



PUBLIC SERVICE ASSOCIATION
OF NEW SOUTH WALES

General Secretary Stewart Little
President Kylie McKelvie
ABN 83 717 214 309

In reply please quote: MW:vv

6 December 2017

Mr Brendan Thomas
Chief Executive Officer
Legal Aid NSW
323 Castlereagh Street
HAYMARKET NSW 2000

Dear Mr Thomas,

RE: Changes to Crime Staffing Structure under the Early Appropriate Guilty Plea Reforms

The PSA is concerned to ensure that members are not unduly disadvantaged by this restructure, and accordingly raise the following issues and recommendations on behalf of members.

1. Ongoing consultation through employee representatives

The PSA wants to ensure that the restructuring of the Criminal Law Division provides the best possible outcomes for legal aid clients, the organisation and our members. Our members in Legal Aid have a vast combined wealth of knowledge and experience in Criminal Law in NSW.

Noting the magnitude of the proposed changes, and the inevitability of significant effects on staff and their criminal practices arising from these, input from staff that will actually be doing the work is essential if the changes and the transition are to operate effectively. Moreover, the most efficient way of obtaining this input is via the PSA simply because staff can be candid within their union in a way that is generally not possible with management simply due to the nature of that relationship.

Results from the most recent People Matters Survey highlight lack of confidence in aspects of management. Working more closely with staff through employee representatives is also a way to achieve significant gains in this area.

Action: PSA inclusion in regular scheduled meetings to monitor all aspects of implementation of the changes

2. Increased workload

How much work will members be required to perform? Will it be more than we currently perform? Is there or will there be a reliable matrix for measuring workload? Because the proposed changes are so substantial the full impact may only be known when the changes take effect.

In many cases our members in Crime - both LSOs and solicitors - are already overworked and experiencing workload pressures. Because the proposal will change the work members have been doing there is the real potential to unreasonably increase workload, so this needs to be monitored going forward. In order for staff to have confidence in any monitoring process, it will need to incorporate involvement of employee representatives.

Recommendations

- I. Management to provide to PSA the workload modelling that Legal Aid used to support the allocation of positions in the proposed model*
- II. Management to outline the actions it will take to monitor workload under the new structure*
- III. PSA to take part in any such measures to give our members confidence in the process*

3. De-skilling of members at Grades IV & V

Central to the proposed changes are Continuity of representation, where a lawyer represents the client from the start to the finish of the proceedings, and the more frequent briefing of barristers and at an earlier stage in matters.

When and by whom will matters be briefed? In the past our members in committals have had free rein to negotiate with the DPP regarding any matter allocated to them (limited only by ethics - client's instructions and a professional obligation not to take on work that they are not adequately skilled to perform).

The model proposed for Head Office sets out who would be able to do what with regard to a case conference. Counsel or more senior staff will be required in order to do certain things, giving rise to a concern about fettering of discretion and de-skilling.

At the consultation at Head Office on 31 October, some assurances were made to the effect that it is not the intention to fetter the role of staff at any grade. Nevertheless, we understand that it is now envisaged that the allocating lawyers will choose and brief counsel before the matter is allocated.

This would mean that the solicitor with carriage of the committal is not involved in this very significant decision-making in their own case. Seemingly, nor would the client be involved, and nor would there be much consideration of their particular needs, given they would not yet have been conferenced.

If correct, the effect of this would be that in future far less discretion is afforded to our solicitor members with carriage of committal files.

If the briefing decision is made at the outset by the supervisor, it also potentially conveys a lot of decision-making power to the private bar, with the potential for in-house staff to be de-skilled.

Recommendation: A modified model for briefing counsel be developed with input from affected staff through employee representatives

4. Selection of counsel

We are aware that in the past the allocating solicitor(s) in some offices have been criticised for selecting counsel from a very small pool and in an untimely fashion. If that were to occur in future, this would be bad for clients and for Legal Aid, but it would also be bad for the allocated solicitors who could be lumbered with inappropriate counsel potentially for a long time.

Issues of a similar nature and complaints about decision making in the allocation of duty work led to the development of the BUDSAS scheme. The concentration of briefing decisions in the hands of very few lawyers increases risk.

