

Provider Contract for Services and Practice Standards for Legal Aid Lawyers

Consultation response report

Table of Contents

Introduction.....	1
Consultation proposal-Provider Contract	2
Improving and streamlining the Contract	2
Distinguishing between the functions of the Commissioner and the Secretary.....	2
Clarifying the difference between legal aid and specified legal services.....	3
Minor new obligations	3
Fixed fee payments	5
Complaint notification.....	6
Consultation proposal-Practice Standards for Legal Aid Providers.....	7
Keep records of proceeds of proceedings.....	7
Retain all closed legal aid files for a minimum of 7 years	7
Protecting the Commissioner’s interest.....	7
Conclusion	8
Next steps.....	8

Introduction

1. On 13 June 2016, we commenced consultation on proposed changes to the Provider Contract for Services (Contract) and the Practice Standards for Legal Aid Lawyers (Practice Standards) in preparation for the expiry of the contract on 30 November 2016.
2. We sent a consultation document to the New Zealand Law Society (NZLS), the Criminal Bar Association (CBA), the Auckland District Law Society (ADLS) and the New Zealand Bar Association (NZBA), with a request for their feedback on proposed changes to the Contract and Practice Standards.

3. We notified legal aid providers about the proposed changes on the 'What's New for Legal Aid Providers' and 'Consultation' pages on the Ministry of Justice website on 13 June 2016. The NZLS also published a link to our consultation document in their weekly e-newsletter.
4. The consultation period ended on 25 July 2016. We received feedback from the NZLS, one private law firm and one individual lawyer.
5. The finalised contract documents take these consultation results into account. The changes that we have made in response to feedback from the legal profession are included in the discussion below. The final Contract is presented as **Appendix 1** and the final Practice Standards are set out in **Appendix 2**.

Consultation proposal-Provider Contract

Improving and streamlining the Contract

6. We proposed changes to the Contract to make it clearer and more streamlined. These changes did not substantively alter existing rights and obligations for either party. Instead, a plain English rewrite created a more accessible and user-friendly document. The rewrite also brought together parts of the Contract that are conceptually linked.
7. The proposed changes clarified existing rights and obligations. Some clauses in the Contract were amended to link the Contract to the relevant provisions of the relevant legislation, regulations, Practice Standards, and operational policies. These links will help providers find the correct policy relevant to any particular issue and help to improve their understanding of legal aid processes.

Response

8. The NZLS commented that overall it *"considers that the proposed changes achieve the purpose of improving and streamlining the provider contract in a way that will help providers to understand their rights and obligations."*

Our response

9. The proposed changes have been made.

Distinguishing between the functions of the Commissioner and the Secretary

10. We proposed changes to the Contract to distinguish more clearly between the functions of the Legal Services Commissioner, such as assignment of legal aid cases, and the functions of the Secretary, such as purchasing high-quality legal services. The changes emphasise that these different functions are separate and independent under the Legal Services Act 2011 (Act). The re-drafted Contract also removed references to the 'Ministry', as the Contract is with the Secretary.

Response

11. No comments were received about this change.

Our response

12. The proposed changes have been made.

Clarifying the difference between legal aid and specified legal services

13. The new Contract distinguishes more clearly between legal aid and specified legal services (ie the Family Legal Advice Service, the Duty Solicitor service and the Police Detention Legal Advice (PDLA) service). An example is the new clause 4.9. This covers replacements for 'rostered duties' on the duty lawyer and PDLA services. These obligations are different from the general obligations around delegation of work that are set out in the remainder of clause 4, but are not new.

Response

14. No comments were received about this change.

Our response

15. The proposed changes have been made.

Minor new obligations

16. Six minor new obligations for providers were proposed in the revised Contract.

1. Notify the Secretary about bankruptcy

17. We proposed a new obligation for providers to advise the Secretary if they have been made bankrupt or if the provider's firm has been made insolvent (clauses 3.8.6 and 3.8.7).
18. There is nothing in the legislation, regulations, the Contract or policies that would prevent a provider from continuing to provide legal aid or legal services solely because they are made bankrupt or their firm goes into liquidation. However, the new obligation to notify us would avoid the occasional situation when the Secretary may inadvertently make payments to a provider, into an account that is not allowed by the Official Assignee.

Response

19. No comments were received about this change.

Our response

20. The proposed changes have been made.

2. Notify the Secretary about judicial sanctions

21. We proposed a new obligation in clause 3.8.4 to notify the Secretary of any sanction imposed by a judicial officer. This change would help to keep the Secretary informed about potential quality concerns without being onerous for providers.

