

# ‘WAITING IN THE WINGS’: THE SUSPENSION OF QUEENSLAND LAWYERS

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## I INTRODUCTION

The Queensland Government has recently announced plans to drastically alter the legal framework for the regulation of lawyers in Queensland.<sup>1</sup> These proposed changes are largely in response to complaints about ‘Caesar judging Caesar’ which arose from a series of stories in the Brisbane *Courier Mail*.<sup>2</sup> Whilst much of this media attention focused on the Queensland Law Society’s initial handling of complaints, very little study has been done of how well ‘Caesar’ judged those matters which did reach a formal disciplinary hearing. This article attempts to inform that debate, by looking closely at cases in which a lawyer has been suspended, rather than struck off or fined.

Disciplinary suspensions are worthy of study for two reasons. Firstly, the imposition of a suspension may not adequately protect the public. Secondly, even if it is argued that the real purpose of lawyer discipline is to legitimate the privileged position of lawyers, then suspension orders are not an effective vehicle for such a purpose. Suspensions send ambiguous messages to the public. One may expect that, whilst a legal profession seeking legitimacy may downplay the general level of misconduct within its ranks, some infrequent but harsh ‘show trials’ may be used to enhance the legitimisation exercise by permanently casting miscreants out of the profession.

But when a practitioner is not struck off but merely suspended from practice for a certain period, she remains part of the profession, with the attendant risk that her presence, ‘waiting in the wings’ of the profession, will continue to taint the image of that profession. While professional discipline is designed to protect the public and whilst the conduct of this practitioner has been found to be serious enough to question her fitness to practise, the public in this case has not been protected at all costs. Instead, a compromise has been struck. The individual practitioner will be given an opportunity to redeem herself. Inevitably this will be seen by the public as exposing them to some risk, certainly more risk than had the practitioner been simply struck from the roll.

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<sup>1</sup> Rod Welford, Attorney-General (Queensland), ‘Government Establishes New Legal Profession Watchdog’ (Press Release, 6 May 2003).

<sup>2</sup> Ibid. Welford’s press release acknowledged the contribution of the newspaper in exposing deficiencies in the system of lawyer regulation.

This article documents the law in relation to disciplinary suspensions and compares the law with the actual use of suspensions in disciplinary proceedings against Queensland lawyers. It then attempts to offer reasons for apparent disparities between law and practice. The article concludes with a discussion of the implications of these findings for theories about the role of professional discipline.

## II CASE LAW

### A *Limited Role for Suspensions*

Particularly since the early 1980s, the High Court as well as the Supreme Courts of 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 leading case on the issue of suspensions was a decision of the High Court in *Ziems v The Prothonotary of the Supreme Court of NSW*<sup>3</sup> in which the High Court was required to determine whether a barrister should be disbarred as a consequence of his conviction for manslaughter following a motor vehicle accident. 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.<sup>4</sup> 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.'<sup>5</sup> McTiernan J was of a similar view to Dixon CJ, referring to the opportunity to re-apply for admission once Ziems' 'good fame and worthiness to be a barrister have been re-established.'<sup>6</sup>

However, the majority thought that Ziems was in fact fit to practise, despite the conviction. Fullagar J believed that, because of a grave misdirection by the trial judge at the manslaughter hearing, 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'.<sup>7</sup> The natural conclusion from this was that the barrister's right to practise should be left intact.<sup>8</sup>

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<sup>3</sup> (1957) 97 CLR 279.

<sup>4</sup> Ibid 285-6.

<sup>5</sup> Ibid 286.

<sup>6</sup> Ibid 287.

<sup>7</sup> Ibid 296.

<sup>8</sup> Ibid.

But the majority was also aware of the 'incongruity' of a person, while he or she is serving a prison sentence, being held out to the public as fit to practise as a barrister.<sup>9</sup> Fullagar J therefore agreed to an order for suspension.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> Instead Taylor J thought that he should be suspended for the period of his imprisonment. The court went on to make such an order.

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 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 desirable to strike off a practitioner shown to be unfit to practise rather than merely suspend him. The practitioner could reapply for admission when he could lead positive evidence to show that he was once again fit to practise. The necessary implication of these comments in *Ziems* is that the High Court of Australia saw very little room for the operation of suspension orders. If a person remains fit to practise his right to practise should not be impugned, by either a suspension order or a strike off order and, once shown to be unfit to practise, a strike off is usually the most appropriate order. The decision in *Ziems* greatly narrows the circumstances in which suspensions are justified. If not fit to practise, the practitioner should normally be struck off. If fit to practise, he should be allowed to remain in practice.

In *New South Wales Bar Association v Evatt*,<sup>13</sup> 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'.<sup>14</sup> The High Court ordered that he be disbarred, notwithstanding his youth and his lack of

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<sup>9</sup> Ibid 290, 297. A similar argument based on 'incongruity' in relation to a practitioner was upheld in *Re B* [1986] VR 695, 705-6 (Brooking J).

<sup>10</sup> (1957) 97 CLR 279, 297.

<sup>11</sup> Ibid 300.

<sup>12</sup> Ibid 308.

<sup>13</sup> (1968) 117 CLR 177.

