NSW Legislative Assembly Hansard

Legal Profession Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 5 April 2006.

Second Reading

Mr MATT BROWN (Kiama—Parliamentary Secretary) [7.30 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

The Government enacted the Legal Profession Act 2004 in December 2004 and the Act commenced operation on 1 October 2005. The Act is a major milestone in the regulation of the Australian legal profession, recognising and providing for a national profession. The national legal profession scheme and model legislation were developed by the Standing Committee of Attorneys General [SCAG]. The scheme removes many of the barriers to increased efficiency and competition in the legal profession, and harmonises clients' rights across jurisdictions. There continue to be a number of issues under debate in relation to the model legislation. A national forum is deliberating in relation to these issues, and will be bringing forward further amendments to the model for consideration by SCAG ministers.

Following the commencement of the legislation in New South Wales, ways of improving and finetuning the legislation have been identified in consultation with the legal profession and the legal profession regulators. The bill implements a number of those improvements. An undertaking of the scale of the national legal profession scheme is necessarily to be regarded as a work in progress. The bill amends the Legal Profession Act 2004 to maintain uniformity with the national model and to improve and streamline the operation of this new Act. Further amendments should be expected. I shall now consider some specific amendments in the bill.

The Legal Profession Act 2004 prohibits a person from engaging in legal practice for fee, gain or reward unless he or she is an Australian legal practitioner. The bill deletes the words "for fee, gain or reward" to ensure that clients who receive pro bono services from solicitors receive the same level of consumer protection as clients who pay for legal services. This amendment will create uniformity with the Victorian and Queensland legislation on this point.

If practitioners are not required to hold a practising certificate, they do not have to undertake continuing legal education, are unlikely to hold professional indemnity insurance, and are not covered by the professional rules. Accordingly, there is a risk that the public will not be protected from under-qualified persons undertaking legal work, however well intentioned they may be. While pro bono legal work must be encouraged, consumer protection is an overriding goal of legal profession regulation. The professional bodies are willing to offer lower practising certificate fees for practitioners who do only pro bono work.

The bill inserts a new section 689A in the Legal Profession Act 2004 to clarify that the Legal Services Commissioner can bring prosecutions for advertising offences under the Act and regulations. The Act already provides that the Law Society and the Bar Association can prosecute offences, and the amendment makes it clear that the Legal Services Commissioner can also do so in relation to advertising offences. This section also gives the Legal Services Commissioner powers to investigate possible advertising offences. These powers are the same as the Legal Services Commissioner's powers to investigate complaints made against lawyers, and will ensure that the commissioner can properly investigate any possible advertising breaches and obtain the material necessary for a prosecution.

Various provisions in the Legal Profession Act 1987, including restrictions on legal advertising, were carried into the Legal Profession Act 2004. However, the maximum penalty that could be imposed by regulation and the maximum penalty for breaching an Administrative Decisions Tribunal direction in relation to advertising were inadvertently specified as 100 penalty units, instead of 200 penalty units. The bill rectifies this, amending section 85 (2) and (8) of the Act, and the Legal Profession Regulation 2005, to make the penalties the same as they were under the Legal Profession Act 1987, and consistent with penalties for similar offences in the workers compensation legislation.

An uplift fee is an additional charge above the normal fees charged by a legal practice, and is conditional on a successful outcome. It is intended to compensate a practitioner for the inherent risk in running a matter. The national model legislation allows an uplift fee payable on the successful outcome of a matter, provided the amount of the uplift is reasonable and that, in litigious matters, the premium does not exceed 25 per cent of the fee that otherwise would be payable. In 2002 the New South Wales Government amended the Legal Profession Act 1987 to require practitioners to certify that their cases involving a claim for damages had reasonable prospects of success. A practitioner who runs a case without reasonable prospects of success can be subject to a personal costs order.

