



Part 3 - Investigating and Managing Provider Conduct

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General

- 1 The purpose of this document is to set out the Agency's approach and processes for dealing with concerns raised about the conduct of a Listed Provider (Provider) when providing services.
- 2 For the sake of clarity, 'services' may be those related to:
 - the provision of legally aided services and
 - participation in the legal aid and related schemes
- 3 The Agency's concerns may, in the first instance, arise from a number of sources. Without exclusion, they might be – complaints received from clients or other Providers, Provider audits, observations or matters arising from Agency staff, referrals from Judges, Court staff and decisions of other bodies.
- 4 The acceptable standards or requirements of Providers, statutory or otherwise, are assumed to be obligations of a Provider as set out in the Legal Services Act 2000 (Act)¹, their Contract for Services (Contract) and the Agency's policies and procedures.
- 5 All staff have a responsibility to assist in the management of the Agency's relationships with Providers.

Definitions

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| Agency concern | Where the Agency has concerns regarding a Provider's conduct, which may indicate that they have failed to comply with their obligations while providing services. |
| Agency Manager | Manager Debt Management Group, Regional Manager, Manager Service Contracts. |
| Authorisation | A complainant's permission for the Agency to present their name and complaint to the Provider. |
| External complaint | A grievance or allegation received from a source outside the Agency about a Provider's conduct, which may indicate that they have failed to comply with their obligations while providing services. |
| Justified matter | Where an investigation demonstrates that the Provider has failed to comply with their obligations while providing services. |
| Matter | An external complaint or Agency concern. Refer to Appendix One for specific examples. |
| Notice | A letter that informs the Provider of their obligations and the Agency's expectations. It may also include actions to be taken and the |

¹ The Legal Services Amendment Act 2006 amended some provisions of the Legal Services Act 2000, as of 1 March 2007.

possible consequences in this process.

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| Obligations | A Provider's obligations as outlined in the Act, the Contract and any relevant policies and procedures. |
| Provider Monitoring Register (PMR) | A central register where all matters will be recorded. The PMR is a monitoring and reporting tool for the Agency. |
| Resolution | Where a satisfactory outcome is reached, which allows the Agency's and the legally aided person's interests to be protected, while also ensuring that the Provider's obligations have been met. |

Principles

- 6 In dealing with any external complaints or Agency concerns the Agency will conduct its processes in accordance with the following principles:
- Fairness
 - Transparency
 - Consistency

