

AUSTRALIAN CAPITAL TERRITORY
Attorney-General's Department
Legal Practitioners Ordinance (No. 2) 1970

Explanatory Memorandum

General

This Ordinance makes extensive provision with respect to legal practitioners in the Australian Capital Territory.

In particular, the Ordinance provides for -

- (a) persons to become barristers and solicitors of the Supreme Court of the Australian Capital Territory;
- (b) the professional conduct of persons practising in the Territory as barristers and solicitors to be subject to inquiry by a Disciplinary Board;
- (c) persons practising as solicitors in the Territory to maintain appropriate trust accounts and records and to have those accounts and records audited;
- (d) persons practising as solicitors in the Territory to make deposits from their trust accounts with a public official for the purpose of being invested at interest through trust accounts established under section 62A of the Audit Act. The interest will be available for application towards -
 - supplementing an account established under section 62A of the Audit Act to meet claims for compensation in respect of defalcations by solicitors and their employees;

- assisting in a scheme of legal aid;
- assisting and promoting post-graduate legal education and legal research; and
- administrative costs related to the above-mentioned investment of deposits at interest.

Repeal of Legal Practitioners Ordinance 1970

2. The Ordinance repeals the Legal Practitioners Ordinance 1970 (hereinafter referred to as the repealed Ordinance), some of the provisions of which were disallowed by the Senate on 29 October 1970. The repealed Ordinance has not been brought into operation. The present Ordinance does not contain any provision that is the same in substance as any disallowed provision of the repealed Ordinance.

Differences between the two Ordinances

3. The present Ordinance differs from the repealed Ordinance in the following respects:

- (a) Entitlement to practise: Under the repealed Ordinance the existing entitlement to practise under s.55D(1.) of the Judiciary Act was to have ceased and been replaced by an entitlement under s.20 of the repealed Ordinance, one of the disallowed provisions. The present Ordinance does not itself confer any entitlement to practise in the Territory. The Ordinance is based instead on the existing entitlement under s.55D(1.) of the Judiciary Act. Section 13 provides, however, for the keeping of a Roll of Barristers and Solicitors of the Supreme Court of the Australian Capital Territory, which will be a roll of barristers and solicitors for the

purposes of s.55D(1.) of the Judiciary Act. A person on this roll of the Supreme Court of the Territory will accordingly, by virtue of that subsection, be entitled to practise as a barrister and solicitor in the Territory.

(b) Admission to practise: Under the present Ordinance a person already entitled to practise in the Territory by reason of having his name on a roll referred to in s.55D(1.) of the Judiciary Act will not need to be admitted as a barrister and solicitor of the Supreme Court of the Australian Capital Territory. If such a person so desires, however, he will be able, on application in writing to the Registrar of the Court, to have his name entered on the Roll of that Court (s.13). A person already admitted overseas and a person not previously admitted will be entitled to apply to be admitted to practise as a barrister and solicitor of the Supreme Court of the Territory as under the repealed Ordinance.

(c) Practising Certificates: The present Ordinance does not provide for entitlement to practise as a solicitor to be dependent, as it was under the repealed Ordinance, upon holding a current annual practising certificate. A provision to that effect would be inconsistent with the entitlement conferred by s.55D(1.) of the Judiciary Act. However, section 61(4.) of the present Ordinance requires a solicitor to pay a prescribed fee when sending to

an official the duplicate of his annual auditor's report. This fee will go to Consolidated Revenue and will reimburse the Commonwealth in respect of such of the costs of administering the Ordinance as are not payable out of any of the trust accounts established for the purposes of the Ordinance under section 62A of the Audit Act.

- (d) Bar Association: All references in the repealed Ordinance to the Australian Capital Territory Bar Association (hereinafter referred to as the Bar Association) were contained in disallowed provisions. As already indicated, those provisions have been omitted from the present Ordinance.
- (e) Law Society: All references in the repealed Ordinance to the Law Society of the Australian Capital Territory (hereinafter referred to as the Law Society) have been omitted. Some of the references were in provisions that were disallowed by the Senate. Apart from those provisions, the repealed Ordinance provided for the Law Society -
- (i) to be incorporated;
 - (ii) to issue annual practising certificates;
 - (iii) to ensure compliance with requirements relating to solicitors' trust accounts; and
 - (iv) to administer a Statutory Interest Account and Fidelity Fund.

