

First print



New South Wales

Legal Profession Amendment (Complaints and Discipline) Bill 2000

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Legal Profession Act 1987* to make a number of miscellaneous changes to the procedure dealing with complaints about, and the discipline of, legal practitioners and to validate certain disciplinary proceedings in which the complaint was made or the proceedings were instituted more than 3 years after the conduct concerned occurred.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Legal Profession Act 1987* set out in Schedules 1 and 2.

Schedule 1 Principal amendments

Schedule 1 [1] replaces Division 3 of Part 10 of the Act with respect to complaints about legal practitioners and the role of the Bar Council or Law Society Council (a “Council”) or the Legal Services Commissioner (the “Commissioner”). The principal changes made are as follows:

- (a) Complaints made by a Council or the Commissioner are also subjected to the requirement that the complaint cannot be made more than 3 years after the alleged conduct concerned occurred unless the Council or the Commissioner (as the case requires) is satisfied that it is just and fair to do so having regard to the reasons for the delay or it is in the public interest (in the case of an allegation of professional misconduct).
- (b) Provision is made for a complainant to withdraw a complaint (but without affecting the right of a Council or the Commissioner to pursue an investigation in an appropriate case or the making of further complaints about the matter).
- (c) The Commissioner is authorised to refer a complaint to a Council even though it is referred more than 21 days after the complaint is made or the Commissioner has commenced to investigate it.

Schedule 1 [2] inserts a broad definition of the nature of mediation that may be undertaken in respect of complaints that deal with consumer disputes.

Schedule 1 [3] enables the Commissioner, with the consent of a Council, to refer a complaint to the Council after the completion of an investigation or after the institution of proceedings in the Administrative Decisions Tribunal.

Schedule 1 [4] authorises the Commissioner or a Council to dismiss a complaint at any time if it is the public interest to do so (for example, in cases where the practitioner has retired from practice or is prevented from practising or is subject to another complaint about the same conduct).

Schedule 1 [5] ensures that the Commissioner has the same powers when reviewing a complaint investigated by a Council as the Commissioner has when investigating a complaint (for example, powers with respect to obtaining information from legal practitioners).

Schedule 1 [6] and **[7]** provide that the Commissioner may, after completing a review of a complaint investigated by a Council, refer the matter to mediation or reprimand the legal practitioner. At present the Commissioner is required to refer the matter back to the Council if the complaint is to be mediated.

Schedule 1 [8] ensures that the Administrative Decisions Tribunal may vary the information laid against a legal practitioner to include an additional allegation even though the conduct concerned occurred more than 3 years before the variation.

Schedule 1 [9] enables the Commissioner or a Council to be replaced as the informant in proceedings before the Administrative Decisions Tribunal if a complaint is transferred between the Commissioner and the Council after the information is laid.

Schedule 1 [10] authorises the Commissioner or a Council to publicise, without incurring liability, the name and other identifying particulars of a practitioner whose practising certificate has been suspended, cancelled or refused or who has been removed from the roll of legal practitioners.

Schedule 1 [11] enables savings and transitional regulations to be made consequent on the enactment of the proposed Act.

Schedule 1 [12] contains a validation and particular transitional provisions. The validation results from the decision of the High Court in *Barwick v The Law Society of New South Wales* on 3 February 2000. The Court decided, despite the past practice of the Law Society Council and the decision of the NSW Court of Appeal, that a complaint against a legal practitioner initiated by the Council was subject to section 138 of the Act (i.e. that complaints could not be made more than 3 years after the alleged conduct unless the Commissioner determines it is fair and reasonable or in the public interest). In addition, the Court decided that the limitation applied when the Administrative Decisions Tribunal, on the application of the Council, seeks to change the allegations contained in an information laid before the Tribunal to add additional allegations of misconduct. The Schedule validates past decisions with respect to complaints and disciplinary proceedings against legal practitioners concerning conduct occurring before that 3-year period.

