



Duty Lawyer Scheme

Protocol

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6	14/5/14	Maureen Kavanagh	10.2.2 – Amendment to Collection of Fees Policy
7.	3/11/2014	Maureen Kavanagh, Kelly Niclair, Karen Shepherd, Elias Harfouch, Lex Payne.	<p>5.2 – Acting for Privately Represented Accused [relocated to 5.7 Scope of Service]</p> <p>5.2.1 – Outline of requirements for private lawyers requesting duty lawyer assistance.</p> <p>5.2.2 - Amendments to scope of service</p> <p>5.2.3 - Amendments to Scope of Service, reflecting more expanded service on written instructions.</p> <p>5.2.3 – Replacement of email address for Perth Office with Table of relevant email addresses for relevant LA Offices/Courts.</p> <p>Incorporating following inserts as Appendix A and B</p> <ul style="list-style-type: none"> • Table of courts and relevant LA Offices [email contacts] • Private Instructions to Duty Lawyer Form [example]
8.	17/8/2015	Fiona Calley, Kelly Niclair, Elias Harfouch, Lex Payne, Maureen Kavanagh	<ul style="list-style-type: none"> • Changes to 3.1 Accreditation and incorporation of grant of aid panel registration requirements as condition of eligibility for applying to be on

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1. Introduction

- 1.1 The Duty Lawyer Services Protocol sets out standards and guidelines for the provision of criminal law duty lawyer services in the Magistrates Court and the Children's Court.
- 1.2 A duty lawyer service is assistance provided by a duty lawyer to an unrepresented person in the Magistrates Court or the Children's Court. A duty lawyer service may either be provided by a Legal Aid WA lawyer or by an accredited private lawyer contracted by Legal Aid WA.
- 1.3 Assistance may include the provision of legal advice and representation for bail applications and pleas in mitigation.
- 1.4 Duty lawyers must be mindful of and comply with the Legal Professional Conduct Rules 2010.
- 1.5 A duty lawyer service is also aimed to assist the Magistrates Court and the Children's Court to enhance access to justice with particular regard to unrepresented parties.

2 Prioritisation

- 2.1 Priority is given in the provision of duty lawyer services to advice to people charged with criminal offences, making bail applications on behalf of accused people and providing pleas in mitigation for people who have been convicted of criminal offences in the Magistrates Court or the Children's Court. Particular priority is given to people in custody. Duty lawyers do not appear in the District or Supreme Court or before the President in the Children's Court.
- 2.2 Duty lawyers will only provide advice about other matters, such as applications for forfeiture of surety, extraordinary driver's licence, confiscation/impounding of cars, and prohibited behavior orders if there is time and other priorities can be met on the day.
- 2.3 Duty lawyers do not provide advice about responding to violence restraining order applications, taxation prosecutions, shire prosecutions (apart from Dog Act prosecutions), and other prosecutions initiated by government agencies or regulatory/incorporated bodies (apart from Animal Welfare Act)
- 2.4 Duty lawyers do not represent people at hearings, including hearings to determine facts for sentencing or to set aside bail where evidence is to be called.
- 2.5 Ordinarily duty lawyers do not represent people on applications for adjournments in their absence.

3 Private lawyers acting as Duty Lawyer

3.1 Accreditation

3.1.1 Private lawyers may provide duty lawyer services in the Magistrates Court and the Children’s Court if they are accredited to provide such services.

3.1.2 Accreditation to provide duty lawyer services in the Magistrates Court is open to any private lawyer who is currently a member of a Legal Aid WA Criminal Law Panel and who fulfils the requirements in 3.1.4.

3.1.3 Accreditation to provide duty lawyer services in the Children’s Court is open to any private lawyer who is currently a member of the Legal Aid WA Crime – Children’s Court Panel and who fulfils the requirements in 3.1.4.

3.1.4 Subject to 3.1.5, private lawyers seeking to be accredited to provide duty lawyer services in the Magistrates Court or Children’s Court are required to attend three sessions at the court in which the service is to be provided, as follows:

First session

The private lawyer will observe an in-house duty lawyer performing duty lawyer services.

