

1994

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

LEGAL PRACTITIONERS (AMENDMENT) BILL 1994

EXPLANATORY MEMORANDUM

CIRCULATED

BY

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LEGAL PRACTITIONERS (AMENDMENT) BILL 1994

OUTLINE

The *Legal Practitioners Act 1970* (the Principal Act) provides for the regulation of the legal profession. The *Legal Practitioners (Amendment) Bill 1994* amends the Act to provide:

- for amendments in relation to the issue of practising certificates;
- for reinstatement of the power in the Supreme Court to reprimand a barrister;
- for a requirement that moneys and valuable securities controlled by a solicitor on behalf of a client but which have not been deposited in the solicitor's trust account are to be subject to audit;
- that the costs involved in making an application for compensation against the Fidelity Fund which are an element of pecuniary loss suffered and able to be compensated are to be the reasonable costs involved in making the application;
- that judgements and claims may be finally satisfied from future accumulations of the Fidelity Fund, and that the Fidelity Fund is to be the only property of the Law Society available for satisfying a successful claim;
- that certain decisions of the Law Society as to a payment out of the Fidelity Fund, currently appealable to the Supreme Court, are to be subject to review by the Administrative Appeals Tribunal;
- that a client of a solicitor must make a request to a solicitor for an itemised statement of account within three months of becoming liable to pay or having paid the solicitor's costs or, within a period set by the Registrar; and
- that the Registrar of the Supreme Court may allow further time in which a solicitor must provide an itemised statement of costs to a client who has requested a statement.

FINANCIAL CONSIDERATIONS

There are no financial considerations.

DETAILS

Clause 1 provides for the citation of the amending Act.

Clause 2 provides for the commencement of the amending Act on the day on which it is notified in the *Gazette*.

Clause 3 provides that the "Principal Act" means the *Legal Practitioners Act 1970*.

Clause 4 amends section 3, the definition section, of the Principal Act.

Subclause 4(a) replaces a section reference in the definition of "trust moneys" consequent on the relocation of several sections of the Principal Act by the Bill (see clause 11).

Subclause 4(b) omits the definition of "relevant administrative unit" which identified the area of the administration of the ACT Government Service with responsibility for the provision of legal services in respect of Territory affairs. References to the Attorney-General's Department are inserted into the Principal Act where appropriate. References to the Offices of the ACT and Commonwealth Director of Public Prosecutions are inserted into new section 24 (see clause 6 and clause 27 below).

Subclause 4(c) inserts a definition of "controlled moneys" for the purposes of new section 87A (see clause 12 below).

Clause 5 amends section 23 of the Principal Act to include a reference to sections 24, 24A and 24B as a consequence of the amendments made by clause 6.

Clause 7 amends section 29 of the Principal Act to include a reference to sections 24, 24A and 24B as a consequence of the amendments made by clause 6.

Clause 27 amends section 194 of the Principal Act to substitute a reference to the Attorney-General's Department for the reference in paragraph 194(2)(c) to the "relevant administrative unit" as a consequence of the amendment made in Clause 4 (above).

THE ISSUE OF UNRESTRICTED PRACTISING CERTIFICATES

Clause 6 repeals section 24 and substitutes new sections 24, 24A and 24B. Section 24 of the Principal Act provides for the issue by the Law Society of unrestricted practising certificates. Subsections 24(1) and (2) of the Principal Act provide that, where the Society is satisfied that the experience of a practitioner who has previously held a practising certificate warrants it, the Society may issue an unrestricted practising certificate to that practitioner. Subsection 24(3) provides for a discretion in the Law Society as to the issue of an unrestricted practising certificate to a practitioner with the appropriate professional experience. Subsections 24(4) and 24(5) provide for the issue of an unrestricted practising certificate to practitioners from a State, another Territory or a specified overseas country.

The details of new sections 24, 24A and 24B are as follows.

