

Legal Profession Uniform General Rules 2015

Consultation Report

June 2015

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Abbreviations

ADI	Authorised Deposit-Taking Institution (Australian government term for a corporation which is authorised under the Banking Act 1959 to take deposits from customers.)
LSC	Legal Services Council
CPA	CPA Australia - Certified Practising Accountants
DLRA	designated local regulatory authority
General Rules	Legal Profession Uniform General Rules
LSC	Legal Services Council
NSW LPA	<i>Legal Profession Act 2004 (NSW)</i>
NSW LPR	Legal Profession Regulation 2005 (NSW)
Uniform Law	Legal Profession Uniform Law
Vic LPA	<i>Legal Profession Act 2004 (Vic)</i>
Vic LPR	Legal Profession Regulations 2005 (Vic)

This document is for general information purposes only.

Background

The Legal Profession Uniform General Rules 2015 (General Rules) form part of a suite of Uniform Rules within the Legal Profession Uniform Law (Uniform Law) framework.

The General Rules are developed and made by the Legal Services Council (LSC) whose role it is to monitor implementation of the Uniform Law and ensure its consistent application across NSW, Victoria and other Australian jurisdictions as they elect to join the scheme after commencement in NSW and Victoria from **1 July 2015**.

The General Rules sit alongside the Legal Profession Conduct Rules and Continuing Professional Development Rules for solicitors and barristers and Legal Practice Rules for solicitors which are also available, along with the Admission Rules, on the LSC website.

The main areas covered by the General Rules are:

- entitlement to use certain titles
- exemptions from the prohibition on engaging in legal practice
- practising certificates
- registration certificates for foreign lawyers
- trust money and trust accounts
- external examiners
- dispute resolution and professional discipline
- professional indemnity insurance
- billing requirements; and
- costs disclosure forms.

The a cost disclosure form are an easy tool for lawyers to give their clients an overall picture of the costs they can expect to pay in minor matters. The new cost disclosure forms are prescribed as a schedule to the General Rules and a user friendly version designed by the LSC can be downloaded from the website at www.legalservicescouncil.org.au.

This Consultation Report describes how the LSC developed the General Rules, including the major changes made in response to submissions, online surveys and other feedback received from consumers, legal practitioners, law students and other stakeholders, prior to the commencement.

For ease of comparison and as amendments to the General Rules were made before the commencement of the Uniform Law on 1 July 2015, this Consultation Report uses the past tense to refer to the General Rules as they were proposed in the consultation draft. The General Rules will apply in NSW and Victoria from 1 July 2015.

Stakeholder consultation and communication

Shortly after their appointment to the LSC Board in October 2014, the current members released a consultation draft of the proposed General Rules for public and specific consultation for the period 28 November 2014 to 16 January 2015.

More than 130 bodies around Australia were directly invited to comment on the draft proposed General Rules. Further feedback was sought through communication channels including a media release, the LSC website, online surveys for legal practitioners and consumers email and Twitter. Invitations to comment on the draft and complete the surveys was also communicated through the distribution channels of interested professional associations and the Victorian Legal Services Board.

The LSC received thirty submissions on the consultation draft. Appendix A lists the public submissions. Full copies are available on the LSC website.

Development of the consultation draft

The consultation draft of the proposed General Rules was based on the draft Legal Profession National Rules (December 2010) developed by the Council of Australian Government's (COAG) National Legal Profession Reform Taskforce. The 2010 draft was reviewed by the LSC against current NSW and the Victorian arrangements.

Development of the rules – LSC responses to stakeholder feedback

Feedback on the consultation draft largely focussed on discrete issues associated with particular rules and important suggestions for new rules.

The LSC gave careful consideration to all submissions and feedback including a rule-by-rule analysis of each draft rule.

Substantive changes were made to better align with contemporary business practice, reduce red tape for law practices, minimise unnecessary regulatory change and strengthen alignment with the Uniform Law's consumer protection objectives.

New rules were incorporated, based on feedback about supervised legal practice, bar exams, notification of summary offences and itemised billing.

Following is a summary of how the LSC addressed the specific issues raised during the development of the General Rules.

Corporate lawyers

Submissions on the consultation draft highlighted the need for transitional arrangements for corporate and government lawyers in NSW. Corporate lawyers (in-house lawyers) have not been required to be admitted or to hold a practising certificate under the NSW LPA.

