
Legal Profession Uniform General Rules 2014

under the

Legal Profession Uniform Law

Response to Consultation draft November 2014

19 January 2015

Contents

PART 1 – GENERAL UNIFORM RULES	5
PART 1.2 – INTERPRETATION.....	5
Rule 5 Definitions.....	5
PART 2.1 – UNQUALIFIED LEGAL PRACTICE.....	7
Rule 10 Entitlement to certain titles.....	7
Rule 11 Exemption from prohibition on engaging in legal practice	7
PART 3.3 – AUSTRALIAN LEGAL PRACTITIONERS.....	8
Rule 18 Applicant for grant or renewal of Australian practising certificate not intending to practise in Australia	8
PART 3.7 – INCORPORATED AND UNINCORPORATED LEGAL PRACTICES.....	8
Rule 27 Notice of intention to engage in legal practice.....	8
PART 4.2 – TRUST MONEY AND TRUST ACCOUNTS	8
Rule 34 Maintenance of general trust account	8
Rule 35 Withdrawal of trust money.....	9
Rule 38 Computerised accounting systems – printed or other copies of trust records.....	10
Rule 42 Method of payment	11
Rule 45 Journal transfers.....	11
Rule 49(2) Notification requirement regarding general trust accounts	11
Rule 50 Notification requirement regarding each trust account	11
Rule 56 Authority to receive trust money.....	12
Rule 59 Receipt of controlled money	12
Rule 61 Register of controlled money	13
Rule 66 External examiner’s report	13
New Rule Retainers	13
PART 4.3 – LEGAL COSTS	13
Rule 68 Alternative disclosure for legal costs below higher threshold	13
Rule 69 Giving bills.....	16
New Rule Commercial and government clients.....	16
New Rule Uplift fees	16
New Rule Reasonable steps	17
PART 4.4 – PROFESSIONAL INDEMNITY INSURANCE	17
New Rule Multi-jurisdictional practices	17
PART 4.5 – FIDELITY COVER.....	17
Rule 79 Defaults to which Uniform Law does not apply	17
PART 4.6 – BUSINESS MANAGEMENT AND CONTROL.....	18
Rule 89 Register of investments.....	18
Rule 90 Other registers	18

19 January 2015

Mr Dale Boucher
Commissioner for Uniform Legal Services Regulation
Legal Services Council
Level 11, 170 Phillip Street,
Sydney NSW 2000

By email: submissions@legalservicescouncil.org.au

Dear Commissioner

LEGAL PROFESSION UNIFORM GENERAL RULES 2014 CONSULTATION

I have pleasure in forwarding to you the Law Council of Australia's Submission in response to the *Legal Profession Uniform General Rules 2014* (the "Uniform Rules") consultation as published by the Legal Services Council on 28 November 2014.

The Law Council is the peak national representative body of the Australian legal profession. The Law Council is responsible for developing draft Uniform Rules relating to CPD, professional conduct and legal practice for solicitors under the *Legal Profession Uniform Law* ("LPUL"). Consistent with that responsibility, the Law Council has considered the Legal Services Council's draft General Rules and has prepared this submission.

This Submission responds to the draft Uniform Rules, and also sets out views and suggestions about other areas of the LPUL where the profession believes there is a need for rules to be developed and made for the proper and efficient functioning of the uniform law scheme. The Law Council will respond separately to the consultation draft *Legal Profession Proposed Admission Rules* as published on 28 November 2014 by the Admissions Committee established under Part 8.4 of the LPUL.

The Law Council has approached these submissions with a number of general principles in mind:

First, the Law Council believes that the certainty of the Uniform Rules should be paramount, and that issues related to the cost and cost effectiveness of the new rules should be considered.

Second, that the LPUL's regulatory objectives include to "promote the administration of justice and an efficient and effective Australian legal profession, by promoting regulation of the legal profession that is efficient, effective, targeted and proportionate"¹.

Third, that the principles for Australian Government policy makers set out in the Australian Government Guide to Regulation² should apply to the Uniform General Rules.

Finally, the Law Council considers that the Uniform Rules should not impose any further restrictions on practice structures than those that currently operate in either participating jurisdiction unless there are identified issues with those structures.

¹ Subsection 3(e) of the LPUL

² <https://www.cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers>

The Submission highlights the Law Council's concerns with the Uniform Costs Disclosure Form (the "Form") which is to be available to practitioners in certain matters under Subsection 174(5) of the LPUL. The Law Council believes that the format of the proposed Form contains information and requirements which go beyond its stated legislative purpose, and would, if adopted, be detrimental to law practices and, in turn, consumers of legal services.

I wish to record my special thanks to the Law Council Uniform Law Working Group, which has worked hard to draw together the responses on the draft rules and develop a cohesive and effective submission under considerable time constraints, during the holiday season.

The Law Council is happy to discuss the matters raised in this submission or the Rules generally. If you do wish to discuss the matters covered in this submission further, please contact Martyn Hagan at (02) 6246 3788.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Duncan McConnel', written in a cursive style.

