



10 April 2019

KINGSFORD
LEGAL CENTRE

Ms Jill Anderson
National Association of Community Legal Centres
By email: jill.anderson@clc.net.au

Dear Jill,

Australian Solicitors' Conduct Rules and Commentary Consultation with Legal Assistance Services Peak Bodies

Thank you for the opportunity to provide comments on the Law Council of Australia's Consultation Paper to the CLC Working Group.

Kingsford Legal Centre (KLC) is very pleased that these issues are being discussed and considered by the Law Council. KLC has long been concerned about how some of the ethical duties of solicitors are understood and applied in our type of largely rural, community legal centre (CLC) environment. We have worked closely with the Law Council on these issues and call for input from CLCs. We will also make specific comments on some of the matters raised in the Consultation Paper.

1. Definition of "community legal service" vice

We believe that the Australian Solicitors' Conduct Rules should include a definition of 'community legal service'. The inclusion of a definition will be especially important if the Rules and Commentary are also changed to include provisions relating to the application of the conflict rules in "other relevant" situations.

2. Communication of advice Rule 7.1

Issue raised- This Rule does not require a solicitor to make any inquiry or explanation as to the possibility that legal aid/assistance may be available. The Rules should include a positive obligation on solicitors to inform clients about eligibility for legal aid/assistance and to assist them in the making of an application for legal aid/assistance.

KLC strongly agrees with this statement. While CLCs promote their services actively, many clients will not be aware of the diversity of legal services they can access. This requirement would increase accessibility of the law and lawyers to disadvantaged clients.

We note the Law Council's response that the Solicitor Conduct Rules are statements of principles, and are not intended to be legal practice rules. The Law Council also states that solicitors would be expected to alert clients to the possibility of eligibility for legal aid/assistance because of their obligations to act in the best interests of a client.

In practice, however, we do not believe that many practitioners outside of the community legal services sector will inform clients of the availability of community legal services as a matter of course. As a minimum, the Commentary for the rules in relation to Rule 4.1.1 (acting in the best interests of a client) should include a reference to advising a client of the availability of community legal services in appropriate cases.

3. Confidentiality- Rule 9

Issues raised

- Discussing cases with a community based Board of Management
- Obtaining client consent in relation to "cross checks"
- Use of case studies

In relation to the first issue, we agree with the Law Council's response that disclosure of confidential client material to a Board of Management will remain within the permitted exception, sufficient to provide the Board with background information on a single client case in question.

The second issue relates to cases' confidential information being viewed by third parties during "cross checks". We agree that it is not possible to obtain prior consent from all clients in relation to this, as those are often "advice-only" clients. Given that the third-parties who conduct the cross-checks are always legal practitioners, and that the cross-checks are conducted for the purpose of making sure that the legal practice complies with its obligations, we propose that an amendment to rule 9.2.3 provides an exception where "the solicitor discloses confidential information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations". The Rule could be amended to also include circumstances where the solicitor is disclosing information for the sole purpose of ensuring compliance with legal and ethical obligations.

The third issue relates to the use of de-identified case studies. We do not hold the view that the presentation of de-identified information would be within the scope of the Rules. We have identified case studies used in training materials, publications and funding reports and applications. We believe that we are breaching our ethical duties by using de-identified case studies.

4. Conflicts Rules 10 and 11

Numerous issues were raised in relation to current Rules in regard to conflicts of duties. We will consider the two issues that arise most commonly for us at KLC:

The issue that comes up most regularly at KLC is how to juggle a solicitor's duties to our local community to provide free legal advice to all those who need it with our ethical obligations not to provide assistance where there is a conflict of interest. Like other CLCs the vast majority of our work is providing "one-off" advices to people in our catchment area on a wide range of legal matters.

We welcome the Committee's view that particular rules could be developed to apply in an "advice-only context". We agree that the rules about conflict have developed largely in the context of ongoing case work for clients; some of the ethical decisions we need to make on an advice-only basis are whether we can book a client for an advice appointment in cases where we have advised against them in the past or we have given one-off advice to the other party in the past. Rules 10 and 11 take the approach that we will not provide an appointment if we have advised any time in the past advised the other party, then we cannot make an appointment. We take into account issues such as:

- Whether we still hold the former client's records, or if they have been destroyed;
- Whether the solicitor who advised the other party in the past is still employed at the Centre;
- Whether it would be reasonable for the former client to expect that we would never advise against them. This would involve consideration of whether the other party has received advice from us on more than one occasion;
- Whether the current appointment is about a different or related matter;
- How long ago we advised the other party.

We agree that either the Rules, or the Commentary to the Rules should refer to situations where a solicitor can advise against a former advice-only client, as the issue arises frequently for community legal services. We agree that Rules 10 and 11 should not apply to advice-only services unless the practitioner has actual knowledge of a conflict of interest.

We recognise that working out whether a conflict of interest in a particular matter will be different depending on the type of advice that is sought. For example, different CLCs may be more likely to find a conflict of interest in advice-only clients where both the respondent and applicant in Apprehended Violence Order proceedings may appear before a solicitor. We agree that Rules 10 and 11 will find that there is any conflict of interest where a person who has come to a solicitor about, say, a motor vehicle accident was the other party to a previous advice and a

completely different matter. KLC is fortunate in that we have a referral protocol with our nearest neighbour local legal centres. We are able to refer people in our catchment area to other local legal centres for advice when we feel we have a conflict. Unfortunately, many of our regional and remote areas do not have this option.

We support the recognition by the courts that access to legal advice is an important consideration in the administration of justice. In fact, we would add that access to legal advice is an important consideration in the administration of justice. As KLC is a not-for-profit organisation, our clients may have greater access to legal services. However, in rural and remote areas, access to legal advice is even more difficult and this issue is particularly pressing.

Circumstances where a conflict will or will not be possible

In most circumstances we are able to conduct conflict checks before we provide legal advice. This is not possible when we visit prisons. We frequently attend community legal education sessions at the prisons in our local catchment areas and are approached by inmates who need legal advice. We cannot conduct a conflict search from the prison. It may be difficult or time-consuming to make contact with the prisoner at the detention facility to provide legal advice. In some instances, prisoners are moved around to different prisons.

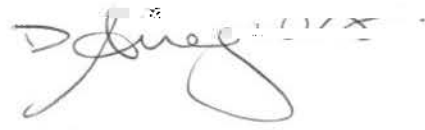
For those circumstances where it is not possible to conduct a conflict search and the expectation of the client is not that of on-going representation, we prefer an alternative arrangement to the rules in similar works. Accession to the rules in similar works.

Yours Sincerely,

KINGSFORD LEGAL CENTRE



Anna Codrington
Director



David King
Acting Principal Solicitor