Guidance Statement No. 17 – Conflicts of Interest in Work Health Safety Investigations (Published 7 August 2019)

1. Introduction

1.1 Who should read this Guidance Statement?
This Guidance Statement is for solicitors and law practices.

1.2 What is the Issue?
This Guidance Statement considers conflicts of interest regarding the representation of multiple employees, at different positions within a company’s chain of responsibility, in Work Health and Safety (‘WHS’) investigations and the ethical obligations that arise when employees are compelled to participate in interviews under the Work Health Safety Act 2011 (Qld) (‘WHS Act’).

1.3 Status of this Guidance Statement
This Guidance Statement is issued by the Queensland Law Society (‘QLS’) Ethics and Practice Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of this Guidance Statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to criminal charges or complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement is endorsed by the QLS Ethics Committee as representing a standard of good practice, following consultation with the QLS Industrial Law Committee.

2. Ethical Principles

ASCR

11. Conflict of duties concerning current clients

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.

2.1 What are the relevant sections of the Act that may impact on conflicts of interest in WHS investigations?

The WHS Act provides no framework for dealing with conflicts arising out of WHS investigations, in particular compulsory interviews under section 171 of the WHS Act. With it being common for a single law practice to represent all employees involved in an investigation, the risk of conflict situations occurring is heightened exponentially.

Section 171 gives all investigators the power to compel employees to participate in an interview, or to produce any documents in their possession required by the investigation. A failure to do so, without providing a reasonable excuse, is an offence punishable by up to 100 penalty units.

Section 172(1) of the WHS Act abrogates an employee’s privilege against self-incrimination during an interview. However, section 172(2) provides that any answer given by an individual during an interview (and any information derived from that answer) is inadmissible against that person in any civil or criminal proceedings.

It should be noted that, read in conjunction with section 173(3), which states that nothing in section 173 prevents an investigator from using information given to him or her voluntarily, the protection afforded by section 172(2) is only enlivened once the person
being interviewed claims privilege. The protection is only applicable to answers given under compulsion.

Section 269 of the WHS Act does not require the disclosure of information subject to legal professional privilege.

Employees’ rights regarding the interview only extend to requesting that it be conducted in private and requesting to exercise their right to representation.

Significantly, the legislation does not prohibit employees from discussing information disclosed in an interview with others. This alone has the potential to create conflict situations during the investigation process, given that the protection under section 172(2) of the Act does not apply to civil or criminal proceedings against anyone other than the person answering questions under compulsion. This creates the potential for collusion against one employee in particular.

2.1.1. Application of the ASCR

It is clear that within the scope of section 171 exists a real potential for conflicts of interest to occur between employees of a business involved in a WHS investigation. A solicitor’s duty under the ASCR to act in the best interests of their client may well be impaired in this scenario.

Under Rule 11 of the ASCR, a solicitor may act for more than one client if full and informed consent is given to do so.

However, in some circumstances, it may not be possible for a solicitor to act fairly and adequately for more than one client, regardless of whether informed consent has been obtained. The position at common law is stated in *Farrington v Rowe McBride and Partners* [1985] 1 NZLR 83, 90:

“A solicitor’s loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibility to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting. … [T]here will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both” (emphasis added).

What is informed consent will be fact sensitive. While full and informed consent may be gained at the beginning of a WHS investigation, it may be affected where facts previously unknown to the solicitor and clients become known throughout the course of the investigation.

Solicitors should be wary of conflicts unexpectedly arising in this manner. Full and informed consent should be obtained, preferably in writing, at each of the key stages of an investigation.

2.1.2. Suggestions on how to reduce the risks of conflict situations occurring

Law firms should seek to reduce the risk of conflicts of interest in situations occurring during WHS investigations by:

- ensuring all communications to clients are in writing, explaining the impact upon them of concurrent representation;
- obtaining in writing the informed consent of each client at pivotal stages of the investigation;
• addressing what happens to solicitor-client confidences in such concurrent representation situations, and specifically the abovementioned risks posed by the WHS regime;
• spelling out specific ramifications arising from multiple representations in an “if / then” format;
• addressing the ground rules of what will happen in the event of a conflict arising, including withdrawal and the additional costs a client will have; and
• agreeing with clients in advance about how confidential information will be treated.

Note that following these steps will not cure all conflicts, however, they do allow clients to be made aware of and appreciate all of the risks flowing from multiple representations.

