

Mental Health Rosters

Final decisions document

November 2018



Legal Aid Services

New Zealand Government

Foreword

Thank you to everyone who has engaged and assisted us in our review of the way mental health rosters of legal aid providers are administered, and how mental health cases are allocated to providers nationwide.

Your contributions have provided great awareness of current processes throughout the country, have given insight into how the proposed changes could be improved, and have helped us clarify the different roles of Legal Aid Services and the District Inspectors. These contributions have helped the Ministry of Health and Ministry of Justice make some well-informed decisions around the rostering and administration of legal services for mental health patients.

This document gives a summary and details of the decisions that have been made following the consultation. I am confident that the new rostering approach outlined in this document will ensure that mental health patients have access to justice and that the new approach is one that will run smoothly, fairly, and effectively, and will ensure patient rights are upheld.

Implementation of the new process will begin in the Auckland region early next year, and will be rolled out to other areas by the end of 2019. We will keep you updated on these changes and provide further information in due course.

Thank you for your ongoing commitment to providing legal services to mental health patients.

Brett Dooley
Legal Services Commissioner

Contents

- Introduction**..... 1
 - Process 1
- Summary of decisions**..... 3
 - Authority and responsibility..... 4
 - The rosters..... 4
 - The referral process 5
 - Regional variations..... 6
 - Complaints 6
 - Re-application process..... 7
 - Practice standards..... 7
 - Training/induction 7
- Implementation dates** 9
- Supplementary information** 9
- Questions** 9

Introduction

Mental health proceedings include all proceedings under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Act). The purpose of the Act is to provide for the compulsory assessment and treatment of mentally disordered people in a manner which protects their rights. Under section 70 of the Act, patients are guaranteed the right to legal advice.

Last year, Ministry of Justice (MOJ) embarked on a review of the way mental health rosters of legal aid providers are administered for these proceedings and how mental health cases were being allocated to providers nationwide.

The objective of this review was to ensure that any roster system put in place would ensure that providers are referred to mental health patients in a way that meets their needs and is sufficiently timely to fit with hearing schedules. To be effective, any new rostering system for mental health proceedings must:

- allow patients to select a preferred provider where they can exercise choice
- facilitate consistency of representation where there are repeat proceedings
- be supported by an effective complaints system and audit policy
- ensure there are sufficient approved providers available at relatively short notice to accept instructions in the required timeframes.

One key aspect of the review was to determine where authority lies for the administration of mental health rosters. We concluded that under the Act, District Inspectors for Mental Health (District Inspectors) are obliged to ensure that mental health patients have their rights upheld, including their right to access legal representation. Legal Aid Services (LAS) has a duty to promote access to justice and ensure there is an effective system supporting patient's access to legal representation.

Process

MOJ embarked on its review of this process in 2017. A high-level consultation paper was developed and published last November setting out MOJ's proposed changes and seeking feedback from key stakeholders including legal aid providers, District Inspectors, District Health Boards (DHBs), LAS staff, Auckland District Law Society (ADLS), and the New Zealand Law Society (NZLS). We published a status update in April 2018 and since then, have undertaken further analysis and had discussions with the Director of Mental Health.

This document outlines who has authority and responsibility for various aspects of the rostering and administration of the mental health rosters, sets out the various findings and

feedback LAS received regarding the proposed changes, and discusses the final decisions that have been made as a result of the review and consultation process.

Should you have questions, contact information is available at the end of this document.

Summary of decisions

Following a review of current processes and the feedback provided from the consultation process earlier in the year, the MOJ and the Ministry of Health have made the following decisions around the rostering and administration of legal services for mental health patients:

