



2 November 2011

Stuart White
Legal Aid Services
Ministry of Justice
SX10125
WELLINGTON 6145

Dear Stuart

Legal Aid Provider Contract

Thank you for the opportunity to comment on the Legal Aid Provider Contract.

The New Zealand Law Society has considered the draft contract for the provision of legal aid services prepared by the Ministry, and has sought comments from a range of groups within the Law Society.

There are a number of general concerns that have been raised by practitioners, as well as specific issues in relation to the terms of the contract. The matters of general concern are identified below, followed by a more detailed consideration of clauses in the contract.

Professional obligations

Legal aid is a statutory scheme, and the primary source of all obligations must be the Legal Services Act 2011. The Law Society considers that it is undesirable to duplicate statutory obligations in the contract, with the potential for conflict between the contract and the statute.

It is also important to recognise that all lawyers are professionally regulated, and subject to professional obligations. These obligations should be taken as a starting point, and should not be the subject of contractual regulation.

The Ministry is not a professional regulatory body, and is not in a position to regulate or enforce professional disciplinary matters. These are matters that are properly left to established disciplinary bodies, and should not form part of a contract.

The Law Society considers that the contract for the provision of legal services should not go further than is necessary to bring about a contractual relationship between the provider and the Ministry. Given the existing statutory and professional obligations, the contract should be a simple one.

Micro-management

In a number of respects, the draft contract seeks to micro-manage the relationship between the Ministry and providers. This approach is likely to create additional frustration and delays without conferring substantial benefits. The Law Society considers that such micro-management is unnecessary in the professional context and should be avoided.

Civil service obligations

The contract needs to recognise that providers are not civil servants, but are professionals entering into independent service contracts with the Ministry. It is wholly inappropriate to seek to impose civil service obligations in a contract of this nature.

The Law Society is strongly opposed to any contractual obligation that infringes the New Zealand Bill of Rights Act 1990. It considers that the “gagging provisions” proposed by the Ministry are misconceived and have no place in the contract.

Definitions

The definition of “day” would be better expressed as “working day” to show what is intended. There should also be recognition of the fact that long holidays are taken over the Christmas period when it is unreasonable to expect normal activities to continue. It would be preferable for the contract to be aligned with court holidays.

“Contract” has an expanded definition when compared with the old contract. The Law Society is concerned that documents published on the website or changed on the website might not be properly promulgated to legal aid providers and that providers should not have to abide by documents or policy changes that are not properly promulgated.

“Disbursement” is defined in accordance with the Grants Manual, which means the Ministry has the power to change the contract unilaterally. There should at the very least be a notice period for any such changes.

“Specified Legal Services” should be defined as having the same meaning as in *section 4* of the Act.

It is not clear why a definition of “Specified Period” is required. The only relevance appears to be in relation to remedying a breach of the contract, and the period should therefore be stipulated in the relevant clause of the contract. It is also entirely unsatisfactory to define a period as “normally 10 Days” subject to the Ministry’s opinion. This uncertainty is an inappropriate basis for a contractual obligation, and an important matter of this nature cannot properly be left to the subjective view of an official.

Consideration

The stipulation of a \$1 consideration in clause 2.1 is meaningless, and would not in any event amount to good consideration at law. The contract amounts to an exchange of promises, and there should be no need for further consideration unless it is considered that the Secretary is not actually giving anything of value under the contract.

The Law Society believes that clause 2.5.1 is not appropriate, and that there should be an obligation on the Secretary to assign legal aid matters on an appropriate and even-handed basis.

The Law Society is concerned about the wording of clause 2.5.3. In the Law Society’s view the contract does confer a right to provide legal aid services. That is the only point of entering into the contract from the provider’s perspective.

General obligations

The Law Society can see no basis for the inclusion of clauses 5.2 and 5.14 in the contract and is strongly opposed to these clauses. As noted above, providers are not civil servants and cannot be expected to behave as civil servants. In accordance with the concept of open justice, the Ministry and the Commissioner should not be immune from public scrutiny.

The Law Society considers that the priorities in clause 5.3 need to be re-ordered in order to reflect the correct legal position. The first priority is the professional obligations imposed on providers by the Lawyers and Conveyancers Act 2006 and regulations made under that Act. Clause 5.3.1 should be reworded to reflect this.