Second session

The private lawyer will observe an in-house duty lawyer performing duty lawyer services and undertake legal advice and court appearances for a portion of clients under the supervision of the in-house duty lawyer. The in-house duty lawyer will assess the performance of the private lawyer following the second session and provide a report to Legal Aid WA on the suitability of the private lawyer advancing to the third and final session.

Third session

The private lawyer will attend to all clients seeking the assistance of the duty lawyer, under the supervision of the in-house duty lawyer. The in-house duty lawyer will assess the performance of the private lawyer following the third session and provide a report to Legal Aid WA on the suitability of the private lawyer to provide duty lawyer services unsupervised.

3.1.5 Legal Aid WA may, at its absolute discretion, waive or vary the requirements in 3.1.4 where it considers it is reasonable or necessary to do so.

3.1.6 Legal Aid WA may approve accreditation of a private lawyer to provide duty lawyer services if satisfied that the criteria for accreditation have been met.

3.1.7 Each private lawyer who is accredited to provide duty lawyer services will be provided with a current copy of Legal Aid WA’s Duty Lawyer Briefcase, on the understanding that it is not to be disseminated or provided to any other person or organisation and is not to be used for commercial gain.

3.2 Contract Terms

3.2.1 Where an in-house duty lawyer is unavailable to carry out the duty lawyer service, Legal Aid can contract with an accredited private lawyer (“a private duty lawyer”) to provide the service.

- 3.2.2 The private duty lawyer is bound by the same standards and guidelines set out in this protocol in the provision of the duty lawyer service.
- 3.2.3 An all-inclusive day fee of \$330 (inclusive of GST) is paid for the service irrespective of hours and court location in attendance.
- 3.2.4 The private duty lawyer is required to be in attendance at the relevant court location by no later than 9.00am and 8.45am if the rostered court is detention at the Perth Magistrates Court.
- 3.2.5 The private duty lawyer is required to complete the list of clients seeking the assistance of the duty lawyer at the relevant court on a given day. Private lawyers undertaking duty lawyer work cannot necessarily rely on in-house duty lawyers to assist them in court on the day.
- 3.2.6 The private duty lawyer is entitled to self-refer clients seen in the role of duty lawyer, including nominating themselves as lawyer of choice, with the client's agreement, in an application for legal aid.
- 3.2.7 The private duty lawyer must give highest priority to duty lawyer clients and make alternative arrangements for private clients on the day, where appropriate.

4. Conflicts of Interest

- 4.1 A duty lawyer must withdraw from assisting an accused where the duty lawyer considers he or she has an ethical conflict.
- 4.2 A duty lawyer should not represent a client who wants to plead guilty for the sake of "convenience" but denies having committed the offence charged
- 4.3 If an in-house duty lawyer becomes aware that the complainant in the matter is being represented by another in-house lawyer, on a grant of legal aid, he or she should withdraw
- 4.4 Where an in-house duty lawyer assists a party to a matter, which is not the subject of a grant of legal aid to an in-house lawyer, and another party to the matter is assisted by an in-house lawyer at another Legal Aid office, the in-house duty lawyer cannot continue to assist where:
- There is a real and sensible possibility that either client would be prejudiced; or
 - Documentation for signature of one of the in-house lawyers and/or the Director of Legal Aid is required for the purpose of any proceeding in which either of the assisted persons is a party or for the filing or production of documents.
- 4.5 Where a conflict is discovered a duty lawyer should advise a client that a potential conflict exists but not the nature of the conflict.

- 4.6 If the other party has a current grant of legal aid and representation for more than one party is required on the day, the client should be referred to a private lawyer.

5. Scope of the Service

5.1 Advise Court Not the Solicitor on the Record

- 5.1.1 The duty lawyer should clearly state to the court for every accused or, at least at the commencement of their matters, that they appear as duty lawyer.

- 5.1.2 This ensures that the duty lawyer does not end up as solicitor on the record, particularly when matters are dealt with on indictment.

