

First print



New South Wales

Legal Profession Amendment Bill 2004

Explanatory note

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

Overview of Bill

The object of this Bill is to make a number of amendments to the *Legal Profession Act 1987* principally in relation to the discipline of the legal profession. The amendments are described in more detail below.

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 Schedule 1.

Schedule 1 Amendments

Pre-admission events—powers relating to bankrupt or convicted applicants for and holders of practising certificates

Schedule 1 [1] amends section 3 to insert a definition of *pre-admission event*, which is an act of bankruptcy committed, or finding of guilt for an indictable or tax offence, occurring before a person's admission as a legal practitioner.

Schedule 1 [2] amends section 30 to make it clear that the regulations may prescribe details relating to pre-admission events as information that must accompany an application for a practising certificate. Transitional provisions validate regulations already made (Schedule 1 [22] amending Schedule 8).

Schedule 1 [3] amends section 37 to make it clear that the Bar Council or the Law Society Council (*Council*) may exercise powers to refuse to issue, or to cancel or suspend, a practising certificate on grounds relating to pre-admission events, though specific authority is given to a Council to take no action in connection with a pre-admission event if satisfied that it is appropriate to do so given the passage of time and other circumstances the Council considers relevant. Transitional provisions validate past actions taken by Councils (Schedule 1 [22] amending Schedule 8).

Notices requiring assistance by legal practitioners

Schedule 1 [4] and [5] amend section 152 in relation to a notice requiring a legal practitioner to provide information, documents or other assistance to the Legal Services Commissioner (*Commissioner*) or a Council when investigating a complaint against a legal practitioner. Under the section as proposed to be amended, the notice will be able to be served by posting it to the legal practitioner's place of practice, business or residence last notified to a Council (as well as by personal service). These amendments substantially implement Recommendation 13 in Law Reform Commission Report 99.

Reprimands administered to legal practitioners by Commissioner or Council

Schedule 1 [6] amends section 155 to remove the requirement that a reprimand can be administered to a legal practitioner only with the practitioner's consent, where the reprimand is to be administered by the Commissioner or a Council instead of instituting proceedings in the Administrative Decisions Tribunal (*Tribunal*).

Schedule 1 [8] amends section 160 to remove a similar requirement when the Commissioner is reviewing a decision of a Council.

These amendments implement Recommendation 17 in Law Reform Commission Report 99.

Schedule 1 [7] and [9] amend sections 155 and 160 to confer a right of appeal to the Tribunal against a decision to reprimand a legal practitioner if the practitioner does not consent to the reprimand.

Schedule [16] inserts a new section 171N to provide for the hearing and determination by the Tribunal of such an appeal.

Time for instituting proceedings in the Tribunal

Schedule 1 [10] inserts a new section 167AA to provide that proceedings on a complaint against a legal practitioner may be instituted in the Tribunal at any time within 6 months after the Commissioner or a Council decides that proceedings be instituted. The Tribunal is empowered to extend that time after consideration of matters mentioned in the proposed section. The proposed section will prevail over section 44 of the *Administrative Decisions Tribunal Act 1997* and any rules or regulations under that Act.

Power to disregard procedural lapses

Schedule 1 [11] inserts a new section 171 to allow the Tribunal to order that a failure to observe a procedural requirement in relation to a complaint against a legal practitioner is to be disregarded, if satisfied that the parties have not been prejudiced by the failure.

Reprimands administered to legal practitioners by Tribunal

Schedule 1 [12] amends section 171C to make it clear that the Tribunal, when reprimanding a legal practitioner, does so by order.

Schedule 1 [13] amends section 171C to require the Tribunal to publish any order by which it publicly reprimands a legal practitioner and a statement of reasons.

Schedule 1 [15] amends section 171LA to exclude private reprimands from the register of disciplinary action kept by the Commissioner.

Appeals from Tribunal to Supreme Court

Schedule 1 [14] substitutes section 171F. Under the current section, certain appeals from decisions of the Tribunal lie to an Appeals Panel of the Tribunal and others lie to the Supreme Court, depending how the Tribunal was constituted at first instance. Under the proposed section, all appeals under Part 10 from the Tribunal

at first instance will lie to the Supreme Court only and Chapter 7 of the *Administrative Decisions Tribunal Act 1977* will be overridden. Section 75A of the *Supreme Court Act 1970* will apply to the appeals, and the appeals will be by way of rehearing rather than by way of a new hearing. This amendment implements Recommendation 36 in Law Reform Commission Report 99.