Schedule 2 Law revision and other amendments

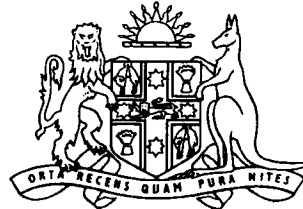
Schedule 2 [1] and **[11]** enable the Bar Council to delegate to one of its committees any functions under the Principal Act instead of only disciplinary functions under Part 10.

Schedule 2 [2]–[6], [9]–[10] and **[12]** make amendments by way of statute law revision to simplify and make consistent the provisions of Part 10 of the Principal Act relating to disciplinary proceedings.

Schedule 2 [7] ensures that Part 10 of the Principal Act does not affect other investigative powers of a Council (eg powers under section 55 to investigate trust accounts).

Schedule 2 [8] ensures that the Commissioner has a right of appearance in the Supreme Court in connection with any proceedings involving the exercise of the Court's jurisdiction with respect to legal practitioners.

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New South Wales

Legal Profession Amendment (Complaints and Discipline) Bill 2000

No. , 2000

A Bill for

An Act to amend the *Legal Profession Act 1987* with respect to complaints about, and the discipline of, legal practitioners.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Legal Profession Amendment (Complaints and Discipline) Act 2000</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6 7
3 Amendment of Legal Profession Act 1987 No 109	8
The <i>Legal Profession Act 1987</i> is amended as set out in Schedules 1 and 2.	9 10

Schedule 1	Principal amendments	1	
	(Section 3)	2	
[1]	Part 10 Complaints and discipline	3	
	Omit Division 3. Insert instead:	4	
	Division 3	Complaints about legal practitioners	5
	134	Making of complaints	6
	(1)	A complaint may be made under this Part about the conduct of a legal practitioner.	7 8
	(2)	A complaint may be made by:	9
		(a) a Council, or	10
		(b) the Commissioner, or	11
		(c) any other person.	12
	(3)	A complaint that is duly made is to be dealt with in accordance with this Part.	13 14
	(4)	A complaint may be made about conduct that is alleged to have occurred either within or outside this State.	15 16
	(5)	This section does not affect any other right of a person to complain about the conduct of a legal practitioner.	17 18
	135	To whom complaint made	19
	(1)	A complaint is to be made to the Commissioner, unless it is made by the Commissioner or by a Council.	20 21
	(2)	A complaint that is made to a Council instead of the Commissioner is to be forwarded immediately to the Commissioner by the Council.	22 23 24
	(3)	A copy of a complaint made by a Council is to be forwarded immediately to the Commissioner by the Council.	25 26

136	Requirements for making complaints	1
(1)	A complaint must be in writing.	2
(2)	A complaint must:	3
(a)	identify the complainant and the legal practitioner against whom the complaint is made, and	4 5
(b)	describe the alleged conduct of the legal practitioner the subject of the complaint.	6 7
(3)	The Commissioner, or the Council to which a complaint is referred for investigation, may require the complainant to do either or both of the following:	8 9 10
(a)	to give further information about the complaint,	11
(b)	to verify the complaint, or any further information, by statutory declaration.	12 13
137	Complaints made over 3 years after conduct concerned	14
(1)	A complaint may be made about conduct of a legal practitioner irrespective of when the conduct is alleged to have occurred.	15 16
(2)	However, a complaint cannot be made more than 3 years after that conduct is alleged to have occurred unless a determination is made under this section that:	17 18 19
(a)	it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or	20 21
(b)	the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.	22 23 24
(3)	A determination under this section:	25
(a)	in the case of a complaint made to or by the Commissioner—is to be made by the Commissioner, or	26 27
(b)	in the case of a complaint made by a Council—is to be made by the Council.	28 29
(4)	A determination made under this section is final and cannot be challenged in any proceedings by the complainant or the legal practitioner concerned.	30 31 32

