

3 March 2017

Dougal Ellis
Branch Manager
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Immigration New Zealand
PO Box 90533
Auckland

By email: dougal.ellis@mbie.govt.nz

Dear Dougal

Draft Guidelines on Children or Minors in the Refugee Status Process — revised draft, December 2016

Thank you for giving the New Zealand Law Society the opportunity to provide comments on the further revisions to the draft *Guidelines on Children or Minors in the Refugee Status Process* ('Draft 1.2 Oct 2016'), released in December 2016.

The Law Society considers that the concerns it expressed in its submission of 26 September 2016 (**enclosed**) on the previous version ('Draft 2.1 Dec 2015') of the draft guidelines have not been addressed. It is apparent from the summary of feedback on the earlier draft guidelines that the Law Society's concerns are shared by other stakeholders. The concerns – along with a range of other legal and operational concerns about the draft guidelines – were discussed in detail at the recent meeting on 20 February 2017 with the Refugee Status Branch and Auckland stakeholders, including members of the Law Society's Immigration and Refugee Law Committee.

The focus of the draft guidelines remains on interviewing children and minors, despite the United Nations Human Rights Committee recommendation that any policy to interview children as part of the refugee determination process should be **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**.¹

The draft guidelines should be amended to better reflect the Conventions and Guidelines referred to as sources informing the guidelines, and in particular paragraphs 65 – 77 of the UNHCR Guidelines.² Paragraph 65 of the UNHCR Guidelines states:

¹ UN Human Rights Committee, Concluding observations on the sixth periodic report of New Zealand CCPR/C/NZL/CO/6 (April 2016), at [36]
<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPpRiCAqhKb7yhstky1HJJMMOR%2Bg124Xadhh68naPWV2k8dZAIFF8ilyRoMnuWaZwXPzS4G12gLHCuxo3kapinqxVj1ST7pjwRrUxquesCZpHp9rlKn1%2FjgaVr> (emphasis added).

² 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
<http://www.unhcr.org/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html>.

“Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.

The Law Society considers that the draft guidelines are not specific enough in setting out these safeguards, and that the guidelines should include more detailed best practice guidance for RSB officers on determining the claims of children and minors.

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 black ink, appearing to be 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President

Encl: letter dated 26 September 2016

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.³ 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)”.⁴

The United Nations Human Rights Committee has recommended that New Zealand:⁵

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

³ 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.

⁴ 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>

⁵ Note 1 above, at [36], emphasis added.

(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:

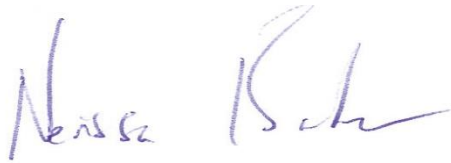
- Children should only be interviewed as part of the refugee determination process in situations where it is necessary to determine the child's own claim and where the child has expressed a desire to be heard.
- Children should not be interviewed to gather information to assess the validity and credibility 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.⁶

⁶ *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.⁷

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 fluid and cursive, with the first name "Nerissa" and the last name "Barber" clearly distinguishable.

Nerissa Barber
Vice President

⁷ See, for example, *UNHCR Guidelines* (note 4 above), at [68] – [69].