The second priority is the Legal Services Act 2011 and regulations made under it. The third priority should be the contractual obligations, which have the force of law. Practice standards and policies, manuals etc do not have the force of law and should not be elevated above legal obligations. It is also critically important that all policies or guidelines relied on by the Ministry be properly promulgated (this issue is discussed further below).

Clause 5.5 requires providers to advise the Ministry where inaccuracies are discovered in the application. The Law Society considers that the application is made by the applicant, not by the provider, and providers should not be made responsible for the information provided by the applicant. The proposed clause raises issues of breach of privilege and breach of confidentiality, and the Law Society considers that it raises more difficulties than it solves. It considers that the contract is not the appropriate place to regulate the correctness of applications for legal aid.

Clause 5.6.4 is too broadly worded. The Law Society is aware that there will be an obligation on the Tribunal to provide copies of orders but many orders made by the Tribunal are subject to restrictions on publication, and this obligation may result in a breach of privacy. Any disclosure should be expressly subject to restrictions imposed by the Tribunal.

Clause 5.6.6 is too broadly expressed, and the Law Society considers that it should be limited to “criminal offences”. To avoid any confusion “minor traffic convictions” ought to be excluded as in the previous contract.

The Law Society considers that clause 5.7 is an example of unworkable and undesirable micro-management. The Law Society considers that these matters do not require contractual regulation. In particular:

- The use of unpaid services is of benefit to both the client and the Ministry. It also enables providers to train aspiring providers so as to be able to become approved providers. As the provider is ultimately professionally responsible for the work, there does not seem to be any need for this matter to be regulated by the Ministry.
- It seems unnecessary to require that every provider who provides services on a particular file has to be specifically approved by the Secretary for that category of services. In the past, a process for minor cross-overs was recognised, and the Law Society considers there are benefits in this approach. Where low-level work is involved, it is more efficient to use the services of another readily available provider rather than perhaps having to engage another firm, or incur additional costs by having a higher paid provider doing the work. Where expert advice is sought, this rule may prevent the involvement of a QC who does not have the requisite approval. The micro-management approach prevents issues being resolved sensibly in particular situations.

Clause 5.9 also involves micro-management, and creates a situation the Law Society regards as unworkable. As it is currently worded even leave of a day to attend a seminar would be covered. Arrangements for leave are primarily matters to be managed by a provider in a sensible and professional way. In most cases, leave arrangements are factored into applications for fixtures, and will not interfere with the proper carrying out of legal services. Where longer periods of leave are involved, all providers are required to make appropriate arrangements to ensure that their absence is covered. This should necessitate the involvement of the Ministry, and certainly does not provide grounds for

reassignment. As it stands, the clause applies to absences of any duration, and is quite unworkable. The Law Society considers that there is no need for this clause. The situation is different where a provider considers that he or she will be unable to complete a legal aid assignment. In that situation, the Ministry must obviously be able to give proper notice.

Clause 5.11 is too broadly worded. While inability to carry out a particular assignment is clearly of concern to the Ministry, general unavailability to take on legal work for a period is not. The Ministry does not assign civil legal aid work to providers – the application comes from the person seeking aid. In cases where the Ministry does allocate work to providers, the obligation to give notice should only apply where the provider will be unavailable for a substantial length of time.

Clause 5.12 involves micro-management, and overlaps substantially with the professional obligations resting on all providers. The Law Society does not see the need for additional contractual regulation of this matter. As it stands, the clause is likely to impose substantial costs if “evidence of supervision” is to be recorded in the detail suggested. This is likely to lead to claims for additional remuneration. In the case of fixed fee arrangements, this would impose substantial additional costs for no recompense.

Clause 5.13 is significantly more onerous than the present contract, which requires retention for 3 years. The Law Society does not see why such a long retention period is required by the Ministry. Absent any complaint, the Ministry could generally be expected to audit recent files, and it appears to be unduly onerous to require retention for more than 3 years, particularly as there is no funding for such retention.

Clause 5.15.1 is repetitive and awkward and should be reworded:

The Provider, being a lawyer in terms of the Lawyers and Conveyancers Act 2006, is no longer entitled to practise as a lawyer.

Reassignment

Clause 6.1 as worded covers a large number of possibilities. It is the “responsibility” as lead provider that has to remain with the provider. It is questionable whether this needs to be stated in the contract at all, because the Ministry has its own rules for reassignment and deals exclusively with the appointed lead provider.

