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Oranga Tamariki (National Care Standards) Regulations 2018 – consultation draft regulations

The New Zealand Law Society appreciates the opportunity to comment on the consultation draft *Oranga Tamariki (National Care Standards) Regulations 2018* (draft regulations). The Law Society's Family Law Section has considered the draft regulations and comments are set out below.[1]

1. General comments

Guardianship

The regulations as currently drafted raise a significant concern relating to guardianship matters: they appear to conflate the legal concepts of "custody" and "guardianship". In legal terms, the concepts are distinct and there are significantly different legal consequences flowing from them. This will need to be resolved before the regulations are finalised and promulgated.

The draft regulations deal with a number of matters that require the involvement and consent of guardians (such as significant decisions regarding a child's health or education), and guardianship decisions need to be made conjointly with the informed consent of all guardians. There appears to be an assumption that the chief executive will have guardianship status, allowing guardianship decisions to be made. However, this will not always be the case:

- A child may enter "care" in a number of ways. For example, there may be a section 78 or 101 custody order in place that grants custody to the chief executive (under section 78) or to another person (under section 101). The effect of a custody order is that person will have the role of providing day-to-day care for the child as if a parenting order had been made under section 48(1) of the Care of the Children Act 2004 (COCA, section 104). Such an order does not confer guardianship rights and obligations in relation to guardianship matters.
- In respect of a section 101 order, these are often but not always accompanied by a guardianship order under section 110. If there is no section 110 order, the chief executive will need to be appointed as a guardian under section 110 or apply to the Family Court under section 32 of COCA

[1] For readability, references in this submission to "child" should be taken as including "young person".

for the child to be placed under the guardianship of the Court. (This issue may be overcome when section 110AA is brought into force which gives the Court power to make an interim guardianship order to address guardianship matters, in the quite limited circumstances that section will make provision for.)

- A child or young person may also enter "care" via a temporary care agreement (section 139) or an extended care agreement (section 140 and 141). The effect of an agreement (section 148) is that the caregiver will have the same powers and responsibilities as if the child had been placed in custody under a section 101 order.
- A temporary care agreement confers no guardianship status. The chief executive will have to separately address guardianship issues to the extent necessary by seeking consent from the other guardians.
- An extended care agreement must contain provisions relating to the educational, social, religious and cultural needs of the child, a programme for the provision of services and assistance for the benefit of the child, the rights and obligations of the parents or guardians, and access to the child by the parents, guardians or any other person (section 146(d)).

The regulations cover a number of matters which require the involvement and consent of the child's legal guardians, but the draft regulations have not provided for this.[2] This concern arises, for example, in relation to the following:

- **Education needs: regulation 10**

  Regulation 10(a) outlines the process by which the chief executive ensures that the child's education needs are assessed. There is no provision for parental or guardianship involvement or consent.

- **Mandatory early childhood education: regulations 36, 37**

  Regulations 36 and 37 impose mandatory early child education. This intrudes on guardianship decisions regarding a child's education. It removes parents' and caregivers' choices about early childhood education for the children in their care.

- **Health needs: regulation 11**

  Regulation 11 outlines the process by which the chief executive ensures that the child's health needs are assessed. The regulation does not address consultation with and decision-making by a guardian (this will need to be done conjointly if the chief executive is a guardian of the child).

Guardianship matters are discussed in more detail in section 2, below.

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[2] Apart from regulation 44(2)(i), which notes that information to be provided to prospective caregivers should include information about "the decisions a caregiver can *and cannot make* … about day-to-day care arrangements" (emphasis added).

Application of the regulations

Regulation 3(1) states that "These regulations apply in respect of a child or young person, in, *or about to enter into*, the care and custody of the chief executive …" (emphasis added).

It is unclear how the regulations can apply to a child about to enter state care. The meaning of chief executive in regulation 5 is in relation to a child or young person *in* the care and custody of the chief executive, not a child or young person *about to enter* into the care and custody of the chief executive. Regulation 3 should be amended by deleting the words "or about to enter into".

2. Specific comments

Part 1: Needs Assessments, plans, visits to, collection of information about children & young persons

Regulation 7 When needs assessment is required

Regulations 7(1)(a) and (a)[3] state that if a child enters the care and custody of the chief executive under Parts 2 or 4 of the Act, the chief executive must ensure that a needs assessment is carried out to identify the child's immediate and long-term needs. The identification of a child's immediate and long-term needs embraces guardianship rights and obligations. The regulations cannot take precedence over guardianship rights and obligations as defined by section 2 of the Oranga Tamariki Act 1989 (Act).

Regulation 11 Process for assessing health needs

This regulation requires consideration of the child's preference (if any) regarding the health practitioner involved in the health assessment. The ability to make decisions of that nature will obviously depend on the child's age and maturity, and regulation 11 should provide for the child's age and maturity to be taken into account.

