REPORT ON THE REVIEW OF THE PUBLIC NOTARIES ACT 1997

New South Wales Attorney General's Department
December 2004

SUMMARY

The NSW Attorney General's Department (the **Department**) has reviewed the *Public Notaries Act 1997* ("the Act") in accordance with section 21 of the Act which requires a five year review to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

As part of the review process, the Department invited key stakeholders to make submissions in relation to the review. The very limited case law interpreting the Act was reviewed. Interstate legislation regulating the appointment of public notaries was reviewed and compared to the current NSW Act.

The review concludes that generally the policy objectives of the Act remain valid and that the terms of the Act remain appropriate for securing those objectives. Recommendations are made for amendment to section 7 and a minor amendment to section 8.

All stakeholders contacted expressed general satisfaction with the current working of the Act. Two submissions were received suggesting significant change to section 11. For reasons detailed in this report it is recommended that this suggestion not be supported.

1. INTRODUCTION

1.1 Reason for the review

Section 21 of the Act requires the Attorney General to review the Act to determine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

1.2 Conduct of the review

In March 2004, the NSW Attorney General's Department wrote to the following key stakeholders, inviting them to make a submission in relation to the review:

- the Bar Association of NSW;
- the Chief Justice of NSW;
- the Law Society of NSW;
- the Society of Notaries;
- the Legal Practitioners Admission Board.

In addition, an article was published in the Law Society Journal in April 2004, inviting submissions from members of the legal profession. In August 2004 further submissions on specific issues were invited from the Law Society and the Society of Notaries.

This report is the outcome of the review process and takes into account the submissions and comments received.

2. BACKGROUND TO THE INTRODUCTION OF *THE PUBLIC NOTARIES ACT 1997*

2.1 The position prior to 1997

The office of Notary Public has its origins in Ancient Rome. Upon the decline of the Roman Empire, the power to appoint Notaries was exercised by the Pope in Rome. The Pope subsequently delegated the power to appoint Notaries in England and Wales to the Archbishop of Canterbury.

In 1533, during the reign of Henry VIII, the King assumed power to appoint Notaries. He delegated the authority to the Archbishop of Canterbury. The Master of Faculties was appointed by the Archbishop of Canterbury to conduct the appointment of Notaries. This remains the method of appointment of notaries in England today. It was the position in the Australian States until the enactment of statutory schemes in all states except Queensland. Appointment of notaries in Queensland remains the province of the Archbishop of Canterbury.

In New South Wales *The Public Notaries Act 1985* ("the 1985 Act") established for the first time a statutory scheme for the appointment of public notaries. Existing public notaries appointed by the Archbishop of Canterbury were automatically appointed notaries under the statutory scheme.

The role of public notaries in many foreign jurisdictions is of even higher status and significance than in Australia. Continued international recognition of the acts of Australian Notaries was and remains the critical policy objective underlying the Act.

2.2 The policy objectives of the *Public Notaries Act 1997*

During the Attorney General's second reading speech the Honourable R.D.Dyer representing the Attorney General set out the policy objectives of the legislation as being:

- "The proposed new legislation applies competition policy to the system for the appointment of notaries and charging of costs for notarial services. ".
- “The provisions of the proposed new Act update requirements in relation to regulation of notaries and provide for a simplified system of appointment.”
- “It is proposed that the Legal Practitioners Admission Board be responsible for the admission of notaries. This approach is consistent with the proposal contained in option one of the 1996 discussion paper and the underlying rationale of the reforms. That is, that notarial work is simply another, specialised area of work undertaken by legal practitioners.”
- “Because of the international significance of notarial work, it is important to ensure that only competent legal practitioners practise as notaries and that applicants for appointment receive adequate training in notarial work.”
- “The proposed legislation also provides for a prohibition against legal practitioners carrying out notarial acts for their employer or related entities, or clients of their employer. The exception is where the employer of a notary is a solicitor or solicitor corporation, or such other body as may be prescribed. This prohibition is designed to prevent any conflict of interest on the part of a public notary, which may also potentially threaten the independence of notaries and damage Australia's international reputation both commercially and in other respects.”

