

QUEENSLAND LAW SOCIETY LEGISLATION AMENDMENT BILL (No. 2) 1996

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The objectives of the legislation are to overcome problems with the complaints and discipline system for solicitors, providing the necessary accountability and independent review lacking from the current system.

Reasons for the objectives and how they will be achieved

The types of complaints against solicitors which are currently able to be investigated and dealt with are limited. The existing categories of complaint will be widened to encompass consumer grievances of delay, neglect and overcharging by solicitors.

The current Statutory Committee and Solicitors Disciplinary Tribunal have no power to order the solicitor to provide redress to a complainant. The new Solicitors Complaints Tribunal which will hear charges against solicitors will have greater powers than available at present, and will be able to award compensation to complainants and make orders in relation to the payment of a solicitor's fees and costs.

Although the Solicitors Disciplinary Tribunal has lay representation, the Statutory Committee consists solely of solicitors. Membership of the new Solicitors Complaints Tribunal (which will replace the Solicitors Disciplinary Tribunal and the Statutory Committee) will be 2 solicitor members and 1 lay member, so ensuring that the tribunal has a consumer perspective.

The Lay Observer, who reviews complaints about the way in which the Law Society has investigated complaints, has no coercive power. This Bill replaces that office with a new Legal Ombudsman (a non-lawyer) who will, for the first time, have the power to direct the Law Society to take certain steps in the investigation of a complaint, and the power to bring charges before the tribunal, where the Law Society should have brought the charges but failed to do so. This will ensure that the Law Society is no longer the final arbiter in relation to complaints against solicitors.

Administrative cost to Government of implementation

The work required of the Lay Observer currently occupies two days per week. It is expected that the expansion of the Legal Ombudsman's role will result in some increase in this workload. The Lay Observer's fees and expenses are currently paid from the Legal Practitioners Fidelity Fund, and this funding arrangement will continue in respect of the Legal Ombudsman. Administrative support for the Lay Observer is provided by the Department of Justice. The Department of Justice will similarly provide administrative support for the Legal Ombudsman. As a result of the Legal Ombudsman's increased workload, it is anticipated that there will be some additional costs for the Department.

The solicitor members of the Statutory Committee and Solicitors Disciplinary Tribunal currently receive no payment for their services. The lay members of the Solicitors Disciplinary Tribunal receive payment from the Department of Justice for each hearing, calculated at the standard rate. This arrangement will continue for the new tribunal. In view of the additional areas which will be open for investigation, there may be more charges brought before the tribunal. More hearings will mean an increased total payment from the Department in respect of lay members' expenses, but this will not be a significant increase. The Fidelity Fund will continue to meet the administrative costs of the tribunal.

Fundamental legislative principles

The Bill complies in all respects with the fundamental legislative principles.

Consultation

In developing the amendments, consideration has been given to submissions from members of the public who have, over the years, raised concerns with the Government about shortcomings in the current solicitors' complaints and discipline system. The recommendations of the Trade Practices Commission Report (Legal) of March 1994 and the Access to Justice Advisory Committee Report of May 1994 in relation to the optimal features of such a system have also been taken into account, as have recommendations from the Queensland Lay Observer's Annual Reports.

The Queensland Law Society has been consulted in the development of the Bill.

NOTES ON PROVISIONS**Part 1—Preliminary**

Clause 1 sets out the Act's short title.

Clause 2 provides for the Act's commencement on proclamation.

Part 2—Amendment of Queensland Law Society Act 1952

Clause 3 provides that the *Queensland Law Society Act 1952* is amended by this part and the schedule.

Clause 4 amends the definitions section to reflect changes made by this Act.

Clause 5 inserts a new definition for "unprofessional conduct or practice", expanding its meaning.

Clause 6 incorporates into section 5(7) reference to the specific new delegation power (section 5N) given to the Queensland Law Society.

Clause 7 inserts new sections 5E-5J and 5N after section 5D.

Section 5E(1) and (2) enable written complaints to be made to the council of the Queensland Law Society about the conduct of practitioners and their clerks or employees. “Conduct” is defined in *section 5E(6)*. In making the complaint, the complainant may also give notice of a claim for compensation for pecuniary loss suffered as a result of the practitioner’s actions.

Section 5E(3) gives the council power to seek further particulars of the claim or require it to be verified by statutory declaration. In the case of an allegation of overcharging, it enables the Council to require the payment of a fee for a costs assessor’s report. Under *section 5E(4)*, if these requirements are not fulfilled, the complaint is considered to be withdrawn. *Section 5E(5)* provides for a three year limitation period for the receipt of complaints.