5.2 Summary Only Offences – Magistrates Court (Adult)

- 5.2.1 A duty lawyer can represent an accused on the entry of pleas of guilty or not guilty, request adjournments and apply for bail on all charges which can be finally dealt with in the Magistrates Court.

- 5.2.2 A duty lawyer should exercise caution before assisting a client to enter a plea of guilty where the client is on serious charges or has a serious record and there is a real risk of imprisonment, or where there has been inadequate time to take instructions or fully investigate the matter. The duty lawyer should encourage the accused to make an application for legal aid or make an appointment for further legal advice.

- 5.2.3 Where a client is pleading not guilty, the duty lawyer should advise the client that a duty lawyer cannot represent the client at the trial. This advice should be noted on the instruction sheet.

5.3 Either Way Offences – Magistrates Court (Adult)

- 5.3.1 A duty lawyer can request adjournments and make bail applications for all either way offences including those that will eventually be dealt with by a superior court.

- 5.3.2 A duty lawyer can represent an accused on an s.5 *Criminal Code* application to determine whether an either way offence is to be dealt with summarily or on indictment, as long as the duty lawyer has adequate information relating to the charge. The exception to this is if the either way offence accompanies an indictable only offence, in which case the duty lawyer will adjourn the matter for further legal advice, apply for bail, if appropriate, and take an application for legal aid or recommend that the accused engage a private lawyer.

- 5.3.3 A duty lawyer should not represent an accused on a plea of guilty to either way offences that will be dealt with by a superior court.

- 5.3.4 Care should be taken when the jurisdiction for an either way offence is in issue.

If the prosecution successfully argues for an either way offence to be dealt with by a superior court, or if the Magistrate independently decides to send an either way offence to a superior court, the accused should not enter a plea of guilty whilst represented by the duty lawyer and, where possible, any such plea just entered should be withdrawn.

- 5.3.5 The duty lawyer must not set disclosure committal hearing dates for either way offences that will be dealt with on indictment unless acting upon clear instructions from the accused's lawyer.

5.4 Indictable Only Offences – Magistrates Court (Adult)

- 5.4.1 A duty lawyer can request adjournments and make bail applications for matters which must be dealt with on indictment in a superior court provided that the Magistrates Court has jurisdiction to deal with the application and there has been adequate time to prepare.

- 5.4.2 Duty lawyers must not enter fast track pleas in the Magistrates Court. This includes having the breach of a superior court order committed for sentencing to the superior court. Instead, the duty lawyer should adjourn the matter for further legal advice, apply for bail, if appropriate, and take an application for legal aid or recommend that the accused engage a private lawyer.

- 5.4.3 The duty lawyer must not set disclosure committal hearing dates for charges that must be dealt with in the District or Supreme Courts unless acting upon clear instructions from the accused's lawyer.

5.5 Children's Court

In the Children's Court a duty lawyer should adjourn a case and get the client to apply for legal aid where there is a risk of detention, the client is a ward of the State, the client has a mental impairment or the client meets the criteria for a grant of legal aid.

5.6 Acting for Privately Represented Accused

- 5.6.1 The scope of The Duty Lawyer Service [s.5 of Protocol] may be extended under written instructions from private lawyers.

The Duty Lawyer Service will accept written instructions from private lawyers to appear for clients if the instructing lawyer has initially:

- Made reasonable previous attempts to engage another private lawyer to appear;
- Emailed their request one clear business day [e.g. by no later than 5pm on Friday for following Tuesday appearance] to appropriate Legal Aid Office.
- Completed, signed and submitted the Private Lawyer Instructions to Duty Lawyer Form [see **Appendix B, page 13**] and;

- Made a request that falls within the scope of the Duty Lawyer Service [outlined below].

The relevant Legal Aid office will confirm by email receipt of the request and acceptance of the instructions or decline/and or request further supporting information.

The Duty Lawyer Service will accept written instructions from a private lawyer to:

- Adjourn proceedings;
- Enter not guilty pleas to summary charge/s and request disclosure date or Trial Date;
- Enter guilty plea/s to indictable charge/s at pre committal stage only. [e.g. Fast Track];
- Enter not guilty plea/s for committal to superior court [Stirling Gardens Only]; or
- Make simple uncontested bail applications/variations.

