



Part 13 – Confirm Provider

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Policy on Assignment, Termination of Assignment and Reassignment

Introduction

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.
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. The individual lead provider must be on the Agency's provider list and approved for the law type of the case being assigned.
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 status and interlocutory 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 status and interlocutory 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 status and interlocutory hearings by other than the lead provider unless the Agency has approved the delegation.

10. In an emergency¹, the lead provider may delegate status and interlocutory 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 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 (see General Information Family/Civil). 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. If an applicant for aid already has a provider assigned to them for other proceedings, and the applicant nominates a different provider as their preferred lawyer, the Agency will assign the existing provider. The new preferred lawyer will have to request a re-assignment. See 'Termination of assignment and re-assignment' below.

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.

19. 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.

20. 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.
21. 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.
22. 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.
23. 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

24. 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: from 17 July 2006 the procedure documented in paragraph 26 below will not apply at the Waitakere and Auckland District Courts. Revised instructions for these two courts are in place.



Note: from 28 May 2007 the procedure documented in paragraph 26 below will not apply at the Wellington, Lower Hutt, Porirua and Upper Hutt District Courts. Revised instructions for these four courts are in place.

PDLA lawyer

25. If a preferred lawyer has not been nominated by a legally aided person, and that person has received prior assistance from an approved PDLA lawyer under the PDLA Scheme, the Agency will assign the case to the PDLA lawyer if the provider:

- has advised the Agency of their prior involvement in the case and that they are willing and available to receive the assignment²
- is approved in the appropriate category
- is based in the location where proceedings are to be held
- is able to appear on the expected substantive dates.

Duty solicitors

26. For duty solicitors, assignment in criminal cases will operate (except in the Waitakere, Auckland, Wellington, Lower Hutt, Porirua and Upper Hutt District Courts) as follows:

- For proceedings categories 1 and 2 cases where there is no preferred lawyer or PDLA 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) Providers who receive proceedings category 1 and 2 assignments must be listed on the appropriate duty solicitor roster. When assigning to PC 1 and 2 providers, check the duty solicitor roster for the court where they will be appearing to ensure that the provider has a current listing.

Proceedings category 3 and 4

27. 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.

² The PDLA lawyer must notify the Agency at the earliest opportunity prior to the first appearance either by notifying the Agency by telephone or in writing, or by providing a completed legal aid application form.

28. (e) 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. Refer to the Travel Policy in Part 7 for further information.
29. (f) 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. Wherever possible, higher category lawyers will be offered assignments.

Termination of Assignment and Reassignment – Family, Civil and Criminal

30. 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.
31. 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.
32. Responsibility and authority for reassignment lies strictly with the Agency and not with the lead provider.
33. 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 (and except for the delegation of minor matters in paragraphs above). An emergency would be where circumstances out of the provider's control that were not able to be anticipated mean that the provider can not appear in person.
34. 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.
35. 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
 - Breakdown of professional relationship
 - Over-commitment
 - Exceptional circumstances
 - Transfer to another court or change of location of the legally aided person.

Conflict of Interest

36. Where a conflict of interest arises and it would not be professionally appropriate to continue acting for the legally aided person.

37. 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.
38. 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

39. Where there is a breakdown of the professional relationship between the lead provider and the legally aided person.
40. 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.
41. 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

42. Where the provider is over-committed or the case changes resulting in over-commitment
43. 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.
44. 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

45. The lead provider, through circumstances beyond their control, can no longer complete the case, for example because of ill health.
46. 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.
47. 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

48. If the case is transferred to another Court or the legally aided person moves to another location.

49. 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.
50. 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 than the aided person's case requires.
51. 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.
52. 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.
53. 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

54. 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 co-counsel at a PC4 level.
55. 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.
56. 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.
57. 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.

Transfers between Lead Providers – Family/Civil and Criminal

The prospective lead provider must make an application to have the file transferred to them. Often the current lead provider will advise the Agency in their final account/report about the request to hand over the file. **The Agency will not approve a transfer of a file until a request from the new lead provider has been received.** This may be in the form of a letter from the prospective lead provider informing the Agency the legally aided person has requested they take over the file.

Making decision to approve/decline

Has the legally aided person moved districts?

1. IF YES:

It is generally acceptable that they would want a lead provider who resides in the same district. The Grants Officer will approve the transfer, subject to consideration of cost estimate.

2. IF NO:

Consider the reasons for the request. The Grants Officer will approve the transfer if due to:

- Conflict of interest
- Breakdown of the professional relationship between lead provider and legally aided person
- Circumstances beyond control such as ill health of lead provider.

