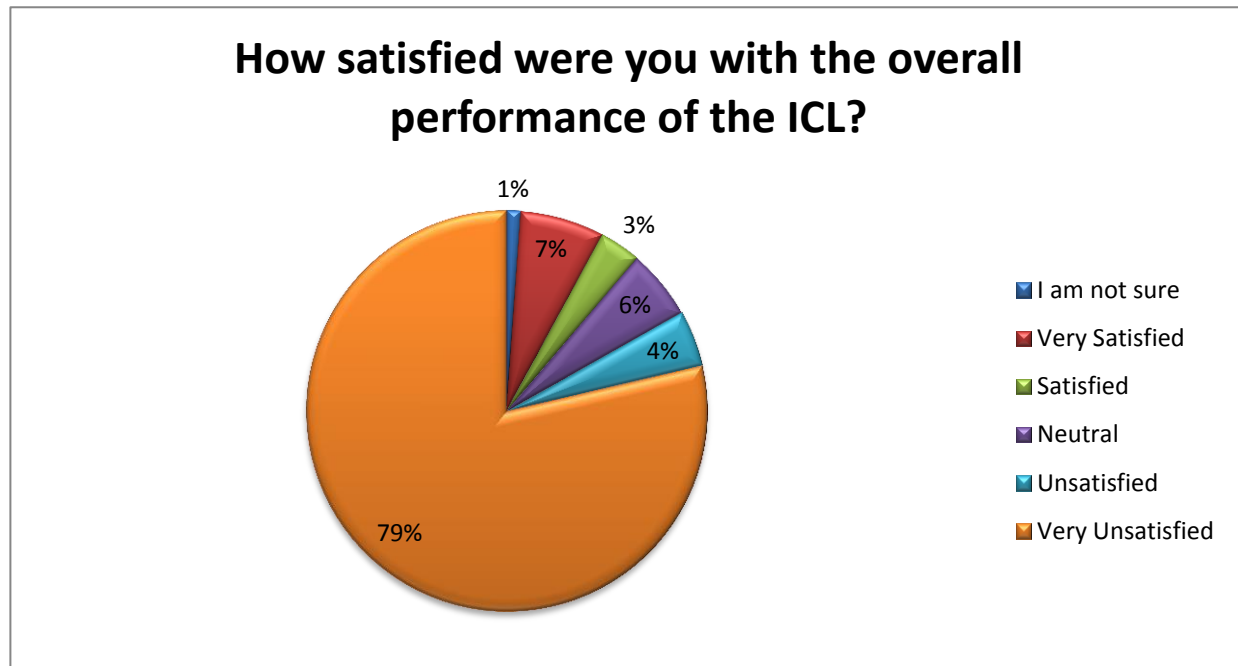
*“Our ICL was more interested in the petty detail of the court procedure than any outcome for the children.” – Respondent.*

The results were much more damning against ICL’s when respondents were asked to rank the professionalism of the ICL, the average ranking being a lowly 2.9 with a median of 1.

Pejoratively, 72% of respondents ranked the ICL’s professionalism between 1 and 3, with a huge 56% of respondents ranking ICL professionalism at just 1. Only 15% of respondents ranked the professionalism of the ICL between 4 and 7, and only 13% offered a ranking between 8 and 10. This is an extremely disconcerting finding.

The expectations of ICL's as outlined in the *Guidelines* emphasise the importance of professionalism in ICL service provision. Professionalism is imperative to an ICL's integrity and is essential in order to build a relationship of trust between the child and the ICL. It is clear that expectations of ICL's need to be addressed and re-defined and that accountability measures need to be increased to ensure that ICL's are fulfilling their role in a professional manner.

Furthermore, the overwhelming respondent expression of unfavorable experiences with ICL's is epitomized through 79% of respondents expressing that they were very unsatisfied with the overall performance of the ICL, with another 4% of respondents expressing that they were unsatisfied. Whilst 1% of respondents were uncertain of their satisfaction, 6% of respondents held neutral views as to the overall performance of the ICL. This remaining 10% of respondents saw only 3% expressing satisfaction and 7% expressing that they were very satisfied. In reality, these statistics should quite clearly have represented the opposite to what they ultimately concluded.



