

# Law Reform Commission

## Report 2 (1966) - Proposed amendments to the Legal Practitioners Act, 1898-1960

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# Report

To: THE HONOURABLE THE ATTORNEY GENERAL

In your letter dated 15th November, 1966, you asked that the Commission give consideration to proposals made by the Council of the Law Society of New South Wales for the amendment of the Legal Practitioners Act. Copies of the two draft bills submitted by the Council (which are dated 26th April, 1966, and 20th July, 1966) are forwarded herewith.

The Commission notes your advice that the only policy decision made by you is in relation to the questions of interest on solicitors' trust accounts and legal assistance. It is assumed that the provisions of the draft bills submitted by the Council in relation to these matters do not call for any comment, and that the preparation of the necessary draft bill to carry your policy decisions into effect will be carried out by the Parliamentary Draftsman.

Several of the remaining proposals do involve policy questions and your suggestion that the Commission might see fit to comment on matters of principle has been considered. The Commission has all times exercised the greatest care to concern itself only with strictly legal problems. You have already indicated your agreement with the Commission's considered view that it should not in any way intrude into the field of policy. However, in the special circumstances of this case, where the draft bills are concerned with the conduct and control of the members of the legal profession, the Commission is prepared to make an exception. In the comments that follow, reference will be made to matters of this type, but it is desired to emphasise that on all questions of policy, the Commission offers its comments only because it is dealing with a special field of which it has particular knowledge and that such comments are intended only for the assistance of the Government ultimately determining the final questions which will still remain for its consideration.

By the way of a preliminary comment it is desirable to invite attention to some matters which involve difficulty. The Legal Practitioners Act is ancient in origin and has been added to and amended on a number of occasions so that it is now a rather untidy piece of legislation which will be made much more untidy if the Law Society's proposals, whether or not varied in accordance with the Commission's recommendations, are accepted. There is need for a complete revision of the whole of this Act, and the Commission recommends that consideration be given to establishing an expert committee drawn from both branches of the profession who will be charged with the duty of preparing a complete re-draft of an Act which will meet present day needs. The Act deals (inter alia) with the qualifications for admission of barristers or solicitors, and, in this regard, attention is invited to the fact that the basic approach to tertiary education has been and still is undergoing a change, and that provision will be required to meet the new types of tuition which will be offered at Universities throughout New South Wales in the near future. Similarly consideration should be given to the period and the nature of the service to be rendered under articles of clerkship. Here again no decision can be made until a proper appreciation is first obtained of the facilities for tertiary education so that academic training and practical training might be woven as part of the one pattern.

However, it is desired to emphasise that the above-mentioned proposal must not for one moment be taken to suggest that there is not an urgent need for legislative attention to be given to the matters referred to in the draft bills prepared by the Council of the Law Society. These matters should not be set aside until a complete overhaul can be made of the whole of the provisions of the Act. As will appear later, several of the matters proposed in the draft bills have been rendered necessary by recent developments within the profession. As to these, the evils are manifest and the legislative remedy should be prompt.

In considering your request for advice as to the matters dealt with in the draft bills, the Commission desires to point out that the Parliamentary Draftsman will presumably desire, so long as the immediate action proposed is to introduce an amendment, to follow the general pattern and language of the existing Act. Because the settlement of any final draft must necessarily be a task undertaken by the Parliamentary Draftsman, the Commission has not paid attention to cases where languages has been used which appears to require revision. The Commission has thought that matters of form do not require comment by it.

Where the Commission has thought it desirable to recommend that a particular proposal made by the Council of the Law Society be not accepted, consideration has been given to suggesting a more suitable alternative to meet a situation which may exist. But here again it is desired to emphasise that the Commission's proposals set out the substance of the views it has formed, and it is not desired that these be taken as suggested final drafts. They are intended rather to indicate to you the Commission's recommendations as to the nature of a provision which should be made, and to leave it to the Parliamentary Draftsman to reduce these suggestions into the appropriate form in due course.

It is desired to add that the provisions of the draft bills, generally speaking, relate, with one major exception, to securing the interests of the public and the better control both of members of the profession and unqualified persons. The aims of the Council, in regard to these matters, are to be praised. Its proposals are fair and objective, and there can be no suggestion of self-interest. The exception referred to is to be found in the part dealing with bills of costs. While these proposals are not unreasonable, and there is a real need for re-examination of many of the provisions of the Act in this regard, these matters are separate and distinct, and it seems convenient to deal with them apart from the other matters referred to. The comments of the Commission thereon are set out in appendix "A" to this report.

It is proposed to deal now with the provisions contained in the draft bills. Comments will not necessarily be offered in respect of each paragraph of each clause but the subject matter will be dealt with under appropriate headings as far as conveniently may be.

## **PRELIMINARY DEFINITIONS**

### *Clause 3 - para. (a)*

This proposal relates to restricting the definition of "barrister" to those who practise as such. The Council desires to restrict the activities of non-practising barristers, who might undertake work normally performed by solicitors.

The Commission considers that any such restriction is not desirable. The control exercised by the Court over non-practising barristers provides adequate safeguards.

The representatives of the Council adhered to the view originally expressed but the Commission does not recommend the proposal.

### *Clause 3 - para. (b)*

This is formal and unobjectionable.

### *Clause 3 - paras. (c) and (d)*

These paragraphs propose amendments to the definition of "University graduate". The Commission is of the view that it is not appropriate to continue a definition of the type contained in the Legal Practitioners Act at the present time. It had its origin in 20 Vic. No 14 which, of course, was passed over 100 years ago. It refers only to graduates in the faculties of arts, law or medicine. This may well be due to the fact that faculties such as commerce and economics did not exist in the days when the provision was framed. Moreover, with the establishment of new universities such as Macquarie University and the University of Newcastle, new and changed courses and faculties will probably be established. The Commission is of the view that it is unnecessary to define this expression in an Act of Parliament, particularly because changes in tertiary education are now taking place and will doubtless continue to take place. The Commission recommends that the definition of "University graduate" in section 3 of the Act be amended to provide that "University graduate" means "a person who has taken a degree in any faculty of any university which may from time to time be prescribed by Rules of Court". The representatives of the Council agree with this.

### **PART III**

#### *Clause 4 - para. 1*

The Council proposes that section 13 of the Act dealing with certain exemptions for university graduates be repealed and replaced. Here again the original section had its origin in an Act passed over 100 years ago. It is quite inapt to meet present day conditions. It exempts a university graduate desirous of being admitted as a solicitor from passing any examination other than law, and limits the period of service under article of clerkship. The first portion of the section seems quite out of touch with modern ideas. It may well be that many faculties of law, and possibly even the Admission Boards, will require students, whether graduates or non-graduate, to study non-legal subjects as, for example, Philosophy, Logic, History or English.

This Commission takes the view that the only purpose which may be served by this section is to limit the period of articles of clerkship which a graduate may be compelled to serve. At the present day, a graduate in the prescribed faculties (other than law) may be required to serve not more than 3 years articles, whilst a graduate in law is required by the rules at present in force to serve only 2 years articles.

It may be doubted whether the retention of any part of this section serves any purposes whatever but if it is thought desirable to maintain a statutory right for a graduate to serve a relatively short period of articles, it is recommended that the existing section be repealed and that it be enacted, in lieu thereof, as follows:

"No University graduate who is desirous of being admitted as a solicitors shall be required to serve under articles of clerkship for more than 3 years".

In conclusion, the Commission desires to invite attention to the fact that section 8 deals with the same subject matters as section 13, and consideration might be given, at some stage, to making a corresponding amendment to section 8.

#### *Clause 4 - para. 2, and clause 5*

These proposals relate to the provisions of the Act dealing with conveyancers and to the repeal of such provisions. This proposal is recommended for adoption. No new certificates to practise as conveyancers have been issued since 1935. Inquiries indicate that there are only three persons on the Roll of Conveyancers in New South Wales. Two of these are employees of the Public Trustee, who are also solicitors and have qualified practising certificates. The third is a lady who is married with a family, who has not practised for many years and does not appear likely ever to do so.

