

Applicant:

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Respondent:

Secretary for Justice

Date of Decision:

23 February 2024

DECISION

Application for Approval as Provider of Criminal Legal Aid Services

[1] On 13 September 2023, the Applicant applied to the Secretary for Justice (“the Secretary”) for approval to provide criminal legal aid services at approval level 3 (as defined in the Schedule (“Schedule”) to the Legal Services (Quality Assurance) Regulations 2011 – “the Regulations”).

[2] Under the Regulations, an applicant for approval level 3 (“PAL 3”) was required to have:¹

- (a) at least 36 months’ recent experience working on approval level 2 criminal proceedings; and
- (b) appeared as counsel with substantial and active involvement in at least 4 approval level 3 or 4 criminal proceedings where—
 - (i) at least 1 charge carries a maximum penalty of 10 years’ imprisonment or more; or
 - (ii) the person charged is likely to face cumulative sentences of more than 10 years’ imprisonment.

[3] Clause 1(1) of the Schedule to the Regulations defines PAL 3 criminal proceedings as proceedings that are Crown prosecutions where the person charged may be liable to a penalty of more than 10 years’ imprisonment that is not a PAL 4 criminal proceeding.

¹ Legal Services (Quality Assurance) Regulations 2011, Schedule, clause 4.

[4] In addition to those minimum requirements, the Secretary was required to take into account the Applicant's experience as a lawyer,² and to be satisfied that the Applicant had the appropriate level of knowledge and skill to provide legal aid services in each area of law to which the application related.³ Overall, where an applicant is a lawyer, and is applying to be a lead provider, the Regulations require that he or she must be experienced and competent in each area of law in which he or she intends to provide legal aid services.⁴

[5] The Regulations contain certain other criteria for approval, including criteria dealing with professional entry requirements (Regulation 5), and service delivery systems (Regulation 9). An Applicant must also be a "fit and proper person" (Regulation 9(c)). None of those criteria appear to be in issue in this application.

[6] In her application, the Applicant said that, as at 6 September 2023, she had been lead provider on 1,220 criminal cases, the majority of which were PAL 1 assignments. The Applicant received PAL 2 approval in 2019. The Applicant said that she had "easily appeared" on over 50 matters at PAL 2 level as lead provider and as junior counsel for jury trials. Her appearances were said to include trial call-overs, case review hearings, sentencings, sentencing indication hearings, bail hearings and plea hearings. She said that she had appeared as lead counsel on the majority of her PAL 2 appearances.

[7] With her application, the Applicant provided details of seven case examples. She acknowledged that one of those sample cases did not show "active and substantial involvement" in the case, as it resolved after the Crown opened its case. However, she did prepare the trial file in that case, prepared for the examination of the witnesses, and participated in the selection of the jury (challenges).

[8] The Applicant provided four references with the Application.

[9] In a supplementary statement, the Applicant referred to her experience as a Youth Court advocate since 2015, and as a weekend supervisor on the duty lawyer (Auckland District Court) roster. Until a short time before her application, the Applicant was on the PDLA roster.

[10] In addition, the Applicant has been appointed counsel to assist the coroner on a number of files.

² Regulation 6(2)(b) of the Regulations.

³ Regulation 6(2)(c) of the Regulations.

⁴ Regulation 6(1) of the Regulations.

[11] The Applicant completed the Auckland District Law Society's intensive "Running an Effective Jury Trial", in 2019.

[12] The Applicant said that she is a fluent speaker of Te Reo, which makes a substantial and positive difference when dealing with Māori clients and their whānau.

[13] Finally, the Applicant noted that her recent work has been in one of New Zealand's busiest courts. She submitted that there is difficulty finding PAL 3 approved providers for assignment on an urgent basis, so that defendants may be remanded in custody overnight for counsel to be assigned. More generally, she submitted that there is a shortage of PAL 3 and 4 lawyers in certain areas of the country.

