

21 February 2020

Hon Andrew Little
Minister of Justice
Parliament
Wellington

Tēnā Koe Minister

Working together for a fair and safe Aotearoa

We are delighted to see that the recently released strategy for the Ministry of Justice identifies addressing family violence and sexual violence and improving access to justice as two key transformational opportunities. We also note the Ministry's enduring priorities include maintaining the integrity of the courts and tribunals.

As the representative group for family lawyers in New Zealand, we continue to work with the Ministry to further our shared goals of ensuring the family justice system meets the needs of families in New Zealand.

As well as contributing and engaging in key consultation on the family justice reforms, we also work to identify improvements and levers that may assist the Ministry in meeting their goals for an efficient and effective justice system.

Recruitment and retention of skilled practitioners

One current area that requires urgent attention is the recruitment and retention of skilled practitioners for Family Court appointed roles including the remuneration rates for these roles. Remuneration rates for Family Court appointed lawyers have not been reviewed nor increased for 23 years (since 1996). This means that in addition to not keeping pace with inflation, the rate does not reflect increases in expectation and complexity over the 23 years and has resulted in considerable inconsistency with the rates of comparative roles.

The role of Family Court appointed lawyers is to represent and advocate for the most vulnerable members of society. The role is broader than the traditional advocacy model for lawyers. Family Court appointed lawyers must have skills, qualifications and experience that are different to the skills generally required and expected of advocates.

The court needs lawyers to continue to make themselves available for the role. If the issue of remuneration is not urgently addressed, and as the gap between private rates and the rate paid to Family Court appointed lawyers grows, the number of skilled and experienced lawyers who are prepared to take appointments from the Family Court will continue to reduce. This in turn will have an adverse impact on access to justice for children who are the subject of Family Court proceedings and also for other vulnerable adults who under legislation require a court-appointed lawyer to represent them.

It is both fair and reasonable to expect that Family Court appointed counsel are adequately remunerated for the services that they provide and that the remuneration paid is comparable to other court-appointed lawyers.

We recommend that urgent consideration be given to increasing the hourly rates of remuneration paid to Family Court appointed lawyers and that the rates are reviewed on a regular basis just as other rates, for example, legal aid remuneration rates and those paid to crown solicitors are reviewed every three years. We have already seen a significant reduction in senior lawyers who no longer practice as lawyers for children or in other court-appointed roles due to the low remuneration rate.

We note that we are not alone in our view that the rate needs attention. This view is shared by the independent panel appointed to evaluate the 2014 changes to the family justice system. In its May 2019 report the panel stated:¹

“In real terms, there has been a 50% reduction in the relative value of lawyer for child remuneration since then. This is a likely factor in the reduction in the pool of lawyer for child.”

The panel recommended that the Ministry review remuneration rates for lawyer for child.²

In a decision from December 2019, Justice Powell (the full decision is attached at Appendix 2) also agrees that regular reviews are appropriate:³

“Given my conclusions it is clearly appropriate that a more structured review be undertaken to ensure that the reasonable fees of all counsel appointed by the High Court are met and that counsel are not unreasonably benchmarked to out of date and inapplicable guidelines such as the 2011 Practice Note. In addition, the analysis shows that the legal aid rates for any form of civil work in the High Court bear absolutely no relationship to the reasonable costs of counsel. In such circumstances and leaving aside other inherent flaws in the current legal aid system,⁴ it is not surprising that there are a lack of providers able to undertake legal aid assignments across the jurisdiction of this Court, not only conventional civil proceedings, but also family proceedings, immigration and Accident Compensation.”

Proposal

The FLS proposes that the Family Court appointed lawyers’ rates of remuneration be increased to a minimum of \$190 plus GST as a standard rate, and \$220 plus GST for urgent and/or complex cases (i.e. those cases who have two or more case characteristics as set out in the court circular attached at Appendix 3). In addition, the rates should be linked to either increases in the crown solicitor rates for criminal prosecutions on instructions from departments or the CPI so that reviews and adjustments to rates are undertaken at regular intervals, for example every three years. We have included more detailed information on the role of Family Court-appointed counsel and comparative rates of other court-appointed counsel which we hope is of assistance to you (attached at Appendix 1).

