

Cover Note

22 June 2023

The following statement can be attributed to Public Defence Service Director, Peter Hutchinson:

In April 2021 Michael Heron KC was asked to complete a review of the operation and performance of the PDS.

The review was requested as part of good governance practice, rather than because of any specific issue identified with the PDS.

Overall Mr Heron's report concluded that "the organisation provides a very valuable service to clients and stakeholders...PDS is an indispensable part of the criminal justice system." The report also noted the dedication and sense of "mission" among PDS lawyers.

The PDS reviewed the report's findings and developed an action plan to address its more significant recommendations. Areas for improvement included staff recruitment and retention, senior resourcing levels and IT systems.

Many of the recommendations have been adopted and work to update the IT system is expected to be completed in the second half of 2023.

Review of the Operation and Performance of the Public Defence Service

21 September 2021

**Michael Heron QC
Charlotte Agnew-Harington**



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Introduction

1. The Public Defence Service (**PDS**) is a young but increasingly vital part of our criminal justice system (**CJS**). The PDS and those within it have a unique and important role in ensuring the quality and longevity of criminal defence services in New Zealand. They are kaitiaki, in part, of the system and the people they serve.
2. We were instructed to undertake a review or audit of the PDS for the Secretary for Justice in accordance with the Terms of Reference (**ToR**) set out in Appendix 1. The review was commissioned for good governance purposes and the ToR require consideration of the PDS from all angles, including:
 - a. Strategy and alignment;
 - b. Leadership;
 - c. PDS' value proposition;
 - d. Systems and tools;
 - e. Human Resources; and
 - f. Data.
3. The report that follows sets out our findings in summary form, before detailing our observations, findings, and conclusions. There are areas we feel are deserving of further inquiry and consideration. Where necessary, we have also made suggestions for further action.
4. Certain of the issues that have emerged from our inquiry do not fit neatly within one or other questions in the ToR and are therefore woven throughout the body of our report (for example, the "Why" question, and the importance of supervision and organisational structure).
5. The work that PDS does is important and it is an organisation with great promise. Some of the issues raised in this report are easily fixed; some will require long term evolution, investment and potentially, political consideration. It is crucially important that PDS, the Ministry of Justice, the Secretary, the Legal Services Commissioner, and the Crown generally carefully consider what exactly PDS is to do and to be. That is a policy question as much as a question of strategy and operations, but the answer to that question – the "Why" – will determine to a large extent what happens next.
6. We are grateful to the Secretary, PDS, and MoJ for including us in this important kaupapa, and for the insights that have been so generously shared with us. We hope that this report will help PDS and others in the same way that PDS supports the communities it so diligently serves.

Executive Summary

7. The Secretary for Justice (the **Secretary**) commissioned us to complete this review to get a sense of how PDS is tracking (in colloquial terms). Because PDS is a business unit within the Ministry of Justice (**MoJ**) the Secretary is ultimately responsible for its operation but given the need for PDS to provide services independently from MoJ, the Secretary's direct involvement is limited.
8. The Terms of Reference (**ToR**) for this review are attached to this report as [Appendix 1](#). They are broad and we acknowledge that there are questions we cannot conclusively answer.
9. Our observations and conclusions have been informed by our review of various documentary evidence and our interviews with PDS staff (at all levels and capacities) and external stakeholders including judges, private bar lawyers, court staff, MoJ staff, prosecutors (Crown and police), and others from the likes of Corrections, Probations, and other organisations. We visited seven out of the 10 PDS offices, as well as PDS' head office at MoJ.
10. The feedback we received was remarkably consistent across the board, and we are grateful to everyone we interviewed (we spoke to more than 200 people directly involved with the work of PDS).
11. Broadly, we have concluded that although there are some significant issues within PDS that need attention, the organisation provides a very valuable service to clients and stakeholders. We have been told countless times – and we agree – that PDS is an indispensable part of the criminal justice system (**CJS**). There is a pressing need to address staff recruitment and retention, the level of senior resourcing, IT, and remuneration. In addition, serious consideration should be given to what we term “the Why” (explained below). That said, PDS presents huge potential and there are many reasons to be proud of its achievements to date.
12. As will be seen throughout this report, we see a pressing need to find and develop the strategic position of the PDS in the CJS (the PDS “**Why**”). We discovered in the course of this review that many of the questions that one might ask about PDS and how and why it operates can be distilled down to a single question: Why does PDS exist? The subsidiary question is: what is PDS here to achieve?
13. It is obvious that PDS exists to provide legal aid criminal defence services to clients. But broader questions exist: is PDS meant to be the best provider of such services, the cheapest? Is it both? Is it intended to train the next generation of criminal lawyers, is it also meant to develop the law through appellate level advocacy? Is PDS meant to be a training ground for junior lawyers, or should it be the country's bulk provider of legally aided criminal defence at every level of seriousness? Is it a law firm or a business unit or both?
14. All of these questions have been raised in the course of our review. Opinions differ and views as to what PDS is meant to provide and how it can and should operate are fragmented. The question of Why needs a consensus answer to allow PDS and MoJ to make targeted decisions that ensure the continued success of PDS.

Key challenges and opportunities

15. The three key concerns arising out of this review can be summarised as follows:

- A. **The Why/Vision:** PDS, MoJ and the Legal Services Commissioner (**LSC**) need to determine an overall vision for PDS, otherwise termed the “Why”. PDS’ strategy and operations are not mandated by a single, consensus view of what the service should be, what it should provide and to whom. Because of that, there is a lack of consistency in operational decisions and outcomes and tension between different parts of the system. The broader vision needs to be seriously considered, and staff and stakeholders will need to be consulted. Determination of the Why will have implications for how PDS adapts its business and resourcing model going forward, how it approaches its workstreams, recruitment, retention, data collection, and engagement with MoJ.
- B. **Business/Resourcing Model:** PDS’ business model is inconsistent with the models adopted by law firms and appears antithetical to best practice. Because approximately 90% of PDS’ work is at PAL 1 level, its operating model has come to rely heavily on junior practitioners qualified to do that work but not more senior work (i.e., PDS has employed a high number of PAL 1 to 2 lawyers to carry out PAL 1 work and a number of PAL 2 and 3 Team Managers to supervise even less experienced lawyers). That was a logical response to PDS’ workflow to date, but it is a far from optimal model for the lawyers, PDS, and the CJS overall.

The business model that is currently in place (as a result of the difficulty recruiting and retaining senior lawyers) puts too much reliance on junior staff and too little emphasis on the need for senior lawyers in every office to support, supervise, and train young lawyers and to allow the PDS to carry more senior work. The current model leaves PDS lawyers at risk, with flow on effects for the system as a whole. We understand recruitment and retention of senior staff is a priority but has had limited success to date. In the long term PDS needs to reshape its business model to correct the imbalance (and MoJ will have to direct that long-term change, given the systems and appropriation implications, including for Legal Aid). Shifting PDS’ workload (with buy-in from MoJ and the LSC and, in all likelihood, reconsideration of remuneration rates) to encompass a greater volume of PAL 3 and 4 cases should help PDS recruit and retain more senior staff and provide better opportunities for development for all lawyers.

- C. **IT:** PDS’ other most pressing issue is the inadequacy of its IT resourcing – namely its practice management system, *Affinity*. We were told countless times that Affinity is unsupported and unreliable; we understand that efforts to shift to the latest (supported) version are ongoing and that the new version will have some additional functionality. We stress that a systems re-think should be made a priority, with a view to not just ensuring PDS has supported IT resources, but progressive platforms that allow it to meet the needs of the modern CJS and clients. PDS is an influential stakeholder within the CJS and a large-scale service provider, so it has potential to be a leader when it comes to the provision of tech-based client service solutions. But the organisation lacks confidence in even its most basic IT system. This is part of a broader problem within MoJ but given the unique work that PDS does in advocating for people in custody and at threat of losing their liberty, it needs to be able to function and meet the day to day demands of the job. IT investment is a crucial component in allowing it to do so.

Responses to the ToR

Strategy and alignment

How well do the staff and stakeholders understand PDS' purpose, vision and strategy?

- D. Purpose and vision are generally well understood, but long-term and short-term strategy are not. There remains a lack of a coherent shared view amongst the PDS, the LSC and MoJ as to the role it should play.

How well integrated into the wider MoJ is the PDS?

- E. PDS appears well served by MoJ generally but there is concern amongst PDS lawyers that PDS is an uncomfortable fit within MoJ and that it would function better in an independent form.

How well does PDS collaborate on strategy and service delivery with the Legal Services Commissioner (LSC) and Legal Aid Services and other parts of the Ministry?

- F. Indications are that PDS and LSC are increasingly collaborative, but further work is needed to determine how LSC and PDS can collaborate to determine how services are delivered and the broader strategic questions raised.

How well does PDS collaborate with external stakeholders (judges, sector partners, legal professional bodies, etc)?

- G. PDS is highly valued by external stakeholders and as part of the overall CJS. It collaborates well.

How is PDS embedding whakaaro Māori?

- H. PDS appears to be taking steps to embed whakaaro Māori. Risks arise in the lack of retention of Māori and diverse staff and the reliance on a few Māori staff members.

Given the LSC had delegated accountability for the performance of salaried lawyers to the Director PDS, how is the Commissioner kept informed about performance?

- I. The LSC is kept informed via fortnightly meetings with PDS and the provision of PDS' monthly dashboards. In addition, PDS and Legal Aid Services (**LAS**) communicate regularly regarding any issues arising. There is increased communication and collaboration between the LSC and PDS.

Leadership

How well does the PDS leadership team provide collective leadership and direction to PDS and how well does it implement change?

- J. The PDS leadership team operates effectively within the constraints we identify. The leadership team has implemented various changes in recent years and these have generally been handled smoothly and well received. That said, concerns were raised on certain matters (like the recent remuneration review) where some thought that PDS leadership had pre-determined the outcome. There is debate to be had about who is hired and what skills are required to fill leadership positions within offices, who can and should train and supervise young lawyers versus manage diverse groups of people. The ability to resolve the problems we identify will be a key challenge for the effectiveness of the leadership team.

Value proposition

Does PDS deliver value to its clients and how is this measured?

- K. It is nigh impossible to measure the value that PDS delivers to its clients with any certainty. We were not able to conduct client surveys, though we understand that recent survey data collected by Legal Aid suggests that PDS lawyers offer better service to clients, particularly in communicating with clients. The courts, judiciary, and prosecutors generally consider that the

profession and the CJS are well served by the PDS (with exceptions noted where particular offices lack senior staff). PDS does not appear, however, to have any reliable system for recording feedback from clients (even good feedback).

Does PDS provide better quality service than the private bar?

- L. Again, it is not possible to determine this with certainty or scientific basis. However, we were consistently told that PDS delivers greater consistency and reliability at the lower PAL levels than the private bar (given that PDS is an organisation whereas the private bar is a collection of sole practitioners). That is reflected across a range of measures such as quality of written material, timeliness, general utility and willingness to assist the Court.

Does the PDS provide service at a lower cost to the private bar when comparing 'apples with apples'?

- M. We understand that PDS generally operates at a lower cost of service per case at PAL 1 level, but that the overheads involved with running PDS are not factored into that cost. We observe that there are touchpoints within the CJS where PDS appears to deliver on a lower-cost basis than the bar (due in part to a rigorous process around approving extensions to grants, expert reports, etc).

What role, if any, should PDS play in lifting the quality of legal defence services across the legal aid system?

- N. As we see it, PDS plays a vital role in lifting the quality of legal defence services and in ensuring the continuation and integrity of the criminal defence industry nationwide.

Why does PDS not meet its obligation to deliver up to 50% of criminal cases which it is funded to do and which negatively impacts the Legal Aid Appropriation?

- O. The reason for this is multi-factorial. Relevant issues include: the fact that defendants in PAL 3 and 4 matters can prefer counsel, resourcing considerations at PDS, increasing numbers of cases in the CJS, increasing workloads associated with cases as they move through the CJS, and issues with retention of work due to legal conflicts.

Does the PDS leadership consider the consequential impact on the Legal Aid Appropriation when making business decisions? If so, how does it do this?

- P. This is not something we have been able to assess with certainty. We understand that PDS generally makes decisions in line with its own mandate and obligations, but is particularly mindful of the impacts on the Legal Aid Appropriation when making decisions within its purview relating to the duty lawyer service (**DL Service**). Questions arise as to whether and how PDS ought to consider the impact of PDS decisions on Legal Aid Services: it is unlikely that the private bar would do so (the lawyer's duty is to the client), but the reality is that PDS' operations have flow on effects for the Legal Aid Appropriation. This reinforces the need for clarity about the overall design of the system for delivering publicly-funded criminal defence services and who has overall responsibility for that. This question raises political as well as operational issues.

Why does PDS have different onboarding requirements/processes/criteria for lawyers compared with LAS – should these be consistent considering the requirements on both groups to provide the same service?

- Q. PDS has different standards for onboarding lawyers for its own quality assurance purposes; we understand that generally the standards for approval are higher at PDS than the private bar. PDS has adopted this model to maintain the integrity of its business. However, questions

arise as to why that is necessary and whether this inappropriately distorts the market and the provision of services.

Systems and tools

Does PDS have good systems for work allocation and time recording?

- R. PDS has robust systems for time recording and allocation. Those systems are more extensive than normal and thought could be given to simplification. We understand that work aimed at reducing the burden of time recording began in February 2021 and that changes were implemented in August 2021.

Do PDS lawyers have the right tools to do their jobs?

- S. PDS lawyers are generally well-supported but outdated and unreliable technology (in particular, Affinity and Citrix) appears to present a real risk to the business and its efficacy – with flow on effects for clients and the CJS. This is a real cause for concern.

Do PDS staff have adequate administrative support?

- T. PDS appears to have good quality, competent administrative support. That said, it is common for there to be significant delay in replacing support staff who leave or are away, which can cause issues for the support teams and lawyers. That said, some delays are understandable and unavoidable, such as when PDS is unable to fill a position or a staff member leaves without notice. There is good collaboration across offices to share resources.

How efficient and robust is the PDS PAL approval system compared with Legal Aid Services approval system for private lawyers?

- U. The system is robust but not necessarily efficient. PDS' PAL approval system imposes additional hurdles to lawyers who want to progress; those hurdles do not face lawyers at the private bar. Those hurdles (particularly, the jury trial workshop and litigation skills course) are well intended and sensible requirements, but they are seen as additional obstacles for lawyers who are keen to progress. This impacts job satisfaction and attrition.

Human Resources

Does PDS have good practises for recruitment and retention of staff, including remuneration, workload standards, training, and professional development?

Recruitment and retention

- V. PDS' recruitment follows a robust process prescribed by MoJ. That process is aimed at ensuring consistency and fairness amongst other outcomes. That said, the process is slow and impinges on PDS' ability to recruit, hire, and remunerate staff in accordance with an office's needs and market demands as and when they arise. In offices where PDS has had multiple resignations in a short timeframe, it needs to be able to move quickly to fill vacancies or staff and clients may suffer.

We are aware that PDS faces acute issues with getting sufficient applicants for vacant positions, particularly when looking to recruit senior lawyers. These issues appear to be much more pressing in certain offices/locations. It is imperative that PDS can recruit and retain more senior staff; we do not consider that PDS can deliver an effective service without having adequate numbers of senior staff across all offices (consideration should be given to establishing higher ratios of senior to junior staff – more senior staff are required in most offices). We have real reservations about giving too much leadership and/or management responsibility to young lawyers.

We are also concerned about putting too much emphasis on progression through management as a pathway for progression and removing automatic progression in line with experience (alongside the traditional change in job title and status, which is a key motivator). We understand that PDS endeavours to provide three progression pathways: one through management (into Team Manager/Leader positions and beyond), one through professional development (from lawyer to Principal Lawyer), and through the Duty Lawyer programme into the DLS role. However, there are very few spots for Principal Lawyers (and only in large offices), so for most that prospect is not compelling. Similarly, the DLS and managerial career pathways focus on managerial and administrative functions which do not appeal to many of PDS' legal staff. While we acknowledge the presence of alternative pathways, they do not necessarily match the needs of PDS' lawyers or the development opportunities available outside PDS, which leads to the loss of talent. These pathways need to be reconsidered (alongside remuneration, below).

Remuneration

- W. Remuneration levels appear to sit below market level. That is to be expected (to some extent) in a government department but we consider it has ramifications on PDS' ability to attract and retain talented staff (particularly to senior positions, where the need for competent and experienced practitioners is the greatest).

Lawyers were generally dissatisfied with the outcome of the recent remuneration review and the consequent proposal for a new remuneration/progression structure. That new structure is not necessarily either within or outside scope of this review, but the de-coupling of internal progression from PAL progression appears negative to many lawyers because it has created the impression that there are fewer pathways to progress (which is contrary to the intention of the proposal) and could prove a stumbling block for increased diversity and/or inclusion. The new model is perceived to put more barriers in the way of progression.

Workload standards

- X. Workload standards at PDS have reportedly improved in recent years and this is regarded as a positive development. It appears to us that PDS actively manages workload issues and equips its managers to address them. That said, workloads are generally reported as being heavy, due to the nature of the work (the unpredictability of clients and court requirements) and the fact that PDS is often relied upon by Legal Aid Services to assist with urgent matters.

Part of what makes the workload heavy is also the toll that it takes on practitioners – emotionally and psychologically – and the responsibility that the lawyers feel to provide client focused “care” as well as representation.

It is relevant that private bar lawyers tend to report that PDS lawyers carry heavy caseloads. Together with remuneration issues, we observe that part of the reason why lawyers leave PDS for the private bar is that they perceive that private bar lawyers carry lighter caseloads, with greater flexibility, while earning more overall.

Training

- Y. Training for lawyers is universally well regarded as a significant strength of the PDS: we are told that training is regular, plentiful, and useful. PDS' training guides are reportedly very good tools.

That said, issues arise with access to training opportunities (including the external litigation skills course required to progress to PAL 3) and the internal jury trial course (required to progress to PAL 2).

It was reported to us that there are fewer external training opportunities for support staff. Although we have been told that there are multiple development opportunities available via PDS and MoJ, it appears these are not widely accessed in practice. Support staff should be regularly and systematically upskilled to meet the demands of their jobs and encourage engagement.

Professional Development

- Z. Professional development is an issue for PDS, and it generally goes hand in hand with issues around retention and remuneration. Lawyers (in some offices more than others) report progression bottlenecks that delay progression from PAL 1 to PAL 2, and again from PAL 2 to PAL 3. The need lawyers feel to progress their careers is a key driver behind lawyers leaving PDS, particularly for the bar (and, potentially, earlier than is optimal). Lawyers commonly fear that the new remuneration/progression model will make this situation worse instead of better (because it relies on vacancies) and will drive people out of PDS.

How well does PDS manage the health, safety, security and well-being of its staff?

- AA. Health, safety and wellbeing appear to be generally well managed, with staff saying improvements over the last three or so years can be explained by an increased emphasis by MoJ on wellbeing and the fact that OPDs are doing more to keep file numbers manageable. We have raised certain other health and safety matters with PDS for further consideration.

Certain PDS buildings have better safety measures (e.g., duress buttons, dual exit interview rooms) than others, although we understand that PDS is working with the MoJ to improve these.

PDS employees value their access to EAP (and professional supervision, though this seems to have mixed accessibility) and most offices (but not all) have supportive cultures that appear to allow people to report and address issues.

Office culture is reported as being strong and of paramount importance to staff.

How well does PDS anticipate and respond to future capacity and capability requirements? Are these discussed with the LSC/LAS?

- BB. For many reasons, PDS struggles to recruit and retain seniors and is generally slow to fill vacancies, particularly those left by experienced lawyers. This is an acute problem for PDS but one which is (at present) common amongst the industry. Against that background and as part of the Why discussion, MoJ and others ought to consider how PDS might better anticipate future systems capacity issues more broadly. This topic needs to be addressed at the highest levels and questions of system design need to be developed in a much broader stocktake of the CJS as a whole. These issues are discussed with the LSC and LAS but remain unresolved.

How well does PDS develop and maintain a diverse, highly committed and engaged workforce?

- CC. PDS has issues with recruitment and retention and those issues impact its ability to maintain strong diversity in offices. It was reported to us that in certain offices staff attrition has seen a

severe decline in diversity. The legal profession suffers generally from a lack of diversity, and PDS should consider how it can implement best practice strategies for ensuring it maintains a workforce that represents its clients. Changes to the progression/remuneration framework should, if implemented, take effect with a proactive view to ensuring and encouraging diversity and inclusion.

The PDS workforce is highly committed: many times it was said to us that PDS lawyers and support staff are at PDS because they are committed to doing the work and serving their clients. It should be noted that PDS lawyers are committed to clients, less so to the “public service” or MoJ.

Data

How well does PDS manage and use information (reporting data) as a strategic asset?

DD. PDS captures data and reports well and regularly. That said, it would be useful to have reports that aggregate more long-term data.

There are gaps in the data that PDS collects in two key areas. The first gap is that PDS does not appear to formally capture positive feedback from clients and stakeholders. The second gap is that PDS does not appear to include in its monthly dashboards (or other obvious and routine reporting) the difference between the time spent on a file and the time charged (i.e., what in some cases will be the “true” value vs the chargeable value to Legal Aid Services). We are uncertain how this data is captured and recorded generally by MoJ for the purpose of determining PDS’ cost per case as opposed to the “value” provided in terms of time spent.

