

Act No. 109

## LEGAL PROFESSION BILL 1987\*

NEW SOUTH WALES



### EXPLANATORY NOTE

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The following Bills are cognate with this Bill:

Legal Practitioners (Amendment) Bill 1987;

Miscellaneous Acts (Legal Profession) Amendment Bill 1987.

The object of this Bill is to repeal the Legal Practitioners Act 1898 and replace it with a modern statute which, while again dealing with a large number of matters the subject of the Act to be repealed, provides for—

- (a) the reorganisation of the Barristers Admission Board and the Solicitors Admission Board;
- (b) a procedure to obtain an early decision as to whether particular conduct disclosed by a student-at-law, or an applicant for registration as a student-at-law, would have an adverse effect on an assessment of his or her good fame or character;
- (c) the introduction of annual practising certificates for barristers;
- (d) continuation of the system of mandatory further legal education for solicitors to be introduced by the cognate Legal Practitioners (Amendment) Bill 1987;
- (e) continuation of the Solicitors' Mutual Indemnity Fund to be established by that cognate Bill;
- (f) lay representation, at the direction of the Attorney General, on a committee of the Bar Council or the Law Society Council;
- (g) the constitution of a Legal Profession Advisory Council;

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

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- (h) revision of the obligations of a solicitor in relation to money received by, or brought under the control of, the solicitor on behalf of another person; and
- (i) a new system of disciplinary proceedings against legal practitioners.

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PART 1—PRELIMINARY

This Part contains general provisions relating to the whole of the proposed Act, being those providing for—

- (a) the short title of the proposed Act (clause 1);
- (b) the commencement of the proposed Act on a day to be appointed by the Governor-in-Council (clause 2); and
- (c) the definition of certain expressions for the purposes of the whole Act including a definition of “legal practitioner” as meaning the holder of a current practising certificate issued by the Bar Council or the Law Society Council (clause 3).

PART 2—BARRISTERS AND SOLICITORS

DIVISION 1—*Barristers*

This Division deals with the admission of persons as barristers and contains provisions—

- (a) for the admission of barristers by the Supreme Court (clause 4);
- (b) constituting the Barristers Admission Board (clauses 5 and 6 and Schedule 2);
- (c) enabling that Board to make rules for the registration of students-at-law and rules specifying the qualifications for admission as a barrister (clause 7);
- (d) authorising delegation of the examination of candidates for admission as a barrister (clause 8);
- (e) requiring the Supreme Court to be satisfied as to the good fame and character of a candidate for admission as a barrister (clause 9); and
- (f) enabling a solicitor of 5 years' standing to be admitted as a barrister (clause 10).

DIVISION 2—*Solicitors*

This Division, in clauses 11–17, contains provisions in relation to solicitors the same as those contained in clauses 4–10 in relation to barristers and—

- (a) confers a right of audience in court on a solicitor (clause 18); and
- (b) specifies certain rights of the Crown Solicitor (clause 19).

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DIVISION 3—*Consideration of character before admission*

This Division—

- (a) enables a student-at-law or an applicant for registration as a student-at-law to apply to the relevant Admission Board for a declaration that a particular matter will not have an adverse effect on an assessment of good fame and character (clause 20);
- (b) if such a declaration is refused—enables a further application to be made together with an application for admission as a barrister or solicitor (clause 21);
- (c) makes binding a favourable declaration unless the applicant has failed to make full disclosure (clause 22); and
- (d) provides for an appeal to the Supreme Court against a refusal to make a favourable declaration (clause 23).

DIVISION 4—*Queen's Counsel*

This Division makes provision for the appointment of Queen's Counsel (clause 24).

PART 3—PRACTISING CERTIFICATES

DIVISION 1—*General*

Since 1935, a solicitor desiring to practise as such has been required to hold a practising certificate. This Division continues the system and provides for its extension to a barrister desiring to practise as such.

