Unbundling and the "missing middle": Submission to the Law Council of Australia's Review of the Australian Solicitors' Conduct Rules

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Acknowledgements

We thank our pro bono lawyers whose casework continues to generate positive outcomes for our clients and directly inform our recommendations for reforms to the Australian Solicitors' Conduct Rules, which will reduce barriers to accessing unbundled legal assistance.

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About Justice Connect's Self Representation Services

Justice Connect is an independent not-for-profit community legal centre based in Sydney and Melbourne. We provide free legal support to people experiencing disadvantage and the community organisations that support them. We have been working to improve legal and life outcomes for vulnerable people for the past 25 years.

Justice Connect operates self-representation services in the Federal Court and Federal Circuit Court in Victoria, Tasmania, the Australian Capital Territory and New South Wales through our "Self Representation Service" (**SRS**). Our SRS assists people facing or initiating proceedings in bankruptcy, Fair Work (employment), human rights claims and judicial review of government decisions. We also operate our self-representation service model in the Victorian Civil and Administrative Tribunal in relation to domestic building disputes via our "Domestic Building Legal Service" (**DBLS**).

Depending on their level of legal capability, clients of both the DBLS and SRS can access a range of assistance from Justice Connect, including receiving advice about the prospects of their claim or defence, assistance with drafting legal documents, and advice about mediation and other appropriate dispute resolution mechanisms.

Both the SRS and DBLS aim to facilitate access to justice for unrepresented people to help them obtain better outcomes through pro bono assistance. We achieve this by empowering unrepresented litigants to pursue and enforce their rights, by helping them to:

1. understand the law;
2. observe court rules and procedures;
3. be aware of potential orders and the effect of not complying with orders;
4. present their cases in the best possible manner; and
5. resolve disputes in the most efficient and favourable manner.

We assist self-represented consumers through unbundled legal services, discussed at paragraph 3 of this submission.

The delivery of unbundled legal assistance is provided in the form of 1 hour appointments (in person or by telephone) with volunteer lawyers from our partner firms, with support from Justice Connect Staff.

Contents

1. Executive Summary and key recommendations

Executive Summary

Justice Connect welcomes the opportunity to contribute to the Law Council of Australia's Review of the Australian Solicitors' Conduct Rules (**Review**).

Rather than responding to the Review of all rules, our submission will focus on the Australian Solicitors' Conduct Rules (**Rules**) that affect the delivery of unbundled legal services to a group of our clients who form part of the 'missing middle'. The 'missing middle' is a term identified in the Productivity Commission's Access to Justice Arrangements Report[1] to describe individuals who lack (liquid) financial resources to pursue meritorious claims, but cannot access publicly funded assistance schemes.[2]

Through our extensive work with the 'missing middle', we see the impact of the existing regulatory framework on the delivery of unbundled legal services. One of our goals is to prevent people getting lost in the justice system, or locked out of it. Through unbundling, we are able to ensure more individuals are able to access legal help, and navigate the system. Responding to the Review provides a real opportunity to remove some of the impediments to lawyers providing legal services that don't amount to full representation.

Key recommendations

- **Recommendation 1** – Innovations and reforms must be embraced in the justice system and legal assistance sector to generate efficiencies where possible, and to create and sustain models that – while more resource intensive – effectively meet the needs of particular people and communities who will otherwise slip through the cracks and find themselves impacted harshly by the legal system.
- **Recommendation 2** – The Rules should be amended to remove the presumption of a more open-ended or traditional end-to-end service model, and to provide greater clarity in relation to the professions' obligations with respect to unbundled legal service delivery.
- **Recommendation 3** – Separate rules for the delivery of unbundled legal assistance should be developed which specifically provide for the availability of limited scope assistance to overcome the narrow interpretation of conflict of interest provisions.
- **Recommendation 4** – If Recommendation 3 is not adopted, in the alternative, an exception should be included in the current Rules in relation to discrete or unbundled assistance. This exception should not be limited to the delivery of pro bono legal services.
- **Recommendation 5** – If neither Recommendation 3 nor 4 is adopted, a uniform guideline or practice note similar to that adopted in Western Australia should be adopted by supported by the LCA.
- **Recommendation 6** – A new rule based on rule 1.2(c) of the American Bar Association Model Rules, which states that '(c) a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent' should be included in the Rules. Law Societies could provide practice notes as to how to create limited retainers, including in relation to the termination of such retainers.

