

[Act 2001 No 53]



New South Wales

## Legal Profession Amendment (Disciplinary Provisions) Bill 2001

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*

### Overview of Bill

The object of this Bill is to amend the *Legal Profession Act 1987*:

- (a) to enable the Bar Council or the Law Society Council to refuse to issue, or to cancel or suspend, a practising certificate if the applicant for or holder of the certificate fails to give a satisfactory explanation of specified conduct (whether or not related to practice as a barrister or solicitor) that may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate, and
- (b) to require the Bar Council and the Law Society Council to refuse to issue, or to cancel or suspend a practising certificate, if the applicant for or holder of the certificate has, since being admitted as a legal practitioner, committed an

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\* Amended in committee—see table at end of volume.

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act of bankruptcy or been found guilty of an indictable offence or a tax offence in circumstances that show that the applicant or holder is not a fit and proper person to hold the certificate, and

- (c) to enable the Bar Council or the Law Society Council to refuse to issue, or to cancel or suspend a practising certificate, if the applicant for or holder of the certificate has failed to make required notifications to the Bar Council or the Law Society Council or to comply with certain requirements made for the purpose of investigating matters under the new provisions, and
- (d) to enable the Legal Services Commissioner to take over a matter referred to in paragraph (b) and to cancel or suspend a practising certificate, or direct the Bar Council or the Law Society Council to refuse to issue a practising certificate, in the circumstances referred to in that paragraph, and
- (e) to require an applicant for or holder of a practising certificate that has engaged in conduct referred to in paragraph (b) or who has failed to make required notifications to show cause why the practising certificate should not be refused, suspended or cancelled, and
- (f) to provide for the automatic suspension of a practising certificate held by a legal practitioner who is being investigated by the Bar Council, the Law Society Council or the Legal Services Commissioner for conduct referred to in paragraph (b) if a determination in relation to the matter is not made within a specified period, and
- (g) to make it clear that certain conduct of a legal practitioner involving the commission of acts of bankruptcy, indictable offences or tax offences may constitute professional misconduct, and
- (h) to enable regulations to be made declaring contraventions of specified provisions of the Act or the regulations to be professional misconduct, and
- (i) to extend the functions and powers of the Legal Services Commissioner and the Legal Profession Advisory Council to enable the monitoring of the exercise of regulatory functions by the Bar Council and the Law Society Council, and
- (j) to make other changes in relation to delegations by the Bar Council or the Law Society Council and the hearing of appeals from decisions of the Administrative Decisions Tribunal under the Act.

The Bill also amends the *Administrative Decisions Tribunal Act 1997* to make changes to the constitution of the Administrative Decisions Tribunal when dealing with complaints against legal practitioners and makes a consequential amendment to the *Defamation Act 1974*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the amendments to the *Legal Profession Act 1987* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to consequential amendments to other Acts set out in Schedule 2.

## Schedule 1 Amendment of Legal Profession Act 1987

### **Conduct by legal practitioners, including bankruptcy, commission of indictable offences and tax offences and failures to notify**

**Schedule 1 [2]** defines *tax offence* as an offence under the *Taxation Administration Act 1953* of the Commonwealth.

**Schedule 1 [3]** provides that a person commits an act of bankruptcy if the person:

- (a) is bankrupt or the subject of a creditor's petition presented to the Court under section 43 of the *Bankruptcy Act 1966* of the Commonwealth, or
- (b) has presented (as a debtor) a declaration to the Official Receiver under section 54A of the *Bankruptcy Act 1966* of the Commonwealth of his or her intention to present a debtor's petition or presented (as a debtor) such a petition under section 55 of that Act, or
- (c) has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with creditors or made an assignment of his or her remuneration for their benefit.

**Schedule 1 [4]** enables the Bar Council or the Law Society Council to refuse to issue or to suspend or cancel a practising certificate if the applicant for or the holder of the practising certificate fails, within a period specified by the Council, to give a satisfactory explanation of specified conduct that may indicate that the person is not a fit and proper person to hold a practising certificate.