138	Request by complainant for compensation order	1
(1)	A complainant who has suffered a loss because of the conduct the subject of the complaint may request a compensation order.	2 3
(2)	A complainant who makes such a request must describe the loss suffered by the complainant.	4 5
(3)	Such a request may be made in the complaint. The request may also be made, by notice in writing to the Commissioner or the appropriate Council, at any time after the making and before the disposal of the complaint.	6 7 8 9
(4)	However, such a request may not be made after proceedings have been instituted in the Tribunal with respect to the complaint unless the Tribunal grants the complainant leave to make the request.	10 11 12 13
(5)	Such a request may only be made within 6 years after the conduct that caused the loss is alleged to have occurred.	14 15
139	Summary dismissal of complaints	16
(1)	A complaint may be dismissed by the Commissioner, or by the Council to which it is referred for investigation, if:	17 18
(a)	further information about the complaint is not given as required by the Commissioner or Council, or	19 20
(b)	the complaint or further information is not verified as required by the Commissioner or Council.	21 22
(2)	A complaint made to the Commissioner may be dismissed by the Commissioner if the complaint is vexatious, misconceived, frivolous or lacking in substance.	23 24 25
(3)	A complaint may be dismissed under this section without any investigation or without completing an investigation.	26 27
	Note. Complaints may also be dismissed at any time under section 155A if it is in the public interest to do so.	28 29

140	Withdrawal of complaints	1
(1)	A complaint may, subject to this section, be withdrawn by the person who made it unless proceedings with respect to the complaint have been instituted in the Tribunal.	2 3 4
(2)	If the complaint was made to the Commissioner, the withdrawal of the complaint is not effective unless notice in writing of the withdrawal is given by the complainant to the Commissioner or to the Council to which the complaint has been referred.	5 6 7 8 9
(3)	The Commissioner or the Council to which the complaint has been referred may reject the withdrawal of the complaint if satisfied that it may involve unsatisfactory professional conduct or professional misconduct.	10 11 12 13
(4)	If a complaint is duly withdrawn, no further action is to be taken under this Part with respect to the complaint.	14 15
(5)	The withdrawal of a complaint does not prevent:	16
(a)	a further complaint being made under this Part, by the same or any other person, with respect to the matter the subject of the withdrawn complaint, or	17 18 19
(b)	action being taken on any other complaint made with respect to that matter.	20 21
141	Referral of complaints to Council	22
(1)	The Commissioner may refer a complaint made to or by the Commissioner to the appropriate Council if the complaint is not to be investigated by the Commissioner under Division 5.	23 24 25
(2)	When referring a complaint to a Council, the Commissioner may recommend that the Council investigate the complaint or refer it to mediation, or both.	26 27 28
(3)	A decision to refer a complaint to a Council is to be made, as far as practicable, within 21 days after the complaint is made or, if further information or verification is required, within 21 days after the further information or verification is given or provided. A Council is not excused from dealing with a complaint because it is referred to the Council after the time prescribed by this subsection.	29 30 31 32 33 34 35

(4) The Commissioner may refer a complaint to a Council even though the Commissioner commenced but did not complete an investigation into the complaint.	1 2 3
(5) This section does not apply to a complaint that is dismissed by the Commissioner under this Division.	4 5
[2] Section 145A	6
Insert after section 145:	7
145A Nature of mediation	8
Mediation of a consumer dispute is not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.	9 10 11 12 13 14
[3] Section 147A Investigation of complaints by Commissioner	15
Insert after section 147A (1):	16
(1A) The Commissioner may, with the consent of a Council, refer a complaint to the Council after the Commissioner has completed an investigation into the complaint (including after proceedings with respect to the complaint have been instituted in the Tribunal by the Commissioner).	17 18 19 20 21
[4] Section 155A	22
Insert after section 155:	23
155A Dismissal of complaints if in public interest	24
(1) The Commissioner or the Council may dismiss a complaint, whether before, during or after the investigation of the complaint, if satisfied that it is in the public interest to do so.	25 26 27
(2) The circumstances in which a complaint may be so dismissed include (but are not limited to) a complaint about a legal practitioner who has retired from practice or is prevented from practising or a complaint about conduct that is the subject of another complaint under this Part.	28 29 30 31 32

