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Dear Carmel

**Policy on Criminal Case Assignment, Termination of Assignment and Reassignment for Categories 1 and 2**

Thank you for inviting the New Zealand Law Society (Society) to comment on the Legal Services Agency's draft Criminal Case Assignment policy for categories 1 and 2. The Society's comments have been prepared with the assistance of its Legal Services and Criminal Law Committees.

**Management of Rotation Assignment Roster - Paragraphs 5 to 11**

It is not clear whether there is a roster for category 1 and a separate roster for category 2. It is preferable that there are separate rosters.

Paragraphs 6 and 8 duplicate the reference to a lawyer only being on one roster for categories 1 and 2. They are inconsistent with the ability in paragraph 10 for the Agency to seek lawyers to travel to a rural satellite Court roster. It is preferable that there be an exception allowing people to be on two rosters, if there is a shortage of providers in a rural area.

It is also not clear what a rural satellite Court is. Those and the Court clusters will need to be defined. The Society would be happy to assist in drafting that definition.

The rotation roster is computer-based. There is therefore no reason why names cannot be added or removed at any time. The ability to add a person's name as soon as criteria have been met will encourage younger practitioners to acquire the qualifications and have their names added to the roster.

**Full Rosters - Paragraphs 12 to 15**

The Society is opposed to the concept of full rosters. Rather than restrict entry to the roster, the Agency should operate a robust quality assessment. It is better to not list non-performing lawyers, than restrict the access of competent and motivated lawyers.

Lawyers should not need to reapply for a preferred Court roster. Surely if they have expressed preference for a particular Court roster then, even if the Agency does have a "full roster" concept, they can be listed when a place becomes available.

It is not clear whether category 3 and 4 practitioners can be on a category 1 and 2 roster. It is suggested that they should be able to be.

### **Sanctions - Paragraphs 17 and 18**

The rationale behind penalising a lawyer for terminating an assignment is unclear. Courts grant leave to counsel to withdraw only for good reason. If there is good reason to terminate an assignment, the lawyer should not be penalised.

### **Applications for legal aid - Paragraph 19**

Lawyers may be able to provide legal aid forms to persons facing criminal charges without receiving payment from the Agency. However, lawyers need not complete any legal aid form unless they are to be paid for this service. Such legal aid applications do take time and often involve some preliminary legal advice. Lawyers should be paid for their time and professional services. The person facing criminal charges could also contact the Agency directly, and the Agency should then provide the person with a legal aid form and assistance in filling that out.

### **Assignment - Paragraphs 20 to 22**

It is inappropriate for a policy as set out in paragraph 21 to have a provision that implies acceptance of and adherence to the policy. Compliance with policies, by both the Agency and the provider, is a matter of such importance that there ought to be a contract between the parties requiring them to be mutually bound. That contract ought to include the Agency being subject to all of the requirements of natural justice including the ability for a provider or legally-aided person to seek a review of all of the decisions of the Agency. The Society would welcome being consulted about the terms of any contract. As you will be aware, the Society has previously had concerns about the content of contracts between the Agency and providers.

It is inappropriate, as set out in paragraph 22, to have the Agency assume the lawyer has accepted an assignment. Amongst other things, the posting of a letter does not mean that the postal system successfully resulted in delivery of the letter and the sending of an email or text can be thwarted by reliability problems with email and cellphone networks. There should be agreed methods of communication, and assignment should be agreed to by the lawyer in each instance.

### **Declining Assignments - Paragraphs 25 to 28**

The numbering in paragraph 25 should be corrected. The reference should be to paragraphs 26-27, not 25-26.

Paragraph 25 introduces the concept of a "rotation total". The policy document will need to explain what this is.

Paragraph 26 outlines the reasons a lawyer may have for declining categories 1 and 2 assignments. Paragraph 27 outlines additional valid reasons a lawyer may have for declining a category 2 assignment. There should be one paragraph in the policy document that lists all of those reasons as applying to both categories. There is no need for the two paragraphs.

In addition, ill-health should not be defined as an exceptional circumstance. Instead, ill-health should be a valid reason for declining, as should, for example, being on leave. There should be a separate category for exceptional circumstances.

The reference in paragraph 27 to the instruction falling outside the lawyer's normal field of practice also ought to include the matter falling outside the lawyer's area of expertise and ability.

There appears to be no provision for challenging the Agency's decision for placing a lawyer at the bottom of the roster (paragraph 28), and there should be.

### **Delegation of work - Paragraphs 29 to 34**

There is concern about the delegation of minor matters to a duty solicitor. A duty solicitor is often very busy and it would be an unreasonable interference for him or her to be asked to undertake the work of an assigned counsel.

It should be made clear in paragraph 30 that the delegation of entering of a plea should not include the entering of a plea where there will be an immediate sentencing, because the sentencing should be a matter for assigned counsel.

