

Legal Profession Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to replace the *Legal Profession Act 1987* with a new Act to provide for the regulation of legal practice in New South Wales and to facilitate the regulation of legal practice on a national basis, in conjunction with the National Legal Profession Model Laws Project.

National Legal Profession Model Laws Project

The Model Laws Project aims to achieve greater consistency and uniformity in legal profession regulation and legal trade and resulted in the release of model provisions developed through the Standing Committee of Attorneys-General. The model provisions are of three types:

- Core Uniform (CU)—these are core provisions that are to be adopted in each State and Territory, using the same wording as far as practicable
- Core Non Uniform (CNU)—these are core provisions that are to be adopted in each State and Territory, but the wording of the model provisions need not be adopted
- Non Uniform (NU)—States and Territories can choose the extent to which they will follow these provisions

In July 2004, the Commonwealth, States and Territories agreed to implement all the CU and CNU provisions in their respective jurisdictions, and established the Legal Profession Joint Working Group to maintain uniformity and monitor implementation. The Joint Working Group has representatives from the Commonwealth, States and Territories and also from the Law Council of Australia. The model provisions were designed to ensure that clients and practitioners in all States and Territories have similar rights and responsibilities, and to provide for the regulation of the legal profession on a consistent national basis (including nationwide recognition of admission as a lawyer in any jurisdiction and of the grant of a practising certificate in any jurisdiction to practise as a legal practitioner).

Legal Profession Bill 2004

The Bill seeks to incorporate the Core Uniform (CU) and Core Non Uniform (CNU) provisions mentioned above. Most of the Non Uniform (NU) provisions have also been included.

As the model provisions address only those aspects of legal profession regulation where national uniformity is essential, parts of the current *Legal Profession Act 1987* are proposed to be retained (eg regulatory bodies and legal authorities, and the distinction between barristers and solicitors). The Bill also implements a number of amendments to the provisions of the current Act, including certain amendments proposed by:

- the Law Reform Commission in Report 99 (*Complaints against lawyers: an interim report*) April 2001
- the Attorney General's Department in a review conducted by it (*A further review of complaints against lawyers*) November 2002
- legal profession regulators

Terminology

The Bill defines a number of expressions used in it. Many of these expressions are used in this explanatory note, including the following expressions:

- **Commissioner**—the Legal Services Commissioner
- **Council**—the Bar Council or the Law Society Council
- **jurisdiction**—a State or Territory of Australia
- **Tribunal**—the Administrative Decisions Tribunal

Outline of provisions

Chapter 1 Introduction

Chapter 1 (clauses 1–11) contains definitions and other interpretative provisions. The 1987 Act is drafted principally to cover local barristers and local solicitors. The Bill defines key terms using the concepts of *lawyer* and *legal practitioner*. This ensures the activities of any Australian lawyer practising in NSW are covered by relevant provisions.

Under the 1987 Act, a person is a “legal practitioner” when admitted to the Supreme Court and a “solicitor” or “barrister” when they hold the appropriate practising certificate. This has been changed in the Bill. When admitted, a person becomes a “lawyer”, and when they obtain a practising certificate they become a “legal practitioner”.

To assist with the uniform status of the model laws project, the Bill uses the following new terms:

- **Australian lawyer**—a person admitted to practise in any jurisdiction in Australia (the 1987 Act currently only applies to people admitted in NSW)
- **interstate lawyer**—a person admitted in a jurisdiction other than NSW (the 1987 Act currently uses “interstate legal practitioner”)
- **Australian legal practitioner**—a person holding a practising certificate issued by an Australian jurisdiction (there is no similar term in the 1987 Act)
- **interstate legal practitioner**—a person holding a practising certificate issued by a jurisdiction other than NSW (1987 Act currently uses “interstate barrister or solicitor”)

These definitions will allow a lawyer to apply for a practising certificate and be covered by mutual provisions around Australia.

Chapter 2 General requirements for engaging in legal practice

Part 2.1 Preliminary

Part 2.1 (clause 12) provides a simplified outline of Chapter 2.

Part 2.2 Reservation of legal work and legal titles

Division 1 Preliminary

Division 1 (clause 13) contains a statement of the purposes of Part 2.2.

Division 2 General prohibitions on unqualified practice

Division 2 (clauses 14–16) contains general prohibitions against engaging in legal work unless suitably qualified. The prohibition is general, stating “a person must not engage in legal practice... for fee gain or reward unless the person is an Australian legal practitioner”. The Division also creates an offence for an unqualified person to represent or advertise that they are entitled to engage in legal practice and restricts the use of titles such as lawyer, legal practitioner, barrister, solicitor, attorney, counsel, Queen’s Counsel, King’s Counsel, Her Majesty’s Counsel, His Majesty’s Counsel, Senior Counsel.

