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**OLD HABITS DIE HARD:
THE BATTLE TO EXTEND THE PROTECTIVE NATURE OF
PROFESSIONAL DISCIPLINE**

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This paper reports on the interesting tension between the courts and the legislature as to the proper reach of professional discipline, and reminds us that true law reform only occurs once legislative change is embraced by those charged with its enforcement. The paper suggests that, as all judges were once lawyers themselves and brought a particular view of discipline with them to the bench, this area of law reform may be more problematic than others.

The paper looks at legislative changes in Queensland, Australia, enacted between 1927 and 2004. These were intended to broaden the jurisdiction of professional discipline beyond its common law emphasis on ‘disgraceful and dishonourable’ conduct. However, this is not necessarily how the legislation has been interpreted by the Supreme Court of Queensland, the disciplinary tribunals or those who prosecute discipline applications. The evidence suggests that, at least until 2001, it was ‘business as usual’. Particularly interesting –given that all Queensland Supreme Court judges were once barristers and none were solicitors – are apparent differences in the treatment of solicitors and barristers by the court.

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I INTRODUCTION

In all Australian jurisdictions, professional discipline of lawyers first occurred within the inherent jurisdiction of the various Supreme Courts. This was subsequently overtaken by legislative structures to deal with complaints and discipline and, more recently, with legislative definitions of conduct liable to discipline. While cases are still occasionally brought before the Supreme Courts in their inherent jurisdiction,¹ more often the courts are hearing statutory appeals, which require the courts to apply legislative definitions of misconduct. Over time, in all Australian jurisdictions, those definitions have substantially broadened the notion of conduct liable to discipline beyond its common law heritage.² However, as the subsequent discussion shows, it appears that - at least in Queensland - the Supreme Court continued to apply narrower, common law notions of professional discipline, even in these statutory appeals. Such a finding does not only have relevance to Queensland. It may suggest the need for greater vigilance before assuming broader notions of discipline are being implemented. The findings also have relevance beyond the field of professional discipline, as they provide useful insights into the relationship between the legislature and the courts.

The structure for the professional discipline of lawyers in Queensland, Australia is typical of that in many jurisdictions. In the early 1900s, statutory discipline was introduced, and over time, the Supreme Court actively encouraged regulators to use the statutory system rather than the court's inherent jurisdiction wherever possible.³ Nevertheless, as the following discussion will demonstrate, the court has continued to apply its own common law view of discipline, often to the exclusion of Parliament's intention to broaden the range of discipline liable to discipline. Barristers have also been disciplined in a very different way to solicitors. This is at least partly because Parliament allowed barristers to stay outside the statutory framework until 2004 - 77 years longer than solicitors, and so barristers could only be disciplined within the

¹ Such as *A Solicitor v Council of the Law Society of New South Wales* (2004) 204 ALR 8.

² For instance, *Legal Profession Act 1987* (NSW) s 127(2);

³ *Queensland Law Society v Smith* [2001] 1 Qd R 649.

court's inherent jurisdiction. But there is also a possibility that the Supreme Court saw barristers in a different light to solicitors, and responded accordingly.

II TYPES OF CONDUCT LIABLE TO DISCIPLINE

A The Common Law: 'Dishonour and Disgrace'

At common law, a lawyer was only disciplined for 'professional misconduct'. This required a finding that the conduct 'would be reasonably regarded as *disgraceful or dishonourable* by professional brethren of good repute and competency'.⁴ The honest but incompetent were unlikely to be caught by such a definition. By 1927 the concept of 'unprofessional conduct' was added to the range of conduct liable to common law discipline, but this only applied to 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'.⁵ Not only did this require the shortfall to be substantial, it was rarely relied on in disciplinary proceedings – prosecutors tended to focus on matters in which professional misconduct (dishonour or disgrace) could be easily established.⁶

B Statutory Discipline Broadens the Range for Solicitors

The following discussion shows how, even as legislation defined the type of conduct liable to discipline with greater precision, and more broadly, the Supreme Court of Queensland preferred to rely on the traditional, common law definitions of misconduct (which haven't changed since 1927) without any apparent reflection on whether these may have been superseded by legislation.