The Legal Aid Office will advise [by email] the instructing private lawyer on the outcome of the client's appearance as soon as practicable.

5.6.2 The duty lawyer will **not** accept instructions for a privately represented accused to:

- Appear in Superior Courts;
- Appear at Disclosure/Committal Hearing;
- Appear At Trial or any Hearing;
- Appear on Trial Allocation List [For Perth Only];
- Appear at Sentence;
- Make contested or complex bail applications/variations; or
- Appear for private lawyer clients who do not seek out the duty lawyer on the date of their appearance.

5.6.3 Private lawyers must email their request to the relevant Legal Aid Office [provided in the **Table in Appendix A, page 12**] with clear and sufficiently detailed instructions a minimum of **one clear business day** before the client's court appearance. Legal Aid will ordinarily decline requests received outside

the specified time frame.

- 5.6.4 Duty lawyers will not look for clients who do not seek the service out and private lawyer utilizing this service are advised to tell their client to attend court at 9.00am and see the duty lawyer.
- 5.6.5 Priority is given to matters where a client is legally aided. Where the matter on which instructions are accepted is legally aided the normal fee will be waived on the understanding that the assigned private lawyer will not charge Legal Aid for that appearance when submitting the invoice.

6. Taking instructions and Providing Advice

6.1 Ability of Client to give instructions

- 6.1.1 The duty lawyer must be satisfied that the client is able to adequately give instructions. It should appear that the client has a sound mental state and not be under the influence of drugs or alcohol.
- 6.1.2 Where a client is under the influence of drugs or alcohol or is otherwise not in a fit condition to provide instructions then an adjournment should be sought.
- 6.1.3 Where a client may be unfit to stand trial then an application for legal aid should be obtained.

6.2 Explain the Scope of the Service

- 6.2.1 The duty lawyer should briefly explain to the client the scope of a duty lawyer service.

6.3 Take Adequate Instructions about the facts

- 6.3.1 The duty lawyer must take adequate instructions about the facts. This includes taking the accused through the statement of material facts before entering pleas of guilty.
- 6.3.2 If the material facts are not available the matter should be stood down or adjourned to obtain them. Alternatively, the duty lawyer may ask for the facts to be read before a plea is taken. The duty lawyer should then take instructions at the bar table as to whether the facts are accepted before the client enters a guilty plea. This latter approach should only be used sparingly.

6.4 Confirm Criminal Record Accurate

A duty lawyer must confirm the client's prior history is accurate with the client prior to giving a plea in mitigation.

6.5 Understand the law

A duty lawyer must have a clear understanding of the relevant law. This

includes giving consideration to and, where appropriate, providing advice on:

- Fitness to stand trial;
- Any available defences;
- The range of sentencing options available and the applicability of those options, including spent conviction order applications;
- Programs such as the Pre-Sentence Opportunity Program, Victim Offender Mediation, the Drug Court and the Family Violence Court;
- The range of applicable penalties; and
- The risk of imprisonment.

6.6 Seek Assistance of Senior Lawyer

6.6.1 A duty lawyer should consult the Duty Lawyer Team Leader, the Solicitor in Charge or a senior lawyer if they require assistance in resolving a query.

6.6.2 Where a duty lawyer is confronted by a situation in court where guidance is required they should ask that the case be stood down while the Duty Lawyer Team Leader, the Solicitor in Charge or a senior lawyer is consulted.

6.7 Be Aware of Other Matters Affecting Bail or Sentence

6.7.1 A duty lawyer should be aware of any matters that may affect the granting of bail or the sentencing outcome such as other charges, parole, current court orders such as suspended sentences, ISOs, CBOs, etc.

6.8 Client's personal circumstances

6.8.1 A duty lawyer must take instructions on the client's personal circumstances including relevant matters in mitigation such as mental impairment.

6.9 Making Referrals

6.9.1 Where a client seeks a referral to a private lawyer by a staff duty lawyer then the client should be referred to the Law Society.