**Schedule 1 [6]** inserts proposed Division 1AA of Part 3 into the *Legal Profession Act 1987*.

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Proposed section 38FB requires an applicant for or a holder of a practising certificate who has, since being admitted as a legal practitioner, committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence to show cause to the Bar Council or the Law Society Council, as appropriate, why the applicant or holder is still a fit and proper person to hold a practising certificate. An applicant for, or the holder of, a practising certificate who has failed to make a notification, being a failure prescribed by the regulations as professional misconduct, must also show cause.

Proposed section 38FC requires the Bar Council or the Law Society Council to refuse to issue, or to cancel or suspend, a practising certificate if the applicant for or the holder of the certificate has, since being admitted as a legal practitioner, committed an act of bankruptcy or has been found guilty of an indictable offence or a tax offence and the Council considers that the act of bankruptcy or the offence was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold a practising certificate.

Proposed section 38FD enables the Bar Council or the Law Society Council to refuse to issue, or to cancel or suspend, a practising certificate if the applicant for or the holder of the certificate has failed to notify a matter (being a failure declared by the regulations to be professional misconduct) and the Council considers the failure occurred without reasonable cause.

Proposed section 38FE enables the Bar Council or the Law Society Council to refuse to issue, or to cancel or suspend, a practising certificate if the applicant for or the holder of the certificate has failed to show cause as required by proposed section 38FB or has contravened proposed section 38FI.

Proposed section 38FF allows the Bar Council or the Law Society Council, when refusing to issue a practising certificate to a person or when cancelling a person's practising certificate under the proposed Division, to stipulate a period (being not more than 5 years) during which the legal practitioner cannot apply for a practising certificate.

Proposed section 38FG enables the Legal Services Commissioner to take over the determination of a matter at any time under proposed section 38FC from the Bar Council or the Law Society Council. The Legal Services Commissioner will have the same powers as the Councils to cancel or suspend practising certificates under proposed section 38FD (and associated powers) and may give a direction to a Council to refuse to issue a practising certificate to a person. If the Bar Council or the Law Society Council fails to make a determination within a specified period, the Legal Services Commissioner must take over the matter.

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Proposed section 38FH provides that a practising certificate held by a legal practitioner to whom proposed section 38FC applies is automatically suspended at the expiration of the relevant period if a determination under proposed section 38FC has not been made by the Bar Council, the Law Society Council or the Legal Services Commissioner within that period. The “relevant period” is defined by proposed section 38FA. A legal practitioner affected by an automatic suspension can apply to the Supreme Court to have the suspension removed. An automatic suspension under proposed section 38FH continues in force until a determination is made in relation to the matter under proposed section 38FC by the relevant Council or the Legal Services Commissioner or until the Supreme Court removes the suspension, whichever occurs first.

Proposed section 38FI gives certain powers to the Bar Council, the Law Society Council and the Legal Services Commissioner to facilitate the investigation of matters under the proposed Division.

Proposed section 38FJ provides that nothing prevents a complaint from being made under Part 10 of the *Legal Profession Act 1987* about a matter to which the proposed Division relates.

**Schedule 1 [5], [13] and [22]** contain consequential amendments.

**Schedule 1 [14]** enables regulations to be made declaring a contravention of specified provisions of the *Legal Profession Act 1987* or the regulations to be professional misconduct.

**Schedule 1 [15]** makes it clear that conduct of a legal practitioner involving the commission of acts of bankruptcy, or indictable offences or tax offences is professional misconduct if the conduct would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners.

**Schedule 1 [17] and [18]** require an appeal from a decision or order of the Administrative Decisions Tribunal in relation to proceedings under the *Legal Profession Act 1987* to be made directly to the Supreme Court rather than to an Appeal Panel of that Tribunal if the Tribunal was constituted so as to include a Judge of the District Court when it made the order or decision.

### **Functions of Legal Services Commissioner and Legal Profession Advisory Council**

**Schedule 1 [9]** requires the Bar Council and the Law Society Council to notify the Legal Services Commissioner and the Legal Profession Advisory Council of the proposed making of a rule and to wait at least 28 days before making the rule to

enable the Commissioner and the Advisory Council to make representations. The Council involved has to take into account any such representations. The 28-day period can be waived in urgent circumstances.

**Schedule 1 [10]** enables the Legal Services Commissioner to require the Bar Council or the Law Society Council to review any rule made by it and to report on the review and enables the Legal Services Commissioner to make submissions to the Attorney General on any rule that has been so reviewed and to recommend that the Attorney General declare it inoperative.

