

NATIONAL FAMILY VIOLENCE PREVENTION LEGAL SERVICES

WORKING TO ACHIEVE IMPROVED JUSTICE OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER
VICTIMS/SURVIVORS OF FAMILY VIOLENCE AND SEXUAL ASSAULT

Submission to the Law Council of Australia Consultation Australian Solicitors' Conduct Rules and Commentary

1. Introduction

The National Family Violence Prevention Legal Services Forum (the National Forum) welcomes the opportunity to comment on the Australian Solicitors' Conduct Rules and Commentary Draft Consultation Document (the Rules). Our concerns are primarily associated with the Conflicts section and issues 10-15 in the Summary of Issues. Our comments will be confined to this area and to other issues specifically addressing the needs of Aboriginal and Torres Strait Islander¹ people. Where applicable we have referred directly to the paragraph in the Summary of Issues.

2. About the National FVPLS Forum

The Australian Government through the Commonwealth Attorney-General's Department provides funding for the Family Violence Prevention Legal Services (FVPLSs). The primary function of FVPLSs is to provide legal assistance, casework, counselling and court support to Aboriginal adults and children who are victims/survivors of family violence, including sexual assault/abuse. FVPLSs can also provide a law reform and advocacy function, community legal education and early intervention and prevention activities.

The National Forum was formally established in May 2012, and it has adopted a Charter setting out its objectives and procedures to guide its operation.

Members of the National Forum are those 14 organisations in receipt of Commonwealth funding to deliver Family Violence Prevention Legal Services in 31 rural and remote locations across Australia:

- Aboriginal Family Violence Prevention and Legal Service Victoria
- Central Australian Aboriginal Family Legal Unit (Alice Springs NT)
- Family Violence Legal Service Aboriginal Corporation (SA)
- Kempsey Family Violence Prevention Legal Service (NSW)
- Marninwarnitkurra Family Violence Prevention Unit WA (Fitzroy Crossing)
- Maruma-Li Mari Outreach Service QLD (Roma)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service
- North Australian Aboriginal Family Violence Legal Service (Darwin)

¹ Hereafter referred to as 'Aboriginal'.

- Queensland Indigenous Family Violence Legal Service
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany WA)
- Thiyama-li Family Violence Service Inc. NSW (Moree)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill NSW)
- Western Australia Family Violence Legal Service (Perth)
- Yoorana Gunya Family Violence Healing Centre Aboriginal Corporation (Binaal Billa FVPLS, Forbes NSW)

The National FVPLS Program was established in recognition of the gap in access to legal services for Aboriginal victims of family violence – predominantly Aboriginal women and children.

The National Forum’s comments to this consultation are informed by members’ experiences of working with Aboriginal victims/survivors of family violence.

3. Limited Representation Exception to Conflict of Interest Rules

15. Should the Australian Solicitor’s Conduct Rules be amended to include a limited representation rule...?

a) National Forum Position on Conflicts of Interest

The National Forum is concerned about the impacts of a limited representation exception to conflict of interest rules. FVPLS services reported undertaking conflict checks before providing legal services of any kind (advice or case work) to clients who approach their service. A range of methods to conduct conflict checks are used, across both metropolitan and regional areas, including over the phone where lawyers are engaging in outreach or where clients seek them out at community or other events. Policies are in place about providing only general information at community legal education sessions and referring all questions relating to specific circumstances to lawyers, who will undertake a conflict check.

If the Rules are changed to relax the requirements around conflicts and conflict checking, services including FVPLS Victoria advised they expect their services will continue to require conflict checks in all situations, consistent with existing practice. FVPLSs are unlikely to put in place an exception for limited representation, as it is inappropriate in a family violence context and likely to be culturally unsafe.

Despite this, changes to the Rules have the potential to impact on the way FVPLS services operate and are perceived in the community. The changes also risk discouraging Aboriginal women, an already marginalised group, from accessing justice. Below two key ways are discussed regarding how a limited representation exception may impact on FVPLSs despite an internal decision to require conflict checks at all times.

b) Cultural Safety and Community Trust

Building trust among the community is essential to effective delivery of services to Aboriginal people. For Aboriginal women, decades of experiencing racism, discrimination and trauma have resulted in distrust and a reluctance to engage with the law and justice system. However, FVPLSs have found that Aboriginal women are

significantly more likely to engage and remain engaged when services are culturally safe and secure and gender focussed. A culturally safe environment is one where Aboriginal people feel safe and draw strength from their identity, culture and community. Cultural security requires service providers to actively ensure that the cultural needs of those accessing the service are met.

