

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

LEGAL PRACTITIONERS (AMENDMENT) ORDINANCE (No 3) 1986

ORDINANCE NO. 82, 1986

The purpose of the Ordinance is to make several amendments to the Legal Practitioners Ordinance 1970 ('the Principal Ordinance') as part of a continuing review of the Principal Ordinance. The review is being conducted in consultation with the Law Society of the A.C.T.

The amending Ordinance addresses a range of matters that have been brought to attention (mainly by the Law Society) where improvements in the Principal Ordinance are required. The amendments draw on legislative changes in other jurisdictions, principally New South Wales, since the Principal Ordinance was made.

The most significant amendments are:

- . a restructuring of the Disciplinary Committee of the Law Society of the ACT ('the Disciplinary Committee') established under the Principal Ordinance to include two lay members appointed by the Attorney-General and the opening of Disciplinary Committee inquiries to the public

- . the abolition of articles of clerkship from 1 March 1987

- . provisions to give the Disciplinary Committee and the Society certain controls over the capacity of a barrister and solicitor to employ an unqualified person
- . provisions enabling a third party who is liable to pay a solicitor's costs to apply for taxation of those costs
- . the prescription of courses in practical legal skills in other Australian jurisdictions for the purposes of entitlement to admission in the A.C.T.

Lay participation in Disciplinary Committee inquiries has been provided for in other jurisdictions for some time. It is the first step in a comprehensive review of the disciplinary procedures under the Ordinance.

The abolition of articles of clerkship follows a similar move in NSW in 1973. A similar proposal has been made in Victoria. The Law Society believes that articles can no longer be justified in view of its responsibilities to the public for the standard of training of entrants to the profession. It is aware that while some people have had 'good' articles others have had bad or inadequate articles. It is considered that the Legal Workshop at the Australian National University provides a uniform and comprehensive course of practical training which should be undertaken by all students.

Other Amendments

The Ordinance also includes amendments to: enable costs of an examination of a solicitor's trust account to be recovered where it reveals a breach of the Principal Ordinance; increase

the maximum fines that may be imposed by the Disciplinary Committee to \$2,000 and by the Supreme Court to \$10,000; provide protection for the Law Society Council and employees of the Society from civil actions in relation to the bona fide performance of functions and duties under the Ordinance and protection for a complainant making a complaint; require an applicant for admission to practise to have knowledge of legal ethics and accounts; allow recovery by the Society from the Statutory Interest Account of the cost of opposing applications for admission; provide for the Society to recover its legal costs on an application to the Supreme Court for the appointment of a receiver of the trust property of a solicitor and increase the fines for offences by unqualified persons to \$2,000.

Details of the Ordinance are as follows:

Section 1 provides that the Ordinance may be cited as the Legal Practitioners (Amendment) Ordinance (No 3) 1986.

Section 2 provides that the Ordinance, other than section 10, comes into operation on notification in the Gazette. Section 10, which abolishes articles of clerkship, is to come into operation on 1 March 1987.

Section 3 defines the Principal Ordinance to mean the Legal Practitioners Ordinance 1970.

Section 4 amends the interpretation provision (section 5) of the Principal Ordinance.

Section 5 amends section 6A of the Principal Ordinance to increase the fee payable on appointment as a Queen's Counsel for the Territory from \$10 to \$50.

Section 6 amends section 7 of the Principal Ordinance consequent upon the change in title of the Senior Judge of the A.C.T. Supreme Court from Chief Judge to Chief Justice.

Section 7 amends section 10 of the Principal Ordinance to:

- . entitle a person qualified for admission to a degree (but not formally admitted) to be entitled to be admitted to practise (amendment of sub-section 10(1))
- . require a person to have passed an examination approved by at least two of the resident Judges of the Supreme Court in legal ethics and accounts, and prescribe courses in practical legal skills in other Australian jurisdictions for the purpose of entitlement to admission in the A.C.T. (amendment of paragraph 10(2)(b))
- . preserve the entitlement to apply for admission for persons who have entered into articles of clerkship prior to their proposed abolition on 1 March 1987 (section 7(2)).

Section 8 makes a technical amendment to section 11 of the Principal Ordinance by removing a redundant paragraph.

Section 9 repeals and remakes section 12 of the Principal Ordinance to clarify and expand the matters that are to be addressed by the Barristers and Solicitors Admission Board in its report to the Supreme Court on an application by a person for admission.