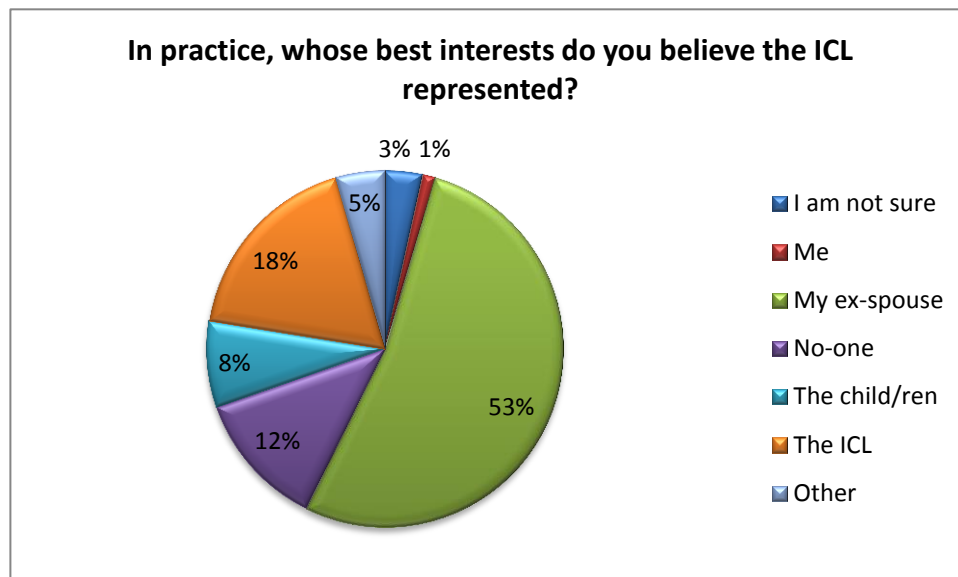
The purpose of ICL's is harshly challenged if nearly 80% of respondents are very unsatisfied with their performance. Dissatisfaction should exist as a rare case and not as the majority case. The fact that it is the majority case suggests that ICL's are not fulfilling the roles and expectations that their profession is founded upon. Whilst the response to this question was overly damning, the 10% satisfaction rate provides some, albeit faint, hope that there are ICL's practicing in the manner purposed for ICL's. However a 10% satisfaction rate is insufficient and is clearly an issue which needs to be addressed.

*"I question the value of an ICL if they cannot remain impartial in the proceedings."*  
– Respondent.



When asked, in practice, whose best interests the respondents' believed the ICL represented, 53% of respondents believe that the ICL best represented the interests of their ex-spouse. This is a particularly difficult result to comment on, as it is sufficiently plausible that the individual circumstances of respondents' were subject to ex-spousal conflict and animosity that is common to child contact and child custody disputes. This response is obviously of a very personal nature and may perhaps be considered as a natural response for any parent.

Given this, it does not necessarily and definitively discredit ICL's, for just as ICL's are expected to be empathetic and responsive to the individual circumstances of children, in analyzing these results one must be empathetic to the experience of parents in these cases. However it does suggest that there may be a lack of impartiality on behalf of the ICL, a staggering suggestion given that impartiality is one of the key expectations of ICL's.



The subsequent results to this question certainly suggest that bias rather than impartiality exists in the practice of ICL's. A mere 8% of respondents believe that the ICL best represented the interests of the child or children involved, while 18% believe the ICL best represented their own interests, 12% believed they represented nobody's interest, 5% believed they represented others interests, 3% were unsure and 1% believed the ICL best represented their interests as a parental party.

Certainly the most concerning response to draw from this question is the scant 8% of respondents' who believe that, in practice, the ICL best represented the interests of the child or children. Is it not the role of the ICL to be a best interest's advocate for children? How then is it that only 8% of respondents believe that the ICL best represented their child's or children's interests? This is a particularly alarming finding and certainly raises significant unease regarding the current practice of ICL's within Australia's family law system.

*“ICL’s use the term ‘best interests’ of the children, when they completely do not even care about the children, just how much they can milk the system for as much billable Court time as they can get.” – Respondent.*

The above concern is further evinced in the following findings. When asked to rank how instrumental respondents believed the ICL was in the quick resolution of their case, 1 being of no importance and 10 being extremely instrumental, a huge 64% of respondents ranked the ICL’s instrumentality at just 1. Looking more broadly, the average ranking of the ICL’s instrumentality in resolving the case quicker was 2.7, with a median ranking of 1. A noteworthy 77.5% of respondents ranked the ICL’s instrumentality in the quick resolution of the case between 1 and 3, 9% ranked it between 4 and 7, and only 13.5% ranked it between 8 and 10. The results of this question only stand to further question the effectiveness of current ICL practice.

On a similar scale from 1 to 10, with 1 being of no importance and 10 being of extreme importance, respondents were asked to rank the importance of the ICL in representing the views of their child or children during proceedings. The results reflect similar notions as those above, with an average ranking of 3 and a median ranking of 1.75. 3% of respondents ranked the ICL’s importance of representing the views of their child or children during proceedings between 1 and 3, 6.7% ranked their importance between 4 and 7, and 18% between 8 and 10.

Again, the instrumentality of current ICL practice is further undermined by these results. Whilst the theory and legal frameworks behind ICL’s appear justifiable and provide great measures of hope, the reality of ICL experiences reveals a contrary picture.

A subsequent question regarding the importance of an ICL in separately representing any child or children involved in a custody dispute, yielded an average ranking of 3.6 and a median ranking of 1. Here, 65.2% of respondents ranked the ICL’s importance between 1 and 3, 10.1% ranked it between 4 and 7, and 24.7% ranked it between 8 and 10.

