



25 June 2010

Alison Hill
Manager Policy and Development
Preferred Lawyer and Criminal legal Aid Assignment Consultation
Legal Services Agency
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Dear Alison

Preferred Lawyer and Criminal legal Aid Assignment Consultation

The Society welcomes the opportunity to comment on the Legal Services Agency's *preferred lawyers and criminal legal aid assignment* consultation document.

Introduction

The Society supports the views of its Criminal Law Committee in favour of a rotational system for all categories, subject to comments around quality and the retention of established lawyer-client relationships.

However, there is a divergence of views in the legal profession as to whether a strict rotational system should be implemented or the current system retained. The Society has in the past submitted strongly in favour of the genuine preferred lawyer policy, and the importance that choice of lawyer has in building client trust.

Preferred lawyer¹

Some lawyers support a preferred lawyer policy for all categories. The philosophy behind the preferred lawyer system is to reflect that a citizen should have a genuine choice in deciding who will represent him or her. The Society has previously reiterated the view of Lord Carter of Coles that "... *the right for clients to choose their legal representative is considered to be critical to both the commercial viability of the suppliers and the confidence and cooperation of clients in the justice system...*"²

One of the strongest arguments put forward for preferred lawyer is that market forces will regulate the market. A lawyer who gains a reputation for hard work and good results should be rewarded and a lawyer who is lackadaisical should not be subsidised by receiving the same number of assignments. There is concern that loss of preferred lawyer will mean that some of the incentives for going the extra mile on a low reimbursement rate will disappear. The fair and efficient administration of justice is compromised where a client is represented by someone they do not want.

¹ In his submissions of 6.6.10 Greg King, Barrister, Wellington, summarised the majority of the arguments that are discussed in this letter, on the desirability of retaining a preferred lawyer system.

² Lord Carter of Coles, *Legal Aid: A Market Based Approach to Reform*, 2006, p.19.

The lawyer-client relationship is special and requires client trust and confidence. Where a client has a preferred lawyer but is given someone else the relationship is likely to commence with resentment, mistrust and a reluctance to engage.

Some lawyers feel that removal of choice means legal aid clients would be treated as second class citizens. Parallels are drawn with the ACC system where a person can receive treatment from a provider of their choice. This is particularly important given that, unlike the medical or ACC government funded system, a legal aid client might be required to pay back the cost of their legal aid provider even though they received no say in who would represent them.

Concern was expressed that a client's inability to choose a lawyer might mean that there will be a greater number of appeals if they are dissatisfied with the lawyer appointed to them.

Rotational

A number of lawyers are more accepting of strict rotation for category 1 and 2 cases, and a preferred lawyer policy for category 3 and 4 cases. The general view of the lawyers who made these submissions was that the more serious the charge and the consequences, the greater the weight that should be given to the applicant's choice.

The Society's Criminal Law Committee supports a strict rotation policy for all categories provided the rotational lists have integrity (see discussion below on Quality). The Society is aware of some abuses of the current system and that some legal aid providers are taking on an unmanageable number of cases under the preferred lawyer policy. In the Manukau District Court half of all assignments go to ten of the 167 lawyers who received assignments. From 01.05.09 to 30.04.10 these ten lawyers received on average 267 cases. One lawyer undertook 599 cases in one year. Putting aside whether or not a competent lawyer could manage this number of cases, such a high allocation causes significant scheduling problems and delays for the courts.

The Society believes that a strict rotation policy would accomplish some of the aims identified in the consultation paper. There are many qualified lawyers who are listed providers who do not get instructions under the preferred system. We heard from some senior members that they wish to play a more active part in the provision of legal aid services and to receive cases on rotation.

All submissions were strongly in favour of a system that allowed a lawyer who had previously acted for a client to act for them again. Strong relationships of trust build up over time, and allowing this to occur saves the Agency money, given the lawyer's knowledge of the client's history. We have presumed that if there are any open files then any new files will be allocated to the same lawyer. Before assigning a lawyer on the basis of a previous relationship or open file, the Agency should check that the lawyer is willing and available to accept the assignment as this will reduce the occasions where an assignment has to be reallocated.

Quality

We would prefer that implementation of a roster system be delayed until the Agency addresses the issue of quality, particularly in categories 3 and 4. Any process which restricts a client's choice of lawyer needs to take particular care to ensure that the Agency is confident that legal aid providers in each category have adequate experience and competence for any assignment.

