

LEGAL PROFESSION (AMENDMENT) BILL 1989

NEW SOUTH WALES



EXPLANATORY NOTE

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

The objects of this Bill are:

- (a) to amend the Legal Profession Act 1987 so as:
 - (i) to vary the provisions of that Act that relate to barristers' practising certificates;
 - (ii) to provide for the appointment of managers for solicitors' practices, and for the management of solicitors' practices, in certain circumstances;
 - (iii) to vary the composition of the Legal Fees and Costs Board and to empower the Board to make determinations in relation to the amount, by way of barristers' fees, that may be recovered as party-party costs;
 - (iv) to rename the Professional Conduct Review Panel, the Professional Standards Board and the Disciplinary Tribunal as the Legal Profession Conduct Review Panel, the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal, respectively, to vary the composition of those bodies, to provide for the appointment of Registrars of those bodies and to vary the functions that may be exercised by those bodies;
 - (v) to vary the composition of the Barristers Admission Board and the Solicitors Admission Board;
 - (vi) to ensure that a solicitor is not prevented from exercising rights in the nature of a general lien over trust money under his or her control;
 - (vii) to make provision with respect to the expenditure of money from the Statutory Interest Account; and
 - (viii) to make other amendments of a minor, consequential and ancillary nature; and

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- (b) to amend the Compensation Court Act 1984, the District Court Act 1973 and the Supreme Court Act 1970 as a consequence of certain amendments to be made to the Legal Profession Act 1987 in relation to costs.
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Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act (with minor exceptions) on a day or days to be appointed by proclamation. Certain provisions of Schedule 1 (Amendments concerning barristers' practising certificates) and proposed section 3 in its application to those provisions are to be taken to have commenced on 1 July 1988.

Clause 3 is a formal provision that gives effect to the Schedules of amendments to the Legal Profession Act 1987.

Clause 4 is a formal provision that gives effect to the Schedule of amendments to the Compensation Court Act 1984, the District Court Act 1973 and the Supreme Court Act 1970.

SCHEDULE 1 - AMENDMENTS CONCERNING BARRISTERS' PRACTISING CERTIFICATES

The amendments made by this Schedule will result in:

- (a) a restatement and clarification, by the substitution of section 32, of the circumstances in which a barrister is entitled to a practising certificate (Schedule 1 (3)); and
- (b) the Bar Council being empowered:
- (i) to refuse to issue a practising certificate to a barrister who is unable to satisfy the Council that he or she intends to practise as a barrister during the period for which the certificate, if issued, would be in force; and
 - (ii) to cancel or suspend the practising certificate of a barrister who is not, in the Council's opinion, practising as a barrister (Schedule 1 (4)); and
- (c) the substitution, by way of statute law revision, of descriptions of the date on which it became unlawful for a barrister to practise as a barrister without being the holder of a current practising certificate with the actual date, namely, 1 July 1988 (Schedule 1 (1), (2) and (5)).

SCHEDULE 2 - AMENDMENTS CONCERNING MANAGERS FOR SOLICITORS' PRACTICES

The amendments made by this Schedule will result in the insertion of a new Part 8A (Schedule 2 (4)) and the making of several consequential amendments (Schedule 2 (1) - (3)). The proposed Part contains the following provisions:

Proposed section 114A defines certain expressions for the purposes of the proposed Part.

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Proposed section 114B enables the Law Society Council to appoint a manager for a solicitor's practice if the Council is of the opinion (generally speaking) that the solicitor (or, in the case of a firm of solicitors, each member of the firm) is incompetent or if the Council has cancelled, or refused to renew, the relevant practising certificate or practising certificates.

Proposed section 114C specifies the functions that may be exercised by the manager of a solicitor's practice, and provides that those functions may not be exercised in relation to the affairs of a client except with the consent of the client.

Proposed section 114D provides that a solicitor's practice may continue to be managed even though a receiver may have been appointed in relation to the practice. The manager is to be required to comply with all lawful directions given by the receiver.