[1] Productivity Commission, *Access to Justice Arrangements: Inquiry Report* (2014) (**Access to Justice Arrangements Report**).
[2] Ibid., 20.

2. What is "unbundling"?

What is unbundling?

The Review considers the application of the current Rules to "unbundled", "discrete", or "limited representation" settings to determine if reform is required to allow practitioners to provide services in that manner.

'Unbundling', in the legal sector, is a method of discrete task based assistance. It is essentially a 'half-way house' between full representation and no representation at all. It is particularly effective in providing assistance to unrepresented litigants, and means that services like ours can help more people. This is achieved by moving away from a traditional end-to-end legal assistance model, to providing assistance with discrete tasks to more individuals.

Our objective through the provision of unbundled legal assistance is to ensure that unrepresented parties to proceedings understand their rights and responsibilities and feel empowered to take the best course of action to present their case and resolve their disputes. For example, for clients with building matters at the Victorian Civil and Administrative Tribunal (**VCAT**), we want to prevent homeowners from losing their homes, or having a defective home that they can't live in because they either don't know their rights, or can't afford to take steps to protect those rights.

Importantly, our services are often provided by volunteer lawyers from our member law firms. It is our experience that some law firms will not engage with services delivering assistance to individuals who are, for instance, opposed to a bank. In circumstances where there is no direct conflict or where there is no known conflict in the mind of an individual volunteer, the firm will err on the side of caution and not participate even where services are unbundled. This can have a significant negative impact on the delivery of legal services.

In addition to the impact the Rules have on the delivery of unbundled assistance, other factors may also prevent legal practitioners from engaging in unbundled legal work. These factors, which are beyond the scope of the current Review, include:

- **Court rules –** Court rules can create direct costs liability for a solicitor. Court rules can require a practitioner who assists with the preparation of a pleading to be 'on the record'. This is restrictive for practitioners who have assisted with a pleading, but do not have ongoing instructions to assist the client.
- **Professional negligence** – the practitioner's lack of context or continuity in relation to a matter can lead to greater exposure to professional negligence claims.
- **Insurance requirements** – a practitioner must consider the professional indemnity insurance implications of regularly accepting limited retainers.

3. Improving access to justice for the 'missing middle'

Our clients - the 'missing middle'

Our self-representation services assist the 'missing middle'. These are low and middle income individuals and families who, because of their income and assets, are not eligible for a grant of legal aid or whose legal issues are such that they are unable to access legal help from community legal centre (**CLC**) with limited resources. The 'missing middle' has also been referred to as the 'sandwiched class', meaning they are neither rich nor poor, but sandwiched in the middle, and are increasingly left out of the legal market[3]. These people might own a home with a mortgage, or they might be older and own their home outright and survive on the aged-pension. They might also be a single parent, or from a culturally and linguistically diverse community.

Our adversarial civil justice system is premised on all parties being on equal footing. However differences in the bargaining power of litigants means that for those in the 'middle' this is far from the truth. While those on high

[3] Centre for Innovative Justice, 'Affordable Justice: a pragmatic path to greater flexibility and access in the private legal services market' (RMIT University, Melbourne: 2013), 7.

incomes are thought to be able to fund their own costs, and those on low incomes could obtain assistance from government funded legal aid services, those in the 'middle' are not able to fund their own legal costs nor access government funded legal aid services and, as a result, are less able to access justice through legal assistance.

The Productivity Commission, in its Access to Justice Arrangements Report, examined the best way to improve access to the justice system and equity of representation. The Productivity Commission found that a lack of unbundled legal services is a barrier to justice for the 'missing middle', and it estimated that only 8% of households would meet the means test for legal aid[4]. It also noted that the legal issues faced by those in the 'middle' relate to housing, employment and consumer law and these remain significant areas of unmet legal.