Division 3 Prohibitions regarding associates, clerks and non-legal partners

Division 3 (clauses 17–20) imposes restrictions on a law practice having an associate who is a disqualified or convicted person, restrictions on the employment of non-legal clerks and restrictions on partnerships with non-legal partners.

Division 4 General

Division 4 (clause 21) provides that a contravention of Part 2.2 by an Australian lawyer who is not an Australian legal practitioner is capable of being professional misconduct.

Part 2.3 Admission of local lawyers

Division 1 Preliminary

Division 1 (clauses 22 and 23) provides a statement of the purposes of Part 2.3 and definitions.

Division 2 Eligibility and suitability for admission

Division 2 (clauses 24–30) deals with eligibility and suitability requirements for admission as a lawyer. The Division provides a mechanism for early consideration of suitability and for referral of some matters to the Supreme Court, and for appeals to the Supreme Court.

Division 3 Admission to the legal profession

Division 3 (clauses 31–34) provides for the admission of persons as lawyers by the Supreme Court.

Division 4 Legal Profession Admission Board

Division 4 (clauses 35–37) provides for the role of the Legal Profession Admission Board (the **Admission Board**) in advising the Supreme Court on matters concerning the admission of lawyers. The Board has a role in considering an applicant's eligibility and suitability for admission and issues compliance certificates for applicants for admission.

Division 5 Admission rules

Division 5 (clause 38) provides for the Admission Board to make rules for the admission of persons as lawyers under the Act.

Part 2.4 Legal practice by Australian legal practitioners

Division 1 Preliminary

Division 1 (clause 39) contains a statement of the purposes of Part 2.4.

Division 2 Legal practice in this jurisdiction by Australian legal practitioners

Division 2 (clause 40) provides for the entitlement of an Australian legal practitioner to engage in legal practice in NSW.

Division 3 Local practising certificates generally

Division 3 (clauses 41–44) deals with the grant of local practising certificates by the Bar Council or Law Society Council and the issue of suitability to hold a local practising certificate. The Division also provides for the duration of local practising certificates.

Division 4 Grant or renewal of local practising certificates

Division 4 (clauses 45–48) deals with the making of an application for a local practising certificate, including eligibility to apply, the period within which an application for renewal of a local practising certificate must be made, and the procedure for determining an application for a local practising certificate.

Division 5 Conditions on local practising certificates

Division 5 (clauses 49–58) deals with the imposition of conditions on local practising certificates, including the imposition of various statutory conditions.

Division 6 Amendment, suspension or cancellation of local practising certificates

Division 6 (clauses 59–64) provides procedures for the amendment, suspension or cancellation of a local practising certificate.

Division 7 Special powers in relation to local practising certificates—show cause events

Division 7 (clauses 65–77) contains special provisions for dealing with the occurrence of “show cause events” (acts of bankruptcy, indictable offences and tax offences) in respect of the holder of or an applicant for a local practising certificate.

Division 8 Further provisions relating to local practising certificates

Division 8 (clauses 78–80) provide for the immediate suspension of a local practising certificate in certain cases, and the surrender, cancellation and return of local practising certificates.

Division 9 Practise as a barrister or solicitor

Division 9 (clauses 81–90) provides special additional requirements (based on provisions of the 1987 Act) for practice as a barrister or solicitor, including

provisions concerning client access, advertising, specialisation and schemes for recognition of seniority or status.

Division 10 Fees for practising certificates

Division 10 (clauses 91–95) deals with the fees payable for local practising certificates (including provision for late fees, refunds, submission of budgets and audits).

Division 11 Interstate legal practitioners

Division 11 (clauses 96–103) deals with the obligations of interstate legal practitioners to notify the establishment of an office in NSW and the requirement for professional indemnity insurance if an office is established in NSW. The Division also provides for the extent of the entitlement of an interstate legal practitioner to practise in NSW and additional conditions of practice on interstate legal practitioners.

Division 12 Miscellaneous

Division 12 (clauses 104–115) contains various miscellaneous provisions concerning legal practice by Australian legal practitioners.

Part 2.5 Inter-jurisdictional provisions regarding admission and practising certificates

Division 1 Preliminary

Division 1 (clauses 116–118) contains a statement of the purpose of Part 2.5 and definitions.

Division 2 Notifications to be given by local authorities to interstate authorities

Division 2 (clauses 119–121) provides for the notification of corresponding authorities in other jurisdictions about the making of an application for admission to the legal profession, the removal of a local lawyer's name from the local roll and a decision to refuse to grant an Australian lawyer a local practising certificate or to suspend, cancel or refuse to renew an Australian lawyer's local practising certificate.