Section 10 repeals Part IV of the Principal Ordinance which provides for entering into articles of clerkship. It is proposed that this occur on 1 March 1987 (see sub-section 2(2)). Provision is made to continue the application of Part IV to persons who have entered into articles of clerkship before that date.

Section 11 amends section 15E of the Principal Ordinance consequent upon the amendment to paragraph 10(2)(b) in section 7.

Section 12 repeals section 25 of the Principal Ordinance (which relates to the Disciplinary Committee) and substitutes a new section 25 to restructure the Committee. Under the new provision, the Committee is to consist of 7 members comprising 5 members appointed by the Council of the Law Society and 2 members appointed by the Attorney-General after consultation with the Society. The Attorney-General's appointees are not eligible for appointment if they are enrolled as a barrister, as a solicitor, or as a barrister and solicitor whether in the Territory or elsewhere.

Section 13 repeals section 27 of the Principal Ordinance (which deals with removal of members of the Disciplinary Committee) and substitutes a new expanded section 27 to take account of the revised composition of the Committee.

Section 14 amends section 28 of the Principal Ordinance to increase from 3 to 4 the number of members required to constitute a quorum for a meeting of the Disciplinary Committee. Of those members at least one is to be a lay member and a majority are to be legal practitioners.

Section 15 amends section 29 of the Principal Ordinance (which relates to complaints to the Disciplinary Committee) by inserting a new sub-section 29(1A). The new sub-section will enable the Council of the Law Society where it considers that a person (not being a barrister and solicitor) who is or was employed by a barrister and solicitor, has, with or without the connivance of the barrister and solicitor, been a party to, or has caused an act or default in relation to the barrister and solicitor's practice (being an act or default in respect of which a complaint has been or could be made against the barrister and solicitor) to make a complaint to the Disciplinary Committee with respect to the person.

Section 16 amends section 30 of the Principal Ordinance to provide that inquiries before the Disciplinary Committee are to be open to members of the public (they are currently closed hearings). A provision has been included allowing the Committee to exclude members of the public or persons specified by the Committee from the inquiry where this is necessary in the interests of justice.

Section 17 amends section 31 of the Principal Ordinance to require the Law Society to notify the person who made a complaint to it of the date set down for the inquiry by the Disciplinary Committee. The section also makes amendments to the section consequent upon the insertion of new sub-section 29(1A) by section 15.

Section 18 amends section 32 of the Principal Ordinance to increase from \$100 to \$500 the penalty for failure to comply with a summons to give evidence and to produce documents.

Section 19 amends section 34 of the Principal Ordinance consequent upon the insertion of new sub-section 29(1A) by section 15.

Section 20 amends section 35 of the Principal Ordinance to increase from \$100 to \$500 the penalty for refusing to be sworn or give evidence at an inquiry before the Disciplinary Committee.

Section 21 amends section 36 of the Principal Ordinance to increase from \$500 to \$2,000 the fine that may be imposed by the Disciplinary Committee on a barrister and solicitor.

The amendment also inserts new sub-sections 36(1A) and (1B) to provide for the order that may be made by the Disciplinary Committee when conducting an inquiry into the actions of a person (not being a barrister and solicitor) employed by a barrister and solicitor as a result of a complaint made under new sub-section 29(1A) inserted by section 15.

Under new sub-section 36(1A) the Committee may order that, from a date specified in the order, no barrister and solicitor shall, in connection with his or her practice as a barrister and solicitor, employ or otherwise remunerate the person concerned except in accordance with permission granted by the Council of the Law Society under new section 129 (inserted by section 47). Power is given for the Committee to revoke any such order made on application of the Law Society or the person with respect to whom the order was made (new sub-section 36(1B)).

Section 22 amends section 38 of the Principal Ordinance to provide that a member of the Disciplinary Committee has, in the performance of the duties of a member, the same protection and immunity as a Judge of the Supreme Court.

Section 23 repeals section 40A of the Principal Ordinance (which relates to publication of an order of the Disciplinary Committee) and inserts a new section 40A consequent upon the amendment to open Disciplinary Committee hearings to the public (section 16).