The Secretary's Decision

[14] By letter dated 22 September 2023, the Secretary declined the Application. The decision declining the application was made after the Secretary considered the recommendation of a selection committee. The following reasons for declining the application were given:

- (a) The selection committee was not satisfied that the application met the experience and competence criteria for lead PAL 3 approval. The case examples provided did not demonstrate a substantial and active involvement in the key tasks required in jury trials, specifically in the cross-examination of witnesses.
- (b) While the case examples provided did indicate involvement in various litigation tasks, the selection committee was not satisfied that the supporting documents demonstrated the extent of the Applicant's involvement, or provided evidence of the Applicant's ability to act in-court. The case examples therefore did not demonstrate substantial and active involvement.
- (c) The selection committee noted that in one of the case examples provided, relevant notes of evidence (recording the cross-examination of a police officer) were limited, involving relatively few questions. Overall, the selection committee considered that the case examples were insufficient for the Applicant to satisfy the knowledge and skill criteria.

- (d) The selection committee considered that excerpts from one or more transcripts in sexual offence cases that went to trial, in which the Applicant cross-examined witnesses, might have assisted the application. Alternatively, additional case examples demonstrating the Applicant's ability to act in-court in jury trials (such as cross-examination of witnesses or the delivery of closing addresses) might have assisted.
- (e) The selection committee noted the Applicant's request for conditional PAL 3 approval, restricted to matters in the Youth Court, if the substantive application was declined. The selection committee did not consider that to be a suitable option, due to the lack of a strict requirement for PAL 3 approval to act in matters in the Youth Court.

[15] The Applicant was invited to re-apply for PAL 3 approval. The Secretary recommended that any further application should be accompanied by transcripts from one or more of the sexual offence case examples she had referred to, demonstrating substantial and active involvement in the cross-examination of witnesses. Alternatively, the Applicant was invited to provide at least one additional case example demonstrating substantial and active involvement in the key litigation tasks required in jury trials, such as cross-examination or the delivery of a closing address. The Applicant was notified of her right to ask for an internal review if she disagreed with any part of the decision.

The Application for Internal Review

[16] By letter dated 11 October 2023, the Applicant asked the Secretary to review the decision. The Applicant noted that cross-examination of most witnesses at PAL 3 and 4 level is done by lead counsel. Junior counsel may cross-examine prosecution witnesses who are not crucial to the Crown case, but lead counsel would not normally run the risk of handing substantial and active cross-examination tasks to junior counsel. With that in mind, the Applicant had submitted a total of seven case examples with her application. She acknowledged that two of those cases (cases "H" and "K") did not go to trial, but her case examples did demonstrate that she carried out cross-examination in four cases (cases "S", "N", "J", and "Pra"). She submitted that the Committee's concern over the relatively limited nature of the cross-examination she conducted in case "S" was inappropriate. Sometimes keeping a cross-examination limited to a few questions is necessary and appropriate.

[17] Similarly, the Applicant submitted that too much weight had been put on her apparent lack of experience delivering closing addresses in PAL 3 cases. Typically, lead counsel will not delegate that role to a junior.

[18] On the issue of active and substantial involvement, the Applicant referred to one of her case examples, case “N”, in which her involvement exceeded 80 per cent in all tasks except cross-examination. She submitted that her other case examples showed a similar pattern, and that the selection committee had wrongly taken a cursory view, effectively closing the door on her application when seeing that she had only made a 30 per cent contribution to cross-examination. The selection committee failed to properly consider everything else in the percentage table provided in the Ministry’s online guidance, or in the additional information submitted by the Applicant.

[19] The Applicant emphasised her skills as a fluent speaker of Te Reo. She referred to the Waitangi Tribunal inquiry into the justice system in case no. *WAI 3060*, submitting that “one of the implications and considerations from [that inquiry] will no doubt demonstrate how the criminal justice system fails Māori”. She submitted that, at the very least, and, as and where possible, Māori-speaking clients should have access to a Māori-speaking lawyer.

[20] The Applicant also referred to her other professional experience, noting that she has been in practice since 2010 and has handled in excess of 1,220 criminal legal aid files.

