

Legal Profession Practice (Amendment) Bill

No.

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LEGISLATIVE ASSEMBLY

Read 1° 19 April 1989

(Brought in by Mr McCutcheon and Mr Roper)

A BILL

to amend the *Legal Profession Practice Act 1958*, the *Ombudsman Act 1973* and the *Supreme Court Act 1986* and for other purposes.

Legal Profession Practice (Amendment) Act 1989

The Parliament of Victoria enacts as follows:

Purpose

1. The purposes of this Act are—

- 5
- (a) to revise the provisions for dealing with disputes and complaints concerning solicitors;
 - (b) to make certain other amendments to the *Legal Profession Practice Act 1958*.

Commencement

10 2. (1) Except as provided in sub-sections (2) and (3), this Act comes into operation on a day or days to be proclaimed.

(2) Section 12 is deemed to have come into operation on 6 November 1986.

(3) Section 21 (2) is deemed to have come into operation on 17 May 1988.

Principal Act

No 6291.
Reprinted to No.
29/1988.

3. In this Act, the *Legal Profession Practice Act 1958* is called the Principal Act.

Definitions

4. (1) In section 2A of the Principal Act, before the definition of “Chief Justice” insert— 5

‘ “**Board**” means the Solicitors’ Board established under Part IIIA.

“**Chairperson**”, in Part IIIA, means chairperson of the Board and includes a person acting as chairperson.’ 10

(2) In section 2A of the Principal Act, after the definition of “Institute” insert—

‘ “**Misconduct**”, in Parts III and IIIA, means misconduct by a solicitor in a professional capacity and includes— 15

(a) wilful or reckless contravention of this Act (other than section 80 or 81) or rules or regulations under this Act; 15

(b) the charging for professional services of fees or costs which are grossly excessive;

(c) the making of a statement which purports to be a statement of fact and which the solicitor knows to be false— 20

(i) to a person in the course of a relationship of solicitor and client; or

(ii) to the secretary, if the statement was made in the course of the investigation by the secretary of a complaint in relation to that solicitor and related to the complaint; or 25

(iii) to a practitioner, if the statement was made by the solicitor in the course of the solicitor’s practice and related to a matter in respect of which the solicitor acts or holds himself or herself out as acting on behalf of his or her client; 30

(d) any failure in performing any work in connection with the solicitor’s practice, being a failure constituting a gross breach of the solicitor’s duty to a client or the court; 35

(e) any failure to comply with an undertaking given to the secretary, the council, or the Board for the purposes of this Act or in the course of any hearing, proceedings or investigation under this Act; 40

(f) any failure by a solicitor to whom section 80 (1) applies (not being a solicitor whose application for a practising certificate has been accepted by the secretary in accordance with section 80 (2)) to apply for a practising

certificate within three months after the last day on which applications for practising certificates may be made;

- (g) any failure by a solicitor to whom sub-section (1) of section 81 applies to lodge with the secretary the report referred to in that sub-section within three months after the last day on which that report is required to be lodged;
- (h) any failure by a solicitor to comply within the specified time with a requirement of the secretary under section 38Q (2);
- (i) any failure by a solicitor to comply with section 33 of the *Sale of Land Act 1962*;
- (j) repeated standards breaches that would be regarded by a solicitor in good standing as showing a serious and continued disregard for proper professional behaviour.’.

(3) In section 2A of the Principal Act—

(a) after the definition of “**Practising fee**” insert—

‘ “**Practitioner**”, in Parts III and IIIA, means a person duly admitted as a barrister and solicitor of the Supreme Court.’; and

(b) after the definition of “**President**” insert—

‘ “**Registrar**” means the registrar of the Solicitors’ Board and includes an acting registrar.’.

(4) In section 2A of the Principal Act, after the definition of “**Secretary**” insert—

‘ “**Solicitor**”, in the definitions of “**Misconduct**” and “**Standards breach**” and in Parts III and IIIA—

(a) means a practitioner or incorporated practitioner who—

- (i) holds or has applied for a practising certificate; or
- (ii) acts or practises as a solicitor; or
- (iii) in the case of a practitioner, acts or practises as a barrister of the Supreme Court and whose name is not on the roll of counsel kept by the Victorian Bar; and

(b) in Part IIIA, includes a practitioner or incorporated practitioner who, at the time at which misconduct or standards breach is alleged to have occurred—

- (i) held or had applied for a practising certificate or was acting or practising as a solicitor; or
- (ii) whose name was not on the roll of counsel kept by the Victorian Bar and who was acting or practising as a barrister.

“**Standards breach**” means conduct by a solicitor in a professional capacity which would be regarded by a solicitor in good standing to be unacceptable or unprofessional behaviour and, without limiting the generality of the foregoing, includes—

5

- (a) conduct unbecoming a solicitor;
- (b) unprofessional conduct;
- (c) a contravention of this Act (other than section 80 or 81), the regulations or the rules without reasonable excuse.’.

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(5) In section 2A of the Principal Act, the definition of “**Tribunal**” is repealed.

(6) After section 2A of the Principal Act and before Part I insert—

Misconduct to include certain agreements

“2B. Despite the abolition by the *Abolition of Obsolete Offences Act* 1969 of the common law offence of maintenance, a practitioner who enters into an agreement with a client to accept part of any amount received by the client in proceedings instituted or conducted by the practitioner on behalf of the client is guilty of misconduct to the same extent after the commencement of that Act as before that commencement.”.

15

20

Amendment of section 14H

5. (1) In section 14H (1) of the Principal Act—

(a) after paragraph (c) (iia) insert—

“(iib) If the commission of the disciplinary offence has directly caused the complainant to suffer pecuniary loss—that the barrister pay the whole or part of the complainant’s costs;”.

25

(b) after paragraph (c) (vi) insert—

“(via) That the whole or part of the expenses incurred by the Victorian Bar Council in connection with the proceedings be paid by the barrister;”.

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(2) After section 14H (1) (c) of the Principal Act insert—

“(ca) if the Bar Tribunal determines that the barrister has not committed a disciplinary offence, the Bar Tribunal may order that the Victorian Bar Council pay the whole or part of the barrister’s costs.”.

