

# What The Legal Profession Act Means To You —

*Ken Handley Q.C. summarizes the provisions of the new Legal Profession Act which affect the Bar.*

The Legal Profession Bill has now passed all stages in the New South Wales Parliament and has been assented to by the Governor. It will come into force on a date to be proclaimed, but the provisions of Part 3 Division 1 dealing with Practising Certificates for barristers will not come into force until a date determined by the Attorney-General in consultation with the Bar Council and notified in the Gazette.

The Act which repeals the Legal Practitioners Act 1898 contains 216 sections covering 107 pages followed by eight schedules which occupy a further 22 pages. Fortunately not all of this legislation relates to barristers! In fact a very large proportion of the Act deals solely with solicitors e.g. trust accounts, fidelity fund, receivers etc.

The Act contains many minor changes to the existing law and practice which govern the Bar in this State but these are far too numerous and detailed for separate treatment in this article. I will attempt therefore to focus on the major changes as they affect barristers now in practice.

## Practising Certificates

Section 25(1) provides that on and after a date to be notified in the Gazette a barrister shall not practise as a barrister without being the holder of a current Practising Certificate. It is understood that the obligation to hold a Practising Certificate will come into force on 1 January 1988. The obligation is enforceable by injunction by the Supreme Court: section 25(2). Practising Certificates are to be issued by the Bar Council, (section 27) on application and payment of a prescribed fee: section 29(1). Different fees may be charged subject to the approval of the Attorney-General: section 29(2).

The holder of a current Practising Certificate is entitled to be a member of the Association without further payment: section 31(1). Restricted Practising Certificates may be issued to pupils, (section 32(2)) but a newly admitted barrister may be given an unrestricted Practising Certificate: section 32(3). A Practising Certificate is normally in force for 12 months: section 34(1).

## Bar Council

The Council must report annually to the Attorney-General on the existence and functions of its committees other than exempted committees: section 49. Specific committees of the Council must have lay representation: section 50. The Bar Council must report annually to the Attorney-General for submission to Parliament on its work and activities under the Act: section 57.

## Advisory Council

The Act establishes a Legal Profession Advisory Council to review the structure and functions of the legal profession: section 59(2). It will comprise nine members appointed by the Attorney-General two of whom will be barristers, one nominated by the Bar Council, and three

shall be solicitors. The other four members are appointed to represent the community.

## Unqualified Practitioners

A person shall not act as a barrister unless he or she holds a current Practising Certificate: section 115(1). A person shall not hold out, advertise or represent that he or she is qualified to act as a barrister unless he or she holds a current Practising Certificate: section 116(2). No prosecution may be brought for breach of these sections without the consent of the Attorney-General: section 122.

## Professional Misconduct

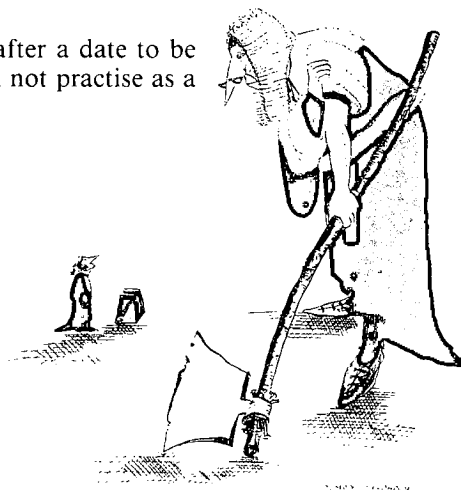
This subject is dealt with in Part 10 of the Act which is entirely new in the legislation of this State. Professional misconduct is defined by section 123 as including '(a) Conduct that falls short of the standard of conduct that a member of the public is entitled to expect of a legal practitioner? Arguably, but not necessarily this alters the existing law relating to professional misconduct. The Bar Council and the Law Society attempted without success to have this definition altered before the Bill was presented to Parliament.

Part 10 applies to former practitioners other than those who have since become State Judges: section 124. The jurisdiction of the Supreme Court is not affected: section 125. **Any** person may make a complaint of professional misconduct against a barrister to the Bar Council: section 130. The Council must investigate the complaint and if it considers that it involves a question of minor professional misconduct it may reprimand the barrister or refer the matter to the **Professional Standards Board**. If the Council considers that the complaint involves a question of serious misconduct it must refer the complaint to the **Disciplinary Tribunal**: section 135.