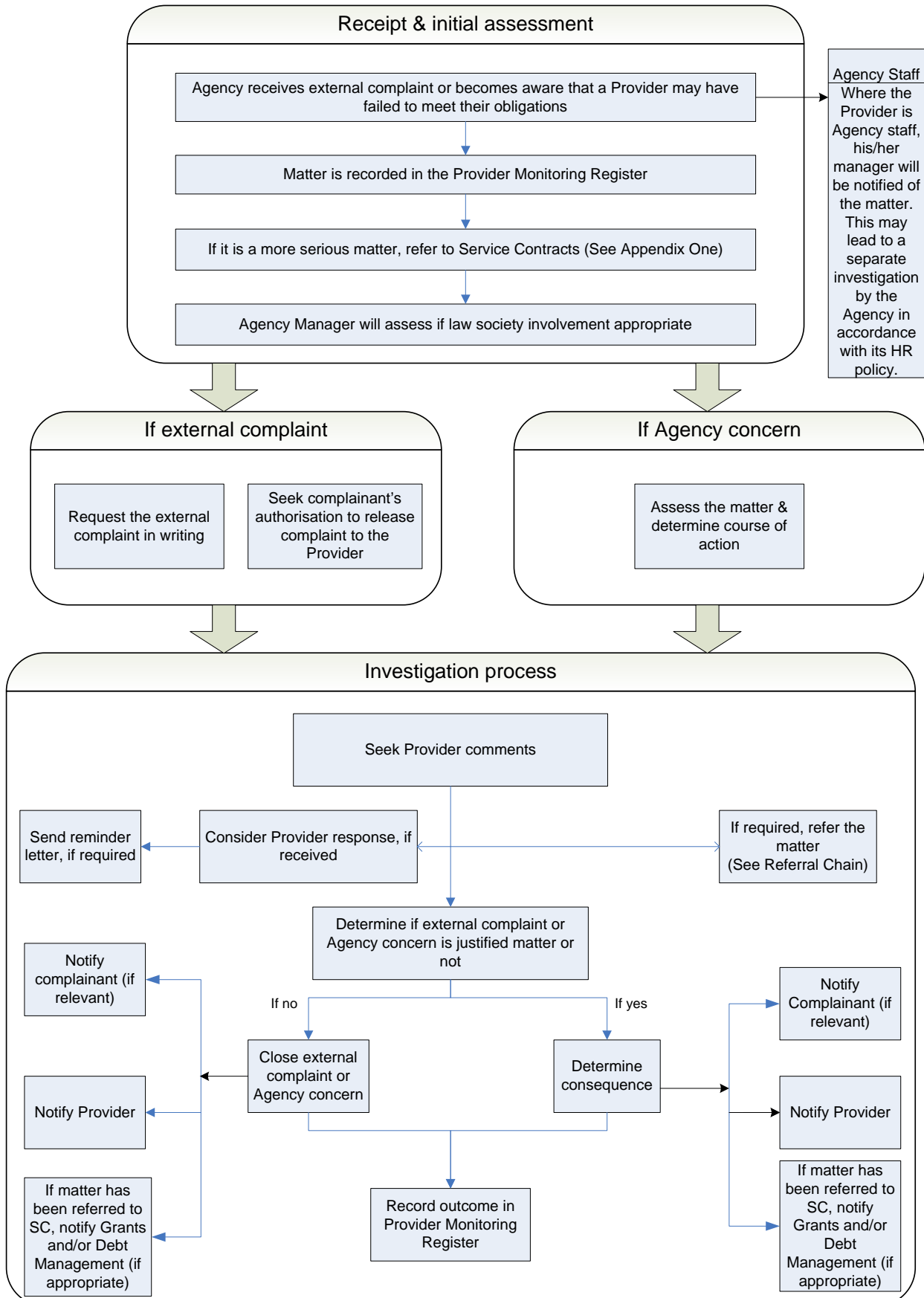
General approach

- 7 The Agency's general approach will be to:
- apply the principles of natural justice
 - neutrally investigate matters
 - seek to remedy any justified matter
 - manage all matters in a timely manner.
- 8 Matters will be dealt with, in the first instance, at the point closest to the Provider, being the local Grants Office or the Debt Management Group. In certain instances however, the matter will or may be referred directly to Service Contracts, in accordance with Appendix One.
- 9 All external complaints or Agency concerns will be managed in accordance with the following timeliness standards²:
- Within 8 -10 weeks of receiving an external complaint or an Agency concern arising, a decision will be made and/or action(s) will be taken and notified to the Provider
 - Agency staff will respond and act within 10 working days of receiving an external complaint or an Agency concern arising

² In certain circumstances the Agency may have to work outside these standards e.g. when a complainant or Provider does not respond to the Agency's requests in the timeframe provided.

- Where a matter is being referred directly to Service Contracts from within the Agency, it will be referred within 15 working days of receipt.
 - Agency staff will provide the complainant, in the case of external complaints, with an interim progress report generally within 20 working days of receipt of the complaint and each 20 working days thereafter, if required.
- 10 The following diagram provides an overview of the processes to be used by Agency staff when investigating external complaints or Agency concerns.

Process for investigating external complaints & Agency concerns



Law society involvement

- 11 In the event that an external complaint is received, or an Agency concern arises that relates to the 'Rules of Professional Conduct for Barristers and Solicitors', the Agency Manager may:
 - refer the matter to the appropriate law society
 - conduct an investigation independently of any law society investigations.
- 12 Where an Agency Manager refers the matter to a law society, the Agency Manager will inform Service Contracts.
- 13 Where any law society upholds a complaint against a Provider, the Provider must notify the Agency, as required by the terms of their Contract.

Providers who are Agency staff

- 14 In the event that an external complaint or Agency concern is received regarding a Provider who is also an Agency staff member e.g. Public Defence Service Pilot, the Agency Manager will:
 - notify the Provider's manager; and
 - follow the Investigating and Managing Provider Conduct process.
- 15 Depending on the nature of the complaint or concern the Provider's manager may also wish to conduct an independent investigation. This would normally be in accordance with the Agency's Human Resources Policy and the Provider's employment contract.