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New sections 141A and 141B inserted

6. After section 141 of the Principal Act, insert—

Orders by Tribunal in cases of mental or physical infirmity

5 “141A. (1) The Committee may, of its own motion or upon receipt of a request from the Chairman of the Victorian Bar Council, make a preliminary investigation concerning any barrister who, by reason of mental or physical infirmity, may be incapable of properly carrying on practice as a barrister.

10 (2) If after a preliminary investigation under sub-section (1), the Committee is of opinion that the barrister, by reason of mental or physical infirmity, may be incapable of properly carrying on practice as a barrister, the Committee may resolve to refer the matter to the Bar Tribunal.

15 (3) If a matter is referred to the Bar Tribunal, the Committee must cause written notice of the reference to be posted to or delivered at the last known business address of the barrister and to the Chairman of the Bar Tribunal.

20 (4) If the Bar Tribunal determines that, by reason of mental or physical infirmity, the barrister is incapable of properly carrying on practice as a barrister, the Bar Tribunal may order that the barrister be suspended for a specified period or until further order.

25 (5) If the Bar Tribunal accepts an undertaking by the barrister concerned not to practise without the permission of the Bar Tribunal, the Bar Tribunal must not make an order under sub-section (4).

30 (6) If a barrister does not abide by an undertaking referred to in sub-section (5), the Bar Tribunal, of its own motion or at the request of the Chairman of the Victorian Bar Council, and after giving the barrister a reasonable opportunity to be heard, may make an order under sub-section (4).

(7) A barrister who has been suspended by order of the Bar Tribunal under sub-section (4), may apply to the Bar Tribunal for an order terminating the order for suspension.

35 (8) A barrister who has given an undertaking referred to in sub-section (5), may apply to the Bar Tribunal for an order relieving the barrister from the undertaking and permitting the barrister to practise.

(9) The Bar Tribunal—

- 40 (a) may make an order—
- (i) terminating an order for suspension of a barrister; or
 - (ii) relieving a barrister from an undertaking and permitting the barrister to practise; or
- (b) may refuse to make such an order.

(10) An order under sub-section (9) may be made by the Bar Tribunal subject to such conditions (if any) as the Bar Tribunal determines.

(11) A failure by the barrister to observe the condition of an order may be taken into account in any subsequent proceedings before the Bar Tribunal concerning the barrister. 5

(12) The provisions of section 14I apply with respect to the hearing of a matter under this section as if it were the hearing of an appeal or charge.”

Suspension in urgent cases 10

“14IB. (1) If the Committee has resolved to refer a matter to the Bar Tribunal under section 14IA (2), the Committee may make an order that the barrister be suspended until the hearing and determination of the matter by the Bar Tribunal.

(2) An order under sub-section (1) must not be made unless the Committee is of the opinion that the matter is urgent and that there are special circumstances which justify the making of an order. 15

(3) The Committee must give a copy of an order under sub-section (1) to the barrister and to the Chairman of the Bar Tribunal with the notice referred to in section 14IA (3). 20

(4) A barrister who has been suspended by an order under sub-section (1), may, at any time while the order remains in force, apply to the Bar Tribunal for an order terminating the order for suspension.

(5) Section 14I applies with respect to the hearing of an application under sub-section (4) as if it were the hearing of an appeal or charge.” 25

Amendment of section 14Q

7. After section 14Q (2) (a) of the Principal Act, insert—
“(aa) may be appointed on a full-time or part-time basis;”.

Amendment of Part III 30

8. (1) The Principal Act is amended as follows:

(a) Section 15 is repealed;

(b) In section 21 (1)—

(i) in paragraph (b), for “president” substitute “the nominated council representative”; 35

(ii) in paragraph (b) (viii) after “Association” insert “and the North-West Law Association”;

(iii) after paragraph (b) (viii) insert—

“(viiiia) the body of persons known as the Mornington Peninsula Solicitors Association;” 40

(2) Sections 27 to 32D (both inclusive) of the Principal Act are repealed.

(3) In section 32F of the Principal Act—

5 (a) in sub-section (1) for “or the Tribunal” substitute “, the registrar or the Board”;

(b) after sub-section (2) (a) (i) insert—

“(ia) may be appointed on a full-time or part-time basis;”;

(c) in sub-section (2) (a) (vii) for “or the Tribunal” substitute “, the registrar or the Board”.

10 (4) In section 33 of the Principal Act—

(a) in sub-section (1) (a) for “of the Tribunal” substitute “under Part IIIA”;

(b) in sub-section (1) (c), omit “was acting or practising solely as a barrister or”;

15 (c) in sub-section (2) (b) for “a full hearing of the Tribunal” substitute “the Board”.

(d) in sub-section (2) (c), omit “was acting or practising solely as a barrister or”.

New Part inserted

20 **9.** After Part III of the Principal Act insert—

“PART IIIA—DISPUTES AND COMPLAINTS

Division 1—Board, Registrar and Conciliators”

Solicitors’ Board

25 “38A. (1) For the purposes of this Act, there shall be a Solicitors’ Board.

(2) The Board shall consist of—

(a) a chairperson appointed by the Attorney-General in accordance with section 38B; and

(b) the members of the council; and

30 (c) such number of solicitors appointed by the council in accordance with section 38D (1) as the council determines; and

35 (d) not more than 15 persons, who are not practitioners, appointed by the Attorney-General in accordance with section 38D (2).”

Chairperson

“38B. (1) The chairperson shall be appointed by the Attorney-General and shall be a person who has resigned or retired from the office of a judge of the Supreme Court or County Court or from the office of a judge of the Federal Court or Family Court. 5

(2) The chairperson shall be appointed for such term, not exceeding three years, and on such conditions as the Attorney-General determines and is eligible for re-appointment.”

Acting chairperson

“38C. (1) The Attorney-General may appoint as acting chairperson a person who has resigned or retired from the office of a judge of the Supreme Court or the County Court or from the office of a judge of the Federal Court or Family Court. 10

(2) The acting chairperson shall be appointed for such term, not exceeding three years, and on such conditions as the Attorney-General determines and is eligible for re-appointment. 15

(3) The acting chairperson shall act as chairperson if there is a vacancy in the office of chairperson or the chairperson is absent or for any reason unable to perform the functions of the office.”

