

Act 1994 No. 81

PROFESSIONAL STANDARDS BILL 1994

NEW SOUTH WALES



EXPLANATORY NOTE

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

The object of this Bill is to provide a general means whereby the civil liability of professionals and others may be limited and, at the same time, to put in place provisions which are designed to facilitate improvement in the standards of services provided by professionals and others in order to protect the users of those services.

The Bill enables the members of an occupational association to be covered by a scheme to limit their civil liability. A scheme may limit liability in either of two main ways (or by a combination of them). The first way limits liability to a specified amount if insurance against civil liability is held to that amount or if business assets are retained to that amount. The second way limits liability to a multiple of the cost of providing the service from which the liability has accrued.

The Bill constitutes the Professional Standards Council. One of its functions is to approve schemes for limiting liability which it has prepared or schemes submitted to it for approval by a professional association. Another function of the Council is to assist professionals and others to improve their occupational standards.

A scheme approved by the Council is to be submitted to the Minister and it cannot commence until the Minister authorises its publication in the Gazette. Part 6 of the Interpretation Act 1987 concerning the tabling and disallowance of statutory rules is applied (with appropriate modifications) to schemes to ensure that they are subject to Parliamentary scrutiny. Provision is also made for persons affected by schemes to challenge their validity in the Supreme Court.

To balance the limitation of liability with appropriate measures for the protection of consumers, the Bill contains provisions enabling the introduction of compulsory insurance, the monitoring of claims in order to establish a claims history, the implementation of risk management strategies, annual reporting and measures for dealing with complaints and disciplining persons against whom complaints are substantiated.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a proclaimed day or days.

Clause 3 specifies the objects of the proposed Act.

Clause 4 contains definitions for the purposes of the proposed Act. “Occupational association” is defined so as to include a body such as a professional society or association.

Clause 5 provides that the proposed Act does not limit liability arising from:

- the death of or personal injury to a person
- any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim
- a breach of trust
- fraud or dishonesty.

Clause 6 provides that the proposed Act binds the Crown.

PART 2—LIMITATION OF LIABILITY**Division 1—Making, amendment and revocation of schemes**

Clause 7 provides that the Council may approve a scheme for limiting the occupational liability of members of an occupational association prepared either by the Council or by a professional association.

Clause 8 requires the Council to publish a public notice in a daily newspaper concerning a proposed scheme before it can approve the scheme.

Clause 9 enables any person to make a comment or submission about a proposed scheme following publication of the notice.

Clause 10 lists the matters the Council must take into account before approving a scheme, including all comments and submissions made by the public.

Clause 11 enables the Council to conduct public hearings concerning a scheme.

Clause 12 provides for the Council to submit schemes it has approved to the Minister.

Clause 13 enables the Minister to authorise the publication in the Gazette of a scheme submitted by the Council. The provisions of Part 6 of the Interpretation Act 1987 concerning the tabling and disallowance of statutory rules will apply to a gazetted scheme.

Clause 14 provides that a scheme will commence 2 months after it is gazetted unless it is challenged in the Supreme Court.

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Clause 15 enables a person affected or reasonably likely to be affected by a scheme to challenge its validity in the Supreme Court on the ground that it does not comply with the proposed Act.

Clause 16 makes the provisions of this Division applicable to the amendment and revocation of schemes as well as to their creation.

Division 2—Contents of schemes

Clause 17 provides that a scheme can apply to all persons within an occupational association or to a specified class or classes within that association.

Clause 18 specifies the circumstances in which the application of a scheme extends to the partners of a person to whom the scheme applies.

Clause 19 specifies the circumstances in which the application of a scheme extends to the employees of a person to whom the scheme applies.

Clause 20 extends the application of a scheme to persons who are declared by regulation to be associated with persons to whom a scheme applies.

Clause 21 provides that a scheme may limit the civil liability of a person to whom it applies to the maximum amount specified in the scheme for that person if he or she has insurance covering that amount.

Clause 22 provides that a scheme may limit the civil liability of a person to whom it applies to the maximum amount specified in the scheme for that person if he or she has business assets, or a combination of business assets and insurance, covering that amount. “Business assets” is defined in clause 4 to mean property of the person that is used in the performance of the person’s occupation and that is able to be taken in proceedings to enforce a judgment of a court.

Clause 23 provides that a scheme may limit the civil liability of a person to whom it applies if that person has insurance, or a combination of insurance and business assets, covering the amount which is the multiple specified in the scheme of the reasonable charge for the services the person provided or failed to provide and from which the liability arises. A “reasonable charge” is defined to mean:

- the ordinary scale charge; or
- if there is no scale, the amount that a competent person of the same qualifications and experience would be likely to charge in the same circumstances.

The clause will not operate so as to limit an amount of damages which is less than an amount specified for the purpose in the scheme.

Clause 24 enables different maximum amounts of liability to be specified in a scheme for different classes of persons within an occupational association or for different kinds of work.

Clause 25 enables the inclusion in a scheme under clause 23 of provisions of the kind contemplated in clause 21 or 22 provided that civil liability is calculated in accordance with clause 23 and does not exceed the maximum amounts specified in the scheme in accordance with clause 21 or 22.

