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Ministry of Justice
Operations Support, National Service Delivery
Wellington

By email: NSDOpsSupport@justice.govt.nz

Consultation Paper: Mental Health Rosters

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the consultation paper *Mental Health Rosters* (paper).

2. The Law Society sought comments on the paper from its Family Law Section and national Legal Services Committee, as well as the wider legal profession. This submission is based on extensive feedback received from the Family Law Section, the NZLS Wellington Branch's Legal Assistance Committee and mental health lawyers practising in Auckland.

The proposal

3. The paper proposes national implementation of a referral and roster system administered by Legal Aid Services (LAS) in relation to representation of patients involved in proceedings under the Mental Health (Compulsory Assessment and Treatment) Act 1990 (Act). LAS proposes to prepare a weekly roster for each of the Family Courts nationwide and, if a patient does not indicate a preference in terms of a lawyer, to refer the patient to his/her previous lawyer or to the lawyer on the roster for the relevant hearing week.

4. The objective stated in the paper is "to ensure that providers are referred to mental health customers in a way that meets the customer's needs and is sufficiently timely to fit in with hearing schedules". Amongst other things, the paper notes that in order to be effective the proposed rosters must:

    - ensure there are sufficient providers available on relatively short notice to accept instructions from mental health customers at a variety of locations,
    - allow an applicant to select their preferred provider where they can exercise a choice, and
    - allow for consistency of representation where there are repeat customers.

General comments

5. The Law Society agrees with the objective of the reform, stated above in paragraph 4.

6. In principle, the Law Society supports the administration of the mental health rosters being undertaken by LAS – subject to administration of the rosters recognising and providing (where appropriate) for regional differences, as discussed in the next section. Ideally, this should lead to consistent services for mental health legal aid clients and providers, while at the same time retaining sufficient flexibility for operation of the rosters to be "tailored to recognise differences between regions in volumes of cases and the number of available providers" (as noted at page 2 of the paper).

7. It is particularly important that the reform of the rosters, including the introduction of national administration, recognises the welfare and rights of patients and the complex nature of the work mental health lawyers undertake. Patients subject to compulsory treatment under the Act are frequently not of sound mind and are not able to make rational decisions. In most cases, they are agitated, distressed, angry, incoherent and acutely unwell, and by definition are vulnerable. A therapeutic relationship based on rapport and trust is particularly important, as well as flexibility within the legal system designed to protect and represent them.

8. Correct terminology is also important. The appropriate term for people requiring representation in proceedings under the Act is "patient" (rather than the term "customer" used in the paper). The person is always a patient of a District Health Board (DHB) and, given that the advice being sought is often in relation to the patient's *compulsory* status under the Act, the word "customer", with its connotation of choice, is inaccurate. The Act refers to "patients". For the sake of consistency, the Law Society has used the term "patient", rather than "customer" (or "client"), in this submission and suggests that LAS adopts the same terminology.

9. The Law Society agrees that in some regions, for example where there are a large number of patients and lawyers available to do the work as well as different courts in operation (as there are in Auckland and Wellington), it would be administratively beneficial for LAS to be responsible for the administration of the roster. The Law Society considers that LAS is the appropriate agency to administer the mental health rosters (as it does for duty solicitor and police assistance lists) and that the cost of administration is appropriately met by LAS.

10. It is unfortunate, however, that the paper does not provide any details of how the roster and referral system is intended to work in practice. For that reason, the comments provided below are limited to what detail is included in the paper and issues that the Law Society has identified that will need to be addressed in order for LAS to achieve its objectives in terms of administering the mental health rosters.

Regional variances

11. The paper refers to "significant regional variations in how the rosters are administered and how providers are referred to customers". However, it does not identify where, how or why these regional variations are disadvantaging or causing concerns or difficulties for patients, lawyers or other stakeholders.

12. It is important to note that regional variances also include other stakeholders involved in the mental health area. There are varying practices and approaches by different District Health Boards (DHBs) and District Inspectors within Auckland and throughout the rest of the country. (Regional

variances are not unusual; they also occur in a wide range of Family Court proceedings – Family Court judges have varying practices as do registry staff in regions throughout the country.)

13. The fact there are regional variations is not necessarily problematic. In this area of law, a "one size fits all" approach is not necessarily the best approach. The Law Society understands that the current regional variances, which are discussed below, have developed to provide flexibility to cater for specific needs in different regions.

Auckland

14. In the Auckland region, the Auckland District Law Society (ADLS) has managed the rosters through its mental health and disability committee (comprising volunteer lawyers practising in the mental health area) supported by ADLS administrative services. Following enactment of the Lawyers and Conveyancers Act 2006 ADLS became a membership organisation independent from the Law Society but has continued to administer the mental health rosters in Auckland. In late 2017 ADLS advised it no longer wished to administer the mental health rosters in Auckland but would maintain the rosters until June 2018. ADLS should be acknowledged for its voluntary work in managing the rosters over many years.

