

11 June 2020

Louise Ainsley
Manager, Provider Services (Legal Aid)
Ministry of Justice
Wellington

By email: louise.ainsley@justice.govt.nz

Dear Louise

RE: Legal Aid Provider contract – proposed variation

Introduction

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the proposed variation to the legal aid provider contract (**proposed variation**).

The proposed variation:

- a. amends the acceptance terms to require providers to agree to the terms and conditions of the contract by submitting the application form for approval, and amends the commencement date to be when the provider is first approved;
- b. makes the contract term open ended until it is terminated in accordance with the contract;
- c. requires a provider to notify the Secretary for Justice and Legal Services Commissioner as soon as s/he becomes aware of any privacy breach (as newly defined in the contract);
- d. specifies that a provider must comply with applicable enactments and practice standards relating to personal information, including taking all reasonable steps to prevent unauthorised access to or disclosure or loss of personal information;
- e. amends provisions relating to cancellation of an approval due to inactivity, to align with a new policy being developed (in the provider manual); and
- f. amends the Secretary for Justice's power to unilaterally amend or delete provisions of the contract, to clarify that the Secretary must consult the provider on any variation and what method of acceptance is being adopted.

The Law Society commends the Ministry of Justice (**Ministry**) for its ongoing commitment to reduce the administrative burden on legal aid providers.

The Law Society is pleased to see its recommendation that the Ministry undertakes public consultation on the proposed variation has been accepted.¹ The proposed variation includes new privacy clauses and obligations on providers, and it is important providers are afforded an opportunity to comment in advance.

¹ NZLS letter dated 11 November 2019 in response to confidential consultation on an earlier proposed variation (v 1), **attached** as Appendix A (for reference).

We are also pleased that the Ministry has adopted other recommendations (either directly or indirectly), for example by including a new definition of ‘privacy breach’, which confirms there must be a ‘*real risk of*’ unauthorised access to or disclosure or loss of personal information.

Further to the Law Society’s letter of 11 November 2019, we now offer the following brief comments on the proposed variation.

Opt-out model for acceptance

As previously indicated, we understand the practical reasons for including an “opt out” model of acceptance. However, we reiterate our view that the Ministry needs to ensure legal aid providers are adequately informed of this new method of acceptance. This should be communicated individually (via email, preferably on more than one occasion) but also in Legal Aid News and the Law Society’s e-newsletter *LawPoints*.

New obligation to notify Secretary and Commissioner of privacy breach

Proposed clauses 3.8A and 3.11A will require a provider to immediately notify the Secretary’s Contract Manager or the Commissioner as soon as the provider becomes aware of a “privacy breach” and all relevant details of that breach. A “privacy breach” is defined in proposed clause 3.22 as:

“In clause 3.21, **privacy breach** means an event or incident that gives rise to a real risk of unauthorised access to, or disclosure or loss of, personal information held by the Provider in relation to the provision of Legal Aid Services or Specified Legal Services that has caused, or may cause, harm of a more than trivial nature to the client or the person the information is about (if they are not the client).”

We are pleased to see the proposed clauses have been improved by stipulating that a breach relates to an event or incident that gives rise to a *real risk of* unauthorised access to, or disclosure or loss of, personal information held by the provider. This will provide certainty and clarity to providers when assessing whether they must notify the Secretary or Commissioner of the breach.

New provisions regarding ‘privacy’

Clause 3.20

To achieve consistency with proposed clauses 3.8A and 3.11A, we suggest proposed clause 3.20.2 is amended to also refer to a “privacy breach”. It would then read:

“take all reasonable steps to prevent **a privacy breach** ~~unauthorised access to, or disclosure or loss of, personal information~~, including by having adequate security for physical storage of personal information and adequate systems for data security (which, at a minimum, must comply with clause 3.5 of this Contract, regulation 9 of the Legal Services (Quality Assurance) Regulations 2011, Information Privacy Principle 5 in section 6 of the Privacy Act 1993, and the Practice Standards), and”

Clause 3.21

The Law Society previously recommended that proposed clause 3.21 be amended to reflect changes to the Privacy Act 1993 contained in the current Privacy Bill. We are pleased to see that specific reference to relevant Information Privacy Principles has been included, as well as qualifying that any notice to be given to affected individuals is only where a provider is required to do so (under any enactment).