Division 3 Notifications to be given by lawyers to local authorities

Division 3 (clauses 122–125) requires local lawyers and local legal practitioners to give notice to the appropriate authority in this jurisdiction of removal from an interstate roll, the making of various interstate orders and foreign regulatory actions.

Division 4 Taking of action by local authorities in response to notifications received

Division 4 (clauses 126–131) deals with the taking of action by local authorities in response to notifications received under Division 3.

Part 2.6 Incorporated legal practices and multi-disciplinary partnerships

Division 1 Preliminary

Division 1 (clauses 132 and 133) contains a statement of the purpose of Part 2.6 and definitions.

Division 2 Incorporated legal practices

Division 2 (clauses 134–164) establishes a scheme for the recognition and regulation of corporations that provide legal services. A corporation may not provide legal services (with certain exceptions such as corporations providing in-house legal services) unless it complies with the Division. Before starting to engage in legal practice in this State, a corporation must give written notice to the Law Society and must also notify the Society when it ceases to provide legal services. Although an incorporated legal practice is not required to hold an Australian practising certificate, it must have at least one legal practitioner director who holds an unrestricted practising certificate and who is to be responsible for the proper management and implementation of the provision of legal services. It will

be an offence for an incorporated legal practice not to have any legal practitioner directors for a period exceeding 7 days and not to notify the Law Society of that fact. The Division also makes it clear that a legal practitioner who provides legal services on behalf of an incorporated legal practice has the same professional obligations and privileges as other legal practitioners. In addition, the incorporated legal practice and each insurable solicitor who is involved (either as a director or employee) in the practice must comply with professional indemnity insurance obligations. An incorporated legal practice must give a disclosure notice to clients about services that clients might reasonably assume are legal services. The Division also makes other special provision with respect to incorporated legal practices, including provision for the application of advertising and other obligations as well as in relation to conflict of interest obligations. Jurisdiction is conferred on the Supreme Court, on application by the Law Society Council or the Commissioner, to disqualify a corporation from providing legal services or to disqualify a person from managing an incorporated legal practice. Other provision is made in relation to the operation of proceedings and laws relating to corporations and the operation of the proposed Act. Restrictions on sharing receipts, income and other revenue with non-lawyers are lifted. A new offence relating to undue influence is created and there are restrictions on employment of and other arrangements with disqualified persons.

Division 3 Multi-disciplinary partnerships

Division 3 (clauses 165–180) establishes a scheme for the recognition and regulation of partnerships that provide legal services, as well as other services, and authorises legal practitioners to provide legal services while being involved in or employed by such a partnership. Before starting to engage in legal practice as a member of a multi-disciplinary partnership, a legal practitioner must give written notice to the Law Society. The Division imposes requirements on members of multi-disciplinary partnerships, including requiring a legal practitioner partner to be responsible for the proper management and implementation of the provision of legal services by the partnership. The Division also makes it clear that a legal practitioner who provides legal services on behalf of a multi-disciplinary partnership has the same professional obligations and privileges as other legal practitioners. A disclosure notice must be given to clients about services that clients might reasonably assume are legal services.

The Division also makes other special provision with respect to multi-disciplinary partnerships, including provision for the application of advertising and other obligations as well as in relation to conflict of interest obligations that may arise out of different services being provided. Restrictions on sharing receipts, income and other revenue with non-lawyers are lifted. A new offence relating to undue influence is created and there are restrictions on employment of and other arrangements with disqualified persons.

Division 4 Miscellaneous

Division 4 (clauses 181 and 182) contains miscellaneous provisions dealing with the obligations of individual practitioners in the context of incorporated legal practices and multi-disciplinary partnerships, and a regulation making power.

Part 2.7 Legal practice by foreign lawyers

Division 1 Preliminary

Division 1 (clauses 183–185) contains a statement of the purpose of Part 2.7 and definitions.

Division 2 Practice of foreign law

Division 2 (clauses 186–197) sets out the practice rights and obligations in this State of legal practitioners who are registered overseas as legal practitioners (***overseas-registered foreign lawyers***) to practice the law of their home jurisdiction in this State. An overseas-registered foreign lawyer may practice without

registration for a limited period. The services that a registered foreign lawyer may provide are to be limited to those involving legal services concerning the law of the home jurisdiction or conciliation and other similar proceedings, but do not extend to legal proceedings before a court. Australian professional and ethical standards are applied to registered foreign lawyers, as well as other obligations applicable to other legal practitioners, including trust account obligations and insurance and fidelity cover obligations (to the extent provided by the regulations).