The conveyancer has become an anachronism. The sooner he is abolished the better.

#### *Clause 4 - para. 3*

This clause also proposes an amendment which would affect the position of barristers and distinguish between practising barristers and non-practising barristers. The distinction is one which cannot be justified. In this regard reference might be made to the report made by Sir Leslie Herron, Chief Justice of New South Wales in March of last year where he expressed the view that no alterations should be made to the present law in this regard. With this view the Commission respectfully agrees. It is recommended that this proposal be not accepted. In any event, the Commission is of the opinion that if a review of these provisions is warranted, it should be left until such time as a complete review of the Act is made.

#### *Clause 4 - para. 4*

It is proposed by this clause of the draft bill that a new sub-section be added to section 14 of the Act. It relates to barristers who have, on their own application, been removed from the Roll of Barristers and who desire to practise as solicitors. The proposal is that the Court be given power to admit such persons as solicitors, but upon such terms and conditions as it thinks fit. In *ex parte Denniston* (73 W. N. 136) this course was adopted by the Full Court as being proper and desirable. Some doubts have been expressed since the decision in this case as to whether a power exists in the Court to impose terms. The purpose of this paragraph is to give legislative sanction to what the Court has thought proper and desirable and has in fact been doing for the last 10 years. The Commission recommends that this proposal be adopted.

*Clause 4 - para. 5*

This paragraph proposes that section 15 of the Act be replaced by an entirely new section. The existing section limits the right of audience in courts in New South Wales to proceedings in which the solicitor in question or his partner acts as a solicitor. The proposal of the Council of the Law Society is that all solicitors whether partners or employees of the solicitor acting in the matter shall be competent to appear and have the right of audience in all courts.

This matter has been discussed with the representatives of the Council. The Council adheres to its view that the proposal is reasonable and desirable. The Commission takes the view that the proposed change is not warranted. At the present time it is only a principal in a firm of solicitors who may appear. He as solicitor must hold the scales so as to give due weight to his duty to the Court, as an officer of the Court, and to balance this duty with his duty to his client. The Council's proposal would, in the view of the Commission interpose a third duty to which the solicitor would be subject, namely his duty as an employee to his master solicitor. The Commission is unable to accept that the interposition of this third duty might not place an employed solicitor in a real difficulty in deciding where his duty lies. Although it is perhaps to be regretted that this is a matter upon which the Council and the Commission cannot agree, the Commission has concluded that the circumstances are such that it is obliged to recommend that this clause be not adopted.

## **PART IV**

### **UNQUALIFIED PRACTITIONERS**

*Clause 7 - para. 1*

This paragraph proposes an amendment to section 30. As drafted it seems to do more than extend the prohibition already contained in section 40A and section 67. This is not necessary as section 40 merely defines who is to be regarded as an "unqualified person" within the meaning of the Act. The proposed amendment is accordingly considered to be unnecessary.

It is therefore not recommended. There is, however, an obvious amendment which might well be made. Section 40 (b) refers to a person who has in force a practising certificate "after 30th June, 1935". This provision was inserted by Act No 12 of 1935. The fact that over thirty years have intervened makes it unnecessary to retain in the section any reference to the date mentioned.

*Clause 7 - para. 2*

These amendments propose increasing prescribed penalties from £50 to \$400. The Council's request seems reasonable and is recommended.

*Clause 7 - paras. 3, 4, 5, 6, 7, and 8*

In these paragraphs amendments are proposed to meet a situation which has proved to require attention.

Generally speaking a person is forbidden to perform legal work for any fee unless duly qualified. The Commission is informed that at least one instance has occurred in relation to a solicitor struck off the rolls for misconduct in recent times, where the former solicitor has offered to perform non-legal work, and made a charge ostensibly only in relation to the non-legal work. Thus under the guise of carrying out non-legal work, he obtains a fee which in fact remunerates him for performing legal work. The Council's representatives acknowledged that difficulties are created in endeavouring to frame an amendment to cover this position. It is understood that many attempts have been made to devise a suitable solution and that the proposal made in these paragraphs is the best that the Council has been able to devise.

The Commission recommends that action be taken to overcome this problem although it is not satisfied that the drafting is all that could be desired. According the Commission has attempted to produce a more satisfactory and specific provision to meet the situation and alternative clauses to replace sections 40C and 40D of the Act are attached as appendix "B". The Commission proposes that the draft prepared by the Commission be referred to the Parliamentary Draftsman for his consideration as to which of these alternatives (or some amalgamation or some other form) is the most suitable.

*Clause 7 - para. 9*

This proposal again relates to an increase in monetary penalties and seems to be satisfactory.

*Clause 7 - para. 10*

This clause as prepared by the Council was designed to cure an error which is said to have occurred in relation to provisions dealing with arrangements for sharing profits which existed on the 24th January, 1935. Upon inquiry the representatives of the Council agree that there are no longer any such cases in existence. The lapse of over 30 years has ceased to make this provision of any importance whatever. Accordingly it is recommended that the proposed clause be not adopted but that subsection 3 of section 40F be repealed.

*Clause 7 - paras. 11 and 13*

These proposed amendments are designed to correct what is an obvious omission and are recommended.

*Clause 7 - paras. 11 and 13*

Having discussed with the representatives of the Council the purpose of these paragraphs, the Commission has come to the conclusion that it is not desirable to introduce provisions of the kind mentioned at this place in the bill. The proposals deal with a limitation upon the right of a solicitor, without the consent of the Statutory Committee, to employ persons who have been convicted of offences against the Legal Practitioners Act. Although the Commission has come to the conclusion that such a provision should be mad, it does not seem that this is the proper place in the bill so to do. This subject matter dealt with is covered by appendix "C" to this report dealing with the employment by solicitors of convicted and unqualified persons.

*Clause 7 - para. 15*

This proposed amendment deals with an increase in penalty and seems unobjectionable.

*Clause 7 - para. 16*

It may be doubted whether this proposed amendment is really necessary but as it will clear up doubts which have existed from time to time is recommended that the proposal be adopted.

## **PART VII**

### **TRUST ACCOUNTS**

#### *Clause 8 - paras. 1 and 2*

These paragraphs propose amendments to section 41 of the Act. The section at present requires that monies received by a solicitor on behalf of some other person shall be paid to a trust account. Sub-section 2 provides that the monies in such a trust account shall not be available for the payment of the debts of the solicitor, to any other creditor of the solicitor, or be liable to be attached or taken in execution under the order or process of any court at the instance of any such other creditor.

If in fact a garnishee order is issued by a court attaching the moneys of that solicitor held to the credit of his account with a bank, the bank is required, under the terms of the existing legislation, to freeze all accounts of the solicitor including any account which may be a trust account. This is because it remains for the court to determine whether the solicitor's account is in fact a trust account or not.

The Council desires to vary this rule. This subject is a difficult one and it is by no means easy to provide a solution.

The Commission is not satisfied that the Council's proposal would be effective and is not prepared at present to suggest an alternative. The proposal is not recommended.

#### *Clause 8 - paras. 3, 4, 5, 6, 7, and 8*

These provisions deal with interest on solicitors' trust accounts and are the matters upon which you have indicated that a policy decision has already been taken. The Commission is unaware of the details. Accordingly no comment is offered in relation to these paragraphs.

#### *Clause 8 - para. 8A*

This paragraph proposes an entirely new procedure for the appointment of a trustee of the trust property of a deceased solicitor. In a later part of this report dealing with receivership of solicitor's trust property, a proposal is made which is wide enough to cover the type of case mentioned in this proposed clause. Accordingly it is unnecessary to give it further consideration. The adoption of the clause is not recommended.

