

1991

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LEGAL PRACTITIONERS (AMENDMENT) BILL (No. 3) 1991

EXPLANATORY MEMORANDUM

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OUTLINE

This is an amending Bill. It amends the *Legal Practitioners Act 1970* which is referred to in the amending Bill as "the Principal Act" and in this Explanatory Memorandum as "the Act".

The Bill is essentially a machinery measure with three predominant themes:

- the correction of references to the Solicitors' Mutual Indemnity Fund;
- providing for the remuneration of the Secretary to the Disciplinary Committee of the Law Society; and
- a general review of penalties in the Act.

FINANCIAL CONSIDERATIONS

No Territory Government funds are involved, but remunerating the Secretary to the Disciplinary Committee will very slightly reduce the funds available in Statutory Interest Accounts for other matters, such as legal aid. The Law Society has advised that during 1989/90 and 1990/91 \$3,220 and \$2,185 respectively were expended in relation to inquiries conducted by the Disciplinary Committee. Accordingly, only a very marginal increase in expenditure is anticipated in respect of providing for the remuneration of the Secretary.

Details of the Bill are set out in the Attachment.

ATTACHMENT

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Clause 1 cites the short title of the Bill, once enacted, as the *Legal Practitioners (Amendment) Act (No. 3) 1991*.

Clause 2 provides that the term "Principal Act" (which appears throughout the Bill) means the *Legal Practitioners Act 1970*.

As is mentioned in the Outline, the Bill has three predominant themes.

Firstly, the Bill will update references in the Act to the Solicitors' Mutual Indemnity Fund. The Fund is used to meet the difference between the amount a solicitor receives under a policy of professional indemnity insurance and the solicitor's actual liability. The Fund was established under interim NSW legislation in 1987. Solicitors from outside NSW can participate in the scheme. The Act requires Territory practitioners to participate in the Fund before a practising certificate can be issued by the Law Society.

On 1 January 1988 a new *Legal Profession Act 1987* came into force in NSW. There were no changes of substance effected by the new NSW legislation, which continued the Fund. The Commonwealth authorities took no action to update the references in the then Ordinance to take account of the new NSW Act. Clauses 19-21 will update the references to NSW law in the Territory Act to make them consistent with the more recent NSW legislation.

Secondly, clauses 10-11 provide for the remuneration of the Secretary to the Disciplinary Committee of the Law Society where the Secretary is a legal practitioner not employed by the Law Society. This will enable a private legal practitioner, who is Secretary to the Committee, to be remunerated on the same basis as other lawyer members of the Committee who are also private practitioners. The remuneration of members and the Secretary will be determined by the Commonwealth Remuneration Tribunal with the present nexus in the Act with the Federal Police Disciplinary Tribunal being removed. The Secretary will be accorded the same protection against legal action as is already conferred upon members (clause 15).

The fees and travelling allowances payable to witnesses before the Disciplinary Committee are presently linked to fees payable under the *Public Works Committee Act 1969* (Commonwealth). Clause 16 will link them to the scale applicable to Supreme Court proceedings. This principle is consistent with the concept of Self-Government. No increased expenditure by parties is involved as both the Public Works Committee and Supreme Court scales are tied to the amounts specified in the High Court Rules.

The third significant theme of the Bill (clauses 12-14, 18, 22-26 and 35-40 refer) is to effect a substantial increase in penalty levels. Many of the penalties included in the Act have remained unchanged for up to 21 years. Most offences have been qualified by the defence "without reasonable excuse" to remove the element of strict liability in view of the generally substantially increased penalties.

The remaining provisions of the Bill are essentially of a machinery and tidying-up nature.

A definition of "Statutory Interest Account" is inserted by clause 3. This will simplify the language used in the Act in relation to Statutory Interest Accounts. (Clauses 27-29 and 31 refer.)

The Bill will make it possible for a Queen's Counsel from the Northern Territory to seek appointment as one of Her Majesty's Counsel for the Territory. (Clause 5 refers.)

The provisions relating to the consequences of bankruptcy in relation to tenure of members of the Admission Board and on the holder of an unrestricted practising certificate will be updated to bring them into line with current drafting practice. (Clauses 7 and 9 refer.)

At present, the Act requires the Attorney General to appoint the Secretary to the Barristers and Solicitors Admission Board. The duties of the position are of an administrative nature and it is unnecessary for the Attorney to appoint the Secretary. The Bill provides (clause 6 refers) that the services of the Secretary be performed by the Registrar of the Supreme Court or an officer nominated by the Registrar.

The *Legal Practitioners (Amendment) Ordinance 1990* amended the Act to substitute references to "failure to account" by a solicitor for "defalcation". Subsection 75(2), which was not altered by the amending Ordinance, provides that a reference to a defalcation by a solicitor includes a defalcation by an employee or a member of a partnership. The elements of the remaining reference to "defalcation" in subsection 75(2) have been incorporated into a revised and simplified definition of "failure to account" contained in section 79A and subsection 75(2) repealed. Subsection 79A(2) adds nothing to the interpretation of the term "failure to account" and will accordingly be repealed. These matters are dealt with in clauses 30 and 32.

An obsolete reference in section 93 to "defalcation" will be corrected by clause 34. Clause 33 will similarly clarify section 82 by including a reference to "failure to account".

Other amendments are of a purely formal nature. The opportunity has been taken (see clauses 4, 17 and 41) to repeal or amend four provisions (subsections 6(4) and 6(9) and sections 42K and 126) whose application is spent. Clause 4 will amend section 6 to remove spent provisions and to make subsection 6(9) gender neutral.

An incorrect reference in the interpretation provisions to the title of the Disciplinary Committee will be corrected by clause 3.

Clause 8 will amend section 15E to make it clear that a reference to the "Attorney-General's Department" is to the Commonwealth Department of that name.

Clause 35 will amend section 94 in order to require a person to comply with a notice without a reasonable (previously a lawful) excuse.

Clause 42 will update the references to the former *Companies Act 1981* of the Commonwealth to refer to the new Corporations Law in respect of the audit of trust accounts, the Statutory Interest Accounts and the Fidelity Fund.