Undertakings

Schedule 1 [17] inserts a new section 171U. Breach of an undertaking given by a legal practitioner to the Commissioner or a Council in the course of investigating or dealing with a complaint or in the course of a mediation will be capable of being unsatisfactory professional conduct or professional misconduct. This amendment implements Recommendation 20 in Law Reform Commission Report 99.

Commencement of proceedings without reasonable prospect of success

Schedule 1 [18]–[20] amend section 198L, which provides that a solicitor or barrister cannot file originating process or a defence on a claim for damages unless the solicitor or barrister certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence has reasonable prospects of success. Under the amendment, a wider definition of *court documentation* is used to describe the material that cannot be filed.

Savings and transitional provisions

Schedule 1 [21] and [22] amend Schedule 8 to permit regulations to be made to deal with savings and transitional matters and to insert specific provisions of a savings or transitional nature.

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New South Wales

Legal Profession Amendment Bill 2004

No. , 2004

A Bill for

An Act to amend the *Legal Profession Act 1987* in relation to suitability to hold practising certificates, the discipline of the legal profession, the handling of complaints against legal practitioners, and other matters; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Legal Profession Amendment Act 2004</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5 6
3 Amendment of Legal Profession Act 1987 No 109	7
The <i>Legal Profession Act 1987</i> is amended as set out in Schedule 1.	8

Schedule 1 Amendments

	1
(Section 3)	2
[1] Section 3 Definitions	3
Insert in alphabetical order in section 3 (1):	4
<i>pre-admission event</i> means:	5
(a) an act of bankruptcy committed by a person before being admitted as a legal practitioner, or	6 7
(b) a finding of guilt against a person before being admitted as a legal practitioner (where the person was found guilty of an indictable offence or a tax offence).	8 9 10
[2] Section 30 Refusal of application for practising certificate as barrister or solicitor	11 12
Insert at the end of the section:	13
(5) Without limiting subsection (1) (b), information prescribed by the regulations may include details of, or details of the nature of, pre-admission events, whether occurring before or after the commencement of this subsection.	14 15 16 17
[3] Section 37 Refusal, suspension or cancellation of practising certificate generally	18 19
Insert after section 37 (1):	20
(1A) Subsection (1) (a) extends to pre-admission events occurring in relation to an applicant for or holder of a practising certificate, whether the events occurred before or after the commencement of this subsection.	21 22 23 24
(1B) Without limiting subsection (1), a Council may decide to take no action or no further action in connection with a pre-admission event occurring in relation to an applicant for or holder of a practising certificate, if satisfied that it is appropriate to do so given the passage of time and other circumstances the Council considers relevant.	25 26 27 28 29 30

[4] Section 152 Powers of Council or Commissioner when investigating complaint	1 2
Insert “, by notice in writing served on the legal practitioner,” after “may” in section 152 (2).	3 4
[5] Section 152 (3) and (3A)	5
Omit section 152 (3). Insert instead:	6
(3) A notice is served under this section on a legal practitioner if:	7
(a) it is served personally on the practitioner, or	8
(b) it is sent by post to the practitioner’s place of practice, business or residence last notified by the practitioner to a Council.	9 10 11
(3A) A notice under this section is to specify a reasonable time for compliance with the requirement.	12 13
[6] Section 155 Decision after investigation of complaint	14
Omit “if the legal practitioner consents to the reprimand” from section 155 (3) (a).	15 16
[7] Section 155 (6)	17
Insert at the end of section 155:	18
(6) If a Council or the Commissioner decides to reprimand a legal practitioner under this section and the practitioner does not consent to the reprimand, the practitioner may appeal to the Tribunal against the decision. Section 171N applies to an appeal under this subsection.	19 20 21 22 23
[8] Section 160 Decision of Commissioner on review	24
Omit “if the practitioner consents to the reprimand” from section 160 (1) (c3).	25 26