Division 3 Local registration of foreign lawyers generally

Division 3 (clauses 198–200) provide for the right of overseas-registered foreign lawyers to be registered as foreign lawyers under the proposed Act and for registration to expire at the end of the financial year in which it is granted.

Division 4 Applications for grant or renewal of registration

Division 4 (clauses 201–203) sets out the procedures and requirements for applications for registration as a foreign lawyer.

Division 5 Grant or renewal of registration

Division 5 (clauses 204–206) requires a foreign lawyer to be registered by the Bar Council or the Law Society Council (the *domestic registration authority*) if satisfied as to the applicant's registration in a foreign country, that law practice is regulated in that country and that the person is not subject to restrictions in practice in that country that would make registration inappropriate. It also enables registration to be refused on disciplinary and other grounds.

Division 6 Amendment, suspension or cancellation of local registration

Division 6 (clauses 207–212) sets out the procedure for amending, suspending or cancelling the registration of a foreign lawyer. The grounds for taking action include being the subject of disciplinary proceedings or being a party in pending criminal or civil proceedings. Before action is taken, the domestic registration authority must issue a show cause notice and consider representations.

Division 7 Special powers in relation to local registration—show cause events

Division 7 (clauses 213–217) provides for an automatic show cause process, and for the refusal, amendment, suspension or cancellation of, or a ban on, registration as a foreign lawyer, if a foreign lawyer becomes insolvent under administration or is convicted of a serious offence or a tax offence.

Division 8 Further provisions relating to local registration

Division 8 (clauses 218–222) confers power on the domestic registration authority to immediately suspend the registration of a foreign lawyer if it considers it necessary in the public interest and provides for the surrender of a certificate of registration. Registration is automatically suspended or cancelled if the registration in the home jurisdiction is suspended or cancelled.

Division 9 Conditions on registration

Division 9 (clauses 223–228) provide for the imposition of conditions on registration as a foreign lawyer.

Division 10 Interstate-registered foreign lawyers

Division 10 (clauses 229 and 230) provides for the conditions on which interstate-registered foreign lawyers may practise foreign law in this State and enables the domestic registration authority to impose conditions of practice on interstate-registered foreign lawyers.

Division 11 Miscellaneous

Division 11 (clauses 231–239) contains miscellaneous provisions relating to foreign lawyers. They include provisions requiring foreign lawyers to provide information to the domestic registration authority, the establishment of a register of registered foreign lawyers by the domestic registration authority, enforcement of practice conditions by Supreme Court order or injunction, a right to appeal to the Supreme

Court against decisions of the domestic registration authority and other provisions.

Part 2.8 Community legal centres

Part 2.8 (clauses 240 and 241) defines community legal centres and enables their operation, while applying the legal profession rules to their employees or people who provide services to them. Regulations may be made with respect to the application of the proposed Act to community legal centres.

Chapter 3 Conduct of legal practice

Part 3.1 Trust money and trust accounts

Division 1 Preliminary

Division 1 (clauses 242–252) contains a statement of the purposes of Part 3.1 and interpretative and application provisions for the Part.

Division 2 Trust accounts and trust money

Division 2 (clauses 253–266) provides for the manner in which a law practice must hold, disburse and account for trust money it receives.

Division 3 Investigations

Division 3 (clauses 267–271) provides for the investigation of the affairs of a law practice.

Division 4 External examinations

Division 4 (clauses 272–279) provides for the external examination of the trust records of a law practice.

Division 5 Provisions relating to ADIs

Division 5 (clauses 280–282) deals with the approval of ADIs to hold trust money of law practices and with the obligations and liabilities of those ADIs with respect to trust money, reports, recommendations and information.

Division 6 Statutory deposits

Division 6 (clauses 283 and 284) provide for the regulations to require a law practice to pay amounts out of a general trust account of the practice into an ADI account maintained by the Law Society for investment by the Law Society.

Division 7 Public Purpose Fund

Division 7 (clauses 285–294) provides for 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 and for purposes determined by the Trustees with the concurrence of the Attorney General.

Division 8 Miscellaneous provisions

Division 8 (clauses 295–300) contains miscellaneous provisions dealing with restrictions on the receipt of trust money, disclosure of information and the application of Part 3.1 to incorporated legal practices, multi-disciplinary partnerships and community legal centres.

Part 3.2 Costs disclosure and assessment

Division 1 Preliminary

Division 1 (clauses 301–302) contains a statement of the purpose of Part 3.2 and definitions.

Division 2 Application of this Part

Division 2 (clauses 303–308) specifies the kinds of matters to which Part 3.2 will apply.

Division 3 Cost disclosures

Division 3 (clauses 309–318) imposes obligations on law practices to disclose certain matters concerning legal costs to clients and prospective clients in respect of the provision of legal services. The Division also makes provision for the consequences of a failure to disclose such matters. 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.