Proposed section 114E provides that an act done by the manager of a solicitor's practice is to be taken to have been done by the solicitor, but that the solicitor is not to be subject to any personal liability on account of an act done by the manager.

Proposed section 114F allows the manager of a solicitor's practice to be reimbursed for damages and costs recovered against the manager, or those persons working for the manager, in respect of acts or omissions that have occurred in good faith and in the exercise of a function under the Act. Neither the manager nor the Law Society Council are to be liable to the solicitor for any such act or omission.

Proposed section 114G provides for the expenses of the manager that are otherwise unpaid to be paid out of the Fidelity Fund and for the recovery from the relevant solicitor of any amount so paid.

Proposed section 114H requires the manager of a solicitor's practice to make periodic reports to the Law Society Council on the management of the practice.

Proposed section 114I ensures that the requirements of the Act with respect to trust accounts apply to the manager of a solicitor's practice in the same way as they apply to other solicitors and requires separate trust accounts to be kept for each practice that is under management.

Proposed section 114J enables the regulations under the Principal Act to control the keeping of office accounts and the expenditure of money earned in connection with a practice that is under management.

Proposed section 114K ensures that any money that is earned in connection with a solicitor's practice that is under management, and that is not needed to pay for the expenses of management, is to become the property of the solicitor when the practice ceases to be under management.

**SCHEDULE 3 - AMENDMENTS CONCERNING BARRISTERS'
AND SOLICITORS' REMUNERATION**

The amendments made by this Schedule will result in:

- (a) the increase, from 4 members to 8, of the size of the Legal Fees and Costs Board and the repeal of the requirement that one of its members be a judicial member of the Industrial Commission (Schedule 3 (2));

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- (b) the requirement that the Board be constituted:
 - (i) when considering barristers' remuneration - by 2 barristers, 1 solicitor and 4 lay persons;
 - (ii) when considering solicitors' remuneration - by 2 solicitors, 1 barrister and 4 lay persons; and
 - (iii) when considering other matters - by 3 lawyers (of whom at least 1 is a barrister and at least 1 is a solicitor) and 4 lay persons (Schedule 3 (3));
- (c) the Board being given the function of making determinations of the maximum amount that can be recovered, on a party-party basis, in respect of barristers' fees in proceedings before the Supreme Court, the District Court and the Compensation Court (Schedule 3 (6));
- (d) the inclusion of provisions indicating the kinds of factors to which regard should be had by the Board in making such determinations (Schedule 3 (8) (b));
- (e) the abolition of the existing upper age limit for membership of the Board (Schedule 3 (11) (a) and (d));
- (f) the Board being required to meet at least 5 times a year (Schedule 3 (11) (e)); and
- (g) the increase, from 3 members to 4, of the quorum for meetings of the Board (Schedule 3 (11) (f)).

SCHEDULE 4 - AMENDMENTS CONCERNING DISCIPLINARY PROCEEDINGS

The amendments made by this Schedule will result in:

- (a) the renaming of the Professional Conduct Review Panel, the Professional Standards Board and the Disciplinary Tribunal as the Legal Profession Conduct Review Panel, the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal (Schedule 4 (1) and (2));
- (b) the extension of the jurisdiction of those bodies to include the conduct of a person who was a barrister or solicitor, but was not the holder of a practising certificate, when the conduct occurred (Schedule 4 (2) (b));
- (c) the appointment, under the Public Sector Management Act 1988, of Registrars for those bodies (Schedule 4 (4) (b), (5) (b) and (6) (d));
- (d) the repeal of the requirement that the members of the Tribunal must include judges of the Supreme Court (Schedule 4 (6) (b));
- (e) the ability of a Council to dismiss a complaint that has been proven to be well-founded in situations where the person to whom the complaint relates is generally diligent and has not been the subject of any other complaint (Schedule 4 (7) (b) and (c));
- (f) the Panel being required to give reasons for its decisions (Schedule 4 (8));
- (g) the Registrars of the Board and the Tribunal being able to compel attendance of witnesses and the production of documents (Schedule 4 (9), (10), (14) and (15));

