

First print



New South Wales

Legal Profession Amendment Bill 1996 (No 2)

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 miscellaneous amendments to the provisions of the *Legal Profession Act 1987* that deal with the following:

- complaints against legal practitioners,
- the fixing of legal fees and other costs,
- the procedure for assessment of legal fees and costs,
- the Solicitors' Fidelity Fund,
- the Solicitors' Mutual Indemnity Fund,
- the admission of legal practitioners,
- various other matters.

The Bill also abolishes the common law offence of being a common barrator (barratry) and makes minor amendments to the *Defamation Act 1974*.

Amendments relating to complaints against legal practitioners

The Bill amends the provisions of the *Legal Profession Act 1987* that deal with the investigation of complaints against legal practitioners, so as to do the following:

- (a) to clarify that those provisions do not apply to federal judicial officers,
- (b) to allow the Legal Services Commissioner to summarily dismiss a complaint against a legal practitioner on the grounds that the complaint is misconceived or lacking in substance,
- (c) to provide for the mediation of any complaint against a legal practitioner in which the complainant seeks redress or remedy,
- (d) to simplify the procedure for the investigation of complaints made against both a solicitor and a barrister in respect of the same or related facts,
- (e) to compel legal practitioners to assist in the investigation of complaints against other legal practitioners,
- (f) to provide for the allegations raised in a complaint against a legal practitioner to be particularised when referred to the Legal Services Tribunal and to allow the Tribunal to vary those allegations where it is reasonable to do so,
- (g) to protect from liability certain people involved in the investigation of complaints against legal practitioners and to provide for the giving of evidence by those people.

Amendments relating to costs

The Bill also amends the provisions of the Act that deal with the fixing and assessment of legal fees and other costs, so as to do the following:

- (a) to limit the application of provisions relating to costs in matters transferred under cross-vesting legislation,
- (b) to provide for certain costs associated with enforcing certain judgments, and with the administration of estates, to be fixed by the regulations made under the Act,
- (c) to remove the obligation on the proper officer of the Supreme Court to advise parties to a costs assessment about mediation services,
- (d) to provide for the referral of a matter to a costs assessor to be revoked,
- (e) to require certain persons to produce documents and provide particulars for the purposes of a costs assessment,

- (f) to modify the matters required, or permitted, to be taken into account in the assessment of costs,
- (g) to provide for the enforcement of costs assessment orders and for the recovery of the costs of a costs assessor,
- (h) to modify the procedure for a merits appeal against a decision of a costs assessor,
- (i) to enable a costs assessor to refer to the Legal Services Commissioner any failure by a legal practitioner to comply with the provisions of the Act relating to costs and costs assessment,
- (j) to protect costs assessors from liability for matters or things done or omitted in the course of their duties under the Act.

Other amendments

The Bill also amends other provisions of the Act, dealing with legal practice and other matters, so as to do the following:

- (a) to limit the exposure of the Solicitors' Fidelity Fund in relation to claims arising from transactions occurring outside Australia and claims where the claimant shares some responsibility for their own loss,
- (b) to require a claimant from the Solicitors' Fidelity Fund to mitigate their loss,
- (c) to allow for contributions to the Solicitors' Mutual Indemnity Fund to be paid by instalment, directly to the company administering the Fund,
- (d) to clarify the operation of provisions of the Act dealing with money received by a solicitor on behalf of another person,
- (e) to enable permanent building societies and credit unions (as well as banks) to hold a solicitor's trust account funds and certain other money under the Act,
- (f) to clarify the criteria for admission as a legal practitioner,
- (g) to provide for disputed or contested applications for admission as a legal practitioner to be heard by the Supreme Court,
- (h) to provide for the costs of the Legal Profession Advisory Council and the costs assessors' rules committee to be paid from the Statutory Interest Account established under the Act,
- (i) to provide for certain other costs, currently met from the Solicitors' Fidelity Fund, to also be paid from the Statutory Interest Account,
- (j) to make other changes of a minor, consequential or ancillary nature and to make amendments by way of statute law revision,
- (k) to make consequential savings and transitional provisions.

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 gives effect to the amendments to the *Legal Profession Act 1987* set out in Schedules 1–5.

Clause 4 gives effect to the amendments to the Acts set out in Schedule 6.

Schedules

Schedule 1 Amendments relating to complaints and discipline

Handling of complaints against legal practitioners

Part 10 of the *Legal Profession Act 1987* provides a scheme for the making of complaints against legal practitioners, for the investigation of those complaints and for the taking of any necessary disciplinary action.

Application to federal judicial officers. Section 128 (Application of Part) is amended to make it clear that Part 10 does not apply to the conduct of a legal practitioner who is a federal judicial officer. (See Schedule 1 [1]) State judicial officers are already excluded from the operation of the Part.

Dismissal of certain complaints. Section 141 (Summary dismissal of complaints) is amended so as to empower the Legal Services Commissioner to summarily dismiss a complaint (that is, to dismiss the complaint without referring it to the appropriate professional Council for investigation) if the complaint is misconceived or lacking in substance. (See Schedule 1 [2])

Mediation of complaints

Division 4 of Part 10 of the *Legal Profession Act 1987* presently provides for the mediation of consumer disputes (defined as disputes between a client and a legal practitioner in which the client seeks redress or remedy by making a complaint under Part 10).

Rights of persons who are not clients. At present, the Act allows any person to make a complaint about the conduct of a legal practitioner, and in some cases complaints by non-clients will involve a claim for compensation that might be suitable for mediation. Section 143, which sets out what disputes are suitable for mediation, is amended so that mediation will be available in respect of any complaint in which the complainant seeks redress or remedy. (See Schedule 1 [3])

Complaints concerning both a barrister and a solicitor

Sometimes, the same set of circumstances may give rise to a complaint against both a solicitor and barrister. At present, such complaints are investigated separately by the Law Society Council and the Bar Council. They are heard separately by the Legal Services Tribunal, with differently constituted membership.

Consultation and cooperation. Section 148, which provides for the investigation of complaints by Councils, is amended so as to allow the two Councils to consult and cooperate in relation to such complaints. (See Schedule 1 [4])

Composition of Legal Services Tribunal. Section 163 (Composition of Tribunal) is amended so as to provide that such complaints will be heard by a Tribunal composed of one of its solicitor members, one of its barrister members and one of its lay members. (See Schedule 1 [11])

Joinder of informations. Section 167 (Institution of proceedings and hearings) empowers the Tribunal to order the joinder of any 2 informations against the same or different legal practitioners. That section is amended so as to create a discretion for the Tribunal to order a joint hearing where one or more complaints have been referred against a solicitor and a barrister and all complaints arise from the same or closely related facts. (See Schedule 1 [13])

Duties of legal practitioners in investigations

Obligation to assist and cooperate. At present, legal practitioners can be required to provide assistance to and cooperate with the Legal Services Commissioner and the Councils for the purposes of the investigation of a complaint. That obligation only applies to the legal practitioner the subject of the complaint. Section 152, which sets out the powers of the Councils and the Commissioner when investigating a complaint, is amended so as to confer power to require any legal practitioner to assist in, and cooperate with, an investigation. (See Schedule 1 [5])

Consequences of misleading or obstructing investigation. Section 152 is also amended so as to provide that a legal practitioner who wilfully misleads or obstructs an investigation is capable of being found to have engaged in professional misconduct. (Schedule 1 [6])

Dealing with allegations raised in information to Tribunal

At present, proceedings may be instituted in the Legal Services Tribunal with respect to a complaint against a legal practitioner by an information laid by the appropriate Council or by the Legal Services Commissioner. There is some concern that this requires the whole of the complaint to be referred, and does not allow the omission of matters from the complaint, or the inclusion of any relevant matters that come to the attention of a Council or the Commissioner. The proposed amendments clarify this matter.

Complaints may be particularised. Section 167 (Institution of proceedings and hearings) is amended so that the Tribunal is required to conduct a hearing into each allegation raised in the information laid by a Council or the Commissioner (rather than into the complaint itself). (See Schedule 1 [12]. Schedule 1 [9] and [10] are consequential on that amendment.)

Review of such decisions. Section 158 (Application for review) is amended so as to provide a complainant with a right to have a decision to omit matters from a complaint reviewed. (See Schedule 1 [7]. Schedule 1 [8] is consequential on that amendment.)

Variation of complaint by Tribunal. A new section is inserted so as to empower the Legal Services Tribunal to vary an information having regard to developments in the course of the hearing or to any other matter. (See Schedule 1 [14])

Protection from liability and competence of certain witnesses

Immunity of consultants. At present, section 171Q provides protection from liability for acts done in good faith for the purposes of the administration of Part 10 (Complaints and discipline). That section is amended so as to extend the protection to certain consultants engaged by the Commissioner and to certain other persons. (See Schedule 1 [15])

Admissibility of evidence. At present, section 171R provides that a person who is afforded protection from liability by section 171Q is neither competent nor compellable, in any legal proceedings, to give evidence or produce documents in respect of the matter in which the person was involved

in the administration of Part 10. That section specifically precludes the admission of such evidence in proceedings before the Tribunal. The section is amended so as to ensure that evidence collected in the course of an investigation can be adduced in proceedings, including proceedings before the Tribunal. (See Schedule 1 [16])

Schedule 2 Amendments relating to legal fees and other costs

Application of Part 11

Part 11 of the *Legal Profession Act 1987* deals with legal fees and other costs. The Part creates obligations to disclose certain matters relating to costs, deals with costs agreements and provides for the assessment of costs.

Cross-vested matters. A new section is inserted to allow for the regulations to make provision for the application of the fees and costs regime in Part 11 to cross-vested matters, that is, to matters initiated in one jurisdiction and transferred to the Supreme Court of New South Wales under the cross-vesting legislation. (See Schedule 2 [1])

Costs fixed by regulations

Section 196 empowers the Governor to make regulations fixing certain costs. The amounts fixed for matters that are not legal services may be taken into account by a costs assessor in assessing costs.

Fixing of certain costs. Section 196 is amended so as to confer power to fix all costs payable for enforcement of a judgment and to allow for the fixing of costs in relation to probate and the administration of estates. (See Schedule 2 [2]) A consequential amendment is made to section 208O, which provides that when costs are fixed by the regulations any assessment of costs has to be made in accordance with the regulations. (See Schedule 2 [18])

Costs assessments

Division 6 of Part 11 of the *Legal Profession Act 1987* provides for the assessment of costs.