However, it is not clear why proposed 3.21(1) has not been amended to reflect the new mandatory reporting requirements which will come into effect when the new Privacy Act comes into force. We reiterate our previous suggestion that clause 3.21(1) is amended to reflect this, for example by including the words “and comply with any other mandatory privacy breach reporting obligations which may be in force at the time”.

The final point is that the new provider contract will come into effect before the Privacy Bill mandatory reporting requirements are in force, and any privacy breaches will still need to be properly managed in the interim. It would be helpful for the Ministry to advise legal aid providers of its expectations as to when providers need to report privacy breaches.

Clarification of notification of complaints

It is proposed that subclause 9.1.1 is amended to include a new footnote stating: “the Secretary will not advise the Provider of a complaint if it is withdrawn or discontinued by the complainant before the Secretary advises the Provider about the complaint.” This is unnecessarily complicated and for clarity we suggest the footnote is amended to say: “the Secretary is not required to advise the Provider of a complaint if it is withdrawn or discontinued before the Secretary would otherwise have been required to do so under clause 9.1.”

Consequential amendments as a result of new “cancellation due to inactivity” policy

The consultation materials note that in the absence of the renewal process, a new “Cancellation due to inactivity” policy is being developed and will be made available at the same time the contract is finalised. The Law Society awaits further details of the proposed policy before commenting further.

Change to process for variation of contract

The consultation materials note:

“17.1B outlines the process for acceptance of variations of the contract (other than unilateral variations as per clauses 17.2 – 17.5) proposed by the Secretary. In addition to the current ‘opt-in’ method of acceptance (i.e. the provider signs and returns a copy of the variation), *this new clause allows the Secretary to specify an ‘opt out’ method of acceptance, whereby the provider can accept by doing nothing (or can give notice if they do not agree).* This is intended to reduce the administrative burden on providers.” (emphasis added)

However, as currently drafted proposed clause 17.1B suggests that the notice to be provided by the Secretary will require the provider to either confirm their agreement to the variation in writing or give notice that they do not agree to the variation. We assume it is intended the notice will set out only one of those options and suggest this is clarified.

We also suggest the requirement to give notice to the provider in proposed clause 17.1B should be mandatory, by amending the word ‘may’ (give notice) to ‘must’.

Finally, the Law Society is pleased to see clause 17.2 no longer includes reference to “Ministry policies and processes”.

Conclusion

We hope these comments are helpful to the Ministry. If further discussion would assist, please feel free to contact me through the Law Society's Law Reform Adviser, Amanda Frank (amanda.frank@lawsociety.org.nz).

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Herman Visagie', written in a cursive style.

Herman Visagie
NZLS Vice President

Appendix A: NZLS letter dated 11 November 2019

Appendix A

11 November 2019

Louise Ainsley
Manager, Provider Services (Legal Aid)
Ministry of Justice
Wellington

By email: louise.ainsley@justice.govt.nz

Dear Louise,

RE: Legal Aid Provider contract – proposed variation

Introduction

Thank you for seeking views from the New Zealand Law Society on the proposed variation to the legal aid provider contract (contract) to:

- g. extend the contract date to 30 June 2020;
- h. require a provider to notify the Secretary of Justice and Legal Services Commissioner as soon as they become aware of any unauthorised access to, or disclosure of, personal information held by the provider in relation to an assignment;
- i. specify that a provider must comply with applicable enactments and practice standards relating to personal information, including taking all reasonable steps to prevent unauthorised access to or disclosure of personal information;
- j. specify that a provider must record what tasks (other than minor administrative tasks) other providers and non-lawyers performed on an assignment as well as the time spent on an assignment; and
- k. amend the Secretary for Justice's power to unilaterally amend or delete provisions of the contract to achieve consistency with changes to Ministry policies and processes and to allow the Secretary to extend the term of the contract, including that the contract continues indefinitely unless terminated.