Duncan McConnel
President

PART 1 – GENERAL UNIFORM RULES

PART 1.2 – INTERPRETATION

Rule 5 Definitions

Supervised legal practice

Section 6(1) of the LPUL includes the following definition of supervised legal practice:

supervised legal practice means legal practice by a person who is an Australian legal practitioner—

- (a) as an employee of, or other person working under supervision in, a law practice, where—
 - (i) at least one legal practitioner associate of the law practice is an authorised principal; and
 - (ii) the person engages in legal practice under the supervision of an authorised principal referred to in subparagraph (i); or
- (b) as a principal of a law practice (other than a community legal service), where the person engages in legal practice under the supervision of an authorised principal of the law practice; or
- (c) as a corporate legal practitioner or government legal practitioner, where the person engages in legal practice under the supervision of a person who holds, or is eligible to hold but is exempted from holding, an Australian practising certificate authorising the holder to supervise legal practice by others; or
- (d) in a capacity or in circumstances specified in the Uniform Rules for the purposes of this definition.

This definition appears to modify section 47(6) of the LPUL which provides that an Australian practising certificate also authorises the holder to supervise legal practice by others, except:

- (a) if the certificate is subject to a statutory or discretionary condition that the holder must engage in supervised legal practice only; or
- (b) to the extent that the certificate is subject to a discretionary condition to the effect that the holder may not supervise legal practice by others.

The Law Council of Australia (“the LCA”) notes under the NSW Legal Profession Act 2004 (“the NSW LPA”) any partner or other employee lawyer who holds an unrestricted practising certificate (e.g. Senior Associates, Senior Counsel) can supervise (see definition of “supervised legal practice” in section 4 of the NSW LPA and Rule 44 of the NSW Professional Conduct and Practice Rules 2013 (“the NSW Rules”). However, under paragraph (1)(a) of the LPUL definition of supervised legal practice, supervision of a restricted lawyer employee of a law firm (or a client employee on reverse secondment) has been narrowed to partners (“authorised principals”) only.

The LCA also notes that under Rule 44 of the NSW Rules, an employee lawyer of a law firm may be supervised working in (e.g. on secondment but not as an employee of) a corporate or government body if supervision is provided by “a person” who holds, or is eligible to hold, an unrestricted practising certificate if that person has completed two years of supervised legal practice – such as a senior lawyer within a client corporate or government legal department. Absent a similar rule under the LPUL, it appears that supervision of restricted law firm employee lawyers on secondment would need to be provided by a partner of the law firm.

Therefore, the LCA proposes the following draft rule which is consistent with the NSW LPA definition of “supervised legal practice” and NSW Rule 44:

Supervised legal practice as defined in section 6(1) of the Legal Profession Uniform Law includes legal practice by a person who is an Australian legal practitioner, other than a principal of a law practice, who engages in legal practice under the supervision of:

- (a) an Australian legal practitioner who is authorised by his or her Australian practising certificate to supervise legal practice by others; or
- (b) if working in a commercial or government body, engages in legal practice under the supervision of an Australian lawyer who holds, or is eligible to hold but is exempted from holding, an Australian practising certificate authorising the holder to supervise legal practice by others

Unincorporated legal practice

1. Multi-disciplinary partnerships

Section 6(1) of the LPUL defines “unincorporated legal practice” as an unincorporated body or group that satisfied various criteria. The LCA suggests that a multi-disciplinary partnership as defined under the NSW LPA would be covered by the reference to “partnership” at paragraph (a)(i). However, if this is not the case, provision should be made to bring multi-disciplinary partnerships under paragraph (a)(ii) (i.e. an unincorporated body or group, or an unincorporated body or group of a kind approved by the Council under section 114 or specified in the Uniform Rules for the purpose of this definition). The LCA requests consideration of whether the Uniform Rules should include a multi-disciplinary partnership, as defined by section 165 of the NSW LPA, as an unincorporated legal practice. The LCA notes that a corresponding rule may be needed under section 6(1)(d)(ii)(C) of the LPUL which deals with the definition of “principal” in relation to law practices which are not incorporated legal practices or partnerships.

2. Partnerships of incorporated legal practices

In addition, the LCA notes that the Legal Profession Act 2004 (Victoria) (“the Victorian LPA”) defines a “law firm” as a partnership consisting only of –

- (a) Australian legal practitioners; or
- (b) one or more Australian legal practitioners and one or more Australian-registered foreign lawyers; or
- (c) incorporated legal practices; or
- (d) one or more incorporated legal practices and one or more Australian legal practitioners; or
- (e) one or more incorporated legal practices and one or more Australian registered foreign lawyers; or
- (f) one or more incorporated legal practices, one or more Australian legal practitioners and one or more Australian-registered foreign lawyers.

Only paragraphs (a) and (b) of the Victorian LPA definition of “law firm” are covered by the LPUL definition of “law firm”. As for multidisciplinary partnerships above, it is unclear whether paragraphs (c) to (f) would be covered by the reference to “partnership” at paragraph (a)(i) of the LPUL definition of “unincorporated legal practice” or if further provision needs to be made under paragraph (a)(ii) within the Uniform Rules.