- Key principles are:
 - patients who can, may choose their own lawyer, or
 - where a lawyer has acted on behalf of a patient before, they will be referred to that lawyer again, or
 - the patient will be referred to a lawyer from a roster, where applicable.
- District Inspectors will have overall responsibility for ensuring mental health patients have access to legal representation.
- Any implemented rosters will be tailored to the needs of the specific area.
- LAS will provide a roster administration for any area where there is no effective roster system in place. This will be dependent on discussion with the Director of Mental Health.
- In those areas where LAS opt-in on roster administration, LAS will create and distribute rosters of approved legal aid providers, including contact details, to mental health administrators.
- The rosters will be open to all approved providers. Newly approved providers who want to be included will be added to the next roster.
- LAS will provide information and guidelines to the mental health administrator(s).
- Mental health administrator(s) will direct any complaints they may have about a provider on the roster to LAS.
- Any complaints that a provider may have regarding the administration of the rosters should first be directed to the mental health administrator. If issues are not resolved the provider will contact LAS.
- LAS will implement a confirmation process for providers on current rosters and Auckland providers currently on the roster waitlist.
- LAS practice standards will be updated to incorporate relevant aspects of the ADLS guidelines.
- Training and induction resources are currently being investigated further.

Authority and responsibility

Following a discussion with the Director of Mental Health of the Ministry of Health, it has been determined that authority and responsibility for ensuring that mental health patients have access to legal representation lies with the District Inspectors.

In the original consultation paper, we proposed that responsibility and authority for administering the rosters could lie with LAS, as those currently administering the rosters did not have legal authority to undertake the management of, or make decisions on, how the rosters operate.

While there was consensus that those currently administering the rosters may not have authority, the proposition that LAS would take on the responsibility of administering the rosters and referring providers to patients was not widely accepted. Feedback indicated that District Inspectors currently play a key role in providing this service to mental health patients around the country, and that this process worked well.

District Inspectors have a statutory obligation to ensure the rights of patients are being upheld. This obligation includes facilitating patient/lawyer contact, either by assisting patients in contacting their lawyer, or in cases where the patient does not have a lawyer, connecting them with one. Accordingly, it has been decided that overall responsibility for ensuring that mental health patients have access to legal representation and referring providers to patients will lie with them.

LAS has an obligation to promote access to justice. LAS will exercise this obligation and provide roster administration for any area where the roster is unmanageable due to size of area, where facilitation between patients and lawyers is not happening, or is problematic. This will ensure that mental health patients are gaining access to lawyers in areas where there is no willing party or body able to administer the roster. Any decision for LAS to provide assistance in this role will be dependent on a discussion between LAS and the Director of Mental Health and local providers.

The rosters

MOJ and the Ministry of Health have agreed that the following will be the key principals of the new rostering approach:

- patients who can, may choose their own lawyer, or
- where a lawyer has acted on behalf of a patient before, they will be referred to that lawyer again, or
- the patient will be referred to a lawyer from a roster.

These principals will be applied nationally, but how the rosters are administered will differ depending on the location and availability of lawyers.

Weekly rosters will be implemented in larger regions (e.g. Auckland, Wellington, Christchurch). Rosters will not be implemented in any region where there are only a small number of active approved providers (e.g. West Coast, Palmerston North) or where a roster would be unnecessary.

Where rosters are implemented, LAS will create and distribute them. These will be provided to mental health administrators on a regular basis well in advance and will identify the approved lawyers available in a given week. LAS will be responsible for ensuring that those administering the rosters and allocating cases have up to date information on approved providers available in the region. Lawyers on the roster will be expected to make themselves available during those weeks.

The new rosters will be open to all approved providers, ensuring that as many providers as possible will be skilled and knowledgeable in this area of law. An open roster will be fair and provide opportunity for new lawyers to come onto the roster ensuring that there is future experience in representation for clients.

A provider may be on only one roster. For example, in the Auckland region providers must elect to be either on the Auckland or South Auckland roster.

Some concern was raised that having an open roster would make it difficult for mental health providers on the roster to maintain a high level of specialist knowledge, as having more providers on the roster would mean each would be allocated less cases. We considered these concerns before making the decision to have an open roster for the Auckland region, and found that there are enough mental health cases annually for this not to be a concern.

The referral process

The referral process will be undertaken by those on the ground, such as the District Inspectors, with the assistance of mental health administrators. The Ministry of Health and the District Inspectors will have overall responsibility for ensuring mental health patients are able to access legal representation, including the responsibility of ensuring referrals are occurring where necessary.

The mental health administrator(s) of the DHB will facilitate connecting mental health patients with representation for legally aided proceedings. Mental health patients will be given the opportunity to select a preferred lawyer if they can exercise choice on their own or with assistance from a support person. The lawyer must be approved to provide mental health legal aid services.

