

**SUBMISSION BY THE AUCKLAND DISTRICT LAW SOCIETY
CRIMINAL LAW COMMITTEE**

**REVISED DUTY LAWYER OPERATIONAL POLICY
1 JUNE 2023**

1. INTRODUCTION

- 1.1 The Ministry of Justice is undertaking a consultation exercise on the Revised Duty Lawyer Operational Policy. The proposed pilot sites for this policy are Hamilton, Hutt Valley and Christchurch District Courts.
- 1.2 The proposals provide for the assignment of legal aid on the day:
- i. to a duty lawyer or another lawyer at court where the case can be progressed to plea or disposal on the day, and;
 - ii. to a duty lawyer assisting a defendant to apply for bail that was opposed.
- 1.3 The Legal Services Commissioner is seeking feedback on the proposed policy from the legal profession, particularly current duty lawyers. This feedback is sought to help the Ministry of Justice ensure the Revised Policy is as robust as possible before starting the pilot.
- 1.4 The proposal and reasons for the changes are set out in the Policy Document dated 11 May 2023.
- 1.5 The ADLS Criminal Law Committee (“the committee”) welcomes the opportunity to make written submissions on the Policy Document. The committee is comprised of counsel from the Defence Bar.

2. COMMITTEE SUBMISSION

- 2.1 The committee is of the view that advancing the pace of case progression for the reasons and processes set out in the Policy Document is undoubtedly beneficial for

everyone involved in the court proceedings. Swift resolution not only saves time, but also helps minimize emotional stress and financial burden on all parties. However, it is crucial to ensure that in the pursuit of speed, we do not compromise on the essential elements of justice, such as fairness and the right to a fair trial.

- 2.2 In essence, achieving a balance between efficiency and maintaining the integrity of the judicial process should be the key objective. It is crucial that every participant in the legal process has their rights protected, including adequate access to legal representation, enough time to prepare their case, and the opportunity to fully present their evidence and arguments in court.
- 2.3 Justice should never be a rushed process; haste must not eclipse the fundamental principles that make up our justice system. While it is advantageous to streamline court processes for better efficiency, we should also acknowledge that each case is unique, and rushing may inadvertently overlook key aspects of the case leading to miscarriage of justice.
- 2.4 Any policy must strive to ensure that every individual going through the court system gets a fair trial, which of course forms the backbone of our judicial system. As we work to expedite court processes, we must never lose sight of the importance of ensuring equitable and unimpeded access to justice. It is not just about timely progression; but about ensuring that justice, in its truest sense, is upheld.

3. CONCERNS REGARDING THE CURRENT PROPOSAL

Types of cases to be included:

- 3.1 It is advisable that the pilot program should exclusively target cases whose charges range from a minimum of six months to a maximum of ten years in penalty. The committee believes this approach ensures a relatively contained number of cases, with penalties that reflect a broad, yet manageable, range of severity.
- 3.2 Regarding bail matters, the proposal that incorporates bail, including reverse onus bail cases, faces significant opposition. Reverse onus bail applications are typically associated with more severe charges, often reaching the higher end of the ten-year maximum penalty range. Due to this, it would be prudent not to include them in the pilot program.
- 3.3 Reverse onus cases inherently carry a heightened risk, primarily due to their complexity. There is potential that bail applications may be presented hastily or

without sufficient preparation, thereby potentially compromising the defendant's rights. In such scenarios, defendants may end up being held in custody until a more thoroughly prepared bail application can be submitted or an electronically monitored bail application could be introduced. This potential delay also has a significant impact on system efficiency.

- 3.4 Moreover, judges often require written bail submissions in such cases, which typically cannot be adequately prepared and reviewed within a single day. Consequently, including such cases in the pilot might not only be impractical but could also compromise the fairness and efficacy of the justice process.
- 3.5 Thus, while striving for efficiency, the committee believes care should be taken to protect the rights of defendants and uphold the integrity of the justice process, which includes excluding more serious cases, such as reverse onus bail cases, from the pilot program. The focus should be on ensuring that every case, despite being expedited, receives the due diligence it requires and deserves.
- 3.6 The pilot program should be restricted to Section 8 opposed bail cases. These are the types of cases that hold a greater potential for same-day progression, where negotiations with the Prosecutor could possibly lead to an agreement on bail conditions, or an oral bail application could feasibly be presented within the day. This streamlined approach would help in efficiently managing the court's time while ensuring the rights of the accused are duly respected.

