NSW Legislative Council Hansard

Legal Profession Bill

Extract from NSW Legislative Council Hansard and Papers Thursday 9 December 2004.

Second Reading

The Hon. TONY KELLY (Minister for Rural Affairs, Minister for Local Government, Minister for Emergency Services, and Minister for Lands) [1.56 a.m.]: 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.

This bill repeals and replaces the current *Legal Profession Act 1987.* It represents a major milestone in achieving consistency and uniformity in the regulation of the Australian legal profession. It will also make it easier for lawyers to practise across State and Territory borders.

The mosaic of State and Territory-based regulatory regimes for the legal profession currently imposes unreasonable burdens on practitioners who want to practise interstate. Also, consumer interests are not served by differences that interfere with efficient business practices.

To address this, in July 2001 the Standing Committee of Attorneys General agreed to develop model laws to facilitate legal practice across State and Territory jurisdictions.
The Standing Committee worked closely with the Law Council of Australia in developing Model Legal Profession provisions and I wish to thank the Law Council for its substantial contribution.

A consultation version of the model provisions was released in 2003 to more than 100 stakeholders. These included professional associations for legal practitioners, regulatory authorities, consumer organisations and heads of courts and tribunals.

The model provisions were finalised and endorsed by SCAG Ministers in August 2003. In July this year all Australian Attorneys-General signed the Legal Profession Memorandum of Understanding and each State and Territory agreed to use its best endeavours to implement legislation giving effect to the model provisions.

The Memorandum of Understanding also establishes a joint working party with representatives from each State and Territory, the Commonwealth, and the legal profession. The joint working group provides regular advice to SCAG on the implementation, operation and maintenance of the provisions. This national joint working party is the appropriate body to initially consider the concerns of any individual or group about the national model provisions.

The working party is currently considering a number of proposed amendments to the model provisions. Some of these were agreed to by the Standing Committee of Attorneys General earlier this month and have been incorporated into this bill. Others are still under consideration.

This bill is the culmination of many years of hard work and co-operation across all jurisdictions. However, it is inevitable that, from time to time it will need amending as the national model provisions are revised and amended. Facilitating legal practice across State and Territory boundaries will be an ongoing project.

In preparing this bill, which adopts the national model provisions for NSW, there has been extensive consultation with the Law Society, Bar Association, the Legal Services Commissioner, the Legal Profession Advisory Board, and the Administrative Decisions Tribunal. I would like to thank these bodies for their contributions, which have been significant and invaluable.

The result is a bill which removes barriers to legal practitioners practising across State and Territory borders. A legal practitioner admitted in NSW will now be able to practice in any Australian jurisdiction without the need to also be admitted in that jurisdiction. A client in Victoria will have the same rights and remedies as a client in New South Wales. Disciplinary action taken against a practitioner in New South Wales can be enforced in Queensland.

This bill will commence on proclamation and will be proclaimed when the regulatory and other authorities affected by the amendments have had time to establish the new processes and procedures that will be required.

CHAPTER 1—Preliminary

Chapter 1 of the bill sets out the definitions used throughout the bill. There are some changes to terms used in the *Legal Profession Act 1987*, developed to facilitate national practice. Some terms denote local, interstate and international practitioners.

For instance under the bill, once admitted a person becomes an 'Australian lawyer'. If admitted in NSW the person is a 'Local Lawyer'. If the person is admitted in another Australian jurisdiction, they are an 'Interstate lawyer'.

If the person holds a practising certificate they are a 'Legal Practitioner'. An Australian legal practitioner is a person holding a practising certificate issued by an Australian jurisdiction. A Local legal practitioner is a person holding a practising certificate issued in NSW, and an interstate legal practitioner a person with a practising certificate issued in another State or Territory.

A 'law practice' is an entity entitled to engage in legal practice. It includes an Australian legal practitioner in sole practice, a law firm, a multi-disciplinary partnership, an incorporated legal practice and a community legal centre.

The bill also uses the term 'Legal practitioner associate'. This term covers partners, directors, employees and others behind the practice who are legal practitioners. It does not include lay directors, partners or employees.

The term "a principal of a law practice" includes a sole practitioner, a partner, or a legal practitioner director of a law practice.