The need to allow time for NSW corporate lawyers to meet admission requirements and/or obtain a practising certificate was recognised by the LSC. As this issue was specific to NSW, these arrangements will be provided by local regulations rather than

the General Rules. Regulations are approved by the Governor of NSW rather than the LSC. While subject to approval, it is anticipated that the local regulations will provide:

- **Admitted:** Not required to hold a practising certificate for two years (ie until 30 June 2017). The person will need to notify the Law Society within 6 months of engaging in practice pursuant to this exemption;
- **Not admitted:** Not required to be admitted or hold a practising certificate for three years (ie until 30 June 2017). The person will need to notify the Legal Profession Admission Board within 12 months of engaging in practice pursuant to the exemption.¹

Supervised legal practice (rule 7)

The NSW LPA permits the holder of an unrestricted practising certificate to supervise junior practitioners in a law practice in NSW, but not in Victoria. The definition of 'supervised legal practice' in the Uniform Law refers only to supervision by an authorised principal.

The Law Council submitted that these NSW arrangements should continue to apply. The LSC agreed on the basis that, in a practical sense, there is a greater chance of junior practitioners being effectively supervised and less risk of issues arising when a wider field of experienced practitioners who can supervise them. The rules were therefore amended to provide for the holder of an unrestricted practising certificate to supervise junior practitioners.

Notification of summary offences (rule 15)

Under the Uniform Law, the holder of a practising certificate must notify the designated local regulatory authority if they have been charged with or convicted of a serious offence or a tax offence.²

Feedback from local regulators suggested that notification of some summary offences provides a useful early warning mechanism. In response, the LSC added a new General Rule that requires notification of summary offences other than parking and minor traffic offences. These notification requirements are based on the current disclosure obligations that apply to NSW practitioners when they are applying for the grant or renewal of a practising certificate³.

From 1 July 2015, a statutory condition obligates practitioners to notify the body granting or renewing practising certificates if they have been **convicted** of a summary offence. Notification is not required for **parking or traffic offences** unless:

- a term of imprisonment was imposed
- the offence had a maximum penalty of imprisonment of six months or more
- the court ordered licence disqualification on conviction; and/or
- the offence is a drink or drug driving offence.

¹ Above, note 1

² The Law Society or NSW Bar Council in NSW and the Victorian Legal Services Board in Victoria

³ Legal Profession Regulation 2005 (NSW), cl 11(1)(g)

Eligibility for a practising certificate (rule 13)

Suggestions for targeting the issue of ‘phoenixing’ were also raised during stakeholder consultations.

In response to this feedback, regulators can now consider the following factors in their determination of whether a practising certificate should be granted or renewed:

- is or has been the director of a company while the company is or was insolvent;
- is or was a director or principal of an incorporated legal practice while the legal practice is or was insolvent; and
- has breached a court or tribunal order. (This new consideration was suggested because the previous consideration was only relevant when the order related to matters under legal profession legislation.)

Receipt of trust money (rule 36)

Where law practices were only required to provide a receipt on request, the rules were also amended to require receipts to be issued in every instance trust money is received. The LSC took the view that this measure aligned with contemporary business practice and was warranted on the grounds of consumer protection and expectations that a receipt be provided when money changes hands.

Withdrawal of trust money after giving the client a bill (rule 42)

The consultation draft permitted trust money to be withdrawn seven days after the client is given a bill relating to the money. This was narrower than the Victorian and NSW Legal Profession Regulations which permit trust money to be withdrawn:

- in accordance with a costs agreement
- in accordance with instructions received by the practice authorising the withdrawal; or
- if the money is owed to the practice by way of reimbursement of money already paid.

Before effecting the withdrawal, the practice is required to give or send the person a request for payment, referring to the proposed withdrawal.⁴

The LSC received a number of submissions on this issue. Some stakeholders thought the narrower approach reflected in the draft rule was appropriate on consumer protection grounds. Others submitted that the rule should be amended to align with existing arrangements.

After considering these competing viewpoints, the LSC concluded that the rule should be amended to better align with current arrangements but without compromising the consumer protection objectives of the Uniform Law. The LSC made the following amendments:

- **after giving a bill:** The rules were amended to permit trust money to be withdrawn seven **business** days after the client is given a bill relating to the money. This change was made in response to submissions from the NSW and Victorian

⁴ Legal Profession Regulation 2005 (NSW), cl 88; Legal Profession Regulations 2005 (Vic), cl 3.3.34

Commissioners that seven calendar days is not enough time for clients to decide whether to dispute the costs and take action. Proposals to extend the timeframe to 30 and 14 days respectively were put forward.