15. Auckland has multiple mental health inpatient units which are catered for by two lists, one in Auckland and one in South Auckland. There are significant differences in how the two lists are currently managed.

16. The Auckland list is based on a combination of Auckland, North Shore and Waitakere Hospitals. The list has team leaders heading up a team of four lawyers who are rostered on rotation. If a lawyer has previously represented a patient, that lawyer is reassigned if available. The ADLS Mental Health Roster Guidelines set out in detail how the rosters work and the roles and obligations of the rostered lawyer. They also set out the duties of each team leader and how the allocation of legal providers is made, reflecting the statutory timeframes that must be met.

17. The South Auckland list is based on units in Middlemore Hospital and a number of community based mental health services. The list works on a rotation basis with a "liaison person" and a "buddy". All new applications are referred to the liaison usually a week or more ahead of the court list. Patients previously represented are referred to the lawyer previously involved if that lawyer is available. All new assignments, and any reassignments due to unavailability are made by the liaison.

18. Travel is a key issue in Auckland and a travel policy and continued funding (including travel, mileage and parking costs) will be essential to ongoing administration of the mental health rosters.

Other regions

19. In some regions outside Auckland there is no roster and patients are referred directly to their preferred lawyer or an available lawyer from a list of those qualified to undertake mental health work. Referrals are made either by the District Inspector or the Mental Health Act administrator at the hospital or by a nurse working with a patient. In some instances, patients make direct contact with a lawyer of their choice from a list of approved lawyers held at the mental health

unit. This system appears to work efficiently in these regions and is sufficiently flexible to take account of the patient's ability or inability to instruct a lawyer and the patient's preference (including to not be represented by a lawyer or a previous lawyer), as well as the availability of lawyers.

20. In other regions there are rosters that are prepared by the District Inspector, with liaison with the lawyers in that region who practise in the mental health area. The roster system in these regions does not preclude a patient from having a lawyer of his or her preference but, in the event of there not being a preference, there is a lawyer available to provide advice and representation.

21. While there appears to be some regional variation in the referral process and rosters outside of Auckland the Law Society has not been made aware of any significant issues arising in relation to representation of mental health patients outside of the Auckland area. The Law Society believes this system works well due to the local knowledge of regional practices, practitioners and other stakeholders involved in these types of proceedings. In Auckland, there are established protocols between the DHBs and the legal profession in terms of practice issues. There are likely to be such protocols established in other parts of the country. A key part of the efficiency of the current system, in both Auckland and the rest of the country, is due to the professional relationships of stakeholders (for example, District Inspectors, Mental Health Act administrators, nurses, lawyers and the court registries) and the ongoing communication between those professionals.

22. It will be imperative for LAS staff who will be administering the roster, to have the necessary contacts in the various regions and knowledge of regional practices and any established protocols in order to effectively manage the roster.

Proposed operation of the mental health rosters

Referral process

23. It is of significant concern to the Law Society that LAS is proposing that "mental health administrators" will notify LAS of hearings (presumably of the names of patients, not just hearing dates). It is not clear from the paper that this is a role that administrators are prepared to or wish to assume. This proposal adds a further level of administrative bureaucracy, with risks of human error including oversight, for both the hospitals and LAS, and delay for both patients and lawyers.

24. There is no detail in the paper as to how the referral process will work in practice. By way of example, each file must have medical reports from two health professionals that are sent to the mental health administrators. The paper does not make clear whether these reports will be sent to LAS who will then forward them to the mental health legal aid provider or whether the administrator will be responsible for doing that. If it is to be the administrator's role to forward reports, they will need to be provided with an updated list of available legal providers, including when there are changes due to availability/unavailability of providers. The performance by the mental health administrators at each hospital (that as mentioned above, have their own different systems) will be essential to the successful operation of the national mental health roster and referral system.

25. It is important to note strict statutory timeframes apply in this area due to the fact that patients are held, often against their will, for compulsory treatment. Hearings are often scheduled at short notice, so any roster or referral system needs to be able to operate under extremely short timeframes.

26. Most significantly the proposal for LAS national administration of the rosters does not recognise the fact that there are many hearings that are initiated by a patient (a section 16 application for review of status is the most obvious example) and not by the hospital after meeting with the District Inspector and well prior to a hearing about the making of a Compulsory Treatment Order. This is a significant gap in the proposal that will need to be addressed.

27. The paper provides no detail on the following aspects:

- how contact will be made (presumably LAS envisages contact being made by telephone but in many situations, that will be neither realistic nor fair for patients);
- how patients, who are in a particularly vulnerable situation, will be "given the opportunity to select their preferred provider";
- how the options are going to be explained to the patient and by whom;
- who is going to decide if a patient is "unable to exercise a choice"; and
- there is reference to a "support person" but it is not clear who is envisaged in that role.