Clause 8 defines the 'home jurisdiction' of a legal practitioner as the jurisdiction where the practitioner's practising certificate was granted.

CHAPTER 2—General requirements for engaging in legal practice

Part 2.2—Reservation of legal work and titles

Part 2.2 reserves legal work and titles for practitioners. This reservation protects the public and clients by ensuring legal work is only carried out by people properly qualified to do so.

This part ensures there is a textually uniform prohibition across Australia restricting unqualified people from engaging in legal practice or representing they are entitled to engage in legal practice.

Clause 14 makes it an offence for any person to engage in legal practice for fee, gain or reward, unless they are an Australian Legal Practitioner. This does not prevent registered foreign lawyers or community legal centres from engaging in legal practice, or prevent licensed conveyancers from doing conveyancing. If an unqualified person engages in legal practice in breach of this clause, they are unable to recover any money for their work.

The term 'engaging in legal practice' is not defined and has deliberately been left to the common law. However, the Government does not expect this definition to limit in any way the current reservation of legal work for practitioners. The bill will ensure that only qualified people can provide legal services to the public. This common law approach has the benefit of remaining flexible and allows the development of common jurisprudence on what constitutes legal practice throughout Australia.

Clause 15 prohibits an unqualified person from representing or advertising they are entitled to engage in legal practice. Clause 16 provides that only qualified people may use the following titles: lawyer, legal practitioner, barrister, solicitor, attorney, counsel, Queens Counsel, Kings Counsel, Her Majesty's Counsel, and Senior Counsel.

This will ensure the public can identify people who are qualified legal practitioners and who are subject to the legal profession regulatory scheme and ethical standards.

Part 2.3—Admission of local lawyers

Part 2.3 sets out the process and requirements for admitting people to the legal profession.

This part is designed to work with similar provisions in other jurisdictions to ensure equivalent qualifications and training requirements are recognised throughout Australia. The part also ensures that only applicants with appropriate academic and practical qualifications and who are fit and proper persons can be admitted to the legal profession. This part is similar to part 2 of the *Legal Profession Act 1987*.

Under clause 31 the Supreme Court may admit an applicant for admission as a Local Lawyer if the Admission Board certifies the applicant is eligible for admission and is a fit and proper person.

Under clause 25 the Admission Board must consider each specified suitability matter, and any other relevant matter. The suitability matters are set out in clause 9 and include whether the person is of good fame and character, whether the person has been insolvent under administration, and any previous convictions.

Clause 26 states a person may apply to the Admission Board for an early determination of their suitability. Clause 27 allows the Admission Board to refer the determination of whether a person is 'fit and proper' to the Supreme Court.

If the Admission Board refuses to certify that a person is eligible for admission, the candidate may appeal to the Supreme Court under clause 28.

Division 4 of part 2.3 sets out the powers and role of the Legal Profession Admission Board, currently the Legal Practitioners Admission Board.

Under clause 38, the Board's power to make admission rules is retained. This allows the Board to specify how and when applications should be made. Rules may also be made about admission requirements for academic qualifications and practical legal training and their assessment; the disclosure of matters that may affect the eligibility of an applicant; and applications under the trans-Tasman mutual recognition legislative scheme.

Part 2.4—Legal Practice: Australian Legal Practitioners

Part 2.4 of the bill establishes the processes for granting and renewing practising certificates.

The relevant model provisions ensure that:

• practitioners will apply for a practising certificate in their principal place of practice;

• a jurisdiction will permit legal practitioners holding an interstate practising certificate to practise in that jurisdiction;

• interstate lawyers will be officers of the Supreme Court of any jurisdiction they practise in;

• each jurisdiction will recognise conditions on practice imposed on interstate legal practitioners in their home jurisdictions (e.g. as a result of disciplinary action);

• practising certificates will be issued on the basis of admission in any State or Territory; and

• Government lawyers whose home jurisdiction does not require that they have practising certificates will be able to practise in other jurisdictions.

Practising Certificates ensure those lawyers wishing to practice as a Solicitor or Barrister are covered by appropriate insurance and the fidelity fund. Practising Certificates also provide an easy mechanism for suspending or revoking a practitioner's right to practise.