Methodology

16. This review began with general discussions with PDS and MoJ leadership about questions, issues, and process. From there, PDS provided us with documents that either illustrated how PDS operated or fed into its operation. In total, we reviewed more than 150 core documents (we list many of those documents in [Appendix 2](#)).¹
17. Having completed a review of certain foundational documents and having spoken to MoJ's Chief Legal Counsel and PDS' Director, we then considered who we needed to gather information from and how we would do so. Working with PDS and MoJ, we determined that it was imperative that we sought the views of stakeholders including:
 - a) PDS staff at all levels and across the organisation;
 - b) Relevant MoJ stakeholders, including PDS' key business partners;
 - c) Court staff;
 - d) District Court Judges;
 - e) Prosecutors (Crown and Police);
 - f) Criminal legal aid practitioners at the private bar; and
 - g) Other stakeholders such as Corrections and Probations.
18. Given constraints of time, we resolved to visit seven out of 10 PDS offices and provide opportunities to feed into the review (by way of anonymous survey or email) to those in offices that we did not visit. Accordingly, we visited the PDS offices in:
 - a) Auckland;
 - b) Manukau;
 - c) Waitakere;
 - d) Hamilton;
 - e) Wellington;
 - f) Christchurch; and
 - g) Dunedin.
19. We did not visit the offices at North Shore, Tauranga, or Hawke's Bay. Because the Support Service Managers in Waitakere, Hamilton and Wellington also support the offices in (respectively) North Shore, Tauranga and Hawke's Bay, we were able to get some insight into those offices.
20. We spoke to as many people as possible in each office. Generally, this meant that we had meetings with the Office Public Defender (**OPD**), Support Services Manager (**SSM**), and then with the lawyers and support staff via group workshops. In offices that also house staff in specialist roles (e.g. RPD, Training Advisor), we spoke to those specialists individually. In most offices, we also spoke to the Duty Lawyer Supervisor (**DLS**), to get an insight into that arm of PDS' work. We are grateful for the time and insights that PDS staff shared with us. Without exception, we found that PDS' people were of the highest quality.²
21. We also spoke with PDS' head office staff, who were committed and genuine in their desire to support the important kaupapa of the PDS. We spoke with other MoJ staff too, including

¹ While the bulk of these documents were provided by PDS in April 2021, others were provided over the course of the review by PDS and others. We have also considered other publicly available materials.

² The 2016 Management Review referred to below said that "PDS staff are imbued with an unusually strong sense of mission", which we wholly endorse.

representatives from Legal Aid Services, and MoJ managers with oversight of various resources that MoJ provides to PDS.

22. We spoke with other stakeholders in person and via AVL or phone. This included prosecutors and court staff in most but not all of the locations we visited. Similarly, we spoke with District Court Judges and court staff across various courts. We engaged with a small handful of people variously involved with Corrections/Probations, and also with a small number of other stakeholders in the community or outreach space.
23. All in all, we estimate that we spoke with more than 200 people (and we give an indicative list in [Appendix 3](#)). As we have said, the views we received were remarkably consistent and for that reason and for confidentiality/privacy reasons we have not attributed comments to individuals in this report.
24. We completed the bulk of our interviews with stakeholders by early June, then began drafting this report. At that stage, we sought and received certain additional material and analytical data from PDS and have factored that other material into this report. We are grateful for the assistance we received.
25. In accordance with the ToR, we provided the Secretary and PDS' leadership with a draft report for comment on 30 June 2021. A draft was provided to LSC. On 30 August 2021, we produced a further report and received some limited final comments. This final report (where necessary and appropriate) reflects the comments we received.

The Foundations of the PDS

26. Before we begin our discussion on where PDS is at, it is relevant to consider where the PDS has come from. That background helps contextualise our review.
27. The PDS was first established in 2004, then as a pilot programme operating only in Auckland Courts. Although we have not seen the founding documentation, we understand that the pilot was intended to:
 - a) Provide high quality, consistent, independent, value for money services to legally aided persons.
 - b) Improve system flexibility and provide opportunities to test different approaches to meeting cultural and other needs of clients.
 - c) Provide opportunities to test new and innovative approaches to the management of legal services, and to encourage the development of areas of expertise.
 - d) Improve the Ministry's understanding of issues facing private practice lawyers when providing legal services to the public by collecting benchmark information.
28. In September 2020, PDS produced a document entitled "Our Story". That document provides useful context to what the PDS does and how it does it. It also sets out a timeline of the organisation:
 - a) Following the success of the pilot programme in Auckland and Manukau in 2004, Cabinet deemed it appropriate to make the PDS permanent and continued to expand it in a series of decisions from 2008 onwards.
 - b) Prior to 2009, PDS was independently reviewed and reviews found it provided value for money and had a number of positive effects on the CJS.
 - c) In November 2009 the Bazley report recommended the expansion of PDS to courts where there were sufficient case volumes, including to Hamilton, Wellington, Christchurch and Palmerston North. Dame Margaret Bazley also recommended that improvements be made to the DL Service.
 - d) In 2011, Cabinet agreed to expand the PDS again, this time into Tauranga, Hastings/Napier, and Dunedin. Cabinet also increased PDS' target of legal aid assignments from 33% to 50%, as part of a package to reduce legal aid spend over four years. At the same time, the Legal Services Agency reformed the DL Service where the PDS operated, including by providing professional oversight of the DL Service through DLSs provided by PDS.

The Legal Services Act 2011

29. As even this brief background illustrates, PDS is a result of strategic and business decisions made by Cabinet within the remit of MoJ. PDS is not, unlike its counterparts in some other jurisdictions, a creation of statute. That said, support for a public organisation of salaried criminal defence lawyers can be found in the Legal Services Act 2011.
30. Section 68 of that Act sets out the functions of the Secretary for Justice. Those functions include the Secretary's obligation to "establish, maintain, and purchase high-quality legal services in accordance with this Act." For the purpose of performing that function, the Secretary may:
 - a) assess and determine the need for legal services by people with insufficient means;
 - b) specify legal services to which subpart 2 (which provides a quality assurance system) applies;
 - c) determine the method or methods for the delivery of legal services;
 - d) determine the allocation of legal services—

- i. on the basis of the method or methods of delivery that the Secretary considers appropriate for the type of legal service to be provided; or
 - ii. in any other manner that the Secretary considers appropriate;
 - e) subject to this Act, disestablish any legal services established under this Act;
 - f) deliver any legal services established under this Act;
 - g) undertake or fund law-related research and education; and
 - h) exercise any other power conferred on the Secretary by this Act or any other enactment.
31. In determining the method for the delivery of legal services, the Secretary may make arrangements for the provision of services by non-lawyers; enter into agreements with individual lawyers, groups of lawyers or law firms; employ salaried lawyers to provide services; or contract for the provision of community legal services with community law centres.³ PDS can, accordingly, be seen as the Secretary's response to the legal needs of the community by providing legal services via salaried lawyers.
32. PDS therefore sits under the umbrella of MoJ and is ultimately accountable to the Secretary. The head of the PDS is currently a lawyer and reports to the Ministry's Chief Legal Counsel.

New Zealand Bill of Rights Act 1990

33. PDS is a business unit that operates with support *from* the Legal Services Act, but part of PDS' function is to give effect *to* the rights set out in the New Zealand Bill of Rights Act 1990 (**NZBORA**). Section 24 of NZBORA sets out the fundamental rights of persons charged, and section 25 provides minimum standards of criminal procedure:

24 Rights of persons charged

Everyone who is charged with an offence—

- a) shall be informed promptly and in detail of the nature and cause of the charge; and
- b) shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
- c) **shall have the right to consult and instruct a lawyer;** and
- d) shall have the right to adequate time and facilities to prepare a defence; and
- e) shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; and
- f) **shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance;** and
- g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- a) the right to a fair and public hearing by an independent and impartial court:
- b) the right to be tried without undue delay:
- c) the right to be presumed innocent until proved guilty according to law:
- d) the right not to be compelled to be a witness or to confess guilt:
- e) **the right to be present at the trial and to present a defence:**
- f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

³ See s 69.

- g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty;
- h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both;
- i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

34. NZBORA makes the provision of meaningful and effective criminal defence services a human right owed to New Zealanders by Crown and public actors. It is imperative that New Zealand ensures the public provision of criminal defence services of sufficient quality. Although the rights of those accused of or charged with offences may be unfashionable or unpopular, they are fundamental to the operation of a democratic society and the rule of law. They need to be protected.

2008/2009 Reports

35. We have been provided with two reports relevant to the PDS pilot. Both are by Martin Jenkins. The first is dated 1 May 2008 and titled "Evaluation of the Public Defence Service" (the **2008 Report**); the second is dated March 2009 and titled "Value for Money Review of Public Defence Service" (the **2009 Report**).

36. The 2008 Report included questions such as whether the pilot maintained or improved the quality of criminal legal aid services. The report noted that "PDS is intended to maintain or improve the quality of criminal legal aid services in the Auckland and Manukau courts," and found that the PDS had maintained or improved the quality of legal services.⁴ Further, Martin Jenkins found that over the course of the pilot PDS cases tended to result in greater use of guilty pleas, fewer changes of plea, and fewer substantive hearings.⁵

37. The 2008 Report went on to note the effects that PDS had on the CJS as a whole, including its ability to train junior lawyers and the fact that its introduction had not materially reduced the amount of legal aid work available for private practitioners (as some had feared it would).⁶

38. The 2008 Report went on to comment:⁷

The available data suggests that the PDS model is not intrinsically more efficient, however the calculation indicates that PDS has been relatively more efficient than private provision over the pilot period. In essence, the relative efficiency of the model requires a good match between the number and composition of cases (caseload and case mix), on the one hand, and the number and experience levels of lawyers employed on the other. This 'matching dynamic' can be expected to change over time. PDS is more likely to maintain its relative efficiency in an environment of relatively steady (or smooth changes in) case load and volumes. In particular, rapid reductions in volumes would have the potential to result in reduced efficiencies in the PDS model vis-a-vis private provision because of the inherently different cost structures.

39. The 2008 Report concluded:⁸

⁴ At page 2.

⁵ At page 2.

⁶ At pages 14-15. In 2021 it is plain that PDS has not harmed the bar or access to justice, and that the majority of criminal legal aid work is still provided by the private bar. Our perception is that the conversation has or is flipping: the question is no longer whether PDS is "stealing" work from the private bar, but whether the private bar has too great a monopoly (particularly over senior work), and whether this is appropriate given the concerns raised in the 2009 Bazley report.

⁷ At page 22.

⁸ At page 23.

The evaluation finds that the quality of the delivery of legal aid services has been maintained or improved by PDS because:

- PDS and private clients have a similar experience of legal aid
- PDS and private clients have the same case outcomes (e.g. conviction rates and sentences)
- Stakeholders generally hold very positive views about PDS, and whilst private lawyers held less favourable views about the quality of PDS; their views were diverse.

40. It went on to say that PDS had not negatively impacted access to justice, and that the pilot seemed to have produced positive effects on the CJS overall.⁹ Finally, it found that the PDS model was generally more cost efficient than the bar, and represented good value for money given that it had at least maintained the quality of criminal defence work.¹⁰
41. The 2009 Report was apparently commissioned to “to inform consideration of expanding the PDS outside Manukau and Auckland” and built on the 2008 Report.¹¹ Martin Jenkins’ 2009 Report concluded that PDS represented value for money and:¹²
- a) maintained or improved the quality of legal aid services;
 - b) did not impact on defendants' rights to choose their lawyer;
 - c) did not adversely impact on private lawyers' ability to practice; and
 - d) provided opportunities for the mentoring and training of junior lawyers.
42. The 2009 Report found that in general the PDS pilot produced lower conviction rates, particularly for more serious offending, and that that overall trend was beneficial for Māori and Pasifika defendants; PDS clients were also less likely to elect trial by jury.¹³ The 2009 Report said that the cost of PDS fluctuated from year to year and by location, but overall the model was generally lower cost than the equivalent cost of private representation for the same mix of cases. It said this was because PDS had “relatively fixed costs”, which may “be appropriate as part of a mixed model of provision in a more volatile context, but requires appropriate management.” Martin Jenkins said its findings supported the expansion of PDS to other locations.¹⁴

2011 Expansion

43. PDS’ mandate was expanded significantly in 2011. A Cabinet Minute from February 2011 states that in December 2009 Cabinet invited the Minister to report to Budget Ministers with options (including on reprioritisation) to establish a sustainable, affordable baseline for legal aid and community law centres for consideration in the 2011 budget.
44. The goal was to save \$138m in legal aid over four years, and work to address the remaining funding gap by reviewing the purpose of legal aid and the cost drivers (particularly in the family jurisdiction). The 2011 reforms also included narrowing the eligibility test for legal aid clients and adjusting the relevant considerations.
45. The February 2011 Minute also considered the place of PDS. It noted that PDS tended to offer higher quality services at a lower, controlled price. Consequently, Cabinet resolved to expand

⁹ At page 23.

¹⁰ At page 24.

¹¹ At page 1.

¹² At page 1.

¹³ At pages 2-4.

¹⁴ At page 4.

the public provision of legal services so that a target of 50% of criminal legal aid cases would be delivered by PDS in Auckland, Hamilton, Wellington, and Christchurch, and new PDS offices would be established in Tauranga, Hastings and Dunedin to do the same.

46. PDS started taking 50% of cases throughout 2011 and 2012. In 2012, Legal Aid Services implemented the fixed-fee framework by which PDS and private legal aid lawyers alike measure their time and fees for the work provided to clients (though, unlike private lawyers, PDS does not collect any actual funds for the work provided. All fees are met from its base appropriation).
47. In 2013 the Criminal Procedure Act 2011 came into force. That Act provided a new pathway for how criminal matters would get resolved through the courts. The Act was disruptive when it arrived, but is now well embedded and familiar to criminal law practitioners.
48. In 2014, PDS implemented its current workflow management system, *Affinity*. That system is still in place but PDS' current version is out of support with the provider.
49. In 2016, a number of management and operations reports were commissioned by the then Director, including:
 - a) the "Review of the Public Defence Service's Remuneration and Progression Approaches" report (**2016 Remuneration Report**);
 - b) the "Review of Management Arrangements to support implementation of sustainability strategy" (**2016 Management Report**); and
 - c) the "Public Defence Service: Review of recruitment and recommendations" (**2016 Recruitment Report**).
50. Those reports were insightful and give a useful snapshot of the PDS as it was in 2016. Many of the recommendations made in 2016 have since been implemented, although the concerns behind and arising from those reports remain live.

Observations and Findings

52. We set out in the Executive Summary our high-level findings against each of the ToR. The below expands on those summaries and reflects (where relevant) on the data that informs our conclusions. Issues that do not fit neatly within one or other ToR are reflected throughout this report and are mainly concerned with issues of Why and of supervision and support structures.

Strategy and alignment

How well do the staff and stakeholders understand PDS' purpose, vision and strategy?

Purpose

53. PDS staff are keenly attuned to the PDS purpose, though the legal staff (generally) more so than the support staff.

54. PDS' purpose is set out in its Code of Conduct:¹⁵ the purpose of the PDS is to provide quality, timely and independent advice and representation to persons subject to criminal proceedings and who are eligible for a grant of legal aid pursuant to the provisions of the Legal Services Act.

55. That Code also sets out the duties that PDS lawyers owe to clients:

- a) to do his or her utmost, consistent with the lawyer's duty to the Court, to protect, promote and work for the best interests of the client and to ensure that the client receives a fair hearing;
- b) to provide the client with fearless, vigorous and effective defence and to use all proper and lawful means to secure the best outcome for the client; and
- c) to act with all reasonable diligence and promptness in handling the affairs of the client, including discharging the duties of disclosure of all relevant information to the client and of keeping the client informed of the progress of the case.

56. We referred above to the sense of "mission" that PDS lawyers have: there is a keen sense of mission amongst lawyers that drives them to do their utmost for clients with the time, resources, and skills they have. The lawyers told us that they focus on each client and often see their purpose as attending to whatever "fire" is raging in front of them. If the purpose of PDS is to do that, then PDS lawyers well understand it.

57. While the core, client-focused purpose is well understood, questions about broader purpose remain. We had many discussions about whether PDS' purpose might be broader than that stated in the Code of Conduct. For instance, is its purpose to provide services to clients at the lowest cost, to do the most cases, or to take cases at the most serious level? (Each of those is potentially in conflict with the other). We come back to the question – what is the Why for PDS and is there consensus on that?¹⁶

Vision

58. PDS' vision statement states that it "is a strong, independent professional, people-centred criminal law practice delivering high quality legal services to our clients." That vision statement appears to be well understood and acted on in the PDS offices. That said, the same questions remain in respect of vision as for purpose: as far as it goes, the vision is sound, but further cohesion and development with Legal Aid Services and MoJ is required.

¹⁵ Dated October 2020.

¹⁶ We discuss the lack of a coherent aligned strategy for publicly funded legal services across the CJS below.

59. We can foresee PDS' articulation of a broader vision leading to a range of possibilities, for example to complete the bulk of all criminal legal aid work at PAL 1 and 2 levels, or to be the criminal defender of choice across all levels of seriousness across all courts or those with sufficient volume to justify an office. The 50% target in areas it operates might remain the goal,¹⁷ although it would be useful to have clarity about what that is designed to achieve.

Strategy

60. As part of this review, we considered PDS' Business Plan 2020/2021 (**Business Plan**). That Business Plan set out four priorities:
- 1) Excellent services to clients
 - 2) Strong, professional and people-centred
 - 3) Build and strengthen our people
 - 4) Contribution to the justice system
61. It went on to set out the PDS values and referred to MoJ's general strategy for the same period. It is said that the Business Plan "links to the Ministry Strategy and its goals and priorities".
62. From our interviews, it is clear that most PDS employees have little knowledge of or engagement with PDS' overall Business Plan. There is a real sense that staff focus on the job in front of them: achieving outcomes for clients (or putting out fires, as some put it). That focus aligns with their obligations of client care and responsibility to the Court. Staff are not necessarily aware of or engaged with the organisation's broader plan.
63. For completeness, the Business Plan includes a focus on:
- a) A modern and responsive approach to service using new technology. PDS' current access to reliable and fit for purpose technological solutions is poor and this impedes its ability to deliver on this aim;
 - b) The provision of client care by a single lawyer for all of a client's substantive appearances. We agree that this is an important element for success. We also understand that the judiciary (for undoubtedly good reasons) does not always appear to prioritise this consistency in the same way as PDS and the private bar;
 - c) Enhanced cultural competency. We agree that this should be a key focus for an organisation such as PDS, particularly given that the legal profession is far less diverse than the communities it serves and the population generally;
 - d) Ensuring clients can access community support;
 - e) A review of the PDS appeals team. This seems sensible, pending clarification of the strategic goals of PDS;
 - f) Attaining long-term business sustainability;
 - g) Strong HR processes in principle and practice;
 - h) Acting on standardised business processes. Although there will always be a place for standardisation, care should be taken to ensure that standardisation does not come at the expense of a responsive and fit for purpose system;
 - i) Providing a healthy and safe environment;
 - j) Clarifying the future and scope of the DLS;
 - k) Ensuring PDS has a solid summer intern programme nationally;

¹⁷ We are told that PDS previously sought to have the 50% target replaced with a target number of cases. Those attempts are, we understand, ongoing. In any event, we encourage MOJ and others to develop a target or KPI consistent with the ultimate PDS Why.

- l) Providing high calibre, effective training for the “next generation of criminal lawyers”. This is already happening but should be considered and, if desired, expressly mandated as PDS and MoJ articulate the Why;
- m) Being a “strong voice” across the CJS; and
- n) Ensure a fit for purpose PDLA scheme is in place.

Finally, the Business Plan sets out core business objectives/measures:

- a) Accept at least 15,000-16,000 new assignments (also an external performance measure);
- b) Contribute no less than 17,000 hours of DL Service across PDS (including Supervision) (also an external performance measure);
- c) Meet workload objective of approximately 50-60 PAL 1 equivalent cases on hand per lawyer;
- d) Achieve staff turnover of 20% or less;
- e) Recruit 90% of PAL 1 lawyers from within PDS;
- f) Average cost [of service] for a PAL 1 case to be no more than \$1,200 (also an external performance measure);
- g) Achieve a rating of acceptable or better for 100% of PDS lawyers audited in the Legal Aid Quality and Value Audit;
- h) No NZLS complaints about PDS lawyers are substantiated; and
- i) 90% of time recording completed by the end of each week.

How well integrated into the wider MoJ is the PDS?

64. PDS is well integrated into MoJ in the sense that it is well served by certain MoJ resources and standards (for instance, being part of MoJ gives certain PDS staff access to MoJ systems and corporate support services such as human resources, property, security, and organisational oversight). That said, there is a sense amongst many that PDS is an awkward fit within MoJ. Many people we spoke to were less interested in how well integrated PDS was than whether or not PDS should be trying to fit within MoJ.
65. The reason for that is that many PDS lawyers think that PDS lawyers – as independent advocates for people charged with offences – are not pursuing the same goals as MoJ. For instance, whereas MoJ might be focused on victim rights, PDS lawyers are focused on defendant rights and the right to a fair trial; the latter is often, they feel, in conflict with the former. PDS lawyers worry that the pressure and internal culture of MoJ is irreconcilable with their role as defence counsel and can create a perception in the community that PDS lawyers are really just part of the “system” that seeks to punish the accused rather than being advocates for them. Senior criminal barristers described PDS lawyers as sometimes inhibited by their MoJ status.
66. On this point, it is relevant that PDS employees are bound by MoJ’s Code of Conduct, as well as (for lawyers) the PDS Code and the Rules of Conduct and Client Care (**ROCCC**) that bind all practising lawyers.¹⁸
67. The MoJ Code requires political neutrality and support for the government, as well as judicial independence, honesty, and the provision of fair and professional service. The MoJ Code generally applies to MoJ employees in their place of work.

¹⁸ The ROCCC are a product of the Lawyers and Conveyancers Act 2006 and are found in the Schedule to that Act. It is also relevant that s 81 of the Legal Services Act highlights the primacy of a legal aid or PDS lawyer’s obligation to fulfil their obligations under the ROCCC.

68. We were provided with guidance that had been produced within PDS to “assist PDS lawyers to better understand the application of the [MoJ Code] to them”. That guidance clarifies that the MoJ Code does apply to PDS lawyers, despite some concern it might inhibit the performance of their duties. The guidance clarifies that:

PDS lawyers have an overriding duty as criminal law practitioners to act independently in advising and representing clients. They also have an obligation to abide by the Code of Professional Conduct and Client Care Rules established under Part 6 of the Lawyers and Conveyancers Act 2006.

Neither the Secretary nor PDS holds concern about any PDS lawyer who acts independently when advising or representing clients. The requirement for PDS lawyers to act independently in the best interests of their clients is paramount.