Mediation of applications for costs assessment. At present, section 205 imposes a duty on the proper officer of the Supreme Court, when receiving an application for costs assessment, to have regard to whether the parties

have attempted mediation. That section is repealed. (See Schedule 2 [4]) Instead, section 203 is amended so as to require an applicant to state in an application for assessment that there is no reasonable prospect of settlement of the complaint by mediation. (See Schedule 2 [3])

Referral of matters to costs assessors. Section 206 provides that the proper officer of the Supreme Court is to refer an application for assessment of costs to a costs assessor. That section is amended so as to empower the proper officer to recall an application for costs assessment from a costs assessor to whom it has been referred. This can only be done if the proper officer is satisfied that it would be inappropriate for the costs assessor to continue to deal with the application. (See Schedule 2 [5])

Power to obtain documents or further particulars. Section 207 provides for the issue of a notice to produce documents or provide certain particulars in respect of the matter. That section is amended so that such a notice can be given to any person (that is, the power to require production of documents or the giving of further particulars will no longer be limited to legal practitioners or clients concerned with the application). (See Schedule 2 [6])

Consequences of failure to comply. At present, section 207 (5) (b) provides that a failure to comply with such a notice is to be dealt with in accordance with the rules of the Supreme Court. That provision is omitted. Instead, the costs assessor may decline to deal with the application if such a notice has not been complied with. (See Schedule 2 [7])

Procedure for assessments. Section 208F, which deals with the assessment of costs ordered by a court or tribunal, is amended so as to require a costs assessor, when considering an application relating to a bill of costs, to have regard to the operation of the rules of the court or tribunal making the order for costs. (See Schedule 2 [8])

Recovery of costs of costs assessments. Section 208F provides that the costs assessed are to include the costs of the assessment. The section provides that the costs of a costs assessor are to be paid to the proper officer of the Supreme Court. Section 208F is amended so that the costs of the parties to an assessment are included in those costs of assessment that are recoverable. (See Schedule 2 [9])

Effect of costs agreements. At present, section 208H provides that a costs assessor is not to have regard to a costs agreement in assessing party/party costs. That section is amended so as to make it clear that a costs assessor is not prohibited from having access to a costs agreement, only from allowing it to influence an assessment. (See Schedule 2 [11])

Certificates of determination. Section 208J provides for the issue of a certificate of determination, setting out the determination of a costs assessor. That section is amended to make it clear that the costs incurred by a costs assessor are not included in a certificate of determination (See Schedule 2 [14]) and that no further action is required for the enforcement of the amount of costs (See Schedule 2 [13]). Also, the section is amended to provide for the issue of more than one certificate in relation to a costs assessment. This would permit a certificate to be issued in respect of that part of the costs that are agreed to, allowing the costs assessor to continue the assessment in respect of the disputed costs only. A further certificate could be issued in respect of such costs. (See Schedule 2 [12])

Enforcement of costs of costs assessments. A new section is inserted, giving the proper officer of the Supreme Court the power to take action to enforce an assessment order in relation to the costs of the assessment. This is done by way of the issue of a certificate by the costs assessor, in a similar manner to that provided for in section 208J. (See Schedule 2 [15]. Schedule 2 [10] inserts a note to that effect.) Such a certificate can only be issued where a party is otherwise liable to pay the costs of a costs assessor.

Determinations on appeal. Section 208L provides for appeals to the Supreme Court against decisions of costs assessors as to a matter of law. The Court is empowered to remit a decision on the question to the costs assessor and to order the costs assessor to re-determine the application. Fresh evidence may be heard on that re-determination. Section 208M provides for appeals on the merits of the case, but only by leave of the Supreme Court. Such appeals are by way of a re-hearing, and the Supreme Court is not empowered to remit the decision to the costs assessor. The procedure for merits appeals is amended so as to allow the appeal court or tribunal to make a determination that, in the opinion of the court or tribunal, should have been made by the costs assessor. (See Schedule 2 [16])

Parties to appeal against costs assessment. A further amendment clarifies that a costs assessor is not automatically a party to any appeal against a decision or determination made as part of his or her assessment. (See Schedule 2 [17])

Notice of appeals. Provision is made for the proper officer of the Supreme Court to be notified of all appeals against decisions or determinations of a costs assessor. (See Schedule 2 [17])

Conduct of legal practitioners in costs assessments. The costs assessment scheme set out in Part 11 of the Act may lead to a matter being referred to the Legal Services Commissioner. At present, a costs assessor may refer to the Commissioner any grossly excessive amounts of costs or any deliberate misrepresentations as to costs.

Section 208Q (Referral of misconduct to Commissioner) is amended so as to empower a costs assessor to refer to the Commissioner any failure by a legal practitioner to comply with a notice issued under section 207 or with any other provision of Part 11. (See Schedule 2 [19]) Failure by a legal practitioner to comply with a notice under section 207 is, by virtue of section 207 (6), professional misconduct.

Liability of costs assessors. A new section is inserted to provide for costs assessors to be protected from liability for acts done in good faith for the purposes of carrying out duties under Part 11 (Legal fees and other costs). (See Schedule 2 [20])

Schedule 3 Amendments relating to Solicitors' Fidelity Fund

The Solicitors' Fidelity Fund is constituted under Part 7 of the *Legal Profession Act 1987*. It is made up of contributions and levies from practising solicitors, and also from interest received on solicitors' trust accounts. The Fund is used to provide compensation for persons who suffer a pecuniary loss as a result of certain dishonest conduct of a solicitor.

Refunds to retiring practitioners. Section 76 (Contributions) is amended to provide for a partial refund of Fidelity Fund contributions to solicitors who retire during the relevant practising certificate year. (See Schedule 3 [1])

Disallowance of claims against the Fidelity Fund. Section 80 sets out what happens when a claim is made against the Fidelity Fund. That section is amended (see Schedule 3 [2]) so as to allow the Law Society Council a discretion to wholly or partly disallow a claim against the Fidelity Fund where:

- the claim relates to money or valuable property received by or entrusted to a solicitor outside Australia or is otherwise unconnected with practice as a New South Wales solicitor in Australia, or
- the claimant knowingly assisted in or contributed to the loss, or
- the claimant's own negligence contributed to the loss, or

- the claimant knew or must have known that the conduct of the transaction with the solicitor was illegal, or
- proper and usual records were not brought into existence (or were destroyed).

Mitigation of loss. Section 80A (Reduction of claim) is inserted. That section has the effect of requiring a claimant to take action to mitigate their loss. (See Schedule 3 [3]) A right to appeal is provided against the operation of that requirement. (See Schedule 3 [4])

Schedule 4 Amendments relating to legal practice

Contributions to Solicitors' Mutual Indemnity Fund. At present, the Law Society is prevented from issuing a practising certificate to an insurable solicitor unless the solicitor's application for the practising certificate is accompanied by an application for an approved policy of indemnity insurance and by the premium payable under the policy. That is, the premiums are payable only in a lump sum, and are payable only to the Law Society Council. Section 41 is amended so as to remove the obligation that a practising certificate be accompanied by an insurance policy and the insurance premium. (See Schedule 4 [1] and [2]) Instead, before issuing a practising certificate, the Law Society Council will have to be satisfied that the company administering the Solicitors' Mutual Indemnity Fund has received the contribution payable by the solicitor.

Payment of insurance premiums from the Indemnity Fund. Section 44 (Payments from the Indemnity Fund) is amended to make clear that the payment of premiums for insurance may be made out of the Indemnity Fund. (See Schedule 4 [3])

Payment of contributions. Section 45 (Contributions) is amended so as to provide for the payment of contributions directly to the company administering the Solicitors' Mutual Indemnity Fund. Those contributions may be paid by instalments. (See Schedule 4 [4])

Failure to pay contributions. Section 47 is amended so as to make it clear that the failure to pay an instalment of a contribution will lead to the suspension of the solicitor's practising certificate. (See Schedule 4 [5]) This gives rise to the possibility of the appointment of a receiver. (See Schedule 4 [7])

Money received by solicitors. At present, section 61 (2) requires money received by a solicitor on behalf of another person to be disbursed as directed by the person on whose behalf it is held. Section 61 is replaced with a plainer provision. (See Schedule 4 [6]) The substituted section 61 clarifies the operation of the present provision of the Act dealing with the handling of money received by a solicitor on behalf of another person. In particular, the amendment imports from the regulations a provision about "money in transit". The object of the substitution of section 61 is to clarify the distinction between trust money, controlled money and money in transit.

Operation of irrevocable authority. The obligation that money be disbursed as directed is retained in the substituted section 61. However, in some cases a client might instruct a solicitor to pay money to a third party in circumstances where, at law, an irrevocable authority arises. The solicitor is under an obligation to that third party. If the client were to withdraw the instructions, the solicitor may find a conflict between the obligation of the solicitor under the Act (to disburse the money as directed by the client) and the duty owed by the solicitor at common law (to comply with an irrevocable authority to pay the money to a third party). The substituted section clarifies that the statutory rule does not operate to affect any irrevocable authority at common law.

Schedule 5 Miscellaneous amendments

Financial organisations

At present, the *Legal Profession Act 1987* discriminates between financial organisations, in favour of banks. For instance, section 61 presently requires all money received by a solicitor on behalf of another person to be paid to the credit of a general trust account at a bank in New South Wales (unless the person on whose behalf the money is received otherwise directs). The proposed amendments made to section 61 of the Act by Schedule 4 [6] (among other things) allow such trust accounts to be kept with a bank, building society or credit union. The Act is amended in various other ways to remove similar discrimination.

Deposits. Section 64 (Deposit of trust funds with Law Society) is amended to allow money deposited with the Law Society to be kept with a building society or credit union, as well as a bank. (See Schedule 5 [15]) Similarly, section 67, which sets up the Statutory Interest Account, is amended so as to allow that account to be kept with a building society or credit union. (See Schedule 5 [17])

Consequential amendments. Certain other provisions are amended so as to allow money to be deposited in building societies or credit unions as well as banks, and to make consequential amendments. (See Schedule 5 [2], [12], [13], [16], [20], [21], [23]–[27]) The definition of *bank* is omitted, as that term is defined in the *Interpretation Act 1987*. (See Schedule 5 [1])

Admission of legal practitioners

At present, the Supreme Court is empowered to admit as a legal practitioner any person approved by the Legal Practitioners Admission Board as a suitable candidate for admission. That is, in addition to holding appropriate legal qualifications, a person must be suitable for admission (whether or not the person is of good fame and character is a relevant aspect of the person's suitability).