The impact of unresolved legal problems was articulated in Victoria's Access to Justice Review[5]:

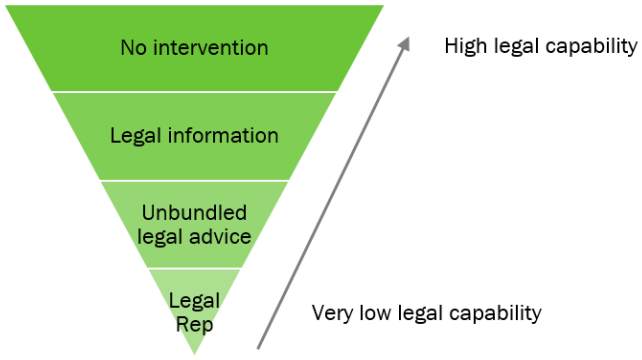
> *'Increasingly, unresolved civil legal problems, such as those related to a community member's housing, mental health, employment or family, are recognised as having far reaching consequences for both the individuals involved and the state. For individuals, unresolved legal problems can lead to diminishing health and restrict social and economic participation, as well as triggering further legal problems, including possible criminal legal issues. These consequences for individuals often generate costs which must be borne by the state, whether in the justice system or in other publicly funded systems.'*[6]

At present, barriers for accessing justice continue to include costs associated with legal proceedings, such as the risk of adverse costs and the complexity of court processes and procedures. Justice Connect agrees that the cost of accessing justice services and securing legal help can prevent individuals from gaining effective access to the justice system. The ability to access justice should not be dependent on the capacity of an individual to pay for legal help, and vulnerable litigants should not be disadvantaged by their financial means. Unbundled legal services is one way to address unmet legal need for the 'missing middle'. Where clients cannot afford full representation they should at least have the option of some level of assistance, rather than none at all.

Continuum of assistance – our tailored model

A justice system that is genuinely accessible and provides equality before the law requires models that are tailored to the diverse needs and capabilities of different people and communities. Our self-representation services' unbundled assistance model recognises the capabilities of clients to self-represent, and applies a tailored continuum model to assist clients in the civil justice space.

For some (possibly the majority) of the population, well-designed self-help tools, one-off advice or duty lawyer representation will be what is needed to help understand their legal issue and effectively navigate the legal system. But for others, a more intensive level of legal and non-legal support will be needed to (a) identify that there is a legal issue and that help is available, and (b) support engagement with the legal process to resolve the issue.



Our self-representation service model provides assistance to individuals who are able to complete the tasks necessary to progress their proceedings with discrete advice and assistance provided by a lawyer. Prospective

[4] Above n 1, 20.
[5] Victoria State Government, *Access to Justice Review: Summary Report* (August 2016) 4 (available at: https://myviews.justice.vic.gov.au/accesstojustice). See also *Access to Justice Arrangements*, which recommended additional funding from Commonwealth and State and Territory Governments for civil legal assistance services of approximately $200 million per year (recommendation 21.4) and summarised the benefits of this as: 'Improving access to legal assistance for civil matters will often prevent legal problems from escalating, reducing costs to the justice system and the community' (at 38).
[6] Ibid. See also *Access to Justice Arrangements,* which recommended additional funding from Commonwealth and State and Territory Governments for civil legal assistance services of approximately $200 million per year (recommendation 21.4) and summarised the benefits of this as: 'Improving access to legal assistance for civil matters will often prevent legal problems from escalating, reducing costs to the justice system and the community' (at 38).

clients are triaged to determine the nature and urgency of their legal issue, their financial situation, what steps they have already taken to address their issue and services they have accessed, and other matters that affect their capacity to understand their circumstances and successfully advocate on their own. The model usually relies on a client already having accessed the court or tribunal where the service is located.

Depending on their level of legal capability, clients can access a range of assistance, including receiving advice about the prospects of their claim or defence, assistance with drafting legal documents, or advice about mediation and other appropriate dispute resolution mechanisms

The benefits to these individuals and to the court system from 'unbundled' access to legal assistance are significant, including empowering an individual to enforce their own rights, and enabling proceedings to move more quickly through the court or tribunal[7]. Importantly, where the self-representation service model identifies that a person has a higher level of need and/or a lower level of legal capability, they can receive more intensive ongoing assistance, such as pro bono legal representation.