The Society questions whether at this stage it is prudent to remove choice at categories 3 and 4 where clients face serious penalties such as life imprisonment. As there are concerns that incompetent or inexperienced lawyers are on these lists, the Agency would be removing the choice of an individual facing the most serious penalties and imposing a potentially incompetent lawyer on that client.

We now respond to the questions in the discussion document.

Aims of a new assignment process

1. *What are your views on the aims outlined in the paper?*

The aims outlined in the consultation document seem sensible.

2. *Do you have any suggestions for additional aims?*

We support the two additional aims outlined in the consultation paper:

- to provide a process that is more cost efficient given current payment policies, for example rotation policies would give preference to category 1 lawyers when assigning category 1 cases; and
- to provide a process that would lead to the Agency working more closely with a smaller group of legal aid providers.

In addition the Agency may want to consider this aim:

- to minimise the risk of improper approaches being made to clients to obtain assignments.

General

3. *What are your views on the new assignment processes in general?*

As discussed above, the views of legal aid providers are divided in relation to the proposed changes to the preferred lawyer policy.

There is considerable support for the rotation system, provided the quality of lawyers on the list is addressed. Some lawyers do not support the proposal to assign criminal cases within all categories to legal aid providers on a strict rotation basis. They argue that many accused are repeat offenders. These accused frequently establish relationships with experienced defence lawyers and seek to be represented by a lawyer with whom they have been satisfied in the past when they again face criminal sanctions. We strongly encourage a system which takes into account this previous established relationship.

Other lawyers support a proposal to assign category 1 and 2 criminal cases to legal aid providers on a strict rotation basis. However, they believe that greater weight should be given to the applicant's choice of lawyer in more serious charges. They argue that the preferred lawyer policy should remain for category 3 and 4 criminal cases given that the problems around caseloads are not at category 3 and 4 cases. We understand that those undertaking too much work and clogging up the court system are receiving assignments at category 1 and 2 levels, and a strict rotation policy at those levels would solve the problem of lawyers taking on unmanageable caseloads.

Some lawyers, including the Society's Criminal Law Committee, support the proposal to assign criminal cases at all levels of seriousness (categories 1-4) to legal aid providers on a strict rotation basis. They argue that the preferred lawyer policy enables lawyers to take on too many cases, with no effective oversight of their caseload, which causes court-scheduling problems. They believe a strict rotation policy would be fairer. There are many qualified senior lawyers who are listed as legal providers who do not get instructions under the preferred system and they wish to receive these cases on rotation. Category 3 and 4 legal aid providers say that the current rotation lists are rarely used because the great majority of cases are allocated as preferred lawyer. They feel that it is unfair that only 4% of category 3 cases and 0.79% of category 4 cases are assigned off the current rotation list.

Rates

We understand that the Agency is not in a position to address legal aid rates at present. However, if the Agency wants to encourage experienced lawyer to participate in the legal aid system then an increase in remuneration rates must be considered.

4 *What do you think will work well?*

The new strict rotation system will work well if each lawyer in each category is suitably qualified and experienced within that category to do the work assigned. The current lists do not have integrity and lawyers on these lists are not necessarily capable of undertaking the work assigned to them. Until lawyers are appropriately categorised a strict rotational system will not achieve the aims outlined in the consultation paper.

A system that allows a senior and experienced lawyer to receive assignments from time to time without having to devote their whole practice to criminal legal aid work is likely to encourage good senior lawyers back into the criminal legal aid area. Remuneration rates are an integral part of this proposal.

5. *What do you have concerns about?*

We have presumed that there will be an exception to the strict rotation system in relation to Lawyer for Youth Court matters that are transferred from the Youth Court (where there is a continuity of lawyer rule) to the jury trial jurisdiction.

It should be possible for a lawyer to turn down an assignment where the assignment falls outside the lawyer's normal field of practice. For example, not all lawyers in category 2 would have sufficient experience to undertake complex fraud cases (see response to question 23).

Previous relationship

We have presumed that if a lawyer has an open file relating to a client then any new assignments would be assigned to that lawyer.

While the Society is in favour of a rotation system with integrity, we strongly support a system that takes into account the special relationship formed between a lawyer, the client and their family when they have previously represented that client. Many lawyers have several clients with mental health histories that they are familiar with. Lawyers unfamiliar with clients' case histories may well enter pleas being unaware of problems of incapacity that are not apparent in the first instance. It is possible that a strict rotation process could disadvantage vulnerable clients, such as those who are intellectually disabled or mentally unwell, where previous case history is not taken into consideration. There are also economies of scale where a lawyer who is familiar with a client's history will not need to spend as much time familiarising themselves with the client's background.