69. It also clarifies that a PDS lawyer can, on instructions, make submissions in court that might be critical of government policy or MoJ, despite the fact that the MoJ Code provides otherwise. It says PDS lawyers can belong to professional bodies and should engage in such groups “without concern that they may be breaching” the MoJ Code, as long as they do so in a purely personal capacity.
70. Despite their concerns around pressure to be both MoJ employee and defence counsel, most PDS lawyers acknowledge that any conflict between those two roles (and any conflict between PDS and MoJ) is more apparent than real. Some PDS lawyers told us that clients have expressed concerns to the effect of “you’re just a government lawyer, you’re not here to help me”, and the like. The issues that arise due to PDS’ integration into MoJ are generally philosophical and perceptual, rather than real. That does not mean that they are irrelevant. Those we spoke with were able to articulate sound reasons for and against PDS remaining within MoJ. For reasons we discuss below, we recommend further thought and investigation into the options to allow PDS greater independence whilst aligning more closely with Legal Aid Services.
71. There are also other measures that could be taken to foster a greater sense of independence from MoJ (in the minds of lawyers and clients):
- a) PDS could (and should) have its own website conceptually and stylistically separate from that of MoJ. Although the current PDS website appears to be a standalone site with its own domain, it is linked (stylistically and in terms of loops of information) to the MoJ site. There is potential to make PDS’ website less anonymous and give PDS lawyers more profile (and credibility) in the same way that law firms generally do. The website reflects the fact that PDS is an MoJ business unit and this may be off-putting for clients. The website is set out under a justice.govt.nz banner and is likely to create confusion and a sense that PDS is part of “the system”;
 - b) By the same token, we suggest thought be given to removing the “.govt” from PDS email addresses, if possible;
 - c) PDS lawyers should be encouraged to participate in sector and professional groups, and should also be promoted as experts in the criminal defence field who are capable of contributing to the broader dialogue about the CJS and the issues facing defendants.

How well does PDS collaborate on strategy and service delivery with the Legal Services Commissioner (LSC) and Legal Aid Services and other parts of the Ministry?

72. In terms of MoJ generally, it appears that PDS collaborates with other units as and when required – generally in the sense that PDS is a client of MoJ resources like HR and property support, and a

sector stakeholder for MoJ units like the Courts, where it can and does usefully collaborate on discussions about strategy and operations (discussed further below).

73. We find that the relationship between PDS and the LSC is increasingly collaborative. For instance, in 2020 PDS and the LSC together decided it was appropriate for PDS to stop accepting new assignments during the COVID-19 lockdown, in an effort to support the private bar during a time where workflows generally decreased. That collaboration was useful and indicates an increasingly healthy working relationship between PDS and the LSC at the senior level.
74. That said, it is not clear how broadly PDS and the LSC collaborate on wider system and operations strategy. Treasury’s draft Legal Services Baseline Review Report of 22 December 2020 (the **Legal Services Baseline Review Report**) said that “[a] strategic view is needed across the full suite of legal service interventions to determine the most appropriate role for government in supporting access to legal services. The system does not appear to be operating strategically with a view to overall value for several reasons.”¹⁹
75. Given that the LSC and PDS are the two biggest organisational players in terms of the provision of legal aid defence work, there is room to explore opportunities for increased collaboration and for MoJ/the Secretary to provide direction accordingly. We say that this is a matter for the Secretary because we are conscious that PDS and the LSC have different mandates and objectives. To the extent that collaboration would mean compromise by each organisation in relation to its objectives, then direction as to the scope of collaboration needs to be given by the Secretary. This includes the broader strategy for Legal Aid Services, PDS’ role within that and how the two methods of provision can work in a complementary fashion.
76. One area where PDS and the LSC are collaborating to some extent is the work that is being done to ascertain the current and future criminal legal aid provider capacity. That work is important because many commented to us that the need for competent criminal legal aid providers outstrips current and future demand. Both the LSC and PDS need to consider how they will respond – ideally, there will be a system-wide strategy with a view to delivering overall best value for clients and the CJS.
77. A “Legal Aid Provider Coverage: Criminal 2019/2020” report is in progress.²⁰ The draft report notes that until about 2011, Legal Aid Services produced an annual report monitoring the demand and supply for criminal legal aid. When reporting resumed in 2017/2018 it revealed that there was unmet need in some regions and areas of the law.
78. The report recorded concerns around the:
 - a) cost of training junior criminal lawyers (and the lack of financial support available for the purpose);
 - b) ageing of the criminal bar;
 - c) low legal aid remuneration rates;
 - d) fact that the paucity of legal aid providers in some regions means greater capacity for conflicts of interest and decreases the number of lawyers available in that region;
 - e) low number of legal aid providers in Hawkes Bay, Manawatu-Whanganui, the West Coast, Marlborough and Waikato;

¹⁹ At [73].

²⁰ The draft we received is dated 12 December 2020.

- f) shortage of criminal legal aid providers in 16 of 21 courts, with the greatest risk being posed in Auckland and Christchurch; and
- g) expectation that all but two regions will suffer a net loss of providers in the next five years.

79. The draft report recommended further consultation, an investigation of the legal aid remuneration rates, and the collection of additional data. We expect there is much to be gained from the development of a high-level strategy for addressing these issues, and both the LSC and PDS should feed into the development of that solution. The extent of collaboration between PDS and the LSC needs to be considered carefully. While both are part of MoJ, they are (at least at present) independent entities with different stakeholders and objectives. It begs the question as to why there is such separation between the two and how greater coordination and collaboration could be achieved.

How well does PDS collaborate with external stakeholders (judges, sector partners, legal professional bodies, etc)?

80. We have spoken with numerous judges, court staff, Crown and Police prosecutors, barristers and others about their views on PDS. Almost without exception, those external bodies have been grateful for the work PDS does and the role it plays in the effective and efficient operation of the CJS. The feedback we received is that PDS is a useful and effective collaborator across the CJS on a case-by-case level and as an organisation.

81. For example, judges and others talked about how the PDS participates in Local Sector Network meetings, where its contributions are generally useful and pertinent given that PDS has the ability to aggregate the voices of multiple criminal defence practitioners.²¹

82. Prosecutors and court staff in many regions told us that PDS is typically easier to deal with than the private bar: PDS is more likely to consistently file on time, meet their obligations to file case management memoranda (or else communicate why they cannot do so), and more likely to represent the clients that “no one else wants”. The overall impression we got was that because PDS lawyers are subject to organisational infrastructure that produces consistency and promotes individual accountability, they are a more reliable contributor to the court process. Because PDS lawyers are employees, other stakeholders can address performance or other issues they observe in PDS staff with the relevant OPD, a channel which is not available with the private bar.

83. Additionally, as part of the review we were provided with a paper entitled “PDS Working Group Feedback” dated March 2020, which was designed “to identify any strategies, improvements or efficiencies it could put in place to help defendants move through the court system more efficiently.” That paper was presented to MoJ’s SLT to provide PDS’ feedback about and response to Court and system pressures arising from delayed guilty pleas and an increasing remand population, and also PDS’ contribution to the Judge-led Criminal Process Working Group Subcommittee.²²

²¹ There was, of course, some concern from the bar that PDS was included whereas individual practitioners might not be. That is inevitable and not of concern. Private practitioners can and should make their voices heard via other membership organisations (e.g. NZLS, NZBA, CBA, and others).

²² We understand that this committee was convened to respond to the COVID-19 crisis and to explore system changes that could improve court processes.

84. This paper not only gave MoJ an update on internal PDS matters, but also collated PDS' reflections on the Court and justice systems generally, which allowed PDS to contribute – based on evidence and experience – to the broader kaupapa around improving access to justice. PDS' paper touched on issues relating to bail applications, judge alone trials (**JATs**), jury trials, sentencing, and other areas that contribute to delays in the court process. In other words, PDS addressed most (if not all) of the key pressure points in the CJS. PDS also looked at MoJ-focussed issues such as the DL Service and case management process. It also made recommendations for change.
85. The paper provided a wealth of knowledge and insight. It is a valuable example of how PDS contributes to the CJS and collaborates with stakeholders in a meaningful and effective way.

How is PDS embedding whakaaro Māori?

86. One of MoJ's "enduring priorities" is "honouring responsibilities to Māori". Although PDS already operates on the basis that it has responsibilities as a Te Tiriti partner, our sense is that more could be done (and that PDS has recognised this). The level of diversity does not appear to be high and the level of engagement with te reo and Te Ao Māori varies between offices. Like the rest of the legal profession, PDS should continue to consider whether it has the right resources and expertise to facilitate this important kaupapa.
87. One workstream we are aware of is PDS' effort to make basic te reo and tikanga training available to staff through a programme run by CORE education. We were provided with a proposal from CORE to PDS in relation to online te reo and tikanga learning support. The document indicates that CORE assists MoJ with its te reo programme, Kokiri, to which we assume all PDS staff have access. We are not sure how widely these opportunities have been made available or taken up. We are advised that PDS' 2021/2022 business plan recognises that more needs to be done and that PDS is looking to recruit a "kaiwhakaterere" to assist its efforts.
88. We are also aware of the efforts made in the Auckland and Waitakere offices (and perhaps others) to engage with training delivered by Te Wānanga o Aotearoa, which appears valuable. We spoke with a representative of Te Wānanga, who told us that the staff at PDS were engaged and responsive. It seems all lawyers would benefit from this kind of training.
89. In our time speaking with PDS employees, we saw hints of the fact that some PDS staff see themselves as kaitiaki of their clients and PDS generally as a guardian of the CJS and those it serves. We met some individuals who were keen to teach their colleagues and share their knowledge of Te Ao Māori with them. Such individuals are a huge asset to PDS, but it is important that PDS does not rely solely on motivated individuals to take responsibility for this important work.

Given the LSC had delegated accountability for the performance of salaried lawyers to the Director PDS, how is the Commissioner kept informed about performance?

90. More work is needed to answer this question with complete confidence, but the LSC is kept informed about PDS' performance via:
- a) Fortnightly meetings between LAS and PDS leadership;
 - b) Receipt of PDS' monthly dashboard;
 - c) Regular engagement between PDS and LAS as and when issues arise; and
 - d) Ongoing discussions at the highest level as to PDS' and LAS' respective priorities and the opportunities for collaboration.

Leadership

How well does the PDS leadership team provide collective leadership and direction to PDS and how well does it implement change?

91. This is an inherently difficult question to address and answer. There are many positive indications of the collective leadership and direction provided by PDS' Leadership Team (**LT**). The results of the feedback we have received speak for themselves; the overall quality of the service and feedback received is testament in part to the effectiveness of the LT. There are intractable issues which the LT team have not been able to solve. The situation at Manukau has existed for some years now and has not been effectively changed.²³ The problem with recruitment and retention of senior staff likewise. Perhaps the biggest contribution the LT team could make would be to influence a change in the strategic vision for PDS and Legal Aid Services, and agreement with MoJ and LAS as to that vision.
92. The LT is keenly aware of its obligation to effectively direct, manage, and communicate change throughout the organisation, on top of its general obligations to provide oversight. It implements change by adopting a process that includes consultation and diligent consideration of the reasons behind and options for change. While we can see that the LT makes an effort to communicate this effectively, staff report a lack of effective communication. Recent changes to the leadership structure reflect the desire to devolve operational decision-making to lower levels. In this section of the report, we discuss various levels of PDS leadership and where relevant the issues that we see arising.
93. In terms of change implementation, issues have arisen, for instance, in relation to the recent remuneration review. In relation to that review, the lawyers generally told us that work was done in Wellington with some, but minimal, consultation on options before the recommended option was put out for a brief period of consultation. The view amongst staff generally is that the current consultative phase is procedural only, the decisions have been made, and that staff have not in fact been meaningfully consulted. In response, PDS' LT notes that the proposal required extensive consultation with MOJ and groups from within PDS (including a focus group). The LT says that opportunities were given to discuss the proposal, ask questions, and make submissions in response and that there was a high level of engagement between the LT and lawyers. The LT advised us that it received eight group submissions from offices and five submissions from individuals.
94. We note the May 2020 Manukau Office Decision Document. We read that report with interest and note that PDS' Director prefaced it with a message to staff and ended it with FAQs that made it clear that *he* (he says "I") made final decisions on the recommended structure. This particular paper illustrates a genuine effort to provide transparency and accountability.

A new leadership structure

95. At the start of 2021, PDS implemented a new leadership structure along the following lines:
 - a) The LT: the LT is comprised of the Director, the Deputy Director Operations (**DDO**), and two Regional Public Defenders (**RPDs**). The LT is required to be accountable for PDS' performance, set its vision and values, ensure compliance with legal and policy

²³ We visited the Manukau office in May 2021. Since then, a new and well-respected OPD has been hired. We have not been back to the office since so cannot comment on developments after our visit.

requirements, and inspire trust and confidence internally and externally by committing to improving outcomes across the justice sector.

- b) National Management Team (**NMT**): the NMT is mandated to assist the LT “with the implementation of group strategy and operational management ensuring national consistency of practice across all PDS offices.” It is also intended to be a source of advice and information via two-way communication channels. Membership of the NMT is determined by expressions of interest (and, when necessary, election) and appointment by DDO and RPDs. The NMT is currently comprised of the:
 - i. DDO;
 - ii. Office Public Defender – Southern (x1);
 - iii. Regional Public Defender Northern;
 - iv. Support Services Manager – Southern (x1);
 - v. Regional Public Defender Southern;
 - vi. National Business Manager;
 - vii. Office Public Defenders – Northern (x2);
 - viii. Senior Duty Lawyer Supervisor (x1); and
 - ix. Support Services Managers – Northern (x2).
 - c) Northern (**Northern LT**) and Southern Leadership Teams (**Southern LT**): the Northern LT and Southern LT are each mandated to assist the NMT by providing and seeking advice and input for service delivery, views on pertinent issues, and ideas for business development. The Northern LT and Southern LT are each comprised of the DDO, their relevant RPD, all of the OPDs and SSMs for the region, and a Senior DLS.
96. The new structure is sensible and should allow the LT to spend more time focusing on PDS’ overall strategy and less time getting bogged down in operational matters, which should be dealt with at a lower level. That said, we have concerns that the RPDs are over-committed and unlikely to be able to be as effective as they ought to be within this structure. It is hoped that the new structure will create greater accountability for and ownership of operational decisions across the organisation. As with many national organisations, there is a need to ensure that the us/Wellington divide is well managed and mitigated.
97. At an office level, leadership is provided by:
- a) Office Public Defenders (**OPDs**): each office is run by an OPD, who is a senior lawyer with the responsibility to provide leadership and management for the lawyers in each office. OPDs report to the RPD for their region.
 - b) Support Service Managers (**SSMs**): SSMs are tasked with leading and managing the support staff and providing operational, business and administrative support to the OPD and legal staff. SSMs are also required to manage all secretarial and litigation support work. SSMs report to the DDO. Several SSMs cover two offices.
98. Larger offices tend to have Team Leader positions held by senior (PAL 3 or 4) lawyers – for instance, Auckland and Wellington. The Manukau office has (as a result of a long-running pilot designed to address resourcing issues in that office) a Principal Lawyer (who provides leadership and mentoring to juniors to develop their technical skills without performing a management function) and Team Managers, typically at a PAL 2 or 3 level.
99. The variety of “leadership” roles at PDS is somewhat unique and is dictated in part by the needs of each office. We set out below some of the concerns that have arisen in relation to the various

leadership arrangements. We have reflected on the concerns raised with us and provide our thoughts accordingly.

OPDs

100. A handful of interviewees put it to us that it is inefficient to have an OPD in every office. That may be the case (economically) but we struggle with the idea that there might be a PDS office (even a small one) that does not have a single senior lawyer as its figurehead on the ground. Ultimately, we consider that the OPD's role in each office and the court(s) it serves is indispensable. We expect that if the OPD was removed from an office, there would be a crisis of confidence amongst the lawyers, the court, and the private bar in that location. This would further embed PDS' recruitment and retention issues and the office would be perceived as a lesser option.

101. The idea was floated that some offices may need only a manager and no OPD. We think this is better framed as a response to the need to devolve more managerial responsibility away from OPDs to managerial experts and reflects a need for greater operational management than any redundancy of the OPD position. The reality is that young lawyers look up to senior lawyers, and they need to feel that there is someone there who has practiced law at the highest level that they can not only learn from but aspire to be.

SSMs

102. We can see that in some offices there is tension in the fact that the SSM directly reports to the DDO, but is in some sense subordinate to the OPD. This tension is not acute and we hear it is well understood and well managed by the DDO. We mention it for completeness.

Principal Lawyer

103. We see real value in the Principal Lawyer role and PDS should consider replicating this position across all offices with a sufficient number of lawyers or where there is an issue with recruitment, retention, or supervision (notably Manukau²⁴ and Christchurch, but the role may also be of value in Auckland, Waitakere, and Hamilton).²⁵ Having a senior lawyer whose primary role is to support, mentor and be a role model (in and out of court) to others is an excellent approach. The Manukau Crown Prosecutor takes a similar approach by bringing in a contracted senior lawyer several days a week to help lawyers troubleshoot issues and to provide general support and expertise. Having this potential progression pathway for lawyers also enhances recruitment and retention options (provided it is attainable). A similar structure was introduced to Crown Law in 2013.

Manukau's Team Managers

104. We acknowledge the LT's perspective that (amongst other things):

- a) The structure designed for the Manukau office followed an extensive period of successfully trialling a team structure where many of the team leaders were PAL 2 lawyers.
- b) In part, the Manukau structure was designed to strengthen leadership and management behaviours and processes right across PDS and develop an internal talent pipeline for management and leadership roles at every level in the PDS.

²⁴ There is currently one Principal Lawyer in Manukau, with capacity for one more.

²⁵ The Wellington office is large enough to support a Principal Lawyer, but at the time of our visit we observed that the Wellington office appeared well-supported by senior staff who took a deliberate approach to mentoring and legal support, such that there seemed no pressing need for a Principal Lawyer at present.

- c) The Team Manager roles require demonstration of ability to lead and manage a legal team or provide constructive feedback, formal coaching and mentoring that contributes to the professional development of other lawyers.
- d) The make-up of each team is carefully monitored to account for the needs of lawyers and changes as and when required.

105. While we understand those perspectives and the intention behind the Team Manager structure employed at Manukau, some Team Leader positions are held by relatively junior lawyers (partly because there is a lack of seniors) and we do have concerns about whether that is sustainable. We have real reservations about installing junior or PAL 2 lawyers as managers. We met with a number of managers in Manukau and although they are competent and dedicated lawyers, they and their lawyers (and some Judges) expressed concerns about “the blind leading the blind” in some cases. PDS’ “Manukau Office Decision Document” of 11 May 2020 concluded that Team Managers should be lawyers “with trial experience”.²⁶ This is rather vague and again we express reservations about junior lawyers holding such positions.

106. Legal team managers need to be more senior lawyers (although we are completely alive to the lack of current options). At present, we observe a high number of relatively junior managers, and consequently a real crisis of confidence, supervision, client care and staff wellbeing. As PDS’ leadership is aware, the lack of resource in the Manukau office deserves serious and urgent attention, and real effort is already being made to meet the need.

The need for senior lawyers generally

107. We commented above on the lack of senior lawyers in some offices, and the consequent concern that some lawyers are not receiving the supervision and senior support they require. In addition, a lack of senior lawyers means a lack of practical senior legal resource for clients. We accept that the present insufficiency of senior lawyers in some offices is not by design but rather results unexpected departures, an inability to recruit and/or compete with private sector remuneration. However, the issue needs to be considered in the round. During our review we were told by some that PDS was by design and needed to be “bottom” or “junior” heavy because the vast majority of its workload is at a PAL 1 level.

108. Most law firms are shaped like a pyramid (more juniors, a lesser number of intermediates and fewer seniors/partners then, generally, a board and a Managing Partner and/or a CEO or Operations Manager). To be blunt, PDS has too many juniors and not enough senior lawyers in most offices. That is, the base of the pyramid is too wide at the bottom and too narrow as you go up.

109. We are not convinced that PDS was designed to be so “bottom heavy”. That does not accord with the general approach to sound legal practice, and it is not the message that comes through the early documentation or those we spoke to that were with PDS in its early years. In other jurisdictions, public defenders’ offices employ large numbers of senior lawyers, and employ silks. That is because the safe and responsible practice of law involves careful supervision and monitoring of junior development. The practice of law requires a university degree *and* an effective apprenticeship.

²⁶ At page 11.

110. In the 2016 Remuneration Report, the reviewer said:²⁷

While PAL 1 work comprises the bulk of the PDS work, it must be resourced to take on PAL 2 – 4 work and to support each level of staff. **Full resourcing will allow the PDS to deliver a rounded service. This has to be supported by staff with the experience and skills to provide the management, leadership, mentoring, support and professional supervision to the workforce at all levels within the PDS.** To achieve this it must be able to recruit and retain staff at each level and it can only do this by paying a competitive market rate tied to appropriate role progression.

The PDS will always have a high proportion of trainee roles, and given the nature of its work a high need for mentoring at each level. **Therefore, the supporting structures will always be slightly “top heavy”.**
(Emphasis added).

111. That is, the 2016 Remuneration Report recognised that the best way for PDS to *support* its high volume of PAL 1 work, was in fact for it to err on the side of being top heavy. This may put pressure on PDS’ current resourcing and appropriation, and we acknowledge that senior roles can be hard to fill, but if PDS is to be a public provider of legal aid criminal defence work it needs to do so credibly, safely, and successfully if it is to truly deliver returns for the public’s investment. Renewed consideration is required of the appropriate resourcing model necessary to ensure PDS’ future viability and credibility.

112. We have also considered the 2016 Management Report.²⁸ That recommended introducing the DDO role (that role is now very effective), and commented generally on the leadership required at PDS. The 2016 Management Report considered the role that partners in large law firms tend to play,²⁹ including the focus on management, leadership and “soft” skills.³⁰ It identified that managers and leaders need not only the skills to manage teams and people (as opposed to “the “hard” analytical and technical skills normally associated with top lawyers”) but also the *desire* to orient their actions towards leading rather than lawyering. That report recognised the need for greater leadership capability amongst senior lawyers, and noted that good leadership enhances performance, stability and morale, but that “inadequate leadership” has real costs.³¹ We agree.