It is crucial that the justice system and legal assistance services are set up to recognise these differences in client capability and cater to the continuum of needs. Innovations and reforms must be embraced both to generate efficiencies where possible, and to create and sustain models that – while more resource intensive – effectively meet the needs of particular people and communities who will otherwise slip through the cracks and find themselves impacted harshly by the legal system. In addition, the Rules that regulate the practise of law should be reformed to support innovative models of service delivery, including the use of discrete task based assistance.

Recommendation 1 Innovations and reforms must be embraced in the justice system and legal assistance sector to generate efficiencies where possible, and to create and sustain models that – while more resource intensive – effectively meet the needs of particular people and communities who will otherwise slip through the cracks and find themselves impacted harshly by the legal system.

[7] See for example Government of South Australia Attorney-General's Department, *Evaluation of the Justicenet Self-Representation Service Pilot,* (Office of Crime Statistics and Research, 2015), 18, where the results of a pilot self-representation service in the civil jurisdiction of the Supreme Court of South Australia demonstrated that a large proportion of clients who received unbundled legal assistance where the advice was to either not commence proceedings or to settle proceedings, accepted that advice, thus taking up less of the Court's time and avoiding protracted legal disputes.

Our model in action

Mary's story

Mary is a single mother raising three children, each with disabilities. Mary is only able to work part-time because she is the carer for her children, she otherwise receives a carer's allowance. Mary wanted stability for her family, and decided to buy a newly constructed house in 2016. Once she moved in, Mary discovered that the house was riddled with more than 50 defects. Mary's builder denied that it was responsible for the defects and a dispute arose. Mary unsuccessfully attempted to resolve the dispute at Building Advice and Conciliation Victoria.

By the time Mary contacted us, she had already filed an application at VCAT, but was unsure about the process and wanted some advice about what to expect. Mary told us that the Builder had the money to hire a lawyer and a barrister, and she was worried this would affect her ability to win her case.

Mary became very stressed and wasn't able to stay on top of things, which meant she lost contact with the Service for a period of time. By the time Mary contacted us again, the Builder's lawyer had lodged an application to strike out Mary's proceeding. Mary's response to the strike out application was due the next day. Mary was provided with an urgent telephone appointment to assist her to respond to the Builder's strike out application. Ultimately, the application was withdrawn and Mary's matter then progressed to a compulsory conference at VCAT.

Diana's story

Diana started working as a casual sales assistant in a western Sydney grocery store in December 2015. For the first six weeks of her employment, Diana was not paid any wages as her boss told her this was a 'training period'. Following this initial period, she was paid weekly in cash at a rate of $17 per hour. Diana suspected that she was being paid too little, however she really needed the work and did not want to raise the pay issue with her boss out of fear of being dismissed.

Diana stopped working at the store in December 2016. Shortly afterwards, she contacted the Fair Work Ombudsman who advised her that based on the applicable Award, she had been underpaid by about $6 per hour throughout the course of her employment. Diana then contacted the Service and we assisted her to calculate that her claim amounted to just over $11,000. She was advised to send a letter of demand to her former boss and about how to commence legal proceedings if she did not receive a satisfactory reply.

When she had no response from her former employer, Diana commenced proceedings in the Small Claims Division of the Federal Circuit Court. She met with the Service shortly before the first court date and received some advice on preparing for the hearing. Given her former employer's disengagement and the likely difficulties she would face in enforcing any judgment made in her favour, Diana was also advised to try negotiating a settlement based on a slightly reduced sum.

Diana followed this advice and ahead of the first listing date made an offer to settle for just under her total amount sought. Happily, a lawyer newly acting for her former employer indicated they agreed to Diana's offer and a deed of settlement and release was drawn up. Diana came back to the Service for some quick advice on the deed which she then agreed to sign and subsequently received her payment. The parties were then able to tell the Court that the matter had settled without the need for a hearing which Diana, as a self-represented litigant, had been very concerned about.

In our last contact with Diana she expressed how grateful she was to have had legal assistance at critical junctures in her case.

4. Justice Connect's response to the Review

General comments on the Rules

The Centre for Innovative Justice's 2013 paper on affordable justice noted that 'legal assistance funding, pro bono services and legislative reforms can never entirely mitigate the fact that private legal representation is perceived as too expensive for the majority of people to afford'[8]. It is therefore essential that different models of delivery be explored in order to generate access to justice for the 'missing middle'.