[21] If her application could not be granted without conditions, the Applicant asked for approval with conditions. Those conditions might include approval subject to supervision and/or mentoring. She identified one senior youth advocate who would be prepared to act as a supervisor or mentor.

[22] The Applicant said that she wishes to act in a specific type of proceeding within one of the prescribed areas of law, namely as an advocate in the Youth Court. She submitted that she has specialist skills and experience in that jurisdiction, in a region with a shortage of existing providers with the necessary skills and experience.⁵

⁵ The Applicant produced a copy of an email from a senior sergeant in the New Zealand Police confirming that, in his area, there is a “real shortage of local Youth Advocates who are able to represent our young people who commit serious offences (14 years penalty and above)”.

The Secretary's Decision on the Internal Review Application

[23] By letter dated 31 October 2023, the Secretary declined the Applicant's internal review application. The letter noted that the Applicant's four strongest case examples were cases "S", "N", "J", and "Pra". In each of the trials in those cases, the Applicant's involvement was limited to either cross-examining one witness, or cross-examining one witness and delivering the opening address. The selection committee remained unconvinced that this level of involvement qualified as substantial and active. The Secretary noted that the selection committee also considered that the Applicant had not demonstrated sufficient experience in carrying out other key trial tasks, such as leading evidence or delivering a closing address. The cross-examinations conducted by the Applicant appeared to have been brief.

[24] The selection committee considered that the application failed to demonstrate the Applicant's ability to run a jury trial from start to finish, and that the Applicant did not demonstrate the level of knowledge and skill expected of a lead PAL 3 provider. The Secretary recommended that the Applicant consider providing a case example from a PAL 2 jury trial where the Applicant had led the trial from start to finish, to help alleviate those concerns.

[25] On the question of conditional approval, or approval limited to Youth Court matters, the selection committee considering the review application had indicated that it would like to see further evidence of the Applicant's in-court experience, before considering a conditional approval. It noted that Youth Court advocates are appointed by a Youth Court judge.

[26] Under the heading "Next steps", the Secretary invited the Applicant to re-apply for PAL 3 approval, with notes of evidence from all case examples where the Applicant cross-examined or led evidence (where possible), or other evidence that would allow the Secretary to assess the Applicant's competence in carrying out such tasks. The Secretary asked for at least one additional PAL 3 case example demonstrating substantial and active involvement in the key litigation tasks required in a jury trial, such as cross-examination, leading evidence, or delivering a closing address. The Applicant was invited to consider including a PAL 2 case example where she led the trial from start to finish, carrying out all key trial tasks.

The Review Application

[27] The Applicant applied under section 85 of the Legal Services Act 2011 (“the Act”) for a formal review of both the decision declining her application for PAL 3 approval and the Secretary’s decision declining to grant the application subject to the imposition of conditions. In support of the review application, the Applicant simply stated:

A fulsome letter was provided to the internal review/select committee outlining the reasons I believe PAL 3 and/or PAL 3 with conditions should have been granted. Please refer to my letter to the internal review/select committee. My reasons have not changed. In sum, I believe I have the requisite experience at the bar (practising criminal law since 2010), junior on a number of trials. I submitted more than the required four cases for consideration for PAL 3 and other reasons outlined in the letter.

The Secretary’s Response to the Review Application

[28] In his response, the Secretary acknowledged that the Applicant is an experienced PAL 2 lawyer. However, the Secretary considers that she has not yet provided sufficient evidence that would allow him to be satisfied that she has the requisite abilities for PAL 3 level approval. The Secretary would be happy to consider a new application if the Applicant were able to provide further evidence of more in-depth cross-examination of witnesses and active involvement in the key litigation tasks required in jury trials.

[29] In her submissions for the Secretary, Ms de Villiers referred to the Applicant’s seven case examples in which she appeared as junior counsel in PAL 3 cases. She referred to the brief descriptions of the Applicant’s involvement in these cases, as appearing from the cover sheet relevant to each case example, and noted that the Applicant has elected not to provide any further case examples, or similar material, in support of the review application.

