DISCIPLINE OF THE QUEENSLAND LEGAL PROFESSION

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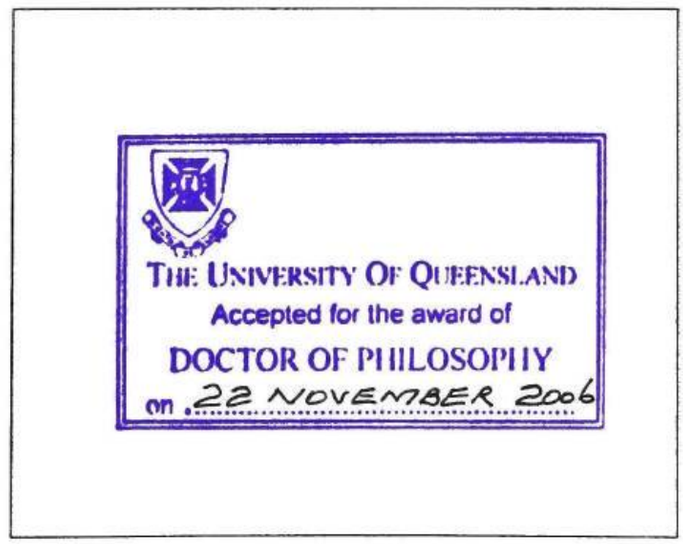
Linda Ruth Haller
BA, LLB (Monash), LLM (Queensland)

TC Beirne School of Law, University of Queensland



CANDIDATE'S STATEMENT OF ORIGINALITY

The work presented in this thesis is, to the best of my knowledge and belief, original and my own work, except as acknowledged in the text, and the material has not been submitted, either in whole or in part, for a degree at this or any other university.

Candidate: L Haller Linda Ruth Haller

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Principal Advisor: Reid Mortensen

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I have a number of people to thank. Without their support, this thesis may never have been completed. I began the thesis while at the University of Queensland. There, I had the support of numerous colleagues, including Suri Ratnapala, who showed me the same generous encouragement he has shown to so many junior academics. Much of the thesis builds on data which I collected, analysed and published as 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis'. I am grateful for the assistance of the Queensland Law Society in that project, as well as the statistical wizardry of Heather Green. Earlier versions of parts of the thesis have already been published, as listed below, and the comments of anonymous referees assisted in raising the standard of the final thesis . I am now at Melbourne Law School, and the support of my colleagues here has allowed me to finally bring the project to completion. My husband Chris, children Britt and Scott and mother Helen have been eagerly awaiting the completion of this PhD for a very long time. Scott presented me with a teddy bear wearing a PhD bonnet six years ago, thinking my task was almost done. Now it finally is, and the teddy can sit on my desk with pride.

Francesca Bartlett was appointed as my associate advisor less than six months ago but hit the ground running. I thank her for the time and energy she committed to the final stages of the thesis. Her insightful comments have improved the coherence of the final work. The biggest thanks of all must go to my principal advisor, Reid Mortensen, who has been with the project from its inception. I have been very fortunate to have had such a wonderful advisor. Reid encouraged me when I was flagging, provided direction when I lost my way, and remained firm when I was tempted by shortcuts. The journey has been a much more satisfying one as a result.

I dedicate this thesis to my late father Ern Anderson - my rock of support and chief collector of press clippings.

ABSTRACT

The thesis compares legal and social theories about the discipline of lawyers with an examination of the actual experience in Queensland. It closely examines rationales for discipline contained in case law and legislation. While a tension exists between the Supreme Court and the legislature - as the court has continued to enforce a much narrower common law view of discipline - both emphasise that an individual lawyer is only to be disciplined if this is necessary to protect the public. Reputational concerns are not sufficient to justify action. The thesis then contrasts this with the social theories of Larson (*The Rise of Professionalism: A Sociological Analysis*) and Halliday (*Beyond Monopoly*). A close reading of their work reveals a prediction that the profession will use professional discipline to gain external legitimacy – to enhance its reputation - not to protect the public.

The thesis then examines the role that the Queensland legal profession *has* played, both in establishing disciplinary structures and in the use of those structures, to look for evidence of the profession taking initiatives to protect the public, even when this was unlikely to enhance, or could even harm, its reputation. Specific chapters are devoted to the orders made by disciplinary tribunals in Queensland, given that selective use of strike off orders is more likely to enhance the profession's reputation than less decisive measures (such as suspensions and fines). The degree to which publicity has enhanced or detracted from any legitimation project is also examined. The thesis documents strong differences in the two branches of the Queensland legal profession and considers possible reasons for this, as well as the utility of the social theories referred to previously.

Even stronger than the courts' emphasis of protection not reputation as the justification for discipline, has been their rejection of punishment. The thesis concludes that a higher degree of retribution is present than has been conceded. Retribution can be seen in the types of orders imposed, the reasons given, and the personal factors used to mitigate orders. The thesis considers possible reasons for the presence of this retributive approach, and its possible interplay with protection and legitimation.

LIST OF PUBLICATIONS AND PRESENTATIONS

A: PUBLICATIONS BY THE CANDIDATE RELEVANT TO THE THESIS

Haller, Linda, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152-178.

Haller, Linda, 'Dirty Linen — The Public Shaming of Lawyers' (2003) 10 *International Journal of the Legal Profession* 281-313.

Haller, Linda, 'Waiting in the Wings: the Suspension of Queensland Lawyers' (2003) 3 *QUT Law and Justice Journal* 397-421.

B: ADDITIONAL PUBLICATIONS BY THE CANDIDATE RELEVANT TO THE THESIS BUT NOT FORMING PART OF IT.

Haller, Linda, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45.

Haller, Linda, 'Lawyers and the Third Dimension: A Solicitor v The Council of the Law Society of New South Wales' (2004) 23 *University of Queensland Law Journal* 211.

Haller, Linda, 'Imperfect Practice under the *Legal Profession Act 2004* (Qld) (2004) 23 *University of Queensland Law Journal* 411-434.

Haller, Linda, 'Smoke and Mirrors: When Professional Discipline May Cause Harm' (2005) 8 *Legal Ethics* 70-86.

Haller, Linda, 'Discipline v Regulation: Lessons from the Collapse of Tasmania`s Legal Profession Reform Bill 2004' (2005) 12 *E Law - Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v12n1_2/Haller12_1.html> at 1 March 2006.

TABLE OF CONTENTS

CHAPTER THREE

LEGITIMATION

Chapter Four

Evolution of Legal Disciplinary Structures in Queensland

CHAPTER FIVE

INCAPACITATION

CHAPTER SIX

DISCIPLINARY FINES

CHAPTER SEVEN

PERSONAL FACTORS

CHAPTER EIGHT

PUBLICITY

CHAPTER ONE

INTRODUCTION

1.1 AIMS

I have a number of aims in this thesis. My primary aim is to determine the role played by the professional discipline of lawyers in Queensland. The legal profession in the State of Queensland, Australia, has a number of features in common with professions in other Australian States, as well as with New Zealand (a jurisdiction of comparable size) and England (an unusually large jurisdiction in terms of population and the number of lawyers). The findings of this thesis are therefore likely to be of relevance in those places. They are also likely to be useful in jurisdictions where the structure of the profession is less similar, just as the findings of studies into lawyers and lawyer discipline in particular jurisdictions of the United States[1] and Canada[2] have been later used in research throughout the common law world.

[1] Jerome Carlin, *Lawyers' Ethics; a Survey of the New York City Bar* (Russell Sage Foundation, New York, 1966); Terence Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (University of Chicago Press, Chicago, 1987); Michael Powell, 'Professional Divestiture: The Cession of Responsibility for Lawyer Discipline' (1986) *American Bar Foundation Research Journal* 31.
[2] Robert Evans and Michael Trebilcock, *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (Butterworths, Toronto, 1982).

One criticism of professional disciplinary systems in many jurisdictions has been that they are used by the legal profession to justify its privileged position, without any true commitment to protecting the public.[3] In the thesis I will consider whether this criticism is justified in Queensland. The claim will be informed by a secondary aim of my thesis – to consider the degree to which disciplinary tribunals and courts in Queensland have focused on censure or retribution – rather than protection - when imposing disciplinary orders. A third important theme running through the thesis is the tension which has existed between Queensland legislatures and regulators in determining the proper scope of discipline. Finally, I explore, and consider reasons for, differences between the discipline of barristers and solicitors in Queensland.

1.2 Professional Discipline Merely to Enhance the Profession?

In Chapter Three I explore the argument that disciplinary systems tend to become a part of a legal profession's 'professional project'. I give particular attention to the work of Magali Larson,[4] as her work is often cited as the most comprehensive assessment of how professions engage in such a project, at the expense of the public interest. I explore a number of limitations and flaws of Larson's theory. I also consider the work of Terence Halliday, who appeared to contradict Larson, and claimed to provide evidence of professions acting beyond the interests of its members.[5] However, as I explain in that chapter, a closer examination of Halliday's work shows that, while his claims may be true

[3] For instance, Richard Abel, *The Legal Profession in England and Wales* (Blackwell, Oxford, 1988); Jerome Carlin, above n 1.
[4] Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, Berkeley, 1977).
[5] Halliday,above n 1.

in regard to some areas of professional endeavour, he was not making such a wide claim in relation to professional discipline.

In subsequent chapters I attempt to apply these theories to the experience in Queensland. In Chapter Four I examine how disciplinary bodies have evolved, to see whether there is evidence of the profession acting against the interests of its members and in the public interest. In Chapter Five I explain why, if the profession was using discipline as part of a 'professional project'[6] to legitimate the profession, strike offs would be the most common form of order. Suspensions would be used only rarely, because they send unclear messages to the public. I then look at the practice of the disciplinary tribunals and courts in the imposition of strike off orders and suspensions and consider the implications for any theory of legitimation. In Chapter Six I consider fines, note the frequency with which the disciplinary tribunal (but not the court) has used fines when disciplining solicitors, and consider whether the tribunal's high use of fines can be explained as part of a 'professional project'.

If the profession is using discipline to send particular messages to the public, then the relationship between disciplinary proceedings and the mass media is critical. I explore this relationship in Chapter Eight, where I also suggest that a professional project would dictate that only limited cases, in which harsh disciplinary action has been taken to expel a person from the profession, should be publicised. Cases which portray the profession as ineffective in its attempts to self-regulate, or suggest that too many unethical or incompetent lawyers remain in practice, would not be publicised. I then compare this

[6] See definition below section 3.2.

hypothesis with the experience in Queensland. I document the very different experiences and practices of the two branches of the profession, and consider whether this could be because the two branches have been at different stages of a 'professional project', and so had differing needs in the use of publicity.

1.3 Discipline as Prevention or Censure?

1.3.1 *Why Doubts About Protection Arise*

The typical orders imposed by disciplinary tribunals are strike off orders, suspensions, and fines.[7] As I explain in Chapter Six, legislation in Queensland allows for disciplinary fines of up to $100,000.[8] This immediately invites connotations of criminal punishment. Despite this, the courts have consistently stated that the primary aim of discipline is to protect the public, not to punish lawyers. I document the attitude of the court in Chapter Two. Clearly, the presence of monetary penalties in a system focused on protection raises doubts as to how punishment can be avoided, and closer examination is warranted. I do this in Chapter Six. But it is not only in the chapter on fines in which I raise doubts about the extent to which discipline aims to protect and not punish. I return to this theme in a number of other chapters. For instance, even though I conclude in Chapter Two that the courts have overwhelmingly reaffirmed protection as the primary purpose of discipline, I also consider judicial comments which have been retributive in tone.

[7] Each of these are described in more detail below section 1.8.
[8] Below section 6.2.1.

In Chapter Five I consider evidence that some solicitors were suspended because the tribunal did not consider their misconduct to be sufficiently 'culpable' – sufficiently dishonourable or disgraceful - for a strike off order to be made. In Chapter Seven I look more closely at a number of personal factors which disciplinary tribunals and courts have considered as reducing the 'culpability' of misconduct. Culpability is a central concern of retribution – and does not relate as significantly to protection. A proper understanding of the distinction between protection and culpable retribution requires an explanation of the various ways in which the disciplinary system could protect the public, and the various ways in which it could punish transgressing lawyers. Much of my discussion in the following section draws from the debate in criminology as to whether criminal punishment should censure or prevent harm.

1.3.2 *How do Disciplinary Orders Vary from Criminal Sentencing?*

Before looking at the censure-prevention debate more closely, it should be acknowledged that discipline claims to be something *other* than criminal in nature – although sometimes it is described as 'quasi-criminal'. I consider much of that argument in Chapter Six. For the moment, let's assume all the possible ways in which a disciplinary system could protect the public, regardless of whether similar features appear in criminal sentencing. First, the public can be protected if an individual who is likely to cause harm is removed from legal practice. Second, the public is also protected if steps are taken to rehabilitate lawyers who have been found guilty of misconduct. Third, the public is protected if disciplinary action deters others from similar conduct in the future. These three features

of a disciplinary system are also considered valid aims of punishment for the commission of a criminal offence. They are also forward-looking in nature – by incapacitating, rehabilitating or deterring, the disciplinary action aims to prevent, or at least reduce, future harm to the public. Disciplinary action could also protect the public by compensating those who have suffered as a result of lawyer misconduct. While compensation has not been a major theme in lawyer discipline, it has figured in a handful of cases,[9] and is now promoted in the relevant legislation.[10] However, its place in discipline remains a tenuous one. Civil litigation, insurance and fidelity funds remain the primary means of compensating loss. In addition, regulators have rarely brought disciplinary proceedings where the complaint appeared co-extensive with a civil claim for negligence, instead focusing on cases where dishonesty could be established.[11] This has reduced the need for tribunals or courts to consider their compensatory role.

Traditionally, compensation has played no role in criminal sentencing.[12] The criminal law has considered this more appropriately dealt with by private civil action. Compensation is one point of distinction between criminal sentencing and discipline. In addition, of all the ways in which discipline can protect the public mentioned so far, only compensation is backward-looking, in the sense that it aims to redress what has happened in the past.

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[9] Such as where a solicitor was suspended until money was repaid to a client (*Re Batho* (1868) 1 QSCR 196; *Re Knapp* (1878) BCR, 21 May 1878), or where the court ordered that a solicitor *not* be suspended, because this would inhibit his ability to repay $46,420 owing to clients. Instead the solicitor was fined $25,000 (*Re X* (1999) 5 Disciplinary Action Report 24, 26).

[10] *Legal Profession Act 2004* (Qld) s 288.

[11] See below section 2.4.3.4.

[12] This may be changing where restorative justice principles are being implemented. See Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 *Modern Law Review* 228-50, excerpted in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, Hart Publishing, Oxford, 1998).

Criminal punishment is thought to be a mixture of backward-looking and forward looking elements – often described as retribution or censure (backward looking) and prevention (forward looking). The primary disagreement among theorists concerns the 'general justifying aim'[13] of punishment and the appropriate relationship between retribution and prevention when determining individual sentences.

So, incapacitation, rehabilitation and deterrence each have a role in both discipline and criminal sentencing. Compensation has played only a minimal role in discipline and criminal sentencing. So when it is said that discipline aims to protect and not punish, what does this mean? What unique aspect of 'punishment' is being excluded from discipline? It is suggested that it could only be retribution which is being excluded.

1.3.3 *Retribution*

Retribution forms an established part of criminal sentencing. It is not claimed that retribution will protect the public by preventing future crime. Retribution is justified on other grounds. The term 'retribution' is not as commonly used today. Instead, some theorists prefer to talk in terms of 'just desert', 'desert theory proportionality' or 'censure'.[14] It is sufficient for our purposes to use the more traditionally understood term 'retribution'. The term will be used here to describe any approach which believes the primary aim of punishment is to respond to the 'wrongness' of past conduct. Importantly

[13] Adopting the term introduced by Hart: HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford, 1968).
[14] Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (Oxford University Press, Oxford, 2005) 1, 13; Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (Northeastern University Press, Boston, 2nd ed, 1998) 141.

for the purposes of this thesis, is to note that retribution is backward looking, and makes no claim about how the punishment will reduce misfeasance rates in the future. The harshness of the retributive response depends on how culpable the conduct was. Culpability is determined by the seriousness of the conduct – the intentions of the perpetrator and the degree of harm suffered. A retributive response directs itself to the perpetrator as a moral being, capable of moral deliberation.[15] Therefore, the degree of response will vary depending on intentions - was the conduct deliberate, reckless or accidental,[16] premeditated or spontaneous; was the perpetrator indifferent to the consequences of their act; or was the perpetrator of diminished capacity?[17] Harsher punishment will also be imposed if – regardless of the perpetrator's intentions – the conduct caused greater harm. This is why the criminal law imposes a greater sentence for murder than for attempted murder, or for theft of $1 million than for theft of chewing gum.[18]

1.3.4 *Greater Deterrence, or Greater Retribution?*

The most obvious explanation for a repeated insistence by disciplinary courts and tribunals that they are protecting and not punishing, is that they must justify harsher treatment than would be warranted in the criminal jurisdiction – presumably because the need for deterrence is so great that fewer factors which would have reduced culpability in

[15] von Hirsch and Ashworth, *Proportionate Sentencing*, above n 14, 17.
[16] The criminal law will not normally punish acts which lack *mens rea*, but some acts are deemed criminally negligent by legislation.
[17] von Hirsch and Ashworth (eds), *Principled Sentencing*, above n 14, 186.
[18] Retribution draws the notion of harm more broadly than physical or economic harm, and includes harm to an individual's potential standard of living and sense of well-being, such as through humiliation or breach of privacy: ibid 187.

the *criminal* setting can be taken into account.[19] Some doubts about the appropriateness of such an approach are raised by research in penology which questions the general effectiveness of deterrence,[20] although it is possible that lawyers might be more easily deterred than the general community – a point I consider in Chapter Six. In subsequent chapters I also consider another possibility - that insistence upon harsher treatment is not linked to a need for greater deterrence but – paradoxically - to a perceived need for greater *retribution*. This is despite the fact that this is the very thing which the courts deny.

The notion of retribution within professional discipline has intuitive appeal. One of the earliest forms of disciplinary response - a 'censure' - has strong moralistic overtones.[21] Another disciplinary response, the 'reprimand', is a sharp form of censure.[22] Discipline was established so as to uphold the high moral standards of the legal profession as one of the most honourable and noble professions, 'in which every member, of whatever standing, may be trusted to the ends of the earth'.[23] It has principally concerned itself with responding to conduct considered 'disgraceful or dishonourable'[24] – ie, which is culpable. Robin Duff considered retribution to be a communicative act which hoped for

[19] von Hirsch and Ashworth, *Proportionate Sentencing* above n 14, 15, describing the 'Benthamite' deterrence model of Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1982 ed, edited by J Byrne and HLA Hart, Methuen, London, 1982).
[20] Sally Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press, New York, 2002) 35; John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, New York, 2002) 102.
[21] The first recorded use of the word 'censure' was to describe 'a spiritual punishment inflicted by some ecclesiastical judge': *Oxford English Dictionary*, 2nd online ed, 1989.
[22] A reprimand is 'a sharp rebuke, reproof, or censure, esp. one given by a person or body having authority, or by a judge or magistrate to an offender'. It is now more commonly used to mean 'to pronounce an adverse judgment on, express disapproval of, criticize unfavourably; to find fault with, blame, condemn: ibid. The legislation provides for reprimands explicitly: *Legal Profession Act 2004* (Qld) s 280(2)(e).
[23] *Bolton v Law Society* [1994] 1 All ER 486, 492.
[24] See below section 2.4.3.3.

the moral penance of the individual.[25] Andrew Von Hirsh rejected Duff's suggestion that, in imposing criminal sanctions, the State had as much concern with a defendant's moral-wellbeing as the head of a monastic community.[26] However, if professional discipline concerns itself with the moral worth of lawyers, then judges disciplining lawyers may be more likely to see some analogy between themselves and an abbott.

1.3.5 *Private Retribution?*

There may be difficulty in explaining a role for retribution if discipline takes place in private. Criminal sentencing takes place in open court and it is taken for granted that criminal justice is a public symbolic process which casts shame and signifies public disapprobation of conduct which has threatened society's dominion.[27] This has not necessarily been the case for lawyers facing discipline. As I demonstrate in Chapters Four and Eight, much discipline of Queensland lawyers has taken place behind closed doors. While private discipline can still protect through incapacitation, its secret nature reduces its ability to deter generally. Without a public hearing it may also lack the retributive element of the criminal law. Private discipline may aim to protect the public in a more indirect but perhaps ineffective way, by maintaining greater control over the degree of stigma and shame which lawyers suffer, and thereby facilitating their rehabilitation.[28] The final alternative may be that private discipline does not expect to protect or censure as

[25] Robin Duff, 'Desert and Penance' in von Hirsch and Ashworth (eds), *Principled Sentencing*, above n 14, 164.
[26] von Hirsch and Ashworth, *Proportionate Sentencing*, above n 14, 95.
[27] Zedner, above n 12, 340. Regulatory prosecutions make a similar public statement: Keith Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002) 416.
[28] Zedner, above n 12, 341.

much as public discipline. Instead, it aims to legitimate claims by the profession that it does self-regulate, but without that self-regulation being examined too closely. I discuss this possibility in more detail in Chapters Four and Eight.

1.4 Tension Between Legislatures and Regulators

In Chapter Two I set out the legal rationale for professional discipline as determined by the lawmakers – courts and legislatures. While lawmakers have stated protection to be the primary function of discipline, I also uncover discrepancies between the aims of discipline as deduced from the language and stated justifications of the legislation, and the approach of the Supreme Court of Queensland. The court has preferred to hold on to notions of professional discipline as understood at common law, regardless of a broadening notion of discipline in the legislation being administered by the court.

1.5 Barristers and Solicitors

The final sub-theme running through the thesis is a comparison of the ways in which barristers and solicitors have been disciplined in Queensland. The difference is striking. In Chapter Four I look at the role played by professional bodies in establishing disciplinary bodies to deal with allegations of misconduct. While the Bar Association of Queensland vacillated as to whether it wanted disciplinary powers at all, and what form they should take, the Queensland Law Society had been actively seeking statutory powers over members since the late 1800s and, whenever there was a suggestion that standards

among solicitors were slipping, lobbied the government - successfully - for even greater statutory power.

Differences between solicitors and barristers can also be seen in the way they were disciplined. In Chapter Five I consider the popularity of suspensions for solicitors but note that no Queensland barrister has been suspended since 1882. In Chapter Six I look at the use of disciplinary fines. Solicitors can be fined up to $100,000 and fines have been the most popular way of disposing of disciplinary matters against solicitors. But no Queensland barrister has received a disciplinary fine. While I consider some practical reasons why these differences may have arisen, I also consider whether there may be a more profound explanation of the difference, that is grounded in the way that barristers and solicitors are perceived.

I also consider differences between barristers and solicitors in Chapter Eight. Until 2004, when legislation required any discipline of a barrister to be heard in public and reported in a discipline register,[29] barristers were very secretive about any discipline they imposed on a colleague. While the Queensland Law Society also preferred to deal with matters behind closed doors, they conceded the inevitability of public hearings much sooner than barristers, and cooperated in the publication of disciplinary outcomes. The society also sometimes chose to 'trumpet' some harsh disciplinary action that had been taken against a solicitor – something that the Bar Association of Queensland has appeared loath to do.

[29] *Legal Profession Act 2004* (Qld) ss 296, 474.

1.6 The Broader Regulatory Context

While my thesis examines the notion of professional discipline, professional discipline plays only one part in a much broader regulatory context. David Wilkins, writing in 1992, noted the many ways in which lawyers in the United States were regulated at that time.[30] As well as through professional discipline, US lawyers were regulated by what Wilkins categorised as liability, institutional and legislative controls.[31] Liability controls include the ability of clients to sue for negligence or breach of confidence.

In comparative terms, discipline has not played a large, active role in the regulation of Queensland lawyers. Many more allegations of substandard conduct by lawyers have been dealt with by the professional indemnity insurer – what Wilkins would describe as a liability control. For instance, between 1977 and 1991 the professional indemnity scheme run through the Queensland Law Society paid out over $28 million on almost 1,200 files in which the insurer accepted that the solicitor's conduct had caused loss.[32] Some of these claims may have included litigation, but in the vast majority of cases the matter is likely to have been settled with little or no publicity. Not only did the insurer compensate 1,200 clients during that time. The insurer also responded by putting financial incentives in place to encourage higher standards of conduct. These included deterrent deductibles, claims history discounts and loadings, and staff to principal ratio loadings.[33] If effective, these incentives protected the insurer and the insured solicitor, as well as consumers of

[30] David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 801-887. The implications of this broader context is discussed in more detail below section 3.10.1.
[31] Ibid 804.
[32] 'The Q and A of PI Insurance', 1992 *Proctor*, March, 11-15, 12.
[33] Ibid 14. The staff to principal ratio loadings are designed to encourage proper levels of supervision.

legal services. During the same 14 year period that the insurer took action in 1,200 cases, only 125 disciplinary hearings were held. The insurer would appear to have more directly regulated lawyers – and protected the public – more often than did professional discipline.

Queensland lawyers have also been regulated by the general law[34] and by courts exercising powers in relation to contempt of court[35] and wasted costs.[36] Even when clients suspect misconduct by their lawyer, they do not necessarily make a disciplinary complaint, particularly given the time and delay involved and the lack of compensation powers in the discipline jurisdiction.[37]

Even when a complaint is lodged, it will not necessarily lead to a disciplinary hearing. Only 1.7% of the written complaints received by the Queensland Law Society during the 1990s led to formal discipline.[38] Until 2004,[39] all statutory disciplinary hearings relied on voluntary, part-time tribunal members, most of who continued to run their full-time legal practices.[40] All of this demonstrates the modest role which professional discipline has played.

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[34] For instance, the law on misleading or deceptive conduct and the criminal law.
[35] *Lewis v Ogden* (1984) 153 CLR 682.
[36] *White Industries (Qld) v Flower & Hart (a firm)* (1998) 156 ALR 169.
[37] Roman Tomasic found that those who use lawyers most often (eg property owners) were the most sceptical about using law society complaints procedures: Roman Tomasic, *Lawyers and the Community* (Law Foundation of New South Wales, Sydney, 1978) 133.
[38] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45, 6.
[39] The *Legal Profession Act 2004* (Qld) s 429 provides for the tribunal to be constituted by a sitting Supreme Court judge.
[40] For instance, in 1996-1997 13 disciplinary hearings were held, and disciplinary expenses amounted to $359,849: Queensland Law Society Inc, *69th Annual Report, 1996-1997*, 61. These comprised 'general disciplinary expenses', and the expenses of the two tribunals, the Statutory Committee and Solicitors Disciplinary Tribunal. In 2004-2005, the costs of handling complaints and discipline was $3,556,404.00:

In comparison to other forms of lawyer regulation, discipline was applied to only a very small proportion of lawyers. That is not to say that discipline is not worthy of the detailed study contained within this thesis. While discipline may not have played a large and visible role in regulating individual lawyers, its mere presence on the regulatory landscape may have had an effective impact in encouraging high standards of conduct. The mere presence of the disciplinary system may also be significant in other ways. As I show in the following chapters, substantial effort has been put into designing and then redesigning disciplinary structures, and amending legislation. The mere fact that so much energy has been put into the issue of professional discipline in Queensland, despite the modest role that it has appeared to play - and is likely to play[41] - makes it worthy of detailed study.

1.7 Terminology and Definitions

In this thesis I use the terms 'lawyer' and 'legal practitioner' to describe a person whose name appears on the roll of legal practitioners and is eligible to practise law, subject to holding a practising certificate. Except where it is clear from the context, my use of the term 'lawyer' or 'legal practitioner' is not intended to make any distinction between a

Legal Services Commission (Qld), *Annual Report 2004-2005*, 35. This did not include the cost of the Supreme Court judge who presided over the tribunal. During the period four disciplinary hearings were held, although this unusually low number is likely to be due to a hiatus as disciplinary responsibilities were transferred from the Queensland Law Society to the Legal Services Commissioner.

[41] Given the cost-effectiveness of other forms of regulation, such as civil litigation.

person with a practising certificate and one without. I use the terms interchangeably.[42] 'Lawyer' and 'legal practitioner' are both generic terms which I use to describe both barristers and solicitors. Barristers are those lawyers who have chosen to specialise in appearances before courts (advocacy) and in specialist advice work. Barristers are sometimes referred to as 'counsel', and are collectively described as 'the bar'. There is no similar collective noun to describe Queensland solicitors. Solicitors can also appear before all courts – act as solicitor-advocates - but their range of work is usually much broader than that of barristers. It includes, for instance, contract negotiation and other transactional work. Queensland lawyers have been represented by two main professional bodies. The Bar Association of Queensland has represented barristers and the Queensland Law Society has represented solicitors.

As I discuss in Chapters 2 and 4, discipline can be imposed on barristers and solicitors by the Supreme Court of Queensland, exercising its inherent jurisdiction. In 2004, the Legal Practice Tribunal and Legal Practice Committee were established as statutory tribunals to discipline both barristers and solicitors. Until then, only Queensland solicitors were subject to statutory discipline. Over time, the relevant tribunals were variously known as the Statutory Committee, the Solicitors Disciplinary Tribunal[43] and the Solicitors Complaints Tribunal. Unless the particular title is important to the discussion, the generic term 'tribunal' will be used.

[42] See Mortensen's discussion of the confusing terminology used in the *Legal Profession Act 2004* (Qld): Reid Mortensen, 'Becoming a Lawyer: From Admission to Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *University of Queensland Law Journal* 319-346, 339.

[43] This operated as a lower level tribunal alongside the Statutory Committee which heard more serious matters.

1.8 Types of Disciplinary Orders

In this thesis I look closely at the ways in which disciplinary courts and tribunals have disposed of matters that have come before them. The most common forms of disciplinary orders have been strike offs, suspensions and fines. A 'strike off' is an order that a person's name be removed from the roll of legal practitioners.[44] This is also described as disbarment – particularly when barristers are involved. As practitioners must be on the roll of legal practitioners *and* hold a practising certificate before they can practise law,[45] practitioners can also be temporarily removed from practice by a court or tribunal ordering that their practising certificate be suspended.[46] I will normally refer simply to the 'suspension' of a practitioner.

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[44] *Legal Profession Act 2004* (Qld) s 280(2)(a).
[45] *Legal Profession Act 2004* (Qld) ss 6, 24.
[46] *Legal Profession Act 2004* (Qld) s 280(2)(b).

CHAPTER TWO

LAWMAKERS' RATIONALES FOR DISCIPLINE

2.1 INTRODUCTION

In this chapter I look at possible rationales for the discipline of lawyers, as indicated by the courts and by relevant legislation. Particularly in earlier cases, the High Court of Australia and Supreme Court of Queensland drew a simple division between protection of the public and punishment of the lawyer. Case law demonstrates that the 'protect not punish' aim of discipline is stated almost as a mantra in disciplinary hearings. More contentious is the degree to which other purposes, such as retribution or protection of the reputation of the legal profession, can also influence disciplinary outcomes. I will consider this dichotomy between protection and punishment before exploring the concept of punishment in more detail, in particular, the deterrent and retributive elements of punishment. I conclude with a consideration of the issue of reputation.

The articulated purpose of discipline seems to depend in part on the nature of the body imposing discipline. While in this chapter I focus on discipline imposed by courts and statutory tribunals, it should be noted that a private body, such as the Bar Association of Queensland can apply discipline for its own purposes, subject only to the rules relating to

private tribunals and as agreed to by members.[1] While the private disciplinary powers of the Queensland Law Society over solicitor members existed alongside the society's statutory powers from 1927 until 2004, the private powers became largely irrelevant in the presence of much more effective statutory powers. Private powers are also unlikely to be used when they have little practical impact. In the case of barristers, the Bar Association of Queensland had no power to remove a barrister's right to practise, and so private disciplinary action against members was rare. Private action is likely to become even rarer now that a statutory system has been put in place for all legal practitioners, including barristers.[2]

I will seek to demonstrate that decisions of, and statements by, the High Court of Australia have generally indicated that court's view that disciplinary proceedings should be primarily concerned about an individual's actual fitness to practise law. The High Court has consistently declared that discipline should have no penal element and - although it has not stated this explicitly - it can be inferred from decisions of the High Court that it discounts the possibility that protection of the reputation of the legal profession would be a sufficient justification for taking disciplinary action. The significance of this finding will become more apparent when I look at theories of legitimation in Chapter Three.

In this chapter I will also show that, in contrast to the High Court, until recently the Supreme Court of Queensland appeared to tolerate at least the possibility of using

[1] John Forbes, *Justice in Tribunals* (Federation Press, Sydney, 2002) 18.
[2] *Legal Profession Act 2004* (Qld) ss 5, 6, 8, 248, 249.

disciplinary proceedings to punish a legal practitioner. While in recent times the court has more clearly denied any penal intent in discipline, it has acknowledged simultaneously the positive role that deterrence can play in protecting the public.

Interspersed with my discussion of the courts' attitude to discipline is a discussion of the Supreme Court of Queensland's response to attempts by the Queensland Parliament to strengthen the protective focus of professional discipline. I will suggest that, while the court clearly acknowledged the protective focus of discipline, its view of the nature of that protection lagged behind the view of the legislature.

2.2 Judicial Rationales for Discipline

2.2.1 *High Court of Australia*

The ultimate body with the power to remove a lawyer from practice in Queensland is the Supreme Court of Queensland. However, when looking at the attitude of the courts to discipline, I will also consider decisions of the High Court of Australia, other Australian State Supreme Courts and English courts. Decisions of the High Court of Australia, whether on appeal from Queensland or another Australian jurisdiction, are considered because of the nature of the court hierarchy and doctrine of precedent in Australia. The High Court hears appeals from any State Supreme Court[3] if a party aggrieved by a decision of a State Supreme Court is granted special leave to appeal to the High Court.[4]

[3] *Australian Constitution* s 73.
[4] *Judiciary Act 1903* (Cth) s 35(2).

The Supreme Court of Queensland is bound to follow relevant decisions of the High Court of Australia, even decisions which originated outside Queensland, unless they are distinguishable by reason only of differences in the statute law of the different States.[5]

While relevant decisions of the High Court are binding on the Supreme Court of Queensland, it is relatively rare for appeals against disciplinary decisions to proceed to the High Court of Australia. This is not only because of the need to obtain special leave to appeal, but also because the High Court has generally indicated an unwillingness to become involved in admission or disciplinary matters, on the basis that it is the Supreme Court of the State in which a person wishes to practise that must be satisfied as to that person's fitness to practise law. Hence the High Court has expressed reluctance to 'second guess' a State Supreme Court's view as to a person's fitness. For instance in *Clyne v New South Wales Bar Association*[6] the High Court noted the danger of overturning the Supreme Court's decision to allow Clyne to remain in practice in New South Wales, given the Supreme Court's view that he was unfit to practise and 'given the essential trust and confidence which must exist between the Supreme Court and all members of the Bar.'[7] In *Wentworth v NSW Bar Association*[8] the High Court emphasised the width of the power of State Supreme Courts to conduct admission and disciplinary proceedings however they wished, subject only to statutory obligations and procedural fairness.[9] The High Court drew its powers on appeal particularly narrowly in *Walsh v*

[5] As the common law is deemed to be uniform across the nation: *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.
[6] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 198.
[7] Ibid 198. On this occasion the court considered the Supreme Court was 'entirely right' in removing the barrister from practice: 199.
[8] (1999) 198 CLR 73.
[9] Ibid 251 (Deane, Dawson, Toohey and Gaudron JJ).

Law Society of New South Wales,[10] stating that, where an appeal is brought pursuant to statutory disciplinary procedures, it is not open to the court to ignore the legislative protections given to the practitioner and to consider the case as if brought within the court's inherent jurisdiction.[11]

2.2.2 *Other Australian State Supreme Courts*

In this thesis I also consider decisions of other Supreme Courts in Australia. While the Supreme Court of Queensland is not bound by these decisions, it looks to decisions of those courts for guidance and because of the desirability of consistency between Australian jurisdictions.[12]

2.2.3 *English Courts*

2.2.3.1 *Australia's English Heritage*

Australian courts also have sought guidance from decisions of English courts and, until the *Australia Acts* of 1986 abolished appeals to the Privy Council, were bound to follow decisions of that court in appeals from Australia. Australian courts have generally chosen to pay close attention to decisions of other English courts as well, even though not bound to follow them. This is particularly true in the period before 1901 when the Privy Council was the sole second-tier court of appeal. But even after the High Court was established,

[10] (1999) 198 CLR 73.
[11] Ibid 97.
[12] *Queensland Law Society v Roche* [2004] 2 Qd R 574, 588.

State Supreme Courts looked to decisions of the English appellate courts, largely because Australia inherited much of its legal tradition from England.

This section looks at the view of English courts as to the rationale of discipline. In particular, English courts took quite a different approach to the discipline of solicitors than they took to the discipline of barristers.

2.2.3.2 *The Nature of England's Divided Profession*

Since the earliest times of the common law[13] English barristers[14] have belonged to one of four Inns of Court,[15] and it is these Inns, through its more senior members, known as benchers, which have been primarily responsible for the education, admission and discipline of barristers in England. Judges retained supervisory power over barristers, sitting as visitors to the Inns of Court and when hearing appeals to the Court of Appeal.[16]

The other branch of the profession, now referred to as solicitors, previously comprised attorneys,[17] proctors and solicitors. Attorneys had been allowed to become members of the Inns of Court until the sixteenth century and were subject to the discipline of the

[13] Roscoe Pound, *The Lawyer from Antiquity to Modern Times*, (West Publishing Co, St Paul, 1953) 87. See also Paul Brand, *The Origins of the English Legal Profession* (Blackwell, Oxford, 1992).
[14] Until the seventeenth century, barristers were known as 'apprentices at law': Pound, above n 13, 101; Brand, above n 13, 158.
[15] Lincoln's Inn, Gray's Inn, Inner Temple and Middle Temple.
[16] *R v Visitors to the Inns of Court, ex parte Calder* [1994] QB 1.
[17] Solicitors arose as part of the legal profession in the fifteenth century and played a similar, although inferior, role to that played by attorneys previously: William Holdsworth, *A History of English Law* (first published 1924, 2nd ed, 1937) vol 6, 449; John Baker, *The Oxford History of the Laws of England* (Oxford University Press, Oxford, 2003) vol VI 1483-1558, 438. By 1750 solicitors and attorneys held equivalent positions in the legal profession and were subject to the same disciplinary controls: Holdsworth, at 457. Christopher Brooks, *Lawyers, Litigation and English Society Since 1450* (Hambledon, London, 1998) 131.

Inns,[18] but were then excluded from membership unless they were studying for the bar.[19] Despite efforts by judges in the seventeenth century to insist that attorneys become members of an Inn,[20] the Inns resisted and no attorney could become a member unless first ceasing to practise as an attorney.[21]

A barrister was admitted to practise law by the Inn of which he was a member and so was independent of the court. Solicitors (meaning solicitors, attorneys and proctors) were admitted directly by the court in which they planned to practise.[22] A different form of discipline for solicitors was therefore necessary and became entrenched after solicitors were excluded from the Inns.[23]

2.2.3.3 *Practical Consequences Given the Nature of England's Divided Profession*

Holdsworth noted that the courts found it difficult to discipline solicitors, who were widely scattered and sometimes had no registered address[24] – hence described as 'vagabond attorneys'.[25] In stark contrast to barristers who remained without statutory control for many years, English solicitors were subject to statutory regulation as early as 1605[26] and the level of control became increasingly strict. In 1729, an Act was passed to

[18] Holdsworth, vol 6, above n 17, 441.
[19] Ibid 442.
[20] Ibid 443.
[21] Ibid 442.
[22] Baker, above n 17, 438.
[23] Pound, above n 13, 99.
[24] Holdsworth, vol 6, above n 17, 443.
[25] William Holdsworth, *A History of English Law* (Sweet and Maxwell, London, 1938) vol 12, 53.
[26] 3 James I. C.7. cited in Holdsworth, vol 6, above n 17, 434, n 7.

deal with the regulation of attorneys and solicitors.[27] It required judges to enquire into the applicant's 'fitness and capacity to act as an attorney' before admitting the candidate to practise.[28] It also strengthened the penalties for practising as an attorney while unqualified.[29] Despite the legislative requirement that the court enquire into the applicant's fitness to practise, the enquiry was done in a perfunctory way,[30] leaving the Society of Gentlemen Practisers, established in 1739, to carry out more substantial investigations into allegations of misconduct[31] before presenting the cases to the court for action.

2.2.3.4 *English Courts Articulate 'Protect not Punish' Dichotomy When Dealing with Solicitors*

In the case of *Re Brounsall*[32] - decided in 1778 - an attorney had been convicted of stealing one guinea, sentenced to nine months imprisonment and branded on his hand. In subsequent disciplinary proceedings against him it was argued that he had already been punished, but Lord Mansfield responded emphatically that no element of punishment was involved:

> ... this application is not in the nature of a second trial or a new punishment. ... but the question is whether, after the conduct of this man it is proper that he should continue a member of a profession which should stand free from all suspicion. ... It is not by way of punishment, but the Courts on such cases exercise their discretion whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.[33]

[27] 2 George II c 23.
[28] 2 George II c 23.
[29] Holdsworth, vol 12, above n 25, 55.
[30] Ibid 61-2.
[31] Ibid 67.
[32] (1778) 2 Cowp 829; (1778) 98 ER 1385.
[33] Ibid.

Lord Mansfield's comments were endorsed by the English courts 120 years later in *Re Weare*.[34] The potential rationales for discipline were again presented as a simple dichotomy – protection or punishment -, with the court denying that its aim was to further punish the solicitor. Instead, the solicitor's name was removed from the roll because the offence 'makes it unfit that he should remain a member of this strictly honourable profession.'[35]

In 1778, in *Re Brounsall*,[36] the court confirmed that an attorney struck from the roll after being convicted of theft was removed not to punish him further but because he was unfit to continue to practise. In contrast, the later case of *Re Elsam*,[37] heard in 1824, appeared to carry many hallmarks of the criminal jurisdiction. Although the attorney in that case had misled the court, the court was influenced by the fact that no fraud was intended and the attorney had already incurred expenses of £40. The court saw its main aim was to deter any future deception, ordering the attorney to pay a fine of £40 and imprisonment until he paid the fine.

In Chapter One I noted the various elements of punishment: deterrence, retribution and rehabilitation.[38] Both deterrence and rehabilitation can also protect,. The English courts have noted that the deterrent aspect of discipline can lead to a harsher order against

[34] [1893] 2 QB 439.
[35] Ibid 445 (Lord Esher).
[36] (1778) 2 Cowp 829; (1778) 98 ER 1385.
[37] *Re Elsam* (1824) 3 B & C 597; 107 ER 855.
[38] Above section 1.3.

solicitors than would otherwise be the case, as shown by comments of Lord Coleridge in *Re Farman*,[39]

> ...it seems to me to be very important that conduct of this kind should be checked...if sentences inflicted for these offences seem sometimes severe, it must be remembered that they are inflicted upon officers of the Court who, clothed by the Court with an exceptional power and character which the Court itself confers upon them, are able to perpetrate these frauds. .....[because] cases of this sort [are] so common; ... it was the more necessary that, when brought before the Court, they should be dealt with in an exemplary manner.[40]

Lord Coleridge's statement was approved in Queensland by Hart AJ in *Re M, a Solicitor*.[41]

2.2.3.5 *A Different Focus in the Discipline of English Barristers?*

Examples of English barristers disciplined so as to protect the public were less common. The Inns were in a much better position to exercise control over the barristers who lived and worked within the Inn and who relied on the Inn for the right to practise, than a court seeking to control a disparate collection of solicitors. Nevertheless, most rules of the Inns of Court dealt with relationships and conduct within the Inns themselves rather than with members' relationships to the outside world,[42] and reports of discipline imposed by the Inns dealt overwhelmingly with internal issues[43] rather than misconduct in legal practice.

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[39] [1883] 18 L Jo 352.
[40] Ibid.
[41] [1938] St R Qd 454, 461. That case arose from a barrister's complaint that a solicitor had retained £80 received from the client to pay counsel, so it could be argued that barristers were the primary group who would be protected from deterring solicitors from such practices, and the public only protected in a more distant fashion.
[42] Baker, above n 17, 462; William Holdsworth, *A History of English Law* (first published 1924, 2nd ed, 1937) vol 4, 264.
[43] Holdsworth, vol 12, above n 25, 38-9.

The Inns suffered a decline from the seventeenth century to the middle of the nineteenth century, particularly in relation to their role in education.[44] Holdsworth referred to the riots which occurred in the Inns in the latter half of the seventeenth century and noted that 'the problem of discipline [became] much less acute' once the Inns ceased to educate students for the bar.[45] He provided by way of example of the declining disciplinary problem the fact that no challenge was mounted to a rule banning the discharge of firearms within Gray's Inn.[46] This suggests a very different focus of discipline in the two branches of the profession, although by 1862 the English courts had claimed that the discipline of barristers should be to protect the public – although perhaps as a secondary aim to the need to protect the honour of the bar:

> The Benchers exercised their jurisdiction partly for the protection of the profession and partly for the protection of the public -- for the protection of the profession that it might not be disgraced by having enrolled among its members those who dishonoured and discredited it, and for the protection of the public that their confidence in the rank of the barrister being a sufficient test of the trustworthiness and honour of each individual member of the Bar might not be misled and abused.[47]

The following discussion will show that many aspects of the English approach to discipline were followed in Australia, although Australia never had institutions equivalent to the English Inns of Court. Australian barristers have always been admitted by colonial and State Supreme Courts in the same way as solicitors. Accordingly, at least in theory, Australian barristers have fallen under direct judicial supervision in ways that English barristers have not. Nevertheless, in my examination in subsequent chapters of

[44] The reasons for the decline were numerous and ranged from the invention of the printing press, to a lack of commitment by students and readers, and lack of interest by the courts or government: Holdsworth, vol 6, above n 17, 490-3.
[45] Holdsworth, vol 12, above n 25, 27.
[46] Ibid

the discipline of barristers in Queensland I will suggest that - at least in that State - barristers may have avoided effective supervision either by a court or by any Australian equivalent to an Inn.

2.3 HIGH COURT OF AUSTRALIA

2.3.1 *English 'Fit and Proper' Test Adopted*

The first case heard by the High Court of Australia concerning the regulation of Australian lawyers was *Incorporated Law Institute of New South Wales v Meagher*,[48] an appeal by the Incorporated Law Institute of New South Wales against a decision of the Supreme Court of New South Wales readmitting Meagher to practise as a solicitor. The High Court gave its view of, not only eligibility for admission, but also the role of professional discipline. Both of the early English cases - *Re Brounsall*[49] and *Re Weare*[50] - were cited by Isaacs J as providing the appropriate test for discipline, namely whether a lawyer is a 'fit and proper' person to remain on the roll. As had the English courts in *Re Brounsall*[51] and *Re Weare,*[52] Isaacs J denied any penal element in discipline.[53]

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[47] *Seymour v Butterworth* (1862) 3 F&F 372, 381-2; 176 ER 166.
[48] (1909) 9 CLR 655.
[49] (1778) 2 Cowp 829; (1778) 98 ER 1385. See above section 2.2.3.4.
[50] [1893] 2 QB 439. See above section 2.2.3.4.
[51] (1778) 2 Cowp 829; (1778) 98 ER 1385.
[52] [1893] 2 QB 439.
[53] (1909) 9 CLR 655, 680. Isaacs J did allude to the public interest in disciplinary proceedings by noting that the duty to remove those no longer fit to practise was owed, not only to the court itself and to the rest of the profession, but also to the 'suitors' of the profession and the whole community (681). The High Court concluded that Meagher was still not fit to resume practise and overturned the order of the New South Wales Supreme Court readmitting him to practise.

As recently as *Clyne v New South Wales Bar Association*[54] heard in 1960, the High Court had not refined its view of the rationale for discipline any further, claiming that the test was 'not capable of more precise statement' than as expressed 130 years earlier in the *Charter of Justice 1823*, that the 'issue is whether the appellant is shown not to be a fit and proper person to be a member of the bar of New South Wales.'[55]

If the court takes its obligation to protect the public seriously, then the public must be protected from incompetent or weak, as well as dishonest, practitioners. Later discussion shows how the Supreme Court of Queensland was slow to consider professional discipline as a legitimate means of protecting the public from honest but incompetent lawyers.[56] But as early 1909, in the High Court's decision of *Incorporated Law Institute of New South Wales v Meagher,*[57] Isaacs J drew the protective net widely, stating that fitness to practise included not only honesty but also knowledge and ability.[58] Meagher had argued that he was innocent of any guilty intent to deceive and was merely a 'dupe' of his business partner. But Isaacs J noted that, even if Meagher's version was accepted, 'he would be much too simple and confiding to bear the heavy strain of responsibility required of him as a solicitor.'[59] Again in *New South Wales Bar Association v Evatt,*[60] the High Court emphasised the need to protect the public from the incompetent as well as

[54] (1960) 104 CLR 186.
[55] Ibid 189.
[56] Below section 2.4.3.4.
[57] (1909) 9 CLR 655.
[58] Ibid 682.
[59] Ibid 688. We see a similar point made later, in *Barristers Board v Young* [2001] QCA 556.
[60] (1968) 117 CLR 177.

the dishonest by holding that Evatt's failure to understand the error of his ways of itself demonstrated his unfitness to practise.[61]

2.3.2 *High Court Denies Any Penal Element*

While the High Court in *Clyne v New South Wales Bar Association*[62] felt unable to express the rationale for discipline more expansively than as expressed in the *Charter of Justice 1823*, it remained anxious to dispel any penal intent, reiterating that, 'although it is sometimes referred to as the "penalty of disbarment", it must be emphasised that a disbarring order is in *no sense* punitive in character'[63] and is made for the 'protection of those who require protection'.[64] Interestingly, the High Court went on to say that a disbarring order is also made, 'from the professional point of view, in order that abuse of privilege may not lead to loss of privilege'.[65] This statement raises concerns about the possible use of discipline in the interests of the profession itself - an issue taken up later in this chapter when discussing reputation.[66]

[61] Ibid 183. The relevance of insight into past misconduct is explored more fully in Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness', (2002) 22 *The Queensland Lawyer* 166.
[62] (1960) 104 CLR 186.
[63] Ibid 201 (emphasis added).
[64] Ibid.
[65] Ibid.
[66] Below section 2.6.1.

2.3.3 *Personal Mitigating Factors Less Relevant*

Because of the protective nature of disciplinary proceedings, personal mitigating factors are less relevant than in criminal proceedings.[67] An apparent misunderstanding of this issue by the Supreme Court of New South Wales led the High Court to overturn a two year suspension and order that the barrister's name be removed from the roll in *New South Wales Bar Association v Evatt.*[68] The High Court was critical of the mercy shown to Evatt by the lower court and concluded that the Supreme Court of New South Wales – in portraying Evatt as a young man who had not understood the error of his ways – had misconstrued disciplinary proceedings as punitive in nature and went on to state unequivocally that discipline was '*entirely* protective' with 'no element of punishment involved.'[69] In Chapter Seven I explore whether disciplinary bodies in Queensland have fallen into the same error as the Supreme Court of New South Wales, in placing too much emphasis on personal mitigating factors.

2.3.4 *Protection as a Moderating Force*

The High Court has consistently unequivocally denied any element of punishment in cases in which it has taken harsher action on appeal, to explain why individual mitigating factors were misapplied by the State court appealed from. But equally, the High Court has overturned Supreme Court decisions which the High Court considered went beyond what was necessary to protect the public. Sometimes this was accompanied by evidence

[67] *Attorney-General v Gregory* [1998] QCA 409, [3].
[68] (1968) 117 CLR 177.

that the decision of the State court included a punitive element, requiring correction by the High Court. This can be seen in *Harvey v Law Society of New South Wales*,[70] where the High Court corrected what it saw as the Supreme Court of New South Wales' punitive view of disciplinary orders. The Supreme Court had ordered that the solicitor cease practising immediately and supply the Law Society of New South Wales with the names of all of his clients in the past 12 months or who had lent money to companies associated with him. The High Court thought such orders were not necessary to protect the public, overlooked the interests of creditors of the practice, and amounted to a punishment of the solicitor.[71]

2.3.5 *Protection Can Subsume Procedural Protections*

In *Wentworth v New South Wales Bar Association*[72] the High Court spoke in general terms of the need for procedural fairness.[73] But in cases dealing more directly with the issue,[74] the protective focus of discipline has led the court to subordinate some procedural protections - which a lawyer may have in criminal or civil proceedings - to the public interest. For instance, in *Weaver v Law Society of New South Wales*[75] the lawyer argued that earlier charges against him could not be re-litigated because of issue estoppel, but the High Court disagreed, stating that issue estoppel did not apply to disciplinary proceedings

[69] Ibid 183 (emphasis added). See also *Smith v NSW Bar Association* (1992) 176 CLR 256, 270 (Deane J).
[70] (1975) 7 ALR 227.
[71] Ibid 231.
[72] (1992) 176 CLR 239.
[73] Ibid 251. Discussed above section 2.2.1.
[74] *Wentworth v New South Wales Bar Association* was primarily concerned with the standing of the NSW Bar Association or Bar Council to oppose an application for admission.
[75] (1979) 142 CLR 201.

because of their protective focus.[76] The High Court again subordinated the concerns of the individual lawyer facing discipline to the need to protect the public in *Walter v Council of Queensland Law Society*,[77] when it noted that the protective focus of disciplinary proceedings meant that a successful appeal did not necessarily mean that the original 12 month suspension ordered by the Queensland Statutory Committee[78] was simply restored.[79] Noting that a 'primary object of [disciplinary] proceedings is to protect members of the public from professional misconduct',[80] the High Court thought it important that the Queensland Law Society have a further opportunity to document its allegations against Walter. It therefore remitted the matter to the Statutory Committee for further consideration.[81] More recently the High Court has enforced procedural protections afforded to lawyers facing discipline,[82] although these have been protections expressly required by relevant legislation.[83]

2.3.6 *Lack of High Court Finesse*

It is perhaps because State Supreme Courts hear significantly more disciplinary cases than the High Court that the exploration of what 'public protection' may mean in an individual case has been more fully explored in those courts than in the High Court. In

[76] Ibid 207.
[77] (1988) 62 ALJR 153.
[78] Then the statutory disciplinary tribunal for Queensland solicitors.
[79] Ibid.
[80] Ibid, citing *New South Wales Bar Association v Evatt* (1968) 117 CLR 117, 183-4 and *Weaver v Law Society of New South Wales* (1979) 53 ALJR 585, 587.
[81] The Statutory Committee reheard the matter on 26 September 1988 and suspended the solicitor for six months, half the period of its original suspension: (1988) 18 *Queensland Law Society Journal* 527.
[82] *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; *Barwick v Law Society of New South Wales* (2000) 169 ALR 236.
[83] *Legal Profession Act 1987* (NSW).

those cases which have come before the High Court, often that court has simply stated the issue as if it were a dichotomy between protection and punishment, with each category mutually exclusive - almost amounting to a statement that discipline cannot be about punishment *because* it is about protection. Perhaps the court would now recognise the flaws of such a dichotomy - it recently acknowledged the difficulties of attempting a simple binary division between protective and punitive provisions in civil penalty proceedings brought against a company director under the *Corporations Act 2001* (Cth).[84]

In later chapters I will demonstrate how such a dichotomy in disciplinary proceedings oversimplifies the nature of both protection and punishment. For instance, deterrence is a well-established purpose of criminal punishment and aims to protect the public from future harm. The simplistic 'protect not punish' dichotomy does not indicate the degree to which disciplinary orders can be motivated by a desire to deter other lawyers from similar misconduct in the future. The issue of deterrence is taken up later.[85] Nor does the dichotomy reflect the actual practice of courts and tribunals when imposing disciplinary orders. Retribution aims only to punish the individuals who are culpable.[86] I will also demonstrate the degree to which elements of retribution have been present in some disciplinary decisions in Queensland, despite the High Court's denial of its role.[87]

[84] *Rich v Australian Securities and Investments Commission* [2004] HCA 42, [32].
[85] Below sections 2.5.2, 6.6.2.2.
[86] See discussion of retribution above section 1.3.3, below sections 2.5.3, 6.1.
[87] Below section 6.5.2, 7.9.

In the following sections of this chapter I explore the protection-punishment dichotomy in more detail, in particular, drawing a distinction between the views of the High Court and the Supreme Court of Queensland.

2.4 SUPREME COURT OF QUEENSLAND

2.4.1 *'Protect not Punish'*

In its earliest disciplinary decisions, the Supreme Court of Queensland averted to the protective focus of discipline, but not always explicitly. For instance, in *Re Swanwick*[88] in 1882, the Supreme Court removed a barrister from the roll after a series of incidents,[89] the last being the sending of a threatening letter. Lilley CJ noted that lawyers were entrusted with great power which could be easily abused[90] and the court had to be extra vigilant because members of the public would only rarely have enough knowledge to know to complain about a lawyer's conduct.[91]

By the time the Supreme Court of Queensland heard the case of *Queensland Law Society v Carberry*[92] in 2000, Supreme Courts throughout Australia had so regularly restated the protective focus of discipline that Moynihan SJA and Atkinson J were minded to comment:

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[88] (1882) QLJ, February 1, 1883, 117.
[89] *Re Swanwick* (1882) May 1, QLJ 66 (suspended until further order for gross misconduct in refusing to cross examine witness and implying improper conduct by presiding judge); *Re Swanwick* (1882) QLJ 116 (complaint of acting without instructions, not proved).
[90] (1882) QLJ, February 1, 1883, 117, 117, 118.
[91] Ibid. The need for harsh action given the difficulty of detection was also discussed in *Queensland Law Society v Wright* [2001] QCA 58, [67] (McMurdo P).

> It is now trite to say that the primary role of proceedings such as those before the Tribunal is to protect the public from persons not fit to be held out as officers of the court and as a proper person to be entrusted with the duties and responsibilities of the solicitor.[93]

2.4.2 *The Language of Punishment and Penalty*

The 'protect not punish' mantra continues to be stated in the Queensland case law.[94] However, while denying any penal intent, many of the judges of the Supreme Court of Queensland have spoken of discipline in terms of the punishment to be imposed.[95] The court's use of such terminology may suggest to some that the court has misconstrued the role of discipline, but it is a fault in terminology which has continued throughout the case law, even in recent times when the protective focus of the court appears otherwise better enunciated. Some think that a convention had arisen in the courts to avoid the use of the term 'punishment' when dealing with disciplinary cases,[96] but a survey of Queensland Supreme Court decisions shows that the court continues to use the term 'punishment'

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[92] [2000] QCA 450.

[93] Ibid [38].

[94] *Re M* [1948] St R Qd 454, 461; *Attorney-General and Minster for Justice v Kehoe* [2001] 2 Qd R 350, 356: 'the end objective of such a [disciplinary] system is not the punishment of the practitioner but the protection of the public'; *Barristers' Board v Darveniza* [2000] QCA 253, [32]: ' [removal of the right to practise is done] not by way of punishment but in order to protect the public and maintain public confidence in the administration of justice'; *Gregory v Queensland Law Society Inc* [2001] QCA 499, [17] (Thomas J): 'the Court is not concerned with the question of punishment.'

[95] *Re Gilbert* [1933] St R Qd 281: '.the only point to my mind is now the adequacy or inadequacy of the punishment.'(286, Blair CJ), '[a]s to the punishment...' (287, Webb J), 'I am not prepared to say that seven months is too little punishment...' (289, Henchman J); *Re B, a Solicitor*, [1938] St R Qd 361: 'The remaining question is as to the amount of punishment...' (365, Webb J); *Re M, A Solicitor* [1938] St R Qd 454, 457 (Webb J), where his Honour uses the term 'punish' or 'punishment' seven times, (463, Graham AJ) where his Honour uses the term 'punishment' five times). Note however that in the same case, Hart J expressly states that a strike off order is not imposed by way of punishment. Hart J therefore uses the term 'sentence', although his Honour also uses the term 'punishment' (462).

[96] Transcript of Proceedings, *Walsh v Law Society of New South Wales* (High Court, Kirby J, 3 March 1999): 'It used to be ... in the old days the convention of the court that it would avoid the word "punishment" lest it get into its mind the fact that it was sitting there as a punishing tribunal as distinct from having the purpose which hangs over all these cases, of protecting the public, as distinct from punishing the practitioner. The consequence may be punishment in the real sense but you kept your eyes fixed on the

when deciding the appropriate order to impose.[97] The use of terms such as 'punishment' and 'penalty' - in cases which simultaneously deny any penal intent - may be partly explained by the paucity of other, more appropriate, terms, leaving the court to ask what 'order' should be imposed. To ask whether an order of the disciplinary tribunal was too 'harsh' or too 'lenient' also risks reflecting a penal intent. Perhaps the appellate court simply needs to ask if the tribunal's order was manifestly inappropriate[98]to ensure there is no subconscious drift away from protection.

2.4.3 *Statutory Discipline*

2.4.3.1 *Judicial Responses to Statutory Discipline*

Perhaps the greatest challenge to judicial claims about the purpose of discipline came with the introduction of legislation to deal with the discipline of solicitors.[99] It then became possible that the legislature required discipline to be imposed for purposes different to those developed by the courts under the common law. An examination of statutory appeals to the Supreme Court of Queensland illuminates this issue. In the vast majority of cases it appears that the court simply presumed that the purpose of statutory

purpose of the jurisdiction.'; '...the term "sanction" is regarded as more felicitous that "penalty".': John Forbes, *Disciplinary Tribunals* (2nd ed, Law Book Co, Sydney, 1996) 153.

[97] *Re M, A Solicitor* [1938] St R Qd 454, 457 (Webb J), 462 (Hart AJ), 463 (Graham AJ); *Re G, A Solicitor* [1939] QWN 67, 68 (Blair CJ); *Re G, A Solicitor* [1940] QWN 7, 10 (Macrossan SPJ, with whom Douglas and Philp JJ agreed); *Re H, A Solicitor* [1940] QWN 8, 13 (Macrossan SPJ), 14 (Webb J), 14 (Philp J); *Re NEG, A Solicitor* [1940] QWN 25, 38 (Webb J), 38 (Douglas J); *Re H, A Solicitor* [1960] Qd R 407, 414 (Hanger J, with whom Townley and Stable JJ agreed): 'The evidence ...shows not only conduct deserving of punishment, but also conduct which indicates that in the interest of the public, his name should be removed from the roll of solicitors.'

[98] *Attorney General v Kehoe* [2001] 2 Qd R 350.

[99] *Queensland Law Society Act 1927* (Qld). Legislation to deal with the discipline of barristers came much later, with the *Legal Profession Act 2004* (Qld).

discipline was the same as the purpose of discipline imposed under the court's inherent jurisdiction.

In some cases it seems that members of the court did not even consult the relevant legislation to elicit the express or implied purpose of statutory discipline, any statutory definitions of conduct liable to discipline or the types of order provided for in the legislation. Both statutory definitions and prescribed orders could have provided the court with important indications as to whether the legislation was intended to vary the purpose of discipline from its purpose under the common law.

As the following discussion shows, it would seem that from time to time, Queensland legislation has tried to strengthen the protective ambit of the professional discipline of solicitors, through changes to the definition of conduct liable to discipline and, more recently, by expressly incorporating a range of orders with a clear protective focus. Despite this, it would seem that the Supreme Court of Queensland continued to apply its common law understanding of the purpose of discipline – a purpose which allowed a greater retributive element than arguably was anticipated by the legislation.

2.4.3.2 *Judicial Response to Queensland Law Society Act 1927 (Qld)*

A statutory disciplinary system for solicitors first came into operation in 1927.[100] Thereafter and until 2004, the Supreme Court continued to be the only body which could

[100] Although the *Queensland Law Society Act* came into force in 1927, the first disciplinary case was not heard by the Statutory Committee until 1930. The first appeal against a decision of the Statutory Committee appears to have been *In re a Solicitor* [1932] St R Q 33. Apart from determining that proceedings before the Statutory Committee were judicial, the court did not discuss the aim of such proceedings.

discipline barristers. But in relation to solicitors, the Supreme Court only rarely heard disciplinary matters within its inherent jurisdiction and encouraged the use of the statutory process.[101] This meant that the court's main function was to hear appeals from the tribunal constituted under the relevant legislation.

The initial *Queensland Law Society Act 1927* (Qld) (the 'Act') did not articulate the aim for which a solicitor was to be disciplined under the Act, other than to state that the Statutory Committee (the tribunal established under the Act) had jurisdiction to determine charges of 'illegal or professional misconduct'.[102] Illegal conduct was not defined in the Act, but the Attorney-General, in his second reading speech, limited the term to 'offences',[103] suggesting it was intended to cover only breaches of the criminal law.[104] In other, and much clearer ways, the jurisdiction of the committee was narrower under the 1927 Act than it was subsequently to become. The Act expressly stated that professional misconduct, as defined by the Act, did *not* include 'any conduct which, either from its trivial nature *or* from the surrounding circumstances' did not in the public interest *disqualify* a person from practising his profession.'[105]

Such a definition was likely to exclude many forms of lawyer misconduct from which the public required protection, but which did not warrant a person's removal from practice. It would appear to suggest that, apart from instances of illegal conduct, the statutory

[101] *Queensland Law Society v Smith* [2001] 1 Qd R 649.
[102] *Queensland Law Society Act of 1927* (Qld) s 5(1)(a).
[103] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 November 1927, 1001 (John Mullan).
[104] Apart from guidance provided by this comment in the second reading speech, the reference to 'illegal' conduct is ambiguous and may suggest there was no necessity to demonstrate a link between the illegal conduct and the practice of law. If this was the case, the jurisdiction of the committee was perhaps wider in this regard than it was to become later. See below section 2.4.3.4.

tribunal only had jurisdiction over those whose conduct required their removal from practice.[106] It could also be argued that this required the Statutory Committee to apply a much narrower view of discipline – and the Supreme Court of Queensland when exercising its appellate jurisdiction – than when discipline was applied by the court within its inherent jurisdiction. For instance, in some of the cases brought within the court's inherent jurisdiction (which predated the Act), the court imposed disciplinary fines upon lawyers.[107] The imposition of a fine in such cases suggests that the court did not consider the lawyer 'disqualified from practice' in the sense used by the later Act.

The debates which preceded the passage of the Bill provide no conclusive evidence as to whether Parliament intended the Act to depart from the common law understanding of conduct liable to discipline. During the second reading speech, the Attorney-General explained that the exclusion from the definition of professional misconduct of conduct which did not disqualify a person from practice was designed to 'save the practitioner from being harassed by the Queensland Law Society Incorporated'.[108] This would suggest that Parliament only intended the society to deal with a narrower range of conduct than the court could deal with in its inherent jurisdiction. But later in the debate the Attorney-General suggested the new Act would overcome the previous difficulties of having insufficient evidence to prove a person should be struck from the roll, and compared the new Act to the Trust Accounts Act, which had 'saved some weak

[105] Section 5(6) (emphasis added).

[106] Where the solicitor had engaged in illegal conduct, the same excuses did not appear to be available.. In other words, under the earliest version of the Act, disciplinary action was sufficiently justified if a person complained that a solicitor had engaged in illegal conduct. 'Unprofessional conduct' did not appear in the Act until 1938.

[107] For instance, *Re Batho* (1868) 1 QSCR 196, where the solicitor was suspended from practice, but only until he had repaid monies owed to the client.

practitioners from themselves.'[109] These comments suggest that the committee was to have jurisdiction over a broad range of conduct, perhaps even to the point of imposing strict liability, similar to that imposed by the Trust Accounts Act.

In summary, there is some evidence in the language of the Act itself and the expressed intention of those who passed the Act that the statutory meaning of professional misconduct was intended to differ from its common law meaning. However, when the Supreme Court heard appeals from the Statutory Committee, it does not appear to have applied any test different to its pre-1927 view of the purpose of discipline.[110]

A close reading of decisions by the Supreme Court of Queensland after the passing of the *Queensland Law Society Act 1927*, particularly decisions until 1939, suggests that the court had very little apparent interest in, or knowledge of, the new statutory provisions relating to discipline. The court's decisions until 1939 also suggest that, while acknowledging in a cursory way the need for discipline to protect the public, the court still struggled with the rationale for discipline, despite the fact that by the 1930s there was clear High Court authority to guide the court.[111] Decisions of the court during that period also suggest that the court had not fully considered *how* the public should be protected or,

[108] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 November 1927, 1001 (John Mullan).
[109] Ibid 1002.
[110] See *Barristers' Board v Darveniza* [2000] QCA 253.
[111] During this period there were Queensland cases which repeated the 'protect not punish' mantra, for instance the admission case of *Re Bridgman* [1934] St R Qd 1. Delivering the court's judgment, Blair CJ referred to *Incorporated Law Institute of New South Wales v Meagher*, *Southern Law Society v Westbrook* and *Re Brounsall* in stating the need to protect the public and absence of any penal element (6). However, the court did not go on to explore what this may mean. *Re M* [1938] St R Qd 454 was the first *disciplinary* decision by a Queensland court to explicitly state that an order striking a practitioner from the roll was not imposed by way of punishment: 'The question is whether he is fit and proper to remain on the roll' (461, Hart AJ), citing *Incorporated Law Institute of New South Wales v Meagher* [1909] 9 CLR 655, 680 (Isaacs J).

erroneously, gave too much weight to a lawyer's personal mitigating factors. This can be demonstrated by examining a group of cases from the 1930s which dealt with solicitors who had misused client money.

2.4.3.3 *Judicial Response to Trust Accounts Act 1923 (Qld)*

During the 1920s and 1930s solicitors faced the pressures and temptations which culminated in the Great Depression. Parliament enacted the *Trust Accounts Act 1923* (Qld) to deal with the problem of solicitors stealing trust money. Nevertheless, it seems that – at least until the latter half of 1939[112] - the Supreme Court underestimated the need to demand strict compliance with that Act and thereby failed to protect the public from solicitors' misuse of client money.

For instance, in *Re Gilbert*[113] two members of the court took a narrow view of obligations under the *Trust Accounts Act*, doubting whether anything less than 'continual or persistent'[114] or 'systematic'[115] breaches of that Act could amount to professional misconduct. The court overturned the Statutory Committee's imposition of a 12 month suspension and held that a seven month period of suspension was adequate, despite the fact that the solicitor had knowingly converted trust money. The only judge to discuss the purpose of discipline or any case law was Blair CJ, citing the aim of protecting the

[112] Discussed below section 2.5.2.
[113] [1933] St R Qd 281.
[114] Ibid 287 (Webb J).
[115] Ibid 289 (Henchman J). His Honour thought that, normally, the Statutory Committee should only recommend whether proceedings under the Act should be taken against a solicitor, rather than take action itself.

public.[116] Notably, he was also the only member of the court who did not overturn the Statutory Committee's finding of professional misconduct in relation to the breach of the *Trust Accounts Act*.

In contrast, the only member of the court in *Re Gilbert*[117] to cite individual sections of the *Queensland Law Society Act 1927* (Qld) was Henchman J, although not to emphasise the need for a heightened level of public protection. Quite the opposite. Instead His Honour went into exhaustive detail as to the basis upon which members of the Statutory Committee and members of the Queensland Law Society Council could be disqualified from practice. He concluded that, as a member of the council was only disqualified from membership following conviction on two occasions for breaches of the *Trust Accounts Act*, then surely the drafters of the Act did not intend that one breach could amount to professional misconduct.[118] Such a literal approach to the Act, focusing as it did on the potential outcomes for a council member, could not be said to reinforce the protective aim of discipline.[119]

The Supreme Court continued to place little importance on solicitors' trust account obligations in *Re B*,[120] heard in 1938. Both judges who heard that appeal agreed that the solicitor's false statements to his client satisfied the common law test of professional

[116] 'The Court, in admitting solicitors to practice, incurs a great responsibility to the public, and on their being admitted there is no doubt a greater responsibility to the public in a proper surveillance of these officers.': Ibid 286. he went on to cite *Southern Law Society v Westbrook* (1910) 10 CLR 609, 618 and the court's earlier decision in *Re a Solicitor* [1932] St R Qd 33.
[117] [1933] St R Qd 281.
[118] Ibid 289.
[119] Although Henchman J also suggested that, had the discretion been his rather than the Statutory Committee's, he would have imposed a more severe order (289).
[120] [1938] St R Qd 361.

misconduct, but disagreed as to how the solicitor's numerous breaches of the *Trust Accounts Act* should be categorised. Because the solicitor's acts and omissions were 'continual or persistent',[121] Webb J - consistent with his comments in *Re Gilbert*[122] - found that this constituted professional misconduct. Graham J disagreed, noting that, despite the numerous breaches of the Act over three years, this 'fails to raise in me the strong sense of indignation which should be raised by any disgraceful or dishonourable action.'[123] His Honour therefore felt unable to construe these actions as amounting to professional misconduct. This perhaps demonstrates the shortcomings of applying the common law test of professional misconduct - 'conduct, in the pursuit of a profession, which would be reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency'[124] - to relatively new legislation. Parliament had indicated its intention that breaches of the *Trust Accounts Act* be treated seriously, by providing for summary prosecution in the courts. But a disciplinary tribunal, applying the common law test of professional misconduct, will not necessarily respond to breaches of the legislation until the need to conform strictly with the Act has been internalised by the legal profession and courts. In other words, a breach of the *Trust Accounts Act* could not amount to professional misconduct until professional brethren considered such a breach 'disgraceful or dishonourable'.[125]

[121] The solicitor had filed to conduct an audit or keep proper receipt books or records for three years, and practised for two years without a practising certificate.
[122] [1933] St R Qd 281.
[123] [1938] St R Qd 361, 365.
[124] *Allinson v General Council of Medical Education* [1894] 1 KB 750, 761.
[125] Both judges agreed that the three month suspension should stand, but ordered the removal of a condition that the solicitor be further suspended until he paid costs *Re B* [1938] St R Qd 361, 365 (Webb J), 366 (Graham AJ).

