# VLSB+C Submission to the Review of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

## Context for VLSB+C submission

The following submission from the Victorian Legal Services Board and Commissioner (VLSB+C) is made in the context of our experience as regulators of the legal profession in Victoria. We have not provided comments on every rule that is contained in the Law Council of Australia (LCA) public consultation document (referred to in our submission as the discussion paper). Rather, we have limited our comments to rules where:

- we have experience of issues arising with a rule's practical operation;
- a rule may have implications for the operation of the *Legal Profession Uniform Law*;
- we believe changes may support greater access to justice for consumers of legal services.

### Rule 1 (Application and interpretation)

We note the LCA Ethics Committee's preference for a statutory style and the comments pertaining to the broader objective of a uniform framework of legal profession regulation across Australia. We support this objective.

As the LCA's Conduct Rules form the basis of the Legal Profession Uniform Conduct Rules made under the *Legal Profession Uniform Law* (the Uniform Law) for the purpose of our jurisdiction, the existing definitions in the Uniform Law will apply in interpreting the Rules. As such, we anticipate definitions within the Legal Profession Uniform Conduct Rules will be limited by the Legal Services Council (LSC) to only those terms that have not been previously defined in the Uniform Law.

### Rule 2 (Purpose and effect of the rules)

We agree with the comments made by the Ethics Committee about the important role played by professional associations in supporting legal practitioners to act ethically, and the courts and tribunals in enforcing standards. However, we note the discussion paper does not provide any substantive discussion of the important role of legal profession regulators in maintaining and enforcing ethical standards. This exclusion limits the clarity of the discussion paper in accurately describing the regulation of solicitors' professional conduct.

We disagree with the Ethics Committee's categorisation of the Conduct Rules as professional self-regulation only. While the Rules may represent the profession's collective judgment, that judgment is being codified by legislative backing in several jurisdictions, including the Uniform Law partners. Failure to acknowledge this relationship does not provide sufficient clarity for solicitors or consumers of legal services regarding the functionality and enforcement of these rules.

In relation to the first matter we disagree with the Ethics Committee that a reference to legislative provisions governing professional conduct need not be referenced within this rule.



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The common law and legislation are not mutually exclusive and function together to create the wider framework within which a solicitor operates. Legislation may alter the common law in some respects and the common law may interpret a particular piece of legal profession legislation differently to how it was thought to apply or was applied administratively. Furthermore, 'legal profession legislation' is not the end of solicitors' statutory obligations. For example, solicitors' conduct may be subject to the *Civil Procedure Act* 2010 (Vic), legislation proscribing solicitors' duties in particular specialist areas of law (e.g. anti-money laundering) and legislation around the efficient functioning of the courts.

In relation to the fourth matter we support some commentary around the term 'cannot be enforced by a third party' as the rule may give a misleading impression to consumers of legal services. Such commentary would sit well with a more detailed commentary about the role of legal profession regulators as we have already suggested, given that much of what comes before the courts and tribunals commences life as consumer complaints to regulatory bodies.

**Rule 4 (Other fundamental ethical duties)**

We agree with the suggestion to include some commentary around the duty of candour. We also support commentary confirming that 'offensive or provocative language or conduct' falls within the broader concept of courtesy. This has been suggested in relation to rule 5; however, we suggest such commentary better informs the concept of courtesy under this rule.

We wish to draw the Ethics Committee's attention to the recent decision in the case *McDonald v Victorian Legal Services Commissioner*[1] which concerned the application of the previous conduct rules in Victoria, specifically rule 21 which contained the above phrase. In that case, it was determined that if a solicitor is acting within the scope of reasonable professional judgement, in a client's best interests, then they do not need to be 'courteous' in their communication. In this case, a senior solicitor believed the opposing junior solicitor was being untruthful with the solicitor calling that opposing solicitor 'fundamentally dishonest'. It transpired the solicitor was mistaken in his belief, yet no apology or acknowledgement was forthcoming. The VLSB+C are currently appealing this decision.

Our interpretation of both the previous Victorian rule and this rule is firmly that lawyers are professionals and should be held to a higher standard. Lawyers should be courteous in all their dealings within legal practice and that robustly acting in a client's best interests can be achieved without resort to abuse and ill temper.

We wish to draw this decision to the Ethics Committee as it has a direct impact on this rule and the concept of courtesy and supports a discussion on this phrase.

We also note the current commentary to this rule does not seem to be clearly anchored to the rule. It reads '*Solicitors should, as a matter of course, consider and advise clients of the possible availability of legal aid where appropriate.*' We suggest this topic best fits within the commentary proposed under rule 7.

[1] McDonald, Alan James v Legal Services Commissioner [2017] VSC 89



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**Rule 6 (Undertakings)**

We appreciate the discussion paper refers to our suggestion that the phrase 'whether or not' be added into rule 6.1. We suggest the addition will clarify the application of the rule as including all undertakings given by solicitors, whether or not in the course of legal practice. We suggested the addition of these words would ensure that undertakings given to courts and regulators, and in a solicitor's personal capacity, are clearly contemplated by the rule. Based on our experience it should be absolutely clear in the rule to solicitors that all undertakings intended to be given as such, must be complied with.

In addition, we suggest that a member of the public being given an undertaking by a solicitor is unlikely to be able to determine whether the undertaking is being given in the course of legal practice or otherwise. It is unreasonable to expect that members of the public should need to clarify the capacity in which an undertaking is provided. If an officer of the court provides a personal undertaking they should honour it.

We strongly support the suggestion that the rule be re-drafted to emphasise that the solicitor giving the undertaking is responsible for making the appropriate assessments as to whether any third party co-operation would be required, rather than leaving this to be clarified through the commentary.

**Rule 7 (Communication of advice)**

We agree that commentary giving examples of what may be considered to be in the client's best interests, other than issuing proceedings, would be beneficial. This could include legal aid but also other avenues that may enhance access to justice such as ombudsman, alternative dispute resolution (ADR) or regulator services. We suggest the commentary on this subject best fits under this rule as opposed to rule 4.

In response to question 18 of the discussion paper, if solicitors are to act in their client's best interests, this should include providing information and advice on alternatives to litigation. This would comprise information on availability of ADR/external dispute resolution (EDR) and the client's eligibility for it; as well as the suitability of available alternatives in relation to the individual client's best interests.

