

Practice Standards for Independent Children’s Lawyers in Family Law Matters

This document sets out practice standards for lawyers acting as Independent Children’s Lawyer under a grant of legal aid. Where appropriate these practice standards incorporate the *Guidelines for Independent Children’s Lawyers* which is endorsed by the Family Court of Australia and the Federal Circuit Court of Australia. Independent Children’s Lawyers should act consistently with the *Guidelines for Independent Children’s Lawyers*.

These practice standards apply to in-house Legal Aid NSW solicitors and private lawyers acting as Independent Children’s Lawyer.

Lawyers who are appointed to the Independent Children’s Lawyers Panel (the panel) are eligible to receive grants of aid and assigned work from the Grants Division.

Legal Aid NSW may audit panel lawyers for compliance with practice standards. Continued inclusion on the panel is conditional on compliance with these practice standards.

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1. General Principles

The role of the Independent Children's Lawyer is set out in s68LA of the *Family Law Act 1975* (Cth).

It is an important overriding principle that a child must be listened to and involved in the decision-making in a way that takes into account the age and maturity of a child and the dynamics of a particular matter.

The Independent Children's Lawyer should act in accordance with s68LA(5) of the *Family Law Act 1975* (Cth) which provides that the Independent Children's Lawyer must:

- a) act impartially in dealings with the parties to the [proceedings](#); and
- b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and
- c) if a report or other document that relates to the child is to be used in the proceedings:
 - (i) analyse the report or other document to identify those matters in the report or other document that the Independent [Children's Lawyer](#) considers to be the most significant ones for determining what is in the best [interests](#) of the [child](#); and
 - (ii) ensure that those matters are properly drawn to the court's attention; and
- d) endeavour to minimise the trauma to the child associated with the proceedings; and
- e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

2. Practice Principles

2.1 Upon appointment

A lawyer acting as an Independent Children's Lawyer will:

- 2.1.1. Act in accordance with Part VII Division 10 of the *Family Law Act 1975* (Cth).
- 2.1.2. Advise the legal representatives of the parties or litigant in person of the appointment as the Independent Children's Lawyer and provide information about their role. Also, advise the Child Dispute Services of the relevant Family Court registry of the appointment.
- 2.1.3. Immediately file a Notice of Address for Service.
- 2.1.4. Seek particulars of the child's circumstances and obtain material which has been filed in the matter.

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2.2 Interaction with children

A lawyer acting as an Independent Children's Lawyer will:

- 2.2.1. Meet with all children, other than those who are preverbal, unless there are exceptional circumstances (e.g. circumstances involving a traumatised young child where, on the basis of independent professional advice, an Independent Children's Lawyer could reasonably decide not to meet with the child).
- 2.2.2. Meet with the child shortly after relevant documents are received and before the Independent Children's Lawyer participates in court proceedings unless there are special circumstances (e.g. where a young child had been interviewed, or was in the process of being interviewed by other professionals in an investigation, and there were concerns about systems abuse).
- 2.2.3. See the child alone unless there are very exceptional circumstances.
- 2.2.4. Develop strategies to make a child comfortable in meetings, listen to a child, observe a child's body language and avoid asking leading questions.
- 2.2.5. Explain the role of the Independent Children's Lawyer in an age appropriate manner, outline what happens in court; explain where the matter is up to and what is likely to happen next.
- 2.2.6. Explain the purpose and procedure for a family report or expert report, if a report is likely to be ordered.
- 2.2.7. Explore in meetings the extent to which a child can participate in helping to frame appropriate proposals which might be used in settling a matter or in the Independent Children's Lawyer's submissions at a hearing of a matter, but avoid involving the child in an adversarial way in the proceedings.
- 2.2.8. Use a qualified interpreter where necessary (interpreter fees are covered by the grant of aid).
- 2.2.9. Be aware of the pressures a child might be subject to and avoid over-interviewing a child or contacting a child over minor issues.
- 2.2.10. Take steps where possible to protect a child from systems abuse.
- 2.2.11. Respect the child's long term relationship with parents and avoid criticisms of parents to children or reporting discussions with children in a way which could have a detrimental impact on a child.
- 2.2.12. Avoid showing children affidavit material that could have a detrimental impact on a child.
- 2.2.13. Develop options for a child's consideration but respect a child's wish not to express a preference in a matter.
- 2.2.14. Have further contact with a child before agreeing to proposals which are substantially different to those discussed with a child.

