



National Legal Aid

Review of the Australian Solicitors' Conduct Rules

Submission to the Law Council of Australia

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National Legal Aid Secretariat
GPO Box 1422
Hobart TAS 7001
nla@legalaid.tas.gov.au
03 6236 3813

Dear Sir or Madam,

About National Legal Aid and Australia's legal aid commissions

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia.

The LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

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.

LAC services are provided consistently with the priorities specified by the inter-governmental National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA) and with the State or Territory enabling legislation of each LAC.

Approximately 1,250 FTE lawyers are employed by LACs. An estimated 4,725 private legal practitioners, who are prepared to undertake work at legal aid fee rates, are also on LAC panels for the purposes of delivering services to financially disadvantaged people. LACs also work with our legal assistance service partners, the Aboriginal and Torres Strait Islander Legal Services and the community legal centres (CLCs), to ensure that legal assistance services are delivered as widely as possible, and that issues such as conflict are addressed.

Attachment A to this submission is a NLA publication which provides information about LAC service delivery.

This submission

NLA is grateful for the opportunity to make a submission to the Law Council of Australia's Review into the Australian Solicitors' Conduct Rules (the Conduct Rules).

NLA has a particular interest in how the Conduct Rules impact on "legal assistance priority client groups". These priority groups "recognise people whose capability to resolve legal problems may be compromised by circumstances of vulnerability and/or disadvantage. People who fall within the priority client groups are more likely to experience legal problems, less likely to seek assistance and/or less able to access services for a range of reasons". "Legal assistance service providers should focus their services on people experiencing financial disadvantage."¹ There are concerns that a number of the rules, particularly those relating to conflict of interest, are restricting the delivery of appropriate legal assistance services to many people who need them.

Context and the demand for legal aid

Ongoing representation services are provided to priority clients through grants of legal aid. Eligibility for representation services is subject to strict means and merits testing. These representation services are delivered by a mix of in-house LAC lawyers and private legal practitioners.

The NPA also provides that legal assistance will be delivered through a range of discrete assistance services. Discrete assistance services delivered include: legal information; legal advice (by video/phone, face to face or online); and at court 'on the day' duty lawyer and Family Advocacy and Support Services. As discrete services cost much less than providing full legal representation services, LACs are able to provide discrete services to more people.

In 2014, the Australian Government Productivity Commission undertook an inquiry into Access to Justice Arrangements. The inquiry examined the civil justice system, including family law and related legal matters such as family violence and child protection, and found that there are more people living in poverty (14%) than are eligible for [a grant of] legal aid (8%).²

The Productivity Commission recommended that an "interim funding injection in the order of \$200m per annum"³ was required for legal assistance services to address the more pressing gaps in service delivery. The recommended funding, which would allow LACs to relax means tests and extend the types of matters for which grants of aid are available, has not been provided.

¹ National Partnership Agreement on Legal Assistance Services 2015-2020 Schedule B Commonwealth priorities and eligibility principles.

² Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72 Appendix H, 2014) 1021-22.

³ *Ibid* vol 2 738.

People who are unable to afford private legal representation, but do not qualify for legal aid may have no choice but to self-represent. This is usually experienced as a daunting and stressful prospect. The availability of discrete assistance services for self-represented litigants improves outcomes for individual litigants and contributes to the efficiency of the courts and justice system more generally.

NLA is concerned that the ability to provide some discrete assistance services is adversely impacted by the conflict of interest rules, with lawyers generally being careful not to run any risk of a breach of the rules.

Attached to this submission is Appendix H of the Productivity Commission report which provides further detail about the funding context in which the LACs are operating.

Rule 1 – Application and Interpretation

Recommendation 2: That a generic definition of community legal service be included in the Commentary as follows:

“community legal service” means an organisation or body that is a community legal service, a community legal centre, or a complying community legal centre for the purposes of the legal profession legislation of a jurisdiction.

NLA supports this recommended definition as consistent with definitions found in State and Territory legislation.⁴

NLA also supports the Ethics Committee’s proposal (raised in the discussion of the **second matter**), that the definition of *law practice* in the Glossary be amended to include a reference to a community legal service, as defined above.

Rule 2 – Purpose and effect of the rules

Recommendation 6: That the Commentary should explain that while the Rules are not directly enforceable by a third party, the circumstances surrounding an alleged breach of the rule(s) can form part of the evidence in a complaint or civil matter.