Response

22. The Law Society supported the obligation to notify where a serious issue is raised by a judge about the competence of a provider. They noted the importance of ensuring the provider

understands what constitutes a “sanction”. The Law Society recommended that the obligation be clarified by including a definition of “sanction” in clause 26 of the provider contract.

Our response

23. We considered this suggestion a useful one, and have included a definition of judicial sanction in clause 26 of the provider contract.

24. The definition of “judicial sanction” is:

A penalty imposed by a member of the New Zealand judiciary, as a result of dissatisfaction with the provider’s conduct. Penalties may include, but are not limited to formal written warnings, fines or referral to the New Zealand Law Society.

3. Keep records of proceeds of proceedings

25. We proposed a new clause 3.7 in the Contract to cross-reference and clarify a provider’s obligation under section 107 of the Act to protect the interests of the Legal Services Commissioner. This obligation is not new, but some providers have been unclear about their obligations. From time-to-time complaints have been raised on this issue. So that this statutory requirement can function fairly for both parties, we proposed that providers must keep all records of proceeds of proceedings (clause 3.12.8). This new record-keeping obligation is good professional practice and will not be onerous for providers.

Response

26. No comments were received about this change.

Our response

27. The proposed changes have been made.

4. Firm’s undertaking to protect interests of the Commissioner

28. We proposed reflecting the requirement to protect the interests of the Commissioner in relation to proceeds of proceedings, in a new paragraph in the Firm’s Undertaking in Schedule 3 of the Contract.

29. As well as the provider protecting the interests of the Commissioner in relation to proceeds of proceedings, we proposed that the provider’s firm also undertakes to take all reasonable steps to protect the interests of the Commissioner.

Response

30. One respondent commented that the proposed provision creates an unreasonably high standard for the provider.

Our response

31. The proposed paragraphs 3.7.1 and 3.7.2 of the amended Contract reflect the current wording of section 107(2) of the Act. The contractual provision is in effect a cross-reference to the Act and is a reasonable and helpful addition to the contract.

32. The proposed changes have been made.

5. Inform the Commissioner about costs orders

33. We proposed a new subclause 3.10.3 to require the provider to inform the Commissioner when the court makes, or is considering making an order relating to costs under section 45 of the Act.

Response

34. The Law Society supported timely notification to the Commissioner where a costs order has been made. However, an obligation to notify where the court is 'considering' making an order is likely to be practically inefficient as it may not be clear whether the court is merely raising the possibility of a costs order rather than actually intending to make an order. The Law Society recommended deleting the proposed obligation to notify the Commissioner the court is considering making a costs order.

35. Another respondent supported the intent of this provision. They noted that "it should also be reflected in the obligations on the legal aid recipient", and raised a potential difficulty in creating contractual obligations on the provider that do not exist at law in terms of the provider's contractual obligations to the Commissioner and their duties to the client and to the Court.

Our response

36. We accept the feedback and have amended this provision to state the provider must notify the Commissioner if they become aware "the *Court has made an order relating to costs under section 45 of the Act*".

6. Inform the Commissioner about decreased prospects of success

37. We proposed a new obligation to inform the Legal Services Commissioner of any matter (civil matters only), that materially decreases the aided person's prospects of success at first instance, or the merits of any appeal. This will assist the Legal Services Commissioner in considering whether legal aid should continue.

Response

38. A respondent made several comments on this proposed amendment. In summary, they were concerned that the proposed amendment created a tension between the provider's obligations to their client, and their obligations to Legal Aid Services.

Our response

39. After carefully considering the feedback we decided to continue with this proposal. We believe providers' obligations are clear under the proposed amendment, and we do not believe a conflict arises between the provider's obligations to the client and to Legal Aid Services.

Fixed fee payments

40. One response sought to clarify the payment of fixed fee when a provider leaves a firm. This issue was not raised in the consultation document and no specific changes were proposed to the existing Contract.

41. Clause 6.17 of the proposed Contract details what happens to payments still outstanding for work done by a provider when a provider leaves their firm prior to the payment being made.

Response

42. The respondent noted the policy and the proposed contract were unhelpful about fixed fee work undertaken prior to the departure of the provider from a firm. They considered it is inadequate to leave this as a matter for the firm and the provider to resolve.

Our response

43. We consider this respondent has made a helpful point. We recognise that clarity about the apportionment of fixed fees between the provider and their former firm is desirable, and would add certainty and clarity to the provider/firm relationship.
44. We have added a new clause 6.18 to the Contract. The provider and their firm will be able to enter into an agreement specifying how fixed fee payments not yet made are to be divided in the event of a provider leaving the firm. The new clause in the contract is framed on an exceptions basis, allowing the provider and the Secretary to come to an alternate arrangement.