Appointment of members of Board 20

“38D. (1) A solicitor appointed by the council as a member of the Board for the purposes of section 38A (2) (c)—

- (a) shall be appointed for such term, not exceeding 3 years, as the council determines; and
- (b) is eligible for re-appointment; and 25
- (c) may be removed from office by the council at any time.

(2) A person appointed by the Attorney-General as a member of the Board for the purposes of section 38A (2) (d)—

- (a) shall be appointed for such term, not exceeding three years, as the Attorney-General determines; and 30
- (b) is eligible for re-appointment; and
- (c) may be removed from office by the Attorney-General at any time.”

Constitution of Board

“38E. For the purpose of a hearing by the Board, the Board shall be constituted by the chairperson and two members of the Board appointed by the chairperson of whom— 35

- (a) one shall be a solicitor; and
- (b) one shall be a person who is not a practitioner.”

Fees and allowances

5 “38F. (1) The chairperson is entitled, for the period during which he or she acts as a member of the Board for a hearing, to receive such fees and allowances, if any, as are agreed between the Attorney-General and the council.

(2) A member of the Board, other than the chairperson, is entitled, for the period during which he or she acts as a member of the Board for a hearing, to receive such fees and allowances, if any, as are agreed between the Attorney-General and the council.

10 (3) The fees and allowances shall be paid out of the Consolidated Fund which is hereby to the necessary extent appropriated accordingly.

15 (4) Money paid out of the Consolidated Fund under sub-section (3) is a charge on the Solicitors’ Guarantee Fund and shall be repaid from that fund by the council to the Consolidated Fund by instalments as required by the Treasurer.”

Disclosure of interests

“38G. A member of the Board who—

20 (a) for profit or reward is concerned in any matter referred to the Board or who derives or is entitled to any benefit either directly or indirectly in relation to a matter referred to the Board; or

(b) is interested either as prosecutor or defendant or as a witness in any matter referred to the Board—

25 must declare to the chairperson the nature of the interest and must not be, or continue as, a member of the Board as constituted for the purposes of a hearing into the matter.”

Validity despite defects etc.

30 “38H. An act or decision of the Board is not invalid by reason only of a defect or irregularity in the appointment of a member of the Board or of a member of the Board as constituted for a hearing.”

Application of *Wrongs Act 1958*

“38I. For the purposes of section 4 of the *Wrongs Act 1958*—

35 (a) the Board shall be deemed to be a legally constituted court; and

(b) the chairperson of the Board shall be deemed to be a presiding officer.”

Registrar

“38J. (1) There shall be a registrar of the Board.

40 (2) The registrar shall be a practitioner of not less than seven years’ standing appointed by the council for such term and on such conditions as the council determines.

(3) The council may remove the registrar from office.”

Acting registrar

“38K. (1) If—

- (a) the office of registrar is vacant; or
- (b) the registrar is unable whether on account of absence, illness 5
or otherwise, to perform the duties of registrar; or
- (c) it would be improper because of a personal interest in a
matter before the registrar for the registrar to perform the
duties of registrar—

the council may appoint a practitioner of not less than seven years’ 10
standing to act as registrar during the period of the vacancy or inability
or while it would be improper for the registrar to act.

(2) A person appointed under sub-section (1) shall be appointed on
such conditions as the council determines.

(3) The council may remove from office a person appointed under 15
sub-section (1).”

Conciliators

“38L. (1) There shall be a panel of not less than 15 solicitors 20
appointed for the time being by the council to be conciliators for the
purposes of this Part.

(2) A conciliator is entitled, for the period during which he or she
is a conciliator, to receive such fees and allowances, if any, as are agreed
between the Attorney-General and the council.

(3) The fees and allowances shall be paid out of the Consolidated 25
Fund which is hereby to the necessary extent appropriated accordingly.

(4) Money paid out of the Consolidated Fund under sub-section
(3) is a charge on the Solicitors’ Guarantee Fund and shall be re-paid
from that Fund by the council to the Consolidated Fund by instalments
as required by the Treasurer.

(5) A person who is or has been a conciliator must not disclose 30
information acquired in that capacity except—

- (a) in the course of carrying out his or her duties or powers as a
conciliator; or
- (b) with the consent of the person to whom the information 35
relates; or
- (c) when authorised or required by law to do so.”

Immunity

“38M. No action lies against any member of the Board, the secretary, 40
the registrar or a conciliator in respect of any decision made or act done
by or under the authority of this Part.”

“Division 2—Disputes”

Application of Division to costs disputes

“38N. (1) This Division does not apply to a dispute relating to a bill of costs of a solicitor—

- 5 (a) where the amount of the costs exceeds \$2500, unless the client, or former client, and the solicitor agree to be bound by a determination under this Division; and
- (b) in any case, unless—
- 10 (i) the client or former client has lodged with the secretary the amount of the costs in dispute; or
- (ii) the secretary has determined that the lodging of an amount in accordance with sub-paragraph (i) would cause undue hardship to the client or former client.

15 (2) The secretary must cause money lodged under sub-section (1) to be placed on deposit in an interest-bearing account with a bank in the name of the Law Institute.

 (3) Interest accruing on money in an account established under sub-section (2) must be placed to the credit of the account.

 (4) Money in the account shall be dealt with as follows:

- 20 (a) If the dispute is settled, whether by order of the registrar or otherwise, the money shall be paid from the account in accordance with this Act and the terms of the settlement or order;
- (b) If the client or former client withdraws the complaint, the money in the account shall be paid to the solicitor;
- 25 (c) If the client or former client dies, the money in the account shall be paid to the personal representative of the client or former client.

30 (5) The secretary must report in writing to the Minister and the Director of Consumer Affairs at least once in each year on determinations made by the secretary under sub-section (1) (b) (ii) in the preceding 12 months or since the last report under this sub-section.”

Request to secretary

35 “38O. (1) A client, or former client, of a solicitor may request the secretary to attempt to settle a dispute relating to—

- (a) an amount of costs of the solicitor; or
- (b) pecuniary loss that the client or former client believes he or she has suffered or any other genuine dispute arising out of the action or inaction of the solicitor in a professional capacity.
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 (2) A request under sub-section (1) must be made—

- (a) if the dispute relates to an amount of costs, within six months after the bill of costs was delivered by the solicitor; and
- (b) if the dispute relates to pecuniary loss or any other genuine dispute, within six years after the alleged action or inaction of the solicitor.