[9] Section 160 (5)	1
Insert at the end of section 160:	2
(5) If the Commissioner decides to reprimand a legal practitioner under this section and the practitioner does not consent to the reprimand, the practitioner may appeal to the Tribunal against the decision. Section 171N applies to an appeal under this subsection.	3 4 5 6 7
[10] Section 167AA	8
Insert after section 167:	9
167AA Time for instituting proceedings	10
(1) An information may be laid under this Part at any time within 6 months after the Council or Commissioner decides that proceedings be instituted in the Tribunal with respect to the complaint concerned.	11 12 13 14
(2) Despite subsection (1), the Tribunal may, on application in writing by the Council or Commissioner, as the case may require, extend the time for laying an information referred to in subsection (1).	15 16 17 18
(3) In exercising the power to extend the time for laying an information, the Tribunal is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing) the Tribunal is to have regard to the following:	19 20 21 22 23
(a) the public interest,	24
(b) the extent to which, having regard to the delay, there is or may be prejudice to the legal practitioner concerned by reason that evidence that would have been available if the information had been laid within the 6-month period is no longer available,	25 26 27 28 29
(c) the reasonableness of the applicant's explanation for the delay in laying the information.	30 31
(4) The time for laying an information may be extended under subsection (2) although that time has expired.	32 33

(5) This section has effect despite anything in section 44 of the <i>Administrative Decisions Tribunal Act 1997</i> or the rules or regulations under that Act.	1 2 3
(6) For the purposes of subsection (1), a decision that proceedings be instituted is made when:	4 5
(a) the Council or Commissioner decides that there is a reasonable likelihood that the legal practitioner concerned will be found guilty of unsatisfactory professional conduct or professional misconduct, as referred to in section 155 (2), or	6 7 8 9 10
(b) the Commissioner decides to institute proceedings in the Tribunal against the legal practitioner concerned, or to direct the appropriate Council to do so, under section 160 (1) (d).	11 12 13 14
(7) An official record or notification of a decision referred to in subsection (6) (a) or (b) and stating the date the decision was made is evidence that the decision was made and of the date the decision was made.	15 16 17 18
[11] Section 171	19
Insert after section 170:	20
171 Power to disregard procedural lapses	21
(1) The Tribunal may order that a failure by the Commissioner or a Council, or a person acting for them or under their direction, to observe a procedural requirement in relation to a complaint is to be disregarded, if satisfied that the parties to the hearing have not been prejudiced by the failure.	22 23 24 25 26
(2) This section applies to a failure occurring before proceedings were instituted in the Tribunal in relation to the complaint as well as to a failure occurring afterwards.	27 28 29
[12] Section 171C Determinations of Tribunal	30
Omit section 171C (1) (e). Insert instead:	31
(e) make an order publicly reprimanding the legal practitioner or, if there are special circumstances, privately reprimanding the legal practitioner,	32 33 34

[13] Section 171C (3)–(5)	1
Insert at the end of section 171C:	2
(3) If the Tribunal makes an order publicly reprimanding a legal practitioner, the Tribunal is to publish the order and a statement of its reasons for making the order.	3 4 5
(4) If the Tribunal makes an order privately reprimanding a legal practitioner, the Tribunal is to provide the appropriate Council and the Commissioner with a copy of the order and a statement of its reasons for making the order.	6 7 8 9
(5) It is sufficient compliance with the requirement to publish an order under subsection (3) if the Tribunal provides to the Commissioner sufficient information to enable the Commissioner to exercise the Commissioner’s functions in respect of the register of disciplinary action required to be kept under Division 9A.	10 11 12 13 14 15
[14] Section 171F	16
Omit the section. Insert instead:	17
171F Appeals against orders and decisions of Tribunal	18
(1) An order or other decision made by the Tribunal under this Part may be appealed to the Supreme Court by a party to the proceedings in which the order or decision was made.	19 20 21
(2) Section 75A of the <i>Supreme Court Act 1970</i> accordingly applies to an appeal under this section, and the appeal is to be:	22 23
(a) by way of rehearing, and	24
(b) not by way of a new hearing (a <i>de novo</i> hearing).	25
(3) Subsection (2) does not affect the provisions of section 75A of the <i>Supreme Court Act 1970</i> relating to the receipt of evidence by the Supreme Court.	26 27 28
(4) Despite subsection (1), an appeal does not lie to the Supreme Court under this section against any of the following decisions of the Tribunal except by leave of the Supreme Court:	29 30 31
(a) an interlocutory decision,	32
(b) a decision made with the consent of the parties,	33