<sup>14</sup> Ibid 182.

understanding, stating that his 'failure to understand the error of his ways of itself demonstrates his unfitness'.<sup>15</sup>

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 cases during the 1930s, the Full Court of the Supreme Court of Queensland did allow a number of suspensions to stand, despite the fact that there was evidence of dishonesty.<sup>16</sup> 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.<sup>17</sup> At this time, the Attorney-General had no power of appeal and the Law Society, whilst having the power to appeal,<sup>18</sup> did not exercise this power until 1983. But once the Attorney-General was given the power in 1938 to appeal decisions of the Statutory Committee,<sup>19</sup> an appeal by the Attorney-General saw a three year suspension for misappropriation overturned and the solicitor struck off.<sup>20</sup> 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.<sup>21</sup> During the subsequent 40 year period, 1940-1980, no appeals were heard in relation to the adequacy of the sanction imposed.<sup>22</sup> The court did not have another opportunity to comment upon its attitude to suspensions until *Mellifont v The Queensland Law Society Inc*<sup>23</sup> in 1980.

Mellifont had appealed against a tribunal order suspending him for five years.<sup>24</sup> 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

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15 Ibid 184.

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

17 Ibid. 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.

18 *Queensland Law Society Act of 1927* (Qld) s 5(4).

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

20 *In re G (a solicitor)* [1940] QWN 7.

21 Ibid 10. In another appeal by the Attorney-General, arguing that a two year suspension was too lenient and heard six months later, 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.

22 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 Inc, 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 The Queensland Law Society Inc* (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).

23 [1981] Qd R 17.

24 SC 230, 20 March 1980.

trust account and had lied to the Law Society. He also perjured himself in his evidence before the tribunal.

The leading judgment 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*<sup>25</sup> 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.<sup>26</sup> It would be unlikely that the tribunal could often be confident of this if the practitioner before it was presently unfit.<sup>27</sup> The tribunal would need to be sure that a transformation of character would occur before the suspension ended.<sup>28</sup> Andrews J went on to say that, given the deceit, dishonesty and dishonour of Mellifont’s conduct, a fine was not appropriate<sup>29</sup> 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.

About six years after *Mellifont*, the Supreme Court had another opportunity to indicate its attitude to suspension orders. The tribunal had imposed a 12 month suspension upon a practitioner found to have lied under oath and given misleading information to the Law Society.<sup>30</sup> Upon appeal by the Queensland Law Society,<sup>31</sup> the suspension was overturned and the practitioner struck from the roll.<sup>32</sup> The court again queried the legitimacy of a suspension order where dishonesty was involved.<sup>33</sup>

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25 (1980) 47 NSWLR 72.

26 Ibid 76.

27 Ibid, cited by Andrews J in *Mellifont* at 31.

28 The difficulties of assessing fitness to practise at the end of a period of suspension had been foreshadowed in *Re M, A Solicitor* [1938] St R Qd 454 where Graham AJ said (at 463):

‘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.’

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.

29 Mellifont had been before the tribunal on three prior occasions for failing to respond to 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).

30 SC 285, 20 August 1986.

31 *Re Walter* (Unreported, Supreme Court of Queensland, Connolly, Shepherdson, Williams JJ, 22 May 1987). The Queensland Law Society has appealed other tribunal decisions, arguing that the penalty imposed was too lenient. These appeals include: *Queensland Law Society v Mead* [1997] QCA 83 (22 April 1997); *Queensland Law Society v Henry William Smith* (Unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998); *Attorney-General v Bax* [1999] 2 Qd R 9 and *Clough v Queensland Law Society Inc* [2002] 1 Qd R 116.

32 *Re Walter* (Unreported, Supreme Court of Queensland, Connolly, Shepherdson, Williams JJ, 22 May 1987).

33 Ibid, 12 (Williams J). The practitioner subsequently appealed to the High Court which found that 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.

In *Attorney-General v Brown*<sup>34</sup> the practitioner had been found guilty of professional misconduct due to his knowing participation 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 had made reference to his '28 years of unblemished practice and the strong testimonials produced on his behalf'.<sup>35</sup> It was common ground in an appeal by the Attorney-General that these were not valid 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.<sup>36</sup> The Court of Appeal thought that it was 'impossible to conclude that a period of suspension affords adequate protection to the public'<sup>37</sup> 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.

About four years after the appeal in *Brown*, the Queensland Law Society appealed another tribunal decision in *Queensland Law Society v Mead*.<sup>38</sup> On 18 September 1996 the tribunal had suspended Mead for 33 months despite the fact that the practitioner had been before the tribunal only 18 months earlier and fined \$10 000.<sup>39</sup> Ten days after that earlier tribunal hearing the respondent again transferred trust monies to his general account without authority. There had been no restitution or indication of remorse and the Court of Appeal had no hesitation in concluding that the practitioner was no longer a fit and proper person to practise and ordered that he be struck from the roll.<sup>40</sup> In the course of the judgment the court said:

Reliance was placed upon the circumstance that the respondent had practised as a solicitor in his own business or firm for a substantial period as a factor which indicated that his fitness to practice [sic] would be re-established after the period of suspension imposed, which it was argued was consistent with a sound exercise of discretion by the Statutory Committee.

The conduct particularised establishes that in the months following his first being dealt with by the Statutory Committee the respondent acted in blatant disregard of the standards of professional behaviour expected of him. In the light of that there is no proper basis for concluding that the respondent would be fit to resume practice or apply for a

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<sup>34</sup> *Attorney-General v Brown* (Unreported, Supreme Court of Queensland, Fitzgerald P, Davies JA, Demack J, 11 June 1993).

<sup>35</sup> SC 339, 6 October 1992. Appeal: *Attorney-General v Brown* (Unreported, Supreme Court of Queensland, Fitzgerald P, Davies JA, Demack J, 11 June 1993) 3.

