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National Legal Profession Taskforce
National Legal Profession Branch
Attorney-General's Department
National Circuit, Barton, ACT

legalprofession@ag.gov.au

31st August 2010

Dear Sir/Madam

Re: NLA submission to National Legal Profession Taskforce

Introduction

National Legal Aid (NLA) represents the Directors of the eight State and Territory Legal Aid Commissions (Commissions) in Australia. The Commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the appropriate cost of legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and the legal system.

NLA welcomes the opportunity to comment on the National Legal Profession Reform consultation package.

Public purpose funds

Under current arrangements nationally, Legal Aid Commissions have, through a variety of statutory arrangements, been significant beneficiaries from lawyers trust account interest (public purpose funds, excess guarantee funds etc).

Whilst NLA has been told that a formula will be devised to ensure an equitable division of interest from revised trust account arrangements, there has not been any detail of these proposed arrangements. Some small Commissions are concerned to ensure that they will still have access to interest earned on trust account funds arising from activity in the relevant state but held in another state, because legal firms will no longer be required to have a trust account in each state.

For example, in South Australia where there is no Fidelity Fund, the implications for the existing Guarantee Fund, and interest earned on that Fund, are not clear. Any excess in the current fund can benefit the Legal Services Commission, and has done to a significant extent in the past. How the loss of this income to the Legal Services Commission is to be compensated has not been addressed.

Cost of practising certificates

A further concern is that the cost of practising certificates will increase further impacting on the budgets of Legal Aid Commissions.

National Legal Services Board

Legal assistance services - including Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services and Community Legal Centres, provide legal services to people who are economically and/or socially disadvantaged. We make the suggestion therefore that a person with a background in and experience of the legal assistance sector would bring a valuable perspective to the proposed Board, particularly given the important role the Board is to play in dealing with consumer concerns. We would be happy to assist in identifying an appropriate nominee.

Consultation Draft - Legal Profession National Rules - Solicitors' Rules 2010

The balance of our submission focuses on several aspects of the proposed rules that may have an impact on the ability of people to gain access to justice. Specifically, our comments relate to communication of advice, capacity of clients, conflict of interest and assisting a client to apply for legal aid.

RELATIONS WITH CLIENTS

Communication of advice - 7.1

Draft Rule 7.1 does not require a solicitor to make any reference to the possibility that legal aid/assistance may be available. NLA recommends that this Rule place a positive obligation on solicitors to inform clients about eligibility for aid, and to assist the client in the making of an application for aid.

Assisting a client to apply for legal aid

Legislation in South Australia and Solicitor's Rules in various jurisdictions contain several provisions concerning the role of a solicitor in assisting a client to apply for legal aid. These rules are designed to improve the administration of the court system by reducing the need for adjournments in criminal matters due to defendants making late applications for aid. The rules also benefit clients because legal practitioners are required to assist clients to apply for legal aid and therefore eligible clients are given the benefit of a grant of legal aid at the earliest possible time. NLA recommends that rules with a similar effect be included in the proposed national rules.

The Criminal Law (Legal Representation) Act 2001 South Australia is noted, and the current South Australian and New South Wales rules in relation to legal assistance are attached.

Client instructions - 8.1

Capacity of client

Draft Rule 8.1 provides that a solicitor must follow a client's lawful, proper and competent instructions. Where, however, a client is unable to provide competent

instructions but is in need of legal assistance, there is a need for clarification in relation to the solicitor's legal and ethical position, and guidance about what the solicitor should do. For example, see s.40 Division 7 Legal Practitioners Act 1981, South Australia.

In our experience the following situations are not uncommon:

- 1) A person's capacity is affected to the point that an application for guardianship should be made.
- 2) A person's capacity is affected to the point that the issue of fitness to plead to criminal charges arises.
- 3) A person's capacity is affected to the point that they are unable to comprehend the proceedings or provide full instructions due to mental illness or impairment; however they require legal assistance, such as in the situation of persons involuntarily detained and the subject of proceedings before a Tribunal.

