

Policy on Assignment, Termination of Assignment and Reassignment

Rationale

1. The Agency is responsible for the assignment of legally aided cases to lawyers. In order for the assignment (and any reassignment) process to be open and fair, the Agency must follow clear published guidelines.

Purpose

2. This policy sets out guidelines for assignment and reassignment that the Agency will follow in all legally aided cases (family, civil and criminal cases).

Guidelines

Assignment

3. Assignment is when a lead provider:

- accepts a legally aided case either by making a successful legal aid application to the Agency on behalf of an applicant;
- or agrees to take on a legally aided case offered by the Agency, whether this is as the applicant's preferred lawyer, as duty solicitor or via an assignment roster.

4. Assignment of a case is to an individual lead provider rather than a firm.

5. Minor matters to be carried out in the course of an assignment can be delegated by the lead provider without the prior approval of the Agency. The conditions for this are outlined in paragraphs 6-12 below.

6. Payment for minor matters, whoever they are carried out by, is assumed to be included in the approved grant of aid (the approved estimate).

7. In criminal cases, minor matters that may be delegated to another listed provider without the prior approval of the Agency are as follows:

- Unopposed bail applications
- Remand hearings
- Allocations of trial dates
- Callovers

8. Payment will be at the appropriate rate for the provider who undertakes the work in question.

9. Other hearings are in principle considered merit hearings and should be attended by the lead provider unless prior approval is given by the Agency. The Agency will approve requests by the lead provider to delegate merit

hearings only where this delegation is considered appropriate given the nature of the case and the reason for the delegation. Payment will not be made for attendances at merit hearings by other than the lead provider unless the Agency has approved the delegation.

10. In an emergency [1] , the lead provider may delegate merit hearing appearances (or equivalent in family or civil cases) to another listed provider. The lead provider must provide a written explanation of the nature of the emergency before the Agency will consider payment for such delegated activity.

11. In criminal cases, research for a case can be delegated by the lead provider to a non-listed junior, without the prior approval of the Agency. This work should be included in the estimate for the grant, on the basis of the appropriate rate set out in the Proceedings Steps. Such work is assumed to be included in the approved grant of aid (the approved estimate). The details of any such work and the rate charged should be set out in the invoice submitted by the lead provider.

12. In civil and family cases, matters such as research, document drafting and other minor preparation for the case may be delegated to an appropriately qualified listed provider, for example a junior, legal executive, or clerk. This work should be included in the estimate for the grant, on the basis of the appropriate rate set out in the Proceedings Steps. Such work is assumed to be included in the approved grant of aid (the approved estimate). The details of any such work and the rate charged should be set out in the invoice submitted by the lead provider.

13. Accepting an assignment implies acceptance of and adherence to this Policy on Assignment, Termination of Assignment and Reassignment.

Preferred Lawyer

14. A *preferred lawyer* is the lead provider chosen by the legal aid applicant.

15. The Agency views abuse of the preferred lawyer process in criminal cases as a very serious matter. If the Agency has information that raises concerns about abuse of the preferred lawyer process by providers in a specific case, it reserves the right not to assign the preferred lawyer, or to terminate the assignment, and to assign from an assignment roster.

16. In general, to be eligible for assignment the preferred lawyer must be:

- a listed provider in the appropriate category (an approved provider)
- based in the location where the proceedings are to be held
- willing and available to undertake the legal aid assignment
- able to appear at Court as needed, or (as may be the case in a criminal assignment) on the given dates of the proceedings.

17. The Agency will not in general assign a preferred lawyer who is based outside the location where the case is to be held. Exceptions to this where the proceedings are transferred in the course of a case are outlined in paragraph 30 of the policy.

18. Under the conditions in this paragraph, the Agency may assign a preferred lawyer based outside the location where the case is to be held if the provider agrees to pay all their travel costs associated with the case. The Agency will agree to such a request if it is satisfied:

- the legally aided person has requested the lawyer as their preferred lawyer
- the lawyer in question has the capacity to take on the work and the associated travel as far as possible,
- that there will be no disruption to hearing schedules, either for cases to which they have already been assigned, or for the new assignment requiring travel.

Before agreeing to such an assignment, the Agency may require information from the provider on these matters, including a breakdown of current commitments.

19. In line with Agency's policy on additional or top-up payments, the Agency will not in general allow the provider to seek or receive any additional or top-up payment from the legally aided person or anyone associated with the legally aided person to cover costs associated with travel in the case. Exceptions to this rule must be approved by the Agency before any such payment is discussed with the legally aided person or anyone associated with them.