The Law Society notes the Ministry is committed to reducing the administrative burden on providers and has therefore gone with an 'opt-out' model of acceptance. This means the provider will be deemed to have accepted the variation by continuing to provide legal aid services and/or specified legal services unless and until they inform the Secretary they do not agree with the variation.

The Law Society offers the following comments on the proposed clauses. The Law Society does not have any issues with the proposed extension of the contract date to 30 June 2020. Where amendments have been suggested, these have been marked up as tracked changes in the variation document included in Appendix 1.

Confidential consultation

The Law Society is concerned that legal aid providers have not been widely consulted about the proposed variations to their contract. Although the Ministry states the variations are intended to primarily allow for the completion of project work currently underway, the Law Society is concerned that new clauses relating to privacy requirements have not been properly considered particularly in light of the proposed changes in the Privacy Bill.

The Law Society's preferred approach to consultation is for open consultation. Open consultation provides an opportunity for full input from the profession and makes for better policy and legislation. Early, informed consultation with those working in the field helps to ensure effective and workable reforms and an effective justice system.

These proposals have therefore only been considered by the Law Society's Legal Services Committee, whose members are senior and experienced legal aid practitioners, and members of the Law Society's Human Rights and Privacy Committee with privacy expertise. The comments below should not be taken as consultation with and reflective of, the wider legal profession.

Opt-out model for acceptance

We understand the practical reasons for an "opt out" model of acceptance. However, we ask that the Ministry take particular care in ensuring that legal aid providers are adequately informed. We recommend that this be communicated individually (via email preferably on more than one occasion) but also in Legal Aid News and LawPoints. Litigation lawyers are often not able to look at all communications during busy phases when they are in court for long periods of time.

Obligation to notify Secretary and Commissioner of privacy breach

Proposed section 2 of Schedule 2 requires a provider to immediately notify the Secretary's Contract Manager as soon as they become aware of unauthorised access to or disclosure of personal information held by the provider in relation to the assignment.

If the intention of this new requirement is to cover situations where a provider has had for example, a device or laptop stolen, and it is uncertain whether legal aid information has been accessed or not, then for certainty and clarity for providers, we suggest it is preferable to include the words "a real risk of an" before 'unauthorised access'.

Requirement to notify any 'unauthorised access to, or disclosure of, personal information'

Clause 3.20

The Ministry will be aware that the Privacy Bill is currently at the Committee of the whole House stage. Given the Bill is likely to progress before the expiry of these proposed variations, we suggest it is preferable to amend clause 3.20(1) to include "or its legislative successor/other privacy legislation in place at the relevant time". We have also amended the reference to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Clause 3.21

As noted above, any proposed variation to the provider contract effecting a providers privacy obligations, should reflect the proposed changes in the Privacy Bill. The Law Society is concerned that wider consideration of the proposed amendments in the Privacy Bill have not been taken into account in drafting clause 3.21.

If the Ministry is wanting to receive information from providers for example, in routine reporting cycles, about whether there have been any privacy breaches, and, if so, provide the Ministry with the ability to investigate whether the provider has handled any breaches appropriately and in accordance with their legal requirements, then clause 3.21 should be drafted to reflect this focus on assurance.

However, as clause 3.21 is currently drafted, it means that the Ministry is notified of and allows the Ministry to intervene, in every breach. It is also unclear who's responsible for managing what. The current clause places some direct responsibilities on the provider (for example to notify affected individuals) but then seems to suggest that the Ministry would do the diagnostic investigation and be responsible for remedying any harm as a result (with the provider only having obligations to co-operate).

Further, although there is a requirement to notify all affected individuals there's no requirement to notify the Privacy Commissioner. Under the current Privacy Bill there will be mandatory reporting to the Privacy Commissioner, and it will be an offence not to notify. The Law Society suggests clause 3.21(1) is amended to reflect this for example by including the words "and comply with any other mandatory privacy breach reporting obligations which may be in force at the time".

