

# Memo

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| <b>Date:</b>     | 19 September 2013   |          |                 |
| <b>To:</b>       | Primary Health Organisations and other interested parties                     |          |                 |
| <b>Copy to:</b>  |   |          |                 |
| <b>From:</b>     | Cathy O'Malley, Deputy Director-General, Sector Capability and Implementation |          |                 |
| <b>Subject:</b>  |   |          |                 |
| <b>For your:</b> | Action  | Decision | Information     |
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## Background

1. The new PHO Services Agreement between DHBs and PHOs came into effect on 1 July 2013. A copy of the Agreement is available on the DHB Shared Services website at:  
<http://www.dhbsharedservices.health.nz/Site/PSAAP/Default.aspx>.
2. That Agreement provides that a PHO may subcontract all or any of the primary health care services that the PHO provides for the DHB (clause B.11(1)). The Agreement also provides that any subcontract entered into by a PHO must include certain mandatory clauses agreed by the PHO and DHB (clause B.11(2)(d)).
3. This memo:
  - (a) sets out the mandatory clauses that must be included in each PHOs' subcontracts (see Appendix 1);
  - (b) describes matters that each PHO will need to cover in its subcontracts to enable it to meet its obligations under the PHO Services Agreement (see Appendix 2); and
  - (c) provides PHOs with an example of a back-to-back contract template that they can choose to use when subcontracting with contracted providers (see attached template).
4. Further information about the development and purpose of the back-to-back contract template, and using the template, is set out below.

## Development of the back-to-back contract template

5. During the development of the new PHO Services Agreement, the Ministry agreed to lead the development of a new back-to-back contract template.
6. While the mandatory clauses must be included in all subcontracts, the template itself is not mandatory – i.e. PHOs are not required to use the template.

7. Rather, the back-to-back template is provided as an example of a contract that PHOs can use if they wish. It has been developed so that all PHOs have access to a template that:
  - (a) includes all mandatory clauses that must be included in each PHO's subcontracts (see Appendix 1);
  - (b) includes other clauses that will help ensure that a PHO meets its obligations under the PHO Services Agreement (see Appendix 2); and
  - (c) includes general terms that are often seen in back-to-back contracts, such as a dispute resolution clause and provisions relating to transfers and assignment, insurance, and notices.
8. When preparing the new contract template, the Ministry reviewed a number of back-to-back contracts that are currently in use by PHOs. Some of those contracts are very comprehensive, in that they copy almost entirely versions 17 or 18 of the PHO Agreement. At the other end of the scale, some back-to-back contracts incorporate the PHO Agreement by reference, and so are quite short.
9. The Ministry adopted an approach that sits in the middle of the range of contracts currently in use. That is, the template is comprehensive in that it includes all the terms you would expect to see in a back-to-back contract, but it does not copy exactly the terms of the PHO Services Agreement, and incorporates some of those terms by reference.

#### **Purpose of the back-to-back contract template**

10. The purpose of the contract template is to provide a template for PHOs to use when they subcontract an organisation or a practitioner to provide services under the PHO Services Agreement. That organisation or practitioner is the "Contracted Provider" referred to throughout the contract template. If a Contracted Provider employs or subcontracts other practitioners to provide services, the Contracted Provider will need to ensure that its employment agreements and/or subcontracts pass on the obligations that the Contractor Provider has under the back-to-back contract, as appropriate.
11. In addition, the contract template provides only for the PHO to subcontract the provision of services under the PHO Services Agreement. It is not intended to set out the terms relating to the relationship between members of a general practice network, or govern other aspects of how general practice networks are managed.

#### **Guidance for using the back-to-back contract template**

12. Because the contract template is an example only, PHOs who wish to use the template are free to delete or amend the terms in the template (except the mandatory clauses) as they choose. If you choose not to use this template I strongly advise you to seek your own legal advice regarding your back-to-back contract. As this document is intended as a guide, and not legal advice, you may also wish to obtain your own legal advice if you do use the contract template.
13. A PHO and Contracted Provider can also agree to add terms to the template, including terms that specify in more detail the obligations of the parties and how the parties will work together.

For example, clause 6 of the contract template (Reporting requirements) could be amended to expressly set out the information that the Contracted Provider will provide to the PHO to ensure that the PHO meets its reporting obligations to the DHB that are set out in the PHO Services Agreement.