Dealing with external complaints

General

- 16 On receiving an external complaint the Agency will:
 - take action within the timeframe indicated in the General Approach
 - seek the authorisation of the complainant to disclose the complaint to the Provider
 - provide a copy of the complaint to the Provider and seek submissions, including advice on whether the alleged facts are correct, and:
 - if yes, ask them to provide an explanation and details of any mitigating factors
 - if no, ask them for a statement of their version of the facts.

External complaints should be in writing

- 17 Where an external complaint is received orally, the complainant should be asked to put their complaint in writing. They should be advised that the Agency requires all complaints to be in writing, and they should also be given instructions on what to include in a letter of complaint.
- 18 Where the complainant is unable to put their complaint in writing, their verbal complaint should be detailed in a filenote. The Agency will send the filenote to the complainant, and ask the complainant to confirm that it is correct and sign the filenote. If the complaint is of a more serious nature, the Agency may, where appropriate, arrange assistance for the complainant to make a written complaint.

Complaints received from the Court

- 19 Where a complaint is received from a Judge, Justice of the Peace or any other member of a judicial body, an assessment of the substance of the complaint must be made. It will depend on the nature of the complaint as to which area of the Agency will deal with this initially. (Refer to Appendix One for specific examples)

Disclosure of information

- 20 The provisions of the Privacy Act 1993 must be adhered to when external complaints are received. In the first instance, personal information, such as the complainant's name and the details of their complaint should not be disclosed to the Provider without their authorisation (Principle 11 Privacy Act 1993).³
- 21 If consent has not already been provided, a request will be made to the complainant asking them to authorise in writing the disclosure of their name and complaint, and any subsequent information received from them, to the Provider to allow the Agency to fully consider and investigate the matter.
- 22 Where the complainant does not give their authorisation for disclosure, the staff member investigating the matter should seek advice from their manager, i.e. Team Leader or Agency Manager, to determine whether the Agency should proceed with an investigation. The Privacy Act 1993 (Principle 11 – exceptions) enables the Agency to proceed with an investigation without authorisation for disclosure from a complainant, where exceptions exist.
- 23 Any decision to proceed with an investigation of the complaint will be made having regard to the nature and seriousness of the allegations made, and where the Agency considers that to disclose personal information is necessary to either prevent, detect, or investigate criminal activity.
- 24 Where the Agency decides to proceed with an investigation without the complainant's authorisation for disclosure, the complainant will be informed of the Agency's decision and requested to submit any objections within 15 working days. These will be considered by the Agency.

³ Further guidance on the application of the Privacy Act 1993 can be found in the Corporate Policy Manual

Dealing with Agency concerns about Providers

Assessment of the matter

- 25 On becoming aware that a Provider may have failed to comply with their obligations while providing services, the Agency will assess:
- the risk posed to the Agency's legal aid and related schemes, and the legally aided person if the issue is not resolved
 - whether the Provider has a history of failing to comply with their obligations
 - whether the Agency concern is a more serious matter and it should be referred to Service Contracts for investigation. Refer to Appendix One for examples.
- 26 All of the above points should be considered prior to commencing an investigation into the matter.

Informal resolution

- 27 Where an Agency concern is considered to be a minor matter that could be adequately dealt with by an informal discussion with the Provider, the Agency shall contact the Provider by telephone to discuss it. For examples of minor matters refer to Appendix One.
- 28 If the matter is informally discussed, a filenote of the conversation and any agreed remedial action must be written and placed on the legal aid file. The matter and the agreed action should be entered into the Provider Monitoring Register.
- 29 The investigation process should be followed where resolution cannot be achieved.

Investigation process

- 30 The purpose of the investigation is to neutrally gather all relevant facts, information and documentary evidence about an external complaint or Agency concern before making a decision.
- 31 All external complaints and Agency concerns will be entered into the Agency's Provider Monitoring Register.
- 32 An investigation into an external complaint or Agency concern regarding a Provider will not usually affect the Agency's dealings with the Provider, for example the Provider may still be assigned files.
- 33 Where a Provider is being investigated regarding two or more matters at the same time the Agency may investigate both matters together. This will be determined on a case by case basis.