## **PART VIII**

### **THE SOLICITORS' FIDELITY GUARANTEE FUND**

#### *Clause 9 - para. 1*

This paragraph proposes that section 45 be repealed and a new provision substituted. The original section applies Part VIII to all solicitors who are engaged in the practice of their profession either on their own account or in partnership. Doubts have been expressed as to its application to such persons as solicitors employed in the Public Service who hold full practising certificates. The purpose of the

proposed section is to release from the application of this part of the Act (and thus from liability to contribute to the Fidelity Fund) solicitors who do not receive hold or disburse moneys on behalf of clients. The proposal is reasonable and is recommended.

*Clause 9 - para. 2*

This clause proposes a new section 47A to give the Law Society power to insure the Fidelity Fund against particular liabilities. It does no more than confer a power. If some obligations of the Fund can be insured against it may be a very desirable thing. Accordingly the proposal is recommended.

*Clause 9 - para. 3*

Under section 49(e) the Council is given power to pay out of the Fund expenses incurred in exercising the authorities conferred upon the Council by Part VIII or Part X. It is proposed that the Council shall have power also to pay out the Fund the expenses incurred in exercising the powers and authorities conferred by Parts VIIIA (Receivership of Solicitors' Trust Property) and Part XI (Miscellaneous). It seems perfectly proper to include a reference to Part VIIIA. However, Part XI contains many miscellaneous provisions. The Commission considers that the only provisions of Part XI which should be included are those dealing with the conduct of inquiries under new provisions which the Commission will propose later in this report (proposed new section 82A) and the exercise of the power conferred upon the Council by section 82. The other amendment proposed by this paragraph is only to clear up doubts and is recommended.

*Clause 9 - para. 4*

This paragraph proposes that section 52 be amended to delete the prescribed maximum and minimum which may be required to be paid by a solicitor to the Fidelity Fund. The Commission is informed by the representative of the Council that the present maximum of 10 in one year is hopelessly inadequate and accordingly it seems impossible to refuse the Council's request. Whether the Government considers that some maximum should be fixed, may be a different question. There is doubtless something to be said for this view. A limit might well be placed upon the powers of the Council. But it is impossible to forecast the future, and it seems reasonable to suppose that the Council will perform its duties fairly and reasonably. Upon this basis any further restriction is unnecessary and the proposal is recommended.

*Clause 9 - paras. 5 and 6*

These paragraph propose amendments to the language of section 52. They do not make any change in substance. They seem preferable to the existing provisions. The proposals are recommended.

*Clause 9 - paras. 7 and 8*

These proposals deal with money matters. In view of the above comments, no further comment is necessary. The proposals seem reasonable and are recommended.

*Clause 9 - paras. 9, 10, 11, 12, and 13*

These paragraphs propose amendments to section 57 of the Act dealing with claims against the Fund. It is undoubted that the present provisions unnecessarily restrict the Council in its desire to make prompt payments from the Fund to persons who have been defrauded. The general purpose of the amendments is to free a claimant from the need to exhaust his legal remedies against a defaulting solicitor before his claim can be met and to provide that if a claimant has been paid out of the Fund and later makes recovery, then he shall repay any monies so recovered to the Fund or, if he has not obtained payment in full, his rights shall abate to the extent of the monies so received. It is to be noted, however, that the proposed new sub-section 3 of section 57 is intended to replace the existing sub-section 3, which should therefore be repealed. It is also proposed to extend the aggregate amounts which may be paid, and to add a new section, section 57A, to give the Council power to make interim payments to defrauded clients and to pay extended benefits.



All these proposals are designed to alleviate the plight of people who have been defrauded and to make it easier for them to obtain prompt relief. Accordingly they are recommended.

The only comment which the Commission would desire to add is that the parliamentary Draftsman might give consideration when reviewing the terms of the proposed new section 57A to including a provision to the effect that the Council shall have a right of subrogation in respect of the legal rights of any person who is paid in advance out of the Fund and shall stand in the shoes of such person to the extent to which he has been paid.

*Clause 9 - paras. 14 to 20 incl.*

The proposals contained in these paragraphs relates to suggested amendments to section 65. This section confers a right upon the Council to examine the trust accounts of any solicitor or firm of solicitors from time to time. The primary proposal is that, whereas section 65 at present commences with the words "for the purpose of safeguarding the Funds", it is desired that the Council be given power to investigate the affairs of a solicitor for purposes not related to the Fidelity Guarantee Fund. There have been several recent cases where investigations have been carried out which disclosed grave irregularities. As a consequences several solicitors were either struck off the rolls or suspended from practice. It was contended at the hearing of certain of these proceedings that the Council acted in excess of its powers in making the investigations which were in fact carried out. Events have proved that it is virtually essential for the Council to have such a power and it is considered quite reasonable that the power should be conferred irrespective of the expressed purpose of "safeguarding the Fund". However, the Commission is of the view that the method of carrying out this proposal is not entirely unobjectionable. The proposal of the Council is that section 65 be replaced by another section in similar terms in Part XI of the Act (which contains miscellaneous provisions), and that the words "for the purpose of safeguarding the Fund" as the commencement of the proposed new section be omitted. The Commission takes the view that it would be better that the power be added by an amendment to the Act which will leave no doubt that a separate power is conferred. Accordingly it will be proposed later in this report that a new section 82A be inserted in Part XI of the Act to cover this position. In these circumstances the amendment proposed by sub-paragraph (a) of paragraph 14 of clause 9 is not recommended.

With regards to the proposal made in sub-paragraph (b) of paragraph 14, it is recommended that an amendment be made omitting the words "to examine the trust account of any solicitor or firm of solicitors" and inserting in lieu thereof the words "to conduct an investigation into the accounts, transactions and affairs of a solicitor or former solicitor or a deceased solicitor or a firm of solicitors of which such solicitor or firm of solicitors or deceased solicitor is or at any time was a partner, so far as they relate to moneys received for or on behalf of any person by such solicitor or firm of solicitors".

Sub-paragraph (c) of paragraph 14 proposes that in sub-section (1) of section 65 the words "or professional misconduct" should be inserted after the word "irregularity" wherever appearing. The proposal is perfectly proper in substance and is recommended.

Sub-paragraph (d) of paragraph 14 suggests that for the word "accounts" where secondly appearing in section 65(1) there should be inserted in lieu, the words "accounts, transaction or affairs". This is recommended.

Paragraph 15 proposes that there should be substituted for the word "expenses" in sub-section 1A of Section 65 "costs charges and expenses". This is recommended.

Paragraph 16 refers to a proposal that the Council should be given power to appoint "any accountant" or "any other person" to investigate the affairs of a solicitor. The Commission is not prepared to recommend such an amendment. Section 65 (1A) ( which was added by Act No 25 of 1960) provides that where an investigation is being made, the solicitor shall pay the expenses incurred by the Council in connection with the examination, unless the report discloses that the solicitor has complied in all respects with the provisions relating to trust accounts. The Commission is of the view that where such a provision exists only an accountant should be permitted to give such a certificate as is mentioned. Accordingly the amendment proposed by paragraph 16 and the amendment proposed by paragraph

17 (which is on the same lines) is not recommended for approval. This also applies to the amendment proposed by paragraph 19 and the first part of the amendment proposed by paragraph 20.

The amendment proposed by paragraph 18 is satisfactory and merely follows the pattern above mentioned, whilst the last recommendation in paragraph 20 merely substitutes the word "investigation" for the words "examination of accounts". These proposals are recommended.

Two other matters were drawn to attention in the course of discussion with representatives of the Council. They relate to disclosure of the result of an investigation, and the right of an accountant appointed for the purpose of conducting an investigation to retain the services of some person to assist him. The Council asserted that problems had arisen which it desired to clear up and this request seems reasonable. The reasons for the proposals will be self-evident. It is accordingly recommended as follows. Firstly that the following words be added at the end of the first paragraph of sub-section 4 of section 65:

"or to members of the Council or to the solicitors, officers or agents of the Council".

