

In addition to the changes to the Parenting framework, which will have significant relevance for Independent Children's Lawyers (ICLs), there are two proposed amendments in the Family Law Amendment Act 2023 (FLAA) that relate directly to ICLs:

1. An amendment to specifically permit the appointment of ICLs in Hague Convention (child abduction) matters (amended s68L(1))
2. A new provision that requires ICLs to meet with children and give them an opportunity to express a view (new s68LA(5A)).

Consistent with Australia's obligations under Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), these reforms seek to ensure the views of children are appropriately heard and considered in family law proceedings.

Expanding the use of ICLs in cases brought under the Hague Convention

The change removes the existing requirement for there to be "exceptional circumstances" justifying the appointment of an ICL under the Hague Convention.

This acknowledges that although in theory Hague matters are supposed to proceed with speed and efficiency, the reality is that these matters are complex and do not always proceed in a summary way.

The amendments recognise the important role that ICLs can have in facilitating the efficient resolution of complex matters – including assisting to resolve matters prior to trial and ensuring the court has relevant evidence (especially where there are deficiencies in the parties' cases).

Subsection 68L(3) is repealed, removing the restriction on the appointment of ICLs in these cases, and substituted with:

Subsection 68L(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration. This includes any such proceedings arising under regulations made for the purposes of section [111B](#).



Codifying Requirement for ICLs to Meet With and Seek the Views of Children

Schedule 4 of the FLAA contains amendments to provisions about ICLs, including a requirement for ICLs to meet with a child and give them an opportunity to express a view. In appropriate circumstances, and where they wish to, children can express their views to the ICL.

The new duties complement the existing duties in subsection [68LA\(5\)](#), which require the ICL to act in a certain way and undertake specific actions in order to promote the best interests of the child.

The FLAA recognises a child's right to be heard in family law proceedings, by providing that the court must, when determining what is in the child's best interest, consider any views expressed by the child. This is supported by the existing section [60CD](#), which details how the views of a child can be expressed, and section [60CE](#) which notes that none of these sections require a child to express their views.

Existing [Guidelines for Independent Children's Lawyers \(2021\)](#), endorsed by the Family Law Courts, provide that ICLs should meet with children in most circumstances (at Parts 5 and 6.2).

National Legal Aid accreditation and professional development training for ICLs also emphasises the importance of meeting with children, these training resources are referenced at the end of the Factsheet.



The New ICL Provisions in Focus

Subsections 68L(5) are repealed; after subsection 68LA(6) these new subsections are inserted:

New subsection 68LA(5A) - Requirement to meet with the child and give the child the opportunity to express their views

(5A) Subject to subsection (5B), the independent children's lawyer must perform the following duties (not necessarily at the same time):

- (a) meet with the child;
- (b) provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate.

Note: A person cannot require a child to express the child's views in relation to any matter (see section 60CE).

- Although many ICLs already meet with children and seek to facilitate children's participation where appropriate, new subsection **68LA(5A)** will require all ICLs to do this.
- The requirement to perform these duties applies in all cases where an ICL is appointed, including parenting matters under Part VII, welfare matters under section [67ZC](#), and where ICLs are appointed for children in proceedings relating to the Hague Convention under regulations made for the purposes of section [111B](#).
- The ICL under subsection **68LA(5A)** must provide the child with the opportunity to express any views in relation to the matters to which the proceedings relate. For example, in proceedings under Part VII, the child may wish to express general views about their home situation or relationship with parents and siblings, or express more specific views about time proposed to be spent with parents.
- If the child does choose to express any views about matters to which the proceedings relate, the ICL must ensure that these views are put fully before the court under paragraph [68LA\(5\)\(b\)](#).

- It is important that children have the opportunity to express a view and to be heard in relation to matters that affect them. The ICL may determine the weight to be given to a child's views when making a submission to the court about a particular course of action under subsection [68LA\(3\)](#). The court must also consider any views expressed by the child when determining what is in a child's best interests when making orders under Part VII.