In NSW, practising certificates can only be issued by the Bar Association or the Law Society. A lawyer holding a certificate from the Bar Association is entitled to practise as a barrister, a lawyer holding a certificate from the Law Society is entitled to practise as a barrister and solicitor. A lawyer may only hold one practising certificate at a time.

Making an application

The process for granting and renewing local practising certificates is contained in part 2.4 Division 4.

A person admitted as a lawyer in any Australian jurisdiction will be able to apply for a practising certificate in NSW. Similarly, lawyers admitted in NSW will be able to apply for a practising certificate in any other jurisdiction. This new system will replace that created by the Mutual Recognition Acts in each State and Territory.

Clause 45 explains when a lawyer must apply for a practising certificate in NSW. This is an important provision under the model law scheme.

Generally, a lawyer must apply for a practising certificate in NSW if he or she principally engages principally in legal practice in NSW.

Other provisions set out where a lawyer can apply for a practising certificate when this is unknown, or when the lawyer is only temporarily engaging in legal practice principally in another jurisdiction.

An applicant for a practising certificate must disclose matters which affect their eligibility or status as a fit and proper person to hold a practising certificate.

Clause 42 specifies various matters which may be taken into account in determining if a person is fit and proper to hold a practising certificate. These grounds include any suitability matter and:

• whether the person has previously obtained a practising certificate with misleading information;

• whether the person has contravened the Act, Regulation or Legal Profession Rules, or any corresponding legislation; and

• whether the person has contravened a condition on their practising certificate or an order of the Tribunal or corresponding disciplinary body.

Clause 48 provides that the Law Society Council or Bar Council may grant, renew or refuse to grant a practising certificate. In granting a certificate, the Council may also impose conditions on the certificate limiting the type of practice that can be undertaken by the Legal Practitioner. The Council can only grant or renew a practising certificate if satisfied the person is eligible and is a fit and proper person to hold the certificate.

Conditions

Division 5 deals with the conditions that a Council may place on a practising certificate.

Conditions must be reasonable and relevant. Some possible conditions include requiring the holder to undertake continuing

legal education, or an academic or training course, or a period of supervised practice. Clause 51 gives a specific power to impose conditions on a certificate when a local legal practitioner has been charged with a criminal offence, but the charge has not been determined.

Clause 52 specifies that where an Australian Legal Practitioner practises in NSW, their NSW practice is subject to any condition imposed on their admission to the Legal Profession, no matter which State or Territory they were admitted in. This facilitates national practice by ensuring that conditions are consistent, and consumers are protected.

Clauses 53, 54 and 55 specify statutory conditions that barristers and solicitors must comply with. For instance, the requirements that a barrister must be a sole practitioner and cannot be in partnership or employment are maintained.

Clause 56 specifies that the Bar Council can impose conditions requiring the holder of a certificate to complete a barrister's reading program or requiring the practitioner to read with a barrister for a period of time. A new sub provision allows the Bar Council to suspend or cancel the practising certificate of a practitioner who does not comply with these conditions.

A contravention of any condition imposed on the certificate is capable of being unsatisfactory professional conduct or professional misconduct. The contravention may also attract a fine of 100 penalty units.

Division 6

Division 6 of part 2.4 of the bill sets out the process for amending, suspending or cancelling a local practising certificate. Under clause 60, this can be done where:

• The practitioner is no longer a fit and proper person to hold the certificate;

• The practitioner no longer has appropriate insurance or fails to pay a contribution;

• The practitioner breaches a condition of their certificate.

Division 7

Division 7 retains the provisions that require legal practitioners who become bankrupt or are convicted of a serious offence or tax offence to 'show cause' or provide details about this and explain why, despite the 'show cause' event they are a fit and proper person to hold a practising certificate. This Division ensures NSW regulatory bodies can take swift action against practitioners who fall into these categories.

Under clause 66 the show cause process also applies to those persons applying for a practising certificate. Where an applicant has been convicted of a tax offence or has been bankrupt, they must provide a written statement to the Council explaining why they consider themselves to be a fit and proper person to hold a practising certificate. After receiving the statement, the Council may decide to refuse to issue the certificate.