This is a theme to which this thesis will repeatedly return – that common law or statutory discipline which defines professional misconduct according to what the legal profession may consider 'dishonourable or disgraceful' necessarily limits its potential to protect.

At its worst, such an approach could mean that no conduct could be subject to discipline while the majority of the profession was engaging in it, or if it invoked too empathetic a response from colleagues. In the subsequent section of this chapter I demonstrate how the Supreme Court continued to overlook or ignore Parliament's intention that statutory discipline break away from the 'disgrace and dishonour' mould and take a broader view of public protection.

2.4.3.4 Judiciary Continues to Ignore Strengthening Legislation: 1938 - 2004

The types of conduct liable to statutory discipline was subject to continued legislative amendment between 1938 and 2004, demonstrating Parliament's consistently expressed desire to strengthen the protective focus of statutory discipline.[126] However, the Supreme Court did not necessarily recognise or comply with the legislative intent. Instead it continued to apply its common law understanding of the purpose of discipline and the types of conduct liable to discipline.

[126] This does not necessarily mean that Parliament provided sufficient funds to enhance the protective functions of the regulatory body. Legislative changes without adequate funding can be viewed cynically, as in Ira Horowitz, 'The Economic Foundations of Self Regulation in the Professions' in Roger Blair and Stephen Rubin (eds), *Regulating the Professions* (1980) 16, citing Richard Posner, 'Theories of Economic Regulation' (1974) 5 *Bell Journal of Economics and Management Science* 335, 337. See discussion below section 3.10.2.1. However arguably, the changes considered here did not require extra funding, simply a change of attitude by the court.

For instance, amendments to the *Queensland Law Society Act 1927* (Qld) in 1938[127] widened the jurisdiction of the Statutory Committee by removing the reference to illegal conduct and requiring the Statutory Committee to hear and determine charges of 'malpractice, professional misconduct or unprofessional conduct'.[128] Arguably, this greatly strengthened the protective focus of statutory discipline, making it clear that the Statutory Committee's jurisdiction extended beyond cases which required a solicitor to be removed from practice to now also include matters which were less serious, but nevertheless evidenced sub-standard conduct from which the public must be protected, namely 'malpractice' and 'unprofessional conduct'. This is also suggested by comments made during debate on the 1938 Bill. Although the Attorney-General did not state expressly why the Bill added 'unprofessional conduct' to the jurisdiction of the Statutory Committee, he did express dissatisfaction with the lenient approach of the Statutory Committee in the past.[129] He also expressed disdain for legal members of Parliament who had thought Parliament should not interfere in the regulation of the profession and claimed the new legislation was 'solely concerned with the public interest.'[130] He claimed that three previous pieces of legislation[131] had improved the conduct of Queensland solicitors,[132] so that the Queensland legal profession had already become 'an example to the rest of Australia'.[133] Despite this, the Attorney-General thought there was a need for

[127] *Queensland Law Society Acts Amendment Act 1938* (Qld).
[128] *Queensland Law Society Act 1927* (Qld) s 5(1)(a), as amended by *Queensland Law Society Acts Amendment Act 1938* (Qld) s 2.
[129] Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 1938, 318 (John Mullan).
[130] Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1938, 375 (John Mullan).
[131] *Trust Accounts Act 1923* (Qld); *Queensland Law Society Act 1927* (Qld); *Queensland Law Society Act Amendment Act 1930* (Qld).
[132] Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1938, 374 (John Mullan).
[133] Ibid 375.

further legislation 'to keep the profession up to the scratch.'[134] These comments, together with the words of the legislation itself, indicate that it was the intention of Parliament to broaden the range of conduct liable to statutory discipline beyond the traditional range of professional discipline at common law.

Surprisingly, the inclusion of such a broad term as 'malpractice' has been largely ignored by the courts, apart from a brief comment in *Queensland Law Society v Smith*[135] that the term was probably limited to conduct in the course of practice.[136] At the time that the term was introduced into the Act, the term 'malpractice' had a broad meaning and was used in common language to mean not only malicious or dishonest conduct but also poor performance due to incompetence, negligence and ignorance.[137] Certainly, an exhaustive survey of the reported cases on lawyers' discipline in Queensland indicates that disciplinary tribunals and appellate courts in Queensland have only found professional misconduct or unprofessional conduct, never 'malpractice'. It is difficult to explain why the inclusion of the term 'malpractice' has been overlooked for nearly 70 years, other than that the court continued to apply its own understanding of the rationale for discipline, regardless of any statutory rationale.

[134] Ibid 374 .
[135] [2001] 1 Qd R 649.
[136] Ibid 652 (Thomas JA).
[137] Oxford English Dictionary (2004): ' *Law.* a. Treatment given by a member of the medical profession that departs from a generally accepted standard of practice and results in injury to the patient, through negligence, ignorance, lack of skill, or malicious intent. ... 1816 A. C. Hutchison *Pract. Observ. Surg.* (1826) 181 This boy is dangerously ill, and likely to die, in consequence of such malpractice.'

'Unprofessional conduct' – also included for the first time in 1938 - was not defined at all by the legislation until 1997,[138] but at common law required a substantial shortfall in standards.[139] It could be argued that the inclusion of the term in the legislation in 1938 removed any doubt, which may have been still present in the common law, that a person could be disciplined for inadvertent as well as deliberate breaches of standards of conduct. Yet there appeared to be resistance by the Supreme Court to view unprofessional conduct as anything very different to professional misconduct and, as late as 2006, the court appeared to conflate the two definitions.[140] It is therefore not surprising that Parliament saw a need to provide an explicit statutory definition of unprofessional conduct in 1997.

The 1997 amendments to the definition of conduct liable to discipline extended the definition of unprofessional conduct from its common law definition to include also 'serious neglect or undue delay, the charging of excessive fees or costs or a failure to maintain reasonable standards of competence or diligence.'[141] The words of the statute suggest there was no longer a need for the shortfall to be 'substantial' before the statutory definition was satisfied. During the second reading speech of the Bill, the Attorney-General confirmed the Government's intention to extend the definition of unprofessional conduct and 'broaden the umbrella of matters that come within the ambit of the

[138] *Queensland Law Society Act 1952* (Qld) s 3B (repealed), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 5, provided a partial definition.
[139] 'Conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency': *Re R, a Practitioner of the Supreme Court* [1927] SASR 58, 61.
[140] *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498; *Re Wheeler* [1992] 2 Qd R 690; *Baker v Legal Services Commissioner* [2006] QCA 145, [46]; David Searles, 'Professional Misconduct - Unprofessional Conduct: Is There a Difference?' (1992) *Queensland Law Society Journal* 239.

complaints tribunal.[142] He expected cases of delays and costs to 'now come before the complaints tribunal', which would increase its workload 'considerably'.[143]

In 2001, in *Queensland Law Society Inc v Smith*,[144] the court appeared to apply its disciplinary function within its inherent jurisdiction in just the same way as when hearing disciplinary appeals under the statutory regime.[145] As recently as 2006, the court preferred to cite the common law definition of professional misconduct,[146] despite the very extensive definition contained in the *Legal Profession Act 2004* (Qld).[147] Despite the comments of the Attorney-General that the government's intention was to broaden the range of conduct liable to statutory discipline, if anything, the court in *Smith* toyed with the possibility that the statutory definition of conduct liable to discipline may be *narrower* than its breadth at common law. Thomas J[148] thought that the term 'professional misconduct', as used in the legislation and at common law, only applied to misconduct in the course of legal practice,[149] so couldn't apply to Smith who was already under suspension and not involved with a legal practice at the time of his dishonest

[141] *Queensland Law Society Act 1952* (Qld) s 3B (repealed), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 5.
[142] Queensland, *Parliamentary Debates*, Legislative Assembly, 6 May 1997, 1442 (Denver Beanland).
[143] Ibid 1440 (Denver Beanland).
[144] [2001] 1 Qd R 649.
[145] Even though this case involved a solicitor and occurred after a statutory disciplinary scheme for solicitors was introduced, the case was brought within the court's inherent jurisdiction because the solicitor was already under suspension at the time of the further misconduct and the Queensland Law Society was unclear whether the case came within the statutory jurisdiction.
[146] *Baker v Legal Services Commissioner* [2006] QCA 145, [46], citing *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498. Both *Adamson* and *Baker* conflated the common law tests of professional misconduct and unprofessional conduct.
[147] Section 245.
[148] With whom McPherson JA and Atkinson J agreed.
[149] [2001] 1 Qd R 649, 652.

conduct.[150] While his Honour thought that part of the statutory definition of unprofessional conduct – 'serious neglect or undue delay, charging of excessive fees or costs, or failure to maintain reasonable standards of competence or diligence'[151] – was 'surprisingly limited',[152] this was remedied by the remainder of the section,[153] which preserved the 'proper limits' of unprofessional conduct.[154] Thomas J's comments should be read in their proper context: the case had been brought within the court's inherent jurisdiction because the Queensland Law Society was unclear as to whether the statutory definition of 'unprofessional conduct' extended to conduct outside of legal practice. It is quite likely that Thomas J thought part of the statutory definition to be 'surprisingly limited' because it clearly limited itself to aspects of legal practice such as fees and delays. The court in *Smith* only had to decide if fraudulent conduct outside practice could lead to statutory discipline, not the degree to which issues of incompetence could lead to discipline.

However, despite the clear words of the statute and Parliament's intention, this interpretation of the legislation was not embraced by the Supreme Court until much later, in 2000 in the case of *Attorney-General v Clough.*[155]

Admittedly, the court could avoid determining the statutory meaning of 'unprofessional conduct' or 'malpractice' because the Queensland Law Society determined which matters

[150] He had been convicted in the District Court of dishonestly applying $12,000 regarding three amusement machines and again in the District Court of misappropriating $156,000 in relation to ostrich-farming activities.
[151] *Queensland Law Society Act 1952* (Qld) s 3B(1).
[152] [2001] 1 Qd R 649, 651.
[153] *Queensland Law Society Act 1952* (Qld) s 3B(2).
[154] [2001] 1 Qd R 649, 651.

would be prosecuted and focused generally on more serious matters where the common law test of professional misconduct – dishonour and disgrace – would be easily satisfied. As a consequence, most disciplinary appeals dealt with matters involving 'professional misconduct'.

The Supreme Court did not undertake an extended discussion of the meaning of 'unprofessional conduct' until *Attorney-General v Clough*[156] in July 2000. Even then the discussion of the extent of the statutory definition of unprofessional conduct was *obiter dicta* as the court found the common law test of a 'substantial shortfall of standards' to be satisfied.[157] Muir J commented that there was a trend in England to conflate the tests of 'malpractice, professional misconduct and unprofessional conduct',[158] and both he and Pincus JA noted that the full range of orders became available on the tribunal or court finding professional misconduct *or* unprofessional conduct, making the need for categorisation less necessary.[159] However, Pincus JA's judgment is notable because it represents the first occasion upon which a Queensland judge clearly and explicitly acknowledged and embraced the intent of the legislature to encompass the 'merely' incompetent. His Honour took the opportunity to expressly state that, under the legislation, it was not necessary to show indifference or recklessness before an incompetent lawyer could be disciplined - incompetent but well-meaning lawyers were also liable.[160]

[155] Although decided in 2000, it was not reported until two years later: [2002] 1 Qd R 116.
[156] Ibid.
[157] Ibid 134-5 (Muir J).
[158] Ibid 137.

The protective focus of the legislation in Queensland was strengthened even further by the *Legal Profession Act 2004* (Qld). Barristers were brought within the statutory regime for the first time. The amendments also discarded the notion of 'unprofessional conduct' and included a new form of conduct liable to discipline – 'unsatisfactory professional conduct'. 'Unsatisfactory professional conduct' is not defined exhaustively by the Act, but includes conduct in relation to practice which 'falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian lawyer.'[161] This appears even wider than the definition of unprofessional conduct which it supersedes and arguably indicates an even stronger legislative intention that even conduct that in the past would have been considered 'simply negligence' and not liable to discipline, is included within the definition and so, now, liable to discipline. No longer is the benchmark what colleagues may consider a shortfall of standards but what a member of the Australian public is entitled to expect. The Legal Services Commissioner agrees with the view that the 2004 definition encompasses this much broader range of conduct and believes that 'consumers have been put first at the very core of the new complaints and disciplinary regime.'[162] Given that it is now the commissioner who prosecutes discipline in Queensland, it will be interesting to see whether his wider understanding of his protective jurisdiction will lead to changes in the profile of disciplinary cases and outcomes.[163] Time will tell whether the

[159] Ibid 138.
[160] Ibid 120.
[161] *Legal Profession Act 2004* (Qld) s 244.
[162] John Briton, Legal Services Commissioner, 'The System for Dealing with Complaints: the Commission's Approach' (Paper presented at the Bar Association of Queensland Annual Conference, Sanctuary Cove, Queensland, 5 March 2006) http://www.lsc.qld.gov.au/speeches/BAQ050306.pdf at 13 March 2006.
[163] By contrast, although the ACT legislation speaks in terms of what a client is entitled to expect and incorporates the notion of a 'substantial, recurring or continuing' departure from standards in the more

Queensland Parliament, the Supreme Court and the prosecuting body have finally reached consensus on the breadth of conduct liable to statutory discipline.

It is not only in definitions of conduct liable to discipline that the Queensland Parliament has expressed an apparent desire that the protective nature of discipline be strengthened. This can also be seen in the nature of orders prescribed by the legislation, particularly orders which proactively seek to ensure that, although allowed to continue to practise, a lawyer's standards of performance will improve in the future. A good example is provided by amendments in 1988 which allowed the disciplinary tribunal to order a solicitor to make files available for future inspection, to submit reports and to comply with conditions, such as attendance at various continuing legal education courses.[164] Amendments in 2004 continued this trend, extending the suggested range of orders to include supervised practice or limited practice.[165]

Another way in which the public is protected from substandard conduct by lawyers is by compensating clients for loss. Provisions for disciplinary tribunals to order lawyers to pay compensation to 'persons aggrieved' have been present in the legislation since 1987,[166]

serious professional misconduct (*Legal Practitioners Act 1970* (ACT) s 37), the Supreme Court of the ACT still appears to read down the definition of unsatisfactory professional conduct to require there to be a '*significant* departure' and for this to be a significant departure from the standards expected of legal practitioners of good repute', not standards expected by clients: *PG v The Law Society of the Australian Capital Territory* [2004] ACTSC 99, [22] (emphasis added). This is arguably a misreading of the court's decision in *Howes v Law Society of the Australian Capital Territory* [1998] ACTSC 71.

[164] *Queensland Law Society Act 1952* (Qld) s 6 (3)(ab) (repealed), inserted by *Queensland Law Society Act and Another Act Amendment Act 1988* (Qld) s 5.

[165] *Legal Profession Act 2004* (Qld) s (4).

[166] *Queensland Statutory Committee Rules 1987* (Qld) s 24 (allowing for orders that portions of fines be paid to 'persons aggrieved'; *Queensland Law Society Act 1952* (Qld) s 6R, inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 9. Now contained in *Legal Profession Act 2004* (Qld) s 280(4)(b). Moorhead *et al* have demonstrated how the inclusion of compensatory powers in the disciplinary

providing further evidence that the protective focus of the legislation has strengthened over time.

2.5 PUNISHMENT

2.5.1 *Punishment* Per Se

The High Court has not drawn a sophisticated rationale for discipline in most cases that have come before it and has usually been satisfied to pose the issue as a simple dichotomy between protection of the public and punishment of the lawyer, expressly disavowing any element of punishment in the disciplinary order. But, as I noted in Chapter One, punishment can contain a number of elements.[167] Two elements relevant to the current discussion are deterrence and retribution. There has been a greater analysis of the concept of punishment in State Supreme Courts than in the High Court, and an acknowledgement that some purposes of punishment – namely deterrence - can also be directed towards the protection of the public.

context has led to confusion in the decision making process: Richard Moorhead, Avrom Sherr and Sarah Rogers, *Compensation for Inadequate Services* (Institute of Advanced Legal Studies, London, 2000) 45.

[167] Above section 1.3.2; HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 43.

Early Queensland cases sometimes emphasised a penal element in discipline.[168] For instance, only a few years after his apparent endorsement of the protective function of discipline in *Re Swanwick*,[169] in *Re Chubb*[170] Lilley CJ spoke of the punishment of discipline[171] and gave weight to personal factors that would be less relevant if the court's focus was on protection.[172] Even though Chubb had sent a threatening letter, the court accepted that he had been simply 'ignorant and foolish'[173] rather than deliberately threatening .and ordered that he only be censured because of the court's 'domestic knowledge' of his good character[174] and strong character references from Bundaberg, where he practised.[175]

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[168] *Re Swanwick; ex parte Bain* (1882) QLJ, February 1, 1883, 117 (Lilley CJ, with whom Harding and Pring JJ agreed): 'There are many instances of misconduct on the part of officers of the court visited by severe punishment....'(118); 'We are sitting in judgment to-day, not upon the question whether he has or has not been guilty of the statutory offence, but whether his conduct has been such as requires the exercise of the penal jurisdiction of the court over him, by means of disbarment and striking him off the roll.' (119); 'severe punishment'(119); *Re Chubb* [1887] 3 QLJ 35, 36 (Lilley CJ): Our jurisdiction being exemplary and severe even to the extent of professional extinction of the wrongdoer...', '... the solicitor acted ignorantly and foolishly, but not in such a way as to call for the severest form of punishment.'; *In re Bridgeman* [1927] QWN 21: 'proceedings taken in the Supreme Court against a solicitor for the purpose of bringing any improper or unprofessional conduct by him before the Court for consideration, ought in all cases to be instituted by calling upon him to show cause why the Court should not exercise its disciplinary and punitive powers over him in regard to such conduct.'

[169] (1882) QLJ, February 1, 1883, 117. Discussed above section 2.4.1.

[170] [1887] 3 QLJ 35.

[171] Ibid 36: Our jurisdiction being exemplary and severe even to the extent of professional extinction of the wrongdoer...', '... the solicitor acted ignorantly and foolishly, but not in such a way as to call for the severest form of punishment.'

[172] See discussion of personal factors in Chapter Seven.

[173] [1887] 3 QLJ 35, 37.

[174] [1887] 3 QLJ 35, 37. It is possible that this solicitor, AFB Chubb was related to the prominent Chubb legal family, which included Charles Frederick Chubb and Charles Edward Chubb: Ross Johnston, *A History of the Queensland Bar* (Bar Association of Queensland, Brisbane, 1979) 49-50, which could explain the court's 'domestic' knowledge of him, a knowledge which other lawyers facing discipline may not be able to call upon. It should also be noted that the legal profession was extremely 'close knit' at this time. Lilley CJ and his son Edwyn Lilley were both criticised because of the frequency with which the son appeared before the father: Johnston at 43-4. In *Re Chubb* itself, the son Edwyn Lilley appeared on behalf of the Queensland Law Association, while his father sat on the bench. In *Re Costello* (1889) 3 QLJ 129, concerning whether a student at law was fit to be admitted as a barrister, Chubb and Lilley appeared for the Board of Examiners for Barristers, before a bench which included Lilley CJ. If indeed AFB Chubb was a member of this prominent Chubb family, *Re Costello* shows the degree to which the legal profession in Queensland was then a close network of friends and relatives.

The Supreme Court had still not expressed a sophisticated rationale for discipline when it heard *Re a Solicitor*[176] in 1913. By then the High Court had heard both *Incorporated Law Institute of New South Wales v Meagher*[177] and *Southern Law Society v Westbrook,*[178] in which the High Court clearly stated the protective focus of discipline and the need to protect the public from the 'simple and confiding' as well as the dishonest.[179] Yet neither of those cases, nor any other case law, either from Australia or elsewhere, was cited by any members of the bench.[180] In a half page judgment, Cooper CJ[181] simply noted that the solicitor's breach of the *Suppression of Gambling Act 1895* (Qld) involved neither 'personal dishonour nor dishonesty', but only ignorance, and proceeded to censure him.

As recently as 1987, at least one member of the Supreme Court of Queensland could be thought to consider punishment to be a primary aim of discipline when he said that the court's concern in disciplinary proceedings is '*not only* with punishment of solicitors guilty of professional misconduct but also with the protection of members of the public.'[182] However, as the following discussion shows, the court has generally endorsed

[175] Ibid 37.
[176] [1913] St R Qd 223. The solicitor is not named in this case, although the previous practice in Queensland was to name, even if misconduct was not established, as in *Re Swanwick* (1882) QLJ 116, where a complaint of acting without instructions was not found to be established on the evidence.
[177] (1909) 9 CLR 655.
[178] (1910) 10 CLR 609.
[179] *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 688, discussed above section 2.3.1.
[180] Although in the course of argument, counsel for the solicitor referred to the two English cases of *Re Weare* [1893] 2 QB 439 and *Re a Solicitor* (1905) 22 TLR 127; 93 LT 838.
[181] With whom Chubb and Lukin JJ agreed.
[182] *Re Walter*, (Unreported, Supreme Court of Queensland, Full Court, Shepherdson, Connolly and Williams JJ, 22 May 1987) 12-13 (Williams J, emphasis added). On appeal by the solicitor to the High Court, in *Walter v Council of Queensland Law Society* (1988) 62 ALJR 153, the High Court overturned the decision of the Supreme Court on the basis that there had been no allegation of dishonest use of client funds, through wrongful conversion or stealing, and the findings of the Statutory Committee could have been equally based on a finding of 'procedural impropriety and incompetent management of lending transactions' (156) rather than fraud. Equally, the High Court cautioned against finding dishonesty simply

the primary role of public protection in discipline, as well as articulating a more sophisticated rationale for discipline than appears from judgments of the High Court.

2.5.2 *Deterrence*

In the relatively few disciplinary cases which have come before it compared with disciplinary cases before the State courts, usually the High Court has stated simply that no punishment is involved in discipline and has not articulated the ways in which discipline can protect the public. In comparison, and possibly because of the greater numbers of occasions upon which they have been required to explore the complexities of discipline, lower courts have explicitly acknowledged that the public can be protected through deterrence.

Although the Supreme Court of Queensland did not appear to be well acquainted with the relevant legislation until much later, it recognised the protective impact of deterrence as early as 1939. This was largely a response to the court's belated acknowledgment that the number of cases in which solicitors had misused, or stolen, client money required a proactive response from the court. While the court did not refer to 'deterrence' by name, in a group of cases in the second half of 1939, the court applied a deterrent approach. For instance, in *Re G*[183] Webb J identified the numerous trust account frauds that had come to the court's attention in recent years[184] and stated explicitly that lawyers must strictly

because the Statutory Committee rejected the solicitor's version of events (157). The High Court did not comment on the reference to 'punishment' in the lower court.

[183] [1939] QWN 39.

[184] Ibid.

comply with the *Trust Accounts Act* or risk being struck from the roll.[185] In a case also called *Re G*[186] but heard four months later, the court gave a further unequivocal indication that, in the future, a solicitor found guilty of stealing client money would normally be struck from the roll.[187]

The court continued this strong message of deterrence in *Re H*,[188] where Macrossan SPJ warned of the need to avoid further confusion by 'whittling down' the decision in *Re G*,[189] and emphasised the need for clear and consistent deterrence of misconduct in the profession:

> The shocking prevalence of malversation of clients' funds by solicitors over the last few years, as shown by a list of cases prepared by the Registrar,[190] further points to the necessity for clear and unambiguous condemnation by the Court, and the enunciation of some principle to cover cases of proved dishonesty.[191]

The earliest detailed and explicit analysis of the deterrent function of discipline was in *Law Society of New South Wales v Bannister*.[192] The High Court's comment in *Clyne v New South Wales Bar Association*[193] - that the power to discipline is entirely protective with no element of punishment involved - was qualified by Sheller JA, who suggested that this dichotomy may be not only misleading but also simplistic. Although retribution played no part in discipline, Sheller JA had no doubt that deterrence did have a clear role

[185] Ibid.
[186] [1940] QWN 7, (heard 2 October 1939).
[187] Ibid 11 (Macrossan SPJ, with whom RJ Douglas and Philp JJ agreed).
[188] [1940] QWN 8, heard 14 December 1939, 13 (Macrossan SPJ and Philp J, Webb J dissented).
[189] [1940] QWN 7 (heard 2 October 1939).
[190] This was the list prepared for the court in *Re M* [1938] St R Qd 454.
[191] [1940] QWN 8, heard 14 December 1939, 13.
[192] (1993) 4 *Legal Profession Disciplinary Reports* 24 (New South Wales Court of Appeal). The deterrent function of discipline was mentioned earlier, but only briefly, by the Supreme Court of the Australian Capital Territory in *Re a Solicitor* (1992) 110 FLR 9, 24.
[193] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 198.

to play.[194] His comments were later endorsed in *New South Wales Bar Association v Hamman*.[195]

The legitimate use of deterrence in discipline was also noted by Pincus JA in *Attorney-General v Bax*:

> Although I accept that the remedies of suspension or striking-off are not applied by way of punishment, but rather for the protection of the public and of the profession's standing, there is also a deterrent element.[196]

The question whether it would be valid to remove a person from practice *merely* to deter others is a more likely outcome if it is acknowledged that deterrence can lead to a harsher result. It is difficult to assess the courts' view of such a proposition, as courts are usually careful to find that a person is in fact unfit to practise at the time of the disciplinary proceedings, before endorsing the role played by deterrence.[197]

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[194] '... the distinction between the two stated objectives of protection and punishment is blurred and can be misleading. ... The order for removal is not punitive but protective. .... But the supervisory jurisdiction of the Court and the Tribunal is also directed to protecting the public more generally by maintaining and encouraging appropriate standards of professional behaviour. .... [R]etribution, a purpose of criminal punishment, is no part of the Court's purpose in making an order against a solicitor in the exercise of its supervisory jurisdiction. The exercise of the power to remove from the roll, suspend or fine a solicitor is directed to protecting the public by ensuring that those unfit to practise do not continue to hold themselves out as fit to practise and that high standards are maintained. The maintenance of such standards involves deterring the offender from repeating the offence and deterring others who might by tempted to offend.': Ibid 27-8.

[195] [1999] NSWCA 404 (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Priestley JA and Davies AJA, 29 October 1999) [77].

[196] [1999] 2 Qd R 9, 22, citing *Clyne v NSW Bar Association* (1960) 104 CLR 186, 202. Shepherdson J and McPherson JA agreed with the comments of Pincus JA.

[197] Linda Haller, 'Lawyers and the Third Dimension: A Solicitor v The Council of the Law Society of New South Wales' (2004) 23 *University of Queensland Law Journal* 211, 216.

Comments by Moynihan SJA and Atkinson J in *Queensland Law Society v Carberry*[198] would appear to argue against the possibility of removing a person from practice merely to deter, as their Honours mark deterrence as only a subsidiary purpose of discipline:

> It is now trite to say that the *primary* role of proceedings such as those before the Tribunal is to protect the public from persons not fit to be held out as officers of the court and as a proper person to be entrusted with the duties and responsibilities of the solicitor..... As was pointed out in *Attorney-General v Bax* ... there is a *subsidiary* purpose in the public interest and that is to deter other practitioners who might otherwise engage in professional misconduct.[199]

In other words, their Honours appear to endorse only deterrence which flows naturally as a result of disciplinary action taken against those who are found unfit to practise.[200]

In *Attorney-General v Clough,*[201] Muir J limited his comments in a similar way,[202] suggesting that, while punishment could not be the primary role, it may be a valid secondary role. His comments were echoed in *Queensland Law Society v Cummings*[203] by McMurdo P,[204] with whom Davies JA agreed, and Fryberg J.[205] McMurdo P was also careful to narrow the sense in which she used the term 'punishment', expressing a desire that an order of the Tribunal still 'provide an appropriate general and specific deterrent.'[206]

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[198] [2000] QCA 450.
[199] Ibid [38].
[200] Ibid [38]. (emphasis added).
[201] [2002] 1 Qd R 116.
[202] Ibid [61] (emphasis added). See also *Queensland Law Society v Roche* [2004] 2 Qd R 574, 589: '...the ultimate objective is not in this case condign severe punishment of the errant practitioner: it is the protection of the public.'
[203] [2004] QCA 138.
[204] Ibid [22].
[205] Ibid [32].
[206] Ibid.

While the courts generally appear unwilling to remove an otherwise 'fit' person from practice permanently, in *Queensland Law Society v Cummings*[207] the court assumed it was acceptable for the tribunal to have suspended Cummings for 12 months merely to 'deter him and others'.[208]

Clearly, if a disciplinary decision is to deter other lawyers from similar misconduct, it is important that other practitioners become aware of the disciplinary decision. This requires disciplinary proceedings to be held in public and the results of that disciplinary proceeding to be published.[209] This has not always been the case in Queensland – an issue which I take up in Chapter Eight.

2.5.3 *Retribution*

While the Supreme Court of Queensland endorsed the role of deterrence in protecting the public, it denied that another primary element of punishment – retribution – had any legitimate role to play in discipline.[210] Retribution looks backward because it aims to provide punishment for past misdeeds simply because it is thought 'fair' that they be punished.[211] Retribution was explicitly discounted in *Re a Barrister and Solicitor,*[212] where the Full Court of the Supreme Court of the Australian Capital Territory stated that

[207] [2004] QCA 138.
[208] Ibid [23].
[209] Chapter Eight looks at the issue of publicity in more detail.
[210] *Legal Services Commissioner v Baker* [2005] QCA 482, [18].
[211] Retribution is discussed in detail above section 1.3.3.
[212] (1972) 20 FLR 234.

the object of disciplinary action was 'not to exact retribution, [but to] protect the public and the reputation of the profession.'[213]

English courts are perhaps more ready to acknowledge a retributive element in discipline. In *Bolton v Law Society*,[214] Sir Thomas Bingham MR, with whom Rose and Waite LJJ agreed, distinguished deterrence from other forms of punishment when he said that a disciplinary order may be imposed,

> ... in order to punish [the solicitor] for what he has done [*and*] to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But *often* the order is not punitive in intention.[215]

Despite this apparent endorsement of penal intent, the Master of the Rolls thought that most orders of the disciplinary tribunal were made, either to ensure that the offender did 'not have the opportunity to repeat the offence',[216] or to 'maintain the reputation of the solicitors' profession'.[217]

There have been occasional comments by members of the Supreme Court of Queensland which, on their face, could be construed as an endorsement of retribution. For instance, in *Attorney-General v Gregory*[218] White J agreed with her fellow judges that 'in a case of this nature the governing principle for the Tribunal to consider is the protection of the

[213] Ibid 244 (Fox, Blackburn and Woodward JJ), adopted in *Re a Legal Practitioner* (1981) 55 FLR 405, 423 (Supreme Court of the Northern Territory); *Re a Practitioner* [2001] WASCA 154, [10].
[214] [1994] 2 All ER 486.
[215] Ibid 492 (emphasis added), cited with approval in *Gupta v General Medical Council* [2001] UKPC 61; 64 BMLR 56, [21].
[216] Ibid.
[217] Ibid.
[218] [1998] QCA 409 (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and White J, 4 December 1998).

public and the standing of the profession, not issues of punishment.'[219] But she also acknowledged the need for the tribunal to consider public perceptions of disciplinary orders imposed by the tribunal and court:

> [T]he community can rightly be uneasy if an attempt to influence a key witness by one who is in a privileged position as an officer of the court, is not treated with the gravity which that conduct deserves.'[220]

Such a comment, particularly the reference to the treatment which past conduct 'deserves', is retributive in flavour[221] and could be interpreted to suggest that there may be occasions on which a court or tribunal could take purely retributive action for past misconduct. Similarly, McMurdo P, with whom Davies JA and Helman J agreed, also hinted at retribution in *Queensland Law Society v Wright*[222] when she stated that serious misconduct was 'deserving of condign punishment, not only as a deterrent but also to reassure the public that such conduct on the part of lawyers will not be tolerated.'[223]

However, such comments appear only rarely in the cases. Like suggestions that a conviction could automatically disqualify a lawyer from the right to practise,[224] they remain *obiter dicta* as they have not been applied in any case. Instead the courts have found that the primary criterion – the need to protect the public - is satisfied, before imposing discipline.

[219] Ibid.
[220] Ibid.
[221] See discussion of retribution above section 1.3.3.
[222] [2001] QCA 58.
[223] Ibid [67].
[224] Discussed below section 2.6.3.

Retribution is backward-looking, in the sense that it aims only to sanction for past misconduct. Therefore, a strong denouncement by the High Court of any element of retribution in discipline can also be implied from comments of Isaacs J in *Southern Law Society v Westbrook*[225] that 'discipline exerted by the Court looks *entirely* to the future',[226] and in *Incorporated Law Institute of New South Wales v Meagher*[227] where his Honour again stated that the question in discipline is not the past, but the lawyer's 'worthiness and reliability for the future.'[228]

Some judicial statements that professional discipline is not designed to punish have occurred in cases in which the practitioner has been struck off or have been explicitly limited to stating that *strike off* orders involve no element of punishment.[229] Thus, it could be argued that those comments only apply to strike off orders, with other forms of order, such as suspensions and fines, still allowed to perform a retributive role. This is an issue which I explore more fully in Chapters Five and Six.[230]

[225] (1910) 10 CLR 609.
[226] Ibid 626 (emphasis added).
[227] (1909) 9 CLR 655.
[228] Ibid 681.
[229] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 201-2: 'a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege'; *Re H, A Solicitor* [1960] Qd R 407, 414 (Hanger J, with whom Townley and Stable JJ agreed): 'The evidence ...shows not only conduct deserving of punishment, but also conduct which indicates that in the interest of the public, his name should be removed from the roll of solicitors'; *Barristers' Board v Darveniza* [2000] QCA 253, [32]: '[removal of the right to practise is done] not by way of punishment but in order to protect the public and maintain public confidence in the administration of justice'. Compare *Attorney-General v Kehoe* [2001] 2 Qd R 350, where, in dismissing the Attorney-General's appeal against a fine of $7,500, Thomas JA noted that the 'end objective' of the disciplinary system was not punishment of the practitioner but protection of the public (356).
[230] Chapter Five (Suspensions) and Chapter Six (Fines).

In addition, some cases have suggested that, while matters brought under the court's inherent jurisdiction are entirely protective and not punitive, a punitive function could exist within the statutory disciplinary framework.[231] In *Mellifont v Queensland Law Society Inc*[232] Andrews J stated:

> Our concern is *not so much to punish* as to protect members of the public against professional misconduct, although the concept of punishment is retained by the *Queensland Law Society Act 1952* (as amended) and Rules.[233]

This view is not supported by a reading of the cases or the legislation. As the earlier discussion of the protective emphasis within legislation demonstrates, in the past the Supreme Court of Queensland has aligned the purposes of statutory and inherent disciplinary processes and made no distinction between the two.

2.6 Reputation

2.6.1 *The Dangers of Reputational Concerns*

The final possible rationale for discipline is the most problematic – the use of discipline to protect or enhance the reputation of the legal profession. It is fair to say that the proper operation of the legal system requires the public to trust the legal profession, and that trust will be reinforced when the public sees that lawyers are disciplined for misconduct. However, there is also a danger that concern about reputation will be misplaced or given

[231] *Queensland Law Society Inc v A Solicitor* [1989] 2 Qd R 331, 336 (Mc Pherson J, with whom Dowsett J agreed).
[232] [1981] Qd R 17.

too much emphasis, causing disciplinary processes to be used for the purposes of the legal profession itself, rather than the public. The danger is illustrated by comments such as those in *Clyne v New South Wales Bar Association*[234] that a disbarment order is made at least partly so that the bar does not lose certain privileges[235] and in *New South Wales Bar Association v Hamman*[236] that:

> In its *own interest*, the organized Bar simply cannot permit the public to gain the impression that its members flout the revenue laws or that it condones or tolerates or belittles the seriousness of crimes against the revenue.[237]

2.6.2 *Public Perceptions and 'Holding Out'*

The concept of reputation is a broad one, but it certainly involves the notion of the public perception of the legal profession. A distinction can be made between whether a person is actually fit to practise, and whether a person can be *held out* as fit to practise. The second variation relates to the perception of fitness rather than actual fitness. It is suggested that concern for the public perception of fitness raises the risk of disciplinary proceedings being used to protect the reputation of the legal profession.

In *Queensland Law Society Inc v Smith*,[238] Thomas JA said the solicitor's conduct was:

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[233] Ibid 28 (emphasis added). In *Ooi v Medical Board of Queensland* [1997] 2 Qd R 176 the Queensland Court of Appeal discounted any such distinction in disciplinary cases in general (177).
[234] (1960) 104 CLR 186.
[235] Ibid 201. Presumably the privilege of self-regulation.
[236] (1999) 217 ALR 553.
[237] Ibid 569, quoting Sandford M Stoddard and Carl A Stutsman Jr, 'Income Tax Offences by Lawyers: An Ethical Problem', (1972) *American Bar Association Journal* 842, 845 (emphasis added). These passages from *Hamman*, including the quote from Stoddard and Stutsman, were cited with approval in *Barristers' Board v Darveniza* [2000] QCA 253, [34] (Thomas JA).
[238] [2001] 1 Qd R 649.

> sufficiently serious to require removal of his name from the roll in the interests and protection of the public *and* reveal him to be unfit to be *held out* to members of the public as an officer of the court.[239]

This wording of the test demonstrates the point being made here - that perhaps the court can consider two alternative bases for discipline: first, where in fact the public must be protected from the solicitor and, second, where the damage caused to the profession's reputation means the solicitor could no longer be *held out* as an officer of the court.

The reputation of the profession was clearly a relevant factor for McMurdo P when confirming the 12 month suspension imposed in *Queensland Law Society v Roche.*[240] The solicitor had been found guilty of gross overcharging and failing to ensure a client gave fully informed consent to a fee agreement and Her Honour noted that in such circumstances 'substantial penalties will be justified to protect primarily the public but also the reputations of the vast majority of decent practitioners to whom such conduct is abhorrent.'[241]

A reference to 'holding out' appears in the case law as early as *Re Weare,*[242] cited with approval by the High Court in *Southern Law Society v Westbrook*[243] and appears in a Queensland case as early as 1931, in *Re a Solicitor.*[244] References to public perception, in particular whether a person could be 'held out' as fit to practise, continue to appear

[239] Ibid 654 (emphasis added). McPherson JA and Atkinson J concurred.
[240] [2004] 2 Qd R 574, 588.
[241] Ibid [57]. See also *Baker v Legal Services Commissioner* [2006] QCA 145, where Jerrard JA agreed that the strike off order should stand, partly because of the shame which Baker had brought upon the profession ([77]).
[242] [1893] 2 QB 439.
[243] (1910) 10 CLR 609.
[244] [1932] St R Qd 33.

regularly in pronouncements by judges of the Supreme Court of Queensland,[245] suggesting that members of that court at least implicitly acknowledge that public perception is a valid consideration when exercising disciplinary powers. What needs to be determined is whether perception alone would justify discipline, in other words, whether a lawyer who is actually fit to practise, would be disciplined merely because of a public perception that he or she is unfit.

2.6.3 *High Court's Attitude to Reputation*

2.6.3.1 *Ziems*

The High Court was forced to deal explicitly with the issue of public perception in *Ziems v Prothonotary of the Supreme Court of New South Wales*.[246] Ziems had been convicted of involuntary manslaughter, involving the death of a motorcyclist. Earlier disciplinary appeals to the High Court had arisen from conduct occurring in the course of practice, such as through the misuse of trust funds. This matter occurred outside the normal conduct of daily practice, so the court had to consider carefully if, and why, such a conviction meant Ziems was no longer fit to practise, and hence consider the aim of professional discipline.

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[245] *Re Walter*, (Unreported, Supreme Court of Queensland, Full Court, Shepherdson, Connolly and Williams JJ, 22 May 1987) 6-7 (Shepherdson J); *Queensland Law Society v Mead* [1997] QCA 83 (Unreported, Fitzgerald P, McPherson JA and Williams J, Supreme Court of Queensland, Court of Appeal, 22 April 1997); *Attorney-General v Bax* [1999] 2 Qd R 9; *Attorney-General and Minister for Justice v Gregory* [1998] QCA 409 (Unreported, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, McMurdo P and White J, 4 December 1998); *Barristers' Board v Pratt* [2002] QCA 532, 2; *Queensland Law Society v Cummings* [2004] QCA 138, [22]; *Queensland Law Society v Whitman* [2003] QCA 438, [32], [37]; *Queensland Law Society v Wakeling* [2004] QCA 42, [27]. Similarly, when deciding whether to readmit a solicitor in *Janus v Qld Law Society Inc* [2001] QCA 180, the court framed the relevant question as whether the applicant should be *put before* the public '*as* a fit and proper person', not whether he was a fit and proper person: [48], [60], [65] (emphasis added).

[246] (1957) 97 CLR 279.

Even on the worst interpretation of the facts, the death of the motorcyclist arose from an isolated instance of drink driving. No participants in the hearing before the Supreme Court of New South Wales or the appeal to the High Court thought that Ziems as an individual was incompetent or lacked the personal characteristics necessary for a member of the legal profession. But it was argued that he should be removed from the profession on the basis that he could not be *'held out'* as fit to practise as a lawyer - in other words, that he should be removed simply to preserve the reputation of the legal profession. The Supreme Court of New South Wales thought Ziems should be struck off simply on the basis of the conviction regardless of his actual fitness at the time of the disciplinary hearing. But the High Court, by a majority,[247] disagreed. Fullagar J emphasised that there was no question of the court punishing Ziems as the punishment had already been imposed by the criminal court.[248] The majority emphasised that a disciplinary hearing focused on a lawyer's actual fitness to practise at the time of the disciplinary hearing, not the time of misconduct or the time of a conviction. Once the majority considered the actual conduct which led to Ziems facing a charge of manslaughter and the circumstances of his conviction, their Honours were satisfied that he in fact remained fit to practise. The most extensive examination of the purpose of disciplinary proceedings was by Kitto J. His Honour foreshadowed the possibility that there may be some convictions which carried such stigma that a conviction would lead a lawyer to be deemed automatically and permanently declared unfit to practise. He stated:

> It is not difficult to see in ... convictions of some kinds of offences, instant demonstration of unfitness for the Bar. ... A conviction may of its own force carry such a stigma that

[247] Fullagar, Kitto, Taylor JJ.
[248] (1957) 97 CLR 279, 289.

> judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails.[249]

The method is *ad hoc*, as His Honour made no attempt to identify the types of convictions which may demonstrate this instant unfitness. He did not consider the conviction in the case before him to meet such criteria, given that the crime was not premeditated, did not indicate 'a tendency to vice or violence or any lack of probity' and had 'neither connexion with nor significance for' Ziem's role as a barrister.[250] The majority concluded that Ziems was fit to practise, but ordered that he be suspended from practice for the period of his imprisonment, merely because of the 'incongruity' of a barrister practising from behind bars.

2.6.3.2 *A Solicitor*

The comments of both Kitto J in *Ziems v Prothonotary of the Supreme Court of New South Wales*[251] and Griffith CJ in *Southern Law Society v Westbrook*,[252] relating to perceptions of unfitness, were cited with approval by the High Court in *A Solicitor v The Council of the Law Society of New South Wales*[253] in the course of acknowledging that an 'additional [third] dimension' may exist to warrant removal from the roll, apart from evidence of professional misconduct or a lack of personal qualities.[254] The case received attention because, like *Ziems*, it brought the purpose of disciplinary proceedings into

[249] Ibid 298 (Kitto J).
[250] *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 299.
[251] (1957) 97 CLR 279.
[252] (1910) 10 CLR 609.
[253] *A Solicitor v The Council of the Law Society of New South Wales* (2004) 216 CLR 253, [21], [20].
[254] *A Solicitor v The Council of the Law Society of New South Wales* (2004) 216 CLR 253, [20].

sharp focus.[255] It involved a solicitor[256] who had been convicted in February 1998 on four counts of aggravated indecent assault involving his stepchildren. He was initially sentenced to three months imprisonment but upon appeal the sentence was fully suspended after he agreed to enter a three year good behaviour bond.

The impact of this conviction upon the public's trust of lawyers was of concern to the New South Wales Court of Appeal. There, Sheller JA (with whom Mason P agreed) argued that:

> The reputation and standing of the legal profession must be upheld. ... The legal profession cannot permit the public to gain the impression that it condones or tolerates or belittles the committing by its members of any serious crime.[257]

However, when the matter went on appeal, the High Court of Australia saw the key issue as whether, at the time of the Court of Appeal's decision, the individual solicitor *was* a fit and proper person to practise as a legal practitioner or whether his personal conduct demonstrated that he currently possessed the qualities required of a legal practitioner.[258] The High Court failed to discuss the Court of Appeal's concern about the adverse impact of the case on the reputation of the legal profession. It is suggested that, by its omission to discuss reputational issues, the High Court effectively treated issues of reputation as irrelevant to the determination of individual disciplinary cases.

2.6.4 *Use of* Positive *Character References*

[255] Haller, above n 197.
[256] The *Children (Criminal Proceedings) Act 1987* (NSW) s 11 prohibits the naming of the solicitor, as this would reveal the identity of the children involved.
[257] *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62, [80].

There are other indications that issues of reputation should be treated with care by a disciplinary tribunal. Consistent with the High Court's disregard of possible evidence of an *adverse* reputation arising from a criminal conviction, the Queensland Court of Appeal has cautioned against giving undue weight to *positive* character references.[259]

2.6.5 *Summary of Current Law on Reputation*

It was noted earlier[260] that Thomas JA's statement of the test in *Queensland Law Society Inc v Smith*[261] suggested that damage to the reputation of the profession may be a sufficient basis for imposing discipline. A survey of the case law would suggest that this is not the case. Only *obiter dicta* in *Ziems v Prothonotary of the Supreme Court of New South Wales*,[262] *Southern Law Society v Westbrook*[263] and *A Solicitor*[264] countenance the possibility of removing a lawyer from practice simply on the basis of a conviction. The courts have never admitted taking such a course, and when determining individual cases, have emphasised that the decision is based on the lawyer's actual fitness at the time of the disciplinary hearing.[265] Thus, if we look at the *ratio* of the case law, the courts have indicated that the public is to be protected from actual unfitness rather than only

[258] *A Solicitor v The Council of the Law Society of New South Wales* (2004) 216 CLR 253, [20].
[259] *Janus v Queensland Law Society Inc* [2001] QCA 180, [12]; *Barristers' Board v Young* [2001] QCA 556, [22]; *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42, [26]. See discussion in Mortensen, above n 61, 168-9. See discussion below section 7.4.
[260] Above section 2.6.2
[261] [2001] 1 Qd R 649, 654: whether conduct was 'sufficiently serious to require removal of his name from the roll in the interests and protection of the public *and* reveal him to be unfit to be *held out* to members of the public as an officer of the court.'
[262] (1957) 97 CLR 279.
[263] (1910) 10 CLR 609.
[264] *A Solicitor v The Council of the Law Society of New South Wales* (2004) 216 CLR 253, [20].
[265] *Prothonotary v Del Castillo* [2001] NSWCA 75, [71]; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [36] (Tobias JA), [17], [30] (Young CJ in Eq, with whom Meagher JA agreed); *Queensland Law Society v Cummings* [2004] QCA 138, [22].

perceptions of unfitness. This means that, while the protection of the reputation of the legal profession can be a valid aim of discipline, it can only be a secondary aim.

2.7 CONCLUSION

In this chapter I have sought to demonstrate the rationale for imposing discipline as stated by the courts and the legislature. The preceding discussion has demonstrated the consistent way in which the High Court and Supreme Court of Queensland have confirmed that the primary focus of discipline is to protect the public. While the High Court has arguably not had sufficient opportunity or necessity to fully articulate the various ways in which the public can be protected, the Supreme Court of Queensland has embraced the notion of protection through deterrence, although only as a valid *secondary* aim of discipline.

All Australian courts continue to deny any valid role for retribution, despite the occasional judicial comment with a retributive tone. More particularly for the purposes of this thesis, the courts, particularly the High Court, has never condoned the use of disciplinary proceedings merely to enhance the reputation of the legal profession. This has only been acknowledged as a secondary outcome when steps are taken to remove a practitioner who has otherwise been shown to be unfit to practise at the time of the disciplinary hearing.

I have also identified some past tension between judicial and legislative rationales for discipline. There have been instances in which the Supreme Court of Queensland applied its own, narrower, common law rationale for discipline, despite the fact that it was operating within a statutory framework, applying legislation which often had a wider understanding of how to protect the public, and from what, than the common law. I take up possible reasons why the court overlooked or ignored the relevant legislation in Chapter Nine.

In the following chapter I consider (and test) theories which argue that much of what is said by lawmakers – be they courts or legislators – as to the purpose of discipline is mere rhetoric and bound to fail to protect the public. Instead, such theories argue, disciplinary structures are created and proceedings taken primarily to enhance the reputation of the legal profession, not to protect the public.

Although I have discussed the relevant disciplinary legislation in this chapter so as to highlight its protective focus, I engage in a more detailed analysis of the legislative provisions in Chapter Four. This is done to examine the role played by professional bodies in the establishment and evolution of disciplinary bodies. Such an examination is useful to the thesis as it can provide insight into the degree to which the professional bodies have embraced lawmakers' rationales for discipline and demonstrated a commitment to enhancing the protective nature of disciplinary structures and proceedings.

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CHAPTER THREE

LEGITIMATION

3.1 INTRODUCTION

In the previous chapter I established lawmakers' rationales for the discipline of lawyers. The High Court has found protection of the public as the controlling reason for discipline and the Supreme Court of Queensland states this as at least the predominant reason. Legislation has reinforced and extended this protective focus. The question then arises whether the establishment of disciplinary structures and the imposition of discipline upon lawyers in Queensland have been consistent with those rationales.

A number of issues must be clarified before commencing any meaningful theoretical discussion of whether the discipline of lawyers is likely to be consistent with those rationales, and if not, why not. Similar studies have been carried out of disciplinary systems in other jurisdictions, in particular in some states of the United States of America.[1] Some of these studies have observed that the disciplinary system examined has not protected the public and has concluded, as a necessary corollary, that it therefore is being used as a means of legitimating the role and status of the

[1] For example, Jerome Carlin, *Lawyers' Ethics; a Survey of the New York City Bar* (Russell Sage Foundation, New York, 1966).

legal profession.[2] In other words, the options are presented as a simple dichotomy – if the disciplinary system is not protecting the public then it must be a protectionist measure for the profession. Many assumptions underlie such a conclusion. These include:

- that the legal profession controls professional discipline;
- that there was a conscious choice within the disciplinary system to favour the interests of the profession over the interests of the public;
- that the actual outcome of disciplinary processes accords with that choice;
- that public interest and the interests of the profession are incompatible; and
- that there is a common understanding as to what outcomes will protect the public and what will not.

As will become evident, the above assumptions do not necessarily hold for the regulation (including the discipline) of the profession in Queensland.

An obvious group of theories to consider when seeking to explain why professional discipline has or has not protected the public are theories of the professions - in particular those theories which, in their crudest form, suggest that professions are motivated primarily by self interest rather than public interest. Lawyers, along with medical practitioners, are generally accepted as belonging to an established profession and therefore form a large part of the subject matter in writings on professions.

[2] For instance, Marks and Cathcart ask whether disciplinary policies serve professional interests, with the underlying assumption that, without convincing argument, the profession will resist any change to those policies: F Raymond Marks and Darlene Cathcart, 'Discipline Within the Legal Profession: Is it Self-Regulation?' (1974) 2 *University of Illinois Law Forum* 193-236, 233.

Not all theories of the professions suggest that lawyers primarily pursue self interest. Some are consistent with the lawmakers' rationale of protection because they believe that professions will effectively self-regulate within the terms of an implicit social bargain. Parsons exemplified this school of thought. He greatly valued the legal profession's independence from the state and the unique role lawyers played in society because of their specialist knowledge, although he did also note some ambiguous ways in which lawyers appeared to be dependant on the state – including the fact that some lawyers practise within organs of the state and that all lawyers are described as 'officers of the court.'[3]

Much of Parson's writing dealt with an ideal type of social structure[4] in which lawyers played a central role and he did not seek empirical evidence for his proposed model. However, he did acknowledge that there would always be some incompetent or dishonest lawyers who needed to be removed from the profession.[5] Parsons did not deal with the role of professional discipline within his ideal social structure explicitly but, given his view that only lawyers hold specialist knowledge, he would consider the legal profession itself to be in the best position to decide whether a fellow member was no longer suitable to perform the important social role of lawyers. Similarly, he considered it vital that lawyers remain as independent from the state as possible. The more self-regulating a profession, the more independent that profession could remain. Hence it is likely that Parsons would advocate strong powers of self-regulation. Parsons did appear to concede a role for external regulation of the legal profession when it came to the ultimate form of discipline –

[3] Talcott Parsons, 'A Sociologist Looks at the Legal Profession' in Parsons T, *Essays in Sociological Theory*, revised edition (Free Press, New York, 1954) 374.
[4] Ibid 381.
[5] Ibid 377, 381.

disbarment – as he assumed this will always be 'an act of the political authority', and cited the political act of disbarment as one example of the ways in which the profession appeared dependent on the state.[6]

Parson's approach has been heavily criticised by later writers as merely a statement as to what professions such as medicine and law *claim* to do. Later writers were more interested in examining what doctors and lawyers actually do. Their examination of the conduct of lawyers and other professional groups led some of these later writers to the conclusion that lawyers, as well as other professional groups, were motivated primarily by self-interest and so could not play the central role in society which Parsons advocated.

Influential among these writers is Larson.[7] She denied any altruistic motivation and believed members of the legal profession, like members of all professions, were driven by a desire to improve their social position by reducing competition from other potential providers of legal services and by restricting the numbers and type of individuals admitted to the profession. She was sceptical of the 'service ideal' held out by the professions themselves and adopted Freidson's argument[8] that it was incorrect to assume that the attitudes of individual professionals accord with attributes as published by professional organisations in by-laws, codes of conduct and formal definitions of malpractice.[9] Both authors lamented the lack of empirical

[6] Ibid 374. In Australia, lawyers are disbarred (also described as being 'struck off' or 'removed from the roll') not by the state but by the Supreme Court of their home state of practice. Sometimes the state has granted a similar power to statutory tribunals which have often been controlled by professional bodies. See below Chapter Four.
[7] Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, Berkeley, 1977).
[8] Eliot Freidson, *Profession of Medicine* (Harper & Row, New York, 1970) 81.
[9] Larson, above n 7, 59, 244.

data as to how many professionals followed a service ideal, and to what extent. They also noted a lack of comparative data – for instance, if a service ideal was more widespread among professionals than among other workers.[10]

In an apparent attempt to respond to critics such as Larson and Freidson, Halliday used empirical evidence concerning the Chicago Bar Association to show that professions could behave altruistically.[11] However, as will be demonstrated later,[12] while Halliday did provide cogent evidence that the Chicago Bar Association assisted the state in many aspects of governance, in regard to professional discipline, Halliday would probably agree with Larson that self-interest will necessarily impede the process.

3.2 'PROFESSIONAL PROJECT'

Larson examined the actual conduct of a number of professions, in both England and the United States, and came to the conclusion that professions engage in a 'professional project'. Although a term such as 'professional project' would suggest a planned and conscious undertaking by lawyers, Larson claimed to use the term in a much less meaningful way, to mean simply the *later* discovery of coherence and consistency between apparently unconnected acts, which may not even have been a deliberate goal of even a subset of members of a profession.[13] Pue has been particularly critical of Larson's use of the term in this abstract way, noting that such

[10] Ibid 59, citing Freidson, above n 8, 81.
[11] Terence Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (University of Chicago Press, Chicago, 1987).
[12] Below section 3.10.2.1.
[13] Larson, above n 7, 6.

an approach is anathema to history.[14] Certainly, a casual reader of Larson's work on the 'professional project' would not expect Larson to have made such a modest claim for what she uncovered in her historical examination of professions – the term 'project' clearly implies conscious, deliberate and planned action by the profession itself.

Admittedly, in the example under consideration here - professional discipline - care must be taken before ascribing any causal relationship in disciplinary outcomes. There may be many reasons why a disciplinary system has or has not protected the public. A failure to protect the public may be due to conscious efforts by those in control of the disciplinary system to use the system for other purposes, which are inconsistent with protection of the public. Alternatively, the failure may be due to subconscious influences over the disciplinary system – influences which do not protect the public. A third possibility is that attempts to reach an outcome which protects the public fail, despite the best intentions of those involved in administering the disciplinary system. Even Pue, despite his many criticisms of the historical inaccuracies in the work of Larson and Abel, has reminded us that professional discipline is only one aspect of the many ways in which a profession can control its members.[15] He is particularly critical of the assumption that, a lack of formal professional discipline necessarily assumes a failure to self-regulate.[16]

Importantly, even those who argue that a profession has exercised very strong self-regulation in the past are not necessarily saying that that self-regulation is always in

[14] W Wesley Pue, 'Trajectories of Professionalism: Legal Professionalism after Abel' (1990) 19 *Manitoba Law Journal* 384, 391 note 23.
[15] Ibid 404.
[16] Ibid 405.

the public interest. Pue himself emphasised this. His point was that the Inns of Court had very effectively controlled its members in ways other than discipline, although this control was used to suppress political dissent.[17]

Conversely, self-interest and public interest can coincide.[18] Even if disciplinary action does appear to enhance the social credit of the legal profession this does not necessarily discount any protective intent. Halliday is critical of 'vulgar monopolistic theories' because they discount the possibility of multiple causes and motivations:

> one consequence or even intent of professionalism becomes the *raison d'etre* of the entire professionalization enterprise. The part is taken for the whole. Latent consequences become explicit intents; accompanying motives become sole bases of action. Results of professionalization are assumed to be the outcome of a professional 'project'. In a word, the entire interpretative model is overdetermined.[19]

Halliday is not the only one to have cautioned against assuming a causal relationship when a change is noted which may either enhance or detract from the profession's position in society or the degree to which the profession serves the needs of the public. Lewis argued in similar vein that most change does *not* occur intentionally. It would therefore be wrong to automatically attribute such changes to any 'professional project'.[20]

While it is dangerous to assume causal relationships, Larson's theory would still be useful if it provided cogent evidence that, regardless of the motivations and

[17] Ibid 404. The focus of the discipline exercised by the Inns of Court has already been noted above section 2.2.3.5.
[18] Ira Horowitz, 'The Economic Foundations of Self Regulation in the Professions' in Roger Blair and Stephen Rubin (eds), *Regulating the Professions* (Lexington Books, Lexington, MA, 1980) 9.
[19] Halliday, above n 11, 350.
[20] Phillip Lewis, 'Comparison and Change in the Study of Legal Professions' in Richard Abel and Phillip Lewis (eds), *Lawyers in Society, vol 3: Comparative Theories* (University of California Press, Berkeley, 1989) 59.

intentions of lawyers, it would be inevitable that their efforts would tend towards self-interest rather than public interest.

Just as Larson used the term 'project' in an abstract and ambiguous way, it is equally difficult to determine the role which she saw for professional bodies in her professional project. She claimed her concept of 'profession' was broader than professional associations,[21] but elsewhere appeared to equate a 'profession' with its leaders.[22]

3.3 Two Limbs

Larson's 'professional project' had two limbs: market control and 'collective mobility'. Collective mobility aimed to upgrade the social status of an occupation[23] but the improved social status was considered an end in itself – it was not necessarily just a means of improving the market position of lawyers.[24]

Some later writers appear to have believed that writers such as Larson claimed that any ills in the legal profession were best dealt with by increasing the level of competition[25] and attempted to refute this claim by pointing to examples of differing

[21] Larson, above n 7, 5, 69. She also noted that professional bodies usually arise at a point at which a 'professional project' has matured: at 5.

[22] Ibid 46: 'Only with the rise of formal training institutions and standardized training can *professions – or more precisely, the associations or elite groups which act as their spokesmen* – begin to assume that there is commonality, however minimal, among their members' (emphasis added).

[23] Ibid 67.

[24] Ibid. In this regard it would seem that the incentive sought by the collective mobility project – prestige and higher status, is the same incentive ascribed to professions by Burrage: Michael Burrage, 'From a Gentlemen's to a Public Profession: Status and Politics in the History of English Solicitors', (1996) 3 *International Journal of the Legal Profession* 45.

[25] Christine Parker, 'Competing Images of the Legal Profession: Competing Regulatory Strategies' (1997) 25 *International Journal of the Sociology of Law* 385, 389-90. Burrage refers to this as using material self-interest as a way to protect the public interest: Burrage, above n 24, 60.

attitudes in the profession as to the optimal level of competition.[26] While Abel may have been guilty of promoting competition as the most effective cure for many ills of legal practice,[27] Larson did not think that increased competitiveness alone was the solution, because she believed any increase in competition in the past had not weakened the hold of the ruling elite within the profession. Instead the pressures caused by greater competition fell on lawyers in the lower levels of the profession.[28] Any residual effect of competition felt by the elite was diffused by increased bureaucratisation[29] and serious, unethical practices within the 'higher' levels of legal practice, which dealt with large, corporate clients, remained ignored by the organised profession and disciplinary processes.[30]

Larson's thesis was not only about market control. It was also about social status. For this reason, to describe her as a 'market control theorist' understates the breadth of her theory. Burrage has provided convincing evidence of the ways in which the legal profession in England, Spain, France and the United States actively withdrew from areas of the market and depressed demand for their markets,[31] and he used this to demonstrate that the greater motivating factor for lawyers was the pursuit of honour, reputation and status.[32] Abel himself has acknowledged that his earlier writings placed too much emphasis on the economic aspects of Larson's 'professional project' and neglected the collective mobility search for social status,[33] but Abel insisted that

[26] Parker, 'Competing Images of the Legal Profession: Competing Regulatory Strategies' above n 25, 393- 4.
[27] Richard Abel, 'Between Market and State: the Legal Profession in Turmoil' (1989) 52 *Modern Law Review* 285, 302.
[28] Larson, above n 7, 134-5.
[29] Ibid 135.
[30] Ibid 89.
[31] Burrage, above n 24, 46-48.
[32] Ibid 48.
[33] Richard Abel, *Lawyers in Society: An Overview* (University of California Press, Berkeley, 1995) 8.

others such as Burrage went too far in suggesting that lawyers only sought status, given that status and wealth are inextricably linked.[34]

The collective mobility project aimed to establish public trust and prestige – to promote an ideology, both within the profession and externally, which saw a profession as 'noble' and its members as 'gentlemen'.[35]

It will be recalled from the previous chapter that, despite isolated *obiter dicta*, the Australian courts have held that the protection of the reputation of the legal profession is not a sufficient basis for taking disciplinary action[36] - the disciplinary system cannot be used primarily to promote an ideology of 'noble gentleman' lawyers - although it is hoped that public trust of lawyers would flow naturally from a disciplinary system which is operating effectively. In later chapters I will consider whether concern about maintaining the reputation of the legal profession has been a motivating factor in some disciplinary cases.[37]

3.4 External Ideology and Trust

Larson argued that this 'professional project' required the legal profession to obtain the trust of both the state and the general public. To reduce competition, lawyers needed to convince the state to outlaw the practice of 'law' by those without certain educational qualifications. Because 'law' is an ethereal product, those who sought

[34] Ibid 9.
[35] Larson, above n 7, 68.
[36] Above section 2.6.4.
[37] Chapter Five looks at disciplinary cases in which lawyers were removed from practice and Chapter Six looks at cases in which lawyers were fined. Chapter Seven is also relevant here, as it has sometimes been argued that a lawyer's individual reputation is relevant to the disciplinary order that should be made: below section 7.4.

this monopoly had to maintain control over its definition, which in turn required them to obtain the trust of the state. Larson emphasised the central importance of maintaining 'cognitive standardisation' among members of a profession, so that the product – legal service - could be uniformly presented to the public[38] and so that the profession itself 'coalesces into an effective group'.[39]

Lawyers also needed to convince the public that other potential suppliers of legal services were inferior, which required the trust of that public. This trust was obtained through external manifestations of ethicality: that even though lawyers may have sought a monopoly control over their work, they could be trusted to handle this monopoly in the public interest.[40]

Importantly, Larson believed that it was only in ideology that the profession spoke of the trust of 'the public'. In truth, an emerging profession sought social credit from that segment of the community with the power to grant the profession the favour it sought and so a number of 'publics' existed.[41] Similarly, Larson acknowledged that various segments of a profession sought the trust of these different 'publics': these relevant 'publics' varied from each profession or segment of profession, and were themselves stratified in terms of class, race, gender, and culture.'[42]

[38] Larson, above n 7, 40.
[39] Ibid.
[40] Ibid 57.
[41] Ibid 158.
[42] Ibid.

3.5 INTERNAL IDEOLOGY

Not only did a profession need to display cohesiveness to the outside world if it was to maintain trust and freedom from external competition. Internal cohesiveness must also be found to exist in fact. According to Larson, elites in the profession had to be able to promote an ideology which struck a chord with members at all levels of the profession so that a united voice would be projected externally.[43] If too much external dissonance was displayed, the trust of the public would be undermined and the profession's rights of self-determination lost. Much of this internal cohesiveness was achieved by promoting a common ideology within the profession. While Larson claimed there was little empirical evidence that lawyers abided by a service ideal, the profession promoted this as a central tenet of the legal profession and the service ideal was internalised by individual lawyers as a work ethic which placed intrinsic value on legal practice.[44] She believed her theory was borne out by evidence that professionals reported a higher level of work satisfaction than other occupational groups – they believed their work had intrinsic value and had a sense of duty to their 'calling' as a lawyer and a strong sense of social bond to their fellow lawyers, creating an ideology of community within the profession and a sense of 'gentlemanly ethics' when dealing with colleagues.[45]

While others would not necessarily claim that ideology is a tool in the hands of the elite to maintain their privileged position, many others would agree with Larson that ideology plays a critical role within the legal profession. For instance, Parker referred

[43] Ibid 40.
[44] Ibid 62.
[45] Ibid.

to the belief of lawyers themselves that they did protect the public interest.[46] While she noted Croft's caution that such ideology can obscure the realities of legal practice,[47] presumably even from lawyer's themselves, like Croft, Parker was optimistic that the aspirational aspect of this ideology could be harnessed to achieve effective regulation of the legal profession.[48]

If the disciplinary system is being used to promote an internal ideology – a sense of calling and honour among 'gentleman lawyers' – disciplinary outcomes may differ from ones where the primary focus was public protection. In particular, it is possible that notions of morality and retribution could infuse decision-making. The previous chapter argued that, while the courts stated that the protection of the public must be the primary reason for discipline, they clung to the notion of 'dishonour and disgrace' long after legislation took a broader notion of conduct liable to discipline. This suggests that notions of morality and retribution may have been more influential in actual disciplinary decisions than conceded by decision makers. I take this issue up in more detail in later chapters.[49]

[46] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999) 119.
[47] Ibid, citing Colin Croft, 'Reconceptualising American Legal Professionalism: A Proposal for Deliberative Moral Community' (1992) 67 *New York University Law Review* 1256, 1278.
[48] Christine Parker, *Just Lawyers: Regulation and Access to Justice*, above n 46, 119.
[49] Chapters Five (incapacitation), Six (fines), Seven (personal factors) and Eight (publicity).

3.6 HISTORICALLY CONTINGENT

3.6.1 *Traditional v Modern Legal Professions*

A strong element of Larson's work was a belief that the imperatives upon professional groups, including lawyers, changed over time. Larson distinguished between traditional professions and modern, rising professions. The modern, rising profession promoted bureaucratisation, standardised education and competence and meritocracy.[50] She believed that, while the notion of a profession as a social group initially performed an economic function, it later came to play an ideological function, but still with the purpose of 'justifying inequality of status and closure of access in the occupational order'.[51]

Larson acknowledged the many variables which could influence the success of any professional project. These included the fact that a profession is made up of individuals, and the social characteristics which they shared at any particular time would determine the direction and extent of the standardisation of knowledge.[52] She noted that bodies of knowledge and markets for services vary from country to country as well as historically, hence the degree of success of any professional project will also vary.[53] The two goals of the professional project (market control and collective mobility) 'were pursued at different times by different groups of

[50] Larson, above n 7, 78.
[51] Ibid xviii.
[52] Ibid 41.
[53] Ibid 50.

professional reformers, using the resources that were accessible in their specific environments.'[54]

Halliday developed this notion of historical imperative and sought to show that, while a legal profession may seek to pursue its own interests when establishing professional legitimacy, once established, it would then be willing to look beyond self interest to perform a greater civic role.[55]

It is for this reason that this thesis looks at changes over time – in judicial attitudes to discipline,[56] in legislation and in the attitude of professional bodies to disciplinary structures[57] and publicity.[58]

3.6.2 *Historical Evidence: England*

Abel was of a similar view to Larson as to what had motivated the legal profession in England[59] and the United States of America.[60] Both writers emphasised the fact that this 'professional project' was not static, but changed over time, and the efforts devoted to the project depended largely on pre-existing and current levels of social credit held by the profession. Larson cited the experience in England during the nineteenth century as an example of the ideal type of professional project.[61] It was the solicitors who had most to gain from embarking on such a project, so as to gain a

[54] Ibid 104.
[55] Halliday, above n 11.
[56] Chapter Two.
[57] Chapter Four.
[58] Chapter Eight.
[59] Richard Abel, *The Legal Profession in England and Wales* (Blackwell, Oxford, 1988); Richard Abel, *English Lawyers Between Market and State* (Oxford University Press, Oxford, 2003).
[60] Richard Abel, *American Lawyers* (Oxford University Press, New York, 1989).
[61] Larson, above n 7, 80.

similar market power and social prestige to that already held by barristers.[62] Larson argued that the membership of the barristers' branch in England aligned with the traditional ruling class, while solicitors aligned with the upcoming bourgeoisie.[63] English barristers could obtain prestige through 'sponsored mobility', which was not so available to solicitors.[64] Barristers in the lower ranks of the bar were also easier for elites within the bar to control because they were much fewer in number than solicitors – solicitors outnumbering barristers 5:1.[65] By contrast, solicitors formed an 'irregular' and dispersed class of lawyers.[66] It was solicitors, through the leadership of the Society of Gentleman Practitioners and then that of the Law Society of England and Wales, who embarked on a professional project to obtain a similar prestige to that already held by barristers.[67]

While they disagreed on many pressures within regulation of the legal profession, Abel and Burrage appear to have agreed that it was the geographic dispersal of solicitors in England - compared with barristers - which required solicitors to seek statutory control over members.[68] Barristers, being centrally located in London, could be more informally controlled by the Inns of Court. However, it is quite likely that physical dispersal does not fully explain why the English bar shunned the need for statutory control over members, while statutory powers were actively sought by the solicitors' branch of the profession. Later chapters of this thesis will consider the

[62] Ibid 85.
[63] Ibid 83-4: Barristers were most often recruited from the upper class, attending one of the top nine public schools in England, followed by Oxford or Cambridge and then nominated to join one of the Inns of Court, all located in London.
[64] Ibid 102-3.
[65] Ibid 85.
[66] Ibid 95.
[67] Ibid 95.
[68] Burrage, above n 24, 56; Abel, *Lawyers in Society: An Overview*, above n 33, 73.

applicability of such an explanation to the regulation of the legal profession in Queensland, a geographically dispersed jurisdiction, even for barristers.