(c)	a decision as to costs.	1
(5)	No appeals lie under Chapter 7 of the <i>Administrative Decisions Act 1997</i> to an Appeal Panel against an order or other decision of the Tribunal under this Part.	2 3 4
[15]	Section 171LA Definitions	5
	Insert “, other than an order under this Part privately reprimanding the practitioner” after “practitioner” where secondly occurring in paragraph (d) of the definition of <i>disciplinary action</i> .	6 7 8
[16]	Section 171N	9
	Insert after section 171MB:	10
171N	Appeals to Tribunal concerning reprimands	11
(1)	This section applies to an appeal referred to in section 155 (6) or 160 (5) against a decision by a Council or the Commissioner to reprimand a legal practitioner.	12 13 14
(2)	The appeal is an external appeal within the meaning of the <i>Administrative Decisions Tribunal Act 1997</i> .	15 16
(3)	The appeal is to be heard and determined by the Legal Services Division of the Tribunal, constituted in accordance with whichever of the constitutions listed in clause 4 (1) of Part 3 of Schedule 2 to the <i>Administrative Decisions Tribunal Act 1997</i> that the President of the Tribunal determines as being appropriate for the particular case.	17 18 19 20 21 22
(4)	In determining the appeal, the Tribunal may:	23
(a)	affirm the decision to reprimand the legal practitioner and dismiss the appeal, or	24 25
(b)	quash the decision to reprimand the legal practitioner and remit the matter back to the Council or Commissioner for the complaint concerned to continue to be dealt with under this Part, or	26 27 28 29
(c)	quash the decision to reprimand the legal practitioner and dismiss the complaint concerned.	30 31

(5) If the Tribunal affirms the decision to reprimand the legal practitioner, the Tribunal must forthwith make an order publicly reprimanding the legal practitioner, whether or not the reprimand appealed against has already been administered.	1 2 3 4
(6) If the Tribunal quashes the decision to reprimand the legal practitioner and remits the matter back to the Council or Commissioner, the complaint concerned is to be dealt with as if the decision to reprimand the practitioner had not been made.	5 6 7 8
(7) If the Tribunal quashes the decision to reprimand the legal practitioner and the reprimand has already been administered, the reprimand is withdrawn by force of this section.	9 10 11
(8) The provisions of section 171C (3) and (5) relating to the publication of an order and of a statement of reasons extend to an order made under this section publicly reprimanding the legal practitioner.	12 13 14 15
(9) Section 171F applies in relation to the appeal.	16
(10) Without limiting anything in the <i>Administrative Decisions Tribunal Act 1997</i> , rules or regulations may be made under that Act in connection with appeals to which this section applies, including the making, hearing and determination of appeals.	17 18 19 20
(11) This section prevails to the extent of any inconsistency with the <i>Administrative Decisions Tribunal Act 1997</i> or any rules or regulations made under that Act.	21 22 23
[17] Section 171U	24
Insert after section 171T:	25
171U Undertakings	26
(1) This section applies if a legal practitioner gives an undertaking to the Commissioner or a Council in the course of:	27 28
(a) investigating or dealing with a complaint against the legal practitioner, or	29 30
(b) a mediation conducted in connection with a complaint against or a consumer dispute with the legal practitioner.	31 32
(2) A breach of the undertaking is capable of being unsatisfactory professional conduct or professional misconduct.	33 34