The Division—

- (a) on and from a day to be decided, prohibits a barrister from practising as such without holding a practising certificate issued by the Bar Council (clause 25);
- (b) prohibits a solicitor from practising as such without holding a practising certificate issued by the Law Society Council (clause 26);
- (c) provides for the making of an application by a barrister for a practising certificate (clause 27);
- (d) provides for the making of an application by a solicitor for a practising certificate (clause 28);
- (e) requires an application for a practising certificate to be accompanied by the appropriate fee (clause 29);
- (f) requires a solicitor's application for a practising certificate to be accompanied by any contributions and levies the solicitor is required to pay (clause 30);
- (g) confers on a holder of the appropriate practising certificate a right to become, without further payment, a member of the Bar Association or the Law Society (clause 31);
- (h) specifies various forms in which practising certificates are to be issued (clauses 32 and 33);

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- (i) provides 12 months' duration for a practising certificate or, if issued after 1 July, for the remainder of the period of 12 months commencing on 1 July (clause 34);
- (j) enables the Bar Council or the Law Society to refuse to issue, or to cancel or suspend, a practising certificate on various grounds (clause 35);
- (k) enables the Law Society to refuse to issue or to cancel or suspend, a practising certificate on grounds of infirmity, injury or illness or in the public interest (clause 36);
- (l) provides for an appeal to the Supreme Court against a refusal to issue, or a suspension or cancellation, of a practising certificate (clause 37); and
- (m) requires the Bar Council and the Law Society Council each to keep a register of the legal practitioners to whom it has issued practising certificates (clause 38).

DIVISION 2—*Solicitors' Mutual Indemnity Fund*

This Division, in clauses 39–48, continues the substance of the provisions of the Legal Practitioners Act 1898 that relate to the Solicitors' Mutual Indemnity Fund and are proposed to be inserted by the Legal Practitioners (Amendment) Bill 1987 that is cognate with this Bill.

PART 4—BAR ASSOCIATION AND LAW SOCIETY

DIVISION 1—*Bar Association*

This Division—

- (a) provides for reports by the Bar Council to the Attorney General in relation to committees of the Bar Council (clause 49);
- (b) enables the Attorney General, after consultation with the Bar Council, to give directions for lay representation on a committee of the Bar Council (clause 50); and
- (c) authorises the Bar Council to act in relation to alleged professional misconduct of a barrister and to appear before, and be heard by, the Supreme Court in relation to matters affecting barristers and the admission of barristers (clause 51).

DIVISION 2—*Law Society*

This Division, in clauses 52–54, contains provisions in relation to solicitors the same as those contained in clauses 49–51 in relation to barristers and—

- (a) contains provisions relating to an investigation of the affairs of a solicitor by an investigator appointed by the President or 2 members of the Law Society Council (clause 55); and
- (b) imposes secrecy obligations on an investigator (clause 56).

DIVISION 3—*Annual reports*

This Division requires the Bar Council and the Law Society Council each to report annually to the Attorney General on its activities under this Act and provides for the report to be laid before both Houses of Parliament (clause 57).

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## PART 5—LEGAL PROFESSION ADVISORY COUNCIL

Under this Part—

- (a) clause 58 and Schedule 3 constitute the Legal Profession Advisory Council consisting of 2 practising barristers, 3 practising solicitors and 4 lay members; and
- (b) clause 59 provides for the Advisory Council to keep the structure and functions of the legal profession under review and to make reports and recommendations to the Attorney General.

## PART 6—TRUST ACCOUNTS

This Part contains provisions governing the manner in which a solicitor must deal with money that is received or controlled by the solicitor (whether or not through a nominee company or a close relative) on behalf of another person. By those provisions—

- (a) extended explanations are given for references in the Part to practising as a solicitor, an associate of a solicitor and the receipt of money by a solicitor (clause 60);
- (b) a solicitor is required, in general, to deal with another person's money in accordance with the instructions of that person or by paying it to the credit of a trust account (clause 61);
- (c) a solicitor is required to keep proper accounts relating to any such money (clause 62);
- (d) the regulations may provide for the auditing of a solicitor's records if mortgages arranged by the solicitor during a period of 12 months secured not less than \$500,000 or exceeded 50 in number (clause 63);
- (e) the existing scheme of depositing a proportion of a solicitor's trust funds with the Law Society is continued (clause 64);
- (f) a solicitor is enabled to obtain, from time to time as required, money deposited with the Law Society (clause 65);
- (g) the Law Society is required to keep accounts of the deposited money and have them audited (clause 66);
- (h) the Law Society is required to pay to a "Statutory Interest Account" interest on investment of the deposited money and to disburse it as specified (clause 67);
- (i) a solicitor is required to pay to the Treasurer any unclaimed money in a trust account (clause 68); and
- (j) a bank is excused from certain liabilities that it might otherwise incur, or have imputed to it, in relation to an account kept at the bank by a solicitor (clause 69).

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PART 7—SOLICITORS' FIDELITY FUND

This Part, in clauses 70–90, continues the scheme at present in force for the maintenance of a fund from which compensation is payable for a pecuniary loss suffered as a result of a failure to account for money received by a solicitor. The scheme has, however, been extended to cover a failure to account for money entrusted to others on the advice of the solicitor.