The issue of client capacity requires careful consideration and the balancing of competing considerations. It is necessary to avoid inappropriate or excessive interference with a person's right to make his or her own decisions, but in some situations there is a countervailing danger that failure to take action to protect a client might expose the person to physical or financial harm or abuse (or risk of such harm or abuse).

In many cases a client will have a family member, friend or community worker who is willing and able to help them to make their own decisions and to provide competent instructions. In some cases however, there is no person to assist. Sometimes, even when there is someone able to assist, this may not be in the client's interests, for example because of conflict of interest or because they are trying to take advantage of the client. In these cases a solicitor may be the only person in a position to help.

Lack of capacity is an issue of increasing concern to the community. The scale of this problem was summarised in the foreword to the recent NSW Parliamentary Report on Substitute Decision Making:

The number of people who will need the support of substitute decision making arrangements of some kind is expected to increase dramatically in the coming decades. This is due largely to Australia's aging population and the increasing number of dementia cases diagnosed each year. The Committee heard that in 2008 there were an estimated 227,000 people in Australia with dementia. By 2050 that number is estimated to increase by 330%, against an estimated population increase of less than 40%.

Of course, people with dementia are only one group who may need the support of substitute decision making. There are also people with mental illness, intellectual disability and acquired brain injury. These groups include some of the community's most vulnerable members.¹

¹ Standing Committee on Social Issues. *Substitute decision making for people lacking capacity*. Report 43 2010. p.xi.

In addition to the groups referred to above our client base also includes people, who have other forms of mental impairment, for example, people suffering from brain damage from long term substance abuse.

NLA foresees the need to clarify the following questions:

- What should a solicitor do when it first becomes apparent that their client's capacity is in doubt?
- Should they cease acting or do they have an ethical obligation to continue?
- If a solicitor continues to act by what authority are they doing so?
- What action can they take to protect the interests of a client who is at risk of harm, whether financial, physical or otherwise?
- To what extent, if any, are solicitors able to reveal client confidential information to third parties for the purpose of protecting a client's interests?
- What is the position if there are no family, friends or community workers willing or able to assist?

NLA suggests that Rule 8.1 be amended to take into account the needs of clients with diminished capacity, and allow solicitors the discretion to take reasonably necessary protective actions in the best interests of the client.

When taking protective action, the solicitor should be guided by the principle that a client's freedom of decision and freedom of action should be restricted as little as possible.

Conflict of interest - draft rules 10 & 11

Legal Aid Commissions provide brief advice services to people to inform them of their legal rights and actions to be taken to resolve their legal problems. In some circumstances, the advice may lead to an application for a grant of legal aid for continuing legal representation, but this does not occur in most cases. Formal means tests are not applied to advice only services, although requirements, such as production of a health care card, can apply to face to face advice services. Commissions provide significant numbers of such services every year. For example, in the 2008-2009 financial year Commissions provided approximately 275,000 legal advice services.

The importance of legal advice services in providing practical information about the law and thereby promoting access to justice is well recognised. In opening the National Access to Justice and Pro Bono Conference in 2006, the Honourable Justice Murray Gleeson highlighted the need and entitlement of disadvantaged people to legal advice services, and the 'immeasurable benefit' of the role played by Legal Aid Commissions and Community Legal Centres in providing these services. His Honour noted the importance of competent and impartial legal advice in maintaining the administration of justice, and the significant increase in self-represented litigants and the related difficulties presented to courts and tribunals. While an advice-only legal service cannot resolve the difficulties experienced by self-represented litigants, practical, competent and impartial legal advice from a legal practitioner can play a role in assisting them and in facilitating the administration of justice. Legal Aid Commissions and Community Legal Centres also provide duty lawyer services at courts around the country to provide further support to self-representing litigants.

