

**LAWYER FOR THE CHILD
BEST PRACTICE GUIDELINES**

**ACTING FOR CHILDREN UNDER THE CARE OF CHILDREN ACT 2004 AND THE
ORANGA TAMARIKI ACT 1989**

1. INTRODUCTION

- 1.1 The appointment of a lawyer to represent a child occurs under the specific legislation the proceeding has been brought.
- 1.2 In all proceedings in the Family Court, the role of lawyer for the child as described in these guidelines is prescribed by section 9B of the Family Court Act 1980 and guided by the United Nations Convention on the Rights of the Child (UNCROC).
- 1.3 The welfare and best interests of the child is the paramount consideration of the Family Court in proceedings that involve children under these Acts.
- 1.4 Except in circumstances where a child is exercising his or her right of appeal, (sections 143 of the Care of Children Act 2004 (COCA) and section 341(2) of the Oranga Tamariki Act 1989 (OT Act), and in limited circumstances as prescribed by these Acts (section 31 of COCA), a child is not a party to the proceedings.
- 1.5 At all times the lawyer shall conduct him/herself in accordance with the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (rules).
- 1.6 These guidelines replace all previous guidelines issued by the New Zealand Law Society (Law Society) on the role of lawyer for child.

2. DEFINITIONS

- 2.1 The term 'child' includes child as defined in COCA and both 'child', 'children' and 'young person' as those terms are defined in the OT Act.
- 2.2 References to 'the lawyer,' unless otherwise stated, means a lawyer appointed by the court to act for a child.
- 2.3 References to 'report writer' means any social worker or report writer from whom a report has been requested under section 132 or 133 of COCA or under section 178, 186 or 187 of the OT Act. 'Specialist report' has a corresponding meaning.

2.4 References to the Ministry for Children, Oranga Tamariki (OT) means the chief executive of the Ministry for Children.

3. OBJECT

3.1 The object of these guidelines is to promote quality and consistency of practice of the role as required by section 9B of the Family Court Act 1980 or the OT Act, or any other Act under which they are appointed.

3.2 The lawyer must exercise their professional judgement about what is relevant, appropriate and in the best interests of the child in each particular case to report, including exercising discretion about when a child's views are conveyed to the court.

4. GUIDING PRINCIPLES

4.1 A child has the right to competent representation from an experienced and skilled lawyer.

4.2 A child must be given reasonable opportunities to be heard (either directly or indirectly) in any judicial and administrative proceedings affecting them, as provided for by section 6(2)(a) of COCA, sections 5(d) and 11(2) and (3) of the OT Act and Article 12.2 of UNCROC.

4.3 A child must be given a reasonable opportunity to express his or her views and any views expressed must be taken into account by the court (section 6(2)(b) of COCA and section 11(2)(d) of the OT Act).

4.4 A child has the right to information about the case in which he or she is involved, including information on the progress and outcome of that case. This means:

- (a) the child should be consulted at all important junctures in proceedings as appropriate to their age and maturity;
- (b) depending on the age and understanding of the child, they should be regularly updated and able to contact their lawyer if necessary; and
- (c) information should be shared with the child in an age appropriate way and with care exercised around sensitive adult information.

4.5 The manner of the discussion with the child shall take into account the child's age, culture, maturity and level of understanding.

4.6 There is no obligation on a child to express any views to the lawyer.

5. ROLE OF THE LAWYER FOR THE CHILD

5.1 The lawyer is to provide independent representation and advice to the child in a manner that the lawyer considers promotes the welfare and best interests of the child, notwithstanding that the child's views may be in conflict with the lawyer's assessment of how the welfare and best interests of the child are best promoted.

5.2 The lawyer must explain to the child that any views expressed to the lawyer by the child that are relevant to the proceeding will be communicated to the court.