Section 5F(1) provides that the council must investigate a complaint received, and *section 5F(2)* allows the council to investigate conduct without receiving a complaint (for example, if an audit of a practitioner’s trust account has revealed discrepancies).

Section 5G gives the council powers in conducting an investigation, including requiring a practitioner to provide an explanation, appear in person, or produce documents. It also enables the council to engage a costs assessor where there is a complaint of overcharging.

Section 5H requires a practitioner to comply with a council requirement under section 5G. Upon failure to comply with a further written notice from the council, the practitioner may be dealt with for professional misconduct in the absence of a reasonable excuse. Under *section 5H(5)* a reasonable excuse may be that the giving of an explanation would contravene or invalidate the practitioner’s policy of professional indemnity insurance.

Section 5I enables voluntary mediation between the parties to resolve the complaint.

Section 5J sets out the council’s powers following an investigation. In addition to the powers which it currently possesses, it may, in relation to complaints of overcharging, make recommendations to the practitioner about the bill and payment of the cost assessor’s fee.

Section 5N enables the council to delegate its powers under this part to appropriately qualified bodies or persons.

Clause 8 omits the existing heading before section 6 (“The Statutory Committee”) and replaces it with a new heading “Part 2A—Solicitors Complaints Tribunal”.

Clause 9 omits existing sections 6 - 6S, which are provisions relating to the investigation of complaints, the statutory committee, the solicitors disciplinary tribunal, and the lay observer. New sections 6 - 6AM are inserted in their place.

Section 6 establishes the Solicitors Complaints Tribunal.

Section 6A sets out the functions of the tribunal.

Section 6B provides for the membership of the tribunal, being practitioners and lay members. Members are appointed by Governor in Council.

Section 6C provides that the tribunal is constituted by 2 practitioners and 1 lay member.

Section 6D provides for the chairperson or another member to preside, and states that decisions of the tribunal are majority decisions.

Section 6E enables charges to be brought by the council or the legal ombudsman.

Section 6F enables the making of rules for tribunal hearings.

Section 6G provides for notice to be given to the council, the legal ombudsman, the person charged, and the complainant in relation to the hearing.

Section 6H sets out the persons who may appear as of right, and by leave, before the tribunal.

Section 6I allows the tribunal to proceed in the absence of the person charged where that person has been given notice of the hearing.

Section 6J requires the council or the legal ombudsman to give the tribunal a copy of the complainant’s particulars of loss where a notice of a claim for compensation has been given.

Section 6K relates to hearings involving overcharging, and enables the tribunal to engage a costs assessor where a report has not already been obtained by the council.

Section 6L requires the tribunal's hearings to be generally held in public.

Section 6M enables the tribunal to require the attendance of witnesses and the production of documents. It also provides for a penalty where the person fails to comply without reasonable excuse.

Section 6N gives the tribunal powers in relation to the taking of evidence. It provides for a penalty where the person fails to comply without reasonable excuse.

Section 6O creates offences in respect of contempt of the tribunal and provides for a penalty.

Section 6P sets out the procedure for enforcing the penalties under sections 6M, 6N and 6O, and enables the tribunal to bring a proceeding for the imposition of the penalty. The right of the council to bring a proceeding for a breach of the Act under section 5D is also preserved.

Section 6Q gives protection to members of the tribunal, persons representing persons before the tribunal, witnesses, and documents.

Section 6R(1) and (2) set out the orders which the tribunal may make where a practitioner is found guilty of a charge. In addition to orders which the statutory committee may currently make, the new tribunal will be able to make an order for compensation, an order that the practitioner waive or repay the practitioner's fees and charges, an order that the practitioner pay the costs of the costs assessor, an order that the practitioner carry out work free of charge or for a stated fee, and an order that the practitioner waive a lien.

Section 6R(3) enables the tribunal to order that no further action be taken against a practitioner.

Sections 6R(4), (5) and (6) relate to compensation orders. The tribunal may make a compensation order to a maximum of \$7,000 only where the complainant has suffered pecuniary loss and has given notice of the claim for compensation to the council or to the legal ombudsman. Where a compensation order was made, but the person's pecuniary loss was higher than \$7,000, the person may still take proceedings before a court for the recovery of the remainder of the loss, but the court must take into account the amount paid under the compensation order. Another court or decision-making body is not bound by the findings of the tribunal.

Section 6S sets out the orders which the tribunal may make in respect of a charge brought against a practitioner's clerk or employee. These orders

are limited to directing persons not to employ the clerk or employee in connection with a practitioner's practice.

Section 6T provides for the tribunal to make an order for striking off or suspension of a practitioner where the practitioner has been struck off or suspended in another state or territory. Such matters are brought before the tribunal and dealt with in the same way as other charges.

