NSW Legislative Assembly Hansard Full Day Transcript

Extract from NSW Legislative Assembly Hansard and Papers Thursday, 9 June 2005.

Second Reading

Mr BOB DEBUS (Blue Mountains—Attorney General, and Minister for the Environment) [4.34 p.m.]: I move:

That this bill be now read a second time.

The Government enacted the Legal Profession Act 2004 in December last year. That Act represented a major milestone in the Australian legal profession, with the establishment of a national profession. The legislation, once implemented across Australia, will remove many of the barriers to increased efficiency and competition in the legal profession, and harmonise clients' rights across jurisdictions. The national legal profession scheme was developed by the Standing Committee of Attorneys-General [SCAG], which continues to monitor implementation and approve amendments to the Legal Profession Model Bill. All Attorneys-General are signatory to the Legal Profession Memorandum of Understanding, which requires them to enact the approved amendments to core uniform or core non-uniform clauses of the model.

The governments of Victoria and New South Wales propose to commence their legislation this year. Victoria has announced that it will commence its Legal Profession Act no later than 1 October 2005. I had hoped to commence the legislation on 1 July 2005, but there is still some work to be done in finalising the regulations and I recognise that the profession needs sufficient notice of both these amendments and the content of the regulations in order to make the requisite changes, particularly to their costing and trust account arrangements. I will make an announcement in relation to the proposed commencement date after we have published a final version of the regulations. It will not be later than 1 October 2005, and I hope it will be considerably sooner.

The existing legislation in other jurisdictions will be recognised as corresponding laws for the purposes of the new Act until they implement the model legislation. Queensland has already largely adopted the model legislation, and Tasmania, South Australia, the Australian Capital Territory and the Northern Territory are working hard towards implementation. I anticipate that by this time next year the model will be firmly in place across Australia. 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 bring forward further amendments to the model for consideration by SCAG Ministers when agreement between the regulators and the profession has been reached.

An undertaking of this scale is necessarily to be regarded as a work in progress, and I will propose future amendments to maintain uniformity with the national model and to improve and streamline the operation of this new Act as necessary. Practitioners should forward any suggestions for improvement they may have through their professional associations and the Law Council of Australia. Other members of the public should let me know of any concerns they may have with the operation of the legislation, and I shall ensure that matters are considered by the SCAG National Legal Profession Joint Working Group. This bill proposes to amend the Legal Profession Act 2004 before it commences. Many of the amendments in this bill arise from proposals approved by the Standing Committee of Attorneys-General under that national profession process at its November 2004 and March 2005 meetings.

Since Parliament enacted the Legal Profession Act 2004 in December last year a number of stakeholders have proposed amendments to clarify and streamline the operation of the Act and many of these proposals have been dealt with in this amending bill. Specifically, amendments have been proposed by the New South Wales Bar Association, the New South Wales Law Society, the Legal Services Commissioner of New South Wales, the New South Wales Legal Practitioners Admission Board, and the Costs Assessors Rules Committee. I take this opportunity to acknowledge the presence in the gallery of Mr Philip Selth, Executive Director of the New South Wales Bar Association, who has been particularly assiduous in support of the model bill, and indeed of these later changes to it.

My department is presently preparing regulations for the 2004 Act. In drafting these regulations it is evident that some of the regulation-making powers previously found in the 1987 Act have not been carried over. To overcome that the bill also makes miscellaneous amendments to ensure that current procedures contained in the regulations can be continued under the 2004 Act. I shall now consider some specific amendments contained in this bill. Throughout the Act there are numerous provisions indicating that breaches of certain sections are capable of being unsatisfactory professional conduct or professional misconduct. However, section 498 (a) of the Act provides that any contravention of the Act is capable of constituting unsatisfactory professional conduct or professional misconduct. SCAG agreed to remove most of the repetitive references to unsatisfactory professional conduct or professional misconduct and rely on the general prohibition in section

498 (a).

However, provisions that clarify which conduct by which person will be considered a breach, or which set a higher standard than the general provision, are retained. In addition, some breaches which involve a practitioner ignoring or defying the requirements of the Act or the regulatory authorities are amended to bring them into line with the higher standard imposed on these sorts of breaches generally in the Act—such breaches are professional misconduct. The Admission Board has requested that section 24 be amended to provide a general power for the Admission Board to exempt a person from the requirements of approved academic qualifications or length of practical legal training, where the board is satisfied that the person has sufficient experience and/or qualifications to be waived.

This may arise where a partner in a large law firm moves from the United Kingdom to Australia and wishes to be admitted based on the length of time spent as a practitioner in the United Kingdom. Under the proposed amendment the Admission Board can place other educational or training requirements on an applicant, for instance, completing a course in Australian constitutional law. The amendments to sections 41 and 45 make clear the underlying policy position of the model scheme that a legal practitioner only holds one practising certificate in one jurisdiction in any given year. Using that one certificate the practitioner will be able to practise in any Australian jurisdiction that has adopted the model laws. Section 47 of the Act states that any application for a practising certificate made out of time cannot be further considered by a council.

A late applicant must apply for a new practising certificate. To stop practitioners deliberately applying for a new practising certificate to avoid a late fee it is proposed that a new section 92A be added. That section states that where an application for a grant of a practising certificate is made, and the applicant in the immediately previous practising certificate year held a certificate issued by the same council as the one applied to, a higher fee may apply to that application. Under the model bill concerns have been raised about how the Act deals with cash received by a solicitor law practice. SCAG has agreed to amend the model so that transit money received in the form of cash will always go through the trust account. This ensures there is a record of that money being received.