<sup>36</sup> 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 Attorney-General* (Unreported, Queensland Court of Appeal, Fitzgerald P, Pincus JA, Sheperdson J, 31 March 1993): application by practitioner for the Statutory Committee to provide reasons for the penalty imposed.

<sup>37</sup> *Attorney-General v Brown* (Unreported, Supreme Court of Queensland, Fitzgerald P, Davies JA, Demack J, 11 June 1993) 6.

<sup>38</sup> [1997] QCA 83 (22 April 1997).

<sup>39</sup> *Re X* (1995) 25 QLSJ 493, SC 365, 28 March 1995.

<sup>40</sup> *Queensland Law Society v Mead* [1997] QCA 83 (22 April 1997).

practising certificate after serving a period of suspension from 18 October 1996 until 30 June 1999.<sup>41</sup>

After *Mead* there followed three appeals in 1998. In *Re Henry William Smith*,<sup>42</sup> the Attorney-General had appealed a decision of the tribunal 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.'<sup>43</sup> This matter did not go to a full court hearing as the practitioner consented to an order that he be struck from the roll. However the Attorney-General had argued in pleadings that such open-ended suspensions were inappropriate, as an improper delegation of the tribunal's responsibilities to the Law Society.<sup>44</sup>

In *Attorney-General v Bax*<sup>45</sup> the tribunal had ordered the practitioner to pay a fine of \$15 000.<sup>46</sup> 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 *Brown*:<sup>47</sup> 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 Law Society investigations and before the tribunal. One redeeming feature to distinguish the case from *Brown* was that Bax had not filed any false affidavits in court. However, 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 that 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, but his Honour did not consider an order for suspension to be appropriate given the practitioner's lack of remorse. This would suggest that the practitioner was not fit to continue in practice.<sup>48</sup> Shepherdson J and McPherson JA 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.<sup>49</sup>

The court also thought it preferable to strike a practitioner from the roll and allow him to apply for readmission at a later time in *Attorney-General v Gregory*.<sup>50</sup> Gregory had been convicted of contempt of court and fined \$4000 in the District Court for

<sup>41</sup> [1997] QCA 83 (22 April 1997); BC9701530, 7. No paragraph numbering appears in the original judgment.

<sup>42</sup> *Queensland Law Society v Henry William Smith* (Unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998).

<sup>43</sup> *Re Henry William Smith* (1998) 2 Disciplinary Action Reports 12, SC 384, 11 November 1997.

<sup>44</sup> The Attorney-General argued that it was an improper delegation because the subsequent fitness to resume practise is left at the discretion of the Law Society. Had the practitioner been struck off, his subsequent fitness to practise would have been a question for the Supreme Court in an application for readmission. See later discussion of open-ended suspensions in text.

<sup>45</sup> [1999] 2 Qd R 9.

<sup>46</sup> SC 393, 29 July 1997.

<sup>47</sup> *Attorney-General v Brown* (Unreported, Supreme Court of Queensland, Fitzgerald P, Davies JA, Demack J, 11 June 1993).

<sup>48</sup> [1999] 2 Qd R 9, 22.

<sup>49</sup> *Ibid* 14 (McPherson JA); 25 (Shepherdson J).

<sup>50</sup> [1998] QCA 409 (4 December 1998).

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.<sup>51</sup> Upon appeal by the Attorney-General, the court acknowledged that the misconduct comprised an isolated, unpremeditated incident for which Gregory had shown remorse. But de Jersey CJ felt that

... such misconduct will inevitably establish unfitness to practice [sic]. That is because it demonstrates the absence of critically important qualities. In the absence of some quite exceptional circumstance - which I am presently at a loss to imagine - such conduct should lead to the striking off of the offender. The appropriate course is that he should then be left, before reapplying for admission - if he wishes to take that course - so to conduct himself as to demonstrate redevelopment of the qualities he must for the present be taken to lack.<sup>52</sup>

Similarly, White J 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.<sup>53</sup>

Another suspension order was overturned by the Court of Appeal in *Queensland Law Society v Carberry*.<sup>54</sup> On 6 March 2000 the tribunal had found Carberry guilty of professional misconduct and suspended him from practice for 12 months.<sup>55</sup> Both the Attorney-General and Law Society appealed.<sup>56</sup> Both argued that Carberry should be struck off. The most serious charge against the practitioner related to a potential conflict of interest which the tribunal thought 'inadvertently or accidentally advanced an associate of the practitioner to the disadvantage of his client.'<sup>57</sup> However, Moynihan SJA and Atkinson J in the Court of Appeal felt that the practitioner was aware of the conflict of interest.<sup>58</sup> Pincus JA thought that it was 'no accident' that the practitioner had preferred the interests of his business associate to those of his client.<sup>59</sup> In the words of Moynihan SJA and Atkinson J:

The more he sought to extricate himself by advancing an 'innocent' explanation or justification, the more he entangled himself in a failure to appreciate elementary but critically important obligations of a solicitor to a client.<sup>60</sup>

The findings against the practitioner demonstrated his 'unfitness to practice [sic]'<sup>61</sup> and a suspension could then only apply in exceptional circumstances, given that the court

<sup>51</sup> *Re Gregory* (1998) 3 Disciplinary Action Report 13, SCT 6174, 13 May 1998.

<sup>52</sup> *A-G (Qld) v Gregory* [1998] QCA 409 (4 December 1998), [4].

<sup>53</sup> *Ibid* [17]. Gregory's subsequent application for readmission was unsuccessful: *Greg Gregory v QLS Inc* [2001] QCA 499 (13 November 2001).