6.10 Aggressive Clients

6.10.1 A duty lawyer may decline to continue to assist an aggressive client.

6.11 Contagious clients

6.11.1 A duty lawyer may decline to assist where it has been disclosed that the client suffers from an illness that would put the duty lawyer at risk of contracting a

contagious disease.

7. Recording Instructions and Advice

The duty lawyer must:

- 7.1 Have a logical and legible system for recording instructions, advice, other information and court outcomes.
- 7.2 Obtain signed, written instructions where appropriate.
- 7.3 Note in writing any advice given regarding services that cannot be provided (eg advised client that a duty lawyer will not be available to represent the client at the trial).
- 7.4 Note in writing any referrals made to other services.
- 7.5 Note in writing any tasks the duty lawyer has asked the client to undertake before the next court appearance (eg obtain a character reference or medical report).
- 7.6 Note in writing any tasks the duty lawyer has agreed to undertake at the request of the court or the prosecutor or another party.
- 7.7 Keep a record of all information relevant to the matter, including electronic communications.

8 Applications for Grants of Legal Aid and Storage of Instruction Sheets

- 8.1 Applications for aid should be taken from clients in custody where time allows. Where there is not time to take the application then the duty lawyer should notify prison-visiting staff to take the application.
- 8.2 Applications for aid for people in custody should be submitted to the Assessing Section of Legal Aid promptly, within one to two days of being taken.
- 8.3 Applications for aid, duty lawyer instruction sheets and related documents are to be held and stored in a confidential manner in the courts and at the office.
- 8.4 As soon as practicable duty lawyer sheets are to be provided to data entry staff for recording on to Legal Aid WA's database and then filing.

9. Activity Recording

- 9.1 In-house duty lawyers are to record their time in Legal Aid's database as soon as practicable.

10. Collecting Fees

- 10.1 In accordance with Treasurer's Instructions 202, persons other than Legal Aid

WA staff are authorised to collect duty lawyer fees must be approved by Legal Aid WA before collecting any fee.

- 10.1.1 The fee for a duty lawyer service is \$20.00 or \$5.00 concession. A concession is generally given only upon presentation of a concession card. No fee is charged for clients in custody.
- 10.1.2 A receipt shall be issued for all duty lawyer fees collected, with a duplicate receipt retained in a receipt book.
- 10.1.3 It is the responsibility of the duty lawyer providing the service to collect the fee wherever possible where the Court Welfare Service is not present or unwilling to collect the fee.
- 10.1.4 Fees for duty lawyers are to be collected at the following courts:
- Perth Magistrates Court
 - Fremantle Magistrates Court
 - Midland Magistrates Court
 - Joondalup Magistrates Court
 - Armadale Magistrates Court
 - Rockingham Magistrates Court
 - Bunbury Magistrates Court
 - Albany Magistrates Court
 - Kalgoorlie Magistrates Court
 - Geraldton Magistrates Court
 - South Hedland Magistrates Court
 - Broome Magistrates Court
 - Kununurra Magistrates Court

10.2 Waiving Fees

- 10.2.1 A Legal Aid WA duty lawyer or other authorised person may waive the duty lawyer fee in the following circumstances:
- The client is eligible to receive services from the Aboriginal Legal Service of WA;
 - The client has previously paid a duty lawyer fee in relation to the matter at hand and requires a straightforward service (such as a remand and continuation of bail on similar terms);
 - The client is being held in custody;

- The client indicates, to the reasonable satisfaction of the duty lawyer or authorised person, that they have no capacity to pay any fee at the time;
- It is the assessment of the duty lawyer or other authorised person that based on the circumstances at the time it would not be appropriate to request the payment of a fee from the client; or
- The client is appearing in a therapeutic/program based court.

10.2.2 The duty lawyer or other authorised person should indicate on the yellow duty lawyer induction form whether a fee waiver has been granted and if so the reason for the waiver.

11. Use of Interpreters

11.1 Where the court has identified the need for an interpreter, the court will endeavour to order an interpreter for the benefit of the accused person.