If a mental health patient is unable to exercise a choice, and they have been previously represented, that lawyer will be referred to them if they are available. If a patient is unable to exercise choice and has not been previously represented, then subject to the District Inspector's advice addressing the mental health patient's specific circumstances, a provider will be referred to them from a roster, in areas where a roster is in place.

The mental health administrator(s) will take on the role of contacting providers when a referral is required. The provider contacted will need to confirm attendance with the administrator and confirm their instructions with the patient.

When a referral is made from the roster the mental health administrators will, to their best ability, allocate cases to the providers equitably.

Regional variations

The consultation paper stated that existing regional variation in how rosters are being administered, and how providers are referred to mental health patients, are potential issues currently. We received a lot of feedback in response to this point.

The feedback provided indicated that this regional variation exists as a necessity and that a standardised approach to the rostering and referral system would not work.

All regions have some form of system in place to ensure that mental health patients can access legal representation. In most regions, this is facilitated by District Inspectors. As each region's size and mental health infrastructure is unique, regions have developed their own localised systems and processes to ensure that this facilitation between patient and lawyer occurs, and that patient needs are met.

The number of approved providers in each area also contributes to this variation. In larger regions where there are more approved providers, rosters have been adopted as an approach. In small regions where there are less providers, a rostering system is inappropriate, and a more collaborative approach is taken.

This variation in approach means that a standardised and mandatory referral system is not practical and will not meet the needs of mental health patients. Resultantly, the rostering approach will only be implemented in the larger regions, where the rostering approach works well. Any implemented roster will be tailored by LAS to meet the specific needs of the area.

Complaints

Early in the consultation process, MOJ had concerns that there was no authority for those administering the rosters to answer complaints about the management of rosters. The feedback provided indicated that respondents were generally satisfied that complaints about the management of the rosters could be made through local channels and are being dealt with in a timely and effective manner.

Any complaints about how the new mental health roster are being administered and managed should first be addressed to the mental health administrators in charge of administering the roster in question. If the complaint cannot be resolved after discussion with the administrators, then providers are to contact LAS with the complaint.

Complaints about providers will be dealt with using the existing complaints processes managed by LAS and the New Zealand Law Society (NZLS). Mental health clients, or anyone else who has a concern about a provider can make complaints via these channels.

Legal Aid Services will be undertaking a review of its complaints, audit and approval processes as part of the legal aid triennial review and the feedback that was received as part of this will also be considered.

Roster confirmation process

The response to a confirmation process being implemented for inclusion on the rosters was largely positive.

In the future LAS will implement a confirmation process where current roster members are invited to indicate if they wish to continue to be part of the mental health rosters. This process will give providers on the roster an opportunity to consider if they want to continue being a mental health legal aid provider.

Any approved mental health provider not currently on the roster will also be invited to indicate if they wish to be included before a new roster is issued. This will ensure that any newly approved provider who wishes to be on the roster is given an opportunity to be included.

This process will be first implemented in the Auckland region. Providers on the current rosters, and any provider on the waitlist will be invited to indicate whether they wish to be included on the rosters.

Practice standards

The comprehensive guidelines that were developed by ADLS for lawyers on the mental health rosters in the Auckland region were previously referred to in the LAS practice standards. As ADLS is no longer involved in administering the rosters, the LAS practice standards will be reviewed and updated.

Appropriate aspects of the ADLS guidelines have been incorporated into the Guidelines Mental Health Roster that are attached to this document as an appendix.

Training/induction

The feedback provided indicated that many believe the current provider approval requirement are insufficient for a lawyer to competently complete work in the area without some form of induction or other means of training.

LAS encourages all mental health providers to make use of any training opportunities that are available to them. We are currently working with NZLS to assist with the development of future training and induction material and will determine in due course whether changes will

be made to the mental health approval policy. In the meantime, if the provider has the appropriate approval, they will be able to be included on the rosters.

