The legal representation of vulnerable children is conceivably the most critical role played by lawyers in the family law system. Perhaps reflecting the importance of the role performed by these legal representatives for children’s best interests (called Independent Children’s Lawyers or ICLs) the last decade has seen a flurry of research around children’s participation from the perspectives of children, their families, academics and the legal profession.

The genesis of this article was a study tour undertaken to examine child legal representation schemes in North America, Canada and the United Kingdom in 2014 on a Churchill Fellowship. The resultant report described developments and initiatives taking place internationally and made recommendations to improve approaches to child legal representation in Australia (Beckhouse, 2015).

This article draws on some of the themes from that report as well as practical challenges around participatory practice in Australia. It considers how children’s voices in family law court proceedings are heard, analyses different approaches and attitudes to an ICL’s engagement with a child, identifies some structural impediments that may inhibit participatory practice, and outlines some enhancements that could be made to improve children’s participation in the Australian family law system.

It argues that while greater awareness of participatory practice has been achieved, there are challenges posed by children’s participation for both ICLs and courts that remain unresolved. Behind the surface of cases, that at face value appear to be limited to a narrow parental conflict, lie a complexity of issues and needs. Often this sees a child rights doctrine on a collision course with the need for a more individualised approach to child participation.

It is argued that reform has the potential to improve the experiences of children in the family law system. However, change needs to be informed by more research to assist people working in the family law system to better understand what processes and practices
improve children’s experiences and when and how they should be employed.

How are children’s voices heard?

Article 12 of the United Nations Convention on the Rights of the Child (UNCROC) obliges Australian courts to facilitate the participation of children in proceedings relevant to their care and to ensure that their views are heard. This has been incorporated into the objects and principles of the Family Law Act 1975 (Cth) (“the Act”) at section 60B (4).

In parenting proceedings under the Act the views and voice of the child can be facilitated via two principal methods. A child may meet with an expert social scientist, who prepares a report of the child and family assessment. In addition, they might have an Independent Children’s Lawyer (ICL) appointed to represent their best interests.

In 2015–16 there have been approximately 4,800 cases across Australia that have benefited from the participation of an ICL. It is estimated that each year Legal Aid Commissions across Australia engage almost 550 Independent Children’s Lawyers to undertake this important work (National Legal Aid, 2016).

Research conducted by the Australian Institute of Family Studies (AIFS) on Family Law Court filings (Kaspiew, Moloney, Dunstan, & De Maio, 2015) tells us that the proportion of contested parenting matters filed in family courts involving families with complex needs increased over a nine-year period. This includes a significant number of parenting matters where there is a combination of family violence, child abuse, drug and alcohol dependency and/or serious mental illness. As the complexity of the subject matter has increased, so has the number of ICLs appointed to represent children in contested cases involving a combination of these risk factors.

In 2013 a report from AIFS on the use of ICLs in the family law system (Kaspiew et al., 2014) found that the ICL’s role is a multi-faceted one with three principle aspects: to facilitate children’s participation (the participatory function), to gather evidence and to manage the litigation and play “honest broker” by bringing a child focus to proceedings (see pp. 29–31). The report also found divergence in practice amongst ICLs around Australia, particularly in terms of meeting children. But, importantly, it found that the area where practice is most variable and contested is in relation to the function of supporting child participation (Kaspiew et al., 2014).

The AIFS ICL study perhaps confirmed the conclusions of other Australian research conducted in the decade before. In 2008 Cashmore and Parkinson undertook a study of lawyers to understand how children are heard in family law proceedings. They found that while lawyers were supportive of children’s participation, they often viewed it as risky (Cashmore & Parkinson, 2009). The lawyers in their study also expressed a desire to protect children from parental conflict and the burden of the responsibility for making decisions (Cashmore & Parkinson, 2009). Ross (2012), who undertook empirical research into the practices of children’s lawyers in NSW, concluded that a discourse on children’s participation was in its infancy in the family law courts.

In 2012, at the same time that the AIFS research on ICLs was commencing, 150 child representatives, judges and social scientists gathered in NSW to consider, for perhaps the first time, their practices around child participation in the family law and child protection legal systems. Four years on (and four child representation conferences later), there have been many state and national initiatives aimed at awareness-raising and at improving the participatory practices of ICLs. In 2011 the Legal Aid NSW’s Best for Kids website (www.bestforkids.org.au) introduced legal information, videos and brochures to provide children and families with access to resources on family separation and the role of ICLs. The participation of children in family law processes (aimed at the development of a more informed discourse on participation) is a recurring theme of training programs and conferences. The most recent initiative is a national ICL website (www.icl.gov.au), which was launched in 2016 The website importantly provides ICLs across Australia with access to high quality resources (including social science content provided by AIFS), forums, news, training and access to mentoring. The website also allows members of the public to access a range of new national resources on the role of ICLs.