PART 2.1 – UNQUALIFIED LEGAL PRACTICE

Rule 10 Entitlement to certain titles

Australian lawyers

It is not currently necessary for a lawyer to hold a practising certificate if the lawyer provides legal services in the capacity of an employee to his or her employer in the ordinary course of his or her employment and receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee. Accordingly, a significant number of government and in-house corporate lawyers do not hold a current practising certificate.

Under the LPUL, government and corporate lawyers will be required to hold a practising certificate and so will be entitled to use the relevant titles as an Australian legal practitioner. However, it is anticipated that transitional arrangements will be in place for a period to enable practitioners to make arrangements if they do not already hold a practising certificate and may have stale qualifications or some other impediment. Additional transitional arrangements should be made for affected lawyers to use the relevant titles during that period.

Foreign lawyers

Section 12(1)(c) of the LPUL allows Uniform Rules to specify legal titles that may be taken and used for the purpose of that section.

The LCA requests that the Uniform Rules include approved titles for foreign qualified lawyers (not admitted in Australia) working under supervision in a law practice or in-house legal department. The LCA supports the policy submitted by the Conference of Law Societies (“COLS”) to State and Territory regulators in May 2014 which would permit lay associates who are admitted in an overseas jurisdiction to be held out under one of the following titles, as appropriate to their seniority and experience:

- Associate (Admitted in [place of admission], not admitted in Australia)
- Senior Associate (Admitted in [place of admission], not admitted in Australia)
- Consultant (Admitted in [place of admission], not admitted in Australia)
- Senior Consultant (Admitted in [place of admission], not admitted in Australia)

The COLS policy states that this is aimed at employees who, while foreign qualified lawyers, are not practising either foreign law or Australian law. The titles are intended to convey to the consumer the person’s experience and seniority while at the same time making it clear that they are not entitled to practise Australian law.

Rule 11 Exemption from prohibition on engaging in legal practice

Draft Rule 11, which exempts various persons from the operation of section 10(1) of the LPUL, refers to “an unrestricted practising certificate” at subparagraph (1)(f) and in paragraph (2).

The LCA notes that while this phrase is currently used in the NSW, it is not used in the LPUL.

Instead, paragraph (1)(f) should refer to an Australian legal practitioner who holds a practising certificate that is (or is not) subject to a condition under section 47(1)(b) or section 49 of the LPUL.

Furthermore, under section 14(2)(a) of the NSW LPA and section 2.2.2(2) of the Victorian LPA the prohibition on unqualified legal practice does not apply to legal practice engaged in under the authority of a law of the relevant jurisdiction or of the Commonwealth. The LCA notes that this exemption applies to services provided by patent attorneys and trade mark attorneys, and requests that it be included in draft Rule 11.

PART 3.3 – AUSTRALIAN LEGAL PRACTITIONERS

Rule 18 Applicant for grant or renewal of Australian practising certificate not intending to practise in Australia

Section 44(4) of the LPUL states that an application for the grant or renewal of a practising certificate cannot be made in a participating jurisdiction unless the applicant reasonably intends that this jurisdiction will be his or her principal place of practice during the currency of the certificate or renewal applied for.

Draft Rule 18 applies in relation to an application for the grant or renewal of an Australian practising certificate in a participating jurisdiction if the applicant does not reasonably intend to engage in legal practice in Australia during the currency of the certificate or renewal applied for.

Uncertainty arises when a legal practitioner intends to practise outside Australia for the majority of the year. The uncertainty can be addressed by the addition to Rule 18 of the following text:

“Principal place of practice” is that jurisdiction within the participating jurisdictions where the practitioner reasonably intends to conduct the majority of their legal work.”

PART 3.7 – INCORPORATED AND UNINCORPORATED LEGAL PRACTICES

Rule 27 Notice of intention to engage in legal practice

Draft Rule 27 requires incorporated and unincorporated legal practices to give the designated local regulatory authority at least 7 days’ notice of intention to engage in legal practice. The LCA would prefer this time period to be extended to 14 days.

PART 4.2 – TRUST MONEY AND TRUST ACCOUNTS

Rule 34 Maintenance of general trust account

Paragraph (b) of draft Rule 34 provides that a general trust account must include in its name:

- the name of the law practice or the business name under which the law practice engages in legal practice, and
- the expression “law practice trust account” or “law practice trust a/c”.

The LCA notes that transitional provisions will be needed because, pursuant to sub-clause 60(3) of the NSW Regulation, these details are not required for accounts established before 1 October 2005. Sub-clause 3.3.8(3) of the Legal Profession Regulation 2005 (Victoria) (“the Victorian Regulation”) provides that these details are not required for accounts established prior to 12 December 2005.

Rule 35 Withdrawal of trust money

Client

Draft Rule 35 uses the term “client” which is defined to include a third party payer. However, other trust provisions refer to the “person for whom or on whose behalf trust money is held”.