4. EXTENDED ROLE OF DUTY LAWYER SUPERVISOR

- 4.1 There are reservations from the committee about the potential pitfalls of case assignments being allocated by duty lawyer supervisors, especially concerns about transparency and fairness. There is a perceived risk that certain individuals could be seen as favouring specific lawyers by "handing" them cases over others, which could foster a perception of bias and unfairness. Such an approach may inadvertently put duty lawyer supervisors in an uncomfortable position of deciding who should handle what cases.
- 4.2 The task of assigning legal aid cases should ideally be carried out by a Legal Aid Grants Officer. This method could involve positioning a Grants Officer in the pilot courts wherever possible. For instance, a Grants Officer from the Wellington Legal Aid office could be placed at the Hutt Valley court. However, if this is not feasible, we propose the utilisation of a 'remote' system. In this system, a Grants Officer could assign cases

to lawyers who have previously indicated their availability for the day, no matter their location.

- 4.3 The integration of Grants Officers into the assignment process can help ensure that there is equitable distribution of cases. They can impartially assign cases while adhering to any rotation policies if such policies are in place. Their involvement helps to preserve the principles of fairness and transparency in case allocation. This way every lawyer gets an equal opportunity, thus eliminating any perception of favouritism or bias. This process would also avoid placing undue pressure on individuals who may feel conflicted about assigning cases.

5. THE ASSIGNMENT OF THE CASES

- 5.1 The committee is of the view that if a duty lawyer who dealt with the defendant is to be assigned the case, there will need to be an increased number of duty lawyers on the roster each day, as lawyers will need to sign off to deal with matters they are assigned. If they are assigned opposed bails, this may take some time to deal with and they may not be available for the remainder of the day.
- 5.2 It will be important to ensure spread of experience of duty lawyers each day – for example, some very experienced ones to balance the less experienced duty lawyers on the roster.
- 5.3 Additionally, the committee has concerns around what is perceived as “experience”, saying that most duty lawyers have at least PAL 1 does not necessarily reflect a high standard of experience. Some rostered duty lawyers will have little experience with more complicated matters, identifying pre-trial issues, breaches of rights etc, as that comes with more experience than most PAL 1 lawyers possess.
- 5.4 The successful determination of case progression on the same day largely depends on the duty lawyer's assessment - a process requiring significant experience. Younger or newer PAL 1 lawyers may lack the necessary expertise to make these assessments accurately and swiftly. Hence, it is crucial to consider the depth of experience, not just the qualifications, when assembling the daily duty lawyer roster. This balance will ensure an efficient and fair progression of cases.
- 5.5 Determining case progression on the day relies on assessment by a duty lawyer – they need experience to make the assessment, some newer PAL 1 lawyers may not have that experience. If the case assignment system is set up so that the duty lawyer who

initially handled the defendant's case continues with it, this would necessitate an expansion in the daily roster of duty lawyers. Once a lawyer has been assigned to a case, they will need to devote their time to it, which may consume a significant portion of their day, especially in instances of opposed bail cases. This allocation might make them unavailable for other tasks for the rest of the day.

- 5.6 Therefore, it is essential to ensure a diverse mix of duty lawyers each day, with varying levels of experience. The committee believe that there needs to be seasoned lawyers on the roster to balance those with less experience. This balance ensures that complex cases can be handled competently, even as we incorporate new lawyers into the rotation.
- 5.7 The requirement for lawyers to be physically present at court to be assigned these matters needs reconsideration. Instead, it could be stipulated that they should be able to reach the court within a specific timeframe, say 15-30 minutes. Lawyers often have their offices or chambers nearby and can quickly arrive at court when needed. However, expecting them to linger around the court in anticipation of a case assignment is neither productive nor efficient.
- 5.8 A practical approach might involve lawyers emailing their availability for the day to a designated email address by a specified time, such as 9am. This system is similar to the current process for urgent same-day assignments, where lawyers notify Legal Aid of their availability, and they receive a call or text message if a case arises. There is no need to wait at the courthouse under this arrangement.
- 5.9 A couple of significant questions also need addressing:
- For instance, how will cases be assigned to the Public Defence Service (PDS)? Will they still receive 50% of the cases? Will they be expected to wait at court as currently proposed, or can they wait at their offices? If the latter, the same privilege should extend to other lawyers who can wait at their offices or chambers. The requirements should be similar for all to ensure fairness.
 - Another question is whether these case assignments should count as rotational or should be in addition to regular rotational assignments. Designating these as non-rotational assignments might incentivise lawyers to make themselves available for such urgent cases. Otherwise, some lawyers might miss the opportunity to handle these more urgent cases yet end up with the same proportion of cases as those who are more flexible and available. It is suggested by the committee that these assignments should not be counted as rotational ones. This approach might encourage more lawyers to express interest in these same-day assignments.