A client should be given the choice of either the lawyer who previously represented them or a new lawyer from the rotational list.

Regional difference

We would like to see a system that takes into account regional differences. It is not a matter of "one size fits all." What suits a provincial court does not necessarily suit an urban court. For example, some Auckland courts demand on-the-day assignment and appearance. Other areas have different needs. For example we have received submissions around particular needs in courts in provincial areas such as Hastings and Tauranga and satellite courts such as Waihi.

We understand that there is only one local Waihi firm that undertakes duty solicitor and criminal legal aid work. The bulk of legal services are provided by two Tauranga-based barristers. It would be uneconomical to service that court if there was not the prospect of almost guaranteed assignments as a result of duty solicitor attendances, either as preferred lawyer or assignments to the duty solicitor roster on a particular day. The Agency needs to be aware that in some areas a strict rotational roster separate from a duty solicitor roster may mean that the Agency does not have sufficient legal aid providers to undertake assignments.

Implementation

Ideally, as mentioned above, implementation should be put on hold until the Agency is confident that the lists have integrity and lawyers on the lists are competent to undertake the allocated work.

However, if the Agency chooses to proceed, implementation of a strict rotation system should not be rushed. Lawyers should be given adequate notice and Agency staff need to receive sufficient training in the new system. The effect of the change needs to be considered in each court area to ensure that if proposals such as delinking of the duty solicitor roster were to proceed, this does not lead to insufficient number of providers. We recommend that implementation be staggered, with a commencement date no earlier than December 2010.

6. *What suggestions would you make that would help ensure that the overall aims of the change are achieved?*

As previously discussed, the Agency should ensure that the rotation lists are made up of competent lawyers, otherwise it will be difficult for the aims to be achieved.

7. *What is needed to ensure that clients get fair representation and access to justice?*

The proposed strict rotational system will achieve this so long as the issue of lawyer quality is addressed.

Encouraging experienced lawyers to participate

8. *How should the new assignment process be developed to encourage competent legal aid lawyers to participate in the criminal legal aid system?*

Experienced and competent lawyers will not always be available to take every assignment offered. Senior and experienced lawyers need to be reassured that they will be able to receive assignments from time to time without having to devote their whole practice to criminal legal aid work. Lawyers should not be expected to take on a minimum number of cases and the system needs to allow for lawyers to turn down assignments for good reason (see questions 18-20). The Society has already mentioned remuneration is an issue (see question 3).

9. *Is there a particular system of rotation that would bring back those lawyers who have exited the system?*

All lawyers will need to be assured that any rotational system is robust and fair (see also question 8).

Duty solicitor scheme

10. *Should the current requirement to be on a duty solicitor roster in order to receive categories 1 and 2 assignments be completely removed?*

Yes, we believe that in general there is no basis for retaining it. However, the Agency needs to be aware that in some smaller regions if the two were delinked then there may be supply issues (see question 5).

11. *If it is, do you anticipate that this will result in insufficient numbers of duty solicitors at your local court?*

Possibly, but that could be addressed in other ways. In urban areas perhaps the Public Defender's office could assume some role in that area to make up for any shortfall. Another solution might be to simply have a requirement (with discretion for waiver) that prior to receiving a category 3 classification the legal aid provider must be able to demonstrate a certain number of hours as a duty solicitor.

12. *How do we ensure the continuing participation of duty solicitors?*

Ensuring adequate rates would encourage participation. And, as discussed above, perhaps making it a requirement for qualifying as a category 3 lawyer. The Agency should have discretion to waive this requirement on a case by case basis, since in some high density areas there may be a limited number of places on the duty solicitor roster.

Police Detention Legal Assistance (PDLA) Scheme

13 *Should there be complete removal of the linkage between the PDLA roster and case assignment, or a compromise position, in which a case could be assigned to the PDLA lawyer who initially dealt with it, and counted against their rotation total?*

There should be a linkage between the PDLA roster and case assignment. The PDLA lawyer who initially dealt with a case should be given first refusal of the brief. If this linkage is removed the Agency is very likely to find it has insufficient numbers to service the PDLA roster as lawyers will not want to come out in the middle of the night to aid someone in custody if the case will probably be assigned to another lawyer.