The importance of legal advice services as early intervention and prevention strategies is well recognised. Most recently, the importance of legal advice services has been recognised in the "Strategic Framework for Access to Justice in the Federal Civil Justice System"². This is reflected in the new National Partnership Agreement on Legal Aid (NPA) signed by the Commonwealth and all States and Territories. The NPA requires legal assistance service providers to increase the delivery of advice services.

As a result of the large number of legal advice services provided, there is a high likelihood that more than one party to any legal dispute may seek advice from a Legal Aid Commission. In many cases, however, the Legal Aid Commission may be the only available source of free advice for a person who is unable to pay for private legal assistance. Similar issues may arise for other publicly funded legal assistance services such as the Aboriginal and Torres Strait Islander Legal Services and Community Legal Centres. It is therefore important that the Solicitors' Rules allow legal assistance services to put in place mechanisms to minimise the number of clients who are excluded from assistance on the basis of conflict of interest.

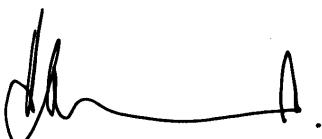
Draft Rule 10 "Conflicts concerning former clients" recognises that an effective information barrier may be established to avoid a conflict between a solicitor's duties owed to current and former clients. This is likely to address many "conflict issues" that arise out of advice services. We endorse this approach.

Draft Rule 11 "Conflict of duties concerning current clients" requires both "clients" to be aware that the solicitor/law practice is also acting for the other client, and that each client has given informed consent to the solicitor/law practice so acting. We appreciate the intent of this draft rule. However, we have some concerns that there could be situations where this rule could prevent the provision of legal assistance to people who have no other avenue for assistance. For example such a situation might arise if one party refused to provide his/her consent. We would therefore suggest that draft Rule 11.3 be amended to provide that an information barrier be sufficient to enable a Legal Assistance Service Provider such as a Legal Aid Commission, Community Legal Centre, or Aboriginal and Torres Strait Islander Legal Service to act. (Draft Rule 11.6 currently provides an information barrier is sufficient in relation to situations where the solicitor or law practice has confidential information in possession).

Conclusion

Thank you for the opportunity to provide comments on the National Legal Profession Reform consultation package. NLA would welcome the opportunity to participate in any further consultations. If you would like to discuss any of the matters raised in our comments, please do not hesitate to contact me.

Yours sincerely



Alan Kirkland
Chair

² Commonwealth Attorney-General's Department, September 2009, with the principles of the Framework being endorsed by the Standing Committee of Attorneys-General.

ADDITIONAL LOCAL RULES APPLICABLE IN SOUTH AUSTRALIA

34. Legal Assistance

- 34.1 A practitioner has an obligation to inform clients as to their eligibility for legal aid either by way of assistance from the Legal Services Commission or the Litigation Assistance Fund, and/or any other scheme for delivering aid or legal assistance to members of the community where that practitioner has reason to believe that such a client may be so eligible.
- 34.2 A practitioner shall give such assistance as may be reasonably necessary to a client in the making of an application for legal aid.
- 34.3 Subject to any requirements of any legal aid agency:
 - (a) a practitioner who forms the view that a client in receipt of legal aid no longer has a reasonable prospect of success, the practitioner shall inform the legal aid agency accordingly and take such steps as may reasonably be necessary to ensure that the furnishing of aid is either terminated or reduced to reflect the opinion so formed;
 - (b) if a practitioner acting in a matter the subject of a grant of legal aid, becomes aware of any change in the financial position or other circumstances of the client, and if such change may be relevant to the continuing grant of aid or the terms upon which such aid may be continued, the legal aid agency shall be informed by the practitioner forthwith of such change;
 - (c) a practitioner who communicates matters pursuant to Sub-rules (a) and (b) hereof to the Legal Services Commission or any other legal aid agency shall inform the assisted person of the matters communicated.
- 34.4 A practitioner shall not disclose to the Court or to any third person including any opposing practitioner or party that a client is assisted by the grant of legal aid or that an application for such a grant has been or will be made, except:
 - (a) upon the express instructions of the client and when such disclosure is necessary for the proper conduct of the matter; or
 - (b) as required by order of the Court or by statute.
- 34.5 A practitioner shall not communicate with the Legal Services Commission with a view to dissuading the Commission from granting or continuing to grant legal assistance to another party involved in any matter, where opposition to the grant of legal aid is advanced simply on grounds relating to the overall merits of the matter or by general comment as to the eligibility of the other party for aid.
- 34.6 If there is good reason to believe that the Commission may be unaware of any specific objective fact or facts clearly pertinent to the question of whether aid should be granted or continue to be granted the opposing practitioner may write to the Commission drawing attention to such fact or facts, but shall not urge that aid should not be granted.

