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Family Court (Supporting Children in  
Court) Legislation Bill:  
supplementary submission – the role  
of Lawyer for Child

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*29/03/2021*

## **Family Court (Supporting Children in Court) Legislation Bill: supplementary submission, on the role of Lawyer for Child**

### **Executive summary**

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) provides this supplementary submission on the Family Court (Supporting Children in Court) Legislation Bill (**Bill**) to the Justice select committee, in relation to the role of lawyer for the child.<sup>1</sup>
2. We believe this further information will enhance the committee's understanding of this vital role. The primary way children participate in Family Court proceedings is through court-appointed lawyers for children. New Zealand is recognised internationally as a leader in providing for the independent representation of children by lawyer for child. This is a statutory role that is central to facilitating children's participation in Family Court proceedings and will therefore be central to helping achieve the Bill's objectives.
3. This supplementary submission also addresses criticisms of the lawyer for child role made by some submitters, which appear to reflect some misconceptions or incomplete awareness of the role.

### **Outline**

4. This submission addresses:
  - a. The Independent Panel's conclusions about the role of lawyer for child
  - b. Evaluating the role, following the 2014 Family Court changes
  - c. Recent moves to strengthen the role and obligations
  - d. Appointments
  - e. Review Panels
  - f. The statutory requirements
  - g. Training and qualifications, and ongoing training requirements
  - h. Double regulation, and the complaints mechanism
  - i. Understanding the role and countering some common misconceptions:
    - (i) Information provided to the public
    - (ii) Variation in practice by lawyers for children
    - (iii) Concerns that children's views not sufficiently heard or advocated for
    - (iv) Lawyer for child's role in settling parental disputes
    - (v) Assessment of children's safety
    - (vi) Understanding family violence
  - j. Who is best to represent children?

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<sup>1</sup> The NZLS Family Law Section principal submission on the Bill, dated 25 February 2021, is available here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/638b5e3ab4/Family-Court-Supporting-Children-in-Court-Legislation-Bill-2020.pdf>.

### **The Independent Panel's 2019 report**

5. The final report of the Independent Panel<sup>2</sup> stated at paragraph 281:

*"We consider the 2014 changes to lawyer for child are working well and do not require amendment. The appointment threshold achieves an appropriate balance between upholding children's rights to participate in decisions concerning them while ensuring resources are targeted to cases where those resources are needed. The clarification of the dual role suitability limits the exposure of children to court-appointed professionals."*

6. The Panel went on to say (at paragraph 282) that:

*"There is, however, a need for change to some settings and practices that shape the lawyer for child role."*

7. Those settings and practices were set out at paragraphs 283 to 291 of the report and included:

- (a) Appointing the right lawyer for child by:
- (i) incorporating the appointment criteria in section 159 of the Oranga Tamariki Act 1989 into the Care of children Act 2014.
  - (ii) ensuring there is a rigorous selection process to be appointed as lawyer for the child; and
  - (iii) making the Family Justice Coordinator responsible for the review of the lawyer for child list to ensure such a review is completed in a timely manner.
- (b) Keeping children informed by incorporating the duty on lawyer for child to explain the nature of the proceedings to the child, in section 10(2) of the Oranga Tamariki Act 1989, into the Care of Children Act 2014.
- (c) Strengthening the professional development and supervision requirements for lawyer for child.
- (d) Directing the Ministry of Justice to review the remuneration rate for lawyer for child.
- (e) Requiring where possible Māori children are represented by a Māori lawyer for child.

### **Evaluation of the role of lawyer for the child**

8. The Law Society submissions to the Independent Panel stated that it was unfortunate that the Ministry's research reports did not consider the impacts of the 2014 changes to the role of lawyer for child.<sup>3</sup> In the Law Society's view, the Ministry should undertake a comprehensive evaluation of this nature.
9. Since 2014, more reliance has been placed on lawyers for children by the judiciary because of self-represented litigants and under-resourced registries. Self-represented litigants have increased expectations on the lawyer for child to guide them or act as a 'go between' throughout the legal process. The lawyer for child is also expected to provide more comprehensive information from other agencies identifying risk to children, to play a greater

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<sup>2</sup> Te Korowāi Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, May 2019.

<sup>3</sup> See NZLS submissions to the Independent Panel, 12 November 2018 (at paragraph 112) and 1 March 2019 (at paragraph 211).

role in case managing matters, and to proactively try to assist cases to settle (when this can safely be done) rather than waiting months for cases to come before a judge.