<sup>54</sup> [2000] QCA 450.

<sup>55</sup> *Re Carberry* (2000) 6 Disciplinary Action Report 17, SCT 6196, 6 March 2000. The tribunal also ordered that he successfully complete a Practice Management Course before applying for a practising certificate and that he pay compensation of \$7,000 to his former client.

<sup>56</sup> *QLS v Carberry* [2000] QCA 450.

<sup>57</sup> *Ibid* [15].

<sup>58</sup> *Ibid* [34].

<sup>59</sup> *Ibid* [5].

<sup>60</sup> *Ibid* [37], citing *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736, 740 and *Bolster v Law Society of New South Wales*, (Unreported, NSWCA, 233 of 1982, 20 September 1982).



must be satisfied that the practitioner will be again fit to practise at the end of the period of suspension.<sup>62</sup> The conduct of the practitioner and his explanations did not suggest that he would be fit to practise at the end of any period of suspension, 'and it is not in the public interest that he should be permitted to [practise]'.<sup>63</sup> Pincus JA agreed that the misconduct was 'bad enough to force one to the unpleasant conclusion that mere suspension is insufficient'.<sup>64</sup>

In summary, two decisions of the High Court of Australia and nine decisions of the Queensland Court of Appeal have narrowed the circumstances in which a suspension is an appropriate order to make.

### B *Long Suspensions*

The longer the period of suspension imposed, the closer the order equates to an order striking a practitioner from the roll and the more likely that the imposition of such an order by the tribunal will invite an appeal by the Attorney-General or Law Society.

While the legislation is silent as to the range of suspension that the tribunal can order, the tribunal in Queensland has usually imposed suspensions of between three months and three years.<sup>65</sup> It has only imposed suspensions of longer than three years on three occasions: although the tribunal imposed five year suspensions in 1933<sup>66</sup> and 1948,<sup>67</sup> neither of these decisions was appealed. It was not until 1981, in *Mellifont v The Queensland Law Society Inc*,<sup>68</sup> that the Supreme Court of Queensland had an opportunity to indicate its concern in relation to long suspensions.<sup>69</sup>

On the hearing of Mellifont's appeal against penalty, the issue for the Full Court was whether the five year suspension imposed by the Statutory Committee<sup>70</sup> was an appropriate order to make in the circumstances. DM Campbell J noted that:<sup>71</sup>

Being suspended from practice for five years is an unusually long period of suspension. It is inappropriate, in my opinion, to impose such a long period of suspension unless there are special circumstances which do not exist here.

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61 Ibid [39].

62 Ibid [40], citing *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 and *Mellifont v Queensland Law Society* [1981] Qd R 17, 31.

63 Ibid [41] (Moynihan SJA and Atkinson J).

64 Ibid [7].

65 L Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis' (2001) 13 *Bond Law Review* 1, 32-3, Table 10.

66 SC 18, 27 July 1933.

67 SC 97, 9 November 1948.

68 [1981] Qd R 17.

69 As mentioned previously, it was in fact the practitioner, Mellifont, who appealed against his suspension, arguing that five years was too long. He may well have regretted lodging the appeal as by the time that the Law Society respondent had argued its case for a strike off order, counsel for Mellifont was simply arguing that the Full Court should impose an order 'similar to the one appealed from': [1981] Qd R 17, 30.

70 *Re Mellifont* (1980) 10 QLSJ 125; (1981) 11 QLSJ 47, SC 230, 20 March 1980.

71 [1981] Qd R 17, 28.

All members of the court agreed that the appropriate order was that the practitioner be struck from the roll.<sup>72</sup>

### C Possible Exceptions

While generally speaking, the court has shown a propensity to disallow suspension orders upon appeal, this has not always been the case. In *Adamson v Queensland Law Society Inc*<sup>73</sup> the solicitor had shared receipts with an unqualified person and had lied to the Law Society about his arrangements with the person. Given the number of cases in which the court has indicated the limited role of suspension orders, it is perhaps surprising that the Court overturned the tribunal order striking Adamson from the roll and replaced it with an order that he be suspended from practice for 12 months. However, there are indications in the judgment that the court may have considered the Law Society's pursuit of Adamson to be over-zealous. The court appeared to be unimpressed with many aspects of the Law Society investigation and the proceedings before the tribunal, as illustrated by the court's order that the practitioner pay only one-third of the Society's costs before the tribunal.<sup>74</sup> Thomas J, with whom Connolly and Ambrose JJ agreed, justified the suspension on the basis that there was no evidence of client dissatisfaction and there was no evidence of failure to supervise the work of the person with whom the practitioner was sharing receipts.<sup>75</sup> In addition, the solicitor had successfully defended four of the six charges against him. What is unusual in *Adamson*, given the trend in the cases, is the court's willingness to excuse his lie to the Law Society investigator. One is left with a sense that the court wished to show its displeasure with the Society for pursuing such a matter so doggedly in the first place.<sup>76</sup>

The Supreme Court also allowed a three year suspension to stand in *Re Wheeler*<sup>77</sup> despite some evidence of conflict of interest, breach of trust and knowingly making false assertions in two letters to fellow solicitors. Despite the apparent dishonesty by the practitioner, the decision of the court to allow the suspension to stand in this case can perhaps be at least partly explained by the delay before the case came to court. The suspension had been imposed by the tribunal on 12 March 1987<sup>78</sup> and by the time of the Full Court's decision four years later,<sup>79</sup> Dowsett J<sup>80</sup> 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.'<sup>81</sup>

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<sup>72</sup> Ibid 31 (Andrews J); 28 (DM Campbell J). Connolly J only appears to have sat on the appeal against finding, not on the later hearing as to penalty and costs.