New section 24 replicates subsection 24(1) with the references to the government bodies for which work of a legal nature qualifies as professional experience for the purposes of the issue of an unrestricted practising certificate updated. In particular, references to the ACT and Commonwealth Offices of the Director of Public Prosecutions have been included in the list in paragraph 24(a).

New section 24A replicates subsection 24(2) to provide for the issue of a practising certificate to a legal practitioner with the appropriate professional experience, and 24(3) to provide that, notwithstanding section 24, the Law Society may issue an unrestricted practising certificate if it is satisfied that the applicant barrister and solicitor has gained the relevant professional experience.

New section 24B provides for the issue of an unrestricted practising certificate to a barrister and solicitor who has fulfilled certain practise requirements in New Zealand. This provision replicates the element of subsection 24(4) which applied to New Zealand practitioners but with a higher requirement as to the period of experience of employment as a legal practitioner in New Zealand.

Subsections 24(4) and (5), apart from the provision for the issue of an unrestricted practising certificate to New Zealand practitioners in new section 24B, are redundant and are not replicated in the new provisions. It is not intended that unrestricted practising certificates be issued under the Principal Act to practitioners from an overseas country other than New Zealand. Interstate jurisdictions have the capacity to evaluate the qualifications of an applicant from overseas; overseas practitioners who wish to practise in the Territory may be admitted in another Australian jurisdiction and then gain admission in the Territory under the Mutual Recognition Scheme.

COSTS

Clause 8 amends section 61 of the Principal Act which provides that the Professional Conduct Board, in a hearing into the conduct of an employee of a solicitor, may order the costs in relation to the hearing be paid by the employee. The amendments will enable the Board to order either the employee or the solicitor who employed the employee to pay the costs.

SUPREME COURT POWERS

Clause 9 amends section 67 of the Principal Act by inserting new paragraph 67(1)(d) to restore the power of the Supreme Court to reprimand barristers. In the drafting of the *Legal Practitioners (Amendment) Act 1993*, the then paragraph 41(1)(a), which provided an express power in the Court to reprimand a barrister and solicitor, was deleted. The power of the Disciplinary Committee to reprimand a solicitor was carried over to the Professional Conduct Board (see paragraph 58(1)(d) of the Act as re-numbered by the 1993 amending Act). While the Court may exercise all the powers of the Board (see subsection 67(2)) it would seem that the Court may only exercise those powers in relation to solicitors. The power of the Court to reprimand a barrister is intended to be, as is the case in relation to the Court's power in respect of a solicitor, in addition to the power of the Court to fine, suspend the right to practise or remove the practitioner from the Roll of Barristers and Solicitors.

Clause 29 provides that the power of the Supreme Court to reprimand a barrister is deemed to have commenced on 24 December 1993, the date of commencement of the 1993 amendments.

APPEALS TO THE SUPREME COURT

Clause 10 amends section 81 by omitting subsection 81(5) which requires the Supreme Court to set out its reasons for a decision in an appeal to the Court in relation to a decision by the Law Society as to professional indemnity insurance. The Court, as a matter of practice, gives reasons for its decisions and it is inappropriate to place such a requirement on the Court in this specific context.

CONTROLLED MONEYS

Part VII of the Principal Act deals with trust moneys and the trust accounts required to be maintained by a solicitor. "Trust moneys" are those moneys deemed by virtue of section 89 of the Act to be received from, and held in trust for, a client by a solicitor.

Clause 11 relocates and renumbers sections 87, 88 and 89 of the Principal Act so that the meaning of "trust moneys" given in section 89 appears before the references to those moneys in the Act.

Clause 12 inserts new section 87A into the Principal Act to provide for the inclusion of "controlled moneys" in the moneys which are to be subject to audit. Moneys and valuable securities entrusted to, and dealt with on behalf of a client by, a solicitor are described by the legal profession as "controlled moneys". A solicitor may exercise control over such moneys and securities but they may not be formally received by a solicitor, may not have been deposited in the solicitor's trust account and may not come within the matters required to be reported on by an auditor under subsection 104(2). This amendment is intended to provide for the concept of controlled moneys to be introduced into the Act in order to make it clear that such moneys and securities are to be subject to the record-keeping and audit requirements of the Principal Act.