On balance, the LSC determined that ensuring clients have seven business days would give them more time to decide what action to take and at the same time, minimise any potential impact on small law practices.

- **in accordance with instructions:** The rules now permit withdrawal of trust money in accordance with instructions, in line with the NSW and Vic LPRs.
- **reimbursement of money already paid:** Informal feedback from law practices and from Legal Aid Victoria highlighted the practical difficulties that could arise if the rules did not permit withdrawal of trust money to reimburse the law practice. The rules have therefore been amended to permit withdrawal of trust money to reimburse the law practice for money already paid if prior notice is given.
- **in accordance with a costs agreement:** Both the NSW and Victorian LPAs permit money to be withdrawn in accordance with a costs agreement if prior to making the withdrawal a notice or request for payment is given to the client.

The General Rules permit law practices to withdraw funds in accordance with a costs agreement if the client is a commercial or government client.⁵ This reflects a compromise between the concerns raised by the Law Council about the impact on law practices of precluding the withdrawal of trust money in accordance with a costs agreement, on the one hand, and consumer protection concerns raised by the NSW Commissioner, on the other.

Trust records (rule 38)

In effect, the General Rules remove the requirement for law practices to keep paper copies of trust account records. The change was made in response to submissions that the removal of this requirement is in keeping with contemporary business practice and technological advances. This should reduce the regulatory obligations on law practices without reducing protection for consumers of legal services.

Trust account statements (rule 52)

Under the Legal Profession Acts, trust account statements have not been required when:

- the ledger account or record has been open for less than six months; or
- a trust account statement has been furnished within the previous 12 months and there has been no subsequent transaction affecting the ledger account or record.

The Victorian Legal Services Commissioner submitted that law practices should provide a statement whenever they are holding money on behalf of the client. In response to that feedback, the Council determined that trust account statements should be required in the above scenarios.⁶ A **12 month transition period** will allow time for law practices to change their internal trust account systems.

⁵ Defined by s 170 of the Uniform Law

⁶ Rule 52 currently erroneously refers to ledger accounts or records that have been open for less than **twelve** months. Action is underway to correct this.

External examiners (rule 65)

The need to ensure that external examiners have appropriate qualifications and experience to discharge their role of examining trust records of law practices was highlighted in the submissions.

While the NSW LPA is not prescriptive⁷, the Victorian LPA requires the person to:

- be a member of a specified accounting peak body (eg CPA Australia)
- meet the requirements of one of those bodies to practice as a public accountant
- have completed a related tertiary qualification, and
- have completed any course required by the Victorian Legal Services Board.⁸

The General Rules replace these requirements with a new requirement that external examiners hold a current public practice certificate from a specified accounting professional body and have completed a course of education approved by the LSC. The requirement for a tertiary qualification that applies in Victoria has not been replicated. This removes duplication in regulatory requirements, as people need to obtain a tertiary qualification to be eligible for a public practice certificate.

It is anticipated that for the first twelve months the course of education required will be that which is available under the existing NSW and Victorian arrangements.

To allow time for external examiners to obtain a public practice certificate, the rules provide a **12 month transition period**. The LSC will work with local regulators and the accounting peak bodies over that period to ensure that they are aware of the new requirements and to agree on the content of the course required.

Approval to remove external examiners (rule 66)

Currently in Victoria, external examiners can only be removed with the prior removal of the Victorian Legal Services Board.⁹ In NSW, notification is required, but not prior approval.¹⁰ The rules were amended to require prior approval of the DLRA in response to a submission from the Victorian Commissioner that this is a useful safeguard against termination of external examiners by law practices anticipating a negative report.

Costs disclosure forms (rule 72 and Schedule 1)

The Uniform Law introduces new costs disclosure arrangements, whereby, if the likely legal costs of a matter (excluding GST and disbursements) are between \$750 and \$3000, full costs disclosure is not required and disclosure can instead be made using a costs disclosure form.

The ability to use a form to satisfy disclosure obligations is a new measure. It is intended to provide an easier way for legal practitioners to meet their disclosure obligations for minor matters, while still providing clients with key information about the costs of their matter. Schedule 1 of the consultation draft contained separate proposed forms for use by solicitors and barristers.