One way to do this is through an unbundled service delivery model, similar to that adopted by Justice Connect services. Through our experience providing unbundled assistance, we have identified there are a number of potential barriers to the provision of unbundled legal services. These barriers include the Rules around limited retainers, cost disclosure, and conflict of interest rules.

While the current Rules do not explicitly preclude the delivery of unbundled legal assistance, they may provide a disincentive to the private practice providing unbundled assistance. Indeed, the Productivity Commission noted that conflict of interest rules, while 'important to prevent lawyers acting where they have a real conflict… can significantly impact on a person's ability to access discrete legal advice and assistance'[9].

If the Rules were amended to remove the presumption of a more open-ended, or traditional end-to-end service model, this could lead to greater access to justice for the 'missing middle'. We note that unbundled service delivery is frequently being used as a model by the CLC sector.

Amending the Rules to include specific rules about unbundled legal service delivery would be a clear way to create greater certainty about practitioner obligations when unbundled legal services are being provided. This view is supported by the Victorian Department of Justice and Regulation's findings in the Access to Justice Review[10] that:

> *there is scope for the Professional Conduct Rules (or accompanying advice) to clarify issues around practitioner liability created by the practice of unbundling. If these rules were clarified in Australian jurisdictions to explicitly recognise 'unbundled' legal services, lawyers would be more likely to offer this service, delivering a more affordable way of providing legal assistance*.

In the meantime, to overcome the current hurdles, our programs have developed specific policies and procedures to address and clarify liability issues, including making sure every client is provided with and acknowledges in writing the scope of the service before we agree to assist them. We also do intensive induction training with the lawyers involved to make sure they are clear about the limits of their role and ensure an additional layer of protection through supervision and review of all advice provided.

Recommendation 2: The Rules should be amended to remove the presumption of a more open-ended or traditional end-to-end service model, and to provide greater clarity in relation to the professions' obligations with respect to unbundled legal service delivery.

[8] Above n. 3, 8.
[9] Above n.1, 646.
[10] Victoria, Department of Justice and Regulation, *Access to Justice Review: Report and Recommendations* (Victorian Government, 2016), 467.

Rules 10 and 11: Conflicts of interest

Rules 10 and 11 relate to conflicts of interest concerning former and current clients, respectively. Broadly:

- Rule 10 provides that solicitors and law practices must avoid conflicts between the duties owed to current and former clients, except with informed written consent (Rule 10.2.1), or where an effective information barrier has been established (Rule 10.2.2).
- Rule 11 provides that solicitors and law practices must avoid conflicts between the duties owed to two or more current clients, except where each client is aware of the conflict and has given informed consent as to the representation of the other (Rule 11.3). Information barriers must also be established where confidential information exists that would prejudice one party in favour of another (rule 11.4)

Our response to the Review focuses on how those rules impact on the provision of unbundled legal assistance. As discussed in greater detail below, the conflict of interest rules do not preclude the provision of unbundled assistance; however, can affect whether a private legal practice or CLC is able to assist a new or future client.

Would it be appropriate and necessary to provide an exemption in rule 10 (and 11) from confidentiality and other duties where legal services are provided on a 'discrete', 'unbundled', or 'limited representation' basis?

If interpreted narrowly, the current conflict of interest provisions set out in rules 10 and 11 require that, where we assist one client in a dispute and the other party subsequently seeks our advice, either at the same time or a later date, we must decline to provide the same level of discrete assistance. For example, this issue can arise in relation to the DBLS, where two or more homeowners in one building require legal assistance in relation to a dispute against the builder who constructed the entire building. The outcome is that a client, who might otherwise be entitled to free legal help from our program, will be left without access to our assistance.

Our clients cannot afford end-to-end legal assistance and the current demands on the legal assistance sector means they are also generally unable to access free legal help. If private lawyers are not able to offer unbundled service delivery, their prospects of receiving legal assistance are even further reduced.