Consideration of suitability of character. The Admission Board is empowered to consider, and make declarations regarding, the character of an applicant, but is not specifically empowered to make declarations as to the suitability for admission of an applicant. Division 3 of Part 2 of the Act (Suitability of candidate for admission) is amended so as to ensure that the requirement as to suitability for admission is reflected in the Admission Board's early consideration of an applicant, and that an applicant has a right to appeal against a declaration that the applicant is not a suitable candidate for admission (on grounds other than the person's fame and character). (See Schedule 5 [3]–[6])

Early consideration of character. Section 13, which provides for early consideration of character, is amended so as to clarify that a person does not ever have to be a student-at-law in order to obtain an early consideration as to their suitability for admission. (See Schedule 5 [7])

Referral of applications for admission to Supreme Court. A new provision is inserted so that the Admission Board is empowered to refer any application for admission (in particular, any disputed or doubtful application) for determination by the Supreme Court. (See Schedule 5 [8]) An appeal lies to the Court of Appeal from any judgment or order of the Supreme Court (see section 101 of the *Supreme Court Act 1970*).

Effect of referral. Some consequential amendments are made to support that right of referral. Section 15 is amended to provide that the declaration by the Supreme Court has a binding effect. (See Schedule 5 [9]) Section 16 is

amended to provide for the representation of a Council (that is, the Bar Council or the Law Society Council) at an inquiry held into an application for admission by the Supreme Court, and for the representation of an applicant at such an inquiry. (See Schedule 5 [10] and [11])

Payments from the Statutory Interest Account

At present the Law Society is required to maintain an account with the name "Statutory Interest Account".

Costs of Legal Profession Advisory Council. A new section is inserted so as to provide for the costs incurred in respect of the Legal Profession Advisory Council to be paid from the Statutory Interest Account. (See Schedule 5 [14])

Costs of costs assessors' rules committee. Similarly, section 208R is amended so as to permit costs of the costs assessors' rules committee to be paid from the Statutory Interest Account. (See Schedule 5 [34])

Costs of inspections and investigations. Provision is made for the costs of inspections or investigations under section 55 to be paid from the Statutory Interest Account rather than from the Fidelity Fund. (See Schedule 5 [22])

Expenses of management. Section 114F (Manager may be reimbursed for damages) and section 114G (Payment of expenses of management) are also amended to provide for the expenses of the management of a solicitor's practice to be paid from the Statutory Interest Account rather than from the Fidelity Fund. (See Schedule 5 [28] and [29]) Section 114K is amended consequentially. (See Schedule 1 [30])

A consequential amendment is made to the provision setting up the Statutory Interest Account to reflect those changes. (See Schedule 5 [18])

Other amendments

Protection from liability. Section 211 confers immunity from liability on certain people and bodies. That immunity relates to any thing done or suffered in good faith in the exercise, or purported exercise, of a function under the *Legal Profession Act 1987*. That section is amended to extend that immunity to include immunity from any liability arising from an omission. (See Schedule 5 [35])

Saving of complaints against legal practitioners. As a consequence of the enactment of the *Legal Profession Act 1987*, the *Legal Profession Transitional Regulation 1987* made specific provision for complaints relating to the professional misconduct of solicitors which occurred before 1 January 1988. Barristers were not subject to the analogous provisions of the *Legal Practitioners Act 1898* and no specific transitional provisions were made in respect of the professional misconduct of barristers occurring before 1 January 1988. The relevant savings provision is amended so as to clarify that the new provisions dealing with complaints against legal practitioners (substituted by the *Legal Profession Reform Act 1993*) apply to the conduct of barristers occurring before 1 January 1988. (See Schedule 5 [37])

Statute law revision. References to the Corporate Affairs Commission are updated to references to the Department of Fair Trading. (See Schedule 5 [31]–[33])

Savings provisions. Certain savings and transitional provisions, consequent on the enactment of the proposed Act, are inserted in Schedule 8 to the *Legal Profession Act 1987*. (See Schedule 5 [36] and [38])

Schedule 6 Amendment of other Acts

Amendment of Defamation Act 1974

Section 17J of the *Defamation Act 1974* provides a defence of absolute privilege in respect of the publication to or by the Professional Councils (the Bar Council and the Law Society Council) for the purpose of the making or referral of a complaint, or the investigation, hearing or review of a complaint under Part 10 of the *Legal Profession Act 1987*. The proposed amendments extend that privilege to a publication to or by the Bar Association and the Law Society or its members or to or by the staff of the Bar Association, the Law Society, the Bar Council or the Law Society Council or the staff of members of those bodies.

Amendment of Maintenance and Champerty Abolition Act 1993

The proposed amendments to the *Maintenance and Champerty Abolition Act 1993* abolish the common law crime of barratry (or being a common barrator), which involves habitually moving, exciting or maintaining suits or quarrels, whether at law or not. Barratry is closely related to the common law crimes and torts of maintenance and champerty, which were abolished in 1993.



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No , 1996

A Bill for

An Act to amend the *Legal Profession Act 1987* with respect to the investigation and mediation of complaints against legal practitioners, the fixing and assessment of legal fees and other costs, the payment of money from the Solicitors' Fidelity Fund, the handling of money received by a solicitor and the admission of legal practitioners; to abolish the common law crime of being a common barrator; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Legal Profession Amendment Act 1996*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation. 5

3 Amendment of Legal Profession Act 1987 No 109

The *Legal Profession Act 1987* is amended as set out in Schedules 1–5.

4 Amendment of other Acts 10

Each Act specified in Schedule 6 is amended as set out in that Schedule.

Schedule 1 Amendments relating to complaints and discipline

(Section 3)

[1] Section 128 Application of Part

Omit section 128 (2). Insert instead: 5

(2) However, this Part does not apply:

- (a) to a judicial officer within the meaning of the
 Judicial Officers Act 1986, or
- (b) to a Justice of the High Court, or
- (c) to a judge of a court created by the Parliament of 10
 the Commonwealth,

 regardless of whether the unsatisfactory professional
 conduct or professional misconduct the subject of a
 complaint allegedly occurred before or after the person's
 appointment as such a judicial officer, Justice or judge. 15

[2] Section 141 Summary dismissal of complaints

Omit section 141 (b). Insert instead:

- (b) if the complaint is vexatious, misconceived,
 frivolous or lacking in substance.

[3] Section 143 Consumer dispute

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Omit "client" wherever occurring in section 143.

Insert instead "person".

[4] Section 148 Investigation of complaints by Council

Insert after section 148 (2):

- (2A) The Law Society Council and the Bar Council may consult and cooperate when dealing with a complaint against a legal practitioner arising from the same, or related, facts as a complaint against another legal practitioner for which the other Council is the appropriate Council. For the purposes of this subsection, the Councils may exchange information concerning the complaints. 5 10

[5] Section 152 Powers of Council or Commissioner when investigating complaint

Omit section 152 (1). Insert instead:

- (1) For the purpose of investigating a complaint, a Council or the Commissioner may, by notice in writing served on any legal practitioner, require the legal practitioner to do any one or more of the following: 15
- (a) to provide written information, by a date specified in the notice, and to verify the information by statutory declaration, 20
- (b) to produce, at a time and place specified in the notice, any document (or a copy of any document) specified in the notice,
- (c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner. 25
- (1A) A Council or the Commissioner may inspect any document produced before the Council or Commissioner under this section and may retain it for such period as the Council or Commissioner thinks necessary for the purposes of an investigation in relation to which it was produced. A Council or the Commissioner may make copies of the document or any part of the document. 30

[6] Section 152 (5)

Insert after section 152 (4):

- (5) A legal practitioner must not mislead or obstruct a Council or the Commissioner in the exercise of any function under this Division. The wilful contravention of this subsection is capable of being professional misconduct.

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Note. *Documents* has a wide meaning. The term is defined in the *Interpretation Act 1987* to mean any record of information. The term would include any file that was itself a record of information.

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[7] Section 158 Application for review

Omit section 158 (1). Insert instead:

- (1) A complainant may apply to the Commissioner for a review of any of the following decisions made by a Council:
- (a) a decision to dismiss a complaint made by the complainant,
- (b) a decision to reprimand the legal practitioner because of the complaint,
- (c) a decision to omit, from the allegations particularised in an information laid before the Tribunal in respect of a complaint, matter that was originally part of the complaint made to the Council.

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[8] Section 159 Reviews

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Omit section 159 (2). Insert instead:

- (2) The Commissioner may also review a Council's decision (of a type referred to in section 158 (1)) at the request of the Council or on the Commissioner's own initiative.

[9] Section 160 Decision of Commissioner on review

Insert after section 160 (1) (c):

- (c1) investigate any part of the complaint that was omitted by the Council from the allegations particularised in the information laid by the Council, or 5
- (c2) direct the appropriate Council to investigate, or re-investigate, any part of the complaint that was omitted by the Council from the allegations particularised in the information laid by the Council, or 10

[10] Section 160 (2)

Insert “, or to investigate part of a complaint” after “complaint” where firstly occurring.

[11] Section 163 Composition of Tribunal 15

Insert after section 163 (1) (b):

- (b1) in the case of two or more complaints concerning a solicitor and a barrister that have been joined in accordance with section 167 (4)—by 1 of its solicitor members, 1 of its barrister members and 1 of its lay members, or 20

[12] Section 167 Institution of proceedings and hearings

Omit “each such complaint” from section 167 (2).

Insert instead “each allegation particularised in the information”.

[13] Section 167 (5)

Insert after section 167 (4):

- (5) This includes the power to order, if it is in the interests of justice to do so, the joinder of:
 - (a) more than one information against the same solicitor or barrister, or 5
 - (b) an information against one or more barristers and an information against one or more solicitors if all informations are founded on the same, or closely related, acts or omissions. 10

[14] Section 167A

Insert after section 167:

167A Tribunal may vary an information

- (1) The Tribunal may, on the application of a Council or the Commissioner who laid an information, vary the information laid so as to omit allegations or to include additional allegations if the Tribunal is satisfied, having regard to all the circumstances, that it is reasonable to do so. 15
- (2) Without limiting subsection (1), when considering whether or not it is reasonable to vary an information, the Tribunal is to have regard to whether varying the information will affect the fairness of the proceedings. 20

[15] Section 171Q Protection from liability

Omit section 171Q (1). Insert instead: 25

- (1) A matter or thing done or omitted to be done by:
 - (a) a Council, or
 - (b) any member of a Council, or
 - (c) any committee or subcommittee of a Council, or any member of a committee or subcommittee of a Council, or 30
 - (d) the Tribunal, or
 - (e) any member of the Tribunal, or

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Schedule 1 Amendments relating to complaints and discipline

- (f) the Registrar of the Tribunal, or
 - (g) the Commissioner, or
 - (h) the Bar Association, or
 - (i) the Law Society, or
 - (j) a consultant engaged by the Commissioner pursuant to section 132 (4), or 5
 - (k) a mediator to whom a dispute is referred under Division 4, or
 - (l) any member of the staff of any of the above,
- does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Part, subject any such member, the Commissioner, the Registrar, the consultant, the mediator or the member of staff personally to any action, liability, claim or demand. 10 15

[16] Section 171R Certain persons not compellable witnesses

Omit "neither competent nor" from section 171R (1).
Insert instead "not".