If an actual conflict does arise, it is impermissible for a firm or solicitor to continue acting for both or all clients. This may cause significant cost to all parties involved and depending on the stage of the investigation, incur the unnecessary expenditure of court resources. A court also has an inherent discretion to prevent a solicitor from acting where a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires it: (Kallinicos v Hunt (2005) 64 NSWLR 561, 586 [91]).

It should also be noted that, whilst not in a WHS context, the Federal Court has considered a situation where an interviewer has perceived a lawyer’s involvement as a representative in a compulsory interview detrimental to the investigation (and therefore the administration of justice) because of the lawyer’s involvement in past and future interviews (see Hogan v Australian Crime Commission (2005) 154 A Crim R 336, where it was held that an interviewer’s discretion to exclude the legal representative was improperly exercised in the circumstances of that case).

2.2. Should employees all be individually represented?

The best guidance concerning the representation of multiple accused in criminal trials comes from R v Pham [2017] QCA 43 (‘Pham’).1

In that case, the President identified several scenarios commonly arising in the course of a criminal trial where it becomes inappropriate for a solicitor to be acting for multiple accused. The factors contributing to these scenarios are equally likely to arise during the course of a WHS investigation. As such, the decision of Pham is relevant to solicitors asked to act for multiple employees of a company in a WHS matter as well.

Under the WHS Act scheme, ‘health and safety duties’ are imposed on a number of different actors within businesses to best minimise the risk arising from work situations. As such, when an incident is investigated there are a number of employees that may be held criminally responsible under the scheme, as well as the employer itself. In these situations businesses often offer to pay for legal representation for the employees affected, however, when confronted with the possibility of conflicts of interest they often find it is impractical to seek independent representation for all involved.

It is well established that a solicitor should not concurrently represent clients if there is any risk of a conflict arising between them. However, the effect of section 171 is that

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1 See Guidance Statement No. 12 – Conflicts of Interests in Criminal and Crime & Corruption Commission Proceedings.
unanticipated evidence may arise without warning and create such a conflict. The unpredictability of conflicts arising was one reason concurrent representation in criminal matters was cautioned against in Pham.

Another point also highly relevant in WHS investigations and arising out of an organisation’s hierarchy or corporate structure, is that certain clients may be more culpable than others. This creates the risk that one client may be more dominant than others and as such may affect the decisions and quality of consent given by the others. In some cases this may ultimately impinge upon a law firm’s ability to act for a group of employees if their consent to concurrent representation is so affected.

Most obviously, Pham reiterated the danger of representing co-accused when advice in the best interests of one client is disadvantageous to another. This could easily arise in the context of a WHS investigation where one employee’s version of events ‘passes the buck’, so to speak, to another employee in the company. Advice to the first employee would necessarily be detrimental to the second. In these circumstances, the solicitor’s duty to advise each client solely with a view to what is in that client’s interests, coupled with a duty to maintain each client’s confidential information, may be irreconcilable: (Spector v Ageda [1973] Ch 30).

Solicitors are encouraged to exercise prudence in assessing risks of conflicts and to take a conservative approach. With reference to these issues as raised in Pham, it seems that a law firm should not act for all employees involved in an investigation as there is always a possibility of a conflict arising.

It should also be noted that the findings of a WHS investigation may later be produced in proceedings. In Gaynor King [2018] FWC 6006, the report of a WHS investigation conducted by a legal firm was not covered by legal professional privilege and was required to be produced in proceedings before the Commission. Commissioner Wilson stated that the dominant purpose of the investigation and subsequent report was not to obtain legal advice, but to inquire into the complaints raised by the employee, to “test” if the employer’s Code of Conduct had been breached, and if so, to hold the transgressors to account.

It is important to distinguish between co-accused (including those who have been charged and those who potentially might be) each of whom ought to be independently represented, and witnesses. It may be entirely appropriate for a firm to act for a group of employees such as a particular department. This is especially the case where that group of employees are not charged and are unlikely to face a prosecution in their individual capacity. If there are no apparent or significant factual conflicts between the individuals within the group of employees, there is a lesser concern that a conflict might exist.

3. More information

Solicitors are also referred to:

- Stafford Shepherd, ‘Multiple clients, divided loyalty - reducing the risks in concurrent representation’ Queensland Law Society (Ethics Note, 6 February 2013).

For further assistance please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on 07 3842 5843 or ethics@qls.com.au.