1 'Malpractice' by Solicitors

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

⁴ *Allinson v General Council of Medical Education* [1894] 1 KB 750, 761 (emphasis added).

⁵ *Re R, a Practitioner of the Supreme Court* [1927] SASR 58, 61 (emphasis added).

⁶ Eighty four per cent of cases between 1930 and 2000 found professional misconduct. Unprofessional conduct was only found in 13 per cent of cases: Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis' (2001) 13 *Bond Law Review* 1, 22.

determine charges of 'illegal or professional misconduct'.⁷ Amendments in 1938⁸ 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*'.⁹ Arguably, this greatly widened the disciplinary jurisdiction. Although the Attorney-General did not state expressly why 'unprofessional conduct' had been added to the jurisdiction of the Statutory Committee, he did express dissatisfaction with the lenient approach of the Statutory Committee in the past.¹⁰ 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'.¹¹ He also claimed three previous pieces of legislation¹² had improved the conduct of Queensland solicitors,¹³ so that the Queensland legal profession had already become 'an example to the rest of Australia'.¹⁴ Still, the Attorney thought there was a need for further legislation 'to keep the profession up to the scratch'.¹⁵

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*¹⁶ that the term was probably limited to conduct in the course of practice.¹⁷ At the time that the term was introduced into the Act the term 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.¹⁸

⁷ *Queensland Law Society Act of 1927* (Qld) s 5(1)(a).

⁸ *Queensland Law Society Acts Amendment Act 1938* (Qld).

⁹ *Queensland Law Society Act 1927* (Qld) s 5(1)(a), as amended by *Queensland Law Society Acts Amendment Act 1938* (Qld) s 2.

¹⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 1938, 318 (John Mullan).

¹¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1938, 375 (John Mullan).

¹² *Trust Accounts Act 1923* (Qld); *Queensland Law Society Act 1927* (Qld); *Queensland Law Society Act Amendment Act 1930* (Qld).

¹³ Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1938, 374 (John Mullan).

¹⁴ *Ibid* 375.

¹⁵ *Ibid* 374.

¹⁶ ('*Smith*') [2001] 1 Qd R 649.

¹⁷ *Ibid* 652 (Thomas JA).

¹⁸ 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.'

Nevertheless, 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 and statutory tribunal continued to apply their pre-existing understanding of the rationale for discipline.

2 'Unprofessional Conduct' by Solicitors

(a) 1938: Conduct Extended to Include 'Unprofessional Conduct'

It could be argued that the inclusion of the term 'unprofessional conduct' in the legislation in 1938 was designed to remove 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. Even this year, in *Baker v Legal Services Commissioner*,¹⁹ cited the common law definition rather than the statutory provisions. The court also appears to conflate the two common law definitions,²⁰ while overlooking the words of the statute. It is therefore not surprising that Parliament saw a need to provide an explicit statutory definition of unprofessional conduct in 1997.

(b) 1997: Solicitors' Shortfall Needn't be 'Substantial'

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'.²¹ 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

¹⁹ [2005] QCA 145, [46].

²⁰ *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.

²¹ *Queensland Law Society Act 1952* (Qld) s 3B (repealed), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 5.

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unprofessional conduct and ‘broaden the umbrella’ of matters that come within the ambit of the complaints tribunal.²² He expected cases of *delays and costs* to ‘now come before the complaints tribunal’, which would increase its workload ‘considerably’.²³ While I have not as yet done a statistical analysis to see if the rate of cases alleging delay or overcharging increased after the 1997 amendments, my impression is that discipline continued to focus on the traditional types of cases – trust accounts and fraud.²⁴

It is not only the prosecutor of solicitors – the Queensland Law Society - that failed to heed the legislative intent to *broaden* the types of cases brought for discipline. The court also continued ‘business as usual’. If anything, at least one member of the Supreme Court in 2001 was toying with the possibility that the statutory definition of conduct liable to discipline may be *narrower* than its breadth at common law.²⁵

Thomas J²⁶ 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,²⁷ so couldn’t apply to Smith who was already under suspension and not involved with a legal practice at the time of his dishonest conduct.²⁸ 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’²⁹ – was ‘surprisingly limited’,³⁰ this was remedied by the remainder of the section,³¹ which preserved the ‘proper limits’ of unprofessional

²² Queensland, *Parliamentary Debates*, Legislative Assembly, 6 May 1997, 1442 (Denver Beanland).

