

16 December 2016

His Hon Judge Walker
Principal Youth Court Judge
DX SX11240
Wellington 6143

By email: walkerj@courts.govt.nz

Dear Judge Walker

Appointment and Review Procedures for Youth Advocates — revised draft July 2016

Thank you for giving the New Zealand Law Society the opportunity to comment on the revised draft Appointment and Review Procedures for Youth Advocates, July 2016 (Procedures).

The Law Society has consulted its Regulatory team and Youth Justice Committee in developing these comments, and recommends improvements to the Procedures and other matters the Youth Court may wish to consider during the appointment and review process.

Complaints about Youth Advocates

The Procedures detail the constitution of panels to consider appointments to the Youth Advocate list where a vacancy exists (Appointment Panel: paragraph 3), the review of the list at 3-yearly intervals (Review Panel: paragraph 4), and consideration of specific complaints about Youth Advocates (Complaint Panel: paragraph 5). The constitution is the same for the three panels.

It is likely that, outside of the large metropolitan areas, actual or perceived conflicts of interest may arise between the Youth Advocate and appointees to a Complaint Panel. Consideration could be given to amending the Procedures to provide for the constitution of a Complaint Panel that is different to the other panels. Alternatively, complaints could be referred to a Complaint Panel constituted by a Youth Court in a different area to the Court that the Youth Advocate practises in. At a minimum, the Law Society recommends providing a discretion for the appointment to a Complaint Panel of a Youth Advocate from another Youth Court or a Law Society nominee.

Request to the Law Society for complaint information

Inquiries are sometimes made to the Law Society about a Youth Advocate's regulatory history (e.g. for the purposes of appointment to a list) or to inquire if a complaint about the Youth Advocate has been received (e.g. to assist in determining the progression of a complaint received by the Youth Court).

The Law Society recognises that Youth Advocates deal with vulnerable people and that checking a practitioner's regulatory history may be important. However, the Lawyers and Conveyancers Act 2006 (LC Act) is specific about who can receive decisions of standards committees (see section 158), as are the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees)

Regulations 2008 (see regulation 31). Section 188 of the LC Act imposes strict confidentiality provisions unless a standards committee makes a publication order.

Consideration could be given to requesting lawyers applying to be a Youth Advocate to declare their complaint history, as a relevant factor for appointment (proposed paragraph 3.7), by way of statutory declaration:

I have not been the subject of any upheld complaint or proven disciplinary action by any former District Law Society or by the New Zealand Law Society or an equivalent overseas body, nor are there any unresolved complaints against me

OR

Details of upheld complaints and proven disciplinary action or unresolved complaints against me are as follows: [insert details]

An alternative would be to require an applicant to provide a certificate of standing issued by the Law Society. This sets out whether there are any upheld and open complaints and Disciplinary Tribunal matters from 1 August 2008, and any disciplinary charges upheld by the former New Zealand Law Practitioners Disciplinary Tribunal. However, this does come with a small cost to the practitioner.

Definitions

Proposed paragraph 5.6 provides the grounds for recommended action following a complaint. The grounds include “professional misconduct” and “conduct unbecoming a Youth Advocate”. The Law Society recommends these definitions are aligned with the respective provisions in sections 7 and 12 of the LC Act.

In addition, the first bullet point in paragraph 5.6 should be amended by removing the reference to the “Roll of legal practitioners” and replacing it with the “roll of Barristers and Solicitors of the High Court of New Zealand”.

Timeframe for conclusion of a complaint

Proposed paragraph 5.3 provides that, where a Youth Advocate is suspended from the list pending further investigation and resolution of the complaint, the investigation and resolution of the complaint shall be completed within one calendar month, if reasonably practicable. This is a very challenging timeframe and the Law Society recommends the timeframe be amended to “as soon as practicable”.

Notification of complaint to the Lawyers Complaints Service

Where a complaint involving conduct that may breach the LC Act – such as professional misconduct or conduct unbecoming of a Youth Advocate such that it constitutes unsatisfactory conduct in terms of section 12 – has been investigated and upheld, the Lawyers Complaints Service (LCS) should be notified. Other conduct of the types listed in proposed paragraph 5.6 may warrant referral to the LCS at the Court’s discretion.