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- (h) the Board and the Tribunal being able to award costs to a person against whom a complaint has been made if the complaint is dismissed (Schedule 4 (11) and (16));
- (i) the composition of the Tribunal being varied for the purposes of hearings conducted by it (Schedule 4 (12) and (13));
- (j) the Registrars of the Panel, the Board and the Tribunal being given immunity from personal liability in respect of the exercise of their functions (Schedule 4 (17));
- (k) the capacity to appoint alternate members for members of the Panel (Schedule 4 (18) (c)); and
- (l) the abolition of the existing upper age limit for membership of the Panel, the Board or the Tribunal (Schedule 4 (18) (b) and (g), (19) (b) and (d) and (20) (b) and (f)).

SCHEDULE 5 - MISCELLANEOUS AMENDMENTS

The amendments made by this Schedule will result in:

- (a) the variation, by inclusion of the Chief Justice, of the composition of the Barristers Admission Board and the Solicitors Admission Board (Schedule 5 (2), (3) and (14));
- (b) a solicitor being able to exercise a right in the nature of a general lien over trust money or controlled money held by the solicitor (Schedule 5 (4));
- (c) the repeal of the provisions requiring reference to the Prothonotary in the keeping of Law Society accounts (Schedule 5 (5));
- (d) the variation in the procedure for the expenditure of money from the Statutory Interest Account (Schedule 5 (6));
- (e) the extension of the grounds on which the Supreme Court may appoint a receiver in respect of a solicitor's property (Schedule 5 (7));
- (f) the admissibility in proceedings under Part 10 (Professional misconduct) of certain information given to a receiver that is not currently admissible in such proceedings (Schedule 5 (8));
- (g) the removal of any doubt as to the applicability to corporations of the offences of acting as a barrister or a solicitor or doing general legal work or probate work for a fee (Schedule 5 (9) and (10));
- (h) the extension of the existing exception to the offence of sharing receipts between a solicitor and an unqualified person (Schedule 5 (11));
- (i) the removal of any doubt as to the capacity of a person who is liable to pay, but who has not yet paid, a bill of costs to apply for taxation of the bill (Schedule 5 (12));
- (j) the Supreme Court being able to impose conditions on an order made by it for the delivery up of documents by solicitors to clients (Schedule 5 (13)); and
- (k) the abolition of the existing upper age limit for membership of the Legal Profession Advisory Panel (Schedule 5 (15)).

**SCHEDULE 6 - AMENDMENTS CONCERNING SAVINGS
AND TRANSITIONAL PROVISIONS**

The amendments made by this Schedule will result in:

- (a) the relocation, from clause 21 to clause 1A, of the regulation-making power concerning savings and transitional provisions (Schedule 6 (b) and (e));
- (b) the Law Society Council being able to deal with certain claims that were barred before the commencement of the Principal Act as if they were claims against the Fidelity Fund that have been made under the Principal Act (Schedule 6 (d)); and
- (c) the making of certain savings and transitional provisions consequent on the enactment of the proposed Act.

**SCHEDULE 7 - CONSEQUENTIAL AMENDMENTS TO
OTHER ACTS**

Compensation Court Act 1984 No. 89

The amendments to this Act will facilitate the making of rules concerning the taxation or other assessment of costs. Such rules will complement the determinations made by the Legal Fees and Costs Board under sections 178A and 180 of the Legal Profession Act 1987.

District Court Act 1973 No. 9

The amendments to this Act will extend the rule-making power under that Act as a consequence of the enactment of the proposed section 178A of the Legal Profession Act 1987.

Supreme Court Act 1970 No. 52

The amendments to this Act will extend the rule-making power under that Act as a consequence of the enactment of the proposed section 178A of the Legal Profession Act 1987.