²³ *Ibid* 1440.

²⁴ Costs and delay had been a low priority in discipline, accounting for only 4-5 per cent of cases in 1930-2000, even though they have constituted about three times that percentage in the profile of complaints in recent years: Haller, above n 6, 19.

²⁵ *Queensland Law Society Inc v Smith* [2001] 1 Qd R 649.

²⁶ With whom McPherson JA and Atkinson J agreed.

²⁷ [2001] 1 Qd R 649, 652.

²⁸ He had been convicted in the District Court of dishonestly applying A\$12,000 regarding three amusement machines and again in the District Court of misappropriating A\$156,000 in relation to ostrich-farming activities.

²⁹ *Queensland Law Society Act 1952* (Qld) s 3B(1).

³⁰ [2001] 1 Qd R 649, 651.

³¹ *Queensland Law Society Act 1952* (Qld) s 3B(2).

conduct.³² 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*³³ 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.

It is not until Pincus JA's judgment in *Attorney-General v Clough*³⁴ that we see any real attempt by the court to focus on the words of the legislation and Parliament's intent. But this was only by *default* – after the court had experienced some difficulty in determining how incompetent the incompetent needed to be before they could be disciplined under the common law definition. Again, it is important to note that Clough was not a common law case – he was being disciplined within the statutory jurisdiction and so the obvious, starting not ending point should have been the definitions within the statute. Pincus JA stated that, whatever the lack of clarity in the common law, 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.³⁵

3 'Unsatisfactory Professional Conduct' by Solicitors or Barristers

The protective focus of the legislation in Queensland was strengthened even further by the *Legal Profession Act 2004* (Qld). Importantly, 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

³² [2001] 1 Qd R 649, 651.

³³ [2001] 1 Qd R 649

³⁴ Although decided in 2000, it was not reported until two years later: [2002] 1 Qd R 116.

³⁵ *Ibid* 120.

‘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’.³⁶

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 standards³⁷ 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’.³⁸ 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.³⁹

III DIFFERENT TREATMENT OF BARRISTERS AND SOLICITORS

This part of the paper compares the types of disciplinary orders imposed on barristers and solicitors. It appears that Queensland barristers have been seen in a much more

³⁶ *Legal Profession Act 2004* (Qld) s 244.

³⁷ As the common law requires a finding that the conduct ‘would be reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency’: *Allinson v General Council of Medical Education* [1894] 1 KB 750, 761 (emphasis added).

³⁸ 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 9 February 2007.

³⁹ 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 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.

two-dimensional way than solicitors - as either fit or unfit to practise. Very little use has been made of suspensions or fines in disciplinary proceedings. That contrasts strongly with the experience in the solicitors' branch of the profession, where a much broader range of disciplinary orders have been utilised. If the Queensland public was to be protected from a barrister, this was only to be done by removing that barrister from practice. Mid-range options, such as fines or suspensions were commonly used in relation to solicitors. But they were not used in relation to barristers.

A Suspensions

Suspensions have been a popular way of dealing with misconduct by Queensland solicitors, ordered in 19 per cent of all disciplinary cases between 1930 and 2000.⁴⁰ But, it is rare to find examples of the suspension of barristers.