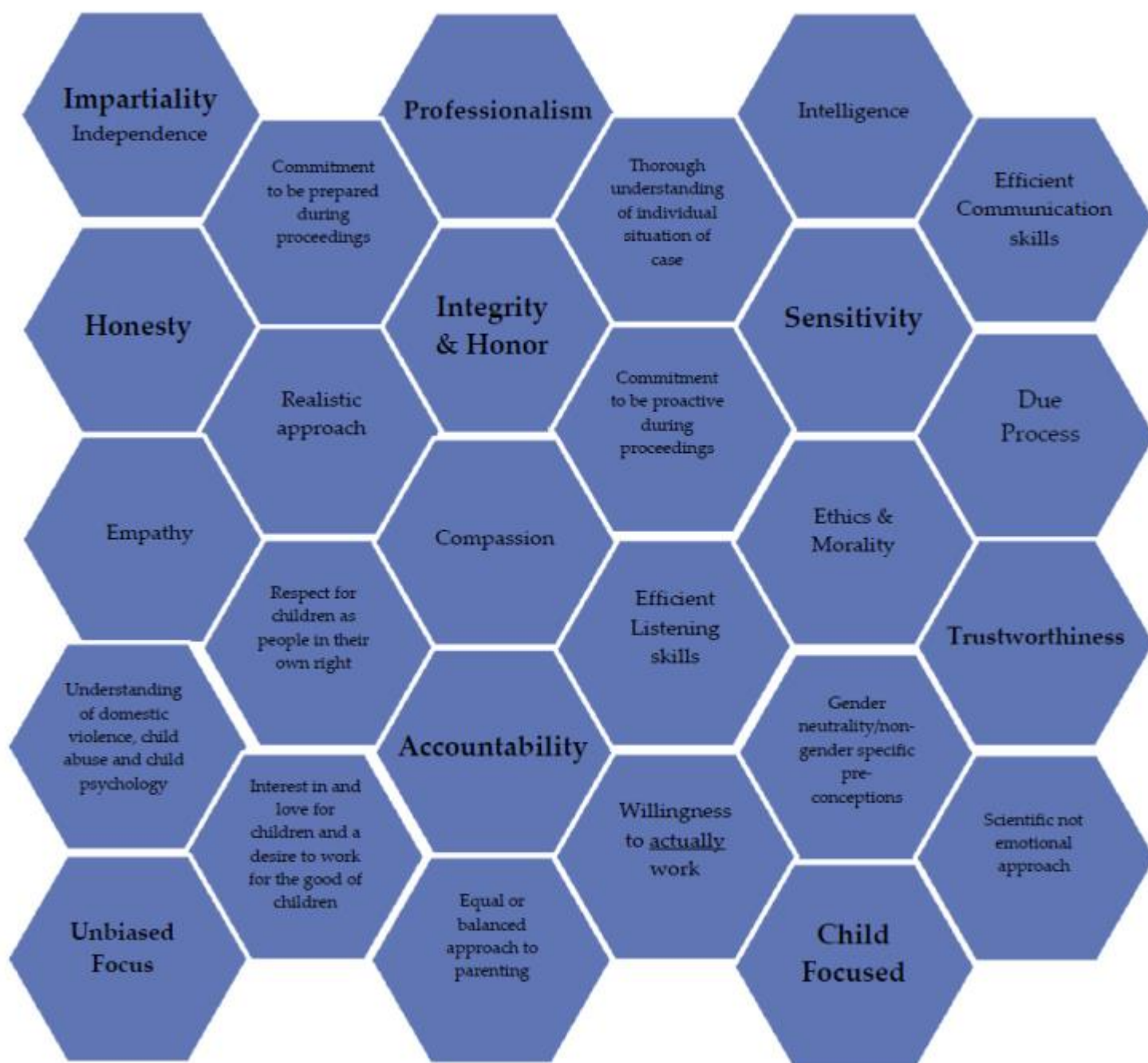
The fact that almost a quarter of respondents provided a ranking between 8 and 10 again provides hope that ICL practice can in fact be improved and ICL’s have the potential to play a pivotal role in child contact and custody disputes. But as is the case with the above questions, the majority ranking existing between 1 and 3 suggests that current practice is inefficient and that much reform and much work is needed to change this.

*“I am really not sure of their value.” – Respondent.*

## RESEARCH FINDINGS – Valued ICL traits

Figure 13 below illustrates the results when respondents were asked what they valued as the most important individual trait expected from an ICL.

*“Integrity and Honour. Something that is severely lacking in the family law system right up to its highest level.” – Respondent.*



# RESEARCH FINDINGS – Further Comments

*“I am sure that there are ICL’s out there who have the positive attributes mentioned above, but it is very easy for an ICL to be slotted into their role once appointed by the Court.” – Respondent.*

Respondents were given the opportunity to provide further comments regarding their experience with ICL’s and many used this opportunity to share further insight into their individual cases and experiences. Many comments detailed harrowing, complex and difficult circumstances to which the involvement of an ICL caused further detriment.

Of particular concern were comments detailing the occurrence of incidents which severely threatened and compromised the safety, health and wellbeing of involved children. Whilst the role of the ICL is directed towards the protection of children and ensuring that children aren’t subject to dangerous and injurious circumstances, respondents who detailed these cases declared that the ICL was either not aware of these incidents or made no effort to ensure child safety and protection against these circumstances.