- 2.2.15. Act in accordance with the duties of confidentiality to a child and canvas with the child whether there are any matters discussed which the child would wish to be kept confidential.
- 2.2.16. Advise the child of the limits of confidentiality and should circumstances arise, for example, as a result of a lawyer's duty to protect a child where it may be necessary to disclose a confidential communication, liaise with the child about developing a strategy for disclosure.
- 2.2.17. Provide a child with sufficient details to allow contact with a lawyer during the course of a matter and respond promptly to contact from a child.
- 2.2.18. Respond to telephone and other inquiries from a child promptly.
- 2.2.19. Advise children if they are likely to be involved in any report preparation process and explain the use of any such report.
- 2.2.20. Explain final orders to a child and where appropriate during the course of a matter write to older children advising of significant decisions of the court in clear straightforward language.

2.3 Independence and impartiality

A lawyer acting as an Independent Children's Lawyer will:

- 2.3.1. Make applications for the protection of the interests of a child where the evidence in support of an application will be that of an independent and suitably qualified witness but avoid making Applications which are more appropriately made by one of the parties.
- 2.3.2. Ensure the confidentiality of any information that the child communicates unless disclosure to the Court is considered by the Independent Children's Lawyer in the best interests of the child.
- 2.3.3. Advise parties that they should communicate with the Independent Children's Lawyer through their lawyer.
- 2.3.4. Explain to a litigant in person that you are unable to advise about how a case should be conducted but are able to give information about matters that involve, for example, clarifying court procedures and requirements and confirm the scope of this advice to the lawyer for a represented party.
- 2.3.5. In the conduct of the proceedings and at court behave in a non partisan manner in relations with the lawyers for each of the parties and any litigant in person

2.4 Preparing a case for the child

A lawyer acting as an Independent Children's Lawyer will:

- 2.4.1. Make appropriate inquiries and obtain authorities where necessary to speak to and engage with professionals who have knowledge of the particular circumstances of a child.

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- 2.4.2. Liaise with any Family Consultants who have been involved in the matter.
- 2.4.3. Subpoena relevant material and identify appropriate witnesses from whom affidavits can be sought in the child's case.
- 2.4.4. Consider the nature of any expert evidence which is required and ensure such evidence is before that court.
- 2.4.5. Brief only counsel who possess demonstrated high level skill and experience in children's matters in the Family Court (and child representation matters in particular) or demonstrated high level skill and experience in appearing in children's matters in the Family Court and who have completed an accredited child representation course.
- 2.4.6. Make appropriate referrals to Legal Aid NSW family dispute resolution conferences in the course of proceedings and actively promote the use of family dispute resolution prior to hearing.
- 2.4.7. If a matter is referred to FDR the Independent Children's Lawyer will cooperate with the Legal Aid NSW FDR Unit in relation to the arrangements for the conference and participate in the conference in a constructive manner consistent with the philosophy of FDR.

2.5 Briefing experts

A lawyer acting as an Independent Children's Lawyer will:

- 2.5.1. Select an expert approved by Legal Aid NSW according to expertise on issues particularly relevant to the matter or seek prior written approval before engaging any other expert.
- 2.5.2. Endeavour to negotiate agreement about the particular expert and the matters into which the expert will be requested to inquire.
- 2.5.3. Where a party or parties are not in receipt of current grants of legal aid and the report is to be paid for privately:
 - (i) obtain a quote on costs from the expert and seek agreement as to an expert's costs before an application for the appointment of the expert is made;
 - (ii) obtain the costs of an expert from a privately funded party before engaging the expert and hold monies in trust pending receipt of the expert's invoice; and
 - (iii) obtain the costs of an expert's attendance at Court as a witness prior to the hearing and hold monies in trust pending receipt of the expert's invoice.
- 2.5.4. Where a party or parties are not in receipt of current grants of legal aid obtain approval via Grants Online from Legal Aid NSW for the funding of a single expert to be paid in accordance with the Legal Aid NSW scale of fees for psychiatrists/psychologists before making the application to the Court in matters where any other party to the proceedings is legally aided. The request for approval must refer to the allegations or issues which require investigation by the expert and

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include the supporting information required by the Legal Aid NSW guidelines in relation to the appointment of experts in family law matters.