20. The Agency reserves the right to terminate an assignment if it appears that the conditions of the assignment are not being or may not be met.

21. In exceptional circumstances, the Agency may agree to assign a preferred lawyer based outside the location of the proceedings and pay the preferred provider's travel costs. Requests for this will be assessed on their merits, and could include exceptional situations where a lawyer has specialised information or skills that the aided person's case requires and that no lawyer based closer to the proceedings can provide.

22. In Court of Appeal cases the preferred lawyer may be based away from where proceedings are held.

Assignment when there is No Preferred Lawyer in Criminal Cases

23. In criminal cases where there is no preferred lawyer, the Agency will operate a system of rotation or rostering to ensure equity of distribution among approved providers.

Note 1: From 17 July 2006 the procedure documented in paragraph 24 below will not apply at the Waitakere and Auckland District Courts. Revised instructions for these two courts are in place.

Note 2: From 28 May 2007 the procedure documented in paragraph 24 below will not apply at the Wellington, Lower Hutt, Porirua and Upper Hutt District Courts. Revised instructions for these four courts are in place.

24. Assignment in criminal cases will operate as follows:

- For proceedings categories 1 and 2 cases where there is no preferred lawyer, assignment will be to lawyers approved as duty solicitors. The Agency will operate a system of rotation using one of the following two options:

(a) **Option 1** is assignment by rotation to the rostered duty solicitors present on the day. A list of duty solicitors (or their replacement) is kept by the Agency and assignment is made in alphabetical order. Agency staff will review all assignments on a monthly basis to ensure equitable distribution of assignments.

(b) **Option 2** is assignment by rotation to approved providers available on any day when they are not rostered on as the duty solicitor. This practice operates at some of the large metropolitan Courts. Approved providers need to indicate their availability to the Agency (in person or by phone) for a particular day. Agency staff will review assignments on a monthly basis to ensure equitable distribution of assignments.

Note: Legal Aid offices using Option 2 for assignment of category 1 and 2 cases must notify duty solicitors whether their availability for assignment can be made by phoning in and/or by making themselves available at the Court on the day.

(c) For proceedings categories 3 and 4 cases where there is no preferred lawyer, assignment will be in rotation off a list of category 3 and 4 lawyers. Appropriately experienced lawyers will be invited to place their names on lists for each Court. Lawyers may place their name on more than one court list.

(d) In general, the Agency will not assign a lawyer based outside the location where the case is to be held and will not pay travel costs. The Agency may agree to pay travel costs where the case is transferred. Current local practice regarding the payment of travel costs where proceedings are transferred will continue for assignment of lawyers for category 3 and 4 cases where assignment is not to a preferred lawyer (see also discussion on this matter below).

Wherever possible, higher category lawyers will be offered assignments.

(e) The Agency will make initial assignments of cases that could become categories 3 & 4 to providers at a grading level that avoids the need for reassignment at a later date.

Termination of Assignment and Reassignment - Family, Civil and Criminal Cases

25. At times there may be a need for a reassignment of a legally aided case from one lead provider to another. It is the Agency's expectation that reassignment will not occur commonly and when it does, it will conform strictly to this policy.

26. Termination of an assignment may be:

- instigated by the Agency, or
- requested by the lead provider, the legally aided person or their new preferred lawyer.

27. Responsibility and authority for reassignment lies strictly with the Agency and not with the lead provider.

28. The Agency will not make any payment against the grant when a lead provider has handed a case to another provider (including those in the same firm) without prior approval of the Agency, except in an emergency situation [3] (and except for the delegation of minor matters in paragraphs above).

29. The Agency expects that requests for termination of assignments by lead providers will be made promptly to allow the Agency reasonable time to assess the need for termination and to reassign the applicant if agreed. Once the Agency has full information to support the request, it will make a decision on the request within a day and reassign as soon as possible after that, taking into account the needs of the case.

30. Termination of an assignment and reassignment of the case may only take place under exceptional conditions. Circumstances in which the Agency may terminate an assignment and reassign another lead provider (at the Agency's instigation or on request) will be strictly adhered to and include:

Conflict of Interest

- Where a conflict of interest arises and it would not be professionally appropriate to continue acting for the legally aided person. If the lead provider requests the termination of assignment, this request should be sent in writing to the Agency, outlining the reasons for the need for termination. If there are reasons of client privilege that prevent disclosure, this should be noted.