Currently, the general principals in the LAS Practice Standards include that a lawyer must:

- have knowledge and understanding of the substantive law that applies in the area of law being undertaken pursuant to legal aid and be in a position to address any substantive issue as it arises (Section 2.1)
- have knowledge and understanding of the procedural law that applies in the area of law being undertaken pursuant to legal aid and be in a position to address any procedural issue as it arises (Section 2.2)
- decline to accept, or return for re-assignment, any matter for which he or she has insufficient experience or skill to competently represent the client, or is too busy to undertake (Section 2.5).

All approved providers must abide by these standards, and no provider should accept assignment for a case they do not have sufficient knowledge or experience in. It is the role of the provider to ensure they have the relevant training and experience for this area of law and to abide by Practice Standards for Legal Aid Providers and it is outside of LAS authority to implement and mandate such training.

LAS will consult further with the NZLS and District Inspectors on developing a training resource for mental health induction.

It is the provider's responsibility when attending at an inpatient unit/community clinic to ensure they follow local rules, arrange appointments to see patients, and consult with nursing staff about any safety issues and how they should be resolved.

Implementation dates

Implementation will begin in Auckland from January 2019, and transition to the other larger regions of the country throughout the course of the next year.

Specific details and timeframes for other regions are yet to be determined and will be dependent on further review.

You will be updated on specific dates and timeframes via *What's New* when we have a firm date for implementation, until then the status quo will continue to remain in place in the other regions.

Supplementary information

LAS will be reviewing the grants handbook; any necessary changes will be made before implementation of the new rostering process.

Any further updates in regards to the changes and implementation will be posted on the "What's new for legal aid lawyers" page on the MOJ website. You will also be able to find information and documents from the previous steps of the consultation process on this page: justice.govt.nz/whats-new/

Questions

If you have any questions about the changes outlined in this document, you can contact the National Service Delivery Operations Support team.

By email: nsdopssupport@justice.govt.nz

Or the Legal Services Commissioner

In writing:

Legal Services Commissioner
DX: SX10125
Wellington

Guidelines Mental Health Roster

The key principals of the mental health rostering system are:

- patients who can, may choose their own lawyer, or
- where a lawyer has acted on behalf of a patient before, they will be referred to that lawyer again, or
- the patient will be referred to a lawyer from the roster

How the rosters work

The primary purpose of the roster is to ensure that all patients under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (“the Act”) may receive specialist legal assistance. Primarily, this involves representing patients at judicial and review tribunal hearings.

The rosters are a list of lawyers’ names, grouped on a weekly basis. Each rostered lawyer is allocated one listing per roster cycle. LAS staff prepare and circulate the rosters to mental health administrators. Lawyers are rostered for a week. During that week, they are to be available to receive instructions for any work arising under the Act. However, if necessary, any lawyer on the relevant roster may be contacted to ensure a patient can be connected with a lawyer.

Lawyer eligibility and admission to the roster

To be added to the roster, a lawyer must:

- be an approved legal aid mental health provider
- be familiar with and agree to comply with the applicable Practice Standards for Legal Aid Providers
- decline to accept, or return for re-assignment, any matter for which he or she has insufficient experience or skill to competently represent the client, or is too busy to undertake
- agree to regularly attend ongoing training as deemed necessary, for continuing education.

Admission to the roster will be offered by LAS once a provider is approved as a mental health provider.

Removal from the mental health roster

LAS has the authority to suspend, or remove a lawyer from the roster according to operational needs and/or based on the performance or conduct of the lawyer. Removal from the roster based on the performance or conduct of the lawyer, may follow from a Ministry of Justice or New Zealand Law Society complaint investigation.

The role of LAS

In regions where rosters are a requirement LAS will:

- develop and maintain guidelines for mental health administrators
- create and distribute rosters to mental health administrators well in advance of roster period
- communicate to providers to confirm roster availability
- communicate to mental health administrators to provide updated list of approved providers, or when providers are removed
- deal with roster complaints that cannot be resolved by the mental health administrator
- deal with complaints in the first instance of any other nature.