Division 4 Legal costs generally

Division 4 (clauses 319–321) specifies in general terms the kinds of legal costs that

are recoverable by law practices from clients. In particular, proposed section 319 provides that, subject to Part 3.2, legal costs are recoverable:

- (a) in accordance with an applicable determination, scale, arrangement or other provision fixing the costs or maximum costs for the legal services concerned made by or under legislation, or
- (b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or
- (c) if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.

Division 5 Costs agreements

Division 4 (clauses 322–328) makes provision for how costs agreements may be entered into. The Division also prohibits certain kinds of conditional costs agreements. The conditional costs agreements prohibited include:

- (a) agreements that provide for the payment of a premium on the legal costs payable under the agreement on the successful outcome of the matter, and
- (b) agreements that provide for a fee to be contingent on certain matters.

Division 6 Costs fixed by regulations

Division 6 (clauses 329–330) enables the Governor to fix certain legal costs by regulation.

Division 7 Billing

Division 7 (clauses 331–334) generally requires a legal practice to give a client a bill of costs before the practice is entitled to recover the costs.

Division 8 Mediation of costs disputes

Division 8 (clauses 335 and 336) enables a dispute about a bill of costs to be referred to mediation.

Division 9 Maximum costs in personal injury damages matters

Division 9 (clauses 337–343) fixes maximum amounts for legal costs in personal injury damages matters.

Division 10 Costs in civil claims where no reasonable prospects of success

Division 10 (clauses 344–349) provides that generally a law practice must not provide legal services in respect of a claim or defence of a claim for damages unless the legal practitioner concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or defence has reasonable prospects of success. A contravention of such a requirement may result in disciplinary proceedings and costs orders against the legal practitioner concerned.

Division 11 Costs assessments

Division 11 (clauses 350–395) makes provision for the following matters:

- (a) the appointment of costs assessors,
- (b) the making of applications for bills of costs to be assessed by a costs assessor,
- (c) the procedure to be followed by costs assessors when conducting a costs assessment,
- (d) the making of determinations by costs assessors in respect of a costs assessment,
- (e) the review of costs assessments by a specially convened review panel where a costs assessment is disputed,
- (f) appeals to the Supreme Court against decisions of costs assessors and review panels.

Division 12 Miscellaneous

Division 12 (clauses 396–400) contains certain other provisions relating to the application of Part 3.2 to certain kinds of lawyers. The Division also provides for the payment of the costs of administering Part 3.2.

Part 3.3 Professional indemnity insurance

Part 3.3 (clauses 401–417) imposes the same requirements as the 1987 Act for professional indemnity insurance.

Part 3.4 Fidelity cover

Part 3.4 (clauses 418–476) establishes the Fidelity Fund to meet claims by consumers who have suffered financial loss due to a practitioner’s dishonest default. This is known as “fidelity cover”.

The Fidelity Fund is funded through contributions by NSW legal practitioners when applying for a practising certificate. However, if the Law Society believes there is insufficient money in the Fund it can levy solicitors to ensure client claims are met.

The provisions of Part 3.4 are similar to the 1987 Act, except for the new interjurisdictional provisions for defaults occurring in more than one jurisdiction.

The Fidelity Fund covers a failure of the practice to pay or deliver money, or a fraudulent dealing with trust property. It is immaterial that the default does not constitute a criminal or civil offence.

A person makes a claim against the Fund by writing to the Law Society within 6 months of the default (or other period specified by the Supreme Court). The current time limit under the 1987 Act is only 3 months. Where there are large-scale defaults by a practice the Law Society may run advertisements to inform clients.

The Law Society can deny or pay a Fidelity Fund claim, either wholly or in part.

There is a list of factors for consideration when determining a claim, including whether the practice concerned has previously paid the loss to the client. If a claimant is dissatisfied with the Law Society’s decision the claimant can appeal to the Supreme Court. Where an associate of a law practice causes a default, the law practice may make a claim against the Fidelity Fund to recover for the default.

The Law Society Council may set caps for maximum claims payable from the Fund, which maintains the current position.

Under the 1987 Act a person can claim against the Fidelity Fund for both a “dishonest default” and a “failure to account”. This is maintained, with both these concepts being incorporated into the definition of **default**.

New provisions in the Bill are used to determine the jurisdictional arrangements between different Fidelity Funds. Under the core uniform provisions, the Law Societies in different States and Territories may determine how much, and the extent to which, each Fund should pay when a default occurs partly in different jurisdictions.