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(3) The secretary must attempt to settle the dispute and may take whatever action he or she believes necessary to assist the parties to effect a settlement.

(4) If the parties settle the dispute, the secretary must draw terms of settlement and, within 14 days after the settlement, serve a copy on the parties and the registrar.

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(5) Upon receiving a copy of the terms of settlement under sub-section (4), the registrar must make an order in those terms.

(6) An order under sub-section (5) has effect as an order of the registrar under Division 4.”

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Formal conciliation

“38P. (1) If the secretary is not able to assist the parties to settle a dispute within a reasonable time after receiving a request under section 38N—

- (a) the secretary must refer the matter (together with any documents) to the registrar; and
- (b) the registrar must refer the matter (together with any documents) to a conciliator.

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(2) The conciliator must attempt to settle the dispute and for that purpose may arrange a conference of the parties with the conciliator.

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(3) A party may attend a conference personally and may be represented by a practitioner.

(4) If the parties attending a conference reach a settlement of the dispute, upon the request of any party, the conciliator must, within seven days, give the registrar a copy of the terms of settlement and the registrar shall make an order in the terms of the settlement.

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(5) If, at a conference with the conciliator, the parties reach a settlement of the dispute and no party requests the conciliator to deliver a copy of the terms of settlement to the registrar, the conciliator shall, within seven days, give to the registrar notice in writing that the dispute has been settled and the registrar must make an order that the dispute is dismissed.

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(6) If, at a conference with the conciliator, the parties do not reach a settlement of the dispute, the conciliator shall, within seven days, give the registrar a statement in writing that the dispute is not settled and the registrar—

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- (a) if the secretary has referred to the Board an allegation of misconduct or standards breach against the solicitor, which

allegation arises out of the matter in dispute, must refer the dispute to the Board; or

(b) in any other case, must refer the dispute to a registrar's hearing.

5 (7) If a conciliator believes the solicitor is guilty of—

(a) misconduct or standards breach; or

(b) an offence punishable by imprisonment for a term exceeding six months—

the conciliator may refer the dispute to the secretary.

10 (8) If the conciliator serves by post at least 14 days' notice of the time and place for a conference on each of the parties and a party fails, without reasonable excuse, to attend the conference—

15 (a) where the party failing to attend is the client or former client of the solicitor, the conciliator may, within seven days, give notice in writing to the registrar requesting that the dispute be dismissed; or

20 (b) where the party failing to attend is the solicitor, the conciliator may, within seven days, give notice in writing to the registrar requesting the registrar to make an order of a kind the registrar could make if the dispute were the subject of a registrar's hearing.

(9) The registrar, on receiving a request under sub-section (8), must make an appropriate order."

"Division 3—Misconduct or Standards Breach"

25 Misconduct or standards breach

"38Q. (1) A person aggrieved by alleged misconduct or standards breach of a solicitor may, within six years after the date of the alleged misconduct or standards breach, make a complaint to the secretary.

30 (2) The secretary, upon receiving the complaint or on his or her own motion, may investigate the alleged misconduct or standards breach and—

35 (a) may cause to be served on the solicitor, either personally or by post addressed to the solicitor at the solicitor's last known or most usual place of residence or business, a written statement of the nature of the alleged misconduct or standards breach requiring the solicitor to give an explanation within a time specified in the statement; and

40 (b) with the prior written approval of a member of the council, may in writing require the solicitor to deliver or produce to the secretary within a specified time such documents or class of documents as are specified by the secretary, being documents which the secretary believes on reasonable

grounds relate to the alleged misconduct or standards breach;
and

- (c) with the prior written approval of a member of the council, may in writing require a solicitor to attend upon the secretary at a specified time and place to give an explanation; and 5
- (d) may obtain such other reports and make such other investigations as appear to the secretary necessary to enable the secretary to determine whether any further action should be taken.

(3) A person is not, by reason of sub-section (2), compelled to deliver or produce any document which he or she would not be compellable to produce to a court. 10

(4) After dealing with a complaint under sub-section (1), the secretary must send to the complainant a statement giving details of the role of the lay observer under this Act. 15

(5) Where after completing the investigation and considering any explanation made by a solicitor, the secretary is of opinion that there appears to have been misconduct or a standards breach, the secretary may—

- (a) refer the matter to a registrar’s hearing; or 20
- (b) if the secretary has the approval in writing of three members of the council so to do, refer the matter to the Board; or
- (c) exercise the power under section 84 to cancel or suspend the solicitor’s practising certificate or to refuse to grant an application for a practising certificate. 25

(6) No action lies against a member of the council in respect of anything done under sub-section (2) (b) or (c) or (5) (b).”

Referral by council to Board

“38R. The council may, of its own motion, refer to the Board any question as to the misconduct or standards breach of any solicitor which appears to the council to require investigation and may appoint some person to act on its behalf at the hearing.” 30

“Division 4—Hearings”

Notice of hearing

“38s. (1) The registrar shall determine the time and place of a hearing under this Part. 35

(2) Not less than 14 days before the hearing, the secretary must cause to be served personally or by post on—

- (a) the solicitor concerned;
- (b) the complainant (if any); and 40

(c) any other person whom the secretary considers has an interest in and should be a party to the proceedings—
a notice setting out the time and place of the hearing and particulars of the matter to be heard.

5 (3) The secretary may, of his or her own motion or at the request of the registrar or the Board, appoint a practitioner to investigate a matter which is the subject of the proceedings at the hearing and to present it at the hearing.

10 (4) The institute and all persons upon whom notice has been served under sub-section (2) and their respective practitioners (including any practitioner appointed under sub-section (3)) are entitled to be heard at the hearing.”

Notice of hearing by Board

15 “38T. Notice of a hearing by the Board shall be published in the daily law list on each day of the hearing but a failure to publish a notice does not invalidate the proceedings.”

Witnesses

20 “38U. If a party to proceedings at a hearing under this Part so requests, the registrar shall issue a summons to a person to attend as a witness.”