¹ Te Korowai Ture ā-Whānau: the final report of the Independent Panel examining the 2014 family justice changes, May 2019, para 289.

² Ibid, recommendation 51.

³ Application for review of Registrar’s decision – T Gunn [2019] NZHC 3413, 19 December 2019, para 15.

⁴ Including the general position that legal aid is a loan that must be repaid: Legal Services Act 2011, pt 2 subpt 4.

We ask that urgent consideration be given to the proposal set out above.

If it would be assistance, we would be happy to meet with you to discuss this further.

Nāku noa, nā

A handwritten signature in black ink that reads "KSwadling". The signature is written in a cursive style with a horizontal line underlining the name.

Kirsty Swadling
FLS Chair

Appendix 1

The Role of Family Court Appointed Lawyers

The Family Court appoints lawyers under the Care of Children Act 2004, the Oranga Tamariki Act 1989, Property (Relationships) Act 1976, the Family Proceedings Act 1980 and the Child Support Act 1991 to represent children, under the Family Violence Act 2018 as lawyer to assist the court (but essentially to represent children) and under the Protection of Personal and Property Rights Act 1998 to represent the person subject to the proceedings. There are also appointments as lawyer to assist the court under other legislation, notably the Adoption Act 1955. The roles primarily involve representing and advocating for society's most vulnerable.

These roles require a skilled and experienced lawyer. To be approved to represent children, a lawyer must demonstrate that they have:⁵

- a) the ability to exercise sound judgement and identify central issues;
- b) a minimum of five years practice in the Family Court and proven experience in running defended cases in the Family Court;
- c) a sound knowledge of the relevant statutes and rules;
- d) an understanding of, and an ability to relate to and listen to, children of all ages;
- e) good people skills and an ability to relate to and listen to adults;
- f) sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
- g) relevant qualifications, training and attendance at courses relevant to the role (an ongoing obligation);
- h) personal qualities compatible with assisting negotiations in suitable cases working co-operatively with other professionals; and
- i) independence.

Children are entitled to expert and competent representation in the Family Court. Article 12 of the United Nations Convention on the Rights of the Child provides that state parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with procedural rules national law.

Lawyers appointed to represent children fulfil this role. In addition, they are usually tasked with investigating a child's situation, identifying any need for urgent action, defining issues that need to be resolved, assessing the need for specialist reports and/or counselling, assisting the parties to reach agreement, negotiating care and contact issues and significantly representing the child in court.

Matters are now more complex. Judges are relying more heavily on lawyers for children to provide more information, due to the lack of information provided by self-represented litigants and to play a

⁵ See para 9.9 of the Family Court Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters.

greater role in case managing matters, particularly where there are significant delays in court hearing time.

This work is undertaken in an environment where there is an increasing level of cases involving family violence, mental ill-health, drug and/or alcohol addiction or a combination of all of these factors. Many cases involve a high level of conflict between parents, who are unable to agree about the most straightforward parenting issues.

Remuneration Rates

Remuneration rates are not fixed by regulation, notwithstanding that section 16D of the Family Court Act 1980 provides for regulations to be made. They are agreed between the ministry and the New Zealand Law Society.

The rates of remuneration for Family Court appointed lawyers have not been increased, nor reviewed, since 1996. Currently lawyers appointed by the Family Court are paid \$137.78 plus GST per hour (standard rate) or \$151.10 plus GST per hour (higher rate) in certain, stipulated, situations.

In 2008, the FLS negotiated with the ministry that the higher rate would automatically be paid in cases where two or more case characteristics were present, rather than lawyers receiving the standard rate in such cases. The Courts Operational Circular of 20 March 2009 sets out those case characteristics ([attached](#) at Appendix 2).

Cost of Living Increases

Between 1996 and 2019 the Consumer Price Index (CPI) has risen 58%. There have been general pay increases in most sectors, since 1996, to reflect increases in the CPI. There has been no adjustment at all in the rates paid to Family Court appointed lawyers to allow for inflation for the last 23 years.

The position is in marked contrast to those whose salaries are subject to the determination of the Remuneration Authority under the Remuneration Authority Act 1977. Pursuant to section 19(5) of that Act, the Authority is required to issue a determination at intervals of not less than three years on those salary levels.