However, changing the long-standing practices of lawyers around children’s legal representation remains a challenge. And one of the reasons cited for this is a lack of more direct and practical guidance as to how the participation function ought to be undertaken by legal professionals (Bell, 2015).

Why don’t ICLs always meet with the child?

Although ICLs are required to meet with the children whose interests they represent...
(and are paid to do so) there is a discretion attached to this. The Act (sections 68L, 68LA and 68M) provides legislative direction about the role of the ICL, and Guidelines for Independent Children’s Lawyers (“Guidelines”; Family Court of Australia, 2013) provide even greater detail on expectations. Part 6 of the Guidelines instructs the ICL to meet the child unless “the child is under school age or there are exceptional circumstances, for example where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child” (p. 6).

It is important to pause and consider the application of the term systems abuse to ICL practice at this juncture. As public awareness about the complexity of child abuse was emerging in the 1990s, the scope of the ICL role was being defined in both case law and through the development of national guidelines. James (1994), writing on the prevention of child abuse and neglect at this time, observed a heightened legal and academic discussion as to what parameters child abuse included. Cashmore, Dolby, and Brennan (1994), in the same year, introduced into the discourse the term “systems abuse” defined as:

harm done to children in the context of policies or programs that are designed to provide care or protection. The child’s welfare, development, or security are undermined by the actions of individuals or by the lack of suitable policies, practices and procedures within systems or institutions. (p. 10)

The Guidelines (Family Court of Australia, 2013) arguably have expanded the 1994 Cashmore et al. definition, now describing systems abuse as occurring when “a child is further traumatised by the systems (courts, child protection or other State Welfare Authority), which he/she encounters or which are appointed to make decisions about the child” (p. 17).

While the term “systems abuse” does not appear in the Act, the notion seems to be endorsed by section 68LA (5)(d), which obliges the ICL to endeavour to minimise the trauma to the child associated with proceedings.

Notwithstanding the many measures introduced to improve the participatory aspect of ICL practice, my personal experience is that some ICLs cite the possibility of systems abuse as a reason why they have not met with a child. And as the volume of parenting matters involving families with complex needs has increased (Kaspiew et al., 2015) the “exceptional circumstances” referred to in Part 6 of the Guidelines has arguably become the ordinary circumstances of many matters in which an ICL is appointed.

My observation is that the factual circumstances of cases where systems abuse is raised as a concern are varied but fall roughly into three groupings.

1. Repeatedly interviewing a child can cause trauma

In matters where there are allegations of abuse or risk of harm, through the swinging doors of the conflict arrive a variety of professionals tasked with investigating or reporting on the child and family; doctors, child protection workers, police, hospital staff, psychiatrists, social workers, therapists, school counsellors, teachers, family consultants and the ICL. In these situations the ICL might argue that it is better to avoid seeing the child, as multiple interviews could be both confusing and traumatic for them.

Recently, an ICL (whose practices were incidentally under investigation) advised that he had not met with the subject children before the final hearing because there was no evidence to suggest that their views had changed since his meeting with them eight months prior.2 His concern was the potential for “systematic abuse”. To be clear, I don’t endorse the view, but it demonstrates the impact the term can have on the participatory practices of ICLs.

2. To meet will potentially contaminate the evidence

In matters involving allegations of violence or child abuse, some ICLs express concern about meeting with children because (in the event that the allegations involve actions that could lead to criminal proceedings) there is potential for the evidence to be contaminated.

3. Involving a child intimately in the decision-making is a form of abuse

Some ICLs have expressed a concern that meeting with a child could be tantamount to systems abuse (Ross, 2012) because the child will become intimately involved in the decision-making. It is argued that the child should not be drawn into “choosing sides”. In doing so, they could be subject to pressure or manipulation by a parent thereby perpetuating the trauma and creating loyalty conflicts and anxiety. Ross (2012) described the ICLs that she observed expressing similar sentiments as taking a “protectionist” stance in their representation as a way of insulating the child from the conflict.
Should an ICL have direct contact with a child in all cases?

Recent studies and enquiries involving children in the family law system have highlighted a need to question current approaches and attitudes to children’s participation. No more powerful argument can be found than in the case of Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens 2016. At the age of 17, Grace Cuzens reflected in an open letter to coroner Barry King that:

The Family Court of WA has been a part of my life as long as I can remember. My parents separated when I was a toddler and were both actively involved in the Family Court until 5 December 2011. It ended only because I lost my sisters and my mother.

