

## Guidelines on Children or Minors at the Refugee Status Branch

These Guidelines on Children or Minors at the Refugee Status Branch (“Guidelines”) are for refugee and protection officers (RPOs), claimants, their representatives and responsible adults involved in the determination of refugee or protected person status of minors or children before the Refugee Status Branch (“RSB”) of Immigration New Zealand.

They provide general guidance as to how the RSB intends to apply section 375 and other parts of the Immigration Act 2009 consistent with the Refugee Convention and relevant human rights instruments such as the United Nations Convention on the Rights of the Child.

These guidelines were developed in 2016-2017.

### SOURCES

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The main sources informing these Guidelines are:

- The Immigration Act 2009 (“the Act”), in particular sections 375-377 <http://www.legislation.govt.nz/>
- The Convention Relating to the Status of Refugees (“the Refugee Convention”) <http://www.unhcr.org/3b66c2aa10.html>
- The United Nations Convention on the Rights of the Child (“UNCROC”) <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- 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 (“UNHCR Guidelines”) <http://www.unhcr.org/50ae46309.html>
- The UN Human Rights Committee *General Comment No. 12* <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

### DEFINITIONS

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*Minor:* The Act defines a **minor** as any person who is under 18 years of age and not married or in a civil union.<sup>1</sup>

*Child/ren:* The Act does not define child. The UNCROC defines a **child** as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. For the purposes of these Guidelines, the terms minor and child are used interchangeably in the sense of a person under 18.

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<sup>1</sup> Section 375(1),

*Dependent child:* The Act states that “a **dependent child**, in relation to any person, means a child under 18 years of age who is not married or in a civil union and who is dependent on that person, whether or not the child is a child of that person.”<sup>2</sup>

*Unaccompanied or separated children:* The Act does not refer to **unaccompanied or separated children**. The UNHCR Guidelines define separated children as those who are “separated from both their parents or from their previous legal or customary primary caregivers but not necessarily from other relatives.”<sup>3</sup> The UNHCR Guidelines define “unaccompanied children” as those who are separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.<sup>4</sup> These guidelines apply to all minors and children, whether unaccompanied, separated or with a parent or guardian.

*RSB* means the Refugee Status Branch.

*RPO* means a refugee and protection officer.

*MSD* means the Ministry of Social Development

*Claim* means a claim for refugee and protected person status.

*Claimant* means a person who is making a claim.

*Refugee or protected person status* refers to the grant of refugee or protected person status by an RPO under the Act. In accordance with the Act an RPO can also make decisions as to whether a person’s refugee or protected person status should be cancelled or ceased.<sup>5</sup>

*Matter* refers to a procedural or other issue relating to refugee or protected person status that is not the formal decision on a claim.

*Asylum* means refugee or protected person status, and

*Asylum seeker* has the same meaning as *claimant*.

## PRINCIPLES

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The following principles inform these guidelines:

- *The role of the RPO is to determine whether the child is in need of international protection. The RPO should set a process which best enables that determination to be made*
- *The best interests of the child should be a primary consideration in any official decision affecting them*
- *A child has a right to be heard, and should be given an opportunity to express his or her views*
- *A child has a right to have their claim assessed independently*

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<sup>2</sup> Section 4

<sup>3</sup> At [6]

<sup>4</sup> At [6].

<sup>5</sup> The Immigration and Protection Tribunal also has the jurisdiction to grant refugee or protected person status under the Act by way of appeal of the decision of the RPO.

## **1. LODGING A CLAIM**

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- 1.1 Every minor has the right to lodge a claim and consent of a parent is not required.
- 1.2 A child can lodge a claim on their own behalf, through their parent(s) or through a responsible adult or other person. Whether the claim or subsequent claim can be considered is subject to the limits imposed by the Act.
- 1.3 All members of a family who are seeking asylum in New Zealand must submit their own claim form and will have their own individual decision.
- 1.4 There is no principal applicant or derivative status in a claimant family group. The claims of all family members are assessed and a decision made, so far as is practicable, independently of each other.

## **2. REPRESENTATION**

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### **Representation generally**

- 2.1 A minor must have a responsible adult to represent their interests for the purposes of the refugee or protected person status or matter.
- 2.2 The responsible adult's role is to elicit the views of the child. The extent that the child has a responsibility to establish their claim will depend on factors such as their age and maturity. Both the RPO and the responsible adult must consider the obligation to obtain the child's views and ensure they are taken into account.
- 2.3 The responsible adult is not the child's lawyer for the purposes of the refugee or protected person status determination, and may instruct a lawyer for the child.
- 2.4 The RPO should confirm who the responsible adult is prior to making a decision on their claim.

### **The parent represents the child's interests**

- 2.5 A minor's parent is usually the appropriate responsible adult.
- 2.6 The Act refers to "the parent", but in many cases, both parents will be present. The RPO should consult with the child and parents as to who will be the responsible adult. There is no presumption as to which parent should be the responsible adult, provided the parent can perform the role and duties of the responsible adult as defined in the Act.