The current holder of a practising certificate must give the appropriate Council a notice that the show cause event happened, and a written statement explaining why the person considers themselves to be a fit and proper person. After receiving the statement, the Council may decide to cancel or suspend the holder's certificate.

Clause 72 states that if the Council determines that a holder is not a fit and proper person to hold a certificate then the Council must either refuse to grant the certificate or institute proceedings in the Tribunal for unsatisfactory professional conduct or professional misconduct.

If a condition is imposed under this Division and the holder does not comply, then clause 73 provides that the holder is guilty of professional misconduct and the appropriate authority may suspend or cancel the local practising certificate. Under clause 74, if the Council refuses to grant the practising certificate under this Division, the applicant is not entitled to reapply for a specified period not exceeding 5 years.

An applicant who is dissatisfied with a decision of the Council or Commissioner under this Division may appeal to the Tribunal. Where a person appeals the decision, the person bears the onus of establishing that they are a fit and proper person to hold a practising certificate.

Division 8

Under clause 78 a Council may immediately suspend a practising certificate where it is in the public interest to do so, on any of the grounds specified for Divisions 6 and 7. Clause 79 allows the holder to surrender their practising certificate and allows the Council to cancel it. Under clause 80 the Council may give a notice to a holder requesting the certificate be returned. Failure to comply with the notice is an offence.

Division 9

Other existing provisions in the Legal Profession Act 1987 are included in the bill. Clause 85 allows the regulations to make provision for regulating and prohibiting the marketing of legal services, including advertising personal injury services.

The provision giving solicitors audience rights before the courts and allowing them to be advocates is maintained in clause 87.

Division 10

The provisions relating to the fees payable for the grant or renewal of a practising certificate are retained in Division 10.

Division 11

Division 11 deals with interstate practitioners practising in NSW. The adoption by all States and Territories of the national model provisions will ensure that all Australian practitioners can practise throughout the country regardless of where their practising certificate was issued.

Clause 98 retains a current requirement that when an interstate legal practitioner establishes an office in NSW they must hold appropriate professional indemnity insurance.

Clause 100 states that an interstate legal practitioner is not authorised to engage in legal practice in this jurisdiction to a greater extent than a local legal practitioner could be authorised under a local practicing certificate. This ensures New South Wales restrictions on practitioners also apply to those holding interstate practising certificates.

Under Division 12 the Councils will be able to enter into protocols with interstate regulatory authorities about matters relevant to the issue of where a lawyer should obtain a practising certificate.

Clause 106 states a Council must keep a register of the names of Australian lawyers to whom they grant practising certificates. The conditions on practising certificates must also be kept in the register.

Other provisions deal with specific government offices or positions.

In some other Australian jurisdictions government lawyers will not be required to hold practising certificates. Clause 114 allows these lawyers to practise in NSW while working for their government, without being required to take out a NSW practising certificate.

Part 2.5—Interjurisdictional provisions regarding practising certificates.

Part 2.5 contains interjurisdictional provisions regarding practising certificates and provides for notification action to be taken by courts and other authorities in relation to the admission of people to the legal profession and their right to engage in legal practice in Australia.

For instance, when an applicant makes an application for admission, the Admission Board may inform other jurisdictions of that application.

Under Division 3, a local lawyer must notify the local Council and Prothonotary if their name is removed from an interstate roll or if an order is made that their name be removed from a roll. They must also notify the local Council if certain orders are made interstate—for example if an order is made recommending that their NSW practising certificate be cancelled or suspended. Finally, they must notify the local Council and Prothonotary if any foreign regulatory action is taken against them.

The local Councils and Prothonotary must take action when they receive such a notice. If a lawyer is removed from an interstate roll the Prothonotary must also remove the practitioners name from the local roll and the Council must cancel their practising certificate, unless there is a court order to the contrary. Where foreign regulatory action was taken against the Practitioner, the appropriate authority may issue a show cause notice asking the lawyer why their name should not be removed from the NSW roll.

Part 2.6—Incorporated Legal practices and multi-disciplinary practices

All States and Territories, either currently or previously, restricted legal practitioners' ability to share profits with non-practitioners. These restrictions were intended to ensure legal practitioners adhered to legal professional obligations, and duties to consumers and courts.