Regulation 12 Process for assessing connection with family, whānau, hapū, iwi, or family group

Regulation 12 contains matters that the chief executive must ensure are assessed for the purpose of maintaining a child's connections with their family, whānau, hapū, iwi, or family group, including who the child considers to be important members of those groups (regulation 12(c)). Siblings are often overlooked as significant members of a child's family/whānau and it may be helpful for them to be expressly mentioned in regulation 12. (Alternatively, the important role siblings can play should be noted elsewhere, such as in the Statement of Rights for children and young persons: Schedule 2 to the regulations).

In the Law Society's view, regulation 12(c) should be placed at the beginning, as 12(a). Its current placement at the end of regulation 12 makes the child's perception of important members of their family subordinate to the adults' views. This reordering would align with the object of the Act in section 4.

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[3] There is a typographical error in the draft regulations: the second subparagraph to regulation 7(1), which is listed as "(a)" should be corrected to "(b)".

Regulation 13 Process to be used to determine safety needs

Regulation 13 sets out the process for determining the safety needs of a child, including identifying the risk of harm to the child (regulation 13(a)) and the nature of the harm, loss or injury that the child has experienced (regulation (13(b)(ii)).

Regulation 13 does not define "risk" or "harm". The definition of "risk" in section 5(a) of COCA provides an appropriate guide to assess the safety needs of a child. One option could be to amend regulation 13(a) to reflect the type of harm described in regulation 13(b)(ii) (which includes "physical, psychological, emotional or sexual harm").

It would be also be logical to move regulation 13(b)(i), which deals with the potential risk the child poses to others, to the end of regulation 13(b). That would ensure the main focus of regulation 13 remains on the risks to the child (current limbs (ii), (iii) and (iv)), consistent with regulation 13(a) which seeks to identify the risk of harm to the child.

Regulation 14 When needs assessment must be completed

Regulation 14 provides that a needs assessment must be completed as soon as practicable after the child or young person enters the care or custody of the chief executive. As noted earlier, a child may enter "care" in a number of ways, and it is unclear whether regulation 14 as currently drafted encompasses situations where there are care agreements in place. It is also unclear how it is intended to deal with guardianship obligations in the needs assessment, or the consent issue in respect of care agreements (see comments under regulation 18). The lack of clarity is a significant problem that needs to be addressed.

Regulation 18 Process to be used to develop plan

Regulation 18(2) refers to the involvement of "other persons (for example, the child's or young person's caregiver, family, whanau, teacher, or doctor)" being recorded in the plan. As already noted, this does not address the issue of parental consent or guardianship obligations.

Regulation 25 Copy of plan to be given to child or young person

Regulation 25(a) provides that a copy of the plan must be given to the child, reflecting the need to involve the child in decisions affecting their care arrangements. As noted earlier, the regulation is silent as to any "age and maturity" qualification, and it may be helpful for this to be added to the regulation.

The plan may address sensitive matters, such as where the child has suffered significant physical or sexual abuse, and it may be inappropriate in some circumstance for the child to see the plan. Section 133 of the Act gives the court power to order a plan not to be disclosed where disclosure would be, or would be likely to be, detrimental to the child's physical or mental health, or emotional well-being. (Similarly, there are restrictions on psychological reports prepared under section 178 preventing their release to a child). Regulation 25 should be amended to provide that in certain circumstances, a copy of the plan may not be disclosed to a child.

Regulation 30: Persons to be regularly contacted

Regulation 30(c) provides that the chief executive must ensure that "persons of significance" to the child are contacted and discussions held on a regular basis. This should be subject to restrictions where any person of significance is identified as posing a risk to the child.

Part 2: Support to address child's or young person's needs

Regulation 32 Support to establish, maintain, and improve whānau connections

Regulation 32(2)(a) should be amended to include reference to siblings (as is done in regulation 32(1)(a)). In practice, siblings are often overlooked as significant members of a child's family and whānau members.

Regulation 32(2)(e) needs to be amended. It appears to confer the ability to make guardianship decisions on those who do not have the legal status of guardian.

Regulation 33 Culture, belonging, and identity

Regulation 33 requires the chief executive, in deciding what support is to be provided, to consider "opportunities for the child … to develop a positive identity associated with being in care, including through contact with other children and young people in care" (regulation 33(2)(d)(ii)). The underlying intent is no doubt to signal that the support of the Ministry is to be seen as positive rather than stigmatising. That is a laudable aim. However, "a positive identity *associated with being in care*" (emphasis added) is odd wording, and the paragraph would better achieve the intended aim by omitting the italicised words (so that it reads "to develop a positive identity, including through contact (etc)".

Regulation 35 Support to maintain and improve health

Regulation 35(1)(a) provides that the chief executive must ensure that reasonable steps are taken to ensure that the child in the care and custody of the chief executive under Parts 2 or 4 of the Act is enrolled with a health provider. This is a guardianship obligation, and would not be possible in situations where there is a section 78 or 101 custody order unless the Act is amended.

Regulation 35(1)(e) makes reference to "seek parental or their guardian's consent where required". As currently drafted, it appears the need to obtain the consent of the parent/guardian(s) is identified *after* the child has been assisted in accessing health services. The wording of regulation 35(1)(e) needs to be amended, to require such consent to be obtained in advance.