Clearly briefs need to go to skilled counsel that are available to provide timely advice, but will systems will be in place (akin to BUDSAS perhaps) to ensure that there is ethical and fair briefing of counsel.

Will the solicitor with ultimate carriage have say over who is briefed? If they are not involved in developing a short list or making recommendations to the SIC, this limitation of discretion could become much more stressful than is presently the case, because of the expectation that they personally stay in the matter.

The relationship of solicitor to counsel is incredibly nuanced and increasing bureaucratisation of briefing counsel can undermine the chances of a great solicitor-barrister team being allocated to best serve clients.

Recommendation: More information be provided by management about adherence to equitable briefing policy

5. Mixture of work and obligations under Anti-Discrimination legislation

If all staff in a newly merged 'Committals and Indictable' are now expected to provide continuity of representation, there will be anomalies. Will Grade V solicitors be instructing in trials on a regular basis, rather than engaged in advocacy? How will staff that need to work part-time be accommodated?

Given it is frequently women of child-rearing age, older workers and workers with disabilities who need to do this, there is a clear risk of indirect discrimination against women, older people and those with disabilities.

While it is appropriate that Legal Aid give priority to issues of continuity and this is a legitimate business need, there are many ways in which this work could be arranged to maintain continuity of service AND meet carer obligations and other part time work arrangements. For example, job-share and part-time work arrangements, and allowing staff who work part-time to work additional days if in trial.

Nevertheless, for some staff, particularly those unable to change their arrangements at short notice, how will their need to work part-time be managed?

Noting again results from the People Matters Survey, PSA members presently have little confidence that Legal Aid will in fact arrange work to ensure both of these commitments are met.

Recommendation: Legal Aid to formalise its commitments to anti-discrimination and flexible work practices regarding how members' needs will be accommodated post implementation.

6. Management structure

If the reporting line is linear in each of the proposed Head Office teams, then the proposed management structure appears top heavy compared to most organisations.

This is even more concerning if the briefing decisions also disempower members. We note historical concerns raised by members in Head Office with our delegates about the many layers of management oversight in the Indictable practice.

Recommendation: More information be provided by management

7. Conferencing Hub and case conferencing

The memorandum of understanding as to how negotiations will take place is in very early stages but critical. We believe it remains unclear what the involvement of the Public Defenders shall be.

Practical difficulties are almost inevitable in competing with court usage of AVLS for existing conferencing resources. We know many of our members face regular frustration and stress when AVLS fall through or cannot be booked in a required time frame. The extra use of those facilities and the need for detailed instructions before entering an early plea under the EAGP reforms will be substantial.

In addition, the process of case conferencing clients with DPP will of itself create real issues, both as to nature and quality of advice and to privacy and confidentiality.

Recommendation: More information be provided by management

8. Confidence in the recruitment process

This is a separate but related issue. The proposed changes to existing practices and the creation of a significant number of new positions amount to a very significant recruitment exercise. This puts the spotlight on results from the People Matters Survey confirming lack of confidence in the recruitment process within Legal Aid.

We are aware of Management's announcement on 24 October regarding holding 'Recruitment workshops' at Head Office to consider this lack of confidence.

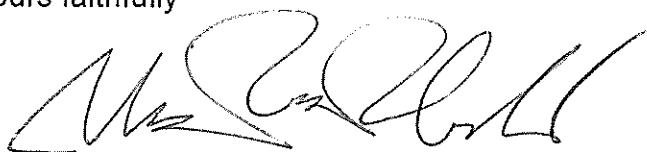
However, aside from excluding staff in regional offices, many employees will simply not feel comfortable to candidly air their criticisms concerning recruitment to management representatives in such forums, or for that matter in Table Talk forums. Management cannot engage in genuine consultation on this issue without seeking staff feedback through employee representatives.

Recommendation: The PSA to be included in a Working Group formed as an urgent priority and tasked with increasing confidence in recruitment in Legal Aid by addressing perceived problems in fairness and transparency in recruitment, under the Government Sector Employment Act.

Finally, the PSA also requests, a written recruitment policy and change management guidelines in relation to the restructure as a matter of urgency.

I can be contacted on 9220 0906 or at mwunderlin@psa.asn.au to discuss any of the above.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Monika Wunderlin', written in a cursive style.

Monika Wunderlin
for **STEWART LITTLE**
GENERAL SECRETARY