Secondly it is recommended that a new sub-section be added to section 65 as follows:

"(4A) An accountant appointed under this section may retain the services of any person to assist him in carrying out his investigation. Provided, however, that no person shall be so retained except with the prior approval of the Council".

## **PART VIII**

### **RECEIVERSHIPS**

#### *Clause 10*

There is not the slightest doubt that recent have drawn attention to the need for the Council to have a right to apply for the appointment of a receiver of the trust property of a solicitor in certain circumstances. Such a proposal was first introduced in Queensland and a series of provisions was included in the Queensland Law Society's Acts by the Queensland Law Society's Acts Amendment Act, 1962. In 1964 provisions of the same type were inserted in the Victorian Act. The proposed new provisions as prepared by the Council are modelled upon the Victorian provisions which, in general terms, seem to be quite satisfactory and desirable. However, the Council desires to extend the nature of the receivership. Whereas the Queensland and Victorian schemes both provide solely for the appointment of a receiver of the trust property held by a solicitor, the present proposal would extend to the appointment of a receiver not only of the trust property but also of other property received or receivable by the solicitor in connection with his practice. In effect the Council desires that it should be empowered to apply for a receiver of the practice of the solicitor as well as the trust property held by him. The Commission is not prepared to recommend this extension of the Victorian scheme. It may be assumed that most defaulting solicitors will ultimately be made bankrupt. The bankruptcy legislation expressly excludes property held in trust. Thus, as regards a receiver of trust property, there will be no risk of any conflict between the proposed law and the bankruptcy law. But if it was open to the Court to appoint a receiver of the solicitor's practices and the assets owned by him in connection therewith, considerable difficulty might well be experienced if a receiver should be appointed and the solicitor later made bankrupt. It is easy to visualise cases where there might be a conflict. Furthermore the Commission is of the view that it would be an unwarranted step for the Council to be empowered to apply to have a receiver appointed of any part of the property owned by a solicitor which was not held by him in trust for his clients. This matter was discussed with the representatives of the Council. They are not unwilling to accept the alternative proposal which the Commission is prepared to recommend. Accordingly the Commission recommends the adoption of provisions similar in substance to those of the Victorian Legal Profession Practices Act 1958 ss. 104A - 104Y (which were added by the amending Act of 1964) subject to the qualifications in the comments attached to this report as appendix "D".

## **PART IX**

### **ANNUAL PRACTISING CERTIFICATES**

#### *Clause 11 Part 1*

This proposal does nothing more than take out of the Act words which have become redundant and does not affect the substantial provisions of the sections. It is recommended.

#### *Clause 11 Part 2*

This proposes a new section 69 dealing with practising fees. The effect of these provisions is to enable practising certificates of different types and for varying fees to be granted to solicitors. In particular it is proposed to enable the Council to charge lesser practising fees to solicitors during their first three years in practice. The Commission recommends the proposals but also recommends that a new sub-clause be added between sub-clauses 2 and 3 of the proposed new clause 69 as follows:

“The Council may from time to time fix as the annual practising fee payable by a solicitor who is not engaged in the practice of his profession either on his own account or in partnership with any other solicitor at a lesser fee than the fee provided for by sub-section 1 of this section”.

The Commission desires to add that the insertion of these powers is acceptable to the representatives of the Council and will grant statutory authority to continue the present practice of fixing a lesser fee for solicitors who are not in practice on their own account. Sub-paragraphs 3, 4, 5, and 6 propose consequential amendments which are satisfactory and are recommended.

The amendments mentioned above will, in the opinion of the Commission, require additions to be made to section 70 which at present deals with the method of applying for a practising certificate and the steps to be taken by the Council in relation thereto. It is recommended that two new sub-sections be added to section 70 as follows:

“2. Such certificates may be in different forms depending on whether the applicant intends to engage in practice as a solicitor on his own account or in partnership or intends no to be so engaged.

3. In issuing such certificates the Council may refuse to issue a certificate entitling an applicant to practice on his own account but may issue a certificate in lieu thereof limiting the applicant to a right to practise either in partnership only or as the employee of a solicitor engaged in private practice or otherwise as the Council may determine”.

The power thus proposed will be in accordance with the present practice which is to issue various types of certificate. As mentioned above the Court assumed the existence of a power to issue limited practicing certificates in Denniston’s case.

However, the Council considers that it is desirable, if such powers are granted to the Council, to grant a right of appeal and this would result in it being necessary to amend section 72. It is recommended therefore that the following further amendments be made:

1. By inserting in section 72 after the word “certificate” where secondly appearing, the words, “or shall refuse to issue a certificate in accordance with the application”.

2. By adding at the end of section 72 the following words, namely, "in the case of an appeal against a refusal to issue a certificate in accordance with the application. the appellants shall, pending the disposal of the appeal, be deemed to be the holder of the certificate actually issued by the Council".

## **PART X**

### **THE SOLICITORS' STATUTORY COMMITTEE**

#### *Clause 12*

In a separate memorandum the Council made submissions regarding new sections which should be added to cover the activities of convicted persons or persons who had been clerks to a defaulting solicitor and who had been parties to the default. In a supplementary memorandum, attached to this report as appendix "C", the Commission makes proposals for the insertion of new sections 40J, 40K and 40L. If these amendments are accepted, it will be necessary to amend section 75 (1) by adding at the end thereof the words "and for the purpose of exercising such other powers as may be conferred on it under this Act". In the same way it will be necessary to amend section 82(1) by adding to paragraph (a), at the end thereof, the words "or as to the conduct of a person who is or was a clerk to a solicitor but is not himself a solicitor".

These proposals together with the proposed new sections referred to have been discussed with the representatives of the Council who are content to accept the Commission's proposals.

#### *Clause 12 - paras. 1 and 2*

These proposals are reasonable and necessary and they are recommended.

#### *Clause 12 - para. 3*

The effect of this proposal is that the discretion of the Chief Justice as to the appointment of solicitors to the Statutory Committee shall be circumscribed. The Commission can see no warrant for this and is not prepared to recommend it.

#### *Clause 12 - para. 4*

This proposal is to add further circumstances which will disqualify a member from continuing as a member of the Statutory Committee if he becomes mentally ill. This appears to have been an oversight. The proposal is recommended.

#### *Clause 12 - para. 5*

Amendments are proposed to sub-section 1 of section 77 dealing with the jurisdiction of the Statutory Committee. The proposals in this paragraph would authorise the Statutory Committee to make an order for payment of costs not by a party (as under the section as it now stands) but, in lieu thereof by any person making a charge, or the Law Society, or by the solicitor. The Commission considers that such an amendment would not be justified. The representatives of the Council, in the course of discussion, acknowledged the existence of difficulties, and stated that they are willing to withdraw this proposal.

The second proposal in this paragraph is that the Committee be given power where it thinks proper, even though there is evidence to justify a finding of professional misconduct, to refuse to make an order, or to reprimand the solicitor concerned. This is a merciful and proper provision and is recommended.

*Clause 12 - para. 6*

This proposes an increase in the amount of the fine which may be imposed. This seems satisfactory and is recommended.

*Clause 12 - para. 7*

This paragraph proposes that two new sections be added after section 77. The proposal contained in section 77A is in accordance with many other legislative provisions and seems quite satisfactory. The proposal contained in the suggested section 77B is entirely new but was suggested to the Council by the Statutory Committee to overcome practical difficulties which they have encountered in the course of their experience. The proposal seems reasonable and is recommended.

If the proposals of the Commission in regard to unqualified practitioners set out in appendix "C" are accepted, it will be necessary to add to section 77 a provision to give jurisdiction to the Statutory Committee to hear matters under the proposed new sections although they do not involve a charge of misconduct.

## **PART XI**

### **MISCELLANEOUS**

*Clause 13 - para. 1*

This proposal is that a further power be conferred upon the Council. Section 82 details the powers given to the Council and the further proposal is satisfactory and is recommended.