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.⁴¹ A barrister was suspended by the court in *R v Byrne; in re Swanwick*.⁴² Although a barrister was also suspended in *Re Perske*,⁴³ he was practising as a solicitor at the time, and the proceedings were instituted by the Queensland Law Association, the professional organisation representing solicitors.⁴⁴

No barrister has been suspended in Queensland since then.⁴⁵ A reading of the cases at first suggests that the court may not have countenanced the option of suspending a barrister. However, *obiter dicta* comments in *Barristers' Board v Darveniza*⁴⁶ do

⁴⁰ Haller, above n 6, 24.

⁴¹ 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* (1979).

⁴² (1882) 1 May 1882, Queensland Law Journal 66.

⁴³ (1896) 7 QLJ 73.

⁴⁴ The association was replaced by the Queensland Law Society in 1927.

⁴⁵ 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.

⁴⁶ ('*Darveniza*') [2000] QCA 253.

suggest otherwise. There, Thomas JA⁴⁷ closely examined the types of disciplinary order that could be imposed upon a barrister. He analysed cases involving not only barristers but also solicitors,⁴⁸ and cited a South Australian decision involving a solicitor - *In Re a Practitioner*⁴⁹ - for the proposition that suspensions were not appropriate where a practitioner had shown that he or she 'lacks the qualities of character and trustworthiness'.⁵⁰ But a suspension was not considered appropriate for Darveniza⁵¹ and he was struck off.

The disciplinary options available to the court were also canvassed by some members of the court in *Barristers' Board v Young*.⁵² De Jersey CJ⁵³ only mentioned in passing that Young would no doubt prefer to be suspended than struck off,⁵⁴ but Mackenzie J discussed the option of suspension in greater detail, adopting Thomas J's statement from *Darveniza*⁵⁵ as to the appropriate circumstances required before a suspension could be imposed.⁵⁶ However, again, suspension was not considered appropriate for this particular barrister.⁵⁷

B Fines

Again we see a wide discrepancy in the type of discipline imposed on barristers and solicitors.

⁴⁷ With whom McMurdo P and White J agreed.

⁴⁸ Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2003) 5 *Legal Ethics*, 155.

⁴⁹ (1984) 36 SASR 590, 593 (King J).

⁵⁰ *Ibid*.

⁵¹ Darveniza had 'an easy familiarity with the drug scene' and an 'utter disrespect for the law.' 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 (46, 48).

⁵² [2001] QCA 556.

⁵³ With whom Davies JA agreed.

⁵⁴ *Ibid* [19].

⁵⁵ [2000] QCA 253

⁵⁶ *above n* 53, [44]-[45].

⁵⁷ Mackenzie J concluded that, although Young may be 'well thought of by friends and workmates and has innate qualities upon which she could build ...' [48], her conduct before the Shepherdson inquiry showed flaws of character [49].

1 Solicitors

Fines have been the most popular method of disposing of a disciplinary matter against a Queensland solicitor – comprising 41 per cent of orders from 1930-2000.⁵⁸

The Supreme Court of Queensland has the power to impose fines in the exercise of its inherent power to discipline any practitioner – whether a solicitor or barrister.⁵⁹ The disciplinary tribunal established in 1927 for the discipline of solicitors (but not barristers) 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.⁶⁰

Therefore, the tribunal had the power to make the same range of orders as the court within the court's inherent jurisdiction.⁶¹ However, Rules of Court were introduced

⁵⁸ Haller, above n 6, 24.

⁵⁹ *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* 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.

⁶⁰ Section 5(3)(a). The subsequent legislation retained this wording, merely renumbering the section: *Queensland Law Society Act 1952* (Qld) s 6(3).

⁶¹ 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) s 50.

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by the Supreme Court of Queensland in 1928 to fix the maximum fine at £100⁶² - but only against solicitors. In 1979, the court rules were again amended to increase the maximum fine for solicitors from A\$1,000 to A\$5,000.⁶³

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 A\$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'.⁶⁴ 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, 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 A\$5,000 to A\$100,000, an amount significantly higher than the maximum amounts that apply to lawyers in New South Wales⁶⁵ and Victoria,⁶⁶ even today.⁶⁷ It is also notable that there was no suggestion that barristers should be subject to a similar regime – Queensland have

⁶² 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).