An outstanding feature of the Authority's determinations is its concern to ensure that those for whose pay determinations it is responsible for are not disadvantaged by a rise in the cost of living.

Economics of Practice

There can be no doubt that the costs of legal practice have increased considerably since 1996.

In 2005, the Law Society instructed Roger N. Taylor, a chartered accountant, to undertake an assessment of law firm performance, to support its submission for a review of legal aid rates.

Mr Taylor found that there had been a 27.6% increase in the costs of a legal practice between 1996 and 2003. The analysis was based on data sourced from two independent surveys. The results show a high degree of consistency in the costs of a legal practice over the period. The costs of legal practice have continued to increase in the 16 years since the 2003 survey was undertaken.

However the data is analysed, the rates paid to Family Court appointed lawyers currently bear no relation to the value of the rates paid to Family Court appointed lawyers in 1996. This point was made by Justice Powell in December 2019 when she considered an application made by counsel who, in her role as lawyer for child, applied for a review of the hourly rate to be paid to her in the High Court. Justice Powell states:⁶

⁶ Application for review of Registrar's decision – T Gunn [2019] NZHC 3413, 19 December 2019, para 10.

“As to what a reasonable fee might be, I have considered and rejected both the rates set out in the 2011 Practice Note and the relevant legal aid rates for family proceedings in the High Court. First, it is apparent that both rates have not been reviewed for a very long time, since March 2011 and July 2009 respectively. These delays are significant, noting that the Producer Price Index (PPI) has increased by some 39.1 per cent since 2009 and 33.8 per cent since 2011.⁷ Secondly, it is by no means clear on what basis the hourly charge out rates were justified at the time, with the legal aid rates in particular having been as a matter of policy kept artificially low for decades, leading to a dwindling number of practitioners accepting legal aid assignments,⁸ including in relation to family proceedings.”

A copy of the full decision is attached at Appendix 3.

The costs of legal practice also include the cost of ongoing professional development – a requirement that all lawyers who hold a current practising certificate must complete a minimum of ten hours of professional development a year, and for lawyers for children and those mediating in the Family Court, a requirement for regular attendance at professional supervision.

Comparative Rates of Remuneration

The FLS is not aware of any comparative assessment of remuneration rates as between the various legal sectors involved in providing government funded legal services when the current remuneration rate was set.

District Inspectors appointed under the Mental Health (Compulsory Assessment and Treatment) Act 1992 are paid \$170 plus GST per hour. Their hourly rate was last increased around 2007 and we understand the rate is due to be reviewed again in the near future.

Psychologists who provide reports for the Family Court are currently paid \$220 per hour inclusive of GST. This rate was increased from \$163.55 per hour (GST inclusive) in mid-2015. However, we note that there appears to be no uniformity of the payment amount between courts and the rate is variable although in the region of \$220 per hour.

It is acknowledged that the government does not pay market rates to lawyers who represent clients funded by Legal Aid Services, youth advocates or to crown solicitors.

Commercial and private charge-out rates have increased steadily to keep pace with inflation and increasing business costs since 1996.

The FLS is not seeking an increase in the rates of remuneration for Family Court appointed lawyers to match those paid by private clients – we are simply seeking an increase in line with periodic increases (i.e. every three years) to crown solicitor rates.

Crown Solicitors

While recognising that the crown solicitor remuneration model has changed, the previous crown solicitor remuneration model is an example of how a regulated mechanism is used to adjust rates.

⁷ At [68]-[71]. Inquiries have shown the same approach is taken by the Auckland Registry. See Statistics New Zealand Business Price Indexes: September 2019 Quarter (November 2019, Wellington).

⁸ See *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176 at [138]; [2012] NZHC 1572 at [125] in relation to the criminal jurisdiction; and, more generally, “Legal Aid: The Problems and Issues” (2018) 923 LawTalk 77.

Up until 2013, remuneration rates of crown solicitors were reviewed annually, using a formula contained in the Crown Solicitors' Regulations 1994.