### **Strengthening the role and obligations of lawyer for the child**

10. In response to suggestions by the Independent Panel, in 2020 the Law Society's Family Law Section (**FLS**) completed substantial work in conjunction with the Principal Family Court Judge to significantly strengthen the appointment and competency requirements of lawyers for children, through the FLS Best Practice Guidelines and the Family Court Practice Note: Lawyer for Child: Selection, Appointment and Other Matters (**practice note**) in respect of the role of lawyer for the child.
11. The practice note and best practice guidelines were reissued on 24 June 2020, and the main changes include:
  - (a) Mandatory and ongoing continuing professional development (**CPD**) requirements.
  - (b) Mandatory and ongoing professional supervision requirements.
  - (c) A greater obligation on lawyer for child to provide more information on CPD and supervision when they are interviewed by the panel at the three-yearly review, including a focus on upskilling in areas such as cultural competency.
  - (d) The requirement for all lawyers for children to have a mentor for the first 12 months following their appointment to the Ministry's list.
  - (e) New provisions relating to the suspension and/or removal of lawyer for child from the Ministry's approved list, including the ability of the panel to consider urgent interim suspension if justified.
  - (f) Ongoing obligations to disclose information to the Principal Family Court Judge of details of any Police investigation to which the lawyer for the child is subject.
12. The practice note and best practice guidelines are attached for the committee's information at [Appendix 1](#).

### **Lawyer for child: appointment panel**

13. The process for appointment to the lawyer for child list is rigorous. Paragraph 9 of the practice note sets out the appointment process. The appointment (and review) panel consists of a Family Court Judge, the Family Court Manager or Family Court Coordinator, two nominees from the Family Law Section of the New Zealand Law Society (senior lawyers for children), and a psychologist and cultural advisor where possible. The appointment is made by the presiding judge (as the judge is the chair of the appointment panel).
14. Applicants are interviewed by the panel on their qualifications and experience and assessed against the criteria set out at paragraph 9.9. Appointment is discretionary and the panels apply high standards. Not all who apply are appointed. Lawyers for children are typically experienced counsel who have been family lawyers for many more years than the minimum number required.
15. In August 2015, the FLS developed guidelines for its panel representatives, to create consistency and ensure that applicants demonstrate knowledge and understanding of the law, best practice, child development, relevant literature and research, family dynamics and *Gillick* competence.

### Lawyer for child: review panel

16. Paragraph 10.1 of the practice note requires that a review of all lawyers on the lawyer for child list be undertaken at intervals of not more than three years, or earlier if the need arises. The registrar in each court must ensure the approved lawyers are reviewed at such intervals.
17. The Independent Panel recommended that the list of approved lawyers for children be regularly reviewed and updated.<sup>4</sup> The Law Society agreed with this recommendation and has expressed concern to the Ministry for many years that the review panels have not been convened regularly or consistently around the country, as required by the practice note.<sup>5</sup>
18. Regular reviews are now taking place and the updated practice note provides that lawyer for child must provide additional information to the panel 28 days prior to being interviewed. Such information should include:
  - (a) details of current professional supervision, including regularity of sessions and topics discussed.
  - (b) experience in working with families from other cultures; and
  - (c) CPD undertaken during the past two years, including a focus on upskilling in areas such as cultural competency.

### Statutory role of lawyer for child

19. The role of lawyer for the child is set out in section 9B of the Family Court Act 1980.<sup>6</sup>

#### **“9B Role of lawyer appointed to represent child or young person in proceedings**

- (1) The role of a lawyer who is appointed to represent a child or young person in proceedings is to—
  - (a) act for the child or young person in the proceedings in a way that the lawyer considers promotes the welfare and best interests of the child or young person:
  - (b) ensure that any views expressed by the child or young person to the lawyer on matters affecting the child or young person and relevant to the proceedings are communicated to the court:
  - (c) assist the parties to reach agreement on the matters in dispute in the proceedings to the extent to which doing so is in the best interests of the child or young person:
  - (d) provide advice to the child or young person, at a level commensurate with that child’s or young person’s level of understanding, about—
    - (i) any right of appeal against a decision of the court; and
    - (ii) the merits of pursuing any such appeal:
  - (e) undertake any other task required by or under any other Act.

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<sup>4</sup> NZLS submission to the Independent Panel, 1 March 2019 (at paragraph 213).

