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Draft Proposed Legal Profession Conduct Rules (Solicitors) 2014

To Whom It May Concern:

We thank the Law Council of Australia for the opportunity to provide feedback on the draft proposed rules for solicitors about legal profession conduct.

As you are aware, the National Association of Community Legal Centres (NACLC) is the peak national body of Australia's community legal centres (CLCs). CLCs are a key provider of legal assistance services in Australia. NACLC has provided the Law Council of Australia with detailed feedback on issues relating to legal profession rules and associated commentary in a number of contexts and on an ongoing basis since 2012.

At the outset, NACLC emphasises the need for recognition of the unique and different types of service providers and operating contexts of the profession, including in the legal assistance sector. NACLC also highlights the need to consider the importance of facilitating access to legal assistance and to justice in determining appropriate professional obligations and the scope and operation of such rules. Failing to take into account these different operating contexts and access to justice considerations when drafting rules, can effectively exclude the most disadvantaged and vulnerable, access to lawyers and legal services.

NACLC encourages the Law Council to consider NACLC's and other legal assistance sector feedback and these issues in reviewing the proposed rules.

NACLC provides comments on a number of issues under the Draft Proposed Legal Profession Conduct Rules (Solicitors) 2014 below. It is unclear whether the Law Council of Australia intends to develop accompanying commentary, as with the Australian Solicitors Conduct Rules, however NACLC suggests that such commentary would provide a useful guide for solicitors as to the intention and interpretation of the Rules and could play a role in clarifying some of the issues highlighted in this submission.

Confidentiality

NACLC considers that there are a number of possible issues arising in relation to proposed r 9 on confidentiality, including in relation to breach of confidence where there is a serious risk of harm; disclosure to CLC Management

Committees/Boards; risk management audits; and use of de-identified information.

Serious Risk of Harm

Rule 9.2.5 as drafted provides that 'a solicitor may disclose confidential client information if...the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person'.

NACLC submits that this rule should be amended to encompass the risk of psychological harm. This amendment would reflect contemporary concepts of harm and the broader approach taken in legislation including the *Privacy Act 1988* (Cth) that permits disclosure of personal information in some circumstances to 'lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety'. The Australian Privacy Principle Guidelines make it clear that this 'can include a threat to a person's physical or mental health and safety'.[1]

Disclosure to Management Committee/Board

In some instances a solicitor may be required to disclose confidential information to the Committee of Management or Board of the CLC as part of the governance process of the organisation.

NACLC considers that it is likely that such disclosure falls within proposed subrule 9.1.2 and/or the exceptions to r 9. Specifically, NACLC considers that a Board Member is a person engaged 'for the purposes of delivering or administering legal services in relation to the client' as permitted under subrule 9.1.2. In addition, it may also be the case that such disclosure falls within the exception under subrule 9.2.1 (implied authorised disclosure) and/or subrule 9.2.2 (compelled by law to disclose, for example, in light of statutory obligations owed by Management Committee/Board members).

However, in light of this potential uncertainty, NACLC suggests that this issue be clarified in commentary to r 9 that could also refer to the confidentiality obligations of Management Committee/Board members.

Risk Management Audits

CLCs have developed a range of rules and procedures to ensure good risk management of CLC practices. NACLC coordinates a national PII and risk management scheme that requires regular auditing of records. Confidentiality undertakings are obtained from the assessors who are experienced principal solicitors external to the particular CLC (although part of the CLC sector).

NACLC considers that disclosure in the context of an external risk management process is permitted by r 9, irrespective of client consent, because the disclosure

[1] Office of the Australian Information Commissioner, *Australian Privacy Principle Guidelines*: *Privacy Act 1988* (2014), Chapter C, C10.

is to a person engaged for 'the purposes of delivery or administering legal services in relation to the client' as permitted under subrule 9.1.2. This approach takes the view that 9.1.2 is not limited to legal services provided to a particular client, but rather is part of a number of services being delivered to clients of the CLC, including for example in relation to risk management or information technology.

Having said this, NACLC acknowledges that other interpretations of r 9 are open and suggests that the rule be amended to make clear that risk management audits are permitted by the rule, without the need to obtain client consent in every instance. NACLC notes that obtaining such consent, in advance, would be very difficult for CLCs given the numbers of clients and the brief nature of the majority of client interactions, many of which are over the 'phone, for example.)

Accordingly, NACLC suggests the rule be amended to include an additional exception permitting disclosure where it is for the sole purpose of participating in an audit or examination of records that forms part of a formal risk management process, and where the auditor/assessor provides appropriate confidentiality undertakings.

Use of De-identified Information

In addition to providing de-identified information to funders, CLCs also use de-identified case studies in their policy, advocacy, law reform and community legal education work.