*Clause 13 - para. 2*

This proposal is to confer power upon the Council to institute a system of arbitration. This seems desirable and satisfactory and is recommended. However, it is suggested that the words "and/ or other persons" after the words "members of the Law Society" should be omitted.

*Clause 13 - para. 3*

This proposes an amendment to section 86. What is intended is that the words "and as to the depositing with the Law Society of part thereof, and the prescribing of such part" be added at the end of sub-paragraph (i) (a) of paragraph 1 of section 86. This proposal is consequential upon the proposals dealing with interest on solicitors' trust accounts.

*Clause 13 - para. 4*

Here again another power is proposed in regard to the making of regulations. The proposal that power be given to make regulations as to the method of operating on trust accounts and the persons who may be authorised so to operate seems satisfactory and is recommended. Further proposed powers relating to persons who have been disqualified or suspended and the employment of former employees of such disqualified or suspended solicitors seem to be unnecessary particularly in the light of the new section 40J proposed by the Commission. Accordingly this further additional is not recommended.

For reasons already mentioned the Commission will not recommend the inclusion of an amendment relating to the appointment of persons other than accountants to conduct investigations. However, there seems to be no objection to the sub-situation in paragraph (b) (iv) of sub-section 1 of section 86 of the word "investigation" for the word "examination".

*Clause 13 - para. 6*

These proposed regulation-making powers seem satisfactory. The first deals with a power to make regulations following the establishment of an arbitration service. The second relates to the prescription of cases where a solicitor may share receipts with an unqualified person. The power to make such last mentioned regulations is necessary particularly in such cases as where a solicitor dies and the executors desire that the practice be carried on for a short period pending disposition thereof. The third relates to the administration of the foundation mentioned in the trust account provisions. The fourth relates to the receivership provisions.

*Clause 13 - paras. 7, 8, and 9*

These are more or less consequential or relates to penalty. All seem satisfactory and are recommended.

*Clause 13 - para. 10*

This proposed amendment has already been provided for in clause 2 of the draft bill and it is unnecessary to repeat it. Accordingly it is not recommended.

As mentioned above it is considered that in this part of the Act dealing with miscellaneous matters a power conferred by section 65, to investigate the affairs of a solicitor. The following is a draft of a new section 82A which the Commission recommends should be added:

**PROPOSED NEW SECTION 82A**

**POWERS TO COUNCIL TO INVESTIGATE AFFAIRS OF SOLICITORS**

82 A. (1) The Council may, in addition to and not in substitution for the powers conferred on it by section 65 and 82 of this Act, at any time and from time to time appoint a solicitor or an accountant to examine the accounts transactions and affairs of a solicitor or former solicitor or a deceased solicitor, or a firm of solicitors of which such solicitor or former solicitor or deceased solicitor is or at any time was a partner; specified in the appointment and to furnish to the Council a confidential report as to any irregularity or professional misconduct or alleged or suspected irregularity or professional misconduct in or in relation to the accounts transactions or affairs of such solicitor or solicitors that may be disclosed by such examination or as to any other matter that in the opinion of such solicitor or accountant should be further investigated. A copy of the report shall forthwith be sent by post by the solicitor or accountant to the solicitor or firm concerned.

(2) The provisions of sub-sections 1A, 2, 3, 4, 4A, 5 and 6 of section 65 of this Act as amended shall apply to any such appointment examination and report.

The Commission invites attention to the fact that the proposed section 82A will give the Council power to appoint a solicitor or an accountant to conduct an investigation of the type referred to, although the Council's proposal to extend section 65 to enable it to appoint an accountant "or any other person" to conduct an investigation under that section was not recommended for reasons already stated. It is the view of the Commission that there may well be cases where it may be desirable to investigate the affairs of a solicitor and that the investigation could properly be conducted by a solicitor. This would be the case, for example, where questions of professional misconduct are involved. But it is considered should be eligible for appointment, and that a solicitor should be eligible only in the extended types of cases mentioned in the proposed new section.

*Clause 14*

This is a proposal for an amendment to the Conveyancing Act but the Commission does not consider that there is any particular need for such an amendment. It is suggested that it be left to the Parliamentary Draftsman to determine whether it is worthwhile pursuing this proposal as it relates only to matters of form.

*J. K. Manning*

Chairman

*R. D. Conacher*

Member

21st December 1966.

# Appendix A

## PART V

### BILLS OF COSTS

By way of preliminary comment, it is desired to state that the Council has drawn attention to the fact that the provisions governing solicitors' bills of costs are obsolete and archaic. It contends that no good purpose is served by these provisions, and there is no justification for requiring solicitors, alone of all professions and occupations, to render detailed bills of costs in all matters.

There may be much to be said for this view, and the Commission does not desire to express any conclusion regarding the general approach.

However, the Commission is disposed to think that the time for a major overhaul of these provisions will be when consideration is given to reframing the Act in its entirety.

At the same time there are many matters which are brought to notice by the proposals contained in the draft Bill which might well be thought to require prompt legislative action.

Where some of the Council's proposals are not recommended it does not follow that the Commission regards them as unreasonable. In several instances, the Commission is not prepared to make a recommendation for the adoption of the Council's proposals, although they may well warrant further consideration at a later date.

The following comments are made with regard to the various proposals contained in the draft Bill:

#### *Clause 6, paras. 1, 2 and 3*

These paragraphs deal with minor matters. There is every reason for substituting the word "signed" for the words "subscribed in his proper handwriting" and for the omission of any reference to "counting houses". It may be doubted whether the proposal referred to in paragraph 2, which excuses a solicitor from signing his bill in certain circumstances, is necessary, but this seems to be relatively unimportant.

#### *Clause 6, para. 4*

This proposal is recommended. It does no more than replace section 30 with a provision in substantially the same terms, although in plainer and simpler language, and to introduce it at the end of subsection (1) of section 21. This would be an improvement.

#### *Clause 6, paras. 5 and 7*

These two proposals are designed to allow a solicitor to render a bill for a lump sum as distinct from a detailed bill of costs of all items charged. The Commission is not prepared to recommend the proposals made by the Council. At this stage, and until a complete review is made of the Act, it should be remembered that solicitors' costs deal with a subject with which the solicitor is familiar but with the client is generally unfamiliar.

However, it is quite true to say that there are many clients to whom bills may be delivered who would not understand the purport and effect of a detailed bill of costs. Moreover, many clients may well desire to avoid the risk that is attendant upon the taxation of a bill, namely, that he may be ordered to pay the costs of the taxation. As an alternative to the Council's proposals, the Commission proposes for consideration that a provision be introduced whereby a solicitor may render a memorandum of his charges, nominating a gross fee, in lieu of a detailed bill. But it is further proposed that a solicitor who



adopts this course shall be prohibited from instituting legal proceedings to recover his fees, unless, after expiration of one month from the delivery of the memorandum (such period of one month is the primary time allowed to lodge a bill for taxation), he delivers the client a further notice of his intention to sue. This notice would expressly draw the client's attention to his legal rights, including a references to the fact that the demand may be referred to taxation if the client so wishes.

Set out hereunder is a proposed new sub-section (4) of section 21 which would give effect to the above proposals:

21 (4) (a) Where a solicitor has not delivered a bill but has delivered a memorandum nominating a gross sum claimed by him for his fees and the amount of charges and disbursements which he claims to be due, he may, after the expiration of one month from the date of delivery of such memorandum, give notice to the person to whom such memorandum was delivered that after the expiration of one month from the services of such notice, he will commence proceedings in a Court to be nominated in the notice, for the recovery of the amount claimed. Such notice shall state that the person to whom it is addressed may require to be furnished with a detailed bill of costs, and that he may at any time within one year from the delivery of the memorandum or bill or thereafter, if special circumstances are proved to the satisfaction of the Court or a Judge (but in any event before judgement), require that such memorandum or bill and the demand of the solicitor be referred to be settled and taxed by the taxing officer.