<sup>5</sup> Ibid, at paragraph 218.

<sup>6</sup> Amended by section 4 of the Family Courts Amendment Act 2014 on 31 March 2014.

- (2) To facilitate the role set out in subsection (1)(b), the lawyer must meet with the child or young person and, if it is appropriate to do so, ascertain the child's or young person's views on matters affecting the child or young person relevant to the proceedings.
- (3) However, subsection (2) does not apply if, because of exceptional circumstances, a Judge directs that it is inappropriate for the lawyer to meet with the child or young person.
- (4) A lawyer appointed to represent a child or young person in proceedings may—
  - (a) call any person as a witness in the proceedings:
  - (b) cross-examine witnesses called by any party to the proceedings or by the court.”

### **Training and qualifications**

- 20. Before lawyers can apply for inclusion on the lawyer for child list, a number of criteria must be met including the need to have practised for a minimum of five years in the Family Court, have experience in running defended cases and training and experience in working with children.
- 21. In addition, candidates are required to complete a three-day entry level lawyer for child workshop run by NZLS CLE Ltd. That workshop includes training on the following areas:
  - (a) The role of lawyer for child
  - (b) Reports and round table meetings
  - (c) Care and protection issues
  - (d) Attachment theory
  - (e) Working with Maori children
  - (f) Child development
  - (g) Communicating with children
  - (h) Putting children first
  - (i) Family violence dynamics
  - (j) Specialist reports
- 22. It is important to note that not all those who complete the workshop apply to be lawyers for children and there is no automatic appointment to the Ministry's lawyer for child list following attendance at the course. Despite the criterion of a minimum five years of practice, lawyers for children are not generally appointed until they have been practising for at least seven years and have solid experience in defended hearings. There is no 'rubber stamping' of appointments and the panels are rigorous about the qualifying criteria contained in the practice note.

### **Ongoing training**

- 23. Since October 2013, all lawyers holding a current practising certificate are required to complete a minimum of ten hours' CPD each year.<sup>7</sup> There are many educational opportunities available to lawyers for children following their appointment to the list (see [Appendix 2](#) for

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<sup>7</sup> See rule 6 of the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013.

what NZLS CLE Ltd has offered over the last five years). These cover various topics on cultural competency, family violence and other topics specifically relevant to a lawyer for child's practice.

24. In addition to the NZLS CLE Ltd program, the FLS offer other opportunities for its members to upskill in various areas. One-day lawyer for child forums are held annually in a number of regions throughout the country and a successful noho marae was held in Dunedin last year, with other regions planning similar events in the future. In addition, most regions hold regular informal lawyer for child network meetings which provide a forum for practising lawyers for children of all experience levels to meet and discuss specific practice issues and to peer review cases.

### **Complaints mechanism for lawyer for child**

25. Lawyers for children are subject to double regulation – by the Family Court *and* the New Zealand Law Society. Because lawyer for child is appointed by the Court, any complaint is dealt with (whether proceedings are before the Court or completed) in the first instance by a Family Court Judge – either by the judge presiding over the proceeding or the Administrative Judge for the region where the complaint has been lodged. The process is regulated by paragraph 14 of the practice note.
26. Complaints are also able to be referred by the Court to the New Zealand Law Society's Complaints Service. Detailed information about this service can be found at <https://www.lawsociety.org.nz/for-the-public/complaining-about-a-lawyer/>.
27. In December 2018, the secretariat to the Independent Panel sought information from the Law Society about the number of complaints regarding lawyer for child. A letter of 13.12.18 sent to the Ministry shows an extremely low percentage of complaints received (and upheld/dismitted) in respect of lawyer for child compared to those received in respect of the whole profession. That is attached for the committee's information at Appendix 3.

### **Understanding the role and countering misconceptions**

28. Much of the feedback from parents involved in Family Court proceedings contained in the Independent Panel's UMR research surveys, and submissions to the Justice select committee on the Bill (including the Backbone Collective report on the role of lawyer for child),<sup>8</sup> illustrate a fundamental misunderstanding of the role of lawyer for child and the associated legislation, best practice guidelines and practice note, including the specific obligations placed on lawyers for children.
29. In March 2019, the Law Society's Family Law Section released an information sheet (attached at Appendix 4) setting out the role of lawyer for child, to assist the public in understanding the role. Much of this information was subsequently replicated on the Ministry's family justice system website.