Schedule 2 Amendments relating to legal fees and other costs

(Section 3)

[1] Section 174A

Insert after section 174:

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174A Application of Part to cross-vested matters

- (1) The regulations may make provisions modifying the application of this Part to matters commenced in another jurisdiction and transferred to the Supreme Court of New South Wales under cross-vesting legislation of the Commonwealth or another State or Territory. 10
- (2) Without limiting subsection (1), the regulations may modify the application of this Part by removing an obligation that a legal practitioner would otherwise have (in relation to such matters) under this Part. 15

[2] Section 196 Regulations to provide for related costs

Omit section 196 (1) (b). Insert instead:

- (b) fixing the costs payable for the enforcement of a lump sum debt or liquidated sum for damages,
- (b1) fixing the costs payable for the enforcement of a judgment by a judgment creditor, 20
- (b2) fixing the costs payable for legal services provided in respect of probate or the administration of estates,

[3] Section 203 How is an application to be made?

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Insert after section 203 (2):

- (3) The application must contain a statement by the applicant that there is no reasonable prospect of settlement of the matter by mediation.

[4] Section 205 Mediation services

Omit the section.

[5] Section 206 Referral of matters to costs assessors

Insert after section 206 (2):

- (3) If the proper officer is satisfied that it is inappropriate for a costs assessor to determine a particular application that has been referred to the costs assessor, the proper officer may:
 - (a) revoke the referral of the application, and
 - (b) refer the application for assessment to another costs assessor.
- (4) An application that has been referred to another costs assessor under this section is to be dealt with as a new assessment or, if the proper officer so directs, by continuing the assessment.
- (5) When a referral has been revoked, the costs assessor to whom the application was initially referred must return all documents relating to the assessment of the application to the proper officer. This includes documents relating to any work done on the assessment and a statement of the amount calculated for costs in respect of any work done on the assessment.

[6] Section 207 Costs assessor may require documents or further particulars

Omit section 207 (1) and (2). Insert instead:

- (1) A costs assessor may, by notice in writing, require a person (including the applicant, the barrister or solicitor concerned, or any other barrister, solicitor or client) to produce any relevant documents of or held by the person in respect of the matter.

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- (2) The costs assessor may, by any such notice, require further particulars to be furnished by the applicant, barrister, solicitor, client or other person as to instructions given to, or work done by, the barrister or solicitor or any other legal practitioner in respect of the matter and as to the basis on which costs were ascertained. 5

[7] Section 207 (5)

Omit the subsection. Insert instead:

- (5) If a person fails, without reasonable excuse, to comply with a notice under this section, the costs assessor may decline to deal with the application or may continue to deal with the application on the basis of the information provided. 10

[8] Section 208F Assessment of costs—costs ordered by court or tribunal 15

Insert after section 208F (1):

- (1A) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs. 20

[9] Section 208F (4)

Omit “(including the costs of the costs assessor)”.

Insert instead “(including the costs of the parties to the assessment, and the costs assessor)”.

[10] Section 208F 25

Insert at the end of section 208F:

Note. Section 208JA provides for the recovery of the costs of a costs assessor.

[11] Section 208H

Omit the section. Insert instead:

**208H Effect of costs agreements in assessments of party/
party costs**

- (1) A costs assessor may obtain a copy of, and may have regard to, a costs agreement. 5
- (2) However, a costs assessor must not apply the terms of a costs agreement for the purposes of determining appropriate fair and reasonable costs when assessing costs payable as a result of an order by a court or tribunal. 10

[12] Section 208J Certificate as to determination

Insert after section 208J (1):

- (1A) A costs assessor may issue more than one certificate in relation to an application for costs assessment. Such certificates may be issued at the same time or at different stages of the assessment process. 15

[13] Section 208J (3)

Insert "and with no further action," after "money,".

[14] Section 208J (4)

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Insert after section 208J (3):

- (4) For this purpose, the amount of unpaid costs does not include the costs incurred by a costs assessor in the course of a costs assessment.

[15] Section 208JA

Insert after section 208J:

208JA Recovery of costs of costs assessment

- (1) This section applies when the costs of a costs assessor are payable by a party to the assessment (under section 182 (3), 208A (4) or 208F (4)). 5
- (2) On making a determination, a costs assessor may issue to each party a certificate that sets out the costs incurred by the costs assessor in the course of the costs assessment.
- (3) If the application for costs assessment has been dealt with by more than one costs assessor, the certificate can set out the costs of any other costs assessor. 10
- (4) The certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs. 15
- (5) The proper officer of the Supreme Court may take action to recover the costs of a costs assessor.

[16] Section 208M Appeal against decision of costs assessor by leave 20

Insert after section 208M (4):

- (5) After deciding the questions the subject of the appeal, the Supreme Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor. 25

[17] Sections 208NA and 208NB

Insert after section 208N:

208NA Assessor can be a party to appeal 30

A costs assessor can be made a party to any appeal against a determination or decision of the costs assessor only by the Supreme Court.

208NB Notices of appeal

A copy of every notice of appeal against a determination or decision of a costs assessor must be served on the proper officer of the Supreme Court by the party making the appeal.

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[18] Section 208O Costs fixed by regulations

Omit "section 196 (1) (a) or (b)" from section 208O (1).
Insert instead "section 196 (1) (a), (b), (b1) or (b2)".

[19] Section 208Q Referral of misconduct to Commissioner

Insert after section 208Q (2):

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(2A) A costs assessor may refer any failure by a legal practitioner to comply with a notice issued under section 207, or with any other provision of this Part, to the Commissioner.

[20] Section 208SA

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Insert after section 208S:

208SA Protection from liability

A matter or thing done or omitted to be done by a costs assessor does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Part, subject any costs assessor personally to any action, liability, claim or demand.

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Schedule 3 Amendments relating to Solicitors' Fidelity Fund

(Section 3)

[1] Section 76 Contributions

Insert after section 76 (4):

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- (4A) If a solicitor who has paid a contribution for a year ending on 30 June ceases to practise as a solicitor at any time before 30 June in that year, the Law Society may refund a part of the contribution at a rate determined by the Law Society Council.

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[2] Section 80 Claims against Fidelity Fund

Omit section 80 (4). Insert instead:

- (4) If a solicitor has failed to account or made a dishonest default, the Law Society Council may wholly or partly disallow a claim:

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- (a) if satisfied that the claim does not have sufficient connection with practice as a New South Wales solicitor in Australia (for example, because the claim arises from the receipt or entrustment of money or valuable property that was received by or entrusted to a solicitor outside Australia and the act or omission giving rise to the claim occurred outside Australia), or

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- (b) if the person who made the claim knowingly assisted in or contributed towards, or was a party or accessory to, the act or omission from which the failure to account or dishonest default arose, or

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- (c) if satisfied that the negligence of the person who made the claim contributed to the loss, or

- (d) if satisfied that the conduct of the transaction with the solicitor was illegal, and the person who made the claim knew or ought reasonably to have known of that illegality, or

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- (e) if satisfied that proper and usual records were not brought into existence during the conduct of the transaction (or were destroyed), and the person who made the claim knew or ought reasonably to have known that such records would not be kept or would be destroyed. 5

- (4A) Subsection (4) does not limit the Law Society Council's power to otherwise disallow a claim.

[3] Section 80A

Insert after section 80: 10

80A Reduction of claim

A person is not entitled to recover against the Fidelity Fund in respect of a failure to account or dishonest default an amount greater than the balance of the pecuniary loss suffered by the person because of the failure to account or dishonest default after deducting the amount or value of all money or other benefits which in the opinion of the Law Society Council might but for the person's neglect or default have been received or recovered by the person from any source other than the Fidelity Fund in respect of the pecuniary loss. 15
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[4] Section 90D Proceedings against Law Society

Omit section 90D (3). Insert instead:

- (3) A claimant may appeal to the Supreme Court against:
 - (a) a decision by the Law Society Council to wholly or partly disallow a claim, or 25
 - (b) a decision by the Law Society Council to reduce the amount allowed in respect of a claim, by virtue of section 80A, or
 - (c) a failure by the Law Society Council to determine a claim within such period as is prescribed by the regulations. 30

Schedule 4 Amendments relating to legal practice

(Section 3)

[1] Section 41 Solicitor to be insured and to make contributions

Omit section 41 (1). Insert instead:

- (1) The Law Society Council must not issue a practising certificate to an insurable solicitor unless it is satisfied: 5
 - (a) that there is, or will be, in force with respect to the solicitor an approved insurance policy, and
 - (b) that any contribution or levy, or instalment of a contribution, that is payable by the solicitor under section 45 or 46 has been paid to the company. 10

[2] Section 41 (3)

Omit the subsection.

[3] Section 44 Payments from the Indemnity Fund

- Insert at the end of section 44 (1) (a): 15
- , and
- (a1) premiums in respect of any approved insurance policy required by section 41, and

[4] Section 45 Contributions

Omit section 45 (4). Insert instead: 20

- (4) A contribution required to be paid under this section must be paid to the company on account of the Indemnity Fund.
- (5) The company may permit a contribution to be paid by instalments under an arrangement approved by the Law Society Council. 25

[5] Section 47 Failure to pay contribution or levy

Omit "premium, contribution or levy".

Insert instead "contribution, instalment of a contribution, or levy".