6. MONITORING

- 6.1 The committee believes that it might be beneficial to include appeals from bail applications processed as part of the pilot program. This inclusion could provide valuable insights into whether ad hoc bail applications lead to an increased rate of appeals. Understanding these dynamics can help refine the process, balance efficiency and fairness, and ultimately ensure a more effective justice system.
- 6.2 Additionally, it would be insightful to track the number of 'straight bail' applications that get denied and subsequently succeed in applying for electronically monitored (EM) bail. If hastily prepared or inadequately substantiated bail applications are presented and rejected, this might result in a surge in EM bail applications. This shift could potentially push more workload into the EM bail space.
- 6.3 Broadening the scope of the pilot program to include these elements will give us a more detailed understanding of the effects of hastening case progression. This will enable us to not only measure the immediate impact on court proceedings but also assess the potential long-term consequences on the wider judicial system, such as changes in appeal rates and the frequency of electronically monitored (EM) bail applications. This expanded view will empower us to make better-informed decisions about the deployment and refinement of the pilot program, ensuring it genuinely aligns with the pursuit of justice.

7. COMPARISON TABLE

- 7.1 The committee's view is that the current nationwide policy may not accurately depict the proceedings at certain courts. For example, at Auckland and Manukau courts immediate assignments are made for opposed bail matters and some other cases. These are regarded as 'urgent assignments,' which deviate from the suggested two to three day delay for a lawyer assignment implied by the existing policy. Lawyers at these courts notify Legal Aid of their readiness to handle urgent matters. Should an urgent case arise, these lawyers are promptly contacted, they attend court, meet the client, and attempt to progress the case on the same day.
- 7.2 In the committee's view, this exemplifies a more responsive approach, which aligns better with the dynamic nature of court proceedings. It showcases how flexibility and

swift action can be integrated into the legal system to ensure that urgent matters are addressed promptly and efficiently. Moreover, it highlights the importance of considering local practices and realities when formulating national policies. By integrating these 'on-the-ground' insights into the policy framework, it can create a system that better addresses the needs of each court, enhances efficiency, and ensures that justice is delivered swiftly and effectively.

8. OTHER COMMENTS

- 8.1 Experience Levels:** For participation in the pilot program, lawyers should have a minimum Provider Approval Level 1 (PAL 1) approval from Legal Aid Services. Duty lawyers who do not meet this minimum PAL 1 requirement should not be included on the duty roster. This consideration might necessitate a broader review of the duty lawyer system to ensure only adequately qualified professionals handle cases.
- 8.2 Fee Structure:** The document suggests that bail applications, pleas, and related legal procedures would be charged at standard legal aid rates. However, previous discussions, such as those mentioned in a PowerPoint presentation, indicated some fees might be lower. It is crucial to confirm and maintain consistency with existing Legal Aid fees for these steps to ensure fairness and to prevent any undue financial burden on clients.
- 8.3 Willingness of Duty Lawyers:** There might be reluctance among some duty lawyers, especially those at the lower PAL level, to accept assigned cases. The nature and complexity of the cases might not align with their typical workload or expertise. Thus, the willingness and suitability of duty lawyers to undertake these cases should be a consideration.
- 8.4 Duty Lawyer Rate Equality:** Increasing the payment rate for duty lawyers in pilot courts could potentially create discrepancies. If duty lawyers in pilot courts receive higher remuneration for similar tasks performed by their counterparts in other courts, it could lead to issues of fairness. Currently, duty lawyers across different courts are expected to progress cases on the same day by sorting bail conditions, among other tasks. As a gesture of good faith, any increase in payment rates should apply to all duty lawyers across all courts. However, it is important to acknowledge that a thorough review of the duty lawyer rate system may be necessary to ensure just compensation for all involved.

The committee is grateful for the opportunity to make submissions on this consultation and trusts that the feedback is helpful.

To contact the ADLS Criminal Law Committee for clarification on any matters raised in this submission please contact committee secretary, Daniel Conway: Daniel.conway@adls.org.nz

Yours sincerely,



Julie-Anne Kincade KC

Vice-President ADLS

Convenor ADLS Criminal Law Committee