NLA supports this recommendation.

Rule 7 – Communication of advice

Recommendation 18: That rule 7 does not need to include a reference to a duty to inform clients about the availability of legal aid, but the Commentary to rule 4 could be expanded to mention other forms of legal assistance in addition to legal aid.

⁴ In addition to the definitions contained at page 17 of the Discussion Paper, the *ACT Legal Profession Act 2006* also contains a definition of a “complying community legal centre”.

NLA wishes to emphasise the importance of ensuring that people are aware of the availability of legal assistance services. As noted by the Productivity Commission, “Most people consult only one adviser when they have a legal problem (figure 5.4). If the first adviser consulted is inappropriate, it is unlikely that a person’s legal needs will be met — highlighting the importance of ensuring that the first point of contact can either directly assist or at least, has the ability to refer people to appropriate legal assistance (known as the ‘no wrong door’ approach).”⁵

Whilst the commentary in Rule 4 currently recommends solicitors advise clients of the availability of legal aid, this is not a prescribed course of action, and permits the possibility that a client may not be appropriately informed of all potential legal avenues to resolve a dispute. NLA therefore wishes to express support for amending Rule 7 to include a reference to informing clients, wherever appropriate, that they may be eligible for a grant of aid.

Ensuring that solicitors who have reason to believe that a client may be eligible for legal aid and legal assistance services inform the client of the availability of those services would help to address the ever growing “justice gap”⁶ experienced by many lower and middle income Australians.

A number of Australian jurisdictions have adopted rules imposing a duty on solicitors to inform a client of the availability of, or their eligibility for, legal aid including:

- The Western Australian Legal Profession Conduct Rules 2010 note that if a practitioner has reason to believe a client may be unable to raise funds to pay costs, the solicitor must inform the client of the availability of legal aid.⁷
- A Tasmanian practitioner must inform a client of any entitlement to apply for legal aid under the Tasmanian Rules of Practice 1994.⁸
- The Law Society of South Australia has incorporated Rule 16A, which is specific to South Australia, into the Australian Solicitors’ Conduct Rules. Rule 16A imposes on a practitioner an obligation to inform clients as to their eligibility for legal aid either by way of assistance from the Legal Services Commission (Legal Aid) 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.⁹

⁵ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72 Vol 1, 2014) 164.

⁶ The ‘justice gap’ or ‘missing middle’ is a term often used to describe those who cannot afford private representation but who also do not qualify for a grant of legal assistance from a LAC.

⁷ *Legal Profession Conduct Rules 2010* (WA) r 11(1).

⁸ *Rules of Practice 1994* (Tas) r 15.

⁹ *Australian Solicitors’ Conduct Rules* (SA) r 16A.1.

Recommendation 19: That rule 7 should not include a duty on all solicitors in all circumstances to assist a client make an application for legal aid.

NLA supports this recommendation.

It is suggested however that the commentary to Rule 7 should include a note that a practitioner should provide reasonable assistance in helping a person apply for legal aid. This could include assisting in making an application if, in the opinion of the practitioner, the client requires such assistance and the practitioner has relevant knowledge of the application process, but could also include directing the person to other sources of help. This would be consistent with the South Australian addition to the Australian Solicitors' Conduct Rules which requires a practitioner to provide "reasonably necessary" assistance in helping a client make an application for legal aid.¹⁰

Rule 9 – Confidentiality

Recommendation 23: That rule 9 does not need be amended to specifically exempt the use of de-personalised information by legal assistance bodies in case studies.

NLA supports this recommendation.

NLA and individual LACs make recommendations to parliamentary inquiries, the Australian Law Reform Commission, and to various government bodies about reforms to the law which would improve access to justice. As recognised by the Ethics Committee¹¹ case studies are used to illustrate issues and to support the recommendations made in submissions.

NLA agrees with the Ethics Committee's assessment that the use of de-identified information in case studies could be addressed in Commentary to Rule 9. Specifically, it could be noted that including appropriately de-identified information in submissions to law reform bodies would not constitute a breach of confidentiality as this would not be confidential information.

Recommendation 24: That rule 9.2 should not contain a specific exemption from disclosure of client confidential information by legal assistance bodies when managing funding agreements and that client consent should be obtained.

NLA supports this recommendation.