Presence at hearing

“38v. (1) At a registrar’s hearing or hearing of the Board held in private, a person who is not—

- 25 (a) a party to the proceedings; or
(b) a practitioner representing a party; or
(c) a person authorised to be present by the registrar or the Board, as the case requires, or
(d) the lay observer—

must not be present.

30 (2) A hearing of the Board shall be held in public unless the Board considers that in the particular circumstances of the case it is in the interests of justice that a hearing or any part of a hearing should be held in private.

35 (3) At a hearing of the Board, the Board may, and if required by any party to the proceedings to do so, must at any time during the hearing order all witnesses other than the complainant and the solicitor to whom the proceedings relate and any witness under examination to go and remain outside until required to give evidence.

40 (4) The registrar or the Board, upon the application of any party to the proceedings at a hearing by the registrar or the Board, may make an order prohibiting publication of a report of the whole or any part of

the proceedings or the name of, or other information which may identify, the parties to the proceedings.

(5) An order under sub-section (4) continues in force—

- (a) if the solicitor to whom the proceedings relate is exonerated, in perpetuity; 5
- (b) if the solicitor to whom the proceedings relate appeals to the Supreme Court against the order and is exonerated on appeal, in perpetuity;
- (c) if the solicitor to whom the proceedings relate appeals to the Supreme Court against the order and is not exonerated on appeal, until the appeal is finally disposed of; and 10
- (d) in any other case, until the time limited by the order.

(6) A person must not knowingly disobey an order under sub-section (3) or (4).

Penalty applying to this sub-section: 5 penalty units.” 15

Application of *Evidence Act 1958*

“38w. Sections 14, 15, 16, 20 and 20A of the *Evidence Act 1958* apply to and in relation to any proceedings or enquiry which the registrar or the Board is by or under this Part authorised to conduct as if the registrar or the Board were a board appointed by the Governor in Council.” 20

Decisions

“38x. A question before the Board—

- (a) shall not be determined unless all members are present; and
- (b) may be determined by the votes of a majority of members.” 25

Procedure

“38y. (1) Subject to this Act, the rules and the regulations—

- (a) the procedure at a hearing; and
- (b) the manner of convening, conducting and adjourning a hearing— 30

is in the discretion of the registrar or the Board, as the case may be.

(2) The registrar or the Board must cause minutes of all its hearings to be entered in a book kept for the purpose.”

Disputes

“38z. (1) Where a dispute is referred to a registrar’s hearing or to the Board under section 38p, the registrar or the Board shall hear, inquire into and decide upon the dispute and may make such order or orders as the registrar or the Board thinks fit including any one or more of the following orders: 35

- (a) An order that the solicitor pay to the client or former client by way of compensation a specified amount not exceeding \$2500 within a specified time;
- 5 (b) an order that the solicitor reduce the amount of the solicitor's costs by a specified amount, not exceeding the amount to which the dispute relates;
- (c) where the solicitor holds a lien and the registrar or the Board considers that the solicitor should cease to hold the lien, an order that the solicitor forfeit the lien and deliver 10 the documents to the client or former client within a specified time;
- (d) an order for the payment of the costs of the hearing;
- (e) an order for the payment of the costs of the registrar or the Board.

15 (2) An order under sub-section (1) does not affect any right of a client or former client to recover damages for pecuniary loss but a court in making an award of damages must take the order into account.

(3) Where an order is made in the case of a dispute relating to costs—

- 20 (a) if the order reduces the amount of the costs—
 - (i) the amount of the reduction, together with that part of the accrued interest applicable to that amount, must be paid to the client or former client from the account established under section 38N; and
 - 25 (ii) the balance of the account (if any) must be paid to the solicitor; and
 - (iii) the balance of the costs (if any) must be paid by the client or former client; and
- 30 (b) if the order is for the payment of the solicitor's costs without any reduction—
 - (i) the amount in the account established under section 38N must be paid to the solicitor; and
 - (ii) the balance (if any) of the costs must be paid to the solicitor by the client or former client.”

35 Standards breach

“38ZA. (1) Where an alleged standards breach is referred to a registrar's hearing or to the Board, the registrar or the Board shall hear, inquire into and decide upon the matter and may make such order or orders as the registrar or Board thinks fit, including any one or more of 40 the following orders:

- (a) An order that no further action be taken against the solicitor;
- (b) An order reprimanding or admonishing the solicitor;
- (c) If the complaint arose out of an obligation by the solicitor to pay money to the institute or the Solicitors' Liability

Committee, an order that the solicitor pay interest on that money at a specified rate for a specified period;

- (d) An order that the solicitor undertake a specified course of education or receive such management or accounting advice as the registrar or the Board considers appropriate; 5
- (e) An order that the solicitor's practice be subject to such supervision as the registrar or the Board considers appropriate;
- (f) An order that the solicitor give the registrar or the Board or the secretary such reports on the practice on such terms as the registrar or the Board requires; 10
- (g) An order that the solicitor not employ, engage or recommend a specified person or class of persons;
- (h) An order for the payment of costs of the proceedings; and
- (i) An order for the payment of the costs of the registrar or the Board. 15

(2) The secretary and the parties to the proceedings shall give effect to the decision of the registrar or the Board.”

Misconduct

“38ZB. (1) Where alleged misconduct or a matter arising under Part V is referred to a registrar's hearing or to the Board, the registrar or the Board shall hear, inquire into and decide upon the matter and may make such order or orders as the registrar or the Board thinks fit, including any one or more of the following orders: 20

- (a) In the case of a registrar's hearing or a Board hearing— 25
 - (i) an order that no further action be taken against the solicitor;
 - (ii) an order reprimanding or admonishing the solicitor;
 - (iii) if the matter arose out of an obligation by the solicitor to pay money to the institute or the Solicitor's Liability Committee, an order that the solicitor pay interest on that money at a specified rate for a specified period; 30
 - (iv) an order that the solicitor undertake a specified course of education or receive such management or accounting advice as the registrar or the Board considers appropriate; 35
 - (v) an order that the solicitor's practice be subject to such supervision as the registrar or the Board considers appropriate;
 - (vi) an order that the solicitor give the registrar or the Board or the secretary such reports on the practice on such terms as the registrar or the Board requires; 40
 - (vii) an order that the solicitor not employ, engage or recommend a specified person or class of persons;