(5AA) The independent children's lawyer has discretion in relation to the following matters (subject to any order or direction of the court with respect to the matter, for example under paragraph 68L(2)(b) or paragraph (5D)(b) of this section):

- (a) when, how often and how meetings with the child take place;
- (b) when, how often and how the child is provided with an opportunity to express views.

- The performance of the two duties in subsection 68LA(5A) do not necessarily need to occur at the same time. The ICL retains the discretion to determine the timing, frequency and method of engagement with the child based on professional judgement and subject to any directions or orders of the court.
- There is no specific time that an ICL must perform these duties because this will depend on the facts and circumstances of each case. It is only required that the ICL must perform these duties at some stage in the proceedings, prior to the court making final orders, subject to subsection 68LA(5B).
- A meeting with the child may occur for various purposes, including but not limited to giving the child an opportunity to express a view. For example, an ICL may choose to meet with the child upon appointment to explain to the child the ICL's role, the nature of the relationship between the child and the ICL and to determine the extent to which the child wishes to be involved. The ICL may seek a subsequent meeting to discuss with the child their views on the matters raised in the proceedings.

- The method by which an ICL may meet with a child under subsection 68LA(5A) is not limited, nor is the method by which a child's views may be obtained, which may include a letter or electronic communication, provided the method facilitates the child's views.
- The [Courts Guidelines for Independent Children's Lawyers](#), provide guidance on meeting with and obtaining the view of the child. The national [ICL website](#) provides resources and guides on the methods and expectations of ICLs when engaging with children. A comprehensive suite of resources for ICLs available on the national ICL website, are listed at the end of this Factsheet.

(5B) The independent children's lawyer is not required to perform a duty if:

- (a) the child is under 5 years of age; or
- (b) the child does not want to meet with the independent children's lawyer, or express their views (as the case requires); or
- (c) there are exceptional circumstances that justify not performing the duty.

- Paragraph (5B)(a) reflects that as a general position it is not appropriate for the ICL to be required to perform the duties in subsection 68LA(5A) in relation to children below school age. However, the ICL retains the discretion to meet with a child under 5 years of age if this is considered appropriate. For example, if an ICL is appointed to represent the best interests of multiple siblings where one child is under 5 years of age, the ICL may choose to meet with the sibling group together and seek individual meetings with the older children.
- Paragraph (5B)(b) provides that an ICL is not required to perform a duty if the **child does not wish to do so**. This is consistent with section [60CE](#) which provides that nothing in Part VII permits the court or any person to require the child to express views in relation to any matter. This paragraph makes clear that a child has choices about the way they want to engage with the ICL. These must be the child's wishes, and not those of others. The child may choose not to meet with the ICL and not to express any views. The child may choose to meet with the ICL but may not wish to express a view. Alternatively, the child may wish to express a view but may not wish to meet with the ICL. In these circumstances, the ICL should organise for an alternative method for the child to communicate their views, for example, a letter or electronic communication.



- Paragraph 68LA(5B)(c) provides that an ICL is not required to perform a duty if there are **exceptional circumstances** that justify not performing the duty. This subsection acknowledges that there may be circumstances where it is not in the best interests of the child for the ICL to perform one or both of the duties in subsection 68LA(5A) to meet with the child and to provide an opportunity to express a view.

(5C) Without limiting paragraph (5B)(c), exceptional circumstances for the purposes of that paragraph include that performing the duty, would:

- (a) expose the child to a risk of physical or psychological harm that cannot be safely managed; or
- (b) have a significant adverse effect on the wellbeing of the child.