⁶³ Rule 26, Rules of Court, *Queensland Government Gazette* 31 March 1979, 1223.

⁶⁴ Section 26. Queensland Government Gazette September 1987.

⁶⁵ A\$75,000: *Legal Profession Act 2004* (NSW) s 562(7)(b).

⁶⁶ A\$50,000: *Legal Profession Act 2004* (Vic) s 4.4.19(b).

⁶⁷ 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 A\$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 A\$100,000 to the Legal Practitioners' Fidelity Guarantee Fund': *Queensland Law Society Act 1952* (Qld) s6R(1)(c), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 9 (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 A\$100,000.

never been 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 A\$5,000 inadequate, as the committee had only imposed the maximum fine on three occasions⁶⁸ prior to the implementation of the increase, and was imposing fines averaging only A\$1,725.00 in the period leading up to the change.⁶⁹ It could be suggested that the increase to the maximum fine was designed to deal with particular problematic cases, as by 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 totalling A\$1.5 million.⁷⁰ 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 A\$5,000 to A\$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.⁷¹ While the technical possibility of a fine as high as A\$100,000 *may* have deterred some solicitors, the disciplinary tribunal never imposed fines of anywhere near that amount, with average fines remaining well below A\$10,000. The 20-fold increase in maximum fines therefore demonstrates an occasion on which the disciplinary ‘armament’ was significantly strengthened against solicitors (but not barristers).

⁶⁸ SC 235, 20 February 1981; SC 250 10 June 1983; SC 292 3 March 1987.

⁶⁹ Haller, above n 6, 33-4, Table 11. Period = 1981- 1985. The figure given is the mean. The median fine was much lower: A\$575.00. During the period in which the increase came into force - 1985-1990 - the mean fine was only slightly higher: A\$2,112.50 (median =A\$1,500.00).

⁷⁰ L Rowett, ‘Solicitors Face Fraud Squad on A\$1.5M Loss’, *Courier Mail* (Brisbane), 31 December 1987, 1.

⁷¹ 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 the economic recession and the council of the society had to make some hard decisions during the year: Queensland Law Society *Annual Report 1986-87*, 1.

2 Barristers

No barrister in Queensland has ever been fined in disciplinary proceedings – even by the Supreme Court, which did have the power to fine in its inherent jurisdiction.

Fines were not available to the professional association when disciplining its own members. 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.⁷² 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 A\$100,000 - the association was reported to be advocating the introduction of a new disciplinary system for barristers with provision for fines of up to A\$6,000.⁷³ In 1999, in its response to the Queensland State Government’s Green Paper on Legal Professional Reform, the Bar Association of Queensland suggested that a barristers’ statutory disciplinary tribunal be established, with the power to impose fines of up to A\$50,000.⁷⁴ But neither of these proposals were adopted.

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 A\$100,000.⁷⁵ 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 A\$100,000 in 2004.

⁷² Art 77.

⁷³ James Woods, ‘Barristers Face Work Penalties for Misconduct’, *Courier Mail* (Brisbane), 2 June 1994, 20.

⁷⁴ Response of the Bar Association of Queensland to the Green Paper on Legal Professional Reform, June 1999.

⁷⁵ *Legal Profession Act 2004* (Qld) s 280(4)(a).

3 Supreme Court's Use of Fines

Although it was the judges of the Supreme Court who sponsored the increase to a maximum of A\$100,000 for solicitors' disciplinary tribunal fines, they have not been as keen to use fines when hearing cases themselves.

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 because on appeal, the court has all the powers of the tribunal.⁷⁶ 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.⁷⁷ 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.⁷⁸ 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

⁷⁶ *Legal Profession Act 2004* (Qld) s 580(1).

⁷⁷ 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* 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.

⁷⁸ *A-G v Kehoe* [2001] 2 Qd R 350 (A\$7,500 fine upheld); *A-G v Delaney* [2000] QCA 504 (A\$15,000 fine upheld). The court also refused to interfere with a 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.

the maximum fine to which a solicitor was exposed from A\$5,000 to A\$100, 000, all the more curious.