The Crown Solicitors' Terms of Office still provide for three different rates for work on criminal prosecutions on instructions from departments:

- senior (seven plus years of practice)
- intermediate (three to seven years of practice)
- junior (up to three years of practice)

A sample of the crown rates (excluding GST) since 1996 are set out in the following table:

Year	Junior	Intermediate	Senior
1996	\$101.00	\$124.00	\$155.00
1999	\$109.00	\$134.00	\$167.00
2003	\$118.00	\$146.00	\$182.00
2006	\$129.00	\$158.00	\$198.00
2017	\$147.00	\$202.00	\$252.00

The FLS notes that Family Court appointed lawyers' current remuneration rates are less than that paid to an intermediate crown prosecutor who must have three years' experience. To be considered for appointment in the Family Court, a lawyer must have a minimum of five years' experience. A significant number of lawyers, still accepting appointments in the Family Court, have more than 20 years' experience yet are paid significantly less than an intermediate crown solicitor.

In our view, the remuneration rates should be adjusted to be commensurate with the intermediate and senior crown solicitor rates, and linked to those rates, so that the Family Court appointed lawyers' rates are, in future, adjusted at the same time as the crown solicitor rates are adjusted.

Appendix 2 – Courts Operational Circular of 20 March 2009

Appendix 3 – Application for review of Registrar's decision – T Gunn [2019] NZHC 3413, 19 December 2019



20 March 2009

COURTS OPERATIONAL CIRCULAR
(Permanent Instruction)

FAM 09/01

To: Regional Managers
All Court Managers
All Family Caseflow Managers
All Family Court Coordinators

**SUBJECT: LAWYER FOR THE CHILD REMUNERATION RATE AS
FROM 1 DECEMBER 2008 – ‘SUPERIOR SKILLS’
CLARIFICATION**

ACTION REQUIRED

Court staff are to note that:

- ◆ This circular replaces and revokes Courts Operational Circular FAM 08/16
- ◆ This circular clarifies the ‘Lawyer for Child: Selection, Appointment and Other Matters’ Practice Note
- ◆ A list of characteristics has been developed to indicate when ‘superior skills’ are required in making Lawyer for Child appointments
- ◆ Where any *two or more* of the characteristics are present in a case then a Lawyer for Child appointment should be made at the Level 3 rate
- ◆ An assessment as to the presence of these characteristics should be made at the time of the appointment

SUMMARY

The purpose of this circular is to clarify the circumstances under which an appointment of Lawyer for the Child should be paid at the Level 3 rate due to the requirement for ‘superior skills’.

BACKGROUND

The Family Law Section has expressed concerns about the inconsistent application of the Level 3 rate around the country. This inconsistency led to cases with similar characteristics being paid at different rates depending on which court was making the referral.

PRACTICE NOTE

The Practice Note currently sets out remuneration rates and includes three levels of rate that can be used when setting the hourly rate for payment. The Level 3 rate (\$155 to \$170 per hour including GST) is to be paid:

- In cases where **superior skills** are required;
- In cases of extreme urgency;
- In cases where there are grave concerns about the immediate safety of the children;
- In most Hague convention cases;
- In cases where there are allegations of sexual abuse.

CLARIFICATION OF 'SUPERIOR SKILLS'

A list of characteristics has been developed to ensure consistency of appointments made at the Level 3 rate due to the need for 'superior skills'. Where any **two or more** of the following characteristics are present in a case the Lawyer for the Child referral is to be made at the Level 3 rate:

- substance and alcohol abuse especially the use of methamphetamine;
- family violence;
- suggestions of mental health issues;
- cultural considerations;
- ethnicity (interpreter) considerations;
- complex or larger families;
- self represented litigants;
- parties have gang affiliations; and
- frequent changes of lawyer

There is no quota for the number of cases that should be classified as requiring 'superior skills'. As such, **all** cases that contain two or more of the characteristics should be paid at the Level 3 rate.

It is acknowledged that these characteristics may not always be apparent at the time of the original referral. In cases where additional characteristics have come to light, the Lawyer for the Child is entitled to request that court staff review the file to determine whether the Level 3 rate should be paid.

If a Judge directs for Counsel to Assist to be appointed then it should be assumed that 'superior skills' are required and the appointment should automatically be at the Level 3 rate.



