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### **Legal Aid Supervised Provider Policy – proposed changes**

#### **Introduction**

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Ministry of Justice's proposed changes to the supervised provider policy in the Legal Aid Granting Decisions Manual.
2. The move to a fixed fee scheme for legal aid has required the profession to adapt how legal services are provided and to adjust to a new system of funding for the provision of those services. The Law Society supports a supervised provider policy that is both clear and flexible enough to ensure that:
  - recipients of legal aid receive quality advice and service;
  - the provision of legal aid is economically viable and therefore sustainable; and
  - junior staff receive appropriate supervision and guidance so they are encouraged to pursue careers as competent lawyers.
3. One of the difficulties with the existing policy is the lack of a clear definition of "supervision" and "minor matters". Supervision has been interpreted differently by different lead providers – from requiring their physical presence with the supervised provider, to a more general oversight and availability to provide guidance. This has, in some cases, caused confusion as to what tasks a supervised provider may undertake. It has resulted in either senior providers being reluctant to hire junior staff because the restrictions on supervised providers appear too onerous, or senior providers undertaking tasks that would be better left to a supervised provider so they can gain practical experience.
4. The existing policy anticipates that the lead provider works primarily on the file and merely delegates tasks to the supervised provider. This creates a tension between complying with the policy, the traditional file management in a law practice, client expectations (including who their lawyer is), and enabling supervised providers to gain necessary skills.
5. In practice, the nature of the supervision provided varies as the supervised provider gains practical skills and experience. It is common for a supervised provider with some experience to attend with clients to take instructions and give advice and to attend judicial events by themselves. The role of the lead

provider is to ensure that the advice is accurate, the work undertaken is of acceptable quality and that the supervised provider is well-prepared before any court events. The lead provider is ultimately responsible for all the work carried out in cases assigned to them.

6. The Law Society considers that the proposed policy is clearer than the current policy and will ensure that good quality legal aid services will be provided. However, it could be further improved by allowing more flexibility and discretion to lead providers to ensure the policy reflects how file management in law practices operate (a lawyer is responsible for the management of a file from inception to completion) and to enable greater use of technology, where appropriate, in their supervisory role. Suggestions to improve the policy are included under each section below.

### **Adequate supervision**

7. The Law Society agrees with the concept that supervision is an interactive process based on trust and flexibility. This gives the lead provider the ability to train a supervised provider and to adapt the nature of the supervision to fit the skill level and professional development of the supervised provider. The four factors included in the supervision policy are sensible and able to be implemented within the standard business structures of a law practice.
8. We note that the regulatory requirements on lawyers practising on own account already require a lawyer to supervise their practice and their employees. Failure to abide by these requirements may result in a matter being investigated by a standards committee and a finding of unsatisfactory conduct or in some cases misconduct. The requirements in relation to supervision and management of a law practice and employees are follows:

1. Rule 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides:

#### ***Supervision and management***

*11.3 A lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practise on his or her own account.*

2. Regulation 18 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 provides:

#### ***Meaning of direct supervision***

*18 For the purposes of the definition of direct supervision in section 6 of the Act, a lawyer provides direct supervision to a person who is providing regulated services if the lawyer—*

- (a) regularly reviews the regulated services provided by the person on behalf of the lawyer or the lawyer's practice (as described in the Schedule of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008); and*
- (b) takes appropriate steps to ensure that those regulated services are provided—*
  - (i) in accordance with the Act and all regulations and rules made under it; and*

- (ii) *competently; and*
- (iii) *in accordance with proper professional standards.*

### **Proximity and access**

9. The Law Society agrees that lead providers must ensure they are accessible and responsive to supervised providers and must be able to be contacted and give advice in a timely manner. The discussion below on accommodating a greater use of technology is also relevant to proximity and access to lead providers. It is both sensible and practical to enable supervision to be provided by other lead providers when required.
10. The policy states that where the lead provider is temporarily unavailable, they should make arrangements for a “suitably qualified lawyer” to provide advice to the supervised provider. We have presumed that this means if there is another legal provider with approval for that area (e.g. family) within the firm, this lawyer can supervise the supervised provider without notifying Legal Aid.
11. However, “suitably qualified lawyer” is not a defined term. It is unclear from the wording whether the “suitably qualified lawyer” is another provider with lead provider status, or whether that practitioner could be a suitably qualified senior lawyer who does not hold a legal aid contract or legal aid provider status.
12. It is not uncommon in a firm of three partners that only one of the partners is a lead provider. There are times when the lead provider is involved in a five-day hearing. A similar situation could occur where the only two lead providers in a provincial town are also involved in a hearing of similar duration. In these instances, lead providers must be able to delegate the responsibility of supervision to another partner in the firm or another senior lawyer.
13. We note that section 75 of the Legal Services Act 2011 requires that no person may provide a legal aid service or specified legal service unless approved. However, in urgent situations where there are no approved providers available, a lawyer should be able to use the “limited approval” process to obtain the necessary approval quickly.
14. The policy should be amended to make it clear that “suitably qualified lawyer” means a suitably qualified lawyer with the appropriate legal aid approvals. The policy should also advise that where a suitably qualified approved provider is not available, an urgent limited approval may be available.