<sup>73</sup> [1990] 1 Qd R 498.

<sup>74</sup> In the vast majority of cases, the practitioner is ordered to pay all of the Law Society's costs of the tribunal proceedings.

<sup>75</sup> [1990] 1 Qd R 498, 508.

<sup>76</sup> Ibid 501-3 (Thomas J).

<sup>77</sup> [1992] 2 Qd R 690.

<sup>78</sup> The tribunal decision is not reported, as no reports appeared in the *Queensland Law Society Journal* between late 1988 and 1993.

<sup>79</sup> 26 April 1991.

<sup>80</sup> With whom Macrossan CJ and Ryan J agreed.

<sup>81</sup> [1992] 2 Qd R 690, 703. Also of apparent significance was the fact that the Law Society had abandoned its appeal and that, in its deliberations, the tribunal had incorrectly imposed the obligations of a director upon Wheeler as a solicitor. Given that only the practitioner's cross-

In both *Adamson*<sup>82</sup> and *Wheeler*,<sup>83</sup> the court did not impose harsher sentences than those imposed by the tribunal, even though there was some evidence that the practitioner had been dishonest. But these were cases where it was the practitioner who had appealed. As the 1990s progressed, the Attorney-General appealed more decisions, as did the Law Society. By the mid to late 1990s, where the tribunal imposed a suspension, it became more common for either the Law Society or the 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 an order that the practitioner be struck from the roll. However, *Clough v Queensland Law Society Inc*<sup>84</sup> provides an exception to that general trend.

In *Clough*<sup>85</sup> the tribunal had ordered that the practitioner be suspended for 12 months.<sup>86</sup> The practitioner appealed against both findings and order, and the 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.<sup>87</sup> Although Pincus JA thought the tribunal's findings had been 'the most charitable which could be adopted',<sup>88</sup> 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. Whilst stating that even the incompetent could be struck from the roll,<sup>89</sup> the court allowed the 12 month suspension to stand given that:

- The practitioner was not dishonest;
- The practitioner would be fit to practise after the period of legal education in personal injury litigation as ordered by the tribunal;
- The practitioner had shown only limited, not general incompetence;
- The practitioner's conduct had not caused material loss to the defendant in the personal injury litigation; and
- The practitioner was already penalised by a substantial order for costs.<sup>90</sup>

In summary, *Clough* was the first case since *Re Wheeler*<sup>91</sup> in 1991 in which the court had allowed a suspension order to stand. However, the court had some reservations about its decision.<sup>92</sup>

The confirmation of the tribunal's suspension order in *Attorney-General and Minister for Justice (Qld) v Priddle*<sup>93</sup> is much more definitive. In that case the Attorney-General

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appeal remained, his Honour only needed to decide that the three year suspension was not unduly harsh.

82 *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498.

83 *Re Wheeler* [1992] 2 Qd R 690.

84 *Clough v Queensland Law Society* [2002] 1 Qd R 116, heard 7 July 2000.

85 *Ibid.*

86 *Re Practitioner X* (1999) 5 Disciplinary Action Report 15, SCT 6204, 24 August 1999.

87 *Clough v Queensland Law Society* [2002] 1 Qd R 116.

88 *Ibid* 119.

89 *Ibid* 120 (Pincus J); 132 (Muir J).

90 *Ibid* 139 (Muir J). Douglas J and Pincus J agreed that the order of the tribunal be allowed to stand.

91 *Re Wheeler* [1992] 2 Qd R 690.

92 [2002] 1 Qd R 116, 139 (Muir J).

appealed against a 12 month suspension imposed by the disciplinary tribunal.<sup>94</sup> The tribunal had found the practitioner 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 Law Society when requested. The tribunal gave no reasons why it was imposing a suspension but the Court of Appeal referred to a number of personal circumstances which ‘helped provide some explanation for the respondent’s grossly unsatisfactory conduct’<sup>95</sup> and noted that there was no evidence of dishonesty or deceit in an isolated lapse<sup>96</sup> and that excellent character references had been tendered.<sup>97</sup> The Court of Appeal dismissed the Attorney-General’s appeal, determining that there was no evidence that the suspension order was manifestly inadequate.<sup>98</sup>

Regardless of whether or not the decisions in *Clough* and *Priddle* suggest that the appellate court is now interfering less often in the tribunal’s use of suspensions, the general trend of the case law since *Ziems*<sup>99</sup> in 1957 has been to restrict the circumstances in which the court accepts that a suspension order will adequately protect the public. The aim of this article is to determine the degree to which the tribunal imposed suspensions at a time when the appellate court was discouraging such orders. Therefore, any very recent change in the attitude of the appellate court is of less relevance to that question.

This article will now consider the practice of the disciplinary tribunal in the use of suspensions.

### III CONTINUING USE OF SUSPENSIONS BY TRIBUNAL

As discussed in more detail above, on the 24<sup>th</sup> October 1980, in *Mellifont v Queensland Law Society Inc*<sup>100</sup> the Supreme Court of Queensland limited the circumstances in which suspensions were appropriate, using the most unambiguous language in its ruling. Subsequent cases have generally confirmed the limited role of suspensions. It could therefore be expected that fewer practitioners would be suspended by the disciplinary tribunal after *Mellifont*, and that, even when a suspension was imposed, it would be for a shorter duration. That does not appear to be the case.