Part 3.5 Mortgage practices and managed investment schemes

Part 3.5 (clauses 477–493) substantially re-enacts Part 9 of the *Legal Profession Act 1987*. This Part provides for the regulation of certain mortgage work carried out by solicitors and prevents claims against the Fidelity Fund from being made in respect of losses arising from certain investments made in connection with mortgage practices and managed investment schemes that are associated with solicitors.

Chapter 4 Complaints and discipline

Chapter 4 provides the scheme for disciplining Australian lawyers and foreign lawyers for unsatisfactory professional conduct or professional misconduct. The broad purposes of the Chapter are:

- to provide a nationally consistent scheme for disciplining the legal profession
- to promote and enforce nationally consistent standards
- to promote best practice legal service delivery
- to provide a means of redressing complaints against lawyers

The only Core Uniform (CU) provisions of Chapter 4 are the definitions of **unsatisfactory professional conduct** and **professional misconduct**. Core Non Uniform provisions (CNU) include the inter-jurisdictional provisions, the range of disciplinary sanctions to be available, and the publicising of disciplinary action.

Chapter 4 is based on the model provisions and relevant provisions of the 1987

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
- the Attorney General's Department in a review conducted by it (*A further review of complaints against lawyers*) November 2002
- legal profession regulators

Part 4.1 Preliminary and application

Division 1 Preliminary

Division 1 (clauses 494–498) states the purposes and objects of Part 4.1, defines unsatisfactory professional conduct and professional misconduct, and specifies certain kinds of conduct that is capable of being unsatisfactory professional conduct and professional misconduct.

Division 2 Application

Division 2 (clauses 499–502) specifies:

- the *persons* to whom the Part applies—current and former Australian legal practitioners, and current and former Australian lawyers (the Part also applies by force of Part 2.7 to Australian-registered foreign lawyers), and
- the *conduct* to which the Part applies—conduct occurring in this jurisdiction, and (in certain circumstances) conduct occurring outside this jurisdiction, committed by those persons.

Even though provisions of the Part are generally expressed to apply to an “Australian legal practitioner”, the provisions extend to the persons mentioned above.

Part 4.2 Complaints about Australian legal practitioners

Part 4.2 (clauses 503–513) enables complaints to be made about the conduct of Australian legal practitioners. Complaints may be made by clients, a Council, the Commissioner or any other persons. Complaints must be made within 3 years after the alleged conduct occurred, unless the Commissioner or a Council (as relevant) determines that a complaint about earlier conduct may be dealt with having regard to specified criteria.

The practitioner against whom a complaint is made must be notified of the complaint and has an opportunity to make submissions about it. A preliminary assessment may be made of a complaint, and machinery is included for the summary dismissal of complaints in appropriate cases and for the withdrawal of complaints.

The Commissioner may refer a complaint to a Council if the Commissioner decides not to investigate the complaint.

Part 4.3 Mediation

Part 4.3 (clauses 514–524) provides for the mediation of complaints that relate to a consumer dispute only (ie a dispute that does not involve an issue of unsatisfactory professional conduct or professional misconduct), or hybrid complaints (ie disputes that relate to a consumer issue and involve an issue of unsatisfactory professional conduct or professional misconduct).

Part 4.4 Investigation of complaints

Part 4.4 (clauses 525–536) requires the investigation of complaints except in specified instances, and sets out various powers and requirements regarding investigations.

A complaint is to be investigated by the Commissioner or by a Council if the Commissioner refers it to the Council. The Commissioner may give directions about the conduct of a complaint and may take over the conduct of an investigation from a Council. The Commissioner or Council investigating a complaint may appoint an investigator, and the Commissioner may appoint an independent investigator in certain circumstances.

The Commissioner or a Council may at their discretion, for the purpose of investigating a complaint, apply for an assessment by a costs assessor of costs claimed by an Australian legal practitioner.

Chapter 6 applies to an investigation under this Part.

Part 4.5 Decision of Commissioner or Council

Part 4.5 (clauses 537–542) requires disciplinary proceedings to be commenced in the Tribunal, unless the complaint is dismissed or summarily concluded by way of caution, reprimand or compensation order.

Provision is made for the commencement of disciplinary proceedings in the Tribunal without starting or finishing an investigation if there is a reasonable likelihood that the Tribunal will find that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

Part 4.6 Review of Councils' decisions

Part 4.6 (clauses 543–547) empowers the Commissioner, on the application of the complainant, to review a decision of a Council:

- to dismiss a complaint
- to impose a caution, reprimand or a compensation order
- to omit, from a disciplinary application made to the Tribunal, matter that was originally part of a complaint made to the Council

Part 4.7 Immediate suspension of local practising certificate

Part 4.7 (clauses 548–550) enables the Commissioner or a Council, in the public interest, to immediately suspend a local practising certificate on the ground of the seriousness of the conduct in respect of which a complaint has been made.