For example, the creation of the new Australian Financial Complaints Authority will introduce a higher eligibility of threshold to include disputes of up to $1 million and the ability to award compensation of up to $500,000 for economic loss. This is expected to bring a wider range of disputes within its jurisdiction and we expect that solicitors will be aware of its jurisdiction and the relative merits of pursuing a dispute in that forum as opposed to through the courts.

We also wish to raise a related issue that has come to our attention anecdotally. Solicitors acting for clients/complainants in a dispute with a business can, on occasion, take an unnecessarily litigious approach in alternative dispute resolution processes, potentially harming constructive engagement with the business and the underlying purpose of ADR. We are of the view that inclusion of some commentary highlighting to solicitors that acting in the client's best interests may sometimes require adjustment depending on the forum in which the representation is taking place, would be beneficial.



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**Rule 8 (Client instructions)**

We have addressed the issues raised in the discussion paper about disclosing confidential information in the discussion under rule 9 below.

We believe that rule 8 requires better commentary on what is meant by "competent". The case of Goddard Elliott (Bell J) is an excellent example of how a client can lose competence to provide instructions during a matter, and in fact, during a day. This was a bitter family law dispute and during mediation the husband settled the matter for a poor financial outcome due to his diminishing ability to withstand the pressure of the circumstances.

At a minimum, the current commentary to rule 8 which refers to the exemption under rule 9.2.3 should be expanded to refer to the considered findings of the Australian Law Reform Commission (ALRC) in its report Equality, Capacity and Disability in 2014. The commentary could note the factors the Ethics Committee have set out in the discussion paper on page 39 pertaining to the matters to which solicitors should turn their minds when considering disclosure.

**Rule 9 (Confidentiality)**

There appears to be considerable support across the profession for a new exemption to rule 9 concerning the situation where a solicitor forms the view that a client has diminished capacity to give competent instructions (note the substantive discussion of this issue in the discussion paper is under rule 8).

We appreciate that the discussion paper includes lengthy and detailed discussion of this important topic and that the Ethics Committee is seeking open submissions on the proposed amendment.

The ALRC has recommended this change subsequent to a detailed and evidence-based examination in its report Equality, Capacity and Disability in 2014. The Ethics Committee now has the opportunity to recommend this change.

As the regulators in Victoria, we support an amendment to rule 9 or alternatively to rule 8 which aims to provide greater clarity to solicitors and avoids the situation where a vulnerable person with diminished capacity is left without legal representation. Given both the increasing life expectancy and incidence of psychological ill health in our community we support an exemption to rule 9 in the terms suggested by the ALRC (see page 39 of the discussion paper). We also support the exemption reflecting the wording used in the New Zealand legal profession conduct rules as set out on page 37 of the discussion paper. The wording used in each of these examples clearly and succinctly sets the parameters and neither is highly prescriptive. Each emphasises the limited protective nature of the disclosure and in our view does not represent a significant diversion from the principle embodied within the existing exemptions particularly, rule 9.2.3. We believe it is important that this wording be adopted to enable solicitors to manage circumstances where clients are unable to provide instructions which would serve the clients' best interests.

Should the Ethics Committee not support including a specific exemption, at a minimum we would like to see clearer guidance within the commentary to rule 9 (and cross referenced to rule 8) that the exemption under rule 9.2.3 would permit solicitors to disclose confidential information in order to seek guidance on their client's capacity, including from a medical practitioner on their legal and ethical obligations. Although we see this exemption as currently capable of allowing this, clearly there remains uncertainty within the profession.

In relation to the first two matters raised under rule 9 in the discussion paper, we support either adjustment to the Rules, or inclusion of specific commentary.



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Community legal centres (CLCs) are frequently asked to provide de-identified case studies. One reason for this may be to demonstrate efficacy and impact of their legal service provision as part of regular evaluations of their work. These evaluations are frequently for external audiences, namely external funders, and are often incorporated into the terms of funding agreements. As such, CLCs may have little discretion to withhold that information.

In our experience, the community legal sector takes a commendable but conservative approach to the interpretation of the Rules and when applying it to their unique operation the result can deviate from what would be expected in a commercial law practice. In our view, the examples raised in these matters are commensurate in nature with the current exemption expressed in rule 9.2.6 relating to insurers. Insurers perform audit functions for quality control within law practices. Provision of de-identified case studies and similar information to support funding applications would likely fall outside the ambit of the rule as suggested by the Ethics Committee. However, we can see value in specifically extending the current exemption under rule 9.2.6 to protect such disclosures, ensuring they can be made without placing CLCs in breach of this rule. We also add that the release of such information for public advocacy purposes may be equally necessary for CLCs to meet their funding obligations but may not be covered under the current exemptions.

Although outside the scope of the Rules the community legal sector should be supported to question the rationale for why particular information is required in the first place, if they are being asked to provide information which they would not otherwise wish to disclose.

With respect to obtaining a client's consent, this could be required prior to disclosure of de-identified case studies concerning them, but not necessarily prior to the provision of the legal assistance. This allows the CLC to retain discretion in how and when it seeks such consent, depending on the circumstances of the client.

The term *client confidentiality* should not be defined because it is for the client to determine when imparting the information. The rule should not be amended to specifically include electronic communication as we agree 'any information' is broad enough to future proof the rule. Commentary however should set out that a lawyer may not avoid responsibility for the confidentiality of that information simply by outsourcing it, including to a cloud-based or overseas provider and then obtaining consent. The choices made by solicitors about appropriate information storage should be guided by the ambit of this rule.

In relation to matter five, we be supportive of the broader protective exemption to rule 9 in the manner expressed by the ALRC, which allows disclosure in a limited protective sense where the client is at significant risk of financial harm. The discussion on this topic however raises another issue which is disclosure in the situation where the solicitor's client appears to be financially exploiting others, such as members of their own family. We would like to see some further exploration of this issue for future consideration, particularly in the context of elder abuse.

In relation to matter six, we support an expansion of the exemption in rule 9.2.5 to prevent 'imminent serious physical harm' to include serious psychological harm. Indeed, the exemption as it currently stands may already be capable of this interpretation. We refer to the discussion around the concept of harm as it is defined in the Australian Criminal Code and how modern approaches are less likely to make a distinction between physical versus mental harm or injury. We suggest that it would also be difficult and artificial for a solicitor to determine whether the threat made was going to cause only one or the other. Indeed one can envisage a situation where the physical harm caused was not 'serious' but the ensuing mental harm was significant. Again there is likely to be some overlap with the exemption to disclosure to prevent the commission of a series criminal offence.

