

13 August 2019

Oranga Tamariki
Wellington

By email: darius.paschke@ot.govt.nz

Regulations for the appointment of youth advocates under the Oranga Tamariki Act 1989

1. The New Zealand Law Society welcomes the opportunity to comment on proposals for regulations to be introduced under section 447(1)(db) of the Oranga Tamariki Act 1989 (the OT Act). The Law Society has consulted its Youth Justice Law Reform Committee in providing feedback on the proposals.
2. The proposals are not yet available in draft format, but relate to:
 - a. the process for the Chief Executive of Oranga Tamariki (OT) to appoint youth advocates under section 248A of the OT Act 1989, in relation to Intention to Charge Family Group Conferences (ITC-FGCs); and
 - b. the fees and disbursements payable to youth advocates appointed by both the Youth Court and the Chief Executive of OT.

Appointment process

3. In respect of the appointment process, OT's proposal is:

"To take legislative provisions for the appointment of youth advocates by the Youth Court, in section 323, and reflect these in regulations for the appointment of youth advocates by the CE of Oranga Tamariki. There are two parts to this:

1. *Section 323(2) requires that a youth advocate is suitably qualified to represent the child or young person. This requirement is met by appointing youth advocates from the youth advocate pool administered by the Ministry of Justice. We will be appointing youth advocates from this pool as well.*
2. *Section 323(3) requires that where a young person has been represented by a youth advocate previously, that youth advocate should, where possible, be appointed to represent the child or young person again. We consider this is important to ensure continuity for young people, allow relationships between young person and youth advocate to build, and to align with the Youth Court's system."*
4. The Law Society agrees that it is appropriate to reflect sections 323(2) and (3) in the regulations governing appointment of youth advocates by the OT Chief Executive.
5. For the reasons given below, this is subject to ensuring that youth advocates appointed hold the appropriate PAL (Provider Approval Level) level for the offence in question.

6. In that regard, we note that:
 - a. Section 323(2) requires “*suitably qualified*” practitioners to be appointed “*so far as practical*”. Arguably this allows scope for a youth advocate who does not hold a suitable PAL level to be appointed depending on the practicalities on a case by case basis.
 - b. In respect of section 323(3), if new charges are added that are at a higher PAL level than is held by the youth advocate who was previously appointed, then it would be more appropriate to appoint a new youth advocate at the correct PAL level, instead of preferring the continuity of appointing the original youth advocate.
7. In practice, the appointment of youth advocates under section 323 is informed by the Appointment and Review Procedure for Youth Advocates, issued by the Principal Youth Court Judge in April 2017 (the Manual).¹ Section 4 of the Manual is headed “*Procedure for Appointment of New Youth Advocates to the Youth Advocate List where a Vacancy Exists*”, and paragraph 4.8 notes the factors that should be taken into account when considering the criteria under section 323(2) of the OT Act. It includes: “*knowledge of, and experience in, criminal law (see 4.11 and 4.12 below)*”.
8. Paragraphs 4.11 and 4.12 provide:

“A Youth Advocate who is a legal aid provider would be able to demonstrate competence to act in a particular PAL category of case by the fact of having the corresponding legal aid lead or supervised provider approval.

A Youth Advocate who is not a legal aid provider may be able to demonstrate competence by meeting the corresponding competence and experience requirements set out in the Schedule to the Legal Services (Quality Assurance) Regulations 2011 and by providing case examples and work samples to the Appointment or Review Panel.”
9. We note that approval for the OT Chief Executive to instruct barristers sole was granted by the Law Society on 16 April 2019, on the basis that:

*“the approval is for the appointment of youth advocates only and the appointments are made from the Youth Advocates lists maintained by the Court Services Manager of each Youth Court (made following the Appointment and Review Procedure for Youth Advocates issued by the Principal Youth Court Judge) and on the same basis as current Youth Advocate appointments made by the Youth Court.”*² (emphasis added)
10. The requirements in the Manual, referred to in paragraphs 7 – 8 above, should therefore be mirrored in the proposed regulations. That would ensure that youth advocates with appropriate PAL levels are appointed by the OT Chief Executive from the list of available youth advocates.

Payment of youth advocates

11. Currently, the payment process for youth advocates is as follows:
 - a. In respect of general appointments by the Youth Court, section 325(1) provides that fees and expenses are paid in accordance with regulations made under the Act. No such regulations have been made to date, and the fees rates are set in Ministry of Justice Practice Notes. (The

¹ https://www.lawsociety.org.nz/__data/assets/pdf_file/0006/69765/YthAdvocates.pdf

² <http://www.lawsociety.org.nz/news-and-communications/news/oranga-tamariki-chief-executive-youth-advocate-appointments-approved>

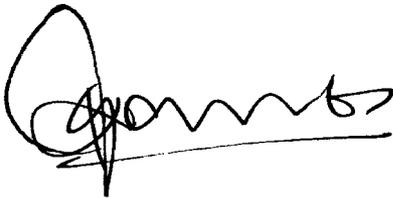
current rate is \$158.48 an hour, and the number of hours payable is limited, subject to additional time being approved at the discretion of the court Registrar.)

- b. In respect of appointments by OT, section 447(1)(db) provides that regulations may be made prescribing the rates payable in relation to ITC-FGCs under section 248A.
12. OT proposes to introduce regulations to specify the payment rates of fees and disbursements payable under both sections 325(1) and 447(1)(db). OT considers this will streamline the current process of paying Youth Advocates' fees and disbursements, rather than making a material change.
13. The Law Society agrees that administrative streamlining of the payment process is desirable. However, it is important the new process retains the flexibility of the current process. The current process includes discretion to approve fees above the default time limit (6 hours) and accommodates advance approval and payment of costs estimates, and this flexibility is valuable in the context of youth advocates' practices. We would appreciate the opportunity to comment on the proposed regulations when drafted, to ensure these considerations have been incorporated.

Conclusion

14. If you wish to discuss these comments, please do not hesitate to contact the convenor of the Law Society's Youth Justice Committee, Rebecca Plunkett, via Law Reform Adviser Dunstan Blay, (dunstan.blay@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Tim Jones', with a horizontal line underneath.

Tim Jones
Vice President