- 2.5.5. Include details for payment of the expert costs in orders.
- 2.5.6. As soon as possible following appointment of the expert, forward a briefing letter to the expert advising of the hearing date, confirming the fees and containing:
 - (i) brief summary of applications before the court;
 - (ii) reference to current arrangements for children; and
 - (iii) court documents received from the parties.
- 2.5.7. Forward a copy of the expert briefing letter to the legal representative/litigant in person and ensure copies of any other correspondence to the expert are also provided to the lawyers or litigants in person.
- 2.5.8. Obtain leave from the court preferably at the time of issuing subpoena for consent to send copies of relevant subpoenaed material to the expert.
- 2.5.9. Critically consider the expert's report and where necessary put further material to the expert or request the expert to provide a supplementary report in the light of matters which may not have been considered in the report.
- 2.5.10. In the event that one or both parties is in receipt of a grant of legal aid, provide a copy of the expert's report to Legal Aid NSW Grants Division immediately upon receipt by the lawyer.

2.6 Court appearances

A lawyer acting as an Independent Children's Lawyer will:

- 2.6.1. Attend interim and final hearings, Legal Aid NSW family dispute resolution conferences, less adversarial trial intake hearings, and any attendances involving submissions or complex arguments. If unable to attend, ensure that an agent is instructed who is on the Legal Aid NSW Independent Children's Lawyer panel.
- 2.6.2. If unable to undertake any of the duties in 2.6.1, contact Legal Aid NSW Grants Division for approval to arrange a transfer of the matter.
- 2.6.3. Advise Legal Aid NSW immediately in the event that an order is made for the discharge of the Independent Children's Lawyer and provide a copy of the order and any related judgment to Legal Aid NSW Grants Division.

2.7 Cost recovery

A lawyer acting as an Independent Children's Lawyer will:

- 2.7.1 Take steps to recover the costs of the appointment of the Independent Children's Lawyer from each non legally aided party by:

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- asking each non legally aided party to pay \$1,650 to Legal Aid NSW at the start of the matter as a contribution towards costs up to the eve of the hearing;
 - ensuring that any request for a waiver of the contribution with supporting information is forwarded to Legal Aid NSW Grants Division for determination;
 - seeking contributions to expert reports and any costs associated with the appointment of the expert, including but not limited to court attendance costs, via costs orders in the order appointing the expert;
 - seeking costs of any interim hearings if appropriate;
 - seeking costs for the hearing including counsel's fees;
 - seeking reimbursement for conduct money and commercial agent fees.
- 2.7.2 Pursuant to 19.04 of the Family Law Rules provide immediately before the first day of the final hearing a written statement of the actual costs incurred by the Independent Children's Lawyer up to and including the final hearing.
- 2.7.3 If the Independent Children's Lawyer forms the view that a costs application should not be pursued in the circumstances of the matter or should be withdrawn seek approval for this proposed course of action from the Legal Aid NSW Grants Division.
- 2.7.4 Report to Legal Aid NSW in relation to the outcome of any costs application at the conclusion of the matter and provide a copy of the orders.

3. Responsibilities to Legal Aid NSW

A lawyer acting as an Independent Children's Lawyer will:

- 3.1 Comply with these practice standards.
- 3.2 Comply with the provisions of the [Legal Aid Commission Act 1979 \(NSW\)](#) and the [policies and guidelines](#) of Legal Aid NSW (as amended).
- 3.3 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 3.4 Comply with the terms and conditions of the grant of legal aid.
- 3.5 Be responsible for the matter and accountable to Legal Aid NSW for any breach of these practice standards including for any work undertaken in the matter by another lawyer or employee of the (your) firm.
- 3.6 Ensure that any applications for legal aid, requests for extensions of funding and requests for reconsideration and review are lodged promptly with all relevant information and supporting material to enable a decision to be made without delay.