The LCA notes that the client may not be the person who is making the payment of or is otherwise entitled to the funds, for example in circumstances where money is held:

- in a conveyancing matter on behalf of the vendor and purchaser, or
- by a solicitor acting for a party in a family law matter directed to hold the balance of the sale of the family home until resolution of distribution between the parties (money is held for the husband and wife), or
- where legal costs are being funded by a relative

The LCA queries whether all trust provisions should refer to the “person for whom or on whose behalf money is held” as this may be more accurate and would provide for a consistent approach.

Withdrawal – otherwise legally payable

Paragraph (1) of draft Rule 35 allows a law practice to withdraw trust money for legal costs as soon as:

- (a) the client gives written authorisation
- (b) the end of 7 days after the client was given the bill, if the client does not object to the amount specified in the bill
- (c) the end of 60 days after the client was given the bill, if the client objects to the amount specified within the bill within 7 days but has not referred the matter to the designated local regulatory authority or for costs assessment

The LCA notes that sub-clause 88(4)(b)(iii) of the NSW Regulation also allows a law practice to withdraw trust money for legal costs if the money otherwise becomes legally payable and requests that a similar provision is included in draft Rule 35. This will allow a solicitor to withdraw money from trust to pay their outstanding legal fees where those fees have been assessed and judgment obtained. Without this clause the following scenario could ensue:

The client objects to the bill within the 7 day period and the solicitor cannot withdraw the funds. The client (or the solicitor) applies for assessment of the legal costs within the 60 day period. The funds remain in the trust account pending resolution of the assessment. The assessment is completed and a certificate of determination in the solicitor’s favour is issued. The client does not seek a review. The solicitor files the certificate and obtains a judgment. The client continues to refuse withdrawal of the money from trust. None of the other options are available for the solicitor to withdraw the trust money.

Withdrawal – costs agreement

Draft Rule 35 does not replicate the equivalent of sub-clause 88(3) of the NSW Regulation, which sets out additional methods by which trust money may be withdrawn, including where a costs agreement authorises withdrawal. The LCA suggests that this provision should be preserved.

Objection to 35(2)

The LCA objects to draft Rule 35(2) because it will have a tendency to cause disputes over payment of accounts from money held in trust. The intended restriction on a law practice to only transfer an amount if authorised could be achieved by modification of Rule 35(1) as follows:

“35(1): A law practice that has given a client a bill specifying the amount payable by the client for legal costs may withdraw money for legal costs from a general trust account or a controlled money account:

- (a) immediately, if the law practice has been given a written authorisation to withdraw an amount, up to the limit of that amount or the bill, whichever is the lesser; or
- (b) after the end of the period of 7 days after the client was given the bill, if the client does not object to the amount specified in the bill; or
- (c) by the end of the period of 60 days after the client was given the bill, if the client objects to the amount specified in the bill within 7 days of being given the bill but has not referred the matter to the delegated local authority or for costs assessment”

35(2) Delete

35(3) Renumber to 35(2)

This proposed amended wording should reflect the fact that the cost agreement provides written authorisation given before the delivery of the bill.

Rule 38 Computerised accounting systems – printed or other copies of trust records

Controlled money

Paragraph (1) of draft Rule 38 includes in brackets the words “including records relating to controlled money”. The LCA queries if these words are necessary, noting that section 129 of the LPUL defines trust money as including:

- (a) money received by the law practice on account of legal costs in advance of providing the services
- (b) controlled money received by the law practice
- (c) transit money received by the law practice
- (d) money received by the law practice, that is subject of a power exercisable by the law practice or an associate of the law practice, to deal with the money for or on behalf of another person

If these words are removed from paragraph (1) of draft Rule 38 then the same amendment should be made to draft Rules 39, 40 and 41.

Printing

The LCA submits that subparagraph (2) of draft Rule 38 should be amended to allow all trust records referred to in that paragraph to be either printed to paper or kept in electronic form that is readable or reportable on demand (provided that the electronic format cannot be later modified). Paragraph (4) may need further consideration in light of this amendment.

Reconciliation statements

For clarity, the LCA suggests it would also help to specify that subparagraph (2)(b) of draft Rule 39 refers to reconciliation statements prepared under draft Rule 47.

Rule 42 Method of payment

Paragraph (4) of draft Rule 42 lists “required particulars”, including (c):

- the name of the person to whom the payment is to be made or,
- in the case of a cheque made payable to an ADI, the name of the ADI and the name of the person receiving the benefit of the payment.

The LCA notes that transitional provisions will be needed because, pursuant to sub-clause 65(7A) of the NSW Regulation, these details are not required for accounts established before 1 October 2005. Sub-clause 3.3.12(9) of the Victorian Regulation provides that these details are not required for accounts established prior to 12 December 2005.

Rule 45 Journal transfers

The proposed rule should not introduce additional regulation on the profession in the absence of evidence of deficiencies in the current regulatory regime. On this basis, paragraph 1(d) should be omitted.

Paragraph (1)(d) of draft Rule 45 requires the client’s written authorisation to transfer money from one trust ledger account to another by journal entry. This requirement does not exist in clause 71 of the NSW Regulation and will cause significant practical difficulties particularly in circumstances where the transfer is required to correct an error. In this case, a person who had no claim to the money would have to authorise its transfer back to the correct account. It is unclear what position the practitioner would be in if the person did not authorise the transfer.