The PDLA scheme does not work well in all regions. The remuneration is insufficient to adequately compensate lawyers to take calls in the early hours of the morning. Most lawyers on the PDLA roster undertake this work because they feel this scheme is integral to the administration of justice. Frequently there are insufficient lawyers available to take calls. This can cause problems for the Police and can lead to dire consequences. The Coroner in re *Anthony Patrick McGuire*³ recommended that the Agency give urgent attention to making lawyers available via a national 0800 number:

*Making available means – exactly that. They have to resource the lawyers and have to make sure they are properly paid, but the bottom line is that people in custody must be able to obtain legal advice.*⁴

If the Agency was to delink the PDLA scheme from case assignment then the establishment of a national 24 hour 0800 number would be essential.

³ *Re Anthony Patrick McGuire*, 7 December 2009, Coroner's Court Rotorua.

⁴ *Ibid*, at para 71.

Limiting the rotation lists

14. *Should eligibility for rotation assignments be limited to one or two courts per lawyer? (Such limits would be on the understanding that case numbers would be ‘evened up’ across sites within the same cluster.)*

Generally the rotation should be within a geographical area and there should be a limit on the number of courts that a lawyer can receive legal assignments from, simply due to the inevitable scheduling conflicts that arise when a lawyer tries to receive assignments from too many courts. However, this will need careful analysis for each geographical area and consultation with local lawyers should be undertaken on this issue.

15. *Should the same limits (to court rotation lists) apply for categories 3 and 4 cases as for categories 1 and 2?*

Yes. Perhaps the number of courts could be widened for more serious cases (possibly only category 3 and 4). For example, category 3 and 4 cases heard in the Rotorua High Court are undertaken by lawyers from a number of outlying areas (and courts) - Taupo, Tokoroa, Tauranga, Whakatane as well as Rotorua itself. These district courts are all within a one-hour drive from the Rotorua High Court. A lawyer could practice in this greater cluster for categories 3 and 4 but in categories 1 and 2 a smaller cluster might be more appropriate.

16. *Should this be the same in all areas, or different for provincial courts vs large urban areas with multiple courts?*

As mentioned above, one size does not fit all and it will depend on the specific region, travel distance and time between courts and the number of lawyers and assignments available. For example, there is one lawyer in Waihi and the area is primarily supported by Tauranga lawyers. Greymouth is primarily serviced by lawyers out of Christchurch.

17. *Should the Agency require lawyers to have an office in the location of the court to be eligible to receive rotation assignments at the court? This requirement could apply in areas with multiple courts.*

It would pose problems for areas which are serviced by out-of-town lawyers if this were a requirement (see question 16). The requirement should be that the lawyer has an office within the court cluster area, rather than located near to any particular court.

Minimum caseloads for lawyers and sanctions

18. *Should all lawyers be required to take a specified minimum number of cases assigned to them on rotation?*

No (see below).

19. *If yes, what sanctions should apply for lawyers who fail to take the agreed number of cases or turn down assignments without an agreed reason? Sanctions could include ‘missing a turn’ or removal from the rotation roster.*

A lawyer who turns down assignments with good reason should remain at the top of the rotation list until a case is assigned. A lawyer who turns down assignments without an understandable and acceptable reason should be given no more than two further opportunities,

then be put to the bottom of the lists; if the problem persists it could progress to removal from the rotation roster.

There are part-time practitioners and practitioners with child-care responsibilities who are able to undertake legal work but with a reduced caseload, and for these types of reason they may need to accept a smaller volume of assignments.

Lawyers should be allowed to put on hold allocation of rotational cases from the roster without penalty. They will at times need to take leave from work for valid reasons such as maternity leave, holidays or illness. Lawyers should be encouraged to advise the Agency of significant absences.

20. *Should lawyers be able to set limits on the type of cases they will accept? For example cases involving domestic violence or defendants with mental health issues?*

Yes, lawyers should be able to set limits on the type of cases they will accept. Sometimes lawyers are competent in some areas but, perhaps due to inexperience, not competent in others. It should be possible for a lawyer to decline an assignment where the assignment falls outside the lawyer's normal field of practice. For example cases involving intellectually disabled clients or clients with mental health issues.

Some lawyers are not comfortable accepting certain types of cases (such as sex offences or homicides) for valid reasons and should not be forced to take on work that they are not equipped to handle.

Same day assignment

21. *In courts that require an assigned lawyer to be available to represent the client on the same day as the assignment, what system of rotation assignment would encourage competent lawyers to participate?*

Options to consider include:

- a) ***Run the system as currently, with lawyers available to accept assignments expected to ring in or turn up on the day. Back this up with an IT system to assist staff to 'even up' the number of assignments per lawyer;***
- b) ***Run a roster system along the lines of the duty solicitor roster, i.e. publish a roster in advance with the same group of lawyers appearing on the same rostered day each week; or***
- c) ***Publish a daily roster well in advance but with no matching to the same day of the week.***

It is presumed that this applies for categories 1 and 2.