(b) If the person to whom such a memorandum and such a notice has been delivered does not require that the memorandum and demand of the solicitor be referred to be settled and taxed by the taxing officer, the solicitor may maintain an action in the Court nominated in the notice to recover the amount of his demand.

(c) If at any time before judgement, the person to whom such a memorandum and such a notice has been delivered requires that the memorandum and demand of the solicitor be referred to be settled and taxed by the taxing officer, he may lodge such memorandum in the office of the Court and give notice to the solicitor notifying him of his having done so and requiring him to furnish to the Court details of the fees charges and disbursements claimed by him. There upon any action shall be stayed and the provisions of this Part shall apply.

#### *Clause 6, para. 6*

Apart from textual matters, this paragraph proposes that the Court or a Judge shall be given the power to order that, where a client desires a bill to be taxed, he may be required to bring a sum of money into Court. The representatives of the Council have pointed out that in many instances the solicitor will have paid sums, which are at times quite substantial, out of his own pocket on the client's behalf. If then the client desires to tax a solicitor's bill, it is suggested that there should be provision which would enable an order to be made for security for such items. The Commission knows of no precedent for such a provision, but it seems reasonable. The only suggestion the Commission would make is that, if the proposed amendment is acceptable, there should be added to the end thereof the words "to abide the further order of the Court".

#### *Section 22*

No question has been raised by the Council in relation to this section, but it seems desirable that the prescribed taxing officers should include not only those listed but their respective deputies. For example, most taxing at common law is done by a Deputy Prothonotary, who is not mentioned in the Act. It seems desirable that the section should be amended to cover this position.

#### *Clause 6, para. 7*

The Commission is not prepared to recommend this proposal at present. The proposal is novel, and there are doubts as to whether it would be effective. The matter could be reconsidered when the whole Act is reviewed.

*Clause 6, para. 8*

It is proposed that Section 29 be replaced by a provision in more modern and simple language. The substance of the proposed paragraph is identical with the existing section. The proposal seems to be a desirable reform and is recommended.

*Clause 6, para. 9*

This paragraph proposes that Section 30 shall be omitted. As will be noted from the above comments, Section 30 is proposed to be replaced by additions to Subsection 1 of Section 21. Thus the proposed repeal is recommended.

*Clause 6, para. 10*

By this paragraph the Council proposes a list of matters to be taken into account by a taxing officer in taxing any bill of costs. The Commission is not prepared to recommend the proposed amendment.

The proposed new Clause is based upon a portion of the (English) Solicitors' Remuneration Orders, 1883 - 1959. These Orders provide for the costs of solicitors in relation to non-contentious business. These Orders and the General Order made under the Conveyancing Act of this State follow the same general pattern. In particular there is a first schedule which prescribes charges for conveyancing work according to the amount of purchase money involved. Both the English order and the local Order also contain a second schedule which provides for costs payable in respect of charges for non-contentious work other than in accordance with the scale in schedule I. The English schedule II contains provisions substantially similar to those contained in Clause 31 of the draft Bill.

There has for many years been a distinction between rules in relation to contentious work on the one hand and rules in relation to non-contentious work on the other. Charges for contentious work have always been fixed by Rules of Court. Charges for non-contentious work have for a long time been fixed by the General Order. In the first case the Rules are made by the Judges. In the second case, the General Order under the Conveyancing Act is made by a committee appointed under Section 260 of the Conveyancing Act, 1919, and which consists of the Chief Justice, the Chief Judge in Equity, the Master in Equity, the President for the time being of the Law Society, and one more practising solicitor selected and nominated from time to time by the Chief Justice.

The Commission takes the view that it is not appropriate to legislate with respect to rules to be observed on the taxation of costs. Special circumstances may arise from time to time which would require these matters to be reconsidered. It does not seem desirable that it should be necessary for the Legislature to concern itself with details of this kind, particularly when it has selected two bodies of experts so to do. If cases should arise requiring reconsideration of one or more of the details of these rules, the authorities having power to deal with the matter can consider the problem and take action promptly. If the matter were committed to the Legislature it would presumably act upon their report in any event, but a degree of flexibility is most desirable if it can be achieved.

Accordingly the Commission is not prepared to recommend the inclusion of the proposed new Clause 31 of the Bill.

In expressing this view it is desired to add that it does not appear that, either in the Costs Rules or in the General Order made under the Conveyancing Act, there is a statement of the matters which, generally speaking, are proper for the consideration of the taxing officer. The Commission would propose that the attention of the Judges and of the Committee be called to the provisions of the English Order, and that they be invited to consider, for inclusion in the Costs Rules or in the General Order (as the case may be), a statement of these matters such as has been proposed by the Council.

One further comment is necessary. Section 31 of the Legal Practitioners Act does require certain matters to be considered, by the taxing officer in taxing a bill. This provision was first introduced by 11 Vic. No 33 and it is hopelessly out of date to-day. Moreover, when the power to make rules in regard to costs in non-contentious matters was committed to the specialist Committee appointed under the Conveyancing Act, it would seem that Section 31 should then have been repealed. There would seem to be little point in committing these matters to such a specialist Committee without repealing the earlier legislative provision, which, in a more modern era, would only serve to restrict the Committee in the performance of its work. Indeed, the General Order under the Conveyancing Act does permit, at least in certain instances, the taxing officer to consider matters other than those specified in Section 31. It is recommended that Section 31 be repealed.

*Clause 6, para. 11*

Enquiries indicate that this proposed amendment will do no more than give legislative sanction to what has been the practice in the office of the Court for many years. The proposals seem reasonable and proper and are recommended.

# Appendix B

## PROPOSED NEW SECTIONS 40C & 40D

### PROHIBITED WORK BY UNQUALIFIED PERSONS

40C (1) Any person who does any work of the nature following (in this section called prohibited general work), that is to say, either directly or indirectly drawing filling up or preparing any will or other testamentary instrument, or any instrument or document creating or regulating rights between parties, or relating to real or personal property, or relating to any legal proceeding, shall be guilty of an offence, and shall be liable on summary conviction to a penalty not exceeding four hundred dollars for each such offence.

(2) This section shall not extend to

(a) any barrister; or

(b) any person qualified to act or practise as a solicitor; or

(c) any public officer drawing or preparing instruments or documents in the course of his duty; or

(d) any person employed merely to engross any such instrument or document; or

(e) any land agent in respect of any instrument or document which he is entitled to draw fill up or prepare, and charge for, under the Land Agents Act, 1927; or

(f) any person who does any prohibited general work without the receipt or expectation directly or indirectly of a fee gain benefit or reward for the prohibited general work.

(3) For the purposes of this section

(a) a person who does any prohibited general work and any work related to the prohibited general work with the receipt or expectation directly or indirectly of any fee gain benefit or reward shall not be taken to have done the prohibited general work without the receipt or expectation of a fee gain benefit or reward for the prohibited general work unless he shows that the fee gain benefit or reward received or expected directly or indirectly is for the related work to the exclusion of the prohibited general work and is reasonable in amount for the related work; and

(b) a person does work related to prohibited general work if he either directly or indirectly draws, fills up or prepares any instrument or document or performs any services or does any other thing being an instrument document service or thing relating to any matter to which any prohibited general work done by him relates or relating to the affairs of any person to whose affairs any prohibited general work done by him relates.

40D (1) Any person who does any work of the nature following (in this section called prohibited probate work), that is to say either directly or as an agent of any other person, taking instructions for, or drawing or preparing any papers on which to found or oppose the grant of probate or letters of administration, shall be guilty of an offence and shall be liable on summary conviction to a penalty not exceeding four hundred dollars for each such offence.

(2) This section shall not affect any liability or disability to which a person may be subject under any other section of this Act, or under any other Act.

(3) This section shall not extend to

(a) any barrister; or

(b) any person qualified to act or practise as a solicitor; or

(c) any person who does any prohibited probate work without the receipt or expectation directly or indirectly of a fee gain benefit or reward for the prohibited probate work.

