



# Representing a child



By Maria Kazmlerow, barrister

When families break up and the Family Court gets involved, an independent lawyer can be appointed by the Court to represent the children. A senior and exclusive role at the family bar, 'lawyer for the child' is involved in many situations. Most frequently, they are appointed in parenting and guardianship disputes and care and protection matters. What do children's lawyers do, and how has that role changed with the new *Lawyer for the Child: Code of Conduct*?

## An multifaceted role

This is a complex, multitasking, and subtle role. It is played out when the child's world – their family – is painfully reforming. It places at its centre, children – usually the most vulnerable of parties. Much of the uniqueness of the role is geared to ensuring that harm to children in this adversarial legal process between their parents is limited, while giving children's views as active a role as is able.

Lawyers acting for children have a dual role, reflecting their client's added vulnerability. While they meet with their client and take instructions, they advocate their client's views and act as champions of their client's best interests and welfare. This unique dual role is at times conflicted, as client's views and their best interest and welfare do not always coincide.

Children's lawyers are restricted in their usual ethical obligation of disclosing to the client all information received by their legal representative – again, a mechanism to protect them from what are adult emotions and issues. Expert opinion reports commissioned by the Court are generally 'off limits' to their client, but children can be told the purpose and contents of reports by expert witnesses. Children have a right to information on the progress and outcome of the case.

Client confidentiality is less strictly observed, with children's views being reported, unless confidence is specifically requested by the child, or the lawyer exercises their discretion not to report.

They have a defined negotiating role with parties to assist in reaching settlement of disputes, as it is always better that parents agree to healthy and safe parenting arrangements than have them imposed. However, children's lawyers are prohibited from acting as settlement negotiators when allegations of abuse, violence, or other safety issues are involved. Such cases must have allegations tested in Court to ensure children are safe while in the care of their parents.

Children's lawyers have case manager obligations. They have specified duties in relation to specialist report writers who provide expert opinion evidence to the Court on matters in dispute. They have particular responsibilities in marshalling evidence and issues prior to a hearing, as well as the usual role of litigator at hearing. They are also obliged to facilitate a judicial meeting with the child prior to hearing, if that is regarded as appropriate.

They write memoranda to the Court on the basis of briefs supplied by the Court. As is usual, children's lawyers cannot lead evidence themselves, but can file affidavits recording evidence from relevant sources, such as the child's school, and call other evidence where appropriate.

## An evolving role

How has the role evolved? A significant part has been played by the Code of Practice – Practice Notes issued by presiding Principal Family Court Judges, and the New Zealand Law Society (NZLS) Family Law Section's *Best Practice Guidelines for Lawyer for the Child* (Guidelines). Both acknowledge the guiding role played by the United Nations *Convention on the Rights of Children*, and statutes such as the *Care of Children Act 2004* and *Children, Young Persons and their Families Act 1989*. Of course, the Courts have interpreted this role further.

How does the new Code, which was issued by Principal Family Court Judge Peter Boshier and came into effect on 1 April 2007, change the role as practitioners understood it?

## 'Particular children'

Under the old Code and new, it is mandatory where children's views and best interest conflict, that the lawyer discusses the issues with the child and attempts to resolve the conflict. *Amicus Curiae* or 'Counsel to Assist' may be appointed in respect of welfare and best interest issues, with the children's lawyer undertaking advocacy of their client's views only.

The new Code refines this further. It creates a special group of 'particular children' for whom representation by their lawyer may be primarily "welfare and best interests". 'Particular children' are children who, for reason of "age, maturity or disability", are either unable to express a view, or their view must be treated with caution, or they can be children unwilling to express a view.

Guidance for lawyers identifying such 'particular' clients is provided by presumptions – particularly, client age. The older the child, the more the lawyer's representation should reflect their client's instructions; the younger the child, representation should accord with the child's welfare and best interests.

With 'particular children', their lawyer has a duty to see that other factors that impact on the client's interests and welfare are put before the court. They also have a duty to put before the court any views expressed by their client 'particular children', but not views expressed in confidence.

It would seem that for 'particular children', the Code does not envisage Counsel to Assist being appointed if there is a views and best interest clash. However, the judicial view is that representation of older 'particular children' may require Counsel to Assist being appointed if there is a views and best interest and welfare clash.