The Public Notaries Bill was passed with bi-partisan support in Parliament.

3. OBJECTIVE AND TERMS OF PUBLIC NOTARIES ACT 1997

A legislative statement of the Act’s objective is set out in the long title of the Act, namely:

> *"*An Act to provide for the appointment and regulation of the practice of public notaries; to repeal the *Public Notaries Act 1985”.*

The key provisions of the Act are summarised in Appendix A to this report.

4. DISCUSSION

There has been no judicial interpretation or criticism of the Act since its assent in November 1997. Similarly there has been no judicial consideration of the role of public notaries, in this State, since that time.

In these circumstances it may be inferred that the legislation has generally achieved its primary purpose of maintaining and improving the already high standard of notarial practice in this state.

Since the passage of the Act in 1997, similar legislation has been enacted in Victoria *(Public Notaries Act 2001*) and the Northern Territory (*Public Notaries Act 2001*). Legislation was already in place in the Australian Capital Territory (*Notaries Public Act 1984*), Western Australia (*Public Notaries Act 1979*), Tasmania (*Notaries Public Act 1990*) and South Australia (*Legal Practitioners Act 1981* sections 91-94). In Queensland the common law system of appointment remains in place.

Persons eligible for appointment as public notaries

In South Australia and the Northern Territory the legislation allows for the appointment of persons who are not legal practitioners as public notaries (s 91 *Legal Practitioner's Act 1981(SA)*; s 4 *Public Notaries Act 2001(NT)*).

However, *In an application by Marliyn Reys Bos to be a Public Notary* (2003) SASC 320 12 September 2003, Justice Debelle of the South Australian Supreme Court in refusing an application by a former notary public from the Philippines, who while holding a law degree in the Philippines, was not admitted to practice in Australia said at paragraph 31:

"A person who is not a legal practitioner should not be admitted as a public notary except in exceptional circumstances"

and further at paragraph 33:

"In my view the applicant for admission who is not a legal practitioner must satisfy the court that he or she is of good character and has by reason of experience or qualification a wide knowledge of legal and commercial affairs."

Justice Debelle urged legislative reform, in South Australia, so as to require public notaries to be legal practitioners, to hold insurance and to undertake a course of study such as are conducted by the College of Law in New South Wales.

This decision supports the maintenance of the current provision in NSW requiring a public notary to be a barrister or a solicitor of 5 years standing.

Restrictions on public notaries undertaking work on behalf of their employer or their employer's client in section 11 of the Act.

The insertion of section 11 in the Act appears to have been in response to the decisions of Powell J *In the Matter of the Public Notaries Act 1985 – Applications of Fitzpatrick and Partington* 18 NSWLR 11 6 December 1989 and McLelland CJ in Equity *In the Application of Michaelis* 42 NSWLR 218 6 August 1997. The courts expressed concern as to possible conflicts of interest arising for notaries employed by corporations.

His Honour Justice McClelland reviewed the practice in those States that had passed legislation and the practice and law overseas (*Michaelis p223-224*).

He found, on balance, that his review of overseas and interstate practice confirmed his view "that it is undesirable for a public notary to perform notarial acts in which his employer has an interest including the certification of the authenticity of the employer's documents'' (*Michaelis p 224*).

No similar provision to section 11 exists in the current legislation in any other Australian State. As a matter of general principle it is desirable that the rules regulating the practice of notaries be consistent in different jurisdictions of the Commonwealth.

Whilst other jurisdictions in Australia do not have an equivalent to section 11, they generally require a "public need" to be established prior to the appointment of a public notary. (South Australia at common law see *Application of Bos* (2003) SASC 320; Western Australia *Public Notaries Act 1979 9(WA)* s7 (2)(e); Tasmania *Notaries Public Act 1990 (TAS)* s5 (1); Northern Territory *Public Notaries Act 2001(NT)* s4 (2)(b)).