(3) Nothing in this section implies that breaches of other undertakings are not capable of being unsatisfactory professional conduct or professional misconduct.	1 2 3
[18] Section 198L Restrictions on commencing proceedings without reasonable prospects of success	4 5
Omit “originating process or a defence on a claim for damages” from section 198L (2).	6 7
Insert instead “court documentation on a claim or defence of a claim for damages”.	8 9
[19] Section 198L (3)	10
Omit “Originating process or a defence on a claim for damages”.	11
Insert instead “Court documentation on a claim or defence of a claim for damages”.	12 13
[20] Section 198L (4)	14
Insert at the end of the section:	15
(4) In this section:	16
<i>court documentation</i> means:	17
(a) a statement of claim, summons, cross-claim, defence or further pleading, or	18 19
(b) an amended statement of claim, summons, cross-claim, defence or further pleading, or	20 21
(c) a document amending a statement of claim, summons, cross-claim, defence or further pleading, or	22 23
(d) any other document of a kind prescribed by the regulations.	24 25
<i>cross-claim</i> includes counter-claim and cross-action.	26
[21] Schedule 8 Savings, transitional and other provisions	27
Insert at the end of clause 1A (1):	28
<i>Legal Profession Amendment Act 2004</i>	29

[22] Schedule 8	1
Insert at the end of the Schedule (with appropriate Part and clause numbering):	2 3
Part Provisions consequent on enactment of Legal Profession Amendment Act 2004	4 5
Definition	6
In this section, <i>amending Act</i> means the <i>Legal Profession Amendment Act 2004</i> .	7 8
Pre-admission events (sections 30 and 37)	9
(1) A regulation made before the commencement of the amendment made by the amending Act to section 30 is and is taken always to have been as valid as it would be or would have been if the amendment had been in force when the regulation was made.	10 11 12 13 14
(2) Anything done or omitted to be done under section 37 before the commencement of the amendments made by the amending Act to that section is and is taken always to have been as valid as it would be or would have been if the amendments had been in force when the thing was done or omitted.	15 16 17 18 19
Reprimands by Council or Commissioner (sections 155 and 160)	20
Sections 155 and 160 as amended by the amending Act extend to conduct occurring before the commencement of the amendments.	21 22 23
Time for instituting proceedings (section 167AA)	24
(1) Section 167AA as inserted by the amending Act extends to decisions made to institute proceedings in the Tribunal before the commencement of that section (whether or not the proceedings were instituted or purported to be instituted before that commencement), as if that section had been in force when the decisions were made.	25 26 27 28 29 30

(2) Without limiting subclause (1), if proceedings referred to in that subclause:	1
	2
(a) were instituted or purported to be instituted in the Tribunal before the commencement of section 167AA, and	3
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(b) were pending in the Tribunal immediately before that commencement,	6
	7
the proceedings are taken to have been as validly instituted in the Tribunal as they would have been had that section been in force when they were instituted or purported to be instituted.	8
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	10
(3) However, section 167AA does not apply to proceedings instituted or purporting to be instituted in the Tribunal before the commencement of that section where the Tribunal has before that commencement made an order or decision to the effect that the proceedings were not validly instituted.	11
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Power to disregard procedural lapses (section 171)	16
Section 171 as inserted by the amending Act extends to:	17
(a) procedural lapses occurring before the commencement of the amendment, and	18
	19
(b) complaints made before that commencement, and	20
(c) proceedings pending in the Tribunal at that commencement.	21
	22
Determinations of Tribunal—publishing information about reprimands (section 171C)	23
	24
Section 171C (3)–(5) as inserted by the amending Act apply to disciplinary action taken after the commencement of those subsections in proceedings commenced before or after that commencement, but nothing in those subsections or this clause implies that the matters referred to in those subsections relating to disciplinary action taken before that commencement cannot be published or included in the register of disciplinary action.	25
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Appeals from Tribunal (section 171F)	1
(1) An appeal pending under old section 171F immediately before the commencement of new section 171F is to be dealt with as if old section 171F had not been omitted and replaced by the amending Act.	2 3 4 5
(2) New section 171F extends to decisions of the Tribunal made before the commencement of the section, where an appeal had not been made under old section 171F before its omission and replacement by the amending Act.	6 7 8 9
(3) The amending Act does not affect any appeal pending in, or right of appeal to, the Supreme Court from a decision of an Appeal Panel.	10 11 12
(4) In this clause:	13
<i>new section 171F</i> means section 171F as inserted by the amending Act.	14 15
<i>old section 171F</i> means section 171F as in force before its omission and replacement by the amending Act.	16 17