- (viii) an order for the payment of the costs of the proceedings; and
- (ix) an order for the payment of the costs of the registrar or the Board; and

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- (b) In the case of a registrar’s hearing, a requirement that the solicitor pay to the institute within a time limited by the order, a sum specified in the order, not exceeding 10 penalty units; and

10

- (c) In the case of a Board hearing—

- (i) an order that the solicitor pay to the institute within a time limited by the order, a sum specified in the order not exceeding 50 penalty units;

- (ii) an order cancelling any practising certificate held by the solicitor;

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- (iii) an order suspending any practising certificate held by the solicitor for a specified period;

- (iv) an order that the solicitor not engage in practice as a barrister for a specified period;

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- (v) an order refusing any application for a practising certificate made by the solicitor;

- (vi) an order that the solicitor is entitled to re-apply for a practising certificate only after the expiration of a time specified in the order or after compliance with any conditions so specified;

25

- (vii) an order that any practising certificate held by the solicitor which authorises the solicitor to practise as a solicitor within the meaning of paragraph (a) of the interpretation of “**Solicitor**” in section 51 be varied so as to authorise the solicitor to practise as a solicitor only as the employee of another solicitor;

30

- (viii) an order dispensing with the further performance of any matter or the further remedying of a breach of an obligation other than a matter or an obligation relating to the payment of moneys.

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(2) The secretary and the parties to the proceedings shall give effect to the decision of the registrar or the Board.”

Reference from registrar’s hearing to Board

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“38ZC. If upon the hearing of any matter referred to the registrar as an allegation of misconduct, the registrar considers that the alleged misconduct is of such a nature as to warrant the making of an order of a kind that the registrar is not empowered to make, the registrar may decline to proceed and may direct that the matter be referred to the Board, and the secretary shall give effect to that direction.”

Certain matters not admissible in civil proceedings

“38ZD. The fact of a hearing under this Part of a matter concerning a solicitor, any admissions made during the hearing by any person and the making of an order, are not admissible in evidence in civil proceedings unless liability has been determined and then only to the extent necessary for calculation of damages awarded in those proceedings.” 5

Publication of notice of order etc.

“38ZE. If—

- (a) an order is made by the registrar or the Board upon a finding of misconduct (other than an order containing only a direction that no further action be taken or an order of the registrar or the Board prohibiting publication); and 10
- (b) the solicitor—
 - (i) appeals against the order to the Supreme Court and is not exonerated on appeal; or 15
 - (ii) does not appeal against the order within the time limited by this Act—

the secretary must, as soon as practicable after the appeal has been finally disposed of or as soon as practicable after the expiration of that time, cause to be published in the official journal of the institute a notice setting out the following particulars: 20

- (c) The name of the solicitor against whom the proceedings were brought; 25
- (d) The nature of the proceedings; and
- (e) The orders made by the registrar or the Board upon those proceedings.”

Orders

“38ZF. Unless the registrar or the Board otherwise orders, a copy of any order made by the registrar or the Board under this Part shall be filed by the secretary in the office of the institute. 30

(2) The registrar shall cause to be served on each party to the proceedings at a hearing under this Part either personally or by post addressed to the party at the party’s last known or most usual place of residence or business a copy of any order made by the registrar or the Board upon those proceedings. 35

(3) An order of the registrar or the Board may be enforced as if it were an order of the Supreme Court.”

“Division 5—Appeals”

Appeals from registrar’s hearings

5 “38ZG. (1) A person aggrieved by an order of the registrar at a registrar’s hearing may, within 21 days after receiving from the registrar a copy of the order, appeal to the Board by lodging with the registrar either personally or by post notice of the appeal.

(2) A notice of appeal must be in writing and must state the grounds of the appeal.

10 (3) The appellant, not more than two days after lodging the notice of appeal under sub-section (1), must serve upon each of the other persons who appeared at the registrar’s hearing and the secretary either personally or by post addressed to the person at the person’s last known or most usual place of residence or business, a copy of that notice.

15 (4) The registrar, on receiving a notice of appeal under sub-section (1), must forthwith refer the matter to the Board.

(5) If a matter is referred to the Board—

(a) the registrar must determine the time and place of the hearing;

20 (b) the registrar must cause to be served on the appellant, the secretary and on each of the persons who appeared at the registrar’s hearing either personally or by post addressed to the person at the person’s last known or most usual place of residence or business, notice of the time and place of the hearing;

25 (c) the secretary may appoint a practitioner to present any matter on appeal to the Board, and the appellant, the institute and each of the other persons who appeared at the registrar’s hearing and their respective practitioners (including any practitioner appointed in accordance with this paragraph) is entitled to be heard by the Board;

30 (d) the Board may proceed with the re-hearing and determination of an appeal in the absence of an appellant; and

35 (e) the hearing shall be in the nature of a re-hearing and the Board shall inquire into and decide upon the appeal and may make any order it could have made if the Board had heard the matter at first instance; and

40 (f) the Board’s decision on the appeal is final and without appeal unless the Board makes orders affecting the solicitor’s practising certificate or right to a practising certificate; and

(g) the secretary and the other parties to the appeal must give effect to the decision of the Board.”

Appeal to Supreme Court

“38ZH. (1) A person whose practising certificate is cancelled or suspended or whose application for a practising certificate is refused by order of the Board, may appeal to the Supreme Court against the cancellation, suspension or refusal. 5

(2) Where the Board hears a complaint under this Part otherwise than on appeal from a registrar’s hearing and makes an order a person aggrieved by the order may appeal to the Supreme Court against the order.

(3) An appeal under this section shall be in the nature of a re-hearing and the Court shall entertain inquire into and decide upon the appeal and for that purpose the Court, in addition to its other powers, has and may exercise all the powers of the Board at a hearing, and its decision on the appeal is final and without appeal, and the secretary and the parties to the appeal must give effect to its decision.” 10 15

“Division 6—General”**Penalties to be paid to fund**

“38ZI. All penalties paid to or recovered by the institute under this Part shall be paid into and form part of the Law Institute Discretionary Fund.” 20

Cost not taxable where this Part applies

“38ZJ. If a dispute relating to costs of a solicitor has ben settled, or an order made, under this Part, the costs are not taxable under the *Supreme Court Act 1986*.”