- The **risk of physical or psychological harm, or significant adverse effect on the wellbeing of the child**, must result from the ICL's performance of the duty.
- ICLs are frequently appointed in cases where family violence or child abuse risks are present, but this should not preclude a child from meeting with the ICL and, if they wish to, from being given an opportunity to express a view. In these circumstances, additional support and safeguards may be put in place to minimise any trauma to the child to ensure that they can safely engage in matters that affect them, rather than a presumption in favour of precluding them from engagement.
- The risk of physical or psychological harm or significant adverse effect on the wellbeing of the child **must be considered in relation to the specific child**. The wishes and needs of each child, including within a sibling group, may differ and should be considered on a case-by-case basis.
- Subsection (5C) **does not limit the circumstances that could be considered exceptional** for the purposes of paragraph (5B)(c). The examples of circumstances that are considered exceptional outlined in (5C)(a) and (5C)(b) are focused on the impact on the child of the ICL performing the duties. This is intended to balance risks to the safety of the child and their rights to participate. There may be other circumstances that impact an ICL's decision to perform a duty that do not necessarily relate to the impact on the child. Determining whether these circumstances are exceptional and justify not performing the duty must be carefully considered, particularly in light of the child's right to express their views freely in all matters affecting them in accordance with Article 12 of the UNCRC.

(5D) If the independent children's lawyer proposes not to perform a duty because of paragraph (5B)(c), the court must do the following before making final orders:

- (a) determine whether it is satisfied that exceptional circumstances exist that justify not performing the duty;
- (b) if the court determines that those circumstances do not exist—make an order requiring the independent children's lawyer to meet with the child or provide the child with an opportunity to express their views (as the case requires).

Note: The court may also make such other orders it considers necessary to secure the independent representation of the child's interests (see paragraph 68L(2)(b)).

- Whether circumstances are exceptional will come down to the facts and circumstances of each case.
- The ICL may seek external evidence to support their decisions, such as advice from a family consultant or relevant expert in the case, or a treating practitioner. ICLs may also wish to refer to evidence from a parent or carer of the child. The weight to be given to this advice is at the professional discretion of the ICL and considered by the court.

Existing Subsections 68LA(6) to (8)

- Subsections (6) to (8) continue to apply in conjunction with the new provisions inserted by Schedule 4 Part 1.
- Under subsections [68LA\(6\) to \(8\)](#) the ICL is not under an obligation to disclose to the court any information communicated by the child, however may do so if the ICL considers disclosure to be in the best interests of the child. This applies to disclosures that are made against the wishes of the child.

Commencement and Application of FLAA Reforms

Schedule 4 will commence on 6 May 2024.

- Parts 1 (Requirement to meet with the child) and 2 (Convention on the Civil Aspects of Child Abduction) will apply to all proceedings instituted on or after 6 May 2024, and all proceedings underway on that date, **except where the final hearing has commenced.**



National ICL Website Resources - Meeting With Children

The following resources, developed to assist ICLs with engaging and meeting with children, can be found on the national [ICL website](#):

- *Family Law: Working with Children A Good Practice Guide* by Anne Graham, Judy Cashmore, Julia Truscott, Felicity Bell, Donnah Anderson, Kylie Beckhouse and Mary Alex; (At **Resources/Tools** webpage)
- *ICL Guidelines Aide Memoire* (At **Resources/Tools** webpage)
- *Independent Children's Lawyers Practice Standards & Guidelines*, Legal Aid for Tasmanians 2022 (At **States/Tasmania/Resources** webpage)
- *Good Practice Guide for Lawyers – meeting with children via technology*, NLA 2020 (At **Resources/Tools** webpage)

Online Training & Webinars - Techniques and Tips for Engaging with and Speaking to Children, and Ethical Considerations When Meeting with Children:

- Meeting with Children, presenters Kylie Beckhouse and Donna Bowen, Phase 1 online ICL accreditation program Module 1 Topic 3 (At **Training/Training Program Resources/Module 1 Topic 3**)
- Webinar recording: Meeting with Children and Participation: Skills Session, NSW Child Representation Conference, September 2023 (At **Events/Library of national ICL webcasts** webpage)
- Webinar recording: Meeting with children via technology (At **Events/Library of national ICL webcasts** webpage)

National ICL Mentoring Program

The **ICL mentoring program** pairs new ICLs, seeking professional guidance and support, with experienced ICLs who are willing to assist and support new ICLs, including ICLs who are new to meeting and engaging with children. You can apply to be paired with a mentor via the ICL website.

To access the resources referred to in this factsheet and a wealth of other resources including significant cases, social science, precedent ICL letters and orders, [register](#) or login to the national ICL website.