- 34 Where a Provider is under investigation for a more serious matter, and he or she is applying for a new listing approval⁴ the Agency may defer consideration of the application until the investigation is complete.
- 35 Where investigating a Provider for a more serious matter, the Agency and the Provider may meet, providing both parties agree, in order to expedite the process and to allow flexibility for both the Provider and the Agency.
- 36 The purpose of the meeting would be to discuss the Agency's information,⁵ for the Provider to respond to the information and to discuss the next steps, where appropriate.

Seeking Provider comments

- 37 The Provider will be advised within 10 working days that the Agency has received an external complaint or has a concern. The letter will include the following:
- the name of the person who made the complaint (if relevant and an authorisation to disclose their name has been received)
 - a copy of the complaint (if relevant) and/or details of the Agency's concern
 - a request for the Provider to confirm whether the facts alleged in the complaint or Agency concern are correct, and:
 - if yes, ask them to provide an explanation and details of any mitigating factors.
 - if no, ask them for a statement of their version of the facts
 - a request for their response within 10 working days of receiving the Agency's letter, in accordance with their contractual obligations
 - a statement that their response may be provided to the complainant (if relevant).
- 38 If the Provider does not respond, a reminder letter will be sent. Where appropriate, staff could also telephone the Provider to request a response.

Consideration of response (where received)

- 39 The Provider's response needs to be considered by the staff member investigating the matter before any decision is made. The following should be considered:
- where the Provider confirms that the facts of the external complaint or Agency concern are correct, have they provided a reasonable explanation, and details of any mitigating factors

⁴ This includes an increase in categorisation in Criminal listing approvals.

⁵ The Provider will receive the Agency's information 10 working days before the meeting.

- whether the Provider has demonstrated that they have taken steps to remedy the situation
- whether further information is required from the complainant (if relevant)
- whether further information is required from the Provider to allow the Agency to determine an appropriate course of action.

If further information is received

40 The Provider will be given an opportunity to respond to any further information received from the complainant, or another source. If appropriate, the complainant may be given the opportunity to respond to the Provider's comments.

If no response is received

41 If no response is received from the Provider the staff member investigating the external complaint or Agency concern will need to either:

- determine whether the matter is a justified matter or not and, if appropriate, the consequences (refer to 'Consequences') or
- refer the matter, as indicated in the referral chain (see below).

Note: The Contract for Services requires Providers to respond to a complaint, made or received by the Agency, within 10 days, unless the Agency allows further time.

42 Failure to respond to the reminder letter or phone call may result in a notice (Refer to Consequences) being issued.

Referrals

43 The Referral Chain is as follows:

Agency Staff → Team Leader → Agency Manager → Service Contracts

44 Throughout this process it may be necessary to refer the matter as per the Referral Chain above. In most instances this will occur where the Agency has not received a response from a Provider, where the matter has not been resolved after the second notice/notice with conditions or where further in-depth investigation is required e.g a special audit .

45 Except for the more serious matters, the Provider will be contacted, in most cases, a maximum of two times, with the initial letter and one reminder (if required), prior to the matter being referred as per the Referral Chain above where no response has been received.

46 Matters that are not resolved after a second notice/notice with conditions has been issued will be referred to Service Contracts in accordance with the Referral Chain above.

- 47 At any time where the Provider's conduct falls within the grounds for considering suspension under s72A and s73 of the Act, the matter may be referred to the Suspension Consideration and Review process.

Making the decision

- 48 At the completion of the investigation a decision must be made on whether the external complaint or Agency concern is a justified matter. The decision can be made whether the Provider has or has not responded to the Agency's requests for information.
- 49 Where an external complaint or Agency concern is found to be not justified the Provider should be notified and informed that the matter has been closed. The Provider Monitoring Register should be updated accordingly.
- 50 Where an external complaint or Agency concern is found to be a justified matter, the appropriate consequence should be determined. Refer to 'Consequences' for guidance. Where an external complaint or Agency concern has been referred to Service Contracts, the relevant Agency Manager will be contacted regarding the proposed decision and consequences at the conclusion of the investigation and will be given an opportunity to comment before the Provider is contacted.