28. In addition, it is unclear how in circumstances of non-availability another provider will be allocated. A rotation system may not be appropriate in cases such as a young person in a child and family unit such as Starship or under Whirinaki (a specialist mental health service for children). A rotation system cannot ensure that an experienced lawyer for child who is also experienced in mental health is allocated to a child or young person. A nuanced approach operates in many regional areas, where a District Inspector or nurse refers a patient to their previous lawyer if that is applicable or to another appropriate lawyer in the event that the patient does not want their previous lawyer but wants, for example, a female lawyer, but this is not discussed in the paper. As noted above, while the paper states that "… how the rosters operate may be tailored to recognise differences between regions" there is no detail provided as to how the rosters will be tailored to reflect local differences.

29. An analogy can be drawn as to how lawyers for children are appointed by the Family Court to represent a child or young person under the age of 18 years. Those who wish to practice in this area must fulfil a range of criteria in respect of specialist training and practical experience. Those who qualify are then appointed (or not) to the list following an interview by a panel established by the Family Court.[1] Once on the list, a Family Court Coordinator, manager or a Family Court judge appoints a lawyer for child based on that lawyer's experience and the nature of the particular proceeding involved, rather than on a rotation basis. For example, it is highly unlikely that a lawyer who has only recently been appointed to the list would be appointed on a complex matter. There are also three levels of remuneration available to lawyers for children, which is based on

[1] *Practice Note: Lawyer for the Child: Selection, Appointment and Other Matters*, 26 March 2015, paragraph 9.

the practical experience of the practitioner but also on the complexity of the proceeding. This system strikes a balance with matching the skills and experience (including cultural aspects) of legal practitioners with the particular child who is the subject of proceedings, while at the same time retaining the skills of senior lawyers for children who are able to deal with highly complex matters and providing experience for less senior lawyers. The Law Society believes the regional differences in the current management of rosters throughout the country (including Auckland) achieve this important balance.

30. The Law Society assumes there will be a dedicated team of staff at LAS for mental health matters to ensure that matters are dealt with as quickly as possible in order for the statutory timeframes to be met. It is difficult to see how LAS will manage a mental health roster without a structure similar to that in operation in Auckland.

Approved mental health providers

31. The paper does not specify criteria that lawyers will need to meet in order to be considered for inclusion on the mental health rosters. It would be appropriate for the rosters to be open to all approved mental health providers, consistent with the approach taken by LAS to other rosters such as the duty lawyer rosters. The paper states that "providers who are approved to provide mental health legal aid services *may* be added to the roster" (emphasis added). It is unclear whether a provider who has been given mental health provider status by LAS must then fulfil additional criteria before that person is able to be added to the roster. The paper notes that the "future intention" is to review the approval standards, but this point needs to be clarified without delay.

32. In respect of Auckland, it is unclear whether there will be one general roster for the whole of the Auckland region, or two separate rosters (as is the case currently). If there are two rosters, will providers be able to be included in both rosters or just one of the two rosters?

33. The Law Society notes that the time period for expected availability of lawyers on the rosters must be reasonable and realistic for the relevant region. While a week might be realistic for smaller regional areas, specific days might be more realistic for the Auckland rosters. Again, this aspect of the proposal will need to be tailored to reflect regional differences.

Review and reapplication

34. The Law Society supports a regular review and reapplication for inclusion on the rosters, to ensure that lawyers remain appropriately qualified and have maintained their skills through regular and relevant continued legal education in what is a specialised and often difficult area of work.

LAS review of approval and practice standards

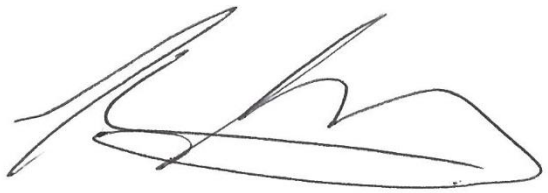
35. The paper states that LAS intends to review the approval and practice standards for mental health providers. Law Society agrees these reviews are necessary and looks forward to being involved in that consultation.

Conclusion

36. There is a significant lack of detail about how the proposed national administration of the mental health rosters will work in practice, and the Law Society would welcome the opportunity to meet with LAS to gain a better understanding of what is proposed. We would also welcome the opportunity to comment further once detailed information is available about implementation of the proposal.

37. We hope these comments are helpful to the Ministry. If you have any questions please contact the manager of the Family Law Section, Kath Moran by email kath.moran@lawsociety.org.nz or on 04 463 2996.

Yours faithfully,



Kathryn Beck
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