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District Courts

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**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
KIRIKIROA ROHE**

**CIV-2019-419-64
[2019] NZHC 3413**

UNDER

The High Court Rules 2016

IN THE MATTER

Of an application for Review of Registrar's
decision by Tracey Gunn

On the papers: At Auckland

Judgment: 19 December 2019

JUDGMENT OF POWELL J

This judgment was delivered by me on 19 December 2019 at 11 a.m. pursuant to
R 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] Tracey Gunn, a barrister, seeks review of a Registrar's decision pursuant to r 2.11 of the High Court Rules 2016.

[2] The application has been brought following the 6 June 2019 appointment of Ms Gunn as counsel for the child in a High Court appeal; Ms Gunn having previously been counsel for the child in the related proceedings in the Family Court.

[3] The review concerns the hourly rate that should be paid to Ms Gunn. In a letter confirming Ms Gunn's appointment, the Deputy Registrar advised on 6 June 2019:

On 6 June 2019 you accepted appointment by the Court to act as Counsel for the child as referred to in section 7 of the Care of Children Act 2004 in proceedings under the Protection of Personal and Property Rights Act 1988.

The rates applying for attendances for this type of appointment are usually in line with those applying in the Family Court (in terms of the 21 December 2005 "Practice Note: Lawyer for the child: Selection, appointment and other matters" of Judge P F Boshier, (Principal Family Court Judge) but allowing for any special factors that might distinguish the High Court proceeding from most proceedings that come before the family court.

The family Court Practice Note currently sets out the remuneration rates and includes three levels of rates that can be used when setting the hourly rate for payment. The rates are as follows:

- Level 1

\$132.89 to \$158.44 per hour (GST inclusive).

Range to be used in cases where the practitioner appointed has only recently been approved or where no approved lawyer is available, and the lawyer appointed is not on the list of approved lawyers.

- Level 2

\$158.44 per hour (GST inclusive).

This fee will be used in the majority of cases.

- Level 3

\$158.44 to \$173.78 per hour (GST inclusive).

This range will be used to calculate fees:

- in cases where superior skills are required;
- in cases of extreme urgency;

- in cases where there are grave concerns about the immediate safety of children;
- in most Hague Convention cases;
- in cases where there are allegations of sexual abuse.

The outcome of a 2008 review of the criteria applied by Courts for an assignment at the higher rate (Level 3) resulted in the case characteristics to be included in that assessment being clarified. It was determined that an appointment at the higher rate would occur where a "cluster" (more than one) of the characteristics requiring superior skills described below is present in a case.

- substance and alcohol abuse especially the use of methamphetamine;
- family violence;
- suggestions of mental health issues;
- cultural considerations;
- ethnicity (interpreter) considerations;
- complex or larger families;
- self-represented litigants;
- parties have gang affiliations; and
- frequent changes of lawyer

Please provide an estimate of the total time you will need to spend on this matter and the total cost of the anticipated attendances. Your estimate should include details of any special factors that might be relevant to your intended charge out rate.

[4] In a response dated 17 October 2019, Ms Gunn, somewhat belatedly, queried the rates quoted and stated:

I note in your letter of 6 May 2019 that you have referred to Family Court rates. With respect, these are no longer Family Court proceedings but are in the High Court. The usual practice is for counsel to negotiate the rate with the Court directly. It is my suggestion that the hourly rate is set in this matter at the rate of \$220 per hour plus GST.

[5] The Deputy Registrar responded the next day:

Thank you for your letter of 17 October 2019.

My letter of 6 May advised that the rates applying for attendances for this type of appointment are usually in line with those applying in the Family Court as per the terms of the 21 December 2005 "Practice Note: Lawyer for the child: Selection, appointment and other matters" of Judge P F Boshier, Principal Family Court Judge. but allowing for any special factors that might distinguish the High Court proceeding from most proceedings that come before the family Court.

I would be prepared to approve the top of the Level 3 rate of \$173.78, for this High Court appeal given that this case does require counsel at a senior level; there was some urgency, the child was overseas and considering cultural differences. I cannot consider above and beyond that given that this is not a Hague convention case, there are no allegations of sexual abuse and the immediate safety of the child was not a grave concern. There were no other distinguishing factors about this case.