Two submissions suggested change to this provision on the basis that in-house corporate lawyers who are qualified as notaries should be able to act as notaries for their employer corporation and the current restriction on them doing so leads to added cost and inconvenience for the employer. It was also submitted that corporate lawyers were inappropriately disqualified from performing work for their corporate employer when their position was compared to a private practitioner (practising as an employed solicitor) whose principal has a single or major corporate client for whom the employed solicitor performs notarial work. It was submitted that a notary should be able to carry out the work of their employer or a client of their employer if:

- the notary has a right of private practice
- the notary holds a practising certificate as a legal practitioner
- the notary holds appropriate insurance
- the notary conducts his notarial practice in a place exclusively set aside for the purpose and accessible to the public
- the work is non-contentious work.

While it is conceivable that a conflict of interest could equally arise in the case of a private practitioner certifying documents on behalf of a client, who may be a major or only client, of a principal solicitor, the matter is really one of perception as identified by McLelland CJ in *Michaelis* at 221. Perception is of critical importance due to the need for notarial acts to be recognised internationally.

The appointment and regulation of public notaries is directed to the "public" nature of the office not the proper but private interests of individuals or corporations.

Section 11 and the policy purposes for its inclusion were referred to in the Minister's second reading speech and elicited no controversy or opposition. It is not recommended that there be any change to section 11.

Procedure for removal of a Public Notary from the roll for proven misconduct

It has become apparent, in the course of this review, that there is a flaw in the legislation in relation to the power to remove a public notary from the roll.

Section 7 of the Act sets out the bases upon which a public notary can be removed. These are:

- at the request of the public notary (section 7(3))
- if the person ceases to be a barrister or solicitor (section 7(4))
- if an order is made under section 171C(1), (f1) or (2)(f) of the *Legal Profession Act 1987* that a barrister or solicitor who is a public notary cease to accept instructions. (section 7(5)).

No other statutory method of obtaining the removal of a public notary is provided.

In *Law Society of New South Wales v. Shad [2002]* NSWADT 236, Mr Shad a solicitor and public notary was found guilty of professional misconduct on two grounds.

These grounds related, in general terms, to falsely certifying that he had witnessed signatures to a mortgage, that he swore a false affidavit in Family Court proceedings relating to dealings with a property and that he deliberately falsified documents in relation to these dealings and annexed them to his affidavit.

This conduct arose out of Mr Shad's practice as a solicitor. He was not undertaking notarial work.

He gave evidence of his general practice as to witnessing documents. This practice was totally contrary to proper practice as a solicitor and public notary.

It appears that at no time was the Administrative Decisions Tribunal made aware that Mr Shad was a public notary.

He was fined $35,000 and ordered to pay the Law Society's costs.

It appears no orders were sought, pursuant to section 171C(2)(f) of the Legal Profession Act 1987, that he cease to accept instructions in relation to notarial work.

Accordingly no such orders were made and he remains on the roll of public notaries.

There is no clear statutory power for any person, the Registrar of Public Notaries, the Legal Services Commissioner or the Council of the Law Society to approach the Administrative Decisions Tribunal or the Supreme Court to seek the removal of a public notary in these circumstances.

It is arguable that there is an inherent power in the Supreme Court to remove a person from the roll of solicitors and of notaries. *In Law Society of South Australia v. Nicholson (No 2) [2004]* SASC148, Justice Gray at paragraphs 7 – 12. outlined the general principles of the Court's inherent jurisdiction:

> "The superior court in each state or territory has an inherent jurisdiction to exercise disciplinary powers over lawyers for the purpose of ensuring the honourable conduct of the profession. By admitting a person as a legal practitioner, the Court is declaring the person to be fit and proper to practise. The Court has a corresponding duty to protect the public and to safeguard the reputation of legal practitioners by disciplining or striking off those who are not fit to practise. Just as the Court has the power to admit, discipline and strike off legal practitioners, it has the power to admit, discipline and strike off public notaries.
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> The Court has a parallel duty to protect the public from public notaries who are not fit to practise and has an inherent jurisdiction to suspend public notaries in appropriate cases. By virtue of section 92 of the Legal Practitioners Act, this court is the custodian of the Roll of Notaries in South Australia.
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> The inherent jurisdiction to suspend public notaries was recognised in In re Champion where the Master of Faculties concluded:
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> …" I have as Master of Faculties an inherent power to deal with the the roll of public notaries of which I am the custodian, and that for a proper cause - a cause likely to interfere with the proper discharge of

> the functions of a public notary - it is competent for me as Master of the Faculties to remove the name of a public notary from the roll".
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> The following comments were also made:
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> "Trustworthiness being thus the basis of the position of a public notary, I feel that to allow to remain on the roll of public notaries a notary who has been guilty of misconduct such as that of Mr. Champion in the present case - misconduct in relation to property of which he had been appointed administrator - and in whose trustworthiness it is impossible any longer to believe, would, when I have the power to strike him off the roll, not be right on my part."
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> There is also an implied statutory power to suspend a public notary. It is a necessary incident of the court's statutory power to admit public notaries contained in section 91 of the Legal Practitioners Act. It is a well established principle of statutory construction that a statutory power will be construed as impliedly authorising those acts which can be fairly described as incidental or consequential to the power itself.
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> Further, the Court has the injunctive power to restrain a person from acting as a public notary. Section 29(1) of the Supreme Court Act 1935 (SA) authorises the Court to grant an injunction 'in all cases in which it appears to the Court to be just or convenient to do so".

This view is supported by section 171M of the *Legal Profession Act (1987) (*NSW*)*, which specifically reserves to the Supreme Court an inherent power and jurisdiction with respect to the discipline of legal practitioners.

While it is arguable that the Supreme Court has the inherent power to suspend or remove a notary public from the roll it is recommended that an amendment to the Act should be made to remove any doubt.

In South Australia by the *Legal Practitioners Act (SA) 1981 s*ection 93(1), the Australian Capital Territory by the *Notaries Public Act (ACT 1984)* section 13(1), the Northern Territory by the *Public Notaries Act (NT 2001)* section 8(1) and in Western Australia by the *Public Notaries Act (WA) 1979* section 16, courts are given broad powers to remove public notaries from the roll upon a proper basis, relating to their conduct, being shown.

It is also recommended that the Registrar of the Legal Practitioners Admission Board ("the Registrar") have power to remove a public notary from the roll at the request of that notary without the necessity to approach the Supreme Court.

The Legal Practitioners Admissions Board expressed concern as to the lack of power to remove a notary from the roll for non-compliance with *The Public Notaries Appointment Rules ("*The Rules*"),* specifically rule 12 (b). It is recommended that there be a specific power, vested in the Supreme Court or the Administrative Decisions Tribunal ("ADT") to remove such a notary from the roll for non-compliance with the Rules. Rule 12(c) authorises the Registrar to approach the Supreme Court to remove a notary from the roll for failure to comply with rule 12(b). There is however no specific power in the Act for the Supreme Court to make such an order. This requires clarification and it is recommended that a specific power be provided in section 7 of the Act.

An alternative approach would be to amend the Act to provide that practising as a notary having wilfully failed to comply with rule 12(b) would constitute professional misconduct within the meaning of s127 1(c) of the Legal Profession Act. This is the approach adopted in s 25(1) of the

Legal Profession Act. This would require an amendment to the Act and a minor amendment to s127 1(c) the Legal Profession Act.

The Society of Notaries of New South Wales Inc and the Law Society of NSW do not support change to the legislation as to the conduct of notaries.

It is recommended that, to maintain the high reputation of notarial acts, the Act be amended so that both the Administrative Decisions Tribunal and the Supreme Court have wider power to remove a public notary from the roll for proven misconduct or non compliance with the Rules.