There is a drafting error in sub paragraph 1(b)(iii) in that the word “and” should be “or”. The authorisations referred to in sub paragraphs (b) and (c) are alternatives: (b) deals with authorisation by the principal of the practice, and (c) deals with the circumstance where the principal is no longer in control of the practice and an intervener has been appointed.

Rule 49(2) Notification requirement regarding general trust accounts

Draft Rule 49 requires certain notifications to be made in relation to trust accounts. Draft Rule 49(2), is not a current regulatory requirement in Victoria, but it is in NSW. The chance of identifying a default by this mechanism is low. On this basis, draft Rule 49(2) should be omitted.

Rule 50 Notification requirement regarding each trust account

Draft Rule 50 requires a law practice to notify the designated local regulatory authority of various details about each trust account. In NSW, these details only need to be provided at such times, and in such manner, as the Law Society Council requires as per the existing provision in sub-clause 105(2) of the NSW Regulation:

- (2) The matters referred to in subclause (1) must be notified to the Law Society Council at such times, and in such manner, as the Council requires

To avoid imposing an unnecessary additional regulatory burden on the profession, this sub-clause should be appropriately replicated in draft Rule 50.

Rule 56 Authority to receive trust money

Section 150 of the LPUL provides that a law practice must not receive trust money unless –

- (a) a principal of the law practice holds an Australian practising certificate authorising the receipt of trust money; or
- (b) the law practice is otherwise authorised to receive trust money under the Uniform Rules.

Section 106(1) of the LPUL provides that a law practice must not be without an authorised principal for more than seven days. Where a law practice is without an authorised principal, paragraph (5) empowers the designated local regulatory authority to appoint an Australian legal practitioner who is an employee of the law practice or another nominated person to exercise the responsibilities of a principal.

Draft Rule 56 is made under section 150(b) of the LPUL. Paragraph (a) states that an incorporated legal practice is authorised to receive trust money if a person is appointed under section 106.

Paragraph (b) of draft Rule 56 is less clear. It allows an incorporated legal practice to continue to receive trust money during any period in which the practice does not have an authorised principal, provided that:

- the incorporated legal practice is not in default of “that section” regarding authorised principals; and
- there was an authorised principal employed by the practice immediately before the start of that period.

Paragraph (b) should be amended to clarify that an incorporated legal practice may only continue to receive trust money without an authorised principal:

- during the seven day notice period referred to in section 106(2); and
- where there is another practitioner employed by the incorporated legal practice during that seven day period who is authorised to receive trust money.

Rule 57 Disclosure of accounts used to hold money

Draft Rule 57 appears to duplicate draft Rule 50 and should be removed

Rule 59 Receipt of controlled money

The LCA suggests that the draft Rules include a naming convention for controlled money accounts. For example, clause 75 of the NSW Regulation requires a controlled money account to be maintained under an account name that includes the following particulars:

- (a) the name of the law practice concerned
- (b) the expression “controlled money account” or the abbreviation “CMA” or “CMA/c”
- (c) such particulars as are sufficient to identify the purpose of the account and to distinguish the account from any other account maintained by the law practice

However, the LCA notes that this naming convention does not apply to accounts opened before 1 October 2005 in NSW. Sub-clause 3.3.22(2) of the Victorian Regulation provides that these details are not required for accounts established prior to 12 December 2005.

Rule 61 Register of controlled money

Paragraph (9) of draft Rule 61 provides that the statement of controlled money prepared each month must be reviewed by a principal of the law practice who is authorised to receive trust money and that review must be evidenced on the statement.

There is currently no express requirement for this review to be undertaken by principals or any other person. Under draft Rule 60(2), controlled money withdrawals must be effected by, under the direction of, or with the authority of an authorised principal or, if they are unavailable, by the other authorised personnel set out in subparagraph (b) of that Rule.

The proposed rules should not introduce unnecessary additional regulation on the profession in the absence of evidence of deficiencies in the current regulatory regime. It is unclear what purpose is served by requiring a principal to review the list of controlled money accounts each month or what current problem is sought to be addressed. The new requirement adds another layer of review which, given the other controls on these accounts, is unnecessary. This requirement should be deleted.

Rule 66 External examiner's report

Draft Rule 66 provides that an external examiner must give a written report of the examination to the designated local regulatory authority at a time or within a period determined by the Legal Services Council and published on the Council's internet site.

The LCA suggests that these timeframes should be as follows:

- year end date – 31 March
- preparation of a statement of trust money by the law practice – 30 April
- lodgement of examiners report – 31 May (extendable to 30 June)

New Rule Retainers

Section 129 of the LPUL specifies that certain moneys are included in the definition of "trust money" and essentially reproduces the current definition of trust money under section 243 of the LPA NSW. The LCA is aware that some law practices are attempting to assert that money received as a "retainer" (i.e. a holding fee that prevents a practitioner from acting against the person who paid the money) is not trust money even though this money is later being applied to legal costs and disbursements.