Alarming, it was also reported that in some cases ICL’s severely down played or dismissed the occurrence of these extremely dangerous and in certain cases life threatening incidents.

An issue raised in the further comments not previously raised or identifiable in other survey questions concerned the fine line of professionalism on which ICL’s operate and form their relationship with the children to whom they have been appointed.

Contrary to majority respondent experiences of a lack of communication and a diminished relationship between children and ICL’s, one respondent detailed a situation where the scales were tipped too far the other way.

As such, the ICL made themselves completely available to the children they were appointed to, taking their phone calls whenever they wished to talk. Whilst some may view this in a positive light, the respondent described the ICL’s relationship with their children as overzealous to the point where the ICL became the children’s private lawyer and wrongly empowered them.

Described by the respondent as the empowerment effect, this serves to demonstrate the fine line on which an ICL operates as regards their relationship with the children to whom they are appointed. The *Guidelines* maintain that it is a child’s right to have a professional relationship with the ICL. This combined with the value and expectations that respondents have placed on professionalism dictate that ICL’s approach their relationship with children with the utmost degree of professionalism and the

understanding that they are acting as a best interests advocate for the children, not as the children's private lawyer.

Beyond exposing the distressing attitudes of certain ICL's towards child protection and the fine line of professionalism on which ICL's operate, the further comments of respondents' suggest that the issues around ICL practice are perpetuations of the flaws within family law more generally.

Along with common references to "corruption", many respondents suggested that the problems with ICL's extend further up the chain to problems with the Australian family law system.

Specifically, respondents suggest that the Family Court is not child focused and is detached from current and evolving familial structures and dispositions. Both of these notions are highly justified and can be recognised within other areas of family law not concerning ICL's.

The failure of the Family Court to be child focused can be seen through the contradictory assumptions in the financial and child related provisions of the *FLA* which not only fail to account for diversity of families, but most significantly fail to address the needs and interests of children involved in family law matters.

Moreover, family law's detachment from current developments is seen in current marriage equality laws which provide further support for the argument that there are issues not only with ICL's but more generally with Australia's family law system. The further comments therefore emphasise the importance of law reform in order for law to stay relevant and effective and suggest that law reform is needed not only in regard to ICL practice but within family law more generally.

With legal reform comes hope that the current issues with ICL's can be addressed to such an extent that ICL's successfully fulfill their purpose as a best interests advocate for children involved in contact and custody disputes.

While the further comments revealed an overpowering disdain for current ICL practice, a rare couple of positive comments detailed committed and child focused ICL's were glimmers of hope for future ICL practice.

But the further comments essentially speak for themselves and no amount of analysis or review can truly capture the insights of parents who have experienced the involvement of an ICL in their legal matter.

As such, below are excerpts from the further comments of respondents. Not all further comments are expressed due to the detail and often personal experience expressed by respondents. However the quotes and excerpts below have been chosen as they are seen to manifest the ideas and notions expressed within all comments generally.

*"The ICL displayed [their] concern to us and listened to us and called for orders to be made." – Respondent.*

*"Absolutely corrupt and they are a massive waste of time and money." – Respondent.*

*"The whole Court system is designed to lean one way...[T]he Court and ICL played their own professional game...The ICL is a tool for the Court." – Respondent.*

*"ICL should spell BIAS JOKE." – Respondent.*

*"ICL's disgust me." – Respondent.*

*"I think they are a disgrace. I don't know how they sleep at night, abusing children as they do." – Respondent.*

*"In my case the ICL was...disconnected from current developments." – Respondent.*

*"I would like to see a class action for those ICL's who have not represented children's best interests and put children in harm's way." - Respondent.*

*"[ICL's] should be able to be held accountable and charged with child abuse, assisting to commit acts of family violence as outlined under the Family Law Act, sued for professional malpractice and struck off from practicing law." – Respondent.*

*"ICL's do more to enable abusers than protect innocent little defence-less children." – Respondent.*

*"FAMILY COURT...IS NOT CHILD FOCUSED." – Respondent.*

*"[ICL] didn't really seem to have any involvement or effect on the case...I felt totally let down as a parent."- Respondent.*

*"The whole Family Law Act is corrupt. It needs to be rewritten." – Respondent.*

*"[ICL] did not help anything, just hindered the process by dragging it out and costing more money for all those concerned." – Respondent.*



*"There is ridiculous over representation when you see at the bar table solicitors and barristers for each of the parties and the ICL so that there are 6 people being paid for, sometimes just to agree on an adjournment." – Respondent.*

*"The ICL in my children's case just ticked and flicked and got some free money." – Respondent.*

*"The ICL should be the instrument which stops lawyers dragging out cases and causing further child abuse...They should stop reckless spending of money...The ICL should be able to quickly stop so many [parents] taking their life while this system goes on." – Respondent.*

*"The ICL does not seem to care about the children, only about matters of law." – Respondent.*

*"ICL's use the term 'best interests' of the children, when they completely do not even care about the children, just how much they can milk the system for as much billable Court time as they can get." – Respondent.*

*"There may be good ones out there, that is what I had hoped for. I never expected such a completely corrupt and loathsome individual...[The ICL] placed [their] need both to cover [their] pathetic ass and [their] need for the cash over the best interests of two children." – Respondent.*