14. Set out below is a summary and explanation of certain key provisions in the contract template.
15. **Clause 2 (Application of the PHO Services Agreement):** Clause 2 describes how the PHO Services Agreement applies to the back-to-back contract. In short:
  - (a) certain parts of the PHO Services Agreement are incorporated into the back-to-back contract;
  - (b) Contracted Providers must comply with the terms of the PHO Services Agreement that are expressed as applying to them. An example is clause B.13 of the PHO Services Agreement, which provides that Contracted Providers must not accept referrer inducements or incentives;
  - (c) words that are capitalised in the back-to-back contract have the same meaning as in the PHO Services Agreement, unless the context requires otherwise; and
  - (d) Referenced Documents referred to in the PHO Services Agreement apply to and form part of the back-to-back contract.
16. Under clause 2.4, variations to the PHO Services Agreement and the Referenced Documents are automatically incorporated into the back-to-back contract. This means that PHOs and Contracted Providers do not have to sign new back-to-back contracts every time changes are made to the PHO Services Agreement or Referenced Documents.
17. **Clause 3 (Our obligations and how we will work together):** Clause 3 describes how the PHO and its Contracted Provider will work together. Specifically:
  - (a) clause 3.1 recognises that the PHO Services Agreement requires the PHO to work with its contracted providers in a way that gives effect to the objectives for the delivery of primary health care services set out in of that Agreement
  - (b) clause 3.2 has been included because PHOs have a number of obligations under the PHO Services Agreement that they can only meet with the assistance of their contracted providers
  - (c) clause 3.3 requires both the PHO and the Contracted Provider to carry out their roles and responsibilities under the back-to-back contract in a collaborative and co-operative way, and to exercise their rights in a reasonable manner.
18. **Clause 4 (Services provided by the Contracted Provider):** If a Contracted Provider is providing services for the PHO in addition to the Nationally Consistent Services described in Schedule 1 (which include First Level Services, General Medical Services, and Immunisation Services), those services can be included in and form part of the contract by the addition of new schedules. See clause 4.1.

19. A PHO and a Contracted Provider can also agree to service delivery principles if they wish. See clause 4.2.
20. **Clause 5 (Practitioners and Service providers):** Clause 5 reflects requirements in the PHO Services Agreement about the qualifications and experience of practitioners and service providers. Clause 5.3 requires Contracted Providers to provide the PHO with specified Practitioner information. This allows the PHO to provide that information to the DHB, which the PHO is required to do under clause 2 of Schedule B2 of the PHO Services Agreement.
21. **Clause 7 (Location of Services):** Clause 7 can be used if the PHO and Contracted Provider want to specify locations where the Services must be provided. The clause as drafted does not limit where Services may be provided. However, if the PHO itself is subject to any geographical limitations under its PHO Services Agreement with the DHB, the PHO could apply those same limitations to the Contracted Provider. That can be done by adding a new clause 7.2 that sets out those limitations.
22. **Clause 8 (Claims and payment for Services):** Clause 8 covers Claims and payments for services. For services covered by the PHO Services Agreement (including the Nationally Consistent Services), Part F of the PHO Services Agreement applies, except that:
  - (a) references to "DHB" should be read as "PHO"; and
  - (b) references to "PHO" should be read as "Contracted Provider",unless the context requires otherwise. This means that PHOs and Contracted Providers will need to be familiar with how Part F works.
23. Clause 8.2 requires Contracted Providers to do everything reasonably practicable to ensure that the PHO is able to comply with its obligations to the DHB that are set out in Part F of the PHO Services Agreement, including the PHO's obligation to submit and certify Registers.
24. **Clause 11 (Audit):** The audit provisions in clause 11 give effect to the audit provisions in the PHO Services Agreement that require the PHO to ensure its Contracted Providers comply with the audit provisions of the PHO Services Agreement.
25. Clause 11.3 refers to section 22G of the Health Act 1956. This section requires a PHO to make its records available for the purposes of verifying claims if requested by the Director-General of Health, or a chief executive of a DHB. The PHO Services Agreement requires PHOs to ensure that its Contracted Providers are under the same obligation. Clause 11.3 has been included for that purpose. Section 22G is available online at <http://www.legislation.govt.nz/act/public/1956/0065/latest/DLM306666.html>.
26. **Clause 15 (Termination):** Either the PHO or the Contracted Provider may terminate the back-to-back contract for any reason by giving 6 months' notice (clause 15.3). It is important to note that this clause deals only with the Contracted Provider leaving the PHO with which it has signed the back-to-back contract. It does not give the Contracted Provider the right to join another PHO. The Contracted Provider must separately obtain the agreement of the other PHO, and the other PHO must give notice to the DHB in accordance with the timing requirements in clause B.11(3) of the PHO Services Agreement.