[6] Section 61

Omit the section. Insert instead:

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61 Money received by solicitor on behalf of another

- (1) A solicitor who, in the course of practising as a solicitor, receives money on behalf of another person:
- (a) must pay the money, within the time prescribed by the regulations, into a general trust account in New South Wales at a bank, building society or credit union and must hold the money in accordance with the regulations relating to trust money, or 10
 - (b) if the person on whose behalf the money is received directs that it be paid or delivered to a third party free of the solicitor's control, must ensure that the money is paid or delivered: 15
 - (i) before the end of the next working day or, if that is not practicable, as soon as practicable after the next working day, or 20
 - (ii) no later than the day allowed by the solicitor's authority or instructions (if that day is later than the day allowed under subparagraph (i)), or 25
 - (c) if the person on whose behalf the money is received directs that it be paid otherwise than into a general trust account or to a third party, must pay the money as directed and (if the money is to be held under the direct or indirect control of the solicitor) must hold the money in accordance with the regulations relating to controlled money. 30

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- (2) In any of those three cases, the solicitor must hold the money exclusively for, and must disburse the money in accordance with the directions of, the person on whose behalf it is held.
- (3) This section: 5
- (a) does not prevent a solicitor from depositing money with the Law Society in compliance with section 64, but this section continues to apply to any money so deposited that is repaid to the solicitor, and 10
- (b) does not prevent a solicitor from withdrawing or receiving, from trust money or controlled money:
- (i) reimbursement for disbursements paid by the solicitor, or
- (ii) money for disbursements to be paid by the solicitor, or 15
- (iii) money due, or to accrue due, to the solicitor for costs,
- so long as the procedure prescribed by the regulations is followed, and 20
- (c) does not affect any enforceable lien or claim that a solicitor has to any money, and
- (d) does not prevent a solicitor from exercising a general retaining lien for unpaid costs and disbursements in respect of money in a trust account or a controlled money account (other than money received subject to an express direction by the client with respect to the purposes for which the money is to be applied), and 25
- (e) does not prevent a solicitor from holding, or disposing of, a cheque or other negotiable instrument payable to a third party if the solicitor does so on behalf of a client and in accordance with directions given by the client, and 30
- (f) does not affect an authority that a solicitor has and that, apart from this section, is irrevocable. 35

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Schedule 4 Amendments relating to legal practice

- (4) A lien referred to in subsection (3) (d):
- (a) may not be exercised for an amount in excess of the sum of the costs and disbursements unpaid, and
 - (b) may not be exercised unless the solicitor has delivered a bill of costs and disbursements to the client on whose behalf the money is held. 5
- (5) Money received by a solicitor on behalf of another person:
- (a) is not available for payment to a creditor of the solicitor, and 10
 - (b) is not liable to be taken in execution of any judgment, order or other process of any court or tribunal at the instance of a creditor of the solicitor, 15
- unless the creditor is the person on whose behalf the money is held by the solicitor.
- (6) If a Crown Solicitor's Trust Account is established as prescribed by the regulations, this section applies to money received by the Crown Solicitor from a person for whom, or a body for which, the Crown Solicitor acts. 20
- (7) If a trust account kept by a solicitor is, as authorised by or under the regulations, operated on by a person other than the solicitor, section 53 of the *Trustee Act 1925* does not apply to the person in relation to the operation on the trust account. 25
- (8) It is professional misconduct for a solicitor to wilfully contravene subsection (1) or (2).
- (9) In this section:
- controlled money** means money required to be dealt with in accordance with subsection (1) (c) that, while under the direct or indirect control of the solicitor by whom or on whose behalf it is received, is for the time being held otherwise than in a general trust account at a bank, building society or credit union. 30 35

trust money means money required to be dealt with in accordance with subsection (1) (a).

- (10) A reference in subsection (1) to a third party does not include a reference to an associate of a solicitor.

[7] Section 92 Supreme Court may appoint receiver

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Insert at the end of section 92 (1) (b):

, or

- (c) that the solicitor's practising certificate has been suspended,

Schedule 5 Miscellaneous amendments

(Section 3)

[1] Section 3 Definitions

Omit the definition of *bank* from section 3 (1).

[2] Section 3 (1), definition of "money"

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Insert ", building society or credit union" after "bank" wherever occurring.

[3] Part 2, Division 3, heading

Omit "Character".

Insert instead "Suitability of candidate for admission".

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[4] Section 11 Character and suitability of candidates

Insert "and is otherwise suitable for admission" after "character".

[5] Section 12 Declaration on character and suitability

Insert "and is otherwise suitable for admission" after "character" wherever occurring in section 12 (1) and (2).

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[6] Section 13 Early consideration of character and suitability

Insert "or suitability for admission" after "character" in section 13 (1).

[7] Section 13 (2)

Omit the subsection.

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Insert after section 13:

- (1) The Admission Board may refer to the Supreme Court any application for admission as a legal practitioner if, in the opinion of the Admission Board, it would be more practical in the circumstances of the case for the Supreme Court to consider whether or not the candidate is of good fame and character or is otherwise suitable for admission.
- (2) The Supreme Court has the same powers as the Admission Board to deal with an application and its decision on an application is taken to be a decision of the Admission Board.
- (3) On a referral under this section, the Supreme Court may make such order or declaration as it thinks fit.
- (4) Nothing in this section affects the operation of section 17.

Omit “section 14”. Insert instead “section 13A or 14”.

Insert “at an inquiry under section 13A or” after “Supreme Court” in section 16 (1).

Insert “, or before the Supreme Court under section 13A,” after
“Board”.

[12] Section 42 Separate account

Insert “, building society or credit union” after “bank”.

[13] Section 43 Investment of Indemnity Fund

Insert “, building society or credit union” after “bank” in section 43 (e).

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[14] Section 59A

Insert after section 59:

59A Payment of costs of Advisory Council

Any costs incurred in respect of the Advisory Council, including remuneration payable under Schedule 3, are to be paid (in accordance with section 67) from the Statutory Interest Account to the Treasurer for credit of the Consolidated Fund.

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[15] Section 64 Deposit of trust funds with Law Society

Insert after section 64 (2):

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(2A) Money is taken to have been deposited with the Law Society if it is deposited in the name of the Law Society with a bank, building society or credit union nominated by the Law Society in accordance with this section.

[16] Section 65 Repayment of deposit with Law Society

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Insert at the end of section 65 (3) (b):

, or

(c) in an account with any bank, building society or credit union.

[17] Section 67 Statutory Interest Account

Insert “, building society or credit union” after “bank” in section 67 (1).

[18] Section 67 (3)

Insert after section 67 (3) (b):

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- (b1) the costs of an inspection or investigation of the affairs of a solicitor or solicitors under section 55 (1) (including all costs incurred by the Law Society Council or on its behalf by its members, employees or agents in relation to any such inspection or investigation to the extent that such costs have not been recovered under section 55 (8)), 10
- (b2) the costs incurred in respect of the Advisory Council in exercising its functions for the purposes of this Act (see section 59A),
- (b3) the expenses of the management of a solicitor’s practice under Part 8A (see section 114G) including any reimbursement for damages (under section 114F), 15
- (b4) the costs incurred in respect of the costs assessors’ rules committee in exercising its functions for the purposes of this Act (see section 208R (4A)), 20

[19] Section 67 (3E)

Insert after section 67 (3D):

- (3E) The fact that money is paid out of the Statutory Interest Account by virtue of subsection (3) does not preclude the recovery of that money in accordance with this Act from any person liable to pay the money. Any such money recovered must be paid to the credit of the Statutory Interest Account. 25

[20] Section 69 Relief for financial organisation

Insert “, building society or credit union” after “bank” wherever occurring. 30

[21] Section 71 Separate account

Insert “, building society or credit union” after “bank” in section 71 (1).

[22] Section 73 Payments from the Fidelity Fund

Omit section 73 (1) (e).

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[23] Section 82 Special provisions relating to failure to account

Insert “, building society or credit union” after “bank” in section 82 (1).

[24] Section 97 Stop order on account

Omit “a bank account” from section 97 (1).

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Insert instead “an account with a bank, building society or credit union”.

[25] Section 97 (1)

Omit “the bank”.

Insert instead “the bank, building society or credit union”.

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[26] Section 97 (2) (a), (3), (4) and (5)

Insert “, building society or credit union” after “bank” wherever occurring.

[27] Section 99 Improper dealing with property

Omit “a bank account” from section 99 (1) (a).

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Insert instead “an account with a bank, building society or credit union”.

[28] Section 114F Manager may be reimbursed for damages

Omit "from the Fidelity Fund" from section 114F (2).
Insert instead "(in accordance with section 67) from the Statutory Interest Account".

[29] Section 114G Payment of expenses of management

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Omit "from the Fidelity Fund" from section 114G (1).
Insert instead "(in accordance with section 67) from the Statutory Interest Account".

[30] Section 114K Termination of management

Omit "Fidelity Fund". Insert instead "Statutory Interest Account". 10

[31] Section 172D Registration and incorporation

Omit "Corporate Affairs Commission" from section 172D (1).
Insert instead "Director-General of the Department of Fair Trading".

[32] Section 172D (1)

Omit "that Commission". Insert instead "the Director-General". 15

[33] Section 172D (2)

Omit "Corporate Affairs Commission is to certify under its seal".
Insert instead "Director-General of the Department of Fair Trading is to certify under the Director-General's hand".

[34] Section 208R Rules of procedure for applications

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Insert after section 208R (4):

- (4A) Any costs incurred in respect of the committee are to be paid (in accordance with section 67) from the Statutory Interest Account to the Treasurer for credit of the Consolidated Fund.

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[35] Section 211 Protection from liability

Omit "done or suffered".

Insert instead "done, suffered or omitted to be done".

[36] Schedule 8 Savings, transitional and other provisions

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

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Legal Profession Amendment Act 1996

[37] Schedule 8, clause 37 (1A)

Insert after clause 37 (1):

- (1A) For the removal of doubt, Part 10 as substituted by the
Legal Profession Reform Act 1993 applies to the conduct of a barrister that occurred before the commencement of the *Legal Profession Act 1987* on 1 January 1988 and applies to any complaint made by any person, or initiated by the Bar Association, in respect of such conduct (whether the complaint was made or initiated before or after that commencement).

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[38] Schedule 8, Part 8

Insert after clause 47:

**Part 8 Provisions consequent on enactment of
 Legal Profession Amendment Act 1996**

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48 Claims against Fidelity Fund

- (1) Section 80 (4), as substituted by Schedule 3 [2] to the *Legal Profession Amendment Act 1996*, does not apply to a claim made before the commencement of that amendment.
- (2) Section 80A does not apply to a claim made before the commencement of Schedule 3 [3] to the *Legal Profession Amendment Act 1996*.