Publication of the roll of public notaries

Currently the Law Society of New South Wales by arrangement with the Registrar publishes a roll of public notaries. This is pursuant to a power provided in Section 8 of the Act. The Legal Practitioners Admissions Board seeks the power to publish the roll. While all notaries must be legal practitioners from 1 July 2004 they need not be members of the Law Society.

In these circumstances it is more appropriate that the Board publish the roll. The Society of Notaries of New South Wales Inc and the Law Society of NSW do not oppose this change.

5. CONCLUSION

Generally, the submissions received support the continued operation of the Act in its current form.

It is recommended that section 7 of the Act be amended, by the insertion of a provision, giving wider powers, to appropriate persons, to approach the Administrative Decisions Tribunal and the Supreme Court to seek the removal of a person from the roll of notaries.

It is recommended that section 7 of the Act be amended to enable the Registrar to remove a public notary from the roll upon request being made by that notary.

It is recommended that section 8 of the Act be amended to make clear that the Registrar can publish a roll of public notaries.

It is not recommended that there be any amendment to section 11 of the Act.

APPENDIX A

KEY TERMS OF THE *PUBLIC NOTARIES ACT 1997*

Section 5 – Eligibility for Appointment

Section 5 provides that a person cannot be appointed as a public notary unless that person is a barrister or solicitor of not less than 5 years standing.

Section 6 – Power of Supreme Court to Appoint Public Notary

Section 6(1) provides that the court may appoint and enrol as a notary a person approved by the Legal Practitioners Admissions Board (s6 (2)).

Section 7 – Removal from the Roll of Public Notaries

Section 7 empowers the registrar to remove a person from the roll at their request (s7 (3)). It requires the registrar to remove a person from the roll if they cease to be a barrister or a solicitor (s7 (4)) or if orders are made against the person pursuant to s171C (1)(f1) or (2)(f) of the *Legal Profession Act 1987* ("the LP Act") (s7 (5)).

Section 8 – Power to publish roll of Public Notaries

Section 8 empowers the Law Society of New South Wales and the Bar Association of New South Wales by arrangement with the Registrar of the Legal Practitioners Admission Board to publish the roll of public notaries.

Section 9 – Legal Practitioners Admission Board may make rules in relation to Public Notaries

Section 9 empowers the Legal Practitioners Admission Board to make rules as to the qualifications (s9(a)), training (s9(b)) and appointment (s9(c)) of public notaries.

Section 10 – Appeals against decision of Legal Practitioners Admissions Board

Section 10 provides a full right of appeal against a decision to refuse to approve a person as a suitable candidate to the Supreme Court.

Section 11 - Employed Public Notaries not to carry out certain work

Section 11 prohibits a public notary from carrying out work for the public notary's employer or a client of that employer or a related corporation**.** The prohibition does not apply to a public notary employed by a solicitor or "incorporated legal practice" within the meaning of the *Legal Profession Act 1987.*

Section 12 – Fees for notarial work

Section 12 provides that the Society of Notaries may prepare and publish in the Government Gazette a scale of indicative fees for the performance of notarial work.

Section 13 – Offences

Section 13 (1) creates offences of a person not being a person on the roll of notaries, advertising or holding out that they are entitled, qualified, able or willing to practise as a public notary.

Section 13 (2) creates an offence of a person, named on the roll, while not being a barrister or solicitor, practising as a public notary.

Section 14 – Complaints & Discipline provisions of the *Legal Profession Act 1987* to apply to public notaries

Section 14 provides that Part 10 of the *Legal Profession Act 1987*, which relates to complaints and discipline against legal practitioners, is to apply to public notaries in the same way as it applies to legal practitioners.

Schedule 1 Section 3

This section provides that persons appointed as a public notary under the 1985 Act are taken to have been appointed under this Act and to have satisfied the requirements under this Act for appointment.