National Competition Policy Reviews by NSW, WA and Tasmania recommended relaxing the restrictions on the sharing of profits, and allowing incorporated legal practices and multi disciplinary partnerships. In late 1999 NSW removed restrictions on profit sharing in multi-disciplinary partnerships and in July 2001 has also permitted incorporated legal practices.

However, differences in legislation around Australia allowing incorporated legal practices and multi disciplinary partnerships restrict the use of these entities. The objective of the model provisions is to establish uniform provisions in all jurisdictions, ensuring that incorporated legal practices and multi disciplinary partnerships can practise across State and Territory borders with ease.

Part 13 adopts the national model provisions relating to incorporated legal practices and multi disciplinary partnerships and strengthens the regulatory requirements to ensure that clients' rights are protected and that the professional obligations on legal practitioners are not affected by the business structures.

An incorporated legal practice must have at least one director who is a legal practitioner. Before carrying on business, the corporation must notify the Law Society that they intend to provide legal services.

As corporations are separate legal entities at law, clause 143 ensures that legal practitioner employees of the practice cannot use the corporation to shield themselves from liability. The clause specifies that any breach by them of a professional obligation can amount to unsatisfactory professional conduct or professional misconduct. Clause 144 ensures all insurable solicitors in an incorporated legal practice have appropriate professional indemnity insurance.

Under clause 146 an incorporated legal practice that provides legal and non-legal services must inform their clients which services are being provided by legal practitioners, and which are not. This is to ensure that their clients are fully informed and not acting under a misapprehension about who is providing the services.

The Law Society Council may apply to the Supreme Court to ban a corporation from providing legal services under clause 153. Directors can be banned from managing incorporated legal practices under clause 154.

Multi disciplinary partnerships

Multi disciplinary partnerships are partnerships that provide legal and non-legal services. Similar to an incorporated legal practice, a multidisciplinary partnership must give the Law Society notice that they intend to provide legal services.

Where a partnership has legal and non-legal partners, clause 168 specifies that the legal partners are responsible for the management of the legal services provided. Clause 171 specifies that a legal practitioner employee in a multi disciplinary partnership must maintain professional standards that apply to other practitioners.

Part 2.7—Legal practice by foreign lawyers

The national model provisions provide a system for registering foreign lawyers. The scheme currently operating in most jurisdictions requires a foreign lawyer to register in each jurisdiction where they practise. However, the national model provisions will allow registration in one jurisdiction to be recognised in other jurisdictions.

The provisions in the bill are otherwise similar to the existing provisions in the Legal Profession Act 1987 in relation to foreign lawyers.

Currently NSW has 14 foreign lawyers registered with the Law Society.

Part 2.8—Community Legal Centres

Clause 240 adopts the current section 48H from the Legal Profession Act. This requires community legal centres to comply with certain provisions allowing them to provide legal services.

CHAPTER 3—Conduct of Legal Practice

Part 3.1—Trust Money and Trust Accounts

Part 3.1 sets out requirements and procedures for legal practitioner trust accounts. This part is crucial to the uniform legal profession scheme. Currently, there are different trust account requirements operating in each jurisdiction. One of the aims of the model laws project was to set similar trust account requirements in all jurisdictions, thus reducing compliance costs.

Under clause 244, money entrusted to a legal practice for, or in connection with, financial services is excluded from part 3.1. This money is protected by the Financial Services License Scheme operated by the Commonwealth.

Part 3.1 generally requires all trust money received by a legal practice in NSW be put into a NSW trust account. Sometimes it may be difficult to determine the jurisdiction where trust money is received. This may be because the client is resident in one jurisdiction, while the services are performed in another, or two different offices of a law practice are involved. To assist with this, clause 247 allows the Law Society Council to enter into protocols with authorities in other jurisdictions to determine where trust funds were received.

Clause 252 specifically excludes barristers from holding money on behalf of other persons. However, the regulations may specify situations where barristers can hold trust funds.

Under Division 3, the Law Society Council may appoint an investigator to a law practice. This appointment may authorise the investigator to investigate a particular allegation or matter, or allow for the investigation of trust accounts on a general or regular basis. Once the investigation is complete an investigators' report must be submitted to the Law Society Council.