2.7 Although only one parent may be nominated as the responsible adult, both parents, where practicable, may contribute to the determination of the child's claim or status.

Reference: Section 375 subsection (1) of the Act:

- (a) the minor's interests are to be represented by the minor's parent; and
- (b) the parent is the responsible adult for the minor for the purposes of this section and sections 376 and 377.

References:

Section 375(3) of the Act:

The responsible adult is to be nominated by the Tribunal, an immigration officer, a refugee and protection officer, or a Judge, as the case may require.

Section 375(4) of the Act:

A person may be nominated as a responsible adult only if they are ... a parent, guardian, or relative of the minor.

### **If there is no parent**

2.8 Where a minor does not have a parent, the RPO must nominate a responsible adult to perform that role.

2.9 A person who is in New Zealand on a temporary visa or is required to hold a visa but does not hold one cannot be a responsible adult unless she or he is the child's legal guardian.

2.10 Where practicable, the child's views should be considered when the RPO is deciding whom to nominate as the responsible adult.

2.11 In determining who is a person "having responsibility for the child or who is otherwise suitable" as well as the criteria in the Act, the RPO may consider:

- is the person known to and trusted by the child
- is the person from the same cultural group or speaks the child's language
- whether the person is able to perform the roles and duties of a responsible adult as set out in the Act
- whether the person is able to act independently in the child's best interests

Reference:

Section 375(4) of the Act:

(4) A person may be nominated as a responsible adult only if—

- (a) the person is 20 years of age or more; and
- (b) except in the case of a parent or guardian of the minor, the person is a New Zealand citizen or a resident or permanent resident; and
- (c) the person is—
  - (i) a parent, guardian, or relative of the minor; or
  - (ii) a person suggested by the minor; or

- (iii) any other person having responsibility for the minor or who is otherwise suitable to represent the minor's interests; or
  - (iv) if no appropriate person is otherwise available under this subsection, a person designated by the chief executive of the department for the time being responsible for the administration of the Children, Young Persons, and Their Families Act 1989; and
- (d) except in the case of a parent or guardian of the minor, the person agrees in writing to be nominated as a responsible adult.

### **Substitute responsible adult**

2.12 In some cases, the child's parent or current or suggested responsible adult may not be suitable, and the RPO must nominate an alternative or substitute person to represent the child.

2.13 This may arise, for example where:

- there is an actual or potential conflict of interest between the child and one or both parents or the suggested responsible adult, such as a custody dispute
- there are care and maintenance issues which may indicate either or both of the parents or current responsible adult are not able to represent the child's interests
- there is evidence that the current responsible adult is not willing or able to fulfil their role as required by the Act

Reference: Section 375(5) of the Act

Should the need arise, and after such consultation as is reasonable in the circumstances, a substitute responsible adult may be nominated in accordance with the requirements of this section.

2.14 In determining whether a substitute responsible adult should be nominated, the RPO will undertake reasonable consultation. This may include, for example, seeking the views of the minor, the minor's parent or parents (if available), MSD, a teacher, a psychologist or another official.

2.15 It may be that the conflict of interest issues can be managed without the need to nominate a substitute responsible adult.

## **3. LEGAL REPRESENTATIVE**

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3.1 It may be appropriate for the child to have their own legal representative independent of the parent/s for the purposes of the refugee and protected person status determination or matter.

3.2 Instructing the legal representative will be a matter for the responsible adult and the child.

## 4. ROLE OF THE RESPONSIBLE ADULT

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### Formal and Procedural Functions

- 4.1 The Act sets out some required actions for any responsible adult:
- providing an address for service to the RPO for the purpose of communicating with them about the minor
  - accepting on the minor's behalf any document which is required to be served or notified to the minor
  - attempting to elicit the views of the minor and make them known on behalf of the minor, where appropriate.
- 4.2 The role of responsible adult is solely about the determination of the child's refugee or protected person status claim or matter.

### Eliciting the child's views

- 4.3 An important role of the responsible adult is to elicit the views of the minor.
- 4.4 A minor must be given an opportunity to express their views, either directly, through interview or another way such as a statement or through their responsible adult.
- 4.5 The responsible adult and the RPO should presume the minor can express their views, and consider how this could be done effectively.

#### References

Section 376(e) of the Act:

to the extent practicable given the level of maturity and understanding of the minor, the responsible adult must attempt to elicit the views of the minor and make them known on behalf of the minor, where appropriate.

Section 375(2)(a) of the Act:

an opportunity must be given, so far as practicable, for the minor to express his or her views on the matter, whether personally or through a responsible adult.

## 5. INTERVIEWING CHILDREN

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5.1 How a child's views are to be elicited will depend on the circumstances. The child may express them directly, via an interview or in some other way.