Proceedings for recovery of costs 25

“38ZK. If a request has been made to the secretary to attempt to settle a dispute relating to an amount of costs of a solicitor, proceedings may not be brought for the recovery of those costs, other than proceedings to enforce a settlement or order made under this Part.”

Restriction of right to practise 30

“38ZL. The secretary may apply to the Supreme Court for an order restricting the rights of a solicitor to practise pending the determination of a matter by the Board or pending the determination of an appeal against a decision of the Board.”

Delegation 35

“38ZM. The secretary may, by instrument, delegate to a person employed by the institute any power of the secretary under section 38N (2) or 38Q (2) or (4).”

Rules

5 “38ZN. (1) The Judges of the Supreme Court may make Rules of Court for or with respect to the practice and procedure with respect to hearings under this Part by the registrar or the Board, the enforcement of orders of the registrar or the Board and appeals against orders of the registrar or the Board.

(2) Section 27 of the *Supreme Court Act* 1986 applies to the making of Rules under sub-section (1) and to those Rules when made.”.

Amendment of section 51

10 **10.** In section 51 (1) of the Principal Act, in paragraph (a) of the definition of “**Solicitor**” after “solicitor” (where last occurring), insert “or who acts or practises as a barrister of the Supreme Court and whose name is not on the roll of counsel kept by the Victorian Bar”.

Amendment of section 53

15 **11.** In section 53 (4) (c) of the Principal Act, for “Tribunal of its functions” substitute “the Board and the registrar of their functions”.

Subrogation of innocent employer

12. (1) After section 64A (1A) of the Principal Act insert—

20 “(1B) Sub-section (1) applies to a solicitor who is an employer of another solicitor, being an employer who has paid compensation to a person for loss suffered by that person from a defalcation committed by the employee solicitor as if, at the relevant time, the employer solicitor and the employee solicitor were members of a firm of solicitors.”.

25 (2) In section 64A (2) of the Principal Act, for “the last preceding sub-section” substitute “sub-section (1)”.

Amendment of Part V

13. (1) The Principal Act is amended as follows:

- 30 (a) In section 80 (1), for “Tribunal” substitute “Board”;
(b) In section 80 (3), for “Tribunal” substitute “Board”;
(c) In section 82 (1), for “Tribunal” substitute “Board”;
(d) In section 84 (1) (f), for “Tribunal” substitute “Board”.

(2) After section 84 (1) (h) of the Principal Act, insert—

- 35 “(ha) has been the subject of an order under section 14F (5) (c), (d) or (e);
(hb) has been the subject of an order under section 14H (1) (c) (i), (ii), (iii) or (iv);
(hc) is suspended under an order under section 14IA (4) or 14IB (1);
40 (hd) is bound by an undertaking under section 14IA (5);

(he) is not a fit and proper person to practise as a solicitor by reason of mental or physical infirmity;”.

(3) After section 84 (3) of the Principal Act insert—

“(4) If a person on whom notice has been served under sub-section (3) so requests within seven days or such extended time, if any, as the secretary allows, and the matter is not one in respect of which an application for a practising certificate has been refused under section 81 (2), the secretary must refer the matter to the Board. 5

(5) The Board shall hear, inquire into and decide upon the matter and may make any order or orders it could make upon hearing an allegation of misconduct.”. 10

(4) In section 85 (1) of the Principal Act, for “Tribunal” substitute “Board”.

(5) After section 85 (2) of the Principal Act insert—

“(3) The secretary may refer the application to the Board. 15

(4) The secretary must serve notice of the referral to the applicant either personally or by post addressed to the applicant at the applicant’s last known or most usual place of residence or business.

(5) If an application is not referred to the Board, the applicant may by notice served on the secretary personally or by post within 14 days after the application is made require the secretary to refer the application to the Board. 20

(6) The Board shall hear, inquire into and decide upon the matter and may make any order or orders it could make upon hearing an allegation of misconduct.”. 25

(6) In section 86 (1) of the Principal Act for “Tribunal” substitute “Board”.

(7) After section 86 (1) of the Principal Act insert—

“(2) The secretary must refer an application under sub-section (1) to the Board. 30

(3) The secretary must serve notice of the referral on the applicant either personally or by post addressed to the applicant at the applicant’s last known or most usual place of residence or business.

(4) The Board shall hear, inquire into and decide upon the matter and may make any order or orders it could make upon hearing an allegation of misconduct.”. 35

Practising certificates

14. After section 86 of the Principal Act insert—

Secretary may make referral to Board

“86A. (1) If it appears to the secretary— 40

(a) that an application for a practising certificate should be refused, otherwise than on the ground of non-compliance by the applicant with section 81 (1); or

- (b) that a solicitor is guilty of conduct described in section 84
(1) (a), (b), (c), (d), (e), (f), (fa), (g), (h) or (i)—

the secretary, instead of refusing the application or cancelling or
suspending a practising certificate held by the applicant under section
5 81 or 84, may refer the matter to the Board.

(2) The secretary must serve notice of a referral to the Board under
sub-section (1) on the solicitor personally or by post addressed to the
solicitor at the solicitor's last known or most usual place of residence
or business.

10 (3) The Board shall hear, inquire into and decide upon the matter
and may make any order or orders it could make upon hearing an
allegation of misconduct.”.

New section 87_{AA} inserted

15. After section 87 of the Principal Act insert—

15 **Person deemed to hold practising certificate in certain circumstances**

“87_{AA}. (1) A person—

- (a) whose practising certificate is cancelled or suspended by the
secretary or by order of the Board; or
20 (b) whose application for a practising certificate is refused by
the secretary or by order of the Board and who immediately
before the application was made—
(i) held a practising certificate which had not been cancelled
or suspended; or
25 (ii) was deemed to be the holder of a practising certificate
under this section—

pending the determination of the appeal or, where the person does not
appeal against the cancellation, suspension or refusal, within the time
limited by this Act, pending the expiration of that time, is deemed to
hold a practising certificate for the purposes of Part V unless the person
30 by whom or the body of persons by which the cancellation, suspension
or refusal is made or the Supreme Court on the appeal otherwise orders.