Throughout this period of my life, from 2001 when I was 3 years old to 2011 when I was 13 years old, I was interviewed by more social workers, counsellors and psychologists/psychiatrists than I can recall, had inconsistent contact (and sometimes no contact) with my father and was placed in the care of my mother who loved me greatly but could never separate herself from the Family and Supreme Court cases. My overall experience of the Family Court has been one of immense negativity, distress and trauma. (Clarke, 2016, “Grace Cuzens’ Statement” paras 1–5)

While the tragic outcome of her case is thankfully extreme and rare, the course the proceedings took and the issues raised are alarmingly common. The prolonged litigation involved family violence, allegations of child sexual abuse, mental health issues and changes of residence. In his judgement, Chief Judge Thackray observed:

Grace’s letter is a plea for all children involved in Family Court proceedings to have someone independent to talk to them about what is happening in the proceedings and to be their voice. This is one of the reasons the court appoints an independent lawyer to represent children where there are serious allegations of abuse. (para. 41, p. 8)

ICLs should by now appreciate that a lack of direct contact with a child may increase stress levels and lead to a lack of faith and trust in the court system. Indeed the ten children interviewed in the AIFS ICL study were all involved in family law proceedings where their safety was in issue (Kaspiew et al., 2014). They described expectations of the ICL listening to them, protecting them, advocating for them and helping them. Some wanted to see the ICL several times, and were dissatisfied with only one meeting. For most of these children their expectations about the role of the ICL were not met.

When Neale (2002) undertook research with 117 children about their post-separation arrangements she reported that for those in the cohort who had experienced neglect or disrespect:

Specialist support, an independent voice and legal representation were seen as crucial to a child’s wellbeing. Children will clearly assert their rights to self-determination where their family relationships are oppressive or abusive. (p. 469)

Neale’s commentary is consistent with Parkinson and Cashmore’s (2008) findings that children want to participate to a greater extent where violence or abuse is a feature of the case.

Interestingly, the application of the systems abuse doctrine to participatory representation practices seems to be an Australian phenomenon that is absent from practice discourse in the USA, Canada and the United Kingdom. In America, formal training and specialist accreditation for children’s legal representatives is delivered with the assistance of a seminal text edited by Duquette and Haralambie (2010), referred to as the “Red Book”. Two chapters of the book are devoted to the topic of working with child clients. On this topic the Red Book notes that many child clients will have had prior involvement with courts or government bodies:

These prior encounters may have been unpleasant or even traumatic for the child, leaving the child with a distrust of adults in the system. Knowing this, and approaching the representation of the child client with consideration of his or her past and/or concurrent involvement in other matters, will help the attorney establish the trust necessary for a positive attorney–client relationship. (Duquette & Haralambie, 2010, pp. 111–112)
The Red Book makes no reference to “systems abuse”—quite the opposite in fact. It refers to the “heightened duty” that a child representative has to ensure that their client understands the relevant issues, and notes that representation “starts with really listening to the child and understanding the short term and long term consequences of any positions taken on the entire fabric of the child’s life.” (Duquette & Haralambie, 2010, p. 122)

Can child representation practices traumatise children any further?

The AIFS ICL study proposed that when child representation is done badly, it has the potential to further traumatising a child (Kaspiew et al., 2014). But this begs the question of what good practice for an ICL looks like. Accepting that at a minimum an ICL is obliged to meet with all children to explain the legal processes they are involved with, a more challenging aspect of good ICL practice is determining what level of participation is appropriate for the child. Meeting a child empowers the ICL to manage the litigation in a way that focuses on the child’s best interests.

If there is a risk that participation could be distressing or detrimental to the child, a good ICL will put in place a case plan to manage that risk. But challenges generally arise in cases involving children who have rejected a parent or who resist spending time with that parent. They are often angry children who take a rigid approach to the deficiencies of the other parent. They are uncomfortable with a best interest model and seek access to processes that allow them to directly participate. They are often the outspoken critics of the family law system who argue that their experience was a poor one.