[30] On the relevant provisions of the Regulations, Ms de Villiers noted the Authority’s decision in *Z v Secretary for Justice*.⁶ In that decision, I described the provisions of clause 4 in the Schedule to the Regulations (setting out the minimum requirements for approval as a criminal PAL 3 provider) as a “gateway” test, which must be satisfied before the overall assessment under Regulation 6 can take place.⁷

⁶ *Z v Secretary for Justice* [2022] NZRA 004.

⁷ At [53].

[31] The Secretary also referred to the guidelines published on the Ministry's website, "Applying to be a Legal Aid Provider: Step-by-Step Guide" (July 2021). At page 13, those guidelines state that case examples are one of the main ways the selection committee and the Secretary assess applicants' experience and competence. The guidelines also recommend that case examples are provided where the applicant made a significant contribution to all key tasks and activities in a matter that has proceeded through all stages and that documents demonstrating involvement in the case are provided. The step-by-step guide acknowledges that the realities of practice may mean that matters resolve before a trial can be concluded and that examples should be provided which show together experience across all or most key tasks, and that show applicants can run matters themselves from start to finish. References provided with the application will also assist in that assessment.

[32] On the broad approach to be taken to applications for review, Ms de Villiers referred to the following passage from my decision in *Z v Secretary for Justice*:⁸

On the interpretation of clause 4(b), I agree with the earlier decisions of the Review Authority which have held that "substantial and active involvement" requires that, in each case relied upon, the applicant must have demonstrated an appearance as counsel, aspects of preparation and aspects of courtroom activity. That follows from the clause 4(b) requirement that an applicant must have "appeared as counsel ...".

I agree also that, to satisfy the "substantial and active involvement" test, it is not necessary for an applicant to have completed every one of the typical criminal litigation tasks identified by the Authority in *AE v Secretary for Justice*. And I accept the view expressed in decisions of the Authority such as *T v Secretary for Justice*, that "substantial and active involvement" may be demonstrated for the purposes of clause 4(b) by considering the applicant's examples collectively, and considering whether, as a whole, they show that the applicant has had substantial involvement in a sufficient number of criminal jury trial tasks (as identified in *AE v Secretary for Justice*) that the examples may fairly be regarded as the *equivalent* of active and substantial involvement in four PAL 3 criminal proceedings.

While many applicants for PAL 3 criminal proceedings approval may endeavour to meet the test of substantial and active involvement in four PAL 3 criminal proceedings requirements by relying on individual tasks performed in numerous different proceedings, the decision-maker must still consider what the applicant did in each case relied upon. If it can fairly be said that the applicant made a substantial and significant contribution to all or most key parts of a given criminal proceeding, that proceeding must in my view qualify as one of the required four PAL 3 criminal proceedings for the purposes of clause 4(b).

[33] Ms de Villiers acknowledged that the Applicant in this case may have met the "gateway" threshold in clause 4 of the Regulations. The Applicant says that she has been actively involved in more than four PAL 3 proceedings, and that she has made a substantial contribution to those proceedings viewed overall. The

⁸ At [55] to [57].

Secretary accepts that she has more than 36 months' recent experience at PAL 2. However, the Secretary still considers that the Applicant has not yet, on the evidence provided to date, demonstrated that she has the requisite levels of knowledge and skill required by Regulation 6. The Applicant may be able to meet those concerns through further evidence of her involvement in criminal proceedings, including potentially PAL 2 proceedings.

[34] The review application is opposed substantially on the basis that the Applicant has not shown that her skills and abilities are sufficient to meet the standard required for PAL 3 approval. While the Regulations do not prescribe requirements for assessing the skill and competence of an applicant, the assessment necessarily involves an exercise of judgement. Ms de Villiers referred to the following passage from my decision in *Z v Secretary for Justice* for the approach the Authority should take in making that assessment:⁹

In my view, the assessment of knowledge and skill must start with the applicant's actual knowledge and skill levels. The next step is to assess whether those knowledge and skill levels are sufficient to enable the applicant to manage a case at the relevant level from start to finish. The applicant's references provided under Regulation 9B may assist in the assessment; they are required to be directed to the applicant's skill in the area of law to which the application relates, and they must reflect the referees' direct experience and knowledge of that skill.