As noted above, the threshold for notification seems to be every breach, regardless of circumstances. However, this does not reflect what is contained in the Privacy Bill. Of course, there can be good reasons within an agency for wanting to know about even minor breaches to ensure that fixes can be put in place to prevent major ones. But the external reporting requirements in the Privacy Bill focus on more serious breaches, especially when it comes to notifying affected individuals.

A common example might be if an email gets sent to another lawyer by mistake and that lawyer - a trusted person with their own professional obligations - promptly verifies that they've deleted it. If there's no realistic chance of harm to the individual's interests, then notification may well not be necessary.

The Privacy Commissioner's Data Breach Guidelines also require notification only when necessary as there may be individual circumstances when notification may cause more harm than good. The guidelines also require that you must first evaluate the breach including the extent, nature of the information, to whom, to enable an informed and proportionate response to be taken. As such, the Law Society suggests that clause 3.21.2 is amended to include the words "if necessary" at the end.

Personal information

It is not clear what is meant by personal information that is 'held in relation to the provision of legal aid services'. It could include any information about the legal aid client or others on a file for which legal aid payments are made. However, not all files or client relationships are that clear cut - there might be a mixture of legal aid/non legal aid information available. It would be helpful if further clarity was provided around what 'personal information' in this context might include.

Change to Secretary's power to unilaterally vary the contract

Proposed sub clause 17.2(a) gives the Secretary the power to unilaterally vary the contract (with the processes to be followed in clause 17.3 in terms of notifying the provider in writing, in advance etc) to achieve consistency with "Ministry policies and processes". The Law Society considers there is a difference between government passed law and policy, and in-house Ministry of Justice policy and process. The extent to which this could be used is likely to be of concern to lawyers and the lack of

consultation on this may not be well received. We understand that the intention was to address more specific changes in policy and it may be that if this was narrowed it might be more acceptable. At a minimum the Ministry should consider whether or not sufficient reassurance could be provided to alleviate concerns that this might lead to significant variations with a lack of consultation. For example, limiting the provision to situations where there has been consultation with the profession around changes in policies and processes and the contract needs to be varied as a consequence.

Conclusion

While we understand the reasons why the variations are proposed, we are concerned about a lack of consultation with the legal profession. We do not see the amendments as non-consequential or minor and therefore more consultation time and consultation with the profession as a whole should have occurred. We are concerned around the rushed addition of extended privacy obligations and the potential impact this will have on legal aid providers. The Ministry will need to clearly inform providers of the expectations around when they need to report privacy breaches and what is expected of them.

Ultimately, if clause 3.20 sets out the core standards that providers are expected to meet, for example, retrieving information and mitigating harm, then clause 3.21 could expand on those general requirements. As noted above, the varied contract will come into force before the mandatory requirements in the Privacy Bill are in force, and any privacy breaches will still need to be properly managed in the interim. If the contract doesn't line up with the anticipated new legal requirements, then the Law Society is concerned this will be misleading and could lead to unnecessary compliance issues for providers.

We hope these comments have been helpful to the Ministry. If further discussion would assist, please feel free to contact me through the Law Society's Law Reform Adviser, Amanda Frank (amanda.frank@lawsociety.org.nz).

Yours faithfully,



Elizabeth Bulger
Legal Services Committee Convenor

Appendix One

Variation– CONTRACT FOR SERVICES (Legal Aid)

Contract Variation No. 1

Parties to the Contract:

The Secretary for Justice	(the Secretary's Contract Manager) Louise Ainsley Manager, Provider Services Ministry of Justice
The Provider	details to be inserted here

Contract: Provider contract for the provision of legal aid services and specified legal services

Date contract signed by Secretary:

Variation

The Secretary and the Provider are Parties to the Contract.

The Parties agree to vary the Contract. The scope of the Variation is set out in the attached Schedule of Changes. The Variation is effective from the Effective Date stated in the Schedule of Changes.

Subject to the changes made by this Variation the terms and conditions of the Contract remain in effect.

