

[Home](#) » [Hansard & Papers](#) » [Legislative Council](#) » [18/10/2006](#) » Article 47 of 58

NSW Legislative Council Hansard

PROFESSIONAL STANDARDS AMENDMENT (DEFENCE COSTS) BILL

Page: 2834

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [8.51 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

New South Wales is the leading jurisdiction in Australia with respect to professional standards legislation. New South Wales has had professional standards legislation in place since 1994. It was followed by Western Australia in 1997.

In the past few years, all other States and Territories have enacted professional standards legislation based on the New South Wales Act. This followed decisions by the Insurance Ministers Forum and the Standing Committee of Attorneys-General in 2003 to implement nationally consistent professional standards legislation. Professional standards legislation was one of a number of strategies adopted by governments across Australia to address the ongoing availability and affordability of professional indemnity insurance.

Professional standards legislation facilitates the capping of occupational liability, while also protecting consumer interests through requirements for insurance and the implementation of risk management strategies and complaints and disciplinary procedures.

In New South Wales, there are currently eight schemes approved under the Professional Standards Act. These schemes cover accountants, legal practitioners, engineers, surveyors and valuers.

The Professional Standards Amendment (Defence Costs) Bill 2006 implements a decision of the Standing Committee of Attorneys-General to enable professionals who are members of schemes to hold either costs-inclusive or costs-in-addition insurance policies. Costs-inclusive policies are inclusive of defence costs, while costs-in-addition policies cover defence costs in addition to the indemnity amount.

The Professional Standards Council, the independent body that approves schemes under the Act, has received legal advice that the current wording of the Act means only costs-in-addition policies are acceptable under the Act.

New South Wales solicitors hold cost-inclusive policies and other professionals who are members of schemes also hold such policies because they are more widely available in the market.

The bill will amend the Act to give flexibility for professionals to hold either costs-inclusive or costs-in-addition policies. Consumers will not be disadvantaged if they deal with a professional holding a costs-inclusive policy because the professional's maximum liability to the consumer will be the amount of the cap applying to the professional. That is, defence costs will not erode a defendant's liability for damages to a successful plaintiff.

I now turn to specific provisions in the bill. Item [1] inserts a definition of "costs" into the Act.

Item [2] replaces the existing definition of "damages" in the Act with a more comprehensive definition.

Item [3] inserts a definition of "amount payable" under an insurance policy to include:

- (a) defence costs, where those costs are payable out of the one sum insured under the policy; and
- (b) any excess payable under the policy.

Sections 21, 22 and 23 of the Act provide, respectively, that liability may be capped by insurance arrangements, by reference to the amount of business assets, or by a multiple of the fees charged. Items [4] to [7] of the bill

reframe sections 21, 22 and 23 by using the new definition of "amount payable" inserted by item [3].

Item [8] of the bill inserts section 26A into the Act to make it clear that a professional's liability to a client cannot be less than the cap applying to the professional where the professional holds a costs-inclusive policy.

Item [10] of the bill applies the amendments contained in the bill to schemes already in force and validates those schemes. It also applies the amendments to proceedings pending before a court.

This bill is strongly supported by the Professional Standards Council. It is also supported by key professional bodies, including CPA Australia, the Law Society of New South Wales and the Law Council of Australia, which were consulted during the drafting of the bill.

I commend the bill to the House.

The Hon. DAVID CLARKE [8.52 p.m.]: The Professional Standards Amendment (Defence Costs) Bill 2006 arises out of recommendations of the Standing Committee of Attorneys-General made in 2003 in respect of professional indemnity insurance and is not opposed by the Opposition. It amends the Professional Standards Act 1994 which, among other things, provides for the setting up of schemes that limit the liability of members of associations of practitioners of particular trades or professions if the practitioner has the benefit of an occupational liability policy that provides at least a minimum level of cover set up by the scheme. The bill amends the Act to allow professionals such as lawyers, doctors and accountants who are members of schemes under the Act to hold either costs-inclusive or costs-in-addition professional indemnity insurance policies. The bill is made necessary as a result of legal advice received by the Professional Standards Council, the independent body that approves schemes under the Act, that only costs-in-addition policies are acceptable under the Professional Standards Act 1994.

