Victorian Legal Services
BOARD + COMMISSIONER

FACT SHEET OCTOBER 2026

# Duty to avoid conflicts of interest for concurrent clients of solicitors in criminal law practice

## Fact sheet for Victorian legal practitioners

### Introduction

The fiduciary nature of the lawyer-client relationship gives rise to various duties. In particular, the lawyer's duty of loyalty to their client encompasses a positive duty on that lawyer to avoid a conflict of interest (the 'no-conflict' rule). The duty to avoid conflicts of interest is also informed by the duty of confidentiality.

While the duty of loyalty is sourced in equity, the duty to avoid conflicts of interest concerning concurrent clients is also specifically set out in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth) (**Conduct Rules**).

Victorian Courts have recently been required to consider whether conflicts of interest have arisen in several criminal matters involving Nicola Gobbo – in her role as a barrister, but also as a solicitor. It is timely to re-visit some of the key issues present and remind practitioners of the need to exercise vigilance where conflicts of interest may arise noting that findings of actual or potential conflicts can result in:

- significant harm to both clients and the community
- potential disciplinary action against legal practitioners.

Importantly – the focus here is on solicitors engaged in criminal law practice. This focus on solicitors' duties to avoid conflicts of interest concerning concurrent clients in criminal law practice is driven by the additional ethical considerations that arise for solicitors who are contemplating acting for co-accused in related proceedings.

The following materials are provided for the assistance of practitioners and include:

- A: Conduct Rules on conflicts of interest
- B: issues relevant to the application of the duties in the criminal law context
- C: an overview of cases involving Ms Gobbo's conflicts of interest
- D: discussion around informed consent
- E: questions to ask in identifying whether a conflict is or may be present.

### A: Conduct Rules on conflicts of interest concerning concurrent clients

**Rule 11.1** provides that solicitors and law practices must avoid conflicts of duties owed to two or more current clients.

**Rule 11.2** is titled "duty of loyalty". It states that a solicitor or law practice must not 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 except where expressly permitted by rules 11.3 and 11.4.

**Rule 11.3** provides that one permitted exception is where each of the clients in question is aware that the solicitor is also acting for another client and has given informed consent for that solicitor to so act. It also states that such an exception is subject always to each solicitor discharging their duty to act in the best interests of the client.

**Rule 11.4** is titled "duty of confidentiality" and operates in addition to rule 11.3. It states that where a solicitor or law practice acting for two or more clients in the same or related matters comes into possession of information which is confidential to one client (the first client) which might reasonably be material to the other client or clients and detrimental to the interests of the first client if disclosed, then that solicitor or law practice must not act or continue to act for the other client or clients unless each client's informed consent (a) permits the disclosure and use of that information for the benefit of the other client or (b) requires an effective information barrier to protect the confidential information of each client.

**Rule 11.5** applies where an actual conflict arises between the duties owed by the solicitor to two or more clients in the course of a matter. It states that in such circumstances, a solicitor or law practice may only continue to act for one of those clients in exceptional circumstances, namely, if (a) any client for whom the solicitor or law practice ceases to act has given informed consent to the solicitor or law practice to continue to act for the remaining client/s and (b) where the duty of confidentiality owed to all clients (including the client for whom the solicitor or law practice ceases to act) is not put at risk.

As officers of the court, solicitors are charged with the responsibility of ensuring the due administration of justice. The court has an inherent supervisory jurisdiction over solicitors and, accordingly, may restrain a solicitor from acting even where there is no actual conflict but where a

"fair-minded, reasonably informed member of the public" would conclude that the proper administration of justice requires that a solicitor should be so restrained (*Kallinicos v Hunt* (2005) 64 NSWLR 561, [76]).

## B: issues relevant to the application of the duties in the criminal law context

### What is a conflict of interest?

The 'no-conflict' rule has two aspects to it: a person must not (except with informed consent, discussed further below) place themselves in a position where there is or may be a conflict between:

- the fiduciary duties that a solicitor owes to two or more clients, or
- the fiduciary duty the solicitor owes to one client and the solicitor's own personal interests or a duty to a third party in the same matter.

(*G E Dal Pont, Lawyers' Professional Responsibility* (Lawbook, 6th ed, 2017) 119, [4.40] cited in *Karam v The King* [2022] VSC 808, [456]).