⁷ *Legal Profession Act 2004* (NSW), s 272(1)

⁸ *Legal Profession Act 2004* (Vic)

⁹ *Legal Profession Regulations 2005* (Vic), cl 3.3.44(2)-(4)

¹⁰ Above note 3, cl 93

Following the public consultation period, significant work to refine the forms was undertaken, in close consultation with consumer groups and legal professional groups. The forms are included as a Schedule to the General Rules which prescribes their content and basic layout. Dynamic web-based versions with greater functionality (eg drop down lists) are available on the LSC website together with information sheets for consumers and legal practitioners about how to use the forms. The forms have been designed to meet online publication accessibility and readability standards.

Costs disclosure – breach of requirements

The Uniform Law introduces additional costs disclosure obligations applying to legal practitioners. For example, law practices must take all reasonable steps to be satisfied that the client has understood and given consent to the proposed course of action and costs.¹¹ At the same time, where a contravention of the costs disclosure obligations occurs:

- a client or associated third party is not required to pay until costs have been assessed or determined; and
- a cost agreement (if any) is void.

Contravention of the costs disclosure obligations can constitute unsatisfactory professional conduct or professional misconduct by a principal, legal practitioner or foreign lawyer involved.

The LSC has the ability to make rules providing that these obligations do not apply or to change how they apply.¹² As a priority, the LSC is actively considering the need for a rule.

Giving bills (rule 73)

Law practices will now be able to provide bills in any electronic format with the consent of the client. Previously, email and fax were the only electronic formats permitted under the LPRs. In response to feedback, this rule change gives give law practices and clients greater flexibility and aligns with modern business practice.

Itemised bills that are higher than lump sum bill (rule 74)

Law practices giving a client an itemised bill for a higher total amount than the amount specified in the lump sum bill were a common cause of complaints identified by the NSW Office of the Legal Services Commissioner.

The LSC therefore included a new rule providing for the client requesting an itemised bill after first receiving a lump sum bill, subsequently receiving an itemised bill for a higher amount than the original lump sum bill. When the itemised bill is higher than the lump sum bill, the higher amount is only recoverable if an appropriate disclosure was made to the client at the time of being given the lump sum bill and following a costs

¹¹ Legal Profession Uniform Law, s 174(3)

¹² Above, note 11, s 178(3)

assessment or binding determination.¹³ Rule 74 is based on an existing policy of the Queensland Legal Services Commissioner.¹⁴

Professional Indemnity Insurance - minimum standards (rules 78 and 79)

All legal practitioners must be covered by an approved insurance policy. For NSW and Victorian practitioners an approved insurance policy needs to comply with minimum standards prescribed by the Uniform Rules.¹⁵

The consultation draft set out proposed minimum standards for professional indemnity insurance based on those in the 2010 draft National Rules.

The LSC made a number of changes to the standards in light of submissions from Lawcover, the Legal Practitioners Liability Committee, the Law Society of Western Australia and others. Separate standards for barristers were also included, based on some crucial differences between the insurance arrangements and considerations applying to barristers, including differences in the level of risk.

The net effect of the changes is to better align with current practices in NSW and Victoria, while still providing minimum safeguards to ensure clients of law practices have adequate protection against the consequences of professional negligence. Central to this is the interaction with NSW and Victorian arrangements, whereby the terms and conditions are approved under NSW and Victorian Legal Profession Uniform Law Application Acts.¹⁶

Professional Indemnity Insurance - exemptions (rule 82)

The LSC explored whether a rule would be appropriate to grant power to the local regulatory authority to exempt community legal services and incorporated legal practices from the requirement to obtain professional indemnity insurance. The Legal Practitioners' Liability Committee's submission indicated that there is no justification for treating incorporated practices differently to unincorporated practices. This was the view adopted by the LSC.

The LSC also considered submissions about whether law practices with offices in two jurisdictions should be granted an automatic exemption in the same way as law practices with offices in three or more jurisdictions are exempt from obtaining professional indemnity insurance. The Institute of Legal Executives submitted that law practices with offices in two jurisdictions should be granted such an exemption on the basis that they saw no reason why a differentiation should be made between 'two' or 'three' jurisdictions. The view of the LSC is that careful consideration about the implications for non-participating jurisdictions is needed, before such a rule is informed for adoption.

