

Piloting a Legal Aid Defence Service at the Auckland and Manukau Courts

1. Introduction

In March 2003 the Minister of Justice, the Hon Phil Goff, announced that he had agreed to the establishment of a pilot in-house legal service providing criminal legal aid services at the Auckland and Manukau courts. This announcement followed the completion of a feasibility study on service delivery options.

The Legal Services Act 2000 provides that the Legal Services Agency must consult with representatives of local lawyers and the community, and determine the maximum proportion of caseload that the pilot will undertake, before employing salaried lawyers and establishing a pilot. This information sheet has been prepared as part of the consultation process with local lawyers. It outlines, as a basis for discussion, the Agency's proposals on the operation of the pilot.

2. Pilot Overview

The Legal Services Agency is committed to delivering high quality, consistent and cost-efficient criminal defence services to legally aided clients. Currently it provides these services through listed providers contracted to the Agency. Under the pilot, the same services would be available to the client. The client would continue to have the right to nominate a preferred lawyer, whether a private practice or Agency lawyer. In cases where the client did not have a preferred lawyer, the Agency would assign a listed provider who would either be contracted to the Agency (as currently) or directly employed by the Agency.

In implementing the pilot the Agency would establish an in-house legal service. The service would be an independent, stand-alone service within the Agency, with a structure wholly separate from the Agency's existing network of regional offices. It would undertake up to one third of the expected total criminal legal aid caseload for the Auckland and Manukau courts.

The service would be led by a professional head of the service, who would report directly to the Chief Executive of the Agency. Agency lawyers would be required to be categorised criminal listed providers. They would work alongside private practice lawyers as duty solicitors, assigned lawyers, and PDLA lawyers. The Agency expects to recruit staff from among lawyers currently listed with the Agency. Service staff would be responsible for implementation decisions on the detailed design and day-to-day operations of the service.

The implementation of a pilot in-house service does not mean that the Agency's need for, and commitment to, private practice listed providers would diminish in any way. Private practice lawyers would still provide at least two thirds of defence services at the pilot courts. We appreciate the services provided by our current listed providers, and believe that the great majority provide high quality and consistent representation

services to their clients. We are also aware of the importance of a strong private practising profession in maintaining quality standards and enhancing choice for legal aid clients.

The pilot would be evaluated as a stand-alone operation. If the pilot were successful in meeting its objectives, the Agency would consider establishing additional pilots. It is not the intention, however, that there be a move towards full public provision of legal aid services, and in fact the provisions of the Legal Services Act do not allow for this. Rather, there could be a move over time towards a legal aid system comprising a mixture of private practice and in-house representation. International research findings show that generally the best systems are those where a mixed service is provided.

3. Objectives of the pilot

The proposed objectives of the pilot are to:

- Provide high quality, consistent, independent, value for money services to legally-aided persons
- Improve system flexibility and provide opportunities to test different approaches to meeting cultural and other needs of clients
- Collect benchmarking information to improve the Agency's understanding of issues facing private practice lawyers when providing legal aid services to the public
- Provide opportunities to test new and innovative approaches to the management of legal services, and to encourage the development of areas of expertise.

The performance of the pilot against these objectives will be measured through an independent evaluation programme.

4. Quality and independence of the pilot service

A consistent theme of responses to the Agency's November 2002 consultation paper on establishing an in-house service has been a concern that the service would not be able to attract staff of sufficient quality, or maintain a service sufficiently independent from pressures from the State as funding body and employer.

The most common comments about staff quality concerned assumptions that the Agency would seek less qualified staff willing to accept lower salary rates, or that skilled lawyers would not want to work for the Agency. Independence issues most commonly cited were that Agency lawyers would be expected to act in ways contrary to the best interests of their clients, for example advise guilty pleas in order to dispose of cases more quickly, or would be forced to take on too many cases and become overloaded. Although we understand why these concerns have been expressed, we do not believe they are valid. Our consultation response (see section 9 below) discusses these issues more fully, but the following points are noted.

With regard to staff quality:

- As a minimum Agency lawyers would be required to meet the same criteria as private practice lawyers for listing and categorisation as a contracted provider. These minimum requirements are a condition of the Legal Services Act 2000
- Salary rates for Agency lawyers would be set at a level to attract staff of the necessary calibre. In setting salary ranges the Agency will seek the advice of an agency experienced in undertaking job sizing reviews within the legal profession
- The comprehensive range of service to be offered by Agency lawyers would provide career structure and job satisfaction for staff, and expose junior staff to the mentoring, quality assurance and training opportunities able to be provided by more senior lawyers. Internal performance standards would be agreed and monitored
- Staff would be encouraged to attend relevant training courses and seminars provided through law societies and other agencies.