[35] Ms de Villiers submitted that, based on the information currently before the Authority, there is limited basis for concluding that the Applicant has demonstrated that she can lead a PAL 3 matter from start to finish.¹⁰

[36] Ms de Villiers submitted that the transition from criminal PAL 2 to PAL 3 is the most critical in the criminal legal aid hierarchy. At PAL 3, a provider must be able to conduct jury trials for serious violent and sexual offending, and the Secretary is particularly concerned that an applicant must have developed the skills to be able to competently conduct jury trials for this serious offending without supervision or support. In this case, the Applicant has provided references from senior practitioners who have led cases in which she has appeared as junior counsel. While those references speak to her skill and experience in that role, the Applicant has provided little documentation on which the Secretary or the Review Authority could assess her skill and experience for themselves. Brief examples of cross-examination of less significant witnesses and opening addresses have been provided, but there is limited information that would confirm that the Applicant currently has the skills and experience to run a PAL 3 proceeding alone from start

⁹ At [76].

¹⁰ The broad, overall test applied in *Z v Secretary for Justice*, above note 6, at [54] and [68].

to finish, including undertaking the cross-examination of sensitive and critical witnesses.

[37] The Applicant may be able to advance further evidence of her skills and experience through a re-application, but as the information before the Review Authority currently stands, the PAL 3 approval application should not be granted.

[38] On the application for conditional approval (if the review application does not succeed unconditionally), Ms de Villiers submitted that legal aid is not available in the Youth Court. She submitted that conditional approval should not be granted (if the issue of conditional approval arises) as it does not appear to be strictly necessary.

Discussion

Legal principles

[39] I reviewed the relevant legal principles extensively in *Z v Secretary for Justice*, noting that trial experience at PAL 3 is not expressly required for a PAL 3 applicant to meet the “substantial and active involvement” requirement of clause 4(b) of the Regulations.¹¹ In that case, I went on to note that an applicant must be free to contend that appearances as counsel in cases that have not gone to trial nevertheless qualify as one of the four PAL 3 criminal proceedings for the purposes of clause 4(b). In such a case, the applicant’s appearances as counsel must still meet the “significant contribution to all or most key parts of the proceeding test”, and the applicant’s appearances and contributions must still be capable of being fairly described as “substantial”. Each case will turn on its own facts, but if such an applicant was lead counsel in the PAL 3 proceeding, with sole responsibility for all tactical and strategic advice given to the client in that proceeding, that is likely to be a factor assisting the applicant.¹²

[40] In a case which does not proceed to a full trial, the question will often be whether the applicant’s involvement as counsel in the tasks that *did* have to be performed in the case can be regarded (overall) as both “active” and “substantial”.

[41] I considered the skill and knowledge requirements of the Regulations in *Y v Secretary for Justice*.¹³ I noted in *Y* that it may be entirely appropriate in a

¹¹ *Z v Secretary for Justice*, above note 6, at [63].

¹² At [64].

¹³ *Y v Secretary for Justice* [2022] NZRA 005.

given case to infer that an applicant with long experience has developed a sufficient level of skill that he or she can be approved at a particular legal aid provider level. I said:

People develop skills by doing things, and if they have been doing them for a long time, without complaint, that may be a good indicator that their skills are well developed.¹⁴

[42] I went on to note, however, that some counsel will perform the basic trial tasks with a greater degree of skill or knowledge than others, and that the Regulations require the Secretary to have regard to such differences. The Secretary is entitled to exercise a degree of care that is proportionate to the more serious cases that are encountered at the higher PAL levels.¹⁵

[43] I noted in *Y v Secretary for Justice* that, in the end, the best evidence of an applicant's skill and knowledge is likely to be in the form of such inferences as can be determined from an applicant's demonstrated experience at or immediately below the level sought, supplemented by references provided by senior counsel who have observed the applicant in court and can say that they believe he or she is ready to step up to the next PAL level.¹⁶

[44] Specifically in respect of delivering closing addresses at trial, I noted in *Z v Secretary for Justice* that the Secretary and the Authority on review may consider the extent to which an applicant may have delivered closing addresses at his or her current PAL level.¹⁷

Application of principles in this case – clause 4 of the Schedule to the Regulations

[45] It is accepted that the Applicant satisfies the requirements of clause 4(a) of the Schedule to the Regulations – she clearly has 36 months' recent experience working on PAL 2 proceedings.