Under clause 272 the Law Society can accredit people to be external examiners. The external examiner examines the records of a trust account. Under clause 274, a law practice must have its trust account examined by an external examiner at least once a year. The external examinations ensure trust accounts are kept in accordance with the legislation, and also assist the Law Society in identifying any discrepancies in the account.

Public Purpose Fund

The bill retains the Public Purpose Fund, which is made up of interest earned on the statutory deposits under Division 6. The Public Purpose Fund is applied for the payment of various costs and expenses set out in clause 290, including the costs of regulatory action under the bill. Discretionary payments may also be made from the Fund to assist Legal Aid, the

Fidelity Fund and the Law and Justice Foundation.

The current trustees of the Public Purpose Fund will be maintained.

Part 3.2—Cost disclosure and Assessment

Currently, cost disclosure and review requirements differ throughout Australia. Sometimes they are in legislation or, in other cases, in the professional associations' practice rules.

Inconsistencies in costs disclosure requirements cause practical difficulties - for example, two or more separate costs disclosures may be required for the one matter. A disclosure complying with the requirements of one jurisdiction may not meet the requirements of another. Uniformity will ensure that consumers receive a single set of costs information.

The national model provisions relating to legal costs ensure there are the same requirements in relation to cost disclosure and similar principles for cost assessment, but with each jurisdiction retaining its own structures and processes for cost assessment.

Part 3.2 sets outs the requirements in relation to costs disclosure and assessment. This includes what must be included in a cost disclosure statement, billing, and having legal fees assessed.

Generally the provisions in the bill apply if a client first instructs the law practice in the matter in NSW.

When the client first instructs the practice, the law practice must give the client a cost disclosure statement detailing the information specified in clause 309(1). This includes an estimate of the total costs, an estimate of the amount the client will be able to recover and how the costs can be assessed.

There are certain exceptions from the requirement to disclose as outlined in clause 312. These include a client who has already received a disclosure notice and who has waived further disclosure, a public company and the holder of a financial services licence.

As a general rule a client will not be required to pay legal costs in respect of matters that have not been disclosed unless the costs have been assessed under Division 11.

In addition to the disclosure statement, a law practice can enter into a costs agreement with the client. The cost agreement is a binding, written contract detailing how costs will be charged and billed.

A costs agreement may be enforced as a contract and can be reviewed under this part. The agreement may be set aside under clause 328 if the agreement is not fair, just or reasonable.

The law practice cannot recover their costs from the client until the bill has been given. The bill can either specify a lump sum or itemise the individual costs involved.

The current provisions in the NSW Act dealing with maximum costs in personal injury damages matters, and costs in civil claims where there is no reasonable prospect of success have been retained in Divisions 9 and 10. These provisions directly replicate sections 198C to 198N of the *Legal Profession Act 1987*.

Costs billed by a law practice can be assessed under Division 11.

When assessing the bill, a cost assessor must consider the criteria for assessment listed in 363. This includes whether the legal work was necessary, carried out in a reasonable manner and whether the fees charged were fair and reasonable. Cost assessors may also assess party/party costs following a court or tribunal award of costs.

Once the cost assessor has reviewed the fees, the cost assessor must make a determination under clause 367 and issue a certificate. Once the certificate is filed in a court with the relevant jurisdiction the certificate becomes a judgement of that court.

If either party to the assessment is dissatisfied with the cost assessor's determination, this may be reviewed by a cost assessment panel.

The Panel consists of two cost assessor members and reviews the determination made by the original cost assessor. After reviewing the fees, the certificate, and any relevant material, the panel can make a new determination and issue a certificate under clauses 377 and 378.

An appeal to the Supreme Court is available under clause 384. The Supreme Court can either make a new determination or remit its decision to the cost assessor for determination.

If a cost assessor considers the costs charged by the law practice are excessive, the cost assessor can refer the claim to the Legal Services Commissioner.

Part 3.3—Professional Indemnity Insurance

The National Legal Profession Joint Working Group has a subcommittee investigating whether a national indemnity

insurance scheme is feasible. This is still continuing. Therefore, this bill maintains the current NSW provisions for professional indemnity insurance.

