

10 March 2017

His Hon Judge Fitzgerald
Private Bag 92069
Auckland

By email: fitzgea@courts.govt.nz

Dear Judge Fitzgerald

Youth Advocate categorisations

Thank you for your letter of 13 December 2016 requesting feedback from the New Zealand Law Society's Youth Justice Committee about the categories of work Youth Advocates are approved to accept in terms of the Criminal Procedure Act 2011 (CPA).

As you are aware, the Law Society wrote to Principal Youth Court Judge Walker on 27 February 2017, recommending minor amendments to the provisions relating to the conditions of appointment to the Youth Advocates list and categories of work that Youth Advocates may be assigned by the Court, set out in paragraphs 4.9.2 and 4.11 of the revised draft of the Appointment and Review Procedures for Youth Advocates – February 2017 (draft Procedures). The following comments are provided in order to assist the Court with implementing these provisions so that the appointment process is fair and robust, and ensures that work is assigned to Youth Advocates who have the appropriate level of knowledge, experience and skills.

Appointment framework

Section 323 of the Children, Young Persons, and Their Families Act 1989 provides for the appointment by the Court of a Youth Advocate to represent a child or young person who has been charged with an offence and where no legal representation has or will otherwise be arranged. Subsection 323(2) provides:

Where the court appoints a barrister or solicitor under subsection (1), it shall, so far as practicable, appoint a barrister or solicitor who is, by reason of personality, cultural background, training, and experience, suitably qualified to represent the child or young person.

In addition to these criteria, proposed paragraph 4.8 of the draft Procedures outlines a number of factors that the Appointment Panel will take into account when making recommendations for appointment to the Youth Advocate list. The relevant factors are:

- knowledge of the objects, principles and provisions of the Act, including a knowledge of the provisions relating to child offenders;
- knowledge of, and experience in, criminal law;

- knowledge of police obligations and requirements as they apply to the arrest, questioning and processing of young people;
- knowledge of the roles of the various participants in the youth justice system;
- knowledge of care and protection issues as they apply to youth justice procedures; and
- relevant qualifications, and training and a 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 factors outlined in the draft Procedures, above, do not prescribe minimum standards or competencies that a Youth Advocate must be able to demonstrate to be included on the list.¹ A Court must be satisfied in each case that the Youth Advocate appointed under section 323(1) has sufficient knowledge, experience and skills to represent the particular young person in the particular proceedings. In the absence of prescribed standards and to ensure efficiency in the section 323(1) appointment process, it is appropriate for the Court to develop categories of work that Youth Advocates can be assigned according to their competency level.²

Categories of offences

The categories of offences defined in section 6 of the CPA are as follows:

- Category 1 – non-imprisonable offences other than infringement offences or offences punishable by a community-based sentence;
- Category 2 – offences punishable by less than 2 years’ imprisonment or a community-based sentence;
- Category 3 – offences punishable by 2 years’ imprisonment or more, excluding Schedule 1 offences;
- Category 4 – Schedule 1 offences.

The Law Society agrees with Your Honour that the categories of offences do not necessarily fit the Youth Court context very well. In addition, the categories of offences do not in themselves provide a good reference point for determining competence.

¹ See for example, the Massachusetts Committee for Public Counsel Services “Performance Standards Governing Representation of Indigent Juveniles in Delinquency, Youthful Offender, and Criminal Cases” <https://www.publiccounsel.net/ya/wp-content/uploads/sites/6/2014/11/Juv-Del-Performance-Standards-10-22-14-FINAL.pdf> and the Bar Standards Board of England and Wales “Youth Proceedings competencies” February 2017 https://www.barstandardsboard.org.uk/media/1821763/bsb_youth_competencies_2017_for_website.pdf.

² Note also that Clause 119 of the Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill enables regulations to be made prescribing eligibility criteria for appointment of a Youth Advocate under proposed section 248A of the Act to represent a child or young person charged with an offence punishable by imprisonment of 10 years or more at an intention to charge family group conference.

Demonstrating competence in the youth justice jurisdiction

As Youth Advocates are first and foremost tasked with assisting young people in terms of their criminal culpability, the Law Society is of the view that Youth Advocates must be able to demonstrate competencies in the practice of criminal law. Although a particular case may not proceed to trial, Youth Advocates must have sufficient competence to advise on the appropriateness of the charges laid, sufficiency of evidence, plea, and any actions taken in relation to the consequences of the offending.

The Law Society also considers that a Youth Advocate representing a young person should be able to demonstrate the same level of competence as a lawyer representing an adult client on legal aid faced with the same charge.

The Legal Aid quality assurance framework prescribes minimum standards for legal aid providers and a system of approvals that accord with legal competence. The experience and competence requirements for criminal matters are included in the Schedule to the Legal Services (Quality Assurance) Regulations 2011 (Regulations). The Provider Approval Levels (PAL) for criminal cases are as follows:

- Provider Approval Level 1 – a Judge-alone trial proceeding which is not a Crown prosecution (i.e. offences where the maximum penalty is 10 years' imprisonment and not jury trial);
- Provider Approval Level 2 – any proceeding that is a Crown prosecution and where the maximum penalty is 10 years' imprisonment (i.e. Judge-alone and jury trials);
- Provider Approval Level 3 – any proceeding that is a Crown prosecution and where the maximum penalty is more than 10 years' imprisonment but is not a Provider Approval Level 4 proceeding;
- Provider Approval Level 4 – Schedule 1 CPA offences and offences punishable by life imprisonment, preventative detention or offences to which section 86D of the Sentencing Act 2002 apply.

The PAL criminal categories provide a logical reference for assigning categories of work to Youth Advocates. The demarcation between Judge-alone and jury trials, and between PAL 3 and PAL 4 levels of proceedings, reflect the different complexity of cases and levels of competence needed in both the criminal and youth justice jurisdictions.

It is desirable to maintain continuity of representation throughout proceedings, as far as possible. Correlating the categories of work assigned to Youth Advocates with the PAL categories would impact on this principle. For example, if the Court initially appoints a Youth Advocate who is approved to accept work to the equivalent competence of PAL 1 and a jury trial is subsequently elected or directed, a Youth Advocate with PAL 2 or higher approval would then need to be appointed. However, the Law Society considers that ensuring competent representation at this level outweighs the benefits of maintaining continuity.

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 Regulations and by providing case examples and work samples to the Appointment or Review Panel.

In addition to demonstrating competencies in the practice of criminal law, it is important that a Youth Advocate can demonstrate knowledge of care and protection issues as they apply to youth justice procedures given the prevalence of young people with care and protection issues in the youth justice system.

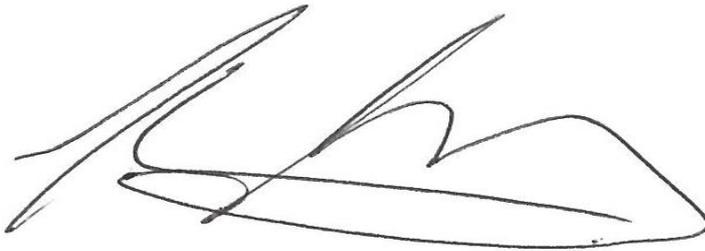
Training and supervision

Mentoring and supervision of junior counsel by senior Youth Advocates should be encouraged through the appointment and review process. This would enable Youth Advocates to work towards approval for higher categories of work and provide for succession planning.

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 be 'Kathryn Beck', written in a cursive style.

Kathryn Beck
President

Cc: Principal Youth Court Judge Walker