Notifying a complainant of the Agency's decision

- 51 At the conclusion of the investigation, the complainant will be informed that the Agency has investigated the matter and appropriate action has been taken.⁶ In most cases it will not be necessary to release specific details of action(s) taken against a Provider. However if requested, any relevant and necessary details of the action(s) taken by the Agency can be provided to the complainant. The Agency must use its discretion to judge what necessary and relevant information is. The Agency staff member should seek advice from their Manager, with respect to the Privacy Act 1993, if required.
- 52 Where further information is requested by the complainant and the external complaint or Agency concern is justified, the Agency may provide the complainant with:
- the Agency's expectations which the Provider has been reminded of; and
 - the nature of any remedial action/s to be taken

Note: It is not relevant to inform the complainant of the warning system, i.e. that a notice has been issued.

- 53 Where further information is requested by the complainant and the external complaint or Agency concern is not justified the Agency may outline the relevant reasons why.

⁶ The Agency will also inform the complainant of any delay into an investigation, where necessary.

Consequences

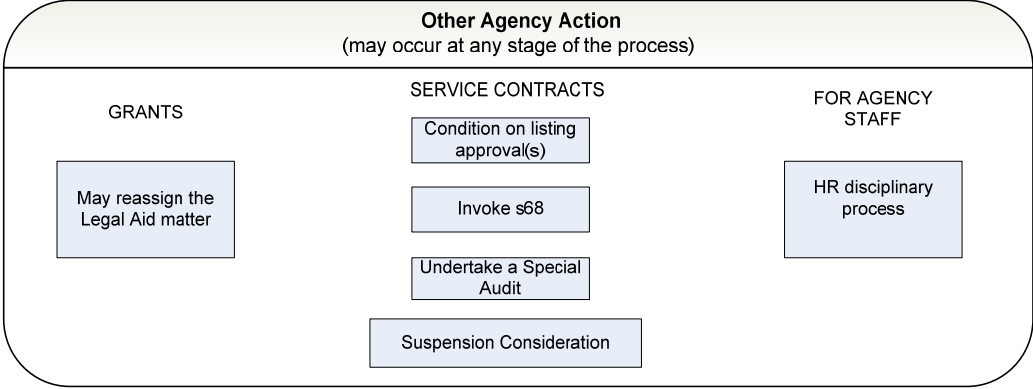
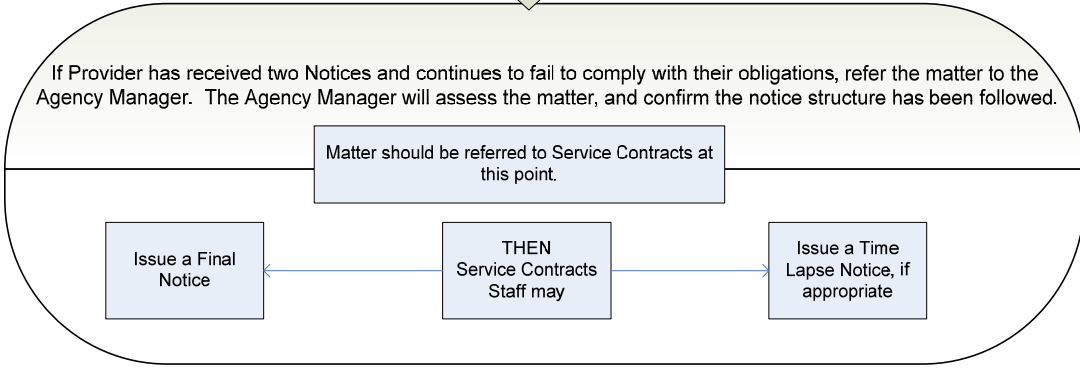
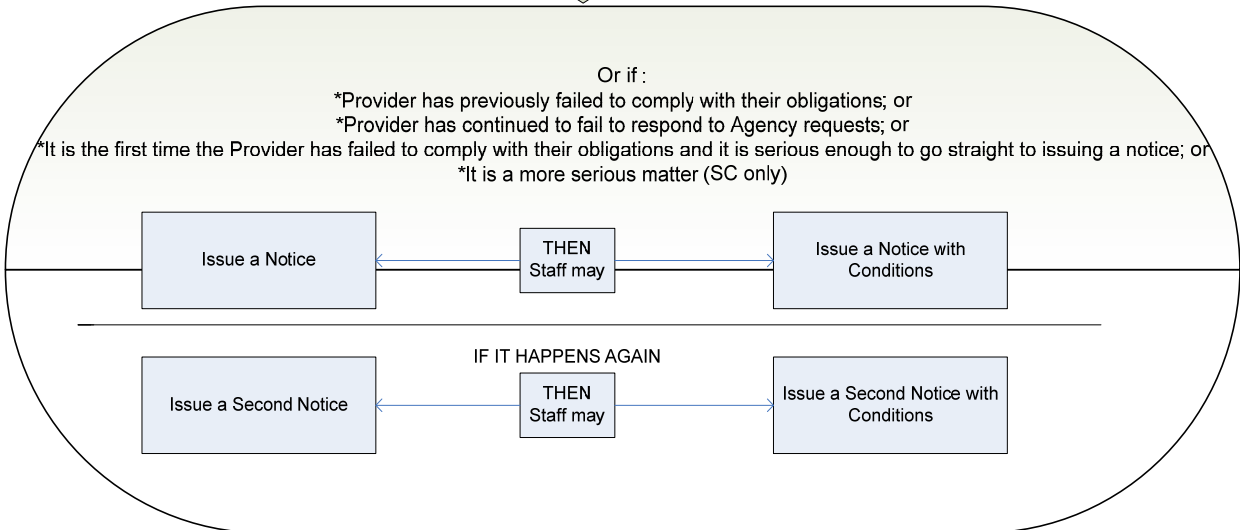
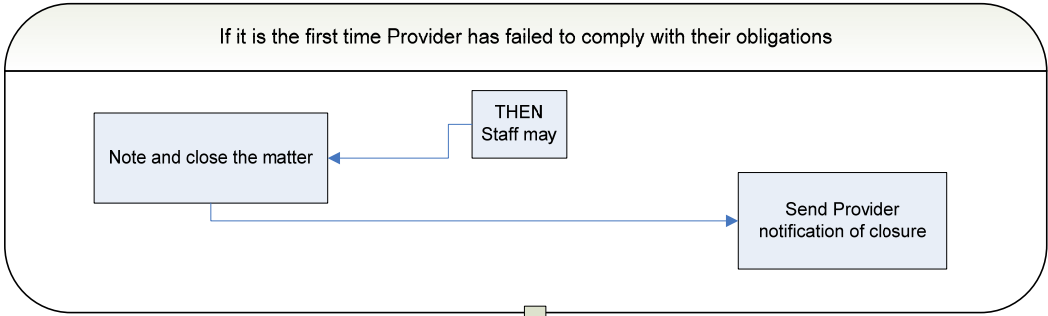
Action where an external complaint or Agency concern is justified