*"It should be mandatory for ALL ICL's to provide children with the Children's Charter of Rights, as I know my child & many other parent's children have never received this booklet." – Respondent.*

*"The ICL was the most corrupt lawyer in the court room." – Respondent.*

*"[I]t appeared to me that the system in its present form was totally ineffective. In theory the system should work but it exposes itself to abuse and is just another process that takes responsibility away from another department up the chain." – Respondent.*

*"CORRUPTION reigns supreme." – Respondent.*

# RESEARCH FINDINGS (Suggestions for Improvement) & RECOMMENDATIONS

A number of common suggestions emerged when respondents were asked to provide suggestions as to how to improve the provision of ICL services. Whilst the suggestion to remove ICL's altogether was frequented, a number of constructive, shared suggestions arose to address the inadequacies and failures of ICL practice that has been highlighted throughout this report.

The shared suggestions of respondents revolved around increased communication, improvements on timeliness, a re-assessment of current funding arrangements, increased accountability measures, a greater focus on specialist training, and, with this, a redefinition or re-emphasis of guidelines.

The disillusionment and dissatisfaction with ICL's that has been reflected in the above research findings was further evident when respondents were asked to suggest improvements to ICL service provision.

Some respondents were blunt in their assertions, suggesting that ICL's are not needed and are a waste of taxpayers' money, or more directly suggesting the "hanging [of] family lawyers".

Other respondents appeared to recognize the potential for there to be efficient and useful ICL's, suggesting only to "get rid" of those ICL's who were lazy, whose contribution did not warrant the related costs and psychological impacts, and those who were uninterested in their child or children's welfare.

It was also suggested that ICL's should not be practicing if they lack adequate training in areas such as parental alienation, something which not only affects involved parents, but which significantly impacts upon their children. Furthermore, the research results made apparent the fact that there are a number of issues surrounding communication with ICL's.

Respondents in most circumstances expressed a dire lack of communication between the ICL and their children, and between the ICL and themselves, a number of respondents identifying a lack of communication as the key problem with their and their children's ICL experience. Thus it was suggested that ICL services can be drastically improved if the ICL actually talks to the child or children concerned, a number of respondents expressing that all parties to the proceedings should be interviewed by the ICL. This is a valuable suggestion, and whilst the ICL's focus must remain with the child or children, interviewing all parties may contribute to the ICL's understanding of the child's relationship with both parents.

Intrinsically related to communication is the issue of accessibility, around which there is a fine line. Whilst there are issues surrounding over-access and the empowerment effect, as discussed above, the majority of respondents reported that their child or children experienced or continues to experience a severe lack of access to their ICL and to ICL services.



Despite being appointed an ICL many respondents reported extremely limited contact, communication and accessibility between the concerned child or children and their ICL. In order for ICL's to act as a best interests advocate for children they need to be made more readily accessible and available for children to be able to speak with and express their views and concerns to.

Research results reveal that current practice lacks this. In order for ICL's to be more effective it is imperative that they speak to children more than once or twice, as was the case for the children of a frightful number of respondents.

Just as communication and access channels require improvement, issues of timeliness also warrant attention. Timeliness appeared as an issue with regard to ICL's in two respects. In the first respect certain respondents reported that an ICL was appointed well into the progress of their case, in one particular case being appointed "at the last minute - in fact the last day - before I [the parent] gave up".

Whilst it is inevitable that circumstances may arise throughout proceedings which alert the Court to appointing an ICL, every effort should be made to appoint an ICL when proceedings are initiated. Involvement of an ICL from this initial stage is surely compatible to understanding the best interests of the child. Whilst an ICL must of course be briefed on proceedings upon involvement, entering the proceedings at later stages can lead to a lack of awareness of all relevant issues.

In the other respect concerning timeliness, many respondents reported that the involvement of an ICL significantly dragged out and lengthened their case to between two and five years in a disconcerting percentage of cases. Such lengthy proceedings compromise child welfare and can serve to increase psychological, emotional, and in many cases, physical trauma, for all parties involved. Thus in regards to both of these issues concerning timeliness, respondents rightly suggested that quicker response times were needed, both in appointment and in the practice of ICL's, in order to improve the provision of ICL services.

With lengthy proceedings come increased and often exorbitant costs. Whilst 58% of respondents were not individually asked to pay for the services of an ICL, many identified that current cost arrangements need to be addressed. This is particularly so given that in many cases an ICL is appointed without thorough consideration of parents' financial capacity, and in many cases it is the parents who have to bear the costs of the ICL.

The AIFS study revealed notable differences in the ICL funding arrangements of Australian states and territories, signaling that cost and funding arrangements require serious reconsideration. A reconsideration of ICL funding arrangements is needed in order to establish more uniform and equal funding arrangements.

Perhaps a national ICL funding framework is best suited to addressing the huge disparities in ICL funding grants between Australian states and territories.

*“ICL(s) should be more closely regulated and held accountable for the quality of work they do.” – Respondent.*

Whilst all the above suggestions were common amongst research responses, the greatest collective suggestions for improving the provision of ICL services concerned regulation, accountability, education and training.