The LCA notes that this issue could be dealt with under section 152 of the LPUL which enables the designated local regulatory authority to determine that money held by a law practice is or is not trust money if it considers there is a dispute about its status. There is also scope to deal with this issue under Uniform Rules. To ensure a consistent approach across participating jurisdictions, a Uniform Rule should be developed to address this longstanding issue.

PART 4.3 – LEGAL COSTS

Rule 68 Alternative disclosure for legal costs below higher threshold

Short form disclosure

The LCA continues to have serious concerns about the proposed uniform standard costs disclosure form which are set out below.

Introduction

The LCA believes that the format of the Uniform Costs Disclosure Form (the “Form”) as proposed in the current consultation draft, contains information and requirements which go beyond its stated legislative purpose, and that the document as proposed will create a number of practical difficulties for legal practices using the Form. The LCA suggests that the Form as proposed is not yet suitable for adoption, and that its specific format should be the subject of further discussions between the LCA and the Legal Services Commission and other stakeholders.

Legislative intent underlying the Form

The costs disclosure provisions of the LPUL³ provide for three disclosure scenarios when the client provides the law practice with the initial instructions in a matter:

- a [full] disclosure as set out in subsections 174(1)(a), 174(2)(a), 174(3);
- an exception from disclosure under subsection 174(1) if the total legal costs are not likely to exceed a lower threshold of (currently) \$750, (although the law practice may nevertheless choose to provide the client with the uniform standard disclosure form referred to in subsection 174(5))⁴; and
- an alternative to disclosure under subsection 174(1) if the total legal costs are not likely to exceed an upper threshold of (currently) \$3000, pursuant to subsection 174(5). The firm may make a disclosure under this subsection by providing the client with the uniform standard disclosure form prescribed in the Uniform Rules (i.e. the Form).

The Form’s legislative context provides some indication about what information the Form should contain and require. While subsection 174(5) does not identify specifically what information should be included in, or required by, the Form, the fact that the LPUL’s wording provides for an *alternative* to full disclosure under the subsection (as above) must mean that what is contemplated under this subsection is something between no disclosure and “full” disclosure. Moreover, the subsection’s use of the words “the”, “uniform” and “standard” in the phrase “...the uniform standard disclosure form” suggests that the LPUL requires that the Form be a single, standard and uniform document that sets out the same information for any client to whom the Form is able to be given. Furthermore, in the Second Reading Speech to the *Legal Profession Uniform Law Application Bill 2013* (Victoria)⁵ stated that:

*For matters that are likely to cost less than a prescribed 'higher threshold' a law practice will only need to comply with a **basic** requirement to provide a client with a standard disclosure form. The standard form disclosure is intended to be a **short document** that is the same for all clients with estimated costs in this band and to include basic information such as the client's rights in respect of costs. Importantly, it is intended that this standard disclosure will also include a statement that the client may not be charged more than the amount of the higher threshold without receiving full disclosure from the law practice. (emphasis added)*

The LCA believes that the format of the Form, as proposed in the consultation, goes beyond the legislative requirements of subsection 174(5) by effectively paraphrasing the requirements of subsection 174(1). The current draft of the Form does not provides a

³ Division 3 of Part 4.3 LPUL

⁴ Subsection 174(4) LPUL

⁵ Legislative Assembly Parliamentary Debates (Hansard) Thursday 12 December 2013 at 4665.

genuine alternative to full disclosure under subsection 174(1), and needs to be revised to address the difficulties we have identified.

Specific difficulties with the Form (as proposed)

The LCA sets out below specific difficulties with the Form, which should be considered in any redrafting of the form as we have requested.

- It is unclear what information is required to be provided (e.g. court scales, fixed fees, hourly rates) in the section of the proposed Form entitled “How I calculated this estimate”.
- The proposed Form contains provision for estimating the “Total legal costs of barrister/other law practice used”, notwithstanding that disclosure under section 174(5) is not available if another law practice is to be retained (see subsection 175(1)).
- The “client details” part of the proposed Form does not contain provision for third party payers.
- The “Our estimated total legal costs” element of the form does not provide practices with the ability to give a range of costs and fees (e.g. \$1000 - \$2000), or provision for a range of estimates to be reviewed.
- The “Estimated full amount you will have to pay” element of the proposed Form adds considerably to the document’s complexity and is a requirement for full disclosure.
- The section of the proposed Form entitled “How I calculated this estimate” is not necessary, given that subsection 174(5) only requires a professional judgment to be made that the total costs in the matter are not likely to exceed \$3000, rather than a detailed or expansive analysis to be provided in the Form.
- The section of the Form entitled “Your rights include to:” sets out some client rights, but not others. Furthermore, this section contains some rights which are not required for full disclosure under s. 174(1).
- The question “Do you understand the information in this form?” should be removed as it is very unclear what the consequences would be were the client to circle “no”.
- The question “Do you consent to the proposed course of action and proposed costs?”, and the requirement for the client’s signature in the proposed Form could pose a number of practical difficulties for legal practices. The way that the proposed Form has grouped the two separate issues of “costs” and “proposed course of action” together in the question has the potential to lead to misunderstanding. This question should also be removed as it introduces uncertainty about whether the client needs to sign the Form or simply continue to give instructions to accept the terms of the agreement. It is also not immediately clear what the legal position of the relevant practice would be if the client refused or failed to sign the Form as the LPUL only requires that it is provided to the client.
- The Form also does not expressly state that if costs are to be in excess of \$3,000 full disclosure is required.