27. A Contracted Provider should also be aware that if it wants to enter into a new subcontract with a new PHO, the new subcontract will come into effect no earlier than 1 July of the following year, unless the DHB and new PHO agree otherwise (see clause B.11(4) of the PHO Services Agreement). That is to ensure that the movement of contracted providers is consistent with DHBs', PHO's and Contracted Provider annual planning cycles.
28. **Clause 26 (Contracts Privity Act):** Clause 26 provides that all obligations of the Contracted Provider set out in the back-to-back contract confer a benefit on the DHB, and that the DHB may enforce those obligations directly against the Contracted Provider, provided it does so in accordance with the back-to-back contract. Clause 26 is included because the standard position under contract law is that only a party to a contract can enforce the other party's compliance with the contract. However, as the back-to-back contract involves the provision of publicly funded health care services, the DHB has an interest in ensuring compliance with the back-to-back contract by contracted providers.
29. Accordingly, clause 26 gives the DHB the right to enforce the Contracted Provider's compliance with its obligations under the back-to-back contract, in accordance with the contract. Because the PHO can also enforce compliance, it will be a question of judgement as to whether the DHB or PHO takes enforcement action. Clause 26 is a mandatory clause, because clause B11.2(c) of the PHO Services Agreement expressly requires that each PHO subcontract must provide for the DHB to exercise and enforce its rights under the PHO Services Agreement in relation to the Contracted Provider's performance of its obligations under the subcontract.
30. **Schedule 1 – Nationally Consistent Services:** Schedule 1 provides that:
  - (a) the Contracted Provider must provide certain Nationally Consistent Services in accordance with the relevant parts of the PHO Services Agreement (clause 1); and
  - (b) the PHO will pay the Contracted Provider in accordance with the relevant Schedules to Part F (clause 2).
31. Clause 2.2 of Schedule 1 provides that the PHO will pay the capitation payments for First Level Services including Urgent Care Services it receives from the DHB to the Contracted Provider no later than 2 Business Days after the PHO receives the payments from the DHB. That is to ensure that the PHO's Contracted Providers receive capitation payments from the DHB in a timely manner, so that Contracted Providers can in turn meet their financial obligations.
32. **Other general terms:** As set out above, the contract template includes a number of general terms that are often seen in back-to-back contracts. To ensure that the PHO Services Agreement and back-to-back contracts are consistent, these drafting of the general terms is based on the drafting of equivalent terms in the PHO Services Agreement.
33. An exception to this is the indemnity clause (clause 23). The PHO Services Agreement does not include an indemnity clause. However, we have included an indemnity in the contract template because indemnities are common in contracts of this type, and because we are aware that some back-to-back contracts currently in use include indemnity clauses. PHOs

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are, however, free to amend or delete the indemnity clause if they wish, as is the case with all the clauses in the contract template except the mandatory clauses.

Cathy O'Malley

**Deputy Director-General**

**Sector Capability and Implementation**

**Ministry of Health**

## Appendix 1 – Mandatory clauses

Each PHO must include the clauses set out in the table below in its subcontracts with its contracted providers.