An overwhelming number of respondents raised the concern that there was no independent accountability or complaints body for their children or themselves to go to when it was felt that the ICL was not fulfilling their role or duties.

Respondents suggested that ICL practice should not only be more closely regulated through stricter guidelines and requirements but that ICL's be held accountable for their quality of work. Respondents suggested greater answerability and the establishment of a stringent performance review body or process to monitor and assess the quality of the ICL's work and their reactivity in individual cases whilst monitoring the overall practice of ICL's in line with stricter guidelines.

More specifically, there were suggestions for an independent body accessible by children to report on their experience with their ICL. One would regard the self-regulation model adopted by the respective law society's not to be an ideal model to base this new body on given that self-regulation is widely held to be ineffective and a toothless tiger in practice. Furthermore, the unique role of ICL's dictates that a separate regulation model and independent regulatory body is needed.

Whilst many factors require consideration in establishing such a body, it may certainly increase accountability. Specifically so if guidelines are established which make it mandatory for ICL's to inform children and parental parties of the existence of such a body and their rights to report to this body.

Another useful suggestion from respondents to increase accountability was introducing requirements for ICL's to file up to date reports to an impartial body detailing their process and practice within individual cases.

There is clearly a need for greater accountability measures for ICL's, especially given the instrumental role that they play in a child's future. Greater accountability will ensure that the impact that ICL's have on a child's present and future is always of a positive nature, not of a questionable nature as the current situation appears to be.

*“There needs to be more complaints handling process(es).” – Respondent.*

Greater accountability measures can, and in fact need to be, supplemented with increased and more specific training for ICL's. Many respondents questioned the qualifications of ICL's in dealing with children and dealing with the circumstances of children to which they were appointed.

Current ICL training appears highly insufficient and unequal to the seriousness of matters within which ICL's are appointed. As such, respondents suggested a number of areas that ICL's should mandatorily be trained in beyond the mandate of legal studies.

Suggestions include training in:

- child psychology;
- identifying child neglect and child sexual abuse;
- identifying domestic violence;
- identifying false & exaggerated allegations;
- parental alienation & other parental disorders;
- training in the behaviors and tactics of abusers, and;
- training in trauma recognition.

Respondents also suggested that ICL's receive specialist training regarding the rights of children and training in remaining impartial in all circumstances. All of these suggestions are highly justifiable and detail areas of education that are all extremely application to the work of ICL's. The fact that ICL's don't already receive specialist training in all these areas is questionable in itself.

Further, respondents' justly suggested that ICL's be appointed to cases based on their expertise in relation to the specific circumstances of the case. As it currently stands, ICL's appear to be appointed on the basis of availability not capability. It must be recognized that ICL's are not simply lawyers, but rather they are highly unique, as are the matters that they are involved in. Thus it is insufficient that they do not currently receive extensive and specialist training in all the areas suggested by respondents. The potential instrumentality of an ICL's role dictates higher qualifications, and more specialised and continual education and professional development.

*"ICL's should have specialist training in domestic and family violence and in dealing directly with children. They should always meet the children and should always place the child's safety as the highest priority." – Respondent.*

All suggestions made by respondents are both justified and useful, and, if implemented, would undoubtedly improve the provision of ICL services.

It is clear from these suggestions that ICL practice needs to be re-evaluated and re-defined. More stringent guidelines are needed, guidelines which, above all, necessitate and re-emphasize the best interests of children as the primary concern of ICL's.

While the above further comments of respondents severely injure the reputation of ICL's these suggestions provide hope that legal reform can play a role in restoring ICL practice and re-aligning ICL's with their true purpose of understanding and advocating for the best interests of the children whom they stand to represent.

# EXTERNAL RECOMMENDATIONS

The disconcerting reality of ICL practice revealed through the above discussion has been recognised by academics and advocacy organisations alike. Thus in considering the required reform of ICL practice, it is imperative to consider the recommendations of publications external to the subject research findings. The following recommendations compliment those already proposed in the previous section and serve to enforce both the inadequacies of current ICL practice and the significant and necessary scope for reform.

**Nicola Ross, 'Independent Children's Lawyers: Relational Approaches to Children's Representatives' (2012) 26 *Australian Journal of Family Law*, 214-239**

The key recommendations that can be drawn from Ross' work are as follows;

- Increased training for ICL's, particularly training which focuses on the engagement between ICL's and children, including but not limited to interviewing children, and developing both rapport and a professional relationship with children.
- An emphasis on training in communicating with children which encompasses three components:
  - (1) Information about the effect to which an individual child's development can impact upon communication;
  - (2) Cultural competency and the importance of differing cultural contexts of children;
  - (3) Interpersonal communication skills.
- ICL training models which require modelling, practice and opportunities for feedback and re-practice in context.