The conflict issue experienced by our self-representation service programs is not unique to our programs[11]. In essence:

> *If these rules mean that parties are denied initial, early advice on the merits of their dispute, for example – advice that CLCs often provide regardless of a party's means – these same parties are propelled unnecessarily towards the private legal market, or are forced to proceed with the matter themselves. The combination of these factors means that the wider availability of discrete task assistance, or 'triage' services – either from the private legal market or from other publicly funded bodies – is even more necessary.*[12]

Rules for the delivery of unbundled assistance should be developed which specifically provide for the availability of limited scope assistance to overcome these issues.

Recommendation 3: Separate rules for the delivery of unbundled legal assistance should be developed which specifically provide for the availability of limited scope assistance to overcome the narrow interpretation of conflict of interest provisions.

[11] QPILCH (now Lawright), *Proposal for Protection of Community Based Lawyers Providing Discrete Task Assistance to Parties in the Same Proceedings*, (QPILCH, July 2010), at http://www.lawright.org.au/_dbase_upl/Submission%20on%20Unbundling.pdf.
[12] Above n.3, 31.

Were the Rules to provide an exemption where legal advice has been provided in a "discrete" or "unbundled" or "limited representation" setting, would it need to clarify what types of services are exempted?

If Recommendation 3 is not adopted, in the alternative, we support the view that an exception could be included in the current Rules in relation to discrete or unbundled assistance.

At present, issues relating to unbundling are overcome by setting out very clearly the limited scope of the retainer. At Justice Connect, our ability to provide unbundled legal assistance is supported by the fact that our CLC does not act for employers, or for builders. This means that potential conflicts of interest between current and former clients are greatly reduced. However, service delivery is clearly more problematic for private legal providers, where a practitioner is more inclined to act for both plaintiffs and defendants. Despite this, the Productivity Commission "does not consider the risk posed by unbundling to be insurmountable, as evidenced by the fact that some Australian law firms are currently providing discrete task assistance[13].

The Law Society of Upper Canada has introduced a separate rule applicable to organisations such as CLCs providing discrete legal services on a pro bono basis, which acknowledges that solicitors providing these services may continue to act unless they have actual knowledge – meaning, that the conflict would rest more on the individual, than the law practice as a whole.

We note that in its submission to this Review, the National Association of Community Legal Centres (**NACLC**) recommended that the LCA adopt a new rule that provides a limited exception to Rules 10 and 11 for unbundled, discrete legal assistance services provided to individual clients by community legal centres, and (if they agree, subject to consultation with relevant agencies) other publicly-funded legal assistance providers including, legal aid commissions, Aboriginal or Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services. The NACLC submission suggested that the rule and commentary might be based on the Canadian rule.

While we broadly support NACLC's recommendation about the implementation and operation of a rule and associated commentary based on the Canadian Rule; we further believe that Rules should be amended to make the delivery of unbundled legal services more accessible to private legal practitioners providing discrete task based assistance to all clients, and not just clients receiving pro bono legal assistance.

It is our view, that creating a limited exception to the current conflict of interest rules to an area of law, or the provision of pro bono assistance is too narrow. Such a rule would prevent the 'missing middle', who are not all eligible for pro bono legal assistance, from accessing affordable unbundled assistance from private legal practitioners. We note, for example, that in the United Kingdom a practice note in relation to unbundled legal services was issued by the Law Society in 2013 in relation to family law services. The practice note provided guidance to lawyers as to:

- Defining the duty of care to clients, liability and risk.
- Defining retainer limits and scheduling provided services.
- Duties to clients and to courts.
- Professional indemnity insurance requirements.
- Limited representation.

The UK practice note is 'good practice' in the area and is 'not legal advice'. Solicitors are 'not required to follow them, but doing so will make it easier to account to oversight bodies for [the solicitor's] actions'[14].

In 2016, the operation of the practice note was extended to cover civil law, generally. It provides a list of areas of law suitable for unbundling (at 2.1), and a list of services provided and not provided (at 5.1), and templates. While there remain issues in relation to the definition of retainers and the extent of liability under them at common law, the extension of the practice note to all civil matters appears to support the contention that there is no need to limit a similar practice note or rule in Australia to pro bono matters, as the rules could be applied more broadly in relation to civil law matters.

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[13] Above n.1, 647.

