

Consultation Document

Legal Aid Provider Contract for Services and
Practice Standards – renewal and refresh

June 2016



[New Zealand Government](#)

We are seeking your feedback

We'd like your feedback about proposed changes to the Contract for the Provision of Legal Aid Services and Specified Legal Services (Contract) and the Practice Standards for Legal Aid Providers (Practice Standards).

The current Contract expires on 30 November 2016. We anticipate sending a new Contract to all active legal aid providers in the middle of October 2016. This will give legal aid providers 6-7 weeks to sign and return the Contract to the Ministry of Justice.

Please email your feedback on the proposed changes to legalaidprovider@justice.govt.nz by **5pm 25 July 2016**.

Contents

- Background..... 1**
- Proposed changes to the Contract 2**
 - Summary of changes 2
 - Improving and streamlining the document..... 3
 - Distinguishing the Commissioner and the Secretary 3
 - Clarifying and linking to existing rights and obligations..... 3
 - Aligning the Contract to approvals..... 4
 - Reflecting the new Family Legal Advice Service..... 4
 - Minor new obligations 4
- Proposed changes to the Practice Standards 7**
- Next steps..... 8**
- Appendix 1: Current Contract 9**
- Appendix 2: Proposed Contract 10**
- Appendix 3: Summary of proposed changes to Contract 11**
- Appendix 4 Proposed changes to Practice Standards 12**

Background

1. The Contract sets out rights and obligations for each party in the provision of legal aid and the Family Legal Advice Service, the Duty Solicitor service and the Police Detention Legal Advice service. The current Contract (in **Appendix 1**) came into effect on 1 December 2013 and is substantially the same as the 2012 version.
2. The Practice Standards were first published in October 2011. They contain the principles and standards expected of legal aid lawyers to ensure the effective and efficient delivery of legal aid services.
3. Consultation with legal aid providers and the legal professional bodies, the New Zealand Law Society, the Auckland District Law Society, the New Zealand Bar Association and the Criminal Bar Association, will help ensure the final Contract and Practice Standards are fit for purpose and fair for providers.

Proposed changes to the Contract

Summary of changes

4. The proposed Contract is presented in **Appendix 2**.
5. We propose a 3-year Contract that expires on 30 November 2019. This is similar to previous contractual periods.
6. As the Contract is due to expire in November this year, we're taking the opportunity to improve the document. We're proposing a number of minor and technical changes that improve and streamline the Contract. It might look different, but nothing of substance has changed. Importantly, there are no substantive new obligations on providers.
7. We propose changes to the Contract to more accurately distinguish between the functions of the Legal Services Commissioner and the Secretary for Justice.
8. We also want to make the Contract a more useful base document that helps providers understand their rights and obligations. The proposed Contract therefore contains cross-references to relevant provisions of the Legal Services Act 2011, associated regulations, the Practice Standards and operational policies.
9. One important proposed change is that we have aligned the Contract to provider approvals. Essentially, if a provider is approved, they should have a contract. Other changes reflect the new Family Legal Advice Service.
10. We are proposing some minor new obligations for providers that reflect good professional practice, and that we think won't be onerous for providers. These are:
 - 10.1.1. to advise the Secretary for Justice if the provider has been made bankrupt or if the provider's firm has been placed into liquidation
 - 10.1.2. to keep records of proceeds of proceedings
 - 10.1.3. where the provider is an employee of a firm, that the firm undertakes to protect the interests of the Legal Services Commissioner in relation to charges or proceeds of proceedings
 - 10.1.4. to notify the Secretary for Justice about any judicial sanctions imposed on the provider
 - 10.1.5. to inform the Legal Services Commissioner if the court makes, or considering making, a costs order under section 45 of the Act
 - 10.1.6. to inform the Legal Services Commissioner of matters that materially decrease the aided person's prospects of success at first instance (civil only), or the merits of any appeal.

11. A detailed table comparing the existing and proposed contracts is presented in **Appendix 3**. The rationales for the changes are explained below.

Improving and streamlining the document

12. We propose changes to the Contract to make it clearer and more streamlined than the current one, without altering the substantive rights and obligations of legal aid providers. Many of the clauses in the Contract have been rewritten in plain English. Our intention is to create a document that is more accessible.
13. The rewrite brings together parts of the Contract that are conceptually linked, in order to enhance its internal coherence. For example, all sub-clauses relating to payments have been brought together under clause 6, but this hasn't materially altered any rights or obligations.

Distinguishing the Commissioner and the Secretary

14. The proposed revisions to the Contract more clearly distinguish between the functions of the Legal Services Commissioner and the Secretary for Justice. These changes reflect their different functions under the Legal Services Act 2011. In particular, the Commissioner must make decisions about individual grants of legal aid independent of the Secretary for Justice.
15. The current contract often refers to the 'Ministry' instead of the Secretary or the Commissioner, blurring the distinction between them. This is not ideal, especially given that the Contract is with the Secretary for Justice, not the Legal Services Commissioner, and that separate teams within the Ministry of Justice are responsible for their different functions. For example, new clauses 3.8 and 3.9 set out matters that the provider must notify the Secretary and the Commissioner of respectively. This differs from the current contract, which requires the provider to notify the 'Ministry'.