**Australian Human Rights Commission, 'Children's Rights Report 2014', National Children's Commissioner (2014). Available at:**

[https://www.humanrights.gov.au/sites/default/files/document/publication/Children's%20Rights%20Report%202014\\_2.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/Children's%20Rights%20Report%202014_2.pdf)

The recommendations of the Australian Human Rights Commission explicitly refer to Australia's obligations to children under international law. Whilst the specificity of the Recommendations of the Australian Human Rights Commission extend beyond the scope of the above discussion, their recommendations should certainly be considered by the judiciary and more extensively, by the family law legal system, in order to engender reform. For such purposes, the following recommendations are relevant.

- *Recommendation 1*: That the Australian government respond formally to 'Concluding Observations of the UN Committee on the Rights of the Child on Australia's 4<sup>th</sup> Report of progress under the *Convention on the Rights of the Child* and its optional protocols'. The response should indicate how it intends to progress addressing the recommendations, and timelines and benchmarks for their implementation.

- *Recommendation 2:* That the Australian government accedes to the 'Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure' and ratifies the 'Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (OPCAT).
- *Recommendation 3:* That the Australian government finalises its review of Australia's reservations and withdraws its reservation under Article 37(c) of the *Convention on the Rights of the Child* which relates to the obligation to separate children from adults in prison.
- *Recommendation 4:* That the Australian Institute of Health and Welfare (AIHW) extends its current cohort of Australian children in 'A picture of Australian children' from 0 to 14 years to 0 to 17 years, consistent with the *Convention on the Rights of the Child* definition of the child.
- *Recommendation 5:* That the Australian government establishes relevant data holdings and analytics covering all the key domains of children's rights outlined in the *Convention on the Rights of the Child*, including comparable data across jurisdictions, which the National Children's Commissioner can use to monitor the enjoyment and exercise of human rights by children in Australia.
- *Recommendation 6:* That the Australian government includes in its regular monitoring and evaluation of national policy reforms and initiatives, a component that reports on how it is giving effect to the articles of the *Convention on the Rights of the Child*.

**Parliament of the Commonwealth of Australia, *Every picture tells a story*, (2003) House of Representatives, Standing Committee on Family and Community Affairs. Available at: [www.aphref.aph.gov.au-house-committee-fca-childcustody-report-fullreport.pdf](http://www.aphref.aph.gov.au-house-committee-fca-childcustody-report-fullreport.pdf)**

The Standing Committee on Family and Community Affairs make a number of recommendations covering Australia's family law system more holistically. Such recommendations are extremely useful, especially in that they reflect that the issues with ICL's extend more deeply to issues with the structure of Australia's family law system. The following recommendations can be deemed as vital to this discussion and to ICL reform.

- *Recommendation 11:* The committee recommends that a shop front single entry point into the broader family law system be established attached to an existing Commonwealth body with national geographic spread and infrastructure, with the following functions:
  - Provision of info about shared parenting, the impact of conflict on children and dispute resolution options;
  - Case assessment and screening by appropriately trained and qualified staff;
  - Power to request attendance of both parties at a case assessment process; and
  - Referral to external providers of mediation and counselling services with programs suitable to the needs of the family's dispute including assistance in the development of a parenting plan.
- *Recommendation 15:* The committee recommends that all family law system providers, but most particularly the single entry point service, should screen issues of entrenched family conflict, family violence, substance abuse, child abuse including sexual abuse and

provide direct referral to the courts for urgent legal protection, and for investigation of allegations by the investigative arm of the Families Tribunal.

- *Recommendation 18:* The committee recommends that in parallel with the establishment of the Families Tribunal the current structure of courts with family law jurisdictions be simplified. This should ensure that there is one federal court with family law jurisdiction with an internal structure of magistrates and judges to support the delivery of judicial determination in the best interests of the child.
- *Recommendation 19:* The committee recommends that a longitudinal research project on the long term outcome of family law judicial decisions should be undertaken and incorporated into judicial education programs.
- *Recommendation 20:* The Committee recommends that there should be an accreditation requirement for all family law practitioners to have undertaken, as part of their legal training, undergraduate study in social sciences and/or dispute resolution methods.

### **Speech of the Attorney General, Senator the Honourable George Brandis QC, Speech to the National Family Law Conference, 8 October 2014**

Similar to the recommendations of the Standing Committee on Family and Community Affairs, the comments of Attorney General George Brandis at the 2014 Family Law Conference addressed the family law system more generally. Again, the following comments are highlighted due to their relatability and relevance to the context of this research.

- “This is, after all, an area of law which has, as a foundational principle, the welfare of some of the most vulnerable members of our society. It is an area of law which is highly contested in its jurisprudence and the social science which underlie it, and in the practical application of that jurisprudence and social science.”
- “The best interests of children, the protection of children from harm, and shared parental responsibility, have become core principles of family law as they ought to be.”
- “[T]he family law system should continue to evolve to become a more integrated system, which acknowledges and addresses the diverse needs of Australian families which come into contact with it, and which brings to bear a multidisciplinary approach.”
- “Of course, there will be different views expressed, and I urge you to express them so that we can maintain and improve a vigorous, strong foundation for the next stages of family law’s evolution, if not revolution.”

It is hoped that this research contributes to and builds upon the above external recommendations, and further, provides clarity on the nature of reform needed in relation to ICL practice.