Clause 6.3 requires the preparation of a summary of actions taken. It should be specified that the legal aid grant will be amended to include the payment for this summary.

It is not clear precisely what clause 6.5 is intended to regulate. At present it covers any absence of the provider from the office, and is wholly unworkable. There does not appear to be any need for this clause at all.

Ministry’s obligations

By rights the obligations should be those of the Secretary as the contracting party. These obligations are noted for their restrictive and vague nature in comparison with those imposed on providers, and there does not seem to be any reason why mutually consistent obligations should not be expected. As in the case of providers, there should be a requirement for the Secretary to carry out obligations in an effective and efficient manner.

There should be contractual obligations on the Secretary:

- To respond to applications and correspondence within 10 working days.
- To provide ready and clear access to all policies, guidelines and manuals relied on by the Secretary.

- To give at least 20 working days' notice of any proposed change to a policy, guideline or manual.
- To pay invoices within 15 working days unless notice is given that the invoice is subject to review.
- To pay interest on overdue amounts owing by the Secretary.

Complaints

There should be a specific time frame for providing notice of complaint to a provider. The time frames in clause 8.2 for response by providers are considered by the Law Society to be too short. They should be 10 and 20 days respectively. The time in clause 8.3 should be 20 days.

It is unclear why the consent of the complainant is required to advise the provider of the complaint. Submission of the complaint should be on the basis that the response of the provider will be requested.

Payments

Clause 9.1 refers to a matter regulated by statute and seems unnecessary.

Clauses 9.4 and 9.5 similarly deal with matters regulated by statute and would be better omitted. As clause 9.4 stands it suggests that an amendment may not be sought at the same time as rendering an invoice. This is an unworkable arrangement, and contrary to the way in which the Ministry currently operates.

Clause 9.18 does not seem to cover the situation where a fixed fee is payable. Nor does it allow for the situations where the fees set by the Secretary are in fact unreasonable. As the issue of billing is regulated by professional rules, this clause appears unnecessary.

Quality

The Law Society does not consider it reasonable that providers should be required to pay for audits carried out by the Secretary. Providers are already subject to their own professional requirements, and are paid less than commercial rates for legal aid work. The Secretary should bear the cost of any audits considered necessary.

Breach of contract

Clause 11.1 makes breach of contract a matter for the subjective opinion of the Secretary. The Law Society does not regard that as an appropriate form of contractual regulation. A breach of contract is something that is determined by the court on an objective basis, and this clause should simply refer to the situation where there has been a breach of the contract.

Clause 11.2 treats all breaches of contract in the same way, regardless of the seriousness. Termination of the contract should be reserved for those breaches that are so serious that they cannot otherwise be remedied.

Clause 11.4.2 treats all failures to comply with practice standards in the same way, regardless of consequences. This power should be limited to those situations where there is a significant impact on the legally aided person.

Clause 11.4.4 makes no allowance for situations of legal professional privilege, or conflicts of interest. It should be subject to such obligations.

Cancellation and termination

The Law Society considers that changes in government policy do not justify summary termination of the contract. There should be notice in the ordinary way.

Clause 13.1 takes no account of the professional obligations of a provider to the court. Immediate termination could result in substantial disadvantage to the client, and the clause should allow for orderly withdrawal.

It is not clear what approval is referred to in clause 13.2. The definition of "Approval" refers to the instrument of approval. This has nothing to do with disbursements. The clause seems to rule out the possibility of an amendment that has not yet been granted.

Disputes

The Law Society does not consider that all matters should have to go to alternative dispute resolution. This should be a matter for the agreement of the parties.

There should also be no predetermination of who pays the costs of alternative dispute resolution as stated in clause 14.4.

Relationship

The position of the Ministry is not clearly stated in the contract. The Ministry is referred to every now and then, and is occasionally given a role to perform. It would be preferable for the position to be stated clearly at the outset, particularly given clause 24.

Entire agreement

There are occasionally arrangements made with providers that fall outside this contract. It is not clear how those fit with this clause.

Liability

It is not clear what is being agreed in clause 21.1. The Secretary can only reach agreement with providers, not the world at large.

Notices

Clause 25.2 should read "to the applicable contract".

The Law Society hopes that the above comments are of assistance to the Ministry of Justice.

Yours sincerely



Anne Stevens
Vice President