Overall, the LCA submits that the amount of free text required by the Form should be minimised to reduce the time and effort required to complete the Form.

Next steps

The LCA would welcome the opportunity of speaking further with the Legal Services Council about the proposed Form and expanding further on the points mentioned above, with a view to bringing the Form into an acceptable format before the General Uniform Rules become operative.

The LCA proposes that the LCA, the Legal Services Council and the ABA collaborate in developing the format of a revised Form.

Rule 69 Giving bills

Draft Rule 69 sets out rules for the giving of a bill for legal costs to a client. It provides at paragraph 1(d) that a bill may be given electronically to an email address.

The LCA requests that the means of electronic delivery referred to in the draft Rule 69 be technology neutral – that is, it should not specify any particular electronic delivery method nor try and predict future technological changes. Technology companies are moving away from email to other platforms, with clients increasingly specifying that invoices must not be emailed but instead loaded directly into the client’s financial system (LEDES billing). To achieve this, the LCA suggests that draft Rule 69 be amended as follows:

“(1)(d) electronically in a manner agreed between the law practice and the client or an agent of the client for that purpose.”

New Rule Commercial and government clients

Section 170(2) of the LPUL provides that a commercial or government client includes at paragraph (h) a client of a law practice where the client is a person specified in, or of a class specified in, the Uniform Rules.

The LCA requests that the extended definition of a commercial or government client include the following:

- high net worth individuals (for example, see the sophisticated investor test in section 708(8) of the Corporations Act)
- foreign law firms
- a partnership which does not provide professional services (for example, a partnership formed for investment purposes) in which all the members are persons to whom disclosure of costs is not required
- statutory corporations

The LCA notes the definition of commercial or government client includes a government authority in Australia or a foreign country (s.170(2)(g)).

New Rule Uplift fees

Section 182(4) of the LPUL allows for Uniform Rules to be made about uplift fees. The LCA requests a new Rule based on section 324(5) of the Legal Profession Act 2007 (QLD), set out below for ease of reference:

(4) If a conditional costs agreement relates to a litigious matter, the uplift fee must not exceed 25% of the legal costs, excluding disbursements, otherwise payable.

(5) However, this Act does not affect the right of a law practice to discount its fees and, if a law practice does discount its fees, the reference in subsection (4) to legal costs is the fees the law practice would have charged if the law practice's fees had not been discounted.

New Rule Reasonable steps

Section 174(3) of the LPUL, which applies where full costs disclosure is provided under section 174(1), requires a law practice to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

The LCA notes that it would be particularly helpful if the Uniform Rules could provide further detail as to what steps practitioners are expected to take to satisfy this requirement.

PART 4.4 – PROFESSIONAL INDEMNITY INSURANCE

New Rule Multi-jurisdictional practices

The LCA requests that the professional indemnity rules in relation to multi-jurisdictional practices should recognise that in some cases (for historical or other reasons) some multi-jurisdictional firms which are fully integrated in a financial and operational sense may technically be structured as separate partnerships in particular jurisdictions. The current practice, by which they are properly treated as a single practice for PII purposes, should be preserved. The following rule is proposed:

“Where a law practice is part of a group of law practices which carry on practice under the same name and whose operations are merged or financially integrated in substance:

- (a) for purposes of section 215(3)(b)(i) of the Uniform Law, the law practice will be taken to maintain a permanent office in this jurisdiction and at least two or more other jurisdictions, where such offices are maintained by the law practice or by another law practice within that same group; and
- (b) for the purposes of section 215(3)(b)(ii) of the Uniform Law, the law practice will be taken to have at least one principal in each of those other jurisdictions who engages solely or principally in legal practice at the permanent office in that other jurisdiction, where the principal is a principal of the law practice or of another law practice within that same group.”

PART 4.5 – FIDELITY COVER

Rule 79 Defaults to which Uniform Law does not apply

Managed investment schemes

Draft Rule 79 needs to be extended to explicitly cover trust property entrusted to or held by a law practice in connection with a managed investment scheme, consistent with section 435(2) of the NSW LPA.

Draft Rule 79 provides that, for the purposes of section 221(4) of the LPUL, Part 4.5 does not apply to a default of a law practice to the extent that the default occurs in relation to money or property that is entrusted or held by the law practice for or in connection with the matters specified in subparagraphs (a) to (c).

While section 129(1)(2)(b) of the LPUL provides that money entrusted to or held by a law practice for or in connection with a managed investment scheme or mortgage financing undertaken by a law practice is not trust money, this does not extend to trust property which may sometimes be held.

Unincorporated legal practices

If draft Rule 56 allows an incorporated legal practice to receive trust money when it does not have an authorised principal or another practitioner authorised to receive trust money, the LCA queries whether defaults in these circumstances should be excluded by Rule 79. The LCA notes that the position on this issue will be affected by the position that the Commissioner takes on Rule 56 above.