A number of the Society's members do not support same day assignment and appearance. However, rosters may be an inevitable result of a court requiring same day appearances. Same day assignment should not be permitted if it ends up with separate legal aid rosters where the amount of work going to some lawyers exceeds that of others on the same roster, simply because some lawyers agree to be on a same day roster and others do not.

Option **b** is unlikely to result in a fair allocation of cases. Analysis will need to be done to ensure that those working on, for example, the second Monday in a month, are not receiving more cases than those working on other days. As long as the number of cases allocated works out to be approximately equal and the process is transparent it does not matter how such a roster works. Fairness might be achieved by an IT system ‘evening up’ cases after a lawyer has appeared on the requisite day, or historical data could be regularly analysed to work out the number of lawyers required on a roster on any given day. For example an analysis over a one year period might show that Mondays result in 25% more case assignments than Tuesdays, which might mean that 25% more lawyers should be assigned to a Monday roster.

22. Should the assignment process try to meet clients’ needs for a lawyer with a specific skill or particular background? In what circumstances? For example:

- a) *A lawyer who speaks the client's first language;*
- b) *A lawyer who is experienced in defending clients with mental health issues;*
- c) *A lawyer who is experienced in defending clients who are deaf or have other disabilities;*
- d) *A lawyer who is experienced in defending clients with backgrounds involving domestic violence or other traumatic circumstances.*

Yes, but this should not be at the expense of the overall integrity of the rotational assignment process.

We support **a** to **c**. With regard to **d**, we believe any competent defence lawyer should be able to deal with cases involving domestic violence or other traumatic circumstances, but that a lawyer should be able to choose not to undertake the work. As discussed above (question 20), some lawyers are not comfortable accepting certain types of cases (such as child sex offences or homicides) for valid reasons and should not be forced to take on work that they are not equipped to handle.

Reassignment

23. Are there situations when you think cases should be reassigned to another lawyer? What are they?

We refer the Agency to the Lawyers and Conveyancers Act (Lawyers: Rules of Conduct and Client Care) Rules 2008 and in particular chapters 4 and 5.

Cases should be reassigned to another lawyer where:

- a conflict of interest arises;
- there is a lack of available time;
- there has been a genuine breakdown in the relationship between client and lawyer such that the lawyer is unable to properly advance the client’s position;
- the instruction falls outside the lawyer's normal field of practice;
- the client misleads or deceives a lawyer in a material respect; or
- the client fails to provide instructions to the lawyer in a sufficiently timely way.

If the client wants to use a lawyer they have had a previous relationship with and then consequently requests reassignment, any reassignment should be to a lawyer from the rotation list.

The most serious cases

24. *Do you think the most serious cases, for example murder, need to be assigned differently from other cases?*

No, not if the rotation lists have integrity and are made up of experienced and qualified lawyers who have been appropriately categorised.

In categories 3 and 4 it is even more important that a lawyer who has an established relationship with a client is allocated to the case. Relationships have often built up over quite some time and this can be of significant benefit to clients, lawyers and the Agency. Assignment to lawyers with established relationships may save the Agency money as a lawyer will not need to spend as much time acquainting themselves with the background and previous history of clients and building up a relationship of trust with the client and family. Co-operation from clients will be enhanced if they have established relationships of trust with their lawyer.

Assignment on the basis of an existing relationship should always occur with the genuine consent of the client. If the client wants to use a lawyer they have had a previous relationship with and then consequently requests reassignment, any reassignment should be to a lawyer from the rotation list.

A search of the Agency's database could be undertaken before assignment at categories 3 and 4. Where a client has received aid the Agency will have a record and should be able to check who represented that client on a previous occasion.

25. *How should these cases be assigned?*

There should be an equitable distribution of the number of cases across available providers on the rotation list.

See question 24 regarding assignment on the basis of an existing relationship.

26. *What cases should be dealt with in this way?*

See question 24 regarding assignment on the basis of an existing relationship.

Appeals

27. *How should appeals to the High Court, Court of Appeal and Supreme Court be dealt with?*

There should be a separate list of lawyers dealing with appeals to the Court of Appeal and Supreme Court. The Society sees no need for a separate list for appeals to the High Court.

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The Society hopes that the above comments are of assistance to the Legal Services Agency. If you wish to discuss any matters raised in this letter please contact me through the Criminal Law Committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm'. The signature is written in a cursive style with a large, looping initial 'J'.

Jonathan Temm
President