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49 Amendments relating to complaints

An amendment made to Part 10 by Schedule 1 to the *Legal Profession Amendment Act 1996* applies to complaints made before the commencement of that amendment in the same way as it applies to complaints made after that commencement. 5

50 Variation of information

Section 167A applies to an information laid before the commencement of Schedule 1 [14] to the *Legal Profession Amendment Act 1996* in the same way as it applies to an information laid after that commencement. 10

51 Protection from liability

The amendments made to section 171Q apply to confer protection from liability on a person or body in respect of any matter or thing done or omitted to be done before the commencement of Schedule 1 [15] to the *Legal Profession Amendment Act 1996* in the same way as they apply in respect of a matter or thing done or omitted to be done after that commencement. 15

52 Appeal against decision of cost assessor 20

Section 208M applies to an appeal against a decision made before the commencement of Schedule 2 [16] to the *Legal Profession Amendment Act 1996* in the same way as it applies to an appeal against a decision made after that commencement. 25

Schedule 6 Amendment of other Acts

(Section 4)

6.1 Defamation Act 1974 No 18

[1] Section 17J Matters arising under Legal Profession Act 1987

Omit section 17J (1) (a). Insert instead: 5

- (a) for a publication to or by any of the following:
 - (i) the Bar Council,
 - (ii) a member of the Bar Council as such a member,
 - (iii) a committee or subcommittee of the Bar Council, or any member of a committee or subcommittee of the Bar Council, 10
 - (iv) the Law Society Council,
 - (v) a member of the Law Society Council as such a member, 15
 - (vi) a committee or subcommittee of the Law Society Council, or any member of a committee or subcommittee of the Law Society Council,
 - (vii) the Bar Association, 20
 - (viii) the Law Society,
 - (ix) the Legal Services Commissioner,
 - (x) the Legal Services Tribunal,

- (xi) any member of the staff of any of the above
as such a member,

for the purpose of the making or referral of a
complaint, or the investigation, hearing or review
of a complaint, under Part 10 of the *Legal* 5
Profession Act 1987, and

[2] Section 17J (2)

Omit section 17J (2). Insert instead:

- (2) This section extends to all publications made on or after
1 January 1988 (the date of commencement of this 10
section) regardless of whether the body or person who
made the publication, or to whom the publication was
made, was at the relevant time a body or person referred
to in subsection (1) (a).

6.2 Maintenance and Champerty Abolition Act 1993 No 88 15

[1] Long title

Omit "maintenance and champerty" where firstly occurring.
Insert instead "maintenance, champerty and barratry".

[2] Section 1 Name of Act

Omit "Maintenance and Champerty". 20
Insert instead "Maintenance, Champerty and Barratry".

[3] Section 4A

Insert after section 4:

4A Abolition of crime of being a common barrator (barratry)

The offence of being a common barrator that but for this
section would be punishable by the common law is 5
abolished.



New South Wales

Legal Profession Amendment Act 1996 No 95

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New South Wales

Legal Profession Amendment Act 1996 No 95

Act No 95, 1996

An Act to amend the *Legal Profession Act 1987* with respect to the investigation and mediation of complaints against legal practitioners, the fixing and assessment of legal fees and other costs, the payment of money from the Solicitors' Fidelity Fund, the handling of money received by a solicitor and the admission of legal practitioners; to abolish the common law crime of being a common barrator; and for other purposes. [Assented to 26 November 1996]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Legal Profession Amendment Act 1996*.

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 1–5.

4 Amendment of other Acts

Each Act specified in Schedule 6 is amended as set out in that Schedule.

Schedule 1 Amendments relating to complaints and discipline

(Section 3)

[1] Section 128 Application of Part

Omit section 128 (2). Insert instead:

(2) However, this Part does not apply:

- (a) to a judicial officer within the meaning of the *Judicial Officers Act 1986*, or
- (b) to a Justice of the High Court, or
- (c) to a judge of a court created by the Parliament of the Commonwealth,

regardless of whether the unsatisfactory professional conduct or professional misconduct the subject of a complaint allegedly occurred before or after the person's appointment as such a judicial officer, Justice or judge.

[2] Section 141 Summary dismissal of complaints

Omit section 141 (b). Insert instead:

- (b) if the complaint is vexatious, misconceived, frivolous or lacking in substance.

[3] Section 143 Consumer dispute

Omit "client" wherever occurring in section 143.
Insert instead "person".

[4] Section 148 Investigation of complaints by Council

Insert after section 148 (2):

- (2A) The Law Society Council and the Bar Council may consult and cooperate when dealing with a complaint against a legal practitioner arising from the same, or related, facts as a complaint against another legal practitioner for which the other Council is the appropriate Council. For the purposes of this subsection, the Councils may exchange information concerning the complaints.

[5] Section 152 Powers of Council or Commissioner when investigating complaint

Omit section 152 (1). Insert instead:

- (1) For the purpose of investigating a complaint, a Council or the Commissioner may, by notice in writing served on any legal practitioner, require the legal practitioner to do any one or more of the following:
- (a) to provide written information, by a date specified in the notice, and to verify the information by statutory declaration,
 - (b) to produce, at a time and place specified in the notice, any document (or a copy of any document) specified in the notice,
 - (c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.
- (1A) A Council or the Commissioner may inspect any document produced before the Council or Commissioner under this section and may retain it for such period as the Council or Commissioner thinks necessary for the purposes of an investigation in relation to which it was produced. A Council or the Commissioner may make copies of the document or any part of the document.

[6] Section 152 (5)

Insert after section 152 (4):

- (5) A legal practitioner must not mislead or obstruct a Council or the Commissioner in the exercise of any function under this Division. The wilful contravention of this subsection is capable of being professional misconduct.

Note. *Documents* has a wide meaning. The term is defined in the *Interpretation Act 1987* to mean any record of information. The term would include any file that was itself a record of information.

[7] Section 158 Application for review

Omit section 158 (1). Insert instead:

- (1) A complainant may apply to the Commissioner for a review of any of the following decisions made by a Council:
- (a) a decision to dismiss a complaint made by the complainant,
 - (b) a decision to reprimand the legal practitioner because of the complaint,
 - (c) a decision to omit, from the allegations particularised in an information laid before the Tribunal in respect of a complaint, matter that was originally part of the complaint made to the Council.

[8] Section 159 Reviews

Omit section 159 (2). Insert instead:

- (2) The Commissioner may also review a Council's decision (of a type referred to in section 158 (1)) at the request of the Council or on the Commissioner's own initiative.

[9] Section 160 Decision of Commissioner on review

Insert after section 160 (1) (c):

- (c1) investigate any part of the complaint that was omitted by the Council from the allegations particularised in the information laid by the Council, or
- (c2) direct the appropriate Council to investigate, or re-investigate, any part of the complaint that was omitted by the Council from the allegations particularised in the information laid by the Council, or

[10] Section 160 (2)

Insert “, or to investigate part of a complaint” after “complaint” where firstly occurring.

[11] Section 163 Composition of Tribunal

Insert after section 163 (1) (b):

- (b1) in the case of two or more complaints concerning a solicitor and a barrister that have been joined in accordance with section 167 (4)—by 1 of its solicitor members, 1 of its barrister members and 1 of its lay members, or

[12] Section 167 Institution of proceedings and hearings

Omit “each such complaint” from section 167 (2).

Insert instead “each allegation particularised in the information”.

[13] Section 167 (5)

Insert after section 167 (4):

- (5) This includes the power to order, if it is in the interests of justice to do so, the joinder of:
 - (a) more than one information against the same solicitor or barrister, or
 - (b) an information against one or more barristers and an information against one or more solicitors if all informations are founded on the same, or closely related, acts or omissions.

[14] Section 167A

Insert after section 167:

167A Tribunal may vary an information

- (1) The Tribunal may, on the application of a Council or the Commissioner who laid an information, vary the information laid so as to omit allegations or to include additional allegations if the Tribunal is satisfied, having regard to all the circumstances, that it is reasonable to do so.
- (2) Without limiting subsection (1), when considering whether or not it is reasonable to vary an information, the Tribunal is to have regard to whether varying the information will affect the fairness of the proceedings.

[15] Section 171Q Protection from liability

Omit section 171Q (1). Insert instead:

- (1) A matter or thing done or omitted to be done by:
 - (a) a Council, or
 - (b) any member of a Council, or
 - (c) any committee or subcommittee of a Council, or any member of a committee or subcommittee of a Council, or
 - (d) the Tribunal, or
 - (e) any member of the Tribunal, or

- (f) the Registrar of the Tribunal, or
- (g) the Commissioner, or
- (h) the Bar Association, or
- (i) the Law Society, or
- (j) a consultant engaged by the Commissioner pursuant to section 132 (4), or
- (k) a mediator to whom a dispute is referred under Division 4, or
- (l) any member of the staff of any of the above,

does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Part, subject any such member, the Commissioner, the Registrar, the consultant, the mediator or the member of staff personally to any action, liability, claim or demand.

[16] Section 171R Certain persons not compellable witnesses

Omit "neither competent nor" from section 171R (1).
Insert instead "not".

Schedule 2 Amendments relating to legal fees and other costs

(Section 3)

[1] Section 174A

Insert after section 174:

174A Application of Part to cross-vested matters

- (1) The regulations may make provisions modifying the application of this Part to matters commenced in another jurisdiction and transferred to the Supreme Court of New South Wales under cross-vesting legislation of the Commonwealth or another State or Territory.
- (2) Without limiting subsection (1), the regulations may modify the application of this Part by removing an obligation that a legal practitioner would otherwise have (in relation to such matters) under this Part.

[2] Section 196 Regulations to provide for related costs

Omit section 196 (1) (b). Insert instead:

- (b) fixing the costs payable for the enforcement of a lump sum debt or liquidated sum for damages,
- (b1) fixing the costs payable for the enforcement of a judgment by a judgment creditor,
- (b2) fixing the costs payable for legal services provided in respect of probate or the administration of estates,

[3] Section 203 How is an application to be made?

Insert after section 203 (2):

- (3) The application must contain a statement by the applicant that there is no reasonable prospect of settlement of the matter by mediation.

[4] Section 205 Mediation services

Omit the section.

[5] Section 206 Referral of matters to costs assessors

Insert after section 206 (2):

- (3) If the proper officer is satisfied that it is inappropriate for a costs assessor to determine a particular application that has been referred to the costs assessor, the proper officer may:
 - (a) revoke the referral of the application, and
 - (b) refer the application for assessment to another costs assessor.
- (4) An application that has been referred to another costs assessor under this section is to be dealt with as a new assessment or, if the proper officer so directs, by continuing the assessment.
- (5) When a referral has been revoked, the costs assessor to whom the application was initially referred must return all documents relating to the assessment of the application to the proper officer. This includes documents relating to any work done on the assessment and a statement of the amount calculated for costs in respect of any work done on the assessment.

[6] Section 207 Costs assessor may require documents or further particulars

Omit section 207 (1) and (2). Insert instead:

- (1) A costs assessor may, by notice in writing, require a person (including the applicant, the barrister or solicitor concerned, or any other barrister, solicitor or client) to produce any relevant documents of or held by the person in respect of the matter.