Part 4.8 Proceedings in Tribunal

Part 4.8 (clauses 551–569) provides a scheme for the commencement, hearing and determination of proceedings before the Tribunal in connection with a complaint. Proceedings are commenced by the Commissioner or a Council by way of application (referred to in the Division as a “disciplinary application” to distinguish it from other applications). A disciplinary application can be made within 6 months after the Council or Commissioner decides that proceedings be commenced, but the Tribunal may, on application in writing by the Council or Commissioner and having regard to specified criteria, extend the time for making the application. Hearings are generally to be conducted in public.

The Division specifies a range of orders that the Tribunal may make when determining proceedings on a disciplinary application, including the following:

- orders requiring official implementation in this jurisdiction
- orders requiring official implementation in another jurisdiction
- orders requiring compliance by the practitioner
- ancillary or other orders
- interlocutory and interim orders

Provisions limit the maximum amount of fines that can be imposed, and authorise consent orders to be made.

Provisions of the *Administrative Decisions Tribunal Act 1997* apply to the proceedings.

Part 4.9 Compensation

Part 4.9 (clauses 570–575) enables a complainant to request the making of a compensation order against the Australian legal practitioner concerned for pecuniary loss incurred through the conduct complained of. A request may only be made within 6 years after the alleged conduct occurred.

A compensation order may be made by the Tribunal, the Commissioner or a Council, and maximum amounts are specified as to how much can be ordered to be paid (more can be ordered if the complainant and practitioner consent). Provision is made for the review of or appeal from the making of compensation orders.

Part 4.10 Publicising disciplinary action

Part 4.10 (clauses 576–582) provides for the publicising of disciplinary action taken against Australian legal practitioners in this jurisdiction, and in other jurisdictions in certain circumstances.

The Commissioner and Councils may publicise disciplinary action in any way they consider appropriate, but the Commissioner is required to keep a Register of Disciplinary Action.

Part 4.11 Inter-jurisdictional provisions

Part 4.11 (clauses 583–589) contains a number of provisions to assist with inter-jurisdictional issues arising in connection with the conduct of Australian legal practitioners, including the inter-jurisdictional conduct of investigations of conduct and the enforcement of disciplinary orders made in any jurisdiction. Protocols may be entered into to deal with cases where conduct appears to have occurred in more than one jurisdiction.

Part 4.12 Miscellaneous

Part 4.12 (clauses 590–609) contains a series of miscellaneous provisions relating to the scheme to deal with complaints against and the discipline of Australian legal practitioners, including:

- preservation of the inherent jurisdiction and powers of the Supreme Court regarding discipline
- application of the rules of procedural fairness
- the duty to handle complaints efficiently and expeditiously
- provision of information about the complaints procedure
- co-operation and information sharing
- pre-complaint powers to assist a client who is denied access to documents
- consequences of not complying with orders
- development of performance criteria by the Commissioner and Councils
- reports by the Commissioner and Councils to the Attorney General
- duty of the Commissioner and Councils to report suspected offences
- effect of current civil or criminal proceedings against a practitioner who is the subject of a complaint
- protection of liability for, and non-compellability of, Commissioner, Councils and others
- production by practitioner of information or documents despite a duty of confidentiality between practitioner and client
- waiver by complainant client of confidentiality
- undertakings by Commissioner or Council regarding non-disclosure of privileged or confidential information
- appeals to the Supreme Court against orders and decisions of the Tribunal
- payment of the costs of administering the Part from the Public Purpose Fund to the Consolidated Fund
- enforcement of undertakings by practitioners
- other powers of investigation not affected by the Part

Chapter 5 External intervention

Part 5.1 Preliminary

Part 5.1 (clauses 610–614) contains a statement of the purposes of Chapter 5 and definitions. The Part also provides for how the Chapter applies to barristers, Australian-registered foreign lawyers and others.

Part 5.2 Initiation of external intervention

Part 5.2 (clauses 615 and 616) provides for the circumstances in which external intervention of a law practice may take place and the procedure for appointment of a supervisor, manager or receiver for a law practice.

Part 5.3 Supervisors

Part 5.3 (clauses 617–622) deals with the appointment of, and the role, powers,

authorities, duties and functions of, a supervisor of trust money of a law practice.

Part 5.4 Managers

Part 5.4 (clauses 623–629) deals with the appointment of, and the role, powers, authorities, duties and functions of, a manager of a law practice.

Part 5.5 Receivers

Part 5.5 (clauses 630–645) deals with the appointment of, and the role, powers, authorities, duties and functions of, a receiver for a law practice.