PART 8—RECEIVERS

This Part, in clauses 91–114, continues the substance of the provisions of the Legal Practitioners Act 1898 that enable the Supreme Court to appoint a receiver of property controlled by the solicitor on behalf of another person.

The aim of appointing a receiver is to enable property to be accounted for if it is suspected that a solicitor will not do so or if a person is unable to obtain payment of money, or delivery of property, by a solicitor because the solicitor—

- (a) is mentally or physically infirm;
- (b) is subject to, or has applied to become subject to, the laws relating to bankruptcy, insolvency and arrangements with creditors;
- (c) is in prison;
- (d) has died;
- (e) has abandoned his or her practice;
- (f) has been struck off the roll of solicitors otherwise than at his or her own request;  
or
- (g) has ceased to hold a practising certificate.

PART 9—UNQUALIFIED PRACTITIONERS

This Part, in clauses 115–122, continues the substance of the provisions of the Legal Practitioners Act 1898 that control the actions and employment of unqualified and disqualified persons in relation to legal matters. It includes amendments consequential upon the proposed introduction of practising certificates for barristers.

PART 10—PROFESSIONAL MISCONDUCT

DIVISION 1—*Preliminary*

This Division contains provisions—

- (a) defining certain expressions for the purposes of the proposed Part, in particular, the expressions “Board”, “Panel” and “professional misconduct” (clause 123);
- (b) applying the proposed Part to certain persons against whom complaints have been made but who are no longer legal practitioners (clause 124); and
- (c) preserving the existing jurisdiction of the Supreme Court with respect to the discipline of barristers and solicitors (clause 125).

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DIVISION 2—*Constitution of the Professional Conduct Review Panel, the Professional Standards Board and the Disciplinary Tribunal*

This Division contains provisions—

- (a) constituting the Professional Conduct Review Panel (clause 126 and Schedule 4);
- (b) constituting the Professional Standards Board (clause 127 and Schedule 5);
- (c) constituting the Disciplinary Tribunal (clause 128 and Schedule 6); and
- (d) enabling the Attorney General to make appointments in cases where nominations for appointments have not been duly made (clause 129).

DIVISION 3—*Complaints against legal practitioners*

This Division contains provisions—

- (a) providing for the making of complaints to the Councils against legal practitioners in respect of alleged professional misconduct (clause 130);
- (b) providing for the furnishing of further particulars and the verification of complaints and further particulars by statutory declaration (clause 131);
- (c) enabling a Council to dismiss a complaint without further investigation if further particulars of the complaint are not furnished, or the complaint or the further particulars are not verified, as required by the Council, or if the complaint is frivolous or vexatious (clause 132);
- (d) providing for the investigation of complaints by the Councils (clause 133);
- (e) requiring a Council to decide whether a complaint should be dismissed or referred to the Board or to the Tribunal (clause 134);
- (f) enabling a Council to make complaints directly to the Board and to the Tribunal (clause 135); and
- (g) enabling a Council, by resolution, to delegate to any of its committees the exercise of any or all of its functions under the proposed Division (clause 136).

DIVISION 4—*Review of Councils' decisions*

This Division contains provisions—

- (a) providing for the making of applications to the Panel for review of a Council's decision to dismiss a complaint (clause 137);
- (b) specifying the composition of the Panel in respect of reviews conducted by it (clause 138);
- (c) requiring the Panel to review decisions the subject of applications made to it (clause 139);
- (d) requiring the Panel to decide whether to uphold a Council's decision or to recommend that a matter be referred to the Board or to the Tribunal (clause 140); and
- (e) requiring the Attorney General to act on a recommendation referred to in clause 140 (clause 141).

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DIVISION 5—*Minor professional misconduct*

This Division contains provisions—

- (a) specifying the composition of the Board in respect of hearings conducted by it (clause 142);
- (b) requiring the Board to hear complaints referred to it (clause 143);
- (c) specifying who shall be considered to be parties to a hearing conducted by the Board (clause 144);
- (d) requiring the Board's hearings to be conducted in the absence of the public (clause 145);
- (e) enabling the Board to summon witnesses to give evidence and to produce documents (clause 146);
- (f) enabling the Board to require persons to produce documents (clause 147);
- (g) enabling the Board to give directions preventing or restricting the publication of evidence given at a hearing or of matter contained in documents produced at a hearing (clause 148); and
- (h) enabling the Board to make certain orders in relation to legal practitioners whom it has found guilty of professional misconduct, including orders of a compensatory nature (clause 149).