C Why the Different Responses?

The previous discussion shows that, 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.

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,⁷⁹ it does not have the same degree of administrative support to supervise orders as has gradually developed within the solicitor's branch of the profession.⁸⁰ Much of this support is funded by practising certificate fees and, within the barristers' branch of the profession, such fees were only introduced in 2004.⁸¹

Other practical consequences arise from the lack of practising certificates, apart from the fees. This is the question of a 'second line of defence'. Since 1927, solicitors needed to be admitted *and* hold a practising certificate if they wished to practice law in Queensland. At the end of a period of suspension imposed by a disciplinary court or tribunal, the Queensland Law Society could exercise its administrative powers to refuse a practising certificate if any doubts remained as to a solicitor's fitness to practise. This 'second line of defence' did not exist in relation to barristers until 2004.

⁷⁹ 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.

⁸⁰ 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, 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.

⁸¹ Practising certificates for barristers were introduced by the *Legal Profession Act 2004* (Qld).

So, in relation to barristers, the court may have thought it had to take more decisive disciplinary action if any doubt existed – by striking off rather than suspending.

Another possible reason for the different treatment of barristers and solicitors may be simply that only the most serious cases are brought to the court in its inherent jurisdiction, making a strike off order almost inevitable – whether against a solicitor or barrister.

The previous suggestions as to why barristers have not received disciplinary fines or suspensions, while they are commonly used for solicitors, have all been practical in nature. The final suggested reason relates to perception. It may be that the court saw barristers in a more two dimensional way, as either ‘fit or unfit’, ‘of good character or bad’, with nothing to be gained from mid-range responses such as fines or suspensions. In contrast, it may have been thought that the character requirements for solicitors were less onerous, so that a suspension or fine could remedy many situations.

IV CONCLUSION

This paper has chronicled legislative efforts to broaden the protective reach of professional discipline, both in relation to the types of conduct to which the prosecutor, tribunal and court could respond, and in the types of response to such conduct. While the common law limited discipline to notions of ‘dishonour or disgrace’ and ignored ‘mere’ negligence, the reach of statutory discipline has become much broader. Legislation also empowers disciplinary bodies to consider using a much broader range of responses to misconduct than have been used traditionally – responses that may protect the public in more creative ways, such as supporting the rehabilitation of lawyers following misconduct. Recent legislation has also allowed disciplinary bodies to award compensation to clients.

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However, this paper has demonstrated how regulators, courts and tribunals have rarely embraced these changes, and how often they have continued to cling to outdated notions of discipline taken from the common law.

The paper also sought to compare the way in which the Supreme Court of Queensland has disciplined barristers and solicitors. No Queensland barrister has ever received a disciplinary fine, and only one has been suspended, and that was in 1882. And yet solicitors are regularly fined – this has been the most popular way to dispose of disciplinary cases against solicitors. In 1987, the judges of the Supreme Court (themselves all barristers before joining the bench) recommended that the maximum fine against solicitors be raised to A\$100,000. No similar recommendation was made in relation to barristers. The judges have not been as supportive of fines when hearing individual cases against solicitors, however, the question does arise as to why solicitors and barristers have been treated in such different ways. While this paper does offer some possible practical reasons for the difference, the Queensland experience does leave us to ponder as to whether solicitors have been seen in a different light to barristers. Time will tell whether any of this will change now that barristers and solicitors have been brought under a common disciplinary framework.

Apart from the very practical reasons reported above for the various findings reported here, it could also be the case that judges are simply more comfortable with the common law notion of discipline which they inherited. When judges were previously barristers themselves, who only knew a common law notion of discipline while in practice, they may be even more inclined to find the traditional notions of discipline more comfortable and familiar. It may even be that judges are resistant to statutory attempts to regulate their own profession – even if this resistance has only a subconscious impact on their decision making. Whatever the varied and complex reasons may be for this judicial tendency to hold onto common law notions of discipline, there is certainly evidence to suggest that discipline is one old habit which does die hard.