#### A Statistical Evidence

An analysis of disciplinary outcomes reveals that neither the rate of suspensions nor their duration decreased after *Mellifont*. As part of a larger study into disciplinary

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<sup>93</sup> [2002] QCA 297.

<sup>94</sup> *Re Priddle* 9 [2002] Disciplinary Action Report 14, SCT 54, 30 October 2001. The suspension was coupled with an undertaking from the practitioner, that, following the period of suspension, he would not practise on his own account for an indefinite period.

<sup>95</sup> [2002] QCA 297, [13] (McMurdo P, with whom Williams JA and Mackenzie J agreed). These personal circumstances related to an armed siege in 1993, as well as financial, health and marital difficulties.

<sup>96</sup> *Ibid* [12].

<sup>97</sup> *Ibid* [13].

<sup>98</sup> *Ibid* [14].

<sup>99</sup> *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279.

<sup>100</sup> [1981] Qd R 17.

decisions against solicitors in Queensland,<sup>101</sup> a comparison was undertaken of disciplinary orders imposed before and after the handing down of the decision in *Mellifont*. The results of that comparison are shown in Tables 1 and 2.

**Table 1**  
**Frequency of Suspensions Before and After *Mellifont***

<b>Before <i>Mellifont</i> (pre 24 October 1980)</b>		<b>Frequency</b>	<b>% Overall</b>	<b>% of Penalties</b>
<b>Penalty</b>	Struck off	63	27.6	30.7
	Suspended	37	16.2	18.0
	Fined	78	34.2	38.0
	Censured	22	9.6	10.7
	Costs only	2	0.9	1.0
	Costs from third party	3	1.3	1.5
	Subtotal	205	89.9	100.0
<b>No penalty<sup>102</sup></b>		23	10.1	
<b>Total</b>		228	100.0	
<b>After <i>Mellifont</i> (post 24 October 1980)</b>		<b>Frequency</b>	<b>% Overall</b>	<b>% of Penalties</b>
<b>Penalty</b>	Struck off	62	27.9	31.3
	Suspended	41	18.5	20.7
	Fined	86	38.7	43.4
	Censured	6	2.7	3.0
	Education/reports/ other	3	1.4	1.5
	Subtotal	198	89.2	100.0
<b>No penalty<sup>103</sup></b>		24	10.8	
<b>Total</b>		222	100.0	

**Table 2**  
**Length of Suspensions Before and After *Mellifont***

	<b>Mean</b>	<b>Median</b>	<b>Std Dev</b>	<b>Min</b>	<b>Max</b>	<b>Count</b>
<b>Before <i>Mellifont</i></b>	20.9	13.0	16.8	0	60	37
<b>After <i>Mellifont</i></b>	18.2	17.0	10.5	0	36	41

It can be seen from Table 1 that the rate of suspensions did not drop after *Mellifont*, but in fact increased slightly, from 18 per cent of orders in the period 1930-1980,<sup>104</sup> to 20.7

<sup>101</sup> Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 65.

<sup>102</sup> 'No penalty' will normally indicate that the practitioner was found not guilty of any charges of misconduct.

<sup>103</sup> Ibid.

per cent of orders in the period 1980-2000.<sup>105</sup> Also contrary to expectations, the average<sup>106</sup> period of suspension did not drop after *Mellifont*, but increased, from 13 months to 17 months. This is shown in Table 2.

Given that the disciplinary tribunal often fails to give reasons<sup>107</sup> for its decision, it is often difficult to know why a suspension was imposed in any particular case. However, it is tentatively suggested that suspensions may sometimes be imposed when the tribunal sympathises with the solicitor before it. It is noted that after *Mellifont*, in the late 1980s and early 1990s, solicitors in Queensland were suffering difficult times: the world sharemarket crashed in October 1987, in November 1989 the High Court held that Queensland practitioners could no longer be protected from competition by interstate practitioners.<sup>108</sup> The gross fees of practitioners dropped markedly in the period 1990-1991<sup>109</sup> as Australia entered an economic recession and fees did not begin to improve again until 1995.<sup>110</sup> The conveyancing scale was abolished in Queensland in 1993, which may have also led to a downturn in income. It may therefore be the case that, despite statements by the court as to the proper role of suspensions as well as statements that personal mitigating factors should have little bearing in disciplinary proceedings against lawyers,<sup>111</sup> the tribunal upon occasions may have felt some sympathy for the economic plight of a practitioner and suspended him rather than struck him from the roll. If so, this may suggest that elements of a retributive approach are present in the disciplinary system, as has already been noted in relation to the use of fines by the tribunal.<sup>112</sup>

Some specific cases in which suspensions have been ordered will now be considered in an attempt to determine whether the disciplinary tribunal has imposed suspensions in accordance with the existing case law.

### B *Specific Cases*

Given that the tribunal must be satisfied that, at the end of any period of suspension, the practitioner will be fit to practise again, any dishonest conduct would suggest that a suspension is inappropriate, even if the misconduct is isolated and unpremeditated.<sup>113</sup>

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<sup>104</sup> The period ended on 24 October 1980, being the date of the judgment in *Mellifont*.

<sup>105</sup> As this percentage has been calculated from the entire population of disciplinary cases, rather than from a sample, it is irrelevant whether the higher percentage is statistically significant or not.

<sup>106</sup> Given that the extremely long (60 month) suspension imposed by the tribunal in *Mellifont* is included in and therefore skews the results for the pre-*Mellifont* group, the median is used in preference to the mean.