DIVISION 6—*Review of the Board's decisions*

This Division contains provisions—

- (a) providing for the making of applications to the Tribunal for reviews of the Board's determinations with respect to complaints (clause 150);
- (b) specifying the composition of the Tribunal in respect of reviews conducted by it (clause 151);
- (c) specifying who shall be considered to be parties to a review conducted by the Tribunal (clause 152);
- (d) requiring the Tribunal to review determinations the subject of applications made to it (clause 153);
- (e) requiring the Tribunal to decide whether to uphold the Board's determination with respect to a complaint or to make some other order with respect to the complaint (clause 154); and
- (f) providing the course that the Tribunal must follow if it is of the opinion that a complaint involves a question of serious professional misconduct (clause 155).

DIVISION 7—*Serious professional misconduct*

This Division contains provisions—

- (a) specifying the composition of the Tribunal in respect of hearings conducted by it (clause 156);
- (b) requiring the Tribunal to hear complaints referred to it (clause 157);



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- (c) specifying who shall be considered to be parties to a hearing conducted by the Tribunal (clause 158);
- (d) requiring the Tribunal's hearings to be conducted in the presence of the public unless the interests of justice require a hearing to be conducted in the absence of the public (clause 159);
- (e) enabling the Tribunal to summon witnesses to give evidence and to produce documents (clause 160);
- (f) enabling the Tribunal to require persons to produce documents (clause 161);
- (g) enabling the Tribunal to give directions preventing or restricting the publication of evidence given at a hearing or of matter contained in documents produced at a hearing (clause 162);
- (h) enabling the Tribunal to make certain orders in relation to legal practitioners whom it has found guilty of professional misconduct, including orders of a compensatory nature (clause 163); and
- (i) providing for the making of appeals to the Supreme Court against the Tribunal's determination of a complaint (clause 164).

DIVISION 8—*Miscellaneous*

This Division contains provisions—

- (a) providing that an order of the Board or the Tribunal shall be enforceable in the same way as a judgment or order of the Supreme Court (clause 165);
- (b) providing for the authentication of the Board's and the Tribunal's documents (clause 166);
- (c) requiring payment to the Law Society of fines imposed as referred to in clauses 149 and 163 (clause 167);
- (d) providing for the funding of the Panel, the Board and the Tribunal (clause 168);
- (e) providing for the making of rules of practice and procedure for the Board (clause 169);
- (f) providing for the making of rules of practice and procedure for the Tribunal (clause 170);
- (g) requiring the submission to the Attorney General of reports by the Councils, the Panel and the Board (clause 171); and
- (h) protecting the members of the Councils, the Panel, the Board and the Tribunal from personal liability in relation to matters and things done for the purpose of executing the proposed Part (clause 172).

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PART 11—SOLICITORS' REMUNERATION

DIVISION 1—*Preliminary*

This Division consists of a provision that defines certain expressions for the purposes of the proposed Part, in particular, "bill of costs", "Board", "client", "contentious business", "non-contentious business", "non-contentious business agreement" and "solicitor" (clause 173).

DIVISION 2—*The Legal Fees and Costs Board*

This Division contains provisions—

- (a) providing for the constitution of the Legal Fees and Costs Board (clause 174);
- (b) providing for the membership and procedure of the Board (clause 175 and Schedule 7);
- (c) enabling the Board to make use of the staff or facilities of a government department, administrative office or public authority (clause 176);
- (d) enabling the Board to investigate and make reports with respect to bills of costs, the taxation or other ascertainment of costs and any other aspect of the remuneration of solicitors (clause 177); and
- (e) providing that formal proof is not required of certain matters concerning the constitution and procedure of the Board (clause 178).