#### **(a) Variation in practice of lawyer for child**

The Panel's report noted that some lawyers for children "have inconsistent practices".<sup>9</sup> However, variation is appropriate and is in line with current social science research and

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<sup>8</sup> The Backbone Collective, *Seen and not Heard – Children in the New Zealand Family Court, Part Two Lawyer for Child*, Herbert and Mackenzie (2018).

<sup>9</sup> Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, paragraph 280.

advocacy for children in other international jurisdictions. The way in which a lawyer for child undertakes their role will vary according to the age of the child and the types of issues present in a specific parenting dispute. The nature and diversity of family life requires an individualised approach to working out future childcare arrangements. A 'one size fits all' approach has been rejected in a number of other jurisdictions as being out of step with the welfare and best interests of children.<sup>10</sup>

**(b) Children's voices are not sufficiently heard or advocated for**

The Panel's report states that "consultations, submissions and research have established that ... children's voices are not sufficiently heard or advocated for."<sup>11</sup> This statement appears to follow one of the key findings in the UMR Research – that "children and young people appreciate being asked for their views but when they feel these are ignored, this can undermine their trust and make them feel powerless."<sup>12</sup>

The role of lawyer for the child involves a balance of obtaining views and putting those views before the Court, while at the same time advocating for an outcome in the best interests of the child (a statutory duty under section 9B of the Family Court Act 1980). This will sometimes mean that what is in a child's best interests does not align with what a child wants. For example, the child may wish to live with a parent who has a serious substance addiction. If the outcome of the proceedings is different to the child's wishes, the child may feel they have not been heard. It is important that children understand that their views are just part of the information that the Court needs to consider when making a decision about them.

**(c) Lawyer for child's role in settling parenting disputes**

Lawyers for children move cases forward by assisting in negotiating between the parties and providing reality testing in terms of potential agreements. Because of this, more matters are likely to settle, with fewer cases coming to court for a final hearing. Round table meetings are held throughout the course of a case to help parties focus on what they each need to do to ensure the child can have safe contact with each parent and to help decide what steps are needed to progress the case towards settlement. When necessary, the views of a child may be updated if there has been some change or development in the adults' situations or their willingness to trial a new arrangement.

**(d) Meeting with the child and obtaining views**

A concern raised by some submitters is the failure of lawyer for child to meet with the child. There is a legal requirement for lawyers to meet with their child client and if it is appropriate to do so, ascertain the child's views on matters affecting the child relevant to the proceedings.<sup>13</sup> It would be extremely rare for a lawyer for a child not to meet that child, and a judicial direction would need to be sought regarding this.<sup>14</sup> This section was enacted as part of the 2014 changes which removed a lawyer's discretion in terms of whether or not they met with the child. Even when a lawyer meets with the child, there

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<sup>10</sup> The role of lawyer for the child, Garry Collin, FLS Symposium, June 2011, Review of the Family Court, page 98.

<sup>11</sup> Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms, paragraph 280.

<sup>12</sup> UMR Research, "A qualitative study on behalf of the Independent Panel examining the 2014 family justice system reforms, main report, April 2019, paragraph 7.3.

<sup>13</sup> Section 9B(2) of the Family Court Act 1980.

<sup>14</sup> Section 9B(3) of the Family Court Act 1980.



may be situations where a child cannot express views, or it is not appropriate to ascertain a child's views, or a child may choose not to offer views.

It is also not considered appropriate to meet with the child on multiple occasions. Lawyers for children are not counsellors, nor social workers. They are acutely aware of the impact of systems abuse and the damage to children of having multiple professionals over-engaging with them.

**(e) Assessment of children's safety**

Some criticism has been made that the lawyer for child actively ignores the safety of children.<sup>15</sup> The Family Court appoints a lawyer for child and sets the brief that the lawyer for child carries out pursuant to section 9B of the Family Court Act 1980. Safety is the most critical factor when lawyer for the child is reporting to the Court and trying to assist the parties to reach agreement. This is in line with the principles set out in the law. However, making a safety assessment of children when there are contested allegations is not part of the lawyer for child's role. That assessment is undertaken by a judge based on the evidence before the Court. Part of the lawyer for child's role is to ensure that necessary evidence is put before the Court that is relevant to the child's safety. As well as affidavits from the parties and other witnesses, this evidence may include: a section 132 report prepared by a social worker; a completion report from a stopping violence programme; the results of hair follicle drug testing; up to date family violence records obtained by lawyer for the child; and in some cases, a psychological assessment. The best practice guidelines confirm that lawyer for child should not accept any brief that requires any assessment of the safety of the child.<sup>16</sup>

**(f) Understanding family violence**

Training on family violence is undertaken by lawyers when they first commence practice as a lawyer for child.