Procedural fairness

Currently, where a Youth Advocate applies for the review of a decision not to be included on a list, they are entitled to receive a copy of the information provided to the Principal Youth Court Judge and have a right of reply (paragraphs 3.8 and 4.8). These entitlements are not included in the proposed Procedures.

In addition, statements that the Appointment and Review Panels shall observe principles of natural justice currently included in paragraphs 1.2 and 4.1 are not included in the proposed Procedures.

The Law Society recommends these provisions are retained so that procedural fairness is explicitly provided for.

Constitution of the Appointment, Review and Complaint Panels

Proposed paragraph 3.5 removes the appointment of a representative from the NZ Police to the three panels. The Law Society understands this is intended to avoid any perceived or actual conflict arising from the adversarial relationship between prosecution and defence counsel. The Law Society understands this view but considers that the focus in the Youth Court on the management of youth offenders results in a more collaborative relationship, and any risk of perceived or actual conflict must be balanced against the valuable knowledge and experience of local practice that NZ Police representation provides.

The Law Society therefore recommends retention of NZ Police representation on the panels. Alternatively, consideration could be given to including a discretion for the Administrative Youth Court Judge (AYCJ) to consult with Youth Advocates and other representatives in the area, and to make additional appointments, such as NZ Police representatives, to the panels where appropriate in the circumstances.

Transfer of a Youth Advocate to a new region or a new court

Proposed paragraph 6 provides for the transfer of Youth Advocates to a new region or court, and requires the procedures set out in paragraph 3 (appointment to the list where a vacancy exists) to be followed. The Law Society considers that it should be clear that the Court is able to appoint a Youth Advocate in a particular case whilst the procedure outlined in paragraph 6.1.2 is pending. A reference to the ability of the Court to appoint from outside the list, stated in proposed paragraph 2.3, could be included at proposed paragraph 6.1.1.

Conditions of Appointment — Category 3 or higher offences

Proposed paragraph 3.8 states that appointment to a list may be subject to specified conditions, for example, whether a Youth Advocate may be assigned in respect of category 3 or higher offences, or whether specific training and mentoring programmes need to be completed. It should be made clear that Legal Aid Provider Approval Level (PAL) 3 is one way a Youth Advocate can demonstrate sufficient competence and experience to be assigned category 3 or higher offences. A Youth Advocate without PAL 3 approval may be able to demonstrate this by providing case examples and work samples to the Appointment or Review Panel. Mentoring and supervision of junior counsel by senior Youth Advocates should be encouraged through the appointment and review process.

Administrative Youth Court Judges

Administrative Youth Court Judges (AYCJ) have a number of responsibilities under the Procedures. It would be helpful if there was reference in the Procedures to a list of AYCJ held, for example, on the Youth Court website.

Law Society references

The references to the “local District Law Society” at proposed paragraphs 2.3, 3.2 and 4.1 should be replaced with “local branch of the New Zealand Law Society”.

Training and education

Proposed paragraph 3.7 provides for a list of factors to be taken into account when appointing to or renewing a list. This includes the factor “relevant qualifications, and training and commitment after appointment to attend all relevant training and education programmes offered by the New Zealand Law Society at a local, regional or national level.”

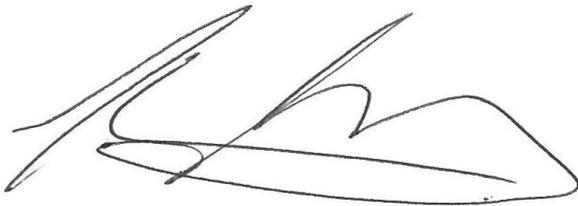
The Law Society’s training provider, NZLS Continuing Legal Education Ltd, would be happy to liaise with the Court to provide accessible training, such as via webinars. The Youth Justice Committee suggests that introductory training could be provided for lawyers wishing to become Youth Advocates, in addition to targeted, or top-up training, for practising Youth Advocates.

In addition to training provided by NZLS CLE Ltd, consideration could be given to encouraging Youth Courts to provide general education or training where specific local needs are identified, for example cultural awareness training.

Conclusion

I hope these comments are helpful to the Court. Please contact the secretary of the Youth Justice Committee, Karen Yates (karen.yates@lawsociety.org.nz/04 4632962) if we can provide further assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President