Corporate and government practitioners

Although government and corporate lawyers do not fall within the definition of an “associate of a law practice”, it has been generally accepted that these practitioners may still be the subject of a claim on the fidelity fund under the NSW LPA, for example, in circumstances where they are effectively holding themselves out as a sole practitioner. The LCA suggests that draft Rule 79 be amended to clarify that defaults by non-contributing practitioners are not covered by the fund.

Non-legal services

The LCA suggests the inclusion of a new provision along the lines of clause 145 of the NSW Regulation to cover business structures which include the provision of non-legal services.

145 Application of Part 3.4 of the Act to multidisciplinary partnerships-section 474 of the Act

A claim may not be made under Part 3.4 of [the Act](#) in respect of a failure to account or a dishonest default by a person who is in a multi-disciplinary partnership, but who is not an Australian legal practitioner, unless the failure to account or dishonest default occurred in the course of the business of the partnership that is [the] business of a barrister or solicitor.

PART 4.6 – BUSINESS MANAGEMENT AND CONTROL

Rule 89 Register of investments

Draft Rule 89 relates to the investment of trust money. The LCA suggests that it would be more conveniently located with the trust rules and could be made pursuant to section 168 of the LPUL.

Rule 90 Other registers

Registers of powers and estates

The requirement for the registers of powers and estates should be amended to reflect the current position in NSW and Victoria which only requires these registers to be maintained “in relation to trust money”. The proposed rule should not introduce additional an unnecessary regulatory burden on the profession in the absence of evidence of deficiencies in the current regulatory regime.

Registers of files opened and safe custody documents

The current rules in NSW and Victoria provide additional detail about the particulars that must be recorded in the register of files opened or the register of safe custody documents. This provides certainty for legal practitioners and limits the information required by regulators. The LCA seeks their inclusion. The LCA notes NSW Rule 48 (File register) and 49 (Safe custody register) which are set out below for your consideration.

NSW Rule 48 (File register)

48.1 A practitioner must, as soon as practicable after receiving instructions to provide legal services to a person -

48.1.1 record in a file assigned for the retention of documents and information on behalf of that person –

- (i) the full name and address of the person;
- (ii) the date of receipt of the practitioner's instructions;
- (iii) a short description of the services which the practitioner has agreed to provide; and
- (iv) an identifier; and

48.1.2 enter the name of the person and the identifier referred to in 48.1.1(iv) in a file register, which must be maintained in the practitioner's office for a period of not less than seven years from the date of the last entry in the register.

48.2 A practitioner will satisfy the requirements of clause 48.1 if the practitioner records the information therein described in a general file maintained for a particular person or in respect of a particular category of work.

NSW Rule 49 (Safe custody register)

49.1 A practitioner who is instructed by a person to hold for that person in safe custody, a will or any deed, document, or other valuable property, must record in a register maintained for that sole purpose in the practitioner's office -

49.1.1 the name and address of the person;

49.1.2 a short description of the item held for the person in safe custody;

49.1.3 the date of the practitioner's receipt of the item; and

49.1.4 the identifier of the safe custody packet, in which the item is held by the practitioner

Register of financial interests

The current rules in NSW and Victoria provide additional detail about the requirement to maintain a register of financial interests as is currently included in NSW Rule 50 (Register of financial documents). This provides certainty for legal practitioners and limits the information required by regulators. The LCA seeks their inclusion. NSW Rule 50 is set out below:

NSW Rule 50 (Register of financial interests)

50.1 A practitioner must disclose in a register maintained at the practitioner's principal place of practice the name and other identifying particulars of any company, partnership, or other entity, in which the practitioner has a financial interest and which engages in any dealing with trust money or controlled money (as defined by section 243 of the Legal Profession Act 2004 (NSW)) received by the practitioner or the practitioner's firm.

To promote consistency, a register of financial interests should be included in Rule 90, excluding companies listed on the Australian Stock Exchange and shelf companies which have not traded and are maintained for sale.

Compliance audits and management system directions

The LCA recognises that compliance audits and management system directions are important issues for the legal profession.

The exercise of the powers set out in section 256 of the LPUL has the ability to materially compromise the day to day running of all law firms, particularly small to medium ones which have limited or no spare resources to respond to the regulator. As such, the LCA submits that there needs to be firm guidance, in the form of a new Uniform Rule or Rules, on what constitutes a “reasonable” trigger for a compliance audit, and a requirement that any such audit relate to that trigger. A new Rule/s could prevent such inspections from becoming “audits at large” (without limiting the ability of Trust Account inspectors to visit and inspect practices) by clearly defining the triggers for, and scope of, audits under section 256.

Similarly, the LCA is concerned about the silence of the Uniform Rules on issues relating to management system directions, given that these compulsory orders have the potential to significantly disrupt the day to day running of law practices and affect their viability. As such, the LCA submits that the Uniform Rules should contain firm guidance, in the form of a new Uniform Rule or Rules, around the giving and operation of management systems directions under section 257 of the LPUL.

The ABA does not support this part of the submission, and will make a separate submission on compliance audits and management system directions as they apply to barristers.