[14] The Law Society of England and Wales, 'Unbundling Civil Legal Services: Practice Note' (2016) (available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/>), accessed 29 May 2018.

Recommendation 4: If Recommendation 3 is not adopted, in the alternative, an exception should be included in the current Rules in relation to discrete or unbundled assistance. This exception should not be limited to the delivery of pro bono legal services

Should a new rule dealing specifically with unbundled legal services be devised?

We believe that new rules applying to the delivery of unbundled legal assistance should be developed, and should be applicable to all unbundled assistance, not just the delivery of pro bono legal services.

Internationally, a number of different approaches have been adopted to overcome perceived barriers to the delivery of unbundled legal services. In addition to the practice note that exists in the United Kingdom[15], there exists:

- A special rule relating to the delivery of unbundled legal assistance for pro bono matters has been developed by the Law Society of Upper Canada. This rule relating to unbundling expressly sets out that this carve out relates to the delivery of short-term limited legal services to "pro bono client[s]", defined as "*a client to whom a lawyer provides short-term limited legal services*".
- In the United States, the American Bar Association[16] has developed a set of model rules which have been rolled out in part or whole in most states of the United States. Rule 1.2 states that '(c) a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent'.
- The Law Society of Western Australia published 'unbundling guidelines' for use in relation to 'limited retainer' matters in 2017. The guidelines acknowledge that unbundling might be "appropriate": "*In areas of law where clients generally may have modest means or limited resources, e.g. personal injury, criminal law, family law, the collection of small claims and generally in relation to small business, a limited retainer may be in the client's best interests. It may serve the client's interests by limiting costs and providing access to justice, which they might otherwise be unable to achieve*." The guidelines give examples of "unbundled legal work". The unbundling guideline covers all types of unbundled legal services, including paid and pro bono advice, in connection with all types of legal services, "*ranging across every kind of litigation and commercial or corporate work*".[17]

It is our view that in the absence of the creation of a rule relating to the provision of unbundled legal assistance to all clients, not just clients of CLCs or clients receiving pro bono legal assistance, our preferred approach to regulating the delivery of unbundled legal assistance is the development of a practice note similar to that adopted in Western Australia.

Recommendation 5: If neither Recommendation 3 nor 4 is adopted, a uniform guideline or practice note similar to that adopted in Western Australia should be adopted by supported by the LCA

[15] Ibid.
[16] American Bar Association, 'Model Rules of Professional Conduct' (available at <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>), accessed 29 May 2018.
[17] The Law Society of Western Australia, 'Unbundling Guidelines' (available at <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017AUG09_Unbundling_Guidelines.pdf>), accessed 29 May 2018.

Should Rules 10.2.1 and 10.2.2 be separated with 'and' instead of 'or'?

We support the view that the use of 'or' is appropriate to separate the requirements of Rules 10.2.1 and 10.2.2. The use of 'and' in this context would further restrict the ability of a law practice or a CLC from delivering unbundled legal assistance.

In the context of unbundled legal assistance, there is no ongoing fiduciary of undivided loyalty owed to former clients, and therefore, no requirement to obtain informed consent to act for the new client.

Rules 13: Completion or termination of engagements

We acknowledge that the current review seeks submissions in relation to the termination of ongoing retainers.

Rule 13 provides that 'a solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS: '13.1.1 the client has otherwise agreed'.

Again, this clause does not expressly prohibit the use of limited retainers for the delivery of unbundled legal assistance; however, it is expressed in such a way that contemplates a full retainer as the 'norm'.

As discussed above, unbundled legal assistance is widely used by CLCs, and is also adopted by private practitioners.

We support a new rule based on rule 1.2(c) of the American Bar Association Model Rules, which states that '(c) a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent'. Law Societies could provide practice notes as to how to create limited retainers, including in relation to the termination of such retainers.

Recommendation 6: A new rule based on rule 1.2(c) of the American Bar Association Model Rules, which states that '(c) a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent' should be included in the Rules. Law Societies could provide practice notes as to how to create limited retainers, including in relation to the termination of such retainers.

5. References

American Bar Association, 'Model Rules of Professional Conduct' (available at <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html>), accessed 29 May 2018.

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