NSW Rules - Assisting a client apply for legal aid

The current NSW Solicitors' Rules contain several provisions concerning the role of a solicitor in assisting a client to apply for legal aid in criminal proceedings. Rules 6A and 6B provide as follows:

Rule 6A Legal Aid Application – Criminal proceedings

1. A practitioner, who has accepted instructions to act for an accused person required to stand trial for a criminal offence, subject to the person's obtaining a grant of legal aid, must assist that person to apply for the grant as soon as practicable after receiving instructions, and not later than thirty (30) days before the commencement of the trial.
2. If instructions to apply for a grant are received within thirty (30) days of the trial, the practitioner must serve on the Registrar, or listing director of the Court, notice in writing that an application for legal aid has been made, and explaining the circumstances in which the application is made, and forward a copy of that notice to the Legal Aid Commission.
3. The practitioner must, thereafter, consult with the Legal Aid Commission in respect of the application, and give notice of the application to the prosecution and, if necessary, apply to the Court for directions.

Rule 6B Legal Aid: Court of Criminal Appeal proceedings

1. A practitioner who accepts instructions from an accused person who is an appellant to the Court of Criminal Appeal must not terminate the retainer and withdraw from the proceedings on the ground that the client has failed to make arrangements satisfactory to the practitioner for payment of the practitioner's costs, unless the practitioner has, not later than thirty (30) days before the date appointed for the call over at which the hearing date of the Appeal will be set -
 - 1.1 served notice in writing on the client of the practitioner's intention to terminate the retainer and withdraw from the proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the practitioner's costs, and
 - 1.2 delivered a copy of that notice to the Registrar of the Court of Appeal.
- 2.1 If a practitioner does not, in the circumstances described in Rule 6.1, terminate the retainer and withdraw from the proceedings, but undertakes to assist the appellant to apply for a grant of legal aid, the practitioner must ensure that the application for a grant of legal aid is lodged with the Legal Aid Commission as soon as practicable, and not later than ten (10) days prior to the call over, if that is practicable.
- 2.2 If, in the circumstances, it is not practicable to lodge the application for legal aid earlier than ten (10) days prior to the call over, the practitioner must, before the call over date, serve on the Registrar of the Court of Criminal Appeal notice in writing of the lodgement of the Application for Legal Aid, containing an explanation for its late lodgement, and must serve a copy of that notice on the Legal Aid Commission.
- 2.3 The practitioner must, thereafter, consult with the Legal Aid Commission in respect of the application, and give notice of the application to the other parties to the Appeal and, if required by the Legal Aid Commission, apply to the Registrar of the Court for direction."

- (c) to a court in which criminal proceedings arising from matters subject to the audit or examination have been brought.
- (5) If an auditor divulges information under subsection (4), the auditor may inform the Society and the practitioner or firm of practitioners by which he or she was employed to make the audit of that fact.