The Ethics Committee has requested submitters consider factors that may be relevant for a solicitor to form a reasonable belief that the likely harm would justify limited protective disclosure. The solicitor may consider seeking the advice of other solicitors within the law practice as already permitted and may also avail of the exemption to seek ethical advice under rule 9.2.3. In addition to the factors set out in the discussion paper, the solicitor should make a comparison of the worst case scenario for each of the possible harms, that is the harm caused by not disclosing and the harm that will ensue by disclosing.

In relation to matter seven, we support the introduction of an exemption for solicitors to disclose confidential information about a will's preparation, should that come into question, before the grant of probate. It is an issue that attracts many complaints from beneficiaries and we agree that solicitors in this position have insufficient guidance. We support both points made, that the solicitor would be giving practical and efficient effect to the testator's will (implied consent to disclose) and that the proposed exemption only pre-empts the likely course that the documents would be compelled to be disclosed anyway when the proceedings are issued. It seems to us a sensible and practical approach to take in this discrete situation. We also refer to our comments in relation to retention of documents in a will file under rule 14 (see below).

**Rule 10 (Conflicts concerning former clients)**

Consent to act and effective information barriers

In our 2015 submission we recommended a substitution of the word 'or' with 'and' in this rule. This was intended to ensure that informed written consent is obtained and effective information barriers are established before a solicitor or law practice acts for a current client in circumstances where:

- they are in possession of a former client's confidential information which is material to the current client's matter; and
- would be detrimental to the former client if disclosed.

It is our contention that both limbs of rule 10.2 must be satisfied before the solicitor can act for the current client.

This suggestion is discussed by the Ethics Committee and rejected on the basis that there is no ongoing fiduciary duty of 'undivided loyalty' owed to former clients, and therefore as a matter of law there is no requirement to obtain informed consent to act for the new client. Furthermore, the Committee has determined to clarify the operation of rule 10 by removing the former client's right to object to the solicitor or law practice acting. This represents a significant change to the rule as former clients will only be able to object to disclosure of confidential information and must trust that the law practice has sufficient and effective information barriers in place.

We note that the discussion in relation to rule 10 is in contrast to the conservative approach taken towards the suggested expansions to the exemptions to rule 9 and the conflicts between current clients' confidential information under rule 11.

In addition, the discussion paper goes into some detail about the nature of the duty to preserve the former client's confidential information, including that the continuing duty to preserve the confidentiality of information survives the end of the retainer.

We have two specific and recent examples of complaints we are investigating where this has been a pertinent issue. These two matters also demonstrate these issues may arise for large and small law practices alike.



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The first matter involves a small law practice where for many years one solicitor acted for the husband in defence of a number of criminal matters. The law practice then commenced acting some years later for the wife against the husband in family law proceedings. The husband did not consent to law practice acting for his wife given the confidential information the law practice possessed about his financial circumstances and the nature of his domestic relationship (issues pertinent to the family law matter), however the law practice continued to act for the wife. The law practice maintained that they had sufficient information barriers in place and a different individual solicitor was acting. As a regulator we have no injunctive power to prevent this situation and can only investigate and take disciplinary proceedings which inevitably takes time and in this situation involved consideration of the adequacy of information barriers. The husband did bring the matter to the attention of the trial judge in the family proceedings, where the law practice was ordered to cease to act, however any damage was already done. While large law firms may be able to put sufficient information barriers in place, our experience is that this is problematic for small practices and we question how much real effort will be invested in locating and obtaining consent when an information barrier is an alternate.

The second matter involves a large law practice that was acting pro-bono for a client in a building dispute. The client was advised by the practice that it could no longer act for the pro-bono client. About six weeks later the law practice merged with another law practice that was already acting for two of the defendant insurers in the matter against the former pro-bono client. The former client brought the matter to the attention of the presiding Victorian Civil and Administrative Tribunal (VCAT) member and despite the law practice ceasing to act the previous night, the member expressed her concern about the situation.

Of concern to us in both these matters is the lack of insight demonstrated by the law practices about how these potential conflicts may diminish public confidence in the administration of justice. It supports our view that while law practices may argue that the rule is too restrictive for modern practice and the increasingly mobile legal profession, there still remains a need to remind law practices that they must act in the best interests of their clients when considering conflicts of interest.

It remains our view that informed consent and effective information barriers must both be satisfied in order to ensure that the continuing duty to preserve confidentiality of information is maintained. The requirement to gain informed consent directly relates to the solicitor/law practice acting for the current client in the current matter despite the fact that solicitor/law practice holds confidential information which would be detrimental to the former client if disclosed. The second limb of the rule ensures that there are effective information barriers in place to prevent that disclosure occurring.

The discussion paper specifically notes that the position in Victoria is different given the obiter in *Spincode* and noting the body of case law supporting the existence of an ongoing equitable duty of loyalty to former clients. These cases support a general proposition that a solicitor or law firm must not act for a client where the interests of a former client are adverse to those of the new client. Therefore, we do not believe it is sufficient to reject the position that both limbs must be satisfied on the basis that the law is settled in this area. In terms of specific advice for solicitors operating in Victoria the current commentary should remain. Amendment of the rule as is suggested would deviate even further from the position in Victoria.

Finally, we submit that it is important to ensure that solicitors and law practices are held to the highest possible standard given the significant potential for consumer detriment should confidential information be misused. While we acknowledge there may be circumstances where it is difficult to obtain informed client consent, these difficulties must be weighed against the knowledge that the former client has disclosed information in confidence to their former lawyer and they should be afforded an opportunity to determine whether that lawyer can now act for a new client on a matter in the circumstances envisaged under rule 10.2. This is significant because in applying rule 10.2, there has already been an assessment made that it would be detrimental to the former client's interests if the confidential information were to be disclosed and that the information is material to the new client's matter.