<sup>107</sup> Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 65, 37.

<sup>108</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461.

<sup>109</sup> From \$837 655 in 1990 to \$759 384 in 1991: G Meredith, *Queensland Legal Professional Cost Index 1997-1998 and 1998-1999: A Report to the Queensland Law Society*, 2000, 3: Practice Performance Data.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Bolton v Law Society* [1994] 2 All ER 486, 492-3.

<sup>112</sup> L Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152.

<sup>113</sup> *A-G (Qld) v Gregory* [1998] QCA 409, [4] (de Jersey CJ).

A suspension was imposed in *Re Crowley*<sup>114</sup> despite a finding of fraud. The practitioner was found guilty of fraudulently converting \$19 900 and of making a false representation to a Law Society auditor in relation to monies held in trust.<sup>115</sup> The tribunal suspended the practitioner for six months and fined him \$5000 upon the practitioner undertaking that he would not apply for a principal's practising certificate for three years. The tribunal noted that it had taken into account that, although the practitioner was guilty of fraudulent conversion, this fraud was to the use of 'Company X' and there was 'no immediate financial gain accruing to the practitioner'.<sup>116</sup> The tribunal also noted that it had taken into account the practitioner's youth, the character references provided, and the pressures to which the practitioner subjected himself in running a solo practice.<sup>117</sup> But equally, a finding of fraud would suggest a suspension was not appropriate given the preceding case law. Nor were youth or the pressures of practice valid mitigating factors when issues of honesty were involved.<sup>118</sup>

Since *Mellifont*, suspensions have been imposed in other cases involving apparently dishonest conduct, including three cases of forgery or of preparing false documents.<sup>119</sup>

An inappropriate use of suspensions is also suggested by three disciplinary decisions, all involving the same practitioner.<sup>120</sup> On his first appearance, the practitioner was found to have acted in a dishonest way on a number of occasions: by preparing and sending a false bill of costs to the Legal Services Commission of NSW on the 16 January 1985 to mislead the Commission into believing that he had charged the client \$3750 when in fact he had charged the client \$13 750, by 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 on 28 August 1985.<sup>121</sup> Thus, not only do these acts appear dishonest, they also do not appear to be isolated, given the dates involved. Without giving any reasons for such an order, the practitioner was suspended for 19 months.<sup>122</sup> That suspension expired on 30 June 1989.

<sup>114</sup> (1996) 1 Disciplinary Action Reports 6, SC 383, 10 December 1996.

<sup>115</sup> *Ibid.* In addition, he was found to have transferred \$20 000 from his trust account to his general account without authority. He also pleaded guilty to borrowing \$25 000 from a client in breach of *Queensland Law Society Rules 1987* (Qld) rule 86 and a number of breaches of the *Trust Accounts Regulations 1973* (Qld).

<sup>116</sup> *Ibid.* 7.

<sup>117</sup> *Ibid.*

<sup>118</sup> 'Basic honesty is not a quality that is ordinarily acquired through experience, or lengthy practice of trying one's best': *Attorney-General v Bax* [1999] 2 Qd R 9, 13 (McPherson J).

<sup>119</sup> *Re John Nevil Palmer* (1985) 15 QLSJ 131, SC 261, 12 February 1985: practitioner suspended for two years after writing a dealing number, date and time and signature purporting to be that of an officer of the Registrar of Titles to represent that the lease had been registered when it had not; *Re Guttormsen* (1985) 15 QLSJ 122, SC 263, also heard 12 February 1985: practitioner suspended for two years after writing a signature purporting to be that of the grantor of a bill of sale thereby falsely representing that it had been executed by the grantor; and *Re Willcox* (1988) 18 QLSJ 411, SC 298, 1 December 1987: practitioner suspended for 19 months after preparing a false bill of costs to mislead the Legal Services Commission of NSW and a false mortgage to deceive Defence Service Homes.

<sup>120</sup> *Re Willcox* (1988) 18 QLSJ 411, SC 298 1 December 1987; *Re Willcox* (Unreported, SC 318, 5 December 1989); *Re Willcox* (Unreported, SC 321, 6 December 1990).

<sup>121</sup> He was also found guilty of transferring monies from the trust account into his general account without authority on a number of occasions.

<sup>122</sup> *Re Willcox* (1988) 18 QLSJ 411, SC 298, 1 December 1987, 417.

Six months later, on 5 December 1989, the practitioner was again before the tribunal upon a charge that on 15 July 1989 he had advertised his business, Property Transfer Co, in two Brisbane newspapers, in breach of strict ethical rules at the time.<sup>123</sup> By majority, the charge was found proved and the practitioner, who had just emerged from a 19 month suspension, was again suspended, again for a period of 19 months, until 30 June 1991.<sup>124</sup> Whilst questions could be raised as to whether the practitioner was fit to practise at the time of his first appearance before the tribunal, when he was found guilty of dishonest conduct, it is more debatable whether the public needed to be protected from his unauthorised advertising. Nevertheless, the simple fact that the practitioner had been before the tribunal on an earlier occasion would raise serious questions as to his fitness to practise on a subsequent occasion and therefore, whether a second suspension was the most appropriate order to make. The practitioner appeared before the tribunal again on 6 December 1990 when he was struck off for practising as a solicitor whilst under suspension.<sup>125</sup>