The lawyer's role

The rostered lawyer is to approach a patient who is scheduled to see a Judge or Tribunal and offer legal assistance. A patient may choose their own approved lawyer or if they have been through the judicial hearing process previously they may wish to have the same lawyer acting for them again. Where a patient does not have a lawyer, they may use the services of the one allocated to them from the roster. The patient has the right not to be represented at all if they wish, but in those circumstances, the District Inspector and Medical Records should be notified. In those circumstances counsel should advise the court at the hearing of their instructions and/or seek direction to be appointed as counsel to assist.

Although the roster is a weekly one, a lawyer who receives instructions outside his or her rostered week may (if available) act for that patient.

Where the patient wishes to retain the same lawyer, the lawyer may attend the patient at another location, subject to LAS approval of any travel costs.

The lawyer's roster obligations

A provider shall:

- a) confirm availability to LAS at least 24 hours before their rostered week
- b) arrange a rostered replacement if unavailable for their rostered week and notify LAS accordingly
- c) respond promptly to the mental health administrator to confirm:
 - i. acceptance of a patient referral
 - ii. they are not available to accept a patient referred to them
- d) contact their client promptly.

It is the responsibility of the lawyer rostered for any given week to ensure their availability to interview patients promptly upon notification, and to be available for the hearings. It is not acceptable to delay the first meeting with a patient until the night before or the day of the hearing, especially where the application is opposed, unless there are exceptional circumstances. Telephone contact on the day before the hearing is the minimum.

No rostered lawyer should represent more than four (4) patients on any given day. The time required to adequately represent a patient is such that any more than four patients would lead to poorer standards of representation. Where possible lawyers should ask for their clients to be called in a staggered order to allow proper debriefing of the first client and preparation of the next client including introduction to family and friends.

The mental health administrator's role

The mental health administrator connects patients with lawyers.

Their duties include:

- a) allocate lawyers to unrepresented patients arising by notification from:
 - i. hospital/unit medical records officers
 - ii. Mental Health Review Tribunal secretary
 - iii. district inspectors
- b) check who was the patient's lawyer to see if the patient wants that lawyer to attend/act for them or whether they would like another lawyer to represent them
- c) notify the preferred lawyer or a lawyer selected from the roster of a patient referral

- d) notify lawyers that do not confirm acceptance of a referral by 10 am the following day that the patient has been referred to another lawyer
- e) report to LAS if providers are not meeting their obligations.

It is desirable for mental health administrators to connect the patient with a lawyer when notified of a hearing or at least a week before if possible.

Notification period

It is essential patients have lawyers available as quickly as possible. A lawyer should confirm to the mental health administrator their acceptance of a referral or their unavailability on the day of the referral. If the mental health administrator has not received a response by 10 am the following day they shall assume that the lawyer is not available and allocate the patient(s) another lawyer from the roster.

A lawyer who has not responded within the notification period is deemed to be unavailable and shall not represent that patient. The lawyer allocated by the mental health administrator may indicate to the patient that the previous lawyer has been contacted and is unavailable.

Late notification

In situations where a mental health administrator receives notification of patients the day before a hearing or in any “last minute” situation and there is a known lawyer who has recently represented the patient, the mental health administrator will telephone the known lawyer. If that lawyer is not immediately available and able to represent the patient the mental health administrator shall allocate another provider. Depending on the urgency the mental health administrator may need to make direct contact with a lawyer via telephone until one is able to confirm their availability.

Temporary absence from roster

A rostered lawyer may arrange a replacement for an allocated week with another rostered lawyer when there are special circumstances for being unavailable and notify LAS.

Unavailability for consecutive rosters or extended leave from rostered duty should be discussed with LAS.

Complaints

All complaints, concerned with the administration of the roster should be addressed to LAS. All other complaints should be sent to Provider Services who may refer the complaint to NZLS who will take over the process from there. Where a complaint is upheld by NZLS, Provider Services will be informed of the decision and any disciplinary consequences.

LAS reserves the right to make any changes to the administration of the roster upon the result of a complaint being upheld against a rostered lawyer.

Region specific instructions

Auckland

There are two rosters in the Auckland region, Auckland City and South Auckland.

To ensure a fair distribution of work, lawyers must choose either the City or the South Auckland roster.

Contacts:

Legal Aid Services: rostersDL@justice.govt.nz

Provider Services: legalaidprovider@justice.govt.nz