- 54 Agency action on justified matters is based on a warning structure on which Agency staff are required to exercise judgment and apply a consistent approach, having regard to the nature of the matter.
- 55 Any decision by Agency staff⁷ should be made in consultation⁸ with an appropriate Team Leader or Agency Manager, and if appropriate, the reasons for closing a matter may need to be documented in a memorandum.
- 56 At the completion of an investigation into an external complaint or Agency concern and where the matter is found to be justified, the staff member investigating the matter may do one of the following:
- note the matter
 - issue a notice or notice with conditions
 - issue a second notice or notice with conditions
 - issue a final notice (Service Contracts only)
 - issue a time lapse notice, if appropriate (Service Contracts only).
- 57 All notices issued will be copied and placed on the Provider's file. Notices should be forwarded to Service Contracts to be placed on the Provider's file.
- 58 The following diagram provides an overview of the action the Agency may take where a matter is justified.

⁷ Agency staff who can issue a first and/or second notice – Grants Officers, Debt Officers, Team Leaders (Grants and Debt Management Group), Regional Managers, Manager Debt Management Group, Advisers' Service Contracts, Senior Adviser Service Contracts and Manager Service Contracts.

⁸ Consultation, in some cases, may simply mean the confirmation of a Team Leader or Agency Manager before issuing a notice.

Consequences flow diagram – Agency action on justified matters



Note the matter

- 59 Where the matter is the first time the Provider has failed to comply with their obligations and it is not a more serious matter (refer to Appendix One for specific examples) it may be noted and closed.
- 60 The Provider should receive written confirmation that the matter will be noted and filed (refer to Documentation and Filing). The aim of this is to draw the matter to the Provider's attention and ensure that they are aware of their obligations.

Issue a notice

- 61 A notice may be issued where:
- The Provider has previously failed to comply with their obligations
 - The Provider has continued to fail to respond to Agency correspondence in respect of the matter
 - It is the first time the Provider has failed to comply with their obligations and it is serious enough to go straight to issuing a notice
- 62 The notice shall contain details of the Provider's failure to comply with their obligations, a statement of the Agency's expectations, and it may request that immediate remedial action be taken.