In the 2013 Information Paper released by the Law Council of Australia, the Council indicated that 'the Committee's view is that the presentation of de-identified information should be permissible within the scope of the Rules' and noted that the Committee was 'considering whether or not to include a specific reference to this in the Commentary'.

In light of this, and NACLC's view that that disclosure of information in such circumstances would not constitute a breach of r 9, NACLC suggests that this be clarified in the Rules.

Capacity to Instruct

Under proposed rr 4 and 8 a solicitor must act in the best interests of a client and according to a client's lawful, proper and competent instructions. However, under r 3, a solicitor's duty to the court and the administration of justice is paramount. In addition, under r 9 a solicitor must not disclose the confidential information of a client, except in limited circumstances.

In circumstances where a solicitor has concerns about the capacity of a client to provide competent instructions, the operation of these rules is likely to result in either the solicitor ceasing to act, or seeking the appointment of a guardian. This may on occasions involve a conflict between the solicitor's duties outlined above,

including for example the duty to do what is in the client's best interests and the duty to maintain confidentiality.

In order to address this issue, the Australian Law Reform Commission in its recent Report, *Equality, Capacity and Disability in Commonwealth Laws* (2014), recommended that the Law Council should consider amending legal professional rules to provide for a new exception to the duty of confidentiality (as under r 9), where a solicitor 'reasonably believes the client is not capable of giving lawful, proper and competent instructions' and 'the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative'.[2] A number of stakeholders involved in the ALRC's Inquiry, including the Queensland Law Society, Legal Aid NSW and the Law Institute of Victoria, appeared to support an amendment of this type to provide clarification and guidance to solicitors in such circumstances, however a number of stakeholders also expressed concern about such an amendment.[3]

While NACLC understands that the Law Council does not currently support such an amendment,[4] given the issues identified and that the approach recommended by the ALRC goes some way to addressing the difficulties identified, NACLC suggests that the Law Council reconsider this issue in the course of finalising the draft proposed Rules, including through consultation with relevant stakeholders.[5]

Conflicts of Interest

The need for the Rules to recognise different types of service providers and operating contexts is particularly clear with respect to the operation of rr 10 and 11, which relate to conflicts of interest.

As currently drafted, and if strictly complied with, the conflict of interest rules are likely to significantly restrict the provision of legal assistance to vulnerable and disadvantaged members of the community, particularly in areas where there may be no other suitable legal service provider available.

Specifically, the Rules do not cater for the provision of limited representation/assistance or short-term assistance services. CLCs and other legal assistance services provide a range of limited representation/assistance, or short-term assistance services including advice-only (including telephone advice), advice and assistance (for example by helping a person by drafting a letter of making a phone call) and duty lawyer representation, advice and assistance.

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[2] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) ALRC Report 124, rec 7-6.

[3] Ibid, 222-224.

[4] Ibid, 223-224.

[5] NACLC understands that the Law Council of Australia advised the ALRC that the Professional Ethics Committee would give further consideration to this issue: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) ALRC Report 124, 223-224.

The conflict rules as drafted are problematic in a number of respects. For example, where the assistance is brief, for example where a duty lawyer is giving short advice to people at court, or advice is provided on a telephone advice line, conflict searches can take up a significant proportion of a solicitor's time and make the duty lawyer service untenable. This is even more likely in the many situations where a private lawyer paid for by Legal Aid is providing the duty lawyer service or other legal assistance.

Further, CLCs provide legal services in some circumstances where it is not possible to carry out a conflict check, for example, in community and other locations where mobile phone and internet access may not be available. Some CLCs run night advice services, including at outreach locations, and the main CLC office may be closed, precluding the lawyers from calling in to conflict check. Other situations in which it is impossible to conduct a conflict check include where the client does not know, or will not provide, the name of the other party, for example in a tenancy matter where clients sometimes only know the real estate agent's name or have lost their documents, or in matters involving family violence.

To ensure compliance with r 10 as currently drafted in all cases, a legal assistance service would need to conduct a conflict check before acting, including before providing advice. As explained above, this is not always possible, and in NACLC's submission, r 10 should be amended to permit some exceptions where there is a real access to justice need, and the risks of conflict are low. The scenario of the very busy duty lawyer, who sees many people over the course of the day at court for a range of legal assistance, is a prime example.

In other circumstances, particularly in rural, regional or remote areas, a CLC may have provided limited representation/assistance to one party, which as the rules are drafted precludes assisting the other party. This is particularly problematic where no alternative legal assistance is available if that second party is turned away. This issue was highlighted in the recent Productivity Commission Report, *Access to Justice Arrangements* (2014) in the context of discussing barriers to provision of unbundled legal services.[6]

A number of possible approaches to these issues have been considered in various contexts, including for example: a reasonableness test and a limited or discrete task assistance rule.