[46] I accept that the Applicant also meets the "substantial and active involvement" requirements of clause 4(b) of the Schedule, having regard to her total contributions across the seven case examples she submitted.

[47] Two of the case examples relied upon by the Applicant did not proceed beyond the first day of trial, and in one of them (case "H") the Applicant did no

¹⁴ At [43].

¹⁵ At [44].

¹⁶ At [45].

¹⁷ *Z v Secretary for Justice*, above note 6, at [85].

more than (i) general preparation and consultation with her senior counsel, and (ii) make some challenges in the jury selection process. Her contributions in that case probably do not meet the basic “substantial” test. But in the other case that did not proceed to the end of a trial (case “K”), I think it can be fairly said that the Applicant’s contributions to the tasks that were required of counsel were both substantial and active.¹⁸

[48] In the other case examples provided, I agree with Ms de Villiers that the Applicant has probably produced sufficient to meet the threshold requirements of clause 4(b) of the Schedule. In case “J” she carried out one cross-examination, and she prepared the cross-examination of a further witness who was not called. She carried out all of the research and 80 per cent of the discussions with her client and with other counsel. She was involved in discussions on the draft question trail for the jury and attended around 90 per cent of all hearing discussions. Overall, her involvement in the case appears to have been both substantial and active.

[49] I think the same can be said of case “N”, where the Applicant prepared and delivered the opening for the accused and carried out one cross-examination. She also carried out 80 per cent of the research and the required liaison with other counsel and participated in the preparation of the closing address. She was present for around 95 per cent of the hearing.

[50] In case “Pra” the Applicant’s contributions again appear to have been both active and substantial. She handled the jury selection, making two challenges, and she drafted and presented the opening address. She cross-examined one Crown witness. She participated in 90 per cent of the client discussions, and carried out 80 per cent of the research.

[51] The Applicant also carried out a brief cross-examination in another of her case examples (case “S”), and she undertook 90 per cent of the research, participated in all chambers discussions, and assisted lead counsel in all matters at the trial in that case. In the last of her examples (case “Pro”), the Applicant delivered an opening statement, assisted with the preparation of a trial file, and

¹⁸ Before opening its case in case “K”, the Crown made an offer to reduce one of the charges faced by the accused. The case was stood down while the accused sought a sentence indication on the basis of the reduced charge. The Applicant had helped draft the defence opening submissions in the case, and was substantially involved in research, client discussions and negotiations. She carried out 100 per cent of the research on sentence and presented the accused’s submissions on the sentence indication hearing.

reviewed two ESR reports. She was also present during all discussions with the client at trial and was present in all chambers' discussions.

[52] Looking at the seven case examples in their totality, I accept that the Applicant has shown sufficient to satisfy the threshold requirements of clause 4(b) of the Regulations.

Knowledge, skill and competence requirements – Regulations 6(2)(c) and 6(1)

[53] I am not satisfied that the Applicant has shown that she has the knowledge and skill to manage a PAL 3 case, on her own, from start to finish. I accept the Secretary's submission that she has not produced sufficient evidence of skill on her feet at trial, particularly in cross-examining witnesses and preparing closing addresses. In the case examples produced, the cross-examination transcripts are all very brief. For example, the transcript of the cross-examination in case "J" occupies around one page of the total transcript, and it is not at all clear from what has been produced how important that short cross-examination might have been in the case. The Applicant's cross-examination of one witness in case "N" appears to have been similarly brief, apparently occupying only around one page of the total trial transcript. So too, the Applicant's cross-examination of one witness in case "S" seems to have been very brief.

