NSW Legislative Council Hansard

Legal Profession Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 23 May 2006.

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [8.00 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.
I seek leave to incorporate the second reading speech in *Hansard*.

Leave granted.

The Government enacted the Legal Profession Act 2004 in December 2004, and commenced it 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. 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. This 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. This 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 in future Parliamentary sittings should be expected.

I shall now consider some specific amendments contained in this Bill.

Protection of consumers receiving pro bono legal services

The *Legal Profession Act 2004* prohibits a person from engaging in legal practice for fee, gain or reward unless they are 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, then 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.

Advertising Amendments

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 for investigating 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 from the *Legal Profession Act 1987*, including restrictions on legal advertising, were carried

over 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 sections 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.

Costs provision amendments

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 the matter. The National Model legislation allows an uplift fee payable on the successful outcome of the matter, provided the amount of the uplift is reasonable and that, in litigious matters, the premium does not exceed 25% of the fee that would be otherwise payable.

In 2002 the NSW 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 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% for the inherent 'risk'.

The Bill retains the s324(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 client is not successful in its tender. To compensate for this, the client is prepared to pay a "premium" to the law firm if the client is successful with its tender.

The Bill implements a range of other minor amendments to the costs agreement and costs assessment provisions, including:

(a) Amending 312 to expand the range of clients that 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;

(b) Amending 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;

(c) Amending s328 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;

(d) Amending s328 to ensure that the offending provisions of a costs agreement can be set aside, and not just the whole costs agreement;

(e) Amending 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;

(f) Amending s333 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;

(g) Amending s369 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;

(h) 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% so the

maximum rate of interest will be 7.5%.

A report commissioned by the NSW Government on Legal Fees in NSW has recently been released. The report aims to foster a movement away from the current dependence on time billing and to improve transparency in costing and billing.

The recommendations in the report are not included in this Bill but will be the subject of further consultation. Where the recommendations relate to core uniform provisions of the national model legislation they will be referred to the Standing Committee of Attorneys General for consideration for inclusion in the model legislation

Other amendments

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 NSW 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 also amends s540 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.

A new s722A 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, that might otherwise be privileged, will be divulged.

Schedule 9 of 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 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.