This section of the Code is at variance with the Guidelines.

## Multi-child representation

The issue of dual role conflict also arises where a lawyer is appointed to represent a number of children, some of whom are able to provide a view as to representation and some who cannot. The lawyer must be alert to the possibility of conflict when multi-child representing. In some cases, the lawyer may be obliged to seek separate representation for one or more of the children.

## The school interview

A lawyer's decision to interview a child at school is now guided by an NZLS Best Practice Protocol on Liaising between Lawyer for the Child and School, which is incorporated into the Code.

## Disclosure

The ability of lawyers to disclose expert reports to clients is now limited to Court-ordered disclosure for *Care of Children Act* reports (the situation is different under the *Children, Young Persons, and Their Families Act*). This is a limitation of the previous "exceptional circumstances" discretion to show affidavits and evidence.

## Judicial meeting

Under the previous Code and the Guidelines, whether a child met with the Judge depended on the child requesting such a meeting, and whether the Judge and Counsel regarded this as appropriate.

The new Code makes it mandatory that the children's views on a judicial meeting are obtained by their lawyer. The children's lawyer is obliged, prior to hearing, to advise the Court whether they consider it appropriate for the children to meet with the Judge and express their views.

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### Case management

Subtle changes have been made to this role in the new Code. The report writer expert is explicitly the Court witness, and the Court now decides if the report writer expert shall be called as a witness. Where an expert is to be cross-examined, and there is no agreement to the children's lawyer briefing the expert, the Court may appoint Counsel to Assist. The lawyer's appointment is to continue for 28 days after judgment, in order to advise on the merits of an appeal, and to explain the effect of any Order to their client.

### Confidentiality and systemic abuse

Unlike the earlier Code, lawyers are no longer obliged to explain the limits of client confidentiality. They are no longer required to actively manage the risk of "systemic abuse" of their client by over-interviewing by professionals. The Guidelines continue to offer specific guidance here.

### Commentary from the Bench and the bar

His Honour Judge von Dadeltszen, Acting Principal Family Court Judge, had the following observations on the changes in Lawyer for the Children's role: "The greatest change made in the new Code is how the conflict between the child's views and his or her best interests and welfare representation is dealt with."

His Honour said that "under the old system, when a child's wishes conflicted with welfare and best interests, there was a written understanding that Counsel to Assist in best interests role would be appointed. The new practice note makes that official. There are two classes of children, those who have views even if their instructions are 'off the wall' and the 'particular children' who cannot give views. How do you distinguish between the two classes of children? The age-related presumptions are helpful and are a starting point. As time goes on, the older the child, the more the distinction. It may be that psychologist briefs expand to consider the issue, or the lawyer asks that the court consider appointing Counsel to Assist in a best interest role - including for older 'particular children'."

Commenting on the practice of Judges speaking with children, His Honour said that "as a result of the greater emphasis on children's views and listening to the child under the *Care of Children Act*, [he] was seeing more children than ever before".

"Judges needed to be aware of natural justice considerations," he said, "and should ensure that what is said by the child is made available in an appropriate way to the parties, subject to issues of confidentiality."

In the case management role, His Honour said that, traditionally, lawyers for a child case-managed matters to do with report writers. The Code now clearly signals that the expert was the Court witness, and briefing was not necessarily a role of the children's lawyer.

Mahon and Associates principal Antony Mahon, co-presenter of the Lawyer for the Child Training Workshop and member of the Family Law Committee, said the new Code "is a reflection of the changes brought about by the *Care of Children Act* and the extent to which New Zealand and overseas jurisdictions have needed to adapt their domestic law and practice to reflect a greater understanding of children and their rights of participation in decisions concerning them."

Mahon also says "the fact that there is a difference between the definition of the role of lawyers appointed to act for the children in the Family Law Guidelines and the obligations under the later Code of Conduct, in the vocabulary of a child's views and issues relevant to the child's welfare and best interests, is an indication of the challenges faced by the Court and lawyers in development of practices which meet the significant changes introduced by the *Care of Children Act*."

Maria Kazmierow is an Auckland barrister. She can be contacted on 09 913 7431 or [maria@ocounselchambers.co.nz](mailto:maria@ocounselchambers.co.nz).

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