LACs are subject to 'secrecy/professional conduct' provisions contained in their enabling legislation.¹²

Confidentiality in the solicitor-client relationship is critical as it encourages full disclosure by a client to the solicitor, promoting the public interest through the effective administration of justice. Exceptions to confidentiality in the relationship should necessarily be kept limited.

¹⁰ *Australian Solicitors' Conduct Rules (SA)* r 16A.2.

¹¹ Law Council of Australia, *Review of the Australian Solicitor's Conduct Rules*, (Discussion Paper, 2018), 42.

¹² E.g. s 25 & 26 of the *Legal Aid Commission Act 1979* (NSW).

Rule 10 – Conflicts concerning former clients

Question 32: Would it be appropriate and necessary to provide an exemption in rule 10 from confidentiality and other duties where legal services are provided on a “discrete” or “unbundled” or “limited representation” basis?

NLA is of the view that it would be appropriate to relax rule 10 in relation to the provision of discrete assistance services.

As indicated above and in Attachment A, a significant volume of discrete assistance services are provided by LACs pursuant to the NPA. Such services are usually provided where there has been no prior arrangement to deliver the service, including to self-representing parties at court on the day that the party has a court appearance.

NLA does not support the suggestion made in consultation referred to in the Discussion Paper that both informed written consent and an effective information barrier should be necessary.

The benefits of discrete assistance services

The benefits of discrete services have been well-documented.¹³ Services delivered under such arrangements increase access to the justice system.¹⁴ They are a means of providing legal help to individuals who do not qualify for a grant of legal aid for either an in-house lawyer or a private practitioner, however are unable to afford a lawyer.

Technology and conflict

Applying the conflict rules to unbundled legal services creates genuine problems for necessary users of legal assistance in the present, and will create similar problems for the wider profession in the future, as legal services increase in volume and reach via technology.

Technology allows the delivery of services in different ways, and better control of access to confidential information, but it also expands the volume of information which is recorded and kept. It is now possible to record each interaction with a client in its entirety and in theory store it indefinitely in instantly retrievable form. Law practices ‘know’ thousands of pieces of information which are not necessarily ‘known’ by the human agents of the practice. Sometimes, the only way a practitioner acquires information which may place them in a conflict situation is by carrying out a conflict search of that system.

The current rules were developed in a different practice environment, and do not sufficiently account for these difficulties. NLA acknowledges that additional work may need to be undertaken around the interaction of conflict, discrete/limited scope services into the future, and technology. In the meantime, NLA suggests that the Ethics Committee should consider including commentary in the Rules acknowledging the existence of IT systems which give lawyers theoretical access to an unprecedented amount of information. Changes

¹³ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72 Vol 1, 2014) 37.

¹⁴ *Ibid.*

to the rules should aim to provide reassurance that the knowledge of a law practice (via its information management systems) would not ordinarily be imputed to individual lawyers.¹⁵

Amending the Conduct Rules

The Ethics Committee comments “Inclusion of a specific rule on limited scope representation would appear to not add any new scope for practitioners to provide unbundled services, but merely draw attention to the existing ability legal practitioners and law practices to provide unbundled services.”

NLA respectfully suggests that in the interests of ensuring access to justice to disadvantaged people that it would be appropriate for there to be a specific rule to confirm that lawyers are able to provide unbundled services. Legal assistance services take a conscientious but conservative approach to the interpretation of the Rules, and a specific rule would deliver reassurance about providing the unbundled services that everyone agrees are a vital element in improving access to justice.

NLA seeks an expansion of the exceptions at Rule 10.2.2 such that an effective information barrier for discrete assistance services is established if the solicitor providing the service does not have actual knowledge of any relevant confidential information.

The qualification is aimed at protecting a lawyer who acts in good faith and has no reasonable grounds for believing a conflict exists based on their actual knowledge of a matter, and extends help to people unable to access it from anywhere else.

In line with the American and Canadian rules, if the solicitor does have actual knowledge of a conflict, then the qualification does not apply and the current client cannot be assisted by that solicitor.

Amending the rules in such a manner could be expected to especially benefit rural and regional communities whose access to services can be particularly limited. This concern is illustrated by a 2014 study surveying what methods rural and regional lawyers in Victoria believed would best serve to improve how conflict of interest could be dealt with.¹⁶ In this survey, 71% of respondents indicated a review of rules/guidelines surrounding conflicts of interest.¹⁷

NLA notes the Ethics Committee view that “it is the making of changes to particular court rules, rather than the inclusion of a specific conduct rule in the Australian Solicitors Conduct Rules which will remove the main impediment to the wider use in Australia of limited scope

¹⁵ As noted by the Ethics Committee at page 55 of the Paper, also referring to G E Dal Pont, *Lawyers’ Professional Responsibility*, 6th ed, 2017, [8.195].

