

Passed by both Houses



New South Wales

Legal Profession Amendment (Complaints and Discipline) Bill 2000

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2000*



New South Wales

Legal Profession Amendment (Complaints and Discipline) Bill 2000

Act No , 2000

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

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Legal Profession Amendment (Complaints and Discipline) Act 2000*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Legal Profession Act 1987 No 109

The *Legal Profession Act 1987* is amended as set out in Schedules 1 and 2.

Schedule 1 Principal amendments

(Section 3)

[1] Part 10 Complaints and discipline

Omit Division 3. Insert instead:

Division 3 Complaints about legal practitioners

134 Making of complaints

- (1) A complaint may be made under this Part about the conduct of a legal practitioner.
- (2) A complaint may be made by:
 - (a) a Council, or
 - (b) the Commissioner, or
 - (c) any other person.
- (3) A complaint that is duly made is to be dealt with in accordance with this Part.
- (4) A complaint may be made about conduct that is alleged to have occurred either within or outside this State.
- (5) This section does not affect any other right of a person to complain about the conduct of a legal practitioner.

135 To whom complaint made

- (1) A complaint is to be made to the Commissioner, unless it is made by the Commissioner or by a Council.
- (2) A complaint that is made to a Council instead of the Commissioner is to be forwarded immediately to the Commissioner by the Council.
- (3) A copy of a complaint made by a Council is to be forwarded immediately to the Commissioner by the Council.

136 Requirements for making complaints

- (1) A complaint must be in writing.
- (2) A complaint must:
 - (a) identify the complainant and the legal practitioner against whom the complaint is made, and
 - (b) describe the alleged conduct of the legal practitioner the subject of the complaint.
- (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:
 - (a) to give further information about the complaint,
 - (b) to verify the complaint, or any further information, by statutory declaration.

137 Complaints made over 3 years after conduct concerned

- (1) A complaint may be made about conduct of a legal practitioner irrespective of when the conduct is alleged to have occurred.
- (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:
 - (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or
 - (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.
- (3) A determination under this section:
 - (a) in the case of a complaint made to or by the Commissioner—is to be made by the Commissioner, or
 - (b) in the case of a complaint made by a Council—is to be made by the Council.
- (4) A determination made under this section is final and cannot be challenged in any proceedings by the complainant or the legal practitioner concerned.

138 Request by complainant for compensation order

- (1) A complainant who has suffered a loss because of the conduct the subject of the complaint may request a compensation order.
- (2) A complainant who makes such a request must describe the loss suffered by the complainant.
- (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.
- (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.
- (5) Such a request may only be made within 6 years after the conduct that caused the loss is alleged to have occurred.

139 Summary dismissal of complaints

- (1) A complaint may be dismissed by the Commissioner, or by the Council to which it is referred for investigation, if:
 - (a) further information about the complaint is not given as required by the Commissioner or Council, or
 - (b) the complaint or further information is not verified as required by the Commissioner or Council.
- (2) A complaint made to the Commissioner may be dismissed by the Commissioner if the complaint is vexatious, misconceived, frivolous or lacking in substance.
- (3) A complaint may be dismissed under this section without any investigation or without completing an investigation.

Note. Complaints may also be dismissed at any time under section 155A if it is in the public interest to do so.

140 Withdrawal of complaints

- (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) 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.
- (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.
- (4) If a complaint is duly withdrawn, no further action is to be taken under this Part with respect to the complaint.
- (5) The withdrawal of a complaint does not prevent:
 - (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
 - (b) action being taken on any other complaint made with respect to that matter.

141 Referral of complaints to Council

- (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.
- (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.
- (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.

- (4) The Commissioner may refer a complaint to a Council even though the Commissioner commenced but did not complete an investigation into the complaint.
- (5) This section does not apply to a complaint that is dismissed by the Commissioner under this Division.

[2] Section 145A

Insert after section 145:

145A Nature of mediation

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.