Subclause 4(c) provides for a definition of "controlled moneys" to mean moneys and valuable securities of a client which are under the direct or indirect control of a solicitor, in the course of his or her practice, but which are not in, or have not passed through, that solicitor's trust accounts.

Clause 13 omits the heading to Division 2 of Part XI which, due to the relocation of sections 87, 88 and 89 (see clause 11 above), is no longer required.

Clause 14 and Clause 22 amend section 94 and section 166, respectively, of the Principal Act as a consequence of the relocation and renumbering of sections 87, 88 and 89 (see clause 11 above).

Clauses 21, 23 and 28 amend sections 148, 176 and 200, respectively, to insert references to "controlled moneys". The effect is that the concept of "controlled moneys" is extended to the funds of a solicitor for the purposes of a receiver, a manager and in relation to unclaimed moneys. Given the inclusion of valuable securities in the definition of "controlled moneys", references to "land title documents" and "securities" are omitted from subsection 148(3).

COSTS IN RELATION TO PECUNIARY LOSS

Section 136 of the Principal Act provides that a person may apply to the Law Society for compensation from the Fidelity Fund for pecuniary loss. In relation to such claims against the Fund, section 136 provides for a definition of "pecuniary loss" which refers, among other things, to the "costs" involved in making an application for compensation. The current definition does not allow a discretion to limit those costs and the section is amended by clause 16 to provide that the "reasonable costs" involved in making such an application are those to be included in the definition of pecuniary loss.

THE PAYMENT OF COMPENSATION FROM THE FIDELITY FUND

Clause 19 amends section 143 of the Principal Act by omitting subsection 143(3) and (4) and substituting new subsections 143(3), (4) and (5) to provide that, where at any time the Fidelity Fund is insufficient to meet outstanding judgements and claims, these shall be met from future accumulations of the Fund and that only the Fund is to be available for satisfying a successful claim. Details of the new subsections are as follows.

New subsection 143(3) provides that, where the amount that the Law Society would be required to pay from the Fidelity Fund to applicants for compensation due to the failure to account of one solicitor exceeds the amount available in the Fund, the amount in the Fund may be divided and paid to the applicants and their claims finally and fully satisfied from future accumulations of the Fund.

New subsection 143(4) provides that, where there is an insufficient amount in the Fidelity Fund to satisfy all successful claims made against the Fund, the Law Society may divide the amount that is available between claimants and finally fully satisfy the claims from future accumulations of the Fund.

New subsection 143(5) provides that the Fidelity Fund is the only property of the Law Society which is to be available for payment of compensation to claimants against the Fund.

RIGHTS OF REVIEW

Decisions made by the Law Society as to payments out of the Fidelity Fund are presently reviewable on their merits by the Supreme Court. Clause 20 amends the Principal Act to provide for a right of review to the Administrative Appeals Tribunal of certain of these decisions made by the Law Society.

Clause 17 omits subsections 141(5) and (6). These subsections provide for a requirement that the Law Society notify an applicant for a payment out of the Fidelity Fund as to a decision made by the Society as to that payment and as to the grounds for that decision when payment is refused. The requirements imposed by the subsections will be replaced by the notice provisions in proposed new subsection 146B (see clause 20 below).

Clause 18 repeals section 142 of the Principal Act which provides for a review by the Supreme Court of a determination of the Law Society relating to an amount of pecuniary loss claimed by an applicant for compensation from the Fidelity Fund.