(2) Where—

- (a) a person to whom sub-section (1) applies appeals to the
Supreme Court against the cancellation, suspension or
refusal, and the cancellation, suspension or refusal is
35 affirmed on appeal; or
(b) a person to whom sub-section (1) applies does not appeal to
the Supreme Court against the cancellation, suspension or
the refusal—

40 the person is, after the decision on the appeal or the expiration of that
time (as the case may be), deemed not to hold a practising certificate
for the purposes of Part V unless the Supreme Court on the

determination of the appeal or (where the person has not appealed) the Board or the secretary otherwise orders.

(3) When making an order under this section that a person shall be deemed to hold or not to hold a practising certificate, the person or body making the order shall have regard to whether or not the first-mentioned person has paid the prescribed fee, if any, and the contribution to the fund payable by the person in respect of the person's application for a practising certificate and any levy payable by the person. 5

(4) Where upon an application for a practising certificate the applicant has paid the practising fee and contribution to the fund payable in respect of the application and the Board orders that the application be refused, that fee and contribution shall forthwith be returned to the applicant." 10

New section 87AB inserted 15

16. In Division 4 of Part V of the Principal Act, after section 87A insert—

Immunity

"87AB. No action lies against the secretary in respect of any decision made or act done by or under the authority of this Division." 20

Amendment of section 90

17. After section 90 (8) of the Principal Act insert—

"(9) No action lies against the secretary in respect of any decision made or act done by or under the authority of this section." 25

Amendment of section 95A 25

18. In section 95A (1) (b) of the Principal Act—

- (a) for "the Tribunal" (wherever occurring) substitute "the registrar or the Board"; and
- (b) for "Part III" substitute "Part IIIA".

Minor amendments 30

19. The Principal Act is amended as follows:

- (a) In section 58 (1), for "or 104GB" substitute ", 104O or 104T";
- (b) In section 83 (2), for "council" (where twice occurring) substitute "secretary"; 35
- (c) In section 95, for "council" (wherever occurring) substitute "secretary";
- (d) In section 104T, for "institute" substitute "council";
- (e) In section 107, for "council" substitute "Council of Legal Education". 40

Transitional provisions

20. (1) The Principal Act as amended by this Act applies to disputes and complaints relating to matters occurring before or after the commencement of this section.

5 (2) The Principal Act, in its application after the commencement of this section to matters occurring before that commencement, has effect as if references to “misconduct” or “standards breach” were references to “Misconduct” within the meaning of section 15 of the Principal Act as in force immediately before the commencement of this section.

10 (3) Where a complaint of misconduct was made under section 28 of the Principal Act before the commencement of this section—

15 (a) if a hearing has been held or has commenced, Part III of the Principal Act as in force immediately before that commencement continues to have the same operation and effect in relation to the complaint as it would have had if this Act had not been enacted; and

20 (b) if a hearing has not been held or has not commenced, Part III of the Principal Act (except section 27 (1), (2), (3), (4A), (4B) and (4C)) as in force immediately before that commencement, continues to have the same operation and effect in relation to the complaint as it would have had if this Act had not been enacted.

25 (4) For the purpose of sub-section (3) (b), Part III of the Principal Act has effect as if a reference to the Tribunal were a reference to the Board.

Statute law revision

21. (1) The Principal Act is amended as follows:

- 30 (a) In section 141 (17) for “1958” substitute “1986”;
- (b) In section 42 (1), after “unless” insert “the”;
- (c) In section 51 (1), in paragraph (a) of the definition of “**Practising public accountant**” for “under section 9 of the *Companies Act 1961*” substitute “within the meaning of the *Companies (Victoria) Code*”;
- 35 (d) In section 53 (11), for “provisions” substitute “provision”;
- (e) In section 53 (12), omit “for Continuing Education”;
- (f) In section 81A (1A) (b) (ii), for “he” substitute “the person”;
- (g) After section 84 (1) (i), insert “or”;
- (h) In section 88 (2) (a) (i), omit “Commissioners of the”;
- 40 (i) In section 92 (1), for “\$100” substitute “1 penalty unit”;
- (j) In section 95 (1), for “Empire” (where twice occurring) substitute “Commonwealth of Nations”;

(k) In section 96, for “Empire” (where twice occurring) substitute “Commonwealth of Nations”.

No 22/1988

(2) The *Legal Profession Practice (Incorporation) Act 1988* is amended as follows:

(a) In section 5 (2)— 5

- (i) in sub-paragraph (iv) for “(2) (b)” substitute “(2)”; and
- (ii) in sub-paragraph (v) for “(2) (b)” substitute “(2)”; and

(b) In section 7 (2) (g), after “solicitor” insert “(where first occurring)”; 10

(c) In section 7 (2), paragraph (h) is repealed. 10

Amendment of *Ombudsman Act 1973*

No 8414
Reprinted to No
40/1988

22. At the end of the Schedule to the *Ombudsman Act 1973* insert—

“The office of lay observer under section 14Q or 32F of the *Legal Profession Practice Act 1958*.”

Amendment of *Supreme Court Act 1986*—taxable costs 15

No 110/1986

23. (1) In section 61 of the *Supreme Court Act 1986*, for sub-section (5) substitute—

“(5) If a solicitor serves a bill of costs drawn in taxable form (whether on a request under sub-section (3) or otherwise)—

(a) the solicitor must not commence any proceeding to recover costs until one month after service of the bill of costs on the party to be charged; and 20

(b) where the solicitor has previously served a bill of costs drawn in lump sum—

(i) if the bill of costs in taxable form exceeds the bill in lump sum, the solicitor is bound by the amount and matters stated in the bill drawn in lump sum; 25

(ii) if the bill of costs in taxable form was drawn on the request of a party under sub-section (3) and is not less than the bill in lump sum and was not drawn by the solicitor or a partner or employee of the solicitor, the party is liable to pay the reasonable costs incurred by the solicitor in having the bill drawn in taxable form.” 30

(2) Section 61 (5) of the *Supreme Court Act 1986* as amended by this section applies to a bill of costs served on or after the commencement of this section. 35