3.6.3 *Historical Evidence: United States*

In the United States of America, there is not a similar bifurcation of the legal profession between barristers and solicitors - as in England (and Australia) - and yet both Larson and Abel considered their theories to be still relevant to describe 'professional projects' in that country. In the United States, as sources of prestige such as sponsored mobility were less available, education became more relevant to the professional project than in England.[69] Larson claimed that the American Revolution weakened the previous influence of the English structure on the American legal profession,[70] and the anti-intellectual sentiment of the Jacksonian era led to a reduction in the educational prerequisites or period of apprenticeship required to be admitted to the bar in the first half of the 1800s.[71] But even then, the court retained control over who could practise law and, in Larson's view, the judiciary maintained homogeneity within the legal profession by requiring applicants to prove moral character. This, combined with general social ostracism, had the effect of favouring a certain form of applicant for the bar, and excluded the Irish and later, Jews, blacks and women.[72]

Despite these efforts to control entry, Larson argued that greater decentralisation, social mobility and religious tolerance in the United States kept the professional

[69] Larson, above n 7, 103.
[70] Ibid 111-112.
[71] Ibid 119.
[72] Ibid 125, 173.

hierarchy more open and fluid than in England.[73] As a result, in the United States there was greater reliance on establishing professionalisation through control of the market.[74]

3.7 One Legal 'Profession' or Many?

Larson and Abel have both been criticised because of an alleged failure to recognise the segmented nature of the legal profession.[75] Pue has been highly critical of the historical statements made in the work of Abel and to a lesser extent, Larson, as to the history of lawyers in both England and the United States.[76] He argued that the histories were much more complex and the forces at play within and upon the legal profession much more diverse than conceded by either Larson or Abel. Examples given of the segmented nature of the profession include disputes between English barristers and solicitors over whether solicitors would be given the right to appear in court and between Australian barristers and solicitors as to the desirability of fusing the two branches of the profession.[77] However, both Larson and Abel did acknowledge the different interests of barristers and solicitors, describing the solicitors as the lower branch of the legal profession, and claiming that, within the English legal profession, it was the solicitors who embarked on a professional project, so as to attain the status already enjoyed by English barristers.[78]

[73] Ibid 13, 112.
[74] Ibid 113.
[75] Pue, above n 14.
[76] Ibid 384.
[77] Christine Parker, *Just Lawyers: Regulation and Access to Justice*, above n 46, 115-6.
[78] Larson, above n 7, 85, 95-96; Richard Abel, 'England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors' in Richard Abel and Philip Lewis (eds), *Lawyers in Society, vol 1: the Common Law World*, (1988) 62.

While Larson did concede the fragmented nature of the legal profession, at least in the United States,[79] she believed there continued to be extensive homogeneity at the elite levels of the profession, due to the successful efforts of those elite to maintain 'brutal selectivity' in legal education, lineage and style.[80]

3.8 The Place of Discipline within any 'Professional Project'

Larson had very little to say about professional discipline. For her, barriers to education and qualification, and monopolies over areas of legal practice, formed the most important elements in establishing and maintaining social credit.[81] Similarly, the key measures to socialise new members into the profession occurred prior to admission to law school, through the very exclusiveness of the method for selecting students. During law school and following admission, socialisation occurred through the imperative of mirroring the values of the professional elite to help improve one's position within the hierarchy of the profession.[82] Therefore, care must be taken not to overstate the importance that Larson would place on professional discipline, either in relation to efforts by the legal profession to create ethical codes and disciplinary structures, or in the day to day enforcement of those codes.

It is telling that, in her 244 page monograph, Larson's most extensive discussion of professional discipline is contained in a footnote. Throughout the book she focused closely on controls upon entry into the legal profession, particularly through educational limitations. She did refer to controls exercised through registration and

[79] Larson, above n 7, 175.
[80] Ibid 177.
[81] Ibid 17, 45.
[82] Ibid 67.

licensing,[83] but with the implication that these were filters which were also applied at the point of entry into legal practice, and only at the point of entry. She described registration and licensing as the 'heteronomous means by which the modern legal profession seeks to obtain professional prestige'[84] - heteronomous because registration and licensing were 'institutionally located in the [s]tate.'[85] But importantly, she presumed that the profession itself would still determine the standards to be applied by law schools and by licensing boards.'[86]

Implicit in Larson's emphasis on entry controls and her almost complete failure to discuss controls on *practising* lawyers, is her apparent acceptance that professions treated fitness to practise as a static concept, applied only at the point of initial registration and licensing. Marks and Cathcart found evidence of this static assumption of fitness to practise in their study of disciplinary agencies in the United States.[87] They claimed that

> disciplinary agencies presume that lawyers who have passed the bar examination, even years ago, and who have been exposed to the original character and fitness screening, are entitled to the benefit of any doubt. Indeed, the disciplinary agencies treat the license as a vested right.[88]

Larson's purpose was to explain how occupational groups went about achieving and entrenching professional status. Larson appeared to suggest that this purpose permeated most, if not all, aspects of the profession's conduct, emphasising that

> the variable and diffuse ideological mechanisms which recognize a profession's functions as "noble", "progressive", or "socially useful" cannot be located in any one [means or source of professional prestige]; rather ideology colors the effectiveness of

[83] Ibid 52, 68.
[84] Ibid 68.
[85] Ibid.
[86] Ibid 52.
[87] Marks and Cathcart, above n 2.
[88] Ibid 225.

> *every* set of means available to a profession in its mobility project, because it ultimately determines the public trust and prestige which a profession "serves".[89]

Hence, if significant segments of a profession did spend time on issues relating to professional discipline, presumably Larson would need to concede that this was because discipline did play a role in the professional project.

At least some sections of the legal professions which Larson studied, in England and the United States, do at least *appear* to have devoted some energy to the issue of professional discipline, either in designing disciplinary systems and processes, investigating complaints or sitting on disciplinary tribunals. Their virtual omission from her analysis is therefore surprising. One explanation may be that professional discipline is one (perhaps the only) aspect of the activities undertaken by professional groups which does not form part of the professionalism project. Alternatively, evidence of energy actually expended by some members of the profession on issues relating to professional discipline may be beyond the explanatory power of her theory, and so weaken it.

While Larson remained largely silent on the matter, Abel dealt with professional discipline explicitly, seeing it as playing a role in the professional project of solicitors.[90] While he believed solicitors actively sought statutory powers to seek similar status to barristers, those powers were exercised very leniently in favour of

[89] Larson, above n 7, 68 (emphasis added).
[90] Richard Abel, *Lawyers in Society: An Overview*, above n 33, 74; Richard Abel, *English Lawyers Between Market and State*, above n 59, 488-491.

solicitors[91] and action to reform disciplinary systems only taken in response to periods of intense public criticism.[92]

There are some apparent contradictions in Abel's criticisms of lawyers' performance in self-regulation: while he criticised the profession for promoting conciliation of complaints against them he suggested that clients would be happy with a simple apology – presumably a key component of any conciliation. While he claimed that lawyers had resisted steps to implement 'in firm' complaint procedures which could 'alleviate the burden on formal disciplinary procedures', he criticised such 'in firm' controls as a means of delaying, or 'cooling-out', client grievances.[93]

3.9 Two Roles for Professional Discipline in the 'Professional Project'

3.9.1 *An External and an Internal Role*

If Larson was asked to explain the amount of energy which some lawyers and professional bodies have put into the design, construction and operation of disciplinary systems for lawyers, it would be consistent with her theory to view the professional disciplinary system as playing two roles in the 'professional project'. First, a professional disciplinary system could be used to display to the public the ethicality of the profession, that while the profession concedes that the occasional black sheep may slip through the controls of education and admission, the public can be assured that they will be identified and expelled from the profession.

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[91] Richard Abel, *Lawyers in Society: An Overview*, above n 33, 75.
[92] Ibid 77.
[93] Richard Abel, *English Lawyers Between Market and State*, above n 59, 489.

Second, it could play a role in the professional project which would be consistent with Larson's overall thesis – it could be used by the elites of the profession to maintain internal control of that group, to foster professional socialisation, to define the 'professional self'. Like other more informal efforts to raise the level of 'professionalism' among lawyers, the disciplinary system could be used by the elite members of the profession to control those at the lower levels of the profession by imposing a professional ideology - as constructed by the elite - upon those members.[94]

3.9.2 *Larson Emphasised 'Front End' Controls*

Larson believed that control over members was 'a matter of structure much more than a matter of obedience to an association's code of ethics.'[95] The structural controls that she referred to were the subtle and informal structures which created hierarchies within educational institutions and within the legal profession itself. She did not appear to turn her mind to what role, if any, disciplinary structures played in the profession's control over members of the profession, let alone the use, or otherwise, of those disciplinary structures. It is clear from her argument, and lack of discussion of discipline, that Larson placed very little importance on the day to day enforcement of ethical standards as a means of maintaining internal cohesion. This is not to say she would deny any role at all for the disciplinary system as a means of securing 'social credit', of demonstrating to the public the continuing 'ethicality' of the profession and the well-placed trust of the public.

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[94] See discussion in Robert Nelson, David Trubek and Rayman Solomon, *Lawyers' Ideals/ Lawyers Practices: Transformations in the American Legal Profession* (Cornell, Ithaca, 1992) 17, citing from Larson, above n 7, 227; Parker, 'Competing Images of the Legal Profession: Competing Regulatory Strategies' above n 25, 389.

[95] Larson, above n 7, 72.

In her writing, Larson returned repeatedly to the importance of controls which limited those who entered legal education, controls applied during education and further filters applied before a person was considered of the right moral character to be admitted to the legal profession. It would seem that she was satisfied that these checks and filters did effectively limit the degree of divergence and dissent among those who were successful in being admitted to the legal profession – her degree of satisfaction is demonstrated by the almost negligible attention she gave to the role played by professional discipline in the professional project. This control over divergence and dissent does not necessarily equate with what is best in the public interest, which depends on the profession's view of a 'good lawyer' equating with the public's best interests.

3.9.3 *Larson's Reference to 'Back End' Controls*

Implications about professional discipline can be drawn from the importance Larson placed on the barriers to entry into the legal profession. Speaking of the effect that the costs of these onerous entry controls and long years of education have on the individual's ideology of self, Larson believed this led the person to identify strongly with their role and to see it as their life's vocation,[96] with little thought given to changing to another occupation because of the investment already made to join the current profession or simply because of inertia.[97] It was also a powerful force for conformity with the views of the elites of the profession.[98]

[96] Ibid 229.
[97] Ibid 229.
[98] Ibid.

Larson also suggested that this 'heavy investment' led individual lawyers, as well as others around them, to see a lifetime attachment to their professional role – a feature which Larson believed distinguished professionals from other occupational groups. She cited popular novels, films and TV serials as reinforcing this permanent identification of a professional with their role, leading Larson to comment: 'you cannot *really* unfrock a priest, unmake a doctor, or disbar a lawyer.'[99]

Surprisingly, given the amount of energy which the profession at least *appears* to devote to professional discipline, it is only in a footnote to her almost flippant comment that you 'can't really' disbar lawyers that Larson began to explore the implications which this supposed identification with, and commitment to, the role of lawyer had for the professional colleagues of a person facing discipline. Larson's footnote read as follows:

> Incidentally, the same notion of "heavy investment" tends to weaken colleague control. Freidson's studies of medicine show that colleagues tend to encourage the culprit to "resign from their company" - to bar him, that is, from the informal networks, rather than expel him from the profession. The latter is the last recourse, forced by publicity given to a gross offense.[100]

Her placement of the comment in a footnote and her description of it as only 'incidental' to her main argument, again suggests the little importance she placed on professional discipline in the 'professional project'.[101]

In later chapters of this thesis I attempt to test aspects of these comments by Larson – in particular, her claim about the relationship between discipline and publicity. For instance, in Chapter Eight I consider whether it is true that strike off orders are more

[99] Ibid (emphasis in original).
[100] Ibid, note 49.
[101] Ibid.

likely in Queensland cases which have already received publicity. Larson's comment also distinguishes between informal bans from practice and expulsion from the profession, suggesting that, in the absence of publicity, colleagues prefer the matter to be dealt with in an informal way, but which still incapacitates the individual. In Chapter Five I look at the various ways – both formal and informal – in which Queensland lawyers have been incapacitated.

Although not discussed by Larson, it could also be the case that lawyers may be reluctant to expel a colleague from their profession because they, in the sense of the legal profession as a whole, have invested heavily, at least ideologically, in the process of selecting those considered fit to join them in the legal profession. This could lead to a reluctance by colleagues to admit that their initial assessment of the person's character or competence was wrong.

Larson's explanation of why colleagues would resist moves to remove a lawyer from the profession presumed that those colleagues, and those who may later judge the actions of those colleagues, apply a static concept of the person's fitness to practise as a lawyer. Larson's assumption of a static approach reflects the findings of Marks and Cathcart referred to earlier.[102] In the eyes of professional colleagues, an individual's moral character may play a primary role in determining that person's suitability for legal practice and technical competencies a very minor role. The static approach also emphasises the view that a person is born of a certain character, that moral character does not necessarily vary greatly over one's lifetime.

[102] Marks and Cathcart, above n 2, discussed above section 3.8.

This has consequences for those involved in regulation of the legal profession. If a lawyer faces disciplinary proceedings because of evidence that the lawyer has behaved dishonestly, or has otherwise demonstrated weak moral character, many lawyers would assume that those character traits were present at the time of admission. Therefore, the revelation in disciplinary proceedings of the misconduct is a reflection, not only on the individual lawyer, but also on those professional colleagues who certified him or her to be of suitable moral fibre to join the ranks of the legal profession. Later chapters of this thesis will attempt to determine whether such a static interpretation of 'fitness to practise', or a more dynamic interpretation, is applied in Queensland.

3.9.4 *'Heavy Investment'*

Professional discipline clearly plays a central role, ideologically if not practically, in the regulation of lawyers, at least in the United Kingdom, United States and Australia. For that reason, it is disappointing that Larson did not devote more attention to the role, if any, which discipline plays in the professional project. She did assume that the legal profession itself was reluctant to remove colleagues from the profession, but the only explanation for this reluctance which she offered, in the footnote referred to earlier, was that this was due to the 'heavy investment' the person was presumed to have made to become a member of the profession. Even if there does appear to be reluctance by lawyers to exercise disciplinary powers, or at least exercise the ultimate form of discipline – the removal of a colleague from practice - there could be many reasons for this reluctance. Apart from this assumed

'heavy investment', reasons could also include friendship, empathy, compassion, fear, diffidence or apathy.

One way of reconciling the reasons for reluctance to discipline colleagues is to read Larson's 'heavy investment' very broadly. In other words, she may have used this term to encompass intangible forms of ideological investment – that is, the colleagues themselves identified strongly with the predicament of the individual lawyer and, should that individual lawyer's fitness to practise be brought into question, then the 'cognitive reality' of other lawyers was also brought into question. This is likely to threaten lawyers' own image of themselves as lawyers where it is suggested that neither lawyers nor the general public could rely on the admission process as a guarantee of the moral character or technical expertise needed for the whole term of practice throughout a professional career.

Important to Larson's theory is the sense of community within a profession: while she referred to the central, and 'brutal' role of selecting only appropriate candidates to join the profession,[103] once those candidates had successfully joined the ranks of the profession, she believed the profession emphasised 'inclusion'.[104] This suggests a natural bias within the profession against excluding those members the profession had once exercised judgment to consider of the requisite competence and character to enter the profession. Nevertheless, suggestions also appear in her work that, if any member is to face discipline, at least public discipline, it is most likely to be a lawyer in a smaller practice, with a lower income. This is because Larson considered

[103] Larson, above n 7, 55.
[104] Ibid 55.

competition for clients to be much greater in the middle and lower levels of private legal practice[105] and it was this competition and partisan loyalty to the client which

> generate the kind of violation of ethics that is publicly deplored by the organized profession. The stereotypes of the "ambulance chaser" and of the lawyer who espouses the unethical business practices of his clients contain no reference to the subtle or, at least, hidden violations of law and public interest that occur in corporate legal practice. Where the volume of legal practice and the amount of fees are both substantial and secure, professional solidarity and at least the appearance of professional behaviour are easier to maintain.[106]

Larson also thought the internal ideology of competence within a profession created a natural reluctance to challenge the competence of eminent colleagues, at least in public, because 'it is hard on [a profession's] unity toward the outside world to denounce altogether an "eminent" [colleague] as a fraud or a quack.'[107]

3.10 The Place of Discipline within Measures to Protect the Public

3.10.1 *The Wider Context*

As I noted briefly in Chapter One,[108] professional discipline is only one aspect of the regulation of lawyers. This is amply demonstrated by Wilkins who, when considering who should regulate lawyers,[109] gave as much attention to issues of insurance against malpractice as to the issue of professional discipline. Parker has noted that even Wilkins' analysis excluded other important forms of regulation, including internal

[105] Ibid 175
[106] Ibid 176-7.
[107] Ibid 45. See also later discussion of impact of greater weight given to testimonials from more eminent colleagues: below section 7.4.
[108] Above section 1.6.
[109] David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 801.

law firm regulation and legislative control by general regulators.[110] Historically, these other forms of regulation appear to have played a much greater role than professional discipline in regulating the conduct of lawyers. For instance, in Australia as well as in England and the United States, the number of claims of substandard conduct handled each year by a professional indemnity insurer may well be much greater than the number of matters that are dealt with by a disciplinary tribunal. Therefore, it cannot be presumed that a failure actively to pursue measures to protect the public through professional discipline necessarily indicates a lack of commitment to public protection. It may indicate a belief that, in the particular circumstances, another form of regulation can more effectively protect the public. This is a point made strongly by Pue, in criticising the assumption that a lack of formal disciplinary hearings by the Inns of Court necessarily meant that the Inns were ineffective in controlling members.[111] While he did not denounce the value of professional discipline, he pointed out that the Inns had other, very effective and more subtle ways of suppressing dissent than through formal disciplinary hearings.[112]

3.10.2 *Discipline as Legitimation*

3.10.2.1 *Disciplinary 'Scaffolding'*

Even when testing the thesis that professional discipline is used to gain external legitimacy for the legal profession, an important distinction must be made between

[110] Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676, 676 note 2. An example of a general regulator is a Competition and Consumer Commission.
[111] Pue, above n 14, 404.
[112] Ibid 404. Similarly, Halliday points out that, although the Chicago Bar Association showed decreased interest in professional discipline, it did increase its interest in continuing legal education, the licensing of specialist practitioners and office management: Halliday, above n 11, 353.

the establishment of disciplinary structures and the actual use of those structures. Much insight can be gained from looking at the part played by professional bodies in refining disciplinary structures and processes to enhance the ability of discipline to protect the public. For instance, it is useful to know how active a part the profession plays in monitoring the effectiveness of disciplinary systems, how regularly and comprehensively it advocates and facilitates changes to those systems to enhance their protective potential and how it responds when government or other interested parties suggest changes to the disciplinary scheme.

A lack of effort by the profession in this regard may suggest that the profession is not truly committed to enhancing the protective effect of professional discipline.[113] But the converse is not necessarily true. For instance, a professional body may want to be seen to be taking an active role in refining the protective ability of a disciplinary system. This will only subject its members to the risk of greater regulation if the greater regulatory machinery is put into action. The professional body may be relatively confident that the new structures will not be put into effect. It could hold this view for a number of reasons. First, it could believe that funding will be inadequate to support the changes properly.[114] Burrage suggested that regulatory legislation was sometimes passed primarily 'as an expression of distaste and annoyance with little expectation that it would actually deal with the problem of unscrupulous and dishonest attorneys.'[115]

[113] Or may consider another form of regulation a more effective means of protecting the public.
[114] Horowitz, above n 18, 16, citing Richard Posner, 'Theories of Economic Regulation' (1974) 5 *Bell Journal of Economics and Management Science* 335, 337.
[115] Burrage, above n 24, 60.

Alternatively, professional bodies may support changes which on their face appear to place an extremely heavy regulatory burden on their members because they believe that those charged with the day to day enforcement of the legislative changes lack commitment to implement the changes. These arguments cannot be taken too far or lawyers would be correct in arguing that they are 'damned if they do show interest in discipline, damned if they don't' - as for instance, Abel's criticisms of lawyers, both for resisting and for implementing 'in firm' complaint procedures.[116]

Not every step taken by the profession to implement structural changes to enhance the protective impact of professional discipline can be dismissed as an exercise in 'window-dressing'.[117] However, more indicative of a profession's commitment to protecting the public is the way it actually uses these structures.

3.10.2.2 *The Work of Halliday*

Halliday's purpose in writing *Beyond Monopoly* appears to have been to respond to critics of the legal profession such as Larson and Abel, by using empirical evidence to show that a profession could act beyond self interest once its position in society became stable and its monopoly assured. It is true that writers such as Halliday could identify periods in which legal professions assisted the state in broad areas of law reform and governance which do not appear to be of any immediate or direct benefit to the profession itself. Some writers have taken Halliday to suggest that the profession could also act *against* self-interest, but this is not the case. A close reading of his work suggests that he would agree with Larson and Abel that, while a profession may exhibit some altruistic endeavour, this did not extend to self-

[116] Richard Abel, *English Lawyers Between Market and State*, above n 59, 489.
[117] For instance, Richard Abel, 'Why Does the ABA Promulgate Ethical Rules?' (1981) 59 *Texas Law Review* 639.

discipline. Any professional discipline system in the hands of the profession would be a mere façade, designed for external consumption rather than for true effectiveness.

For instance, Halliday documented the activity of grievance committees and ethics committees of the Chicago Bar Association and concluded that the emphasis on these committees was only important to the Chicago Bar Association in a transitory stage of its development as a professional association. Notably, he described issues of ethics and grievance as *self-interested* pursuits,[118] not matters of concern to the broader public and thought that, once the profession became more established and its market control less open to external attack, it could spend proportionately less time on such 'self-interested' matters.[119] Only in times of severe public scrutiny would it be necessary for the Association to refocus its energies and funds on disciplinary matters.[120]

Halliday looked at the early history of the committees of the Chicago Bar Association as an indicator of the monopolistic concerns of that body.[121] Before its monopoly became assured, discipline, fee and education committees were established. It could equally be argued that these were merely the public manifestations of what the Chicago Bar Association *thought* they should be seen to be interested in. Also relevant would be to know the number of times the discipline, fee and education committees met in comparison to other committees, and the time

[118] Halliday, above n 11, 352.
[119] Ibid.
[120] Ibid 111. Such a period occurred in Chicago in 1890-1920: Ibid 77.
[121] Ibid 68

spent on measures to protect the public rather than issues of primary concern to the profession itself.

The examples of Chicago Bar Association activity which Halliday used to show that the Chicago Bar Association had gone beyond self-interest do not support his thesis as widely as he perhaps claimed. For instance, while Halliday provided extensive examples of instances in which the Chicago Bar Association devoted its energies to causes in which the profession's own interests did not appear to be at the forefront, such as in its 'fearless' pursuit of higher standards within the Illinois judiciary, it would seem that the Chicago Bar Association had much greater difficulty in acting against its own self-interest.[122] Indeed, despite the many examples he gave of lawyers acting *beyond* their interests, he was unable to provide any examples of the Association pursuing high standards among its *own* members, except as a reaction to times of intense external scrutiny.

Halliday expressed no surprise that, as the privileged position of the legal profession in Illinois became more entrenched, the Chicago Bar Association reduced its interest in the discipline of its own members. He referred to a reduction in the number of committees and in funding to deal with issues such as admission, ethics, fees, professional education and discipline as confirmation that the profession's monopoly had become assured. Implied by such a correlation is that a demonstrated interest in discipline and ethics merely reflects a concern to establish a monopoly and has no intrinsic merit in the eyes of a professional body. This is also suggested by Halliday's use of the term 'scaffolding' to refer to professional discipline. He said:

[122] Ibid 181-9. Occasions on which the professional bodies in Queensland appeared to act in the public interest against the interests of members are discussed below paras 4.5.3 and 8.6.

> A more robust, economically entrenched and bureaucratically structured profession, with powerful representative associations, may afford itself the luxury of dispensing with some of the expensive and elaborate scaffolding erected in formative years. The partial externalization of lawyer discipline from bar associations represents a case in point. The appearance of lay members of the public on previously restricted panels of lawyers for discipline, legal aid, and the delivery of legal services represents yet other instances.[123]

The word 'scaffolding' has about it the sense of structure regardless of content – that the Chicago Bar Association wanted to be able to point to the structures it had put in place, regardless of the actual effectiveness of those structures. Halliday clearly suggested that a profession will jettison self-regulation once its monopoly becomes assured. The word also connotes a temporary framework used to build something but which is then dismantled when the 'project' is completed.

3.10.2.3 *Powell Confirms Halliday's Findings*

Powell also examined the experience of the Chicago Bar Association.[124] His study is useful because, while in other jurisdictions the state had taken disciplinary control from professional bodies compulsorily, in this case the Chicago Bar Association asked to be relieved of responsibility for discipline. Like Halliday, Powell's work is sometimes cited as an example of research which demonstrates that professional bodies can be activated by more than self-interest.[125] Powell confirmed Halliday's thesis that direct control of discipline was only considered valid by the Chicago Bar Association in the early period of legitimation. If the primary concern of the Association was to ensure a disciplinary structure which could best protect the interests of the public, its handing over of control would provide clear evidence of a

[123] Ibid 355.
[124] Michael Powell, 'Professional Divestiture: The Cession of Responsibility for Lawyer Discipline' (1986) *American Bar Foundation Research Journal* 31.
[125] See, for instance, discussion in Christine Parker, *Just Lawyers: Regulation and Access to Justice*, above n 46, 118-9.

profession subsuming its interests to those of the public. But this was not the case. Powell believed self discipline had become a source of embarrassment to the profession. By handing over control to a court run system, the Chicago Bar Association was able to avoid a system with more legislative or public control.[126] It was more comfortable that the judges would maintain a narrow focus of what lawyer discipline entailed, as established many years earlier by the bar associations.[127] Powell himself concluded from his examination of the handing over of responsibility for discipline that it was the *appearance* of discipline that was more important than the substance.[128]

Halliday's and Powell's theories of the Chicago Bar Association are further discussed in the context of the Queensland legal profession in Chapter Four, which looks at the role played by the Bar Association of Queensland and the Queensland Law Society in the design of new disciplinary structures.

3.10.2.4 *Disciplinary Action*

Generally speaking, an examination of how disciplinary structures and processes actually operate can provide a more effective insight into whether there is a true commitment to the use of professional discipline to protect the public than mere 'tinkering' with ethical rules and structures. However, much more care must be taken before applying theories of the professions to this latter analysis if those theories are drawn from experience of disciplinary systems which are managed predominantly by the profession itself. This is because, as I noted in the introduction to this chapter,[129]

[126] Similar sentiments have been expressed by barristers in Queensland: below section 4.3.
[127] Powell, above n 124, 53.
[128] Ibid 50.
[129] Above section 3.1.

in many instances the profession has less control over the day-to-day running of disciplinary systems than many of those theories assume.

In some jurisdictions the investigation and prosecution of complaints and the imposition of discipline is undertaken by an independent body or by the state. In such circumstances, it is still instructive to examine the degree to which a professional body initiates, supports or in fact ignores or impedes attempts to take disciplinary action in individual cases. Care must be taken not to impute disciplinary action automatically to the profession itself.

Larson may not have necessarily limited her comments to situations in which the profession itself controlled discipline. For instance, she noted the compulsion of the state 'to protect the public by eliminating the incompetent or less competent professionals' where the professional market is independent from other markets.[130] Perhaps implicit in her statement is an assumption that it will not be the elite of the profession who will be found to be 'less competent'. Larson's point was that, while state sanction is necessary to remove a person from practice, much of that power will be delegated to the profession itself. In particular, it is a central tenet of Larson's theory that a successful profession will have control over defining competence[131] and character standards applied in education and admission. Hence, even though she spoke of the state removing the incompetent from practice, Larson would suggest

[130] Larson, above n 7, 47-8. Notably, she sees this State action as to the *advantage* of the profession: 'The more independent the professional market from other markets, the more the state is compelled to protect the public by eliminating the incompetent or less competent professionals, the more favourable the situation is for the profession.'

[131] Arguably, Australian admission proceedings place much more emphasis on character than on competence, as Australia does not have bar exams as in the United States. Instead, at least in practice, the holding of an Australian law degree is taken as sufficient certification of competence. This may suggest that - in Australia - both admission and disciplinary proceedings focus more heavily on character than do jurisdictions in which the profession itself supervises bar exams.

that, if the professional project is operating successfully, the authority to determine whether a person should or should not be removed from practice would, for all practical purposes, reside with the profession itself.

The more distant a profession is from structural design of a disciplinary system and, more particularly, its day to day enforcement, the more tenuous theories of the professions become for assessing the purpose of discipline. In other words, even if lawyers' occupational groups are motivated primarily by self interest this does little to explain the dynamics of a system over which they have little influence.

Larson's theory is useful when analysing disciplinary systems at times when the profession has a role to play in discipline. As subsequent chapters will show, the solicitors' branch of the profession, through the Queensland Law Society, has had a significant role to play, particularly following legislative amendments in 1927. Over subsequent years it actively sought, and was granted, even greater powers to regulate solicitors in Queensland. In contrast, the Bar Association of Queensland has had a very limited role to play in relation to discipline of barristers. It has been ambivalent about seeking powers to discipline members. Subsequent chapters of this thesis will seek to demonstrate whether Larson's theory can offer any explanation for the different experience in the discipline of barristers in Queensland.[132]

Even more problematic in seeking to apply Larson's theory to the professional discipline of lawyers in Queensland is the removal of the Queensland Law Society's role in professional discipline in 2004, and the parallel exclusion of the Bar

[132] See discussion below section 4.3.

Association of Queensland from a professional disciplinary role at the same time. If Larson's theory is correct, it should be expected that the removal of the society and exclusion of the association from the disciplinary processes would allow those processes to fulfil at last their stated purpose of protecting the public.

However, it may be that, even if the profession does not have direct control over a disciplinary system, there is a continuity of influence, if only indirectly. Examples include where former leaders of professional bodies sit as members of disciplinary tribunals. The disciplinary tribunal may be a separate legal identity, but the attitude of a former leader of the profession, now sitting as a member of that tribunal, is likely to be informed by his or her ideology and experiences as a leader of the profession. The members of a disciplinary tribunal may also be nominated for that position by a professional body. In such a case, it is clear that the professional body is unlikely to nominate a person if it feels that the person is unlikely to reflect the views of the professional body as to the proper role of professional discipline.

3.11 By the Profession or For the Profession?

One of the most problematic issues for any theory attempting to explain why a disciplinary system has or has not been used to protect the public is the need to consider the *perceptions* of those involved in the disciplinary system as to the role and jurisdiction of that system and how that system can best protect the public. In other words, some theories necessarily limit their explanatory power by arguing that the disciplinary system is used *by* the profession for certain purposes of the profession (and usually, self interest). These theories lose utility the less direct or

indirect influence the profession has over that system. A different but equally valid question to ask is if the disciplinary system is used *for* the profession. It is not only currently practising lawyers who may seek to promote the interests of the profession.[133] In fact, any regulator may sympathise with the 'plight' of lawyers facing strict regulation.[134] Larson would not necessarily concede that her theory loses explanatory power if lawyers are not involved in the day to day running of a disciplinary system: in the case of education, she claimed it was not critical that professions retained control over selection of those who entered legal education, because she presumed that 'the various units in the system of higher education have themselves been relatively standardized and arranged in a recognized system of hierarchical prestige.'[135] If it could be argued that disciplinary structures also mirrored the values of the legal profession, then Larson may perhaps have argued that the profession's direct control of discipline was unnecessary.

The notions of public protection and the best interests of the profession are not necessarily mutually exclusive. It could be the case that what is in the best interests of the public is also in the best interests of the profession. For instance, there would be general agreement that it is in the public interest that a lawyer be removed from practice if that lawyer is found to have stolen money from clients on a number of occasions. It is also in the interests of the broader legal profession that the lawyer be removed, as it provides cogent evidence of the profession supporting action to

[133] For instance, some would argue that judges should be considered to still identify strongly with the legal profession, particularly that branch from which most judges are drawn – the bar.
[134] This flaw in some scholarship has been noted by Rostain, who criticises the failure of some writers to recognise that, while the profession may have some self-interest, external regulators are not without interests themselves: 'The unstated premise underlying this scholarship is that 'bad' men represented by "bad" lawyers will be prevented from harming the legal framework by public-minded, "good" regulatory agencies.': Tanina Rostain, 'Ethics Lost: Limitations of Current Approaches to Lawyer Regulation'(1998) 7 *Southern California Law Review* 1273, 1314.
[135] Larson, above n 7, 201.

remove individual lawyers who prove a risk to the public, which is consistent with any aim of obtaining 'social credit'.

Just as the public interest and the interests of the profession can coincide, it cannot be assumed that, if the disciplinary system is not taking action to protect the public, this must be because the disciplinary system is seeking to further the interests of the legal profession.

There is not a simple dichotomy between protecting the public and protecting the profession. In other words, there may be evidence that a disciplinary body is not implementing a legal imperative to protect the public. Simultaneously, the profession may have no direct control over disciplinary processes and there may be little evidence that the profession has influence over the membership of the disciplinary tribunal. Nevertheless, there may be other reasons why the decisions of a disciplinary tribunal do not protect the public. It may be that the tribunal misconstrues its role or the notion of public protection, or continues to be influenced by outdated notions of professional discipline which emphasised public protection less than the current law. The previous chapter demonstrated how the Supreme Court of Queensland's view of professional discipline appeared to be narrower than the view articulated in legislation.[136] Therefore, it should not be surprising to find that a less informed tribunal, with members often operating on a voluntary basis, was also applying an outdated understanding of its protective jurisdiction.

[136] Above section 2.4.3.4.

Even though they may not be lawyers themselves, those charged with prosecuting and imposing discipline upon lawyers may be most likely to use that system *for* the profession if they consider a legitimate way of protecting the public is by protecting the reputation of the legal profession. As is demonstrated in Chapter Two, courts have only condoned the pursuit of enhancing the reputation of the legal profession as a secondary purpose of professional discipline.[137] Subsequent chapters of this thesis will seek to determine whether this has been misunderstood by disciplinary bodies, who may have considered the reputational issue to be sufficient justification for taking disciplinary action in a particular case.

At times when the professional bodies have little control or influence over professional discipline, theories about what motivates professional groups become much less relevant. Other theories must be considered or developed. Useful parallels can be drawn between professional discipline systems and the regulatory systems examined in the work of Carson[138] and Hawkins.[139] Carson examined the enforcement of strict liability legislation and observed that those charged with enforcing the legislation imposed an additional requirement of moral fault. There are many elements in Carson's study which assist in understanding the discipline of lawyers in Queensland. For example, Carson noted a general animosity, even within Law Commissions, to the notion of strict liability crimes, and a tendency to continue to infer the need for moral blame before instituting a prosecution, and to limit the serious nature of such offences by referring to them as 'folk crimes'.[140] Hawkins has

[137] Above section 2.6.4.
[138] Wesley Carson, 'Some Sociological Aspects Of Strict Liability And The Enforcement Of Factory Legislation' (1970) 33 *Modern Law Review* 396-412.
[139] Keith Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002).
[140] Carson, above n 138, 397, 411.

confirmed that regulatory personnel are unlikely to prosecute breaches of legislation – whether strict liability or not - without the presence of blame.[141]

Similarly, in relation to professional discipline, a difficulty appears in determining the relationship between discipline and the criminal law,[142] a matter I take up more fully in Chapter Six.[143] An ongoing emphasis, even by the courts, on notions of 'dishonour and disgrace' when considering professional misconduct, has already been noted.[144] Obviously, any theory which suggests any regulator, either within the profession or external, has a tendency to superimpose notions of moral blame before prosecuting conduct, must be considered as a potential source of explanatory power. This is particularly the case given the limitations and inconsistencies of theories of the profession which I have discussed in this chapter.

An ideological 'time lag' between the purpose of discipline as required by the law and the interpretation of the purpose of discipline applied by those charged with the day to day enforcement of discipline is more likely to arise if the same group of individuals continue to be responsible for the enforcement of discipline after changes are implemented. It is possible that enforcement personnel may not internalise the changes. I have already noted this in the previous chapter in relation to the Supreme Court of Queensland's failure to embrace legislative change in relation to the range of conduct liable to discipline.[145]

[141] Hawkins, above n 139, 333.
[142] Marks and Cathcart, above n 2; Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152, 158-9.
[143] Below section 6.4.
[144] Above section 2.4.3.3.
[145] Above section 2.4.3.4.

Marks and Cathcart have warned of the necessity to consider the attitude of disciplinary agencies, and their comments are not necessarily limited to disciplinary agencies under the control of the legal profession. They pointed out that disciplinary agencies in many parts of the United States were established to deal with a particular form of substandard performance by lawyers, and resisted any broadening of their jurisdiction because they claimed they were not established to deal with a broader range of substandard performance.[146] This resistance to change will be particularly true where the same personnel are employed within the disciplinary agency over a period of time.[147]

3.12 Conclusion

This chapter has demonstrated that, while it may first appear that there is great discrepancy between various theories of the professions, if those theories are only considered insofar as they relate to the question of professional discipline, there is considerable consistency. Theories which appear at first glance to provide evidence that a profession can effectively self-regulate must be treated with caution. A close reading of these, particularly the work of Halliday, shows in fact that, while lawyers as a group may be able to operate 'beyond monopoly' in the public interest once their monopoly is entrenched, the profession is unable to self-regulate properly. In fact, Halliday went even further than this, and appeared to suggest that, even when

[146] Marks and Cathcart, above n 2, 226. The authors themselves point out the circularity of such an argument.

[147] This conclusion may require further substantiation. Grabosky and Braithwaite have reported that an apparent correlation between a lower rate of convictions by regulatory agencies which employed higher numbers of staff who had previously worked in the industry which they were regulating disappeared when corrected for size of the agency: Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, Melbourne, 1986) 210, 214.

seeking external legitimacy to justify a monopoly over the supply of legal services, a profession only manifested the indicia of self-regulation, through erecting the 'elaborate scaffolding' of disciplinary processes.

My analysis of theories of the professions in this chapter has also pointed to the central role which ideology plays within the legal profession. Ideology is as important to Larson's professional project as it is to those, such as Croft and Parker, who seek to harness the aspirational aspects of professional ideology to achieve effective self-regulation. But ideology does not only play a role *within* the legal profession. It can also have an impact on those who deal with the legal profession, whether as consumers of legal services, regulators or lawmakers. in later chapters of this thesis I will seek to explore the question whether enduring paradigms of what makes a 'good lawyer' and as to the proper role of professional discipline may have impacted on the ability of professional discipline in Queensland to discharge its primary responsibility of protecting the public.

In the following chapter I look at the role played by professional bodies in establishing structures to deal with professional discipline. Such an examination is likely to provide some insight into the degree to which those bodies appear to have been motivated by self-interest or public interest and whether those structures represent simply the ideological 'scaffolding' referred to by Halliday. Perhaps a more useful tool for considering Larson's theory is an examination of the role played by professional bodies in using those structures in taking disciplinary action against individual lawyers, and in publishing disciplinary outcomes. These are all matters which I take up in subsequent chapters of the thesis.

CHAPTER FOUR

EVOLUTION OF LEGAL DISCIPLINARY STRUCTURES IN QUEENSLAND

4.1 INTRODUCTION

Chapter Three presented theories that suggested professional bodies are only likely to participate actively in the creation of new disciplinary structures ('scaffolds') and in disciplinary action against their members when those bodies perceive an external threat to their legitimacy or reputation. It also noted theories which suggest an 'ideological time lag' may exist within any regulatory body, particularly if such a body is asked to enforce legislation which takes a stricter view of liability than that to which the regulator has been accustomed. Subsequent chapters of this thesis will consider whether these theories are useful to explain disciplinary action taken against Queensland lawyers. This chapter examines the legal framework within which the discipline of Queensland barristers and solicitors has operated and the role played by professional bodies in the establishment of that framework. Particular attention will be paid to evidence of external threats to the legitimacy of the profession (or segments of the profession) which may have precipitated the erection of symbolic 'scaffolding'[1] by professional bodies.

Until 2004 the legal profession in Queensland remained divided at the point of admission, and very different disciplinary structures applied to barristers and

[1] The term 'scaffolding' is used in the sense used by Halliday, to describe structures erected at times of external pressure, without any necessary concern about how well those structures were utilised: Terence Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (University of Chicago Press, Chicago, 1987). See more detailed discussion above section 3.10.2.1.

solicitors. It is therefore necessary to consider barristers and solicitors separately. A marked difference in the activity of each branch of the profession will be noted.

4.2 COURT'S INHERENT JURISDICTION

Since it was first established in 1861[2] the Supreme Court of Queensland has held inherent jurisdiction over both barristers and solicitors, a jurisdiction that originally arose from the *Third Charter of Justice*.[3] Where a lawyer engaged in misconduct within the court, it could initiate action of its own motion, but required lodgement of a complaint before it would act on misconduct outside the court.[4]

Although Queensland separated from New South Wales in 1859, neither solicitors nor barristers in the new colony formed any representative body until the Queensland Law Society was established in 1873. The report of *Re Batho*[5] names the applicant as the 'Law Society of Queensland', but neither the Queensland Law Society nor any other professional representative body was in existence at that time. Gregory believes that this 'society' in fact referred to an informal group of solicitors working towards improved professional standards.[6]

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[2] Hon Bruce McPherson, *The Supreme Court of Queensland 1859-1960. History Jurisdiction Procedure* (Butterworths, Sydney, 1989) 27.
[3] The Supreme Court of Queensland exercises powers inherited from the *Third Charter of Justice* given to New South Wales because the area that now comprises Queensland was part of the colony of New South Wales until 1859.
[4] *Re Swanwick; ex parte Bain* (1882) QLJ, February 1, 1883, 117, 118.
[5] (1868) 1 QSCR 196.
[6] Helen Gregory, *The Queensland Law Society Inc 1928-1988* (Queensland Law Society, Brisbane, 1991) 17.

4.3 BAR ASSOCIATION OF QUEENSLAND

4.3.1 *No Statutory Regulation of Barristers*

In 1903, the Bar Association of Queensland came into existence and its committee comprised the Attorney-General, the Solicitor-General, all King's Counsel and five other practising barristers, elected annually.[7] As the association itself has since noted, 'if the motions adopted at this [first] meeting are a guide' the association was formed to deal with the 'perennial issues of unpaid fees and direct briefing'.[8] At its initial meeting, the association agreed to blacklist solicitors who had failed to pay barristers' fees, and to ban holding a brief with a fellow barrister who accepted work directly from a client, without an instructing solicitor.[9] Both these matters could only be said to be of indirect interest - let alone of benefit - to the public.[10] The evidence suggests that, the association's initial aim was to protect the economic interests of members rather than to protect the interests of the general public. This accords with predictions of market control theorists referred to in the previous chapter.[11] Any – albeit muted - interest in protecting members of the public more directly came later.

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[7] Ross Johnston, *History of the Queensland Bar* (Bar Association of Qld, Brisbane, 1979) 21.

[8] Bar Association of Queensland, 'Early History of the Queensland Bar' http://www.qldbar.asn.au/20967.html at 23 February 2005.

[9] Michael White and Stephen Sheaffe, 'A Short Account of the Beginnings of the Queensland Bar', Supreme Court of Queensland Library, 2003. Arthur Feez, the first president of the association, recorded its foundation meeting in his diary as follows: 'Court at 10 … Game of snooker after lunch and I played better. Bar meeting in the AG's chambers when we formed a Bar Association and passed certain resolutions. …': Ibid. See also Bar Association of Queensland, 'Early History', above n 8.

[10] Although the English case of *Doe d Bennett v Hale* (1850) 15 QB 171; 117 ER 423 found that the need to brief a solicitor was in the public interest, some may argue that an absolute ban on 'direct access' clients may be against the public interest, by requiring clients to pay both a solicitor and a barrister even in the simplest of advocacy matters. A prohibition against direct access to barristers has also been criticised as anti-competitive: *National Competition Policy Review of the Legal Profession Act 1987* para 4.2, http://www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncp_4 at 27 April 2005.

[11] Above section 3.3.

Although the Queensland Law Society sought and achieved statutory control over all Queensland solicitors in 1927,[12] that legislation was not extended to cover Queensland barristers, except when practising as a solicitor.[13] The omission of barristers from the legislative framework was queried in Parliament during the passage of the 1927 Bill,[14] but the only explanation given by the Attorney-General was that barristers were excluded because 'they do not deal with money matters ... they do not handle the money of clients in the same way as solicitors.'[15] During debate of the Bill a conveyancer member of Parliament noted the narrowness of this response, given that 'a barrister might do something outside of taking money or neglecting a trust, and therefore should be under the control of the society.'[16] Yet such an argument did not hold sway with Parliament, and barristers were to remain outside legislative control until 2004.[17]

This meant that until 2004 the only legal basis upon which the Bar Association of Queensland could exercise any disciplinary power over barristers was on a consensual basis, in relation to those barristers who chose to become members. Through the Articles of Association, members gave the Committee of the association[18] the power to enquire into conduct and, after giving 21 days notice,[19] to hear charges of a breach

[12] *Queensland Law Society Act 1927* (Qld). See discussion later in this chapter.
[13] Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 1927, 827. The *Legal Practitioners Act 1881* (Qld) s 1 permitted a barrister to practise as a solicitor, although it is thought that very few chose to do so: Michael White, 'The Development of the Divided Legal Profession in Queensland', (2004) 23 *University of Queensland Law Journal* 296, 314.
[14] Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 1927, 826 (William Kelso, who described himself as a 'humble conveyancer': Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 1927, 827).
[15] Ibid 826 (John Mullan, Attorney-General).
[16] Ibid 828 (William Kelso).
[17] *Legal Profession Act 2004* (Qld).
[18] The Committee was elected annually by the members and consisted of the President, Vice President and 13 ordinary members: *Bar Association of Queensland Articles of Association*, article 52(a).
[19] Article 76.

of etiquette, a breach of the rules of membership, unprofessional conduct, or 'misconduct of such a nature as to make [the barrister] unsuitable for membership.'[20]

If charges were proved beyond reasonable doubt,[21] the association could suspend or expel a member from membership[22] and other members were barred from sharing a brief during the period of suspension or expulsion.[23] It has been suggested that this was a more effective form of control than the General Council of the Bar's degree of control over English barristers,[24] but it did little to control those barristers who were able to practise without the co-operation of barristers who were members of the association.

The only other available response to misconduct by a barrister was an application to the Supreme Court in its inherent jurisdiction. The Bar Association of Queensland has always had standing in relation to admission proceedings,[25] which necessarily involve non-members. In *Clyne v NSW Bar Association*[26] the High Court had no doubt that the New South Wales Bar Association had standing, not only in admission proceedings but also in disciplinary matters involving any member of the bar, not just members of that association. The Supreme Court of Queensland has also held that the Bar Association of Queensland had standing to prosecute disciplinary matters.[27]

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[20] Article77.
[21] This is equivalent to a criminal standard of proof and higher than the usual standard of proof in disciplinary proceedings, which is the *Briginshaw* standard. Compare also *Legal Profession Act 2004* (Qld) s 479 which codifies the Briginshaw standard.
[22] Article 78.
[23] Article 79.
[24] Johnston, above n 7, 21.
[25] *Bar Association of Queensland v Lamb* [1972] ALR 285; as do bar associations elsewhere: *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239.
[26] (1960) 104 CLR 186.
[27] *Re Clancy* (1970) QWN 8.

In New South Wales, although the Supreme Court acknowledged that it could institute disciplinary proceedings on its own initiative *ex mero motu*, it encouraged the New South Wales Bar Association to prosecute the action as a rule *nisi*.[28] Bennett reports that the association agreed with this proposal.[29] The association's apparent reasons made no mention of the public benefit that could accrue from the association investigating and prosecuting disciplinary matters but instead focus on the advantages to the bar itself, noting that such a proposal was desirable because it would

> [protect] members of the Bar against possible blackmailing proceedings and the danger of the Prothonotary's acting on complaints by litigants of unsound mind. ... These obligations, sometimes found distasteful by the Council, were seen on a broad view to be for the benefit of the Bar as a whole, as well as protecting individual barristers.[30]

Article 82 of the Articles of Association of the Bar Association of Queensland does contemplate the association reporting disciplinary matters to the Supreme Court of Queensland, and the association has reported an 'involvement' in at least two applications to the Queensland Court of Appeal to have a barrister disbarred.[31] However in recent times it was the Barristers' Board of Queensland[32] which has prosecuted any applications to the Queensland Court of Appeal that a barrister be disciplined.[33]

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[28] John Bennett (ed), *A History of the New South Wales Bar* (Law Book Co, Sydney, 1969) 170.
[29] Ibid.
[30] Ibid.
[31] Letter from Daniel O'Connor, Chief Executive, Bar Association of Queensland, to Linda Haller, 13 December 2002. One of these was *Barristers' Board v Darveniza* [2000] QCA 253, in which the applicant was the Barristers' Board but the association was joined as a party on its own application.
[32] The Barristers' Board was first established in 1866 and was primarily charged with assessing fitness to be admitted to practise. It was replaced in 2004 by the Legal Practitioners Admission Board: *Barristers' Admission Rules 1975* (Qld) (repealed) s 4; *Legal Profession Act 2004* (Qld) s 489; Bar Association of Queensland, From the President, July 2004, http://www.qldbar.asn.au/From_Pres_7_04.pdf at 27 April 2004. See below section 4.4.
[33] *Barristers' Board v Darveniza* [2000] QCA 253; *Barristers' Board v Young* [2001] QCA 556; *Barristers' Board v Pratt* [2002] QCA 532. See discussion later in this chapter.

Even if the Supreme Court of Queensland had the co-operation of the association in the hearing of disciplinary matters against barristers, the range of orders available to any court exercising its inherent jurisdiction is necessarily limited[34] and more inflexible than the orders available to a statutory disciplinary tribunal, such as the tribunal which heard disciplinary matters against solicitors.

4.3.2 *Attitude of Members*

Members of the bar were divided as to whether it was desirable to establish a disciplinary tribunal at all, and if so, whether that tribunal should be established under Rules of Court or by legislation. Forbes claims that the concept of a statutory disciplinary committee for barristers was raised in 1976.[35] The following discussion demonstrates that discussion within the association continued, but without any material change, until legislation was finally implemented in 2004.

At the Annual General Meeting of the Bar Association of Queensland held in May 1983, the members of the association endorsed a proposal that a disciplinary tribunal be established.[36] That proposal was criticised by the Editor of *Queensland Bar News*, who commented:

> It is said that when the Falklands War was rumoured as being likely to spread to Europe, Italy surrendered just in case. The vote for a disciplinary body smacked of the same. It was a funny vote by the younger members whose integrity at the poll demonstrated quite clearly the absence of a need for the Body for which they ultimately voted. Had they been about for the last 15 years, they would have known

[34] *Barristers' Board v Darveniza* [2000] QCA 253, [37], discussed in Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness' (2002) 22 *The Queensland Lawyer* 166, 171.
[35] John Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (Law Book Co, Sydney, 1979) 144, note 82.
[36] C W Pincus, 'From the President' (1983) 6 *Queensland Bar News* 3. It appears that a similar decision was made at a General Meeting on 20 February 1989, and that the tribunal be created pursuant to a Rule of Court rather than by statute: Cedric Hampson, 'President's Page', (1997) 53 *Refresher* 3.

> that members in the past would not have a bar of it. May the Judge never have to pause in his court duties to sit upon that Tribunal. [37]

The editor's comments suggest that the push for a disciplinary body came from the younger members of the association. As was noted in the previous chapter, the profession is not an amorphous group.[38] While some may not be surprised at this evidence of younger, more junior barristers more willing to embrace change than older, more established barristers, it is telling that – despite the outcome of a democratic vote of members – the actual establishment of a disciplinary tribunal was delayed for many years. Larson would claim that this was because a tribunal was against the interests of the elites controlling the association.[39] The subsequent examination of the circumstances surrounding the delay in the implementation of the disciplinary tribunal suggests other possible explanations: the delay may have been simply the result of indecision by the association as to the legal form any such tribunal should take. Equally it may have been a result of delays by judges in implementing Rules of Court, at times when the bar preferred a tribunal governed by Rules of Court. Once again, it is important to avoid the over-determinism against which Halliday and Lewis have warned.[40]

In March 1984, at a joint symposium held by the Queensland Law Society and the Bar Association of Queensland, the Attorney-General was reported to have called on both branches of the profession to include community input into their disciplinary systems voluntarily or risk losing self-regulation. He said:

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[37] James Crowley, Editorial (1983) 6 *Queensland Bar News* 1.
[38] Above section 3.7. Christine Parker, 'Competing Images of the Legal Profession: Competing Regulatory Strategies' (1997) 25 *International Journal of the Sociology of Law* 385, 392.
[39] Above section 3.5.
[40] Halliday, above n 1, 350; Phillip Lewis, 'Comparison and Change in the Study of Legal Professions' in Richard Abel and Phillip Lewis (eds), *Lawyers in Society, vol 3: Comparative Theories* (University of California Press, Berkeley,1989) 59. Discussed above section 3.2.

> the idea of Caesar judging Caesar on matters of professional misconduct and negligence no longer attracted community support. ... I would hope that we will not reach the position in this state where Government will be forced, by legislation, to impose on the profession a government-devised method of management and discipline. ... this possibility however should be recognised.[41]

It does not appear that any more was said publicly about the proposal passed at the 1983 Annual General Meeting until 1988 when the President informed members that a 'new system for investigating and hearing complaints against barristers and of punishing misconduct will, I hope, be placed before our next Annual General Meeting...'[42]

A reading of the association's *Bar News* in December 1989[43] would strongly suggest that it did then have the political will to establish a more effective disciplinary system. The Editorial of that month's issue suggested that Rules of Court were already in draft form to establish a disciplinary tribunal for all barristers in Queensland, whether members of the association or not, to be headed by a Supreme Court judge.[44]

4.3.3 *Rules of Court or Legislation?*

The association's preference for Rules of Court rather than legislation accords with the finding of Powell that the Chicago Bar Association handed over control of discipline to a court run system rather than a system with more legislative or public control, because it believed judges would maintain the narrow focus of what lawyer discipline entailed, established over many years earlier by bar association led

[41] A Miller, 'Lawyers Risk 'Loss of Public Esteem', *Sunday Mail* (Brisbane), 25 March 1984, 2.
[42] G L Davies, 'From the President' (1988) 26 *Queensland Bar News* 5.
[43] This was published only a few months after the decision in *Hampson,* discussed later in this chapter.
[44] Michael White, 'Editorial' (1989) 30 *Bar News* 3.

discipline.[45] It is all the more likely that Queensland barristers would trust Queensland Supreme Court judges to maintain the bar's understanding of discipline, as all of the State's Supreme Court judges were previously members of the bar. None were appointed to the bench directly from the solicitors' branch of the profession.

However, still no changes occurred and the continuing defects of the system were well described by Justice C W Pincus in 1990:

> The disciplinary system we have had has often worked well enough, but in the critical cases where something serious was happening, or seemed to have been done, I thought the Committee had insufficient legal power. All it had was contractual power. All it could do, short of going to the Supreme Court, was enforce a contract constituted by the rules, but that didn't appear to be enough to enable the collection of proper evidence and to enable proper penalties. Fortunately, ethical standards here have been good, despite some deficiency in the mechanism of enforcement.[46]

In September 1991, the President blamed the lack of any progress towards a new disciplinary tribunal on a lack of funding, [47] although he hoped to have the tribunal in place by the end of that year.[48] In the President's Annual Report two years later, in 1993, the decision at the 1983 Annual General Meeting to establish a disciplinary tribunal was alluded to, but the continuing delay was again blamed upon a lack of funding and apparent delays in the approval of Rules of Court. However the political resolve in 1993 did appear to be stronger, with the President stating:

> The Committee feels strongly that as a responsible profession the Bar has hesitated too long in implementing a professional disciplinary tribunal. It has decided to recommend that there be a Barristers' Disciplinary Board to which substantiated matters of complaint concerning a barrister's conduct would be referred. The Board,

[45] Michael Powell, 'Professional Divestiture: The Cession of Responsibility for Lawyer Discipline' (1986) *American Bar Foundation Research Journal* 31, 53. Discussed in more detail above section 3.10.2.3.
[46] Hon C W Pincus, 'Ethical Conduct at the Bar', Speech delivered to Bar Association of Queensland pupils 21 September 1990 and published (1990) 34 *Bar News* 17, 24.
[47] D Drummond, 'Why the Bar Association?' Speech at the Pupils Dinner 19 July 1991 and reported in (1991) 37 *Queensland Bar News* 5, 6.
[48] Ibid 7.

> which would include lay persons, would have powers to suspend or cancel practising certificates[49] where the case warranted it. Funding for the Board would come from annual practising certificates.
>
> A great deal of work has gone into drafting the proposed rules and after much discussion it was decided that it would have to be implemented in the form of legislation rather than Rules of Court, otherwise we may be waiting a further five or ten years before the Disciplinary Board was up and running. A final draft will be available in the near future and circulated to members for comment before being submitted to the Attorney.[50]

4.3.4 *A Quiet, but Slow-paced, Resolve?*

There is much that can be said about the President's comments. First, as with much of the association's deliberations, this discussion took place among members and was published only to members through the association's own journal. There was no public grandstanding in the mass media about the association's plans to instigate changes so as to weed out any 'bad apple' barristers. Grandstanding by the Queensland Law Society was more common.[51] The association's quieter approach makes it difficult to argue that the association was putting its energies into the design of new disciplinary structures so as to obtain public legitimacy – it does not appear as if the Queensland public would even have been aware of the association's efforts. Second, the President claimed that it could be five or ten years before the judges of the Supreme Court of Queensland would have agreed to disciplinary structures governed by Rules of Court – hence the association's decision to seek legislative powers. This would suggest that the association was keener to obtain the power to remove a barrister's right to practise than were the judges to grant that power. Why

[49] It should be noted that any proposal to create a power to cancel or suspend practising certificates would first have required all barristers to *hold* practising certificates: this did not occur until 2004, with the passing of the *Legal Profession Act 2004* (Qld).
[50] R R Douglas, 'President's Page', (1993) 44 *Refresher* 6.
[51] See below section 4.5.

might the judges have delayed taking more direct responsibility for the disciplinary structures to govern barristers? All judges were once lawyers, and all of them had been barristers. Larson would suggest that judges would continue to identify strongly as barristers, despite their elevation to the bench.[52]. It is nevertheless difficult to know the true reasons for the delay.

While the bar may have vacillated as to whether it should place its 'disciplinary trust' in the judges of the Supreme Court, through Rules of Court, or risk the greater uncertainties of legislative regulation, the bar appeared united in the need to remain a distinct branch of the profession. The same article which reported the association's frustration with delays in the implementation of Rules of Court noted that care was being taken to ensure that any legislation did not 'introduce fusion [in]to the Government's agenda'.[53]

The Bar Association of Queensland reports that it conducted a comprehensive review of its Rules of Conduct in 1994,[54] but by 1997 the bar remained without a disciplinary tribunal. And it appeared that indecision about whether the restructure should be through Rules of Court or legislation continued. The prospect of a legislative framework was reconsidered, with the President of the association stating that the Disciplinary Tribunal would be constituted [by Rules of Court] rather than by statute.[55]

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[52] Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, Berkeley, 1977) 229. Discussed in more detail above section 3.9.
[53] Ibid 7.
[54] Bar Association of Queensland, *Submission to Queensland Attorney-General on Discussion Paper on Legal Profession Reform in Queensland*, December 1998, 5.
[55] Cedric Hampson, 'President's Page', (1997) 53 *Refresher* 3.

In 1998 the association lodged a submission in response to the State Government's Discussion Paper on Legal Profession Reform. In that submission, the association claimed to have 'urged for many years now that a more comprehensive disciplinary regime be introduced'.[56] The association acknowledged the current deficiencies of the limited range of disciplinary responses available when dealing with members of the association, and the even fewer disciplinary responses available in relation to barristers who were not members of the association.[57] It advocated that Queensland follow the New South Wales model, whereby complaints were first received by an independent body and then referred to the professional body for investigation and hearing.[58] It also recommended that one lay member sit with two barrister members on a barristers' disciplinary tribunal.[59] The lay member could ensure 'openness, transparency and impartiality.'[60]

In its response to the Green Paper on Legal Professional Reform in June 1999, the association reiterated arguments made during the passing of the *Queensland Law Society Act* in 1927, emphasising that

> ...the very nature and number of complaints against barristers as a whole is quite different from that of the solicitors' branch. The costs associated with extensive investigation and hearing, as with trust account defalcations, are not a feature of practice of a barrister and therefore do not produce the same funding implications.[61]

[56] Bar Association of Queensland, above n 54, 19.
[57] Ibid.
[58] Ibid 16.
[59] Ibid 19.
[60] Ibid.
[61] Bar Association of Queensland, *Response to the Green Paper on Legal Professional Reform*, June 1999, 6.

This is not a strong argument as to why barristers should be subject to a separate disciplinary system to that which applied to solicitors. It is true to say that, in the past, the Queensland disciplinary system was used primarily to discipline solicitors for breach of trust account obligations, with 46% of disciplinary cases against solicitors in 1930-2000 relating to trust account matters.[62] But that is not to say that regulators should prioritise trust account matters or that, had barristers been brought within a statutory disciplinary regime, the focus of the regulator would have remained on trust account matters.

In summary, while on a number of occasions members of the Bar Association of Queensland discussed the possibility of a more formal disciplinary tribunal, established either under Rules of Court or pursuant to legislation, the position remained unchanged until 2004: the only powers of discipline were contractual in nature, arising out of the contract of membership. Therefore, the most onerous discipline that the association could impose was to revoke or suspend that membership of the association and, given that a barrister did not need to be a member of the association to practise as a barrister in Queensland, it had no power to incapacitate any barrister, and no powers whatsoever in relation to non-members. The lack of statutory control also meant that the association's powers of investigation and adjudication were limited: it did not have the same immunities from suit granted to the Queensland Law Society, witnesses and disciplinary tribunal members in disciplinary matters involving solicitors,[63] nor the power to require the attendance of

[62] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45, 18.
[63] *Queensland Law Society Act 1952* (Qld) s 6Q, s 49 (repealed).

witnesses.[64] It was generally accepted that the regulation of barristers was unsatisfactory.[65]

4.3.5 *Barristers and the Legal Profession Act 2004* (Qld)

The position became vastly different with the passing of the *Legal Profession Act 2004* (Qld). The Act gave statutory power to the Bar Association of Queensland for the first time, but in relation to practising certificates and investigations, and not discipline. These powers extend to all barristers wanting to practise in Queensland, not just barristers who are members.[66] All complaints against a Queensland legal practitioner, whether solicitor or barrister, are received by the Legal Services Commissioner,[67] who can investigate the complaint himself or refer it to the Queensland Law Society or Bar Association of Queensland for investigation.[68] The association has coercive powers for the first time and, if asked to investigate a complaint, can now demand that a barrister provide explanations of conduct, attend interviews or supply documents to the association.[69] Although the decision whether to institute a discipline application will be that of the Legal Services Commissioner,[70]

[64] *Queensland Law Society Act 1952* (Qld) s 6M (repealed).
[65] Bar Association of Queensland, above n 54, 19; *Response of the Judges of the Supreme Court of Queensland to the Queensland Government Green Paper on 'Legal Profession Reform'*, September 1999, 3; Pincus, above n 46, 24.
[66] In addition to the complaints and discipline powers discussed here, the association has extensive statutory powers in relation to practising certificates, show cause events and health assessments.
[67] *Legal Profession Act 2004* (Qld) s 256.
[68] *Legal Profession Act 2004* (Qld) s 265 (2).
[69] *Legal Profession Act 2004* (Qld) s 269. The barrister is excused from supplying an explanation if this would incriminate the barrister or contravene the terms of professional indemnity insurance.
[70] *Legal Profession Act 2004* (Qld) s 273.

the association must include a recommendation whether or not to prosecute with the report of any investigation it undertakes.[71]

The legislation had been anticipated for many years,[72] and no one was surprised to see a Bill which included provision for the statutory regulation of barristers - least of all barristers, who had managed to avoid statutory regulation for 76 years longer than solicitors. The association has not publicly criticised the Act but has noted that only 'modest' Government funding is available to defray the substantial cost of statutory regulation, requiring the balance to be passed on to members.[73]

4.4 BARRISTERS' BOARD

While the Bar Association of Queensland took little action in regard to discipline, another body, the Barristers' Board, appeared much more active, even though discipline appears to have been beyond its purpose and powers. The Barristers' Board was first established in 1866 and was primarily charged with assessing an applicant's fitness to be admitted to practice.[74] Its formal disciplinary powers, as eventually stated in the *Barristers Admission Rules 1975* (Qld), were limited to applications for the disbarment of a barrister convicted of an indictable offence.[75] The Supreme Court of Queensland conceded that the board also had an interest in applications for removal

[71] *Legal Profession Act 2004* (Qld) s 268(4)(b).
[72] Chief Justice Paul de Jersey, 'The Supreme Court under the Legal Profession Act 2004' (2004) 23 *University of Queensland Law Journal* 281, 286.
[73] Bar Association of Queensland, *From the President*, May 2004, number 2, http://www.qldbar.asn.au/From_Pres_May_2_04.pdf at 28 April 2004.
[74] *Barristers' Admission Rules 1975* (Qld) (repealed) s 4; *Legal Profession Act 2004* (Qld) s 489; Bar Association of Queensland, From the President, July 2004, http://www.qldbar.asn.au/From_Pres_7_04.pdf at 27 April 2004.
[75] *Rules Relating to the Admission of Barristers of the Supreme Court of Queensland 1975* (Qld) as amended by *Barristers' Admission Rules (no 1) 1995* (Qld) r 42A. This power was in addition to its power to enquire into the fitness of applicants for admission and of current students-at-law: *Barristers' Admission Rules (no 1) 1995* (Qld), rr 36, 42B, 44.

where a fraud on the board had been alleged, for instance a failure to disclose relevant information to the board prior to admission.[76] But the board also became the de facto prosecutor in disciplinary cases,[77] and there appeared to be general acceptance that the board had the power to investigate complaints and to prosecute discipline. The Attorney-General sometimes received complaints about barristers and referred these to the board for investigation.[78] The most likely party to challenge the standing of the board was the barrister facing discipline, but no barrister mounted a challenge.[79] When the board was disbanded in July 2004,[80] the President of the Bar Association of Queensland appeared to have no doubt as to the central role it had played in the discipline of barristers, thanking members of the board for the 'significant amount of time' spent investigating complaints made to the board about barristers and for the 'vital' role played by the board in disciplinary cases which had come before the Supreme Court.[81]

It is difficult to discern why the board took on a prosecutorial role, given that there is no evidence that this was its purpose or that it had power to do so. It also is interesting to compare the attitude of the Supreme Court in 2000-2002 when the board was the prosecutor in all three discipline applications to the court that related to barristers during that period and so presumed to be the appropriate prosecuting

[76] *Re Watson* [1941] St R Qd 231; *Barristers' Board v Khan* [2001] QCA 92.
[77] *Barristers' Board v Darveniza* [2000] QCA 253; *Barristers' Board v Young* [2001] QCA 556; *Barristers' Board v Pratt* [2002] QCA 532.
[78] Personal communication, Marshall Cooke QC, Chair of Barristers' Board, 26 June 2003. Some of these complainants may have already complained to the Bar Association of Queensland before complaining to the Attorney-General but been dissatisfied with the association's response, which may explain why the Attorney-General referred the complaints to the Barristers' Board rather than back to the association.
[79] Ibid.
[80] It was replaced by the Legal Practitioners Admission Board.
[81] Glenn Martin, Bar Association of Queensland, *From the President*, July 2004, http://www.qldbar.asn.au/From_Pres_7_04.pdf at 27 April 2005.

body,[82] to the situation 30 years earlier, in *Re Clancy*.[83] In that case the Full Court of the Supreme Court rebuffed any suggestion of a role for the board in the discipline of a practising barrister except to redress a fraud practised on the board in the course of admission, and confirmed that 'the current practice is for the Bar Association of Queensland to move' a disbarment.[84] Although no reason for the change in practice since 1970 has been articulated by the court, a few possible reasons are hazarded. First, the available records suggest that the Bar Association of Queensland was unwilling to undertake a disciplinary role within its own ranks, had not exercised strong discipline, and so was unfamiliar with disciplinary processes.[85] Second, the Barristers' Board was established pursuant to the *Supreme Court Act 1921* (Qld) and had its offices within the Supreme Court building, so could be viewed by the court as more closely aligned with the court than the association.[86] And yet this second possible explanation for the role granted to the board seems incongruous in light of the fact that the association's disciplinary impotence appeared at least partly due to procrastination by the judges of the Supreme Court in implementing Rules of Court.[87]

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[82] *Barristers' Board v Darveniza* [2000] QCA 253; *Barristers' Board v Young* [2001] QCA 556; *Barristers' Board v Pratt* [2002] QCA 532.

[83] *Re Clancy* (1970) QWN 8.

[84] Ibid. It is unclear from the report whether Clancy was a member of the Bar Association of Queensland at the time.

[85] *Australian Commercial Research and Development Ltd v Hampson* [1991] 1 Qd R 508 provides a rare insight into the handling of a complaint lodged with the Bar Association of Queensland. The matter only came to light because the complainant subsequently sought an injunction in the Supreme Court. The case report indicates that the members of the association committee considering the complaint declined to view all of the material sent by the complainant, for fear that this would disclose confidential information to them and so disqualify them from accepting certain work as barristers in the future. This provides a sharp contrast with the situation in relation to complaints against solicitors, as the Queensland Law Society was required by law to investigate all written complaints: *Queensland Law Society Act 1952* (Qld) s 5F(1) (repealed).

[86] Although this would not explain the court's reluctance to acknowledge a disciplinary role for the Barristers' Board in *Re Clancy* (1970) QWN 8.

[87] Above section 4.3.3.

4.5 QUEENSLAND LAW SOCIETY

4.5.1 *The Years Until 1938*

A strong contrast is provided by the level of disciplinary control imposed upon solicitors in Queensland. Although Queensland separated from New South Wales in 1859, neither solicitors nor barristers formed any representative body until the Queensland Law Society was established for solicitors in 1873. It included among its initial aims the protection of the public through the 'rigorous prosecution of dishonourable practices', advising the legislature on proposed legislation and assisting in the 'amicable resolution of professional differences between practitioners' so as to 'present a dignified image to the public'.[88] But support for the society waned. The tension between the regulatory and representative roles of the society was already becoming apparent, as at least one solicitor blamed the demise of the society on its zeal in 'preying on' solicitors rather than promoting their interests.[89] Despite lack of solicitor support for the society, a few solicitors joined to form the Queensland Law Association in 1883. Reports in the late 1800s show that the association brought some disciplinary prosecutions before the Supreme Court of Queensland, despite the fact that it was a voluntary body with no statutory powers or responsibilities.[90] Yet it apparently declined to prosecute other matters on the basis that it lacked the power to do so.[91]

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[88] Gregory, above n 6, 22.

[89] See (1883) Queensland Law Journal p civ, cited in McPherson, above n 2, 233.

[90] *Re Chubb* (1887) 3 Qld LJ 35; *Re Perske* (1896) Qld LJ 73 (barrister practising as a solicitor, at a time when the practice of law was fused).

[91] Gregory, above n 6, 66, where she reports that the association rejected Justice Department requests to prosecute a solicitor for breaches of the *Trusts Account Act 1923* (Qld) because it claimed it could not do this until it was incorporated. The Law Society of New South Wales appears to have been active in a number of disciplinary applications to the court, even at a time when it had no statutory role in discipline: John Bennett, *A History of Solicitors in New South Wales* (Legal Books, Sydney, 1984) 345-6.

Any doubts about the power of the solicitors' professional body to receive and investigate complaints and prosecute discipline were dispelled in 1927 with the passing of the *Queensland Law Society Act 1927* (Qld).[92] The Act established the Queensland Law Society as an incorporated body and provided for all members and assets of the association to be taken over by the society.[93] The first council of the new society were to be the members of the council of the former association.[94] So, in many ways, the Queensland Law Society was a continuation of the Queensland Law Association, but now with statutory powers and protection.