Therefore, we do not support the proposed changes to rule 10.2 which will have the effect of changing the nature of the consent given by former clients from consent to act for the new client to consent to the disclosure and use of confidential information. We do not agree with the assertion that the issue central to the rule is that the informed consent is to the disclosure and use of the confidential information, noting that the disclosure of confidential information is specifically dealt with under rule 9. Rather, our view is that the issue central to the rule is that the former client must first agree to the lawyer acting and if they do agree, then the lawyer must have effective information barriers in place to protect the confidentiality of the information they hold. It may arguably form part of the agreement to act that none of the former client's confidential information is to be disclosed or alternatively as part of the agreement, the former client may agree to some of that information being used in the current matter. If the revised rule were to be adopted it would remove the client's capacity to refuse to agree to the legal practitioner acting for the new client. This would be a significant watering down of this rule.

Another matter we have found in this rule that has caused some concern to us as a regulator are the words 'might reasonably be concluded'. It is unclear who is doing the concluding about the detriment – the solicitor, the former client or a reasonable person. In applying the test as to whether a *reasonable person* would believe the disclosure of the confidential information would be detrimental to the former client, there is a greater impetus, where a complaint is made, for the former client to articulate precisely what the confidential information is such that the test may be applied. This can be difficult as noted in the discussion paper. The previous rule in Victoria provided that the former client was the person who might reasonably conclude. We suggest inclusion of the words 'by the former client' after the word 'concluded'.

In conclusion, we disagree with the proposed changes to rule 10.2 which would change the nature of the informed consent, and we reiterate our 2015 recommendation that a solicitor/law practice should be required to gain the former client's informed consent in writing and have effective information barriers in place.

### Issue of CLCs providing unbundled services v conflicts

We note the views raised in consultations and submissions that the rules reflect case law derived from litigation experience, rather than experience in providing discrete legal services provided on a short term and limited basis. We have some sympathy for this view. We also note concerns of the Productivity Commission that 'overly strict application of the rules can affect access to important legal advice where there is only a perceived conflict'[2].

Within that context we note that rule 10 already sets a high threshold as there must exist firstly confidential information relating to the former client that is *material* to the matter of another client and secondly the disclosure of that information would be *detrimental* to the interests of that former client.

Given this context, we agree that a key test is whether the information provided by a former client has the necessary degree of confidentiality and materiality to attract the operation of rule 10. The courts are acknowledging modern practice by being more pragmatic about the doctrine of imputed knowledge, instead focusing on 'actual' knowledge.

Although we continue to be concerned about protecting former clients where there are material and detrimental conflicts of interest, we also acknowledge that the risk of this occurring in the provision of unbundled legal services is likely to be low. However, the potential for consumers of legal services to be 'conflicted' out remains, and there is a need to encourage CLCs to maximise access to justice outcomes. To that end, the Law Society of Upper Canada has introduced a separate rule applicable to organisations such as CLCs providing discrete limited legal services on a pro bono basis which acknowledges that a solicitor providing these services may continue to act unless they have actual knowledge. The focus of enquiry is less on the law practice as a whole and more upon the individual and the retainer itself.

[2] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72, 5 September 2014, Vol 2, Ch 19.

CLCs are not commonly the subject of complaints and certainly not in this particular area and from a regulatory perspective CLCs do not present as high risk.

We also wish to draw the Ethics Committee's attention to recommendation 7.4 of the Victorian Access to Justice Review which focused on clarity about unbundled pro bono legal services. The Victorian Government expressed support for this recommendation which stated the following:

> *"The Standing Committee of the Legal Profession Uniform Law (comprising the Attorneys-General of Victoria and New South Wales) should seek an amendment to the Professional Conduct Rules to support the provision of unbundled pro bono legal services. Issues to have regard to include:*
> - *practitioner liability;*
> - *inclusion and removal of practitioners from the court record; and*
> - *adequate disclosure and communication with clients and with opposing parties."*

Therefore, we anticipate that the LSC will consider these issues further when appraised of the final version of the Conduct Rules.

**Rule 11 (Conflict of duties concerning current clients)**

In relation to the second matter, given the Ethics Committee's view that amendment is unnecessary, we wish to suggest additions be made to the commentary highlighting that the onus is on the solicitor to demonstrate informed consent and noting that committing that advice to writing is the surest way to achieve this.

We note that throughout the discussion paper and in relation to several rules there has been a lessening of emphasis on obtaining written consent. We acknowledge the courts have indicated there are other ways of ensuring informed consent. However, we must emphasis that as a regulator it is in both the client's and the solicitor's interests that consent be evidenced in writing. It is only in the absence of written consent that the issue of consent must be determined by a court.

As with our earlier commentary in relation to rule 10, our view is that rules which relate to duties regarding conflicts should be drafted to the highest possible standard and provide practitioners with firm guidance on how to obtain informed consent.

**Rule 12 (Conflict concerning a solicitor's own interests)**

In relation to the first matter, we would like to see a greater emphasis being placed on the *vulnerability* of the client when a solicitor examines the extent of any conflicts between their duty to serve the best interests of the client and their own interests. Noting the established position that a solicitor can gain a personal profit or advantage provided the client has provided informed consent, there may be a need for a greater level of protection for vulnerable clients particularly in high risk areas such as the administration of estates, debt-collection and financial planning/mortgage and finance broking.

Examining the vulnerability of a client may extend beyond the issue of informed consent to consider factors such as, the quality of the business, degree of regulation and access to redress in determining whether they are acting in the client's best interests.



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We also suggest that some additional information should be added to the commentary to this rule regarding personal conflicts where a solicitor briefs another family member, such as a spouse, as the barrister in a client's matter. In our view, the rule already contemplates this situation as one raising a conflict requiring the informed consent of the client, however, we are aware anecdotally of situations where informed consent may not have been provided in practice.

In relation the second matter, we believe the proposed amendment to rule 12.2 is suitable.

In relation the third matter, we have previously suggested that rule 12.4.1(i) be amended to provide more detail about the type/value of the entitlement of the solicitor, and we maintain this view. We are concerned that this is an area where there is high risk of consumer detriment. We also believe that more detailed disclosure assists both the solicitor and the client as it may avoid the potential for misunderstanding and resulting complaints being made about the solicitor.

Our concern is demonstrated by the seven successful prosecutions of individual solicitors we have brought before VCAT from 2010 involving unauthorised charging of executor's commission. Some of these cases involved multiple estates and involved various issues including:

- charging where there was no entitlement to do so;
- grossly exceeding an acceptable entitlement, in that, the will allowed commission but very little work was actually done;
- misleading beneficiaries such that they were precluded from giving informed consent to the commission;
- withdrawing funds from trust for legal costs and commission prior to resolving other debts of the estate; and
- failing to properly advise testators when drafting wills including commission charging clauses.

