

LEGISLATIVE COUNCIL

**STANDING COMMITTEE ON
LEGISLATION**

REPORT

ON

***THE LEGAL PRACTITIONERS
AMENDMENT (DISCIPLINARY
PROVISIONS) BILL 1992***

Presented by -

THE HONOURABLE GARRY KELLY, MLC

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REPORT

STANDING COMMITTEE ON LEGISLATION

LEGAL PRACTITIONERS AMENDMENT (DISCIPLINARY PROVISIONS) BILL 1992

A. INTRODUCTION

1. The Committee received the *Legal Practitioners Amendment (Disciplinary Provisions) Bill 1992* as a draft bill on Wednesday, December 4, 1991, being tabled paper No. 948.
2. An advertisement calling for submissions was published in "The West Australian" on Saturday, December 21, 1991. Thirteen written submissions were received and the Committee took evidence on the draft bill from the Law Society of Western Australia.
3. Essentially, the purpose of the legislation is to provide for the creation of a separate complaints committee and a disciplinary tribunal to deal with the matters of discipline in the profession.
4. It also provides for a Complaints Officer. Each of these moves recognises what is already the practice of the Barrister's Board and the Law Society. There is also the addition of a member of the public to the Tribunal.
5. It should be noted at this point that the draft bill referred to the Committee forms only a part of the *Legal Practitioners Amendment (Disciplinary and Miscellaneous Provisions) Bill 1992* which is presently before the House. It is for this reason the Committee has decided to attach to this Report a List of Proposed Changes to the *Legal Practitioners Amendment (Disciplinary Provisions) Bill 1992* and not an amended Bill as would normally be the procedure.
6. The Committee therefore draws the attention of the House to this Report and the proposed amendments when it considers *Legal Practitioners Amendment (Disciplinary & Miscellaneous Provisions) Bill 1992*.

B. GENERAL COMMENTS

7. The Committee has examined the draft and the submissions which have come before it, and agrees with the broad thrust of the legislation. However, the Committee suggests that the following amendments be made.

8. Codes of Ethics

The Committee recommends that a new Clause 25, as detailed in the List of Proposed Changes attached to this Report, be inserted to establish a provision for

the recognition of codes of ethics which may be published by the Law Society of Western Australia and the Western Australian Bar Association Inc. At present the ethical rules prescribed by the Law Society have no statutory effect. The Committee received a submission that they should and it is the opinion of the Committee that there should be a power to make rules of ethics, the breach of which is prima facie unprofessional conduct.

9. Rules of evidence

The Committee believes that any hearing conducted by either the Complaints Committee or the Disciplinary Tribunal should not be formally bound by the rules of evidence, but should be able to consider any matter which it considers just and relevant to the hearing. This is the case with all other professional disciplinary bodies and the Committee can see no reason why it should not be the case with lawyers. This does not prevent either body from applying those rules in the cases it thinks appropriate.

10. Accordingly, the Committee recommends that a new sub-clause (3) be added to Clause 27 and that a new sub-clause (4) be added to Clause 28D as per the List of Proposed Changes attached to this Report.

11. Hearings to be in public

The Committee was concerned that the hearings of the Complaints Committee and Disciplinary Tribunal should, under Section 31C be stated to be closed to the public unless otherwise determined.

12. As this legislation has the need to provide for justice not only to be done but to be seen to be done, the Committee has recommended a new Clause 31C, which provides for open hearings, unless otherwise determined and for the publication of an account of behaviour where there has been an adverse finding against a practitioner.

13. Right of appeal

The Committee also notes that although under Clause 29B, an appeal lies to the Full Court against any finding or order made by the Disciplinary Tribunal, no such right of appeal lies against a decision of the Complaints Committee. As it is the power of the Complaints Committee to fine, reprimand or make other orders affecting the practice of the practitioner and contempt of court provisions may be applied for failure to comply, it would seem that a right of appeal should also be provided.

14. The Committee believes that the provisions of this draft will provide the means for openness in the conduct of legal disciplinary matters and by giving statutory recognition to rules of ethics, will provide a means of self regulation in the profession.

**LIST OF PROPOSED CHANGES TO THE LEGAL
PRACTITIONERS AMENDMENT (DISCIPLINARY PROVISIONS)
BILL 1992**

New clause 25

Page 6, after line 12 - To insert a new Clause as follows:

"Code of Ethics

25. (1) The Law Society of Western Australia Inc may by publication in the Gazette issue codes of ethics for the practice of law and the conduct of legal practitioners and the Bar Association of Western Australia Inc may in addition, by publication in the Gazette, issue codes of ethics for the practice of law and the conduct of practitioners by persons who conduct themselves only in the practice of a barrister.

(2) A code or practice may by publication in the Gazette be amended or revoked and replaced by a new code.

(3) A code of practice may adopt wholly or partly any standards, rules, code, or other provisions published by some other body and may adopt them -

(a) with or without any amendment or modification; or

(b) as in force at the time of adoption or as amended from time to time.

(4) A breach of the code of ethics may of itself constitute unprofessional conduct but shall not be the only basis upon which unprofessional conduct may be asserted.

(5) A code, or any amendment, revocation or replacement shall be a regulation for the purpose of section 42 of the Interpretation Act (1984)."

Clause 27

Page 11, after line 10 - To insert a new subclause as follows:

"(3) The Complaints Committee is not bound by the Rules of Evidence but may inform itself in any matter it considers just."

Clause 28D

Page 17, after line 3 - To insert a new subclause as follows:

- "(4) The Disciplinary Tribunal is not bound by the Rules of Evidence but may inform itself in any manner it considers just."

Clause 31C

Page 26 and 27 - To delete Clause 31C and substitute the following new Clause:

"31C (1) Subject to this section:

- (a) any inquiry or hearing under this Part shall be held in public; and
 - (b) the proceedings shall not be published by any means, or otherwise disclosed or made available to any person.
- (2) The Complaints Committee or the Disciplinary Tribunal, in a particular case, or as to particular aspects of a particular case may determine:-
- (a) that any proceedings to be conducted under this Part before it shall not be conducted in public; or
 - (b) who, other than persons or their representatives as this Act may require or authorize, may be excluded from being present.
- (3) The Complaints Committee or the Disciplinary Tribunal may in respect of proceedings conducted before it, if satisfied that it is appropriate to do so, order that proceedings before it may be published and in making such order may order that -
- (a) any evidence given before it;
 - (b) any information, or any record or the contents of any record, produced or referred to before it; or
 - (c) any information that might enable a person who has appeared before it to be identified,
- be excluded from the application of that order.
- (4) The Complaints Committee or the Disciplinary Tribunal shall in respect of proceedings conducted before it, in the event of an adverse finding against a practitioner, cause to be published -
- (a) the name of the practitioner;

- (b) the nature of the complaint against the practitioner;
 - (c) the penalty, if any, imposed;
 - (d) its reasons for its findings; and
 - (e) such details of the evidence that it considers helpful in understanding the nature of the case, but in doing so may withhold such details as it considers in the interests of the complainant should be withheld or which would prejudice the interests of any person other than the practitioner (or a partner of the practitioner).
- (5) A person who contravenes an order made under this section or who makes any publication or disclosure in contravention of this section shall be liable to be dealt with as though for a contempt of the Court."