(4) For the purposes of this section

(a) a person who does any prohibited probate work and any work related to the prohibited probate work with the receipt or expectation directly or indirectly of any fee gain benefit or reward shall not be taken to have done the prohibited probate work without the receipt or expectation of a fee gain benefit or reward for the prohibited probate work unless he shows that the fee gain benefit or reward received or expected directly or indirectly is for the related work to the exclusion of the prohibited probate work and is reasonable in amount for the related work; and

(b) a person does work related to prohibited probate work if he either directly or as an agent of any other person whether a person qualified as above mentioned or not, takes instructions for, or draws or prepares any papers or performs any service or does any other thing being papers or a service or a thing relating to any matter to which any prohibited probate work done by him relates or relating to the affairs of any person to whose affairs any prohibited probate work done by him relates.

## Appendix C

### CONVICTED AND UNQUALIFIED PERSONS

The proposals contained in the supplementary draft bill dated 20th July 1966 have been submitted by the Council because it has found in recent cases that powers of this type are most necessary. The Commission is satisfied that the Council's reasons are valid and that an amendment on the lines suggested is required.

However the Commission is of opinion that all provisions dealing with convicted and unqualified persons should be consolidated.

Set out below are three new sections prepared by the Commission which it is suggested should be included after Section 40I and numbered 40J, 40K, and 40L.

After each proposed section or subsection, comments are added to indicate the reasons for, or the source of, the draft provisions.

40J (1) No solicitor shall in connection with his practice as a solicitor, without the leave of the Statutory Committee, employ any person who to his knowledge:

(a) has been convicted of an indictable offence or,

(b) has within the next preceding fifteen years been convicted of an offence (not being an indictable offence) under this Act as from time to time amended, unless such person is the holder of a current practising certificate.

(2) The Statutory Committee may grant leave under subsection (1) of this section for such period and subject to such conditions as the Statutory Committee thinks fit.

(3) If any solicitor acts in contravention of the provisions of this section or of the conditions subject to which any leave has been given thereunder, he shall be guilty of professional misconduct and may be dealt with accordingly.

(4) Subject to subsection (5) of this section, this section applies to a conviction before or after the commencement of the Legal Practitioners (Amendment) Act, 1967.

(5) This section does not apply to the employment by a solicitor pursuant to leave granted by the Court before the commencement of the Legal Practitioners (Amendment) Act, 1967, of a person convicted of an indictable offence.

With one amendment (apart from textual matters) this proposed section replaces rule 19 of the Solicitors' Practices Rules and includes a new provision relating to persons who have been convicted summarily of offences under this Act. The latter provision was proposed by the Council and seems desirable. There is one departure from the present terms of Rule 19. Whereas the rule provides that a solicitor shall not employ a person convicted of an indictable offence, without the consent of the Court, this proposal will confer jurisdiction in this regard upon the Statutory Committee. The rule upon which rule 19 was based was originally promulgated in 1877. With one exception, not material to consider at this stage, it has remained in force ever since. The Statutory Committee was not established until the passing of the Legal Practitioners (Amendment) Act, 1935, and the scheme of the legislation is to grant jurisdiction to the Statutory Committee on every charge or question as to the professional misconduct of any solicitor. Under section 78 of the Legal Practitioners Act, 1898 - 1960, an appeal to the Court lies from any order of the Statutory Committee. Thus it would seem to be in accordance with the spirit of modern legislation to give jurisdiction in this regard to the Statutory Committee in the first instance.

40K (1) Where a person who is or was a clerk to a solicitor, but is not himself a solicitor, with or without the connivance of the solicitor to whom he is or was a clerk, has the opinion of the Council,

been a party to, or has occasioned an act or default in relation to that solicitor's practice, in respect of which an application against that solicitor has been or might be made to the Statutory Committee under any other provision of this Act, an application may be made to the Statutory Committee with respect to that person by or on behalf of the Council.

The draft prepared by the Council was based upon the provision of the Solicitors Act 1957 (England) section 38 (1). In fact this provision has been replaced by section 18 (1) of the amending Act of 1965.

Paragraph (a) of section 38 (1) of the English Act of 1957 as amended by the Act of 1965 deals with matters which do not require consideration in this country in view of the proposals made in the draft of section 40J above. Thus, subsection (1) of section 40K as now drafted adopts, substantially without variation, para. (b) of the English subsection.

40K (2) On the hearing of any application under the foregoing subsection the Statutory Committee may make an order that, as from such date as may be specified in the order, no solicitor shall, in connection with his practice as a solicitor, take into or retain in his employment or remunerate the person with respect to whom the application is made except in accordance with permission in writing granted by the Council for such period and subject to such conditions as the Council may think fit to specify in the permission, and may also make an order as to the payment by any party to the application of costs.

This subsection as at present drafted adopts substantially without variation, subsection 2 of section 38 of the English Act of 1957 which is still in force in England.

40K (3) An order made by the Statutory Committee under subsection (2) of this section, other than an order as to payment of costs, may, on the application of the Council or the person with respect to whom the application for the order was made, be revoked by a subsequent order of the Statutory Committee.

This subsection is based upon an additional subsection added to section 38 of the English Act of 1957 by the amending Act of 1965. The English subsection contains a provision which has been omitted in the present draft, which is to the effect that where application is made to the Statutory Committee to revoke an order previously made under subsection (1) of section 40K above, the Committee could refuse the application without hearing the applicant where, in its opinion, no prima facie case is shown in favour of the application. This follows the provisions of section 46(5)(b) of the English Act of 1957. However, there is no equivalent provision in the existing Act of this State and accordingly it was thought proper to omit it in the present draft.

40K (4) An appeal to the Court from any order made under this section shall be at the instance either of the Council or the said person. Every such appeal shall be in the nature of a rehearing and shall be made within such time and in such form and shall be heard in such manner as shall be prescribed by rules of Court in that behalf to be made under the authority of this Act. The Court or a Judge may order that any order made by the Statutory Committee shall be stayed pending the disposal of an appeal therefrom upon such terms as shall seem just.

The English provisions in regard to appeals from an order made by the disciplinary committee are not precisely the same as provisions relating to appeals as contained in our Act. It was thought desirable to follow the provisions of our Act for the sake of uniformity. Accordingly subsection 4 substantially reproduces the provision of section 78 of the Act.

40K (5) Every order made under this section shall be filed with the Secretary of the Law Society, and the file kept by him for that purpose may be inspected by any solicitor during office hours without payment but shall not be open to the inspection of any other than a solicitor.

This subsection substantially reproduces provisions of section 38 (4) of the English Act of 1957.

40K (6) For the purposes of this section the death of a solicitor against whom an application or complaint might have been made to the Statutory Committee under this Act shall not prevent an application being made under this section in respect of a person who was a clerk to that solicitor, but is not himself a solicitor, and who is alleged to have been a party to any act or default of that solicitor.

This subsection substantially reproduces the provisions of para. (b) of subsection 5 of the English Act of 1957. Para. (a) deals with special provisions of the English Criminal Justice

Act 1948 and appears to be unnecessary in this State.

40L (1) Any person who, while there is in force in respect of him an order under the preceding section seeks or accepts any employment by or remuneration from a solicitor, in connection with his practice as a solicitor, without previously informing him of that order, shall on summary conviction be liable for each such offence to a fine not exceeding five hundred dollars.

This subsection substantially reproduces subsection 1 of section 39 of the English Act of 1957. A variation has been made in prescribing a penalty. The English Act fixed a maximum fine of £50 which would be equivalent to approximately A\$125.

The Council suggested that this should be increased to \$500. In view of the lapse of time since the passing of the English Act and the nature of the evil to be punished, it seems that the Council's proposal in this regard is reasonable.

40L (2) Where an order has been made under the preceding section against any person and such order remains in full force and effect, then, if any solicitor knowingly acts in contravention of that order or of any condition subject to which permission for the employment of that person has been granted thereunder, he shall be guilty of professional misconduct.