Those ultimately affected were often vulnerable beneficiaries and relatives of the deceased who have little knowledge of, or experience with, the management of an estate and who are distracted by grief and often family conflict. We see it as an area particularly susceptible to rogue operators given the opportunity for personal gain. In addition to the matters prosecuted at VCAT we have made six findings of unsatisfactory professional conduct where the practitioner accepted a caution or reprimand or where we determined to take no further action.[3]

The discussion paper notes that the issue of the appropriateness and amount of executor's commission is one to be determined by the courts. However, the costs involved for those affected may be prohibitive, particularly if the estate is small. If it is the will of the testator that the solicitor as executor should be paid commission (often in addition to legal costs) then we do not accept that the solicitor should not be required to disclose the details of that commission.

It is not in our view an insurmountable burden when solicitors are already required to precisely document and disclose their legal costs. Requiring detail may more fully alert the solicitor to their duty to act in the best interests of their client and to give more consideration to whether they have sufficiently alerted the testator to the fact another person such as a close relative may not charge such commissions at all as required under limb (iii) of the rule. We also note recent changes to the *Administration and Probate Act* in Victoria now require fully informed consent of the beneficiaries to the taking of executors' commissions even in the situation where there already exists a valid charging clause in the will.

[3] In these matters the particular practitioners were determined to have engaged in unsatisfactory conduct but had not been the subject of an adverse finding in the preceding 5 years and were deemed otherwise competent and diligent in accordance with section 4.4.13(3) of the now repealed *Legal Profession Act* 2004 (Vic).

In addition, we have found this rule to be unclear in practice as to the obligations of a solicitor where the solicitor is operating two or more affiliated businesses, which are legal and non-legal but where there are no referral fees or commissions per se because the solicitor is earning income from both businesses. The scenario does not appear to be addressed in either this rule or rule 39 (Sharing Premises). Other areas of conflict have also not been addressed, such as conflicts arising through personal relationships. These relationships such as familial, marital or other connections that extend beyond normal professional boundaries, may impact objectivity, or at least the perception of objectivity.

Finally, we note that the use of the phrase "fair remuneration" is in contrast to section 172 of the Uniform Law where the expression used is "fair and reasonable". This may be something for the LSC to consider when adopting the rules for the Uniform Law jurisdictions.

The commentary to this rule should also cross-reference rule 8 of the *Legal Practice Rules*, where law practices' obligations with respect to conducting other businesses, the conflicts associated with that and the disclosures that should be made, are set out.

**Rule 13 (Completion or termination of engagement)**

In relation to the third matter, we have received complaints about solicitors who have ceased to act on the basis of loss of trust and confidence because the client has raised a genuine resolvable issue with the solicitors' handling of a matter or where the solicitor is attempting to cover up a mistake. Therefore, we have some concerns about the circumstances that may lead to a loss of trust and confidence. In our experience, clients who are dealing with stressful and deeply personal matters (e.g. family law) or have engaged a solicitor on the basis of 'no win no fee' (e.g. personal injury) are more likely to suffer from the potential exploitation of this rule by their solicitor. We suggest the commentary include discussion articulating circumstances where it may or may not be appropriate to cease to act. While we acknowledge the complexities of acting for clients who are experiencing challenging personal situations, the fact a client may be emotional or questioning is not in our view sufficient to amount to a loss of trust and confidence.

We also note that the discussion paper refers to the 'Doctrine of Entire Contract' but suggest the commentary embrace a modern view of the solicitor-client relationship (see *Dal Pont, Law of Costs* at para 4.44).

We also refer to our comments under rule 8 about client capacity to give instructions.

Finally, in the context of the provision of unbundled legal services (see our substantive comments under rule 10), we note that rule 13 may act as a barrier to the provision of unbundled legal services as the rule does not explicitly contemplate the concept of a limited retainer. We welcome further discussion about how we can assist in mitigating such barriers to increase consumer choice in the provision of legal services, including 'task-based' legal services.



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**Rule 14 (Client documents)**

The commentary to this rule should articulate the principle that a solicitor is required to retain client documents in a secure and confidential manner and that essential documents should be retained in this manner indefinitely. The high amount of complaints about, and laxity towards, secure retention of documents has led us to the view that the common law principle is not necessarily well understood. The commentary or the rule itself should note that this obligation does not end merely because the solicitor no longer holds a valid practising certificate.

It is unclear from the rule as to whether the solicitor is obligated to keep copies of the client's documents after a request to return them is made with their own file. Although the text contained within the brackets about electronic documents seems to indicate this is not required, this is not sufficiently certain. We think such an obligation would be onerous for practitioners and so should be clarified either within the rule or as part of the commentary such that one is not implied. It is also unclear from the rule that the solicitor remains obligated to keep their own file records for seven years. We have had a number of situations where a solicitor has simply given over the whole file (not just the client's documents) to the client and in these situations we are unable to satisfactorily resolve or investigate the complaint because we cannot rely on the integrity of the records. The commentary to this rule should discuss the prudency of securely retaining files and refer to guidance produced by professional associations.

The current commentary appears to focus on what is an effective lien which we believe may be more relevant to rule 15. Our view is that the commentary to rule 14 should focus on the retention of client documents, including that the solicitor must have regard to the common law principles concerning retention of deeds and other important documents such as testamentary documents and that these documents must be kept in accordance with instructions.

In light of recent high profile cases in Victoria concerning solicitors' old files being left in unsecured bins in laneways, we suggest that rule 14.2 should say 'must' rather than 'may' destroy the documents. Currently the solicitor has discretion to *not* destroy such documents, which in our view, has allowed the above situation.

At a minimum, the commentary should be address this issue and be linked to a solicitor's obligations under rule 9. Solicitors should also ensure they are aware of information privacy, data protection and retention obligations as applicable. In general, it is our view that heightened sensitivity towards data and privacy protection means there is an increased onus on solicitors to ensure the security of their clients' data.

Finally, we suggest that the commentary should reference the *Legal Practice Rules* regarding the obligations to clients when transferring a legal practice. As we note in our submission to rule 39, consideration should be given to cross-referencing these rules within the Conduct Rules.