113. The August 2010 discussion paper entitled “National Management Structure for The Public Defence Service” also considered the roles of lawyer/managers, by reference to PDS, other public organisations, and overseas examples. It is clear that PDS is alive to issues regarding the types of leaders it needs. We suggest that PDS continue the conversations it is already having about hiring for legal vs management skills, and whether there remains a need for greater role differentiation and/or management support.

Value proposition

Does PDS deliver value to its clients and how is this measured?

114. Our clear view (based on the feedback of many, many relevant stakeholders) is that PDS provides an invaluable service not only to its clients (mostly PAL 1) and Legal Aid Services (because it

²⁷ At [43] – [44].

²⁸ The 2016 Management Report highlighted salient issues that continue to ring true.

²⁹ The report also noted, at [5.3], that in the past large New Zealand law firms “found that if partners simply focused on lawyering, then work quality and staff wellbeing suffered.”

³⁰ At [5.4] - [5.5].

³¹ At part 6.

reliably delivers PAL1 cases arguably at lower cost) but also the CJS and society generally, by lifting the standard of criminal defence work, by training the next generation of criminal defence lawyers, and by giving criminal defence work a place in the public sector.

115. That said, we readily acknowledge that there is real difficulty in measuring value to clients and our opinion (above) is formed from extensive interviews of those in the system, but without any feedback from clients. We note, however, that recent survey data collected by Legal Aid suggests that PDS lawyers offer value to clients and the CJS, particularly in respect to the quality and usefulness of information provided to clients.³² This appears to be a positive distinguishing feature between PDS lawyers and other legal aid lawyers.
116. The recent Treasury Baseline Review (in December 2020 – before the survey above) said there was no client survey data available to compare satisfaction rates between PDS and private bar clients (if such a survey could reliably be designed). At present, PDS and private bar providers have very indirect measures of value to clients. PDS has no formal client surveys or feedback mechanisms. Anecdotally, there are many examples of positive comments from clients yet there is no formal system for capturing, preserving or collating these. The limited number of complaints are recorded and responded to (either internally or through Law Society channels).
117. Surveys or other satisfaction measures are innately difficult to construct and inevitably highly subjective. Client surveys are possible but fraught. Comparisons between the private bar and PDS are inevitably critiqued as lacking comparability. Legal Aid Services performs regular quality audits of providers but to our knowledge these are not used in comparison (further investigation of this would be helpful).
118. But it remains true that the overwhelming feedback we have received from all we have spoken to is that PDS provides a valuable service to clients and the CJS. That includes Judges, prosecutors, court staff, barristers, Police, Corrections and others. They are genuine experts in this area.
119. Any comparison of quality or cost with the private bar is fraught with difficulty given the difference in models of provision and caseloads. The majority of PDS services are provided to clients at the less serious end of criminal legal aid work. PDS is able to and does deliver a much broader range of support for the CJS than any one legal provider.
120. Any consideration of value for money needs to start from an understanding of what that term implies and how it is used in the relevant context. What is important in any assessment of value for money is looking at all the benefits and all the costs, and comparing those to relevant comparators. The Auditor-General in its procurement guidance for public entities states:³³

Value for money: Public entities should use resources effectively, economically, and without waste, with due regard for the total costs and benefits of an arrangement, and its contribution to the outcomes the entity is trying to achieve. In addition, the principle of value for money for procuring goods or services does not necessarily mean selecting the lowest price but rather the best possible outcome for the total cost of ownership (or whole-of-life cost).

³² Colmar Brunton “Legal Aid Customer Satisfaction Survey – Final Report” dated April 2021 at page 26.

³³ Controller and Auditor-General “Procurement guidance for public entities” June 2008 at [2.3]. Available at <https://oag.parliament.nz/2008/procurement-guide/docs/procurement-guide.pdf>, accessed 22 June 2021.

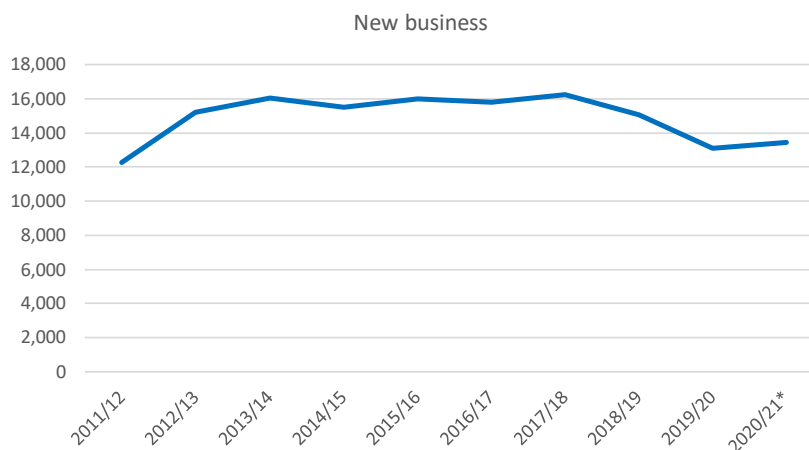
121. The 2021 annual budget for the PDS is approximately \$38.8m, comprised of personnel and direct operating costs of just over \$27m, property and depreciation/capital costs of almost \$3m and attributed MoJ costs of around \$8.8m. PDS' appropriation for 2021/2022 is \$41,367.³⁴ There is a predicted underspend against budget largely due to increased staff turnover and delays in filling vacancies.

122. The equivalent figures for the year ended 30 June 2020 showed a total cost of \$37.4m, comprised of personnel and direct costs of \$25.5m, property and depreciation/capital costs of almost \$3m and attributed MoJ costs of around \$8.9m. The appropriation was \$38.72 and after all matters there was a small surplus against appropriation. PDS' budget is relatively modest compared to that of LAS. LAS has a budget of almost \$210m with a further \$13m of OpEx. Criminal work takes about 60% of that budget. Clearly there is opportunity for collaboration and collective attention to solve challenges in the criminal defence sector.

123. As discussed above, the scale of the PDS expanded significantly in 2009 and again in 2011. We include below only some of the relevant tables and figures made available to us by MoJ.³⁵ In addition we have drawn on the published criminal legal aid figures made available on the MoJ website and various other PDS documents and early independent reviews. Some of these are listed in Appendix 2. Figures for the earlier years (in particular before 2013) are more difficult to obtain.

124. Some key tables are reproduced below and we note that 2020/2021 data is to 31 May 2021:

a. New cases per annum:³⁶



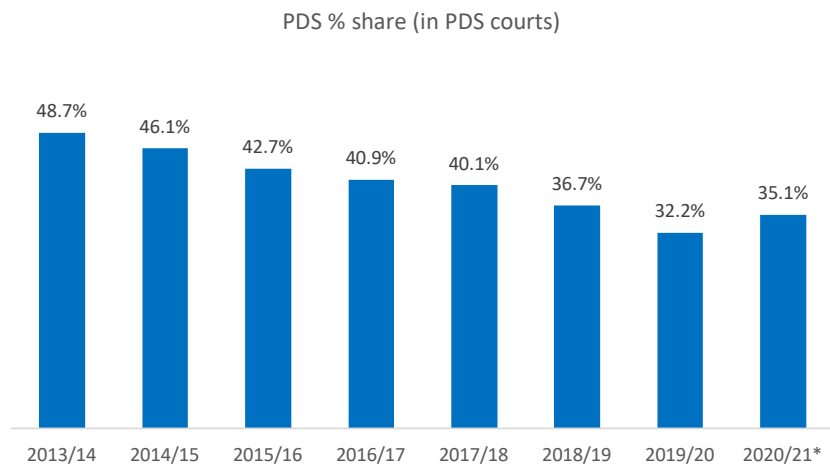
³⁴ The Estimates of Appropriations 2021/22 - Justice Sector B.5 Vol.7, available at

<https://www.treasury.govt.nz/sites/default/files/2021-05/est21-v7-just.pdf>, accessed 29 June 2021.

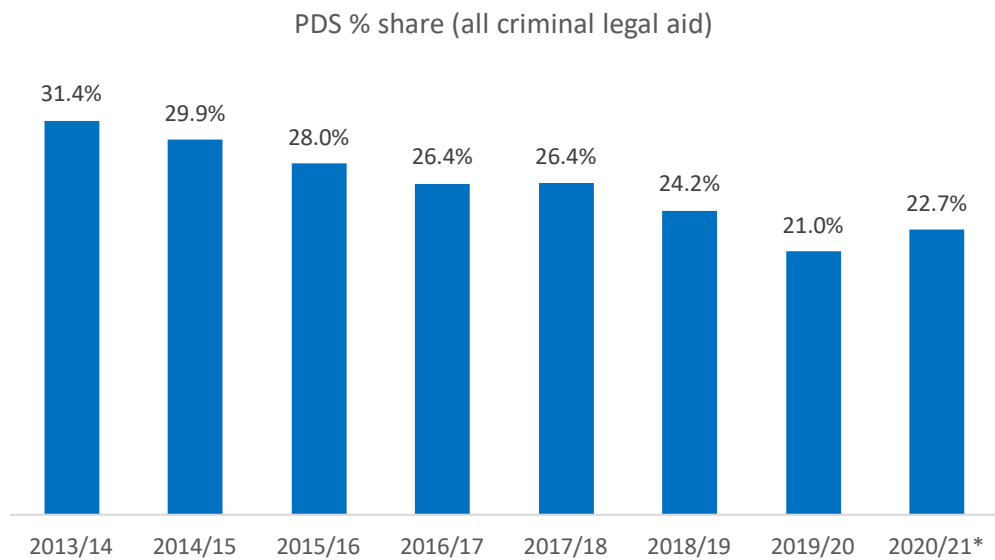
³⁵ We note again our gratitude to Jonathan Day, Senior Analyst, Ministry of Justice, for providing much of the data and tables relied upon.

³⁶ This table tracks new cases that come into PDS during the year on the basis of each new case entered into Affinity.

b. PDS' % share of cases in the Courts which PDS operates:

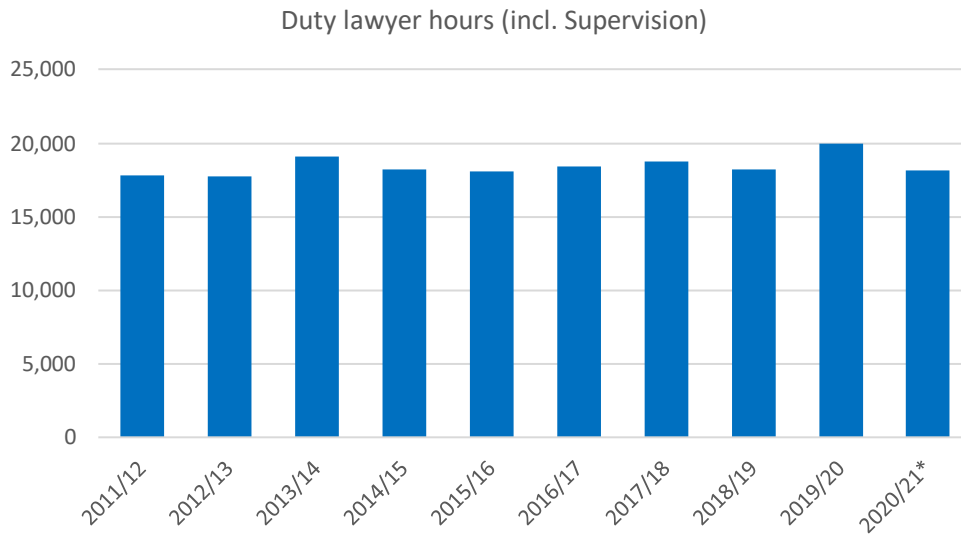


c. PDS' % share of all criminal legal aid cases on a case allocation basis:³⁷

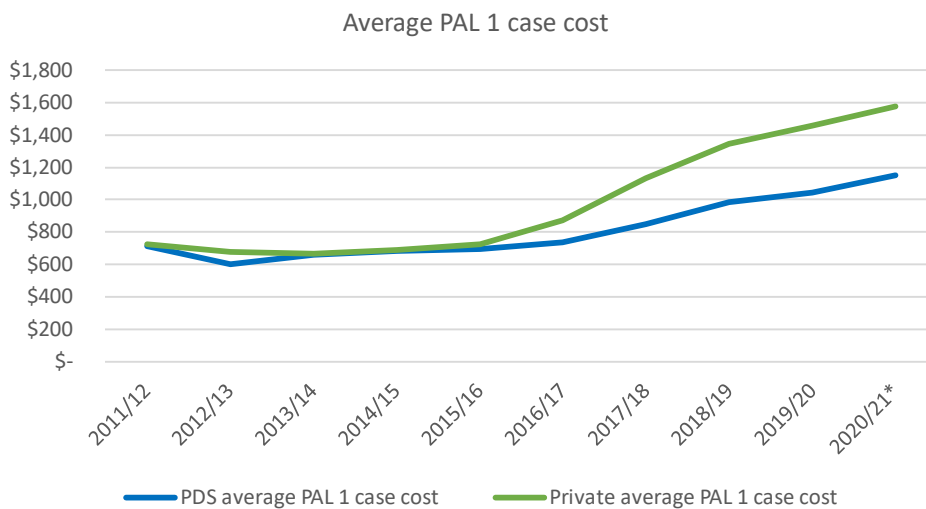


³⁷ The drop in 2019/2020 is due to the impact of COVID. By agreement with Legal Aid Services, all cases went to the private bar during the two months most impacted by the lockdown, being April/May 2020. This was expressly to support the incomes of private providers during the COVID period. We also note these figures relate to those cases falling within the legal aid rotation allocation model whereby one case is allocated to the PDS, and one case to the private bar. By definition, this just examines allocated cases – not cases where there is a choice of preferred counsel.

d. Duty lawyer hours provided by PDS:³⁸



e. Average PAL 1 case cost – PDS vs private barristers:³⁹



125. PDS’ number of new cases rose from about 12,000 in 2011/2012 to about 16,000 in 2013/2014 through to 2017/2018. In 2018/2019 new cases fell to around 15,000 and then to about 13,000 in 2019/2020 (primarily due to the impact of COVID-19, discussed above). The average chargeable hours per case at the PAL 1 level rose from 5.7 hours in 2011/2012 to 10.11 hours 2020/2021.

126. The average cost of PDS’ PAL 1 cases rose from \$711 to \$1,148 over that 10-year period. During the same period, the average cost of a private provider PAL 1 case rose from \$726 to \$1,577. See

³⁸ This is duty lawyers and supervisors provided by PDS. As noted, there is a target of hours set for PDS. The obvious trade-off for PDS is that an increase in duty lawyer hours will naturally result in less capacity to handle cases.

³⁹ This table is based on data from the legal aid system. Whilst these costs are comparable, there is no incorporated amount for the overheads of either PDS or the private provider. Both amounts simply measure the cost per case to Legal Aid Services (rather than the overall cost to the system, including overheads which PDS/MoJ might bear). It is noted that the MoJ view of the data is that the marked increase in cost from about 2016/2017 is due to later resolution of cases, including more court events. That is, the cost drivers are not particular to one or other of PDS or private providers (by that we understand the drivers could be found within both or neither).

figure (e) above. That represents the cost to Legal Aid Services on average of the PAL 1 cases. On that basis alone the comparison is favourable. The comparison is limited, however, because it appears to only include the direct costs associated with the provision of such services, as opposed to an allocation of the corresponding MoJ overhead costs (referred to above). It may not be apples with apples.

127. The 2009 Report by Martin Jenkins provided a similar favourable comparison for the Auckland and Manukau offices using data from 2004 to 2008. The 2009 Report compared the cost of actual PDS provision with the estimated cost of private provision of the same case mix by using the actual average costs of private provision for cases of equivalent complexity (PAL 1 to 4).

128. The 2009 Report stated:

The cost of PDS provision is less in all instances, except Auckland in 2004/05 (by a small amount) and 2006/07 (where it was 27% more expensive). The reasons for this are not fully clear but a contributory factor may be a reduction in PDS cases in 2006/07, leading to a higher unit cost of PDS provision. With that exception, PDS provision overall offers substantial savings compared with the estimated cost of equivalent private provision.

129. Martin Jenkins concluded:

The foregoing analysis has established that the PDS provides at least as good a service to clients in terms of conviction rates and there is some inference that it offers an appreciably better service for the more serious offences. Maori and Pacific Islanders benefit from this overall pattern. *Furthermore, our May 2008 evaluation found that the PDS has, or has the potential to have, a number of positive effects on the legal aid system and the wider criminal justice system. Issues of statistical significance and methodology suggest caution in assessing the quantum of any savings resulting from the use of the PDS.* However, consideration of the cost of provision and of the impact on the value of court time both suggest that it offers value for money.

The cost of provision fluctuates from year to year and by location, but overall is lower than the equivalent cost of private provision of the same case mix. However, as noted, the cost of PDS provision was higher than the estimated equivalent cost of private provision in Auckland in 2006/07. A contributory factor is likely to have been a dip on the number of PDS cases leading to higher unit costs. This is because the PDS has relatively fixed costs. A fixed cost structure is suited to a situation where volumes are stable. It can be appropriate as part of a mixed model of provision on a more volatile context, but requires appropriate management.

These conclusions lend support [sic] a decision to roll out the PDS to new locations. However, any such decision should take into account: the ability to manage changes in demand; establishment costs; and any cost of capital. It would also benefit from the analysis of the case flow and outcomes of more recent cases than in the sample provided to us.

130. The 2008 Report concluded:

The evaluation finds that PDS has complied with the principles of the Legal Services Act 2000, does represent value for money, and has (or has the potential) to have a number of positive effects on the legal aid system and wider criminal justice system.

131. When discussing value, it is also relevant to consider client feedback. Although PDS has a complaints process (and provides information to clients about how they can complain as required under the ROCCC),⁴⁰ there is no formal mechanism for collecting or sharing positive feedback. The complaints process invites clients to address complaints to the relevant OPD, while also referring them to the New Zealand Law Society's complaints service.
132. Many PDS staff told us stories of positive interactions with grateful clients. Equally, we were told war stories about guilty verdicts for which PDS lawyers were blamed – an occupational hazard (unfortunately) for the criminal defence lawyer.
133. Although client surveys and feedback channels could be an option worth exploring for PDS, we doubt that they will ever paint a full picture of the service provided to and received by PDS clients. It is difficult for the criminal defence lawyer to obtain fair and objective feedback from a client. That said, we would encourage consideration of how PDS can better collect feedback from clients, and include in that the need to collect the good as well as the constructive.⁴¹

Does PDS provide better quality service than the private bar?

134. Our review indicates that, as a whole, PDS provides higher quality and more consistent service than the private bar at the level it primarily operates at (PAL 1). There are, of course, many excellent private bar lawyers providing legal aid. There are also some whose performance is below average (by definition). Those we spoke to told us that PDS has generally lifted the standard and that on the whole the PDS outperforms the private bar.
135. We see various reasons for this:
- a) PDS imposes more rigorous requirements on PAL progression than those at the bar are subject to (more on this below).
 - b) PDS has drafted a criminal law competencies framework that sets out the skills required of lawyers at all levels. Although the PAL approval requirements apply to PDS and private bar lawyers, there are no other hard performance metrics or standards that private bar lawyers are systematically held to (other than perhaps the ROCCC and the law itself).
 - c) The LSC has limited capacity to exercise quality control over all private bar lawyers. The Legal Aid Audit Report of March 2021 made this plain, explaining that MoJ “has limited visibility over the day-to-day services provided by legal aid providers. That is why audits are a key part of the Ministry’s quality assurance framework, alongside the legal aid complaints process and the work of frontline staff.”⁴² LAS completes quality control audits annually, but the sample size is (understandably) small. The 2021 report records that MoJ “completed 113 audits in 2018-2019 and 111 audits in 2019-2020. This covered approximately 5% of all lawyers providing legal aid services (providers) in each year... In both 2018-2019 and 2019-2020, more than 80% of the providers

⁴⁰ Rule 3.4. We were provided with copies of PDS' client care brochure, which discusses complaints mechanisms, in both English and te reo. We understand that PDS is working on making the brochure available in Samoan and Tongan. PDS should work with MoJ to ensure that other languages follow as required.

⁴¹ With, of course, appropriate controls for individual privacy.

⁴² At page 20. The March 2021 Report covered audit years 2018-2019 and 2019-2020. The report is available at <https://www.justice.govt.nz/assets/Documents/Publications/LA-Audit-Report-2018-2019-and-2019-2020-Final.pdf>, accessed 29 June 2021.

audited received a rating of 3 (acceptable) or above; 88% in 2018-2019 and 84% in 2019-2020.”⁴³

- d) No one, barring perhaps judges, has objective oversight of the daily service provided by private bar lawyers, whereas almost every practising lawyer at the PDS is subject to supervision.
- e) PDS lawyers are paid a salary and are less likely to be influenced by financial factors in the choices recommended to clients (even if only unconsciously).

136. Another way in which PDS provides valuable service is in its contribution to the DL Service. PDS oversees the DL Service in the courts in which it operates via the DLS, who is a PDS employee paid for out of PDS’ baseline funding. It also employs people to oversee the general operation of the DL Service.

137. PDS’ *Our Story* document records that PDS intends to provide up to 33% of the duty lawyers for rosters in courts where it operates. In total, PDS spent over 20,000 hours on DL Service in 2019/2020. In some courts, the number of duty lawyers is limited and declining; PDS is essential in filling the gap.

Does the PDS provide service at a lower cost to the private bar when comparing ‘apples with apples’?

138. Treasury’s Legal Services Baseline Review Report said that the data required to directly compare PDS and Legal Aid Services was missing, and that relative costs were opaque.⁴⁴ The only clearly comparable data was the average cost of PAL 1 matters and as stated above this may not be apples with apples.