3. If no reasons are given, the Grants Officer will contact the current/prospective lead provider for details. No decision can be made until reasons are supplied.

4. If the legally aided person wants a new lead provider purely because they do not like the advice they have been given, and the current provider has followed all processes correctly, the transfer of the current grant may be refused.

5. If the file has already been closed when the transfer request comes in, the Grants Officer will consider whether a new application is required or whether the file can be reopened.

Grants Officer's decision

The Grants Officer will:

- either approve or refuse the request to transfer lead provider
- current lead provider, proposed new lead provider and legally aided person of the decision and the reasons for it.

Setting Maximum Grant

1. The Grants Officer will consider the amendment submitted by the new lead provider using the same process as any amendment of aid. The Grants Officer must take into account aid previously approved when assessing the amendment.

2. If the new lead provider has requested aid over the standard rate (after taking into account aid previously approved, the Grants Officer will consider the reasons given, and if unable to make a decision, refer the file to another Grants Officer, Team Leader or Specialist Adviser (if necessary) for advice.

Appointment of Second Counsel – criminal

Types of Second Counsel

1. The Agency will appoint a second counsel where necessary due to the complexity of the proceedings. There are two types of Second Counsel:
 - Co-Counsel – a provider of equal standing; and
 - Junior Counsel – a legal assistant role.
2. When assigning second counsel, counsel should normally take an assistant role (junior counsel, rather than another co-counsel).

Appointment of Junior Counsel

3. Junior Counsel takes a secondary role to the lead provider and works under the legal supervision of the provider although that may not require the lead provider to be present at all times.
4. Junior counsel may be appointed in cases where the number of charges, issues of law, or the evidence is large and complex and there is a substantial volume of documentary evidence and the prosecution is represented by at least two counsel.
5. When assigning a junior counsel, the grants Officer will identify the tasks junior counsel can undertake:
 - Lead evidence – with lead provider present
 - Cross-examine witness – with lead provider present
 - Organise witness evidence and file
 - Interview witness
 - Undertake legal research
 - Make bail applications
 - Attend pre-trial conferences
 - Attend callovers and adjournment applications
 - Appear at interlocutory hearing

Junior counsel should be able to undertake these tasks without the lead provider being present.

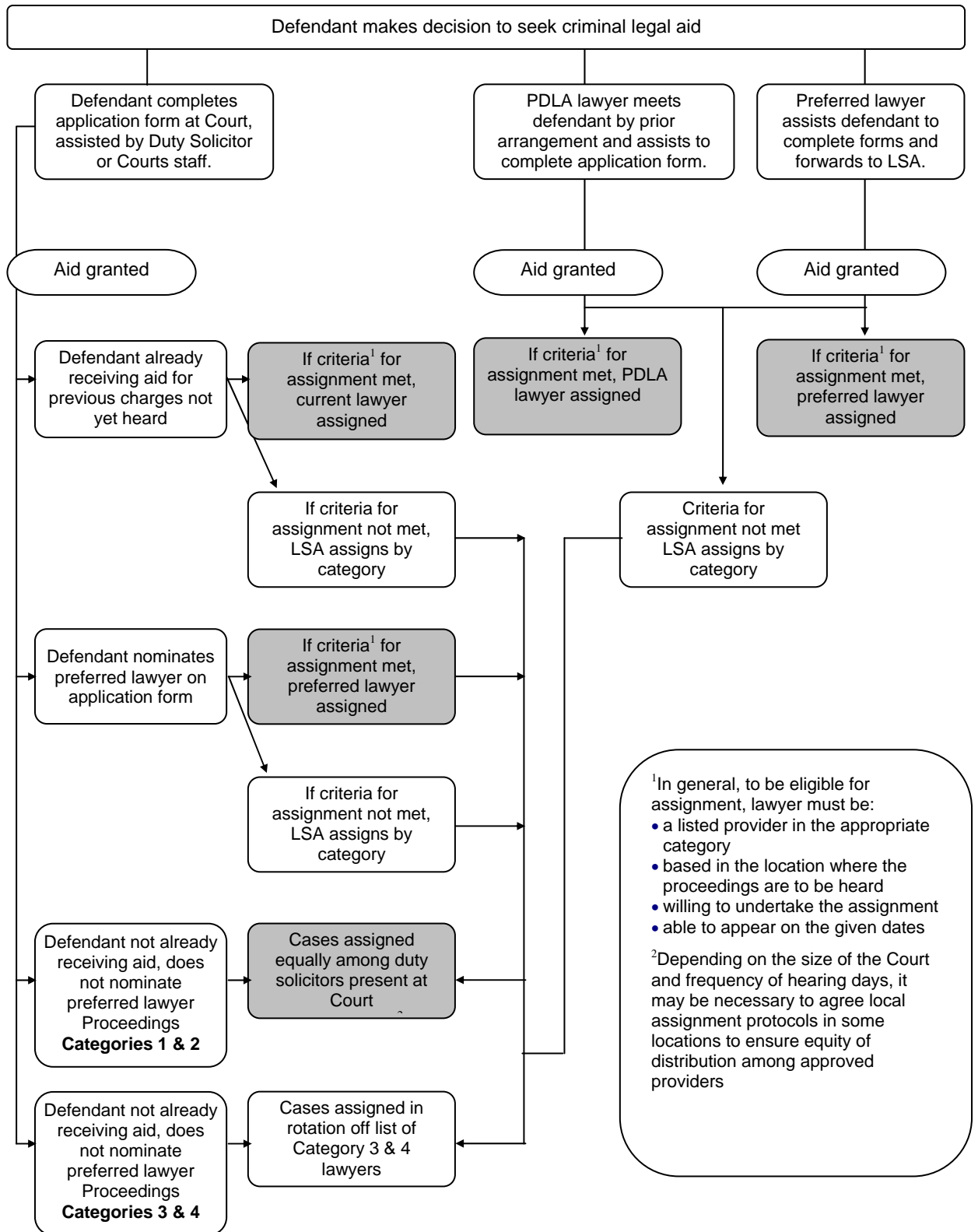
6. Junior counsel may hold a lower proceedings categorisation than the applicable proceedings category for that case. For example, a PC1 provider may be assigned as junior counsel to a PC3 category case.
7. Junior Counsel remuneration rates are calculated by applying their approved Litigation experience level to the Proceedings Category rating they hold under their Listing Approval. The remuneration rate is *not* calculated on the Proceedings Category rating of the proceedings they are appointed to appear in. The rates are detailed in the Guideline Hourly Rate Table for Criminal Proceedings. In the example above where a PC1 provider is assigned to a PC3 case, the provider will be remunerated at the PC1 rate.