The 1927 Act established a statutory disciplinary tribunal to hear charges against solicitors,[95] with all the powers of the Supreme Court of Queensland, including the power to strike a solicitor's name from the roll. It was also given the same protections as a commission of inquiry.[96] The Act originally required members of the tribunal to be closely aligned with the leadership of the solicitor's branch, as past members of the council of the Queensland Law Society.[97]

The Queensland Law Society's handling of its first case[98] after being given these extensive powers led to strong criticism by a Supreme Court judge, Macrossan SPJ, and to the resignation of the Statutory Committee's first chairman, EH Macartney.

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[92] The only solicitor member of Parliament at the time that the statutory powers were finally granted, noted that the professional body had been seeking such powers since 1884: Queensland Parliamentary Debates, 8 November 1927, 826.
[93] *Queensland Law Society Act 1927* (Qld) ss 3(1)(a), 3(4).
[94] *Queensland Law Society Act 1927* (Qld) s 4(2).
[95] *Queensland Law Society Act 1927* (Qld).
[96] *Queensland Law Society Act 1927* (Qld) s 5(2)(h).
[97] *Queensland Law Society Act 1927* (Qld) s 5(1)(b), (c).
[98] The involved Robert McCowan. On his first appearance before the disciplinary tribunal he was merely censured. He continued in practice and, by the time he was again brought before the disciplinary tribunal – in May 1930 – clients had already lost over £20,000.

Both claimed the Queensland Law Society failed to act earlier and more strongly against the solicitor, Robert McCowan, because he was 'well-known and socially prominent'.[99] Clients lost over £20,000 as a result of his misconduct. Although Macrossan SPJ wrote to the Attorney-General suggesting the society's powers be removed, the Government adopted the society's suggested response of establishing a fidelity fund[100] to reimburse a person for pecuniary losses suffered through the stealing or fraudulent misappropriation of money or other property entrusted to a solicitor.[101]

It would have been surprising if the Government had agreed with the opposition that its legislation was unworkable so soon after the legislation had been enacted. Nevertheless, it is worth remembering that the fidelity fund and changes to the disciplinary system should not have been seen as alternative responses to the situation – arguably, action against individual lawyers to protect future clients and compensation for past clients were both needed. Lunney has also examined the period leading up to the society's stewardship of the fidelity fund legislation and come to the same conclusion - that the society was reacting to a period of moral panic, rather than pursuing more altruistic concerns.[102]

[99] Gregory, above n 6, 70-1. *R v McCowan* [1931] St R Qd 149, 154, citing comments by the trial judge Macrossan SPJ; 'Solicitors' Honesty', *Brisbane Courier* (Brisbane), 14 March 1930, 14; '14 Years' Gaol – Robert McCowan Sentence – Judge Denounces Conduct', *Brisbane Courier* (Brisbane), 14 March 1930, 16; 'McCowan Case - Failure to Act – Judge Admonishes Law Society', *Brisbane Courier* (Brisbane), 15 March 1930, 16; 'McCowan Case – Law Society's Statement – Reply to Mr Justice Macrossan', *Brisbane Courier* (Brisbane), 21 March 1930, 16.

[100] Gregory, above n 6, 70-2; 'Fidelity Fund – Law Society's Proposal – Security Against Exploitation', *Brisbane Courier* (Brisbane), 12 March 1930, 16.

[101] Legal Practitioners' Fidelity Guarantee Fund: *Queensland Law Society Act 1952* (Qld) s 24; *Re Queensland Law Society* (Unreported, Supreme Court of Queensland, Ryan J, 14 October 1992).

[102] Mark Lunney, 'The Solicitor and the Bookmaker – the Foundation of the Solicitors' Compensation Fund' (1996) 26 *Queensland Law Society Journal* 35-48.

Rather than remove the Queensland Law Society's powers, in 1938 the jurisdiction of the Statutory Committee was widened from hearing charges relating to merely 'illegal or professional misconduct' to include hearing charges of 'malpractice, professional misconduct or unprofessional conduct or practice.'[103] This arguably sought to extend the committee's charter into issues of incompetence rather than merely dishonest conduct.[104]

The 1938 Act also widened the range of potential regulators. The Minister for Justice was also given the power to appeal a decision of the disciplinary tribunal, a power previously held only by the Queensland Law Society and the relevant practitioner. Despite misgivings held by the Attorney-General that the Statutory Committee had been imposing orders which were too lenient,[105] the 1938 amendments also gave the society greater control over who would be nominated for membership of that committee.[106]

4.5.2 *A Period of Relative Calm: 1938 – Early 1970s*

Between 1938 and the early 1970s, the legislation remained virtually unaltered, apart from amendments to the subordinate legislation in 1948, requiring solicitors to respond to Queensland Law Society enquiries about their conduct.[107] This was partly due to other matters monopolising the concern of Federal and State governments,

[103] *Queensland Law Society Amendment Act 1938* (Qld) s 2, amending s 5(1)(a).
[104] See further discussion of the changes to the definition of conduct liable to discipline above section 2.4.3.4.
[105] Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 1938, 318 (John Mullan).
[106] Ibid.
[107] *Rules of Queensland Law Society Inc* Rule 76. This was then stated in the *Queensland Law Society Act 1952* (Qld) ss 5G, 5H. The 1948 amendments also required solicitors to report fellow practitioners who they suspected of trust account breaches (Rule 77).

such as the Second World War. The war also greatly depleted the number of lawyers in practice in Queensland and hence the number of solicitors against whom complaints could be lodged and discipline instigated.[108] Subsequently the profession – like the rest of the community - enjoyed a more buoyant economy, and there was little public discussion of lawyer discipline. The only legislative change worth noting was a renaming of the Act from the *Queensland Law Society Act 1927* (Qld) to the *Queensland Law Society Act 1952* (Qld), as part of a 1952 consolidation of all Queensland legislation.

However, the credibility of the Queensland Law Society's role in self-regulation was damaged by some large trust account defalcations and disciplinary proceedings in mid-1972,[109] which led State Parliament to pass the *Trust Accounts Act 1973* (Qld) which imposed tighter regulation upon solicitors' trust accounts than that imposed already by the *Trust Accounts Act 1923* (Qld). The society appeared to play only a minimal role in the drafting of the Act: most members of the government's consultative committee were accountants or auditors, and only some society suggestions were incorporated into the Act.[110]

It is important to reflect on the place of discipline in the wider regulatory context.[111] The *Trust Accounts Act 1973* (Qld) provides criminal liability for solicitors who

[108] Thirty-eight disciplinary cases were heard in the five years 1935-1940. As few as eleven cases were heard in subsequent years, and hearings did not surpass 38 in a five year period until 1985-1990: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 62, 26, Table 7.

[109] SC 182, 22 May 1972: $109,940.00; SC 183, 4 July 1972: $33,274.00; SC 184, 4 July 1972: $162,873.92.

[110] P Crouch, Presidential Address delivered at 46th Annual General Meeting of the Queensland Law Society, 8 June 1973, and reported in *Queensland Law Society Journal*, July 1973, 124, 125.

[111] See above section 3.10.1.

breach the Act – including imprisonment.[112] If the government was frustrated by the apparent inability of the society to detect the impending trust account frauds and avoid the magnitude of the losses to clients, it may have been equally doubtful that an amendment of disciplinary legislation was the most effective response, as this would still leave the society in charge of investigations and prosecutions. The tightening of the trust accounts legislation which led to criminal sanctions provided the government with a much more direct and powerful deterrent. It also increased the possibility of a lawyer being incapacitated from practice through imprisonment rather than through disciplinary proceedings.

Although it seemed that the society had been excluded from the design of trust account legislation the previous year, by 1974 it seems the society was taking some initiative itself, by asking the State Government to amend the *Queensland Law Society Act 1952* (Qld) to give it greater power to control trust accounts and to refuse practising certificates.[113] The society also asked that its officers and council members be indemnified from any personal liability in relation to their statutory duties,[114] and suggested that the number of members[115] of the disciplinary tribunal be increased to deal with a greater volume and complexity of disciplinary hearings.[116] The government appeared to accept the society's requests without reservation.[117] In fact, the Attorney-General went to great lengths in Parliament to defend the Queensland legal profession in the face of criticism by some members of the Opposition

[112] *Trust Accounts Act 1973* (Qld) s 7(4)(b).
[113] *Queensland Law Society Act Amendment Act 1974* (Qld) s 19 replacing *Queensland Law Society Act 1952* (Qld) s 41and s 7, and amending *Queensland Law Society Act 1952* (Qld) s 10.
[114] *Queensland Law Society Act Amendment Act 1974* (Qld) s 22 inserting *Queensland Law Society Act 1952* (Qld) s 49.
[115] These members sat on the tribunal on a voluntary basis.
[116] *Queensland Law Society Act Amendment Act 1974* (Qld) s 5 amending *Queensland Law Society Act 1952* (Qld) s 6.
[117] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 March 1974, 2945 (William Knox, Minister for Justice and Attorney-General).

backbench.[118] In contrast to his own backbenchers, the Leader of the Opposition expressed support for the Queensland Law Society and agreed to give it the greater regulatory power requested. While he emphasised that defalcating solicitors must be dealt with harshly and queried whether there was sometimes undue delay in dealing with complaints, the Opposition Leader's tone was generally conciliatory. Although mixing his metaphors, he noted the difficult role of the society - the profession had 'its black sheep ...[but] there is always the bad apple in every barrel ...'[119] who must be 'weeded out'.[120]

In 1977, the society rejected claims that the disciplinary system for solicitors required greater scrutiny by claiming that 'Queensland had some of the toughest enforcement powers in Australia and planned to tighten its enforcement process even further'.[121] However, there is independent evidence that during the late 1970s the disciplinary tribunal was at its most lenient: in the five years 1976-1980 it imposed fines in 66.7% of cases - the highest use of fines in its history. It only struck off solicitors in 20.8% of cases, and suspended solicitors in another 8.3% of cases.[122] The fines averaged $663.00.[123] During the late 1970s, the Queensland Law Society was also less likely to allege trust account fraud.[124] In addition, after a high use of charges of statutory professional misconduct[125] in the early 1970s, the number of cases alleging statutory

[118] Ibid 2946.
[119] Ibid (Keith Wright, Leader of the Opposition).
[120] Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1974, 2988 (Keith Wright, Leader of the Opposition). The use of the metaphors of 'bad apples' and 'black sheep' is common and suggests a simple dichotomy of good lawyers and bad lawyers, good character and bad character, of individuals who deserve to be members of the profession and those who should be expelled.
[121] Gregory, above n 6, 204.
[122] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 62, 25, Figure 3.
[123] Ibid 33-34, Table 11.
[124] Ibid, 29, Figure 4.
[125] A failure to respond to Queensland Law Society requests for explanations was deemed to be professional misconduct by *Queensland Law Society Act 1952* (Qlds 5H) (repealed).

professional misconduct fell markedly in the latter half of the 1970s.[126] Of course, there may have been less need for the Statutory Committee to act harshly during this period. Certainly, it did not hear cases involving trust account defalcations of such high amounts as it had heard in mid-1972,[127] suggesting that there may not have been the same level of external pressure on the society to act harshly as during the large trust account defalcations of the early 1970s.

At the same time as the disciplinary system appeared to be more lenient in regulating lawyers, the society was focusing its attention on the establishment of a compulsory professional indemnity insurance scheme. In May 1978, amending legislation gave the society substantial power to regulate the proposed scheme of professional indemnity insurance.[128] Generally speaking, if a lawyer holds professional indemnity insurance, this will assist a legitimacy project, as it could be presumed that a client who has been adequately compensated for any losses that he or she has suffered is less likely to be as persistent in pursuing a complaint against the lawyer. By ensuring that all solicitors held professional indemnity insurance, the profession could reduce the number of disgruntled clients who would take their dissatisfaction into the public arena.[129] This was the same rationale which saw the establishment of a fidelity fund in

[126] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 62, 29, Figure 4.

[127] Whereas the tribunal heard two cases in 1972 involving defalcations of over $100,000, in the second half of the same decade, the tribunal heard only two cases involving trust account defalcations, and these involved amounts of only $22,000.00 (SC 223, 5 December 1978) and $11,092.28 (SC 211, 19 September 1977).

[128] *Queensland Law Society Act Amendment Act 1978* (Qld) s 3.

[129] If the end purpose is to protect the public from lawyers, then litigation should be perceived as just one potential form of regulation. However, Wilkins questions the effectiveness of litigation as a form of control: David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 801, 848.

1930,[130] but extended the coverage of client compensation from instances of dishonesty or fraud.

A scheme of professional indemnity insurance increases the degree to which some members of the public are protected, as previous clients are compensated for a loss caused by a solicitor's breach of duty, but this may sometimes be at the expense of future clients, as the blanket insurance coverage increases the likelihood of the incompetent remaining in practice. Insurance policies usually exclude indemnity where the claim has been brought about by fraud or other dishonest conduct,[131] but many instances of loss in such circumstances were already at least partly dealt with by the Legal Practitioners' Fidelity Guarantee Fund, established in 1930.[132] While the State Government did need to place pressure on the Queensland Law Society to investigate the insurance issue[133] - this was not an initiative of the society itself - the society, with the support particularly of its younger members,[134] then appeared to embrace the concept, although there appeared to be some reluctance in regional areas of the State by members who were concerned about the cost.[135]

[130] Gregory, *The Queensland Law Society Inc 1928-1988* above n 6, 70-2; 'Fidelity Fund – Law Society's Proposal – Security Against Exploitation', *Brisbane Courier* (Brisbane), 12 March 1930, 16.
[131] For instance, clause 5 (e)(v) of the Queensland Law Society's Solicitors' Professional Indemnity Certificate of Insurance for the year 2004-2005 excluded indemnity where the liability was 'directly or indirectly brought about by the dishonest or fraudulent act of omission of the Assured'. See also *Crowe v Wheeler & Reynolds (a firm)* [1988] 1 Qd R 40, where the exclusion was upheld.
[132] A person who suffered loss due to fraud *other* than the stealing or fraudulent misappropriation of money or other property entrusted to a solicitor remained without the protection of the fidelity fund or professional indemnity insurance.
[133] Gregory, above n 6, 197 note 34.
[134] Ibid 197.
[135] Ibid 198.

4.5.3 *1983 – 1997*

The following discussion demonstrates how, during the period 1983-1985 it seems that the Queensland Law Society was claiming publicly that the disciplinary system for solicitors was working well, but was preparing privately for an inevitable tightening of the regulatory scheme. It also seems that, while there was some public criticism of the society, not only did the society appear to play an important role in drafting amendments in the mid 1980s,[136] the effect of the amendments was to increase, rather than decrease, the society's powers.

Although the tribunal generally experienced stable, long term membership, there was a radical change to the membership of the tribunal on the 17 June 1983, with only one member retained and six new members appointed. Within three months the Queensland Law Society lodged its first ever appeal against a decision of the Statutory Committee,[137] although this appeal was withdrawn the following month,[138] suggesting there may have some internal upheaval in the relationship between the Queensland Law Society and the Statutory Committee at this time. Nevertheless, in the same month the society told its members that the existing disciplinary system was not only effective but also 'efficient and economical.'[139]

But, as mentioned previously,[140] in March 1984 the Attorney-General was reported to have called on both the Queensland Law Society and the Bar Association of

[136] Denis Byrne, President's Introduction, *Queensland Law Society Annual Report 1985-86,* 1.
[137] *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166, Supreme Court file, Appeal 75 of 1983, lodged 6 September 1983.
[138] 7 October 1983.
[139] 'Self-Regulation and How it Works' *The Proctor*, Newsletter of the Queensland Law Society, October 1983, 1, 2.
[140] Above section 4.3.

Queensland to include community input into their disciplinary systems.[141] At the same time, the society decided to create a Professional Standards Department and appoint more staff to its Law Claims,[142] accounting and audit sections as well as appoint a Public Relations Officer.[143] Criticism of the society by the State Opposition continued[144] but the then President of the society, Geoff Gargett, denied the need for change, arguing that the presence of only council members sitting on the Complaints Committee[145] indicated the seriousness with which the society dealt with complaints.[146] This is capable of an alternative interpretation – the presence of only council members may suggest that the elite of the solicitors' branch were exercising too much control over the prosecution of discipline. The input of lay members into deciding which matters should be prosecuted may have been a better indicator of the society's commitment to the protection of the public.

But six months later, in October 1984, it was reported that 'wide-ranging' discussions had been underway between the Attorney-General and the Queensland Law Society for 'some time' with a view to implementing changes to the disciplinary system so as to include lay people.[147] It is quite likely that these discussions were a response to external threats to the legitimacy of the society, as they coincided with extensive press coverage of criminal proceedings against Yvon Wigley, a Warwick solicitor who had

[141] A Miller, 'Lawyers Risk Loss of Public Esteem' ,*Sunday Mail* (Brisbane), 25 March 1984, 2.
[142] The Law Claims Department of the Law Society was primarily concerned with competence issues such as negligence and other civil actions against solicitors, including supervision of the Professional Indemnity Insurance Scheme. In 1984 it reported that it was increasing its focus on claims *prevention*: Queensland Law Society, *56th Annual Report 1983-1984,* Brisbane, Queensland Law Society, 1984, 9.
[143] Ibid 2.
[144] I Miller, 'Call for Eagle Eye on Legal Eagles', *Sunday Mail* (Brisbane), 8 April 1984, 15.
[145] This committee determined what complaints would be prosecuted before the disciplinary tribunal.
[146] Miller, above n 144.
[147] Glenn Milne, 'Solicitors –Tribunal Plan, *Telegraph* (Brisbane), 5 October 1984, 5. The same article also noted that Queensland was the last Australian State to be without community involvement within its disciplinary system.

taken over $500,000 from her trust account.[148] Wigley had been struck off by the disciplinary tribunal in 1981.[149] Gregory claims that the Queensland Law Society was criticised by the national press for its treatment of Wigley, as the press 'took a gentler view of her defalcations',[150] but it is likely that the prominence of these criminal proceedings in the press during late 1984 did not aid the society in its bid to avoid changes to its disciplinary processes.

In a paper presented in March 1985, the then President, Jim Carey, admitted to members that the current disciplinary procedures had not kept pace with changes in legal practice. He said:

> Your Council has been considering this problem since 1977 and its interest was quickened by the report in 1979 of the Royal Commission on Legal Services in England. The Queensland Minister for Justice began to take an interest in our disciplinary procedures.....In 1983, the Leader of the Opposition was quoted as saying 'The Law Society itself had better get its house in order or a Labor government will do it for them.' Arising, therefore, out of its own initiatives, from the two Commissions referred to and in the light of interest expressed by the Queensland government, our Council has engaged in a very close scrutiny of our procedures, to find more modern and effective ways of enforcing ethical and disciplinary standards.[151]

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[148] B McKean, 'Solicitor Guilty on $500,000 Loss', *Courier Mail* (Brisbane, 3 November 1984, 10 (noting that she worked for 'Warwick's oldest and most respected legal firm'); R Allen, '"Fussy" Banker Nipped $1/2 M Fraud in the Bud', *Sunday Mail* (Brisbane)4 November 1984, 3 (giving full credit to a banker for uncovering the fraud, of which the bank then notified the Law Society); Ian Eckersley, 'Dolls Took Over Life, Solicitor Trial Told' *Courier Mail* (Brisbane), 6 November 1984, 12 (reporting that the total value of claims was $2.1 million, of which the Law Society had recovered $1.4 million, with a shortfall of $200,000 expected); P Gregory, 'Solicitor Gets 6 Years – Court Told of "Evil Minds"', *Telegraph* (Brisbane), 7 November 1984, 5; D Fagan, 'Livewire Solicitor Became a $500,000 "Robin Hood"', *Courier Mail* (Brisbane), 8 November 1984, 3; D Fagan, 'Dispute Over Trust Payouts', *Courier Mail* (Brisbane), 8 November 1984, 3 (noting that the Law Society had paid $2.1 million to 197 people 'in the biggest legal pup-up in Queensland history'); D Fagan, 'Law Society Promises to Pay Claims', *Courier Mail* (Brisbane), 9 November 1984, 13 (in which the President of the Law Society, Jim Carey, reassured the public that $3 million remained in the fidelity fund, that the society went to 'great pains to ensure that clients affected by defaults were compensated' and pointing out that the society had devoted substantial resources over a number of years to resolve the Wigley defalcation).

[149] *Re Wigley* (1981) 11 QLSJ 319, SC 239, 22 July 1981.

[150] Gregory, above n 6, 206.

[151] Jim Carey, 'Self Regulation - Changes in Disciplinary Procedures', Paper presented to a Legal Symposium in March 1985 and published August 1985, 15 *Queensland Law Society Journal* 282.

The Queensland Law Society drafted proposed amendments to the legislation and submitted them to the Attorney-General for consideration in early 1985.[152]

As was the experience in 1974, in 1985 the Opposition was again relatively subdued in criticising the Queensland Law Society's role in discipline. In fact the Opposition Labor Party and the Liberal Party proposed an amendment to the Bill which would have increased the society's control over the disciplinary tribunal. The suggested amendment would have required the society to supply only a list of nine names as potential members of the disciplinary tribunal, rather than 18 names, to the Attorney-General. Such an amendment would have given the society full control over which practitioner members would sit on the tribunal. It was argued by Angus Innes, Leader of the Liberal Party, in favour of such an amendment, that:

> ... to suggest that a body that has invited and co-operated with self-regulation should be required to put forward the names of 18 persons to have nine selected by somebody else is an unnecessary imposition. It is also an unnecessary affront to the Law Society's record of self-determination and the bold step that it took to permit the participation of others in its disciplinary structure.[153]

This motion was defeated,[154] but demonstrates the degree of bi-partisan support for the Queensland Law Society's role and past performance in the self-regulation of solicitors. It is important to note however, that both Innes, and the Opposition spokesman on justice at the time, Wayne Goss,[155] had been practising lawyers before

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[152] D Byrne, President's Introduction, *Queensland Law Society Annual Report 1985-86,* 1.

[153] Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1985, 3322 (Angus Innes. Interestingly, Innes was a barrister).

[154] Queensland *Parliamentary Debates*, Legislative Assembly, 4 and 5 December 1985, 3329. The issue of how members would be appointed to the disciplinary tribunal was also the one issue on which Victorian legislation varied from the Victorian Attorney-General's initial draft: Christine Parker, *Just Lawyers: Regulation and Access to Justice* (1999) 136.

[155] Opposition spokesman on Justice May 1985 – March 1988, when he became opposition leader, and then Premier in December 1989: http://www.parliament.qld.gov.au/view/historical/documents/memberBio/Gossw.htm at 31 March 2006. He is likely to have had a strong influence in relation to the Opposition's position on the 1985 amendments.

entering Parliament. Some would argue that it was inevitable that they would have internalised the ideology of professional 'self-determination' and self-regulation during their time in the legal profession, had formed a lifetime identification with their role as lawyers[156] and so carried this with them even when elected to Parliament.

The Bill passed with the support of both sides of the House. In the course of supporting the Bill, both Labor and Liberal speakers praised the track record of the society in maintaining high standards within the profession. Thus the general message from both sides of the House was that there was not *in fact* any problem in the disciplinary system but that public scepticism remained: lay membership on the disciplinary tribunal would provide accountability and reassure the public of the legitimacy of the disciplinary process.

The 1985 amendments created a second, lower level tribunal, the Solicitors Disciplinary Tribunal.[157] The creation of the tribunal had many of the hallmarks of symbolic 'scaffolding' erected to give the appearance of tougher discipline, but not necessarily concerned with content or effectiveness.[158] This tribunal consisted of 12 persons. Nine were practitioner members, selected by the Minister from a list of 18 provided by the Queensland Law Society. The remaining three members were lay persons, appointed by the Minister.[159] Hearings would be before not less than three members, one of whom must be a lay member.[160]

[156] Larson,above n 46, 229. Discussed in more detail above section 3.9.
[157] s 6A *Queensland Law Society Act Amendment Act 1985* (Qld).
[158] The term 'scaffolding' is used in the sense used by Halliday, to describe structures erected at times of external pressure, without any necessary concern about how well those structures were utilised: Halliday, above n 1. See more detailed discussion above section 3.10.2.1.
[159] S 6A(2)(b). "lay person' was defined as a person who was not a practitioner or a public servant: s 6A(7).
[160] Section 6D.

While the new Solicitors Disciplinary Tribunal could hear charges of professional misconduct or unprofessional conduct on the part of a practitioner,[161] it could not strike off or suspend a solicitor: this power remained solely with the Statutory Committee.[162] The President of the Queensland Law Society told his members that this second body was needed to

> provide the Society with a body which can discipline practitioners in a more constructive and positive role when the occasion so demands. In particular ... to order remedial action to be undertaken by the practitioner concerned, including attendance at lecture programmes conducted by the Society.[163]

There are strong arguments that there was no need to create a second body as the existing Statutory Committee already had the power to order such remedial action.[164] Nevertheless, the records suggest that the Solicitors Disciplinary Tribunal did not take up the invitation to order remedial action to the extent envisaged by the President. From a total of 33 hearings for which records are available, further education was ordered in only three cases; audits, reporting or document inspection in two; and counselling in only one.

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[161] Section 6F, as inserted by *Queensland Law Society Act Amendment Act 1985* (Qld), s7.

[162] The powers of the Solicitors Disciplinary Tribunal were set out in s 6J of the Act.

[163] Denis Byrne, '1985 Amendments to the Law Society Act Introduce Widespread Changes in the Society's Disciplinary Procedures' (1986) 16 *Queensland Law Society Journal* 7, 7.

[164] From its inception in 1927, the Statutory Committee had been given powers as broad as those held by the court: Section 5(3)(a) of the Act of 1927 stated that the Statutory Committee had

> ... power after hearing the case to make any such order as to striking off the roll or suspending from practice either conditionally or otherwise, the practitioner to whom such application relates or as to the payment by any party of costs *or otherwise, in relation to the case as before the commencement of the Act the court would have had power to make in accordance with the authority and practice of the court*' (emphasis added).

Therefore, for guidance on the extent of its own powers, the Statutory Committee need only look to the court's inherent powers to discipline practitioners. In *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, Kirby J had no doubt that the Court of Appeal in New South Wales, in exercising its inherent jurisdiction, could frame quite novel orders to fulfil its protective role. He called on courts to be 'more creative' in fashioning orders 'apt to the misconduct found'.

The President also promised members that the less formal style of the Solicitors Disciplinary Tribunal would provide a 'less awesome' prosecution process[165] and the Attorney-General told Parliament that this new tribunal would be less formal, and therefore more efficient, than the Statutory Committee.[166] This reminds us that – even if the new arrangements did constitute mere 'scaffolding' - the society still had to convince its members that it was navigating a safe path between its regulatory and representative roles.

It is questionable whether the new tribunal was less formal than the Statutory Committee. It is true that proceedings before the new, lower level tribunal were more private because it was not required to report its hearings — as was the Statutory Committee[167] — and sat in private until 1993.[168] Closed hearings *may* encourage greater co-operation[169] and hence more 'efficient' hearings, but any perceived advantage was lost once proceedings were opened to the public in 1993. Perhaps it is just a coincidence that the only record of senior counsel appearing on behalf of a solicitor before the Solicitors Disciplinary Tribunal occurs in a case heard after such hearings were opened to the public (and the media). While it is unclear whether the QC was briefed to appear because the hearing was to be in public, his presence itself attests to the fact that proceedings before the Solicitors Disciplinary Tribunal were not necessarily less formal than those before the Statutory Committee. It remains difficult

[165] Byrne,above n 163.
[166] Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 3046–3047 (Neville Harper). The changes were supported by the opposition, with the Leader of the Opposition noting that 'for a long time a need for greater flexibility has existed': Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1985, 3316 (Wayne Goss).
[167] *Queensland Law Society Act 1952* (Qld) s 6(3)(b), relocated to s 6W (repealed).
[168] Linda Haller, 'Dirty Linen — The Public Shaming of Lawyers' (2003) 10 *International Journal of the Legal Profession* 281-313, 295.
[169] Ibid 298–9.

to know how the President of the Queensland Law Society and the Attorney-General expected them to be.

It was not only the society which may have felt the need to 'sell' these changes to solicitors. Parliament also seemed willing to include a sweetener in the legislation: the bitter pill was made more palatable by the inclusion of provisions to allow for more money to become available for legal aid work, through interest on solicitor's trust accounts.[170] This held the promise of more work for solicitors, particularly those who practised in family or criminal law. The prospect of more legal aid becoming available was also attractive to the general public and, contained in a package of reforms, also reduced the likelihood that the general public would be critical of the legislative amendments.

While members of the Queensland Law Society were told by their President that the changes were being implemented to provide more remedial outcomes in disciplinary cases, different reasons were given in very brief press reports which announced the amendments. One press report quoted the Attorney-General as saying that the new Solicitors Disciplinary Tribunal 'should end public concern about the self-regulatory role of the Queensland Law Society in dealing with complaints against members. Suggestions of secret deliberations would no longer be valid.'[171] This is a surprising claim, as it was intended that the new tribunal would hold private hearings and it was not required to report its findings. The press report went on to explain how three of the 12 members of the tribunal would be non-lawyers.

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[170] *Queensland Law Society Act Amendment Act 1985* (Qld) s 28, inserting new Part 3A into the Act which established a 'General Trust Accounts' Contribution Fund and Grants Fund'. Previously, the banks had not been required to pay any interest on monies held in solicitors' general trust accounts.

[171] Mr Neville Harper, Attorney-General, cited in 'State Tribunal To Hear Complaints About Solicitors' *Courier Mail* (Brisbane), 30 November 1985, 11.

The article in fact focused on the new source of legal aid funding provided by the package of amendments, rather than on the changes to the disciplinary structure.[172] The only other press report of the amendments was equally brief,[173] and made only passing reference to the changes to the disciplinary structure.[174] Instead the article emphasised the increased power to protect the public that the amendments gave to the Queensland Law Society, by allowing the society to refuse to issue a practising certificate[175] or by insisting on continuing legal education. The article also noted that clients would be more fully compensated from the fidelity fund than they had been in the past,[176] and concluded with a quote from the President of the Queensland Law Society which claimed that the amendment was a society initiative, acted upon by the State Government.

The lack of media coverage may suggest that the Queensland Law Society was quietly putting in place a structure which would facilitate its protective role, whereas, if the society was pursuing an agenda of legitimation, it would have courted much greater media coverage. This aspect of the 1985 changes suggests the society was acting against the interests of its members[177] and may undermine an analysis of Queensland's professional disciplinary structure which saw it purely in terms of legitimation by professional bodies. However, more questions arise in relation to the productive nature of certain aspects of the amendments, in particular the provisions

[172] Ibid. more than half of the brief (320 word) article explained how legal aid would receive 40% of $3 million which had been formerly 'frozen'.
[173] 240 words.
[174] 'Legal Changes Welcomed' *Sunday Mail* (Brisbane) 1 December 1985, 3.
[175] *Queensland Law Society Act Amendment Act 1985* (Qld) ss 32-35, amending ss 40-41B.
[176] The article also noted the greater powers given to a receiver of a solicitor's trust account: s13, amending s 11A.
[177] Above section 3.10.2.1.

which introduced a lower level tribunal to hear disciplinary cases behind closed doors and was not required to report on its decisions, and the amendments which provided a forum in which lay members could participate, but only in a very limited way.

The establishment of a lower level tribunal meant that the Queensland Law Society avoided the need to appoint a lay member to hear more serious disciplinary charges, a position which was not to change until the creation of the Solicitors Complaints Tribunal in 1997, 12 years later.[178] Members of the legal profession had been reluctant to give lay persons the power to determine whether they could practise or not. Under this new structure, the society could assure its members that more serious matters in which there was a risk of being suspended or struck off would continue to be heard only by their fellow practitioners, in the Statutory Committee.

The introduction of the lower level Solicitors Disciplinary Tribunal was not a success. The reasons for its demise may be many, but notably it was the prosecutor, the Queensland Law Society, which appears to have finally lost faith in a two-tier system well before it was formally removed by legislation. The society did not refer any matters to the Solicitors Disciplinary Tribunal after December 1994 and instead brought all matters before the Statutory Committee. Although it had no more work to do, the tribunal remained part of the disciplinary framework in Queensland until it was formally disbanded by legislation in 1997, along with the Statutory Committee, and replaced by one tribunal, the Solicitors Complaints Tribunal.[179]

[178] *Queensland Law Society Legislation Amendment Act 1997* (Qld).
[179] *Queensland Law Society Amendment Act 1997* (Qld).

4.5.4 *1997-2004*

The Solicitors Complaints Tribunal sat with one lay member and two practitioner members. Its powers were otherwise quite similar to those of the Statutory Committee - it had the power to strike off, suspend from practice, fine up to $100,000 or impose one of the numerous orders set out in section 6R.

Disciplinary cases against solicitors continued to attract adverse attention from the press despite the 1997 amendments.[180] The Queensland Law Society was also criticised for its failure to ensure that clients who lost a total of $6 million to a solicitor, Harry Smith, were fully compensated by the fidelity fund.[181] Despite the damage to the society's public credibility caused by this crisis, the greatest damage following the 1997 amendments to the society's claim to continue to regulate solicitors was an investigation by the *Courier Mail* newspaper into claims that the Queensland Law Society had not properly handled numerous complaints it had received about a particular law firm, Baker Johnson.[182] The pressure applied by the print media was intense and led to the establishment of two inquiries - one by retired District Court judge Patrick Shanahan QC,[183] and the other by the Legal Ombudsman,

[180] Paul Whittaker, 'Lawyer Fined $15,000 For False Papers', *Courier Mail* (Brisbane), 30 July 1997 at 11; C Taylor, 'My Lawyer Put Me Behind Bars', *Sunday Mail* (Brisbane), 29 August 1999, 23; Chris Griffith, 'Solicitor Accused of Ripping Off Client', *Courier Mail* (Brisbane), 23 February 2000, 5; Chris Griffith, 'Client Accuses Lawyer of Not Playing Ball' *Courier Mail* (Brisbane), 24 February 2000, 8; Chris Griffith, 'Lawyers' Tribunal Confusing for Public, Says Reform Group', *Courier Mail*, 15 March 2000, 10; Chris Griffith, 'Judge Slams Solicitors' Watchdog', *Courier Mail* (Brisbane), 4 November 2000, 16;

[181] Adrian Evans, 'Queensland Fidelity Compensation 1990-2004: The End of the Money Tree' (2004) 23 *University of Queensland Law Journal* 397, 402-3.

[182] Typical of at least 16 articles which appeared in the *Courier Mail* (Brisbane) between 9-14 August 2002 is Hedley Thomas, 'Charge! Law of the Jungle', *Courier Mail* (Brisbane), 10 August 2002. A partner of the firm was later struck off: *Baker v Legal Services Commissioner* [2006] QCA 145.

[183] Pat Shanahan, *Independent Review of the Queensland Law Society's Complaints Process* (2002), announced by the Law Society on 13 August 2002.

Jack Nimmo.[184] Their findings were reported in late 2002 and both agreed that the Queensland Law Society's handling of complaints had been inadequate.

4.6 *LEGAL PROFESSION ACT 2004* (QLD)

Given the discontentment with the performance of the Queensland Law Society, crystallising in the Nimmo and Shanahan reports, it was not surprising that the *Legal Profession Act 2004* (Qld) totally removed the role of the Queensland Law Society in receiving complaints and in prosecuting discipline applications. An office of Legal Services Commissioner was established to oversee all complaints and disciplinary matters involving Queensland lawyers – both solicitors and barristers. All complaints are channelled through the Legal Services Commissioner.[185] While the Legal Services Commissioner can ask the Queensland Law Society to investigate a complaint, the decision whether to institute a prosecution against a solicitor is made by the Commissioner.[186]

Surprisingly, the two tier system which collapsed in the mid 1990s was resurrected by the 2004 amendments. Now a Legal Practice Tribunal hears more serious matters and a Legal Practice Committee hears less serious matters.[187] The source of the idea to reintroduce a two-tier disciplinary system in 2004 is obscure. Although both the Queensland Law Society and Attorney-General promoted the introduction of a two-

[184] Legal Ombudsman, *The Queensland Law Society and Baker Johnson Lawyers* (2002).
[185] *Legal Profession Act 2004* (Qld) s 256.
[186] *Legal Profession Act 2004* (Qld) s 273. The Queensland Law Society or Bar Association of Queensland must include a recommendation whether or not to prosecute with the report of any investigation the commissioner has requested that they undertake: s 268(4)(b).
[187] Arguably, there is some ambiguity as to the jurisdiction of each of these disciplinary tribunals: Linda Haller, 'Imperfect Practice under the *Legal Profession Act 2004* (Qld), 2004) 23 *University of Queensland Law Journal* 411-434, 425-6.

tier system in 1985, since its demise in 1994, neither the Government nor either of the professional bodies has championed its reintroduction. In its response to the State Government's Discussion Paper on Legal Profession Reform[188] in December 1998, the Bar Association of Queensland recommended the introduction of a single disciplinary body, as was then operating in New South Wales.[189] In June 1999 the Government issued a Green Paper which proposed the introduction of a single disciplinary body,[190] and while both the Bar Association of Queensland[191] and Queensland Law Society[192] had a number of criticisms of the model proposed in the Green Paper, neither suggested a two-tier system.

The Government did not provide any reasons for creating two (rather than one) disciplinary bodies when tabling the 2004 amendments. Even though a professed aim of the 2004 reforms is to increase the consistency with existing or proposed disciplinary structures in other Australian jurisdictions,[193] a two-tier system in Queensland appears contrary to the national trend. In May 2004, the Standing Committee of Attorneys-General agreed to work towards the implementation of National Legal Profession Model Laws[194] and those Model Laws contemplate only a

[188] Queensland Department of Justice and Attorney-General, *Legal Profession Discussion Paper* (1998) <http://www.justice.qld.gov.au/ourlaws/papers/legalreform.htm> at 21 September 2004 (*'Discussion Paper'*).
[189] Bar Association of Queensland, above n 54, 19.
[190] Queensland Department of Justice, *Green Paper — Legal Profession Reform* (1999) 10 <http://www.justice.qld.gov.au/ourlaws/papers/legrefrm.pdf> at 21 September 2004 (*'Green Paper'*).
[191] Bar Association of Queensland, above n 61, 4–6.
[192] Queensland Law Society, *Response to the Green Paper on Legal Profession Reform*, August 1999, 8. The Law Society's main criticism of the proposed new Disciplinary Board was that it would not be able to award compensation, as could the Solicitors Complaints Tribunal: 1.2.6. Later in its submission, the Law Society did say that 'Allegation of professional misconduct or unprofessional conduct could be referred for hearing to the tribunal or disciplinary board …' (1.5.6), but it is suggested that the Law Society was providing alternate terminology rather than suggesting two separate bodies, particularly as two bodies are not suggested anywhere else in its response.
[193] Explanatory Memorandum, Legal Profession Bill 2004 (Qld), 2.
[194] Law Council of Australia, 'National Practice – The Model Laws Project', http://www.lawcouncil.asn.au/natpractice/modellawproject.html at 12 January 2005.

single disciplinary body.[195] Similarly, New South Wales and Victoria have only a single-tier disciplinary tribunal to hear matters at first instance.[196]

While the Solicitors Disciplinary Tribunal may have constituted mere 'scaffold' when introduced in 1985, it is difficult to sustain a similar argument in relation to the Legal Practice Committee. Although the Act does not require findings of the committee to be published,[197] the decision whether to publish is now that of the Legal Services Commissioner not the society.[198] In addition, unlike the Solicitors Disciplinary Tribunal, the Legal Practice Committee is required to sit in public.[199] Rather than suggesting that the two tier system was reintroduced as part of any deliberate 'project',[200] it is more likely the result of a lack of knowledge or understanding of Queensland's previous experience of a two tier system.

The Queensland Law Society has much less influence over the composition of the disciplinary tribunal than before. Since 1927, practising solicitors comprised the majority of members sitting on any disciplinary tribunal, but the members of the Legal Practice Tribunal are the current judges of the Supreme Court and the tribunal is constituted by one of those judges.[201] Solicitors still have a part to play, but only as

[195] *National Legal Profession Model Laws* Part 11, Division 9, ss 1137–1152.
[196] *Legal Profession Act 2004* (NSW) s 551; *Legal Profession Act 2004* (Vic) s 4.4.15.
[197] This is because the committee only has jurisdiction in relation to unsatisfactory professional conduct and the discipline register only needs to record findings of professional misconduct: *Legal Profession Act 2004* (Qld) s 282, 296(1).
[198] The commissioner has decided to report decisions of the committee: Legal Services Commissioner, *Discipline Register*, http://www.lsc.qld.gov.au/searchReg.htm at 31 March 2006.
[199] *Legal Profession Act 2004* (Qld) s 474.
[200] See more detailed discussion above section 3.10.2.1.
[201] *Legal Profession Act 2004* (Qld) s 429.

members of advisory panels to sit with the tribunal and 'help the tribunal in hearing and deciding a discipline application'.[202]

Nor will solicitors necessarily comprise a majority of the members of the lower level Legal Practice Committee. Although one solicitor will sit on any discipline application involving a solicitor, so too will a lay member and the chairperson of the Committee, who can be drawn from either branch of the profession.[203]

4.7 SOLICITORS' BOARD

The active role played by the Barristers' Board in the discipline of barristers[204] can be contrasted with the role played by the Solicitors' Board. Like the *Barristers' Admission Rules*, there is nothing in the *Solicitors' Admission Rules* to suggest that the Solicitors' Board should take an interest in disciplinary matters[205] and the Solicitors Board confined itself to the function stated expressly in the Rules, only becoming a party to Supreme Court proceedings which involved matters relating to admission[206] - and not discipline.

4.8 LEGAL OMBUDSMAN

The Queensland Law Society resisted calls for an independent overseer of the discipline of solicitors for some time. When the Premier, Johannes Bjelke-Petersen,

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[202] *Legal Profession Act 2004* (Qld) ss 437(3), 444(2). A barrister member will assist in relation to matters involving barristers and a solicitor in matters involving solicitors: s 444(3)(b).
[203] *Legal Profession Act 2004* (Qld) s 452(2). The section merely requires that the chairperson have 'high level experience and knowledge of the legal system and legal practice.'
[204] See above section 4.4.
[205] *Rules Relating to the Admission of Solicitors of the Supreme Court of Queensland 1968* (Qld).
[206] *Solicitors Board v Hope* [1996] 2 Qd R 25; *Fursey v Solicitors Board* [2001] QCA 53.

argued in favour of the appointment of a legal ombudsman in 1977,[207] the society claimed this was unnecessary.[208] In 1984 the Opposition again called for a legal ombudsman or observer to be appointed but the society continued to resist.[209] Eventually the society's objections were overruled and in 1985 a statutory office to oversee the disciplinary system for solicitors was established - the office of Lay Observer.[210] The observer had no jurisdiction over barristers, but in relation to solicitors, was required to monitor written complaints received by the Queensland Law Society[211] and could observe disciplinary hearings, attend meetings of the Complaints Committee of the society and attend society council meetings, but could not vote in any of these forums.[212] He or she could also demand access to society records of complaints and investigations.[213] The appointment of the individual who would assume the office of Lay Observer was on the recommendation of the Minister for Justice.[214]

Amendments in 1997 renamed this office the Legal Ombudsman.[215] Although barristers remained outside the jurisdiction of the Ombudsman, the Ombudsman was given more extensive powers in relation to solicitors, including a power to bring charges against a solicitor before the disciplinary tribunal and appeal a decision of the tribunal.[216]

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[207] Minutes of Law Society Council 29 September 1977, 27 October 1977, Council minutes, vol 12, cited in Gregory, above n 6, 204, footnote 66.
[208] Gregory, above n 6, 204.
[209] I Miller, above n 144.
[210] *Queensland Law Society Act 1952* (Qld) s 6O, inserted by *Queensland Law Society Act Amendment Act 1985* (Qld).
[211] Section 6S (1).
[212] Sections 6S (3)(a) and 6S(3)(b).
[213] Section 6S (3) (c).
[214] Section 6O (1).
[215] *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 9.
[216] *Queensland Law Society Act 1952* (Qld) s 6AI (1), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 9.

While there appeared to be little consideration given to extending the Ombudsman's jurisdiction to include barristers, in 1998 the Bar Association of Queensland accepted the need for an ombudsman to oversee the discipline of barristers as well as solicitors.[217] It saw no impediment to a lawyer acting as Legal Ombudsman, as a lawyer was 'more likely than most unqualified people to understand best practice in the profession and to expect high standards.'[218]

Despite the concessions made by the Bar Association of Queensland in 1998, barristers remained outside the purview of the Legal Ombudsman until the radical overhaul of the complaints and disciplinary structure in 2004, through the *Legal Profession Act 2004* (Qld). The functions of the Legal Ombudsman were then absorbed into the larger regulatory functions of the Legal Services Commissioner.[219] Not only does the Commissioner have regulatory powers to deal with both barristers and solicitors, he now receives all complaints about any solicitor or barrister or legal practice employee[220] and prosecutes all discipline applications filed against a Queensland legal practitioner.[221]

[217] Bar Association of Queensland,above n 54.
[218] Ibid 21. This contrasts with the actual practice in relation to the legal ombudsman in Queensland. Since that position was introduced in 1985, it has been required that the incumbent never have been qualified to practise law: *Queensland Law Society Act 1952* (Qld) (repealed) s 6AE(2), previously s6O(2). The current legislation does not exclude a lawyer from eligibility. It simply requires the Legal Services Commissioner to be 'familiar with the nature of the legal system and legal practice and posses appropriate qualities of independence, fairness and integrity: (*Legal Profession Act 2004* (Qld) s 414(2)), and need not be an Australian lawyer (s 414(3)).
[219] *Legal Profession Act 2004* (Qld) ss 412-427.
[220] *Legal Profession Act 2004* (Qld) s 256.
[221] *Legal Profession Act 2004* (Qld) s 273.

4.9 CONCLUSION

The preceding survey of the evolution of disciplinary structures for Queensland lawyers shows a strong divergence between the two branches of the legal profession. Within the barristers' branch of the profession there were times at which the leaders of the bar professed a desire for greater statutory regulation of barristers, yet the impetus appeared to falter over whether strengthened Rules of Court would be preferable to legislation. There also appeared to be some obstruction or indecision on the part of the judges of the Supreme Court of Queensland in implementing Rules of Court. There is no evidence that the bar was subject to the same external pressure as the solicitors' branch to reform its internal regulation and early moves to bring barristers within the reach of the *Queensland Law Society Act* in 1927 were quickly dispelled as unnecessary. Nor did the Bar Association of Queensland often exercise its power to prosecute disciplinary matters before the Supreme Court, instead leaving this to the Barristers Board, which arguably had less standing to prosecute discipline than the association - if it had any standing at all.

Some may argue that the likelihood of a barrister requiring discipline is less than a solicitor - an issue which is taken up in the final chapter. The evidence is clear that from time to time there have been barristers in Queensland who should have been brought before a disciplinary body with sufficient power to remove them from practice –*Darveniza* and *Young* are two recent examples which have come to light. Yet in both these cases no action was taken by the association and prosecutions taken instead by the Barristers Board.[222] The evidence appears strong that the organised

[222] Tara Young was not a member of the Bar Association of Queensland so it could not bring its own discipline application against her. But the association had standing to move the Supreme Court and yet left this to the Barristers Board.

bar, through the Bar Association of Queensland, has not effectively sought to establish structures to enhance its ability to protect the public, and has not even been inclined to use its standing before the court to initiate those mechanisms which were available for discipline.

In comparison, the Queensland Law Society has had statutory powers and responsibilities in relation to discipline since 1927. Subsequently, the society has been subject to periods of intense criticism. Sometimes this criticism was due to its failure to avert large losses of client funds in solicitors' trust accounts, as in the early 1930s,[223] in 1984,[224] and in 1999.[225] In more recent times the society has been heavily criticised for its poor handling of complaints.[226] The society's response to these periods of crisis have varied: in 1930 it responded by obtaining the State Government's assistance to establish a fidelity fund, in the late 1970s it embraced the State Government's proposal for compulsory professional indemnity insurance and, while it was given very little role to play in the drafting of the *Trust Accounts Act 1973* (Qld), in 1985 it appears to have played a leading role in drafting amendments to the *Queensland Law Society Act 1952* (Qld) which strengthened its own disciplinary powers.

While the Queensland Law Society has been the subject of more public criticism than the Bar Association of Queensland, it is interesting to note that, within Parliament, the society often appeared to have bipartisan support for the role that it played, and the response to public criticism of the society was for Parliament to increase, not

[223] Above section 4 5.1.
[224] Above section 4.5.3, discussing Yvonne Wigley defalcation.
[225] Above section 4. 5.4, discussing Harry Smith defalcation.
[226] Above section 4.5.4.

decrease, its disciplinary powers. This approach changed dramatically in the drafting of the *Legal Profession Act 2004* (Qld). The Queensland Law Society was given very little opportunity to provide input into, or comment on, the Bill – a Bill which also greatly reduced the disciplinary powers of the society.[227]

While there have been periods when the Queensland Law Society appears to have taken steps to increase the protection of the public from substandard conduct by solicitors, the sustained nature of the scrutiny to which the society has been subject makes it difficult to determine whether such steps would have been taken without such scrutiny - in other words whether the society's conduct was prompted primarily by altruistic or legitimating motives.

In the following two chapters I shift the focus of the thesis from disciplinary structures to disciplinary outcomes – not only disciplinary action which removes a person from legal practice (Chapter Five) but action which imposes a fine while leaving the individual in practice (Chapter Six).

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[227] Above section 4.6.

CHAPTER FIVE

INCAPACITATION

5.1 INTRODUCTION

In this chapter I consider those cases in which the disciplinary tribunal incapacitates a practitioner. Incapacitation can take many forms. One method is for a disciplinary tribunal to order that a person's name be removed from the roll of legal practitioners.[1] This is also described as disbarment or striking off. This method will usually be described in this chapter as 'striking off'. As practitioners must be on the roll of legal practitioners *and* hold a practising certificate before they can practise law,[2] practitioners can also be incapacitated in a more temporary way, by the tribunal ordering that their practising certificate be suspended.[3] Here, I will refer to the 'suspension' of a practitioner.

In Chapter Two I looked at the emphasis which lawmakers placed on the need for discipline to protect the public. In Chapter Three I discussed theories which suggest that all activities of a disciplinary tribunal are likely to serve a legitimating function for the benefit of the legal profession. I will argue in this chapter that strike off orders are more

[1] *Legal Profession Act 2004* (Qld) s 280(2)(a). Lawyers can also be struck off by a court exercising its inherent jurisdiction. See above paras 1.8, 4.2.
[2] *Legal Profession Act 2004* (Qld) ss 6, 24.
[3] *Legal Profession Act 2004* (Qld) s 280(2)(b).

likely to fulfil a legitimating function than are orders which suspend or fine[4] a practitioner.

Orders striking a practitioner from the roll will simultaneously protect the public in most cases, as any risk at all of further misconduct is removed. The only exception to this argument would be if the removal of the practitioner from practice reduced public access to competent legal assistance, but this is likely to be rare.[5] Therefore, the protective and any legitimating functions are likely to be most aligned where a strike off order is made.

After looking at strike off orders, I will examine the use of orders by which the practitioner is only suspended from practice for a period of time. The use of suspensions is problematic, from the point of view of both the protective and legitimating function.

Finally, I will explore powers in relation to practising certificates. Admission to the roll of legal practitioners is not sufficient to practise law. Queensland solicitors and - more recently - barristers must also hold a current practising certificate. These are issued by the Queensland Law Society and Bar Association of Queensland, which have extensive powers to refuse, cancel or suspend certificates, including on grounds similar to those relevant to professional discipline.[6] A practising certificate can be cancelled in a much

[4] Fines are discussed in Chapter Six.
[5] For instance, the argument of Kirby P in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, that the public would be better protected if Foreman – the solicitor being disciplined - was required to donate her 'talent and experience' through supervised work at a community legal service, rather than if she was 'expelled from the profession (420). Kirby P was in the minority and the majority ordered that Foreman's name be removed from the roll.
[6] Such as where the Queensland Law Society or Bar Association of Queensland believes the holder of the certificate is 'no longer a fit and proper person to hold the certificate': *Legal Profession Act 2004* (Qld) s 46(2).

less conspicuous way than disciplinary proceedings can be taken. Therefore, any discussion of why disciplinary proceedings may have been used to remove a person from legal practice is incomplete without also considering this alternative method of incapacitation.

5.2 Strike Off Orders

5.2.1 *The Legal Basis of Strike Off Orders*

There are two methods by which a lawyer's name can be removed from the roll of legal practitioners. The first is through the exercise of the court's inherent jurisdiction, which arises from the court's common law power to admit person's name to the roll.[7] Until 2004, this was the only method by which barristers could be struck from the roll. Since 1927 for solicitors (and since 2004 for barristers) there has also been a statutory method of removing a lawyer's name from the roll.[8]

5.2.2 *How Strike Off Orders May Legitimate*

If the disciplinary system is being used by the legal profession as a tool for external legitimacy, an order striking a practitioner from the roll would most enhance this legitimating function. Here, the offending practitioner is cast out of the profession. The profession is 'cleansed'. From the perspective of external legitimation, the expulsion of a

[7] Above section 4.2.
[8] Initially contained *in Queensland Law Society Act 1927* (Qld) and now contained in *Legal Profession Act 2004* (Qld) s 280(2)(a).

person from the ranks of the profession has the advantage that the profession no longer has to justify or trivialise the practitioner's misconduct. The misconduct has been uncovered and dealt with harshly. In most situations a strike off order will be seen as a measure which unequivocally protects the public, regardless of the consequences for the practitioner involved. The individual practitioner has been quickly marginalised and ostracised. The public is protected from the risk of any future transgressions by that individual and the profession gains external legitimacy by showing that it can turn fiercely upon one of its own when ethical standards are transgressed. Such strong action will clearly demonstrate to the public that the profession can be trusted to regulate itself.

Strike off orders also provide the greatest 'fit' with the rhetoric often used in relation to professional discipline, which treats the issue as a simple dichotomy between those who are and those who are not 'fit to practise', of the need for discipline to cleanse the profession by removing the 'bad apples'.[9] Other orders - such as suspensions and fines - do not fit the rhetoric as well because the making of the order itself acknowledges that the individual engaged in misconduct but the nature of the order allows them to remain within the profession.

[9] Below section 8.5.3. The rhetoric of expelling 'bad apples' is commonly used by professional bodies. For instance, the president of the Queensland Law Society said in 2002: '[W]hat's in it for the profession to self-regulate? It is to maintain the highest standards for Queensland solicitors, which means getting rid of the bad apples': Perspectives Piece by Queensland Law Society President Tom Sullivan (Press Release, 30 August 2002). The Queensland Legal Services Commissioner has also observed the frequent reference to 'bad apples' in the context of professional discipline: John Briton, Legal Services Commissioner, 'The System for Dealing with Complaints: the Commission's Approach' (Paper presented at the Bar Association of Queensland Annual Conference, Sanctuary Cove, Queensland, 5 March 2006) http://www.lsc.qld.gov.au/speeches/BAQ050306.pdf at 13 March 2006, 4-5.

As explained in Chapter Three,[10] if the disciplinary system is being used for legitimation purposes, those matters which will proceed to a public hearing will be carefully chosen to provide maximum legitimisation for the profession. It would therefore be expected, that orders striking a practitioner from the roll would be the most common type of order made by the tribunal when that tribunal sits in public.

Given the dangers which publicity poses for any legitimation project,[11] it could be expected that orders striking a practitioner from the roll would be utilised where the nature of the client's complaint or pre-existing adverse publicity meant it could not be dealt with in a more private manner.[12]

The clearest example of a complaint which is unlikely to be dealt with in a private manner is any instance of fraud. A client will be unable to claim against the lawyer's professional indemnity insurance where there has been fraud, as fraud is a standard basis of exclusion on professional indemnity insurance policies. The client can make a claim on the fidelity fund, but the fund does not protect against all instances of fraud.[13] The

[10] Above section 3.9.
[11] Below section 8.4.1.
[12] The legitimation theory would also suggest that the more publicity that has been attracted, the more severe the sanction generally. Carlin argued that the visibility of the offence had greater effect on the severity of the sanction than the nature of the offence itself: Jerome Carlin, *Lawyers' Ethics; a Survey of the New York City Bar* (Russell Sage Foundation, New York, 1966) 161-2. The impact of the media on the type of sanction imposed by the disciplinary tribunal in Queensland is considered in Chapter Eight.
[13] *Legal Profession Act 2004* (Qld) s 162(1) allows a person to make a claim against the Legal Practitioners' Fidelity Guarantee Fund if they have 'suffered a pecuniary loss through stealing or fraudulent misappropriation (s 145)....of any money or other trust property entrusted to the practising practitioner...', this requires monies or other property to have been entrusted to the solicitor: it does not protect from all instances of fraud. In addition, this is a fund of last resort (s 172) and payments are usually capped (s 182). Until 2004 the legally available cap was $60,000, but it was never imposed. Further, the legislation prohibited the corpus of the fund accumulating above $5 million. As a result of paying all proven claims in full from a limited corpus, the fund experienced a long period of financial difficulty. In 1999-2000 it had a deficit of $2.8 million: Queensland Law Society Inc *72nd Annual Report 1999-2000*, 77.

client may also want more than financial recompense. A client who does not feel adequately compensated or vindicated is likely to be more vocal in calling for action, perhaps with the aid of the media.

Even if a client is adequately compensated by the fidelity fund, there may still be pressure from elsewhere to take disciplinary action. If fraud is involved, criminal proceedings are likely to follow,[14] and these are likely to attract media attention and public calls to remove the person from practice. The pressure to take disciplinary action may also come from within the profession. Fidelity funds are financed by members of the profession, who will be angry that the claim has depleted the fund. The legal obligation of solicitors to reimburse the fund if its balance is too low may, in turn, threaten the financial viability of smaller practices.[15] Other practitioners will simply be angry that the fraud has tarnished the reputation of the profession as a whole. It is therefore highly likely that members will demand that disciplinary action be taken to remove the person responsible from the profession. In this case, members may be less concerned with the need to protect the public than with their own desire for retribution. In discharging its responsibility to represent the interests of members – and legitimate itself to members - a professional body which is also responsible for discipline may have difficulty keeping public protection – not retribution – in its sights.

[14] In 1997, the *Queensland Law Society Act 1952* (Qld) was amended so as to require the Queensland Law Society to report any suspected offence to the Commissioner of Police: s 50A, inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 11A.

[15] This is likely to be particularly true in jurisdictions, such as Queensland, where practitioners have been required to pay additional levies as a result of substantial claims against the fund. In 1998, the Queensland Law Society increased the findelity fund levy to $650 to cover a shortfall due to some large claims: Adrian Evans, 'Queensland Fidelity Compensation 1990-2004: The End of the Money Tree' (2004) 23 *University of Queensland Law Journal* 397-410, 402.

5.2.3 *Strike Off Orders as a Self-Fulfilling Prophecy*

In cases where the conduct is more ambiguous and may in fact be forgiven by the community, a tribunal pursuing an agenda of legitimation may be less inclined to strike the practitioner from the roll because such an action then confirms that this member has been involved in misconduct of the most serious kind. This is a self-fulfilling prophecy: it is the order striking the member from the roll which itself casts shame upon the individual practitioner, rather than the underlying conduct which led to such an order. In cases in which the general public may not understand or be concerned about the risk of the practitioner's conduct, the message from the imposition of a suspension, fine or censure could then be that the conduct was not serious and the risk of adverse publicity is lessened.

It could therefore be expected that strike offs will be used where the nature of the misconduct is clear, where it is tantamount to criminal conduct, such as trust account fraud or other dishonest conduct. Where the 'wrongness' of the behaviour is more ambiguous, the tribunal may find itself in a bind. A strike off will label this conduct as of the worst kind, it will necessarily require notification of existing clients and will possibly draw media attention to the case. It could therefore be expected that in cases relating to charges other than trust account fraud and dishonesty, other factors may come into play in influencing the tribunal's decision and therefore the outcome will be less predictable.[16]

5.3 SUSPENSIONS

5.3.1 *The Ambiguity of Suspensions*

If the disciplinary tribunal decides to order that a practitioner be suspended from practice for a certain period, this is more problematic, both for protective purposes and for any legitimation project, than an order striking the person from the roll. The real advantage of striking a member from the roll is that they have been permanently removed. The profession has permanently distanced itself from the conduct of the individual practitioner in question. A strike off order has completely forsaken the interests of the individual lawyer to the interests of the public. The public has been protected in the most uncompromising of ways.

But when a practitioner is not struck off but merely suspended from practice for a certain period, they remain part of the profession, with the attendant risk that their presence, 'waiting in the wings' of the profession, will continue to taint the image of that profession. Thus, when a member is suspended, the message to the public is ambiguous. While lawmakers – both judicial and legislative - have determined that professional discipline must aim to protect the public,[17] and while the conduct of this practitioner has been found to be serious enough to question their fitness to practise, the public in this case has not been protected at all costs. Instead, the individual practitioner will remain a

[16] An example would include conflicts of interest (actual and potential). It could be expected that the prosecuting body, if the legitimisation theory is correct, will avoid the dilemma of what sanction the tribunal should impose by not bringing such charges before the tribunal.

member of the profession and be given an opportunity to reform. Inevitably this will be seen by the public, if members of the public become aware of the suspension order,[18] as exposing them to some risk, certainly more risk than had the practitioner been simply expelled from the profession through a strike off order.

5.3.2 *Suspensions May Encourage Appeals*

If the disciplinary system has played a role in any legitimation project, it would be expected that suspensions would be ordered much more rarely than a strike off order. Appeals against disciplinary decisions which allege that the tribunal has been too lenient are also counter-productive to any legitimation project. It would be expected that the tribunal would seek to avoid decisions which invite appeals. As suspension orders tend to invite appeals (as explained below), this is another reason why the number of suspensions would be expected to be low.

It could be expected that the tribunal will want to avoid appeals which allege that it has dealt too leniently with a practitioner. An appeal by a practitioner which argues that the tribunal has been too harsh may well enhance the legitimation project as such an appeal portrays the tribunal as able to act harshly against members of the profession. However, an appeal suggesting that the tribunal has acted too leniently is more problematic. The publicity given to an appeal to the Queensland Court of Appeal is likely to be much

[17] See discussion in Chapter Two.
[18] The publication of disciplinary orders is discussed in more detail below section 8.3.

greater than the publicity given to a tribunal decision.[19] If an appeal is lodged, this increases public scrutiny of, and pressure upon, the disciplinary process and could pose grave danger for any legitimation project. If the tribunal imposes a suspension in disregard of the legal constraints imposed by prior case law, it faces the risk that an appeal will be lodged by the prosecuting body or Attorney-General.[20] This chapter will now explore the reasons why any appeal against a suspension order has a high chance of success.

5.3.3 *Legal Constraints on Power to Suspend*

5.3.3.1 *High Court of Australia*

Particularly since the early 1980s, the High Court and Supreme Courts in New South Wales and Queensland have restricted the circumstances in which the court considers a suspension to be an appropriate manner in which to dispose of disciplinary proceedings. The disciplinary tribunals in the two States are bound by these decisions. Until 2004, all members of the Queensland tribunal except the lay member were legally trained and most served on the tribunal for extended periods of time.[21] It could therefore be presumed that these members were aware of court decisions and the need for the tribunal to follow court

[19] See further discussion below section 8.2.

[20] *Legal Profession Act 2004* (Qld) s 292(1)(b). Until that Act came into force, the Queensland Law Society also had a right of appeal: *Queensland Law Society Act 1952* (Qld) s 6Z(6).

[21] In the words of Gregory, 'there was a strong tradition of continuity in Statutory Committee membership': Helen Gregory, *The Queensland Law Society Inc 1928-1988*, (1991) 205. Mr ER Cuppaidge served on the committee from 1952 until 1977, a period of 25 years. Mr WP Rowland served from 1940 until 1961. Sir Douglas Wadley was a member from 1960 until 1981 and RR Stephens from 1970 until 1983. Sir John Rowell served from 1973 until 1983. In more recent times, GA Murphy and TM Treston both served on the tribunal from 1983 - 2000, a period of 17 years. Mr JSP O'Keefe, appointed in 1983, sat on the tribunal until the early 2000s.

decisions. It could further be expected that the number of suspensions ordered by the tribunal would have decreased over time, in accordance with the more restrictive rulings of the courts, as to the circumstances in which a suspension is an appropriate method of disposing of disciplinary charges.

The leading case on the issue of suspensions was a decision of the High Court of Australia in *Ziems v The Prothonotary of the Supreme Court of NSW*[22] in which the court was required to determine whether a barrister should be disbarred as a consequence of his conviction for manslaughter following a motor vehicle accident.[23] The court had some concern about the conduct of the manslaughter trial of Ziems and divided on whether the conviction itself automatically proved that Ziems was unfit to practise.

Dixon CJ thought that the conviction spoke for itself and made Ziems unfit to practise.[24] His Honour then dealt with the issue of particular interest here, namely, whether it was more appropriate to suspend or to strike Ziems from the roll of barristers. His Honour thought that it would be preferable in most such cases to strike the practitioner from the roll, allowing him to seek readmission at a later time. At the readmission hearing, the applicant could 'offer positive evidence of the grounds upon which he then claims to be re-admitted.'[25] McTiernan J was of a similar view to Dixon CJ, referring to the

[22] (1957) 97 CLR 279.
[23] The facts are discussed in more detail above section 2.6.3.1.
[24] (1957) 97 CLR 279, 285-6.
[25] Ibid 286.

opportunity to re-apply for admission once Ziems' 'good fame and worthiness to be a barrister have been re-established.'[26]

However, the majority thought that Ziems was in fact fit to practise, despite the conviction.[27] The natural conclusion from this was that the barrister's right to practise should be left intact.[28] But the majority also thought that it would be 'incongruous' for a person to be held out to the public as fit to practise as a barrister while serving a prison sentence.[29] It was only on this basis that Fullagar J agreed to an order for suspension.[30] Kitto J agreed that Ziems was fit to practise and, like Fullagar J, expressed some disquiet about the justification for a suspension order. He commented:

> If it were not that the members of the Court who think with me that he should not be disbarred are in favour of the proposed suspension, I should be against it. If the appellant's conviction and imprisonment are held not to disqualify him from the Bar, it seems to me, with respect, that logically that should be the end of the case. There can be no question of imposing a punishment additional to the imprisonment, and as far as I can see there is no purpose to be served by adding a *de jure* suspension to the *de facto* suspension which the appellant's incarceration produces while it lasts. However, even if I am right in thinking that suspension is inappropriate, it can do no harm, and I am prepared to assent to it so that an order may be made. [31]

It can therefore be seen that, despite the fact that both Fullagar and Kitto JJ agreed to an order suspending Ziems from practice for the period of his imprisonment, both indicated

[26] Ibid 287.
[27] Fullagar J believed that a grave misdirection by the trial judge at the manslaughter hearing meant the court was entitled to look behind his conviction in determining whether or not Ziems was fit to practise. His Honour felt that it was 'impossible to say that the conviction justifies a finding that the appellant is not a fit and proper person to practise at the Bar' (296).
[28] Ibid.
[29] Ibid 297. A similar argument based on 'incongruity' in relation to a practitioner was upheld in *Re B* [1986] VR 695, 705-6 (Brooking J).
[30] (1957) 97 CLR 279, 297.
[31] Ibid 300. Taylor J was more confident in his view that, despite the fact that Ziems was in fact fit to practise, he should not be able to hold himself out as permitted to practise while serving a prison sentence for such a serious offence as manslaughter (308), so thought that he should be suspended for the period of his imprisonment. The court went on to make such an order.

that suspension is normally only justified if a practitioner *is unfit* to practise. In contrast, those in the minority, Dixon CJ and McTiernan J, thought it much more desireable to strike off practitioners shown to be unfit to practise rather than merely suspend them. Practitioners could then reapply for admission when they could lead positive evidence to show that they were once again fit to practise. The necessary implication of these comments in *Ziems* is that the High Court saw very little room for the operation of suspension orders. If a person remains fit to practise the right to practise should not be impugned, by either a suspension order or a strike off order. Once shown to be unfit to practise, a strike off was usually the most appropriate order.

In *New South Wales Bar Association v Evatt*,[32] the High Court narrowed the role of suspensions even further, overturning the two year suspension of a barrister who had engaged in a scheme of charging 'extortionate and grossly excessive fees'.[33] The High Court ordered that he be disbarred, notwithstanding his youth and his lack of understanding, stating that his 'failure to understand the error of his ways of itself demonstrates his unfitness'.[34]

5.3.3.2. *Early Queensland Cases*

Apart from the restricted approach to suspension orders afforded by the High Court in *Ziems* and *Evatt*, case law in Queensland also suggests that suspensions are not appropriate where there is evidence of dishonest conduct by a practitioner. In such circumstances the practitioner should be struck off.

[32] (1968) 117 CLR 177.
[33] Ibid 182.

In cases in the 1930s, the Full Court of the Supreme Court did allow a number of suspensions to stand, despite the fact that there was evidence of dishonesty.[35] These appeals were brought by the practitioner alleging that the penalty imposed, a suspension, was excessive. It would seem that in the 1930s, fines were routinely ordered, even in cases of misappropriation from the trust account.[36] At this time, the Attorney-General had no power to appeal decisions of the Statutory Committee, and the Queensland Law Society, while having the power to appeal,[37] did not exercise it until 1983. But once the Attorney-General was given power,[38] an appeal by him saw a three year suspension for misappropriation overturned and the solicitor struck off.[39] During the subsequent 40 year period, 1940-1980, no appeals were heard in relation to the adequacy of the sanction imposed[40] and so the court did not have another opportunity to comment upon its attitude to suspensions until *Mellifont v The Queensland Law Society Inc*[41] in 1980.

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[34] Ibid 184. This aspect of the case is discussed in more detail above section 2.3.1.

[35] *Re B* [1938] St R Qd 361; *Re M* [1938] St R Qd 454, 457; *Re G* (1939) QWN 39.

[36] *Re B* [1938] St R Qd 361; *Re M* [1938] St R Qd 454, 457; *Re G* (1939) QWN 39. In *Re M*, Webb J expressed no surprise that there was then a bill before Parliament giving the Attorney-General the power to appeal, given the very lenient punishments imposed by the tribunal at the time: *Re M* [1938] St R Qd 454, 457. The court's lenient approach to trust account matters is discussed in more detail above section 2.4.3.3.

[37] *Queensland Law Society Act of 1927* (Qld) s 5(4).

[38] *Queensland Law Society Act of 1927* (Qld) s 5(4), as amended by *Queensland Law Society Acts Amendment Act 1938* 2 Geo 6 No 6.

[39] *In re G, A Solicitor* (1940) QWN 7. Macrossan SPJ, with whom RJ Douglas J and Philp J agreed, stated that, unless exceptional circumstances appeared, a solicitor who has stolen monies from his client should be struck off (10). In another appeal by the Attorney-General, arguing that a two year suspension was too lenient and heard six months after *In re G*, the court dismissed the appeal, confirming that stealing required proof of more than wrongful conversion. In the circumstances, the two year suspension was adequate: *Re NEG* (1940) QWN 25.

[40] The number of appeals during this period were few and related to the procedural powers of the tribunal: *Re a Solicitor* [1953] St R Qd 149 (appeal on the validity of Rule 76 which deemed a failure to respond to a Law Society request for information to be professional misconduct); *R v Queensland Law Society, Ex parte a Practitioner* [1958] Qd R 394 (writ of prohibition sought to stop *prima facie* case being found on affidavit material alone); *Re H, A Solicitor* [1961] Qd R 407 (appeal on the validity of Rule 76); *Hally v Queensland Law Society* (1960) 105 CLR 286 (appeal on the validity of Rule 76); *Re H, A Solicitor* [1962] Qd R 1 (taxation of costs of disciplinary hearing).

[41] [1981] Qd R 17.

5.3.3.3 *1980 – 2001: The Mellifont Years*

In 1980 a solicitor by the name of Mellifont appealed against a tribunal order suspending him for five years.[42] He argued that such an order was too harsh in the circumstances. The tribunal had found that Mellifont had acted fraudulently in seeking to hide errors in the trust account. He had made false trust account entries, fabricated a letter to explain a payment from the trust account and had lied to the Law Society. He also perjured himself in his evidence before the tribunal.