139. In the Baseline Review Report, Treasury said rather obliquely:⁴⁵

PDS plays a role in hiring and training less-experienced lawyers, essentially increasing skill in the profession as a secondary output. PDS cites having taken on this role following changes to the legal aid fee system that made the private market less able or willing to take on this function. It also allocates its services based on gaps in the market. These broader functions have a cost for the Crown. Ministers may wish to reconsider expectations based on these wider considerations and value for money.

140. That Report did, however, note a “negligible difference in average cost per case for criminal legal aid and PDS, including administration and overhead costs, since 2016/17” noting that PDS tends to be “more expensive for Category 2 cases but slightly cheaper for Category 3 cases.”⁴⁶ It went on to say that “there are few gains in prioritising resources between PDS and legal aid”.⁴⁷

141. One area in which we are told that PDS is more cost effective than the private bar is in the realm of disbursements for things like expert and s 27 reports. PDS has robust guiding principles for expert expenditure. Such expenditure must be approved by the OPD (up to \$1,000), or the RPD (up to \$5,000). Anything costing more than \$5,000 must be approved by the Director.⁴⁸

⁴³ At page 2.

⁴⁴ At [73] – [77].

⁴⁵ At [75].

⁴⁶ At [70].

⁴⁷ At [71].

⁴⁸ One cannot help but comment that this level of control by such senior personnel is not a good use of time or expertise.

142. To get approval for such expenditure, a PDS lawyer must demonstrate why the witness or report is required (for example, it may contribute to a better outcome for the client) and confirm that potentially less expensive sources or evidence have been considered. The report or witness must be logically connected to and fit the case theory, be of probative value, and take into account justice principles including the equity of arms, the right to offer an effective defence, the seriousness of the charge, and the fact that the ability to cross-examine a prosecution witness does not always equate with having a defence witness/expert.
143. PDS' expenditure approval process is supported by its internal register of experts. This register collates information about experts across the country and details their expertise, the quality of their work, the cost, and whether or not they are recommended for use. We consider the expert register to be a valuable tool for PDS and therefore of service to clients.
144. While we have not seen data on whether PDS actually incurs less cost on disbursements than private legal aid lawyers, that is certainly the perception. On that basis, then, it would appear that PDS may be more "cost effective" than the bar.
145. The caveat to that is that many lawyers told us PDS' process is too restrictive and that some clients are not getting the service they deserve (in terms of, for example, a s 27 report) because PDS is so keen to manage the costs of disbursements (that said, PDS staff also told us that they were finding "work arounds" to the difficulties they face at PDS). They say that the ease with which private bar lawyers can access funding where the need it is appropriate given the lawyers' obligations of client care. In short, there is a tension between PDS' desire to manage costs, versus the interests of clients and the difference in service that they may get from a private bar provider, such that it may not be of benefit to the system overall for PDS to be cheaper on this front. We understand that PDS and Legal Aid have begun work to address this discrepancy and ensure that the same requirements apply across the board. This should be a priority, because too restrictive a system becomes a broader access to justice issue.⁴⁹

What role, if any, should PDS play in lifting the quality of legal defence services across the legal aid system?

146. PDS has, by all accounts, generally lifted the quality of legal defence services across the legal aid system. This is not to say that all PDS lawyers are better than all private bar lawyers. Rather, we were told repeatedly that the introduction and expansion of the PDS did what Dame Margaret Bazley said it ought to do: it had the effect of lifting the general standard of legal aid criminal defence work in the courts where it operates.
147. Moreover, PDS is fulfilling the role of guardian for the next generation of criminal defence lawyers and thereby ensuring the *continued* quality of defence services. It is clear to us that:
- a) Absent the PDS, there would be little to no opportunity for young lawyers to access the criminal defence training and supervision required to pursue that difficult line of practice.
 - b) The criminal bar is relatively small and ageing, and it is expected that the bulk of the young lawyers needed to replace the current workforce must by necessity come out of the PDS.

⁴⁹ In relation to s 27 reports in particular, this work is taking place within the context of a broader MoJ review.

- c) For some years now, senior criminal defence lawyers have practiced without the support of juniors or employed barristers. We are told that this is in part because legal aid remuneration rates are not high enough to allow barristers to employ juniors, and that legal aid funding for second counsel is too hard to get.

148. We also need to mention, again, that PDS provides DLSs and coordinates the provision of the DL Service in the courts where it operates. We were told that DLSs played an important role in improving the quality of the DL Service and the provision of service by individual duty lawyers to clients.⁵⁰

Why does PDS not meet its obligation to deliver up to 50% of criminal cases which it is funded to do and which negatively impacts the Legal Aid Appropriation?

149. PDS’s share of all criminal legal aid work is consistently less than 50% because:

- a) Although PDS gets a high proportion of PAL 1 work (approximately 90% of its workload), it gets less work at higher levels. Partly that is because defendants facing PAL 3 and 4 charges can choose their counsel;
- b) PDS does not have the senior capacity in every office required to bring in and retain senior work;
- c) We are not convinced PDS’ funding level is commensurate with its provision of 50% of all criminal legal aid cases to the appropriate standard;
- d) The growth in PDS’ capacity and funding has not matched the growth in legal aid cases (see below);
- e) PDS’ significant contribution to the DL Service (and PDS and Legal Aid Services are, together, considering broader strategy objectives and solutions on this front).

150. According to the 2020 “Our Story” document, PDS’ share of criminal legal aid cases across 2014 – 2020 was as follows:⁵¹

Criminal Legal Aid assignments in courts where PDS operates				
FY	PDS	Private	Total	PDS % share
2014/15	16013	18716	34729	46%
2015/16	16733	22427	39160	43%
2016/17	16701	24117	40818	41%
2017/18	17336	25946	43282	40%
2018/19	16408	28328	44736	37%
2019/20	14031	29561	43592	32%

⁵⁰ That said, there are real issues around the mandate or jurisdiction of the DLSs, who coordinate but have no power or control over the duty lawyers they supervise. There is a gap in that relationship and PDS and others may like to consider whether this is an appropriate model for service delivery.

⁵¹ At page 8 – 9.

The allocation of assignments per PAL level over past periods were:

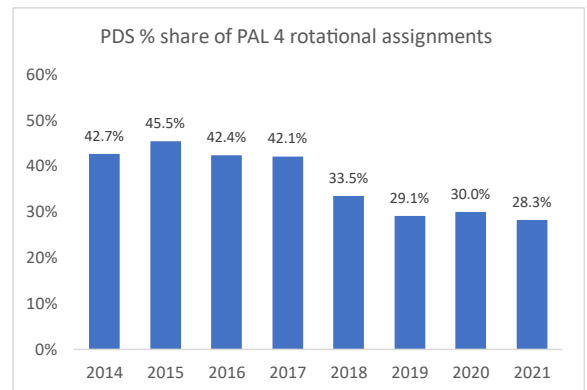
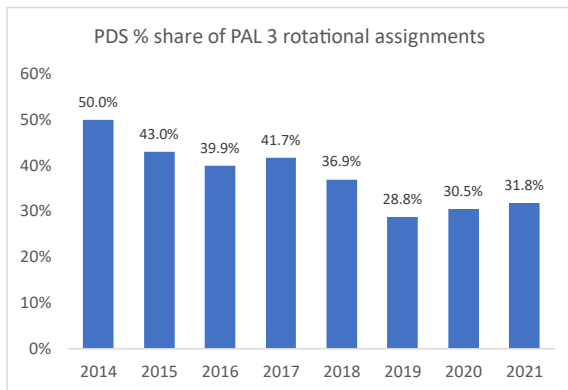
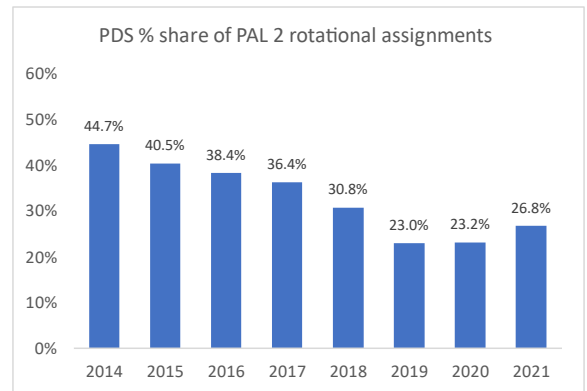
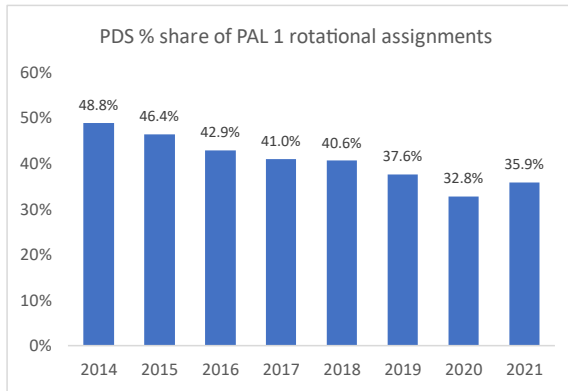
	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
PAL 1	92%	92%	90%	90%	92%	88%
PAL 2	5%	4%	5%	5%	5%	7%
PAL 3	2%	3%	3%	3%	3%	4%
PAL 4	1%	1%	1%	1%	1%	1%
TOTAL:	100%	100%	100%	100%	100%	100%

The PDS share of assignments, from the total criminal legal assignments were:

	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
PAL 1	14,182	14,691	14,257	14,681	13,810	11,542
PAL 2	771	713	800	828	681	865
PAL 3	386	423	501	552	398	464
PAL 4	150	163	202	188	154	184
TOTAL:	15,489	15,990	15,760	16,249	15,043	13,055

151. It is important to note that PDS' lower-case numbers in FY2019/2020 show the impact of COVID-19.

152. The following graphs indicate PDS' share of rotational assignments per financial year (by reference only to the courts in which PDS operates). PDS' share has generally been decreasing (save for the distorting effects of COVID-19), reflecting a relative consistency in PDS' volume of cases in combination with the increase in the number of legally aided criminal cases overall.



Getting and retaining senior cases

153. PDS struggles to get and retain clients facing PAL 3 and 4 charges.⁵² There are at least two reasons why. The first is that people facing PAL 3 or 4 charges have the ability to choose their own lawyer; clients facing PAL 1 or 2 charges do not have that option.⁵³ We hear and observe that clients are less likely to choose a PDS lawyer when faced with an option of either a PDS or a private bar lawyer (and “poaching” apparently remains a real issue). Preferred counsel cases amount to about 12% of total cases and yet PDS gets a very small proportion of these (<5% of the 12%).

154. However, that is not a complete answer because, as the graphs above show, PDS also consistently carries less than 50% of PAL 3 and 4 cases that *are* rotationally assigned to lawyers across PDS and the private sector. We assume this represents an inability to retain senior cases that get assigned to it.⁵⁴

155. Against that background, the second reason why PDS does not represent 50% of legally aided clients on PAL 3 and 4 matters is due to conflicts: PDS is the largest criminal practice in the country, with a history of more than 10 years, so conflicts will preclude a PDS lawyer from acting in the absence of a more robust approach to conflict management.

⁵² This limits the opportunities for development of intermediate – senior lawyers.

⁵³ Further, once a client has a PAL 3 or 4 charge, we understand that usual practice is to allow their chosen lawyer to represent them on all charges – i.e., if an accused chooses Lawyer X to represent them on a PAL 3 charge, Lawyer X will generally represent the accused on active charges and further charges that arise, e.g. breach of bail conditions or a minor assault. That practice is sensible as it allows continuity of counsel and therefore client care.

⁵⁴ Explanations might include that PDS has turned the tap for PAL 3 or 4 assignments off/down (to allow it to address high caseloads, absences, recruitment issues, or a lack of seniors), incidents where PDS gets assigned the case but it then gets re-assigned to a “preferred lawyer”, or due to issues with the rotational tool or practice.

Preferred counsel

156. Defendants to PAL 1 and 2 charges will be assigned a legal aid lawyer, and Legal Aid Services rotates assignments between PDS and private lawyers on a 50:50 basis.⁵⁵ Defendants to PAL 3 and 4 charges can choose their own lawyer *if* there is an existing, meaningful relationship between the client and the lawyer (though we are told that this requirement is subject to abuse). Out of all the “preferred counsel” assignments, PDS gets less than 5% of them.

157. We observe, first, that most PDS lawyers tend not to be high profile in the way that some private bar lawyers are. Because PDS lawyers work for an organisation, they do not promote themselves in the way barristers do. Rather, they promote PDS.

158. Material published by MoJ seems to almost obscure the PDS from view, giving the impression that being assigned a lawyer – PDS or otherwise – is a last resort. For instance, MoJ’s “Your guide to legal aid: Information about applying for legal aid” brochure says:⁵⁶

If you don’t have a lawyer, the Commissioner will assign one to you. If you don’t know whether you can choose your own lawyer, call your local legal aid office and they will tell you.

159. That publication goes on to advise people how to find or choose a lawyer, entirely without mention of PDS (or the need for a pre-existing relationship for “preferred assignments”). Only once the document has set out how to find a legal aid lawyer and advised people on whether their legal aid lawyer will contact them does the brochure refer to the PDS, when it says:

You may be assigned a lawyer from the Public Defence Service (PDS). The Ministry of Justice employs lawyers to take on criminal legal aid cases through this in-house service. A PDS lawyer will represent you, give independent advice and act in your best interests. This is the same responsibility that all legal aid lawyers have to their clients. You can find out more about the PDS – and how to contact them – at justice.govt.nz.

160. Given that the majority of legal aid cases will be rotationally assigned, we query why MoJ is advising clients to seek out legal aid lawyers prior to assignment.

161. Moreover, as we read this particular brochure, we feel bound to state that the inevitable impression it leaves is that PDS is a last resort only for people who do not have a lawyer already. It refers only to the fact that a PDS lawyer may be assigned; it doesn’t give a defendant any notice that they can prefer PDS or indeed why they would. This kind of messaging undoubtedly creates the potential to frustrate the rotational system and undermines PDS’ credibility and therefore its share of the overall case load. The lack of holistic approach is odd and counter-intuitive.

162. Similarly, MoJ’s website states:⁵⁷

If you face very serious criminal charges and may go to prison for a long time (more than 10 years), you can choose a lawyer to represent you. The lawyer will need to be an approved legal aid provider. You can choose your own lawyer or go to the Public Defence Service.

⁵⁵ Exceptions to the general rotational system exist for open matters, urgent matters, PAL 1 and 2 “holding” matters where more serious charges are imminent, matters involving existing mental health issues, matters where the accused has already been assisted by a legal aid lawyer in the context of the Police Detention Legal Assistance (PDLA) scheme, or where a person is involved in a superior court or parole application.

⁵⁶ See page 15. Available at <https://www.justice.govt.nz/assets/Documents/Publications/Your-guide-to-Legal-Aid.pdf>, accessed 21 June 2021.

⁵⁷ See <https://www.justice.govt.nz/courts/going-to-court/legal-aid/get-legal-aid/can-i-get-criminal-legal-aid/apply-for-criminal-legal-aid/get-a-criminal-legal-aid-lawyer/>, accessed 21 June 2021.

Conflicts of interest

163. A lawyer's duty not to act where there is an actual or apparent conflict of interest is fundamental. Section 4 of the Lawyers and Conveyancers Act 2006 states:

4 Fundamental obligations of lawyers

Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:

- a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- b) the obligation to be independent in providing regulated services to his or her clients:
- c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

164. Chapters 5, 6 and 8 of the ROCCC apply. For example, rule 5 provides that "A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients."

165. We have been provided with the Terms of Reference for PDS' Ethics Committee and with PDS' Conflicts of Interest Policy. For completeness, we record that once an actual conflict has been identified, the lawyer must notify the OPD and arrange for the case to be reassigned (it is not clear whether the OPD reviews the lawyer's decision).⁵⁸ Apparent conflicts must be discussed with the OPD. The Ethics Committee is the final backstop for concerns around conflicts and its stated "primary function" is "to consider the management and resolution of conflicts of interest and general ethical issues as and when they arise."⁵⁹

166. PDS' Conflicts of Interest Policy of October 2014 gives the following examples of when a conflict may arise:⁶⁰

Where we have acted for the complainant and/or a witness before and there is a need to cross-examine the complainant and/or the witness at a trial or a hearing.

Where we have acted for a co-defendant before and the interests of the co-defendant and our present client are likely to be in conflict.

Where we act for more than one defendant at a single trial and their interests are different.

Where a lawyer has a personal relationship with a witness.

Where we are unable to follow instructions because of a subsequent confession or admission which contradicts the original instructions.

⁵⁸ Conflicts of Interest Policy, at page 5.

⁵⁹ PDS Ethics Committee Terms of Reference 2014. The committee will consider conflict issues referred to and assist with other ethical concerns. According to clauses 11 -12 of its Terms of Reference:

11. The Committee will be guided by the PDS Conflicts of Interest policy which provides guidance on identifying and managing conflicts of interest.

12. Committee members, when meeting to consider referrals to the Committee, must identify and declare a conflict of interest if one arises as a result of the referral. The Chairperson must arrange for another Committee member to attend in the place of the member who has declared a conflict of interest.

⁶⁰ Our emphasis.

167. The biggest area of concern lies in the first of these examples. We are told that PDS may consider itself conflicted and unable to act for a defendant where PDS previously acted for a complainant, even where PDS provided that representation:
- a) From a different office;
 - b) Many years prior; and
 - c) Through a lawyer who has since left PDS.
168. This approach appears to be a strict reading of the conflict rules in the ROCCC and would seem to be able to be alleviated by an effective information barrier as envisaged under Rule 8.7 of the ROCCC. PDS' Conflicts of Interest Policy already envisages the use of information barriers for the purpose of dealing with conflicts of interest.
169. Whilst the ROCCC allow lawyers to act in some conflict situations, provided that they obtain informed consent from both parties (after the provision of independent advice and provided that the consent is freely given) PDS will be unlikely to be able to follow that process or to obtain informed consent and that possible option is therefore effectively irrelevant.
170. The "conflict" problem is primarily one of information about former clients. PDS will not be acting against former clients but may hold their confidential information. This appears to be a solvable issue which needs a more robust solution. The problem arises because PDS is akin for present purposes to a large firm with a now significant history of cases and a widespread operation across 10 offices. This issue needs to be lawfully addressed to ensure PDS' longevity.

Funding and workloads

171. The question of why PDS does not deliver the 50% of cases it is "funded to do" asserts or presumes that PDS is funded to a level commensurate to allow it to deliver 50% of all criminal legal aid defence work. We cannot comment on whether that is so. The Justice Baseline Review Report does not tackle the issue either. We can observe that the tables above demonstrate that PDS' case numbers have remained relatively static (COVID year excepted) while overall case numbers have increased by more than 20% over the years from 2015-2021.
172. The volume of criminal cases generally is increasing, and the number of active legal aid providers is not necessarily sufficient to meet demand. The amount of time it takes from charge to disposal of a case is increasing, as is the general number of court appearances required. The Justice Baseline Review Report noted that court timelines were appearing to impact the average case cost for Legal Aid Services relative to PDS, with the average cost of a category 3 legal aid case increasing by 29.3% in Auckland in 2016/2017, but only 8.5% for PDS, which suggests that while costs are increasing overall, PDS may be better able to manage the changes in the system.⁶¹
173. The Justice Baseline Review Report noted that while case "volumes have not decreased recently, PDS is currently providing services for less than 50 percent of all cases. One of the non-financial barriers to PDS expansion may be the allocation of more serious cases, which provides senior lawyers with experience. While PDS has invested and seen improvements in retention, its model still relies on more junior lawyers and it may continue to struggle with recruitment."⁶² As we

⁶¹ At [71] – [72].

⁶² At [69].

discuss further below, the other key barrier to PDS taking on more cases is its bottom-heavy approach and lack of senior resource.

Does the PDS leadership consider the consequential impact on the Legal Aid Appropriation when making business decisions? If so, how does it do this?

174. As far as we can tell, PDS leadership does not make decisions by reference to the flow-on effects those decisions may have on the Legal Aid Services appropriation. It makes decisions by reference to the PDS appropriation, its service delivery objectives, and its obligations to clients, staff, and stakeholders.

175. This question in the ToR is essentially directed at something else: i.e., it delves into whether PDS' leadership *should* take into account the Legal Aid Appropriation, and therefore whether and how strategic and operational decisions of PDS will or should impact the Legal Aid Services system and expenditure more generally. That question is outside our mandate and lies with the Secretary and others. It needs to be answered once there is clarity of the PDS Why. It is plain that certain operational decisions made by PDS could have flow-on effects for Legal Aid.⁶³

176. That said, we would make the following observations:

- a) PDS is one part only of the legal aid system. We know from the foundational objectives of PDS that it was set up in part to provide healthy competition to the private bar in terms of quality and costs of service. Just as private bar lawyers are not expected to have regard to the Legal Aid Services appropriation when making decisions (including as to clients), it could be argued that PDS should not either. Again, that comes back to whether PDS' main objective is managing costs for the Crown, providing top quality independent client service, or something else again.
- b) To the extent that we have observed how and why PDS' LT operates we have observed that it makes evidence-based decisions with a view to ensuring best practice while keeping within PDS' appropriation and the obligations of publicly funded bodies to spend public money responsibly and achieve the best value for every dollar.
- c) PDS' responsibility to the Crown for public expenditure is inevitably balanced against its obligations to ensure that its clients receive quality service, and to ensure that its staff are properly provided for. As will be apparent, there are real tensions in meeting all of these various objectives and obligations.
- d) There is clear pressure on the Legal Aid Services appropriation: case volumes have been steadily increasing and there is already pressure to increase the legal aid rates paid to lawyers. This reflects mounting pressure that we observe throughout the CJS.
- e) However, PDS and Legal Aid Services generally have different objectives (and this may change pending the Why conversation). Legal Aid Services must provide payment (by way of grants) to lawyers and service providers for end service only. PDS must provide end services to clients, and those costs are met by Legal Aid Services. But PDS must also meet other objectives, like ensuring that workloads are manageable and appropriate according to each person's skill and capacity.
- f) We see that a conflict arises when PDS "turns the tap" for new legal aid cases either off or down. This may have an impact on the Legal Aid Services appropriation and the distribution of cases between PDS and the private bar. But as far as we can tell PDS

⁶³ And we understand that Legal Aid's reporting on its appropriation typically excludes the PDS spend. Some say that it is not, therefore, a true representation of the appropriation as a whole. The Legal Aid and PDS appropriations are separate.

only turns the tap off or down when absolutely necessary, for instance to deal with understaffing, workloads that are already too high, or to respond to other issues (e.g. a failure of its IT resource). PDS also needs to make decisions that have more indirect effects on service delivery, such as where its offices are and the standards of its buildings, or things like the training and development of its lawyers. PDS needs to have the freedom and mandate to make those decisions with clients and staff in mind, and at least at present we think that making it accountable for those decisions by reference to the Legal Aid Services appropriation as well as its own may put it in an untenable position.

