

Conflict of Interest Policy – Grants of Aid for Criminal Law Co-Accused

Purpose

To ensure that lawyers acting for legally aided co-accused in criminal law matters comply with their ethical obligation to act in the best interests of their clients by establishing:

- a *one client per law practice* policy under which law practices, including Legal Aid Queensland, are able to act for only one of two or more legally aided co-accused, except as provided by this policy; and
- a *one client per barrister* policy under which barristers, including Legal Aid Queensland in-house counsel, are able to act for only one of two or more legally aided co-accused.

The policy applies to grants of legal assistance for criminal law co-accused only. Representation of co-accused by lawyers acting as duty lawyers is addressed in the *Duty Lawyer Handbook*.

Background

The rules and standards of professional conduct and ethics which a lawyer is required to observe include the requirement to avoid conflicts of interest. A type of conflict of interest, which is particularly relevant to criminal law matters, is a conflict between the duties owed to two or more current clients where two or more co-accused seek a legal service from the same lawyer or law practice.

Rule 11 of the *Australian Solicitors Conduct Rules* applies to the duties owed to two or more current clients and provides:

- 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.
- 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.
- 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:
 - 11.3.1 is aware that the solicitor or law practice is also acting for another client; and
 - 11.3.2 has given informed consent to the solicitor or law practice so acting.
- 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and

the solicitor's law practice must not act for the other client, except as follows:

11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client;

11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

In *R v Pham* [2017] QCA 43 McMurdo P stated:

“Even if there is no immediately apparent conflict of duties concerning the co-defendants, conflicts can easily arise during trials, which are notoriously unpredictable. They can also arise in sentence proceedings. Unanticipated evidence or submissions can result in a conflict of duties owed to two co-defendants, with a risk of prejudice to one or all co-defendants. Substantial costs to parties and the community result where lawyers withdraw because of an arising conflict, causing adjournments or even mis-trials. One or a number of defendants may be more culpable than others. By having the same legal practitioner acting for all, more dominant co-defendants may manipulate those less dominant to give instructions to their detriment and to the advantage of the dominant co-defendants. Where co-defendants are faced with a strong prosecution case, their lawyers should advise them of the value of a guilty plea and co-operation with the authorities in mitigation of penalty. That course may be against the interests of other co-defendants. This list of potential conflict of duties when acting for co-defendants is far from exhaustive.”

“The practice is apt to undermine public confidence in the legal profession and should be discouraged. Unless there is no possibility of a conflict existing or emerging, and such cases will be rare, co-defendants should have separate legal representation. These observations apply equally to solicitors and barristers. If legal practitioners persist in acting for co-defendants, they must be assiduous in meeting their arising ethical responsibilities.”

Rule 113 of the Barristers Rule 2011, as amended, provides:

113. A barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for:

- (a) all the clients in the case of confidentiality to which Rule 108 would apply; or
- (b) one or more of the clients so as to remove that possibility of conflict.

Rule 108 of the Barristers Rule 2011, as amended, provides:

108. A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep such information confidential unless or until:

- (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or
- (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.

Scope

This policy applies to:

1. The Director, Grants and Grants officers;
2. External Review Officers;
3. Preferred supplier private law practices;
4. The Director, Criminal Law Services and in-house criminal lawyers;
5. Barristers briefed to appear in criminal law matters pursuant to a grant of legal aid, including Legal Aid Queensland in-house counsel.

Policy Statement

1. Legal Aid Queensland will apply:
 - a *one client per law practice* policy under which any law practice, including Legal Aid Queensland, is able to act for only one of two or more co-accused, except as provided by this policy; and
 - a *one client per barrister* policy under which barristers, including Legal Aid Queensland in-house counsel, are able to act for only one of two or more legally aided co-accused.

Preferred supplier private law practices

2. For preferred supplier private law practices, different lawyers in the same practice can represent co-accused with the approval of an External Review Officer.
3. External Review Officers, in deciding whether to approve different lawyers in the same practice representing co-accused, must be satisfied that each of the requirements of Rule 11 of the *Australian Solicitors Conduct Rules* can be met by the lawyers and law practice.

Legal Aid Queensland's in-house criminal practice

4. For Legal Aid Queensland's in-house criminal practice:

- (a) different lawyers located in different offices can represent co-accused with the approval of the Director, Criminal Law Services;
 - (b) different lawyers in the same office can represent co-accused with the approval of an External Review Officer.
5. The Director, Criminal Law Services, in making decisions under paragraph 4(a), or an External Review Officer, in making decisions under paragraph 4(b), must be satisfied that each of the requirements of Rule 11 of the *Australian Solicitors Conduct Rules* can be met by the lawyers.

Exceptional circumstances exemption

6. The Director, Grants, has the discretion not to apply the *one client per law practice* policy where the application would:
- (i) limit access to justice (for example, where there are insufficient law practices in a regional area to separately represent all co-accused); or
 - (ii) create unreasonable additional expenditure (for example, in a complex matter in a regional area with multiple co-accused and a large volume of material where briefing separate practices would result in the incurring of travel costs).
7. In exercising this discretion, the Director, Grants, must be satisfied that Rule 11 of the *Australian Solicitors Conduct Rules* can be complied with.

Barristers

8. There are no exceptions to the *one client per barrister* policy.

Related policies

Conflict of Interest Policy
Protocols - Information Barriers
Grants Policy Manual
Grants Handbook
Quality Legal Services Framework.