A conflict arises by disabling the solicitor from discharging their duty to one client because of the requirement to observe a duty to the other (*Break Fast Investments Pty Ltd v Rigby Cooke Lawyers [*2022] VSCA 118, [55]). For example, a conflict arises when a solicitor, who is seeking to act for two different clients, finds themselves in a position where if they act in the best interests of one client, it might be inconsistent with, or adverse to, acting in the best interests of another client.

Importantly, there is a duty to avoid even a potential conflict of interest. Rule 11.2 requires that a solicitor must not act for two or more clients in the same or related proceedings 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.

Avoiding conflicts of interest aims to safeguard the fiduciary obligations owed by the solicitor, such as undivided loyalty by the solicitor to their client, the duty to act in the client's best interests, and the duty of confidentiality.

No conflict arises in either respect where there are concurrent clients with unrelated interests or entirely common interests. It is for this reason that there is no outright legal or professional prohibition on concurrent representation.

### Application for solicitors in criminal practice

It is important to bear in mind that whilst the Conduct Rules apply to both criminal and civil matters, there are a number of factors relevant to criminal proceedings that make conflicts of interest of particular concern. They include the greater potential in criminal proceedings for conflicts of interest to arise when acting for co-accused and the serious ramifications of such conflicts, and difficulties associated with obtaining informed consent from clients in respect of conflicts due to the nature of the proceedings and capacity of the client to understand the relevant issues.

Any actual conflict, or potential conflict, carries particular weight in criminal practice due to the adverse implications for both clients and the administration of justice. It may lead to a solicitor or law practice being compelled to cease acting for failing to recognise or act upon an actual or potential conflict of interest.

## C: an overview of cases involving Ms Gobbo's conflicts of interest

**1. *Arnautovic v The King* (No 3) [2024] VSC 335 (an example of conflict between the interests of clients)**

As a solicitor, Ms Gobbo acted simultaneously for Mr Arnautovic and his co-accused in respect of the same police operation involving allegations of drug trafficking. In doing so, the solicitor advised the co-accused that he should plead guilty on the basis that Mr Arnautovic was the supplier of drugs to him. This was directly contrary to the way in which Mr Arnautovic defended his charges of trafficking. It was clear that scenario involved a duty-duty conflict between current clients.

**2. *Orman v The Queen* (2019) 59 VR 511 (an example of conflict between the interests of clients)**

As a barrister, Ms Gobbo represented Witness Q in relation to his criminal proceedings. She also represented Mr Orman in relation to charges he was facing interstate. While acting for both clients, she improperly took active steps to ensure that Witness Q gave evidence against Mr Orman in a Victorian murder trial. The prosecution case against Mr Orman substantially depended on the evidence of Witness Q. In acting in the best interests of one client, this adversely affected the interests of the other (current) client.

The Court found that conduct was a fundamental breach of the barrister's duties to Mr Orman and to the Court. The barrister's conduct subverted Mr Orman's right to a fair trial, and went to the very foundations of the system of criminal trial. The appeal was allowed, the conviction for murder was set aside, and a judgment of acquittal was entered for the offence of murder.

**3. *Mokbel v The King* [2024] VSC 725 (an example of conflict between the interest of a client and the legal practitioner's personal interests)**

In Mokbel, there were a number of instances where Ms Gobbo was found to have breached the 'no-conflict rule', in particular when Ms Gobbo's personal interests in meeting her obligations and responsibilities as a police informer were permitted to dominate over, and divide, the loyalty she owed her clients. For example:

a) Ms Gobbo gave information to police about Mr Mokbel in connection to police operations K, O and P in circumstances where she was also retained by Mr Mokbel in relation to police operation K, O and P.

b) Ms Gobbo gave information to police about a suspect's criminal conduct and how he might respond upon his arrest. Ms Gobbo was then retained by that individual when he was arrested in respect of that same criminal conduct.

## 'D: discussion around informed consent

As noted above, there is an exception to Rule 11.2 prohibiting a solicitor or law practice from acting 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.

That exception is provided for in Rule 11.3, namely, where each client is aware that the solicitor or law practice is also acting for another client, and has given informed consent to the solicitor or law practice so acting. That exception is subject always to the solicitor or law practice discharging their duty to act in the best interests of their client.

What is required for informed consent will depend on all the circumstances of each case and there is no precise formula (Maguire v Makaronis (1997) 188 CLR 449, [43]). However, consent can only be provided once a client is fully aware of all relevant information. The Commentary to the Conduct Rules (Commentary) sets out such information to include:

- the existence or potential existence of a conflict
- the potential advantages or disadvantages of the conflict
- the fact that alternative representation is likely to be available
- the manner in which the solicitor intends managing the conflict.