Under the new provision it is an offence to publish details of a Disciplinary Committee inquiry except where the Committee makes an order against a barrister and solicitor or person the subject of the inquiry and 21 days have elapsed since the order was made and no appeal to the Supreme Court has been instituted. Where an order is made and no appeal is instituted, a person may publish a report of the prescribed matters in relation to the order. The prescribed matters are the name and address of the barrister and solicitor, or the name and address of the barrister and solicitor who employed the person the subject of the inquiry and that person's name; the findings of the Committee; where the Committee so orders, the evidence or part of the evidence given at the inquiry, and the terms of the order. A person who publishes a fair and accurate report of the prescribed matters is afforded the same protection in relation to the publication of the report as the person would have if the Committee were a court of justice.

Section 24 amends section 41 of the Principal Ordinance to increase the fine that the Supreme Court may impose in disciplinary proceedings against a barrister and solicitor from \$1,000 to \$10,000.

Section 25 amends section 42 of the Principal Ordinance to provide an appeal to the Supreme Court from an order of the Disciplinary Committee against a person who was subject to a complaint under new sub-section 29(1A) inserted by section 15. The Society in such cases is also to be given a right of appeal against a decision of the Committee to refuse to make an order in respect of that person.

Section 26 repeals section 42A (which provides for evidence before the Disciplinary Committee to be read before the Court) and inserts a new section 42A restructured to take account of the amendments to the appeal provisions in section 25.

Section 27 amends section 42E of the Principal Ordinance consequent upon the insertion of sub-section 36(1A) by section 21.

Section 28 inserts a new section 45A which provides that nothing in Division 3 (Trust Bank Accounts) Division 4 (Solicitors' Records) and Division 5 (Audit), other than provisions relating to the giving of receipts for trust moneys, apply where a solicitor does not have a place in the Territory from which the solicitor conducts his or her practice and all trust moneys received in the Territory by the solicitor are paid into a trust bank account in accordance with the laws of the State in which the solicitor conducts his or her practice.

Section 29 amends section 52 of the Principal Ordinance to require a solicitor to notify the Law Society in writing of the address of the branch of the bank at which the solicitor maintains a trust bank account. A solicitor is also to be required to notify the Society within 7 days of any changes in the name or address of the bank.

Section 30 amends section 58 of the Principal Ordinance to require a solicitor to notify the Law Society in writing of the name of the auditor engaged to audit the solicitor's records in respect of trust moneys.

Section 31 amends section 61 of the Principal Ordinance to require an auditor engaged by a solicitor to audit the solicitor's trust moneys to also include in the auditor's report the lowest amount that stood to the credit of the general trust bank account of the solicitor in the year to which the report relates.

Section 32 amends section 66 of the Principal Ordinance to allow the Law Society to recover from a solicitor as a debt due to the Society the costs of an examination of the solicitor's trust account records where that examination discloses that the solicitor has failed to comply with the provisions of the Principal Ordinance relating to trust moneys. An amount recovered by the Society is to be paid into the Fidelity Fund.

Section 33 amends section 70 of the Principal Ordinance to allow the amount shown in a bank statement as standing to the credit of a general trust bank account on a day to be used for the purpose of determining the amount of trust moneys a solicitor must deposit with the Law Society.

Section 34 amends section 72 of the Principal Ordinance to make a minor consequential amendment that was missed when the Legal Practitioners (Amendment) Ordinance 1983 was made.

Section 35 inserts a new paragraph (caa) in sub-section 74A to enable the Law Society to be re-imbursed from the Statutory Interest Account for legal costs incurred by it in opposing an application by a person for admission as a barrister and solicitor. An amendment is also made to current paragraph 74A(4)(cb) consequent upon the amendment made to sub-paragraph 10(2)(b)(i) by section 7.

Section 36 inserts a new section 108A to provide that where the Law Society is a party to proceedings under Part IX of the Principal Ordinance (Appointment of Receivers) the costs and disbursements incurred by the Society are payable out of the Fidelity Fund. This amendment will fill a gap in the Principal Ordinance which has only just come to light.

The Society is empowered to apply to the Supreme Court in certain circumstances to have a person appointed as receiver of the trust property of a solicitor. All such orders in the past have been ancillary to disciplinary proceedings and the question of recovery of the costs of the application has not arisen. In a recent case, however, involving an application to the Court in respect of the appointment of a receiver of the trust property of a solicitor who had become mentally infirm, it was discovered that although there was provision to reimburse the costs of the receiver from the Fidelity Fund there was no similar provision covering the legal costs of the Society in carrying out its statutory obligations in respect of the receiver's appointment. The legal costs of such an application are significant and, consistent with the purposes for which the Fidelity Fund is established, it is appropriate that they be borne by the fund rather than be a charge on the general funds of the Society.