FVPLSs have established reputations as legal services that provide culturally safe services. This reputation is built on factors including community relationships, holistic understandings of client needs, Aboriginal leadership and confidentiality.

FVPLSs are recognised within the Aboriginal community as providing legal services only to victims/survivors of family violence, not to perpetrators, and this is stipulated in funding agreements with the Commonwealth Government. It has been the experience of services that women who have experienced family violence are more likely to access legal services when they are assured that neither the perpetrator nor anyone connected to the perpetrator will also be accessing the service. Concerns about safety, family and community backlash are mitigated by confidentiality and trust in the service.

FVPLSs reported already having to be alert to and have policies in place to manage community perceptions of conflict. In small Aboriginal communities there are often people from different families and cultural groups. Clients can sometimes perceive conflicts where an FVPLS is acting for people from other cultural groups, even where no legal conflict exists. Services have developed appropriate policies for managing these types of non-legal conflicts in a way that maintains the communities' trust in the service.

The National Forum is concerned that introducing exceptions to the conflict of interest rules may impact on the trust built within Aboriginal communities, the perception of FVPLSs and the legal system generally.

Although the limited representation exception is unlikely to be incorporated into FVPLS operational policies, Aboriginal communities have contact with a range of other legal services, including Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions, through which they may become aware of changes in legal practice. They may assume that all legal services are relaxing conflict of interest rules in the same way and raise doubts about the safety and confidentiality of legal services. A perception that the service is no longer culturally safe could be just as damaging to community trust and engagement with Aboriginal women as any actual policy change.

c) Sector Pressure

The National Forum is concerned that FVPLSs may be pressured to apply the limited representation exception to conflict of interest rules. If the rules are changed, and the exception is implemented in many legal assistance services it could become industry standard.

Government, funding bodies and the broader sector may expect the application of the exception and put pressure on FVPLS services and other organisations for which the change is not appropriate. Core documents such as the FVPLS Operational Guidelines may be amended to reflect the new standard.

While the National Forum understands the reality of point 51 – that some organisations are unable to undertake conflict of interest checks through lack of access to technology – the National Forum does not support relaxing conflict requirements to address this

problem. Services should be adequately funded to obtain appropriate and up-to-date technology and to train staff in undertaking conflict checks from the base office.

If the Rules are changed to include a limited representation exception the commentary must recognise the diversity of the sector, and that exceptions to the conflict of interest rules are not appropriate for all parts of the sector and types of legal services.

4. Advice-only Legal Services

11. To what extent does Rule 10 apply in relation to advice-only legal services where the relationship between the former client and solicitor was temporary, limited to advice-only and ended at the completion of that advice-only service.

The National Forum has concerns about the definition of ‘advice-only services’ and the appropriateness of this concept in the context of family violence service provision.

To our knowledge there is no clearly agreed definition of ‘advice-only services.’ Therefore, there is the potential for the term ‘advice-only services’ to be interpreted increasingly broadly by legal services seeking to avoid undertaking conflict checks.

The Law Society of Alberta Code of Conduct, which has been suggested as a possible model, uses the term ‘short-term legal services.’ It defines short term legal services as advice or representation of a summary nature with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter. It goes on to mention that where legal services provided are of this nature, there is no need for clients to give informed consent for the lawyer to represent another party where there is a conflict.

While the National Forum supports the need to ensure access to justice for as many people as possible, we question the practicality of the requirement to ensure the client has no expectation of continuing representation. We cannot comment on the experiences of duty lawyers or telephone help lines; but in the experience of FVPLSs, it is often difficult to ascertain quickly the needs and expectations of a particular client, especially when the person is likely to be experiencing significant distress and trauma.