(3) If proceedings with respect to a dismissed complaint have been instituted in the Tribunal by the Commissioner or Council, the Tribunal may, on the application of the Commissioner or Council, dismiss the proceedings.	1 2 3 4
[5] Section 159 Reviews	5
Insert after section 159 (3):	6
(4) The Commissioner has the same powers when reviewing a decision of the Council as the Commissioner has under section 152 when investigating a complaint.	7 8 9
[6] Section 160 Decision of Commissioner on review	10
Omit section 160 (1) (b). Insert instead:	11
(b) refer the matter to mediation, or	12
[7] Section 160 (1) (c3)	13
Insert after section 160 (1) (c2):	14
(c3) reprimand the legal practitioner if the practitioner consents to the reprimand, or	15 16
[8] Section 167A Tribunal may vary an information	17
Insert after section 167A (2):	18
(3) The variation of an information by the Tribunal to include an additional allegation is not precluded because the alleged conduct concerned occurred more than 3 years before the variation is made.	19 20 21 22
[9] Section 167B	23
Insert after section 167A:	24
167B Substitution of informant	25
(1) If a Council or the Commissioner takes over a complaint after an information has been laid in respect of the complaint, the Tribunal may, on the application of the Council or Commissioner, direct that the informant in the proceedings is	26 27 28 29

to be the Council or Commissioner, whichever has taken over the complaint.	1
(2) This section has effect even if a hearing of the matter has commenced before the Tribunal.	2
	3
	4
[10] Section 1710A	5
Insert after section 1710:	6
1710A Disclosure of information about disciplinary and other proceedings against legal practitioners	7
	8
(1) In this section:	9
<i>disciplinary action</i> means any of the following:	10
(a) the suspension or cancellation of the practising certificate of a legal practitioner,	11
	12
(b) the refusal to issue a practising certificate to a qualified person,	13
	14
(c) the removal of the name of a legal practitioner from the roll of legal practitioners,	15
	16
whether or not any such action is taken under this Part or in this State.	17
	18
<i>liability</i> includes liability in defamation.	19
(2) The Commissioner or a Council may publicise disciplinary action taken against a legal practitioner (including the name and other identifying particulars of the legal practitioner).	20
	21
	22
(3) If disciplinary action is quashed on appeal or review after the action was publicised by the Commissioner or a Council, the result of the appeal or review is to be publicised with equal prominence by the Commissioner or Council.	23
	24
	25
	26
(4) No liability is incurred by the State, the Commissioner, a Council or any person acting at the direction of the Commissioner or a Council in respect of anything done in good faith for the purposes of publicising under this section disciplinary action taken against a legal practitioner.	27
	28
	29
	30
	31

Schedule 1 Principal amendments

(5) No liability is incurred by a person publishing in good faith disciplinary action, or a fair report or summary of disciplinary action, publicised by the Commissioner or a Council under this section.	1 2 3 4
(6) This section is subject to section 56 but is not subject to section 171P.	5 6
(7) This section extends to disciplinary action taken before the commencement of this section.	7 8
[11] Schedule 8 Savings, transitional and other provisions	9
Insert at the end of clause 1A (1):	10
<i>Legal Profession Amendment (Complaints and Discipline) Act 2000</i>	11 12
[12] Schedule 8	13
Insert at the end of the Schedule (with appropriate Part and clause numbering):	14 15
Part Provisions consequent on the enactment of the Legal Profession Amendment (Complaints and Discipline) Act 2000	16 17 18
Definition	19
In this Part:	20
<i>amending Act</i> means the <i>Legal Profession Amendment (Complaints and Discipline) Act 2000</i> .	21 22
Validation	23
(1) Any investigation or decision of a Council, the Commissioner, the Administrative Decisions Tribunal, the former Legal Services Tribunal or any court with respect to a complaint made or initiated before 4 February 2000 is not invalid because the complaint was made or initiated more than 3 years after the conduct concerned was alleged to have occurred, whether or not the Commissioner accepted the complaint in accordance	24 25 26 27 28 29 30