The leading judgement in *Mellifont* was that of Andrews J, who cited with approval the decision of the New South Wales Court of Appeal in *Law Society of New South Wales v McNamara*,[43] in which Reynolds JA had said that the disciplinary tribunal must not impose a suspension unless confident that, at the end of the suspension, the practitioner would be fit to practise. It would be unlikely that the tribunal could often be confident of this if the practitioner before it was presently unfit,[44] as the tribunal would need to be sure that a transformation of character would occur before the suspension ended.[45] Andrews J went on to say that,[46] given the deceit, dishonesty and dishonour of Mellifont's conduct, a

[42] *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17.
[43] (1980) 47 NSWLR 72.
[44] (1980) 47 NSWLR 72, 76, cited in *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17, 31 (Andrews J).
[45] The difficulties of assessing fitness to practise at the end of a period of suspension had been foreshadowed in *Re M* [1938] St R Qd 454 where Graham AJ said:

> During the hearing of the appeal I considered the advisableness, in the interests both of the public and the offender, of suggesting a change in the form of the punishment so as to make the possibility of the appellant's return to actual practice conditional upon proof of penitence and good behaviour during the term of suspension (463).

However, his Honour finally agreed to the usual, unconditional, return to practice at the end of the three year period of suspension ordered in that case.
[46] *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17, 31.

fine was not appropriate[47] and nor was a suspension, given that the court could not be satisfied that Mellifont would be again fit to practise at the end of any period of suspension. The court ordered that he be struck from the roll.

In at least eight cases heard after *Mellifont*, the Supreme Court continued to indicate the very narrow range of cases in which a suspension order would be appropriate.[48] But as

[47] Mellifont had been before the tribunal on three prior occasions for failing to respond to Queensland Law Society investigations. On each occasion he had been fined: SC 175, 6 July 1970 ($150); SC 191, 27 April 1973 ($100); SC 207, 29 October 1975 ($600).

[48] 1. *Re Walter* (Unreported, Supreme Court of Queensland, Full Court, Connolly, Shepherdson, Williams JJ, 22 May 1987). The tribunal had imposed a 12 month suspension for lying under oath and giving misleading information to the Queensland Law Society (SC 285, 20 August 1986). On appeal by the society, the suspension was overturned and the practitioner struck from the roll. The court queried the legitimacy of a suspension order where dishonesty was involved (12, Williams J). The practitioner subsequently appealed to the High Court, which found there was inadequate evidence of dishonesty and remitted the matter to the Statutory Committee: *Walter v Council of Queensland Law Society Inc* [1988] 62 ALJR 153. However, the success of the appeal by Walter does not affect the argument here which relates to the court's view of the proper penalty where dishonesty has been found.

2. *Attorney-General v Brown* [1992] QCA 241 (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies JA, Demack J, 11 June 1993). The practitioner had knowingly participated in the backdating of documents and the preparation and filing of false affidavits to assist his clients. In deciding to suspend Brown for 21 months, the tribunal (SC 339, 6 October 1992) had made reference to his '28 years of unblemished practice and the strong testimonial produced on his behalf', but it was common ground in an appeal by the Attorney-General that these were not valid personal mitigating factors in disciplinary proceedings as they did not address the issue of the practitioner's fitness to practise. The practitioner therefore sought to argue that the tribunal had taken account of a number of other, valid, mitigating factors in determining the appropriate penalty. He was greatly hampered by the tribunal's failure to give reasons for its decision, even five months later: *Brown v Minister for Justice and AG* (Unreported, Supreme Court of Queensland, Court of Appeal, 31 March 1993, Fitzgerald P, Pincus JA, Shepherdson J)(application by practitioner for the Statutory Committee to provide reasons for the penalty imposed). The court thought that it was 'impossible to conclude that a period of suspension affords adequate protection to the public' (6) given the respondent's deliberate and sustained course of grave misconduct designed to mislead the court, and his lack of remorse. The decision of the Statutory Committee was set aside and the practitioner struck off.

3. *Queensland Law Society v Mead* [1997] QCA 83. The tribunal had suspended Mead for 33 months despite the fact that he had been before the tribunal only 18 months earlier and fined $10,000 (*Re X* (1995) 25 QLSJ 493, SC 365, 28 March 1995). Ten days after that earlier tribunal hearing he had again transferred trust monies to his general account without authority. There had been no restitution or indication of remorse and the court refused to accept an argument that Mead would be fit to practise by the end of the period of suspension (7).

4. *Queensland Law Society v Henry William Smith* (unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998). The Attorney-General appealed a decision of the tribunal (SC 384, 11 November 1997) that the practitioner be suspended 'until such time as he is able to satisfy the Council of the Queensland Law Society Inc that he is a fit and proper person to hold a practising certificate', but the matter did not go to a full hearing as Smith consented to an order that he be struck from the roll.

later discussion shows,[49] the disciplinary tribunal appeared to disregard the court's consistent and strengthening caution regarding suspension orders. In fact, the disciplinary tribunal used suspension orders *more often* after *Mellifont* than before.[50]

5. *Attorney-General v Bax* [1999] 2 Qd R 9. The tribunal had ordered the practitioner to pay a fine of $15,000 (SC 393, 29 July 1997). On appeal, the Attorney-General argued that the practitioner should be struck from the roll and in its simultaneous appeal, the Queensland Law Society argued that the practitioner should be suspended. The facts in *Bax* were quite similar to those in *Attorney-General v Brown* (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies JA, Demack J, 11 June 1993): the practitioner had backdated documents to seek an advantage for his client by removing property from the reach of creditors should the client become bankrupt. Also, as in *Brown*, Bax had continued this deception by evasive comments in the Federal Court, during the investigation of complaints against him and before the tribunal. Pincus JA thought that the substantial nature of the deception over a period of time required that Bax be removed from the roll as it showed he was not fit to practise. His Honour then considered, as a secondary matter, whether the removal should be permanent or temporary, by way of a period of suspension and decided that it was Bax's lack of remorse which foreclosed the possibility of a suspension order (22, Pincus J). Shepherdson J (25) and McPherson JA (14) also placed great weight on the practitioner's lack of remorse and agreed that the appropriate order was one striking the practitioner from the roll.

6. *Attorney-General v Gregory.* [1998] QCA 409. Gregory had been convicted of contempt of court and fined $4,000 in the District Court for attempting to influence a witness to change her evidence to make it more favourable to his client. The disciplinary tribunal had suspended him for two years (*Re Gregory* (1998) 3 Disciplinary Action Report 13, SCT 6174, 13 May 1998). On appeal by the Attorney-General, the court acknowledged that the misconduct comprised an isolated, unpremeditated incident for which the Gregory had shown remorse. But de Jersey CJ thought the conduct demonstrated the absence of 'critically important qualities' (4) requiring Gregory to be struck from the roll. He would need to demonstrate he had 'redeveloped' those qualities before he could be readmitted. White J also thought that the appropriate course was to strike Gregory from the roll, allowing him to apply for readmission at a later time when he could prove his fitness to practise (17). Gregory's subsequent application for readmission was unsuccessful: *Greg Gregory v QLS Inc* [2001] QCA 499.

7. *Queensland Law Society v Carberry* [2000] QCA 450. The tribunal had found Carberry guilty of professional misconduct and suspended him from practice for 12 months (*Re Carberry* (2000) 6 Disciplinary Action Report 17, SCT 6196, 6 March 2000). Both the Attorney-General and Queensland Law Society appealed and argued that Carberry should be struck off. The most serious charge against the practitioner related to a conflict of interest which Carberry chose to ignore [34] (Moynihan SJA and Atkinson J). Pincus JA thought that it was 'no accident' that the practitioner had preferred the interests of his business associate to those of his client ([5]). Moynihan SJA and Atkinson J were doubtful as to Carberry's level of remorse([37]), suggesting he would not be fit to practise by the end of any period of suspension ([41], Moynihan SJA and Atkinson J). Pincus JA agreed that the misconduct was 'bad enough to force one to the unpleasant conclusion that mere suspension is insufficient' ([7]).

8. *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42. The tribunal had suspended Wakeling for two years, and then not practise as a sole practitioner for a further five years (SCT 110, 26 August 2003). The court held that the multiple findings of dishonest conduct meant that the court could not 'confidently present the respondent as someone on whom the client and the court may rely' ([27]). Nor could the court have confidence that he would regain fitness to practise before the two year period of suspension expired.

[49] See discussion below section 5.3.5.

[50] Linda Haller, 'Waiting in the Wings: the Suspension of Queensland Lawyers' (2003) 3 *QUT Law and Justice Journal* 397-421, 409, Table 1.

The series of cases, which started with *Mellifont v Queensland Law Society*[51] in 1981, make it clear that the Supreme Court expected suspensions to be used only where there was clear evidence that the practitioner would be fit to practise again at the end of a fixed period of suspension. But, there is fairly clear evidence that the tribunal paid very little heed to these rulings of the court, arguably imposing suspensions in a number of cases where a suspension was not the most appropriate way of protecting the public.[52] The question arises as to why the court's attitude to suspensions appears to have been ignored by the tribunal.

5.3.4 *Cases in Which Supreme Court Has Considered Suspension Appropriate*

5.3.4.1 *Two Exceptions 1990-2001*

While, generally speaking, the court disallowed all suspension orders after *Mellifont*, in the period 1990-2001, there were two exceptions. The first was *Adamson v Queensland Law Society Inc.*[53] The tribunal had ordered that Adamson be struck from the roll, but the court replaced this with a more lenient order - that he be suspended from practice for 12 months and pay one third of the society's costs before the tribunal. This was on the basis that the costs of a three day hearing with senior counsel on both sides amounted to 'an immense fine'[54] anyway, only limited misconduct had been found, and there was no

[51] [1981] Qd R 17.
[52] Below section 5.3.7.2.
[53] [1990] 1 Qd R 498. He had shared receipts with an unqualified person (his secretary) and lied to the Queensland Law Society about their arrangement.
[54] [1990] 1 Qd R 498, 508.

evidence of client dissatisfaction or failure to supervise the work of the person with whom the practitioner was sharing receipts.[55]

The second case in which the Supreme Court of Queensland allowed a suspension to stand in the period 1990-2001 was *Re Wheeler*.[56] By the time of hearing, the Queensland Law Society had abandoned its appeal and the court was only left to decide on the practitioner's cross appeal that the three year suspension was too harsh. This – combined with the delay in the hearing of the appeal[57] - is likely to explain why the court chose not to interfere with the suspension order.

In both *Adamson*[58] and *Wheeler*[59], the court did not impose harsher sentences than those imposed by the tribunal. But these were cases where it was the practitioner who had appealed. The previous discussion has shown that, as the 1990s progressed, the Attorney-General appealed more decisions, as did the Queensland Law Society. By the mid to late 1990s, where the tribunal imposed a suspension, it became more common for either the society or Attorney-General to lodge an appeal. There was also an increased likelihood that those appeals would be successful. On the hearing of these appeals, the court generally took a harsher approach, overturning a number of suspensions and substituting them with an order that the practitioner be struck from the roll.

[55] [1990] 1 Qd R 498, 508. The court may have replaced the strike off order with a fine had it been aware this was an option available to it: below section 5.3.7.
[56] [1992] 2 Qd R 690.
[57] The suspension had been imposed by the tribunal on 12 March 1987 and by the time of the Full Court's decision - 26 April 1991 - Dowsett J (with whom Macrossan CJ and Ryan J agreed) commented that 'it would seem that the appellant has already served his period of suspension and no point will be served by "fine-tuning" at this stage' (703).
[58] *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498.
[59] *Re Wheeler* [1992] 2 Qd R 690, decided 26 April 1991.

5.3.4.2 *Suspension Renaissance in 2000s?*

Having not allowed any suspension imposed by the tribunal to stand since *Re Wheeler*[60] in 1991, between 2002 and 2006 the court then dismissed five appeals in which the Attorney General or Queensland Law Society argued that individuals who had been suspended should have been struck off.[61] The general approach of the court in these later cases was to state that a finding of lack of character or trustworthiness was necessary

[60] [1992] 2 Qd R 690.

[61] 1. *Attorney-General v Clough* [2002] 1 Qd R 116 was the first such case. The tribunal had ordered that the practitioner be suspended for 12 months (*Re Practitioner X* (1999) 5 Disciplinary Action Report 15, SCT 6204, 24 August 1999.). The practitioner appealed against both findings and order, and the Queensland Law Society cross-appealed against the order and argued that the practitioner should be struck off. The Attorney-General also appealed against the suspension order and sought a strike off order. Although Pincus JA thought the tribunal's findings had been 'the most charitable which could be adopted' (119), the case proceeded on the basis that the practitioner's conduct amounted to incompetence rather than a dishonest attempt to further his client's case. Although the court did hold that even the incompetent could be struck from the roll (120, 132), the court appeared reluctant to strike off Clough without a direct finding of dishonesty. Although 'not without reservations' (139), the court allowed his 12 month suspension to stand.

2. *Attorney-General v Priddle* [2002] QCA 297 suggests a more definitive embrace of suspension orders by the court. The Attorney-General appealed a 12 month suspension imposed by the tribunal (*Re Priddle* 9 [2002] Disciplinary Action Report 14, SCT 54, 30 October 2001). The practitioner was found guilty of unprofessional conduct for failing to keep proper records of trust monies as required by the *Trust Accounts Act 1973* (Qld) and of failing to provide accounts of the trust assets to the client or the Queensland Law Society when requested. The tribunal had given no reasons why it was imposing a suspension but the Queensland Court of Appeal referred to a number of personal circumstances which 'helped provide some explanation for the respondent's grossly unsatisfactory conduct', ([13]) and noted that there was no evidence of dishonesty or deceit in an isolated lapse ([12]) and that excellent character references had been tendered ([13]). The court dismissed the Attorney-General's appeal, determining that there was no evidence that the suspension order was manifestly inadequate ([14]).

3. *Council of the Queensland Law Society Inc v Whitman* [2003] QCA 438: the Queensland Court of Appeal expressed concern ([42]) that the disciplinary tribunal (*Re Whitman* SCT 83, 12 February 2003, 7, unreported) had suspended a solicitor for nine months, even though the solicitor 'gives the appearance of still not believing he has done anything wrong and is likely therefore to re-offend'. The court also noted Whitman's 'combative stance' in the tribunal but allowed the suspension to stand.

4. *Council of the Queensland Law Society v Roche* [2003] QCA 469: the appeal court again deferred to the tribunal's ability to observe at first hand whether a solicitor was likely to develop insight into their misconduct so as to become fit to practise before a period of suspension expired. The court refused to interfere with a 12 month suspension because it felt the solicitor would 'undoubtedly [learn a lesson] from the substantial period of suspension imposed upon him' and his 'basic honesty, integrity and intelligence' would ensure there would be no further misconduct on his return to practice.[61]

5. *Council of the Queensland Law Society v Cummings* [2004] QCA 138: the court allowed a 12 month suspension to stand, accepting that the tribunal had found the solicitor to be fit and proper at the time of the hearing but had imposed the suspension as a special and general deterrent ([23]). See discussion above section 2.5.2.

before a person would be struck off, but arguably this overlooks the degree to which law required the public to be protected from the honestly incompetent, not just the dishonest.[62]

Regardless of whether or not these decisions suggest the appellate court is becoming more tolerant of suspension orders or deciding to interfere less often in the tribunal's exercise of discretion more generally, this does not affect the evidence that, between 1957 and 2002, when the court was clearly discouraging the use of suspensions, the tribunal appeared to disregard the court's preference. The attitude of the courts since *Ziems*[63] in 1957 had been to restrict the circumstances in which a suspension order would adequately protect the public. If the tribunal was ignoring the attitude of the appellate court, this may indicate that the tribunal was not operating according to law. More importantly for the thesis raised here, it may also show that the tribunal was risking the success of any legitimation project *and* failing to protect the public.

5.3.5 *The Evidence: Suspensions Imposed by the Tribunal*

The earlier parts of this chapter have explained why the use of suspensions is problematic from the point of view of any legitimation project, and also because the courts have greatly constrained the circumstances in which suspensions should be used. The chapter will now look at general trends in the use of suspensions by the tribunal. It will then

[62] See discussion above section 2.4.3.4.
[63] *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279.

examine some cases in which the tribunal has suspended a practitioner and seek explanations for the imposition of such an order.

The decision in *Ziems* was handed down in July 1957. As was discussed previously, in that decision the High Court greatly narrowed the circumstances in which suspensions were justified. If not fit to practise, a practitioner should normally be struck off. If fit to practise, the practitioner should be allowed to remain in practice.

What impact did that decision have upon the practice of the disciplinary tribunal in Queensland? Although the rate of suspensions did decrease after *Ziems*, from 21% of cases at the time of *Ziems* to only 5% of cases in the first half of the 1960s,[64] suspensions then became much more popular with the tribunal, which imposed them in 30 percent of cases heard in the latter half of the 1960s. This comprises the highest rate of suspensions since the late 1930s.[65] However, suspensions were then used less often, comprising only 11% of orders in 1971-1975 and 8% in 1976-1980.[66]

In October 1980, in *Mellifont v Queensland Law Society Inc*[67] the Supreme Court of Queensland limited the circumstances in which suspensions were appropriate, using the

[64] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis' (2001) 13 *Bond Law Review* 1-45, 25, Figure 3.
[65] N=10. Period = 1966-1970. The low number of disciplinary hearings during this period is also cause for concern: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 64, 26, Table 7. This reinforces the point made in Chapter One that disciplinary hearings form only the tip of the iceberg and to understand the whole picture it is not sufficient to focus only on types of disciplinary outcomes or even disciplinary hearings. Investigation is also required as to which complaints are filtered out of the system before a formal hearing.
[66] This period ended on 30 April 1980: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 64, 10.
[67] [1981] Qd R 17.

most unambiguous language in its ruling.[68] It could therefore be expected that fewer practitioners would be suspended by the disciplinary tribunal after *Mellifont*. However, this does not appear to have been the case. During the five year period 1981-1985, 13 percent of practitioners were suspended.[69] Throughout the 10 year period 1986-1994, the number of suspensions increased to well over 20 percent,[70] despite the warnings in the cases discussed earlier in this chapter.[71] It is possible that, just as Chapter Two noted that Queensland judges appear to not necessarily have kept abreast of the relevant legislation,[72] the tribunal did not necessarily closely follow the legislation *or* court decisions.

Interestingly, as the Supreme Court of Queensland has allowed more suspensions to stand since *Clough*, the tribunal appears to have become even bolder in its use of suspensions: the Legal Services Commissioner reports[73] that in 2002-2003 eight practitioners were suspended, representing 33% of the orders imposed that year – as high a proportion as it has ever been.

It will often be inappropriate to suspend a practitioner who has already appeared before the disciplinary tribunal, as their reappearance suggests that they are not able to learn from their mistakes and are likely to remain unfit to practise. Suspensions become even less appropriate the greater the number of previous appearances. And yet, the tribunal has

[68] See discussion above section 5.3.3.
[69] Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 64, 25, Figure 3.
[70] 1986-1990=24.5%, 1991-1995=23.4%. Ibid.
[71] The number of suspensions then reduced to 17.5% of all orders in 1995-2000. Ibid.
[72] Above section 2.4.3.4.
[73] Queensland Legal Services Commissioner, *Annual Report 2004-2005*, 31, Table 1.1.

imposed suspensions on practitioners who have appeared previously. In the period between the decision in *Mellifont* and 28 March 2003,[74] at least 46 practitioners were suspended. Thirteen (28%) of them appear to have been before the tribunal on at least one prior occasion.[75] These included practitioners who had already received a period of

[74] Being the date at which this analysis of suspensions was undertaken.

[75] 1. *Re Zakrjevsky* (1985) 15 QLSJ 41 (SC258, 29 August 1984 (suspended for three years for failing to supervise an articled clerk, failing to adequately protect the interests of clients, failing to ensure that lenders were told of his articled clerk's personal relationship with various borrowers, and for various breaches of the *Trust Accounts Act 1973* (Qld) and Regulations). This practitioner had appeared on two prior occasions: SC 215, 20 February 1978 fined $200 and censured for unprofessional conduct and SC 221, 27 November 1978 fined $500 for failing to respond to Law Society enquiries);

2. *Re Brown* (1989) 19 QLSJ 76, SC 301, 12 April 1988 (suspended 26 months after being found guilty of unprofessional conduct due to applying trust monies of $587.60 to his own use, failing to pay $300 received for Counsel's fees into trust, while acting for lessor and lessee, charging the lessee $387.00 for stamp duty when the true amount was $38.55, borrowing $5,000 from his client in breach of Rule 68E, which loan was not secured and not repaid). The practitioner had previously been suspended for 13 months, nearly 30 years earlier: SC 133, 8 December 1959

3. *Re Willcox*, unreported, SC 318, 5 December 1989 (by majority, suspended for 19 months for advertising his business, Property Transfer Co, in two Brisbane newspapers, in breach of Rule 81(1), which prohibited the unfair attraction of business). He had already been suspended on an earlier occasion: *Re Willcox* (1988) 18 QLSJ 411, 417; SC 298, 1 December 1987 (suspended for 19 months for preparing and sending a false bill of costs to the Legal Services Commission of NSW to mislead the Commission into believing that he had charged the client $3,750 when in fact he had charged the client $13,750, preparing a false mortgage document to mislead Defence Service Home Corporation into believing that his client had received bridging finance, and by making a false statement to that corporation, transferring monies from the trust account into his general account without authority on a number of occasions).

4. *Re Simotas*, unreported, SC 337, 3 September 1992 (suspended for 15 months for failing to respond to Law Society enquiries). He had appeared before the lower level Solicitors Disciplinary Tribunal on an earlier occasion: SDT 3016, 21 March 1990 (fined $4,000 for failing to respond to Law Society enquiries). He also appeared in SDT 3016, 21 March 1990, when the Solicitors Disciplinary Tribunal referred the matter to the higher level Statutory Committee, leading to the present proceedings.

5. *Re Tunn* (1993) 13 QLSJ 190, SC 340, 4 November 1992 (suspended for 14 months after being found guilty of five breaches of Rule 83 *Queensland Law Society Rules 1987* (Qld) and four charges of touting for business in breach of Rule 81(1), two charges of failing to register transfer documents, failing to deposit monies with the Queensland Law Society, failing to reconcile his trust account and failing to follow various advice from the society). He had previously been fined: *Re a Practitioner*, (1985) 15 QLSJ 407, SC 279 (fined $3,000 for wrongful conversion of $2,637.19 to pay his own rent, failing to keep proper trust accounting records, failing to advise a client that the client's appeal had been listed and that the practitioner intended to seek leave to withdraw, and failing to advise the client that the appeal was likely to be dismissed if the client was not legally represented). He was later suspended again: *Re Tunn* (1995) 25 QLSJ 208, SC 354 28 September 1994 (suspended for 12 months for failing to reveal to his clients, the purchasers of certain land, that he was a director and shareholder of the vendor company, acting without instructions, practising without a practising certificate and criminal conviction on two counts of sodomy).

6. *Re Graeme John Delaney* (1993) 23 QLSJ 190, SC 344, 15 February 1993 (suspended for 28 months after failing to pay a professional indemnity insurance premium, acting as a solicitor without a practising certificate and failing to pay $500 into his trust account). He had previously appeared before the tribunal in 1985 and fined $1,000 for preferring the interests of one client over the interests of another by failing to lodge a mortgage or caveat to secure a loan and, in relation to another loan, also preferred the interests of one client over the interests of another by failing to advise the client lender that the loan was to

suspension. One practitioner was fined[76] and then suspended for 14 months,[77] before being suspended for a further period of 12 months on his third appearance.[78] He was later

be used to pay outstanding indebtedness of the borrower client or otherwise protect the interests of the lender: *Re X* (1985) 15 QLSJ 353.

7. *Re Revell* (1994) 24 QLSJ 380, SC 352, 22 February 1994. (suspended for three years for numerous trust account breaches, misleading the Law Society and misleading the tribunal). He had been censured and ordered to arrange a management audit and attend LawCare in 1993 by the Solicitors Disciplinary Tribunal after failing to respond to Law Society requests for information: *Re X* (1993) 23 Queensland Law Society Journal 295, SDT 40, 9 February 1993.

8 *Re Tunn* (again) (1995) 25 QLSJ 208, SC 354 28 September 1994 (suspended for 12 months for failing to reveal to his clients, the purchasers of certain land, that he was a director and shareholder of the vendor company, acting without instructions, practising without a practising certificate and criminal conviction on two counts of sodomy). Previously fined and suspended: *Re Tunn* (1993) 13 QLSJ 190, SC 340, 4 November 1992 (suspended for 14 months after being found guilty of five breaches of Rule 83 *Queensland Law Society Rules 1987* (Qld) and four charges of touting for business in breach of Rule 81(1), two charges of failing to register transfer documents, failing to deposit monies with the Queensland Law Society, failing to reconcile his trust account and failing to follow various advice from the society); *Re a Practitioner*, (1985) 15 QLSJ 407, SC 279 (fined $3,000 for wrongful conversion of $2,637.19 to pay his own rent, failing to keep proper trust accounting records, failing to advise a client that the client's appeal had been listed and that the practitioner intended to seek leave to withdraw, and failing to advise the client that the appeal was likely to be dismissed if the client was not legally represented).

9 *Re Mead* (1997) 1 Disciplinary Action Report 4, SC 378, 18 September 1996. This suspension was set aside on appeal and the practitioner struck off: *Queensland Law Society Inc v Mead* [1997] QCA 83 (22 April 1997).

10. *Re Webster* (1999) 4 Disciplinary Action Report 9, SCT 6, 3 July 1998 (suspended for one year for failing to respond to Law Society requests for information and for failing to supply a bill of costs). He had previously been fined $10,000 by the tribunal for borrowing from a client and for sending a misleading letter to the Law Society: *Re X* (1993) 23 QLSJ 90. This prior appearance is not referred to in the latter report.

11. *Re Carberry* (2000) 6 Disciplinary Action Report 17, SCT 31, 6 March 2000 (suspended for 12 months). He had previously appeared before the Solicitors Disciplinary Tribunal in 1992 and was fined $400 for failing to respond to Law Society requests for information. This suspension was overturned on appeal.

12. *Re Nettleton*, SCT 42, 21 November 2000.

13. *Re DaCosta* (2003) 11 Disciplinary Action Report 39, SCT 82, 22 October 2002 (suspended for two years for practising without a certificate). In 1997 he had been fined $2,500 by the tribunal for borrowing from a client (Rule 86), acting for both parties in relation to an excluded mortgage (Rule 85) and acting in a conflict of interest: SC385, 27 February 1997, unreported.

[76] *Re a Practitioner*, (1985) 15 QLSJ 407, SC 279 (fined $3,000 for wrongful conversion of $2,637.19 to pay his own rent, failing to keep proper trust accounting records, failing to advise a client that the client's appeal had been listed and that the practitioner intended to seek leave to withdraw, and failing to advise the client that the appeal was likely to be dismissed if the client was not legally represented).

[77] *Re Tunn* (1993) 13 QLSJ 190, SC 340, 4 November 1992 (suspended for 14 months after being found guilty of five breaches of Rule 83 *Queensland Law Society Rules 1987* (Qld) and four charges of touting for business in breach of Rule 81(1), two charges of failing to register transfer documents, failing to deposit monies with the Queensland Law Society, failing to reconcile his trust account and failing to follow various advice from the society).

[78] *Re Tunn* (1995) 25 QLSJ 208, SC 354 28 September 1994 (suspended for 12 months for failing to reveal to his clients, the purchasers of certain land, that he was a director and shareholder of the vendor company, acting without instructions, practising without a practising certificate and criminal conviction on two counts of sodomy).

struck off.[79] Another solicitor was suspended for 19 months[80] before being later suspended for another period of 19 months[81] and subsequently struck off.[82] It is surprising that the tribunal appeared so willing to use suspensions rather than strike off orders when previous appearances before the tribunal raise serious doubts as to fitness - and particularly when a previous period of suspension has not been effective in improving a practitioner's standards of conduct.

5.3.6 *Broader Range of Orders Available in Australia*

Under the *Legal Profession Act 2004* (Qld), and the *Queensland Law Society Act 1952* (Qld) before it, the tribunal had a wide range of orders available to it. There was no need for the tribunal to impose a suspension where doubt existed. Also, in Queensland, a suspension is quite distinct from a strike off order. By comparison, when practitioners are suspended in most States of the United States, they do not have an automatic right to

[79] Tunn's fourth appearance before the tribunal was in July 2004: *Re Tunn* SCT 124, 1 July 2004. (by majority, struck from the roll for serious neglect and failing to maintain reasonable standards of competence or diligence, failing to respond to society requests for explanations of his conduct). The practitioner member in the minority did not consider a strike off order appropriate in the absence of any finding of fraud and would have preferred to fine the solicitor $30,000. Perhaps surprisingly, given his long history before the tribunal, Tunn appealed this decision: *Council of the Queensland Law Society Inc v Tunn* [2004] QCA 412. The court dismissed the appeal on the basis that Tunn did not appear to have learnt from his previous three appearances before the tribunal ([21]). Tunn may represent the extremes to which a 'merely' incompetent lawyer must go before they will be struck from the roll.

[80] *Re Willcox* (1988) 18 QLSJ 411, 417; SC 298, 1 December 1987 (suspended for 19 months for preparing and sending a false bill of costs to the Legal Services Commission of NSW to mislead the Commission into believing that he had charged the client $3,750 when in fact he had charged the client $13,750, preparing a false mortgage document to mislead Defence Service Home Corporation into believing that his client had received bridging finance, and by making a false statement to that corporation, transferring monies from the trust account into his general account without authority on a number of occasions).

[81] *Re Willcox*, unreported, SC 318, 5 December 1989 (by majority, suspended for 19 months for advertising his business, Property Transfer Co, in two Brisbane newspapers, in breach of Rule 81(1), which prohibited the unfair attraction of business).

[82] *Re Willcox*, unreported, SC 321, 6 December 1990 (struck off for practising as a solicitor while under suspension).

recommence practice at the end of the period of suspension, as they would in Queensland. They must attend a hearing to show that they are fit to practise again.[83] In Queensland, the right to recommence practice at the end of the period of suspension is automatic. The practitioner can quietly serve out the period of suspension and then re-enter the profession without any further publicity necessary. Therefore, the nature of a suspension order in Queensland is more distinct from a strike off order than it is in the United States. The automatic right to recommence practice at the end of the period of suspension means that suspensions have a less harsh effect than they have in the United States.

American theorists who discuss the preferred options of disciplinary tribunals do not countenance the different regime of sanctions available to the tribunals in Queensland.[84] In the United States, a suspension order is often likely to be ordered by default when the tribunal does not want to disbar an attorney from the roll but a censure or reprimand would appear to the public to be an inadequate response to the misconduct. Suspensions do not need to play the same role in Queensland, given that the option to fine up to

[83] For instance in Florida the disciplinary rules state that a practitioner suspended for more than 90 days, shall not be allowed to recommence practice without proof of rehabilitation and may be required to resit all or part of the Florida Bar examination: Florida Bar, Standards for Imposing Lawyer Sanctions, rule 2.3 (updated July 2000) The concerns about the protective effect of a suspension are discussed in the commentary at page 13:
http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/18F71B077A612FB785256DFE00664509/$FILE/lawyersanctions03.pdf?OpenElement at 3April 2006.

[84] For example, Stephen Bené, 'Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions' (1991) *Stanford Law Review* 907-941; Leslie Levin, 'The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions' (1998) 48 *American University Law Review* 1.

$100,000 exists, if necessary.[85] If the tribunal does not want to strike off a practitioner, it can impose a fine.

Given that in Queensland, the tribunal has a wide range of other options available to it and that the court has queried the circumstances in which a suspension will adequately protect the public, a low rate of suspension orders could be expected if the tribunal is pursuing its protective role. The imposition of a suspension may also risk an appeal by the Attorney-General. Such appeals are likely to be damaging to any legitimation project.

The option of seeking readmission has some small chance of success in Queensland.[86] This should therefore not be a factor inhibiting the tribunal's use of the strike off power.

5.3.7 *Suspensions as Deterrence or Retribution? The Court's Attitude*

It will be recalled that the High Court suspended the practitioner in *Ziems v Prothonotary of the Supreme Court of New South Wales*[87] for the period that he remained in prison, even though the majority of the court accepted that Ziems remained fit to practise.[88] As well as protecting the public from the 'incongruity' of a barrister practising from prison, there was arguably a deterrent element in the court's decision. But such a finding is unusual. It was earlier suggested that the courts usually find that the person appearing

[85] *Legal Profession Act 2004* (Qld) s 280(4)(a), previously *Queensland Law Society Act 1952* (Qld) s 6R (1)(c). Fines in the disciplinary context are considered in Chapter Six.
[86] Applications for readmission were successful in *Re Bell*, Supreme Court of Queensland, Full Court, 622/1991, 6 December 1991, Thomas, Williams, Derrington JJ, unreported, and in *Re Taylor* [1997] 1 Qd R 533. Unsuccessful applications for readmission were made in *Re Currie* Supreme Court of Queensland, Full Court, 417/1990 8 March 1991, Williams, Ryan, Dowsett JJ, unreported, *Janus v Qld Law Society Inc* [2001] QCA 180 and *Gregory v Queensland Law Society Inc* [2001] QCA 499 (13 November 2001).
[87] (1957) 97 CLR 279.

before them is unfit to practise before speaking of the deterrent effect of strike offs and suspensions.[89]

This chapter will now discuss the few cases in which, despite a finding that a practitioner was fit to practise at the date of the tribunal hearing, the court imposed a suspension order. The question is whether the aim of the suspension was to deter such conduct, either by that practitioner (special deterrence) or by fellow practitioners (general deterrence) or whether it was imposed as retribution for past misconduct. Deterrence is consistent with the protective role of the tribunal. However, general deterrence requires the knowledge of the order to be disseminated to the wider legal community – an issue taken up in Chapter Eight. As noted in Chapter Two,[90] the courts have generally denied that disciplinary proceedings should contain any element of retribution. A closer look at the cases in which a suspension order was ordered despite current fitness to practise may help to illuminate this question whether retribution may in fact exist.

In two of the three Queensland cases in which 'fit' practitioners were suspended, they were appealing from tribunal decisions that they be struck from the roll and so a suspension order represented a more favourable outcome. The first of these cases is *Re a Solicitor*,[91] decided in 1932. There, a strike off order was set aside and the practitioner suspended for 18 months despite a finding that he was fit to practise at the time of the

[88] The case is discussed in more detail above section 2.6.3.1.
[89] Above section 2.5.2. *Prothonotary v Del Castillo* [2001] NSWCA 75, [71]; *Prothonotary of the Supreme Court of NSW v P* [2003] NSWCA 320, [36] (Tobias JA), [17], [30] (Young CJ in Eq, with whom Meagher JA agreed).
[90] Above section 2.5.3.
[91] (1932) St R Qd 33. The practitioner had appealed from a tribunal order that he be struck from the roll.

hearing.[92] It is possible that the court imposed the suspension order to punish the practitioner as it was not until 1938, in *Re M*,[93] that the Supreme Court of Queensland first acknowledged that discipline was designed to protect not punish.[94] This is supported by the numerous references to 'punishment' in the judgment[95] and by the comment of Blair CJ and Webb J that, despite the solicitor's current fitness to practise, a 'strong mark of disapproval' was required.[96]

Although the court was much more practised in the 'protect not punish' mantra by the time it heard the second practitioner appeal in *Adamson v Queensland Law Society Inc*,[97] no unfitness to practise was found by the court in that case, and yet the court suspended Adamson for 12 months. This was also an appeal by a practitioner against an order striking him from the roll and so a suspension constituted a more favourable outcome for Adamson. While noting that Adamson's conduct did not warrant an order striking him from the roll,[98] Thomas J did not explain why he considered a 12 month suspension to be

[92] The practitioner had led a client mortgagee to believe a property was worth 2,250 pounds by withholding a valuation prepared by his own employee which valued the property at only 2,000 pounds. The court found that the practitioner knew or should have known that the security for another mortgage was 'grossly inadequate' (41). The court declined to find that fraud had been proved (47) and felt that the practitioner was fit to practise (41).

[93] [1938] St R Qd 454.

[94] Discussed above section 2.4.1.

[95] *Re a Solicitor* (1932) St R Qd 33.

[96] Ibid 41. EA Douglas J agreed that the appropriate order was a suspension of 18 months (47).

[97] [1990] 1 Qd R 498, discussed in more detail above section 5.3.6.

[98] Thomas J, with whom Connolly and Ambrose JJ agreed, considered that the tribunal's order striking the practitioner from the roll was not sustainable having regard to the 'limited basis upon which the finding of professional misconduct' had been sustained before the court (508). There was a 'failure to find any breach of the duty of supervision, the absence of any disservice to clients' (506). Only two of the six charges against the practitioner were upheld upon appeal, namely that that practitioner had knowingly breached Rule 67 of the Solicitors' Handbook by sharing receipts with an unqualified person. Thomas J noted that Rule 67 as contained in the Solicitors Handbook did not expressly prohibit the sharing of receipts (501). Nor did the Rule have the status of law, there being no evidence that it had been approved by the Governor in Council (501-2). It was more an indication by the profession that it considered the sharing of receipts, without prior express approval by the Queensland Law Society, to be unacceptable (501). Thus his Honour did not consider this to be a serious example of misconduct.

the most appropriate substitute order. However, comments earlier in his judgment suggest he may have been unaware that fines could be imposed.[99] Had he been aware of this, the court may have taken that opportunity, given strong indications in the case that the court considered Adamson still fit to practise.

The reason for the suspension in the third case - *Council of the Queensland Law Society v Cummings*[100] - is much clearer. There, the court stated categorically that the tribunal had found the practitioner fit to practise at the time of hearing, and the court endorsed his suspension, as a deterrent for both himself and other practitioners.[101]

In summary, only three Queensland cases have suspended practitioners while noting their current fitness to practise. Two of these replaced strike off orders with suspensions, one[102] predating Queensland's adoption of the 'protect not punish' purpose of discipline and the other indicating[103] that the court may have imposed a fine had it been aware of that option. It is only in the third case that the court clearly endorsed the use of suspensions as deterrence.[104]

[99] [1990] 1 Qd R 498, 506. This aspect of the case is discussed in more detail below section 6.6.
[100] [2004] QCA 138.
[101] Ibid [23]. See above section 2.5.2.
[102] *Re a Solicitor* (1932) St R Qd 33.
[103] *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498.
[104] *Council of the Queensland Law Society v Cummings* [2004] QCA 138.

5.3.8 *Barristers*

It is rare to find examples of the suspension of barristers. The suspension imposed by the High Court in *Ziems v The Prothonotary of the Supreme Court of NSW*[105] has been referred to earlier.[106] But it would seem that the only reason Ziems was suspended was because of his imprisonment and it was only for the period of his imprisonment.

Until the *Legal Profession Act 2004* (Qld), any suspension of Queensland barristers, as with any disbarment, could only be imposed by the Supreme Court of Queensland in its inherent jurisdiction.[107] A barrister was suspended by the court in *R v Byrne; in re Swanwick*.[108] Although a barrister was also suspended in *Re Perske*,[109] he was practising as a solicitor at the time, and the proceedings were instituted by the Queensland Law Association, the professional organisation representing solicitors at the time.[110]

No barrister has been suspended in Queensland since that time.[111] A reading of the cases at first suggests that the court may not have countenanced the option of suspending a

[105] (1957) 97 CLR 279.
[106] Above section 5.3.3.1.
[107] See above section 4.2. The Statutory Committee did suspend a barrister for three years in 1932 during a period when the legal profession in Queensland was fused: SC 13, 29 February 1932. For the history of the divided profession in Queensland, see John Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (Law Book Co, Sydney, 1979).
[108] (1882) 1 May 1882, Queensland Law Journal 66.
[109] (1896) 7 QLJ 73.
[110] The association was replaced by the Queensland Law Society in 1927: above section 4.5.1.
[111] Of course, no barristers have ever been suspended by their professional body, the Bar Association of Queensland, as it had no statutory, only contractual, powers over those barristers who chose to become members. Although the *Legal Profession Act 2004* (Qld) gave it some statutory powers, these relate only to practising certificates not the imposition of discipline. Practising certificates are discussed in the following section.

barrister. However, *obiter dicta* comments in *Barristers' Board v Darveniza*[112] do suggest otherwise. There, Thomas JA[113] closely examined the types of disciplinary order that could be imposed upon a barrister. He analysed cases involving not only barristers but also solicitors,[114] and cited a South Australian decision involving a solicitor - *In Re a Practitioner*[115] - for the proposition that suspensions were not appropriate where a practitioner had shown that he or she 'lacks the qualities of character and trustworthiness'.[116] His Honour then catalogued the evidence that Darveniza had 'an easy familiarity with the drug scene'[117] and an 'utter disrespect for the law.'[118] Combined with his recent convictions for the supply of methyl amphetamines and his opportunistic conduct, this demonstrated a character that was unsuitable for legal practice,[119] and the court ordered that his name be removed from the roll.

The disciplinary options available to the court were also canvassed by some members of the court in *Barristers' Board v Young*.[120] De Jersey CJ[121] only mentioned in passing that Young would no doubt prefer to be suspended than struck off,[122] but Mackenzie J discussed the option of suspension in greater detail, adopting Thomas J's statement from *Darveniza* as to the appropriate circumstances required before a suspension could be imposed.[123] However, Mackenzie J concluded that, although Young may be 'well thought

[112] [2000] QCA 253.
[113] With whom McMurdo P and White J agreed.
[114] Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2003) 5 *Legal Ethics* 152-178, 155.
[115] (1984) 36 SASR 590, 593 (King J).
[116] Ibid 593 (King CJ), cited *Darveniza* [38].
[117] [2000] QCA 253, [46].
[118] Ibid [48].
[119] Ibid.
[120] [2001] QCA 556. Discussed in more detail below section 7.2.5.
[121] With whom Davies JA agreed.
[122] Ibid [19].
[123] Ibid [44]-[45].

of by friends and workmates and has innate qualities upon which she could build …',[124] her conduct before the Shepherdson inquiry showed flaws of character. Therefore, a suspension order would not be sufficient to protect the public.[125]

Thus, while very few disciplinary cases are brought against barristers, those which do come before the court are much more likely to lead to a strike off order than to a suspension or fine. The dearth of cases in which barristers have been suspended by the courts when imposing discipline within their inherent jurisdiction is consistent with the court's general dislike of suspensions when dealing with appeals against suspensions imposed upon solicitors. However, the distinction between solicitors and barristers in the applicability of suspensions may be even greater, as the survey of the case law suggests that the courts may treat the conduct of barristers in a more absolute way, whereas a range of disciplinary responses is recognised in relation to solicitors. In other words, it may be that the court applies the 'fit-unfit', 'good character-bad character' dichotomy more readily to barristers than it does to solicitors. Alternatively, it may be that a broader range of disciplinary responses is anticipated by both the courts and legislature in relation to solicitors simply because solicitors engage in a much broader range of legal practice – and hence misconduct - than barristers. While technically, the court has the power to fashion a broad range of orders in its inherent jurisdiction,[126] it does not have the same degree of administrative support to supervise orders as has gradually developed within

[124] Ibid [48].
[125] Ibid [49].
[126] Note the range of orders available within the court's inherent jurisdiction, as anticipated by Kirby P in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 420.

the solicitor's branch of the profession.[127] Much of this support is funded by practising certificate fees and, within the barristers' branch of the profession, such fees were only introduced in 2004.[128] This may be a practical reason why the court has been less inclined to consider suspensions or fines when disciplining barristers. Finally, it may simply be that only the most serious cases have been brought to the court in its inherent jurisdiction, making a strike off order almost inevitable – whether against a solicitor or barrister.

5.4 PRACTISING CERTIFICATES

5.4.1 *The Relevance of Practising Certificates*

Chapter Three documented the dearth of discussion of professional discipline in the work of Larson.[129] In her footnote discussion of discipline,[130] Larson adopted Freidson's observation from the medical profession[131] that discipline became a necessity only in the most egregious cases of misconduct which had already caught public attention. In other cases,

> colleagues tend to encourage the culprit to "resign from their company" - to bar him, that is, from the informal networks, rather than expel him from the profession.[132]

[127] Examples include the collection of fines, supervision of suspension, reporting, education and counselling. All of these orders have been managed by the Queensland Law Society since 1927. See Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness', (2002) 22 *The Queensland Lawyer* 166-179, 171. While the support is usually provided to orders made by the statutory tribunal, there is no reason why the society would not have offered similar support if required by the court. It remains unclear whether the Legal Services Commission or the professional bodies will take similar administrative responsibility under the *Legal Profession Act 2004* (Qld), given that the Act clearly excludes those bodies from any disciplinary role.

[128] Practising certificates for barristers were introduced by the *Legal Profession Act 2004* (Qld).

[129] Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, Berkeley, 1977), discussed above section 3.8.

[130] Ibid 229, note 49.

[131] Eliot Freidson, *Doctoring Together: a Study of Professional Social Control* (Elsevier, New York, 1975).

[132] Larson, above n 129, 229 note 49.

The cancellation or suspension of a lawyer's practising certificate can be seen as a more informal way of dealing with allegations of misconduct than is discipline. There have been such extensive changes in disciplinary structures that it is now difficult to argue that professional bodies control discipline.[133] In contrast, professional bodies have extensive powers in relation to practising certificates which give them great practical control – short of removal from the profession itself - as to who will, or will not, be able to practise law.[134] In order to assess whether professional bodies devote most of their energy to pursuing a 'professional project,[135] an examination of how those bodies have used their powers in relation to practising certificates is necessary.

5.4.2 *Extent of the Practising Certificate Powers*

Since the *Queensland Law Society Act* was first introduced in 1927, the Queensland Law Society has had some power in relation to the right of solicitors to practise law and over the years, those powers have increased.[136] The *Legal Profession Act 2004* (Qld) extended

[133] Above section 4.6.

[134] Linda Haller, 'Discipline v Regulation: Lessons from the Collapse of Tasmania's Legal Profession Reform Bill 2004' (2005) 12 *E Law - Murdoch University Electronic Journal of Law*, http://www.murdoch.edu.au/elaw/issues/v12n1_2/Haller12_1.html at 1 March 2006.

[135] Above section 3.8.

[136] Although the Act of 1927 gave the society the power to prescribe an annual practising fee (s 4(9)(i)(g)), much more extensive powers were granted by amendments in 1930, making it an offence to practise without a practising certificate (s 26), and giving the society the power to refuse a certificate if the applicant was an undischarged bankrupt, in prison, in breach of trust account obligations, in default of the Act, refusing to explain his conduct, or sharing receipts with an unqualified person (s 29). Further amendments in 1938 allowed the society to refuse to issue a practising certificate to a practitioner who was in default of an order of the disciplinary tribunal, had practised without a certificate in the past or who had not reimbursed monies paid from the fidelity fund (s 9).Amendments in 1974 gave the society the power to cancel or refuse to issue a practising certificate if 'infirmity, injury or illness (whether mental or physical)' made a practitioner 'unfit to carry on and conduct his practice' and if it was 'in the interests of his clients or of the public' that the certificate be cancelled or refused (s 41A). The society could also suspend a

the practising certificate powers of the Queensland Law Society even further, and granted similar powers to the Bar Association of Queensland for the first time.[137] As well as having the power to impose any condition which is 'reasonable and relevant',[138] the professional bodies can now refuse, cancel, suspend or amend a local practising certificate after giving the certificate holder 28 days to respond to a 'show cause' notice,[139] or immediately if necessary in the public interest.[140]

5.4.3 *Discipline and Certification: Effectiveness*

What relevance do these certification powers have for the current thesis about disciplinary proceedings? The protection of the public is not necessarily concerned with how an individual lawyer is removed from practice, whether by the judicial means of discipline or by the administrative act of cancelling a practising certificate.[141] Nevertheless, the exercise of practising certificate powers cannot play the symbolic, demonstrative role that disciplinary proceedings can play.[142] A professional body's

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practising certificate if the Council had decided to lay disciplinary charges[136] or had taken control of the practitioner's trust account,[136] where there were trust account irregularities or where the practitioner had been convicted upon indictment or convicted of an offence which involved moral turpitude or fraud (s 41B). In 1985, the society's powers to refuse a certificate were further extended to situations where the applicant had taken advantage of the bankruptcy laws, was in default of an order of the disciplinary tribunal or had failed to comply with a condition on a previous practising certificate (s 41).

[137] Reid Mortensen, 'Becoming a Lawyer: From Admission to Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *University of Queensland Law Journal* 319-346, 321–322; Linda Haller, 'Imperfect Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *University of Queensland Law Journal* 411-434, 415.

[138] *Legal Profession Act 2004* (Qld) s 53(1).

[139] *Legal Profession Act 2004* (Qld) s 68.

[140] *Legal Profession Act 2004* (Qld) s 79.

[141] It is likely to be cheaper to remove a person's right to practise by cancelling their practising certificate through administrative action than by convening a disciplinary hearing to achieve the same result. Administrative action can also respond more rapidly to concerns about a legal practitioner's suitability to practise than can disciplinary action.

[142] Many forms of prosecution serve an important symbolic role, which can outweigh any instrumental role: Keith Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002) 416.

choice between exercising practising certificate powers or disciplinary powers may also provide useful insights into the degree to which that body is pursuing an agenda of legitimation rather than public protection.

Some of these powers also demonstrate an area in which disciplinary proceedings have developed a limited ability to protect the public. The particular powers of interest are those which allow the professional bodies to deal with unfitness arising from ill-health. It has already been noted that the Supreme Court took a narrower view of the type of conduct liable to discipline than did Parliament[143] – usually requiring 'dishonour or disgrace' or defects in character before removing a person from practice through a strike off order. Later discussion will demonstrate in more detail how the court's approach made a disciplinary response to mental illness problematic.[144] Amendments to practising certificate powers in 1974[145] show that there was no doubt – at least within Parliament – by that time that ill health could lead to unfitness to practise. But discipline carried overtones of moral turpitude which limited its protective ability. The extension of powers in relation to practising certificates had the same practical effect as disciplinary proceedings: an individual who it was thought was no longer fit to practise was removed from practice. But this was done, not through establishing their 'dishonourable or disgraceful misconduct' but by cancellation or suspension of their practising certificate, a process which did not have the same moral overtones as discipline.

[143] Above section 2.4.
[144] Below section 7.2.
[145] *Queensland Law Society Act 1952* (Qld) s 41A.

This raises the question of why – in other types of cases - disciplinary proceedings are used in preference to practising certificate procedures that are likely to be quicker and cheaper? It is suggested that the issue is not seen as simply the removal of an individual lawyer from practice; disciplinary proceedings play a symbolic role that practising certificate powers cannot. This explanation is also supported by noting the number of individuals brought before a disciplinary tribunal even though they were no longer practising law – as many as 22%.[146] This strengthens the argument that much of the role of disciplinary proceedings is a demonstrative and symbolic one rather than a practical, instrumental one.[147] It could be that the proceedings were taken to deter other practitioners from similar misconduct, which is consistent with the protective role. Alternatively, the proceedings could be playing a role in a legitimation project.

What evidence do we have as to the choices that professional bodies have made? If up to 22% of solicitors were no longer practising law when they were brought before the disciplinary tribunal, up to 78% of cases the society allowed an individual to continue to practise pending the disciplinary hearing. Any comparison of choices made by the society is only valid for the period when the society had the power to prosecute discipline as well as powers in relation to practising certificates. The society no longer has any prosecution role.[148] Similarly, the Bar Association of Queensland has never had a statutory

[146] In the period 1977-2000, 22% of solicitors were no longer practising at the time of their appearance before the Queensland disciplinary tribunal: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 64, 16. This figure does not distinguish between those practitioners who had voluntarily resigned from practice and those who had been refused a practising certificate by the Queensland Law Society.
[147] Hawkins, above n 142, 416.
[148] This was removed by *Legal Profession Act 2004* (Qld).

prosecution role and has only recently been given powers in relation to practising certificates.

Despite the potential power in relation to practising certificates, very little information is available as to how often the Queensland Law Society used that power. Unlike the extensive reporting required in relation to discipline, very little recording in relation to practising certificates has been required or provided.[149] Evidence of the suspension or cancellation of practising certificates may only come to light if the practitioner challenges the cancellation in court, and this has been rare.[150] If the society has exercised its powers in relation to practising certificates less often than anticipated by the legislation, it could be argued that it has abrogated the protective function allocated to it. But conversely, these certification powers have the potential to assist a legitimation project, by allowing matters to be handled behind closed doors and forestalling the need for the profession to air its dirty linen in public. It is difficult to criticise the society if it chose instead to bring

[149] The Queensland Law Society annual reports advise on the number of certificates issued each year, but not the number refused, suspended or cancelled. Clues as to the frequency with which the powers are used are rare. The 2000-2001 Annual Report noted that the practising certificate of two of six solicitors awaiting disciplinary hearing in relation to trust account matters had been suspended: Queensland Law Society, *73rd Annual Report* 2000-2001, 47. This is the only reference to numbers of suspensions or cancellation in annual reports between 2000 and 2005.

[150] One reported case is *Cheney v Queensland Law Society Inc* [2001] QSC 338, where the certificate had been cancelled by the society after an audit by the society revealed a number of breaches of the *Trust Accounts Act 1973* (Qld) and a shortfall of $9,399.50 in her trust account. She was subsequently struck off: SCT55, 30 April 2002. The only other reported case is *Jensen v Queensland Law Society Inc* [2006] QSC 27. Evidence that the society cancelled or suspended a solicitor's practising certificate can arise through other means, as in *Barristers Board v Khan* [2001] QCA 92: in an application to strike the name of a barrister from the roll, it was noted that, when he had previously practised as a solicitor, the society had suspended his practising certificate after he improperly deposited $35,000 into his general account. He was fined $1,000 by the disciplinary tribunal in 1997 for failing to respond to requests for information: SC 390, 15 July 1997.

public disciplinary proceedings. These questions cannot be answered without more information about the use of certification powers.[151]

5.5 CONCLUSION

This chapter has sought to explain why a theory of legitimation would suggest that, once a matter reaches a disciplinary tribunal or court, it is likely that the practitioner will be struck off, rather than suspended or fined. The chapter has also sought to demonstrate that the use of suspensions poses difficulties from a protective point of view, because the courts have indicated the very limited circumstances in which a suspension is a valid protective order.

The chapter has also noted that disciplinary proceedings were brought in 22% of cases, despite the fact that the individual was not practising law at the time of the hearing.[152] Was discipline necessary in such cases, given that any danger to the public had been effectively removed? Disciplinary proceedings were still necessary if they play a demonstrative - rather than a practical - role. What of, potentially, the 78% of cases in which the solicitor was still practising at the time of the disciplinary hearing? In a number of these cases, the society (as prosecutor) may have submitted to the tribunal that the solicitor was unfit to practise. Why then did the society allow them to continue to practise pending the disciplinary hearing? Many of those who have appeared before the solicitors'

[151] As noted above section 3.10.2.1.
[152] Above section 5.4.3. It is not known how many of these had chosen not to practise and how many had had their practising certificates cancelled.

disciplinary tribunal in the past have been sole practitioners,[153] and the courts have warned against exercising administrative intervention powers against sole practitioners, except in the most extreme circumstances,[154] given it will effectively destroy their practice.[155] This is likely to have been a consideration. Even if there were partners to keep a practice alive, the society may have been reticent to fully exercise its practising certificate powers. If an individual was to be denied the right to practise, this would be decided by a statutory tribunal, not by the professional body itself.

Once the matter has been brought before the disciplinary tribunal, it would be expected that strike off orders would play the clearest demonstrative role. Instead the chapter has provided evidence to show that the tribunal which disciplines solicitors has continued to impose suspensions at a higher rate than would be expected, even to the point of defying court rulings. The high rate of suspensions challenges the effectiveness of any demonstrative role and questions the explanatory power of a legitimation theory, because suspensions send ambiguous messages to the public and risk a damaging appeal.

Why then are suspensions used so commonly by the tribunal in preference to strike off orders? One explanation is that the tribunal has operated under a more retributive model than has been previously conceded.[156] In other words, in cases in which the tribunal would otherwise strike a lawyer from the roll, the tribunal has taken personal mitigating factors into account to spare the individual the greater shame of being struck off. The

[153] Between 1977 and 2000, 60% of practitioners who were still practising at the time of the tribunal hearing were sole practitioners: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 64, 16.
[154] *Sheikh v The Law Society* [2005] EWHC 1409 (Ch).

tribunal may hope that the lawyer will choose to retire from practice voluntarily following the suspension. In addition, given the high rate of sole practitioner solicitors who have appeared before the tribunal,[157] the tribunal may have believed that the *practical* effect of the suspension order would be to remove the lawyer from practice, as it may be difficult for a sole practitioner solicitor to resurrect their practice after their period of suspension.[158] Although it is unknown how many suspended lawyers did resume practice, if a number of them do voluntarily retire from practice, a suspension order may be of greater protective effect than first thought. This is particularly true when combined with the fact that the Queensland Law Society[159] has had extensive statutory powers to refuse practising certificates, even when a period of suspension imposed in disciplinary proceedings had been completed. Therefore, in practical terms, a decision as to whether an individual would or would not be allowed to practise becomes an administrative rather than a judicial decision, and the disciplinary tribunal plays more of a demonstrative rather than a practical role.

Most of this chapter has considered the suspension of Queensland solicitors. Only one Queensland barrister has ever been suspended in disciplinary proceedings, and that was in 1882.[160] Those Queensland barristers who have faced formal disciplinary proceedings have usually been struck off. The obvious explanation for this would be that only the

[155] Ibid [9].
[156] See discussion of retribution above section 1.3.3.
[157] Between 1977 and 2000, 60% of practitioners who were still practising at the time of the tribunal hearing were sole practitioners: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 64, 16.
[158] *Sheikh v The Law Society* [2005] EWHC 1409, [9].
[159] And since 2004, the Bar Association of Queensland.
[160] *R v Byrne; in re Swanwick* (1882) 1 May 1882, Queensland Law Journal 66, discussed above section 5.3.13.

most serious disciplinary matters involving barristers have been brought before the court, lessening the likelihood of a suspension order. Another reason why the court did not suspend barristers could be the absence of practising certificates for barristers until 2004. In other words, there was no 'second line of defence' as there was in relation to solicitors. In addition, it must be noted that it has been the solicitors' disciplinary tribunal which has imposed suspensions while the Supreme Court has generally discouraged their use. Queensland barristers had no equivalent tribunal which may have been similarly inclined to order suspensions.

Equally, the court may have been loath to extend the same 'mercy' to barristers as it appeared to have sometimes extended to solicitors. There could be a number of reasons for this. It could be that the court only saw the most serious cases involving barristers, felt that the bluntness of the inherent jurisdiction limited its disciplinary choices, applied a different standard to barristers,[161] or saw the conduct of barristers in a simpler, two dimensional way. All of these reasons may explain why, in relation to barristers, there often seemed to be a much simpler disciplinary choice - between striking off or not striking off.

I will take up the issues of 'mercy' and retribution more fully in the next chapter, in the context of disciplinary fines, and in Chapter Seven, where I discuss the relevance of personal factors.

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[161] The vast majority of judges were once barristers themselves, not solicitors.

CHAPTER SIX

DISCIPLINARY FINES

6.1 INTRODUCTION

In Chapter One I noted the mix of features present in criminal sentencing, where a court can aim to censure, protect and rehabilitate simultaneously.[1] In Chapter Two I documented the courts' insistence that the primary aim of discipline is to protect, not punish. The previous chapter is the first chapter in which I question the degree to which disciplinary outcomes have been consistent with the courts' pronouncements. In particular, I looked at orders which incapacitated lawyers from practising law and presented evidence as to the frequency with which suspension orders have been used by the solicitors' disciplinary tribunal. This result would be surprising both to lawmakers and from the perspective of theories of legitimation, given that a suspension order does not categorically and permanently remove a person from legal practice. I raised the possibility that retributive forces may have been at work in the disciplinary system more often than has been previously conceded – hence the high rate of suspensions. I look at another form of disciplinary outcome - fines - in this chapter. Again, I question whether the use of fines has been consistent with the 'protect not punish' mantra. Given that

disciplinary fines leave an individual in practice, their protective function becomes more tenuous – fines could only protect through deterrence. This leaves more room for retribution to play a role.

As I cautioned in Chapter Three, it is not suggested that the members of the tribunal are necessarily making conscious choices in pursuing a particular mix of protection and retribution in making any one order.[2] Those members are no better trained in criminology than the newly appointed judges referred to by Hart,[3] and it is notoriously difficult to establish causal relationships in matters involving as many actors as are involved in disciplinary proceedings. However, this is not to deny the usefulness of looking for patterns in the approach of the disciplinary tribunal and at least considering possible explanations for any patterns found.

6.2 Power to Impose Disciplinary Fines

6.2.1 *Solicitors*

Fines are not new in the discipline of Queensland lawyers – at least in relation to solicitors. The Supreme Court of Queensland has the power to impose fines in the

[1] Above section 1.3.2. This is also the case for financial penalties in many regulatory settings: Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 18 *Melbourne University Law Review* 440-475.
[2] Above section 3.2.
[3] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford, 1968) 168-9

exercise of its inherent power to discipline practitioners.[4] The disciplinary tribunal established in 1927 for the discipline of solicitors was given extremely broad powers in regard to the order which it could make. The *Queensland Law Society Act 1927* (Qld) stated that the disciplinary tribunal had

> ... subject to Rules of Court made under the authority of the Act, ... power after hearing the case to make any such order as to striking off the roll or suspending from practice either conditionally or otherwise, the practitioner to whom such application relates or as to the payment by any party of costs or otherwise, in relation to the case as before the commencement of the Act the court would have had power to make in accordance with the authority and practice of the court.[5]

Therefore, the tribunal had the power to make the same range of orders as the court within the court's inherent jurisdiction.[6] However, Rules of Court were introduced by the Supreme Court of Queensland in 1928 to fix the maximum fine at £100.[7] In 1979, the court rules were again amended to increase the maximum fine from $1,000 to $5,000.[8] The legislation governing the lower level disciplinary tribunal, the Solicitors Disciplinary Tribunal, which operated from 1985-97, gave the tribunal the power to 'order the

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[4] *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 505 (Thomas J, with whom Connolly and Ambrose JJ agreed), citing two cases from New South Wales: *Re Heydon* (1901) 1 SR (NSW) 81 and *Re Fanker* (1913) 30 WN (NSW) 39. The Supreme Court of Queensland exercised its inherent power to impose disciplinary fines upon legal practitioners in two cases decided before the introduction of the statutory tribunal for solicitors: *Re Godfrey* [1879] BCR 30 May (£20) and *Re Cooper* (1890) 4 QLJ 49 (fined £50 and suspended for 12 months). The Court of Appeal has recently confirmed that the court has the power to impose a fine within its inherent jurisdiction: *Barristers' Board v Darveniza* [2000] QCA 253, 37 (Thomas J, with whom McMurdo P and White J agreed). The barrister in that case was struck off.

[5] Section 5(3)(a). The subsequent legislation retained this wording, merely renumbering the section: *Queensland Law Society Act 1952* (Qld) s 6(3).

[6] The Supreme Court retains this inherent jurisdiction: *Legal Profession Act 2004* (Qld) s 579. However, the court has indicated that it would prefer most disciplinary matters against solicitors to be brought within the statutory framework: *Queensland Law Society Inc v Smith* [2001] 1 Qd R 649, 651 (Thomas JA, with whom McPherson JA and Atkinson J agreed). England has a similar preference that parties avoid invoking the inherent jurisdiction: *Solicitors Act 1974* (UK) s50.

[7] Rules of Court Made in Pursuance of '*The Queensland Law Society Act of 1927*', Queensland Government Gazette, 20 October 1928, 1380. The fine was to be in lieu of a strike off or suspension order. The power of the Council of the Queensland Law Society to make rules with the status of subordinate legislation was contained in *Queensland Law Society Act 1952* (Qld) s 5A(1) and (2). The introduction of these rules is discussed in more detail above section 4.5.3.

[8] Rule 26, Rules of Court, *Queensland Government Gazette* 31 March 1979, 1223.

practitioner to pay to the Society such sum not exceeding $5,000 as the Tribunal thinks fit'.[9]

In September 1987, the Rules of the Supreme Court of Queensland were amended to increase the maximum amount that the higher level disciplinary tribunal, the Statutory Committee, could impose to $100,000, a twenty fold increase from the former limit. The committee was given quite a bit of flexibility in relation to the fine: it could be imposed in addition to a strike off or suspension order and the committee could order any amount of it to be paid 'to any person aggrieved'.[10] In other words, the committee could treat the fine as either punishment or compensation to clients.

Rules of Court are made by the Governor on the advice of the Executive Council, but only following a recommendation by the Judges of the Supreme Court of Queensland – themselves former lawyers, and to date always barristers. It is fascinating to consider why Queensland judges decided in 1987 that it was necessary to increase the maximum amount that solicitors could be fined from $5,000 to $100,000, an amount significantly higher than the maximum amounts that apply to lawyers in New South Wales[11] and Victoria,[12] even today.[13] It is also notable that[14] there was no suggestion that barristers

[9] *Queensland Law Society Act 1952* (Qld) s 6J(1)(c)(ii), (repealed), inserted by *Queensland Law Society Act Amendment Act 1985* (Qld) s 7.
[10] Section 26. Queensland Government Gazette September 1987.
[11] $75,000: *Legal Profession Act 2004* (NSW) s 562(7)(b).
[12] $50,000: *Legal Profession Act 2004* (Vic) s 4.4.19(b).
[13] In 1988 the Statutory Committee was given express statutory power to 'order the practitioner to pay to the society such sum, not exceeding the amount fixed by the Rules of Court, as the Statutory Committee thinks fit': *Queensland Law Society Act 1952* (Qld) s 6(3)(ab)(i) (repealed), inserted by *Queensland Law Society Act and Another Act Amendment Act 1988* (Qld) s 5. From 1997 the *Queensland Law Society Act 1952* (Qld) itself indicated that $100,000 was the maximum fine which the tribunal could impose. However, the Act did not refer to this amount as a 'fine' or as a 'sum' but stated that the tribunal could make an order that 'the practitioner pay a *penalty* of not more than $100,000 to the [Legal Practitioners'

should be subject to a similar regime – barristers were rarely fined even small amounts. What possible triggers could there have been for the judges to increase the maximum fine applicable to solicitors so dramatically? It does not seem likely that this was due to any request from the Statutory Committee itself after the committee found its pre-existing limit of $5,000 inadequate, as the committee had only imposed the maximum fine on three occasions[15] prior to the implementation of the increase, and was imposing fines averaging only $1,725.00 in the period leading up to the change.[16] It could be suggested that the increase to the maximum fine was designed to deal with particular problematic cases. For instance, in December 1987, a front page story in the mass media had reported that 13 Queensland solicitors were under police investigation for alleged trust account fraud totaling $1.5 million.[17] However, this does not seem to be a plausible explanation for why the judges of the Supreme Court saw fit to increase the maximum fine for solicitors from $5,000 to $100,000, as any solicitor found guilty of trust account fraud was much more likely to be struck off than fined. Much more plausible is the suggestion that judges recommended that the maximum fine be increased as a general deterrent against any form of future misconduct by solicitors, during the severe economic recession of the late 1980s.[18] As discussed later in this chapter,[19] while the technical possibility of a

Fidelity Guarantee Fund': *Queensland Law Society Act 1952* (Qld) s6R(1)(c), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s9 (emphasis added). The language of 'penalty' has been retained in *Legal Profession Act 2004* (Qld) s 280(4)(a) and the maximum fine retained at $100,000.

[14] See below section 6.2.2.

[15] SC 235, 20 February 1981; SC 250 10 June 1983; SC 292 3 March 1987.

[16] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45, 33-4, Table 11. Period = 1981- 1985. The figure given is the mean. The median fine was much lower: $575.00. During the period in which the increase came into force - 1985-1990 - the mean fine was only slightly higher: $2,112.50 (median = $1,500.00). The relevant table is reproduced below section 6.8.1.

[17] L Rowett, 'Solicitors Face Fraud Squad on $1.5M Loss', *Courier Mail* (Brisbane), 31 December 1987, 1.

[18] The world stock market crashed, and the Australian share market followed on 19 October 1987. The president of the Queensland Law Society reported in 1986-87 that members were feeling the full impact of

fine as high as $100,000 *may* have deterred some solicitors, the disciplinary tribunal never imposed fines of anywhere near that amount, with average fines remaining well below $10,000.[20] It is suggested that it is more likely to be the practice of the tribunal, rather than maximum fines 'on the books', which would send the strongest signals of deterrence, or otherwise, to solicitors facing temptation. The 20-fold increase in maximum fines therefore demonstrates an occasion on which the disciplinary 'scaffold'[21] was significantly strengthened against solicitors (but not barristers).

6.2.2 *Barristers*

Fines have not formed part of the armoury used in the discipline of Queensland barristers. Article 78 of the Memorandum and Articles of Association of the Bar Association of Queensland listed the powers of a committee of enquiry upon finding that charges against a member of the association had been found proved beyond reasonable doubt. The committee could record that the charge was found to be proved, caution the member, reprimand the member, suspend the member for a stated term or upon a condition, or expel the member.[22] The association had no power to impose a fine upon a member found guilty of misconduct or unprofessional conduct. However, in 1994, – seven years after solicitors became liable to fines of up to $100,000 - the association was reported to be advocating the introduction of a new disciplinary system for barristers with provision for

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the economic recession and the council of the society had had to make some hard decisions during the year: Queensland Law Society *Annual Report 1986-87*, 1.

[19] See Table One below section 6.8.1.

[20] Ibid.

[21] See discussion of disciplinary scaffolding above section 3.10.2.1.

[22] Article 77.

fines of up to $6,000.[23] In 1999, in its response to the Queensland State Government's Green Paper on Legal Professional Reform, the association suggested that a statutory disciplinary tribunal be established, with the power to impose fines of up to $50,000.[24] The *Legal Profession Act 2004* (Qld) - which makes solicitors and barristers amenable to the same range of disciplinary orders for the first time – provides for fines of up to $100,000.[25] Thus, while the disciplinary financial liability of solicitors increased dramatically in 1987 with the sponsorship of the judges of the Supreme Court and has since remained static, the liability of barristers increased from nil to $100,000 in 2004.

Although the Supreme Court could discipline a barrister or solicitor by way of a fine in its inherent jurisdiction,[26] the court has only rarely endorsed the use of fines in the disciplinary context, as later discussion shows.[27]

6.3 Protective Effect of Fines

It is in relation to the imposition of fines that retribution is most likely to be apparent. A fine does not have a direct protective effect as when a practitioner is removed from contact with clients. A fine does not expel a practitioner from the profession unequivocally as does a strike off order. Nor does a fine even temporarily incapacitate a

[23] James Woods, 'Barristers Face Work Penalties for Misconduct' *Courier Mail*, 2 June 1994, 20.
[24] Bar Association of Queensland, *Response of the Bar Association of Queensland to the Green Paper on Legal Professional Reform*, June 1999.
[25] *Legal Profession Act 2004* (Qld) s 280(4)(a).
[26] *Barristers' Board v Darveniza* [2000] QCA 253 at [37] per Thomas JA, citing *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 505. The Supreme Court of Queensland has imposed fines in *Re Godfrey* [1879] BCR 30 May and in *Re Cooper* (1890) 4 QLJ 49 (FC). Although both of these latter cases involved a solicitor, the court's inherent powers are the same for both branches of the profession.
[27] See discussion below section 6.6.

practitioner in the same way as an order which suspends from practice. When a fine is imposed, the practitioner can continue to practise. If a tribunal finds that a practitioner's past conduct has transgressed professional standards, but allows them to remain in practice with only a fine, then the tribunal must have found that the individual did not pose any future risk to the public, despite the past transgression. Any protective effect of a fine must therefore be indirect, through deterrence. More contestable may be a claim that retribution can protect.