38—Regulations

The Governor may make regulations for the purposes of this Division—

- (a) prescribing and providing for the payment of fees for an audit or examination under this Division; and
- (ab) prescribing qualifications for approved auditors generally or for specified classes of approved auditors; and
- (ac) prescribing records to be kept by legal practitioners for the purposes of the Division; and
- (b) generally ensuring that the accounts and records required to be kept under this Division are properly kept and audited and that persons beneficially entitled to money and securities held by legal practitioners on trust are properly informed of the investment and disposition of the money and securities; and
- (c) exempting legal practitioners from this Division, or specified provisions of this Division, in respect of transactions of a specified class; and
- (d) prescribing fines not exceeding a fine of \$10 000 for contravention of any regulation under this Division.

Division 6—Delivery up of legal papers

39—Delivery up of legal papers

- (1) The Supreme Court may, on the application of any person, order a legal practitioner or former legal practitioner to deliver up documents—
 - (a) held by the practitioner or former practitioner on behalf of the applicant; or
 - (b) relating to proceedings taken or work done by the practitioner or former practitioner on behalf of the applicant.
- (2) The powers conferred by subsection (1) may be exercised notwithstanding the existence of a lien on the documents.
- (3) An order may be made under this section on such terms and conditions as the Supreme Court thinks fit and, in particular, on conditions protecting the rights of the legal practitioner or former legal practitioner to costs for legal work done by the practitioner on behalf of the applicant.

Division 7—Authority of a legal practitioner to act on behalf of a person of unsound mind

40—Authority of legal practitioner to act on behalf of person of unsound mind

- (1) The authority of a legal practitioner to act on behalf of a person is not abrogated by reason only of the fact that that person becomes of unsound mind.

Legal Practitioners Act 1981—1.6.2007

Part 3—The practice of the law

Division 7—Authority of a legal practitioner to act on behalf of a person of unsound mind

- (2) When the mental unsoundness of a person on behalf of whom a legal practitioner is acting comes to the knowledge of the practitioner, the practitioner's authority to act on behalf of that person ceases, subject to subsection (3), and determines.
- (3) Where it is necessary for the purpose of protecting the interests of a person of unsound mind in any legal proceedings or other business, the authority of a legal practitioner, notwithstanding that the practitioner knows of the mental unsoundness of the person on behalf of whom the practitioner is acting, continues for the purpose of completing those proceedings or that business.

Division 8—Recovery of legal costs**41—Bill of costs to be delivered**

- (1) A person cannot bring an action for the recovery of legal costs or appropriate money in or towards satisfaction of a claim for legal costs unless a bill specifying the total amount of those costs, and describing the legal work to which the costs relate, has been delivered to the person liable to the costs either personally, or by post addressed to the person at the person's last known place of business or residence.
- (2) The person liable to legal costs may at any time within six months after delivery of a bill of costs under subsection (1) request the person claiming to be entitled to the costs to provide a statement showing in detail how the amount of the costs to which the bill relates is made up.
- (3) A person of whom a request is made under subsection (2) must comply with the request.
Maximum penalty: \$750.
- (4) Where the defendant to an action for the recovery of legal costs has made a request of the plaintiff under subsection (2), and the plaintiff has not complied with the request, the court must, at the request of the defendant, stay the action until the plaintiff has complied with the request.

42—Costs

- (1) On the application—
 - (a) of a person claiming to be entitled to legal costs; or
 - (b) of a person who is liable to pay, or who has paid, any legal costs,
the Supreme Court may tax and settle the bill for those costs.
- (1a) The Supreme Court's power to tax and settle a bill of costs (but no other power of the Supreme Court under this section) may, subject to any rule, order or direction of the Court, be exercised by the Registrar of the Court.
- (1b) Subject to the rules of the Supreme Court, an appeal lies to a judge against a decision of the Registrar pursuant to subsection (1a).
- (2) Where an application has been made under subsection (1), the Supreme Court may—
 - (a) restrain a person claiming to be entitled to the costs from commencing an action for recovery of the costs; or
 - (b) stay any proceedings for recovery of the costs.