### **Direct supervision**

15. The wording under this factor of the policy is confusing. The policy states that “*Direct supervision means to be physically present, and available to respond to the supervised provider*” (emphasis added).
16. It goes on to say that direct supervision (physical presence) is necessary in the substantive appearances listed in the table but then states beneath the table that “*direct supervision of a substantive appearance may include discussing the appearance with the supervised provider, both before and after [the substantive appearance] ...*”. This suggests the physical presence of the lead provider is not necessary in a substantive appearance.
17. Briefing the supervised provider before and after an appearance is a more sensible style of supervision by a lead provider than the need for both lawyers to attend court together (see the discussion below regarding substantive appearances). Lawyers are used to supervising and training employees and juniors. The requirements around practising on own account both from a regulatory perspective and from a general liability perspective are well known to lawyers. Lawyers understand that they are fully responsible for the conduct and work of those they supervise. It should be up to the individual lead

provider to assess the person they are supervising and adjust the level of supervision needed based on the supervised provider's individual experience, knowledge and competence. The policy acknowledges this in some places but not in others, for example it appears that a lead provider may need to be physically present for substantive appearances.

18. The policy needs to be robust enough to accommodate the use of technology. For example, a lead provider can use Skype, instant messaging, text messages, cell phone and email to connect with and be available to respond to the supervised provider. A lead provider might also use other techniques – such as email monitoring, recording interviews, spot checking files, scheduled staff case management meetings, requiring all or certain types of documents to be approved before filing, and an open door policy – as a means of monitoring and supervising a provider.
19. It is not possible for a principal, sole director or employed lead provider supervising another provider always to be physically present and immediately available in all circumstances. Good internal business policies and procedures as well as making arrangements with senior colleagues should be considered to be a lead provider providing supervision.
20. In addition, “direct supervision” is a defined term in relation to the regulation of the legal profession (see regulation 18 of the Practice Rules, discussed above). Consequently, it may cause some confusion particularly in relation to regulatory matters such as complaints. It may be sensible to use another term such as “close” or “active” supervision or “direct oversight”.
21. The Law Society suggests the wording below be included in the proposed policy:

*“The assigned lead provider has the discretion to determine whether the appropriate exercise of direct oversight requires the physical presence at Court by the lead provider, based on the issues and complexity of the matter and the skill level of the supervised provider, or whether a desirable level of supervision can be achieved in other ways. The supervising lead provider needs to be satisfied that supervision will be easily accessible, appropriate in content and sufficient in time, particularly if more than one lawyer is being supervised.”<sup>1</sup>*

### **Substantive appearances**

22. The policy states that “supervised providers may make substantive appearances, but only under the direct supervision of the lead provider”. “Direct supervision” means to be “physically present, and available to respond to the supervised provider”. It is unclear whether a lead provider must be “physically present” because the definition of “direct supervision” then concludes with “the extent to which the lead supervisor is not physically present will depend on the experience of the supervised provider”. If this means that a lead supervisor can directly supervise in other ways (such as approving submissions or memoranda and adequate briefing beforehand) and does not need to be physically present for all appearances, this should be clearly set out.
23. The policy defines “substantive appearance” as an appearance where:
  - one or more decisions will be made at or as a result of the appearance;
  - any decisions will have a significant effect on the client and/or the progress or outcome of a case; and/or
  - another party is likely to oppose any submissions put forward.

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<sup>1</sup> Adapted from draft guidelines and application form for approval of an alternative supervision arrangement in a community law centre.

The definition is broad enough to include virtually all court appearances, as at least one decision will be made as a result of the appearance. This would mean that the supervised provider has to have the “direct supervision” of the lead provider (i.e. the lead provider must be physically present) at all court appearances.