Following the format of the current provisions relating to remuneration of the receiver from the Fidelity Fund (section 105 of the Principal Ordinance) provision is made for the costs and disbursements incurred by the Society where a receiver is appointed to be recovered as a debt due to the Society from the solicitor concerned (new sub-section 108A(2)). Any amount recovered is to be paid into the Fidelity Fund.

The provision allowing the Law Society to recover its costs and disbursements out of the Fidelity Fund is to apply to costs and disbursements incurred but not paid before 1 November 1986 as well as costs and disbursements incurred on or after that date. This will allow the costs of the case referred to above to be paid out of the Fidelity Fund (sub-section 36(2)).

Provision has been made to make it clear that new sub-section 108A(2) only applies in respect of proceedings instituted after the date of commencement of the section (sub-section 36(3)). Thus, although the Society may recover from the Fidelity Fund its legal costs of the case referred to above these are not recoverable from the solicitor concerned as a debt due to the Society.

Section 37 repeals section 109 of the Principal Ordinance (Interpretation) and inserts a new section 109 containing additional interpretation provisions for the purposes of Part X of the Principal Ordinance (Costs).

Section 38 inserts a new section 110A in the Principal Ordinance to permit a person who is not the client of a solicitor but who is liable to pay the solicitor's costs and disbursements (e.g. on a mortgage or lease) to request the solicitor to give him or her an itemised statement of the costs and disbursements (new sub-section 110A(1)). Where the

person requesting the statement has paid the costs and disbursements the solicitor is liable to repay the amount if the statement is not delivered within 3 months of the request (new sub-section 110A(3)). When the request is received by the solicitor and a copy has been served by the person on the solicitor's client, all proceedings in respect of the costs and disbursements are stayed until one month after the solicitor gives the statement requested (new sub-section 110A(4)). Under the Principal Ordinance, as amended by section 38, the person requesting the statement has a right to have the statement taxed by the Registrar of the Supreme Court.

Sections 39 and 40 amend sections 111 and 118 of the Principal Ordinance, respectively, consequent upon the provisions of new section 110A.

Section 41 inserts a new section 119A in the Principal Ordinance to exclude the right of a mortgagor or lessee to request a statement under new section 110A and the right to a taxation of it where, before the mortgage or lease is entered into, the mortgagee or lessor gives to the mortgagor or lessee a notice informing the mortgagor or lessee that he or she is liable to pay the costs and disbursements of the mortgagee or lessor and a statement of those costs and disbursements. Where such a statement is given the mortgagor or lessee is not liable to pay any greater amount than the costs shown in the statement.

Section 42 amends section 120 of the Principal Ordinance consequent upon the amendments to be effected by section 38 and 41.

Sections 43 to 46 amend sections 122 to 125, respectively, of the Principal Ordinance to increase the penalty for offences by unqualified persons in each of those sections from \$500 to \$2,000 to bring them into line with current penalty levels for offences of this kind.

Section 47 inserts new sections 129 and 129A in the Principal Ordinance.

New section 129 enables the Council of the Law Society to give permission subject to conditions for the employment by a barrister and solicitor of a person the subject of an order by the Disciplinary Committee under new sub-section 36(1A) to be inserted by section 21 and a person referred to in section 128 of the Principal Ordinance (i.e. a person whose name has been removed from a roll of legal practitioners other than at his or her own request).

Where the Council refuses permission the person concerned may appeal to the Supreme Court.

New section 129A gives protection from civil proceedings to the Law Society, a member or employee of the Law Society and an examiner appointed to examine the records of trust moneys kept by a solicitor, in respect of an act done in good faith in the course of making an investigation of a complaint in respect of the professional behaviour of a barrister and solicitor or the conduct of an unqualified employee and in the exercise of powers or the performance of duties or functions under the Principal Ordinance or any other law of the Territory. The protection is also afforded to the person making a complaint to the Society about the professional behaviour of a barrister and solicitor or the conduct of an unqualified employee.

Section 48 amends section 130 of the Principal Ordinance to correct a wrong cross-reference.

Section 49 provides, in effect, that the amendments in the proposed Ordinance relating to inquiries before the Disciplinary Committee do not apply to inquiries before the Committee into complaints made before the proposed Ordinance comes into force.

Authorised by the
Attorney-General