The *Legal Profession Act 1987* has provisions dealing with claims against solicitors relating to HIH Insurance. These provisions are now little used, but will be retained in a schedule to the bill.

Part 3.4—Fidelity Cover

Fidelity Funds meet claims by consumers who have suffered financial loss due to a legal practitioner's dishonest default in failing to pay or deliver money, or through a fraudulent dealing with trust property.

The model provisions ensure greater consistency across Australia in relation to the claims that can be made on Fidelity Funds, ensuring consumer rights do not differ between jurisdictions. The model provisions also clarify which fund is liable for claims with an interstate element, and include interjurisdictional provisions to facilitate co-operation between interstate authorities on the investigation of defaults.

Under part 3.4, solicitors are required to pay a contribution to the Fidelity Fund when applying for a practising certificate. Additionally, interstate legal practitioners who become eligible to withdraw money from a NSW trust fund must also pay a contribution.

The NSW Fidelity Fund is only available for defaults occurring in NSW. Therefore, clause 433 determines the 'relevant jurisdiction' where a default occurs. Generally this will be determined by the location of the funds and the person authorised to withdraw the funds.

Given that funds associated with financial services are excluded from the trust provisions of the bill, clause 435 also prohibits clients claiming on the Fidelity Fund for claims relating to financial services. This is because financial services funds are regulated by the Commonwealth Government.

Division 9 of part 3.4 gives the Law Society Council the ability to deal with interstate regulators when a claim against the Fidelity Fund occurs partly in NSW and partly in another jurisdiction. Clause 462 gives the Law Society Council the power to enter into formal protocols with interstate regulators to share information about claims, and investigate claims across jurisdictional borders.

Part 3.5—Mortgage Practices and Managed Investment Schemes

This part adopts the current provisions from s. 115-122M of the Legal Profession Act 1987 regulating a practitioner's ability to carry on a mortgage practice or managed investment scheme.

CHAPTER 4—Complaints and discipline

Chapter 4 of the bill adopts the national model provisions relating to complaints and discipline. These will achieve greater uniformity in standards applied by regulators and courts across Australia to determine when a practitioner's right to practise should be removed or restricted. They will also ensure that the rights afforded to complainants are broadly comparable across jurisdictions. In particular, the bill adopts the definitions of unsatisfactory professional conduct and professional misconduct from the national model provisions, ensuring that this will be the same across Australia.

Chapter 4 also facilitates the mutual recognition of disciplinary action, co-operation between regulators, and the exchange of information concerning complaints.

This Chapter draws from both the national model provisions and the relevant provisions of the current Act. It also implements a number of amendments to the current provisions, including certain amendments proposed by the Law Reform Commission in Report 99—*Complaints against lawyers: an interim report*) April 2001 and the Attorney General's Department's *Further review of complaints against lawyers* in November 2002. Other proposals came from the legal profession regulators.

Professional misconduct is defined in clause 497 as conduct that involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence occurring in the practice of law.

Unsatisfactory professional conduct is the lesser offence, and is defined in clause 496 as conduct occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the profession is entitled to expect from a reasonably competent legal practitioner.

Clause 498 sets out certain types of conduct that are capable of being unsatisfactory professional conduct or professional misconduct and these include serious offences, tax offences and offences involving dishonesty.

The Chapter applies to Australian legal practitioners, Australian lawyers both current and former, and current and former Australian Registered Foreign Lawyers.

Clause 562 specifies that the Administrative Decisions Tribunal can make any order it sees fit, including some specified orders if it finds the legal practitioner has engaged in professional misconduct or unsatisfactory professional conduct. The Tribunal will also be able to make orders that will be implemented in other States and Territories. For instance the Tribunal can make an order recommending that the name of a practitioner be removed from an interstate roll or an order

recommending that a practitioner's interstate practicing certificate be suspended or cancelled.

Under part 4.9, the Legal Services Commissioner must keep a register of disciplinary action taken against lawyers. The register must contain the details of all disciplinary action taken against lawyers in NSW and of disciplinary action taken against lawyers in another State or Territory if there is a New South Wales connection to the conduct.

