

26 September 2016

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Dear Mr Ellis

Refugee Status Branch – Draft Guidelines: Minors and children in the refugee status process

Thank you for meeting with officers of the New Zealand Law Society on 4 August 2016 and for giving the Law Society the opportunity to provide comments on the draft *Guidelines: Minors and children in the refugee status process – Draft 2.1 Dec 2015* (draft guidelines).

The draft guidelines have been considered by the Law Society’s national and Wellington Branch Immigration and Refugee Law Committees and Family Law Section, and the Law Society makes the following comments.

The Law Society supports the development of guidelines to assist participants in the refugee status process to understand how the Refugee Status Branch (RSB) will interpret and apply the Immigration Act 2009 (Act).

However, the draft guidelines relating to the child’s right to be heard in the refugee process (and the associated processes for interviewing children) are in some respects inconsistent with New Zealand’s obligations under relevant international conventions. Whilst children have a right to be heard and may be able to express their views, there should not be a presumption that it is in their best interests to be interviewed.¹ The RSB will be aware of the concern recently expressed by the United Nations Human Rights Committee in its *Concluding observations on the sixth periodic report of New Zealand* under the International Covenant on Civil and Political Rights (ICCPR), about the “... intention [in New Zealand] to interview children as part of the refugee determination process, a **practice which may negatively affect children** (arts. 17 and 24)”.²

¹ United Nations Committee on the Rights of the Children *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) CRC/C/GC/14 (2013) provides guidance for the implementation of the best interests principle.
http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

² UN Human Rights Committee, *Concluding observations on the sixth periodic report of New Zealand* CCPR/C/NZL/CO/6 (April 2016), at [35], emphasis added <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/087/77/PDF/G1608777.pdf?OpenElement>

The United Nations Human Rights Committee has recommended that New Zealand:³

36. ... should take all appropriate measures to:

(c) Ensure that any policy to interview children as part of the refugee determination process is **restricted to situations in which such interviews are necessary to determine the child's claim and the child has expressed a desire to be heard.**

Given the potential to negatively affect children, interviewing children in the refugee process should not become a standard practice. Further, children should not be interviewed to gather information to assess the validity and credibility of the evidence provided by the child's parents or other family members.

The Law Society has seen a letter dated 15 April 2016 from the Refugee Council of New Zealand (RCNZ) to you, and agrees with the concerns set out at pages 11 – 15 and that the draft guidelines should be amended in relation to interviewing children in the refugee process.

In summary, the Law Society considers that the draft guidelines need to be amended to reflect the United Nations Human Rights Committee observations, noting in particular that:

- Children should only be interviewed as part of the refugee determination process in situations where it is necessary to determine the child's own claim and where the child has expressed a desire to be heard.
- Children should not be interviewed to gather information to assess the validity and credibility of the evidence provided by the child's parents or other family members.
- The child is entitled not to exercise their right to be heard or express a view.
- There is a presumption against interviewing children under the age of 12.
- The child's wish to be heard or not, and the way they wish to express their view, should be ascertained through their responsible adult.
- The decision whether a child is to be interviewed must include consultation with the child's parent/guardian and should not rest solely with the Refugee and Protection Officer.
- Parents or guardians should be present when a child is interviewed unless there are clear and compelling reasons for interviewing a child separately.
- Legal representation should be provided for child claimants where a responsible adult (other than a parent or guardian) is nominated.
- Interviewers (and persons designated as responsible adults under section 375(4)(c)(iv) of the Act) should have specialist training, and guidance should be provided on child-appropriate interviewing processes/techniques.
- Children should be allowed to express their views in a variety of ways (as an alternative to interviews), such as drawing, writing, role-playing etc.⁴

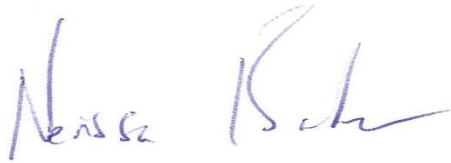
³ Note 1 above, at [36], emphasis added.

⁴ *UNHCR Guidelines on International Protection: Child Asylum claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, at [70] – [72].

- Further information should be provided in the guidelines, in relation to unaccompanied minors who claim refugee status.⁵

The Law Society would welcome the opportunity to discuss these issues further and to assist you in drafting the appropriate amendments to the guidelines. Contact can be made in the first instance with the secretary of the Immigration and Refugee Law Committee, Karen Yates (karen.yates@lawsociety.org.nz / 04 463 2962).

Yours sincerely

A handwritten signature in blue ink, appearing to read "Nerissa Barber". The signature is written in a cursive style with a large initial 'N' and 'B'.

Nerissa Barber
Vice President

⁵ See, for example, *UNHCR Guidelines* (note 4 above), at [68] – [69].