with section 138 (as in force before its amendment by the amending Act).	1 2
(2) The variation of an information by the Administrative Decisions Tribunal or the former Legal Services Tribunal before 4 February 2000 to include an additional allegation is not invalid because the alleged conduct concerned occurred more than 3 years before the variation was made.	3 4 5 6 7
(3) This clause does not operate to reverse the decision of a court in a particular case in which proceedings were finally determined before the commencement of this clause. However, this subclause does not preclude further complaints with respect to the same or any related conduct.	8 9 10 11 12
Amending Act—application to pending complaints and proceedings	13 14
(1) A complaint that was made or initiated under Division 3 of Part 10 and that was not determined before the substitution of that Division by the amending Act is taken to be a complaint made under that Division, as substituted by the amending Act.	15 16 17 18
(2) Sections 147A (1A), 155A and 160 (1) (c3), as inserted by the amending Act, extend to a complaint made before the commencement of those provisions.	19 20 21
(3) Sections 167A (3) and 167B, as inserted by the amending Act, extend to an information laid before the commencement of those provisions.	22 23 24

Schedule 2 Law revision and other amendments	1
(Section 3)	2
[1] Section 51 Functions of Bar Council	3
Insert at the end of the section:	4
(2) The Bar Council may delegate to any of its committees the exercise of any of its functions under this Act, other than this power of delegation. Such a delegation may be made only to a committee whose presiding member is a member of the Council.	5 6 7 8 9
[2] Part 10 (except a provision being omitted by this Act)	10
Omit the following wherever occurring:	11
and interstate legal practitioners	12
or interstate legal practitioner	13
or interstate legal practitioners	14
and locally registered foreign lawyers	15
or locally registered foreign lawyer	16
[3] Section 126 Definitions	17
Omit the definition of <i>complaint</i> . Insert instead:	18
<i>complaint</i> means a complaint under this Part.	19
[4] Section 126	20
Insert in alphabetical order:	21
<i>legal practitioner</i> includes an interstate legal practitioner.	22
[5] Section 127 Professional misconduct and unsatisfactory professional conduct	23 24
Omit section 127 (1) (b1).	25

[6] Section 128 Legal practitioner to whom Part applies	1
Omit section 128 (3). Insert instead:	2
(3) This Part applies to a person who is or was an interstate legal practitioner only if the person practises or practised as a barrister or solicitor and barrister in this State.	3 4 5
[7] Section 128A	6
Insert after section 128:	7
128A Investigations not related to complaints under this Part	8
This Part does not affect the power of a Council to conduct an investigation into the affairs of a legal practitioner under the provisions of any other Part of this Act or under any other Act.	9 10 11
Note. See for example the power of the Law Society Council to appoint a person to conduct an investigation under section 55.	12 13
[8] Section 131 Functions of Commissioner	14
Insert after section 131 (1):	15
(1A) The Commissioner may appear by barrister or solicitor before, and be heard by, the Supreme Court in the exercise of the functions of the Supreme Court under this Act or otherwise in relation to barristers or solicitors.	16 17 18 19
[9] Section 148 Investigation of complaints by Council	20
Omit “initiated by the Council” from section 148 (1). Insert instead “made by the Council”.	21 22
[10] Section 148 (2)	23
Omit the subsection.	24
[11] Section 157 Delegation by Council	25
Omit the section.	26

Legal Profession Amendment (Complaints and Discipline) Bill 2000

Schedule 2 Law revision and other amendments

[12] Section 171M Jurisdiction of Supreme Court not affected	1
Omit section 171M (2). Insert instead:	2
(2) That inherent power or jurisdiction extends to interstate legal practitioners and locally registered foreign lawyers.	3
	4