Part 4.10 contains a number of provisions to assist with inter-jurisdictional issues. Clause 583 allows the Legal Services Commissioner to enter into protocols with other jurisdictions for investigating and dealing with conduct that appears to have occurred in more than one jurisdiction. Under clauses 584 and 585 both the Commissioner and the Law Society and Bar Councils can request another jurisdiction to investigate a complaint, and other jurisdictions can also ask the Commissioner or the Councils to investigate a complaint.

Clause 586 allows the Legal Services Commissioner and the Law Society and Bar Councils to enter into arrangements with authorities in other States and Territories for the sharing of information.

Clause 588 requires that authorities in NSW implement orders made by interstate disciplinary bodies, just as disciplinary orders made by the NSW, Administrative Decisions Tribunal for removal of a practitioners name from an interstate roll or cancellation of an interstate practising certificate, will be implemented elsewhere.

CHAPTER 5 External Intervention

Chapter 5 provides for intervention in the business and professional affairs of law practices in certain circumstances in order to protect the interests of the general public, and clients of the legal practice.

External intervenors can be appointed in a range of circumstances set out in clause 615, including where the practitioner has died, ceased to be a legal practitioner, or has become insolvent under administration.

Under clause 616 the Law Society Council may appoint a supervisor of trust money for a law practice where there are issues relating to the practice's trust accounts and it is not appropriate that the practice be wound up and terminated.

Under clause 620 the supervisor is responsible for the trust money and accounts of the practice. The supervisor has power to open trust accounts, receive trust money and keep records relating to the trust account. A supervisor's appointment terminates when a receiver or manger is appointed, when all trust funds are distributed or where the Law Society determines that the appointment should cease.

Clause 616 also allows the Law Society or Bar Council to appoint a manager where the practice is, or may become, a viable business concern and where for this to occur a person needs to be appointed to take over the professional and operational responsibility for the practice. For instance, a manager may be appointed where the principal is sick or cannot otherwise run their practice.

Under clause 626 the manager is responsible for carrying on the law practice. The manager may transact any urgent business, operate the trust account, accept instructions from clients and wind up the affairs of the practice. The manager's role ceases when a receiver is appointed with the powers of the manager, where the practice has been wound up, or where the Council has determined that the appointment should cease.

Under clause 616 the Law Society Council can apply to the Supreme Court for a receiver of a law practice to be appointed if it believes the appointment is necessary to protect clients' trust money and that it may be appropriate for the practice to be wound up and terminated.

Under clause 633 a receiver is to be the receiver of trust money and other regulated property, and to wind up and terminate the practice.

The *Legal Profession Act 1987* only provides for the appointment of receivers and managers. This bill provides another option of appointing a supervisor of trust money in circumstances where this would be more appropriate.

CHAPTER 6—provisions relating to investigations

Chapter 6 of the bill specifies the powers of investigation for:

• Trust account investigators;

• Trust account external examiners;

• A complaints and discipline investigator; and

• A compliance auditor.

Clause 670 allows the Legal Services Commissioner or the Law Society to conduct a compliance audit of a law practice to determine if the practice complies with the requirements imposed by the bill.

CHAPTER 7 Regulatory Authorities

Chapter 7 deals with the constitution, appointment and functions of the:

• Legal Profession Admission Board;

• Legal Profession Advisory Council;

• Legal Services Commissioner;

• Law Society; and the

• Bar Association.

These are largely the same as in the *Legal Profession Act 1987,* but modified where necessary to accommodate the changes introduced by implementing the national model provisions.

Under clauses 702-704 the Bar Council and Law Society Council will continue to be able to make rules in relation to legal practice.

CHAPTER 8—General Provisions

Chapter 8 contains provisions of general application to the bill.

Clause 721 provides a general disclosure provision allowing information to be shared with interstate and New Zealand regulatory bodies.

Conclusion

This bill adopts the national model legal profession provisions, it ensures a national approach to the regulation of the legal profession and removes barriers to legal practitioners practising across State and Territory borders.

It establishes a regulatory framework that meets the needs of the profession, while at the same time protecting the interests of consumers.

It is the culmination of many years' work and co-operation between the Governments of each State and Territory in Australia, the Commonwealth Government, and the Australian legal profession.

I commend the bill to the House.