**Schedule 1 [11]** enables the Attorney General to declare a barristers or solicitors rule or a joint rule inoperative if the Legal Services Commissioner has reported that the rule is not in the public interest. The existing powers of the Attorney General in relation to declaring such rules inoperative are preserved.

**Schedule 1 [12]** re-enacts provisions relating to the Legal Services Commissioner in a separate Part (proposed Part 5A) of the *Legal Profession Act 1987* so as to include certain new functions not associated with complaints against legal practitioners under Part 10 of that Act. The new functions are as follows:

- (a) to monitor the refusal to issue, cancellation and suspension of practising certificates under Part 3 of the *Legal Profession Act 1987* on grounds relating to fitness to practise (for example, in connection with acts of bankruptcy, the commission of indictable offences or tax offences or failures to give required notifications),
- (b) functions conferred on the Commissioner under proposed Division 1AA of Part 3,
- (c) to monitor generally the exercise of regulatory functions by the Bar Council and the Law Society Council (other than the imposition of conditions on practising certificates),
- (d) to review barristers rules, solicitors rules and joint rules.

Proposed section 59E enables the Commissioner to require the Bar Council or the Law Society Council to provide information relating to possible professional misconduct or unsatisfactory professional conduct, notifications required to be made by legal practitioners or the Bar Council's or the Law Society Council's intention to refuse to issue, or to cancel or suspend, a practising certificate under Part 3 of the *Legal Profession Act 1987*. The Bar Council or the Law Society Council is to take into account any representations made by the Legal Services Commissioner on any of those matters. The proposed section also requires those Councils to provide the Commissioner with copies of notifications concerning acts of bankruptcy or the commission of indictable offences or tax offences.

Proposed section 59F enables the Legal Services Commissioner, in consultation with the Bar Council and the Law Society Council, to develop protocols relating to the exercise of the Commissioner's new monitoring functions.

Proposed section 59G requires the Legal Services Commissioner to include, among other things, in the Commissioner's annual report information about the review of a barristers or solicitors rule or a joint rule requested by the Commissioner and enables the Commissioner to include in that annual report a report on the exercise of the new monitoring functions of the Commissioner and functions of the Commissioner under proposed Division 1AA of Part 3.

**Schedule 1 [1], [16] and [19]–[21] and [23]** contain consequential amendments.

#### **Delegations by Bar Council and Law Society Council**

**Schedule 1 [7]** removes a requirement that the Bar Council, when delegating functions to a committee, must choose a committee whose presiding member is a member of the Council and enables the Bar Council to delegate functions to any of its committees or officers. **Schedule 1 [8]** removes a similar requirement in relation to the Law Society Council.

#### **Savings and transitional provisions**

**Schedule 1 [24] and [25]** contain savings and transitional provisions.

### **Schedule 2 Consequential amendment of other Acts**

**Schedule 2.1** amends the *Administrative Decisions Tribunal Act 1997* to require the Administrative Decisions Tribunal to be constituted in one of the following ways, as determined to be appropriate in the particular case by the President of the Tribunal, when dealing with a complaint under Part 10 of the *Legal Profession Act 1987*:

- (a) 1 judicial member who is a judge of the District Court, 1 barrister or solicitor member and 1 lay member,
- (b) 1 judicial member who is a judge of the District Court, 1 barrister or solicitor member and 2 lay members,
- (c) 2 barrister or solicitor members and 1 lay member,
- (d) 2 barrister or solicitor members and 2 lay members.

Barrister members are to be chosen if the complaint is against a barrister and solicitor members are to be chosen if the complaint is against a solicitor.

**Schedule 2.2** amends the *Defamation Act 1974* to extend the defence of absolute privilege afforded to certain publications under the *Legal Profession Act 1987* to:

- (a) the publication by the Bar Council or the Law Society Council, any members, committees or subcommittees of those Councils, the Bar Association, the Law Society or the Legal Services Commissioner, or any members of staff of any of those persons or bodies to such a person or body of information in accordance with the exercise of functions under Part 3 or Part 5A of the *Legal Profession Act 1987*, and
- (b) the publication by a person or body referred to in paragraph (a) of a report of the decision or determination of the Bar Council or the Law Society Council in respect of the refusal to issue, suspension or cancellation of a practising certificate.