DIVISION 3—*Determination of solicitors' remuneration*

This Division contains provisions—

- (a) enabling the Board to make determinations regulating the remuneration of solicitors for non-contentious business (clause 179);
- (b) enabling the Board to make determinations fixing the maximum amount of costs payable in respect of contentious business transacted in connection with civil proceedings before the Supreme Court, the District Court or a Local Court (clause 180);
- (c) specifying the principles that may be employed by the Board in making a determination (clause 181);
- (d) enabling a determination to authorise solicitors to charge interest on the unpaid costs of non-contentious business and to fix the maximum rate at which any such interest may be charged (clause 182);
- (e) requiring the Board to conduct an inquiry before making a determination (clause 183);
- (f) requiring the Board to have regard to the quantum and principles determined in State Wage Cases in making a determination (clause 184);
- (g) requiring the Board to make a report to the Attorney General of its determinations and requiring such a report to be published in the Gazette (clause 185);
- (h) providing for the commencement of determinations (clause 186);

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- (i) requiring the reports made in connection with determinations to be tabled in each House of Parliament (clause 187);
- (j) enabling either House of Parliament to disallow a determination at any time before the expiration of 15 sitting days after the tabling of the relevant report (clause 188);
- (k) requiring judicial notice to be taken of determinations (clause 189);
- (l) providing for the presumption, in legal proceedings, of procedural regularity in the making of determinations (clause 190);
- (m) enabling determinations to be amended and revoked (clause 191);
- (n) requiring the Board to review each determination every 12 months (clause 192);
- (o) providing that the taxation of bills of costs under the proposed Division 5, together with any other aspect of the remuneration of solicitors, in respect of non-contentious business shall be regulated by determinations (clause 193); and
- (p) providing that the taxation of bills of costs under the proposed Division 5, together with any other taxation or other ascertainment of costs, in respect of contentious business transacted in connection with civil proceedings before the Supreme Court, the District Court or a Local Court shall be regulated by determinations (clause 194).

*DIVISION 4—Non-contentious business agreements*

This Division contains provisions—

- (a) enabling solicitors and their clients to make non-contentious business agreements (clause 195);
- (b) specifying the formal requirements of a non-contentious business agreement (clause 196); and
- (c) providing for the enforcement and setting aside of a non-contentious business agreement (clause 197).

*DIVISION 5—Bills of costs*

This Division contains provisions—

- (a) preventing solicitors from commencing or maintaining proceedings against a person for the recovery of costs until one month has passed since the person was given a bill of costs (clause 198);
- (b) providing for the making of applications for the taxation of bills of costs (clause 199);
- (c) enabling the Supreme Court to make orders referring bills of costs for taxation (clause 200);
- (d) ensuring that an application for taxation of a bill of costs operates to prevent proceedings for the recovery of those costs from being commenced or maintained until after the bill has been taxed (clause 201);

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- (e) enabling the Supreme Court to order that a person be given a copy of a bill of costs if the person has applied, or is entitled to apply, for taxation of the bill (clause 202);
- (f) providing that bills of costs shall be taxed in accordance with the rules of the Supreme Court (clause 203);
- (g) enabling the Supreme Court to make orders with respect to the disbursement of money brought into court in connection with the taxation of a bill of costs (clause 204);
- (h) restricting the circumstances under which a bill of costs can be retaxed (clause 205); and
- (i) providing for the effect of a taxing officer's certificate as to the amount to be paid in respect of a bill of costs and for the recovery of the amount so certified (clause 206).

DIVISION 6—*Miscellaneous*

This Division contains provisions—

- (a) enabling a solicitor to take security from a client for business yet to be transacted by the solicitor (clause 207);
- (b) enabling the Supreme Court to order a solicitor to deliver up a client's documents that are in the solicitor's possession (clause 208); and
- (c) enabling a solicitor who is or becomes a mortgagee to recover mortgagee's costs from the mortgagor (clause 209).

## PART 12—MISCELLANEOUS

Under this Part—

- (a) the imposition of a penalty for a contravention of the proposed Act does not affect the power of the Supreme Court to punish a contempt of the Court (clause 210);
- (b) bodies and persons exercising functions for the purposes of the proposed Act are exonerated from liability (clause 211);
- (c) offences are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone (clause 212);
- (d) proof of certain matters is dispensed with unless contrary evidence is given (clause 213);
- (e) effect is given to Schedule 1 which lists the repeals effected by the proposed Act (clause 214);
- (f) effect is given to the savings and transitional provisions specified in Schedule 8 (clause 215); and
- (g) the making of regulations is authorised (clause 216).

Schedule 1 specifies the Acts to be repealed by the proposed Act.

Schedule 2 provides for the procedure at meetings of the Admission Boards.

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Schedule 3 contains the formal provisions relating to the Advisory Council and its meetings.

Schedules 4, 5 and 6 contain the formal provisions relating to the Professional Conduct Review Panel, the Professional Standards Board and the Disciplinary Tribunal.

Schedule 7 contains the formal provisions relating to the members of the Legal Fees and Costs Board and the procedure at its meetings.

Schedule 8 contains savings and transitional provisions.

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