[3] Section 147A Investigation of complaints by Commissioner

Insert after section 147A (1):

- (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).

[4] Section 155A

Insert after section 155:

155A Dismissal of complaints if in public interest

- (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.
- (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.

- (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.

[5] Section 159 Reviews

Insert after section 159 (3):

- (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.

[6] Section 160 Decision of Commissioner on review

Omit section 160 (1) (b). Insert instead:

- (b) refer the matter to mediation, or

[7] Section 160 (1) (c3)

Insert after section 160 (1) (c2):

- (c3) reprimand the legal practitioner if the practitioner consents to the reprimand, or

[8] Section 167A Tribunal may vary an information

Insert after section 167A (2):

- (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.

[9] Section 167B

Insert after section 167A:

167B Substitution of informant

- (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

to be the Council or Commissioner, whichever has taken over the complaint.

- (2) This section has effect even if a hearing of the matter has commenced before the Tribunal.

[10] Section 1710A

Insert after section 1710:

1710A Disclosure of information about disciplinary and other proceedings against legal practitioners

- (1) In this section:

disciplinary action means any of the following:

- (a) the suspension or cancellation of the practising certificate of a legal practitioner,
(b) the refusal to issue a practising certificate to a qualified person,
(c) the removal of the name of a legal practitioner from the roll of legal practitioners,

whether or not any such action is taken under this Part or in this State.

liability includes liability in defamation.

- (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).
- (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.
- (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.

- (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.
- (6) This section is subject to section 56 but is not subject to section 171P.
- (7) This section extends to disciplinary action taken before the commencement of this section.

[11] Schedule 8 Savings, transitional and other provisions

Insert at the end of clause 1A (1):

Legal Profession Amendment (Complaints and Discipline) Act 2000

[12] Schedule 8

Insert at the end of the Schedule (with appropriate Part and clause numbering):

Part Provisions consequent on the enactment of the Legal Profession Amendment (Complaints and Discipline) Act 2000

Definition

In this Part:

amending Act means the *Legal Profession Amendment (Complaints and Discipline) Act 2000*.

Validation

- (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

with section 138 (as in force before its amendment by the amending Act).

- (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) 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.

Amending Act—application to pending complaints and proceedings

- (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.
- (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.
- (3) Sections 167A (3) and 167B, as inserted by the amending Act, extend to an information laid before the commencement of those provisions.

Schedule 2 Law revision and other amendments

(Section 3)

[1] Section 51 Functions of Bar Council

Insert at the end of the section:

- (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.

[2] Part 10 (except a provision being omitted by this Act)

Omit the following wherever occurring:

- and interstate legal practitioners
- or interstate legal practitioner
- or interstate legal practitioners
- and locally registered foreign lawyers
- or locally registered foreign lawyer

[3] Section 126 Definitions

Omit the definition of *complaint*. Insert instead:

complaint means a complaint under this Part.

[4] Section 126

Insert in alphabetical order:

legal practitioner includes an interstate legal practitioner.

[5] Section 127 Professional misconduct and unsatisfactory professional conduct

Omit section 127 (1) (b1).

[6] Section 128 Legal practitioner to whom Part applies

Omit section 128 (3). Insert instead:

- (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.

[7] Section 128A

Insert after section 128:

128A Investigations not related to complaints under this Part

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.

Note. See for example the power of the Law Society Council to appoint a person to conduct an investigation under section 55.

[8] Section 131 Functions of Commissioner

Insert after section 131 (1):

- (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.

[9] Section 148 Investigation of complaints by Council

Omit “initiated by the Council” from section 148 (1).

Insert instead “made by the Council”.

[10] Section 148 (2)

Omit the subsection.

[11] Section 157 Delegation by Council

Omit the section.

[12] Section 171M Jurisdiction of Supreme Court not affected

Omit section 171M (2). Insert instead:

- (2) That inherent power or jurisdiction extends to interstate legal practitioners and locally registered foreign lawyers.