This subsection is based upon subsection 2 of section 39 of the English Act of 1957. There are two variations which should be mentioned. In the first place the provisions as to appeal in England are somewhat different from those provided for in our Act and accordingly a variation has been made to preserve the rules already laid down by our Act. Secondly, the English Act provides that if a solicitor employs knowingly a person against whom an order has been made, a complaint in respect of the contravention may be made to the Disciplinary Committee. As section 77 of the Act confers jurisdiction on the Statutory Committee in respect of charges of "professional misconduct" it was thought desirable to adhere to the language of this section.

40L (3) Any document purporting to be such an order as aforesaid and to be signed by the Chairman or a member of the Statutory Committee acting as Chairman shall be received in evidence in any proceedings under this Act and be deemed to be such an order without further proof unless the contrary be shown.

The draft submitted by the Council provides that a document signed by the secretary or assistant secretary of the Law Society should be evidence of an order having been made. There is no provision in Part X of the Act (which establishes the Statutory Committee) for the secretary of the Law Society to sign a document. However, section 80 provides that every court of law shall take judicial notice of the signature of the Chairman and of any member acting as Chairman of the Committee. It was thought proper to follow the scheme of this section.

40L (4) Proceedings under subsection (1) of this section may be commenced at any time before the expiration of six months after the first discovery of the offence by the Council, but no such proceedings shall be commenced by any person other than the Council or a person acting on its behalf.

The subsection is in similar terms to subsection (4) of section 39 of the English Act of 1957, and has been varied only to the extent that is rendered necessary by differences in other legislation in this State and in England.



# Appendix D

## RECEIVERS

### COMMENTS ON THE (VICTORIAN) LEGAL PROFESSION PRACTICE ACT SECTION 104A - 104Y

1. The definitions in section 51 apply to expressions used in sections 104A - 104Y. See in particular the definitions of “defalcation” “fund” and “money”.
2. In the definition of “property” in section 104A, paragraph (a) is confined to money or property “entrusted to or received ...by” the solicitor etc., presumably *before* the appointment of the receiver. The meaning of “property” should extend to money or property which would (were it not for the appointment of the receiver) be receivable by the solicitor *after* the appointment. Paragraph (b) of course deals with money received by the receiver but is confined to money in the nature of income. This suggestion would make the definition of “property” more compatible with the provisions of section 104B which speak of “property with ... is recoverable by the solicitor” etc.
3. The cases in which a receiver may be appointed are stated in section 104B paragraphs (a) and (b). The proposals of the Council are set out in the proposed new section 65A of the Legal Practitioners Act. The Commission thinks that paragraphs (d) and (e) of the proposed section 65A should be included but that paragraphs (a), (b) and (c) would tend to defeat the utility of the receivership provisions. The events stated in the last mentioned paragraphs are events which take time to accomplish and there may be appeals. It is of the essence of the utility of the receivership provisions that they may be brought into operation instantly on it appearing that something has gone wrong concerning the dealings by a solicitor with trust money or property. There should, in the view of the Commission, be something along the lines of the Victorian section 104B (a), aided as that paragraph is by the definition of defalcation in section 51 (1) of the Legal Profession Practice Act 1958. Consideration should be given to the grant to a solicitor of a right to compensation out of the fund for injury to goodwill or other loss in case it should appear that a receiver has been appointed without due cause. The right to compensation should be excluded in a case where the solicitor has, in a matter of substance, failed to comply with the provisions of the Act or regulations relating to trust accounts.
4. In section 104C (1), the Court or Judge should have a discretion to permit service less than 48 hours before the return of the summons.
5. As to section 104C (2), it is perhaps implicit in this subsection that the application must be heard in Court and not in chambers or elsewhere. This possible implication should be excluded.
6. As to the provisions of section 104F dealing with a stop notice for a trust bank account, the Commission takes the view that as between the receiver and the bank, the receiver should be able to give notice concerning any bank account of the solicitor. For this view there are two reasons: firstly, unless this is done, a solicitor might put trust money beyond the immediate reach of the receiver by the simple expedient of paying it into a bank account which is not identifiable by its title as a trust account; and, secondly, the bank ought not to be put to inquiry on the question whether any account in the name of the solicitor etc. is a “trust account”. The receiver should, however, be directed by the legislation not to give notice, unless on reasonable grounds he believes that there is in the bank account money received for or on behalf of any person by the solicitor (compare the Legal Practitioners Act, s.41 (1)).
7. The Commission is of the opinion that the provisions of section 104L (2) are too rigid and may do injustice, and that the receiver should only be protected as to dispositions made by him before receiving notice of a claim and that there should be some relief to persons entitled to claim but who do not claim by reason of accident or mistake.
8. As to the section 104L (3), the Commission thinks that, as between solicitor and the client, the solicitor should retain any lien that he may have whether or not the proper claims of all claimants

other than a solicitors are fully satisfied. As between the solicitor and the receiver, however, the receiver should be entitled to possession of the documents or writings under lien. Section 104M enables prompt determination of the solicitor's claim for costs.

9. Further on section 104L (3), the subsection seems to alter what would otherwise be the substantive rights of the parties: this may be illustrated by references to the law of bankruptcy. Suppose the solicitor has two clients, A and B, and has received \$1,000 for A and \$1,000 for B and for the sake of clarity of statement, let it be supposed that the solicitor has paid each sum of \$1,000 to a separate trust bank account. The solicitor, let it be further supposed, has a right to withdraw \$100 from A's \$1,000 for costs and has wrongfully withdrawn \$200 out of B's \$1,000. Under section 104L (3), the \$100 belonging to the solicitor out of A's \$1,000 would go towards restoration of the wrongful withdrawal from B's \$1,000 and would not go in the order of priorities which would apply if the solicitor were bankrupt (see the Bankruptcy Act 1966 ss. 108 - 144). A piece of State legislation purporting to have such an effect may be invalid, but, if valid, it is unjust.

10. Section 104P (1) requires the receiver to pay all surplus money and deliver all surplus property to the institute. By section 104P (3), if, after meeting claims and expenses, there remains a surplus of moneys paid by the receiver to the institute, the surplus has to be paid to the solicitor. In some cases, perhaps many cases, these provisions are unnecessarily circuitous. An example is the case where a solicitor dies and the only occasion for appointing a receiver is to enable a prompt distribution to the persons entitled to the money in the trust bank account of the deceased solicitor. The Commission thinks that the receiver should be required to pay money or deliver property to the institute only on, and to the extent of, a request by the institute, and that otherwise he should pay the money or deliver the property to the solicitor.

11. Although section 104P (1) requires the receiver to deliver property (other than money) to the institute, the section is silent about what the institute is to do with property so delivered. There will no doubt be a variety of cases making it impracticable to lay down antecedently in the statute rigid rules for the manner of dealing with such property. The Commission suggests a provisions whereby the institute would deal with such property in such manner as the Court may direct, including sale and disposal of these proceeds of sale as if the proceeds were moneys paid by the receiver to the institute under section 104P (1).

12. Section 104P (3) speaks of "the expenses of the receivership". This expression is defined in section 104R (1), but only for the purposes of section 104R (2). The definition is also referred to in section 104O (3). The expression ought to be defined for all the purposes of the receivership provisions. The definitions should include a reimbursement made under section 104T.

13. Section 104R (2) says that an amount paid out of the fund for the expenses of the receivership shall be recoverable by the institute from the solicitor. Although perhaps it is implicit, it should be expressed, that the right of recovery is to be only to the extent to which the amounts paid plus amounts paid to the claimants under section 104P (2) exceed the money received under section 104P (1).

14. Section 104R (3) enables the Court to determine the amount of the remuneration of the receiver, but only on application by the institute or the receiver. The solicitor should be entitled to have the remuneration reviewed by the Court. He should also be entitled to have the other expenses of the receivership reviewed by the Court.