¹⁶ Louise Kyle, Richard Coverdale and Tim Powers, *Conflicts of Interest in Victorian Rural and Regional Legal Practice* (Research Paper, Centre for Rural and Regional Law and Justice – Deakin University, 2014).

¹⁷ *Ibid* 96.

retainers/unbundled legal services”¹⁸, however, this would only assist in litigation matters, as opposed to legal advice or drafting activities where the matter does not proceed to hearing.

Rule 11 – Conflicts concerning current clients

The first matter raised in consultation reflected in the Consultation Paper is of interest to NLA, i.e.

1. *Is Consent of the (first) current client or clients necessary where the proposed (second) current client requires discrete service provision only and the solicitor possesses no actual knowledge of confidential information about another (first) current client or clients with contrary interests in the same or a related matter? Alternatively, should “discrete service provision” be exempt from the operation of rules 10 and 11 entirely?*

Recommendation 36: That an exemption from rule 11 would be inappropriate and unnecessary where legal services are provided on a “discrete” or “unbundled” or “limited representation” basis.

Many of the same issues arise in relation to Rule 11 as arise in the context of discrete assistance services provided to former clients.

For a LAC there is the potential that more than one party to a dispute may need to receive discrete assistance services at the same time, or alternatively, one party may already be in receipt of a grant of legal assistance for a matter and the other party seeks discrete assistance in either a related or unrelated matter. In these circumstances, to be able to readily provide discrete assistance to the second person, including where the matter is unrelated, a qualification to Rule 11 would be required.

Rule 11.4, and the associated commentary, indicates that the detrimental confidential information need not be disclosed for a conflict to arise. Rather, the existence of that confidential information and the fact that it is in the possession of the law practice appear to be enough for Rule 11.4 to be engaged and would conflict out an entire legal assistance service unless the exceptions of informed consent **and** an effective information barrier have been established.

To ensure that limited scope arrangements can be used to their full potential to reduce the justice gap in Australia, NLA suggests an additional qualification to Rule 11.2 along the following lines:

- 11.6 *Where a solicitor is providing legal assistance in accordance with a discrete/limited scope arrangement unless the solicitor knows, or becomes aware, of an actual conflict of interest in the same or a related matter.*

¹⁸ Law Council of Australia, *Review of the Australian Solicitor’s Conduct Rules*, (Discussion Paper, 2018), 60.

Rule 11.2 would also require amendment as follows:

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3 or Rule 11.6.

NLA understands the Ethics Committee's position on the recognition of limited scope retainers is that relevant legal service providers should develop appropriate procedures in relation to conflicts rather than special rules being provided for such services. In this regard, NLA notes the Productivity Commission's finding that 'overly strict application of [conflict of interest] rules can affect access to important legal advice where there is only a perceived conflict'.¹⁹ As indicated above, LACs have experienced situations where the mere potential of conflict has prevented a person from obtaining critical legal advice.²⁰

Therefore, NLA suggests that amendments to the Conduct Rules are required to facilitate the wider provision of discrete/limited scope arrangements. As currently formulated, the Conduct Rules are counter-intuitive to such arrangements and in the context of legal assistance services, may prevent legal assistance being delivered to vulnerable and disadvantaged people who cannot afford to retain a private lawyer, as the mere spectre of conflict will dissuade a LAC or CLC from providing advice. Amending the Conduct Rules to permit discrete/limited scope arrangements would ensure protection for lawyers who are simply providing a limited level of assistance.

Rule 13 – Completion or termination of engagement

Much like the suggested commentary to Rule 10 above, the commentary to Rule 13 could clarify a solicitor's responsibilities regarding providing service in regards to a limited scope arrangement. This could include noting that a solicitor should make an assessment as to whether providing services under a limited scope arrangement is appropriate and, if providing services under a limited scope arrangement, the solicitor must outline to the client what services will be provided and what actions the client will need to undertake themselves.

Rule 21 – Responsible use of court process or privilege

NLA wishes to comment on an issue in relation to rule 21 which is not raised in the Paper.