**Rule 15 (Lien over essential documents)**

In relation to the first matter, we believe the word 'essential' should be retained. We believe there may be practical implications of omitting it as it would place huge pressures on solicitors to copy their entire file often as a matter of urgency.

In relation to the fourth matter, while we do not have any direct experience of subversion of a valid lien, we would not be opposed to further exploration of this issue.



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**Rule 16 (Charging for document storage)**

We agree with the proposed amendments to this rule.

Complaints about costs, particularly invoice items that are 'surprises', are the most common of all complaints. Solicitors should be encouraged to be upfront about their costs. Therefore, the commentary to this rule should include a discussion of the benefits to the client (and the solicitor) in providing written disclosure of these fees and their amounts and that the solicitor bears the onus of proving disclosure.

**Rule 19 (Frankness in court)**

We agree with the proposal to change the title of this rule to 'Duty to the court'. Further, we agree with the proposed removal of rule 19.3. It should be incumbent upon solicitors to ensure that errors made in court are corrected regardless of who has made them. Failing to correct an error undermines the solicitor's duty to the court which is outlined in rule 3.1.

**Rule 21 (Responsible use of court process and privilege)**

With regards to the fifth matter raised, we agree with the Ethics Committee's suggestion that domestic and family violence should be addressed in the commentary to rule 21.2.

Given that the *Evidence Act* 1995 and its state-based equivalents are reactionary (i.e. they only come into play after an inappropriate question has been asked) it would be preferable if solicitors were aware of the need to exercise a degree of sensitivity when questioning victims of domestic and family violence. We recognise that family violence is often based on unequal power dynamics between family members and that as noted by the Special Taskforce on Domestic and Family Violence in Queensland, lawyers should be aware of the complexity surrounding family violence cases.

In addition to the comments of the Queensland Special Taskforce, we note the Victorian Royal Commission into Family Violence stated (*Report Vol III at page 175*):

> *"For their part, legal practitioners should also be capable of discerning whether a proceedings or application in connection with which they are providing advice or advocacy is improperly based. They are officers of the court and required both by procedural and professional conduct rules to act accordingly."*

We agree with the Ethics Committee's proposal that an equivalent to barrister's rule 63 should be included in rule 21.

**Rule 22 (Communication with opponents)**

With regard to the second matter raised, we support the inclusion of commentary which deals specifically with personal costs orders.

We agree with the ninth matter raised, that rule 22.8 should be re-drafted for clarity. The Ethics Committee has already set the rule out clearly in its commentary on this matter on page 111 of the discussion paper. A re-draft along these lines would clarify the rule.



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**Rule 27 (Solicitor as material witness in client's case)**

We agree with the recommendation put forward in the first matter for discussion, that the words 'may not' in rule 27.1 should be amended to 'must not'.

We respectfully disagree with the Ethics Committee's position and suggest that rule 27.1 should completely prohibit a solicitor from appearing as a witness in their client's case, whatever the circumstances.

We consider that appearing both as a witness and an advocate in their client's case creates a conflict of interest which breaches the solicitor's duty to the court. We consider this conflict of interest to be of greater threat than the possibility of unnecessary complication as suggested by the Ethics Committee in the discussion paper (see page 120). Unlike barristers, solicitors are under no obligation to work for any client, and we consider this a circumstance in which it is appropriate that the solicitor should withdraw from their role as advocate for the client.

We suggest reformulation of rule 27 as suggested on page 121 of the discussion paper with the phrase: 'unless the due administration of justice would warrant otherwise in the solicitor's considered opinion' omitted.

Should the Ethics Committee wish to retain the exemption, then at a minimum the expression 'in the solicitor's considered opinion' should be removed, as in our view this is open to subjective interpretation.

**Rule 28 (Public comment during current proceedings)**

We agree with the Ethics Committee's assessment that rule 28 does not completely prohibit the publication of comments, provided the comments do not prejudice a fair trial or the administration of justice. Similarly, where a case settles on confidential terms, it is our view that the rule is unlikely to be breached, noting that there may be contractual provisions preventing the disclosure of systemic issues associated with the matter.

Therefore, we agree with the Ethics Committee's suggestion that the rule should be retained in its current formulation, and that appropriate commentary should be developed. The case of *LSC v Orchard,* referred to on page 122 of the discussion paper, identifies that public comment is not just via the media.

> "[I]*ts apparent intent is to ensure a fair trial of proceedings, and to maintain the proper administration of justice and the word 'publication' is not used in a way, or in any context, suggesting the rule is only intended to prevent general or widespread publication, e.g. via the media."*

It would be useful to consider including some information along these lines in the commentary as solicitors may believe this rule relates only to public comment in the media.

It should be noted that there is currently legislation before the Federal Parliament that proposes to amend the *Corporations Act* to extend whistleblower protections in certain circumstances to include disclosures to journalists. However, this will be limited to disclosures made about organisations that are currently regulated by APRA and ASIC. Disclosure to a journalist will be protected if a whistleblower has previously disclosed the information to ASIC, APRA, the AFP or a person in their organisation authorised to receive disclosures; a reasonable period has passed since the disclosure was made; and the whistleblower has reasonable grounds to believe there is an imminent risk of serious harm or danger to public health or safety or to the financial system if the information is not acted on immediately. In these circumstances, the whistleblower may make a protected disclosure to a journalist. While this legislation would co-exist with the Conduct Rules, the Ethics Committee may wish to consider making a note of it in the commentary to this rule.

**Rule 29 (Prosecutor's duties)**

We support the inclusion of the proposed new rules 29.13-29.17 which will specifically deal with investigative tribunals.

**Rule 30 (Another solicitor's or other person's error)**

We agree with the Ethics Committee that the word 'unfair' should not be removed from the rule as it is impossible to bar solicitors from ever taking advantage of their opponent's mistake. As illustrated in the example put forward – *Thames Trains Ltd v Adams* – a solicitor may be unaware of such a mistake and, therefore, their advantage may be inadvertent. The difference in intent between the two examples put forward in the discussion paper should be included in the commentary to this rule.