For these children, working out the best approach to representation is difficult. And arguably an assessment of what is needed is the task of a social scientist, not a lawyer. While ICLs seek out good referral sources for therapeutic intervention, therapy is generally not what the child is seeking. It can also be dangerous—especially where abuse allegations are made or surface during the assessment process (as they often do). Altobelli (2011) argues that for some of these children participatory practices make therapeutic intervention potentially more difficult:

To give a voice allows them to “buy in” to this potentially harmful process, or to “take sides”, and to engage in the “tribal warfare” that so typically occurs in these cases. (p. 197)

Child representatives in Ontario, Canada, have developed their approach to child representation with some of these concerns in mind. Their child representatives are expected to listen to the voice of a child contextually over several meetings when first appointed. It is a three-pronged process called the “contextual approach” and it is said to avoid the paternalistic or “protectionist” lawyer who says something like “she said ‘X’ but I know what is best for a child of this age”. McSweeney and Leach (2011) who champion this model argue that “advocating uncritically the influenced and manipulated views of children is unhelpful and irresponsible” (p. 15).

But this should not be read as justifying a decision to not meet with the child. In my experience this approach inevitably leads to high levels of dissatisfaction and anger on the part of the child. This is supported by the data from interviews with children participating in the AIFS ICL Study, which reported that the lack of meaningful direct contact from ICLs caused disappointment and a lack of faith in the family law process. Bell, undertaking a literature review of practices and approaches to child representation, concluded that to fail to even meet with a child at a minimum “may further silence and disempower children” (Bell, 2015, p. 39).

Greater participation in court processes

The question of judicial meetings with children tends to polarise views amongst professionals in the family law system. The practice is rare
in Australia (Fernando, 2013), in contrast to the more regular participation of children in courts throughout the USA, Canada and the United Kingdom as observed during my study tour (Beckhouse, 2014). Instead of judges, Australian family courts use ICLs and report writers (such as family consultants) to facilitate the involvement of children and ascertain their views. And there is a range of practical measures that can be used to ensure that children understand the manner in which their views are considered by a judge. Recently, a child represented by an ICL from Legal Aid NSW asked for a letter of advice on our role and the practical operation of the best interests principle. While not usual practice, the ICL did provide the letter and developed a highly participatory relationship with the child. Another colleague arranges for children to tour a family law court complex before a final hearing. While the process is done without the involvement of a judicial officer, it is an example of another participatory practice that can provide children with a better understanding of court processes, and may lead to them having greater confidence in the family law system.

Research with children (Kaspiew et al., 2014; Parkinson & Cashmore, 2008) suggests that children may feel that they have had their views acknowledged if they are afforded the opportunity to visit the court and/or meet the judge. And, from practical experience, there are cases where judicial meetings with children should be considered as another valuable way of involving them. This is a position advocated by Justice Benjamin (2012) of the Family Court of Australia who argues:

*It is not a panacea and is not useful in all cases, but it seems to me to be an effective tool in some parenting proceedings. (p. 107)*

While the Guidelines provide ICLs (and the family law system more broadly) with valuable direction as to their role, the same cannot be said for the existence of guidance around judicial meetings with children in Australia. In order to manage the expectations of children meeting with judicial officers, an important consideration may be providing a clear explanation of the manner in which these views are to be considered and the role that they play in the decision-making process. In the USA, Canada, the United Kingdom and New Zealand, the involvement of children is supported by guidelines promulgated to give some direction on the participation and attendance of children in family courts (Beckhouse, 2015). These guidelines articulate the purpose of the child’s attendance, but they also guide all the participants, reducing judicial discretion and arguably leading to a greater comfort in the process.

Drawing on international approaches and her own survey of the attitudes of judges in Australia, Fernando argues that guidelines giving direction on how judicial meetings should be conducted are a “logical step” (2012, p. 215). Whether you support the practice or not, the development and adoption of guidelines on how and when judicial meetings with a child should be conducted in Australia are overdue.

New resources for ICLs have been greeted enthusiastically from many in the family law system, especially the children represented. But there are more significant movements in the form of national forums and committees focused on system-wide improvements. In South Australia, they will soon commence trialling a Young Peoples Family Law Advisory Group. This is another emerging form of participation for children in the family law system via feedback processes such as children’s reference and advisory groups where children are directly involved in providing feedback about their experiences. Hearing the views and experiences of children in the family law system can only serve to improve our approaches.

**Reform**

As the previous sections have highlighted, while ICLs accept the important participatory role that they play, there is some confusion and tension brought about by the current framework. This is supported by the AIFS ICL Study and leads Kaspiew et al. (2014) to conclude:

*engaging with children and young people may have a participation-related purpose or a forensic purpose: there is some tension in this area that leads to a lack of clarity in practice about the role, purpose, function and impact of ICLs having direct contact with children and young people. (p. 32)*

More research is needed to better support ICLs and help strengthen our ability to provide appropriate and responsive models of practice. Ideally, that research would consider whether the current Guidelines and the legislative framework are promoting the appropriate level of participation of children in family law processes, as well as promoting community confidence in the family law system more broadly.