- 5.3 The lawyer has a duty to ensure that any views expressed by the child *to the lawyer* (and not expressed to another person, such as a psychologist, social worker or teacher) on matters affecting the child and relevant to the proceedings, are communicated to the court. The manner in which these views are conveyed and the timing of this is in the lawyer's discretion. If the child requests that information shared with the lawyer is kept confidential the lawyer must then exercise discretion about disclosing this information to the court or to any agency (for example, Oranga Tamariki) and if such disclosure is made, the lawyer is to explain to the child why this is necessary.
- 5.4 The lawyer must exercise professional judgement about what is relevant, appropriate and in the best interests of the child to report.
- 5.5 Where a lawyer has been appointed to represent a number of children, the lawyer must be alert to the possibility of conflict. The lawyer may be obliged to decline to act for one or more of the children in such circumstances.
- 5.6 The lawyer has a duty to ensure that all factors relevant to the child's welfare and best interests, are before the court.
- 5.7 The lawyer should remember that they are obliged to convey the views expressed by the child irrespective of whether they may be in conflict with the lawyer's assessment as to the child's welfare and best interests. The lawyer should convey both the child's views and the lawyer's assessment of what they consider to be in the child's welfare and best interests.
- 5.8 The lawyer must be aware of, and actively manage, the risk of the child being exposed to systems abuse.¹

6. ROLE OF THE LAWYER FOR THE CHILD IN ORANGA TAMARIKI PROCEEDINGS

- 6.1 Once appointed under the OT Act, the lawyer has the role set out in section 9B of the Family Court Act 1980.
- 6.2 The lawyer has additional statutory functions as set out in the OT Act, such as:
- (a) Explaining the proceedings, the order and any appeal rights to the child or any parent or guardian or other person having the care of the child, in a manner and in language that can be understood by them.
 - (b) For any proceedings before a court the lawyer must:
 - (i) encourage and assist the child to participate;
 - (ii) ensure that reasonable assistance is given for the child to understand the reasons for the proceedings and how different options are available and could affect them;
 - (iii) ensure that the child has reasonable opportunities to freely express their views on matters affecting them; and
 - (iv) ensure that support is provided for the child to express their views if the child has difficulties with this.
 - (c) Attending the Family Group Conference (FGC) as an entitled person (who must consent to the plan being formulated).

¹ Systems abuse is defined as the over exposure of children to multiple interviews by professionals.

- (d) Making any applications that are considered necessary in the welfare and best interests of the child.²
- (e) Consenting to the disclosure of a protected communication by a registered medical practitioner or a clinical psychologist on behalf of their client child.³
- (f) Considering and responding to as appropriate the review of a plan on behalf of a child.⁴

6.3 While the lawyer's role is often in abeyance between reviews, the lawyer will continue to have an ongoing role and should be:

- (a) advised and consulted about any important changes to the plan which occur between reviews; and
- (b) part of any professional case consults held by OT.

6.4 Once the plan and report are available for review and a court date allocated, the lawyer will need to meet with the child, explain the plan (and proposed orders) to them and file a report on their views and best interests.

6.5 The lawyer may decide to also meet with the caregivers, parents, guardians or any other person in preparation for filing any report to the court.

6.6 If the lawyer has concerns about the report or does not agree with the report, he or she should discuss this with counsel for OT so that their position can be considered and possibly included (or altered) before the report is filed.

6.7 The judge should be advised of any dispute about the plan when the plan is filed.

7. RELATIONSHIP WITH THE CHILD

7.1 The lawyer must meet with the child he or she is appointed to represent unless, because of exceptional circumstances, a judge directs that it is inappropriate for the lawyer to meet with the child (section 9B(2) and (3) of the Family Court Act 1980).

7.2 The lawyer should maintain appropriate professional boundaries with the child.

7.3 The lawyer in meeting with the child must, if it is appropriate to do so, ascertain and report on the child's views on matters affecting the child that are relevant to the proceedings.

7.4 In deciding whether or not it is appropriate to ascertain the child's views, the lawyer should consider:

- (a) whether the circumstances are such that the child should not be interviewed on a particular occasion or in a particular environment;
- (b) that having met the child, the issues are such that the lawyer should not attempt to ascertain the views of the child for reasons pertinent to that child;
- (c) that although it is necessary to meet the child (to have an understanding of who is being represented), the issues are such that it is not appropriate to ascertain the child's views.