Also, if controlled moneys are received in cash with no instruction they will now be defined as trust money at the time of receipt and must be deposited into the trust account. The client can then give a subsequent written instruction to make the cash controlled money. The controlled money is withdrawn from the trust account and banked to the controlled money account. If controlled moneys are received in cash with an instruction they go straight to the controlled money account and do not go through the trust account. Essentially, this is the same policy formulation that is currently in the model bill and the Act. However, the amendments to the Act will simplify that underlying principle and remove any drafting inconsistencies.
Section 295 is about restrictions on the receipt of trust money. Part 3.1 is drafted so that a principal of a law practice with an unrestricted practising certificate is able to receive, and is responsible for, trust money entrusted to the law practice. However, subsections 295 (2) to (3) confuse this concept by implying that others may have control in some circumstances. The amendments clarify that the principal bears ultimate responsibility for the trust money. The Cost Assessors Rules Committee has written to the Attorney General's Department noting the problems that costs assessors have in collecting their costs when they are payable by a party to the assessment, and the difficulty some parties have in accessing the assessor's determination.

This bill proposes to amend the Act so that a costs assessor will give the determination to the Manager, Costs Assessment, and inform the parties that the certificate can be obtained from the manager, on payment of the costs. The manager will have a power to give exemptions. Currently under section 393 all "excessive" charging of costs—the word that is used in the Act—must be referred to the Legal Services Commissioner. The Legal Profession Act 1987 requires that all deliberate, grossly excessive charging of costs must be referred. The Bar Association, the Law Society and the Costs Assessors Rules Committee have each provided me with advice that the present section must be amended to impose a higher standard than merely "excessive" before a referral is made to the commissioner.

Their advice states that whenever a law practice's costs are reduced after a review this will give rise to a referral. Accordingly, cost assessors will only be required to refer grossly excessive bills. The Act will still provide, however, that excessive charging is capable of being unsatisfactory professional conduct or professional misconduct. The model bill developed by SCAG does not have an interjurisdictional provision for dealing with professional indemnity insurance. The national professional indemnity insurance committee is still considering this issue. A temporary interjurisdictional provision is needed to improve the ability for interstate practitioners to practice in New South Wales. Section 74 of the Queensland Legal Profession Act 2004 and section 18 of the Queensland Legal Profession Regulation 2004 provide a system where a practitioner who holds professional indemnity insurance interstate can practice in Queensland without needing also to take out insurance in Queensland, provided certain conditions are met.

This bill proposes to amend the New South Wales Act in a similar fashion. The Bar Association is concerned that the use of the term "investigator" in section 531 may be confusing for the complaint processes used by the association. The bar has suggested that an additional subclause be added allowing the appointment of an

authorised person who can exercise the same powers as an investigator in chapter 6. This bill proposes to make this amendment. Currently, as drafted, section 649 is unclear about whether appealing an appointment of an external intervener stays that appointment. This bill proposes to amend that section to clarify that an appeal does not stay the appointment of an external intervener. Appointments are made as a matter of urgency to protect clients and it is critical to ensure that an appeal does not prevent the intervener from acting during the intervening period.

The report of the Review of Public Notaries Act was tabled in the Legislative Assembly on 9 December 2004. The report recommended three amendments to the Legal Profession Act: first, to give the Administrative Decisions Tribunal [ADT] and the Supreme Court a clear power to remove public notaries who are guilty of misconduct or who have not complied with the Public Notaries Appointment Rules for the roll of public notaries; second, to give the Legal Practitioners Admission Board [LPAB] the power to publish the roll of public notaries, instead of the Law Society; and, third, to give the registrar of notaries, who is an officer of the LPAB, power to remove his or her name from the roll if requested by the notary. This bill proposes to enact these recommendations. A number of provisions new to the 2004 Act permit a decision by a regulatory authority to be reviewed by the ADT.

The amendment bill inserts notes to relevant sections and section 606 has been redrafted and relocated to section 729A so as to clarify that reviews will be conducted under chapter 5 of the Administrative Decisions Tribunal Act without a requirement for internal review, with a panel determined by the head of the Legal Services Division, and with any appeals going to the Supreme Court. Finally, I would also like to mention an amendment that I do not propose to make. The legal profession has expressed its concern to me about the requirement in the model laws and the 2004 Act that practitioners disclose to their clients in litigation matters an estimate of the range of costs the client may be ordered to pay if the matter is unsuccessful. They say that it is impossible to estimate the other side's costs at the beginning of a matter, and that this requirement should be removed.

I would like to emphasise that the 2004 Act very clearly establishes a regime for continuous disclosure to clients of information relating to costs. At the beginning of the matter a practitioner may not know that the other side is going to brief the most senior barrister in town. A practitioner can only give an estimate based on his or her experience of costs in the average kind of matter of this kind, or provide a range of estimates from the cheapest possible to the most expensive possible. But once a practitioner knows that the other side is hiring expensive counsel or, on the other hand, is representing themselves, an updated estimate needs to be provided.

Most disputes that occur between solicitor and client involve a lack of communication with the client about costs. It is a very clear goal of this legislation to improve the level of communication about costs. The amendments in this bill will ensure that the Act will operate more smoothly on commencement. I understand that the Opposition does not intend to oppose this bill. I thank the honourable member for Epping for his support. This bill has been introduced to meet the requirements of the Legislative Council. I commend the bill to the House.