[54] The question mark over the Applicant's cross-examination skills was if anything highlighted by the wording of her application to the Secretary made in September 2023. Her appearances in PAL2 cases were said to have included "trial call overs, Crown case review hearing, sentencings, sentence indication, bail hearings and plea hearings". I did not note any reference to cross-examination experience in her application (although it seems likely that she would have conducted at least some cross-examinations as lead or junior counsel over the course of 50-plus PAL2 cases).

[55] On the delivery of a closing address, the Applicant submits, not unreasonably, that senior counsel at PAL 3 level will rarely delegate the delivery of a closing address to their juniors. An applicant for PAL 3 approval is more likely to satisfy the Secretary that he or she has the requisite knowledge and skill to take responsibility for delivering a closing address at PAL 3 level, by a combination of examples of closing addresses delivered in PAL 2 cases and strong references attesting to the applicant's advocacy skills and ability to summarise the important parts of the evidence and present the client's case to the jury in the most favourable light.

[56] In this case, no examples of closings in PAL 2 cases have been provided, and the Applicant has only presented draft notes she prepared, apparently as part of a contribution to the closing address given for the accused, in one case (case “N”). This document appears to be no more than an incomplete draft, and I found one part of it confusing (that part dealing with the question of which party carried the onus of proof on a particular affirmative defence raised by the accused).

[57] I acknowledge that the Applicant has prepared and delivered a number of opening addresses in PAL 3 cases. However, the opening addresses were brief, comprising in significant part submissions that defence counsel might make in any jury case, with limited focus on the facts of the case in hand. That is not intended to be a criticism of the Applicant’s opening addresses – I accept that it will frequently be wholly appropriate for defence counsel to refrain from showing too much of their hand during an opening address. The difficulty is that short opening addresses such as these cannot shed much light on an applicant’s ability to carry out all of the tasks required of lead counsel for the defence, from start to finish.

[58] I agree with the Secretary that cross-examination, in particular, is a core function a competent PAL 3 provider must be able to carry out, and that the case examples provided do not sufficiently demonstrate the Applicant’s knowledge, skill, and overall competence to handle all of the cross-examination in a PAL 3 case. Nor is there sufficient to demonstrate the Applicant’s competence in delivering a closing address. In some cases, those difficulties might be overcome by strong supporting references, and I have carefully considered the references in this case. But in my view they do not provide enough to counter the difficulty created by the inadequate nature of the case examples and other material that has been provided.

[59] One referee said that she had observed the Applicant undertaking court proceedings, working with people from different cultural backgrounds, and communicating with judges, other lawyers, experts and court staff. This referee expressed the view that the Applicant is a strong advocate for peoples’ rights by making passionate submissions, including those who are from minority backgrounds. The Applicant was said to have good people skills, and had the ability to communicate well. While this referee considered the Applicant to be sufficiently skilled and knowledgeable to provide legal aid services in a lead capacity, the reference provides little assistance on the Applicant’s specific abilities at cross-examination and closing.

[60] Another senior barrister said that the Applicant had junioried with him on jury trials over the years. He said that he had no hesitation in endorsing her application for PAL 3, “as she is a very capable advocate. Her written skills are of a high quality”. This reference recorded that the referee had observed the Applicant providing advice, preparing cases, undertaking court proceedings, producing documents, correspondence, working with people from different cultural backgrounds, engaging in peer review discussions, and communication with judges, other lawyers, experts, and court staff. But again, there was little in the reference to assist the Secretary in assessing the Applicant’s abilities at cross-examination and closing.

[61] A third senior barrister said he had observed the Applicant in criminal sentencing and bail oppositions. This referee said that the Applicant has developed strong written and oral skills as a barrister sole in complex cases in both the District and Youth Courts. He said that he had witnessed the Applicant argue difficult points in court in several hearings, and he had no hesitation in supporting the Applicant for PAL 3 work. He also referred to the Applicant’s fluency in Te Reo as a unique and important cultural understanding. Again, there was nothing much to assist on the Applicant’s skills in cross-examination and closing a case.