The Commentary also states that a prudent solicitor will urge the client to seek independent legal advice on the matter.

### Consenting to conflicts in criminal practice

Relevant information in a criminal law context might include the following:

- that the solicitor is acting for another co-accused
- explanation of the risks and consequences as a result of acting for the co-accused/s, including if a conflict subsequently arises in the course of the proceeding
- there is, or might potentially be, confidential information received from one client which might be material to the other client's matter but not able to be disclosed, or detrimental to their interests if it was disclosed
- the disadvantages or potential disadvantages of being represented by the same solicitor, even though it may involve some advantages such as fewer costs.

In terms of the potential risks and disadvantages associated with a conflict of interest arising during a criminal proceeding, it is important to remember that such proceedings can be unpredictable. Unanticipated evidence, submissions, or changing instructions can result in a conflict of duties between clients that was previously unforeseen. The result may be that the solicitor must cease to act for all clients, which in turn leads to potential adjournments, delay, or even discharging a jury part-way through a trial. The costs associated with such developments are likely to be considerable.

The consenting client's thorough understanding of these issues is critical and it is the solicitor's responsibility to ensure that the client does understand. This ordinarily dictates not only full disclosure but a strong recommendation that the person seek independent legal advice.

Notably, the LIV's Guidelines for the Representation of Co-Defendants in Criminal Proceedings state that, in criminal matters, client consent to the potential or present conflict may carry little weight. This is because many defendants in criminal proceedings might be considered unsophisticated or otherwise be unable to fully appreciate the nature and repercussions of conflicts of interests and therefore unable to give informed consent. Where this is the case and there is an actual conflict, the best course of action is for a solicitor to refrain from acting in the first place. This is reflected in the observations of President McMurdo in the Queensland Court of Appeal that there is a very real danger of conflict of duties where a solicitor or law practice acts for two or more clients in the same or related criminal matters and such an approach is "fraught with danger" (*R v Pham* [2017] QCA 43, [58])

The words "subject always to each solicitor discharging their duty to act in the best interests of their client" in rule 11.3 of the Conduct Rules also highlights that informed client consent, by itself, cannot be determinative of a solicitor acting in the event of a conflict or potential conflict. The solicitor must still be able to discharge their duty to act in the best interests of their clients. In many cases, this will mean a solicitor or law practice simply cannot act for co-accused clients when one client's interests are adverse to the interests of another client.

## E: questions to ask in identifying whether a conflict is or may be present

Here are some of the questions that a solicitor or law practice should ask themselves prior to agreeing to act for co-accused defendants in criminal proceedings.

1. **Can each client be properly advised in terms of the strength of the prosecution case, their defence to charges, any benefits of pleading guilty or cooperating with police, without acting against the best interests of another client/s?**
   If no, then there is likely to be a conflict of interest.
2. **Does one client have a defence or possible defence which would potentially incriminate the other client?**
   If yes, then there is likely to be a conflict of interest.
3. **Is there any inconsistency between clients' instructions? If so, what effect will this have? For example, is there disagreement as to who did what act (in a contested matter) or who was the principal offender (at a plea hearing)?**
   If there is an inconsistency and acting in the best interests of one client will have an adverse effect on one or other client, then there is likely to be a conflict of interest.
4. **Is there any confidential information received, or which might be received, on behalf of one client which might reasonably be concluded to be material to the other client's or clients' matter and detrimental to the interests of the first client if disclosed?**
   If yes, then there is likely to be a conflict of interest.
5. **Is there evidence which is favourable to one client but prejudicial to another? For example, evidence that could be challenged for admissibility may be inculpatory for one accused, but exculpatory to another.**
   If yes, then there is likely to be a conflict of interest.
6. **What is the risk of a conflict of duties arising as the matter progresses? What are examples?**
   This might be difficult to know in the first instance, but for the reasons set out above, the likelihood is high in criminal practice and it is important to consider a range of possibilities that might arise from unanticipated evidence or changes to instructions or some other means by which previously unforeseen information comes to light during the criminal proceeding.
   Remember, the test for the existence of an actual or potential conflict of interests is objective. It is to be determined from the standpoint of the objective observer with knowledge of all relevant facts and circumstances (*Boardman v Phipps* [1967] 2 AC 46)