5.2 The RPO may consider that the best way to seek the child's views is to talk to them, and may request an interview with the child.

5.3 When determining whether to seek an interview, the RPO should consider:

- The child's views on being interviewed
- The age and maturity of the child
- The opinion of the parent/responsible adult
- The child's understanding of the purpose of the interview, the process and the decision that is to be made
- The nature of the material or evidence about which the child's views may be sought
- Who else could or should be present in the interview – such as a trusted friend or the parent or responsible adult
- Whether the support person or responsible adult should attend for all or part of the interview

5.4 The nature and length of the interview should be adjusted according to the child's age and maturity.

5.5 Children may be vulnerable and care should be taken not to expose them to situations where they are unnecessarily re-traumatised or feel obliged to discuss matters they do not wish to discuss. The RPO should be cautious about interviewing a young child who has suffered severe trauma. The RPO may seek professional assistance, such as a psychologist, or other means of eliciting the information relevant to determining the claim.

5.6 In some circumstances the RPO may need to interview the child independently, or seek a person other than the parent to elicit the child's views, for example where:

- the child was a direct witness to events relevant to the claim or matter
- there is a conflict or potential conflict of interest between the child and the parent
- there are issues or potential issues relating to trafficking or exploitation or criminal matters or exclusion; and
- it is most appropriate to elicit this information through an interview.

5.7 A child's consent to be interviewed should be obtained. The nature of what consent requires will be related to their age and maturity. In most cases, consent includes an understanding of the purpose of the interview and how their information will be used.

5.8 A child can decline to be interviewed and can stop the interview at any time.

## **6 OTHER MECHANISMS FOR SEEKING THE CHILD'S VIEWS**

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**Ways that a child can express their views.**

6.1. The RPO and responsible adult may seek evidence or information relevant to the child's claim or matter from other sources, such as parents, siblings, other family

members, members of the child's community and professionals, such as teachers, psychologists or medical persons.

6.2. A child may submit a written statement or other document to express their views.

6.3. The decision as to the process to be set is the RPO's, after taking the child's and the responsible adult's views into account, as well as any other relevant information.

6.4. The process to be set is one which is in the child's best interests in order to properly determine their claim or matter.

## **7. THE ROLE OF PARENTS AND RESPONSIBLE ADULTS**

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7.1 Parents and those legally responsible for a child have rights and duties with respect to the well-being of the child and have the right to give direction to the child in that regard.<sup>6</sup> The role of the parent or responsible adult in the claim process is to represent the child's interests.<sup>7</sup>

7.2 The RPO should be sensitive to the role of parents and explain the legal requirement to provide an opportunity for the child to be heard and for his or her views to be considered. The RPO should discuss the process with the parent and keep them informed of progress.

7.3 The RPO should advise the parent that the weight to be given any information the child provides will vary according to the child's age, maturity and understanding, and the circumstances of the case.

## **8. CONFIDENTIALITY**

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8.1 All claimants have a right to confidentiality over the information they provide as part of their claim.<sup>8</sup> This may include a right for their information not to be shared with other family members.

8.2 In general, adult family members claiming as a family group are asked to sign privacy waivers with respect to one another and for any children for whom they are the responsible adult.

8.3 There may be circumstances where it is not appropriate for a child's information to be shared with others, and vice versa. The continuing applicability of any privacy waiver should be considered in light of such circumstances.

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<sup>6</sup> See for example UNCROC Articles 5 and 3(2).

<sup>7</sup> Section 375(1).

<sup>8</sup> See section 151(1) of the Act subject to the limits in section 151(2).



8.4 The responsible adult may express his or her views to the RPO as to the sharing of the child's information with other claimants, but the decision as to whether the information should be shared is the responsibility of the RPO.

8.5 All claimants have the right to have their claim or matter determined fairly and general principles of natural justice apply to all, including the opportunity to respond to any prejudicial information which may be used in the decision.

## **9. THE CHILD'S BEST INTERESTS**

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9.1 Certain harms will have a different impact on a child than an adult, and there may be child-specific forms of harm for example female genital mutilation (FGM), discrimination in social services and conscription.

9.2 The RPO's assessment as to the type and overall impact of the harm on the child and whether it meets the relevant criteria under the different conventions is an objective one.

9.3 In the context of refugee and protected person status determination, it is in the child's best interests that the process adopted enables the child to express his or her views so that due weight can be given those views, having regard to the child's age, maturity and understanding.

9.4 The process set is to enable the RPO to determine whether the child is in need of international protection according to the criteria in the Act. It is not the RPO's role to make a determination regarding in which country the child should live.

## **10. AN INDEPENDENT ASSESSMENT**

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10.1 A refugee and protected person status decision on a family group which includes a child should where appropriate consider the circumstances and risks to the child from their perspective, and independently of the parents or other family members.

### Reference

UNHCR Guidelines: The principle of the best interests of the child requires that the harm be assessed from the child's perspective.