When Aboriginal women, who are among the most disadvantaged Australians, seek out legal assistance it is usually because they are experiencing multiple complex problems. In the family violence legal services area it is extremely rare that a client will seek only a specific answer to a very discrete legal question, with no expectation or possibility of ongoing service provision. Such services may include meeting non-legal needs such as access to counselling or housing. FVPLSs had very few, if any examples of clients who did not require, and expect ongoing support.

The Law Council should consider the inclusion of a presumption that any contact with a client in the family violence area is not advice-only, and that there is likely to be the expectation of ongoing support.

5. Information Barriers

Information barriers are cited as a possible means of managing potential or actual conflicts within an organisation. The National Forum agrees with the commentary at point 56, which states that information barriers are often not a feasible option for reasons including financial cost and the impracticalities within small organisations. To

obtain the required level of independence, confidential information must be kept strictly apart. As a result, information barriers can be costly and difficult to maintain. They are therefore unlikely to be an appropriate solution for community legal centres with small teams, a single principal lawyer, limited physical space and funding.

In addition to the challenges for the organisation, information barriers may not be of benefit to FVPLS clients either. Most of the clients who come to FVPLSs experience multiple problems and layers of trauma. The legal work required is often complex, involving a number of areas of law. FVPLSs aim to work holistically with clients, across areas of law including family violence, family law, child protection and victim's assistance. Fragmentation of this work, through information barriers is unlikely to be in the best interests of the client or the service.

Even if FVPLSs were able to overcome the difficulties associated with implementing information barriers in small organisations, a perception from the community that information is shared is likely to persist. A characteristic of FVPLSs is our commitment to cultural safety. One of the key principles of cultural safety is strong connections with the local Aboriginal community, and where possible the recruitment of Aboriginal staff members. Given that many Aboriginal communities are relatively small, often individual members of the community are known to each other. Members of the community will likely assume, not unreasonably, that anyone who works within the organisation has access to the details of clients and their cases. Even if effective information barriers are in place, the perception of conflicts will remain.

6. Informed consent

13. Consider what informed consent may mean or require in the context of Aboriginal and Torres Strait Islander persons.

The responsibility of establishing informed consent lies with the lawyer and the legal service. It has been suggested that this responsibility will be higher where the client is legally unsophisticated, or where the implications of possible conflict are serious. Considering the potential impacts on safety in the family violence area and the lack of knowledge about legal rights that exists in Aboriginal communities, we would expect the test for establishing that informed consent was obtained be difficult to satisfy.

To consent freely, it is essential that the client:

- is provided with all relevant information about the decision and their options;
- understands the information that has been provided;
- is not pressured or forced in any way, and their choice is respected.

In relation to the delivery of information, it is important that legal services ensure information is provided in a variety of formats and check that it is understood by clients. Lower levels of literacy, mental health issues and states of distress or anxiety may all limit the capacity of people to understand information provided to them. The duty must be on legal services to confirm the person has received the information and understands the options available to them.

Perhaps most concerning for the National Forum is the possibility that Aboriginal people will feel pressured into giving consent, even if this is not the intention of the legal service. When seeking out legal services, people are often experiencing a crisis and require immediate assistance. Clients may feel pressured to consent if they believe they

are unlikely to receive assistance unless they do so. In this circumstance, a client may give consent even if they do not understand or are uncomfortable with the situation.

There also remains a significant power imbalance. The legal system has been used as a tool of oppression against Aboriginal people for generations. Some Aboriginal clients report a fear of challenging legal professionals in case they are refused service or otherwise threatened. For many women there is also a strong fear, based on past experiences, that being 'difficult' may lead to the removal of their children. The power imbalances and past traumas experienced at the hands of the justice system may lead Aboriginal people to consent out of fear, rather than through an informed choice.

The commentary should highlight the additional considerations in seeking and obtaining informed consent from Aboriginal people in the context of past experiences with the justice system.

7. Conclusion

The National Forum is concerned about the proposal to include a limited representation exemption to the conflict of interest provisions in the Solicitor's Conduct Rules. While it is unlikely to be implemented in most FVPLS services, the exemption may have broad implications, including altering the perception and expectations of how legal services handle conflict. We encourage the Law Council of Australia to consider building in to the commentary an acknowledgement of the diversity of the legal sector, and that such an exemption may not be appropriate in the context of family violence and Aboriginal legal services.