|          | <b>Mandatory clause</b>  | <b>PHO Services Agreement clause reference</b> | <b>Back-to-back contract template clause reference</b> |
|----------|--|--|--|
| <b>1</b> | <p><b>Annual practicing certificate and registration</b></p> <p>The Contracted Provider must ensure that it and/or each Practitioner who Provides the Services holds an annual practising certificate and a current registration from the appropriate New Zealand statutory body.</p>  | Clause B.11(2)(a)                              | Clause 5.2   |
| <b>2</b> | <p><b>Payments</b></p> <p>The PHO may recover, by way of set-off against any Payments due to the Contracted Provider, the reasonable costs of providing Services for any period that the Contracted Provider does not Provide, either itself or by means of alternative arrangements, the Services.</p>                        | Clause B.11(10)                                | Clause 8.4   |
| <b>3</b> | <p><b>Contracts privity</b></p> <p>The PHO and Contracted Provider agree that all obligations of the Contracted Provider set out in this Agreement confer a benefit on the DHB, and the DHB may, in accordance with the Contracts Privity Act 1982, enforce those obligations directly against the Contracted Provider.</p>    | Clause B.11(2)(c)                              | Clause 26  |
| <b>4</b> | <p><b>Information about Claims</b></p> <p>The Contracted Provider agrees that in respect of any claims for payments that it makes under this Agreement, section 22G(2) of the Health Act 1956 applies to the Contracted Provider as if the Contracted Provider was a provider under section 22G(1) of the Health Act 1956.</p> | Clause B.34                                    | Clause 11.3  |

## Appendix 2 – Matters that must be covered in PHOs' subcontracts

The PHO Services Agreement contains various obligations on PHOs that in practice PHOs can only meet by including appropriate provisions in their back-to-back contracts with Contracted Providers.

The first column in the table below summarises those obligations. The second column refers to the relevant clause in the PHO Services Agreement. The third column refers to the clause in the contract template contract that covers the obligation. The clauses in the contract template are examples only. The obligations could be incorporated into a back-to-back contract in other ways.

|          | <b>Summary of PHO obligations that must be covered in the back-to-back contract</b>  | <b>PHO Services Agreement clause reference</b> | <b>Back-to-back contract template clause reference</b>                 |
|----------|--|--|--|
| <b>1</b> | <p><b>Subcontractors</b></p> <p>The PHO must use its best endeavours to ensure that each Contracted Provider has the qualifications or accreditations, experience, competency and availability to enable it to perform all of the subcontracted Services to the standards required under the PHO Services Agreement.</p> | Clause B.11(1)                                 | Clause 5.1   |
| <b>2</b> | <p><b>Location of Services</b></p> <p>The PHO will provide the Services in the geographical locations specified in the PHO Services Agreement.</p>   | Clause B.9                                     | Clause 7   |
| <b>3</b> | <p><b>Incentives and inducements</b></p> <p>Neither a PHO nor a Contracted Provider may accept any incentive or inducement from a Referred Service provider, either directly or indirectly.</p>  | Clause B.13                                    | Not included expressly, but included by the operation of clause 2.1(a) |
| <b>4</b> | <p><b>Audits</b></p> <p>The PHO must ensure that the Contracted Provider cooperates with the DHB during an audit, including by providing the DHB or its auditors with reasonable assistance, including access to its premises, records and information, personnel, and service users.</p>                                | Clauses B.25-B.33                              | Clause 11  |
| <b>5</b> | <p><b>Claims and payments</b></p> <p>The PHO and its Contracted Provider must Claim for Services in accordance with Part F, and the provisions in Part F apply as between the PHO and</p>  | Part F   | Clause 8   |

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|          | the Contracted Provider.  |                         |                |
| <b>6</b> | <b>Practitioner information</b><br>The PHO will provide Sector Services and the PHO Performance Programme secretariat with information about each Practitioner providing Services.  | Clause 2 of Schedule B2 | Clause 5.3     |
| <b>7</b> | <b>Reporting</b><br>The PHO will meet the reporting requirements in Schedule B2 of the PHO Services Agreement.  | Clause B.4              | Clause 6       |
|          |   |                         |                |
|          |   |                         |                |
| <b>8</b> | <b>Notification of problems</b><br>The PHO will notify the DHB of any changes, problems, significant risks, or significant issues that materially reduce or affect, is are likely to materially reduce or affect, the ability of the PHO to meet its obligations. | Clause B.24             | Clause 13      |
| <b>9</b> | <b>Termination</b><br>The PHO must terminate a subcontract with a Contracted Provider if required by the DHB because the Contracted Provider has failed to perform a material obligation or has claimed a payment in breach of the subcontract.                   | Clause B.37             | Clause 15.4(a) |