Issue a notice with conditions

- 63 Where the matter requires further action, a notice with conditions may be issued. Conditions attached to the notice may include:
- if no remedial action is taken by the specified date – reassignment⁹ of the legal aid case
 - imposition of a condition on the Provider's listing approval(s), such as, supervision, completion of training courses, submission of timesheets with invoices.
- 64 Any decision to impose a condition on a Provider's listing approval(s) will be made by the Manager Service Contracts.

Issue a second notice or a second notice with conditions

- 65 Where a Provider has failed to comply with their obligations again after receiving a first notice or has not complied with the condition of their first notice in the required timeframe, the Agency will issue a second notice or notice with conditions.

⁹ Grants Officers will consult with a team leader before reassigning a case in these circumstances.

- 66 The second notice shall contain details of the Provider's failure to comply with their obligations; a statement of the Agency's expectations, possible consequences and it may request that immediate remedial action be taken.
- 67 Where a matter is unable to be resolved after the second notice/notice with conditions it will be referred to an Agency Manager. The Manager will assess the matter, confirm the notice structure has been followed and all appropriate steps have been taken before referring the matter to Service Contracts.

Issue final notice

- 68 A final notice may only be issued by Service Contracts where:
- The Provider has not remedied a failure or
 - The Provider has received two prior notices or notices with conditions and has continued to fail to comply with their obligations.
- 69 The notice will state clearly that it is a final notice and that the Provider is expected to correct their conduct. They may also be informed of what action the Agency will take if they fail to do so.
- 70 A Provider should be issued with two notices prior to a final notice being issued. The notices do not have to apply to the same obligation.

Period of notices

- 71 All Agency notices will remain in place for a period of 12 months. This time period will be recorded on the notice letters.

Time lapse notices

- 72 Where the time has lapsed on a final notice and the Provider continues to fail to comply with their obligations, where appropriate, another final notice may be issued by Service Contracts.

Other Agency Action

- 73 Where appropriate, the Agency may also take other action/s during the process. Other Agency action/s may include:
- reassigning the legal aid file to another Provider (Grants only)
 - imposing a condition on the Provider's listing approval(s) pursuant to s69 (2)
 - where the Provider has failed to take all reasonable steps to protect the interests of the Agency under a charge in favour of the Agency, invoking the process to recover money from the Provider pursuant to s68 (4)
 - undertaking compliance checking or a special audit of the Provider pursuant to s78.

- 74 Decisions in respect to the last three bullets points above may only be made by the Manager Service Contracts.
- 75 Where the Provider is employed with the Public Defence Service, a separate disciplinary process as provided in the Agency's Human Resources Manual may be undertaken.

Recording and Reporting

Recording

- 76 All external complaints or Agency concerns must be entered in the Agency's central Provider Monitoring Register. As correspondence relating to the matter may be placed on the legal aid file and/or the Provider's file, it is important that the Agency is able to keep track of any issues concerning a particular Provider.
- 77 The register will note the following information:
- the name of the Provider
 - the staff member investigating the matter
 - a description of the matter – e.g. external complaint or Agency concern
 - the outcome of the investigation, including the action taken, if any.
 - where the documentation is filed that is, in the Provider's file and/or in the legal aid file.
- 78 Whether the matter is justified or not, all information will be retained in the register for reporting and auditing purposes.

Documentation and Filing

- 79 While the investigation is underway and once it has been completed, copies of all correspondence will be kept on the legal aid file and/or the Provider's file. Regional Managers may however keep a separate file in which to record documentation and correspondence, when dealing with matters that are sensitive, complex and/or voluminous. The location of the documentation will be noted on the Provider Monitoring Register.
- 80 Copies of correspondence from investigations initiated by Grants or Debt Management Group will generally be kept on the legal aid file. If there has been a prior justified matter in relation to the Provider, copies may also be kept on the Provider's file.
- 81 All notices issued will be kept on the Provider's file, and on the legal aid file, if appropriate.¹⁰

¹⁰ Where the notice is regarding an aspect of that legal aid file particularly.