-
- (2) The costs assessor may, by any such notice, require further particulars to be furnished by the applicant, barrister, solicitor, client or other person as to instructions given to, or work done by, the barrister or solicitor or any other legal practitioner in respect of the matter and as to the basis on which costs were ascertained.

[7] Section 207 (5)

Omit the subsection. Insert instead:

- (5) If a person fails, without reasonable excuse, to comply with a notice under this section, the costs assessor may decline to deal with the application or may continue to deal with the application on the basis of the information provided.

[8] Section 208F Assessment of costs—costs ordered by court or tribunal

Insert after section 208F (1):

- (1A) An assessment must be made in accordance with the operation of the rules of the relevant court or tribunal that made the order for costs.

[9] Section 208F (4)

Omit “(including the costs of the costs assessor)”.

Insert instead “(including the costs of the parties to the assessment, and the costs assessor)”.

[10] Section 208F

Insert at the end of section 208F:

Note. Section 208JA provides for the recovery of the costs of a costs assessor.

[11] Section 208H

Omit the section. Insert instead:

**208H Effect of costs agreements in assessments of party/
party costs**

- (1) A costs assessor may obtain a copy of, and may have regard to, a costs agreement.
- (2) However, a costs assessor must not apply the terms of a costs agreement for the purposes of determining appropriate fair and reasonable costs when assessing costs payable as a result of an order by a court or tribunal.

[12] Section 208J Certificate as to determination

Insert after section 208J (1):

- (1A) A costs assessor may issue more than one certificate in relation to an application for costs assessment. Such certificates may be issued at the same time or at different stages of the assessment process.

[13] Section 208J (3)

Insert "and with no further action," after "money,".

[14] Section 208J (4)

Insert after section 208J (3):

- (4) For this purpose, the amount of unpaid costs does not include the costs incurred by a costs assessor in the course of a costs assessment.

[15] Section 208JA

Insert after section 208J:

208JA Recovery of costs of costs assessment

- (1) This section applies when the costs of a costs assessor are payable by a party to the assessment (under section 182 (3), 208A (4) or 208F (4)).
- (2) On making a determination, a costs assessor may issue to each party a certificate that sets out the costs incurred by the costs assessor in the course of the costs assessment.
- (3) If the application for costs assessment has been dealt with by more than one costs assessor, the certificate can set out the costs of any other costs assessor.
- (4) The certificate is, on the filing of the certificate in the office or registry of a court having jurisdiction to order the payment of that amount of money, and with no further action, taken to be a judgment of that court for the amount of unpaid costs.
- (5) The proper officer of the Supreme Court may take action to recover the costs of a costs assessor.

[16] Section 208M Appeal against decision of costs assessor by leave

Insert after section 208M (4):

- (5) After deciding the questions the subject of the appeal, the Supreme Court or court or tribunal may, unless it affirms the costs assessor's decision, make such determination in relation to the application as, in its opinion, should have been made by the costs assessor.

[17] Sections 208NA and 208NB

Insert after section 208N:

208NA Assessor can be a party to appeal

A costs assessor can be made a party to any appeal against a determination or decision of the costs assessor only by the Supreme Court.

208NB Notices of appeal

A copy of every notice of appeal against a determination or decision of a costs assessor must be served on the proper officer of the Supreme Court by the party making the appeal.

[18] Section 208O Costs fixed by regulations

Omit "section 196 (1) (a) or (b)" from section 208O (1).

Insert instead "section 196 (1) (a), (b), (b1) or (b2)".

[19] Section 208Q Referral of misconduct to Commissioner

Insert after section 208Q (2):

(2A) A costs assessor may refer any failure by a legal practitioner to comply with a notice issued under section 207, or with any other provision of this Part, to the Commissioner.

[20] Section 208SA

Insert after section 208S:

208SA Protection from liability

A matter or thing done or omitted to be done by a costs assessor does not, if the matter or thing was done or omitted to be done in good faith for the purpose of the administration of this Part, subject any costs assessor personally to any action, liability, claim or demand.

Schedule 3 Amendments relating to Solicitors' Fidelity Fund

(Section 3)

[1] Section 76 Contributions

Insert after section 76 (4):

- (4A) If a solicitor who has paid a contribution for a year ending on 30 June ceases to practise as a solicitor at any time before 30 June in that year, the Law Society may refund a part of the contribution at a rate determined by the Law Society Council.

[2] Section 80 Claims against Fidelity Fund

Omit section 80 (4). Insert instead:

- (4) If a solicitor has failed to account or made a dishonest default, the Law Society Council may wholly or partly disallow a claim:
- (a) if satisfied that the claim does not have sufficient connection with practice as a New South Wales solicitor in Australia (for example, because the claim arises from the receipt or entrustment of money or valuable property that was received by or entrusted to a solicitor outside Australia and the act or omission giving rise to the claim occurred outside Australia), or
 - (b) if the person who made the claim knowingly assisted in or contributed towards, or was a party or accessory to, the act or omission from which the failure to account or dishonest default arose, or
 - (c) if satisfied that the negligence of the person who made the claim contributed to the loss, or
 - (d) if satisfied that the conduct of the transaction with the solicitor was illegal, and the person who made the claim knew or ought reasonably to have known of that illegality, or

- (e) if satisfied that proper and usual records were not brought into existence during the conduct of the transaction (or were destroyed), and the person who made the claim knew or ought reasonably to have known that such records would not be kept or would be destroyed.

- (4A) Subsection (4) does not limit the Law Society Council's power to otherwise disallow a claim.

[3] Section 80A

Insert after section 80:

80A Reduction of claim

A person is not entitled to recover against the Fidelity Fund in respect of a failure to account or dishonest default an amount greater than the balance of the pecuniary loss suffered by the person because of the failure to account or dishonest default after deducting the amount or value of all money or other benefits which in the opinion of the Law Society Council might but for the person's neglect or default have been received or recovered by the person from any source other than the Fidelity Fund in respect of the pecuniary loss.

[4] Section 90D Proceedings against Law Society

Omit section 90D (3). Insert instead:

- (3) A claimant may appeal to the Supreme Court against:
 - (a) a decision by the Law Society Council to wholly or partly disallow a claim, or
 - (b) a decision by the Law Society Council to reduce the amount allowed in respect of a claim, by virtue of section 80A, or
 - (c) a failure by the Law Society Council to determine a claim within such period as is prescribed by the regulations.

Schedule 4 Amendments relating to legal practice

(Section 3)

[1] Section 41 Solicitor to be insured and to make contributions

Omit section 41 (1). Insert instead:

- (1) The Law Society Council must not issue a practising certificate to an insurable solicitor unless it is satisfied:
 - (a) that there is, or will be, in force with respect to the solicitor an approved insurance policy, and
 - (b) that any contribution or levy, or instalment of a contribution, that is payable by the solicitor under section 45 or 46 has been paid to the company.

[2] Section 41 (3)

Omit the subsection.

[3] Section 44 Payments from the Indemnity Fund

Insert at the end of section 44 (1) (a):

, and

- (a1) premiums in respect of any approved insurance policy required by section 41, and

[4] Section 45 Contributions

Omit section 45 (4). Insert instead:

- (4) A contribution required to be paid under this section must be paid to the company on account of the Indemnity Fund.
- (5) The company may permit a contribution to be paid by instalments under an arrangement approved by the Law Society Council.

[5] Section 47 Failure to pay contribution or levy

Omit "premium, contribution or levy".

Insert instead "contribution, instalment of a contribution, or levy".

[6] Section 61

Omit the section. Insert instead:

61 Money received by solicitor on behalf of another

- (1) A solicitor who, in the course of practising as a solicitor, receives money on behalf of another person:
 - (a) must pay the money, within the time prescribed by the regulations, into a general trust account in New South Wales at a bank, building society or credit union and must hold the money in accordance with the regulations relating to trust money, or
 - (b) if the person on whose behalf the money is received directs that it be paid or delivered to a third party free of the solicitor's control, must ensure that the money is paid or delivered:
 - (i) before the end of the next working day or, if that is not practicable, as soon as practicable after the next working day, or
 - (ii) no later than the day allowed by the solicitor's authority or instructions (if that day is later than the day allowed under subparagraph (i)), or
 - (c) if the person on whose behalf the money is received directs that it be paid otherwise than into a general trust account or to a third party, must pay the money as directed and (if the money is to be held under the direct or indirect control of the solicitor) must hold the money in accordance with the regulations relating to controlled money.

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- (2) In any of those three cases, the solicitor must hold the money exclusively for, and must disburse the money in accordance with the directions of, the person on whose behalf it is held.
- (3) This section:
- (a) does not prevent a solicitor from depositing money with the Law Society in compliance with section 64, but this section continues to apply to any money so deposited that is repaid to the solicitor, and
 - (b) does not prevent a solicitor from withdrawing or receiving, from trust money or controlled money:
 - (i) reimbursement for disbursements paid by the solicitor, or
 - (ii) money for disbursements to be paid by the solicitor, or
 - (iii) money due, or to accrue due, to the solicitor for costs,so long as the procedure prescribed by the regulations is followed, and
 - (c) does not affect any enforceable lien or claim that a solicitor has to any money, and
 - (d) does not prevent a solicitor from exercising a general retaining lien for unpaid costs and disbursements in respect of money in a trust account or a controlled money account (other than money received subject to an express direction by the client with respect to the purposes for which the money is to be applied), and
 - (e) does not prevent a solicitor from holding, or disposing of, a cheque or other negotiable instrument payable to a third party if the solicitor does so on behalf of a client and in accordance with directions given by the client, and
 - (f) does not affect an authority that a solicitor has and that, apart from this section, is irrevocable.
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- (4) A lien referred to in subsection (3) (d):
- (a) may not be exercised for an amount in excess of the sum of the costs and disbursements unpaid, and
 - (b) may not be exercised unless the solicitor has delivered a bill of costs and disbursements to the client on whose behalf the money is held.
- (5) Money received by a solicitor on behalf of another person:
- (a) is not available for payment to a creditor of the solicitor, and
 - (b) is not liable to be taken in execution of any judgment, order or other process of any court or tribunal at the instance of a creditor of the solicitor,

unless the creditor is the person on whose behalf the money is held by the solicitor.