Section 6U allows the tribunal to make orders in relation to costs.

Section 6V provides for tribunal orders to be signed and for findings of fact to be set out.

Section 6W requires tribunal orders to be filed in the Supreme Court, whereupon they become enforceable as an order of that Court.

Section 6X allows for the inspection of tribunal orders filed in the Supreme Court.

Section 6Y provides for the giving of a copy of the tribunal order to certain parties who are entitled to appeal from the tribunal's order.

Section 6Z enables appeals to the Court of Appeal by the practitioner or the practitioner's clerk or employee, the Minister, the council and the legal ombudsman, and sets out the time within which appeals may be lodged.

Section 6AA provides that this Act does not prevent practitioners being dealt with in other existing ways.

Section 6AB provides for judicial notice to be taken in relation to the tribunal.

Section 6AC contains provision in relation the appointment and vacation of office of members of the tribunal.

Section 6AD provides that the lay members of the tribunal are paid by the Department of Justice. Practitioner members of the tribunal are not paid.

The heading "*Part 2B—Legal Ombudsman*" is inserted.

Section 6AE enables the Governor in Council to appoint a legal ombudsman. The legal ombudsman must not be legally qualified or a public service officer.

Section 6AF sets out the legal ombudsman's functions, namely to monitor investigations by the council, to investigate complaints in relation to the way in which the council has dealt with complaints, and to monitor

tribunal hearings. Complaints about the conduct of practitioners or their clerks or employees must be dealt with at first instance by the council.

Section 6AG puts an obligation on the Department of Justice to provide administrative support to the legal ombudsman.

Section 6AH enables the legal ombudsman to refuse to investigate complaints in certain circumstances.

Section 6AI gives the legal ombudsman powers. These are wider than the powers which the existing lay observer has, in that the legal ombudsman has a power to direct the council to take additional steps in the investigation of a complaint, bring a charge before the tribunal, and appeal a decision of the tribunal. Where the legal ombudsman intends to bring a charge before the tribunal, he or she must notify the council of their intention and the reasons for doing so.

Section 6AJ provides for the legal ombudsman's term of appointment and vacation of the office.

Section 6AK allows for the appointment of an acting legal ombudsman.

Section 6AL provides that the legal ombudsman's fees and expenses are paid from the Fidelity Guarantee Fund.

Section 6AM requires the legal ombudsman to prepare an annual report, which is tabled in Parliament.

A new heading "*Part 2C—Trust Accounts and Trust Property*" is inserted.

Clause 10 inserts a consequential amendment into section 8(2) to take account of the fact that fines under new section 6R(1)(c) are paid into the Fidelity Guarantee Fund.

Clause 11 relocates existing sections 7, 8 and 9 to Part 2 (The Queensland Law Society Incorporated and the Council), and renumbers them as sections 5K, 5L and 5M.

Clause 12 inserts a new *section 53*, which provides that reference to the statutory committee or the solicitors disciplinary tribunal in other Acts or documents may be read as the solicitors complaints tribunal. *Clause 12* also inserts a new "*Part 6—Transitional*", and sections 54 and 55.

Section 54 provides that the council and the legal ombudsman may refuse to reopen a complaint already investigated before these amendments came into effect.

Section 55 provides that if a charge is currently before the statutory committee or the solicitors disciplinary tribunal at the time these amendments came into effect, it may continue to be dealt with by that committee or tribunal.

Part 3—Amendment of Legal Aid Act 1978

Clause 13 provides for the amendment of the *Legal Aid Act 1978*.

Clause 14 amends section 23(10) as a consequence of the removal of the existing section 6 of the *Queensland Law Society*.

Clause 15 amends section 81(2A) as a consequence of the abolition of the statutory committee and the solicitors disciplinary tribunal.

Part 4—Amendment of Supreme Court of Queensland Act 1991

Clause 16 provides for the amendment of the *Supreme Court of Queensland Act 1991*.

Clause 17 omits reference to the rule-making power in relation to the statutory committee.

Part 5—Amendment of Trust Accounts Act 1973

Clause 18 provides for the amendment of the *Trust Accounts Act 1973*.

Clause 19 amends section 25 as a consequence of the abolition of the statutory committee.

SCHEDULE**MINOR AMENDMENTS**

Clauses 1 to 6 and 9-12 make minor amendments to the *Queensland Law Society Act 1952* as a consequence of the amendments to the *Queensland Law Society Act* under this Bill.

Clause 7 amends section 15(c) of the *Queensland Law Society Act 1952* to correct an error.

Clause 8 amends section 29(1) of the *Queensland Law Society Act 1952* to remove reference to the insurance commissioner.