177. Ultimately, PDS' need or otherwise to consider the impact of its decisions on the Legal Aid Services appropriation hinges on determination of the broader Why. Under the current settings, we see a need for PDS to have a mandate that allows it to consider the interests of its clients and staff in the same way that private legal aid lawyers can. Because any and all decision-making by PDS is governed by the principles of good governance and the expenditure of public money, there is little risk that the organisation would make decisions that are inefficient from either a client or systems point of view. If, in future, PDS and Legal Aid Services were to sit within the same business unit or some other structure were adopted, there may be a need to reconsider the decision-making process accordingly.

Why does PDS have different onboarding requirements/processes/criteria for lawyers compared with LAS – should these be consistent considering the requirements on both groups to provide the same service?

178. PDS' PAL approval regime is more robust than the regime applied by Legal Aid Services and, at least in theory, makes it harder to move up the PAL levels at PDS than the bar. The reasons are based in quality assurance: PDS imposes additional requirements on lawyers to ensure that PDS is completely confident in that lawyer's ability to handle more serious work before that work is allocated to them, and therefore that the organisation can provide the best service possible. PDS is endeavouring to ensure its service is top quality, and while we see only good intention in that approach it does create inconsistency between PDS and private legal aid lawyers. Whether PDS is rightly aiming for higher level service than the bar turns on the Why question that we emphasise throughout this report.⁶⁴

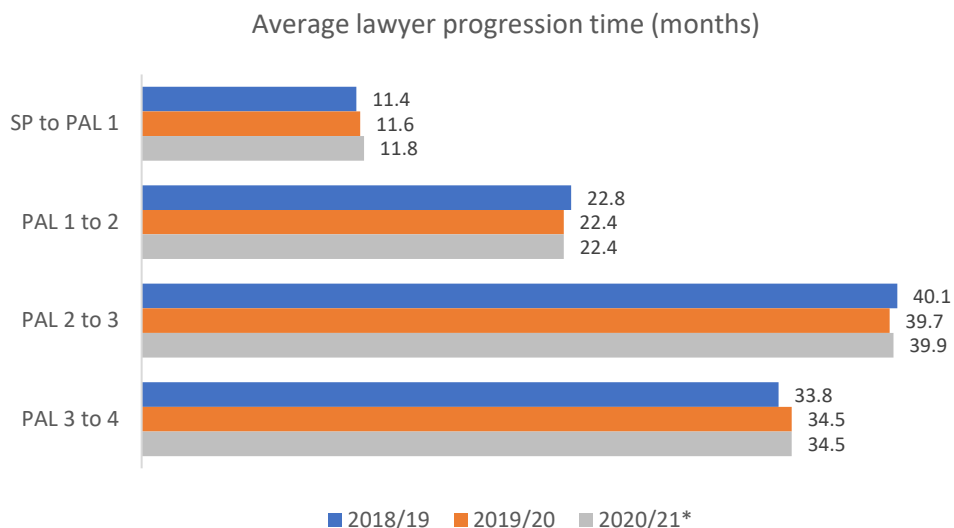
179. We have been provided with PDS' September 2017 Approvals Policy. That policy shows that PDS mainly handles PAL progression in house: lawyers looking to move up a PAL level complete an application, which is assessed by the OPD. The PDS Approvals Evaluation Panel will then evaluate the OPD's assessment and make a recommendation to the Secretary (delegated) as to whether the application should be approved or declined. The Secretary (or delegate) then approves or declines the recommendation.

180. PDS' Approvals Policy sets out the requirements for advancing to each PAL level. The requirements set out in that document mirror the requirements that apply to non-PDS lawyers, as set out in the Legal Services (Quality Assurance) Regulations 2011 (**QA Regs**). To obtain approval a lawyer must:

⁶⁴ In 2020 Legal Aid Services undertook work on its provider approval process and attempts were made to close the gap between Legal Aid and PDS' requirements. We have not seen the outcome of that work and, at least at the time of our review, the gap remained.

- a) **PAL 1:** have at least 12 months' experience and must have appeared as counsel with substantial and active involvement in at least criminal three trials.
- b) **PAL 2:** have at least 24 months' experience working at PAL 1 and must have appeared as counsel with substantial and active involvement in at least three trials that are Crown prosecution or indictable matters (generally, this equates to a requirement that the lawyer has had substantial involvement in three JATs).
- c) **PAL 3:** have at least 36 months' experience working at PAL 2 and must have appeared as counsel with substantial and active involvement in at least four level 3 or 4 matters where the charges might have resulted in significant imprisonment (generally, this means the lawyer must have had substantial involvement in at least three jury trials).
- d) **PAL 4:** have at least 24 months' recent experience working on PAL 3 proceedings, and must have appeared as counsel with substantial and active involvement in at least four PAL 3 or 4 proceedings, at least one of which must have been a PAL 4 proceeding.

181. PDS data shows average progression time to be consistent with the approvals policy:



182. In addition to attaining the minimum standards set out in the QA Regs, PDS lawyers are required to participate in:

- a) the PDS-run criminal law workshop before they can progress from SP to PAL 1;
- b) the PDS-run jury trial workshop before they can progress from PAL 1 to PAL 2; and
- c) the NZCLE (i.e., external) litigation skills workshop, before they can (generally) progress from PAL 2 to PAL 3.

183. We have probed the reasons for these requirements and the value they bring. On all counts, they are sensible measures designed to ensure better service. That said, they impose additional barriers and there is therefore a need for PDS to be intentional about enabling people to meet those. Young lawyers everywhere reported that people spent a long time waiting to complete the jury trial workshop and therefore could not progress to PAL 2 at the appropriate time (the same was also said of the litigation skills course). While seniors have told us that these complaints were more theoretical than real, the perception remains and drives the flight of young lawyers to the bar. If PDS is going to be the gatekeeper to progression by providing or precluding access to these additional courses, it needs to do so responsibly and to generally provide more access more often to the additional courses.

Systems and tools

Does PDS have good systems for work allocation and time recording?

184. The short answer to this question is yes, PDS has good systems for both work allocation and time recording.

Work allocation

185. Work allocation generally sits with OPDs and team leaders, who consider each file as it comes in and assign it to the lawyer best placed to assist by taking into account capacity, capability and discretion as to who is best placed to do the work. This is an orthodox approach to work allocation in a law firm.

186. Naturally, the orthodox system can at times lead to individuals feeling that they are not treated equally – perhaps they feel they get too much or too little work, or that someone else gets all the “good” work. The only time we really saw this issue arising at PDS was in the allocation of trials: because trials (JAT at PAL 1 and jury at PAL 2) are necessary for PAL progression, tension can arise around who that work gets assigned to. OPDs and seniors are acutely aware of this and endeavour to allocate work fairly, so that those on the cusp of progression can progress when the time comes, and those that need more experience can get it. That said, there is a desire for greater transparency around trial allocation in some offices.

Time recording

187. PDS has highly prescribed systems for time recording and more time recording codes than normal. As a result, it has a wealth of data and lawyers are trained to be meticulous, which we see as a positive. PDS regularly reports on the number of hours tracked and uses that to inform billing and to monitor staff workloads in each office (noting that PDS needs to record time in a way that matches the Legal Aid fixed fee framework). It also reviews from time to time the narrations provided by lawyers against each code and ensures these are of sufficient quality; this also allows PDS to check whether time has been allocated to the right code.

188. That said, at present PDS lawyers are required to record 75 units (amounting to 7.5 hours) of time for every day – something that we have not seen rigorously enforced in law firms. Other MoJ lawyers are not required to record time. The 75 units daily requirement is excessive and has contributed to a sense among some lawyers that PDS is operating a low trust model.

189. PDS’ time recording system also seems to fragment time recording into categories over and above what we are familiar with. For instance, work that is not chargeable (because of the LAS fixed-fee model) is recorded across multiple different codes and this adds complexity in circumstances where the time spent is not “accountable” in the sense of feeding into a particular bill. In other law firm contexts, there is a general expectation that non-chargeable time (or a certain amount of it) is inevitable and firms trust lawyers to use it productively but not strictly code or narrate it.

190. We understand that PDS began an internal review of its time recording strategy in February 2021. We are told that review is aimed at reducing the burden of time coding and moving away from the fixed 7.5 hours model to a percentage range for accountable, chargeable time based on PAL level, while reducing reporting obligations for non-chargeable time. Those measures (of which we have not seen any detail) seem sensible, provided that any new model appropriately factors in not only PAL levels but the various responsibilities staff have (for instance, management and admin time for managers, and training/supervision time for any lawyer that might find

themselves training less experienced staff). We have not seen the results of that review, but we are told changes were made in August 2021. Our suggestions need to be considered in that context.

191. Decreasing the compliance burden of time recording should assist in increasing engagement and, as PDS moves to a new or updated practice management system, we would suggest that it also considers what technological solutions are available to encourage compliance with time recording obligations (for instance, cloud-based and/or in-app recording).

Do PDS lawyers have the right tools to do their jobs?

192. PDS lawyers generally say they have the tools they need to do their jobs – though the exception to that is an adequate IT system. Lawyers and support staff are appropriately equipped with laptops and lawyers are given cell phones, which are required for modern legal practice. The lawyers appear to be generally equipped with other tools of the profession, including:

- a) Access to databases, libraries and the like (which appears to be a benefit of PDS' integration within MoJ); and
- b) Office supplies and resources, such as files, books, and the like.

193. These “tools” are available to PDS lawyers as a consequence of being in the law firm-type environment of PDS. Many PDS lawyers see opportunities to make more money and enjoy more freedom by working at the private bar, but it is important to note that most barristers do not have access to the tools that PDS lawyers do (and if they do, the high cost of those tools must be met from the lawyer's own pocket. One ex-PDS lawyer spoke to this point, noting their shock when they left PDS and realised how expensive subscriptions to legal databases are). PDS' access to these tools is without a doubt a factor in why the organisation is said to out-perform the private bar.

194. In addition to the more mechanical tools it provides, PDS supports staff via specialist support staff. These include a:

- a) Leadership Coach, via a fixed term position currently located in Manukau;
- b) Technical Practice & Improvement Specialist, currently located in Waitakere;
- c) Contracted HR advisor (who works remotely); and
- d) Training Advisor.

195. We spoke with and were impressed by each of these specialists and it is clear that they have all been put in place to assist PDS to meet distinct needs and targeted KPIs that will help the organisation and its lawyers serve clients by directly assisting in delivery or ensuring the quality of operations overall.

IT Systems

196. The most immediate and glaring issue with PDS' tools is the inadequacy of its practice management system, Affinity. This is not a new issue and we are loathe to labour the point, but it was said to us many times that Affinity is crucial to PDS' operations and at constant risk of failing. We were told it was one of the biggest risks to PDS' business. It is not fit for purpose and is out of support and prone to crashing, which stalls the work of lawyers and support staff alike.

197. While we acknowledge that there are IT issues facing many parts of MoJ, we must point out that Affinity should be replaced with a fit-for-purpose IT solution as soon as possible. Affinity is an off-the-shelf product designed for use in small to medium sized private law firms. We are told

that a recent market scan failed to identify any alternative off-the-shelf product. While we appreciate that a supported, updated version of Affinity would be an improvement, we think that a new and fit for purpose system is required. According to its Business Plan, PDS' top priority is to implement "a modern, responsive and flexible service... using new technology and systems". Achieving that goal will require strategic vision and investment. PDS is a leader in the provision of criminal defence services and there is an opportunity for it to be a leader in client care and delivery. Both of those things require investment in and support from fit for purpose IT systems.

Do PDS staff have adequate administrative support?

198. PDS is well supported administratively. From the DDO to the SSMs, Lead Legal Secretaries, Legal Secretaries, Legal Support Assistants and Receptionists, it appears that PDS lawyers are served by competent support staff.

199. It appears that PDS generally has a healthy number of support staff in each office. PDS monitors the level of secretarial and litigation support the lawyers need in each office and responds accordingly by recruiting additional staff – that is appropriate. That said, we were told that there are frequent delays in the recruitment of support staff, which causes real difficulty whenever someone leaves. It could be that more forward planning and projections would assist.

200. We were reminded in the course of this review how valuable a resource good support staff are for lawyers. Many lawyers in the private bar do not have access to support staff or resourcing at a level anywhere near that of PDS.

How efficient and robust is the PDS PAL approval system compared with Legal Aid Services approval system for private lawyers?

201. The PAL system is a system for ensuring that Legal Aid lawyers have the skills and experience necessary to take on criminal work at different levels. As we have set out above, the PDS PAL approval system is more robust than the Legal Aid Services system (which is to say, the QA Regs). There remains a need to consider whether consistency across both regimes is preferable to PDS' emphasis on ensuring lawyers only progress when they more than meet the requirements of the QA Regs.

Human Resources

Does PDS have good practises for recruitment and retention of staff, including remuneration, workload standards, training, and professional development?

Recruitment

202. PDS follows MoJ recruitment processes to the extent possible. It endeavours to manage recruitment fairly and responsibly, but recruitment is arguably one of its biggest challenges. We are told that PDS tends to start the recruitment process too late and that it proceeds too slowly. We suspect there are reasons of consistency and policy underlying that, but the reality is that a delay in filling vacancies creates tension and increases pressure on existing staff, who are frustrated by PDS' apparent lack of foresight and responsiveness to staff departures. Consideration could be given to extending notice periods or recruiting proactively on a periodic basis (at more than just the graduate or SP levels).

203. The 2016 Recruitment Report found, amongst other things, that:⁶⁵

The PDS struggles to attract quality candidates for roles requiring an experienced criminal defence lawyer – from intermediate level (PAL 2) upward. This is not surprising – as with any skilled, qualified and experienced professional group – there is a limited market and the PDS employment offering will only appeal to some of these candidates.

...

There is no current coordinated programme of promoting the organisation and its opportunities to the more elusive candidates - experienced criminal defence lawyers. These lawyers are currently working in chambers, in private firms or for other government agencies, and although the PDS do not want to be seen to overtly head-hunt it is critical that a positive employment brand is pushed out to this group.

Through its current sourcing methods the PDS is targeting active candidates – candidates who are actively looking for a new opportunity. If the PDS wants to access the passive candidate pool – those who might be tempted to move but who are not actively looking – it will need to develop a more strategic and coordinated approach.

204. That is consistent with our findings. PDS needs to get creative if it is going to be successful in this area (this was emphasised repeatedly).

205. The 2016 Recruitment Report also used data from a targeted survey to identify the things that made the PDS an attractive place to work. The top five factors were:⁶⁶

- a) helping and advocating for the most marginalised people in our communities;
- b) strong training and professional development programmes;
- c) significant court and trial time for qualified lawyers;
- d) career path and opportunities to progress; and
- e) experienced senior lawyers to learn from.

Recruitment of senior lawyers

206. PDS' LT advised us that PDS does not hire juniors if it does not have the supervisors required, and we accept that this is its intention and, by and large, its practice. However, it was reported that in certain offices where there were low levels of senior lawyers, an inability to recruit more of them saw that gap get “plugged” by hiring additional graduates and SPs. While we have sympathy for that position (what else was to be done?) and accept that at times the issue was caused by the unexpected loss of senior staff, this is a far from ideal way to run a legal practice – even one whose workload is predominantly low-level – and indicates an issue with PDS' model. We have real concerns about bringing in additional juniors at a time when there was already a dearth of senior lawyers to supervise and lead existing staff. We accept that seniors may leave unexpectedly, but where that occurs there needs to be a mechanism to ensure supervision remains stable – part of the solution is, we think, ensuring that PDS is better stocked with senior lawyers generally and better placed to retain senior staff. Bringing in juniors where there are not enough seniors cannot be a solution because graduates and SPs have little to no experience and, by definition, are not competent to practice without supervision (or in the case of graduates, to practice at all).

⁶⁵ At pages 3 - 4. The observations and findings in that report are generally consistent with ours. There are exceptions (for example, we did not observe a “bare minimum” culture amongst the support staff we spoke to), but concerns around salary, the need for senior resourcing, flexibility, and streamlined recruiting remain.

⁶⁶ At page 5.

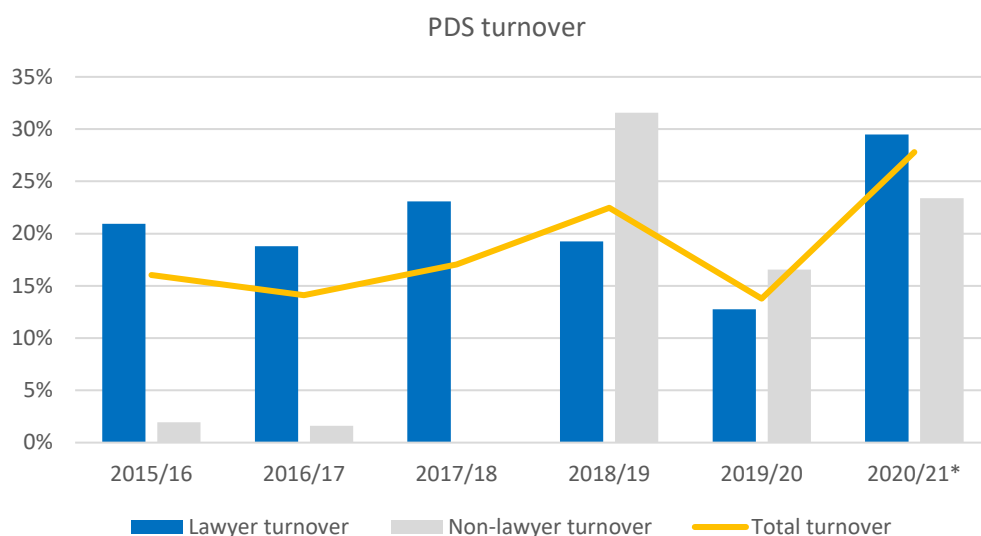
207. The better option would have been to lower cases numbers – but this would have had (adverse) flow on effects for Legal Aid Services. It is a difficult conundrum, and begs the question of why PDS cannot recruit intermediate and senior lawyers?
208. But an inability to recruit intermediate and senior lawyers is not unique to PDS: there is either too few lawyers, or too few lawyers willing to take on the jobs (at PDS and, in some places, the Crown and PPS) in exchange for the incentives currently on offer. More research needs to be done to determine what incentives are required, but we see the key drivers as being:
- a) Remuneration. Feedback indicates that remuneration rates are vastly out of line with what intermediate and senior lawyers can make in private practice.
 - b) Flexibility. Lawyers tell us they would prefer to work at the bar where they have more flexibility regarding hours, where they work from, and how they manage their workloads. It was said to us, and we do not disagree, that a lack of flexibility tends to particularly inhibit female lawyers or anyone with childcare responsibilities and creates equity issues. PDS needs to ensure that it has measures in place (in relation to flexibility, recruitment, and retention) that ensure that staff members' needs for flexibility do not pose a barrier to participation or progression in the workplace, nor inhibit the hiring and promotion of a diverse range of people.
 - c) Workloads themselves. There is a perception that PDS lawyers all handle very high caseloads and those already at the bar are unlikely to want to move to PDS to carry higher loads for less remuneration.
 - d) Career pathways. PDS needs to more widely communicate the progression opportunities that may be available at the PDS. Many do not want the managerial responsibilities that come to seniors at PDS; they want to be lawyers practicing at the highest levels and in the appellate courts. A flowchart reflecting PDS' current progression model is included as [Appendix 4](#).

Recruitment of juniors

209. We are told that PDS has no issue recruiting junior lawyers. It hires graduates and summer interns. That practice aligns with how law firms operate and puts PDS in a good position to competitively recruit talented people out of Universities.
210. That said, we hear anecdotally that PDS has less of an on-campus presence at universities than firms do. For instance, we are told that the Auckland Crown Prosecutor regularly presents on campus and actively engages with the student body (including its minority groups). PDS should consider doing more in this space, and also consider directly targeting and recruiting Māori and other minority students.
211. We should also mention that PDS has a detailed and robust induction plan for both lawyers and support staff. We are told that induction processes are good, but that it can be difficult for staff to make time to complete the induction of new recruits.
212. There are some concerns about the lack of utility/transparency between PDS' onboarding process and MoJ's centralised HR portal, which can make it hard for PDS to access documents and information relating to new recruits, and consequently to ensure that the IT systems for new recruits are set up on time. We heard reports of new recruits starting but having to wait up to a week to have their IT systems set up.

Retention

213. Retention – particularly of senior staff – appears to be one of the greatest challenges and greatest opportunities for the PDS. The 2016 Recruitment Report noted PDS had seen consistently high turnover of intermediate lawyers,⁶⁷ and the most recent data (May 2021) shows that at present staff turnover is very high. This is graphically demonstrated by the following:



214. The May 2021 PDS Dashboard records “PDS turnover has been increasing this FY - from 11.8% in July to 27.8% in May, with a greater than usual number of lawyer leavers in recent months.” The stated reasons include the impact of COVID-19, low levels of trials, and significant turnover in the Manukau office. The Dashboard rightly recognises that difficulty “recruiting intermediate and senior lawyers affects the provision of adequate supervision for supervised and junior lawyers.” Further:

The loss of lawyers from the largest PDS office has had a significant impact upon assignment volumes. The PDS, while having taken more assignments than last year, are not likely to reach the low end of our target range (15,000 –16,000) this year (projected assignments for this FY are 14,026).