**Rule 31 (Inadvertent disclosure)**

In relation to the third matter raised, we wish to highlight to the Ethics Committee the unintended consequences that may flow from placing an obligation on solicitors to inform their clients when they have been inadvertently disclosed to. We sympathise with the view that a solicitor should be open and honest with their clients and that this enhances the solicitor-client relationship of trust and confidence. However, no information read by a solicitor inadvertently can be used in their client's case, so there is no tangible purpose served by telling the client, particularly as they may not fully understand why it cannot be used.

Further, informing the client may incur an additional and unnecessary cost to the client. Time spent reviewing the correspondence, calling the client, informing the sender etc. are all billable to the client and would only serve to highlight to them that the solicitor holds information they cannot use to their advantage.

We can also envisage circumstances where an obligation to disclose may place a solicitor in a difficult situation if the client seeks to place undue and improper pressure on the solicitor to disclose the nature of the information itself. A particularly forceful individual or corporate client is not bound by the ethical obligations of the solicitor and is guided only by a desire to be successful in their action. At the very least clients may be frustrated by the solicitors' inability to reveal the nature of the information received or use it to the client's advantage.

Therefore, requiring the solicitor to tell their client about the inadvertent disclosure may in reality produce the opposite effect and potentially undermine the relationship of trust and confidence. It may also place a solicitor under further ethical pressure.

Given these tensions, in our view leaving this decision to the discretion of the solicitor to determine, as the individual circumstances dictate, may be the preferable option.



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**Rule 33 (Communication with another solicitor's client)**

The discussion paper notes a suggestion that rule 33 be amended to include an exemption where solicitors are acting for individuals or small businesses in disputes with businesses that are legally obligated to give customers access to internal or external dispute resolution processes. Effectively, the exemption would enable a solicitor acting for the customer to be able to communicate directly with the business, even if a solicitor acts for a business with internal dispute resolution (IDR) processes. The Ethics Committee disagreed with this proposal on the grounds that even sophisticated clients are entitled to legal protection. However, it is our view that this exception should be granted in the limited circumstances as suggested in the discussion paper.

Many businesses, especially larger ones, now subscribe to industry-specific self-regulatory codes of conduct, or are otherwise required under law to provide IDR. Access to IDR, which is intended to provide informal, low-cost and efficient dispute resolution and which is binding on the business but not on the consumer, will generally be mandated by legislation.

It is our understanding that it is often the case, especially in larger businesses, that the IDR team is a separate entity to the legal team. While the legal team will generally be staffed by legal practitioners, the IDR team is generally not staffed by legally-qualified representatives. The complaints process will generally see a complaint made at IDR, then escalated to EDR and if the consumer does not agree with the outcome at EDR or is not eligible for EDR, litigation may become an option. It is only at this final stage that the business would expect to be legally represented.

As such, we agree with the suggestion that rule 33 should allow for lawyers representing consumers to communicate freely with non-lawyers within businesses in such situations. We are concerned that requiring communication to be limited between lawyers only may completely undermine the purpose, operation and value of IDR/EDR. It is not a matter we would prioritise for disciplinary investigation.

While most IDR/EDR complainants are not legally represented, they should retain the ability to be represented, and this should not place them at a disadvantage by escalating their matter to a legal 'arms race' between the parties, but should be accommodated within the informal IDR context.

**Rule 34 (Dealing with other persons)**

In relation to the first matter, we support changes being made to this rule to place it at an equivalent standard to the Australian Consumer Law relating to misleading and deceptive conduct. We do not agree with the Ethics Committee's assertion that the unique nature of the solicitor/client relationship justifies a lesser standard of behaviour and weaker protection of consumers. We support the proposal that rule 34.1.1 be amended to include the words 'reasonably likely to mislead or intimidate the other person'. The rule as currently drafted places the onus on the consumer to prove they were actually misled or intimidated.

In relation to the second matter, we agree with the proposed re-phrasing of rule 34.1.2 to read that a solicitor must not in any action or communication associated with representing a client "threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor's client is not satisfied". We also agree that commentary could be developed arising from *LSC v Sing* as suggested by the Ethics Committee.



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**Rule 37 (Supervision of legal services)**

We note that no substantial issues have been raised in relation to rule 37. However, we would like to raise an issue about the current scope of the rule which is limited to supervision of others in relation to *a matter*.

We submit that there remains merit in broadening the scope of this rule to encompass the need for solicitors who have supervisory duties (not just principals) to exercise reasonable supervision over any other solicitors and all other employees to ensure that those who work for them are able to properly perform the duties required of them generally and not just in the context of individual client matters. Supervisors have an essential role in the ethical development of new and inexperienced solicitors that is not limited to the conduct of a particular legal file. It is essential this wider duty is addressed by this rule. We do not agree that sections 34 and 35 of the Uniform Law completely address these issues for non-principals and the provisions in non-Uniform Law jurisdictions would vary in any event.

We are currently investigating several complaints where we assert that the solicitor is responsible for a 'subject matter area', not just a single file or matter. While there may not be specific evidence on the file of their involvement in that particular matter, there is evidence showing that the solicitor was responsible for overseeing matters in that practice area, including the supervision of lawyers and other employees working in that area. This person is often not the responsible principal pursuant to section 34 of the Uniform law, and this is often by design.

An example is motor vehicle recovery matters which often form a division within a legal practice. This is an area which receives a high volume of complaints and is an area of law where there are many professional misconduct findings. The principal may have no direct knowledge or control over the practice area. Although we are able to examine their conduct under sections 34 and 35 of the Uniform Law, the principal may argue that they are entitled to rely on their experienced solicitors. We need, however, to be able to prove that the solicitors have control over the area.

We suggest that this rule be broadened as suggested above so that it does not limit supervisory duties to a particular file. We also suggest that the term 'designated responsibility' be defined. This could be included in the commentary to this rule or in the glossary/definitions section.

**Rule 39 (Sharing premises)**

This rule (as drafted) focuses on the sharing of premises by different kinds of businesses (that may appear associated), as opposed to a focus on the underlying principle that clients must be fully informed of which services are, and are not, being provided to them as a legal service. The assertion that legal and other business practices may be perceived as being connected only by bricks and mortar is limited in achieving the defined principles. Perceived business associations may be gleaned by clients via a number of different means beyond sharing premises.

We suggest changing the title of this rule and having the content focus more heavily on disclosure of information to the client that creates a full and clear understanding of the services provided by each business they are being serviced by, and the various rights, remedies and protections that may apply to clients, as opposed to the risks posed by simply sharing physical premises.