Complaint notification

45. We received a response about notifying providers when a complaint is made about them. This issue was not raised in the consultation document.

46. Clause 9.1.1 of the proposed Contract stated:

The Secretary will notify the Provider of any Legal Aid Complaint received by the Secretary as soon as reasonably practicable, unless the Secretary does not intend to take the Complaint further;

Response

47. The respondent commented that the Ministry's current discretion in not forwarding complaints to the provider where the Ministry doesn't intend to proceed with the complaint is not ideal. They consider that natural justice mandates the provider being notified that a complaint has been made against them.

Our response

48. We accept this feedback is helpful. The Ministry's Complaints Management policy is structured in accordance with the principles of natural justice. Accordingly, clause 9.1.1 now states:

The Secretary will notify the Provider of any Legal Aid Complaint received by the Secretary as soon as reasonably practicable. The Secretary will notify the provider whether it intends to take the Complaint any further.

49. We will also amend the existing Complaint Management policy to reflect the new clause 9.1.1 of the Contract.

Consultation proposal-Practice Standards for Legal Aid Providers

50. We proposed three minor changes to the Practice Standards, to reflect current or proposed changes to the contract.

Keep records of proceeds of proceedings

51. We proposed requiring providers to maintain records of all proceeds of proceedings and associated transactions in a new Standard 11.2.6.

Response

52. No comments were received about this proposed change.

Our response

53. The proposed changes have been made.

Retain all closed legal aid files for a minimum of 7 years

54. We proposed requiring providers to retain all closed legal aid files for a minimum of 7 years in a new Standard 11.5. This is currently in the Contract, so this addition aligns the Practice Standards with the Contract.

Response

55. No comments were received about this proposed change.

Our response

56. The proposed changes have been made.

Protecting the Commissioner's interest

57. We provided more detail about how a provider must protect the Commissioner's interests under section 107 of the Act in a new Standard 24. The proposed standard sets out practical steps providers must take to protect the Commissioner's interests, which will help to ensure legal aid clients meet their obligations to repay legal aid debt.

58. These proposed practical steps cross-reference requirements found in section 107 of the Act.

59. Proposed Standard 24.1 required the provider to take all reasonable steps to protect the interests of the Commissioner under a charge (Section 107 (2) (a) and (b)).

60. Proposed Standard 24.2 required the provider to advise the Commissioner if they are aware that a legally aided person has or is attempting to avoid making payments to the Commissioner from proceeds of proceedings (section 107 (2) (c) of the Act.)

61. Standard 24.3 required the provider to ensure that any instructing solicitor or any other relevant person is aware of the obligations contained in Standards 24.1 and 24.2.

62. Proposed Standard 24.4 specified that a provider must:

Ensure that any proceeds of proceedings are received by the lawyer or their firm, and particularly that any proceeds in the form of money is paid into the lawyer/firm's trust account.

63. Proposed Standard 24.5 required that a provider makes various checks as to the status of the legally aided person's debt before distributing proceeds of proceedings, or disposing of any property subject to a charge in favour of the Commissioner.

Response

64. We did not receive any comment about Standards 24.1 to 24.3, or Standard 24.5.

65. The NZLS noted that the proposed obligation in Standard 24.4 is expressed in mandatory terms. They noted in some circumstances, it will be beyond the power of the provider to control the payment of proceeds of proceedings into his or her trust account. For example, where the other party pays the proceeds of proceedings direct to the provider's client, contrary to arrangements made between the provider and the other party's lawyer. The Law Society recommended that this obligation be amended to provide that the lawyer "must take all reasonable steps to ensure".

Our response

66. We considered the NZLS comment a useful one. The obligation on the provider has been amended to state the lawyer must

Take all reasonable steps to ensure that any proceeds of proceedings are received by the lawyer or their firm and particularly that any proceeds in the form of money is paid into the lawyer/firm's trust account.

Conclusion

67. The consultation received has helped clarify and improve the proposed changes to the Provider Contract for Services and the Practice Standards for Legal Aid Lawyers. We believe that the changes will make these documents more effective, transparent, and robust. We are grateful for the feedback received. The new Contract and Practice Standards are now available on the Ministry's website.

Next steps

68. We intend to email the new Contract and accompanying new Practice Standards to all active legal aid providers in mid-October 2016. This will allow providers sufficient time to read and sign the Contract before the current contract expires on 30 November 2016. It would be appreciated if providers emailed back the signed Contract well before 30 November 2016.

69. As we receive the signed Contracts we will execute them on behalf of the Secretary for Justice and email the final document back to providers for their records.