11.2 Where an interpreter is not available and the duty lawyer considers that the unrepresented accused will be disadvantaged by the absence of an interpreter, the duty lawyer may request the court to book the services of an interpreter.

12. Relationship between Judicial Officers and Duty Lawyers

12.1 Judicial officers may refer unrepresented people directly to a duty lawyer for advice in relation to a charge or representation for a plea in mitigation.

12.2 Duty lawyers will, subject to the guidelines set out in this Protocol, use their best endeavours to accommodate the needs of the unrepresented person and the court.

12.3 When appropriate, judicial officers will assist by providing the duty lawyer with access to the prosecution notice and other relevant materials.

13. Infrastructure

13.1 The court will endeavour to provide the following resources to facilitate the provision of duty lawyer services in the court:

- A room or rooms to accommodate the duty lawyer/s, each with adequate signage, lockable door, desk or work station, telephone and duress alarms;
- Copies of documents to enable the smooth running of the court.

13.2 Legal Aid WA will supply computers and printers for the rooms, as necessary.

[Appendix A:] Table of Court and relevant [contact details] Legal Aid offices

Legal Aid Office	Court/s [Perth/Metro]	Legal Aid Office: Email Address
Perth	Perth, Joondalup Armadale Midland Rockingham Fremantle Mandurah	criminallawdivisionadminstaff@legalaid.wa.gov.au
Perth	Stirling Gardens	stirlinggardens@legalaid.wa.gov.au
	Northam	jack.trainor@legalaid.wa.gov.au
Legal Aid Office	Court/s [Regional]	Legal Aid Office: Email Address
Albany	Albany, Katanning, Narrogin.	albadmin@legalaid.wa.gov.au
Broome	Broome, Derby, Fitzroy Crossing.	broome.admin@legalaid.wa.gov.au
Bunbury	Bunbury, Busselton, Collie, Manjimup, Merredin	bunbury.admin@legalaid.wa.gov.au
Christmas Island	Christmas Island	annie.gray@legalaid.wa.gov.au ; nora.koh@legalaid.wa.gov.au
Geraldton	Geraldton, Carnarvon	geraldton.office@legalaid.wa.gov.au
Kalgoorlie	Kalgoorlie, Coolgardie, Esperance	kalgoorlieAdmin@legalaid.wa.gov.au
Kununurra	Kununurra	kununurraOfficeAdmin@legalaid.wa.gov.au
South Hedland	Port Hedland, Karratha, Roebourne	southhedland-general@legalaid.wa.gov.au

[App B] PRIVATE LAWYER INSTRUCTIONS TO DUTY LAWYER FORM

Client name: File number:
 [if applicable]

Lawyer: Court date:
 Phone:
 Email:

Location:

In custody Appearing in person Appearing by video link

On bail If yes, bail conditions

Co-accused **name** [if app]:

Charge no/s.	Charge/s.	Pleas: G, NG or ENP.	Adjourn.	*Apply for/vary bail. *Bail must be agreed/ Uncontested.	Enter not guilty pleas and request disclosure date OR trial date for Magistrates Court.	Enter guilty pleas [committal to superior court].	Enter not guilty pleas [committal to superior court]. ** Stirling Gardens only.

Instructions [incl **additional** charges/co-accused, **unavailable dates**, **reports** required for Superior Court Pleas of Guilty if applicable]:

Declaration for Instructions [sign and date appropriate option]

I confirm that I _____ act on behalf of _____ on the above charge/s and acknowledge that Duty Lawyer is not counsel on record and is acting as **agent** on this court appearance only.

I have written instructions that my client wishes to plead **guilty** to the above charge/s **and** that the plea/s of guilty is/are appropriate.

Signed _____ **Date** _____

I confirm that I _____ act on behalf _____ on the above charges and acknowledge that Duty Lawyer is not counsel on record and is acting as **agent** on this court appearance only.

I confirm that my client wishes to enter **not guilty** plea/s for the matter/s to be committed to the superior court for trial/set for trial [delete as appropriate] **and** I have advised my client in these terms **and** I confirm that this is appropriate.

Signed _____ **Date** _____