24. In the Family Court context, this level of direct supervision is not necessary. For most directions conferences, pre-hearing conferences, domestic violence List events and CYPF List events counsel are either in agreement about the directions required or, even if there is no agreement, adequate briefing and preparation by the lead and supervised provider means that a supervised provider can attend such events without the physical presence of the lead provider. In most cases written submissions or memoranda are filed in advance of the matter being called in court, so the lead provider will provide supervision through the checking of those submissions to ensure that what is being sought is appropriate.
25. It is also likely that a supervised provider is suitably skilled to undertake formal proof hearings. These follow a standard process and supervised providers can be fully briefed beforehand as to what the process is and what issues need to be covered. There are rarely new issues arising.
26. Conferences, lists and formal proof hearings are all court appearances frequently undertaken by junior staff on privately paid work. The policy should not prevent similar work being undertaken simply because the matter is funded by Legal Aid.
27. The Law Society agrees with the policy that the extent to which the lead provider is not physically present will depend on the experience of the supervised provider. It will also depend on the nature and level of complexity of the matter. It is a reasonable expectation that a newly admitted lawyer should be accompanied by the lead provider in the early stages of their training.
28. However, at some point a supervised provider will be competent to attend court events without the lead provider also being present. This depends on factors such as the past experience of the lawyer, the frequency of their court appearances, the level of training provided by the lead provider, the complexity or simplicity of the issues on the file and how quickly the individual learns.
29. Such factors are difficult to cover with a blanket policy and are best determined by the lead provider who holds the ultimate responsibility for the work and who has a thorough knowledge of the supervised provider’s competency and the supervision required to ensure delivery of quality legal advice and representation.
30. The Law Society agrees that the direct supervision of a supervised provider by a lead provider (not necessarily the assigned lead provider) is appropriate at appeals. However, the physical presence of the lead provider at a defended hearing may not be necessary in all circumstances. Again, it would depend on the type of case, the experience of the supervised provider, and their role at the hearing. For example, if a supervised provider is acting for a father who is the second respondent to an application by grandparents against the mother of the child and supports the grandparents’ position, the supervised provider should be able to attend the hearing without the physical presence of the lead provider.
31. The Law Society suggests that this part of the policy (including the associated table of substantive appearances) is reworded to reflect that there are circumstances where direct supervision (i.e. physical presence) may be necessary and that lead providers should actively consider the nature of the supervision that may be appropriate for a supervised provider in each particular circumstance. Where the lead provider’s physical presence is appropriate and necessary but the lead provider is unable to attend, he/she should be able to delegate that supervision to another suitably qualified lead provider.

**Number of supervised providers**

32. The Law Society prefers the policy to reflect that a lead provider may supervise “a reasonable number of supervised providers” at any one time rather than specifying a particular number. This approach gives a lead provider the flexibility to adapt the nature of the supervision to reflect the varying skill and competency levels of a number of individual supervised providers.
33. Some supervised providers are quite competent but do not yet meet the Ministry of Justice criteria to be a lead provider. Those providers would require less supervision than a newly admitted lawyer.
34. The seniority of the lead provider is also a relevant factor. A senior practitioner could easily supervise a number of providers particularly when some of those supervised providers are close to qualifying as a lead provider. However, it may not be appropriate to require a newly appointed lead provider to supervise any providers. There may also be an intermediate level lead provider in the firm to whom some supervision responsibilities can be delegated.
35. This approach reflects the intent of the policy to give lead providers the discretion and flexibility needed to ensure that supervision requirements match the supervised provider’s level of competency, and also takes into account the structure of their particular law practice.

**Remuneration**

36. The Law Society agrees that in most cases the assigned lead provider should submit and sign all invoices in respect of the work undertaken by a supervised provider, as they are responsible for ensuring that all claims are accurate.
37. However, the policy should allow for another lead provider, for example the listed alternate lead provider, to sign an invoice where exceptional circumstances exist (for example, where the assigned lead provider is suddenly seriously unwell and/or incapacitated or has a family emergency resulting in them being unavailable for an unknown period of time). In these circumstances, another lead provider could check the file before signing an invoice given the fees are clear and based on task completion. This would also enable compliance with the time limitation requirement for invoicing.
38. It would be the responsibility of the alternate lead provider to be satisfied that he/she can give the assurance required of the lead provider when signing the invoice. This could be done by direct discussion with the lead provider and/or the supervised provider and through knowledge of the file.

The Law Society hopes you find these comments helpful. If you wish to discuss the comments, please do not hesitate to contact Bronwyn Jones in the Executive Director’s Department (ddi (04) 463 2906/[bronwyn.jones@lawsociety.org.nz](mailto:bronwyn.jones@lawsociety.org.nz)).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Moore', with a long horizontal line extending to the right.

Chris Moore  
**President**