¹³ Legal Profession Uniform General Rules, r 74

¹⁴ Paragraph 7(b) of the Queensland Legal Services Commission, *Regulatory Guide 6 Itemised Bills* (2012), available at http://www.lsc.qld.gov.au/_data/assets/pdf_file/0009/183996/Regulatory-Guide-6-Itemised-Bills-v2-March-2012.pdf

¹⁵ Above note 111, s 210(1)(b)

¹⁶ See section 95 of the *Legal Profession Uniform Law Application Act 2014* (NSW) and sections 13 and 120 of the *Legal Profession Uniform Law Application Act 2014* (Vic)

Managed investment schemes

Under the Uniform Law, law practices (and related entities) are prohibited from:

- promoting or operating a managed investment scheme (subject to certain exceptions); and
- providing legal services in relation to a managed investment scheme if any associate of the law practice has an interest in the scheme.¹⁷

In both cases, a civil penalty of 250 penalty units applies.

These prohibitions will not apply in Victoria until 2018 (except insofar as the prohibition on incorporated legal practices conducting managed investment schemes will continue).¹⁸ Recent amendments to the *Legal Profession Uniform Law Application Act 2014* (NSW) similarly provide that the above prohibitions will not apply in NSW until 1 July 2018. Instead, the existing prohibition on incorporated legal practices conducting a managed investment scheme continues to apply¹⁹, as will the arrangements under s 486 of the NSW LPA (whereby law practices are required to give the client notice of any interest).

The consultation draft rules provided for a three year transitional period. In light of the recent changes to NSW legislation, **this rule is no longer required and has been removed.**

Feedback about the issue of managed investment schemes during development of the General Rules suggests that the ongoing operation of the prohibition may be better targeted by adopting a risk-based exemption framework. The LSC is therefore examining the need for some ongoing limited classes of exemption with a view to arrangements being in place before the three year transition period ends.

Increased alignment with existing arrangements

A number of discrete changes were made to the consultation draft to remove unnecessary differences between the General Rules and NSW and Victorian pre-Uniform Law requirements. These changes include:

- Preserving existing transitional arrangements that apply to requirements for trust accounts to be established with an authorised ADI and the information to be included in trust account name.²⁰
- Aligning the requirement to maintain a register of powers and estates with current requirements in both NSW and Victoria;²¹ and
- Clarifying the particulars that must be recorded for the register of files opened or the register of safe custody documents based on the advice of the Law Council about current Legal Practice Rules.

¹⁷ Above note 111, s 258

¹⁸ *Legal Profession Uniform Law Application Act 2014* (Vic), s 170

¹⁹ This is set out in s 135(2) of the *Legal Profession Act 2004* (NSW)

²⁰ Above note 133, r 35(2)

²¹ Above note 133, r 60

Future work for the LSC

The LSC is considering responses to a number of additional issues which were also highlighted in consultation draft feedback. These include:

- **Compliance audits and management directions:** Exploring the need for guidelines about how compliance audits and management directions functions are exercised by DLRA's.
- **Use of titles by overseas qualified lawyers:** Developing an agreed approach and any rules, if necessary, for the titles which may be used by foreign lawyers who are not admitted.
- **powers of attorney:** Investigating the use and types of powers of attorney, with a view to providing for appropriate rules and a register, if required.
- **Wills and estates:** Developing an agreed approach with the Law Council of Australia about specific conduct and practice rules about wills and estates.
- **Retainers:** Investigating the need for a policy or guidelines about retainers and whether they should be treated as trust money.
- **Costs assessment:** Considering the adequacy of third party eligibility to apply for a costs assessment.

Contact the LSC

While the public consultation period has ended, your constructive feedback is always welcome. You can click on the 'Contact Us' tab on the menu bar of our website home page.

Appendix A: Public Submissions

Australian Corporate Lawyers Association (1)
Australian Corporate Lawyers Association (2)
Consumer Action Law Centre
Fair Trading NSW Government
Federation of Community Legal Centres Victoria
Institute of Legal Executives
Law Council of Australia
Lawcover
Law Society of Northern Territory
Law Society of West Australia
Legal Practitioners Liability Committee
Lexcel Consulting
Ueichii Makkoto
AH May
Makinson d'Apice
National Assoc of Community Legal Centres
National Pro Bono Resource Centre
NSW Civil and Administrative Tribunal
NSW Young Lawyers
Office of Legal Services Commissioner (1)
Office of Legal Services Commissioner (2)
Small Business Commissioner
State Trustees
B Toluk
Transport Accident Commission
Victorian Civil and Administrative Tribunal
Victoria Legal Aid
Victorian Legal Services Board & Commissioner