In circumstances where it is not possible to conflict check, a reasonableness test - for example, amendment of r 10 to require that all reasonably practicable measures have been taken in the circumstances - would assist and facilitate the provision of limited or discrete task assistance in such circumstances.

There are differing perspectives across the legal assistance sector on the application of the conflict of interest rules in diverse operating contexts and how

[6] See, eg, Productivity Commission of Australia, *Access to Justice Arrangements*, Inquiry Report (2014) Vol 2, 646-650.

the Rules should be amended. There is significant sector support for amending the rules to include a limited assistance rule, on the basis of operating context and type or characteristics of legal service activity, rather than based on the types of legal assistance provider. However, while such a rule may address some of the difficulties solicitors in CLCs currently face, there are other situations that are perhaps not resolved by this form of response.

NACLC submits that it is critical that a solution be found, acknowledging that it may have to be a narrow exception. In view of the complexity of the issues and diversity of operating contexts, considerations and perspectives, and the difficulty in drafting an appropriate rule, NACLC supports the establishment of a working group to consider this issue as recommended by the Productivity Commission in its *Access to Justice Arrangements* Report.[7] NACLC emphasises the importance, however, of all relevant stakeholders, including CLCs, Aboriginal and Torres Strait Islander Legal Services (ATSILS), Family Violence Prevention Legal Services (FVPLS) and Legal Aid Commissions being consulted in such discussions, and an agreed improved rule being developed as soon as possible.

Communication with Other Solicitor's Client

Rule 33, the 'no contact' rule provides significant protection, particularly for vulnerable and disadvantaged clients who may have limited ability to protect their own interests. It is important in ensuring that solicitors are not able to contact another solicitor's client and exploit or gain advantage arising from that client's vulnerability and in reducing the risks of a solicitor becoming a witness where there is a dispute about the terms of the communication.

However, in practice some difficulties and flow-on effects can and do arise from this rule, particularly in civil disputes against legally represented providers of financial, insurance or investment services, local councils, utilities, or debt collection agencies. These are circumstances where the company or entity is not vulnerable to manipulation or exploitation, where legislation or an enforceable industry code gives the 'consumer' particular rights in relation to dispute resolution or financial hardship and where prompt communication and negotiation by a lawyer for the individual can resolve the matter with cost benefits to both parties, and most importantly without increasing the debt of the individual.

The following example from the Consumer Action Law Centre highlights these difficulties: 'A CLC acts for a person who is having mortgage difficulties. The bank has retained a solicitor to recover the debt/arrears. The CLC ideally needs to contact the financial hardship team at the bank to negotiate repayment, the bank having legal obligations to consider a financial hardship request. Contacting the debt collection solicitor will simply add to the debt and will be ineffective since that solicitor is not receiving instructions from the financial hardship team but from a different section of the bank'.

[7] Productivity Commission of Australia, *Access to Justice Arrangements*, Inquiry Report (2014) rec 19.1.

In such cases the experience of CLCs is that contact with the solicitor rather than the solicitor's client (and particularly the relevant department of that client) adds to the time and cost associated with resolving the matter. This is problematic as efficiently resolving disputes is important, not only to individual CLC clients who are vulnerable and financially and otherwise disadvantaged, but also to the other party and the community (because unpaid debts are passed on to other consumers).

CLCs and other legal assistance services often have established and effective relationships and developed protocols with banks and other such businesses, that facilitate the quick, fair and realistic resolution of disputes with as little formality and cost as possible. The 'no contact' rule prevents such contact, despite the existence of these relationships, and can add costs and flow on detriments, including costs to the community, to the original debt or civil dispute.

In debt matters the discussion between a CLC solicitor and a business may go beyond the legal rights of the parties and relate to financial hardship, social and health issues experienced by the client, practical considerations, and commercial and reputational considerations for the business. Specialist debt collection lawyers may lack the requisite knowledge or simply not be instructed to resolve the matter in this way, having only been instructed to pursue recovery action.

Further, where a service provider is subject to requirements to attempt alternative or internal dispute resolution, in some circumstances the process calls for direct contact between the parties. Permitting direct contact in these situations ensures compliance with any such requirements is possible and not problematic, and that CLC clients are able to access those processes and progress the resolution of the dispute as expeditiously and cheaply as possible, in accord with the legislative and policy intent behind dispute resolution processes.