² Such as applications for interim custody, services, restraining or support (sections 78, 86A, 88 and 92) or an order to vary or discharge an order (under section 126), or request a medical, psychiatric or psychological report (under section 178) or a cultural or community report (under section 187), rehearing (under section 204).

³ Oranga Tamariki Act 1989, section 196.

⁴ Oranga Tamariki Act 1989, sections 132(1)(b) and s 135(3)(e).

- 7.5 The timing and venue for such a meeting, and any further meetings, should be at the discretion of the lawyer. However, the lawyer shall meet with the child at a time which ensures that the child's views are up to date at the time of the hearing so that they can be taken into account by the court.
- 7.6 When meeting with the child the lawyer shall:
- (a) make it clear to the child that they do not have to express any view (section 9B(1)(b) of the Family Court Act 1980);
 - (b) explain that a child's views are part of what the judge must consider when deciding what is in the child's welfare and best interests;
 - (c) consider an appropriate process for disclosure of information the child would prefer to remain confidential; and
 - (d) explain to the child that he or she is not responsible for any decision which will be made by the court.
- 7.7 At the conclusion of the case the lawyer must provide advice to the child about:
- (a) the outcome of the case;
 - (b) any right of appeal against a decision of the court; and
 - (c) the merits of pursuing any such appeal.

8. INTERVIEWING THE CHILD AT SCHOOL

- 8.1 When interviewing the child at school, lawyers should refer to the Family Law Section Lawyer for Child Protocol with Schools "*Lawyers for children appointed by the Family Court – A resource for schools and lawyers for children*" (see Appendix One).

9. CASE MANAGEMENT

- 9.1 The lawyer should endeavour to move the case towards resolution, including where appropriate, in the lawyer's assessment of the child's welfare and best interests, assisting the parties to reach an agreement.
- 9.2 In all proceedings, except OT Act proceedings, if the lawyer considers there are care and protection issues that may justify OT involvement, the lawyer should take the necessary steps to refer the matter to OT directly or via a judicial referral under section 15 or 19 of the OT Act.
- 9.3 The lawyer should be alert to the possibility of records held by the court, the Police, OT and the Ministry of Justice that may be relevant to the proceedings, and where appropriate, obtain copies of those records.
- 9.4 In OT Act cases where there has been a referral to a Family Group Conference (FGC), the lawyer shall:
- (a) be proactive in ensuring an FGC is held as soon as possible; and
 - (b) be present at the FGC to ensure that the focus is on the best interests of the child.
- 9.5 If the lawyer ceases to act for the child, and proceedings continue in the Family Court, he or she must ensure that the new lawyer receives all relevant information held by him or her.

10. BRIEFS BY THE COURT

- 10.1 It is the task of the court to set the brief for the lawyer.
- 10.2 Section 9B of the Family Court Act 1980 prescribes the statutory role of the lawyer.
- 10.3 The lawyer should not accept any brief that requires the lawyer to undertake an assessment of the safety of the child. Undertaking an assessment of the safety of the child is the role of the court (see para 14.3).

11. LAWYER FOR THE CHILD REPORTS

- 11.1 The lawyer will file reports to the court from time to time. These reports should be based on their meetings with the child and documents filed with the court and avoid unnecessarily introducing evidence.
- 11.2 Reports filed prior to a directions conference often include information from a variety of sources, including:
 - (a) family violence reports
 - (b) information from pre-schools or schools and other professionals
 - (c) information from other third parties such as grandparents/whanau
 - (d) information from the child
 - (e) information obtained by OT, including CYRAS notes and/or from discussions with social workers
- 11.3 The lawyer should seek written acknowledgement from the person providing the information about how and with whom the information may be shared. Any person providing information should be advised that they may be required to give evidence at any court hearing.
- 11.4 The lawyer should advise the person providing the information to exercise judgement in terms of the need to preserve the relationship between that professional and the parties.
- 11.5 Where possible, information should be introduced by an affidavit with an exhibit attaching a letter and/or report from the person who can confirm the truth of the information.
- 11.6 The lawyer should consider having information from third parties admitted as evidence by consent, including family violence reports and criminal conviction records for the parties, and consult with other counsel or the parties about filing such documents as an agreed bundle of documents.
- 11.7 The lawyer may consider providing a summary of the information on the basis that an affidavit will be filed if the information is disputed by a party.
- 11.8 Third party information to be referred to in the report should ideally be disclosed to all parties, prior to it being included in the report. This allows parties to respond to the information prior to it being put before the court. If a party disputes the information, that party can address the issue in evidence.
- 11.9 Should the matter need to proceed to a hearing the lawyer shall ensure that any contentious information received is filed by way of an affidavit.