It is generally thought that fines carry less stigma[28] than a strike off or even a suspension order. In particular, for many years[29]it was the practice of the Queensland Law Society not to name practitioners who had only been fined, so the degree of public shame attached to a fine was much less than in the case of a strike off order or suspension, as both of these latter orders must necessarily be publicised.[30] Therefore, a fine usually only deterred in an economic sense.[31]

In addition, it could be argued that the imposition of a fine merely duplicates the economic sanctions that can be imposed upon a lawyer in other regulatory contexts, such as through court orders against lawyers for wasted costs,[32] civil actions to recover

[28] On the issue of shame, or stigma, see Nigel Walker, *Punishment, Danger and Stigma: the Morality of Criminal Justice* (Barnes & Noble, Totowa, 1980) 142-163; William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, Cambridge, 1998) 203.
[29] See below section 8.3.2.3 regarding the society's policy regarding the naming of solicitors.
[30] See generally discussion in Chapter Eight regarding publicity.
[31] Posner argues that fines do not generally have the moral stigma that they may once have had: Richard Posner, *Economic Analysis of Law*, (5th ed, Aspen, New York, 1998) 247. Arguably a fine carries more deterrence value, in the sense of shame, than a censure. Censures are very rare, having been ordered in only 28 of the 473 cases heard between 1930 and 2000: Haller, above n 16, 24.
[32] *Myers v Elman* [1940] AC 282; *Harley v McDonald* (New Zealand) [2001] UKPC 20 (10 April 2001; *Flower & Hart (a firm) v White Industries (Qld) P/L* (1999) FCA 773.

damages for negligence[33] or for breach of confidence[34] and fines imposed by a criminal court.[35] By comparison, the disciplinary system is unique in its ability to strike off or suspend, to censure or to make remedial orders, such as for further legal education, supervision or counseling. Arguably, these are strengths of the disciplinary system, which it could exploit. As I discussed in Chapter One,[36] lawyers are subject to a number of forms of regulation, each with its own strengths and weaknesses and it is important that the disciplinary system recognise and exploit its most advantageous features rather than simply mimic other forms of control.[37] It is for these reasons that the use of fines in the disciplinary context should be subjected to close scrutiny.

It is most likely that the imposition of fines in the disciplinary context will mimic the punishment imposed by the criminal law. There have been court decisions in which judges have explicitly stated that they consider fines to be a form of punishment. In *Law Society of New South Wales v Moulton*,[38] Hutley J said:

> The issue which faced the Statutory Committee when it decided not to remove the respondent from the roll was not how to punish him, for this order is not a punishment (as is a fine or a reprimand), but whether he was fit to be held out by the court as a solicitor.[39]

[33] *Arthur JS Hall & Co v Simons* [2000]3 WLR 543; *Hawkins v Clayton* (1988) 164 CLR 539.
[34] *Barber v Stone* [1881] 50 LJ QB 2,; *Colborne Capital Corp. v. 542775 Alberta Ltd.* No 9301-12382 Calgary, Alberta Queen's Bench, 1995 A.C.W.S.J. LEXIS 49248; 1995 A.C.W.S.J. 634629; 55 A.C.W.S. (3d) 746 (Virtue J).
[35] Such as fines for contempt of court, such as the $4,000 fine imposed by the District Court for contempt by a solicitor, who was struck off in later disciplinary proceedings: *A-G v Gregory* [1998] QCA 409 (4 December 1998).
[36] Above section 1.6.
[37] This is a theme explored in great detail in David Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 801.
[38] [1981] 2 NSWLR 736.
[39] Ibid 751.

In the course of questioning submissions made in *Walsh v Law Society of New South Wales,* Kirby J said:

> A fine can only be a punishment, really, can it not, unless you are thinking of it conceptually as being for protection of the public but it is hard to see how the fine which goes into the coffers of the Law Society, I suppose, is for the protection of the public.[40]

Similarly, although in the context of discipline of medical practitioners, after citing passages from *Clyne v NSW Bar Association*[41] that a disbarring order 'is in no sense punitive'[42] and from *New South Wales Bar Association v Evatt*[43] that the discipline of barristers is 'entirely protective'[44], Dowsett J of the Supreme Court of Queensland has said in relation to fines and suspensions:

> I must confess to some doubts concerning the proposition in light of the range of alternative orders available under the Act. While it may be said that erasure is protective, it is difficult to say the same about suspension or a fine. Each of these orders may have a protective effect in that each may be expected to discourage practitioners from falling short of an appropriate standard of professional conduct, however that sounds very much like the deterrent aspect of punishment. Fortunately, neither party submitted that I should consider any aspect other than the protection of the public.[45]

The protective aim of discipline comes into sharper focus in relation to fines than in relation to incapacitative orders. In the above statements, both Hutley J and Kirby J describe fines, unlike strike offs and suspensions, as a form of punishment.

[40] Transcript of proceedings, *Walsh v Law Society of New South Wales* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Callinan JJ, 3 March 1999).
[41] (1960) 104 CLR 186.
[42] Ibid 201-2.
[43] (1968) 117 CLR 177.
[44] Ibid 183-4.
[45] *Re a Medical Practitioner* [1995] 2 Qd R 154, 164-5.

On a number of occasions, the Supreme Court of Queensland has only referred to strike off orders when referring to the protective aim of discipline.[46] Fines have either been omitted from the examples given, or when mentioned, some disquiet has been expressed as to their protective function. A narrow reading of such statements may leave room for fines - but not strike off orders – having a retributive role. A deeper analysis of the role of fines in the discipline of lawyers is therefore warranted.

6.4 CRIMINAL PROCEEDINGS?

Related to the question of whether discipline aims to punish, is the question whether disciplinary proceedings are criminal in nature or not. Strictly speaking, once a disciplinary tribunal is given power to impose fines, then those proceedings are criminal in nature. Proceedings are considered 'criminal' if the statute allows imprisonment, even as a last resort.[47] A Queensland lawyer who does not pay a disciplinary fine can be dealt with under the *Justices Act 1886* (Qld),[48] which allows for imprisonment for non-payment of 'penalties'.[49]

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[46] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 201-2: 'a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege'; *Barristers' Board v Darveniza* [2000] QCA 253, [32]: '[removal of the right to practise is done] not by way of punishment but in order to protect the public and maintain public confidence in the administration of justice'.

[47] *Queensland Law Society Inc v A Solicitor* [1989] 2 Qd R 331, 336 (McPherson J, with whom Dowsett J agreed).

[48] Ibid. McPherson J relied on s 8 (later s 5L) and s 47 of the *Queensland Law Society Act 1952* (repealed). Section 8 said:

> *Subject to any rules made in that behalf*, all fees, subscriptions, fines, and dues payable under the rules and by-laws of the society or of the council *or under this Act* may be sued for and recovered in a summary way under the provisions of the *Justices Act 1886*... [emphasis added]

Given the initial proviso, it would therefore seem that s 8 needed to be read subject to *Rules of the Queensland Law Society Inc 1987* s 124 (formerly Rule 109 *Rules of Qld Law Society Inc 1948*) which read:

Disciplinary systems in the United States do not impose fines[50] because they see problems in the analogy to criminal sanctions. Disciplinary agencies in the United States believe that, if they were to consider imposing any form of monetary penalty upon a practitioner, this would be tantamount to a criminal penalty, thereby entitling the practitioner to a level of due process which is not required while the range of sanctions is limited to the right to practise and censures.

> Rule 124: Any person contravening any provision of *these Rules* shall be guilty of an offence, which, *save and except where the Statutory Committee or Solicitors' Disciplinary Tribunal is empowered to deal therewith*, may be prosecuted summarily under the provisions of the *Justices Act 1886-1987* and shall be liable (where no other punishment is provided) to a penalty not exceeding one thousand dollars.' [emphasis added]

It is argued that r 124 only applied to breaches of the Rules, thus the exclusion of matters within the jurisdiction of the Statutory Committee or Solicitors' Disciplinary Tribunal did not act to exclude fines imposed under s 6 for malpractice, professional misconduct or unprofessional conduct rather than for breach of a specific rule. Justice Thomas in *Adamson* confirmed that proceedings before a magistrate brought under r 124 were criminal in nature: *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 506.

Even if it was thought that r 124 acted to limit the possible imprisonment for non-payment of disciplinary fines, s 47 of the *Queensland Law Society Act 1952* (Qld) provided additional powers to proceed under the Justices Act 1886. Section 47 (repealed) read:

> *In addition* to any other right, remedy, or power vested in the Society, Council, or secretary, whether by this Act or otherwise, *any sum of money whatsoever payable under this Act* may be recovered either in a summary manner under the provisions of the *Justices Act 1886* or by action for a civil debt due to the Society' [emphasis added].

That imprisonment was the ultimate sanction for non-payment of a fine was also implied by *Queensland Statutory Committee Rules 1987* (Qld), s 37 (repealed) which specifically stated that no person could be imprisoned for non-payment of *costs* in relation to a disciplinary hearing. The Rules were silent on the consequences for non-payment of fines. The enforcement of costs is no longer dealt with as a separate issue in either the Act or the Rules and therefore costs are now recoverable in the same manner as the fine: *Justices Act 1886* (Qld) s 160.

[49] *Justices Act 1886* (Qld) s 161, 163A. See also *Qld Law Society Inc v A Solicitor* [1989] 2 Qd R 331, 336, citing *Michel v Medical Board of Qld* [1942] St R Qd 1, 33. The amount payable under the *Legal Profession Act 2004* (Qld) is still described as a 'penalty': s 280(4)(a). Although in *Ooi v Medical Board of Queensland* [1997] 2 Qd R 176 the Queensland Court of Appeal held that proceedings before the Medical Assessment Tribunal were not criminal proceedings, the court did not expressly state its view on the impact of a power to impose fines.

[50] The range of available sanctions in use throughout the United States are set out in American Bar Association, *ABA Standards for Imposing Lawyers Sanctions*, http://www.abanet.org/cpr/regulation/standards_sanctions.pdf at 15 March 2006.

In the words of an American Bar Association guideline on appropriate dispositions in lawyer discipline:

> Fines are punitive and criminal in nature and should be avoided. The use of fines in discipline might be deemed to imply that the proceedings are criminal and require proof beyond a reasonable doubt, trial by jury, and other standards of criminal due process.[51]

Bené has argued that fines should be introduced into the disciplinary system in the United States.[52] He suggested that fines are particularly appropriate given that much of lawyer misconduct is economic in nature rather than a 'crime of passion',[53] that lawyers are more risk averse than the 'average criminal'[54] and that lawyers are 'wealthier than most other criminals'.[55] However, implicit in Bené's argument is the assumption that the disciplinary system deals with 'criminals' and is therefore an appendage of the criminal justice system.

The wisdom of, and juristic basis for, copying the criminal justice system is debatable. Bené has argued that the public can be protected through deterrence. Fines have the potential to deter. However, empirical evidence discussed later in this chapter[56] questions the effectiveness of fines as a form of deterrence.

Much of the debate in Queensland as to whether disciplinary proceedings are criminal in nature has arisen from a need to determine the procedural protections to be afforded to

[51] National Center for Professional Responsibility for the Joint Committee on Professional Discipline, American Bar Association, *'Professional Discipline for Lawyers and Judges*, ABA, Chicago, 1979, 112.
[52] Stephen Bené, 'Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions' (1991) *Stanford Law Review* 907.
[53] Ibid 924.
[54] Ibid 925.
[55] Ibid.
[56] See below 6.6.2.1 (specific deterrence) and 6.6.2.2 (general deterrence).

the practitioner: in *Michel v Medical Board of Queensland*,[57] the debate took place because the practitioner would not be entitled to a retrial if the proceedings were criminal in nature. He was denied a retrial. In *Queensland Law Society Inc v A Solicitor*,[58] the court needed to determine whether the Attorney-General could appeal against a dismissal of disciplinary charges.[59] It was decided that no appeal lay, as the dismissal was tantamount to a criminal acquittal. In *Adamson v Queensland Law Society Inc*[60] and in *Ooi v Medical Board of Queensland*[61] a discussion of the nature of disciplinary proceedings was necessary to determine the appropriate standard of proof. Both cases determined that the *Briginshaw*[62] standard of proof, not the criminal standard of proof applied. No procedural issue was in issue in *Council of the Queensland Law Society v Whitman*,[63] but the court stated categorically that the proceedings were not criminal in nature but directed towards protection of the public. This meant the respondent's lack of cooperation was much less acceptable than had he been a criminal defendant.[64] In summary, while some earlier cases saw an analogy between criminal and disciplinary proceedings, more recent cases have discounted this, reducing any possible role for retribution in discipline.

The particular question being considered now is the reason why a disciplinary tribunal may impose fines. Any protective function of fines is unclear, given that the practitioner

[57] [1942] St R Qd 1.
[58] [1989] 2 Qd R 331. This case was not cited in *Adamson v Qld Law Soc Inc* [1990] 1 Qd R 498, decided six months later.
[59] That is, whether this was akin to an acquittal in criminal proceedings, where no such right of appeal lies.
[60] [1990] 1 Qd R 498.
[61] [1997] 2 Qd R 176.
[62] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[63] [2003] QCA 438.
[64] Ibid [36]. See also *Law Society of New South Wales v Mc Namara* (1980) 47 NSWLR 72, 78.

remains in practice. Any argument that fines afford protection through deterrence is also tenuous, if little publicity is given to cases in which fines have been imposed. Until recently, this was the case.[65] It could be that, despite denials, the tribunal has applied fines as a form of retributive punishment. Such an argument is not weakened by the cases referred to above which have argued that disciplinary proceedings are not criminal in nature, as those cases were dealing with different issues, such as the appropriate standard of proof and rights of retrial and appeal. A disciplinary order can seek retribution, whether or not the proceedings in which such an order was made are described as criminal or not. The term 'criminal', like the term 'punishment' - given that some punishment can protect through deterrence - may cloud the issue under consideration here.

6.5 FINES CAN SERVE ONLY A LIMITED LEGITIMATING FUNCTION

6.5.1 *Fines Appear Analogous to Criminal Sanctions*

It is suggested that it is difficult to see how fines serve an effective protective function if the case in which a fine has been imposed is given little publicity.[66] The imposition of disciplinary fines may also not effectively serve any legitimation project,[67] should such a project exist. There are two reasons for this. First, fines bear too close an analogy to

[65] See below section 8.3.2.5.
[66] Publicity is considered in more detail in Chapter Eight.
[67] See discussion above section 3.10.2.2 concerning the theory of Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, Berkeley, 1977).

criminal sanctions. Second, and as will be discussed shortly,[68] if the disciplinary tribunal imposes a large fine, it risks an appeal by the Attorney-General, and poor publicity for the legal profession and its disciplinary system may result.

From the point of view of any legitimation project, what is most important is the impression given to the public of disciplinary proceedings. The profession is seeking the trust of the public. The profession will gain that trust when a practitioner is struck from the roll, because that individual is no longer a member of the legal profession and the profession has thereby unambiguously protected the public from that former member. While a suspension order does still incapacitate a solicitor, this is only for a temporary period, so suspension orders send ambiguous messages, as discussed more fully in the previous chapter. Fines hold even greater perceptual difficulty. It is even more difficult for the public to see how the imposition of a fine will protect them. From the point of view of public impression, the use of fines in professional discipline may not be consistent with a legitimation project.

In addition, any analogy with criminal proceedings may be thought to be undesirable for a legitimation project which may be expected to seek to *increase* the distance between discipline and other legal controls on lawyer behaviour, in particular the criminal law, so as to give the aura that professional discipline is a form of self-control which is much more stringent than any controls imposed upon the general populace.[69] The danger for

[68] See below section 6.5.3.
[69] See above section 3.4.

any legitimation project would therefore be that, when a lawyer is fined, their conduct is viewed as analogous to that of the petty thief or the drink driver who is fined.

But only rarely does the public become aware that a lawyer has been fined by the disciplinary tribunal.[70] Fines may be imposed in disciplinary cases for other reasons. The imposition of a fine may avoid drawing any attention to the case. As was argued in relation to orders which remove a lawyer's right to practise,[71] a legitimation project would be best served by demonstrating that very few lawyers need to be disciplined, but when some discipline becomes unavoidable, a legitimation project would require that discipline to be severe.

6.5.2 *Fines as Retribution*

The preceding discussion explained why it is often difficult to see how fines will protect or serve a legitimation project. It is possible that notions of retribution played a greater role in the use of a fine. The tribunal may have sensed that the public would be appeased to see individual retribution. The public may be more satisfied with a fine than an order which did not punish the practitioner but, for instance, required simply that the practitioner work under the supervision for a period of time. While the latter form of supervisory order may in fact protect the public more than the mere imposition of the fine, it is arguable that the fine leaves the public with a greater sense of justice and

[70] Discussed more fully below section 8.3.23.
[71] See above section 5.2.1.

vindication in the individual case, as it involves greater censure.[72] However, the public's impression of the legal profession overall may remain diminished by its knowledge that the misconduct occurred at all, and by the profession's failure to strike the practitioner off the roll. And of course, this sense of individual retribution requires the public to have been aware that the individual had been punished.[73] The discussion of publicity in Chapter Eight shows that this has not normally been the case in Queensland.[74]

6.5.3 *The Risk of Appeal*

The imposition of a fine is also risky for the primary disciplinary tribunal as there is a chance of an appeal being lodged against its decision. This would be damaging to any legitimation project because the appeal will bring the matter into open court and give the court an opportunity to criticise the tribunal for being too lenient.

An appeal against the imposition of a fine would rarely be lodged by the practitioner as a fine allows them to remain in practice and, under Queensland Law Society policy until July 2002,[75] they were not publicly named. It would be unlikely that a practitioner would risk the publicity and costs of an appeal against the imposition of a fine and in fact no practitioner in Queensland has ever so appealed, even when the fine was as large as $25,000 or $40,000.[76] Any appeals upon the basis that a fine was an inappropriate order

[72] Above section 1.3.4.
[73] Above section 1.3.5.
[74] Below section 8.3.
[75] See below section 8.3.2.3.
[76] The appellant in *Re a Solicitor* [1953] St R Qd 149 was fined £5 by the Statutory Committee. His appeal was not against the order made but against the finding of professional misconduct. The appeal was

in the circumstances of the case have been lodged by the Attorney-General,[77] by both the Attorney-General and Queensland Law Society[78] or by the society alone.[79]

6.6 COURT'S ATTITUDE TO DISCIPLINARY FINES

The lack of appeals against fines means that the Supreme Court has not been required to rule on the appropriateness of fines as often as it has in relation to suspensions and strike off orders. However, there is evidence to suggest that the court does not consider fines to be an appropriate method for disposing of disciplinary matters.

It is not only in appeals against the imposition of a fine that the court has an opportunity to comment on their appropriateness. In any case in which the court considers an order suspending a practitioner or striking a practitioner from the roll to be inappropriate, it is free to replace it with any other order, including an order fining a practitioner. This is

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successful, on the basis that a letter sent pursuant to Rule 76 (later s 5G and now *Legal Profession Act 2004* (Qld) s 269) was sent without proper authority.

[77] *Attorney-General v Kehoe* [2001] 2 Qd R 350; *Attorney-General v Delaney* [2000] QCA 504. It was only in 1938 that the Attorney General was given the power to appeal a decision of the Statutory Committee: *Queensland Law Society Act 1927* (Qld) s 5(4) as amended by *Queensland Law Society Amendment Act of 1938* (Qld) s 2(iv). The appeal power was later moved to s 6Z and is now contained in *Legal Profession Act 2004* (Qld) s 292(1). The 1938 amendment would appear to have been in response to a number of cases before the Statutory Committee in which only small fines were imposed despite large misappropriations: *Re M, A Solicitor* [1938] St R Qd 454, 457, where Webb J commented:

> The heavier punishments recently inflicted can safely be assigned to action in Parliament, and to nothing else. Indeed the statement prepared by the Registrar [of all punishments imposed by the Statutory Committee in the previous three years] shows convincingly that the clemency of the Committee was extended without discrimination, and no doubt it would have reached the appellant M had he been dealt with before action in Parliament had been taken or foreshadowed.

Between 1935 and 1940, the tribunal had become more lenient, with the rate of strike offs dropping from 46% to 26% of all orders made and average fines dropping from £24 to £21: Haller, above n 16, 28, 36.

In addition to giving the Attorney-General a right of appeal, the 1938 amendments also required a copy of all orders of the Statutory Committee to be given to the Attorney-General, widened the definition of actionable conduct from 'illegal or professional misconduct' to 'malpractice, professional misconduct or unprofessional conduct or practice' and increased the powers of auditors. See above section 2.4.3.4.

[78] *Attorney-General v Bax* [1999] 2 Qd R 9.

[79] *Council of the Queensland Law Society v Lowes* [2003] QCA 201.

because on appeal, the court has all the powers of the tribunal.[80] Therefore, the court will have suggested an aversion to fines simply by its disinclination to impose a fine upon appeal and by its omission to even discuss fines as an option available to it.

Prior to the creation of a statutory framework for the discipline of solicitors in Queensland, the Supreme Court did impose fines for professional misconduct when exercising its inherent jurisdiction.[81] But following the introduction of the statutory framework in 1927, on an appeal by any interested party against a tribunal decision in Queensland, it has been very rare for the court to allow the payment of a fine to stand, and this has only occurred in relatively recent cases.[82] The court has never substituted an order that the practitioner pay a fine for any alternative order imposed by the tribunal. In disciplinary matters which have come before the court in Queensland and where the court has been satisfied that there was some conduct requiring discipline, the court has preferred to rely on orders which incapacitate the practitioner - in other words, orders which strike off or suspend rather than fine the practitioner. This makes the judges' sponsorship of the amendment of the Rules of Court in 1987, increasing the maximum fine to which a solicitor was exposed from $5,000 to $100, 000, all the more curious.[83]

[80] *Legal Profession Act 2004* (Qld) s 580(1).
[81] The court, in its inherent jurisdiction, has imposed fines upon solicitors: *Re Godfrey* (1879) BCR May 30 (FC), (20 pound fine, imposed 50 years before the statutory disciplinary framework); *Re Cooper* (1890) 4 QLJ 49 (FC), (fined £50 and suspended). The Supreme Court of Queensland has indicated that the court could also impose fines upon barristers: *Barristers' Board v Darveniza* [2000] QCA 253, 37 (Thomas J), with whom McMurdo P and White J agreed, although this does not have appeared to have ever been done in Queensland within the court's inherent jurisdiction.
[82] *A-G v Kehoe* [2001] 2 Qd R 350 ($7,500 fine upheld); *A-G v Delaney* [2000] QCA 504 ($15,000 fine upheld). The court also refused to interfere with a $15,000 fine imposed in *Queensland Law Society Inc v Lowes* [2003] QCA 201, but the issue in that case was whether there was evidence of dishonesty or not. The court concluded there was not.
[83] See above section 6.2.

A typical example of the court's attitude to fines can be seen in *Adamson v Qld Law Society Inc.*[84] The case received attention because of the court's apparent conflation of the tests for professional misconduct and unprofessional conduct.[85] Adamson had been struck from the roll by the Statutory Committee for sharing receipts with an unqualified person. One issue for the court's determination was the standard of proof required in disciplinary proceedings. The court considered the types of orders which a statutory disciplinary body could make. If the disciplinary body could impose a fine in the nature of a criminal penalty, then the criminal standard of proof would need to be satisfied.[86] Chapter Two documented examples in which it appeared that at least some members of the court were unfamiliar with the legislation they were applying.[87] *Adamson v Qld Law Society Inc*[88] provides another example of this. The court seemed unaware that, under the *Queensland Statutory Rules 1987* (Qld), the Statutory Committee could fine a practitioner up to $100,000.[89] Justice Thomas stated that 'the Statutory Committee has no power to impose a pecuniary penalty'.[90] This may explain why, in setting aside the order of the Statutory Committee striking the practitioner from the roll, the court did not appear to look beyond the option of a 12 month suspension. It is interesting to surmise whether the court may have imposed a different order had it been aware of the power to fine, as the court did note as a mitigating factor that the risk to the public appeared minimal.[91]

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[84] [1990] 1 Qd R 498.
[85] David Searles, 'Professional Misconduct - Unprofessional Conduct: Is There a Difference?' (1992) *Queensland Law Society Journal* 239.
[86] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[87] See 2.4.3.4.
[88] [1990] 1 Qd R 498.
[89] The imposition of a fine could be in addition to an order striking off or suspending a practitioner: Rule 24.
[90] *Adamson v Qld Law Soc Inc* [1990] 1 QdR 498 at 506 per Thomas J (with whom Connolly and Ambrose JJ agreed).
[91] Justice Thomas noted that there was 'a failure to find any breach of the duty of supervision [and an] absence of any disservice to clients: *Adamson v Qld Law Soc Inc* [1990] 1 QdR 498 at 508 per Thomas J,

In *Re Wheeler*,[92] the tribunal had suspended the practitioner for three years.[93] The Queensland Law Society appealed against that order and the practitioner lodged a cross-appeal against both findings and orders. While Dowsett J[94] found that three findings of professional misconduct could not be sustained, he still considered the three year suspension to be an appropriate order, given the findings which were sustainable. It is not surprising that His Honour did not discuss alternative orders, such as fines, given that the period of suspension had already been served.

In *A-G v Bax*, [95] upon appeal by the Attorney-General, the Queensland Court of Appeal overturned a fine of $15,000 imposed by the tribunal and ordered that the practitioner be struck from the roll. The practitioner had been found guilty by the disciplinary tribunal of backdating a document and misleading a creditors' meeting.[96] Once the court determined that these actions were taken with dishonest intent and occurred over a period of time, it is not surprising that it found him unfit to practise and struck him from the roll.[97] The court thereby implied that a fine, even at the maximum of $100,000, was inappropriate in such circumstances. The decision in *Bax* suggests that the court did not believe that fines could protect the public as adequately as some other forms of orders. Accordingly, it is

with whom Connolly and Ambrose JJ agreed. Most telling against the practitioner were misleading statements made in the course of the Law Society investigation.

[92] [1992] 2 Qd R 690.

[93] SC 291, 12 March 1987.

[94] With whom Macrossan CJ and Ryan J agreed.

[95] [1999] 2 Qd R 9.

[96] *Re X* (1997) 2 Disciplinary Action Reports 6, SCT 393, 29 July 1997.

[97] Shepherdson J hinted that, had Bax pleaded guilty and shown 'genuine remorse and contrition,' he may not have been struck off, although his Honour stressed that the result would not have been 'necessarily different' in such a case: [1999] 2 Qd R 9, 25

difficult to imagine in what circumstances the court would consider a $100,000 fine to be the *right* order.

It is only in more recent times that the Court of Appeal has allowed fines to stand. In *Attorney-General v Kehoe*[98] the tribunal had fined the practitioner $7,500 for unprofessional conduct. The practitioner was found to have failed to supervise his secretary which led to the secretary deceiving a client as to a large discrepancy between a valuation and the contract price. The Attorney-General argued that the practitioner should be suspended, so as to deter other practitioners from failing to 'control their practices'.[99] However, the court did allow the fine of $7,500 to stand, on the basis that the practitioner had not shown any 'moral turpitude',[100] the error was quickly remedied, no actual harm resulted, there was no harm to the public, and the practitioner had been seriously affected by the event, had suffered ignominy and had shown remorse.[101] While this was the first appellate decision in which the Supreme Court allowed a fine to stand, the court did not take the opportunity to discuss the proper role of fines as a disciplinary measure. Thomas JA did note that strong elements of disgrace were attached to orders striking off or suspending a practitioner,[102] again allowing the inference that a fine of any magnitude did not involve the same degree of shame.

In a case related to *Kehoe*, *Attorney-General v Delaney*,[103] the tribunal had imposed a fine of $15,000 and ordered the practitioner to pay compensation of $7,000 to each of

[98] [2001] 2 Qd R 350.
[99] Ibid [28].
[100] Ibid [27].
[101] [2000] QCA 222, [27], [29] (Thomas JA, with whom de Jersey CJ and Ambrose J agreed).

three complainants. Upon appeal, the Attorney-General argued that Delaney should be struck off while the Queensland Law Society argued that either a heavy fine or a suspension should be imposed. Byrne J, with whom Davies JA agreed, thought that the conduct was 'most unsatisfactory'. However, he was unwilling to consider the penalty to be 'manifestly inadequate' and described the $15,000 fine imposed by the tribunal as 'substantial'[104] given that no 'moral turpitude' was involved, the practitioner had practised for almost 30 years without a complaint to the Queensland Law Society, had a number of character references, was remorseful, had agreed not to do any further contributory mortgage work, had co-operated with the society investigation and had 'apologised to the profession'.[105] McMurdo P, in agreeing to the order and reasons of Byrne J, also noted that 'the penalty imposed protected the public from any further risk from the respondent's mismanagement of mortgage loans.'[106]

The third case in which the court allowed a disciplinary fine to stand was *Council of the Queensland Law Society Inc v Lowes*,[107] but there the court felt unable to interfere with the tribunal's order given the lack of information about the tribunal's reasons.[108] The case was not an appropriate vehicle for a discussion of the proper role of disciplinary fines.

[102] Ibid [28].
[103] [2000] QCA 504.
[104] Ibid [35]. This is well below the statutory maximum of $100,000.
[105] Ibid [35-37].
[106] Ibid [12]. Her Honour does not appear to be claiming that the fine would protect the public. Instead, she appeared to be referring to the undertaking by the practitioner to not engage in any further contributory mortgage work.
[107] [2003] QCA 201.
[108] Ibid [21]. The court went on to criticise the court for the lack of reasons: at [23] – [25].

In summary, no appeal against the imposition of a fine was heard by the Supreme Court until *Attorney-General v Bax*[109] in 1998, despite the fact that fines have been the most common form of order imposed by the tribunal in its 76 year history.[110] Even in appeals in which the court considered it necessary to set aside an order made by the tribunal, the court avoided the use of fines. The court imposed fines on at least two occasions when exercising its inherent jurisdiction,[111] but both of these cases were decided well before the Australian courts clearly distinguished the protective aim of disciplinary proceedings from the punitive aim of criminal proceedings.[112] There is some evidence that a fine was not utilised in at least one statutory appeal because the court did not seem to be aware that fines were an available option.[113] Other evidence suggests that the court may not have believed that a fine adequately protected the public, at least in the cases which came before it.[114]

6.7 The Role of Large Fines

Given the proceeding analysis of the Supreme Court's attitude to fines in general, and that previous cases cited involved maximum fines of $15,000, it is difficult to see what role the option of large fines could play other than as regulatory scaffolding. The larger the fine imposed by the tribunal in a case, the harder it is to argue that the order can be perceived as serving a protective or legitimating function. A large fine indicates how

[109] [1999] 2 Qd R 9.
[110] See the more detailed discussion of the tribunal's use of fines below section 6.8.
[111] *Re Godfrey* [1879] BCR 30 May (£20); *Re Cooper* (1890) 4 QLJ 49 (fined £50 and suspended for 12 months).
[112] See discussion above section 2.3.2; 2.5.1.
[113] *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 506 (Thomas J).
[114] *Re Wheeler* [1992] 2 Qd R 690; *A-G v Bax* [1999] 2 Qd R 9.

seriously the tribunal viewed the conduct. The larger the fine, the more serious the misconduct and, accordingly, the more likely that issues of fitness to practise would seem to be relevant. A large fine at least raises the question whether that lawyer is less fit to continue to practise than is a lawyer who receives a smaller fine. Therefore, a large fine would seem more likely to risk adverse attention from the Attorney-General or Legal Services Commissioner. An appeal would be disadvantageous for any legitimation project as it is more likely to attract adverse publicity than the original tribunal hearing and gives the Supreme Court the opportunity publicly to air concerns about standards in the profession. Given that the Queensland Court of Appeal has generally shown an aversion to the use of fines as a disciplinary response, any appeal by the Attorney-General or commissioner against a fine is likely to cast the tribunal and profession in an unfavourable light.

Therefore, while the relevant rules of court and legislation have allowed the imposition of fines of up to $100,000,[115] it could be expected that the use of large fines would be rare if the disciplinary system was being used as part of a legitimation project.

It was suggested earlier in this chapter[116] that fines rarely protect. Nor does the imposition of a fine serve any legitimation project as well as an order which removes a lawyer from practice. In some cases it will be the order made by the tribunal which will define the seriousness of the conduct, as this cannot always be objectively defined. The difficulty of a review body or external observer objectively determining the seriousness

[115] The relevant section now is *Legal Profession Act 2004* (Qld) 280(4)(a).
[116] See above section 6.3.

of the conduct of a practitioner who has appeared before the tribunal and the appropriateness of the tribunal's response was exacerbated by the limited information available about a case and the many occasions upon which the tribunal failed to give reasons for its decision.[117] The imposition of a small fine increased the likelihood that the matter would be kept out of the public arena. First, there was not the same practical need to notify existing clients as there would have been if a practitioner was struck off or suspended by the tribunal. Second, a case in which a small fine has been imposed does not provide material for sensational media headlines: 'Solicitor Fined $7,500'[118] was not as likely to sell newspapers as the headline which read 'Solicitor Struck Off Roll'.[119] The case in which a lawyer received only a small fine is only likely to provide material for sensational news if there is objective evidence that the conduct involved demanded a much stronger response from the tribunal, for instance, the headline reading: 'Lawyer Fined $15,000 For False Papers'.[120] However, if the nature of the conduct appeared more ambiguous to the outside observer who did not have access to the details of the case, less sensational headlines would be generated, for instance headlines such as 'Solicitor Fined Over Bill'.[121] A journalist may have attended the disciplinary hearing to obtain details about the case beyond those published in the Findings and Orders lodged at the Supreme Court of Queensland, or in any published disciplinary reports.[122] Otherwise, no information would be available to suggest that the fine was inappropriate to the circumstances of the case. A good example is provided by a case heard in 1986 in which the solicitor was fined $500 after being found guilty of falsely witnessing a memorandum

[117] See the discussion of publicity below section 8.3.2.2.
[118] *Courier Mail* (Brisbane), 8 May 1998, 9.
[119] *Courier Mail* (Brisbane) 15 February 1989, 20.
[120] *Courier Mail* (Brisbane), 30 July 1997, 11.

of transfer.[123] The lack of information about the case makes it difficult to be sure that a fine was inappropriate, but on its face the conduct appears dishonest. Hearings were not held in public at this time, so no journalist would have been present to cast further, independent light on the circumstances of the case or the appropriateness of the small fine.

Media reports of the imposition of fines certainly appear to have been much less common than reports of strike offs or suspensions,[124] despite the fact that fines were the most common order made by the tribunal, comprising 41% of orders made in the period 1930-2000.[125] This supports the proposition that the media is less likely to report cases in which fines, especially small fines, have been imposed, and therefore that – if the decision of the tribunal can avoid publicity and close public scrutiny - the imposition of a small fine serves the legitimation project. It serves the project by effectively suggesting that the vast majority of lawyers are of the highest ethical standard, and that those who are not, are expelled from the profession through a strike off order. The implicit message is that, apart from strike offs, other matters that come before the disciplinary tribunal are only the result of the strict regulatory character of trust account reporting obligations of

[121] James Woods, 'Solicitor Fined Over Bill', *Courier Mail* (Brisbane), 15 December 1994, 24.
[122] See the discussion of published disciplinary reports at 8.3.2.2.
[123] Re X, SC 280, heard 25 March 1986, reported in 'Statutory Committee Proceedings', *Queensland Law Society Journal* 197. The solicitor was not named, as was the practice at the time.
[124] Some examples of rare reports of disciplinary fines include: James Woods, 'Solicitors Suspended by Misconduct Tribunal', *Courier Mail* (Brisbane), 16 December 1993, 20: This article referred to cases studies included in the report of the Lay Observer (later renamed the Legal Ombudsman and now the Legal Services Commissioner) tabled in Queensland Parliament. As well as cases of strike offs and suspensions, it included cases of practitioners fined $10,000 and $5,000 (three practitioners), but importantly, the headline focused on cases in which an incapacitative order was made; James Woods, 'Solicitor Fined Over Bill', *Courier Mail* (Brisbane), 15 December 1994, 24; 'Solicitor Fined $7,500', *Courier Mail* (Brisbane), 8 May 1998, 9; 'Society Silent on Coast Solicitor's $15,000 Fine' *Gold Coast Bulletin*, 17 February 2001, 13; Paul Whittaker, 'Lawyer Fined $15,000 For False Papers', *Courier Mail* (Brisbane), 30 July 1997, 11.
[125] Haller, above n 16, 24. During the same period, 31% of solicitors were struck off and 19% suspended.

solicitors or because of trivial complaints by clients. These are represented as giving no cause for concern, and do not in any way reflect on the honesty or trustworthiness of the individuals involved and can be adequately dealt with by a small fine.

Small fines are also consistent with retribution, given that a retributive response will usually moderate the order which may have otherwise been imposed for deterrent effect.[126] The protective effect of small fines, except perhaps through specific deterrence, is less clear.

6.8 The Evidence: Fines Imposed by Tribunal

6.8.1 *Overall Trends*

This section examines the tribunal's use of fines. The section will only look at fines imposed on solicitors because there was no statutory tribunal with jurisdiction to impose fines on barristers until 2004[127] and barristers in Queensland have *never* been fined – even by the court in its inherent jurisdiction.[128] After looking at overall trends, a closer examination will be undertaken of cases in which the tribunal imposed the largest fines on solicitors, to determine how effectively those orders fulfilled the tribunal's protective function (or were merely retributive in character).

[126] Although it has been argued that a retributive model can suggest a minimum level of punishment, it is generally thought that a retributive model leads to a more moderate order than a pure deterrence model: Nigel Morris, 'Desert as a Limiting Principle' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992) 201; Andrew von Hirsch, 'Ordinal and Cardinal Desert' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992) 209.

[127] With the introduction of *Legal Profession Act 2004* (Qld).

Fines were the most common type of order made by the tribunal, comprising 41% of orders in the period 1930-2000.[129] The preference for fines over other forms of order varied over time, comprising only 15.4% of orders made in the five years following the establishment of the statutory disciplinary tribunal[130] rising to 54.5% of all orders in the early 1950s.[131] In the most recent time period studied statistically - 1996-2000 - fines comprised 45.6% of orders made.[132] The high use of fines by the tribunal when dealing with solicitors has been maintained: in 2003-2004, 13 of the 25 solicitors who appeared before the tribunal were fined, a proportion of 52%.[133]

The size of fines also varied over time, ranging from £4 to £150 before decimal currency was introduced in 1966 and from $25 and $40,000 in the years since then.[134] The average size of fines has tended to be small, as shown in Table 1 below, even though the maximum fine available has been $100,000 since 1987.[135]

[128] Discussed above section 6.2.2.
[129] Haller, above n 16, 24. Orders striking a solicitor from the roll comprised 31% of orders made and suspensions comprised 19% of orders.
[130] Namely, 1930-1935. N=26. Although the tribunal was established in 1927, it did not hear its first case until 8 May 1930.
[131] N=11.
[132] Haller, above n 16. N=57.
[133] Queensland Legal Services Commissioner, *Annual Report 2004-2005* 31, Table 1.1.
[134] Haller, above n 16, 33-4.
[135] See above section 6.2.1 for discussion of why such a high maximum fine for solicitors may have been introduced in Queensland.

TABLE 1[136]

Average Size of Fines[137]

5yrs to	Mean	Median	Std Dev	Minimum	Maximum	Count
1935	23.8	25.0	6.3	15	30	4
1940	21.0	17.9	11.8	10	50	12
1945	38.3	25.0	32.1	15	75	3
1950	42.8	25.0	38.2	21	100	4
1955	21.7	20.0	14.0	5	40	6
1960	46.4	25.0	30.4	25	100	7
1965	50.6	50.0	47.3	4	150	7
1970	70.0	77.5	31.9	25	100	4
1975	182.7	150.0	133.6	25	500	13
1980	662.5	750.0	334.4	100	1000	16
1985	1725.0	575.0	1796.8	200	5000	16
1990	2112.5	1500.0	1700.9	100	5000	16
1995	6490.0	3750.0	7616.6	400	25000	30
2000	8518.5	5000.0	9022.9	500	40000	27

Thus it can be seen that, while fines were often utilised by the tribunal, they tended to be small. Small fines are unlikely to play a significant role in general deterrence. Fines may play some part in specific deterrence, and presumably, the larger the fine, the greater the deterrence, which has the potential to support the protective effect of discipline. However, a survey of cases in which the tribunal imposed the largest fines – discussed later in this chapter[138] - shows a high rate of further misconduct, thereby casting doubt on the efficacy of fines for specific deterrence.

It was suggested earlier in this chapter[139] that the imposition of a small fine may serve a legitimation project because the size of the fine itself may define the conduct as less serious. This is only likely to be possible in cases in which the nature of the conduct is

[136] Taken from Haller, above n 16, 33-4.
[137] The figures until 1965 are in pounds (£)and in dollars ($) thereafter.
[138] Below section 6.8.
[139] See above section 6.5.4.

ambiguous. For instance, a small fine, even if it came to the attention of the mass media, could be easily criticised if it had been imposed in relation to the stealing of money from a client. There is no ambiguity in relation to theft.[140] Areas of professional conduct which may appear more ambiguous to those outside the profession include conflict of interest and confidentiality. Table 2 indicates the types of misconduct for which various forms of orders were imposed in the period 1930-2000.

TABLE 2[141]

Orders made by Type of Findings

Table 2A: Cases With a Single Charge Type

	Trust fund	Misleading	Conflict	Ethics	Compliance
Strike off	52.3	33.3	0.0	50.0	2.5
Suspension	14.0	28.6	11.1	0.0	17.5
Fine	30.8	33.3	88.9	18.8	66.3
Censure	2.8	4.8	0.0	31.3	11.3
Rehab	0.0	0	0.0	0	0.0
Costs	0.0	0	0.0	0	0.0
NUMBER	107	21	18	16	80

Table 2B: All Cases (Not Mutually Exclusive)

	Trust fund	Misleading	Conflict	Ethics	Compliance
Strike off	45.9	43.0	21.8	39.1	14.0
Suspension	20.3	27.9	27.3	19.6	22.8
Fine	29.5	25.6	47.3	30.4	52.2
Censure	2.9	2.3	1.8	10.9	7.4
Rehab	1.0	0	1.8	0	1.5
Costs	0.5	0	0.0	0	0.7
NUMBER	207	86	55	46	136

[140] Christine Parker, *Just Lawyers* (Oxford University Press, New York, 1999) 16.

[141] This table forms part of a separate body of data collected and analysed using funds provided by a University of Queensland New Staff Research Start Up Grant. Parts of that data analysis have been published in: Haller, above n 16.

The cases with a single charge type, as shown in Table 2A, provide the most direct relationship between the type of charge proved and the penalty imposed. As Table 2A shows, between 1930 and 2000, the tribunal heard 18 cases in which the only charge proved related to a conflict of duty and interest.[142] Of those 18 cases, the overwhelming majority of solicitors were fined (88.9%). None were struck off and 11.1% were suspended. While some caution must be exercised given the low number of cases involved, it could be argued from these figures that a solicitor found guilty of charges relating to a conflict of duty and interest in the period 1930-2000 was highly likely to receive a fine.

By comparison, a solicitor who was only found guilty of trust account breaches was much more likely to be struck off (52.3%).[143] It could be argued that conflicts of duty and interest are more ambiguous to the general public than trust account issues, which can be portrayed as the misuse of client monies. Thus, the high rate of fines to dispose of 'conflict of interest' charges is consistent with the legitimation argument raised earlier.[144]

[142] This group includes: borrowing from a client (breach of Rule 86 *Queensland Law Society Rule 1987 (Qld)*), acting for both borrower and lender where prohibited by Rule 85, preferring the solicitor's own interest over the interest of the client or placing oneself in a position of potential conflict of interest or conflict of duty.

[143] This group does not only include trust account fraud, but any breach of the *Trust Accounts Act 1973* (Qld), even if inadvertent.

[144] See above section 6.6.1. It is also interesting to note the low number of conflict of interest charges which have been brought before the tribunal: 55 such charges found proved in the period 1930-2000.

6.8.2 *Large Fines Imposed*

6.8.2.1 *Specific Deterrence*

A survey of the six cases in which the tribunal imposed its largest fines, ranging between $25,000 and $40,000, casts doubt on the efficacy of fines as a means of specific deterrence. In four of the six cases,[145] the individual practitioner was to later reappear before the tribunal, despite the imposition of a large fine.[146] For instance, in the case in which the largest fine was imposed, a fine of $40,000,[147] the practitioner O'Neill reappeared before the tribunal three years later on further charges.[148] The charges found proved included the misappropriation of monies belonging to various clients - totalling more than $500,000.00 - and the knowing preparation of false bills of mortgage and of making false representation to clients. On this later occasion he was struck off.[149]

Similarly, a practitioner Ballment was fined $25,000 in 1990,[150] but reappeared before the tribunal on two subsequent occasions.[151] When fined $25,000 in 1990, he had already appeared before the tribunal on two occasions and been fined.[152] On his fourth

[145] *Re a Practitioner* (1996) 26 QLSJ 615, SC 377, 22 October 1996 ($40,000); SC 314, 17 July 1990 (unreported, $25,000); *Re a Practitioner* (1994) 24 QLSJ 281, SC 353, 8 March 1994; *Re Practitioner X* (1999) 5 Disciplinary Action Report 24, SCT 18, 8 September 1999 ($25,000).
[146] There is no evidence of further misconduct by the practitioners involved in SC 319, 25 July 1990 or in *Re X* (2001) 8 Disciplinary Action Report 10.
[147] *Re a Practitioner* (1996) 26 QLSJ 615, SC 377, 22 October 1996.
[148] *Re O'Neill* (1999) 5 Disciplinary Action Reports 9.
[149] Ibid 14.
[150] SC 314, 17 July 1990, unreported.
[151] *Re a Practitioner* (1992) 22 Queensland Law Society Journal 462, SC 334, 15 May 1992; *Re Ballment* (1998) 2 Disciplinary Action Reports 4, SC 389, 17 June 1997.
[152] He first appeared in SC 267, 20 March 1985. The practitioner admitted that he had failed to respond to Queensland Law Society requests for information and was fined $500 The practitioner admitted two charges of failing to respond to society requests for information in breach of Rule 82, later relocated to

appearance before the tribunal he was fined again, this time a sum of $5,000.[153] On his fifth appearance - again for failing to respond to Queensland Law Society enquiries - the tribunal heard evidence of an 'ongoing problem with procrastination for which the practitioner had sought treatment'.[154] Upon Ballment complying with various undertakings,[155] the tribunal ordered that a five year suspension order be stayed.

Nor did a fine of $25,000 imposed in 1994[156] appear to deter the solicitor Wright from further misconduct, as she was to reappear before the tribunal in December 1999, when she was struck off for misleading a court, attempting to suborn a witness to swear a false affidavit and misleading the Queensland Law Society.[157]

Queensland Law Society Act 1952 (Qld) s5G, now contained in *Legal Profession Act 2004* (Qld) s 269. The section deems breach of this rule to be professional misconduct. The nature of the disciplinary proceedings brought against him in 1988 is unclear, although they were brought before the lower level tribunal, the Solicitors Disciplinary Tribunal: SDT 4 of 1988, 22 February 1988. Although the details and result of this hearing before the Solicitors Disciplinary Tribunal are missing from Queensland Law Society records and are not lodged at the Supreme Court of Queensland (there was no requirement under the legislation to lodge a copy of the findings and orders of this tribunal), a 1998 article in the *Courier Mail* (Brisbane) suggests that the Solicitors Disciplinary Tribunal fined the practitioner $1,000 when he appeared before it in February 1988. The source of the *Courier Mail*'s information is unclear: M Fishpool, 'Solicitor's Record of Misconduct Revealed', *Courier Mail* (Brisbane), 4 March 1998, 3. While the society was publishing detailed reports of Statutory Committee decisions in the Queensland Law Society Journal in 1988, it did not begin to publish Solicitors Disciplinary Tribunal decisions in the journal until October of that year.

[153] *Re a Practitioner* (1992) 22 *Queensland Law Society Journal* 462, SC 334, 15 May 1992. He was found to have again failed to respond to Law Society requests for information.

[154] *Re Ballment* (1998) 2 Disciplinary Action Reports 4, 5.

[155] These undertakings included a requirement that the practitioner cease working as a principal and not seek to work again as a principal until 30 June 2002. The practitioner was also required to supply a psychiatrist or psychologist report to the Queensland Law Society before seeking a principal's practising certificate in the future. He also undertook to notify any employer of the disciplinary proceedings. If the practitioner sought employment as a solicitor in private practice, his employer was to supply the society with an undertaking to supervise his work, such undertaking to be approved by the Council of the society.

[156] *Re a Practitioner* (1994) 24 QLSJ 281, SC 353, 8 March 1994.

[157] *Re Wright* (2000) 6 Disciplinary Action Report 7, Charge 29, 22 December 1999. An appeal by the practitioner to the Court of Appeal was dismissed: *Council of Qld Law Society Inc v Wright* [2001] QCA 58.

The fourth of the practitioners to reappear before the tribunal despite the fact that they received one of the six largest fines imposed by the tribunal was Nettleton.[158] He was to reappear in November 2000 for failing to comply with an earlier undertaking and was suspended indefinitely.[159]

It would seem that the two remaining practitioners with the largest fines were deterred: there is no record of a reappearance by the practitioner fined $25,000 in 1990[160] or the practitioner fined $30,000 in 2001.[161] But a reappearance rate of 66.6% even when large fines are imposed, casts serious doubt upon the effectiveness of fines as specific deterrence.

6.8.2.2 *General Deterrence*

While large fines could have deterred other practitioners from engaging in similar misconduct, the effectiveness of such general deterrence required the disciplinary proceedings to be reported in the professional journals and for those reports to be sufficiently detailed to guide the conduct of other practitioners. While it is notoriously difficult to determine the effectiveness of general deterrence,[162] optimal deterrence at least requires systematic dissemination of information to the population to be deterred, in

[158] *Re Practitioner X* (1999) 5 Disciplinary Action Report 24, SCT 18, 8 September 1999. He had received a fine of $25,000 after admitting to charging excessive fees and of unauthorised movement of trust monies. He had appeared before the tribunal on an earlier occasion when he had also admitted to the unauthorised handling of trust monies and of making a recklessly false statement to the Law Society. On that occasion he had been fined $3,000.00: *Re Practitioner X* (1998) 2 Disciplinary Action Reports 3, SC 387, 10 June 1997.
[159] *Re Nettleton* (2001) 7 Disciplinary Action Report 18, 19.
[160] SC 319, 25 July 1990, unreported.
[161] *Re X* (2001) 8 Disciplinary Action Report 10, SCT 40, 7 March 2001.
[162] Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992) 57.

this case the Queensland legal profession. This survey of the six largest fines suggests that the impact of these fines in deterring other practitioners was likely to vary widely, as it was largely dependent upon whether or not that decision was published in professional journals and upon the detail of any such published report. The degree of publication varied widely from case to case. For instance, two of the cases were not reported to fellow solicitors at all,[163] and other cases were only briefly reported, sometimes in only half of a page of the professional journal.[164] On other occasions the nature of charges was only reported in summary form, making it difficult for other practitioners to fully grasp degrees of acceptable and unacceptable conduct.[165]

The potential of these large fines to deter other practitioners was also limited by a common failure by the tribunal to give reasons for the imposition of the fine. [166] When the

[163] SC 314, 17 July 1990 ($25,000); SC 319, 25 July 1990 ($25,000). No disciplinary decisions were reported in the *Queensland Law Society Journal* during 1990 and 1991.

[164] *Re a Practitioner* (1994) 24 QLSJ 281, SC 353, 8 March 1994.

[165] For example, *Re a Practitioner* (1996) 26 QLSJ 615, SC 377, 22 October 1996, in which the solicitor received a fine of $40,000, the largest fine ever imposed, the charges are greatly summarised in the one and a half page report, as:

1 Twenty charges of breach of Rule 82;
2 Eleven charges of breach of Rule 83;
3 Charges relating to 5 separate client matters where the practitioner failed to attend to his clients' affairs in a timely manner and was, on occasions, responsible for gross and unexplained delay. Further, the practitioner failed to keep his clients sufficiently informed in relation to the matters and failed or refused, to receive or alternatively respond to enquiries written or oral from clients in relation to matters;
4 One charge of communicating inaccurate information to the Society which was made recklessly made, uncaring as to its accuracy; and
5 One charge of false communication to a client knowing it was false or misleading.

[166] The disciplinary tribunal in Queensland has been criticised on a number of occasions for failing to give reasons: *Walter v Council of Queensland Law Society* (1988) 62 ALJR 153 at 157; *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498 at 508; *Attorney-General v Kehoe* [2001] 2 Qd R 350, [22-26] (Thomas J), [3-4] (de Jersey CJ, with whom Ambrose J agreed); *QLS v Carberry* [2000] QCA 450, [6] (Pincus JA). The need to state findings on questions of fact has been contained in the Act since its inception in 1927: first contained in *Queensland Law Society Act 1952* (Qld) s6(3)(b), then *Queensland Law Society Act 1952* (Qld) s 6V(1)(b). The need to provide reasons for the particular order made, in addition to giving findings on questions of fact was stated explicitly in the subordinate legislation: *Queensland Law Society (Solicitors Complaints Tribunal) Rule 1997* (Qld) s 14(h). Surprisingly, the *Legal Profession Act 2004* (Qld) has removed any express statutory requirement to provide reasons. This will require the courts and tribunals to revert to the common law: *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 476-477,

public is protected directly by an order which incapacitates a practitioner, such as a strike off or suspension order, a failure to give reasons may be partly excused. However, fines can only protect through deterrence. Practitioners cannot understand what they are to be deterred from and when they are more likely to be fined than dealt with in another way unless the tribunal gives reasons. Presumably, the larger the fine, the greater deterrence intended. Thus, in these six cases in which the largest fines were imposed, it is difficult to understand any failure to give reasons, if the tribunal was seeking to deter. And yet no reasons were given to fellow practitioners, simply by the failure to publish two of the decisions in which large fines were imposed.[167] Of published decisions, some contained no reasons at all for the imposition of a fine rather than a suspension or a strike off order,[168] and only brief reasons were given in other reported cases involving large fines. For instance, a fine of $30,000 was imposed in March 2001[169] because of

> ... the practitioner's long period of unblemished practice, the references provided and the fact that there is no *real* evidence of fraudulent behaviour or attempting to profit from his behaviour.[170]

Similarly, a fine of $25,000 rather than a suspension was imposed in September 1999 because a 'suspension could result in the inability of the practitioner to repay the persons adversely affected' by his overcharging.[171]

482-484, cited with approval in *A-G v Kehoe* [2001] 2 Qd R 350, [22] (Thomas JA). See also *Queensland Law Society Inc v Carberry* [2000] QCA 450, [36] and *Council of the Queensland Law Society v Lowes* [2003] QCA 201, discussed above section 6.6.

[167] SC 314, 17 July 1990; SC 319, 25 July 1990.

[168] *Re a Practitioner* (1994) 24 QLSJ 281, SC 353, 8 March 1994.

[169] *Re X* (2001) 8 Disciplinary Action Report 10, SCT 40, 7 March 2001. This solicitor was not identified as the Queensland Law Society did not name practitioners who were 'only' fined until later: see discussion below section 8.3.2.4.

[170] Ibid 21 (emphasis added).

[171] *Re Practitioner X* (1999) 5 Disciplinary Action Report 24, 26. While it could be argued that this moderation of the order was designed to protect those members of the public who were owed money by the solicitor, arguably it fails to take account of the need to protect the public more broadly, in the guise of *future* clients. The tribunal also noted undertakings by the practitioner to repay the amounts overcharged,

The lack of detail, combined with the tribunal's reticence to give reasons for its decisions, limited the potential for these large fines to provide general deterrence.

I suggested at the beginning of this chapter that if the tribunal was serving a legitimating function it would avoid the imposition of large fines as these would increase the possibility of an appeal. However, no appeal was lodged in any of the six cases in which the largest fines were imposed.[172] The low rate of appeals by the Attorney-General suggests that, even if the tribunal was serving a legitimating function, fear of an appeal by the Attorney-General was unlikely to have been a factor inhibiting the tribunal's use of large fines. This is contrary to the argument proposed at the beginning of this chapter, that large fines would attract appeals by the Attorney-General or Legal Services Commissioner, which would detract from any legitimation project.

6.9 Conclusion

This chapter began with a consideration of the existence of the power to impose fines in the disciplinary 'scaffold':[173] the potential to impose large fines on solicitors has existed for many years in relation to solicitors but was only introduced into the disciplinary framework for barristers in 2004. Although it was the judges of the Supreme Court of

which totalled $46,420, to be supervised by a senior practitioner, to consult with his psychiatrist monthly, for monthly reports from the psychiatrist to be provided to the Queensland Law Society and for the practitioner to attend a Practice Management Course.

[172] Appeals were lodged in *Attorney-General v Bax* [1999] 2 Qd R 9 by both the Queensland Law Society and the Attorney-General against the imposition of a fine of $15,000. At the time that the tribunal imposed that fine (29 July 1997), it was the seventh largest fine imposed by the tribunal (since the introduction of decimal currency in 1966).

Queensland who sponsored the introduction of fines of up to $100,000 for solicitors, the court has only rarely endorsed the use of fines in the cases which have come before it. In contrast, the solicitors' disciplinary tribunal has continued to favour the use of fines - despite the challenge they present to either a protective or legitimation purpose for discipline - but has imposed fines of amounts much lower than the statutory maximum. I considered the six cases in which the tribunal imposed the largest fines, to see whether the fines could have protected the public through deterrence. The evidence casts severe doubt upon both the general and specific deterrence of fines in the disciplinary context. Of all the disciplinary orders available, fines are the most analogous to criminal punishment and so require close scrutiny in the disciplinary context. These results suggest that the tribunal has operated under a more retributive model than the tribunal itself would concede. This can be more clearly demonstrated by a closer examination of personal 'mitigating' factors in disciplinary proceedings, which I explore in the following chapter.

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[173] See discussion of 'scaffolding' above section 3.10.2.1.

CHAPTER SEVEN

PERSONAL FACTORS

7.1 INTRODUCTION

In the two preceding chapters I considered cases in which the tribunal suspended or fined practitioners. The circumstances of some of those cases suggested that the tribunal may have considered taking more serious action against the practitioner had it not been for factors personal to the practitioner, such as poor health, reputation, financial pressures or inexperience. Traditionally, the courts have stated that the protective nature of disciplinary proceedings meant that a practitioner could not rely on personal, mitigating factors to the same degree as in criminal proceedings.[1]

The fact that a practitioner suffered from some personal adversity, such as poor mental health or financial pressure, at the time of misconduct may sometimes be relevant to the tribunal or court's protective role. However, this depends on the nature of the misconduct and whether these factors are likely to recur in the future. These issues will be explored in more detail throughout this chapter. The chapter will note occasions on which disciplinary courts or tribunals do not appear to have distinguished between future risk

[1] Above section 2.3.3.

and moral blame for past misconduct, and so appear to have been at least partly influenced by retribution, and not simply protection.

It should be noted at the outset that any assessment of the appropriateness of tribunal orders is hampered by the dearth of tribunal reasons and lack of information as to submissions on penalty.[2] In addition, the tribunal often fails to provide adequate factual detail in relation to individual charges. It should also be noted that some personal factors are treated with more privacy than others. For instance, even if mental illness has been disclosed by a practitioner and used as a mitigating factor by the tribunal, the tribunal may choose not to refer to it in their reasons, or refer to it in an oblique way, such as 'the practitioner's health problems', which could apply equally to a broken leg or mental ill-health.[3] Thus, for all these reasons, while the tribunal may have given too much weight to personal factors, this will not always be apparent from the face of the record.

After looking at the attitude of the High Court and Supreme Court of Queensland to the question of personal factors, I consider some personal factors in more detail. I focus primarily on reputation, acknowledgment of the legitimacy of the proceedings, mental illness, and client loss/practitioner gain, as these are common but problematic factors in disciplinary proceedings against lawyers. The way in which the tribunal deals with these factors may provide some insight into whether the tribunal is pursuing protective, legitimating or retributive objectives.

[2] The court decisions in which the tribunal was repeatedly criticised for failing to give reasons are listed below section 8.3.2.2.

7.2 ATTITUDE OF THE HIGH COURT

As early as 1947, in *Re Davis*,[4] the High Court stated that sympathy for individual misfortune was 'no reason whatever for impairing in [that practitioner's] interests the standards of a profession which plays so indispensable a part in the administration of justice.'[5] Similarly, in *New South Wales Bar Association v Evatt*[6] the High Court overturned a two year suspension of a barrister and ordered that he be disbarred notwithstanding his youth and his lack of understanding, as his 'failure to understand the error of his ways of itself demonstrates his unfitness',[7] and confirmed there was little or no room for 'mercy' given that disciplinary proceedings contained 'no element of punishment' and were 'entirely protective'.[8]

Those earlier cases can be compared with the High Court's more recent decision in *A Solicitor v Council of the Law Society of New South Wales*.[9] A reading of the case may suggest to some that the court was willing to overturn the strike off order of the New South Wales Court of Appeal because it thought the solicitor had already 'suffered'

[3] In *Re Wakeling* SCT 110, 26 August 2003, the tribunal ordered that evidence regarding a medical report not be published, although it did require that the solicitor not be allowed to practise until certified fit to practise by a psychiatrist.
[4] (1947) 75 CLR 409.
[5] Ibid 426 (Davis J). Although these comments were made in relation to a barrister seeking readmission rather than in disciplinary proceedings, it is suggested the principles are the same.
[6] (1968) 117 CLR 177.
[7] Ibid 184.
[8] Ibid 183. The position is the same in England: *Re a Solicitor* [1959] 103 Solicitors Journal 875; *Re H, a Solicitor* [1940] QWN 8; *Bolton v Law Society* [1994] 2 All ER 486, 492-3; A Cordery, *Cordery's Law Relating to Solicitors*, 8th ed, (1988) 322. See also *Law Society of NSW v Moulton* [1981] 2 NSWLR 736, 750..
[9] (2004) 216 CLR 253. Discussed above section 2.6.3.2 in relation to the relevance of the damage the conduct may have on the reputation of the legal profession.

enough – in other words, that the High Court was adopting a retributive approach. The High Court did say a strike off order was not appropriate given the 'powerful subjective case' made on the solicitor's behalf.[10] Unfortunately, the court did not identify the subjective factors it was placing weight on, or the relative weight it gave to each. However, the court had been told that, at the time of the conduct in question,[11] the solicitor had been made redundant and was suffering depression, and his father was dying from mesothelioma. After questions were raised about his conduct, the solicitor left a 'promising' career in the Army Reserve and ceased practising as a solicitor. In the criminal proceedings which followed, both retribution and protection were highly relevant to sentencing. In deciding to impose a three year good behaviour bond rather than a period of imprisonment, the appellate court accepted there was little risk of any further offending, the defendant was under extreme personal stress at the time of the offence and had not caused serious harm.[12]

But how should the solicitor's personal circumstances be treated in disciplinary proceedings? While the High Court did not explicitly deny being influenced by any sympathy it felt for the solicitor's predicament, it indicated that its decision to allow the solicitor to remain in practice was because it could not find any *future* risk to the public, given the solicitor's full rehabilitation.[13] So, despite the degree to which both the New

[10] (2004) 216 CLR 253, 275.

[11] Aggravated indecent assault on two daughters of his defacto wife. He was later convicted.

[12] The sentencing judge in the criminal proceedings, Luland J, had said: 'The assaults upon the children were not in my view the most serious examples of indecent assaults that one unfortunately sees all too often in these courts. ...There is material before me where the children themselves seem to have suffered no psychological harm, ... In fact they ... want the continuance of [the opponent] in their life as the father figure that he was before this all occurred.' : [2002] NSWCA 62, 5.

[13] (2004) 216 CLR 253, 275.

South Wales Court of Appeal and High Court took account of the personal circumstances of the solicitor, both at the time of the conduct in question and subsequently, *A Solicitor* cannot be interpreted as condoning a greater retributive approach in disciplinary decision-making. Nevertheless, the distinction between the relevance of personal factors to culpability and to future risk can be a subtle one to make, and it would not be surprising if voluntary members of part-time disciplinary tribunals found the reasoning in *A Solicitor* difficult to apply.

7.3 GUIDANCE FROM THE SUPREME COURT OF QUEENSLAND

The Supreme Court appears to have sometimes condoned the use of personal factors which prior case law may have considered irrelevant. Chapters Five and Six documented the many disciplinary appeals in which the Supreme Court of Queensland has overturned suspensions and fines and ordered that the practitioner be struck from the roll.[14] In some of these cases the court had evidence that the tribunal had made inappropriate use of personal factors to moderate the decision it would have otherwise made.[15]

[14] Above sections 5.3.3.3 (suspensions), 6.6 (fines). In some appeals, the tribunal's failure to give reasons for its order made it difficult to determine whether the tribunal's order should be set aside: For instance, *Queensland Law Society v Carberry* [2000] QCA 450. The tribunal had found Carberry guilty of professional misconduct and suspended him from practice for 12 months The tribunal gave no reasons for imposing a suspension order rather than a strike off or any other order. (*Re Carberry* (2000) 6 Disciplinary Action Report 17, SCT 6196, 6 March 2000). Both the Attorney-General and Queensland Law Society appealed and argued that Carberry should be struck off. The most serious charge against the practitioner related to a conflict of interest which Carberry chose to ignore [34] (Moynihan SJA and Atkinson J). Pincus JA thought that it was 'no accident' that the practitioner had preferred the interests of his business associate to those of his client ([5]). Moynihan SJA and Atkinson J were doubtful as to Carberry's level of remorse ([37]), suggesting he would not be fit to practise by the end of any period of suspension ([41], Moynihan SJA and Atkinson J). Pincus JA agreed that the misconduct was 'bad enough to force one to the unpleasant conclusion that mere suspension is insufficient' ([7]).

[15] 1. *Attorney-General v Brown* [1992] QCA 241 (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies JA, Demack J, 11 June 1993). The practitioner had knowingly participated in the backdating of documents and the preparation and filing of false affidavits to assist his clients. In

deciding to suspend Brown for 21 months, the tribunal (SC 339, 6 October 1992) had made reference to his '28 years of unblemished practice and the strong testimonials produced on his behalf', but it was common ground in an appeal by the Attorney-General that these were not valid personal mitigating factors in disciplinary proceedings as they did not address the issue of the practitioner's fitness to practise.

2. *Queensland Law Society v Mead* [1997] QCA 83. The tribunal (SC 378, 18 September 1996) had suspended Mead for 33 months despite the fact that he had been before the tribunal only 18 months earlier and fined $10,000 (*Re X* (1995) 25 QLSJ 493, SC 365, 28 March 1995). The tribunal thought that his fitness to practice would be re-established after the period of suspension because he had practised as a solicitor in his own business or firm for a substantial period, but this reasoning was rejected by the court and he was struck off (7).

3. *Queensland Law Society v Henry William Smith* (unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998). The tribunal ((1998) 2 Disciplinary Action Report 12, SC 384, 11 November 1997) was satisfied that the misconduct was caused by Smith's major depressive illness, as his actions were 'naïve at a time when he was not in financial need' (14). The tribunal ordered that he be suspended 'until such time as he is able to satisfy the Council of the Queensland Law Society Inc that he is a fit and proper person to hold a practising certificate'. On appeal by the Attorney-General, the matter did not go to a full court hearing as Smith consented to an order that his name be struck from the roll. Unfortunately, the Queensland regulators failed to inform regulators in other States of the disciplinary proceedings. When forced to cease practice in Queensland, he merely moved into New South Wales: Adrian Evans, 'Queensland Fidelity Compensation 1990-2004: The End of the Money Tree' (2004) 23 *University of Queensland Law Journal* 397-410, 407. He was found to have stolen millions of dollars from clients in both jurisdictions.

4. *Attorney-General v Bax* [1999] 2 Qd R 9. Despite finding that the solicitor had deliberately backdated a document and misled a creditor's meeting, the tribunal had ordered the practitioner to pay a fine of $15,000 ((1998) 2 Disciplinary Action Report 6, SC 393, 29 July 1997). The published report of the tribunal's decision did not include any reasons, but the later appeal revealed that the tribunal had taken into account his relative inexperience and the fact hat he did not gain personally from the misconduct. The court overturned the order and ordered that his name be removed from the roll, noting in particular, the irrelevance of inexperience when there is a finding of dishonesty (13, McPherson J).

5. *Attorney-General v Gregory*. [1998] QCA 409. Gregory had been convicted of contempt of court and fined $4,000 in the District Court for attempting to influence a witness to change her evidence to make it more favourable to his client. The disciplinary tribunal took into account his inexperience, his ignorance, and that his judgment was 'clouded and pressured' and suspended him for two years (*Re Gregory* (1998) 3 Disciplinary Action Report 13, SCT 6174, 13 May 1998). On appeal by the Attorney-General, the court acknowledged that the misconduct comprised an isolated, unpremeditated incident for which the Gregory had shown remorse. But de Jersey CJ thought the conduct demonstrated the absence of 'critically important qualities' (4), and so Gregory needed to be struck from the roll. He would need to demonstrate he had 'redeveloped' those qualities before he could be readmitted. White J also thought that the appropriate course was to strike Gregory from the roll, allowing him to apply for readmission at a later time when he could prove his fitness to practise (17). Gregory's subsequent application for readmission was unsuccessful: *Greg Gregory v QLS Inc* [2001] QCA 499.

6. *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42. The tribunal had suspended Wakeling for two years, and then not practise as a sole practitioner for a further five years (SCT 110, 26 August 2003). It had taken account of traumatic events in his personal life, a significant mental illness, his successful practice, and that his misconduct could only given his client a temporary advantage. However, on appeal, the court held that the multiple findings of dishonest conduct meant that the court could not 'confidently present the respondent as someone on whom the client and the court may rely' ([27]). Nor could the court have confidence that he would regain fitness to practise before the two year period of suspension expired. The court ordered that he be struck off.

Since 2000, the view of the Supreme Court has become less clear. The court has allowed a number of tribunal decisions to stand, including decisions in which the tribunal appeared to use personal factors to moderate the order it would otherwise make.[16]

There could be a number of reasons for the change in the court's practice since 2000. The court may have modified its attitude to the relevance of personal factors. Equally possible is that the court has become more willing to defer to the tribunal's discretion and ability to judge the character of the practitioner at first hand. This can be seen in *Council of the Queensland Law Society v Lowes*,[17] where the court was reluctant to second-guess the tribunal's assessment of the solicitor's character, given that the tribunal had had the advantage of listening and watching the solicitor give evidence and being subjected to lengthy cross-examination.[18] Similarly, in *Council of the Queensland Law Society v Roche*[19] the court noted that the tribunal was in a much better position than the court to

[16] 1. In *Clough v Queensland Law Society* [2002] 1 Qd R 116, the court allowed the 12 month suspension to stand partly because Clough's conduct had not caused loss to the other side in the litigation, and also because Clough had already suffered the expense of costs orders against him (94).

2. In *Attorney-General and Minister for Justice (Qld) v Priddle* [2002] QCA 297 the court thought the suspension was appropriate, partly because:

> '[During the period giving rise to complaints] the respondent was held hostage in his city office for 15 hours by a disturbed gunman. ... followed by death threats ... He had other financial, health and marital difficulties .... Excellent character references were tendered ... It was open to the Tribunal to be satisfied that at the expiry of the suspension period, having suffered public disgrace and humiliation as well as the economic loss resulting from his inability to practise ..., the respondent will have learnt his lesson (13-14).'

3. In *Council of the Queensland Law Society v Roche* [2003] QCA 469 the court refused to interfere with a suspension order, partly because '[w]hen it came to the question of penalty the Tribunal had before it evidence from two legal practitioners as to the solicitor's standing in the legal community and as to his preparedness to act in difficult cases for disadvantaged clients (66).'

4. The court refused to interfere with the imposition of a fine in *Attorney-General v Kehoe* [2001] 2 Qd R 350, partly because no actual harm had been caused, the practitioner had been seriously affected by his conduct, and had suffered ignominy and remorse (27, 29).

5. A fine was allowed to stand in *Attorney-General v Delaney* [2000] QCA 504, partly because the practitioner had practised for almost 30 years without a complaint to the Queensland Law Society, had a number of character references and was remorseful (35-37).

[17] [2003] QCA 201.

[18] Ibid [7], [15].