Status and minor interlocutory hearings including, for example, name suppression, might also be usefully able to be delegated without prior approval being given by the Agency. Such flexibility is important, given the low legal aid rates and the fact that the Court will allocate days without often much ability to accommodate counsel. It is probably not in the Agency's interests to receive frequent requests for approval for delegation, when it already has difficulties in responding to some communications within an appropriate timeframe.

### **Exceptions to rotational assignments - Paragraphs 35 to 40**

Paragraph 35 ought to have, between the bullet points, an "or" instead of an "and".

Paragraph 36 states that "*where there is a second related criminal matter, the Agency will avoid more than one lawyer acting for a legally-aided person at the same time*". We agree that it would be inefficient for one client to have two, or potentially more, lawyers acting.

However, there needs to be some flexibility or discretion to provide for situations where the client faces multiple charges involving different degrees of seriousness. In such circumstances, it would be appropriate for the provider who was first assigned to continue to act, provided it is within their experience level. If not, it would be appropriate to assign a category 3 / 4 provider.

The reference in paragraph 39 to advice as to prior involvement by 8.30 am the following work day is unrealistic. Can that not be extended to at least 9.30 am? In addition, paragraph 39 requires the lawyer to confirm to the Agency that he or she will be able to appear on the expected substantive dates. That requirement should be deleted, as the expected substantive dates will not be known at that stage.

### **Reassignment and Termination of Assignments - Paragraphs 44, 46, 48 and 52**

Withholding payment for the reasons set out in paragraph 44 is not a justified sanction for what is a contractual matter between the Agency and provider. If the work is properly undertaken in accordance with the grant, then payment should be made, regardless of the fact that prior approval to delegate was not given by the Agency. Again there appears to be no provision for challenging the Agency's decision, and there should be.

Ill-health is not an exceptional circumstance. There should be a category for ill-health and being absent on holiday, and then a separate category for exceptional circumstances. The list ought to include circumstances where the Court grants leave for a lawyer to withdraw.

The assessment in paragraph 48 is inappropriate. If there is a breakdown in the professional relationship then surely that is a matter in respect of which the lead provider's view should be sufficient?

Paragraph 49 is confined to exceptional circumstances. Why?

Paragraph 50 contains one of a number of examples of the Agency being able to decide whether it is satisfied or not with the responses and to make decisions that do not seem to be reviewable. The policy ought to expressly include an obligation in all respects upon the Agency to act in accordance with principles of substantive fairness and natural justice, and its decisions ought to be reviewable.

Paragraph 52 states that a person can request a change of lawyer once or maybe twice in exceptional circumstances. In many cases, for example those involving legally aided persons afflicted by mental illness or facing life imprisonment charges relating to Class A drug dealing with multiple accused and potential conflicts, a change of lawyer can occur on more than two occasions. Does this mean that, if there is not an exceptional circumstance for the second request for transfer or if there is a further request for transfer, the provider is stuck with a client who does not want them to act, or is the legally aided person meant to proceed without a legal aid lawyer? A policy must be in place for this as some legally aided people may, for example, sack their legal aid lawyer immediately prior to trial to secure a last-minute remand.

### **Transfer to another Court of Location of the legally aided person - Paragraph 54**

Under the new Legal Services Bill 2010, there is no right for a provider to apply to the Legal Aid Review Panel for a review of fees. There needs to be some ability to challenge decisions of the Agency in relation to remuneration, whether it is for travel payments, or fees generally.

### **Duty lawyer rosters**

Regardless of whether duty lawyer reforms are in place, lawyers should not be required to be on a duty lawyer roster to receive category 1 and 2 assignments. That will deter senior counsel from undertaking category 1 and 2 work.

There are good reasons for senior counsel being able to undertake lesser category work including that:

1. standards would likely suffer or at least not improve if lower categorised counsel are not exposed to more senior counsel undertaking cases; and
2. the fact that a case is a category 1 or 2 matter does not mean that it is not complex. There are matters, for example, fraud, that are of lesser categorisation but can be very complex.

### **Observation**

As a general comment, the policy does not encourage new lawyers aspiring to undertake criminal aid work to do so. Once a lawyer has completed the various Law Society training programmes, there is no guarantee that his or her name will be added to the list of assigned counsel in that lawyer's district.

In addition, operating a closed roster may well be contrary to the provisions of section 27 of the Commerce Act 1986 as being a restrictive trade practice.

Section 27 of the Commerce Act 1986 provides that:

- (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.*
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.*

*(3) Subsection (2) of this section applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.*

*(4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable*

Section 7 of the Commerce Act 1986 provides that the Act binds the Crown.

The Society hopes that the above comments are of assistance to the Legal Services Agency. If you wish to discuss this submission further please contact the Legal Services Committee convener, James Wilding, through the committee secretary, Rhyn Visser phone (04) 463 2962 or email [rhyn.visser@lawsociety.org.nz](mailto:rhyn.visser@lawsociety.org.nz).

Yours sincerely

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

Jonathan Temm  
**President**