12. JUDICIAL MEETING

- 12.1 A judge has discretion as to whether or not to meet with a child who is the subject of proceedings.

- 12.2 The lawyer shall advise the parties and the court of the child's views about such a meeting and whether such a meeting is appropriate.

13. RELATIONSHIP WITH THE PARTIES AND THEIR COUNSEL

- 13.1 Where a party to a proceeding is represented by his or her own lawyer, the lawyer should obtain the consent of the party's lawyer before making direct contact with that party in accordance with their professional obligations under the rules.
- 13.2 The lawyer should explain the role of the lawyer to the parties so they have an understanding of the role of the lawyer and, in particular, that any communication with a party is not subject to privilege and may be shared with others at the lawyer's discretion.
- 13.3 Any information provided to the court by the lawyer must be provided to all of the parties except in circumstances where the disclosure of information would be:
- (a) likely to place at risk the health (including mental health) and safety of a child or any other person; or
 - (b) in breach of the law or in breach of an order of the court.

14. ROLE OF THE LAWYER IN NEGOTIATION BETWEEN THE PARTIES

- 14.1 The lawyer should explore alternative methods of resolution where it is clearly in the child's welfare and best interests rather than have the matter determined by the court.
- 14.2 The lawyer should consider whether safety issues would prevent a negotiated outcome.
- 14.3 It is the role of the court and not of the lawyer to make findings on safety and the assessment of risk. If issues are disputed the court will need to make findings of fact. The lawyer must not compromise on issues where a finding of fact must be made, for the sake of expediency.
- 14.4 When negotiations between parties takes place, the lawyer should ensure that parties have the opportunity to seek legal advice and that lawyers for the parties are given the opportunity to be present.

15. OTHER PROFESSIONAL ISSUES

- 15.1 Before accepting any appointment the lawyer should be satisfied that he or she is able to give the time which the case requires.
- 15.2 Appointment of the lawyer is personal. The lawyer should not delegate substantive steps in the fulfilment of the brief to a non-lawyer for the child. Where an agent is to be briefed, the agent is to be properly instructed and must be listed on the current court-approved lawyer for child list.
- 15.3 The lawyer must be aware of issues including gender, ethnicity, sexuality, culture, religion and disabilities, in dealing with issues in any particular case.

- 15.4 The lawyer must undertake professional supervision appropriate to the nature and extent of their lawyer for child practice.
- 15.5 Professional supervision is a contractually agreed working relationship between a supervisor (professionally trained and accredited) and a client supervisee (lawyer). Within this confidential relationship, the supervisor meets with the supervisee for the purpose of conducting a self-reflective review of practice, to discuss professional issues and to receive feedback on all elements of practice, with the objective of ensuring quality of service, improving practice and managing stress. The primary focus of supervision is on the client of the supervisee and to maximise the competence of the supervisee in the provision of services to their clients.
- 15.6 The lawyer should undertake a minimum of five hours of active lawyer for the child practice per annum and must complete a minimum of five hours of continuing professional development (CPD) in areas specific to practising as a lawyer for the child within each CPD year. CPD is defined in rule 3.1(i) of the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013. The five hours of CPD may be part of the lawyer’s annual CPD requirement of ten hours.
- 15.7 All newly appointed lawyers to the list must be mentored by a senior lawyer for child for 12 months from when they receive their first appointment. A mentor will be appointed by the panel at the time the lawyer is appointed to the ministry’s list. A mentor may claim up to two hours CPD pursuant to para 15.6 in each membership year.
- 15.8 All lawyers for children appointed to the ministry’s list have an ongoing obligation to notify the liaison judge of the court where they receive appointments if the Law Society takes disciplinary action and/or upholds a complaint against the lawyer, and to notify the Principal Family Court Judge if they become the subject of any pending criminal charges or Police investigation.
- 15.9 A lawyer also has an ongoing obligation to disclose to the Law Society, as soon as practicable, information about any matter that might affect their continuing eligibility to hold a practising certificate.