Clause 20 inserts new section 146A which provides for review by the Administrative Appeals Tribunal of certain decisions made by the Law Society. New section 146A provides for review by the Administrative Appeals Tribunal of a decision of the Law Society:

- . under subsection 139(1), refusing to extend the time within which an application for compensation from the Fund may be accepted;

- . under subsection 139(2), when a notice has been published under section 138, refusing to allow further time within which an application for compensation from the Fund may be accepted;
- . under paragraph 141(1)(a) as to the amount of pecuniary loss in respect of which compensation may be paid;
- . under paragraph 141(1)(b) that there is no pecuniary loss for which a payment may be made;
- . under subsection 145(3) to refuse to pay compensation out of the Fidelity Fund to a solicitor;
- . under subsection 145(3) as to the amount of compensation to be paid out of the Fidelity Fund to a solicitor;
- . under subsection 146(1) to refuse to make an interim payment of compensation out of the Fidelity Fund to an applicant; and
- . under subsection 146(1) as to the amount of an interim payment of compensation to be paid out of the Fidelity Fund to an applicant.

Clause 20 also inserts a new section 146B which provides for notice of the relevant decisions of the Law Society to be given to an applicant.

New subsection 146B(1) requires the Law Society to cause a notice of a decision of the Society as to payment from the Fidelity Fund to be given to an applicant to the Fund.

New subsection 146B(2) provides that, before the prescribed date, the notice of a decision to be given to the applicant shall include:

- (a) a statement to the effect that an application may be made to the Administrative Appeals Tribunal for a review of the decision; and
- (b) except where subsection 26(11) of the *Administrative Appeals Tribunal Act 1989* applies, include a statement pursuant to section 26 of that Act. Section 26 of the *Administrative Appeals Tribunal Act 1989* provides that a person affected by a decision may obtain a statement in writing of the reasons for the decision. Subsection 26(11) of the *Administrative Appeals Tribunal Act 1989* provides that an applicant is not entitled to make a request to be given a notice in writing which sets out the reasons for a decision if the decision sets out the reasons for the decision.

New subsection 146B(3) provides that the validity of a decision is not affected by a failure to comply with the requirement to provide the notice described in subsection 146B(2).

New subsection 146B(4) provides that, after the prescribed date, the notice of the decision shall be in accordance with the requirements of the Code of Practice in force under subsection 25B(1) of the *Administrative Appeals Tribunal Act 1989*.

New subsection 146B(5) provides that, in section 146B, the "prescribed date" means the day on which section 9 of the *Administrative Appeals Tribunal (Amendment) Act (No 2) 1994* commences.

Clause 30 provides that new section 146A is to apply in relation to decisions made on or after the commencement of the amending Act.

INSERTION OF A DEFINITION OF AN ITEMISED STATEMENT

Clause 24 amends section 177 of the Principal Act to insert a definition of an "itemised statement" to mean a detailed account signed by a principal of the firm or by a solicitor in the firm's employ showing specific items of work done and the specific charges allocated to each item of work done.

INSERTION OF A TIME LIMIT FOR A REQUEST FOR AN ITEMISED STATEMENT

Clause 26 amends section 179 of the Principal Act which provides that a request may be made of a solicitor by a client for an itemised statement for work done by the solicitor for the client. No time limit is provided within which such a request may be made. Clause 26 inserts new subsection 179(1A) to provide that a request under subsection 179(1) for an itemised statement must be made within 3 months of the date of receipt of a written account or of payment of an account of a solicitor's costs and disbursements or within such time as the Registrar of the Supreme Court allows. Clause 26 also amends paragraph 179(3)(b) to give a discretion in the Registrar to allow further time within which a solicitor must provide an itemised statement to a client.

TECHNICAL AMENDMENTS

Clause 15 amends section 106 to remedy drafting defects in the Principal Act.

Clause 25 amends section 178 to remedy a drafting defect in the Principal Act.

Clause 31 provides for the amendment of the Acts set out in the Schedule. The **Schedule** amends the *Agents Act 1968*, the *Legal Aid Act 1977*, the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Notaries Public Act 1984* as a consequence of the renumbering of the Principal Act by the *Legal Practitioners (Amendment) Act 1993*.