The current exceptions to r 33 do not cover these types of situations. Rather, NACLC suggests that a specific exception to the rule be crafted to address the situations and issues outlined above. Any such exception should allow solicitors to directly contact the company/entity in these kinds of cases, without the need to contact and obtain the consent of the other solicitor first. The exception should be limited to situations where the client (business) contacted directly is not susceptible to disadvantage as in the fact situations mentioned above.

Communication of Advice

Proposed r 7 provides that a solicitor must inform a client about the alternatives to fully contested adjudication of the case that are reasonably available to the client, except in some circumstances.

NACLC considers that in addition to this obligation, the rule should be amended to include an obligation to advise clients about the potential availability of legal aid and/or any other scheme or body for delivering legal assistance to members of the community where the solicitor reasonably believes that the client may be

eligible for such assistance. This reflects an obligation under r 16A.1 of the South Australian version of the Australian Solicitors Conduct Rules.

NACLC considers it is vital, for the individual client and the justice system, that clients are aware of the availability of legal aid and any other free or subsidised legal assistance, for example assistance provided by CLCs, ATSILS, FVPLS and pro bono lawyers. The possible availability of free or low-cost legal services to a client who cannot afford private lawyers is as important as informing clients of the alternatives to fully contested adjudication of their case.

Accordingly, NACLC supports a new subrule 7.3 which imposes on obligation on solicitors to advise clients about the potential availability of legal aid and/or any other legal assistance where the solicitor reasonably believes that the client may be eligible for such assistance. This could also encompass an obligation to assist the person to access that legal assistance service, for example, through providing a warm referral to the relevant legal assistance service or assistance with completing a form. However, as NACLC recognises the difficulty for solicitors in keeping abreast of all legal aid eligibility guidelines, NACLC suggests that any new subrule be similar but less prescriptive than subrule 16A.2 of the South Australian Rules that provides that the practitioner 'shall give such assistance as may be reasonably necessary to a client in the making of an application for legal aid'.

Misleading Statements

Proposed r 34 relates to dealing with other persons. As drafted it appears to have a lower threshold than the *Australian Consumer Law* (ACL).

Section 18 of the ACL prohibits, in trade or commerce, misleading and deceptive conduct, as well as conduct likely to mislead and deceive. NACLC understands that the ACL applies to the legal profession, including not-for-profit legal assistance services.

However, NACLC is concerned that as drafted r 34 appears to permit a greater range of behaviour than under the ACL and, for example, permits a solicitor to engage in conduct that is likely to mislead but that falls short of being grossly excessive. NACLC draws the Law Council's attention to the submission made by the Consumer Action Law Centre on this point.

NACLC supports the inclusion of, at a minimum, the requirements under the ACL in the Rules. NACLC is concerned that inclusion of a lower standard than the ACL is not, as a matter of policy, appropriate, and that it may mean disciplinary action could only be taken when the conduct is extreme and exceeds that permitted under the ACL. Accordingly, NACLC proposes amendment to r 34 to include a general prohibition on misleading or deceptive conduct, or conduct likely to mislead or deceive, as provided under s 18 of the ACL.

Insurers: Acting Under Right of Subrogation

CLCs see cases in which solicitors do not disclose that they are acting under the right of subrogation and, in some cases, have refused to confirm or deny whether they are acting under the right of subrogation.

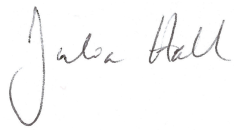
The failure of a solicitor to advise that they are acting under the right of subrogation can disadvantage the other party, particularly disadvantaged people. For example, in the context of debt and insurance matters, the Insurance Code of Practice provides some rights to third parties (for example, consideration of financial hardship) that are legally enforceable. In order to take advantage of these rights, the client needs to be aware that an insurer is involved in the matter and the name of the insurer.

Clause 8.10 of the General Insurance Code of Practice obliges subscribing insurers and the nature of any claim to be identified in any communication with debtors. Accordingly, NACLC submits that the Rules should contain a similar obligation and suggests that a new rule should be inserted after r 22.4 that provides: 'If a solicitor is acting under the right of subrogation, the solicitor must advise the other party that the solicitor is acting for the client under the right of subrogation and provide the name of the insurer'.

Conclusion

Please contact me or Amanda Alford, Deputy Director, Policy and Advocacy on 02 9264 9595 or amanda_alford@clc.net.au should you wish to discuss any of the issues raised in this submission.

Yours sincerely



Julia Hall
Executive Director
National Association of Community Legal Centres

NACLC's members are the eight State and Territory Associations of Community Legal Centres. A number of the State and Territory Associations will be making individual submissions to the Law Council on the Proposed Legal Profession Conduct Rules (Solicitors) 2014 and have indicated that they will be endorsing NACLC's submission. Community Legal Centres Tasmania has advised that it wishes to adopt the NACLC submission.

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