The Professional Standards Board when hearing a complaint against a barrister will be composed of two barristers and one lay person: section 142. In conducting a hearing the Board is not bound by the rules of evidence, (section 143(2)) but must record its determination and the reasons therefor: section 143(4). The barrister concerned, the Council, the Attorney-General, and in some cases the complainant may appear before the Board. Other persons may be granted leave to appear: section 144. The hearing takes place in the absence of the public: section 145.

The Board on finding a barrister guilty of minor professional misconduct may impose a reprimand or fine not exceeding \$2,000, and may order the barrister to undertake further legal education: section 149(1). Orders compensating a complainant for loss or damage may be made, provided both barrister and complainant consent: section 149(3), (4). Decisions of the Board are subject to review by the Disciplinary Tribunal: sections 150-154.

Allegations of serious professional misconduct not dismissed after preliminary investigation by the Bar Council go to the Disciplinary Tribunal. In cases



concerning barristers this may be constituted by a Supreme Court Judge, two barristers and two lay persons, or by a Supreme Court Judge, a barrister and a lay person, or by two barristers and a lay person: section 156. The parties entitled to appear as of right or by leave are the same as with the Board: section 158. The Tribunal will ordinarily sit in public: section 159. Upon finding the barrister guilty of serious professional misconduct the Tribunal may cancel or suspend a barrister's Practising Certificate, order that the barrister be removed from the roll, or may impose a fine not exceeding \$25,000: section 163. Orders compensating a complainant for loss or damage may also be made, provided both barrister and complainant consent: section 163(3) and (4). An appeal by way of new hearing lies to the Court of Appeal: section 164.

Decisions of the Bar Council dismissing complaints of professional misconduct without a hearing may be reviewed on the application of the complainant by a **Professional Conduct Review Panel** which in the case of complaints against barristers will consist of one barrister appointed by the Attorney-General on the nomination of the Bar Council, and two lay persons: sections 137-141.

It is thought that these provisions do not apply to alleged professional misconduct committed prior to the commencement of the new Act (see definition of professional misconduct in section 123, section 124 and section 130) bearing in mind the general presumption against legislation affecting past conduct, especially when it is penalised.

#### **Barristers Required to Serve on the New Bodies**

Apart from members being required to serve, as in the past, on the Bar Council itself and the Admission Board (two barristers) one barrister will be needed for the Review Panel, at least two (probably many more) for the Disciplinary Tribunal and at least two for the Legal Profession Advisory Council.

While members of the Council, Panel, Board, and Tribunal will be entitled to such remuneration as the Attorney-General may from time to time determine in respect of the member, it is clear that the new legislation will probably impose substantial demands on the time of experienced barristers who will be called upon to serve on one or other of these new bodies. In all cases apart from the Admission Board current members of the Bar Council will not be eligible for appointment.

#### **General**

The Bar Council made a large number of submissions to the Attorney-General on the form of the new legislation and over 30 of these were adopted. However an attempt to have the Attorney drop the Advisory Council was unsuccessful. The legislation thus has spawned four new "qangos" for the regulation of the two branches of the profession and a bureaucracy will undoubtedly grow up to service these new bodies, to be paid for out of the Statutory Interest Account at the ultimate expense of the Legal Aid Fund: See section 67. There is no fusion, and no common admission, and to a very large extent the control of the Bar, and its affairs, and the professional standards of its members remains under the control of practising barristers or the Supreme Court. However for the first time the disciplinary jurisdiction has been placed on a statutory basis, and a measure of compulsory lay participation has been required. □

### **Director of Public and Professional Affairs**

Recent legislative changes to the legal profession has prompted the Bar Association to engage a member of the profession to devise and institute procedures to give effect to these changes and to deal with other public and professional issues of importance to the Association as they arise.

The Association has now appointed Yvonne Grant as its Public and Professional Affairs Director. Miss Grant is a graduate (BA/LLB) of the University of Queensland and has a Master of Laws degree from the University of London.

She is a member of Gray's Inn and has practised at the English Bar. She was the Director of the Ministerial Council for Companies and Securities Secretariat. She is admitted to the New South Wales Bar.

Currently she is assessing the implications for the administration of the Bar of the Legal Profession Bill which has now been passed by both Houses of the New South Wales Parliament and assented to by the Governor.

At present she is located in Room 2, Lower Ground Floor, Selborne Chambers but she will move into a permanent office in the building in August, 1987. Her telephone number is 233 4380. □



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