With regard to independence issues:

- Agency staff would be bound by the NZLS Rules of Professional Conduct, but we are considering in addition the development of a code of conduct dealing with issues specific to an in-house service. The code would protect professional independence from the Agency, emphasise the primacy of the interests of the client, and provide for an express duty to refuse cases if this would lead to inadequate representation
- International research indicates that fears of a lack of independence from pressures of the funding body are not borne out in practice if the service has adequate funding and good quality staff. This is particularly so when the client is able to nominate a preferred lawyer. Many researchers and commentators note that public lawyers when interviewed do not appear to identify with the State as employer, but rather derive their motivation from providing a first class and dedicated service to their clients
- The structure of the pilot service and its relationship with other divisions of the Agency would be designed to reinforce a strong and independent service management.

5. Proposed operation of the pilot

The scope of the service

An in-house service would be staffed to represent clients in all criminal proceedings from the District Court through to the Court of Appeal. Duty Solicitor and Police Detention Legal Assistance Scheme services would be included.

Although senior staff would be qualified to undertake the most serious or complex cases, such as murder or serious fraud, the caseload emphasis of the service is likely to be on the more routine, high quantity, cases.

The size of the service

The Legal Services Act provides that the Agency must take all reasonable steps to ensure that any pilot will not have the result that lawyers outside the pilot are denied in practice the opportunity to offer the service. It also requires the Agency to determine the maximum proportion of likely caseload that the pilot will undertake.

The Minister of Justice has authorised the Agency to undertake consultation on the basis that the service would not exceed a maximum caseload of 33% of the total expected criminal legal aid caseload for the Manukau and Auckland courts. Based on current volumes 33% equates to approximately 2,580 approved cases per year (see the profile of current assignment patterns provided later in this document).

It is likely that initially the maximum caseload would be kept lower, ie the service would build up to the agreed caseload over time. We expect to employ less than 20 staff (including support staff) in the first year of operation.

The location of the service office

No decisions have been made, but it is expected that there would be a main office close to one of the two courts and a sub-office with meeting rooms close to the other.

The choice of lawyer

The choice of preferred lawyer would continue to be available to clients provided the Agency's criteria are met. Clients may also choose an Agency lawyer as a preferred lawyer. If the client has no preference, he or she may be assigned either to private lawyers or the in-house service, with numbers for each dependent on the caseload the service is to carry.

Approval of grants and amendments

The current process for seeking approval of initial grants of aid, and amendments, from Agency grants officers would apply. Agency lawyers would be expected to provide the same documentation as private practice lawyers and would receive no advantage from the Agency in this process.

Duty solicitor and PDLA rosters

Agency lawyers would be rostered as duty solicitor and PDLA providers and would receive the same proportion of duty solicitor work as those in private practice.

Assignments

Agency lawyers would be encouraged to build a client base as preferred lawyer. As for private practice lawyers they would be assisted in this process through their presence on duty solicitor and PDLA rosters. A proportion of 'in rotation' cases would be assigned to Agency duty solicitors (categories 1 & 2) and listed providers (categories 3 & 4) in accordance with the current assignment policy and practice.

The Agency may provide an advantage to the in-house service by assigning a further percentage of all (ie categories 1 – 4) 'in rotation' cases to a maximum of 50% of these cases. Overall, however, total cases assigned to the in-house service would not exceed the maximum caseload determined by the Agency. As noted above the maximum caseload of the service would not exceed 33% of the total expected criminal caseload of the two courts.

Accessibility and cultural issues

In-house lawyers would be expected to be conversant with appropriate methods of service delivery for particular groups of people. A service at the Auckland and Manukau courts would have a high proportion of Maori and

Pacific people as clients. Management and recruitment policies would ensure that legal services could be provided in culturally appropriate ways.

6. Background to the decision to pilot a criminal in-house service

The Agency reported to the Minister of Justice in February 2003 on the results of its feasibility study into alternative delivery systems. The study tested the feasibility of piloting both family and criminal in-house services, and of contracting with the private sector for the delivery of bulk or bundled family services. It also examined international models of service delivery and research findings. A full copy of the report is available on the Agency's website, www.lsa.govt.nz.

Most overseas jurisdictions with legal aid regimes similar to the New Zealand system, including Australia, Canada, England, Ireland, Scotland and Wales have a mixture of publicly and privately-provided legal aid systems. Research findings suggest that generally the best legal aid systems are those where services are provided through mixed systems.