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Clause 26 provides that a scheme cannot affect the first \$½ million of a person's liability in respect of a claim or such greater amount as may be determined by the Council for the particular scheme.

Clause 27 requires an insurance policy to be of a kind which complies with standards determined by the occupational association concerned.

Division 3—Effect of schemes

Clause 28 provides that a scheme limits the civil liability of a person to whom it applies from the date of its commencement but only for the period for which it remains in force. A person to whom a scheme applies cannot choose not to be subject to the scheme.

Clause 29 provides that the limitation of liability is a limitation of the amount of damages which may be awarded for a single claim and is not a limitation of the amount of damages which may be awarded for all claims arising out of a single event. However, claims by persons who have a joint interest and claims by the same person arising out of a single event against associated persons (such as partners, co-employees and persons in an employer/employee relationship) are to be treated as a single claim.

Clause 30 provides that defendants to an action who are not persons to whom a scheme applies do not have their liability limited by the scheme.

Clause 31 provides that a scheme in force under the proposed Act will apply only to liability that arises after the scheme's commencement.

Clause 32 provides that the application of a scheme is to cease after a period determined by the Council of not more than 5 years in most cases so that schemes are kept under regular review.

Clause 33 requires a person whose civil liability is limited under Part 2 of the proposed Act to notify that fact on all documents given by the person to a client or prospective client that promote or advertise the person or the person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation, business cards and similar documents. Contravention of the clause is made a summary offence punishable by a maximum penalty of 50 penalty units. Under section 56 of the Interpretation Act 1987, one penalty unit is currently equivalent to \$100.

PART 3—COMPULSORY INSURANCE

Clause 34 enables an occupational association to compel its members to hold insurance against occupational liability.

Clause 35 enables an occupational association to establish committees to monitor and analyse claims against its members.

PART 4—RISK MANAGEMENT

Clause 36 requires an occupational association that wishes its members to be brought under the proposed Act to develop risk management strategies.

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Clause 37 requires an occupational association to report annually (and more frequently if requested by the Council) as to the implementation and monitoring of its risk management strategies.

PART 5—COMPLAINTS AND DISCIPLINARY MATTERS

Clause 38 enables the adoption by an occupational association of a code set out in Schedule 1 to the proposed Act. The code contains provisions concerning the making and resolution of complaints against members of occupational associations and the taking of disciplinary measures against members.

PART 6—THE PROFESSIONAL STANDARDS COUNCIL

Division 1—Constitution of the Council

Clause 39 constitutes a body corporate to be known as the Professional Standards Council.

Division 2—Membership and procedure of the Council

Clause 40 enables the Minister to appoint the Council's members. Membership is to comprise 11 persons, having appropriate experience, skills and qualifications.

Clause 41 is a formal provision which gives effect to Schedule 2. That Schedule contains detailed provisions relating to the appointment, term of office, tenure of office and remuneration of members.

Clause 42 is a formal provision which gives effect to Schedule 3. That Schedule contains detailed provisions relating to the procedures and determinations of the Council.

Division 3—Functions of the Council

Clause 43 specifies the functions of the Council. The Council is:

- to advise the Minister concerning the publication in the Gazette of a scheme it has submitted and the operation of the proposed Act
- to assist, in a variety of ways, in the improvement of occupational standards
- to collect information concerning, and to monitor the occupational standards of, persons to whom the proposed Act applies.

Division 4—Miscellaneous

Clause 44 enables the Council to require an occupational association to supply it with information it needs in order to exercise its functions.

Clause 45 enables the Council to establish committees to assist it in the exercise of its functions.

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Clause 46 enables the Council to make use of the services of the staff of government departments or public authorities.

Clause 47 requires the Council to prepare an annual report and provides for the tabling of the report in Parliament.

PART 7—MISCELLANEOUS

Clause 48 will characterise the provisions of the proposed Act as part of the substantive law of the State, so that when the law of the State is applied in another jurisdiction as the law governing the proceedings, the limitation on liability effected by the proposed Act will also be applied.

Clause 49 provides that Parts 3, 4 and 5 of the proposed Act are to take effect subject to the provisions of other Acts but that, otherwise, the proposed Act is to have effect despite any other law to the contrary. The clause also makes clear that the proposed Act is not intended to affect the operation of the Corporations Law. This has the consequence that liability for which provision is made under the Corporations Law will not be limited by the proposed Act.

Clause 50 prevents persons to whom a scheme applies from contracting out of the provisions of the proposed Act.

Clause 51 provides that the proposed Act does not limit the insurance arrangements a person may make apart from those made for the purposes of the proposed Act.

Clause 52 provides for the summary prosecution before a Local Court of offences against the proposed Act or the regulations.

Clause 53 enables the Governor-in-Council to make regulations for the purposes of the proposed Act.

Clause 54 enables rules of court to be made concerning matters arising under Part 2 of the proposed Act.

Clause 55 requires the proposed Act to be reviewed within 5 years.

SCHEDULES

Schedule 1 contains the Occupational Associations (Complaints and Discipline) Code.

Schedule 2 contains provisions relating to the members of the Council.

Schedule 3 contains provisions relating to the procedure of the Council.