[19] [2003] QCA 469.

judge Roche's character, having observed his demeanour at first hand over a six-day hearing.[20]

There is no doubt that personal factors are consistent with the protective focus of the disciplinary court or tribunal if they reflect on the future risk to the public. However, if the factors are used to vary the lawyer's culpability, or to show that the practitioner has already suffered enough as the result of the conduct, then retributive elements are playing a role in the disciplinary decision-making process.[21]

A good example of a case in which the tribunal appeared to take into account a number of personal factors which related to culpability but not future risk is *Re Crowley*.[22] The most serious finding against him was the fraudulent conversion of $19,900.[23] The tribunal ordered that he be suspended from practice for six months, fined $5,000 and not practise as a principal for three years. The only reasons given for such an order were 'the practitioner's relevant youth, the character references provided, ... the pressures to which the practitioner subjected himself in running a sole practice' and the lack of 'immediate

[20] Ibid [38], [39]. The preceding discussion has focused on personal factors which may lead a disciplinary court or tribunal to reduce the severity of the order it would otherwise make. In the criminal jurisdiction, they would be described as mitigating factors. But personal factors can have the opposite effect. They can increase the severity of the order – (aggravating factors). A practitioner's lack of remorse or insight into their misconduct, or failure to acknowledge the legitimacy of the investigation into their conduct normally will lead to a stronger disciplinary response. Two recent Supreme Court decisions (*Council of the Queensland Law Society v Roche* [2003] QCA 469, [35], [38], and *Council of the Queensland Law Society Inc v Whitman* [2003] QCA 438) raise questions as to whether the Supreme Court is reassessing its view of these as aggravating factors, as the court chose to not interfere with the tribunal decision. Alternatively, these appeals may be simply further evidence that the court has been more ready to defer to the tribunal's ability to judge future risk at first hand.

[21] The claim is simply that retributive elements have caused a change in the disciplinary order imposed. Whether the court or tribunal is aware of this or not is of less significance. Above section 3.2.

[22] (1996) 1 Disciplinary Action Reports 6, SC 383, 10 December 1996.

[23] (1996) 1 Disciplinary Action Reports 6, 6. The practitioner was also found to have made a false representation to a Queensland Law Society auditor, and paid $20,000 from his trust account to his general

financial gain accruing to the practitioner.'[24] All of these factors would reduce his culpability in criminal proceedings, but were irrelevant in disciplinary proceedings unless the tribunal could explain how they reduced the risk of further fraud in the future, which it failed to do.[25] There was no appeal from the tribunal's decision.

7.4 REPUTATION

Chapter Two indicated how the courts have consistently stated that the reputation of the legal profession as a whole is irrelevant when determining individual disciplinary cases.[26] Although the admission rules in Queensland used to refer only to 'good fame', the Supreme Court warned against giving undue weight to evidence of an individual's good reputation.[27] For instance, in *Barristers' Board v Young*[28] de Jersey CJ pointed out that the disciplinary tribunal should 'focus on a respondent's intrinsic character, and not be unduly distracted by reputed good fame, whether within the legal tradition or the wider

account when not authorised to do so. He also pleaded guilty to a number of charges relating to breaches of *Trust Account Regulations* 1973 (Qld) and borrowing $25,000 from a client in Breach of Rule 86.

[24] Ibid 7.

[25] Presumably, the risk to the public would be less for the three years when he could only practise as an employee, not as a principal, and so would be subject to some supervision.

[26] Above section 2.6.

[27] *Janus v Queensland Law Society Inc* [2001] QCA 180, [12]; *Barristers' Board v Young* [2001] QCA 556, [22]; *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42, [26]. See discussion above section 2.6.4 and Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness', (2002) 22 *The Queensland Lawyer* 166, 168-9.

[28] [2001] QCA 556.

community.[29] The Act now codifies the need to consider character as well as good fame.[30]

Equally, in *A Solicitor*, the High Court of Australia dismissed the relevance of the bad reputation that may attach to a criminal conviction.[31] Nevertheless, testimonials appear to be led routinely on behalf of practitioners appearing before disciplinary courts and tribunals, suggesting that evidence of good reputation has been given undue and positive weight, despite the stated attitude of the court. It is usually impossible, without reading each testimonial, to determine the degree to which these testimonials attest to the 'intrinsic character' of the person – which is acceptable - and the degree to which they merely attest to that person's reputation.[32] However, it can be assumed that it is difficult for those writing testimonials to restrict themselves to evidence of character, and that evidence of reputation may also be included and influence less experienced tribunal members.

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[29] Ibid [22]. While Mackenzie J noted the references which showed that Young was 'well thought of by friends and workmates and ha[d] innate qualities upon which she could build' he thought that the issue for the court was the person's 'intrinsic character, not necessarily his or her good fame either within the profession or the community at large.'

[30] *Legal Profession Act 2004* (Qld) s 31(1)(a). See Reid Mortensen, 'Becoming a Lawyer: From Admission to Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *University of Queensland Law Journal* 319-346, 332-3.

[31] *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, discussed above section 2.6.3.2.

[32] For instance, even in *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, while ignoring arguments about the bad reputation which would attach to the solicitor's criminal conviction, the High Court accepted as relevant the following character references:

> There was also a report from the founder director of the Child Abuse Protection Centre who said that she regarded the appellant as a man of basically good character who was not a future risk. Three barristers and a solicitor gave character evidence in support of the appellant. One of the referees, who had distinguished service in the army reserve, and retired with the rank of Major-General, and who had also worked with the appellant in the legal profession, described him as a person who acted with probity, professionalism and honesty, and said that he would have no hesitation in working with him in the future. None of that evidence was challenged (271).

The court has said that testimonials will be given little weight unless the deponent shows that they were aware of the full circumstances of the matter before the tribunal or court and comments upon it.[33] In addition, given that presumably such referees either turned a blind eye to the misconduct or were unable to detect it themselves, their more general powers of judgment and ability to predict or prevent further misconduct may be questionable.[34] Testimonials are valid if they provide evidence that there is little or no future risk to clients. This can be demonstrated by showing that the misconduct was an isolated aberration which is not likely to recur or, perhaps, if the testimonial amounts to a form of undertaking to the court or tribunal that the deponent will mentor the practitioner before the tribunal, to ensure no further misconduct occurs.

Testimonials are likely to advantage more established members of the profession. Testimonials from lay people are usually given less weight than those from lawyers. In *Re Melvey*[35] a solicitor disciplined for profiting too much from running speculative actions had filed over 100 testimonials. Thirty of these were from barristers and solicitors, however the remainder were discounted by the court which felt that few of the lay referees would be aware of the 'standards of honour and honourable conduct expected

[33] In the words of Blair CJ in *Re Bridgman* [1934] St R Qd 1, 7, when presented with testimonials covering a period in which the practitioner had admitted further misappropriations of trust monies:

> Apart from any question as to the weight of such testimonials, we cannot suppose that the gentlemen who gave them were aware of the facts now disclosed. If they were, and thought that such conduct was right and proper, their opinion is of no value; if, on the other hand, they were not, the foundation for their opinion is gone.

See also *Re Melvey* (1966) 85 (pt 1)(NSW) 289; *Robb v Law Society of the Australian Capital Territory* (1996) 72 FCR 225, 243 per Jenkinson J; *Janus v Queensland Law Society Inc* [2001] QCA 180, [51]. See also Mortensen, above n 27, 169.

[34] Leslie Levin, 'The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions' (1998) 48 *American University Law Review* 1, 56.

[35] (1966) 85 WN (Pt 1)(NSW) 289.

from a solicitor'.[36] Similarly, the testimonial provided by the client from whom the practitioner had borrowed money in *Law Society of New South Wales v Moulton*[37] was given no weight, as this was the client to whom the potential conflict of interest and duty had not been explained. The court was also wary of giving much weight to the support of the client in *Council of the Queensland Law Society Inc v Roche*.[38]

If a non-lawyer's opinion of a practitioner before the disciplinary tribunal is discounted because of the non-lawyer's lack of understanding of the 'standards of honour and honourable conduct' within the legal profession then, similarly, judges and leadings members of the profession will normally be considered to be more aware of these standards than more junior members. It would seem that – where testimonials are considered - this would inevitably lead to more lenient treatment of more senior and experienced members of the profession, who will know more senior members of the profession and judiciary from whom to seek testimonials.

Levin has questioned the use of testimonials in disciplinary proceedings and claimed they are the most misused of all the 'mitigating' factors relied upon in disciplinary systems in the United States.[39] She believed that, as they are usually provided by highly regarded members of the profession, they will be given undue weight by the tribunal.[40] She has gone so far as to suggest that judges and other leaders of the profession be banned from

[36] Ibid 298.
[37] [1981] 2 NSWLR 736.
[38] [2003] QCA 469, [42]. The court thought this may have been influenced by the solicitor's refund of $147,000 to the client and the client's desire that the solicitor continue to act for his other child.
[39] Leslie Levin, 'The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions' (1998) 48 *American University Law Review* 1, 54.
[40] Ibid 55.

providing testimonial evidence, unless they are the lawyer's current employer and their evidence cannot be otherwise obtained.[41] As testimonials are more likely to advantage more experienced members of the profession over more junior or less well-connected members who are less able to acquire a wealth of glowing testimonials, they are likely to reinforce the ascendancy of the elite *within* the profession. This would come as no surprise to those who believe disciplinary processes serve as a form of legitimation in a professional project.[42] The greater weight given to testimonials from the elite of the profession reinforces the elite's control in defining what makes a 'good lawyer' and the 'professional self'.[43]

It may be difficult for a court or tribunal to explain how the public will be equally protected if two practitioners - one of whom can muster a large number of testimonials and the other of whom is less well known within the profession and so cannot - are treated differently for the same misconduct. Different treatment is not justified on any deterrence argument, as all practitioners should be equally deterred from the conduct, whatever their status. Some may also question the degree to which this approach has allowed the profession to define 'fitness to practise' and, perhaps, to introduce notions of culpability. Until 2004, to some degree, legislation appeared to condone conduct being measured against what fellow lawyers thought or did.[44] The *Legal Profession Act 2004*

[41] Ibid 58.
[42] Above section 3.5.
[43] Above section 3.9.1.
[44] The legislation did not exhaustively define professional misconduct or unprofessional conduct. The common law definition of professional misconduct referred to whether colleagues of good repute and competency would consider the conduct disgraceful or dishonourable: above section 2.4.3.3. Unprofessional conduct required the conduct to fall substantially short of conduct observed or approved of by colleagues of good repute and competency: above section 2.4.3.4.

(Qld) formally breaks this nexus, by referring to what members of the public are entitled to expect.[45] Time will tell whether this weakens the influence of testimonials.

7.5 CHARACTER

Instead of relying on reputation, the court seeks to determine an individual's actual moral character.[46] The aim is to determine whether – despite the incidence of misconduct - the individual has an innate sense of honesty and adequate moral fibre to carry out the responsibilities of a legal practitioner. This is not an easy enquiry for the court or tribunal to undertake, although the court is more practised than a disciplinary tribunal consisting of volunteer members. Even when a court or disciplinary tribunal is careful to separate character from reputation, there may be a risk of over-simplifying the aspects of character. McHugh J, in criminal proceedings before the High Court, warned of the oversimplicity of thinking of a person as one-dimensional, as either of good or bad character.[47] He provided as an example the treatment of a sex-offender as a person of bad character in a trial for embezzlement, despite overwhelming evidence of the accused's honesty.[48] The good character – bad character dichotomy also suffers from the same logical flaws as the 'moral bookkeeping' discussed below,[49] as both fail to acknowledge the complexity of human behaviour. There is a risk that retributive elements will enter

[45] Section 244.
[46] *Janus v Queensland Law Society Inc* [2001] QCA 180, [12]; *Barristers' Board v Young* [2001] QCA 556, [22]; *Council of the Queensland Law Society Inc v Wakeling* [2004] QCA 42, [26]; *Council of the Queensland Law Society Inc v Whitman* [2003] QCA 438, [36].
[47] *Melbourne v R* [1999] HCA 32, 34.
[48] Ibid.
[49] Below section 7.4.

the decision-making process because the tribunal does not need to justify its decision making process as directly by reference to future risk.

7.6 Failure to Acknowledge Legitimacy of Disciplinary Proceedings

In many disciplinary cases, it is the practitioner's failure to acknowledge the legitimacy of the investigation and subsequent disciplinary proceedings which becomes the primary concern of the disciplinary tribunal. The importance of this factor has been confirmed in numerous court decisions[50] and in academic writing.[51] There is no doubt that a certain degree of cooperation is necessary if the investigators and tribunal are to be able to carry out their task, hence the long-standing inclusion of statutory provisions which deem a failure to respond to investigators' requests for information to be professional misconduct.[52] But the concern goes deeper than that. Usually the court will argue that, without insight and contrition regarding past misconduct, there is a risk of further misconduct.

It can be extremely difficult to determine the genuineness of insight and contrition. This is well demonstrated by the differing views in *Re Maidment*[53] as to whether the practitioner did truly understand now that what he had done was wrong,[54] or whether there was reason to be sceptical of the timing of his supposed insight.[55] The risk of being

[50] *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253; *Gregory v QLS Inc* [2001] QCA 499; *Barristers' Board v Young* [2001] QCA 556.
[51] Mortensen, above n 27.
[52] *Legal Profession Act 2004* (Qld) s 269(4).
[53] (1992) 23 ATR 629.
[54] Ibid 651 (Olsson J). .
[55] Ibid 645 (Millhouse J).

deceived by a practitioner's ability for mere moral discourse is obvious,[56] as seen in *Gregory v Queensland Law Society Inc.*[57] Gregory was applying for readmission, and was cross examined as to the matters which led to him being struck off.[58] Because he agreed that he 'had never really regarded himself as someone who lacked honesty, objectivity or respect for the court',[59] counsel for the Queensland Law Society argued that this response demonstrated that Gregory had still not accepted that his earlier attempt to suborn a witness was wrong.[60] However, Thomas JA rejected this submission, stating that the cross-examination 'was a better test of the applicant's capacity for moral discourse than of lack of character'.[61] His Honour went on to say that, while the court must be satisfied that the applicant has shown sufficient remorse and moral fibre to ensure that no further misconduct will occur,

> that is not necessarily measured by an applicant's capacity for abasement or for producing the best self-analysis of the nature of his guilt. Such exercises may be a better test of intellect than of rehabilitation.[62]

Mortensen believes the court distinguishes between a lack of moral apprehension and a failure of will.[63] A failure of will is more likely to show permanent unfitness to practise, while a lack of moral apprehension can often be corrected through education and

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[56] *Greg Gregory v Queensland Law Society Inc* [2001] QCA 499.
[57] [2001] QCA 499.
[58] *Attorney General v Gregory* [1998] QCA 409.
[59] [2001] QCA 499, [28].
[60] Ibid. Counsel for the Queensland Law Society also relied on the applicant's insistence that he rely on the findings of fact of the District Court judge rather than a finding of White J in the Court of Appeal. Justice Thomas also refused to draw any adverse inferences from this insistence: at [15]-[16]. See discussion in Mortensen, above n 27.
[61] Ibid [29].
[62] Ibid. See also *Council of Queensland Law Society Inc v Roche* [2003] QCA 469, where the practitioner was spirited in his defence of disciplinary charges, leading to prosecution submissions that his lack of appreciation of his serious breach of fiduciary duty itself demonstrated his unfitness (38). However, the court rejected this and accepted the tribunal's view that Roche would be fit to practise by the end of the 12 month suspension period, by which time 'the lesson will have been learned'.
[63] Mortensen, above n 27, 171.

training.[64] However, the distinction is a particularly subtle one to make and it is suggested that those who do not submit to the authority of the proceedings - though at least feigning moral insight - are less likely to be given the opportunity for moral improvement through education and training which Mortensen anticipates.[65]

I would suggest the demand for contrition goes even deeper than suggested by Mortensen. Regardless of any risk of future misconduct, the court or tribunal requires an act of public contrition for past conduct – just as criminal punishment encourages moral reflection.[66] This is further evidence that elements of retribution exist in discipline.

The argument that notions of retribution arise from the need to acknowledge the unethical nature of past misconduct is demonstrated by the admission case of *Victorian Lawyers RPA Ltd v X*.[67] The Supreme Court of Victoria found that, although it did not necessarily reflect on her character *or* reputation,[68] a failure to deal adequately with 'awkward facts from the past'[69] meant the applicant was not a fit and proper person to be admitted.[70] The court found she had not yet shown an adequate appreciation of the gravity of the offences or the potential distress that such reports could cause to the persons falsely accused and their families, and so admission was refused.[71] Given that this insight was not necessarily

[64] Ibid.
[65] Ibid.
[66] Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (Oxford University Press, Oxford, 2005) 174.
[67] [2001] 3 VR 601.
[68] *Victorian Lawyers RPA Ltd v X* [2001] 3 VR 601, 602.
[69] The applicant had been convicted on six counts of making false reports of sexual assault two years earlier.
[70] The court accepted that this occurred during a dissociative state, but thought that the applicant had some conscious awareness at the time of the false report: ibid 610. The court relied on this lack of insight. There was no suggestion that the applicant suffered from any mental disorder at the time of the application.
[71] Ibid 610.

linked to character or reputation, the case suggests that the court required an act of public contrition before the applicant could be admitted. This has hallmarks of retribution.

In similar a vein, it could be argued by those who see disciplinary action as part of a professional project which seeks to reinforce internal ideology,[72] that the need to publicly acknowledge the 'wrongness' of conduct promotes a cohesive sense of self within the profession.[73] More particularly, it reinforces the view of the elite as to 'right' and 'wrong' conduct.

On a retributive model in the criminal context, moral culpability is normally linked to the conduct in question. But Walker has noted that penalties are sometimes reduced because of some 'meritorious action' which has little to do with the misconduct or with the risk of future offences.[74] He gives the example of the man whose prison term is reduced because of a good war record or because he saved a boy from drowning or gave a kidney to his sister.[75] In Walker's view, such an approach does not fit with the classical retributive model and can only be explained if the criminal sentence is really imposed for general moral worth, rather than for the particular crime, and if we presume that:

> ... moral worth can be calculated by moral book-keeping of this crude sort, in which spectacular behaviour counts more than unobtrusive decency.[76]

[72] Above section 3.5.
[73] Ibid.
[74] Nigel Walker, *Punishment, Danger and Stigma: the Morality of Criminal Justice* (Barnes & Noble, Totowa, 1980) 124.
[75] Ibid.
[76] Ibid. Von Hirsch and Ashworth do not believe this form of 'social accounting' has any role in *criminal* sentencing: von Hirsch and Ashworth, above n 66, 167.

It is suggested that there is some evidence of such moral book-keeping in determining whether a person is 'fit and proper' to be a member of the legal profession. For example, in *Ex parte Lenehan*[77] the High Court took strong account of the applicant's 'fine war record'[78] and declared him to be a fit and proper person to be admitted.[79] Similarly, the tribunal in *Council of the Queensland Law Society v Roche*[80] took account of the solicitor's 'admirable contribution to the legal profession through his involvement in the Australian Plaintiff Lawyers Association and other community work'. The tribunal stated that this evidence 'confirms the Tribunal's impression of him .... that he is a person of integrity ...'[81]

The attributes of fine soldier, scout leader or community volunteer do not necessarily guarantee a person's fitness to practise law. Some may argue that professional discipline must be distinguished from criminal sentencing. Through professional discipline, the legal profession portrays its members as moral citizens in the broadest sense of the word, so that this form of moral book-keeping *is* justified in the disciplinary context. It is true that the proper functioning of our legal system requires a greater trust of lawyers than of others in the general community. If this moral bookkeeping simply aims to audit levels of trustworthiness, then it is justified. But if not, there is a danger that 'spectacular good

[77] (1948) 77 CLR 403. Although this was an application for admission to practice rather than a disciplinary hearing, the issues are the same.
[78] Ibid 424.
[79] Ibid (by majority, Latham CJ, Dixon and Williams JJ, Stark and Rich JJ dissenting). The decision followed earlier refusal to admit due to ongoing improper conduct. See as another example the details of the extra-professional service of the eight partners which were used to determine the appropriate discipline for tax evasion in *Re Milte* (1991) 22 ATR 740. Conversely, although evidence was adduced of the 'major role played by the barrister in advancing the interests of members of the Aboriginal community', this was not sufficient to dissuade the Court of Appeal from disbarring a barrister for swearing a false affidavit in *Coe v NSW Bar Association* [2000] NSWCA 13.
[80] [2003] QCA 469.
[81] Tribunal reasons, cited [2003] QCA 469, [33].

deeds' will emphasise reputation not character. There is the added danger that members of the public may overestimate the ability of the disciplinary system to guarantee all lawyers as 'paragons of virtue' in all aspects of their life. Not only is such a guarantee unnecessary, it is something the system cannot guarantee and may lull the public into a false sense of security.[82]

7.7 MENTAL ILLNESS

7.7.1 *Prevalence of Mental Illness in Disciplinary Cases*

It is generally accepted that many lawyers who appear before disciplinary tribunals suffer from mental illnesses, such as depression and substance abuse.[83] Some go so far as to claim that most attorney disciplinary cases in the United States of America involve alcoholism or other substance abuse.[84] It is difficult to assess the actual prevalence of mental illness among lawyers facing professional discipline because the mental illness may not be disclosed to the tribunal, or disclosed to the tribunal but not reported to the public by the tribunal.

That mental illness has only rarely been dealt with in an explicit way by a court is demonstrated by the comment of Brooking J as recently as 1986 that 'mental unfitness to

[82] Linda Haller, 'Smoke and Mirrors: When Professional Discipline May Cause Harm' (2005) 8 *Legal Ethics* 70-86.
[83] New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints Against Lawyers*, Report No 70 (1993) [5.16].
[84] Patricia Heil, 'Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline' (1993) 24 *St Mary's Law Journal* 1263, 1265.

practise the law does not seem to have formed the basis of any reported application to strike off the roll either in England or in Australia.'[85]

The disciplinary tribunal in Queensland has been criticised on a number of occasions for failing to give reasons for its decisions and for the orders made.[86] There have been instances where there is no evidence on the face of the record that the tribunal has taken into account any personal factors, but this becomes apparent at a later time. For instance, the practitioner in *Re Bartlett* was suspended indefinitely in 1994 after the tribunal found her guilty of wrongful conversion, of forging her client's signature and of making false entries in trust account records.[87] The report of the case suggests that she may have been struck off, but instead, 'in view of the special circumstances relative to the practitioner's medical condition ... and other facts of mitigation', the tribunal ordered that she be suspended until she was able to satisfy the Queensland Law Society that she was fit to practise.[88] It was not until *Re Bartlett* was cited in *Re Smith*[89] in 1997 that it was revealed that Bartlett had been suffering from 'severe physiological damage to the brain' which

[85] *Re B (a solicitor)* [1986] VR 695, 699. Given the paucity of English or Australian precedent, Brooking J relied on cases from New Zealand (*Re Shortland* (1893) 12 NZLR 137), Canada (*McKeown v Law Society of Upper Canada* (1983) 1 OAC 211) and the United States (*Smith v State* 9 Tenn (1 Yerg)228 (1829); *Re Sherman* 58 Wash 2d 7 (1961); *Re Chipley* 254 SC 588 (1970); *Re M* 59 NJ 304 (1971)).

[86] *Walter v Council of Queensland Law Society* (1988) 62 ALJR 153, 157; *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 508; *Attorney-General v Kehoe* [2001] 2 Qd R 350, [22-26] (Thomas J), [3-4] (de Jersey CJ, with whom Ambrose J agreed); *QLS v Carberry* [2000] QCA 450, [6] (Pincus JA). The need to state findings on questions of fact has been contained in the Act since its inception in 1927: first contained in *Queensland Law Society Act 1952* (Qld) s6(3)(b), then *Queensland Law Society Act 1952* (Qld) s 6V(1)(b). The need to provide reasons for the particular order made, in addition to giving findings on questions of fact was stated explicitly in the subordinate legislation: *Queensland Law Society (Solicitors Complaints Tribunal) Rule 1997* (Qld) s 14(h). Surprisingly, the *Legal Profession Act 2004* (Qld) has removed any express statutory requirement to provide reasons. This will require the courts and tribunals to revert to the common law: *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 476-477, 482-484, cited with approval in *A-G v Kehoe* [2001] 2 Qd R 350, [22] (Thomas JA). See also *Queensland Law Society Inc v Carberry* [2000] QCA 450, [36] and *Council of the Queensland Law Society v Lowes* [2003] QCA 201. See discussion above section 6.6.2.2.

[87] *Re Bartlett* (1994) 24 *Queensland Law Society Journal* 594, SC 360, 31 May 1994.

[88] Ibid.

meant that she 'either did not know what she was doing or was incapable of controlling what she was doing and was incapable of distinguishing between right and wrong'.[90]

The treatment of mental ill-health in disciplinary proceedings provides an interesting contrast to the treatment of lawyers who fail to acknowledge the legitimacy of the proceedings against them. It was suggested earlier that part of the reason why an acknowledgment of wrongdoing is demanded is that the court or tribunal requires an act of public contrition, of moral reflection – a retributive response. In such cases, even though the risk of future misconduct by that individual may be low or the individual may not intend to resume practice, disciplinary action will be pursued against the unrepentant, so as to demonstrate the legitimacy of the disciplinary process to the profession and the public. In contrast, an individual suffering mental ill-health at the time of their misconduct is often considered to lack culpability and, provided the public can be protected by other means, disciplinary action may be less likely to be taken. One other means by which the public can be protected is through the administrative act of suspending or cancelling a practising certificate.[91] This removes a person from practice without the need for them to face disciplinary proceedings which have traditionally had connotations of shame attached.[92]

There will be times when disciplinary proceedings against the mentally unwell will be unavoidable, for instance where clients have lost money and are demanding strong action.

[89] (1998) 2 Disciplinary Action Report 12, SC 384, 11 November 1997.
[90] Ibid 13.
[91] See discussion above section 5.4.

Even if the tribunal decides that the individual is unfit to practise, it may decide to dispose of the case in a gentler way with less disgrace attached than traditionally attached to a strike off order. An obvious example is by the use of a suspension order.[93] The option of a confidential health assessment - introduced in 2004[94] - is yet another way in which private action can be taken to protect the public from the mentally unwell while avoiding the shame – and retribution - of disciplinary proceedings.

7.7.2 *Lawmakers' Attitude to Mental Health*

The proper relevance of mental conditions as a basis for varying a disciplinary order that may otherwise be imposed has not been as clearly articulated in Australia as it has in the United States.[95] None of the legislation in Australian States deals explicitly with the relevance of personal factors and, until very recently, the courts, when exercising their inherent jurisdiction or when hearing an appeal from a disciplinary tribunal, appear to have sometimes struggled with the appropriate response to evidence of mental illness.

7.7.3 *Mental Illness and the Court's Inherent Jurisdiction to Discipline*

Where disciplinary proceedings are brought within the court's inherent jurisdiction, the court has the power to strike off a practitioner who is no longer 'fit to practise', as the

[92] Between 1930-2000 the Queensland disciplinary tribunal for solicitors focused on 'disgraceful and dishonourable conduct', finding this common law test of professional misconduct established in 63% of cases.

[93] Above section 5.5. The public will continue to be protected if the Queensland Law Society or Bar Assocation of Queensland refuses to issue a practising certificate at the end of the period of suspension if the person is still unfit.

[94] *Legal Profession Act 2004* (Qld) s 533.

power to discipline arises from the power to admit[96] and the courts refuse admission to the profession on the basis of unfitness to practise.

However, there is some evidence that the court and tribunal have not considered the mentally ill to be morally culpable, and may have been reticent to exercise their inherent power to strike a practitioner from the roll in the absence of moral culpability, even where a practitioner was clearly unfit to practise due to mental illness. On some occasions, Australian courts have limited their jurisdiction to a power to strike off only to cases where there has been 'misconduct'.[97] In other words, just as we have seen in relation to suspension orders,[98] the court has been preoccupied with notions of 'dishonour or disgrace' when exercising its disciplinary powers.[99]

[95] American Bar Association (ABA) Standards for Imposing Lawyer Sanctions Rule 9.32(i).
[96] *Re Davis* (1947) 75 CLR 409.
[97] A good example is provided by the Victorian case of *Re B (a Solicitor)* [1986] VR 695, where the practitioner had fired shots at a family of three strangers, injuring the husband and baby. He later told police he had been 'driving all around Melbourne looking for someone to kill' (696). He was found not guilty of charges of shooting with intent to murder and of malicious wounding on the ground of insanity and was detained at the Governor's pleasure. In subsequent disciplinary proceedings brought by the Law Institute of Victoria, within the court's inherent jurisdiction, the judgment of Brooking J shows that His Honour had some difficulty in determining the extent of his jurisdiction to deal with a practitioner who was mentally ill. Three grounds were suggested by the institute for B's removal from the roll: first that B's conduct required his removal, second, the incongruity of B remaining on the roll, or thirdly, the verdict that he was not guilty of manslaughter on the grounds of insanity should be taken as showing he remained presently unfit to practise (698).The Law Institute of Victoria conceded that the finding of insanity meant that B's conduct was neither 'criminal nor morally reprehensible'(702), therefore B could not be removed *because of* his conduct. Instead the court, ordered that the practitioner be suspended for the period of his detention at the Governor's pleasure, given the 'incongruity' of an officer of the court being able to practise in such circumstances (705). This was the same reasoning used in *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, where the court held that, although Ziems was fit, it would be incongruous for him to practise from behind prison bars. See discussion above section 2.6.3.1.
[98] Above section 5.4.3.
[99] See more detailed discussion of the notion of 'dishonour and disgrace' in disciplinary proceedings above section 2.4.

7.7.4 *Mental Illness within a Statutory Regime*

The courts have sometimes chosen to draw their inherent powers narrowly, even though the inherent jurisdiction of the court should more clearly direct the court to a focus on fitness to practise rather than on moral turpitude. It is less surprising to see the problems which have arisen when mental health issues have been raised in a statutory tribunal with more circumscribed powers than a court.

For instance, in South Australia, the Statutory Committee could refer a matter to the Supreme Court of South Australia for disciplinary action where the committee was satisfied that the practitioner was guilty of 'illegal or unprofessional conduct'.[100] In *Re a Practitioner*[101] it was successfully argued that behaviour that occurred during a 'paranoid episode' did not come within such a definition. The tribunal had found that the practitioner's conduct made him unfit to practise but, as it occurred during a 'paranoid episode', it could not be described as unprofessional conduct.[102] As a result, the Supreme Court considered that it lacked jurisdiction and declined to make any order against the practitioner.[103]

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[100] *Legal Practitioner Act 1936* (SA), s 51(1). The legislation now allows for disciplinary action to be instituted, not only when the practitioner is guilty of unprofessional conduct, but also where he is guilty of 'unsatisfactory conduct': *Legal Practitioners Act 1981* (SA) s 82(1). Presumably one's conduct can be inadvertently 'unsatisfactory', in other words, this amendment may have sought to overcome the effect of the decision in *Re a Practitioner*.

[101] [1960] SASR 178.

[102] Ibid 182 (Ross J), 193 (Chamberlain J).

[103] Similarly, in *Re Harrison* (1997) 6 Disciplinary Reports 29, the Legal Services Tribunal in New South Wales accepted that 'involuntary inertia' had led a barrister to fail to lodge tax returns between 1981 and 1993 and fail to comply with three court orders requiring the lodgment of outstanding tax returns. Under the statutory jurisdiction of the tribunal in New South Wales, personal conduct could form the basis for a legal practitioner to be removed from the roll if the practitioner was not of good fame and character or not fit and proper to remain on the roll (*Legal Profession Act 1987* (NSW) s 127(1)(b)). The tribunal held that the barrister remained of good fame and character: his good character was not impugned because his

In other words, the practitioner was found to be not responsible for his own actions. Therefore, there was no misconduct, and no disciplinary response could follow within the statutory constraints then existing. This demonstrates the confusion caused if a statutory test requires evidence of 'disgraceful or dishonourable conduct' before the power to take disciplinary action is enlivened, but inherent powers are framed more broadly, simply in terms of 'unfitness to practise'. This is so even though both jurisdictions supposedly seek to achieve the same purpose. This confusion was noted in *New South Wales Bar Association v Murphy*.[104]

Although no Queensland court has been required to decide the same point - whether conduct occurring during a paranoid episode is liable to discipline - it is quite possible that the Queensland Law Society may have declined to take disciplinary action in similar circumstances, given the South Australian precedent. Given the secrecy provisions which surround the handling of investigations of misconduct,[105] it is not possible to know if this has been the case. Even in the absence of the South Australian case, it is suggested that there is likely to be reluctance in the disciplinary system to take action against individuals suffering mental illness. This is partly because of the traditional, narrow view of discipline – that it is a response to dishonourable or disgraceful conduct - which implies the need for moral culpability to be present.

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actions were not deliberate but were due to a psychological block (31). He also remained of 'good fame' because a number of judges and barristers, with knowledge of his non-payment of tax, testified to this. The tribunal relied on *Ziems* to also find that the practitioner remained fit and proper to practise, as the Council of the New South Wales Bar Association had failed to discharge the onus of proving that his psychological problems had or could manifest in his professional affairs.

[104] (2002) 55 NSWLR 23, 32-3 (Giles JA, with whom Ipp AJA agreed).

[105] *Legal Profession Act 2004* (Qld) s 592.

The Queensland Parliament has sought to deal with the limitations caused by the traditional approach to discipline. The statutory definition of professional misconduct now explicitly states that conduct can amount to professional misconduct if that conduct would justify a finding that a practitioner was not a fit and proper person.[106] The public needs to be protected from the lawyer who is mentally unfit to practise as well as from the lawyer who makes a habit of misappropriating trust money. Both need to be removed from practice while they remain unfit. However, while there is likely to be external and internal pressure for the dishonest lawyer to face discipline and be struck off,[107] there may be a temptation to avoid discipline and use gentler means to protect the public from the mentally unfit lawyer. For instance, the practising certificate of the mentally unfit lawyer can be cancelled by the administrative act of the professional body which issued the certificate, or through the gentler means of a health assessment.[108] In practical terms, there is no need for disciplinary proceedings to also take place.[109]

7.7.5 *Mental Health to Vary Disciplinary Orders*

The earlier examples dealt with situations in which a court or tribunal found that no conduct liable to discipline existed and hypothesised about situations in which a decision might be made to not prosecute discipline against an individual with mental health problems. Even if disciplinary proceedings are brought, a lack of culpability may

[106] *Legal Profession Act 2004* (Qld) s 245(1)(b). See also *Legal Profession Act 2004* (NSW) s 497(1)(b); *Legal Profession Act 2004* (Vic) s 4.4.3(1)(b).
[107] The reasons for this were explored above section 5.2.2.
[108] *Legal Profession Act 2004* (Qld) s 67(a), s 533.

moderate the order that would otherwise be made, for instance, leading to a suspension order rather than a strike off order.[110] As so many of those who face discipline are sole practitioners,[111] the practical effect of a suspension will often be the same as a strike off order – the practitioner does not have the support of partners to continue the practice during the suspension, and will be unable to resurrect their practice at its conclusion. However, a suspension will spare the practitioner the greater shame which attaches to a strike off order.[112]

I will now look more closely at the practice of the courts and tribunals when a lawyer claims that their conduct occurred during a period of mental illness. It was suggested earlier that, where alternative means exist to protect the public from an individual who is mentally unfit to practise, disciplinary proceedings are less likely. The approach is demonstrated by Brooking J of the Victorian Supreme Court in *Re B (a solicitor)*.[113] His Honour noted that the court's power to strike a person from the roll extended beyond cases of misconduct, but then went on to say,

> Retired practitioners grow old and may ultimately lose their faculties, becoming unfit to practise; they have no intention of practising; no-one would suggest that their incapacity requires them to be struck off the roll. There is no need for protection, for they intend neither to practise nor to take advantage in any other way of the standing which they have by reason of their admission. But if a lawyer who is mentally ill intends to practise his profession, or to make some indirect use of his status as a person admitted to practise, the protective jurisdiction may well have to be invoked against him.[114]

[109] The ill-health can also be dealt with in a confidential way, as a health assessment, leading to the cancellation of a practising certificate - but not discipline: s 537.
[110] See evidence above section 5.3.5.1, of the tribunal's high use of suspension orders, even after discouraged by the Supreme Court.
[111] Sixty per cent of respondents were practising as sole practitioners at the time of the disciplinary hearing: Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45, 16.
[112] Above section 5.5.
[113] [1986] VR 695.

Thirteen years later in *Victorian Bar Incorporated v Himmelhoch*,[115] O'Bryan J took a similar view. He accepted medical evidence that the barrister - who had been stalking and harassing a person about a fictitious debt - was suffering from Adult Attention Deficit Disorder, which was exacerbated by an anxiety and depressive disorder.[116] Despite the fact that the barrister had not as yet responded well to treatment, O'Bryan J thought it 'a grave step to find a person is not a fit and proper person to practise the law and to remove that person's name from the roll of practitioners.'[117] By this time, the powers of the Law Institute of Victoria to suspend practising certificates when it determined that a practitioner was unfit to practise had been increased.[118] Thus, O'Bryan J was able to conclude that the public would be adequately protected by the cancellation of the barrister's practising certificate[119] and seemed less concerned that disciplinary proceedings demonstrate to the public that an individual had been permanently removed from the profession.[120]

Compare this with the position in South Australia. There, the absence of powers to suspend the practising certificate of a mentally unfit practitioner[121] may explain the

[114] Ibid 699.
[115] [1999] VSC 222.
[116] Ibid 14.
[117] Ibid 25.
[118] *Legal Practice Act 1996* (Vic) s 38(1). The factors relevant to suitability to hold a practising certificate are now contained in *Legal Profession Act 2004* (Vic) s 2.4.4.
[119] Ibid 26.
[120] Practising certificates are discussed in more detail above section 5.4.
[121] Unlike legislation in a number of other States, including Queensland, the *Legal Practitioners Act 1981* (SA) contains no power to cancel or suspend a practising certificate on health grounds. Thus, the only effective way to ensure that neither of these practitioners recommenced practice while unwell was to issue formal disciplinary proceedings.

decision to institute disciplinary action in two cases.[122] In both cases the practitioner had ceased to practise and in both cases there was no actual danger to clients.

What has been the approach in Queensland when dealing with lawyers with mental health problems? The most notorious example was the case involving Henry ('Harry') Smith.[123] Even though Smith no longer held a practising certificate, the number and seriousness of the complaints against him meant there was likely to have been strong client pressure for some form of public airing of their complaints, and disciplinary proceedings were the most likely forum.[124] The tribunal accepted medical evidence that Smith had engaged in a form of 'professional suicide' while suffering a major depressive illness. Given these 'special circumstances',[125] the tribunal resisted Queensland Law Society submissions[126] that he be struck off and instead ordered that he be suspended from practice until he could satisfy the society that he was again fit to hold a practising certificate.[127] On a later appeal by the society and Attorney-General, he consented to an order that he be struck from the roll.[128]

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[122] *Law Society of South Australia v Murphy* [1999] SASC 83; *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58. In *Murphy*, although it was argued that the public could be successfully protected by Murphy undertaking not to practise law and despite the fact that he had not practised since 1994, the court thought it necessary to remove his name from the roll of practitioners. This was because the court thought it important to 'demonstrate' that a person was 'not fit to remain a member of a profession that plays an important part in the administration of justice and in which the public is entitled to place great trust' (30), emphasising the need to maintain public confidence in the legal profession (33).Disciplinary proceedings were also brought in *Trueman* despite the fact that he, like Murphy, had ceased practising.

[123] *Re Smith* (1998) 2 Disciplinary Action Report 12, SC 384, 11 November 1997.

[124] At least 10 clients had complained and it was alleged that $6.2million of client money was missing: Evans, above n 15, 402.

[125] *Re Smith* (1998) 2 Disciplinary Action Report 12, 14.

[126] Note that the society (representing members?) asked for strong action. Members were to lose large amounts of money due to the pressure which Smith's misconduct placed on the fidelity fund: Evans, above n 15, 407. Smith was found to have stolen millions of dollars from clients.

[127] It was argued on appeal that this was an improper delegation of authority, but as Smith consented to an order that his name be removed from the roll, the court was not required to decide the matter.

[128] *Queensland Law Society v Henry William Smith* (unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998).

Although she was no longer practising and even though her case was not as notorious as *Smith*, it was also likely that disciplinary proceedings were inevitable in a matter involving Julie Bartlett.[129] Five clients had complained about forgery and over $80,000 was missing from her trust account. The original and brief report of the tribunal's decision simply noted 'the practitioner's medical condition as outlined by the evidence of the medical practitioner and the other facts of mitigation', and the tribunal's decision to suspend her from practice until she could satisfy the Queensland Law Society that she was again fit to hold a practising certificate.[130] It was not until *Re Bartlett* was cited in *Re Smith*[131] in 1997 that more was revealed about her medical condition. She had been suffering from 'severe physiological damage to the brain', which meant that she 'either did not know what she was doing or was incapable of controlling what she was doing and was incapable of distinguishing between right and wrong'.[132]

Re Smith and *Re Bartlett* are two cases in which we know that the tribunal chose not to strike a practitioner from the roll because of evidence of mental ill-health. Instead, the tribunal preferred to suspend the practitioner's practising certificate indefinitely, leaving any decision about a return to practice to be that of the Queensland Law Society, through its certification powers. We can also see from *Re Bartlett* that the tribunal does not always disclose the personal factors on which it relies, and so there may well be other, similar cases. Nevertheless, these two cases provide a clear indication that, where mental

[129] *Re Bartlett* (1994) 24 Queensland Law Society Journal 594, SC 360, 31 May 1994.
[130] Ibid.
[131] (1998) 2 Disciplinary Action Report 12, SC 384, 11 November 1997.
[132] Ibid 13.

illness has been involved, the tribunal has been reluctant to impose a strike off order, and has preferred to defer the future protection of the public to the Queensland Law Society, through its practising certificate powers.

7.8 CLIENT LOSS AND LAWYER GAIN

7.8.1 *Traditional Emphasis on Conduct not Consequences*

The final factor that will be considered in this chapter is the degree to which a disciplinary tribunal or court takes into account whether clients have suffered loss as a result of the lawyer's misconduct, or whether the lawyer benefited from the misconduct. Certainly, such factors are of critical importance in the criminal jurisdiction when deciding the appropriate level of retribution, as they reflect the seriousness of the harm caused.[133] Whether clients happened to suffer or the defendant happened to benefit from past criminal conduct says nothing about the risk of further misconduct. It is a retributive consideration.

Unlike criminal sentencing, discipline aims to protect the public by deterring other lawyers from similar misconduct in the future. As it may be simply fortuitous whether past misconduct led to client loss or lawyer profit, the traditional view has been that these

[133] See above section 1.3.3. Hawkins has also reported that many regulators take it into account in deciding which regulatory offences to prosecute: Keith Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002) 362, 274.

factors are not relevant when determining the appropriate disciplinary order.[134] However, it is fairly common to see reference to these factors, even in decisions of the High Court. For instance, in *Walsh v Law Society of New South Wales*,[135] the High Court emphasised the family context in which the conduct occurred, and the fact that 'no financial detriment to anyone was found to have been intended or caused'.[136] In Queensland, in *Attorney-General v Clough*,[137] Muir J cited the lack of material loss as one reason for not imposing more than a suspension.[138] In deciding on the appropriate order in *Attorney-General v Bax*,[139] Pincus J noted two factors that relate more to retribution than to future protection: the solicitor had not derived any personal benefit, but the amounts involved were considerable.[140] The court also appeared swayed by the lack of client loss or lawyer gain in upholding the $7,500 fine in *Attorney-General v Kehoe*.[141] Given that the courts sometimes take these factors into account, it would not be surprising to find that voluntary, part-time tribunal members had followed the lead of the Supreme Court, and done the same.

It is also likely that the pressure to take disciplinary action – either from the public or within the profession[142] – will vary depending on whether or not clients have lost money

[134] *Re a Solicitor* (1959) 103 Solicitors Journal 875; *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 740 Hope JA).
[135] (1999) 198 CLR 73.
[136] Ibid [76].
[137] [2002] 1 Qd R 116.
[138] Ibid [94], with whom Douglas J agreed 'generally'.
[139] [1999] 2 Qd R 9.
[140] Ibid 20.
[141] [2001] 2 Qd R 350, 355, 357. A similar approach was taken in *Robb v Law Society of the ACT* (1997) 72 FCR 225, 257-9 (Keifel J).
[142] Above section 5.2.2.

as a result of the lawyer's conduct. This pressure does not reflect a demand for greater protection, but for greater retribution.

7.8.2 *Conduct Subsequent to Conduct Leading to Discipline*

What weight, if any, should be given to evidence that the practitioner has reimbursed any losses suffered by the client or, more generally, has made amends for their past misconduct? Given that the primary aim of discipline is to protect the public, and the public is protected by the payment of compensation, it may seem logical that a disciplinary tribunal facilitate compensation. The risk of such an approach is that it draws 'the public' too narrowly, and prefers the interests of past clients over the potential risk which may remain for future clients. However, courts and tribunal have regularly taken this into account when determining the appropriate disciplinary order. For instance, in *Re Roche*,[143] the Supreme Court of the Australian Capital Territory acknowledged that the practitioners' offer of a $150,000 compensation fund was a 'significant mitigatory factor' as it indicated recognition of their 'disgraceful' misconduct in grossly overcharging clients.[144] The Law Society of the Australian Capital Territory immediately applauded the court's decision in a press release and claimed that, had the offer of compensation not been made, it was 'highly likely' that the two solicitors would have been struck off rather than suspended for 18 months.[145] The society also claimed that the decision was a 'break through' for consumers of legal services as clients would have not been reimbursed if the

[143] [2002] ACTSC 104.
[144] Ibid 88.
[145] Law Society of the Australian Capital Territory, 'Landmark Decision Protects Lawyers' Clients', (Press Release, 21 October 2002).

solicitors had been struck off.[146] Such comments highlight a tension within the disciplinary system between a desire to protect past clients and potential clients. The same tension was apparent in the Queensland tribunal decision of *Re Practitioner X*,[147] where the practitioner was fined $25,000 rather than suspended so as to ensure that past clients were repaid amounts which had been overcharged.

It could be argued that the ACT Supreme Court gave too much weight to the compensation fund in *Re Roche*, especially as the court had otherwise found that the client agreements were 'extortionate' and that the two solicitors 'cheated and effectively defrauded their clients,'[148] not in an isolated incident, but in a habitual practice,[149] which was 'an exercise in calculated greed [which deprived] vulnerable injured persons of many thousands of dollars'.[150] It could be argued that the disciplinary proceedings were compromised by an effort to achieve a compensatory outcome, which would be more appropriately addressed in civil proceedings by the clients who had been overcharged.

There is no doubt that the making of amends is a valid consideration if it demonstrates ethical insight into the dangers of past misconduct, lessens the risk of recurrence and shows the individual is again fit to practise. But like contrition, the 'making of amends' is given a greater emphasis than this in disciplinary proceedings. It is also used to reduce the culpability of the person appearing before the tribunal.

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[146] Ibid.
[147] (1999) 5 Disciplinary Action Report 24, 26. The overcharging amounted to $46,420: Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152-178, 175.
[148] [2002] ACTSC 104, 67.

Similar considerations apply where the tribunal notes that the practitioner has 'suffered' in other ways as a result of the misconduct, with the inference being that it is less necessary for disciplinary proceedings to cause further suffering. Again, such reasoning indicates a degree of retribution in disciplinary decision-making. Careful reading of *A Solicitor v Council of the Law Society of New South Wales*[151] is required in this regard. The High Court did not elaborate which of the solicitor's 'powerful subjective factors'[152] were most influential to its decision, but substantial evidence had been placed before the New South Wales Court of Appeal as to the solicitor's subsequent shame, loss of employment and economic suffering,[153] and the relevance of these factors was not explicitly discounted by the High Court. Again, the High Court, like the Supreme Court of Queensland, has not provided clear guidance to assist tribunals in properly avoiding the retributive elements which can influence any consideration of personal factors.

7.9 Conclusion

The courts have insisted that the focus of professional discipline remain on protection and future risk – not retribution. In this chapter I have looked at how the courts and tribunals have handled testimonials, client loss and gain, and a lawyer's acknowledgment of the legitimacy of the disciplinary proceedings. All of these factors demonstrate a retributive and backward-looking approach. They are only consistent with the protective focus of discipline if they can also demonstrate that the risk of future harm is less or, in the case of

[149] Ibid 68.
[150] Ibid 89.
[151] (2004) 216 CLR 253. Discussed above section 2.6.3.2 in relation to the relevance of the damage the conduct may have on the reputation of the legal profession.

the lawyer's recognition of the legitimacy of the disciplinary process, if it assists the tribunal in making an accurate judgment as to *how* the public can be protected. It will often be difficult to show the risk of future harm, particularly in relation to testimonials. However, a retributive approach can be reconciled with legitimation if it is endorsed by those from whom legitimacy must be sought. As I mentioned in the previous chapter, external legitimacy is served if clients who have suffered at the hands of a lawyer are more satisfied to see the disciplinary system meting out retribution than ensuring future protection.[154] Testimonials and the need for a lawyer to submit to the authority of the proceedings can also promote internal legitimacy, by reinforcing the elite's view of the 'good lawyer', 'good discipline' and its control over the lower levels of the profession.[155]

The complex relationship between discipline and mentally unwell lawyers makes it more difficult to untangle the threads of protection, legitimation and retribution. Even though the lack of culpability will militate against disciplinary action being taken in favour of a more gentle method of protecting the public,[156] there still will be pressure to take disciplinary action against some lawyers experiencing mental illness, particularly where clients or other lawyers have suffered loss at the hands of the lawyer. A suspension order can adequately protect the public without the shame of a strike off order – and retribution and protection can be reconciled - if care is taken at the 'second line of defence' to ensure no practising certificate is issued until the lawyer is again fit to practise, as was the

[152] Ibid [37].
[153] *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62.
[154] Above section 6.5.2.
[155] The external and internal legitimating roles of discipline are discussed above section 3.9.1.
[156] Such as through the exercise of practising certificate or health assessment powers. Discussed above section 7.7.4.

intention of the tribunal in *Re Smith*[157] and *Re Bartlett*.[158] The lack of information regarding the society's use of its practising certificate powers makes it difficult to know if the tribunal's retributive approach – and effective delegation of responsibility to the society - has compromised its protective effect. In the following chapter I again pursue issues relating to information (and lack thereof). This time, the issue is the relationship between discipline and publicity.

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[157] *Queensland Law Society v Henry William Smith* (unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998).

[158] *Re Bartlett* (1994) 24 Queensland Law Society Journal 594, SC 360, 31 May 1994. As I demonstrated in the previous chapter, there are serious doubts as to whether other less shameful orders – such as fines - can adequately protect the public.

CHAPTER EIGHT

PUBLICITY

8.1 INTRODUCTION

In earlier chapters, I considered the use of incapacitation orders and disciplinary fines and the degree to which such orders could be protecting the public or serving a project of legitimation. If the legal profession expels an individual from the profession without public fanfare, it is difficult to see how that profession could be using the expulsion to legitimate its position outside the profession. Further, there is no doubt that disciplinary fines can protect the public through deterrence, but this also requires disciplinary proceedings to be publicised. Hence the importance of this chapter.

As I discussed in Chapter Three[1] and Chapter Five,[2] if the disciplinary system is being used for legitimation purposes, it would be expected that strike off orders would be given the greatest publicity by the legal profession, as such an order appears to protect the public in the most compromising of ways. The primary aim of this chapter is to examine whether the degree of publicity given to disciplinary proceedings in Queensland supports an argument that those proceedings were concerned with legitimation rather than public protection. The chapter will also seek to demonstrate the divergent approaches to public

[1] Above section 3.9.
[2] Above section 5.2.1.

discipline which existed between the two branches of the legal profession in Queensland. The chapter will show that barristers have been subject to much less pressure than solicitors to report disciplinary action and to conduct their disciplinary hearings in public. Also, the Bar Association of Queensland continued to argue in favour of private disciplinary hearings long after this issue was abandoned by the solicitors' branch of the profession. After considering arguments as to why disciplinary hearings should or should not be subject to the same public hearings as court proceedings, I look at the actual reporting of disciplinary outcomes in Queensland and the holding of public disciplinary hearings. I also consider whether 'strategic reporting' may have taken place in Queensland.

8.2 Courts' Attitude to Public Hearings

Many arguments have been offered as to why tribunal proceedings are different to court proceedings, and should be heard behind closed doors. Courts are reluctant to close their hearings except in exceptional circumstances as it is presumed that a public hearing is the most effective means of ensuring that justice is done and seen to be done.[3] Publicity allows for the 'proper scrutiny of the exercise of power and the creation of confidence in those who exercise it'[4] to the advantage of the participants and the broader community.

Levels of accountability within lawyer disciplinary systems have increased with the inclusion of independent observers, variously named Lay Observers, Legal Ombudsmen

[3] *Scott v Scott* [1913] AC 417; *McPherson v McPherson* [1936] AC 177.
[4] *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 61 (Mahoney JA).

or Legal Services Commissioners, charged by statute to oversee the complaints and disciplinary system. While their participation provides a valuable independent overview of the system, they only report a personal view as to whether the system is operating satisfactorily. In contrast, public disciplinary hearings allow members of the public to attend individual hearings and form their own views. Public trust in the system requires justice to be seen to be done *directly*, not through the opinion of others. This is also true in the context of court proceedings, where it has not been thought sufficient that a third party report to the public that he or she is satisfied that all court hearings in a given jurisdiction proceeded in a proper manner. Public trust requires open court hearings. Why should the same not be true of disciplinary hearings?

There may be greater justification to close hearings before bodies other than a court, such as a tribunal established by statute. This will partly depend on the purpose of the tribunal, its procedures and powers. For instance, while a court can compel the attendance of witnesses, unless a tribunal has similar coercive powers, witnesses may refuse to cooperate except behind closed doors.[5] As Forbes also notes, participants may be intimidated by the threat of a defamation action if a tribunal sits in public and if legislation does not provide for the proceedings to be privileged.[6]

A statutory tribunal may not require the express grant of privilege as its proceedings are likely to be protected by absolute privilege if the tribunal is acting in a similar manner to

[5] John Forbes, *Justice in Tribunals* (Federation Press, Sydney, 2002) 150.
[6] Ibid.

a court,[7] but these subtleties of law may be of little comfort to a potential witness, and in the case of any residual reluctance, a private hearing may facilitate more candid evidence.

Even if a tribunal can compel witnesses to attend and can afford them absolute privilege, there may be other valid arguments as to why a disciplinary tribunal should be closed to the general public more readily than a court. Although some may fear that the evidence placed before a disciplinary tribunal may not be as rigorously tested as the evidence placed before a court, this should not be a concern as disciplinary tribunals normally apply the *Briginshaw*[8] standard of proof, which varies with the seriousness of the allegations: the standard of proof is equivalent to the civil standard (balance of probabilities) for disciplinary charges which only amount to allegations of civil breaches of duty, but increases to the criminal standard (beyond reasonable doubt) if the charges allege misconduct which is tantamount to criminal conduct.

There may be greater justification to hear disciplinary matters behind closed doors if it is thought that disciplinary tribunals have greater potential to damage reputations than other tribunals. Unlike tribunals that determine whether a decision maker has acted within power or that hear merits reviews against administrative decisions, a disciplinary tribunal is required to focus on a person's 'fitness' as a lawyer. In determining this issue, allegations of misconduct will often arise, which will require the tribunal to consider

[7] Ibid.
[8] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

whether the conduct has been 'disgraceful or dishonourable'.[9] Such allegations are likely to cause severe damage to an individual lawyer's reputation.

The arguments in favour of closed disciplinary hearings have not been embraced by the courts in Queensland or elsewhere.[10] The Supreme Court of Queensland has also maintained that the public interest requires that disciplinary proceedings against solicitors be held in public, even though the airing of an allegation of fraud was likely to impact upon a solicitor's practice and reputation, and even though the disciplinary charges may be ultimately dismissed.[11] The Court did not think that it was likely that the public interest would be served 'if the tribunal routinely ordered private hearing of, and suppressed publication of, material relating to charges imputing disgraceful conduct.'[12]

Similarly, in *Kyle v Legal Practitioners' Complaints Committee*[13] the Supreme Court of Western Australia emphasised the importance of open justice, in the course of refusing an application to suppress any report of disciplinary proceedings pending the outcome of an appeal. Even though the court sympathised with the fact that unsubstantiated allegations could thereby be published, it felt that 'the fundamental principle [of open justice] is so compelling ... that this prospect of personal or professional embarrassment or damage to reputation must be accepted'.[14] The court went so far as to suggest that the concept of the open administration of justice may be of even greater importance 'when this court was

[9] Above section 2.4.3.3.
[10] The New Zealand High Court declined to suppress the name of the practitioner or to prohibit a search of the court file in *Ellis v Auckland District Law Society* [1998] 1 NZLR 750 as the public interest required full publication (759-60).
[11] *Atkins v Queensland Law Society* [1999] QCA 143.
[12] [1999] QCA 143, [12] (Pincus JA and Atkinson J, with whom McMurdo P agreed).
[13] [1999] WASCA 115.

dealing with the professional conduct of one of its own practitioners'.[15] This echoes comments made by the Court of Appeal in *Allbutt v General Council of Medical Education and Registration*,[16] emphasising the important public role of the medical profession, which justified the publication of information about disciplinary proceedings against members of that profession.[17]

As mentioned throughout this thesis, unlike barristers, Queensland solicitors have been heavily regulated by statute since 1927. This regulation has included a requirement that a copy of the findings and orders of the disciplinary tribunal be filed at the Supreme Court and - since 1994 – a requirement that all disciplinary hearings involving solicitors be in public.[18] Until the *Legal Profession Act 2004* (Qld) shifted many of its responsibilities to the Legal Services Commission,[19] the Queensland Law Society also went beyond its statutory obligations by voluntarily reporting most of the disciplinary action that it took to its members. The society also sought out the mass media to publicise some, but not all, disciplinary action to the broader community.

After examining the law and practice in relation to the publication of disciplinary proceedings, this chapter discusses strategic publicity. The term 'strategic publicity' is used here to refer to the selective reporting of only some disciplinary cases. The term presupposes that the cases are chosen in pursuit of a particular strategy – in this case a

[14] Ibid [78].
[15] Ibid [76].
[16] (1889) 23 QBD 400.
[17] Ibid 409.
[18] Below section 8.4.2.
[19] Discussed in more detail below section 4.7.

legitimation project. The chapter goes on to consider the inherent risks of strategic publicity for any legitimation project.

8.3 Reporting of Disciplinary Outcomes

8.3.1 *Ex Post Facto Reporting More Easily Controlled*

The reporting of disciplinary decisions provides a measure of public accountability and of education to the public and fellow members of the legal profession.

While a public hearing makes it difficult to control the nature of material which is published, the subsequent reporting of disciplinary proceedings held in private can be controlled, and more conscious efforts made to balance the privacy of third parties[20] and the reputation of the legal practitioner against the need for public accountability. The case law generally accepts that there are fewer grounds to object to the subsequent publication of finalised proceedings than exist to justify the closure of the hearing.[21]

An example of the type of information that can be more easily controlled in subsequent reporting than in public hearings is the identity of the legal practitioner appearing before the disciplinary tribunal. Accountability and transparency concerns may be addressed if the disciplinary proceedings are reported but the practitioner not named. This would be

[20] As in *Law Society of New South Wales v M (no 2)* [2001] NSWADT 54, where the tribunal was asked to consider whether sufficient steps had been taken to protect the identity of the victims of the practitioner's criminal offences. The court held that the use of the pseudonym 'M' provided sufficient protection.
[21] *Scott v Scott* [1913] AC 417, 448 (Earl Loreburn); *Dental Board of Queensland v B* [2003] QCA 294, 31.

an acceptable practice where disciplinary charges have been dismissed, as the reputation of the individual is protected and the wider community informed as to the type of conduct that the tribunal considers acceptable.

Apart from the issue of naming, other information about concluded disciplinary hearings which can be controlled include whether all disciplinary decisions should be reported or only those in which there has been a finding of misconduct or serious discipline imposed. Conscious decisions can be made as to where the information should be disseminated and whether it should comprise only a summary of disciplinary action taken or be more detailed. Issues also arise as to whether legislation should require the information to be published or whether it should simply provide a statutory immunity from defamation actions for the disciplinary tribunal or other interested body should that body wish to publish such information.

8.3.2 *The Queensland Experience*

8.3.2.1 *Reporting of Solicitors and Barristers*

As the following discussion shows, there is much variation in how these questions have been answered in Queensland, where extensive information is available about disciplinary action taken against solicitors, but very little available in relation to barristers prior to the introduction of the *Legal Profession Act 2004* (Qld). The following discussion documents the history of this fragmented approach in Queensland to demonstrate how the solicitors' branch of the profession has engaged in public shaming –

sometimes because this was required by law but at other times voluntarily - while Queensland barristers have not. The chapter will consider why such a discrepancy has occurred in the law and practice relating to the two branches of the profession, and also consider whether the differences can be explained by theories which claim that professions are motivated largely by self interest, not the public, and why there might be such a difference between solicitors and barristers in relation to publicity.

8.3.2.2 *Mandatory Reporting Regarding Queensland Solicitors*

From 1927 until 2004 legislation required every order of the solicitors' disciplinary tribunal,[22] including its findings on questions of fact,[23] to be filed with the Registrar of the Supreme Court of Queensland.[24] This file of orders was to be available for inspection by any person.[25] From 1997 the legislation also required the tribunal to provide reasons for the particular order made.[26] The common law also required the statutory tribunal to give reasons,[27] although the tribunal often failed to do so.[28] Hence the Findings and Orders, especially in earlier times, sometimes simply recorded a finding of professional misconduct and an order that the solicitor be struck off or censured. Such abbreviated

[22] First called the Statutory Committee, then in 1997 renamed the Solicitors Complaints Tribunal and in 2004 the Legal Practice Tribunal.
[23] *Queensland Law Society Act 1952* (Qld) s 6V(1)(b), relocated from s6(3)(b).
[24] Initially contained in *Queensland Law Society Act 1927* (Qld) s 5(3)(b) and relocated to s 6(3)(b) in 1952 (repealed). Later contained in *Queensland Law Society Act 1952* (Qld) s 6W (repealed). The relevant provision is now *Legal Profession Act 2004* (Qld) ss 281(2) (tribunal), 283(3) (committee).
[25] *Queensland Law Society Act 1927* (Qld) 5(3)(d), relocated to s 6(3)(d) in 1952 (repealed), then contained in s 6X (repealed); *Ex parte The Queensland Law Society Inc* [1984] 1 Qd R 166. These provisions did not apply to the lower level Solicitors Disciplinary Tribunal.
[26] *Queensland Law Society (Solicitors Complaints Tribunal) Rule* 1997 (Qld) s14(h).
[27] *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 508.
[28] The tribunal has been criticised on numerous occasions by the court for its failure to give reasons: *Walter v Council of Queensland Law Society* (1988) 62 ALJR 153, 157; *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 508; *Attorney-General v Kehoe* [2000] QCA 222, [22-26] (Thomas J), [3-4] (de Jersey CJ, with whom Ambrose J agreed); *QLS v Carberry* [2000] QCA 450 [6] (Pincus JA); *Council of the Queensland Law Society Inc v Lowes* [2003] QCA 201, [22]–[26] (de Jersey CJ).

records provide little opportunity for the public to independently assess the performance of the disciplinary tribunal.

The courts have generally taken the view that they lack any inherent power to restrict the publication of the findings and orders of a disciplinary tribunal in the face of a statutory requirement that they be published.[29] The Supreme Court of Queensland has taken this view even when all charges have been dismissed and even at times when the tribunal sat in private. For instance, in *Ex Parte Qld Law Society Inc*,[30] the Queensland Law Society appealed a decision of the Statutory Committee dismissing all charges against four partners in a firm of solicitors. The hearing had been in private, as were all disciplinary hearings until 1993. The solicitor respondents to the appeal then sought an order that neither the Statutory Committee file or the appeal file be available for inspection, or the fact of the appeal or the names of the solicitors be published. In refusing the application, McPherson J considered that it was doubtful whether he had any power at all to override the provisions of the *Queensland Law Society Act 1952* (Qld).

In considering the further question of whether to exercise the court's discretion to limit access to the appeal file, His Honour reaffirmed that such an order in relation to proceedings of the court would only be made where publication could lead to an unjust outcome. Such was not the case, according to His Honour,[31] hence the application to restrict the inspection of the Statutory Committee and appeal files and the publication of the names of the solicitors was refused.

[29] *In re a Solicitor* [1944] 1 KB 427, 431.
[30] [1984] 1 Qd R 166.

8.3.2.3 *Voluntary Reporting by Queensland Law Society*

For a number of years the Queensland Law Society went beyond its legal obligations by providing additional reporting of disciplinary hearings to its members through its professional journal, although there were periods when publication ceased[32] for no apparent reason: decisions whether or not to publish may have varied with the attitude of various Councils or Presidents or staff of the Professional Standards Department of the Law Society or Editor of the Journal.[33]

Reporting to members became more extensive in June 1997 when the Queensland Law Society began to publish more comprehensive reports, which included not only the findings of fact and orders of the tribunal, but also the details of the charges laid and submissions made on behalf of the practitioner and the society.[34] In March 2003, the disciplinary reports became even more accessible to members as they were posted in full on the Queensland Law Society website and in September 2003, were made available on the public section of the website. This extensive and detailed reporting to the profession and the public had the potential to provide a valuable source of deterrence and education.

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[31] Ibid 170-1.

[32] For instance, no disciplinary proceedings appear to have been reported in the *Queensland Law Society Journal* between November 1988 and July 1993, apart from very brief statements to advise when a solicitor's right to practise was affected (in other words, strike offs and suspensions were noted but not fines).

[33] A decision to publish would always be subject to any orders made by the tribunal under *Queensland Law Society Act 1952* (Qld) s6L to prohibit or restrict the publication of evidence given before the tribunal.

[34] These were published in *Bi-Annual Reports of Disciplinary Action*, produced as a supplement to *Proctor*, the Law Society's monthly magazine. These Bi-Annual reports also contained brief reports of any resolutions of the Professional Standards Committee to censure or admonish practitioners.

8.3.2.4 *Naming of Individual Solicitors*

Until July 2002 the Queensland Law Society had a policy that it would not name individual solicitors unless they were struck off or suspended.[35] Despite this policy, the tribunal findings filed at the Supreme Court did contain the names of the individual concerned, which could be reported in the mass media, although court records were not easy to access without the name of the practitioner concerned.[36] Equally, even when hearings became 'public' in the mid 1990s and a journalist who attended the hearing could name the lawyer facing disciplinary charges in a press report, it remained difficult for the mass media to receive prior notice of disciplinary hearings.[37] The Legal Ombudsman and his predecessor, the Lay Observer, were not as concerned about naming as the society and sometimes chose to name solicitors in Annual Reports,[38] who were then sometimes named in the mass media.[39]

Given the society's policy to name only solicitors who had been struck off or suspended, the imposition of a fine usually ensured anonymity, even in relation to fines as large as $25,000. Solicitors who were fined or received any other form of discipline were not identified by the society, even to fellow members.[40] By July 2002 the society had had a

[35] 'Self-Regulation and How it Works' (1983) *The Proctor: Newsletter of the Queensland Law Society* 1, 2.
[36] Letter from E Kempin, Acting Registrar, Supreme Court of Queensland to Linda Haller, 4 August 1998.
[37] See below section 8.4.2.
[38] For instance, the Lay Observer (Qld), *Sixth Annual Report of the Lay Observer*, for 12 months ended 30 June 1993, released 1 October 1993. This report named all solicitors against whom an adverse finding was made.
[39] James Woods, 'Solicitors Suspended by Misconduct Tribunal', *Courier Mail* (Brisbane), 16 December 1993, 20.
[40] James Woods, Solicitor Fined Over Client Deal', *Courier Mail* (Brisbane), 18 August 1994, 20. This article was based on a report in the *Queensland Law Society Journal* of a case heard in March of that year: SC353, 8 March 1994, and did not name the solicitor concerned. A solicitor who has only been fined was sometimes publicly identified, such as a solicitor fined only $2,000 by the tribunal: *Re X* SDT 53, 8 December 1994, reported but not named in (1995) *Queensland Law Society Journal* 210, but named in:

change of heart and decided to name any solicitor found guilty of any conduct issue whatever disciplinary order was imposed.[41]

8.3.2.5 *Selective Reporting*

Prior to the wholesale reporting of disciplinary outcomes on its website, the Queensland Law Society sometimes sought out the mass media and advise it of *some* forms of discipline imposed by the tribunal. While it advised Queensland newspapers of cases in which a solicitor was struck off or suspended, it did not advise them of any other cases, such as where a solicitor was fined or reprimanded,[42] even though some of these fines were substantial.[43] There have been exceptions to the rule, such as a press release by the society on 15 April 2003 to advise that on the previous day a solicitor had been fined $3,000 by the tribunal for failing to restore $2,000 to his trust account.[44] Both the heading of the press release, 'Brisbane Solicitor Fined After QLS Action' and its tone emphasised a proactive stance by the society: the press release ended with the President of the society stating that 'solicitors' trust accounts are protected by law and the Law Society makes no apology for taking this action.' Similarly, a society press release on 15 May 2003 headlined 'QLS Takes Action Against Four Solicitors' detailed the imposition of three suspensions and a fine of $7,500.[45]

James Woods, Solicitor Fined Over Client Deal', *Courier Mail* (Brisbane), 18 August 1994, 20. The source of the naming is unclear.

[41] Letter from Nick Masinello, Director, Professional Standards, Queensland Law Society, to Linda Haller, 7 August 2002.

[42] 'Self-Regulation and How it Works' (1983) *The Proctor: Newsletter of the Queensland Law Society* 1, 2.

[43] They include a fine of $40,000 in *Re A Practitioner* (1996) QLSJ 615, SC 377, 22 October 1996 and a fine of $25,000 in *Re a Practitioner* (1994) 24 QLSJ 281, SC 353, 8 March 1994. Two other cases, heard in July 1990, in which fines of $25,000 were imposed, were not reported either to the general public or to fellow members of the profession through the professional journal: SC 314, 17 July 1990; SC 319, 25 July 1990.

[44] Queensland Law Society, 'Brisbane Solicitor Fined After QLS Action' (Press Release, 15 April 2003).

[45] Queensland Law Society, 'QLS Takes Action Against Four Solicitors' (Press Release, 15 May 2003).

The society issued these press releases to the mass media at about the same time that it was under intense pressure in relation to its regulatory role, which would suggest that the society was responding to external pressure. On 6 May 2003, the Queensland Attorney-General announced plans to establish a new 'Legal Profession Watchdog' stating '[t]he days of self-regulation by the Queensland Law Society are over, because it's clear Queenslanders have no confidence in a system of lawyers judging lawyers'.[46]

8.3.2.6 *Reporting of Discipline of Queensland Barristers*

The practice of the Bar Association of Queensland provides an extreme contrast to the level of reporting undertaken voluntarily by the Queensland Law Society. Until 2004,[47] the association was not required to report on disciplinary action taken against a member and - although in 1994 it was reported to support public access to information about the outcome of disciplinary proceedings[48] - it has only rarely chosen to report any such disciplinary action, even to its own members. What information has been published appeared in *Queensland Bar News*,[49] the official journal of the Bar Association of Queensland, distributed to members only.

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[46] Department of Justice and Attorney-General (Queensland), 'Government Establishes New Legal Profession Watchdog' (Press Release, 6 May 2003). The society finally lost this role in 2004 when the *Legal Profession Act 2004* (Qld) provided for the Legal Services Commissioner to coordinate the receipt and investigation of all complaints against lawyers.

[47] The *Legal Profession Act 2004* (Qld) now requires findings of professional misconduct against any legal practitioner, whether practising as a barrister or solicitor, to be published on a discipline register: s 296.

[48] James Woods, 'Barristers Face Work Penalties for Misconduct', *Courier Mail* (Brisbane), 2 June 1994, 20.The press report claimed that the Bar remained opposed to public hearings.

[49] *Queensland Bar News* was first published in 1980, and appeared on a quarterly basis. It was replaced in December 1994 by *Refresher*, which was published until 1998, also on a quarterly basis. From May 1999 the association readopted the name *Queensland Bar News* for a publication which replaced both *Refresher* and the more informal *Wig Words*.