Education: Regulation 36 (Children aged 1 to 4), Regulation 37 (Children aged 5)

Regulations 36 and 37 deal with education of children aged 1 to 5 and the mandatory duty on the chief executive to ensure that, where it is in the best interests of the child aged between 1 and 4 years, they are enrolled in a licensed early childhood services or certificated playgroup, and in the case of a child aged 5 years, they are enrolled at a registered school or continue to be enrolled in a licensed early childhood service or certified playgroup.

Making early childhood education mandatory is an important policy decision with far-reaching ramifications. This is a matter that should be included in legislation, rather than being introduced via regulations.

Imposing mandatory early childhood education is also a significant intrusion into guardianship decisions regarding a child's education. The law currently requires children to be enrolled at school when they turn 6. Any change to this would need to be made by legislative amendment.

Regulation 38 Children and young persons aged 6 to 15

Regulation 38(2) states that if a dispute arises about the particular school where a child is enrolled, the chief executive must take steps to resolve the dispute including, where necessary, bringing legal proceedings.

However, where there is a section 78 order or a section 101 order, with no guardianship order in place or a temporary or extended care agreement (where the latter is silent as to guardianship or specifically to education), the chief executive is unable to issue legal proceedings unless it is by a wardship application for that specific purpose. To resolve a dispute between guardians, the chief executive will need to be a guardian. This issue needs to be resolved and the wording of regulation 38 clarified.

Regulation 43 Persons to be informed of child's or young person's progress and development

Regulation 43 provides that the chief executive must ensure that members of a child's family, whānau, hapū and iwi who should be kept informed of the child's progress and development, are identified and informed, if that is in the best interests of the child. Depending on how the information is to be disseminated, this may raise privacy issues. Careful consideration should be given to how a child or young person's privacy is maintained in respect of this information, while carrying out the duty to inform persons of the child's or young person's progress and development.

<u>Part 3: Caregiver and care placement assessment and support</u>

Regulation 44 Information to be provided to prospective caregivers

Regulation 44 provides that the chief executive must ensure that sufficient information is provided to a prospective caregiver to enable them and their household to understand the role of a caregiver and what will be expected of them. Regulation 44(2)(k) should be amended to include the importance of the child maintaining links with persons of significance to them.

Regulation 46 Duty to assess prospective caregivers

Regulation 46(2)(b) provides that an assessment of prospective caregivers must include a process to safety check persons aged 18 or over who are living in, or who regularly visit, the caregiver's household if those persons consent to a safety check.

The regulations do not address the situation where a person refuses to consent to a safety check. Regulation 46 should be amended to specify the consequences of a refusal to give that consent.

Regulation 54 Risk assessment

Regulation 54(2)(a) requires the chief executive to assess a person "in respect of whom a safety check is being undertaken", to determine "whether the person poses, or would pose, any risk to the safety of children … *as a prospective caregiver or as a member of a caregiver's household*" (emphasis added).

The italicised words are an unnecessary addition: prospective caregivers and members of a caregiver's household are within the category of persons requiring safety checks (regulation 46(2)(a) and (b)) and are therefore already covered by the opening words of regulation 54(2)(a) – namely, as a person "in respect of whom a safety check is being undertaken". The italicised words also omit a third group identified as requiring safety checking, i.e. regular visitors to the caregiver's household (regulation 46(2)(b)). If the current wording is retained, "persons aged 18 or over who regularly visit the caregiver's household" will need to be added.

Regulation 61 Support for maintaining whānau relationships

Regulation 61(c) states that the chief executive must provide any support required to enable the caregiver to "facilitate" the contact arrangements between the child and his/her family, whānau, hapū, and iwi.

The requirement to "facilitate" this contact is not defined. It is not clear from the regulation as currently drafted whether this means merely supplying whānau, hapū and iwi contact details to the caregiver, or whether it means a greater obligation (such as paying for supervised contact, or travel). Clarification would be helpful.

<u>Part 4: Supporting children and young persons to participate in decision making</u>

Regulation 64 Matters to be explained to children and young persons

Regulation 67 Duties in relation to abuse or neglect

Regulation 68 Provision of information to independent monitor

These regulations deal with important matters relating to children's ability to participate in deciding matters affecting their care and custody arrangements. Unfortunately, the regulations omit reference to the lawyer for child. The lawyer for child is appointed by the court to represent and advocate for the child, and therefore has an important role to play in these matters. Regulations 64, 67 and 68 should be amended to include relevant references to the lawyer for child. In particular, regulations 67 and 68 should be amended to ensure that any lawyer for child appointed is to be provided with any information containing concerns in relation to a risk of harm caused by abuse of neglect of a child in care.

Regulation 65 Method of providing information and explanation

Regulation 65 requires that where a child does not have capacity to understand information, the information is to be provided to a support person. In those circumstances it will be important for the support person to have the requisite capacity, and regulation 65 should be amended to require that the information be provided "to an appropriate support person".

We hope you find these comments helpful as the Ministry finalises the draft regulations. If you have any questions or would like to discuss the comments, please contact the Family Law Section Manager, Kath Moran (kath.moran@lawsociety.org.nz / 04 463 2996) in the first instance.

Yours faithfully

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