Exit interviews of PDS lawyers have indicated one of the factors impacting lawyer decisions to exit PDS is limited access to jury trials. Under the regulations lawyers require active and substantial involvement in at least 3 jury trials to be able to apply for PAL 2, and 4 jury trials to apply for PAL 3 approval. Reasons for limited jury trials include: the impact of rescheduled trials due to Covid lockdowns; system delays in getting firm trial dates; and most trials resolve before reaching hearing.⁶⁸

215. Retention is key to ensuring that PDS can build a reliable and sustainable workforce that can, ideally, take on 50% of all criminal legal aid work at all levels. We have already said that PDS needs to be more top heavy than it currently is – that is simply what is required to ensure adequate service delivery. The greater the retention of lawyers, the greater the opportunity to develop those lawyers into PDS lawyers who bring in more serious cases. Having and retaining

⁶⁷ At [59].

⁶⁸ Many courts are facing a backlog of trials. In Manukau we understand that as at May 2021 there was a backlog of around 700 JATS and several hundred jury trials.

more serious cases would breed more of the same, give senior lawyers more reason to come to and stay at PDS, and therefore provide better and more consistent support and opportunities for junior lawyers. The eco-system of an effective legal practice requires solid senior stock, and the best way to ensure quality and fit is to retain good staff.

216. The 2016 Recruitment Report referred to above recorded that the main reasons people stayed at PDS were the quality of the work (criminal, court, and trial), the opportunities for professional development, and the collegial and supportive work environment.⁶⁹ That report said that PDS employees said the things most likely to make them move on were salary, workload, and moving to a new life stage.⁷⁰ We observe that, generally, these overall patterns have not shifted. There is work to be done to get to higher ground.

217. We were provided with an Exit Interview Report from the first quarter of 2021 that collated feedback received from departing employees over that period. The report reflects what we were told, almost unanimously, by those we interviewed. It reported that:

The overall driver for people leaving PDS continues to be the timely opportunity for progression. In addition, workload and parity features strongly. This quarter 71% of leavers interviewed will remain in criminal law after leaving PDS.

Technical training available at PDS remains highly regarded and in conjunction with criminal law exposure are the main reasons people join the organisation.

218. The report identified issues around limited progression opportunities, needing progression vs needing work, and a need for more structure and training. It said that PDS' legal workforce is more junior than senior, leading to a lack of sufficient oversight, feedback, and personalised learning opportunities. There is a lack of access to and feedback from senior lawyers. Leavers also raised issues around workload, churn, lack of recognition of experience and opportunities for progression, arrangements for working from home and flexible working options.

219. One of the biggest issues for PDS is consistently ensuring it has a sufficient number of senior lawyers. Where there are too few senior lawyers there is too little supervision (although, in some cases, even where there seems to be enough senior lawyers, supervision remains lacking if those seniors are too busy to provide it). Supervision is not clearly either a recruitment or retention issue, but it is plainly one of PDS' greatest risks and it drives the flight of juniors to the bar. One young lawyer put it to us that you can be unsupervised and at PDS for poor wages, or you can be unsupervised and at the bar for two or three times the money. That is not a healthy reality for PDS, the CJS, or clients.

220. For completeness, during our review there was much conversation about the recent remuneration review and subsequent proposals for change. We said at the outset that those proposals were neither expressly within or outside of scope. It is plain to us that the proposals are likely to lead to the loss of staff (predominantly at PAL 1 and 2 level) in the interim if they are introduced. Whether the changes, once embedded, continue to lead to the departure of lawyers at PAL 1 and 2 levels will need to be closely monitored. The LT is confident that in the long run the changes will be positive for lawyers. Lawyers say the changes will drive resignations because the proposals put greater emphasis on promotion to management vacancies (which the LT

⁶⁹ At pages 5-6.

⁷⁰ At page 6.

denies), and do too little to recognise progression through changes to job title and automatic progression past PAL 1 level.

221. Further, it was put to us that an emphasis on management would unnecessarily restrict the progression of those who have or seek flexible working arrangements, those with childcare obligations (which generally means a disproportionate impact on women), and those who simply want to practice the law (and not to manage people). Those concerns will no doubt be front of mind for the LT.
222. Progression up the PAL levels is a consequence of experience and capability and should be reflected in job titles and salaries (as it would be at the bar – albeit in different ways). Undue reliance on management could have the effect of decreasing substantive diversity and parity and drive flight to the bar (in some cases, before the lawyer would otherwise be ready to practise independently). These factors will need to be taken into account if the proposals are implemented.

Remuneration

223. Remuneration continues to be a sticking point and cause for concern – ironically – amongst both PDS lawyers (particularly the junior ones) and those at the bar, who see PDS lawyers working too hard for too little, or who would never consider working at PDS due to the salary limitations. As is to be expected, issues around remuneration are most acute in Auckland and Wellington.
224. We were provided with PDS’ “pay band” structure for the 2019/2020 and 2020/2021 financial years.⁷¹ The documentation is useful as far as it goes but to put it plainly intermediate and junior lawyers generally consider that the remuneration is too low, as do some of the support staff. Amongst young lawyers, there is a real and pressing concern that salaries do not match the market (either what they would make in a firm or at the private bar).⁷² To us it is clear that remuneration rates contribute to PDS’ inability to recruit and retain staff, and drive in part the flight of junior lawyers. However, in contrast to junior lawyers there are senior staff who are either content with the pay, or happy to receive a “below market” salary for their legal expertise based on the other benefits that PDS provides.⁷³
225. Earlier this year after consultation on design, PDS’s LT began consulting with legal staff on a new PDS Lawyers Career Progression and Remuneration plan. That plan intends to reduce lawyers’ reliance on PAL progression as the primary determinant of job title and salary, and replace the existing model with one that focuses on vacancy-based promotions to positions of leadership

⁷¹ While it is difficult to reconcile the bands with remuneration paid to particular cohorts and individuals, we recognise that having a transparent structure is important and derived from MoJ.

⁷² The 2016 Remuneration Report made recommendations for PDS’ remuneration framework, and at that point in time considered that potential remuneration comparators for PDS lawyers were the PPS, Crown Law, Crown prosecutors, the private bar, and “other larger concentrations of lawyers within the public/private service”. That report also made the point that there is no true comparator because PDS “is the market”. It was put to us that PDS lawyers make less than other lawyers of the same PQE working as lawyers in other parts of MoJ. We understand that the 2021 remuneration review focused on career progression pathways, rather than remuneration rates per se for lawyers. We are unclear on the extent to which PDS or MoJ has reconsidered where the market sits in terms of remuneration for junior lawyers (which generally operates on the basis of job type, PQE, and skillset).

⁷³ It goes without saying that some observed that it is easier to be content with lower pay once one is financially established and secure.

within PDS.⁷⁴ In total there will, accordingly, be three progression pathways: via management, via the Principal Lawyer position, and via the DLS framework. We have already said that we question whether those three progression pathways are all meaningfully available or necessarily desirable to lawyers. The proposed new model intends to:

- a) Ensure that PDS does not become over-supplied with senior lawyers in a context where approximately 90% of its workload is at the PAL 1 level (although PDS' LT have explained to us the reasons why they think automatic progression is problematic, we do not share the view that there is any real risk of an over-supply or that automatic progression is problematic if the case-mix can be changed);
- b) Ensure that capable, competent people are retained and promoted within PDS (to management positions); and
- c) Allow lawyers to continue to move up the PAL levels if they are not in a management position (although, under the proposed new structure an increase in PAL levels will not necessarily mean a shift in job title or salary bracket – which, we observe, is what lawyers want).⁷⁵

226. It was said to us many times that “no one comes to PDS for the money”. It was also suggested that PDS needs to commission market research that would identify appropriate pay rates for criminal defence lawyers.⁷⁶ No one expects to work for a government department, even after many years of study, and be paid handsomely. However, it was said to us by a junior lawyer that “if I was charged with an offence, I would qualify for legal aid” (being below the income/capital thresholds). While we accept the statement may have been hyperbolic, if that is the position then we agree with the lawyer that this is rather incongruous.

227. We were also told many times that lawyers at PAL 1 and above perceive that leaving PDS and becoming barristers sole at the private bar could increase their salaries by at least two to three times, and perhaps more (even if they were to rely solely on legal aid work). There is a real and pressing perception amongst PDS lawyers that they could earn much more for doing the same work if they simply left the PDS.

228. There was less discontent amongst senior lawyers (though this is a much smaller group) about remuneration than juniors: many had already been in private or public sector jobs and thought PDS salaries were either adequate or appropriate given that the lawyers received other benefits (e.g. sick leave, holidays, at-source tax deductions, overheads). However, those at the bar repeatedly told us that experienced lawyers (the kind that would be a huge asset to PDS) would not and could not work at PDS, given the paucity of the salaries.

229. There were, however, a number of lawyers who recognised the many benefits of being at PDS, including:

- a) mentoring, supervision, and training;
- b) administrative support;

⁷⁴ While we accept this approach and its intentions, the 2016 Remuneration Report expressly recommended that “PDS look to retain progression, irrespective of any change in remuneration approach. Good control can be maintained **by continuing to use PAL as a lead indicator**, particularly at the Junior levels. It will also save a significant amount of time and money in avoiding having to advertise and appoint on merit to positions which the PDS consider are progression roles” at [126].

⁷⁵ Lawyers are consistently concerned that the new model will materially penalise lawyers that want to progress their legal practice and not, for various reasons, become managers. Our interviews suggest a risk that the new model may drive the exit from PDS of lawyers who do not want to be managers. PDS' LT put it to us that the changes to the remuneration framework are not intended do that and other pathways are available.

⁷⁶ The 2016 Remuneration Report did some of that work, but we are not clear if there is any contemporary data.

- c) job security;
- d) organisational infrastructure; and
- e) camaraderie (this last one is particularly important).

230. We pause to say we do not think the lawyers we spoke to are necessarily over-zealously chasing money. It was reported to us that PAL 1 – 2 lawyers leaving the PDS for the bar were often on salaries in the \$60,000s and \$70,000s, with post qualification experience of (generally) 3 to 5 years or more.⁷⁷ They are generally in at least their late 20s, some with children, many attempting to enter the housing market or looking to start a family.

231. Recently,⁷⁸ Tyler Wren and the College of Law New Zealand released a Salary Guide for 2021.⁷⁹ That guide states that the “market is more volatile than ever before and the demand for New Zealand and Australian qualified Lawyers is at an all-time high.” The report goes on to state:

2021 / 2022 is without a doubt a candidate’s market! The intrinsic rewards that candidates are making decisions on are pay parity, working conditions (flexibility), and the organisation’s and team’s culture. However, extrinsic rewards are now coming to the forefront as candidates decide what is next in their career trajectory and what can an employer offer them in building on that experience.

232. Mental wellness support, flexible working, and tailored progression are also listed as relevant drivers. It also gives the indications of market salaries across top, mid-size, boutique, and regional firms, as follows:⁸⁰

Top Tier Law Firms *	2 Years PQE	3 Years PQE	4 Years PQE	5 Years PQE	6 + Years PQE	Senior Associate	Special Counsel
Auckland	\$75,000	\$85,000	\$105,000	\$120,000	\$140,000	\$160,000	\$170,000
Wellington	\$72,000	\$82,000	\$100,000	\$117,000	\$130,000	\$150,000	\$160,000
Christchurch	\$70,000	\$80,000	\$97,000	\$110,000	\$125,000	\$145,000	\$155,000
Regions	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Mid Tier Law Firms*	2 Years PQE	3 Years PQE	4 Years PQE	5 Years PQE	6 + Years PQE	Senior Associate	Special Counsel
Auckland	\$70,000	\$80,000	\$95,000	\$115,000	\$130,000	\$140,000	\$150,000
Wellington	\$67,000	\$77,000	\$90,000	\$112,000	\$120,000	\$135,000	\$145,000
Christchurch	\$65,000	\$75,000	\$87,000	\$100,000	\$110,000	\$130,000	\$140,000
Regions	\$67,000	\$77,000	\$90,000	\$112,000	\$120,000	\$135,000	\$145,000

⁷⁷ It is a prerequisite that a lawyer looking to “join the bar” (i.e., become a barrister sole) has completed at least three years of supervised legal practice since their admission to the roll.

⁷⁸ And following the delivery of a draft of this report to MoJ.

⁷⁹ Available at <https://www.collaw.ac.nz/>, accessed 23 August 2021.

⁸⁰ We acknowledge that PDS is both a “large” law firm (given its more than 300 personnel) and also in some regards boutique or regional, given the size of its offices in some locations. We also acknowledge that the Tyler Wren/College of Law Report states: “Many firms, especially boutiques and general practices are tailoring their benefits to individuals rather than having a standard list. This has allowed them to calibrate their workforce and attract individuals not just based on salary. This has also allowed them to compete with top tiers offering higher salary bandings.”

233. The Aotearoa Legal Worker’s Union (**ALWU**) has also been actively working to create transparency around the remuneration of New Zealand’s junior lawyers. In its “Employment Information Report 2020”, ALWU reported the following median pre-tax salaries:⁸¹

Median pre-tax annual salaries (from responses only)
(excludes Kiwisaver, bonuses, overtime, insurance, wellness subsidy, or any other benefit)

Type of Employer	Less than 1-year legal experience (law graduate)	1 year	2 years	3 years	4 years
Large private firm (25+ partners)	\$49,987	\$57,659	\$69,698	\$79,266	\$84,594
Medium private law firm (6 - 24 partners)	\$47,042	\$56,907	\$60,668	\$72,160	\$83,809
Small private law firm (1 - 5 partners)	\$48,924	\$55,131	\$59,321	-	-
Public sector	\$53,828	\$63,209	\$66,488	\$71,320	-
Overall median	\$50,000	\$58,000	\$65,281	\$72,375	\$83,000

Note: this table excludes salary information obtained under the Official Information Act for the Department of Prime Minister and Cabinet; the Ministry of Business, Innovation and Employment; the Ministry of Foreign Affairs and Trade; and Treasury (see table below). Public sector figures are therefore lower than otherwise expected.

234. We suggest that PDS consider whether and/or how its new remuneration model will bring junior and intermediate salaries more into line with market expectations (if it considers they are not already). For reasons of credibility and good faith, it may be of use for PDS or MoJ to do work attempting to measure market salaries for junior to intermediate lawyers in criminal practice (PDS, Crown prosecution, PPS, MoJ and at the bar) and compare those to rates that apply in other sectors of the profession. We are told that the new remuneration model will, on average, produce higher salaries for PDS’ juniors and intermediates, but we do not have the data to substantiate that. In any event, the perception that remuneration rates are too low for juniors are pressing and no doubt frustrate PDS’ ability to recruit and retain.

235. Finally, remuneration was not generally a concern for support staff. While most reported that they could earn more in private practice, those with greater responsibilities sometimes thought the opposite (because PDS generally gives support staff more avenues for progression and higher salaries).

Workload standards

236. We have concluded that PDS generally manages workloads well and they appear to be appropriate, save that in this context what is seen as “appropriate” at PDS is seen as “high” or “very high” to those outside the organisation.

237. It is clear that PDS has greatly improved its monitoring and management of workloads in recent years. For junior lawyers (those without management responsibilities), PDS – via its OPDs and other seniors – tries to keep the number of PAL 1 equivalent files held by each lawyer in the realm of 50 – 60 files. We are told that this is generally manageable, save that a file may appear straightforward but the demands of the particular client may not be. This is endemic in legal

⁸¹ ALWU collected data from 245 lawyers – a relatively small sample size. Indeed, ALWU writes that its “[s]urvey was not of a representative sample of legal workers, and this Report is not intended to draw conclusions that are applicable across all legal workplaces.” It is unlikely that this data reflects the position of young lawyers at the bar. The data has limitations and we refer to it for an example only, and in the knowledge that PDS lawyers may be looking at this report and wondering why PDS salaries do not measure up. The report is available at <https://www.alwu.org.nz/resources>, accessed 22 June 2021. PDS regards itself as competitive with medium-sized law firms.

practice, and we suggest that PDS take care to manage not only file numbers (i.e., apparent or theoretical workloads) but also actual workloads – in the sense of how laden a lawyer is given the requirements of the files they actually hold and the stress and pressures of each client and matter.

238. Workloads will always be a fluid thing, and in some offices we were told that workloads were manageable, while in others it was common for lawyers to work late and on weekends. Support staff often reported that although the support resource within PDS was responsive and well managed and that extra resource could be brought in where needed, PDS was often slow to fill vacancies and that that tardiness led to overflowing workloads and stress for support staff.
239. The issue of lawyer workloads was also raised in another context: flexibility. In certain offices lawyers are strictly held to the 8.30 am – 5pm model by management, without recognition of the fact that lawyers might work weekends or evenings. It is obvious that the work is never done and PDS lawyers are diligent and committed to ensuring that clients are ably assisted.
240. It grates to be held to strict “in office” hours when lawyers are putting in extra hours in what would otherwise be personal time, and there is a perception that PDS operates a low trust model, opposed to the high trust model that one would expect when working with a committed and responsible workforce. We suggest that PDS consider how it might embrace a higher trust model that allows for greater flexibility, allowing lawyers to manage their workloads as required and creating greater capacity to work from home and manage other responsibilities (including childcare).

Training

241. PDS is renowned for the level and quality of the training it provides to junior lawyers. Training opportunities provided for those above a junior level, and for support staff, appear more limited. Overall, however, the training programme is robust and PDS rightly prides itself on its quality. PDS tracks training hours in each office and is working on augmenting its nationalised training programme for lawyers.
242. PDS’ National Training Committee (**NATCOM**) was established to advise on the design, implementation and evaluation of all PDS legal training and development to ensure that:
- a) The legal training and development needs of all PDS legal staff are met; and
 - b) PDS legal training and development is of a high calibre and effective.
243. NATCOM is required to be comprised of at least one member from MoJ’s People and Capability Team, and the PDS Training Advisor.
244. PDS also has a Precedent Management Group, designed to “to ensure that all correspondence, court documents and forms are of a consistently high quality throughout the organisation. All PDS documentation should be professional, clear, accurate and written in plain English.”⁸² This group consists of three members.

⁸² Per the Group’s Terms of Reference dated 2018.

245. As set out above, PDS' performance of various training and development functions is supported by various experts, including the Training Advisor, Technical Practice & Improvement Specialist, and Leadership Coach.
246. The Training Advisor role is newly established and was filled earlier this year. The Training Advisor's role is to be "responsible for the design, development, maintenance and evaluation of training to support the professional development of our public defence lawyers, and for the delivery of the Summer Intern Programme."
247. We have spoken with the current Training Advisor and it is clear that there is a robust plan in development to modernise PDS' approach to training and to ensure that the organisation continues to provide relevant, up to date training for legal staff. There are opportunities for utilising technology to enhance the learning experience and provide more opportunities for both group-based and individual learning.
248. In addition to the formal training programme, it is clear that PDS lawyers get "on the job" training in the form of guidance and supervision from their peers and seniors (including the DLSs and, informally, other members of the bar) both in and outside of court.
249. We have been provided with a copy of PDS' junior lawyer certification programme and junior lawyer training checklist. The intention is that all graduates, SPs and PAL 1 lawyers have to complete the programme (which consists of 11 modules designed by NATCOM) and the PDS criminal law workshop with oversights from managers/supervisors. The programme appears to be a valuable tool, though we cannot comment on how robustly it is implemented.
250. In some offices juniors reported significant delays in being given the opportunity to complete the PDS criminal law and jury trial workshops. Given that these are managed and facilitated by PDS, they should be run regularly in every office. Early training is essential to building confidence, competence, and preventing the development of bad habits.

Professional development

251. As we have said, PAL levels are a product of the QA regs and frame PDS' overall approach to career development (at present). Apart from the PAL levels, PDS lawyers are also required to complete additional continuing professional development over and above the 10 hours required of all lawyers by NZLS – for instance, PDS juniors are required to do six times that. That is an excellent framework for building good practice and developing good staff.
252. The 2016 Management Report discussed the difficulty that PDS faces in attracting and retaining PAL 1 and 2 lawyers:⁸³

PDS's need for PAL 1s and PAL 2s cannot be met from the marketplace because barristers and private law firms put little effort into developing such staff. Therefore, PDS has to recruit university graduates and develop them through to PAL 1 and PAL 2 levels. This is what the sustainability strategy calls for.

253. PDS has had a "grow our own" strategy since 2016, in part to address the issues highlighted above. As we have said, we consider that a key aspect of professional development is and will continue to be PDS' ability to provide lawyers with exposure to senior work – that requires more

⁸³ At [4.9].

seniors and PAL 2 – 4 work, but is key not only to providing professional development but ensuring that everyone in PDS *continues to develop*, instead of leaving.

254. All PDS staff complete professional development plans (**PDPs**) and we are told the intention is that these are completed quarterly, with supervision and guidance being provided by the relevant senior person. PDPs are not popular with staff, who report that four PDP updates a year is too many and that there is minimal meaningful engagement with PDPs generally. That said, it was also put to us that PDPs are of as much or as little use as the individual seeks to make of them, and in some offices we were told that management specifically responded to the goals or objectives people recorded in their PDPs by providing opportunities to meet those objectives.

255. For our part, we recognise that PDPs or the like are a useful tool for goal setting and monitoring, albeit that four a year is excessive and likely decreases meaningful engagement. PDS should consider moving to an annual or six-monthly approach to PDP reporting. We understand that quarterly PDPs reflect MOJ requirements, but we are told that the reality is that they are either not completed that regularly or, if they are, the engagement is not necessarily meaningful.

256. PDS also has systems in place to ensure regular file reviews and court observations. In this process, a senior lawyer is supposed to review the work on a small sample of a particular lawyer's files, and to observe that lawyer in court. We consider these to be excellent objectives with the potential to add huge value to the development of PDS' lawyers, but cannot say how reliably these activities are actually carried out. We expect that the dearth of senior lawyers in some offices, combined with high workloads generally, makes it difficult for seniors to ensure that all lawyers are regularly and fulsomely subjected to file reviews and/or court observations.

How well does PDS manage the health, safety, security and well-being of its staff?