If the Agency is aware of a conflict that has not been addressed by the lead provider, the Agency may terminate the assignment and reassign the case.

Breakdown of Professional Relationship

- Where there is a breakdown of the professional relationship between the lead provider and the legally aided person.
Where the legally aided person or the lead provider requests termination of the assignment, the Agency will assess the need for this on receipt of a letter from each of the parties involved - the legally aided person, the current lawyer and (if there is one) the proposed new preferred lawyer - giving the reasons for the breakdown.
If, because of the nature of the breakdown of the relationship, letters are not forthcoming from any party, the Agency will assess the need for termination of assignment on the basis of the information it has.

Over-commitment

- Where the provider is overcommitted or the case changes resulting in over-commitment.
The Agency expects listed providers to control their own workload commitments and to not accept assignments if there are possible workload problems. The Agency accepts, however, that there will be occasions where providers, through circumstances outside their control, find they are over-committed. If the lead provider requests termination of assignment because of over-commitment, a request for this should be sent in writing to the Agency outlining the reasons.
In addition, the Agency may terminate an assignment if it has reason to believe that a provider is not able to undertake adequate preparation and/or may need to seek a significant adjournment for a case.

Exceptional Circumstances

- The lead provider, through circumstances beyond their control, can no longer complete the case, for example because of ill health.
If termination of assignment is requested by the lead provider because of exceptional circumstances, a request should be sent in writing to the Agency outlining the reasons. The Agency may also terminate the assignment if it is aware of exceptional reasons why this should happen.

Transfer to another Court or Change of Location of the Legally Aided Person

- If the case is transferred to another Court or the legally aided person moves to another location:
 - The Agency may decide that the transfer of a case to another Court may be accommodated by the appointment of an agent. In rare situations this may also occur if the legally aided person moves.

- Or, the Agency may agree that the appointment of an agent is not appropriate and that for specific reasons it will pay the travel costs of the lead provider. The Agency might decide to take this approach where there are specific reasons to maintain the assignment, such as where the case involves matters requiring a special relationship of trust between the client and the lead provider, or where the lawyer has specialised information or skills that the aided person's case requires.
- Or, the Agency may agree to pay travel costs to the lead provider if the anticipated financial cost of reassignment at that stage (such as new instructions and preparation) will be greater than the anticipated cost of the travel for the remainder of the case.
- If the Agency decides to pay travel costs, it may establish a maximum travel payment on the basis of anticipated travel costs. The Agency may also decide to establish a maximum travel payment on the basis of the anticipated cost of reassignment. If the maximum travel payment is not acceptable to the lead provider, the Agency will terminate the assignment.
- If the Agency does not agree to pay travel costs, it may agree not to terminate the assignment if the lead provider agrees to cover their own travel costs.

Reassignment due to Preventive Detention sentencing hearing

- Preventive Detention hearings are handled by PC4 providers.
- If the current provider is not appropriate, the Agency will consider a request to:
 - reassign the case to a PC4 practitioner as lead provider, or
 - assign a co-counsel at a PC4 level.

31. If an assignment is terminated by the Agency, on its own instigation or on request, payment in line with the approved grant and commensurate with the work already undertaken will be made by the Agency to the lead provider up to the date of termination.

32. Where the Agency terminates an assignment, the legally aided person has the option to choose another approved lawyer. In a criminal case, if the legally aided person does not have a preferred lawyer, the Agency will assign the next lawyer on the assignment roster. As noted in paragraph 12 above, if the Agency has concerns about abuse of process in criminal cases, it reserves the right not to reassign to a preferred provider.

33. Decisions relating to assignment, termination of assignment and reassignment are subject to the reconsideration and review provisions under the Legal Services Act 2000 (sections 54-58). This means that (under s 54) the applicant or legally aided person can seek a reconsideration or review of an Agency decision about assignment. A listed provider can seek a review of an Agency decision relating to payment by the Agency to the provider.

Endnotes

[1] An emergency would be where circumstances out of the provider's control that were not able to be anticipated mean that the provider cannot appear in person.

[2] The payment of travel costs in an assignment where there is no preferred lawyer and a case is transferred to another court is included in the Agency's review of travel policy.

[3] An emergency would be where circumstances out of the provider's control that were not able to be anticipated meant that the provider cannot appear in person.