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- 3.7 Seek approval of the Legal Aid NSW Grants Division for any disbursements prior to expenditure on the file by obtaining the appropriate grant or extension via Grants Online.
- 3.8 Review all files on completion of the matter to ensure all necessary steps have been taken before notifying the Grants Division that the matter is finalised. When submitting the final claim to the Grants Division the lawyer must complete the file outcome form setting out the steps involved in completion of the matter and the result in the matter.
- 3.9 Ensure prompt payment to experts, witnesses and other third party vendors who have undertaken work pursuant to a grant of aid for that work.
- 3.10 Reassign all pro forma invoices for Counsel's fees to the barrister who has been briefed so that the barrister can claim directly from Legal Aid NSW.
- 3.11 Notify Legal Aid NSW immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter.
- 3.12 Attach a copy of the final orders to the outcome form.
- 3.13 Complete at least three CLE points each year specifically relevant to the practice of representing children.
- 3.14 Accept a minimum of three offers of Independent Children's Lawyer grants in each financial year.

4. Responsibilities to Others

When dealing with other lawyers, Counsel, experts, witnesses and the staff of the Tribunals or Courts or other agencies or institutions, the lawyer will:

- 4.1 Conduct all communication in a courteous, prompt and professional manner.
- 4.2 Comply with time limitations, procedural steps, the practice directions of the Court or Tribunal and any undertakings given to the Court or Tribunal.
- 4.3 Avoid unnecessary expense or waste of time by ensuring that:
 - (i) documents are served or filed on time;
 - (ii) documents served, filed or given to the client are legible;
 - (iii) the client is aware of medical appointments, conferences and hearing dates and understands the importance of attending promptly and on time;
 - (iv) witnesses are aware of conferences and hearing dates and understand the importance of attending promptly and on time;
 - (v) court commitments are accurately diarised.

5. File Management

A lawyer acting as an Independent Children's Lawyer must ensure that:

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- 5.1 Files must be maintained in an orderly manner so that Legal Aid NSW may effectively audit the file if required, and to ensure that another lawyer assuming conduct of the matter may quickly and easily understand its factual basis, the views of the child/ren, the stage the matter has reached and all further action required to run the matter in line with the practice standards.
- 5.2 All documents including:
- (i) correspondence from the Grants Division in relation to the grant of legal aid; and
 - (ii) correspondence received and sent in relation to the matter
- are kept on the file in date order.
- 5.3 Court documents filed, served or issued in the proceedings are kept in a separate bundle on the file in date order.
- 5.4 Clear and legible file notes are kept of all telephone conversations, conferences, meetings with children, meetings with witnesses and experts include:
- (i) date;
 - (ii) name of person spoken to; and
 - (iii) relevant details of the conversation.
- 5.5 Clear and legible file notes are kept.
- 5.6 All court attendances are noted on the file in date order with:
- (i) Coram;
 - (ii) date and venue of court appearance;
 - (iii) the name of the solicitor attending on behalf of the legally assisted person;
 - (iv) other parties' representative/s;
 - (v) summary of any negotiations and orders or directions made;
 - (vi) start and finish time/s of the court attendance; and
 - (vii) the date proceedings have been adjourned to or the outcome of the matter.
- 5.7 All dispute resolution events are noted on the file with:
- (i) date;
 - (ii) start and finish time/s;
 - (iii) location (including if shuttle);
 - (iv) summary of negotiations and outcome of mediation; and
 - (v) the name of all legal representatives attending.
- 5.8 Receipts or other verifying evidence for all disbursements claimed for payment from Legal Aid NSW are retained in a separate section of the file.
- 5.9 Files must include documentation that demonstrates proactive evidence gathering including the issuing of subpoenae, obtaining authorities and communication with experts and other relevant persons.