Please provide an estimate of the total time you will need to spend on this matter and the total cost of the anticipated attendances. Your estimate should include details of any special factors that might be relevant to your intended charge out rate.

Your estimate of your fees should be marked for my attention. Your hourly rate and the maximum for your costs will be set when that reply is received.

[6] This resulted in the present review with Ms Gunn submitting:

Practice Notes in the Family Court that detail remuneration have no relevance in the High Court. They are entirely different courts. It is the practice in the Hamilton Family Court that every Lawyer for Child file is billed at the top rate. Accordingly, in you offering me the top rate in the High Court, there is absolutely no differentiation between what I would be paid in the Family Court and the High Court. As your letter points out, there are issues in relation to this particular case that required the appointment of Senior Counsel. In particular, there had been criticism of the earlier Lawyer for Child in the Family Court and Senior Counsel was required. I would request that you review the rate that I can bill this at so that I can progress this matter.

Discussion

[7] As Potter J noted, although this Court appoints counsel for the child as a matter of course the basis for doing so is less than satisfactory.¹ It is clear that the appointment of counsel for the child in the Family Court does not continue through to an appeal in this Court,² nor do the relevant statutes provide for such appointments to be made.³ It is however clearly appropriate that such appointments are made in order that this Court can be satisfied that the interests of children in an appeal can be properly

¹ *M & D v S* [2008] NZFLR 120 (HC).

² At [57].

³ At [58]-[69].

considered and accommodated. The result is that current appointments must be seen as an exercise of the appointing Judge's inherent jurisdiction.⁴

[8] It follows, as Ms Gunn submitted, that the Family Court practice note is not in any way determinative of the remuneration payable for counsel accepting appointments as counsel for the child in a High Court appeal. It follows that there is no basis for the Registry to conclude the maximum hourly rate that can be paid to counsel for the child appointed in the High Court is limited to that set out in the Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters issued by the Principal Family Court Judge in 2011 ("2011 Practice Note"), relied upon by the Deputy Registrar in this case.⁵

[9] Instead, it must be the case that any appointment by a Judge of this Court impliedly assumes that a reasonable fee will be paid, having regard to all the circumstances of the appointment, noting that the type of proceedings where counsel for the child are likely to be appointed by this Court are appeals from the Family Court, which are of course civil proceedings conducted pursuant to the High Court Rules 2016.

[10] As to what a reasonable fee might be, I have considered and rejected both the rates set out in the 2011 Practice Note and the relevant legal aid rates for family proceedings in the High Court. First, it is apparent that both rates have not been reviewed for a very long time, since March 2011 and July 2009 respectively. These delays are significant, noting that the Producer Price Index (PPI) has increased by some 39.1 per cent since 2009 and 33.8 per cent since 2011.⁶ Secondly, it is by no means clear on what basis the hourly charge out rates were justified at the time, with the legal aid rates in particular having been as a matter of policy kept artificially low for decades, leading to a dwindling number of practitioners accepting legal aid assignments,⁷ including in relation to family proceedings.

⁴ At [68]-[71].

⁵ Inquiries have shown the same approach is taken by the Auckland Registry.

⁶ See Statistics New Zealand *Business Price Indexes: September 2019 Quarter* (November 2019, Wellington).

⁷ See *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176 at [138]; [2012] NZHC 1572 at [125] in relation to the criminal jurisdiction; and, more generally, "Legal Aid: The Problems and Issues" (2018) 923 *LawTalk* 77.

[11] A far better basis for determining a reasonable hourly rate is the scale costs set out in the High Court Rules. While the costs regime is designed to achieve certainty for parties with regard to the amount of costs able to be recovered by a successful party⁸ it is nonetheless based upon a notional daily recovery rate so as to enable the successful party to recover approximately two thirds of the costs incurred.⁹ This recovery rate is determined by the High Court Rules Committee made up of members of the judiciary, the profession and the Ministry. The Committee has recently reviewed the daily rate – the Appropriate Daily Recovery Rate – taking into account changes to the PPI since the rate was last reviewed in 2009. The new rate took effect from 1 August 2019.¹⁰ The appropriate daily recovery rates are now:

Category of proceedings (r 14.3)	Appropriate daily recovery rate (r 14.4)
	(\$)
1	1,590
2	2,390
3	3,530

[12] Although the appropriate daily recovery rate is not expressed as an hourly rate, such can be calculated given the number of hours in a court day can be determined with precision (5.25 hours) and is directly recoverable.¹¹

[13] Taking the median rate (the appropriate daily recovery rate on a 2B basis)¹² and allowing for the fact that the recovery is calculated as being two thirds of a

⁸ In accordance with the general desirability of the award of costs being expeditious and predictable: High Court Rules 2016, r 14.2(1)(g). See further Rachael Schmidt-McCleave “Costs” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 763 at [21.2.1].

⁹ See Rules Committee *Minutes of the Meeting of 2 October 2017* (Judicial Office for Senior Courts, Wellington, 13 October 2017) at 3: “Asher J observed that the “two-thirds” rule is a fiction, as the rule more properly delivers about one-third. The costs regime has not kept up with actual costs. Even when it was initially set-up it did not achieve two-thirds.”

¹⁰ High Court Amendment Rules 2019, r 11.

¹¹ High Court Rules 2016, sch 3 item 57. Note that the reference to quarter days confirms that the appropriate daily recovery rate is limited to the court day and does not include preparation time or other attendances.

¹² It is noted that, by definition, counsel who have been appointed Lawyer for the Child in a Family Court proceeding are senior Family Court practitioners. Specifically, Part 9 of the 2011 Practice note confirms that counsel for the child are only appointed to a panel of Lawyer for the Child if they possess a minimum of five years practice in the Family Court and are approved by a panel as provided for in the 2011 practice note. The full list of criteria for appointment as a lawyer for the Child are set out in 9.5 of the 2011 Practice Note is as follows:

notional reasonable charge out rate for civil work in the High Court, a notional reasonable charge out rate is \$682.85.¹³ As this rate effectively includes GST, after GST is subtracted the GST exclusive rate is \$593.78 per hour.

[14] On any basis therefore, it can be seen that the \$220 per hour sought by Ms Gunn is eminently reasonable and should be paid in this case.

[15] Given my conclusions it is clearly appropriate that a more structured review be undertaken to ensure that the reasonable fees of all counsel appointed by the High Court are met and that counsel are not unreasonably benchmarked to out of date and inapplicable guidelines such as the 2011 Practice Note. In addition, the analysis shows that the legal aid rates for any form of civil work in the High Court bear absolutely no relationship to the reasonable costs of counsel. In such circumstances and leaving aside other inherent flaws in the current legal aid system,¹⁴ it is not surprising that there are a lack of providers able to undertake legal aid assignments across the jurisdiction of this Court, not only conventional civil proceedings, but also family proceedings, immigration and Accident Compensation.

[16] Quite clearly there can be no basis for artificially restricting the charge out rates of certain types of counsel appearing before this Court when considerable work has already been done by the High Court Rules Committee to calculate the reasonable costs of counsel. There can be no basis for differentiating between different types of

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- (a) a current Practising Certificate;
 - (b) the ability to exercise sound judgement and identify central issues;
 - (c) a minimum of five years practice in the Family Court;
 - (d) proven experience in running defended cases in the Family Court;
 - (e) a sound knowledge of the Care of Children Act 2004;
 - (f) an understanding of, and an ability to relate to and listen to, children of all ages;
 - (g) good people skills and an ability to relate to and listen to adults;
 - (h) sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
 - (i) relevant qualifications, training and attendance at relevant courses;
 - (j) personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
 - (k) independence; and
 - (l) knowledge and understanding of the Practice Note: Lawyer for the child: Code of Conduct and "Best Practice Guidelines for Lawyer for the Child".

¹³ \$2,390 multiplied by 150 per cent, divided by 5.25, equals \$682.85.

¹⁴ Including the general position that legal aid is a loan that must be repaid: Legal Services Act 2011, pt 2 subpt 4.

lawyers coming before this Court as to do so would simply serve to aggravate existing access to justice issues and is otherwise unfair.

Decision

[17] The application for review is allowed. Ms Gunn is to be paid at a rate of \$220.00 per hour (GST exclusive).

Powell J