Part 5.6 General

Part 5.6 (clauses 646–656) deals with miscellaneous matters concerning external intervention, including conditions of appointment, status of acts, appeals to and directions by the Supreme Court, disclosure of information by ADIs, and fees, legal costs and expenses.

Chapter 6 Provisions relating to investigations

Part 6.1 Preliminary

Part 6.1 (clauses 657 and 658) contains general provisions (including definitions) for the purposes of Chapter 6 which deals with trust account investigations, trust account examinations, complaint investigations and law practice compliance audits.

Part 6.2 Requirements relating to documents, information and other assistance

Part 6.2 (clauses 659 and 660) deals with the requirements that may be imposed by an investigator in carrying out an investigation, examination or compliance audit in relation to a law practice or an Australian lawyer.

Part 6.3 Entry and search of premises

Part 6.3 (clauses 661–664) confers powers of entry and search, and other incidental powers, on investigators in connection with the carrying out of trust account investigations and complaint investigations.

Part 6.4 Additional powers in relation to incorporated legal practices

Part 6.4 (clauses 665–669) contains additional powers, such as the power to examine persons, inspect books and hold hearings, that may be exercised by an investigator in conducting an investigation or compliance audit in relation to an incorporated legal practice. These additional powers are the same as those conferred on ASIC under certain provisions of the *Australian Securities and Investments Commission Act 2001* of the Commonwealth.

Part 6.5 Miscellaneous

Part 6.5 (clauses 670–678) contains other provisions in relation to investigations and investigatory powers. Provision is made for audits to be conducted of the compliance of law practices (other than barristers) with the requirements of the proposed Act, the regulations and the legal profession rules. The Part also deals with failure to comply with investigatory powers and makes it an offence to obstruct an investigator and for an investigator to make an unauthorised disclosure of his or her appointment. An indictable offence of destroying, concealing or removing any information or document that may provide evidence of a contravention of the proposed Act, the regulations or the legal profession rules is also created. Provision is also made to authorise the disclosure, in certain circumstances, of information obtained in the course of an investigation, examination or audit under the proposed Part.

Chapter 7 Regulatory authorities

Part 7.1 Legal Profession Admission Board

Part 7.1 (clauses 679–681) deals with the constitution and functions of the Legal Profession Admission Board.

Part 7.2 Legal Profession Advisory Council

Part 7.2 (clauses 682–685) deals with the constitution and functions of the Legal Profession Advisory Council.

Part 7.3 Legal Services Commissioner

Part 7.3 (clauses 686–693) deals with the appointment and functions of the Legal Services Commissioner.

Part 7.4 Professional bodies

Part 7.4 (clauses 694–700) contains provisions relating to the functions of the Bar Council and the Law Society Council (including provisions requiring the Councils to report to the Attorney General on their respective committees and to prepare annual reports). Provision is also made for lay representation on the committees of the Bar Association or Bar Council and on the committees of the Law Society and Law Society Council.

Part 7.5 Legal profession rules

Part 7.5 (clauses 701–717) enables the Bar Council and the Law Society Council to make rules in relation to legal practice and contains a number of miscellaneous and machinery provisions (such as the procedure for making rules and the review of rules by certain bodies).

Chapter 8 General provisions

Chapter 8 (clauses 718–739) contains provisions of general application to the Act (including provisions for delegation, liability of principals, injunctions, confidentiality and disclosure of information, legal professional and other privileges, liability protection, offences, evidence and review of the Act).

Schedule 1 Repeals

Schedule 1 lists the *Legal Profession Act 1987* and an unrepealed amending Act that are to be repealed.

Schedule 2 Legal Profession Admission Board

Schedule 2 contains provisions relating to the members (including protection from personal liability) and procedure of the Legal Profession Admission Board.

Schedule 3 Legal Profession Advisory Council

Schedule 3 contains provisions relating to the members (including protection from personal liability) and procedure of the Legal Profession Advisory Council.

Schedule 4 Trustees of Public Purpose Fund

Schedule 4 contains provisions relating to the trustees of the Public Purpose Fund and the procedure of meetings of the trustees.

Schedule 5 Costs assessors

Schedule 5 contains provisions relating to the appointment of costs assessors.

Schedule 6 Amendments

Schedule 6 contains consequential amendments to other Acts.

Schedule 7 Professional indemnity insurance— provisions relating to HIH insurance

Schedule 7 contains special indemnity insurance provisions relating to the HIH Insurance collapse.

Schedule 8 Mortgage practices and managed investment schemes—provisions relating to old mortgages

Schedule 8 provides for savings and transitional provisions in connection with Part 3.5 of the Bill (Mortgage practices and managed investment schemes).

Schedule 9 Savings, transitional and other provisions

Schedule 9 contains consequential savings, transitional and other provisions.