Costs-inclusive insurance policies cover defence costs, while costs-in-addition policies cover defence costs in addition to the indemnity amount. Solicitors and other professionals hold costs-inclusive policies because they are more widely available. Henceforth, practitioners covered by the Act will have a choice of costs-inclusive or costs-in-addition policies. Because defence costs will not erode a defendant's liability for damages to a successful plaintiff in a claim, consumers will not be disadvantaged.

Specifically, the bill makes it clear that, although a defence-costs-inclusive insurance policy may, as compared with one that is not defence-costs-inclusive, reduce the amount available to be paid under the policy to a scheme participant's client in respect of a claim, this does not lower the cap on the scheme participant's liability to the client. The scheme participant will continue to be liable to the client for any difference between the amount payable to the client under the policy and the amount of the cap. We have been assured by the Government that the Law Society of New South Wales, the Law Council of Australia and other key professional bodies have all been consulted during the drafting of the bill and are fully supportive.

Reverend the Hon. FRED NILE [8.57 p.m.]: The Christian Democratic Party supports the Professional Standards Amendment (Defence Costs) Bill. This bill will allow professionals who are members of schemes under the Professional Standards Act 1994 to hold either costs-inclusive or costs-in-addition professional indemnity insurance policies. Professional standards legislation facilitates the capping of occupational liability while protecting consumer interests through requirements for insurance and implementation of risk-management strategies and complaints and disciplinary procedures.

New South Wales enacted professional standards legislation in 1994 and Western Australia followed in 1997. In recent years all other States and Territories have enacted professional standards legislation based on the New South Wales legislation. This followed decisions by the Insurance Ministers' Forum and the Standing Committee of Attorneys-General in 2003 to implement nationally consistent professional standards legislation. Professional standards legislation was one of a number of strategies adopted by governments to address the ongoing availability and affordability of professional indemnity insurance.

It is important that the legal profession functions at the highest possible level of integrity and openness. I have been concerned about a television campaign conducted by, I assume, the New South Wales Law Society—probably supported by the Bar Association—that is critical of the legislation dealing with occupational health and safety. It advises people to ring a number that appears to be a government department or some authorised body. Obviously the campaign is being conducted on behalf of the legal profession, which is hurting because it has lost a lot of business as a result of the Government's reforms, which I strongly supported. Money that was available for injured workers was going to the workers and not into the pockets of lawyers. In one year about \$400 million went to injured persons, but almost the same amount went to lawyers. I would rather see \$800 million going to injured workers. It is important that the legal profession operates at the highest standards of integrity when it has a vested interest in seeking additional business.

This bill implements a decision to enable professionals who are members of schemes under the Act to hold either costs-inclusive or costs-in-addition insurance policies. Costs-inclusive insurances policies include defence

costs and costs-in-addition insurance policies cover defence costs in addition to the indemnity amount. The Professional Standards Council, the independent body that approves schemes under the Act, has received legal advice that the wording in the Act provides that only costs-in-addition policies are acceptable. That is the reason for these amendments. New South Wales solicitors hold costs-inclusive policies and other professionals who are members of schemes also hold such policies because they are more widely available in the market.

Consumers will not be disadvantaged if they deal with a professional holding a costs-inclusive policy because the maximum liability of a professional is not reduced by the fact that he or she holds such a policy. That is, defence costs will not erode a defendant's liability for damages to a successful plaintiff. That is an important issue. Where damages are awarded to a plaintiff, the lawyers acting on behalf of that plaintiff should not take an exorbitant amount in professional fees and that should be closely monitored. Hopefully this legislation will ensure that no harm is done to the interests of the consumers of this State.

The Hon. HENRY TSANG (Parliamentary Secretary) [9.00 p.m.], in reply: I thank honourable members for their contributions to the debate. The proposed amendments implement a decision of the Standing Committee of Attorneys-General to enable professionals who are members of schemes to hold either costs-inclusive or costs-in-addition insurance policies. The bill recognises the realities of the insurance market, provides flexibility for members of schemes to hold either costs-inclusive or costs-in-addition insurance policies, and enables professionals to purchase the type of policy which best suits their needs.

At the same time, the bill ensures that consumers will be protected regardless of whether they deal with a professional who holds a costs-inclusive or costs-in-addition policy. Other States and Territories, which have modelled their professional standards legislation on the New South Wales Act, will introduce similar amendments so as to maintain a nationally consistent approach. I commend the bill to the House.

Motion agreed to.

Bill read a second time and passed through remaining stages.