16. LAWYER FOR THE CHILD AND REPORT WRITERS

- 16.1 The report writer is the court’s witness.
- 16.2 The lawyer and the report writer may not always agree on the conclusion reached in the psychologist’s report.
- 16.3 Where a specialist report is obtained under COCA, the lawyer may give or show the report to the child only if the court orders. The lawyer shall make a recommendation to the court on this issue. However, the lawyer should explain to the child the purpose and contents of the report, unless the lawyer considers that the child is too young to understand the report, or to do so would be contrary to the welfare and best interests of the child.
- 16.4 Where a report is obtained under the OT Act, the lawyer may give the report to the child unless the court orders that the whole or any part of the report not be disclosed to the child (section 192 OT Act).

- 16.5 The lawyer should check the availability of the report writer prior to the setting down of a hearing and ensure the report writer is aware of the hearing date (once it has been set) and that the report writer is available.
- 16.6 The lawyer should liaise with the registry once a hearing date has been set to ensure that the court has advised its witness of the hearing date and has provided the report writer with a copy of all updating affidavits and reports if these have been filed after the psychologist was first briefed.
- 16.7 The lawyer should liaise with the report writer over the timing of when they need to attend the hearing.
- 16.8 Subject to the court's discretion, if requested or considered appropriate, the lawyer should ensure that the notes of evidence are made available for the report writer.
- 16.9 The lawyer should communicate with the report writer to identify issues for the hearing. The lawyer and the report writer should not discuss how the questions may be answered.
- 16.10 The lawyer should also communicate with the report writer and advise of possible settlement proposals that the report writer may be questioned about.
- 16.11 The lawyer should check that the court has advised the report writer of the court's decision and provided a copy of the decision to the report writer at the conclusion of the proceedings.
- 16.12 If there is a procedural issue that arises during the hearing, the lawyer will explain it to the report writer.

17. ROLE OF LAWYER FOR THE CHILD IN PREPARATION FOR AND AT A HEARING

- 17.1 If the lawyer wishes to call any person as a witness, the lawyer must ensure, prior to the hearing that the proposed witness knows of the hearing and is available. Nothing in this paragraph shall excuse the lawyer from complying with rule 48(1) (evidence by affidavit) and rule 52D (restrictions on steps to be taken after notice of hearing date given in non-COCA cases) of the Family Court Rules 2002.
- 17.2 At the hearing the lawyer should take all steps necessary to ensure that the court can determine the welfare and best interests of the child. This will include:
 - (a) identifying all relevant issues which need to be determined in regard to the child's welfare and best interests
 - (b) ensuring that the court has all the necessary information relevant to the welfare and best interests of the child, including the child's views relevant to the proceedings
 - (c) calling evidence where appropriate (other than any court's witness)
 - (d) cross-examining to ensure that all relevant issues are fully explored, having regard to the time limits imposed by rule 416ZF(2) of the Family Court Rules 2002 in COCA proceedings
 - (e) making submissions on behalf of the child
 - (f) not giving evidence

18. GUARDIANSHIP (WARDSHIP) OF THE COURT – section 31 of COCA

- 18.1 The lawyer should not make an application to the court for guardianship of the court (wardship), nor accept an appointment as agent for the court.
- 18.2 The lawyer should be aware that making an application for guardianship (wardship) will expose the lawyer to *inter partes* costs and the mandatory cost contributions award.

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Ratified by the New Zealand Law Society Board on 19 June 2020

Appendix One

Family Law Section Lawyer for Child Protocol with Schools “*Lawyers for children appointed by the Family Court – A resource for schools and lawyers for children*”.