A survey of issues of the association's journal published between 1980 and May 2002 suggests that only two disciplinary matters were reported through that medium during that 22 year period. Both of those reports appeared relatively recently and in neither case was the barrister named: in August 1999, *Queensland Bar News* reported that disciplinary tribunals of the association had heard two matters in the past year, but gave detail only in relation to one. [50] The article reported that the barrister involved had admitted that his conduct during a trial, including his allegations of partiality against a trial judge, amounted to unprofessional conduct, for which the barrister had apologised to the judge. The tribunal found that his comments were 'wilfully disrespectful and calculated to offend' but took into account the length and complexity of the proceedings in which the conduct arose and other (unidentified) pressures on the barrister. It reprimanded the barrister and advised him that he would be suspended unless he undertook to 'report on professional matters to Senior Counsel on a monthly basis'. As the member failed to provide such an undertaking, he was suspended from membership of the association for 12 months.[51]

Early the following year, in April 2000, another reference to a disciplinary hearing appeared in *Queensland Bar News*.[52] The report noted that the disciplinary hearing involved a barrister who had falsely told opposing counsel that the presiding judge had

[50] Bar Association of Queensland, *Queensland Bar News*, August 1999, 23. No information was provided as to the other disciplinary hearing heard in the previous 12 months.

[51] As Queensland barristers were not required to be members of the association, this suspension from membership did not affect his right to practise. This may be the same disciplinary matter referred to in a newspaper article which noted that, in a facsimile sent on 29 July 1999, members were advised that a barrister accused of swearing at a prosecutor had been suspended by the association in relation to another matter: B Vale, 'Barrister Charges Dropped', *Courier Mail* (Brisbane), 20 July 1999, 3. Neither source indicates when the disciplinary hearing was held.

[52] A Wilson, 'Committee News', *Queensland Bar News*, April 2000, 42.

contacted him to discuss the case, which led opposing counsel to ask that the judge disqualify himself. After hearing medical evidence,[53] the disciplinary tribunal reprimanded the member, sought certain undertakings from him[54] and reported the result of the hearing to the judge and the relevant court.

The striking impression gained from reading the official journal of the Bar Association of Queensland is that the association believed that the discipline of members should not be referred to, even in its own journal. This would appear to be the view of the association even if the reporting was to be in the most general terms and the individual not named. Despite the rarity of disciplinary reports in its regular publications, the association did advise members of the outcome of disciplinary hearings by 'fax stream', as individual matters were determined.[55] The individual was only named if expelled or suspended from membership of the association.

The association has not avoided discussion of conduct matters altogether. In 1998, it was reported to have said that it was receiving 'two or three complaints a month' but its voluntary status meant that it had 'no control over discipline' and was asking the State Government to give it legislative control over all barristers in Queensland.[56]

[53] The Tribunal accepted medical evidence that the barrister had been suffering from an illness at the time of the incident and had subsequently sought treatment, which was successful.
[54] The undertakings required that, in the event the illness became symptomatic to his knowledge, the barrister would report it to the committee forthwith and undertake prompt and appropriate medical treatment. Secondly, for the ensuing 12 months, the barrister would be subject to monthly supervision and counselling from a nominated senior member of the Bar.
[55] Letter from Dan O'Connor, Chief Executive Officer of the Bar Association of Queensland, to Linda Haller, 13 December 2002. The letter also advised that Bar Association of Queensland disciplinary tribunals had heard 10 matters against members in the period 1992-2002. .

In March 2000, *Queensland Bar News* began to publish 'Ethical Rulings'. The president of the association explained the reasons for this to members as follows:

> We decided to increase awareness of the Association's role in setting and enforcing professional conduct standards. Members regularly approach [us] for advice and ethical rulings. Publication of a record of some of these rulings to heighten member's awareness of current ethical issues and to stimulate debate in contentious areas is desirable, as is a record of the number and experience of counsel seeking advice.[57]

While such ethical rulings are extremely useful, as they encourage lawyers to seek advice before any misconduct occurs, the association still appeared reluctant to leave any lasting public record of misconduct which had in fact occurred. The 'fax stream' used to advise members immediately of the outcome of individual disciplinary hearings had limited deterrent and informational value because facsimiles have a transient quality and may be discarded. The stronger argument is that proper deterrence and education required a more systematic body of information to be available to the profession for perusal as issues arose, such as the body of solicitors' disciplinary reports which have been available for a number of years. Yet it would seem that the barristers' branch of the profession in Queensland did not see that publication of disciplinary proceedings could help promote external legitimacy, internal ideology or indeed any other purpose. The bar clearly preferred any dirty linen to be aired behind closed doors.

It would seem that the bar became finally caught up with the pressure for reform of regulation for *all* lawyers, although largely due to scandal in the solicitors' branch of the

[56] Fran Metcalf, 'Barristers Face Tougher Rules', *Courier Mail* (Brisbane), 18 June 1998, 4.
[57] James Douglas, 'President's Page', (2000) *Queensland Bar News* 5, 6.

profession.[58] For the first time in 76 years, under the *Legal Profession Act 2004* (Qld), Queensland barristers became subject to the same level of public scrutiny as solicitors.

8.3.2.7 *Reporting under Legal Profession Act 2004 (Qld)*

The *Legal Profession Act 2004* (Qld) potentially *restricts* the information available about Queensland lawyers. The Act adopts a very narrow definition of disciplinary action for the purposes of publication, defining it as meaning only action taken as the result of a finding of professional misconduct not unsatisfactory professional conduct.[59] In contrast, in New South Wales, disciplinary action is defined much more broadly to include the suspension or cancellation of a practising certificate, for whatever reason, and reprimands and compensation orders, regardless of whether any such order was accompanied by a formal finding of professional misconduct or unsatisfactory professional conduct.[60]

This narrow definition is ambiguous as to the power to publicise less serious disciplinary action and timidity on behalf of regulatory bodies. For instance, the Act allows the commissioner to 'publicise *disciplinary action* taken against a person in any way the commissioner considers appropriate.'[61] But, given the narrow statutory definition of disciplinary action, this provision does not provide the commissioner with any protection for publicising the outcome of disciplinary matters where a lawyer is acquitted or only

[58] Above section 4.5.4.
[59] *Legal Profession Act 2004* (Qld) s 295.
[60] *Legal Profession Act 2004* (NSW) s 576. Only cautions are excluded: s 576(d).
[61] *Legal Profession Act 2004* (Qld) s 297(1) (emphasis added).

unsatisfactory professional conduct is found, even if the tribunal considered it appropriate to fine the practitioner the maximum amount of $100 000.[62]

It seems unlikely that there was a conscious decision to frame the legislation in such a narrow way. It is more likely that the drafters of the Queensland legislation were simply following the wording of the National Legal Profession Model Laws[63] which are equally narrow in scope.

The Queensland Legal Services Commissioner has decided to take a broad view of his powers of publication, taking as guidance the fact that the proceedings themselves are public (and so could be reported in any event), the broader position in New South Wales, and the more liberal reporting practice of the Queensland Law Society which existed prior to the *Legal Profession Act 2004* (Qld).[64] As well as going beyond the Act's mandatory reporting requirements, the commissioner has decided to include disciplinary action taken against barristers since late 1996, including barristers suspended from membership of the Bar Association of Queensland.[65] Yet, only six disciplinary matters are recorded on the register for barristers[66] and of these, five relate to barristers disbarred by the Queensland Court of Appeal. Only one case in which a barrister was suspended

[62] Linda Haller, 'Imperfect Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *University of Queensland Law Journal* 411, 429-430.
[63] Standing Committee of Attorneys-General, *Legal Profession — Model Laws Project: Model Provisions* (2004) Attorney-General's Department http://www.lawcouncil.asn.au/natpractice/currentstatus.html at 18 March 2006 ('*Model Laws*') s 1159.
[64] Legal Services Commission, *Discipline Register* (2004), http://www.lsc.qld.gov.au/searchReg.htm at 18 March 2006.
[65] Ibid.
[66] As at 18 March 2006.

from membership from the Bar Association of Queensland is recorded.[67] In 2002 the association reported that in the previous 10 year period it had held about 10 disciplinary hearings.[68] Since 1996, it would seem that all but one disciplinary hearing led to *less* than a suspension or cancellation of membership from the association. Keeping in mind that even cancellation of membership of the association did not affect a barrister's right to practise, this provides powerful evidence of the association's reticence to take formal action against a member – a theme repeated throughout this thesis.[69]

8.4 Public or Private Hearings?

8.4.1 *Dangers of Public Hearings to any Legitimation Project*

For a profession seeking external legitimacy, public hearings pose greater concerns than the mere reporting of disciplinary outcomes. While it is possible to control the information which is disclosed in a report of the outcome of disciplinary proceedings, there is much less ability to exercise any control once the public, including the mass media, are able to attend a disciplinary hearing. There is much greater freedom to report the outcomes of proceedings at which the public is entitled to be present, even in the absence of statutory protection, as reports of public hearings attract privilege.[70] In the absence of a suppression order by the tribunal, the identities and evidence of the lawyer

[67] This is the case discussed above section 8.3.2.6 and reported briefly in Bar Association of Queensland, *Queensland Bar News*, August 1999, 23.
[68] Letter from Dan O'Connor, Chief Executive Officer of the Bar Association of Queensland, to Linda Haller, 13 December 2002.
[69] See above section 4.3 regarding the association's resistance to the establishment of formal, statutory disciplinary structures and section 4.4 regarding the association's inaction regarding the prosecution of discipline in the Supreme Court of Queensland.

and any witnesses appearing before the tribunal can be reported by any third party in attendance. Such a report will be based on the reporter's own impression of the hearing rather than on carefully considered reasons as can be supplied by the tribunal at the conclusion of the hearing.[71]

Hence a public hearing holds greater risk to the legitimation project than does the reporting of disciplinary outcomes. Admittedly, the risk may be not only to the reputation of the practitioner or legal profession but also to clients and other third parties. Potential witnesses may be more reluctant to give evidence or to give comprehensive evidence if the hearing is in public. Similarly, there is a risk of inadvertent disclosure of confidential information in a public hearing. It is therefore valid to be more circumspect about opening proceedings to the public than about the official reporting of disciplinary outcomes. As well as the greater potential for damage to individuals, public disciplinary proceedings also have greater potential to damage the image of the legal profession as a whole. This may be in the form of 'guilt by association' or by the risk that the disclosure of misconduct, particularly misconduct which has occurred over a long period of time, will raise concerns as to the effectiveness of self-regulation.

Given these considerations, it is not surprising that lawyers have generally resisted calls for public hearings. Nevertheless, Queensland solicitors appear to have been subject to greater pressure to hold public hearings than have barristers. Not only has the barristers' branch been subject to much less pressure to publish disciplinary outcomes or hold public

[70] *Chapman v Lord Ellesmere* [1932] 2 KB 431, 475 (Romer LJ).

hearings, it also continued to argue in favour of private discipline long after this argument was abandoned by Queensland solicitors. Further, not only does the evidence suggest that Queensland solicitors have now finally accepted the inevitability of public hearings, it also suggests that the Queensland Law Society has sometimes publicly championed disciplinary action that it has taken. The position of the two branches of the Queensland profession in relation to public hearings is documented below.

8.4.2 *Hearings Involving Queensland Solicitors*

From its establishment in 1927, the Statutory Committee sat in private and it was not until the 1980s that there were serious moves to open its hearings to the public. In 1983 the Queensland Law Society argued that disciplinary hearings should continue to be held in private because they 'may be of little interest to and will often not benefit the client complainant', and public proceedings could disadvantage the client involved as such proceedings risked the disclosure of confidential information.[72] It is necessary to protect a person who wishes to report misconduct and it is for that reason that the filing of a complaint has absolute privilege.[73] Although express statutory provisions can protect the disclosure of confidential information passed to the investigating body,[74] such provisions

[71] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial*, (Oxford, Oxford University Press, 2002) 263.
[72] 'Self-Regulation and How it Works', (1983) *The Proctor: Newsletter of the Queensland Law Society* 1-2.
[73] *Addis v Crocker* [1961] 1 QB 11; *Hercules v Phease* [1994] 2 VR 411. In *Lincoln v Daniels* [1962] 1 QB 237, absolute privilege was granted to complaints lodged with the Inns of Court, but not to complaints lodged with the Bar Council, as the court delegated the control of professional conduct to the Inns of Court whereas the authority of the Bar Council to receive complaints was unclear. The privilege attached even though proceedings by the Benchers of the Inns of Court did not have all the powers of the court. For instance, they did not have the power to compel witnesses to attend and evidence was not given on oath: *Lincoln v Daniels* [1962] 1 QB 237, 255.
[74] Such as the preservation of confidentiality in *Legal Profession Act 2004* (Qld) s 592.

cannot avoid the need to disclose confidential information during the hearing itself. A complainant or other witness may be less likely to disclose sensitive but relevant information if the hearing is a public one which can be reported in the mass media. While the tribunal can make suppression orders to prevent disclosure, this may be of less assurance to a witness than if the hearing took place behind closed doors. Conversely, public hearings ensure the rigour and reliability of evidence.

Despite its opposition in 1983, in later years the Queensland Law Society's attitude to public hearings appeared to vary with the attitude of its incumbent office bearers, who are elected annually. In May 1992, the society was reported to be considering opening its disciplinary hearings to the public with the support of its then President.[75] But by the following month, this support appeared to waver when the incoming President-Elect cautioned that complainants may be less likely to come forward if hearings were open to the public, and that any move towards public disciplinary hearings was a 'delicate issue' with the potential to cause problems.[76]

The legal position in relation to solicitors began to change in 1993, when the *Queensland Law Society Act 1952* (Qld) was amended to require hearings before the lower level Solicitors Disciplinary Tribunal be held in public.[77] Hearings before the higher level Statutory Committee, which heard more serious matters, continued to be held in private until 1994 when legislative amendments required that hearings be in public unless the

[75] J Gagliardi, 'Shonky Solicitors May Face Public Hearings' *Courier Mail* (Brisbane), 13 May 1992, 1.
[76] J Gagliardi, 'Open Hearings Might Discourage Complaints', *Courier Mail* (Brisbane), 25 June 1992, 5.
[77] *Queensland Law Society Act 1952* (Qld) s 6KA (repealed), introduced by *Statute Law (Miscellaneous Provisions) Act 1993* (Qld) s 3 sch 1.

committee ordered otherwise 'because of the confidential nature of the evidence or other matter or for another appropriate reason.'[78]

Thus the legislation then assumed that any disciplinary hearing involving a solicitor would be open unless individual circumstances justified its closure. The tribunal has generally accepted this approach, only exercising its power to close hearings on rare occasions.[79]

Legislative edict and tribunal co-operation do not automatically lead to public attendance at disciplinary proceedings and subsequent damage to reputation: in the years following the legislative changes in 1994, there were a number of practical impediments to public observation of disciplinary hearings. Hearings before the Statutory Committee[80] and the Solicitors Disciplinary Tribunal were held at Law Society House until the late 1990s. In his 1994 Annual Report, the Lay Observer[81] noted that he had never seen a member of the public attend a hearing of the Solicitors Disciplinary Tribunal. He noted that this was 'probably due to the fact that hearings are not publicly advertised, with the only notice of hearing being one displayed in the Law Society building on the day'.[82] According to the

[78] *Queensland Statutory Committee Amendment Rule (No 1) 1994* (Qld) s 3 replacing s 17. In 1997 the requirement was included in the Act itself: *Queensland Law Society Act 1952* (Qld) s 6L, inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 9.

[79] In *Re Carberry* (2000) 6 Disciplinary Action Report 17, 20, SCT 6196, Charge 31, 6 March 2000, the tribunal refused an application by the practitioner that the proceedings be heard in private, although proceedings were closed in a case heard the following day: *Re X* (2000) 6 Disciplinary Action Report 22, 24-5, SCT Charge 25 and 32, 7 March 2000; (*Courier Mail* (Brisbane), 21 March 2000, 7).

[80] Both this higher level tribunal and the lower level Solicitors Disciplinary Tribunal were replaced by the Solicitors Complaints Tribunal in 1997, which in turn was replaced by the Legal Practice Tribunal in 2004.

[81] The Lay Observer had the statutory obligation of overseeing the disciplinary system. The office was renamed the Legal Ombudsman by amendments in 1997: Part 2B inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 9. These functions were taken over by the Legal Services Commissioner in 2004.

[82] Office of the Lay Observer (Queensland), *Seventh Annual Report* July 1993-June 1994, 21.

Lay Observer, despite the requirement since 1993 that hearings before the Solicitors Disciplinary Tribunal be heard in public, the Queensland Law Society had decided against publishing notices of hearings in the daily press.[83] In such circumstances, it is not surprising that a member of the public had not attended. The Lay Observer appeared to approve of the society's approach and perhaps even trivialised the importance of disciplinary proceedings, noting that the public could 'observe much more interesting cases in the mainstream courts'.[84] Even if the Lay Observer thought the disciplinary cases uninteresting, the mass media had an interest in attending them but reported some obstruction by the society. In August 1994, the Brisbane *Courier Mail* alleged that the society had refused to inform that newspaper of upcoming hearings.[85] The article included a quote from the immediate past President of the society which implied that, without legislative authority, a notification of hearing could not be given to persons other than those immediately interested in the hearing.[86] And yet this would not appear to be in accord with the intent of the legislation - that the hearing be 'in public'.

In subsequent years the Queensland Law Society appeared more willing to accept that disciplinary hearings would be in public. From May 1998 until it was disbanded in 2004, the Solicitors Complaints Tribunal sat at the Brisbane Magistrates' Court, and the society published notices of hearings in the Daily Law List.[87]

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[83] *Queensland Law Society Act 1952* (Qld) s 6KA (repealed) inserted by s3, Schedule 1, *Statute Law (Miscellaneous Provisions) Act 1993* (Qld).
[84] Office of the Lay Observer (Queensland), *Seventh Annual Report* July 1993-June 1994, 21.
[85] James Woods, Solicitor Fined Over Client Deal', *Courier Mail* (Brisbane), 18 August 1994, 20.
[86] Ibid.
[87] Letter from Jon Broadley, Clerk to Solicitors Complaints Tribunal to Linda Haller, 19 August 2003.

8.4.3 *Queensland Barristers*

By contrast to the increasing transparency in relation to the discipline of solicitors, until the passing of the *Legal Profession Act 2004* (Qld) the discipline of barristers in Queensland only occurred in public when a barrister was disciplined by the Supreme Court, in accordance with the court's inherent jurisdiction to discipline both barristers and solicitors. Even when the Bar Association of Queensland acted against a member, there was no legislation which required any aspect of that discipline to be disclosed.[88] Nor did the association choose to make its disciplinary processes more transparent.

In December 1998, the Queensland Government instigated a review of many aspects of the Queensland legal profession, including admission to the profession, business structures and the handling of complaints and discipline.[89] That discussion paper noted that a similar review in New South Wales had raised the question whether disciplinary proceedings should be heard in public or in private.[90] In its response to the discussion paper, the Bar Association of Queensland emphasised the need for any disciplinary tribunal to have the discretion to close hearings and to restrict publication of tribunal decisions.

[88] Barristers are now subject to the *Legal Profession Act 2004* (Qld), which requires disciplinary hearings involving barristers or solicitors to be in public: s 474.
[89] Department of Justice and Attorney-General (Queensland), *Discussion Paper: Legal Profession Reform* (1998).
[90] Ibid 15.

The association gave a number of reasons for conducting disciplinary hearings in private.[91] Its argument focused heavily on the damage that a disciplinary hearing could cause to the individual barrister before the tribunal, claiming that:

- A lower evidentiary standard in disciplinary proceedings may lead to more speculative evidence being placed in the public domain;
- The publicity of the proceedings could be 'devastating' and out of proportion to any penalty which the tribunal chose to impose; and
- The damage caused to a barrister's reputation may be permanent, even where the conduct was vindicated by the tribunal.[92]

The association's submission to the Queensland Government focused largely on the damage to a barrister's reputation that a public hearing could cause. It did not refer at all to the damage which public hearings could cause to other participants in the hearing, such as the complainant or other witnesses, apart from noting that closed hearings would be 'shorter', which would benefit complainants by providing them with 'quicker and easier redress'.[93]

In June 1999, in its response to the State Government's Green Paper on Legal Profession Reform, the association did not appear to have resiled from its earlier preference for closed hearings. It did suggest that Queensland adopt a co-regulatory disciplinary model similar to that which operated in New South Wales, where the Legal Services Commissioner received all complaints and oversaw the disciplinary system but usually referred matters to the Bar Council. The association approved such a model partly

[91] Bar Association of Queensland, *Submission to Queensland Attorney-General on Discussion Paper on Legal Reform* (1998) 20.
[92] Ibid.
[93] Ibid.

because it provided a 'transparent and objective review' of disciplinary proceedings,[94] but it is arguable that such transparency and objective review requires open hearings. By 2002 the association conceded that the lack of control over barristers was unsatisfactory and was 'planning to review its 1998 submission when draft legislation was tabled in Parliament'.[95] However, by the time draft legislation was tabled in State Parliament in 2003,[96] broader difficulties in the legal profession – largely emanating from the solicitors' branch[97] – had drawn the bar into an irresistible push for a common regulatory framework. Very little time was given for comment on the legislation and it was presented as a *fait accompli*, so it is likely that any suggestion by the bar that it be allowed to continue to discipline behind closed doors would have fallen on deaf ears.

The *Legal Profession Act 2004* (Qld) now requires all disciplinary hearings, whether involving solicitors or barristers, to be open to the public.[98] Hearings can be closed if this is in the public interest, but it is not sufficient that closure would be in the interests of the practitioner appearing before the tribunal.[99]

To summarise, it would seem that in Queensland the solicitors' branch of the legal profession initially rejected any calls for public disciplinary hearings, and could even be

[94] Bar Association of Queensland, *Submission to Queensland Attorney-General on Green Paper for Legal Reform*, June 1999, 5.
[95] Letter from Dan O'Connor, Chief Executive Officer of the Bar Association of Queensland, to Linda Haller, 13 December 2002.
[96] The legislation was initially passed as *Legal Profession Act 2003* (Qld) and replaced by *Legal Profession Act 2004* (Qld). The reasons for this are more fully discussed in Reid Mortensen and Linda Haller, 'Legal Profession Reform in Queensland', (2004) 23 *University of Queensland Law Journal* 280-288, 280.
[97] As discussed more fully above section 4.5.4.
[98] *Legal Profession Act 2004* (Qld) s 474(1).
[99] The public interest in closure must relate to the subject matter of the hearing or nature of the evidence: *Legal Profession Act 2004* (Qld) s 474(2).

said to have frustrated the intent of legislation introduced to require public hearings by failing to publicise upcoming hearings and by holding hearings at Law Society House. In more recent times, the Queensland Law Society demonstrated greater co-operation with the spirit of the legislation. By contrast, any discipline of barristers by the Bar Association of Queensland remained behind closed doors until a common regulatory system was introduced in 2004.

8.5 Analysis of Possible Reasons for the Difference

8.5.1 *Issues of Cost and Expedition*

The Bar Association of Queensland's argument that closed hearings would provide complainants with 'quicker and easier redress' seems surprising, given that the focus of disciplinary proceedings is not to compensate a complainant but to protect the public. The association also argued that a barrister was more likely to admit misconduct to a closed hearing, thereby implying that closed hearings could be more efficient and cost effective.[100]

Proceedings are likely to be shorter if a lawyer co-operates by admitting guilt and thereby foregoes the need for the prosecution to prove its case. Additionally, a closed hearing may mean that fewer steps need to be taken to minimise damage to reputation or inhibition of witnesses. This is also likely to lead to shorter hearings. On the other hand,

[100] Bar Association of Queensland, *Submission to Queensland Attorney-General on Discussion Paper on Legal Reform* (1998) 5.

it would seem that a lawyer accused of misconduct is likely to defend such an allegation regardless of whether the proceedings are heard in private or public.

There is some tentative empirical evidence to support the proposition that a solicitor may be more likely to admit misconduct to a closed hearing,[101] although it is interesting to consider whether the same would be true of barristers. In any event, the issue remains whether cost considerations should outweigh the benefits of open hearings.

8.5.2 *Information Asymmetry*

As the legal services market becomes more deregulated and open to market forces, it could be argued that the consumer should have access to as much information as possible about the lawyers offering services. Accurate comparative price information needs to be available, as part of the protective function. Clients may also prefer to select a practitioner on the basis of integrity and competence,[102] but will need as much information as possible to perform this task, given that competence[103] and reputation[104] can be difficult to assess.

Some members of the public may be interested to know about cases in which a lawyer had been fined or reprimanded so as to draw their own conclusions about the seriousness

[101] Linda Haller, 'Dirty Linen: The Public Shaming of Lawyers', (2003) 10 *International Journal of the Legal Profession* 281-313, 298-9.
[102] Office of the Legal Services Commissioner (NSW), *Submission to the National Competition Policy Review of the Legal Profession Act 1987 (NSW)*, 1998, 19.
[103] Robert Dingwall and P Fenn, "A Respectable Profession"? Sociological and Economic Perspectives on the Regulation of Professional Services, (1987) 7 *International Review of Law and Economics* 51-64.
[104] George Cohen, 'When Law and Economics Met Professional Responsibility' (1998) 67 *Fordham Law Review* 273, 288.

of the misconduct. Although the practice of the Queensland Law Society for a number of years was to only identify solicitors who had been struck off or suspended, it could be argued that the public has less need to be informed when a lawyer is removed from the profession, as that person is of no further risk to potential clients, than when a person has been disciplined but remains in practice. A similar argument was alluded to in *Allbutt v General Council of Medical Education and Registration*[105] when the English Court of Appeal emphasised that it was important that patients be able to obtain information about why a medical practitioner's name had been erased from the register, given that removal from the register did not disqualify him from practising, so that those patients could then decide whether to continue to employ him.[106]

Could it be then, that the Queensland Law Society was engaging in strategic reporting – an issue more central to the legitimation theories raised in Chapter Three? In other words, was the society only publicising those disciplinary cases which most enhanced the image of the legal profession, regardless of which cases required publicity so as to protect the public?

8.5.3 *Strategic Reporting of Harsh Discipline*

When a professional body only advises the public that a member has been removed from the profession, the public could gain the impression that the profession is acting harshly to protect the public. The actual practice of the disciplinary tribunal may show

[105] (1889) 23 QBD 400.
[106] Ibid 409.

differently, for instance, that fines rather than strike off orders were the most common form of order imposed by the tribunal.[107]

There are a few possible reasons why a professional body may choose to inform the general public of some of the discipline which it has actually imposed upon its members. Reporting may enhance the status of lawyers as a group if it can show that the profession can act harshly against the odd deviant member who has slipped into its ranks.[108] While in objective terms, a broader range of orders may have greater protective effect than simple disbarment, a profession seeking to maintain the privilege of self-regulation against a hostile public is more likely to use the public rhetoric of uncompromising public protection: harsh action will be taken to cleanse the profession of 'bad apples'.[109]

Reporting can also cause great damage to the profession, as publicity is a double-edged sword. While a profession seeking legitimation needs to show that it can act harshly against the odd deviant member who has slipped into its ranks, the reporting of too much discipline may heighten public concern as to the true levels of competence within the profession. The publicity can be counter-productive. The point is well demonstrated by an English report that 'record numbers of solicitors are being disciplined for dishonesty' and that the Law Society of England and Wales planned to 'name publicly a thousand

[107] As has been the case in Queensland: Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45, 24.
[108] Eric Steele and Raymond Nimmer, 'Lawyers, Clients and Professional Regulation' (1976) *American Bar Foundation Research Journal* 919-1019, 1001.
[109] The rhetoric of expelling 'bad apples' is commonly used in relation to professional discipline. See above section 5.2.2.

shoddy solicitors to help to build public confidence in lawyers'.[110] No doubt the society's intention was to reassure the public of the society's protective endeavour, but public confidence is likely to be damaged rather than enhanced by an official acknowledgment that at least a thousand 'shoddy' solicitors remained in practice - particularly when the society then failed to name them as promised.

Similarly, the image of the profession may be damaged if the public perceives that, although lawyers have been disciplined, that discipline has been too lenient. Thus, a profession seeking legitimation could be expected to engage in strategic publicity and limit publicity to cases in which harsh discipline has been imposed. The imposition of a fine may allow greater control over subsequent publicity, as in this situation there is no practical reason why clients need to be informed that their practitioner is no longer in practice.[111] At least in cases in which the conduct is ambiguous, the imposition of a fine may itself define the conduct as less serious and avoid damaging publicity.[112] The past policy of the Queensland Law Society to report only strike offs and suspensions to the general public through the mass media did have this effect. Yet future clients may require more protection from a solicitor fined $40,000 as from a solicitor suspended from practice – particularly as the fine leaves the solicitor in practice. In either case, members of the public may prefer to be advised of all disciplinary action and draw their own conclusions.

[110] Robert Verkaik, 'Solicitors Disciplined in Record Numbers', *The Independent* (London), 26 July 2001, 9.
[111] Stephen Bené, 'Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions' (1991) *Stanford Law Review* 907-941, 931.

The Bar Association of Queensland has been much less inclined to advise the general public of disciplinary action taken against a barrister and has generally shunned public discussion of disciplinary issues. It may have had little to gain from seeking out such publicity as this may have only highlighted its disciplinary impotence.[113] Although only statute can provide unambiguous protection from liability for defamation, the public dissemination of more detailed disciplinary information could have been facilitated if members of the association had agreed to amend the Articles of Association to provide such protection, as occurred in *Chapman v Lord Ellesmere*.[114] But the association did not seek out any of these options – any form of publicity of discipline was never a serious part of its agenda.

8.5.4 *Possible Reasons for Discrepancies between Barristers and Solicitors*

There may be many reasons why the level of publicity given to disciplinary proceedings has varied so greatly between the two branches of the Queensland legal profession.

The answer may simply be numerical, that there have always been many more solicitors than barristers in Queensland about whom to complain, and in a small professional group the 'grape vine' and general collegiality may provide sufficient information for general deterrence and informal sanctions to be effective.[115] But by 1991, membership of the Bar

[112] Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152-178, 168-9. See discussion above section 6.5.4.
[113] Above section 4.4.
[114] [1932] 2 KB 431. Consent is a complete defence to the publication of defamatory material: *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 (523-524, Dixon J). It constitutes a form of *volenti non fit injuria*.
[115] F Raymond Marks and Darlene Cathcart, 'Discipline Within the Legal Profession: Is it Self-Regulation?' (1974) 2 *University of Illinois Law Forum* 193-236, 205.

Association of Queensland stood at over 450 with another 250 interstate counsel on the bar roll[116] and the increasing difficulty of the association to enforce standards as the size of the bar increased was acknowledged by the president at that time.[117] Solicitors were first subject to statutory discipline when there were fewer than 400 solicitors in practice in Queensland.[118] Thus the different attitude of solicitors is not simply due to their larger number.

Perhaps the legal profession will only open disciplinary proceedings to the public after external pressure to do so. As I foreshadowed in Chapter Four, and discuss further in the following chapter, there has been less external pressure placed on Queensland barristers than solicitors. It may also be the case that solicitors and barristers have different attitudes to public shaming. Such a view is supported by the work of Abel, who claimed that English solicitors used much more visible mechanisms than barristers to gain legitimacy.[119]

8.6 Conclusion

Given that disciplinary proceedings are designed to protect the public, there are strong reasons why the outcome of those proceedings should be reported in detail to fellow

[116] Interstate barristers were admitted to the Queensland Bar as a result of the High Court's decision in *Street v Bar Association of Queensland and Barristers' Board* (1989) 168 CLR 461.
[117] Doug Drummond 'Why the Bar Association?' Speech at the Pupils Dinner 19 July 1991' *Queensland Bar News* 37, 5.
[118] Helen Gregory, *The Queensland Law Society Inc 1928-1988* (Queensland Law Society, Brisbane, 1991) 74.
[119] Richard Abel, 'England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors' in Richard Abel and Philip Lewis (eds), *Lawyers in Society, vol 1: the Common Law World*, (University of California Press, Berkeley, 1988) 62.

members of the legal profession, to deter and to educate them. Transparency and accountability would also suggest that disciplinary proceedings be open to the public and fully and freely reported. This is not to suggest that open disciplinary hearings could supplant the existing role of an independent auditor of the complaints and disciplinary system, such as a Legal Services Commissioner, who has a valuable overview of the entire system. The value of public legitimacy gained through both open hearings and an independent auditor such as the Legal Services Commissioner is recognised by reforms which have simultaneously opened hearings to the public *and* increased the power of commissioners to report to the public as they see fit.

This chapter has sought to document differing attitudes to the publication of disciplinary outcomes and the holding of public disciplinary hearings. While discipline was imposed behind closed doors, the Queensland Law Society and Bar Association of Queensland had greater control over the information that they released in relation to that discipline and could engage in strategic publicity – should they choose to. This is no longer possible, as legislation now requires that all proceedings be open to the public, which in turn allows for them to be independently reported in the mass media. A profession seeking legitimacy may be tempted to champion publicly the efforts that it has made in regard to discipline. But paradoxically, too much or misdirected publicity may have the adverse effect of heightening public anxiety as to the extent of misconduct and incompetence within the profession.

Although there is some evidence in Queensland that solicitors have been more willing to engage in public shaming than barristers, on some occasions this greater willingness may have been precipitated by periods of crisis within the solicitors' branch which were not experienced by the bar. In the following chapter I explore these periods of crisis in more detail and consider the degree to which they – or other factors - provide an adequate explanation of the different attitudes to publicity and public shaming.

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CHAPTER NINE

CONCLUSION

9.1 INTRODUCTION

In this thesis I have attempted to untangle the threads of protection, legitimation and retribution which appear to run through the Queensland legal profession's disciplinary system. In Chapter Three I warned of the dangers of treating the concepts of protection and legitimation as mutually exclusive and of assuming that the legal profession actively sought or achieved particular outcomes which enhanced its reputation at the expense of the public. Protection and legitimation sometimes coexist, and can be mutually supportive purposes of discipline. Occasionally, retribution will enhance a legitimation project. It is more difficult to argue how retribution can be reconciled to the protective function of discipline, given that their focuses are diametrically opposed.

In the subsequent discussion in this concluding chapter I will look at disciplinary scaffolding (structures) and disciplinary action separately, because, while there may be great enthusiasm to erect an edifice with the potential to protect the public from lawyers, there may be much greater reluctance actually to use those structures to take action against individual lawyers.

9.2 DISCIPLINARY STRUCTURES, OR 'SCAFFOLDING'

9.2.1 *Queensland Law Society*

There is no doubt that the Queensland Law Society has been active for over 70 years in establishing disciplinary structures to deal with the discipline of Queensland solicitors. Over most of that time it had the support of the government, and the government's usual response to periods of crisis – such as a spate of thefts from trust accounts – was to increase the powers of the society rather than reconsider its effectiveness in regulating members.

Often the society's most active 'construction periods' followed periods of external pressure – either from government or the mass media – but this was not always the case. For instance, there were many occasions when the society put extensive, but quiet, energy into designing the legislative changes necessary to enhance its powers, which were then adopted *in toto* by the Parliament and introduced with little or no fanfare.

9.2.2 *Bar Association of Queensland*

The Bar Association of Queensland has been much less interested in changing the disciplinary structures available for barristers. For most of its history the association has been satisfied with relying on the inherent powers of the court and its own, ineffectual contractual powers over members - even though the disciplinary strength

of the English Inns of Court was absent.[1] During the 1980s, association members began to discuss whether a disciplinary tribunal was needed. Younger members were apparently more enthusiastic than older ones, but were criticised for 'surrendering just in case'.[2] In retrospect, it seems hard to believe that the debate within the association dragged on for so long – at least since 1983 – because of indecision as to whether it was preferable to be controlled by legislation or by the judges of the Supreme Court through Rules of Court. In Chapter Two I documented the court's reluctance to embrace the legislative broadening of conduct liable to discipline.[3] It was probably true that the judges – themselves all once barristers – were also more likely than the legislature to draft Rules of Court which were consistent with the narrow, common law view of lawyer discipline.[4] But the bar finally had the decision made for it, with the passing of the *Legal Profession Act 2004* (Qld).

9.2.3 *The Role of Queensland Judges in Erecting Disciplinary Structures*

While the judges of the Supreme Court did not create the Rules of Court sought by the Bar Association of Queensland, they did sponsor an increase in the maximum fine to which a solicitor (but not a barrister) was subject from $5,000 to $100,000.[5] No similar fines were established for barristers. Why the difference? As barristers – by limitations on the nature of their practice – have had none of the temptations of a trust account, and were much less numerous than solicitors,[6] the judges may have been

[1] Above section 2.2.3.5.
[2] James Crowley, Editorial (1983) 6 *Queensland Bar News* 1. Above section 4.3.2.
[3] As documented above section 2.4.
[4] Michael Powell, 'Professional Divestiture: The Cession of Responsibility for Lawyer Discipline' (1986) *American Bar Foundation Research Journal* 31, 53, discussed above sections 3.10.2.3, 4.3.3.
[5] Above section 6.2.1.
[6] In 1991, four years after the judges increased the maximum fine, 3,626 solicitors held practising certificates, but only about 450 barristers were members of the Bar Association of Queensland – a ratio of 8 solicitors for every one barrister: Doug Drummond, 'Why the Bar Association?' Speech at the

exposed more often to perceived deficiencies in the regulation of solicitors and so felt a more pressing need to look for new ways in which to deter them. In addition, any misconduct by a barrister was much less likely to involve money. With the 20-fold enhancement of fines for solicitors, the judges may have thought they should be ready to fight 'fire with fire', in the hope that solicitors would respond to a range of financial disincentives, in a way not even countenanced for barristers.

9.2.4 *Legislature*

In Chapter Four I documented the evolution of disciplinary structures in Queensland. The legislature appeared unwilling to remove the Queensland Law Society's role in regulating solicitors. Although some token external control was introduced through the granting of powers of appeal to Attorneys-General, the establishment of a Legal Ombudman's office and lay membership on disciplinary tribunals, for all practical purposes the society remained in control. Even though the *Legal Profession Act 2004* (Qld) has totally removed the society's power to prosecute discipline applications, it has retained and strengthened the society's powers in relation to practising certificates.

For many years there appeared to be a close working relationship between the Queensland Law Society and the Queensland government. The Parliamentary opposition parties were also usually supportive of the society. The society's usual response to claims that self-regulation was not working was to request additional statutory powers. Until 2004, it was rare for the government to deny any such request.

Pupils Dinner, 19 July 1991, published in *Queensland Bar News* 37, 5; Queensland Law Society, *Annual Report 1990-1991*, 13. At that time, barristers could practise without being a member, but in 2002 the association estimated that less than 5% of practising barristers would not be members: Email from Dan O'Connor, Chief Executive Officer, Bar Association of Queensland, to Linda Haller, 8 November 2002.

The legislature, usually in cooperation with the society, was extremely active in designing, then redesigning, complex structures to deal with Queensland solicitors – introducing the *Queensland Law Society Act* in 1927 and amending it 42 times since then.

The amount of government funding given to support the various forms of statutory discipline has been minimal. The structures have been funded from solicitors' practising certificate fees and the interest earnt on client money in solicitors' trust accounts.[7] Solicitor members of disciplinary tribunals have donated their time. The lack of funding may suggest that the legislative changes were passed primarily 'as an expression of distaste and annoyance' with little expectation that they would actually work.[8] However, the support which the society received from both sides of Parliament in parliamentary debates[9] may also suggest that the government simply did not *want* to take on the responsibility of lawyer regulation itself.[10] At other times, the legislature was happy to sponsor the introduction of a fidelity fund[11] and insurance[12] rather than deal with criticisms of the society's ability to regulate members head-on.

[7] The Legal Ombudsman was also paid from Queensland Law Society funds, which he thought threatened his perceived independence from the society: Legal Ombudsman (Queensland) *13th Annual Report, July 1999-June 2000*, 45. He called for government funding. In 2001 he reported that the government had increased the funding for his sole support staff from two to four days a week – the first staffing increase since the office was created in 1985: Legal Ombudsman (Queensland), *14th Annual Report, July 2000 – June 2001*, 30.

[8] Michael Burrage, 'From a Gentlemen's' to a Public Profession: Status and Politics in the History of English Solicitors', (1996) 3 *International Journal of the Legal Profession* 45, 60. Discussed above section 3.10.2.1.

[9] Above sections 4.5.2, 4.5.3.

[10] For instance, the Attorney-General's wistful hope in 1985 that the legislative changes then implemented would 'end public concern about self-regulatory role of the Queensland Law Society', discussed above section 4.5.3.

[11] Above section 4.5.1.

[12] Above section 4.5.2.

In contrast, until 2004, the legislature chose to ignore barristers totally, and the bar appears to have liked it that way. The bar never sought out the assistance of – and appeared suspicious of - the legislature.[13]

What can we conclude from the evolution of disciplinary structures in Queensland, and the role played by the professional bodies, judges and legislature? Why has such a complex structure been developed, but which for most of its history only dealt with solicitors? Is there a greater need to protect the public from solicitors? Do these structures constitute ideological 'scaffolding' only erected in times of external threat, suffered more often by Queensland solicitors than barristers? Or could it be that they simultaneously protected and legitimated?

9.2.5 *A Greater Need for Structures to be Available to Protect from Solicitors?*

In the past, barristers have claimed that there is much more disciplinary scaffolding to deal with solicitors than with barristers because there is a greater need to protect the public from solicitors.

While the bar remained small, it could perhaps have argued that informal, collegial forms of discipline were more effective than statutory regulation.[14] But this may not be true. Given that the Bar Association of Queensland was first established to blacklist direct-access barristers and tardy solicitors,[15] any informal, collegial discipline exercised in later times may not have necessarily focused on public

[13] It appeared particularly concerned that legislative powers would also lead to fusion of the profession: above section 4.3.4.
[14] F Raymond Marks and Darlene Cathcart, 'Discipline Within the Legal Profession: Is it Self-Regulation?' (1974) 2 *University of Illinois Law Forum* 193-236, 205.
[15] Above section 4.3.1.

protection rather than self-interest.[16] Given the secrecy which has surrounded bar discipline, it is difficult to know if this is true.

In addition, Queensland barristers were more geographically dispersed than is conducive to informal controls. Finally, while the number of practising barristers was once very small, by 1991 it had surpassed the size of the solicitors' branch at the time that solicitors first became subject to statutory control,[17] but was to remain without similar control for another 13 years.

Is a barrister's work of less risk to the public than the work of a solicitor? Data from England and New South Wales suggests that, proportionately, barristers attract fewer complaints than solicitors.[18] The lack of any statutory procedure for the receipt of complaints against Queensland barristers meant it was unclear whether a person unhappy with the conduct of a barrister should complain to the Bar Association of Queensland, the Barristers Board, the Legal Ombudsman, the Supreme Court or the Minister for Justice. This could have meant potential complainants were deterred and

[16] W Wesley Pue 'Trajectories of Professionalism: Legal Professionalism after Abel' (1990) 19 *Manitoba Law Journal* 384, 404, discussed above section 3.2.

[17] In 1991, membership of the Bar Association of Queensland stood at over 450 with another 250 interstate counsel on the bar roll. The increasing difficulty of the association to enforce standards as the size of the bar increased was acknowledged by the president:
Drummond, above n 6, 7. Solicitors were first subject to statutory discipline when there were fewer than 400 of them practising: Helen Gregory, *The Queensland Law Society Inc 1928-1988* (Queensland Law Society, Brisbane, 1991) 74.

[18] In England and Wales the Office of the Legal Services Ombudsman *Annual Report 2002-03*, Facts and Figures, Figure One, reports 89,045 solicitors in practice and 22,830 complaints (26 per cent) and 13,601 barristers in practice but only 461 complaints (three percent): <http://olso.org/AR2003/06-factsandfigures.asp> at 23 January 2004. In New South Wales in 1998-99, 1890 barristers held practising certificates and 156 complaints were lodged against them. This comprises a complaint rate against barristers of 0.08. During the same period 14966 solicitors were in practice and 2506 complaints were lodged against them, a complaint rate against solicitors of 0.167, twice the rate against barristers: New South Wales Bar Association, *Statistics Booklet –Volume Three (August 2002)* 3; New South Wales Law Reform Commission, *Complaints Against Lawyers: Review of Part 10*, Issues Paper 18, NSW Law Reform Commission, Sydney, 2000, 23-4; Law Society of New South Wales, *Professional Standards, Annual Report 1998-99*, October 1999, 39, Table 10.

any complaints dispersed. Hence, and not surprisingly, we have no comprehensive data about the number of complaints made against barristers.

It should be conceded that there may be some forms of additional control on the conduct of barristers which may have made formal discipline less necessary. Where a barrister is instructed by a solicitor, that solicitor can simply withdraw the brief if unhappy with the barrister's conduct. But barristers can also accept direct access clients and a briefing solicitor may actually approve of the barrister's misconduct. It can also be argued that barristers, as a group, are subject to greater day-to-day scrutiny by the court than are solicitors. But other controls are not as available in relation to barristers as they are in relation to solicitors –suggesting a *greater* need for discipline to fill the gap. An obvious example is advocates' immunity, which was once partly justified by the High Court on the basis that another form of control apart from civil liability - discipline - was available to uphold the standard of barristers' conduct.[19]

The rate or nature of client complaints does not necessarily justify whether or not a formal disciplinary system is necessary. Complaints do not always mirror misconduct, for instance where the client benefits from the misconduct and so is unlikely to complain. Nor has the past disciplinary system responded to the profile of client complaints. Queenslanders have complained about costs and delay by solicitors[20] but the disciplinary system has focused on trust account matters.[21]

[19] *Giannarelli v Wraith* (1988) 165 CLR 543, 580 (Brennan J).
[20] Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', (2001) 13 *Bond Law Review* 1-45, 19.
[21] Forty-six per cent of disciplinary cases against solicitors in Queensland have related to trust account matters: Ibid 18.

Nevertheless, the combined effect of the lack of a formal process for complaining about barristers, the disciplinary tribunal's focus on trust account matters and the absence (and express banning) of the holding of a trust account in a barrister's practice may have been to give the public – and the legislature - the impression that higher ethical standards existed among barristers and hence, that there was less need for statutory regulation.[22]

9.2.6 *A Greater Need for Structures to Legitimate the Position of Solicitors?*

Legal professions are thought to be more active in creating the edifice of strong discipline during periods of external threat.[23] The Queensland bar has not experienced the same periods of 'moral panic' which have preceded some activity within the solicitors' branch to change its disciplinary structures.[24] Queensland barristers also appear to have avoided any public outcry similar to that which enveloped barristers in New South Wales, when a number of them were found to have avoided their tax obligations.[25]

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[22] John Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (Law Book Co, Sydney, 1979) 259:

> '[an] emphasis upon monetary offences [in the disciplinary system] lends support to the old view that counsel are inherently more ethical when the truth is that they seldom handle clients' money. That ... explains why the 'lower branch' contains more public sinners, as sinners are now defined'

[23] Terence Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (University of Chicago Press, Chicago, 1987), discussed above section 3.10.2.2; W Wesley Pue, 'Moral Panic at the English Bar: Paternal vs Commercial Ideologies of Legal Practice in the 1860s' (1990) 15 *Law and Social Inquiry* 49-118.

[24] Above section 4.9.

[25] *Re Harrison*(1997) 6 Disciplinary Reports (NSW) 29; *New South Wales Barr Association v Hamman* [1999] NSWCA 404; *New South Wales Bar Association v Cummins* [2001] NSWCA 284; *New South Wales Bar Association v Somosi* [2001] NSWCA 285; *New South Wales Bar Association v Murphy* [2002] NSWCA 138; *Cameron v Bar Association of NSW* [2002] NSWSC 191; *Wardell v New South Wales Bar Association* [2002] NSWSC 548; Paul Barry, 'As Caesar Judges Caesar, Bankrupt Barristers go on their Merry Way', *Sydney Morning Herald* (Sydney), 27 February 2000, 4.

An episode in the history of the solicitors' branch of the profession in Queensland in the late 1920s and early 1930s does suggest a 'moral panic', to which the solicitors' branch responded by initiating the establishment of a fidelity fund.[26] A period of anxiety if not 'moral panic' occurred again in more recent times, when the State Government first threatened to remove the Queensland Law Society's role in discipline.[27]

Even in the absence of a period of moral panic, solicitors as a group may be more sensitive than barristers to public demands for greater accountability. Traditionally, a barrister relies on solicitors to send work and it is the barrister's reputation among solicitors which ensures the receipt of future work. Conversely, a solicitor relies on receipt of work from members of the public. Solicitors may also establish longer-term relationships with clients than barristers and communications between the client and barrister are usually conveyed through the solicitor. These factors may mean that barristers have traditionally been less concerned than solicitors with the attitude of clients or stated more broadly, with the attitude of the general public and legislature, and may explain why the Queensland bar was much more complacent about the need to appease any public calls for change – even if such calls had existed.

A different approach in the two branches is suggested by the work of Abel.[28] He claimed that, in the late 1800s and early 1900s, English solicitors sought legitimacy

[26] Mark Lunney, 'The Solicitor and the Bookmaker – the Foundation of the Solicitors' Compensation Fund' (1996) 26 *Queensland Law Society Journal* 35-48.
[27] Above section 4.5.4.
[28] Richard Abel, 'England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors' in Richard Abel and Philip Lewis (eds), *Lawyers in Society, vol 1: the Common Law World*, (1988).

through more formal and visible mechanisms than English barristers,[29] such as through the promotion of technical competence, the use of scale fees and the development of highly refined ethical codes.[30] While there are differences between the legal professions in England and Australia, Abel's claims may have some relevance in an historical context: the Queensland bar opposed moves to fuse the profession, partly because this would 'destroy the gentlemanly independence and honor of the higher branch.'[31] Similarly, while some barristers were suspended or disbarred by the Supreme Court in the late 1880s for serious misconduct, the bar felt that, if it could control discipline, this had the advantage that 'only the most favourable image was presented to the public'.[32]

In the following section I summarise my findings in relation to disciplinary action. As I mentioned in Chapter Three,[33] the actual use of disciplinary structures is a much greater test of true commitment to public protection than the mere construction of scaffolding which may be used only occasionally.

9.3 Disciplinary Action

9.3.1 *The Use of Protective Alternatives to Discipline*

Earlier in this chapter I noted the increased certification powers given to the Queensland Law Society, and the more recent option of insisting that a solicitor or barrister undergo a health assessment if medical explanations for substandard conduct

[29] Ibid 62.
[30] Ibid.
[31] Ross Johnston, *History of the Queensland Bar* (Bar Association of Queensland, Brisbane, 1979) 25.
[32] Johnston, above n 30, 20.
[33] Above section 3.10.2.4.

seemed likely.[34] Both of these had the potential to protect the public in ways other than discipline, including an area in which discipline had proved itself inadequate – mental illness. But how often have these structures been used? The society has not been required to report – and has not reported[35] - the frequency with which it has suspended or cancelled practising certificates,[36] so it is difficult to know how often or why the society may have chosen to use its certification powers rather than issue disciplinary proceedings. This warrants further investigation in future research. Later in this chapter I consider any symbolic role that discipline may play which may prompt a decision to prosecute, and the implications of this in relation to protection, legitimation and retribution.

9.3.2 *The Decision to Prosecute*

The Queensland Law Society chose to prosecute only a tiny proportion of the written complaints it received: 1.7% in the 1990s.[37] Without knowing the detail of complaints, it is difficult to know if only 1.7% of the complaints met the statutory definition of conduct liable to discipline. Nor do we know how the other 98.3% of complaints were disposed of. This, combined with the lack of information in regard to the society's use of practising certificate powers, makes it difficult to assess the vigour with which the society undertook its role as regulator of Queensland solicitors.

[34] Above section 9.2.4.
[35] Above section 5.4.
[36] Even if had chosen to do so, it is unlikely to have disclosed whether this was due to mental illness or not, given the propensity to suppress information about mental illness, even in those cases which did proceed to discipline: above section 7.7.1. This is also reflected in the confidentiality provisions which surround health assessments: *Legal Profession Act 2004* (Qld) s 537.
[37] Haller, above n 20, 6.

There is clear evidence that the Bar Association of Queensland did not embrace the role of public protector. Instead, it allowed the Barristers' Board of Queensland to prosecute those serious cases which demanded action,[38] even though it was the association - not the board - which appeared to have prosecutorial standing before the Supreme Court.

9.3.3 *Why Has the Common Law Definition of Misconduct Prevailed?*

One of the most interesting findings of this investigation has been the degree to which traditional notions of conduct liable to discipline have remained intact, despite the many years over which the legislative definition of discipline applicable to solicitors expanded. There are a number of possible explanations for this.

In Chapter Three I discussed research - both within and outside the legal profession - which found that regulators were unlikely to initiate prosecutions of new definitions of conduct subject to their regulatory control, particularly where the changes weakened the need first to find culpability.[39] This is much more likely to be the case where the same personnel are enforcing the old and the new legislation. In Queensland, the same society personnel were employed over many of the years of legislative change, and it was these individuals who decided which cases would be prosecuted, and so be brought before the tribunal or court for deliberation.[40]

[38] Above section 4.4.
[39] Above section 3.11.
[40] The society's Director of Professional Standards decided which cases to refer to the Professional Standards Committee to authorise prosecution. The director over the period of most legislative change (1985-2004) joined the society in 1982 and worked on audits and the fidelity fund, before being appointed director in 1993, a position in which he remained until 2002. His assistant director joined the society in 1985 and was assistant director from 1994 until 2002.

As I foreshadowed in Chapter Three,[41] the traditional view of a 'good lawyer' and 'good discipline' was also likely to prevail among members of the solicitors' disciplinary tribunal, as many of them previously had been president of the Queensland Law Society[42] and it was common for members to remain on the tribunal for long periods of time.[43]

There are many possible reasons for the Supreme Court's failure to embrace the breadth of legislative change which occurred between 1927 and 2004, and which I documented in Chapter Two. First, it was the society prosecutors who decided which cases to bring before the tribunal or court, and it was at this preliminary stage that decisions were made to continue to focus on the same type of cases as previously – where dishonour or disgrace could be easily established. This is not a feature which can be necessarily attributed to a 'professional project' or the fact that the prosecution was instigated from within a professional body. Hawkins has found that personnel in many regulatory agencies have been unlikely to instigate a prosecution in the absence of blame.[44] If prosecutors have already preselected those cases which involve most dishonour and disgrace, judges will not necessarily have an opportunity or need to reflect or comment upon the breadth of legislative definitions.

[41] Above section 3.11.

[42] They included ER Cuppaidge, WP Rowland, SC Foote, WH Hart, Sir John Rowell, Sir Sholto Douglas, GA Murphy, JSP O'Keefe, HW Peterson and GC Fox. Gregory has reported that some past presidents even retired from council to become members of the Statutory Committee: Gregory, above n 17, 96.

[43] Mr ER Cuppaidge served on the committee from 1952 until 1977, a period of 25 years. Mr WP Rowland served from 1940 until 1961. Sir Douglas Wadley was a member from 1960 until 1981 and RR Stephens from 1970 until 1983. Sir John Rowell served from 1973 until 1983. In more recent times, GA Murphy and TM Treston both served on the tribunal from 1983 - 2000, a period of 17 years. Mr JSP O'Keefe, appointed in 1983, sat on the tribunal until the early 2000s. The 'strong tradition of continuity of membership' is confirmed by Gregory: Gregory, above n 17, 205.

[44] Keith Hawkins, *Law as Last Resort* (Oxford University Press, New York, 2002) 335.

There is another possible reason why the Supreme Court judges did not embrace the legislative changes: they had themselves all once been barristers. Even more so than solicitors, who had been subject to statutory discipline since 1927, barristers were wedded only to a common law notion of discipline. It would not be surprising if the members of the bench carried this understanding with them to the bench, and saw less need to read the legislative definitions closely. Had they been interpreting legislation dealing with the discipline of say, engineers or nurses, there may not have been a similar potential for personal understanding of any paradigm for understanding the purposes of discipline to overshadow the legislature's intent.

Professional misconduct was defined primarily by the common law until 2004,[45] and that definition required that colleagues of good repute and competency would consider the conduct disgraceful or dishonourable.[46] As is demonstrated particularly well in the discussion of discipline in relation to trust account breaches,[47] even if the standards of conduct expected from lawyers are heightened externally – such as through trust account legislation – this is unlikely to be reflected in disciplinary proceedings for some time. The initial empathetic response of colleagues must wait until it gives way to a less tolerant response – which will only occur when the majority of the profession has internalised the 'dishonour and disgrace' of the conduct.

The narrow, common law definition of conduct liable to discipline is also partly due to the deference to legal knowledge which exists in the disciplinary system. Not only was it fellow lawyers who needed to determine if the conduct was 'disgraceful or

[45] For a number of years, the legislation has extended this to include a failure to respond to Queensland Law Society enquiries. The *Legal Profession Act 2004* (Qld) broadened the definition much more extensively.
[46] *Allinson v General Council of Medical Education* [1894] 1 KB 750, 761.
[47] Above section 2.4.3.3.

dishonourable'. Testimonials also appear to have played an important part in disciplinary proceedings. As I explained in Chapter Seven,[48] it is the testimonials of more elite members of the profession which were likely to carry more weight in disciplinary hearings. The opinions of lay people as to their view of the conduct have been discounted, if not fully ignored. This is yet another reason to explain why it was difficult for the wider, legislative definitions to gain traction.

I am certainly not suggesting that there was any deliberate project undertaken by the profession or regulators to ignore the legislation and continue 'business as usual'. Larson was not suggesting her 'professional project' was a conscious plan.[49] Nor was Hawkins suggesting that the search for blame in prosecutorial decision-making was a deliberate strategy to undermine Parliament's intent.[50] However, their theories provide useful explanations of the forces which may entrench a traditional view of discipline, whether consciously or not.

In the next two sections I consider what influence the threads of protection, legitimation and retribution appear to have had on the types of orders made by disciplinary courts and tribunals.

[48] Above section 7.4.
[49] Above section 3.2.
[50] Instead it reflected a particular view of the best use which could be made of prosecutions within a broader regulatory framework: Hawkins, above n 44. This will not subvert the protective purpose of legislation provided other elements of a regulatory pyramid – below the pinnacle of the prosecution – reflect the legislative intent. On the notion of a regulatory pyramid, see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, New York, 1992) 35.

9.3.4 *The Use of Incapacitation in Discipline*

In Chapter Five I predicted that, if the disciplinary system was being used as part of a legitimation project, action was more likely to be taken – and taken harshly – where allegations of lawyer misconduct could not be resolved out of the public gaze. I explained that this was more likely to be the case when clients could not be adequately compensated in private.[51] The experience in relation to Queensland solicitors is consistent with this hypothesis, largely because the disciplinary system has focused on trust account matters, in particular, trust account fraud. But it is more difficult to explain why the rate of strike offs did not appear to vary depending on whether the disciplinary hearing was public or held behind closed doors.[52]

Much more difficult to explain is the use of suspensions. The high use of suspensions did not serve any legitimation project, as it sent ambiguous messages about the tribunal's commitment to unequivocal protection of the public. In Chapter Five, I also reported on the propensity of the disciplinary tribunal to suspend solicitors, even in defiance of court rulings regarding appropriate circumstances for suspensions. This practice compromised the protective ability of discipline, even though a second line of defence – in the form of practising certificates – may have been exercised later by the Queensland Law Society to prevent the individual returning to practice at the end of the period of suspension. Data that indicates how often this was the case is not presently available. I suggest the high use of suspensions reflects the presence of the very element which all deny in disciplinary proceedings – retribution. This is also

[51] Above section 5.2.2.

[52] Between 1930 and 2000, discipline was imposed behind closed doors and strike offs comprised 31% of orders made. As noted in Chapter Eight, disciplinary hearings were open to the public in late 1994. In the subsequent period 1995-2000 strike offs comprised 29.8% of orders made – slightly less, but certainly no higher - than the rate during private discipline. Haller, above n 20, 25, Figure 3.

suggested by the use of suspensions in cases where mental illness reduced the culpability of misconduct, as documented in Chapter Seven. Larson's comment that lawyers are seen as having a lifetime's attachment to their role[53] may also explain the high use of suspensions. Again, this is not to suggest that regulators were consciously preferring the interests of individual lawyers over the public interest. It simply seems that numerous forces are likely to have been in play.

But what of barristers? As I reported in Chapter Five, only one Queensland barrister has ever been suspended from practice in disciplinary proceedings, and that was in 1882. As I mentioned in that chapter, there are many practical reasons why barristers may not have been suspended, including the fact that the court appeared to only see the most serious cases against barristers – making a strike off inevitable – and that that the 'second line of defence' of practising certificates was not in force against barristers.[54] Apart from these practical reasons, it is also possible that the court saw barristers in a more two-dimensional way than solicitors – of either good or bad character – making a 'compromise' disciplinary order such as a suspension less appropriate.

9.3.5 *The Use of Disciplinary Fines*

As I explained in Chapter Six, fines were the most popular method of disciplinary tribunals to dispose of cases against Queensland solicitors, comprising 41% of orders between 1930-2000.[55] Nevertheless, those fines on average remained quite small and never approached anywhere near the statutory maximum of $100,000. In Chapter Six

[53] Above section 3.9.3
[54] Above sections 5.3.8, 5.5.
[55] Above section 6.8.1.

I explained why these fines –whether large or small – were unlikely to have much protective effect. They left the solicitor in practice and could have only negligible deterrent or educative effect during the many years when they were applied secretly. While it was the judges of the Supreme Court who sponsored amendments to the Rules of Court to allow the tribunal to fine solicitors up to $100,000, the judges were much less inclined than the tribunal to endorse the use of fines when hearing individual cases. The court never imposed a fine itself – on either a solicitor or barrister – and only allowed a fine imposed by the tribunal to stand on rare occasions.

As I explained in Chapter Six, the imposition of small fines by the disciplinary tribunal was consistent with a legitimation project, because the fine itself usually allowed any publicity of the proceedings to be controlled. The solicitors' branch of the profession could say it was engaging in discipline, but those disciplinary proceedings did not need to be too closely examined. It is less easy to explain how large fines could have played into any legitimation project, as their mere size suggested that serious misconduct had occurred, raising questions about fitness to practise, and inviting the interest of the media, if the media became aware of it. There was often little chance of that occurring, as I discussed in Chapter Eight.[56]

Fines bear the closest analogy of all possible disciplinary orders to criminal punishment. There is also evidence that the tribunal was sometimes using a retributive approach – by looking at levels of culpability and harm - when it chose to impose a fine rather than a more serious order. Interestingly, and as I discuss in Chapter Six, I do think there would be occasions on which the public would be more satisfied to see

[56] Above 8.4.2.

a fine imposed than an order that may protect the public more directly – by facilitating a lawyer's rehabilitation. In this regard, if public satisfaction increases the likelihood of the profession being allowed to retain its privileges and self-regulation, the retributive nature of fines may serve a legitimation project. I return to this theme below.

9.3.6 *Publicity*

The Queensland Law Society played a much more active role than the Bar Association of Queensland in disseminating information about disciplinary proceedings to the broader legal profession and the public. This undoubtedly enhanced the protective effect of those proceedings, through general deterrence and education as to acceptable and unacceptable forms of conduct.[57] Its website reporting and naming of individual solicitors eventually surpassed what was required by the legislation.[58] The society appeared willing to take action to protect the public even when this may have been against the wishes of its members. However, it is hard to discount the argument that this was simply a rearguard response to a period of intense external threat,[59] as it coincided with the society's final battle to retain its disciplinary powers – a battle it lost in 2004.

The Bar Association of Queensland was much more secretive. Serious cases of misconduct involving barristers were prosecuted by the Barristers' Board in the Supreme Court, and so publicised in the usual way. The few cases in which the Bar Association of Queensland chose to exercise its contractual disciplinary powers

[57] Above section 8.5.2.
[58] Above section 8.3.2.3-4.
[59] Above section 4.5.4.

against members were not always reported, even to members.[60] When they were reported, this was in a cursory, transient way which provided little of the educative value of the reports provided by the Queensland Law Society. The Queensland public was given very little insight into the world of barristers.

9.3.7 *Symbolic Disciplinary Action*

Lawyers have sometimes been disciplined even though they were no longer practising law, and so the public was already protected from them. This suggests that discipline has sometimes played a symbolic - as well as a practical role.[61] But what does disciplinary action symbolise, and to whom? It could play a role in internal ideology by demonstrating to fellow lawyers that their profession does have ethical standards, that those standards are enforced, and that those who break those standards will be stripped of any right to call themselves 'lawyer'. In that way, discipline may serve an aspirational role. Some may argue that, in that indirect way, disciplinary action can protect the public. However, this must always play a secondary role, and should never be a sufficient reason to take action. If too much focus is placed on symbolism, there is a danger that the disciplinary system will slide into a primary focus on the reputation of the profession, and an exercise in 'smoke and mirrors'.[62]

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[60] Above section 8.3.2.6.
[61] Prosecutions are seen as playing a symbolic role in a number of regulatory contexts: Hawkins, above n 44, 416.
[62] Linda Haller, 'Smoke and Mirrors: When Professional Discipline May Cause Harm' (2005) 8 *Legal Ethics* 70-86.

9.3.8 *Disciplinary Action and Retribution*

I argued in Chapter Six that there may be some situations in which the public may prefer to see a lawyer fined than to see alternative action which may actually have more protective effect.[63] In Chapter Seven I presented evidence that disciplinary outcomes have sometimes varied depending on the degree to which clients have suffered at the hands of lawyers,[64] and concluded that more retribution pervades the disciplinary system – and the public's acceptance of that system – than has been previously conceded. This is more likely to be the case while disciplinary courts and tribunals focus their energies on judging the moral worthiness of lawyers, not their technical competence.

My argument that discipline has been used not just for protection but also for retribution is not without some weaknesses. This is particularly true where disciplinary action has been taken behind closed doors, as retribution is normally assumed to be a public act.[65] The Queensland Law Society continued to prosecute disciplinary matters when they were held behind closed doors and there was very little reporting of the outcome.[66] Nor was the harshness of disciplinary orders against solicitors less when imposed behind closed doors.[67]

Can this argument that that disciplinary action has contained elements of retribution be applied equally to the discipline of Queensland barristers? The absence of the trust

[63] Above section 6.5.2.
[64] Above section 7.8.
[65] Above section 1.3.5.
[66] No disciplinary proceedings were reported in the *Queensland Law Society Journal* between November 1988 and July 1993, apart from very brief statements to advise when a solicitor's right to practise was affected. Discussed above sections 8.3.2.3, 8.4.2.
[67] Above n 52.

account in practice at the bar means that clients are unlikely to lose money at the hands of barristers to anywhere near the extent to which they could (and have) at the hands of solicitors. It is possible for clients to suffer in other ways due to the conduct of a barrister, such as through the loss of a case, but there the causal relationship will be much more indirect and tenuous. Therefore, retribution for client loss will be less likely in relation to barristers than solicitors. In fact, none of the disciplinary cases involving Queensland barristers have arisen as the result of a complaint about loss to a client. They arose as a result of deception or disrespect shown to the court or admission authorities,[68] or other concerns about character.[69]

It is not only members of the public who may be satisfied to see retribution being taken against a lawyer. As I mentioned in Chapter Five, the pressure for disciplinary action and retribution can also come from fellow lawyers.[70] This is particularly likely to be the case where fellow lawyers are likely to suffer loss. This loss does not need to be direct, but can also arise from the pressure which fraudulent colleagues place on fidelity funds and, as a result, on other solicitors who are required to make contributions to it.[71] This form of retribution does not require the proceedings to be published to the general public. It is enough that it becomes known among solicitors that action was taken. As barristers do not hold trust money and have no fidelity fund, it would be much less common for a barrister to suffer financially due to the misconduct of a colleague.

[68] *R v Byrne; in re Swanwick* (1882) 1 May 1882, Queensland Law Journal 66; *Re Watson* [1941] St R Qd 231; *Barristers' Board v Khan* [2001] QCA 92; *Barristers' Board v Young* [2001] QCA 556.
[69] *Barristers' Board v Darveniza* [2000] QCA 253 (serious drug convictions and dishonesty); *Barristers' Board v Pratt* [2002] QCA 532 (convictions for serious child sexual offences).
[70] Above section 5.2.2.
[71] Ibid.

The lack of any statutory framework for barristers until 2004 meant that, for barristers, it was not a tribunal of part-time, voluntary colleagues determining whether the ultimate disciplinary order – a strike off – would be applied, as it was for solicitors, but the Supreme Court. This is likely to dilute the degree of retribution significantly in Supreme Court disciplinary decision-making in relation to barristers. Any pressure for retribution then is simply likely to be as a result of anger felt by the court (all ex-barristers) because of the damage caused to the reputation of the profession.

9.4 When Legitimation and Retribution may Complement Each Other

Retribution can sometimes legitimate the position of the legal profession. Members of the public and the legislature may be more willing to leave disciplinary structures untouched where they feel culpable misconduct will be punished. Similarly, and as Larson noted, professional bodies must also legitimate their position of power to members.[72] Queensland solicitors may have been more willing to continue to subsidise the disciplinary expenses of the Queensland Law Society when they felt the society would punish those solicitors who had caused them harm.

9.5 Value of Social theories in Explaining Queensland Experience

In Chapter Three I concluded that Larson's emphasis on 'front-end' controls, such as education, admission and socialisation, weakened the explanatory force of her theory.

[72] Above sections 3.5, 3.9.1.

As I have documented in this thesis, many 'back-end' controls exist in Queensland.[73] They have been an important part of the regulatory landscape for many years and could only have been introduced because front-end controls were considered inadequate. It is not only the legislature which has introduced back-end controls. The profession itself has seen some advantage in seeking greater control through discipline and certification.

If presented with this evidence, and in particular, the discrepancy between the back-end controls established for the two branches of the profession, Larson and Halliday would simply say that the two branches had differing needs for the erection of scaffolding, as the level of external threat to their legitimacy differed. And no one would deny that the solicitors' branch of the profession has been subject to much more criticism than the barristers' branch, as I documented earlier in this chapter.

A more serious challenge to Larson's theory comes when we examine, not just disciplinary structures, which could be dismissed as mere 'scaffolding', but the use which has been made of those structures. The barristers' branch of the profession in Queensland appears to have been more willing to rely on front-end controls alone and has avoided an active role in disciplinary prosecutions. The same cannot be said of solicitors. Disciplinary action – as well as structure - appears to have been important to them. Given the absence of anything other than a minimal reference to discipline in Larson's work, I suggested an extension of her theoretical approach which would explain disciplinary action as serving both external and internal functions in the professional project. It could be used to display to the public that, while the occasional

[73] I have concentrated on discipline, but have also referred to certification powers: above section 5.4.

black sheep may slip through the controls of education and admission, he or she will be identified and expelled from the profession. In addition, within the profession, it could serve to control those at lower levels of the profession through the imposition of the elite's ideology of 'good lawyer' and 'good practice'. Particularly with this extension, Larson's work has proved to be a useful tool in the thesis to explain the forces which may influence the taking of disciplinary action.

9.6 Recommendations for the Future

The primary aim of this thesis was to determine the role played by the professional discipline of lawyers in Queensland. That has not been an easy task, largely because of the secrecy which has surrounded discipline in the past – particularly within the bar. It is to be hoped that the transfer of the prosecutorial role to an external body – the Legal Services Commissioner – will increase the transparency surrounding disciplinary proceedings. Early signs are promising, with the publication of disciplinary decisions in much greater detail than required by legislation, prosecution guidelines,[74] and detailed and meaningful statistics.[75] Disciplinary courts and tribunals must also clearly articulate the reasons for their orders, and how these relate to the protective function of discipline. Now that all Queensland lawyers will come before a disciplinary tribunal constituted by a sitting Supreme Court judge, this is much more likely to occur. Nevertheless, as this thesis has clearly demonstrated, the rhetoric of decision makers – including judges – cannot always be reconciled with their action. Independent assessments of disciplinary action, as contained in this thesis, will always be necessary.

[74] Legal Services Commissioner, *Prosecution Guidelines: Unsatisfactory Professional Conduct and Professional Misconduct*, <http://www.lsc.qld.gov.au/policies/prosecution270306.pdf> at 7 July 2006.
[75] Legal Services Commissioner (Qld), *Annual Report 2004-2005*.

The thesis has provided a thorough account and analysis of disciplinary prosecutions of lawyers in Queensland. While, through the exhaustive treatment of all reported disciplinary cases in the State, this is as comprehensive an account of *discipline* in the Queensland legal profession as is possible, the *regulatory* picture is necessarily incomplete – and the threads of protection, legitimation and retribution remain a little tangled – until other aspects of the regulatory framework are explored. For instance, very few statistics have been available regarding the nature of complaints against Queensland lawyers, how those complaints have been handled, and how decisions have been made to prosecute. Nor do we know how often, and in what circumstances, the Queensland Law Society has used its powers in relation to practising certificates rather than its prosecutorial powers. These, however, are all matters for another investigation.

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