- (6) If a Crown Solicitor's Trust Account is established as prescribed by the regulations, this section applies to money received by the Crown Solicitor from a person for whom, or a body for which, the Crown Solicitor acts.
- (7) If a trust account kept by a solicitor is, as authorised by or under the regulations, operated on by a person other than the solicitor, section 53 of the *Trustee Act 1925* does not apply to the person in relation to the operation on the trust account.
- (8) It is professional misconduct for a solicitor to wilfully contravene subsection (1) or (2).
- (9) In this section:

controlled money means money required to be dealt with in accordance with subsection (1) (c) that, while under the direct or indirect control of the solicitor by whom or on whose behalf it is received, is for the time being held otherwise than in a general trust account at a bank, building society or credit union.

trust money means money required to be dealt with in accordance with subsection (1) (a).

- (10) A reference in subsection (1) to a third party does not include a reference to an associate of a solicitor.

[7] Section 92 Supreme Court may appoint receiver

Insert at the end of section 92 (1) (b):

, or

- (c) that the solicitor's practising certificate has been suspended,

Schedule 5 Miscellaneous amendments

(Section 3)

[1] Section 3 Definitions

Omit the definition of *bank* from section 3 (1).

[2] Section 3 (1), definition of "money"

Insert ", building society or credit union" after "bank" wherever occurring.

[3] Part 2, Division 3, heading

Omit "Character".

Insert instead "Suitability of candidate for admission".

[4] Section 11 Character and suitability of candidates

Insert "and is otherwise suitable for admission" after "character".

[5] Section 12 Declaration on character and suitability

Insert "and is otherwise suitable for admission" after "character" wherever occurring in section 12 (1) and (2).

[6] Section 13 Early consideration of character and suitability

Insert "or suitability for admission" after "character" in section 13 (1).

[7] Section 13 (2)

Omit the subsection.

[8] Section 13A

Insert after section 13:

13A Admission Board may refer certain matters to Supreme Court

- (1) The Admission Board may refer to the Supreme Court any application for admission as a legal practitioner if, in the opinion of the Admission Board, it would be more practical in the circumstances of the case for the Supreme Court to consider whether or not the candidate is of good fame and character or is otherwise suitable for admission.
- (2) The Supreme Court has the same powers as the Admission Board to deal with an application and its decision on an application is taken to be a decision of the Admission Board.
- (3) On a referral under this section, the Supreme Court may make such order or declaration as it thinks fit.
- (4) Nothing in this section affects the operation of section 17.

[9] Section 15 Binding effect of declaration

Omit "section 14". Insert instead "section 13A or 14".

[10] Section 16 Representation by Councils

Insert "at an inquiry under section 13A or" after "Supreme Court" in section 16 (1).

[11] Section 16 (3)

Insert ", or before the Supreme Court under section 13A," after "Board".

[12] Section 42 Separate account

Insert “, building society or credit union” after “bank”.

[13] Section 43 Investment of Indemnity Fund

Insert “, building society or credit union” after “bank” in section 43 (e).

[14] Section 59A

Insert after section 59:

59A Payment of costs of Advisory Council

Any costs incurred in respect of the Advisory Council, including remuneration payable under Schedule 3, are to be paid (in accordance with section 67) from the Statutory Interest Account to the Treasurer for credit of the Consolidated Fund.

[15] Section 64 Deposit of trust funds with Law Society

Insert after section 64 (2):

- (2A) Money is taken to have been deposited with the Law Society if it is deposited in the name of the Law Society with a bank, building society or credit union nominated by the Law Society in accordance with this section.

[16] Section 65 Repayment of deposit with Law Society

Insert at the end of section 65 (3) (b):

, or

- (c) in an account with any bank, building society or credit union.

[17] Section 67 Statutory Interest Account

Insert “, building society or credit union” after “bank” in section 67 (1).

[18] Section 67 (3)

Insert after section 67 (3) (b):

- (b1) the costs of an inspection or investigation of the affairs of a solicitor or solicitors under section 55 (1) (including all costs incurred by the Law Society Council or on its behalf by its members, employees or agents in relation to any such inspection or investigation to the extent that such costs have not been recovered under section 55 (8)),
- (b2) the costs incurred in respect of the Advisory Council in exercising its functions for the purposes of this Act (see section 59A),
- (b3) the expenses of the management of a solicitor’s practice under Part 8A (see section 114G) including any reimbursement for damages (under section 114F),
- (b4) the costs incurred in respect of the costs assessors’ rules committee in exercising its functions for the purposes of this Act (see section 208R (4A)),

[19] Section 67 (3E)

Insert after section 67 (3D):

- (3E) The fact that money is paid out of the Statutory Interest Account by virtue of subsection (3) does not preclude the recovery of that money in accordance with this Act from any person liable to pay the money. Any such money recovered must be paid to the credit of the Statutory Interest Account.

[20] Section 69 Relief for financial organisation

Insert “, building society or credit union” after “bank” wherever occurring.

[21] Section 71 Separate account

Insert “, building society or credit union” after “bank” in section 71 (1).

[22] Section 73 Payments from the Fidelity Fund

Omit section 73 (1) (e).

[23] Section 82 Special provisions relating to failure to account

Insert “, building society or credit union” after “bank” in section 82 (1).

[24] Section 97 Stop order on account

Omit “a bank account” from section 97 (1).

Insert instead “an account with a bank, building society or credit union”.

[25] Section 97 (1)

Omit “the bank”.

Insert instead “the bank, building society or credit union”.

[26] Section 97 (2) (a), (3), (4) and (5)

Insert “, building society or credit union” after “bank” wherever occurring.

[27] Section 99 Improper dealing with property

Omit “a bank account” from section 99 (1) (a).

Insert instead “an account with a bank, building society or credit union”.

[28] Section 114F Manager may be reimbursed for damages

Omit "from the Fidelity Fund" from section 114F (2).

Insert instead "(in accordance with section 67) from the Statutory Interest Account".

[29] Section 114G Payment of expenses of management

Omit "from the Fidelity Fund" from section 114G (1).

Insert instead "(in accordance with section 67) from the Statutory Interest Account".

[30] Section 114K Termination of management

Omit "Fidelity Fund". Insert instead "Statutory Interest Account".

[31] Section 172D Registration and incorporation

Omit "Corporate Affairs Commission" from section 172D (1).

Insert instead "Director-General of the Department of Fair Trading".

[32] Section 172D (1)

Omit "that Commission". Insert instead "the Director-General".

[33] Section 172D (2)

Omit "Corporate Affairs Commission is to certify under its seal".

Insert instead "Director-General of the Department of Fair Trading is to certify under the Director-General's hand".

[34] Section 208R Rules of procedure for applications

Insert after section 208R (4):

- (4A) Any costs incurred in respect of the committee are to be paid (in accordance with section 67) from the Statutory Interest Account to the Treasurer for credit of the Consolidated Fund.

[35] Section 211 Protection from liability

Omit "done or suffered".

Insert instead "done, suffered or omitted to be done".

[36] Schedule 8 Savings, transitional and other provisions

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

Legal Profession Amendment Act 1996

[37] Schedule 8, clause 37 (1A)

Insert after clause 37 (1):

- (1A) For the removal of doubt, Part 10 as substituted by the *Legal Profession Reform Act 1993* applies to the conduct of a barrister that occurred before the commencement of the *Legal Profession Act 1987* on 1 January 1988 and applies to any complaint made by any person, or initiated by the Bar Association, in respect of such conduct (whether the complaint was made or initiated before or after that commencement).

[38] Schedule 8, Part 8

Insert after clause 47:

**Part 8 Provisions consequent on enactment of
 Legal Profession Amendment Act 1996**

48 Claims against Fidelity Fund

- (1) Section 80 (4), as substituted by Schedule 3 [2] to the *Legal Profession Amendment Act 1996*, does not apply to a claim made before the commencement of that amendment.
- (2) Section 80A does not apply to a claim made before the commencement of Schedule 3 [3] to the *Legal Profession Amendment Act 1996*.

49 Amendments relating to complaints

An amendment made to Part 10 by Schedule 1 to the *Legal Profession Amendment Act 1996* applies to complaints made before the commencement of that amendment in the same way as it applies to complaints made after that commencement.

50 Variation of information

Section 167A applies to an information laid before the commencement of Schedule 1 [14] to the *Legal Profession Amendment Act 1996* in the same way as it applies to an information laid after that commencement.

51 Protection from liability

The amendments made to section 171Q apply to confer protection from liability on a person or body in respect of any matter or thing done or omitted to be done before the commencement of Schedule 1 [15] to the *Legal Profession Amendment Act 1996* in the same way as they apply in respect of a matter or thing done or omitted to be done after that commencement.

52 Appeal against decision of cost assessor

Section 208M applies to an appeal against a decision made before the commencement of Schedule 2 [16] to the *Legal Profession Amendment Act 1996* in the same way as it applies to an appeal against a decision made after that commencement.

Schedule 6 Amendment of other Acts

(Section 4)

6.1 Defamation Act 1974 No 18

[1] Section 17J Matters arising under Legal Profession Act 1987

Omit section 17J (1) (a). Insert instead:

- (a) for a publication to or by any of the following:
 - (i) the Bar Council,
 - (ii) a member of the Bar Council as such a member,
 - (iii) a committee or subcommittee of the Bar Council, or any member of a committee or subcommittee of the Bar Council,
 - (iv) the Law Society Council,
 - (v) a member of the Law Society Council as such a member,
 - (vi) a committee or subcommittee of the Law Society Council, or any member of a committee or subcommittee of the Law Society Council,
 - (vii) the Bar Association,
 - (viii) the Law Society,
 - (ix) the Legal Services Commissioner,
 - (x) the Legal Services Tribunal,

-
- (xi) any member of the staff of any of the above as such a member,

for the purpose of the making or referral of a complaint, or the investigation, hearing or review of a complaint, under Part 10 of the *Legal Profession Act 1987*, and

[2] Section 17J (2)

Omit section 17J (2). Insert instead:

- (2) This section extends to all publications made on or after 1 January 1988 (the date of commencement of this section) regardless of whether the body or person who made the publication, or to whom the publication was made, was at the relevant time a body or person referred to in subsection (1) (a).

6.2 Maintenance and Champerty Abolition Act 1993 No 88

[1] Long title

Omit "maintenance and champerty" where firstly occurring.
Insert instead "maintenance, champerty and barratry".

[2] Section 1 Name of Act

Omit "Maintenance and Champerty".
Insert instead "Maintenance, Champerty and Barratry".

[3] Section 4A

Insert after section 4:

4A Abolition of crime of being a common barrator (barratry)

The offence of being a common barrator that but for this section would be punishable by the common law is abolished.

[Minister's second reading speech made in—
Legislative Council on 24 October 1996
Legislative Assembly on 30 October 1996]