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We also suggest that the rule may be trying to capture too wide a range of situations and that this may reduce its usefulness. We would like to see the rule more closely linked to a solicitor's obligation to act in the best interests of their client, when they suggest to their client that additional services may be beneficial and in the recommendation that they make. Solicitors should be providing sufficient disclosure of relationships between businesses to allow the particular client to make an informed choice. In recommending a business the solicitor should make an assessment of that business, the degree of regulation to which it is subject, and the ability of the client to seek redress if necessary. The commentary to this rule should also refer to solicitors needing to assess the particular vulnerabilities of their clients when suggesting a referral with particular care in the area of financial planning, debt collection and the administration of estates.

Further to our comments on rule 12 and above, we believe there is a lack of clarity regarding the obligations of a solicitor where the solicitor is operating two or more affiliated businesses, which are legal and non-legal but where there are no referral fees or commissions per se because the solicitor is earning income from both businesses. We are of the view that rule 8 of the Legal Practice Rules more directly addresses these issues but this rule is not cross-referenced within the Conduct Rules. Consideration should be given to the inclusion of rule 8 of the Legal Practice Rules within the Conduct Rules and then locating both rules following rule 12 which then places all rules addressing conflicts of interest together.

**Rule 41 (Mortgage financing and managed investments)**

In the Uniform Law jurisdictions a prohibition on law practices promoting or operating a managed investment scheme is due to come into operation from 1 July 2018, in accordance with section 258 of the Uniform Law. In light of this we anticipate that the continuing need for this rule would be closely examined by the Legal Services Council in adopting these rules as Uniform Rules.

**Rule 42 (Anti-discrimination and harassment)**

We agree with the proposed change to this rule.

**Rule 43 (Dealing with the regulatory authority)**

We support retaining rule 43 as we believe it articulates an important and basic principle of ethical conduct. The understanding by solicitors that it is part of their ethical obligations to be open and frank with regulatory authorities and respond to their requirements is fundamental. We suggest that the addition of the word 'courteous' to sub rule 43.1 would add weight to this principle. In our experience, courtesy and respect in dealings with the regulator correlates with more efficient and effective resolution of complaints and disciplinary investigations.

In relation to sub-rule 43.2 we submit that the inclusion of a time limitation of 14 days and the bracketed text is unnecessary and potentially confusing for solicitors. Every jurisdiction will have different timeframes which could be more or less than 14 days. For example, in the Uniform jurisdictions, section 371 vests the power to determine a reasonable time for a response (depending on the particular circumstances) upon the regulator. It is important that the rule focuses on the principle that solicitors are obligated to respond in a timely manner, and that the timeframe and relevant circumstances are matters for the relevant regulatory authority to determine.

We are also supportive of the inclusion of the words 'or documents' in rule 43.2.



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**Part C Proposals for new rules**

### Disclosure of insurer

We appreciate the discussion relating to the need to balance client confidentiality and the desire to disclose other potential (and maybe more beneficial) resolution methods when a solicitor is acting under the right of subrogation for an insurer.

While it can be argued that this issue may be managed either by requirements of the General Insurance Code of Practice, the Conduct Rules, or a combination of both, we believe there would be benefit in a rule being included that directs solicitors to disclose that they are acting under the right of subrogation enabling debtors to better know their rights and position. This direction could be limited to simply disclosing that the solicitor is acting under the right of subrogation and the client they are acting for. We do not believe the simple acknowledgement by a solicitor that they are acting under subrogation and the client they are acting for would breach the clients' confidentiality. It is the substance of the retainer that creates the potential confidential information, not the fact a retainer exists. We are not satisfied there is any demonstrable detriment to the insurer here particularly where codes of conduct promote disclosure and when weighed against the detriment to the debtor.

### Claiming costs in letter of demand

We acknowledge the relationship between rules 4.1.1, 5.1.2 and 34.1.1 and the directions they provide for solicitors not to engage in misleading behaviour such as creating the appearance that legal or recovery costs are legally payable in a letter of demand (unless the costs are based on a reasonable contract or trading term). We are concerned that there may be need for further direction for solicitors in these rules if community legal centres are still seeing the frequent issue of clients perceiving these costs to be legally payable, even with the amendment of terms from "demand" to "request". It is reasonable to assume that a person without legal training would or may interpret the inclusion of a non-enforceable cost on a letter of demand as requiring payment regardless of the terminology associated with it. Because of this, we request a specific conduct rule be devised to manage this ongoing problematic behaviour.

### Personal relationships with clients

We agree with the recommendation included in the discussion paper that the ethical duty not to form a relationship with a client, including a sexual relationship, is already embodied in other rules underpinned by principles relating to maintaining independence and not bringing the profession into disrepute. Prescription beyond this may cause issues in Victoria in relation to interactions with legislation such as the *Equal Opportunity Act* 2010 (Vic).

### Duty to report – mental wellbeing

We strongly disagree with the inclusion of a rule that would dictate an ethical duty for a lawyer to report a fellow practitioner on the grounds of mental health for the following reasons:

1. Lawyers are not qualified to assess or diagnose any health impairment, including mental health
2. A rule dictating an ethical duty for lawyers to report other practitioners who they suspect have a mental health condition incorrectly assumes that individuals with mental health conditions are automatically unfit, or have impaired capacity to practice. Mental health conditions should only be considered in relation to conduct where problematic behaviour is demonstrated by a practitioner, not considered as likely to lead to such behaviour
3. A rule such as this would create an opportunity for nefarious or vexatious reports to be made which could create significant and undue detriment for the lawyer being reported, and may bring the profession into disrepute (potentially creating an unnecessary regulatory burden for VLSB+C as the DLRA in Victoria)
4. A rule such as this has a strong likelihood of breaching legislation such as the *Equal Opportunity Act* 2010 (Vic) or the *Disability Discrimination Act* 1992, as well as stigmatising people with mental health conditions.



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We acknowledge the need to be proactive in relation to assisting the management of mental health within the profession. It would be much more productive and reasonable for the profession to continue to be highly proactive and engage in education and support activities, as opposed to creating a conduct law targeting lawyers with mental health conditions.

Fiona McLeay
**Victorian Legal Services Board CEO & Commissioner**

30 May 2018