## CONCLUDING REMARKS

Undeniably, current ICL practice appears to be both harrowing and extremely inadequate. The research speaks for itself in presenting ICL practice as ineffective, and in too many circumstances, ineffective to the point of placing children at risk. The principles and purpose for which ICL exist, at the heart of which is the best interests of children, certainly has value but the apparent reality of ICL training, development and practice completely negates these founding principles. Accordingly, a great deal of reform is needed in relation to the whole system governing ICL's and ICL practice in order for any of these founding principles to be actualized and in order for ICL's to truly and transparently act as child's best interests advocates.

The inadequacies in current ICL training and practice manifests itself in a number of ways. Namely, in instances of discrimination towards parental parties on the basis of gender, race and parental relationships; through inadequate funding regimes; and in the absence of the effective communication, consultation, understanding and the establishment of a professional relationship with children.

Further, current ICL guidelines, training and practice requirements are fatally insufficient to the meet the interests and needs of children and to respond to the fragile context of matters on which ICL's are appointed. As well insufficiently responding to the context of individual matters, ICL practice appears to virtually ignore the differing contexts and needs of children, not only at the time of ICL appointment, but the differing contexts and needs of children as they mature. Such inadequacy is not born from training and practice requirements alone but also from the current lack of transparency and accountability in ICL practice.

Reform is essential. It needs to be accepted that children can have multiple primary attachments, it needs to be accepted that children have differing cultural, developmental, social, psychological needs, it needs to be accepted that children in family law matters are in vulnerable positions and it needs to be accepted that the best interests of children are the defining factor in such matters. Ultimately, these need to be not only accepted but need to be the founding principles for substantial reform.

The findings in the above discussion necessitate reform on a wide scale. In light of such research findings, this paper leaves readers with the resounding comment of a respondent.

*“Be honest, our children's lives depend on it.” – Respondent.*



# APPENDIX – QUESTIONNAIRE / SURVEY QUESTIONS

1. What is your first name? (First names may be used in the reporting of survey results but are not intended for the purpose of identifying you. If you do not wish to provide your first name or have concerns about this then please provide an alias or false name for the purposes of this survey).
2. I engaged in legal proceedings which involved an Independent Children's Lawyer (ICL) as recently as (select year). (Please only participate in this survey if you have been involved in legal proceedings with an ICL since 2001).
3. I am (Male/Female)?
4. The ICL was (Male/Female)?
5. Your child/children was appointed an ICL as a result of:
  - A request by your child/children for an ICL?
  - An application by yourself for an ICL?
  - An application by your ex-spouse for an ICL?
  - A joint application by yourself and your ex-spouse for an ICL?
  - An application made by another party for an ICL?
  - A motion by the Court to appoint an ICL?
6. Upon an ICL being appointed to your child/children, both you and your child/children were made aware of the role of the ICL.
  - True?
  - False?
7. Did the ICL meet and interview:
  - The child/children?
  - Yourself?
  - The other parent?
8. Your ICL spoke about legal matters in a manner:
  - Comprehensible to both you and your child/children?
  - Comprehensible to you but not to your child/children?
  - Comprehensible to neither you nor your child/children?
9. How well do you believe the ICL prepared for hearings?
  - Poorly prepared. Seemed to be making decisions on the fly?
  - Somewhat prepared. Had some notes from meetings and interviews?
  - Thoroughly prepared. Had interviewed all parties and established groundwork for hearings?
10. Throughout proceedings, the ICL regularly informed and updated both you and your child/children of their progress and you remained aware of the role of the ICL.
  - True?
  - False?
11. From 1 to 10 (1 being least, 10 being most), how would you rank the ICL's knowledge of the family law act? (1 to 10)



12. From 1 to 10 (1 being least, 10 being most), how would you rank the ICL's knowledge of the Court process? (1 to 10)
13. From 1 to 10 (1 being highly unprofessional, 10 being highly professional), how would you rank the professionalism of your ICL? (1 to 10)
14. How satisfied were you with their performance?
  - Very satisfied?
  - Satisfied?
  - Neutral?
  - Unsatisfied?
  - Very unsatisfied?
  - N/A?
15. Do you feel that the ICL treat you treated differently because of your gender?
  - Yes?
  - No?
  - At times?
  - N/A?
16. How much were you (individually) asked to pay for the services of the ICL?
  - No Payment
  - \$1000 or less
  - Between \$1001 to \$3000
  - Between \$3001 to \$5000
  - Between \$5001 to \$8000
  - Between \$8001 to \$15000
  - Above \$15000
17. What was the outcome of your case?
  - Case not yet finished
  - I was pleased with outcome
  - I was not pleased with outcome
18. How instrumental do you think the ICL was in resolving case quicker, (1 being of no importance in the quick resolution of your case and 10 being extremely instrumental)? (1 to 10)
19. From 1 to 10 (1 being of no importance, 10 being extremely important), how would you rank the importance of an ICL:
  - (i) To your child/children? (1 to 10)
  - (j) To any child/children involved in a custody battle? (1 to 10)
20. In practice, whose best interests do you believe the ICL represented?
  - The child/ren
  - My ex-spouse
  - Me
  - No-one
  - Not Sure