Each year there are numerous training opportunities offered through the New Zealand Law Society, ADLS and other organisations (such as LexisNexis) on topics relevant to family law practice and advocacy which include family violence. As mentioned above, [Appendix 2](#) lists out the education opportunities offered by NZLS CLE Ltd for the last five years for lawyers for children and specifically on family violence, including relevant sessions at the biennial family law conference.

The lawyer for child training includes a module on family violence, including the pervasive area of psychological abuse, which has historically not been well understood. The amendments to the Family Violence Act 2018 have more explicitly referred to psychological abuse and behaviour which is coercive or controlling, making it easier for courts and lawyers to recognise behaviour as family violence, even if on its face it may not obviously be so.

30. Lawyers for children are particularly alive to any suggestions of family violence. When appointed by the Court, lawyers for children request information from:

- (i) Police, seeking all family harm reports on the parties and any new partners, including any pending criminal charges.

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<sup>15</sup> Report Five – Seen and Not Heard – Lawyer for Child, Backbone Collective, May 2018 at page 2.

<sup>16</sup> Family Law Section Best Practice Guidelines – Lawyer for Child at paragraph 9.3.

- (ii) Oranga Tamariki, seeking a copy of the Oranga Tamariki CYRAS notes. (These typically run to hundreds of pages of information and sometimes more).
  - (iii) The Ministry of Justice, seeking criminal conviction histories.
31. The first mandatory principle that the Court and lawyers for children must consider is that a child's safety must be protected and, in particular, a child must be protected from all forms of violence. Section 5A requires that family violence is taken into account and sets out particular matters that the Court *must* have regard to.
  32. The information obtained by lawyer for child is vital to ensure that lawyers for children can advise the parties and the Court about any identified risks to a child's safety at an early stage in the proceedings.
  33. It is important to note that the presence of family violence does not negate a child's need to have a continuing relationship with both parents (even the abusive parent). In proceedings involving family violence, it is usual that initially only professionally supervised contact will be put in place for the abusive parent to have contact with a child. Lawyers for children have an obligation to assist in negotiating safe contact for children and will try to ensure that both the applicant and respondent complete living without violence programs. Lawyer for child will often refer their child clients to programmes specifically for children who have been exposed to family violence such as the Tamariki Ora programme through the Women's Refuge.
  34. Society's understanding of family violence continues to develop and there will always be room for further education of all professionals (not just lawyers) working in this difficult area.


#### **Who is best to represent children?**

35. The Panel asked whether a lawyer for the child is the best person to understand and advocate for a child's views when parents separate.
36. While others, such as qualified social workers, are able to obtain children's views, without legal training they may not be able to give logical submissions, challenge evidence brought before the Court or cross-examine witnesses. In addition, the role of a lawyer for child is to be the advocate for the child. This is a very different role than a social worker.
37. We acknowledge that the most in-depth information about children can be obtained by psychologists who have the specialist training to interpret behaviours. They will meet the child across several meetings; meet each parent; observe the child in the care of each parent and make assessments about whether a child is free to express views, as well elicit information about any complex dynamics that may be impacting on a child's wellbeing.
38. In the past, psychologists' reports were obtained more frequently by the Court. However, the ability of the Court to commission and obtain such reports has become severely hampered due to the limited pool of psychologists willing to write reports for the Family Court. Such reports are very expensive and can be very invasive of a child's life.
39. It is also important to note that psychologists' reports are not permitted to be obtained solely or primarily to ascertain a child's wishes.<sup>17</sup>
40. If others such as social workers or psychologists were used to seek children's views, it is likely the Court would still need to appoint a lawyer for child at some point in the proceedings. This

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<sup>17</sup> See section 133(6)(e) of the Care of Children Act 2004.

could result in more exposure of a child to court-appointed professionals, duplication of work and greater cost to the system overall.

A handwritten signature in black ink, appearing to read 'Herman Visagie', written over a large, faint oval shape.

Herman Visagie  
**NZLS Vice President**

29 March 2021

Appendices:

- 1 – Best Practice Guidelines and Practice Note for Lawyer for Child, updated June 2020
- 2 – Education
- 3 – Complaints
- 4 – Information sheet on the role