- 82 Copies of correspondence, where matters are referred directly to Service Contracts, will be kept on the Provider's file, and on the legal aid file, if appropriate.

Reporting

- 83 A trend analysis of the Agency's action on external complaints or Agency concerns about Providers may be reported in an anonymous format. The analysis will incorporate information sourced from the Provider Monitoring Register.

Minor Matters

Listed below are matters that can be resolved with an informal discussion with the Provider. In most cases this would involve the Agency contacting the Provider by telephone.

Examples include (note this list is not exhaustive):

- accidentally completing a form incorrectly
- poor record keeping due to inexperience as a Listed Provider
- a genuine mistake by the Provider that has had no impact on the service provided
- Providers applying for legal aid after the proceedings have been completed
- general impoliteness to Agency staff or client, however where a Provider is considered to have behaved in an aggressive or abusive manner this will be considered a serious matter and dealt with using the notice system.

Matters that should be investigated and dealt with initially by Agency staff at the local level

Listed below are matters that should be dealt with initially by Agency staff at the local level. Where a Provider continues to repeat the same or similar conduct or performance and is failing to meet his/her obligations then the matter will be referred to Service Contracts, after two Notices have been issued. In certain circumstances however, where there is repeated conduct of matters that are dealt with initially at the local level, it may be necessary to refer the matter to Service Contracts directly. Advice should first be sought from the Agency Manager; the Agency Manager should then refer the matter to Service Contracts, as per the Referral Chain.

Examples include (note this list is not exhaustive):

- Providers not being available for PDLA work when rostered
- Providers failing to arrange cover for their legal aid clients while on leave
- Providers failing to attend court on the given date of proceedings
- Providers being late for court when representing legal aid clients
- Providers approaching the client of another lawyer with the intention of seeking reassignment
- Providers failing to attend duty solicitor roster dates and not scheduling a replacement or contacting the supervisor in advance
- Providers unable to attend their rostered duty solicitor date and not finding a replacement of a similar or higher category or contacting the supervisor in advance

- Duty solicitors seeking nomination as preferred lawyer or telling clients that they will be their preferred lawyer
- Singular instances of duty solicitors claiming rostered hours while representing other clients at the same time
- Duty solicitors nominating colleagues in their firm or chambers as preferred lawyers
- Duty solicitors signing off early to pick up assignments
- Providers actively soliciting unrepresented defendants (either in the cells or court) who would normally be dealt with by the duty solicitor
- Providers accepting assignments with the intent to hand them over to a colleague in their firm or chambers
- Providers making unreasonable threats to withdraw from proceedings
- Providers accepting private payments from their legal aid clients, unless authorised by the Agency
- Singular instances of Providers claiming for excessive costs, double billing, billing of work not undertaken, improper claiming of expenses
- Providers failing to protect the Agency's interests in respect to charges in favour of the Agency.

Note

If at any stage Agency staff become aware that the concern or complaint is of a more serious nature (examples listed below) than originally assessed, they should refer the matter (using the Referral Chain) at this stage. It is not necessary to wait until after the second notice is issued in these situations.

Matters that should be immediately referred to Service Contracts

Where the matter is of a more serious nature it should be referred to Service Contracts in the first instance.

Examples include (note this list is not exhaustive):

- allegations of other serious fraudulent behaviour, for example tampering with information supplied to the Agency, fabrication of clients' financial details, falsely signing forms, misuse of a nominated Trust Account by the Provider
- allegations of Provider misconduct, for example, inappropriate relationships with clients, perverting the course of justice, repeated or significant double billing including the duty solicitor scheme
- those matters that may result in suspension consideration, these can be found in -

“Suspension Consideration and Review Process”, for example:

- Providers having had their practising certificate suspended, been struck off or declared bankrupt
- Matters relating to section 72A of the Act i.e. Providers having been charged with an offence or subject to disciplinary procedures under the Law Practitioners Act 1982, where the Agency considers that this will have an adverse effect on the interests of aided persons or the integrity of legal aid schemes generally.
- Providers having been convicted of a crime where the nature of that conviction might adversely affect their relationship with aided persons, or the integrity and credibility of the legal aid schemes. Examples include, but are not restricted to fraud, perjury and bribery
- Providers having had a complaint upheld by either the District or New Zealand Law Societies which is a risk to the integrity and credibility of the Agency’s schemes or which contravenes the Agency’s service standards.