Clarifying and linking to existing rights and obligations

16. Some clauses in the Contract have been amended to clarify providers' existing rights and obligations and cross-reference to relevant provisions of the Legal Services Act 2011, associated regulations, the Practice Standards, and operational policies. These cross-references are intended to help providers to find relevant information and improve their understanding of legal aid processes. It is important to note that the cross-references are to existing, not new, obligations.
17. Examples of proposed cross-references include:
 - 17.1.1. inserting a new clause 3.7 to clarify providers' obligations to protect the interests of the Legal Services Commissioner in relation to charges and proceeds of proceedings under section 107 of the Legal Services Act 2011
 - 17.1.2. more clearly referencing clauses of the Contract to relevant operational policies, for example, clause 4 (delegation of work) clause 7 (Audits and Quality Assurance Checks), clause 9 (Legal Aid Complaints) and clause 10 (Cancellation and variation of approvals)

18. For the avoidance of doubt, the revised Contract clarifies existing rights and obligations. Examples include:

- 18.1.1. inserting a new clause 3.5 to explicitly refer to the requirement for providers to maintain standards for approval, primarily competence, service delivery systems, and being a fit and proper person. Some requirements, such as recent experience, are only relevant at the time that approval or reapproval is sought
- 18.1.2. a new clause 6.17 that clarifies what happens when a provider leaves a firm, and the process for payment for work undertaken prior to their leaving.

Aligning the Contract to approvals

19. The current contract allows the Secretary for Justice and the provider to cancel the contract in situations where the provider would still be approved under the Act. This does not actually happen in practice and the contract and approval are so inextricably linked that it doesn't make sense to allow for it. Consequently, the proposed changes to the contract include only allowing the contract to be cancelled if the provider's approvals are cancelled or expire.

Reflecting the new Family Legal Advice Service

20. The existing contract contains separate provisions for Legal Aid Services and Specified Legal Services that reflect the differences between them. However, the current Contract predates the introduction of a new Specified Legal Service – the Family Legal Advice Service – in March 2014.
21. The Family Legal Advice Service differs from the other Specified Legal Services (the Duty Solicitor service and the Police Detention Legal Advice service). To reflect this difference and incorporate the new service we have amended the definition of 'Assignment' (new paragraph (b) of that definition).

Minor new obligations

22. The revised Contract proposes some minor new obligations that are outlined below. The proposed new obligations reflect good professional practice and we do not think they will be onerous for providers.

Notify the Secretary about bankruptcy or liquidation

23. We propose a new obligation in clauses 3.8.6 and 3.8.7 of the Contract to advise the Secretary for Justice if the provider has been made bankrupt or if the provider's firm has been placed into liquidation.

24. There is nothing in the Legal Services Act 2011, the Legal Services Regulations 2011, the contract (either currently or the proposed revisions), or operational policies that would prevent a provider from continuing to provide legal aid or specified legal services solely because they're made bankrupt or their firm goes into liquidation. However, the new obligation to notify bankruptcy/liquidation will avoid the occasional situation where the Secretary inadvertently pays into an account that is not approved by the Official Assignee.

Notify the Secretary about judicial sanctions

25. We propose a new obligation in clause 3.8.3 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.

Keep records of proceeds of proceedings

26. The obligation to protect the interests of the Legal Services Commissioner in respect of proceeds of proceedings under section 107 of the Act isn't new. However some providers have been unclear about their obligations, and from time-to-time, there have been concerns about this issue. New clause 3.7 is intended to ensure providers are aware of their obligations.
27. We are also proposing that providers be required to keep records of proceeds of proceedings (new clause 3.12.8). This is good professional practice and will assist in resolving any concerns about whether the provider has properly protected the interests of the Legal Services Commissioner.

Firm's undertaking to protect interests of the Commissioner

28. We propose new paragraphs (5 and 6) in the Firm's Undertaking in Schedule 3 of the Contract that mirror providers' obligations to protect the interests of the Legal Services Commissioner under section 107 of the Act.
29. We propose that the firm also undertakes to take all reasonable steps to protect the interests of the Commissioner with regard to charges and proceeds of proceedings. This is particularly relevant when the provider has left the firm.
30. This change is intended to help to avoid the occasional situation when firms have inadvertently paid out proceeds of proceedings from their trust account without first checking whether the client has a legal aid debt. This issue has arisen on occasion when finalising Relationship Property matters.

Inform the Commissioner about costs orders

31. We propose a new subclause 3.10.3 to require the provider to inform the Commissioner when the court makes, or considering making, a costs order under section 45 of the Act. This new obligation would help to avoid situations where the Commissioner is 'surprised' by previously unanticipated costs commitments.

Inform the Commissioner about decreased prospects of success

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

Proposed changes to the Practice Standards

33. There are 3 minor changes proposed to the Practice Standards. These are:
 - 33.1.1. an obligation to maintain records of all proceeds of proceedings and associated transactions (new standard 11.2.6)
 - 33.1.2. an obligation to retain all closed legal aid files for at least 7 years (new standard 11.5). This obligation is already in the existing Contract and the proposed addition will simply align the Contract and Practice Standards
 - 33.1.3. more detail about how a provider can protect the Legal Services Commissioner's interests under section 107 of the Legal Services Act (new standard 24).
34. The proposed changes to the Practice Standards simply reflect current or proposed obligations under the Contract. The 3 changes are presented as highlighted text in the proposed Practice Standards in **Appendix 4**.

Next steps

35. Your feedback is invited on the proposed changes to the Contract and Practice Standards. Please email your feedback to legalaidprovider@justice.govt.nz by 5pm, 25 July 2016.
36. Your feedback will be carefully considered before the Contract and Practice Standards are finalised. We plan to send the Contract and the associated Practice Standards to all legal aid and legal services providers in mid-October 2016 for their signing and return to us by 30 November 2016.

Appendix 1: Current Contract

Appendix 2: Proposed Contract

Appendix 3: Summary of proposed changes to Contract

Appendix 4 Proposed changes to Practice Standards

The proposed new standards are presented as highlighted text

Ministry of Justice
Tāhū o te Ture

justice.govt.nz

National Office
Justice Centre | 19 Aitken St
DX SX10088 | Wellington | New Zealand



New Zealand Government

June 2016