Since the Senate's disallowance action the Attorney-General has received a letter from the President of the Law Society, which pointed out that the Law

Society at present lacks suitable office accommodation, staff and financial resources. The President accordingly stated that, if steps necessary for the Law Society to fulfil its functions under the repealed Ordinance are to be taken, 'then the Society will require considerable financial assistance'. The granting of such assistance by the Commonwealth from public moneys would not, it is felt, be justified. Accordingly, the present Ordinance provides for the above-mentioned functions (iii) and (iv) to be performed by officers in the Attorney-General's Department with existing appropriate facilities at their disposal. As indicated above, function (ii) (the issuing of annual practising certificates) is not provided for in the present Ordinance. Incorporation of the Law Society can, if desired, be effected under the Companies Ordinance of the Territory, that course already having been adopted by the Bar Association.

(f) Inspector of Solicitors' Trust Accounts: A number of functions relating to solicitors' trust accounts and to payments in respect of defalcations by solicitors and their employees were, under the repealed Ordinance to be vested in the Law Society. As the Law Society is not now to be incorporated, those functions are vested by the present Ordinance in an Inspector of Solicitors' Trust Accounts appointed by the Governor-General under section 43.

- (g) Discipline: The Disciplinary Board provided for in the repealed Ordinance is retained in the new Ordinance. To enable the Board to be suitably constituted for inquiries into the conduct of a practitioner at the instance of either the Law Society or the Bar Association, the repealed Ordinance provided for the Board to consist of seven members, five of whom would constitute a quorum, and for the Board to appoint a committee of three members to exercise its powers in relation to a particular inquiry. As the disciplinary provisions of the present Ordinance are not specifically related to either the Law Society or the Bar Association, the need for such a large membership does not exist. The present size of the legal profession in the Territory could, moreover, pose problems in constituting a Board of seven members. The present Ordinance accordingly provides for the Disciplinary Board to consist of five members, three of whom will constitute a quorum. Provision for the Board to act through a Committee is, in consequence, unnecessary, and no such provision is included. In view of the disallowance of the provisions in the repealed Ordinance enabling complaints to the Disciplinary Board to be made by the Council of the Law Society or the Council of the Bar Association, the present Ordinance provides (s.28) for the Attorney-General to make references to the Board

concerning questions of professional misconduct of practitioners. For similar reasons, where the Disciplinary Board believes that a practitioner has been guilty of misconduct of such a nature that the matter should be dealt with by the Court, the Board is required by s.35 of the present Ordinance to report to the Attorney-General. In accordance with undertakings given to the Senate the new Ordinance ensures that -

- . a witness before the Disciplinary Board has all the privileges and protection of a witness in proceedings in the Supreme Court (ss.30(3.), 33(1.) and 36(4.)).
- . such a witness may make an affirmation without first objecting to taking an oath.

The disciplinary provision in the present Ordinance will be supplementary to the power of the Court under s.55D(3.) of the Judiciary Act to cancel or suspend a person's entitlement to practise in the Territory.

- (h) Trust Accounts under the Audit Act: The present Ordinance refers to two trust accounts established under section 62A of the Audit Act. Division 7 of Part VII provides for deposits from solicitors' trust accounts to be paid to the Inspector for the purposes of the Australian Capital Territory Solicitors' Statutory Deposits Account. Part VIII provides for solicitors to pay annual contributions for the purposes of the Australian Capital Territory

Solicitors' Fidelity Trust Account, which replaces the Solicitors' Fidelity Fund of the Australian Capital Territory that was provided for in the repealed Ordinance. A third account that has been established under the Audit Act but is not referred to in the Ordinance is the Australian Capital Territory Solicitors' Statutory Interest Trust Account, which replaces the Statutory Interest Account provided for in the repealed Ordinance. The purposes of each of the abovementioned accounts established under the Audit Act are set out in the appendix to this memorandum.

November, 1970.

T.E.F.H.