Words used but not defined in this Variation have the same meaning as they do in the Contract.

Acceptance

Despite anything in clause 17.1 of the Contract (which requires that variations, other than unilateral variations by the Secretary, be in writing and signed by the Parties), **the Provider is deemed to have agreed to this Variation** by continuing to provide legal aid services and/or specified legal services, unless and until the Provider informs the Secretary's Contract Manager that the Provider does not agree to the variation (such information to be provided to the Secretary's Contract Manager by 02 December 2019).

Signed for and on behalf of
the **Secretary**:

Signature

Name: Louise Ainsley

Position: Manager Provider Services (Legal Aid)

Date:

Schedule of Changes

Effective Date: 30 November 2019

Changes

Changes to Schedule 2

1 Change to Expiry Date

The “expiry date” in subclause 1.2 of Schedule 2 is replaced with 30 June 2020.

2 New obligation to notify Secretary and Commissioner of privacy breach

Under the subheading *When the Provider must notify the Secretary* insert the following clause:

- 3.8A The Provider must immediately notify the Secretary’s Contract Manager as soon as they become aware of a real risk of an unauthorised access to or disclosure of personal information held by the Provider in relation to the Assignment.

Under the subheading *When the Provider must notify the Commissioner* insert the following clause:

- 3.10A The Provider must immediately notify the Commissioner as soon as they become aware of a real risk of an unauthorised access to or disclosure of personal information held by the Provider in relation to the Assignment.

3 Clarification of record keeping obligations

Subclause 3.12.7 is deleted and replaced with the following subclause:

- 3.12.7 records of all time spent on the Assignment by the Provider, and records of all time spent and tasks (other than minor administrative tasks) undertaken by any other providers or non-lawyers, and

4 New provisions regarding privacy

After clause 3.19 insert the following heading and clause:

Privacy

- 3.20 In providing Legal Aid Services or Specified Legal Services, the Provider must:

- 3.20.1 comply with all relevant enactments relating to personal information, including the Privacy Act 1993 or its legislative successor/other privacy legislation in place at relevant time and the Lawyers and Conveyancers

Act (Lawyers: Conduct and Client Care) Rules 2008, as well as any applicable Practice Standards, and

3.20.2 take all reasonable steps to prevent unauthorised access to or disclosure of personal information, including by having adequate security for physical storage of personal information and adequate systems for data security (see clause 3.5 and regulation 9 of the Legal Services (Quality Assurance) Regulations 2011, and clause 11A of the Practice Standards), and

3.20.3 take reasonable steps to ensure the reliability and integrity of any personnel who have access to personal information and that such personnel know of and comply with the obligations in clause 3.20.1.

3.21 If the lawyer becomes aware of a real risk of any unauthorised access to or disclosure of personal information that occurs in relation to the provision of Legal Aid Services or Specified Legal Services, the Provider must:

3.21.1 notify the Secretary and the Commissioner in accordance with clauses 3.8A and 3.10A and comply with any other mandatory privacy breach reporting obligations which may be in force at the time

3.21.2 notify all affected individuals, if necessary

3.21.3 recover the personal information, if possible, or otherwise take steps to prevent or mitigate the consequences of the unauthorised access or disclosure

3.21.4 provide reasonable assistance to the Ministry in any investigation of the privacy breach and in implementing any steps to prevent or lessen any harm as a result of the unauthorised access or disclosure

, and

3.21.5 take all reasonable steps to prevent any recurrence of the unauthorised access or disclosure, or similar situations.

5 Change to Secretary's power to unilaterally vary the contract

Subclause 17.2 is deleted and replaced with the following subclause:

17.2 The Secretary may unilaterally amend or delete any provisions of this Contract to:

- (a) achieve consistency with a relevant change in the Act, Regulations, government policy, Ministry policies and processes, or a change in appropriation;
- (b) extend the expiry date of the Contract, including by providing that the contract continues indefinitely unless terminated.

Any such amendment or deletion must be consistent with the Act and any regulations made under the Act.