[62] The last of the references was from a senior barrister who has worked with the Applicant over a number of years. He said that he had seen her skills as an advocate develop as she junioried with him in a number of jury trials, and had found her assistance to be invaluable. The referee described the Applicant as “a solid advocate on her feet”, who had great communication skills with clients and their families. For those reasons, she had been the referee’s approved junior on a number of matters over recent years. The referee said that he had entrusted the Applicant with an array of tasks, including research. The Applicant would contribute to discussions with the client and with the Crown and to any discussions held with the judge in chambers (including such matters as question trails, and dealing with questions from jurors). The referee noted that the Applicant had taken her time to progress through to the next stage. He specifically endorsed that approach, “due to the nature of the work and what is at stake for the client, and in fact, the lawyer”. The referee expressed the view that it is crucial that lawyers progressing to PAL 3 and 4 stages have skills and experience.

[63] The impression I have from this last reference, is that the referee has found the Applicant to be very competent and helpful in the junior counsel role, but he

has not been able to provide much support on the issues of her skills in cross-examining witnesses and closing cases, and (therefore) her readiness to move up to the next level.

[64] I conclude from the evidence that the Secretary was correct when he required further evidence of the Applicant's in-court skills, particularly in cross-examination. It may be that the Applicant will be able to satisfy those concerns in any further application she may elect to make. The Secretary has expressed a willingness to consider the Applicant's performance in some PAL 2 proceedings, as part of his wider consideration of the experience, skill, and knowledge criteria, and the Applicant has been counsel in over 50 matters at PAL 2 level. It seems likely that she would be able to provide at least some further examples from those cases, demonstrating her cross-examination skills.

[65] I mention two other matters raised by the Applicant. First, the Applicant's fluency in Te Reo Māori. That skill will no doubt provide advantages in a number of cases, particularly those involving Māori defendants and their whānau, and any cases where issues of Tikanga Māori or Te Ao Māori arise. But I do not think fluency in Te Reo can provide a substitute for a failure to demonstrate the required level of knowledge and skill in other, core, areas of the barrister's skillset, including cross-examination and the delivery of closing addresses.

[66] Nor in my view can any shortage of capable Youth Court advocates provide a basis on which an applicant could avoid the need to demonstrate knowledge, skill and competence in the core functions a PAL 3 advocate must possess.

Conditional approval of the application?

[67] As an alternative, the Applicant asks that her application be approved conditionally, either subject to a supervision or mentoring requirement, or limited to appearance work in the Youth Court. Ms de Villiers submitted that legal aid is not available in the Youth Court, and that conditional approval should not be granted as it does not appear to be strictly necessary. The Applicant does not appear to have addressed that issue.

[68] I note that section 8(5) of the Legal Services Act 2011 provides generally that the Commissioner may not grant legal aid to a child or young person in respect of any proceedings against that child or young person for an offence, if those proceedings are heard in the Youth Court. Having regard to that provision, it

is not clear to me how PAL 3 approval is necessary for an advocate involved in Youth Court proceedings.

[69] Nor do I see any benefit in adding a condition requiring supervision, or mentoring of some sort. On the papers I have before me, it appears that the Applicant already has substantial experience working with senior counsel. I do not think a mentoring condition would be appropriate. As far as a possible supervision condition is concerned, that may be something the Secretary could consider in any further application the Applicant might elect to make. But for now, the obstacle is that the Applicant has not produced sufficient evidence from her previous trial experience to satisfy me on what her existing capabilities actually are. When that evidence is produced, the Secretary will be in a better position to decide whether any supervision condition would be appropriate.

[70] For the foregoing reasons, the application for review is refused.

Decision

[71] Pursuant to section 86(1) of the Legal Services Act 2011, the decision of the Secretary refusing the Applicant's application for approval to provide services in approval level 3 criminal proceedings, is confirmed.

[72] In accordance with the Authority's practice in earlier cases, I consider it appropriate in this case that the Applicant's name should not be published. There will accordingly be an order that any publication of this decision is to have the Applicant's name anonymised to a single letter of the alphabet (or two letters if two are necessary to distinguish this case from others)

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W A Smith
Review Authority