Victoria Legal Aid has reported an increase in family law matters where practitioners, apparently acting on instructions, use legal proceedings or the court system to maintain a dynamic of abuse in a relationship.

¹⁹ Productivity Commission, above n 3, 646.

²⁰ This was also expressed in the Productivity Commission's Access to Justice Report where not only *real* conflicts of interest may prevent people from accessing legal advice, but also the mere *perception* of a conflict can prevent a lawyer at a LAC or CLC from assisting. This has been outlined at length within this submission.

Examples observed in practice include:

- instigating adversarial proceedings when there are simple and cost-effective internal review or administrative processes available under child support legislation;
- pressuring a party who is not represented into signing consent orders;
- repeatedly challenging and appealing child support determinations;
- delaying matters by non-disclosure;
- action to exhaust a party's legal aid funding;
- deliberately arranging personal service on a party by a process server, despite that party having legal representation;
- taking action to create and then assert a conflict of interest (then withdrawing the assertion when the conflict issue is listed for an interim defended hearing); and
- deliberately bringing actions with a high risk of failure, or which are subsequently summarily dismissed.

The Law Council of Australia has drawn attention to the problem of behaviours of this kind in its recent submission to the Australian Law Reform Commission's *Review of the Family Law System*²¹.

NLA recognises that these behaviours, when they are designed primarily to intimidate or harass a party, already breach the ethical principles expressed in rule 21. For this reason, NLA does not think it is necessary to expand the scope of this rule. However, NLA suggests that commentary could usefully be added, advising that practitioners take particular care when acting for an alleged perpetrator of family violence or psychological abuse, noting the potential for the use of legal/court proceedings/processes in perpetuating that abuse.

Glossary – Terms used in these Rules

Recommendation 104: That the definition of "court" be amended as follows:

"court" means:

- (a) any body described as such;
- (b) any tribunal exercising judicial, or quasi-judicial, functions;
- (c) a professional disciplinary tribunal;
- (d) an industrial tribunal;
- (e) an administrative tribunal;
- (f) an investigation or inquiry established or conducted under statute or by a Parliament;
- (g) a Royal Commission;
- (h) an arbitration or mediation or any other form of dispute resolution.

²¹ *Review of the Family Law System – Issues Paper 48*, Law Council of Australia, 7 May 2018, [277-84].

Definitions

NLA notes the Ethics Committees concern that “or any other form of dispute resolution” lacks specificity therefore should be omitted. However, while NLA agrees with the assessment that the phrase lack specificity, we suggest that paragraph (h) should be altered to “an arbitration, mediation or any other form of alternative dispute resolution”.

The term “alternative dispute resolution” has a specific meaning referring to any process designed to prevent a matter proceeding to court or a tribunal hearing.²² Removing “dispute resolution” from paragraph (h) would potentially omit conciliation from the definition of court in the Conduct Rules.²³ NLA is of the view that the proposed alteration addresses the Ethics Committee’s concern regarding the specificity of paragraph (h) along with maintaining enough scope to include all forms of lawyer assisted alternative dispute resolution.

Conclusion

NLA would again like to express appreciation for being invited to make a submission to the Law Council of Australia’s Review of the Australian Solicitors’ Conduct Rules. With Legal Aid solicitors subject to the same conduct rules as private legal practitioners, we are of the view that the Conduct Rules must be flexible enough to apply to the realities of practice in both the private and legal assistance sectors.

In conclusion, NLA considers that the proposed amendments above address potential concerns the Conduct Rules, and particularly those Rules relating to conflict, are not well suited to regulate legal services provided by LACs and CLCs at present, and will also fail to address the changing nature of legal service provision in the future.

Please do not hesitate to contact us if you have any questions.

Yours sincerely,



Dr John Boersig PSM
Chair

²² National Alternative Dispute Resolution Advisory Council, ‘Your Guide to Dispute Resolution’ (Information Paper, Commonwealth Attorney-General’s Department, 2012) 5.

²³ Conciliation can differ from mediation through the provision of a more specialised mediator who can provide expert advice regarding the dispute. See NSW Department of Justice, *Conciliation* (20 April 2016) NSW Government
<http://www.courts.justice.nsw.gov.au/Pages/cats/courtguide/alternate_dispute_resolution/types_adr/catscorporate_conciliation.aspx>.