In international jurisdictions the requirement that a lawyer meets with a child is often legislated (see e.g., section 6, *Care of Children Act 2004*, New Zealand, and *Colorado Children’s Code*, C.R.S Title 19). While different jurisdictions understandably adopt diverse approaches to
representation, most are able to articulate clear expectations about their processes for meeting with children. Often this includes frequency, location, who is to be present, how old a child should be to order a meeting, how soon after the appointment a meeting should occur, and ongoing contact (Beckhouse, 2015).

There is a risk that section 68LA (5)(d) of the Act (which requires the ICL to endeavour to minimise the trauma to the child associated with proceedings) inadvertently acts as a further barrier to participatory practice for the reasons outlined earlier. It is time to consider whether section 68LA should impose a duty on the ICL to meet with the child, similar to the compellability created by section 9B(2) of the Family Courts Act 1980, New Zealand.

Section 60CC(3)(a) of the Act places a legislative imperative on family courts to consider a child’s views but there is no requirement to address the reasons why orders would be made contrary to those views. In a contested matter, this can be addressed in a judgment. But as we strive for more participatory frameworks we should also consider other approaches such as judgments written for children or letters. Judge Altobelli did this recently in the case of Gaylard & Cain (2012) when he commenced his reasons for judgment with the words:

Dear X and Y,

After your mum and dad separated they could not agree about where you were to live. You were 10 and 6 at the time. As a judge it was my job to make this decision. I had a lot of help from the lawyer who was representing you, and each of your parents, as well as an expert child psychiatrist. Even with all of this help it was a hard, sad case to decide. This letter is to try to explain my decision to you, even though you probably won’t read it for many years. (p. 1)

The failure of judges to give reasons when making orders contrary to the views of a child is raised occasionally by ICLs frustrated that parents have reached a settlement that conflicts with a child’s express wish. Perhaps a solution to this should be considered in the context of a more participatory framework.

In addition to the adoption of guidelines or procedural documents on judicial meetings with children, representative bodies in family law systems internationally have promulgated charters to support child inclusive and participatory practices in their systems. For example, in the United Kingdom, the Family Justice Young People’s Board produced a “National Charter” (2014) and, in the USA, the “Children in Court Policy Statement” (2012) was adopted by the National Council of Juvenile and Family Court Judges. The time has arrived for the Australian family law system to develop a set of principles to guide decision-making about the participation of children in legal processes. While the extent of a child’s participation should be determined on a case-by-case basis, guidelines need to be developed and refined to inform our approaches. These guidelines should articulate appropriate procedures to ensure that children are allowed to participate in a safe, transparent and child-inclusive manner.

A “best interests” approach to child representation

Tobin (2012) argued that “children’s rights can no longer be dismissed as a marginal consideration reflecting the utopian aspirations of international law” (para. 9). And he is right. However, we have to also ensure that any discourse on children’s rights in the context of ICL practice does not overlook the importance of designing a model of representation that is appropriate for each particular case, and one that respects the individual child’s own ability and willingness to participate.

A child’s perspective on the extent to which their participation was facilitated, is very much dependent upon the relationship that they develop with the ICL, their experiences with a range of professionals in the family law system and the capacity that an ICL has to use creative and occasionally innovative mechanisms to involve them in the process. There is no textbook to guide this, and there can’t be. The ongoing development of resources, training and support mechanisms are useful, however, and a vast improvement on previous approaches.

Case representation, in a similar way to case management, depends on the individual circumstances of a case. However, this analysis of the participatory practices of ICLs and the challenges we face hopefully serves to highlight the gaps in our knowledge. Partly due to these gaps, Legal Aid NSW is currently participating in a research project with children about their experiences and feelings of meeting with ICLs. We hope to gain a better understanding of what ICL practices work best for the children we represent.

But more research is needed, particularly of the experience of children from families where there are allegations of family violence, child abuse, parental rejection and/or mental illness. Such research would allow us to better understand the validity of the notion of systems abuse in child representation practice. It would also allow us to consider whether there should be different models of representation or case
management approaches depending on the type of conflict, or perhaps more appropriately, the child’s wishes.

Over the last 5 years, the family law system has travelled a long way down the road of participatory practice. Now is the time to lay down guideposts to ensure that these practices best support the children who come into contact with the family law system.

Endnotes
1 The term “family courts” is a collective name used to describe the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia.
2 Personal communication, name withheld.

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