The feasibility study favoured a criminal in-house service, as against a family in-house service, for the following reasons:

- Cost analyses using Agency data indicated more favourable outcomes for a criminal in-house service, mainly because assumptions about caseload could be made with greater certainty
- Responses to the Agency's consultation paper confirmed initial findings that an in-house family service would involve a number of complexities over and above those present in a criminal service.

Preliminary costing analyses also indicated cost efficiencies were possible with the bulk contracting of specified family law matters. However, international commentators on bulk contracting have stressed the need for extensive preparatory work on a contracting framework, standards and benchmarking. We considered that these requirements would present some risks in implementing bulk contracting at this stage.

7. Why the Auckland and Manukau Courts?

There were two main reasons for the choice of the Auckland and Manukau courts:

- The Agency's cost analysis favoured an Auckland/Manukau combination, mainly because the high number of cases allowed for greater cost efficiencies. In addition the relatively high percentage of 'in rotation' assignments meant greater certainty of caseload, and therefore less business risk, in the initial stages of the service
- The pilot will provide the opportunity to test service delivery across two large courts with a range of differences in their operation, including caseload type and client profile.

8. Implications for local lawyers

The effect on local lawyers cannot be stated with certainty at this stage. It will depend on the service maximum caseload determined of the Agency, the number of local lawyers appointed by the Agency, and how quickly Agency lawyers are able build up a 'preferred lawyer' client base.

All of the 207 lawyers currently undertaking cases at the Manukau and Auckland courts have the potential to be affected by the reduction in cases, but for the great majority the effect would be minimal. Lawyers with higher proportions of preferred lawyer assignments would be the least affected.

The following table provides an analysis of the maximum expected loss of legal aid income by the 207 lawyers, based on assignment practice and payments made* over the year ending 31 December 2002. The analysis assumes that the service would build up to the agreed maximum caseload over time, and that 40% of all cases not having a preferred lawyer would be assigned to the in-house service.

Number of lawyers	Expected annual loss of legal aid income (GST excluded)	
Group 1	63	Nil
Group 2	64	Less than \$5,000
Group 3	32	Between \$5,000 and \$10,000
Group 4	39	Between \$10,000 and \$20,000
Group 5	7	Between \$20,000 and \$30,000
Group 6	2	Above \$30,000

There is a group of up to 10 lawyers from Groups 4, 5 & 6 above whose legal aid income may reduce by between 20% and 30%, if they continue with low percentages of preferred lawyer assignments. These 10 lawyers had caseloads comprising between 78% and 100% 'in rotation' cases in the year ending 31 December 2002.

9. November 2002 Consultation Paper

The Agency received over 40 responses to its consultation paper on piloting an in-house legal service, and revised aspects of its proposals as a result of the consultation exercise. Many respondents had put considerable thought into their comments and provided helpful information and insights into the viewpoints of other 'players' in the justice system. A detailed consultation response will be published on the Agency website within the next month.

10. Evaluation

The Act requires that every pilot plan must be evaluated, and that the evaluation must address the effect of the pilot on other parts of the justice system, including the legal profession. The evaluation is expected to cover a five year period. Independent researchers would be appointed to undertake the evaluation.

11. Implementation

The Agency will, as a first step, consult with representatives of local lawyers and the community. More detailed design work and the development of an implementation timetable will follow. We expect to be in a position to commence the implementation phase by 1 August 2003, with the pilot commencing in early 2004.

April 2003

**Payments may include amounts paid to a lead provider for second counsel. They exclude GST and disbursements.*

**Profile of legal aid cases assigned at Auckland & Manukau District Courts
1 January – 31 December 2002**

	Total	Categories 1 & 2	Category 3	Category 4
Total Approved Cases				
Auckland	4077	3794	215	68
Manukau	3761	3573	149	39
Total	7838	7367	364	107
Number of lawyers (Ak & Manukau)	207	199	85	41
Assigned to Preferred Lawyer				
Auckland cases	2060	1870	136	54
Auckland % preferred	51%	49%	63%	79%
Manukau cases	1352	1272	64	16
Manukau % preferred	36%	36%	43%	41%
Total cases	3412	3142	200	70
Total % preferred	44%	43%	55%	65%
Number of lawyers (Ak & Manukau)	200	191	70	36
Assigned in rotation				
Auckland cases	2017	1924	79	14
Auckland % rotation	49%	51%	37%	21%
Manukau cases	2409	2301	85	23
Manukau % rotation	64%	64%	57%	59%
Total cases	4426	4225	164	37
Total % rotation	56%	57%	45%	35%
Number of lawyers (Ak & Manukau)	144	137	55	19
Duty Solicitor				
No. on Auckland roster	64			
No. on Manukau roster	48			