Section 324 (1) of the Legal Profession Act 2004 prohibits uplift fees in claims for damages to ensure that practitioners do not certify that their claims for damages have reasonable prospects of success and then charge their clients an extra 25 per cent for the inherent risk. The bill retains the section 324 (1) departure from the model legislation for claims for damages but restores the balance of the provisions to more closely reflect the model law provisions and the comparable provisions in the Victorian Legal Profession Act 2004. It removes the cap on uplift fees for matters that are not litigious and ensures that, if there is a breach of the uplift fee provisions, the law practice can still recover the base level fee, but not the premium.

An example of the type of non-litigious situations in which it might be appropriate for uplift fees to be charged is a competitive tender. A client in a competitive tender for a particular project—for example a large infrastructure project—will incur legal fees in the tender preparation and the client may not be successful in its tender. The client may therefore want the law firm to share some of the pain if the tender is not successful. To compensate for this, the client is prepared to pay a premium to the law firm if the tender is successful.

The bill implements a range of other minor amendments to the costs agreement and costs assessment provisions. It amends section 312 to expand the range of clients who do not need to be given the detailed costs disclosure required under the Act. Currently this applies to "sophisticated clients", such as public companies, government departments, and financial service licensees, who are in a position to seek any information they require. The bill expands the categories to include liquidators, administrators and receivers, large partnerships, and joint ventures or joint venture proprietary companies where one of the members or shareholders is a person to whom disclosure is not required.

The bill amends section 323 so that if the ordinary costs disclosure requirements do not apply because the client falls into one of the categories of sophisticated clients, some of the conditional costs agreement disclosure requirements do not apply either. It amends section 328 to permit the same rights of appeal on questions of law in applications to set aside a costs agreement as exist in relation to costs assessment applications generally. The bill further amends section 328 to ensure that the offending provisions of a costs agreement can be set aside, and not just the whole costs agreement. It amends section 332A to allow a person to request an itemised bill after receiving a lump sum bill. The law practice will not be able to commence proceedings to recover unpaid legal costs until 30 days after the person has been given an itemised bill.

The bill amends section 333 so that clients who fall within any of the categories of sophisticated clients need not be given a written statement about avenues for disputing bills. It amends section 369 to permit a cost assessor to determine by whom and to what extent the parties' costs of an assessment are to be paid, and to include them in the assessment. The bill amends the Legal Profession Regulation 2005 to cap the rate of interest that lawyers may charge for unpaid legal costs by reference to the Reserve Bank cash rate target. The cash rate target is currently 5.5 per cent, so the maximum rate of interest will be 7.5 per cent.

Section 45 is amended to permit the Bar Association and the Law Society to grant practising certificates to Australian lawyers whose principal place of legal practice is in a foreign country. The bill amends section 102 to exempt interstate barristers who wish to practise in New South Wales from the requirement imposed on local solicitors to undertake two years of supervised practice, because there is no such requirement on local barristers. The bill amends section 540 to enable a complaint against a legal practitioner to be dealt with by imposing a condition on a practitioner's practising certificate. This will be in addition to the current powers to issue a caution, reprimand or compensation order. Part 4.9 of the Legal Profession Act 2004 is amended to ensure that where a person complains about a solicitor on behalf of a client, the client may receive compensation under Part 4.9 of the Act, even though they are not the official complainant.

The bill also amends sections 696 and 699 to ensure that the professional bodies have power to investigate and prosecute former practitioners or persons holding themselves out to be practitioners. Presently the provisions may be read as limiting the regulatory authorities to investigating only barristers or solicitors who hold a current practising certificate. New section 722A will ensure that the professional bodies are not required to divulge information they receive in connection with an application for pro bono legal services. People should be able to apply for legal assistance without the risk that the information they provide, which might otherwise be privileged, will be divulged.

Schedule 9 to the Legal Profession Act 2004 is also amended to provide for any existing solicitor corporations formed under the Legal Profession Act 1987. It largely re-enacts the savings and transitional provisions for solicitor corporations from the Legal Profession Act 1987. It also allows these corporations to become an incorporated legal practice under the Legal Profession Act 2004 by registering them as a company under the Corporations Act 2001. The bill makes a range of other minor or machinery amendments to enhance the operation of the legislation and achieve greater uniformity with other jurisdictions. The amendments in this bill will ensure that the Act will operate more smoothly. I commend the bill to the House.