8. For interlocutory applications, junior counsel may undertake the applications without the lead provider being present, however that is at the discretion of the lead provider.
9. A junior counsel is not able to undertake the substantive hearing if the lead provider is unavailable. All work must be done under the supervision of the lead provider; however lead provider may not necessarily always be present all the time.

Appointment of Co-counsel

1. Co-counsel may be assigned where:
 - The number of charges, issues of law, or the evidence is large and complex
 - The Crown has two or more senior prosecutors due to the level of complexity; or
 - A trial is going to take longer than a month
2. In these types of cases the second counsel should be able to complete the trial without an adjournment if for any reason the leading practitioner is unable to complete the trial.
3. To assess whether to assign a junior or co-counsel, the Grants Officer may seek the advice of a specialist adviser.

Protocol for Assignment – criminal



Instructing solicitors

1. Under Rule 14.6 (f) of the Rules of conduct and client care for lawyers, barristers sole may act or advise without instructions from a solicitor where they:
 - have been assigned to a legally aided person in a criminal matter,
 - are acting as a duty solicitor,
 - are providing assistance to a legal advice service operating on a non-profit basis or acting pro bono on work referred by such service,
 - are acting as a specialist adviser to the Legal Services Agency,
 - are acting under the Police Detention Legal Assistance Scheme,
 - are acting in a refugee status matter pursuant to the United Nations 1951 Convention,
 - are representing a client under the provisions of the Mental Health (Compulsory Treatment and Assessment) Act 1992, and
 - are representing a prisoner in an internal disciplinary hearing.
2. In respect of the above list, barristers do not need to provide the Agency with evidence of an instructing solicitor with the legal aid application.
3. In all other legally aided matters, barristers sole are required to have an instructing solicitor. This requirement applies to lead and secondary providers. When the barrister is to be the lead provider the name of the instructing solicitor must be noted in the legal aid application form.
4. The instructing solicitor must have the appropriate listing approval, as he/she is also considered to be providing legal services under a grant of aid (s 69(1)). Obligations under s 68 regarding protecting the Agency's interests apply to both the instructing solicitor and the barrister.
5. Barristers, who are lead providers, are to assign the collection of any financial recoveries by the Agency (repayments, costs and other proceeds of proceedings) to their instructing solicitor.
6. The Agency will pay a disbursement based on actual and reasonable time at the appropriate GHR for the instructing solicitor's attendances.