257. PDS has taken steps to ensure the safety, security, and wellbeing of its staff, but there are still issues that need to be addressed. We observed that:

- a) the public versus private areas in PDS offices are carefully sectioned off and access is controlled by key-card;
- b) most offices have dual-access meeting rooms and panic buttons in case of threats;
- c) PDS staff complete CERT training (which addresses health and safety);
- d) PDS staff have access to EAP, which includes three free counselling sessions a year (and this service is regarded as a valuable asset); and
- e) professional supervision, via access to psychologists/counsellors and online group supervision efforts, is available but has had mixed success. The LT says it is not widely used, while some lawyers reported to us that it was not practicably available. We understand that PDS is considering imposing expectations that all lawyers engage in a certain number of sessions per annum.

258. However:

- a) Several allegations of internal bullying have been reported to us, involving both legal and support staff.
- b) We have not undertaken a detailed inspection of all the PDS offices, but note that the security systems in at least some do not appear fit for purpose (for instance, we were told that in one Hamilton meeting room the panic button was positioned on the wall opposite the lawyer's escape door, on the client's side of the room).

- c) It was reported to us that access to professional supervision/counselling was more apparent than real. Staff in one office had tried to access it but had not been able to do so, had been referred to practitioners with irrelevant expertise (e.g., eating disorder specialists) and the wait times were long.
- d) There have been instances of clients being aggressive or inappropriate with lawyers. In such circumstances, PDS has a clear responsibility as an employer to ensure staff safety and we stress that if a client has mistreated his or her lawyer in any way then that client should be reassigned. Again, we noted a strong sense of service amongst the PDS lawyers and a reluctance to inconvenience the client. We are assured the LT is well aware of its obligations and responds accordingly.
- e) The report provided on group supervision sessions shows that group supervision efforts were not overwhelmingly successful. The report shows a need for genuine, good faith options and solutions for meeting staff wellbeing needs in a context where staff feel there is capacity to create meaningful change.

259. Certain other health and safety issues were raised with us during the review. We have raised these separately with PDS and MOJ's Chief Legal Counsel.

How well does PDS anticipate and respond to future capacity and capability requirements? Are these discussed with the LSC/LAS?

260. PDS conducts extensive "resource modelling" that keeps track of the number of current vs proposed FTEs in each office, the number of cases and target number of cases, and PDS' estimated share of legal aid cases. PDS also tracks the number of open cases each week, and reports on the same at the end of each month (numbers of cases are measured to get an overview of PDS as part of the legal system using actual numbers and on a "PAL 1 equivalent" basis to give a sense of the amount of work actually on hand in each office and nationally).

261. In addition, weekly assignment reports track how an office is performing against its target of assigned cases (based on a national quota of approximately 15,000 cases), and monthly office reports detail the number of cases received each month and what PDS' share of the total legal aid cases was. This report also sets out the number of FTEs per office, the number of leavers, and forecasts actual and target case volumes. Duty lawyer hours are also forecast on a monthly basis and the number of hours PDS provides to the DL Service are measured monthly too.

262. All this is to say that PDS has robust and detailed mechanisms for tracking case numbers, workloads, staff numbers, and the percentage of legal aid cases it is receiving. That data is fulsome.

263. However, these reports generally reflect on a weekly or monthly basis, and where we see a gap is in long term forecasting or estimating, particularly in terms of looking ahead and planning operations and staffing levels accordingly. We were told many times in interviews that PDS' approach – particularly to staffing and office management generally – is reactive rather than proactive.

How well does PDS develop and maintain a diverse, highly committed and engaged workforce?

264. It is clear to us that PDS has recruited and developed a workforce of highly committed and engaged people. Some support staff are less engaged with PDS' overall mission, but they remain engaged and committed to the work that they do.

265. The 2016 Management Report collated insights from interviews with 13 PDS staff members. In that report, it was said that PDS staff are dedicated to their “mission” and consequently were frustrated when they saw PDS was not as well organised as it should be. The interviewees for that report reportedly made comments along the lines of:⁸⁴
- a) “We lurch from crisis to crisis.”
 - b) “It often feels like an organisation in chaos.”
 - c) “I’m too busy fire-fighting to perform my core role well.”
 - d) “I’m not sure I know any more what my core role is.”
266. The 2016 reviewer said “[i]n short, the sense I picked up from most interviewees is that PDS is an organisation under great pressure. This is so particularly in the Manukau and Christchurch offices.”⁸⁵ These comments (and the balance of that report generally)⁸⁶ reflect what we have been told in the course of this review. PDS’ workforce is dedicated and committed, and that drive translates into discontent on certain issues.
267. We were provided with a short report titled “Spotlight on... PDS Diversity” dated March 2021. That report noted, for instance, that PDS’ staff are predominantly NZ European and 64% are women (54% of legal staff). It said that 56% of PDS’ leadership roles were filled by women, including 48% of the leadership roles for lawyers (25% of the LT).
268. The report also noted that 5.9% of PDS staff identify as Māori, compared to 6.1% of the legal profession generally. However, it is not clear from the report whether PDS’ figure of 5.9% is legal or legal and support staff. The report also noted single-figure proportions of people who identify as European, Asian, or Pasifika. 17.7% identified themselves as “Don’t Know” and 10.70% chose “Other”.
269. The report also identified that “PDS staff are comparatively young, with more than half under the age of 35”. The largest segment of staff were within the 25 – 30 age bracket, which fits with what we perceived during our office visits.
270. We see that youth as a function of PDS’ current bottom-heavy approach, which as we have said we do not think matches the demographic of most law firms. We see a need for greater diversity, particularly amongst legal staff and particularly in offices that serve diverse communities. PDS should consider whether and how its recruitment activities reach and relate to lawyers from minority groups, particularly those who are of Māori, Pasifika, and Asian descent. In the same vein, concerted effort should be made to ensure that diversity is factored into retention efforts. We have not seen data on the languages spoken by PDS staff, but suggest PDS might also gather that data and consider whether it should focus on recruiting lawyers fluent in languages other than English.

⁸⁴ At [4.4].

⁸⁵ At [4.5].

⁸⁶ The 2016 Management Report highlighted issues around the predominance of inexperienced lawyers, the difficulty of attracting and retaining lawyers at all PAL levels, and the high need for supervision, mentoring and team management skills.

271. PDS has an internal “Culture and Diversity Committee”, the purpose of which is “to enhance diversity and cultural competency, understanding, responsiveness, awareness and sustainability in the PDS.”⁸⁷ The responsibilities of the committee include:
- a) overseeing commitments under the NZLS Gender Equality Charter;
 - b) facilitating opportunities for training in tikanga, te reo, and Te Tiriti;
 - c) developing strategies to improve communications and awareness of culture and diversity issues; and
 - d) working with relevant internal and external groups.
272. PDS staff have access to MoJ’s Rainbow network, as well as internal gender equality and pacific committees, amongst others. This is a step in the right direction but PDS, like the profession, suffers from some lack of diversity, particularly amongst its lawyers. It was pointed out to us in Manukau that the loss of a large number of staff has had a serious impact on the make-up of that office’s cohort of lawyers. The lawyers in Manukau were concerned that their cohort did not reflect the people they were meant to serve, and that the loss of those lawyers with the mana and cultural awareness to do so was a real loss to clients. There is a serious need to avoid tokenism, albeit in a context where PDS needs to be acutely aware of diversity issues within its offices.

Data

How well does PDS manage and use information (reporting data) as a strategic asset?

273. PDS collects and utilises a wealth of data and evidence that undoubtedly serves its overall objectives and assists its service delivery. We have been greatly assisted by the variety and volume of data PDS (and MoJ) provided to us.
274. That data allows PDS to measure things like the metrics of its staff (age, PAL level, PQE, gender, background), the numbers of active cases it has on hand and the percentage of Legal Aid Services assignments it has at each PAL level compared to the number of assignments held by private bar lawyers.
275. It also collects data on the cost of each matter, in particular the cost of service (i.e., the amount billed to Legal Aid Services on a particular matter in accordance with the fixed fee model) and the cost of effort (i.e., the measure of the cost to PDS in terms of time and resources spent by PDS staff on the matter).
276. PDS is also generally well served by MoJ in terms of the collection and analysis of relevant data – and it is clearly useful that MoJ can collate data from both PDS and Legal Aid Services generally. PDS is especially well served by MoJ’s analysts, one of whom specialises in data analysis for the PDS. We consider this an invaluable resource.

⁸⁷ Per its Terms of Reference.

Appendix 1: Terms of Reference

Review of the Operation and Performance of the Public Defence Service

Terms of Reference

April 2021

Introduction

The Public Defence Service (PDS) is an independent criminal law practice providing advice and representation to legally aided defendants in criminal cases. They also oversee the duty lawyer services in the courts where they operate, have administrative responsibility for the PDLA Scheme rosters, lead the two legal teams for the Auckland and Waitakere AODTC and regularly provide submissions on and feedback about criminal law reform.

PDS is a business unit of the Ministry of Justice's Office of Legal Counsel. It is comprised of salaried lawyers (Ministry of Justice employees) and support staff operating in ten offices across New Zealand, plus a small number of national office staff. Cases are assigned by Legal Aid Services to the Public Defence Service and the private bar on a rotational basis with a maximum allocation of no more than 50% of assignments in any court where it operates. As Ministry employees, PDS staff are subject to and must observe all Ministry policies (health and safety, bullying and harassment, IT security, etc)

PDS lawyers operate independently from the Ministry in representing their clients. However, the Senior Leadership Team (SLT) is responsible to Ministers for PDS' operation and performance.

Purpose

A review of the operation and performance of the PDS has been requested by the Ministry of Justice's Strategic Leadership Team Board (SLT Board). This request for review does not arise from any specific concerns by the SLT Board with PDS but is for proper governance purposes.

The review will consider aspects of the operation and performance of PDS to determine whether improvements can be made.

Approach and timing

- The review will be undertaken by an independent reviewer.
- The scope of work set out in these terms of reference is quite broad. The reviewer will touch base regularly with the Secretary for Justice or his delegate on progress to ensure effort is applied to the most useful lines of enquiry..
- The independent reviewer will provide a report to the Secretary for Justice by 30 June 2021.
- Depending on progress, the review may be completed in two stages with the second stage completed no later than 31 December 2021.

Roles and responsibilities

- The review will be undertaken by a person with a deep understanding of the criminal justice system and the management of legal services.

- The reviewer will be supported by officials from the Ministry of Justice as required.

Scope

The review will consider all relevant materials, interview people as necessary and report to the Secretary for Justice on its findings and recommendations on the following:

Strategy and alignment

- How well do the staff and stakeholders understand PDS' purpose, vision and strategy?
- How well integrated into the wider MoJ is the PDS?
- How well does PDS collaborate on strategy and service delivery with the Legal Services Commissioner (LSC) and Legal Aid Services and other parts of the Ministry?
- How well does PDS collaborate with external stakeholders (judges, sector partners, legal professional bodies, etc)?
- How is PDS embedding whakaaro Māori?
- Given the LSC had delegated accountability for the performance of salaried lawyers to the Director PDS, how is the Commissioner kept informed about performance?

Leadership

- How well does the PDS leadership team provide collective leadership and direction to PDS and how well does it implement change?

Value proposition

- Does PDS deliver value to its clients and how is this measured?
- Does PDS provide better quality service than the private bar?
- Does the PDS provide service at a lower cost to the private bar when comparing 'apples with apples'?
- What role, if any, should PDS play in lifting the quality of legal defence services across the legal aid system?
- Why does PDS not meet its obligation to deliver up to 50% of criminal cases which it is funded to do and which negatively impacts the Legal Aid Appropriation?
- Does the PDS leadership consider the consequential impact on the Legal Aid Appropriation when making business decisions? If so, how does it do this?
- Why does PDS have different onboarding requirements/processes/criteria for lawyers compared with LAS – should these be consistent considering the requirements on both groups to provide the same service?

Systems and tools

- Does PDS have good systems for work allocation and time recording?
- Do PDS lawyers have the right tools to do their jobs?
- Do PDS staff have adequate administrative support?

- How efficient and robust is the PDS PAL approval system compared with Legal Aid Services approval system for private lawyers?

Human Resources

- Does PDS have good practises for recruitment and retention of staff, including remuneration, workload standards, training, and professional development?
- How well does PDS manage the health, safety, security and well-being of its staff?
- How well does PDS anticipate and respond to future capacity and capability requirements? Are these discussed with the LSC/LAS?
- How well does PDS develop and maintain a diverse, highly committed and engaged workforce?

Data

- How well does PDS manage and use information (reporting data) as a strategic asset?

Out of Scope

- Any review and comment on PDS' performance in any individual case

Appendix 2: Documents reviewed

The documents we reviewed in the course of this review included but were not limited to:

Legal Aid Review - Dame Margaret Bazley Report
Evaluation of the Public Defence Service Pilot
Value for Money Review of Public Defence Service
Cabinet Minute - Expansion of PDS
PDS - Our Story
PDS LinkedIn page
PDS website
PDS National Structure
PDS Values
PDS Leadership Team - Terms of Reference
PDS National Management Team - Terms of Reference
PDS Northern & Southern Leadership Teams - Terms of Reference
PDS Ethics Committee - Terms of Reference
PDS Continuing Professional Development (CPD) Policy & Plan
PDS staff diversity
PDS Dashboard
Minister's Quarterly Report
MOJ Survey 2020 - PDS National results
PDS Phone Directory
PDS Working Group and PDS COVID-19 Response Papers
Duty Lawyer Service
PDS Business Plan - 2020/2021
PDS Business Plan - 2020/2021 - One Page
PDS Strategic Priorities
Spear Communications - Scoping document
Legal Aid Provider Coverage Report - DRAFT
CORE Education - Terms of Reference
PDS Leadership Team Dashboard - March 2021
Code of Conduct for PDS Lawyers
Ministry of Justice - Code of Conduct
Guidelines as to the application of Ministry of Justice Code of Conduct to PDS Lawyers
Example of PDS Response Team - Managers' Briefing
Example of Weekly News email
PDS Staff Christmas Newsletter
Extract from Justice Baseline Review Report
Exit Interview Report - Quarter 3
PDS Resource Model
PDS Open Cases Report
Assignment Report
Monthly office OPD report
Office forecasts
Duty Lawyer hours - Forecast
Duty Lawyer Dashboard - March 2021
PDS Time Recording Policy and Guidelines

Time recording summary - chargeable
Time recording summary - non-chargeable
Duty Lawyer Supervisors - Time recording summary - non-chargeable
Time recording - FAQs
Support Services Manager - Learners Guide - Time Recording
Legal Secretary Leads - Learners Guide - Time Recording
Lawyers - Learners Guide - Time Recording
Duty Lawyer Supervisors - Learners Guide - Time Recording
Accountable time recording report
Time recording analysis feedback - Christchurch
Time recording analysis feedback - Dunedin
Time recording analysis feedback - Hamilton
Time recording analysis feedback - Hawkes Bay
Time recording analysis feedback - Tauranga
Time recording analysis feedback - Wellington
Position Description - Support Services Manager
Position Description - Receptionist/Administration Assistant
Position Description - Legal Support Assistant
Position Description - Legal Secretary Lead
Position Description - Legal Secretary
Position Description - PDS Training Advisor
NATCOM Terms of Reference
Precedent Management Group - Terms of Reference
PDS Client Care Brochure
PDS Client Care Brochure - Te Reo
Legal Aid Services - Disposal Schedule
Summary reconciliation per site - July ratio
Summer Intern Programme - Induction booklet
Summer Intern Programme - Monthly Checklist
PDS Junior Lawyer Certification Programme
Junior Lawyer Training Checklist
Assignment User Manual
Assignments - Checklist and tips
PDS Approvals Policy
Legal Aid Grants Handbook
2020/21 Pay Band Structure
2021/22 Pay Band Structure
PDS Leadership Team Agenda and notes - example
Lawyer Induction programme 2019
First week plan for induction 2019
Criminal Case Process
Court glossary handout 2019
Checklist for Managers 2019
Legal Support Team - Induction and Onboarding material
Leads Guide
Buddy Guide
Auckland - Internal and external training register
PDS Consolidated Training Register - 16 April
Monthly Finance Report - 31 March 2021
PDS Actuals and Outputs View - 2020
PDS Budget as at 16 April

CE Memo on PDS lawyer progression
Draft Lawyer Competency Framework - April 2020
PDS Expert Register
MOJ External Factsheet - Privacy Guidelines
MOJ Privacy Guidelines - IT - self assessment template
Privacy Act - provider letter
Privacy Checklist
Provider confirmation form
PDS Expert Expenditure - Guiding Principles
PDS Request for Expert Expenditure form
PDS Complaints Management Policy
Arataki - MOJ Induction
PDS Cultural & Diversity Committee - Terms of Reference
CERT Training Reconciliation
Compulsory Professional Supervision
MOJ Rainbow Network
Pacific Committee - Minutes of Meeting
Gender Equality Subcommittee - Updates
Vitae feedback
PDP template - Junior Lawyer (Supervised Provider)
PDP template - Junior Lawyer (PAL 1)
PDP template - Intermediate Lawyer (PAL 2)
PDP template - Senior Lawyer (PAL 3 or 4)
PDP template - Senior Lawyer (Team Leader)
PDP template - Senior Lawyer (Legal Team Manager)
PDP template - Senior Lawyer (AOPD)
PDP template - Senior Lawyer (OPD)
PDP template - Executive Assistant
PDP template - Legal Secretary Lead
PDP template - Legal Secretary
PDP template - Legal Support Assistant
PDP template - Receptionist / Admin Assistant
PDP template - Support Services Manager
NATCOM - list of topics
BCP Plan example
File Review and Court Observation - Register
Lawyer PAL approvals - Register
List of PDS Policies/Guidelines
PDP template - principal template
Colmar Brunton's Legal Aid Customer Satisfaction Survey, Final Report dated April 2021

Appendix 3: Who we spoke to

We have given an overview of the types of people we spoke to in the body of our report. To give a modicum more specificity, our interviewees included:

- Seven OPDs;
- Seven SSMs;
- Lawyers in seven of 10 offices, by way of group workshops;
- Support staff in seven of 10 offices, by way of group workshops;
- DLSs in Auckland, Manukau, Waitakere, Hamilton, Christchurch, and Dunedin;
- PDS' specialists, including the Leadership Coach, Training Advisor, and Technical Practice & Improvement Specialist;
- PDS' LT;
- Representation from the LSC;
- The Secretary and Chief Counsel at MoJ;
- PDS' MoJ Property, HR, IT and Data partners;
- Crown prosecutors in Manukau, Auckland, Waitakere, Christchurch, Dunedin, and Hamilton;
- Police Prosecutors in Auckland, Manukau, and Dunedin;
- Court staff from Auckland, Manukau, Christchurch, Dunedin, Hamilton, and Waitakere;
- A court custody sergeant from Hamilton;
- Representatives from Crown Law;
- Representatives from the New Zealand Law Society;
- Lawyers from the independent bar in places including Dunedin, Hamilton, Auckland, Wellington, and Manukau;
- District Court Judges in Auckland, Manukau, Waitakere, Hamilton, Christchurch, and Dunedin; and
- Representatives from Corrections, Te Wānanga o Aotearoa, and Manukau Bail Support Services.

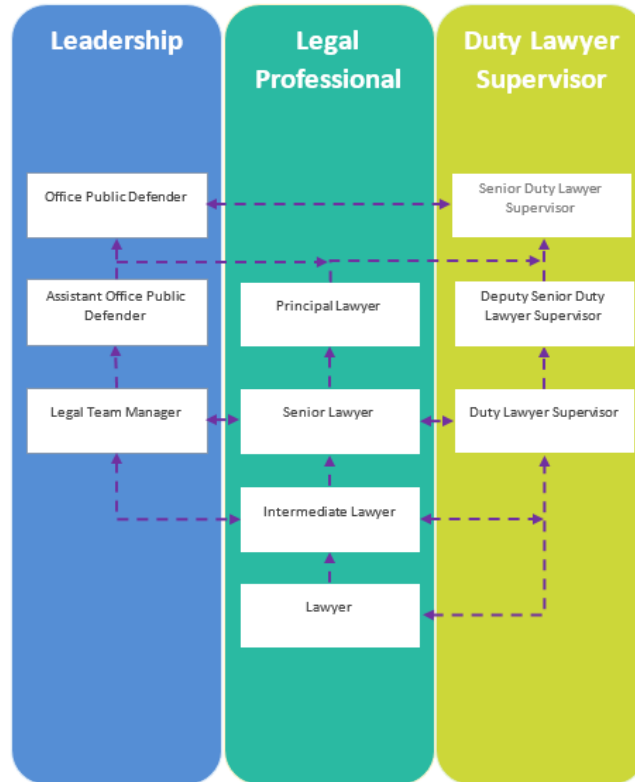
Appendix 4: Progression pathways

Overview of the PDS Lawyer Career Paths

To be appointed as an AOPD or OPD, the lawyer must think and talk about the law from a broad perspective. They must understand the key drivers of PDS's business and be able to shift from holding their direct reports accountable for technical outputs to holding them accountable for managerial work. They must demonstrate the confidence and maturity to operate at this level.

Appointment to AOPD or OPD from Principal Lawyer would require previous successful experience as a manager, otherwise the move is unlikely to be feasible without considerable support and development.

To be appointed as a Team Manager, the lawyer must demonstrate leadership potential in terms of motivating, empowering and developing others. They must be prepared to step back and let others deliver and be able to tackle new problems or situations and develop effective solutions.



Appointment to Principal Lawyer involves a significant step change. The Senior Lawyer must have the internal and external reputation and credibility as a leader in their field, with the breadth and depth of knowledge and experience required to provide counsel to others within a highly complex environment. Is successful at providing professional and intellectual leadership and supervision to ensure quality, validity, accuracy and consistency. Must have highly developed stakeholder management skills.

Shift from Principal Lawyer to Team Manager or Senior Duty Lawyer Supervisor is a feasible move for someone who demonstrates leadership and management potential. They must be able to step back and let others deliver. Must have the resilience to cope with competing demands and work pressures.

An experienced lawyer may consider a Duty Lawyer Supervisor role. Appointment to this role broadens understanding of the court and legal processes and strengthens influencing skills and management ability.