Other practitioners have been suspended on subsequent occasions. In *Re Tunn*,<sup>126</sup> the practitioner was suspended for 14 months in 1992 after being found guilty of five breaches of Rule 83 of the *Queensland Law Society Rules 1987 (Qld)*<sup>127</sup> and four charges of touting for business in breach of Rule 81(1),<sup>128</sup> two charges of failing to register transfer documents, as well as charges of failing to deposit monies with the Society, failing to reconcile the trust account and failing to follow various advice from the Law Society.<sup>129</sup> This practitioner had already appeared before the tribunal on 28 October 1985<sup>130</sup> when he had been fined \$3000 after he was found to have wrongfully converted \$2637.19 of trust monies to pay rent, failed to keep proper trust accounting records, failed to advise a client that the client's appeal had been listed and that the practitioner intended to seek leave to withdraw, and failed to advise the client that the appeal was likely to be dismissed if the client was not legally represented. As in *Re Willcox*, this earlier appearance may have suggested that a suspension was not an appropriate response on his second appearance in 1992. But the practitioner was to appear before the tribunal on a third occasion, in 1994, when he was again suspended, this time for a period of 12 months.<sup>131</sup> On his third appearance, the practitioner admitted to failing to reveal to his clients, the purchasers of certain land, that he was a director and shareholder of the vendor company. He also admitted two charges of acting without instructions, practising without a practising certificate and also admitted to a criminal conviction.<sup>132</sup> Given the nature of the charges on his third appearance, and the two earlier findings of professional misconduct, it is surprising that the tribunal was satisfied

<sup>123</sup> *Re Willcox* (Unreported, SC 318, 5 December 1989). Rule 81(1), which prohibited the unfair attraction of business, was removed in 1995.

<sup>124</sup> It is worth noting that on both occasions the practitioner was suspended until the beginning of a financial year. It is unlikely that the tribunal could be confident that this was the time at which the practitioner would again be fit to practise.

<sup>125</sup> *Re Willcox* (Unreported, SC 321, 6 December 1990).

<sup>126</sup> (1993) 13 QLSJ 190, SC 340, 4 November 1992.

<sup>127</sup> Failing to respond to Queensland Law Society, now contained in s 5G of the *Queensland Law Society Act 1952* (Qld).

<sup>128</sup> Rule 81(1) was deleted by *Queensland Law Society (Approval of Rules) Regulation 1995*.

<sup>129</sup> (1993) 23 QLSJ 190.

<sup>130</sup> *Re a Practitioner* (1985) 15 QLSJ 407, SC 279, 28 October 1985.

<sup>131</sup> *Re Tunn* (1995) 25 QLSJ 208, SC 354, 28 September 1994.

<sup>132</sup> *Ibid.* The conviction related to two counts of sodomy.



that, at the expiry of this 12 month suspension, the practitioner would be fit to practise again.<sup>133</sup>

These are not the only instances in which practitioners have been suspended on their second or subsequent appearance before the tribunal. Since the decision in *Mellifont*, 46 practitioners appear to have been suspended.<sup>134</sup> Of these, 13 appear to have been before the tribunal on at least one prior occasion.<sup>135</sup>

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<sup>133</sup> *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17.

<sup>134</sup> As at 28 March 2003.

<sup>135</sup> 1. *Re Zakrjevsky* (1985) 15 QLSJ 41, SC258, 29 August 1984: suspended for three years for failing to supervise an articulated clerk, failing to adequately protect the interests of clients, failing to ensure that lenders were told of his articulated 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 \$5000 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* SC 318, 5 December 1989, discussed above in text at n 120.

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 and was fined \$4000 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*, SC 340, 4 November 1992, discussed above in text at n 126.

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 \$1000 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 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* SC 354, 28 September 1994 (again), discussed above in text at n 126;

9. *Re Mead* (1997) 1 Disciplinary Action Report 4, SC 378, 18 September 1996. Discussed in text at n 38. 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 \$10000 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. See discussion in text;

As recently as February 2003 the tribunal suspended a solicitor for nine months, after finding him guilty of misappropriating \$630 by transferring it into his general office account when he knew that his fees were in dispute, of giving false information to the Law Society as to the type of work performed by an employee,<sup>136</sup> and of failing to provide documents as requested by the Law Society, in breach of s 5H. This suspension was imposed despite the fact that the tribunal felt that the solicitor ‘gives the appearance of still not believing he has done anything wrong and is likely therefore to re-offend’.<sup>137</sup> The tribunal went on to say that it felt that he was ‘capable of learning now from his mistakes’.<sup>138</sup> However, it would seem from the earlier comments that the tribunal could not be sure that the solicitor would gain the necessary insight into his conduct to be fit to resume practice when the nine month suspension expired.<sup>139</sup>

### C Open Ended Suspensions

On occasions, the difficulty of satisfying the *Mellifont* test<sup>140</sup> appears to have tempted the tribunal to suspend the practitioner for an indefinite period, leaving the decision of when the suspension is to end at the discretion of the Law Society. An example can be seen in *Re Smith*,<sup>141</sup> where the tribunal had ordered 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’.<sup>142</sup> Had the practitioner been struck off, his subsequent fitness to practise would have been a question for the Supreme Court in an application for readmission.

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12. *Re Nettleton*, SCT 42, 21 November 2000. Discussed in text below at n 143 in relation to open-ended suspensions;

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).

136 The tribunal found that the employee was practising as a solicitor without a practising certificate. The practitioner had claimed that the employee was working as a law clerk.

137 *Re Whitman* (Unreported, SCT 83, 12 February 2003, 7).

138 *Ibid.*

139 The courts place a heavy emphasis in disciplinary matters on the need for insight into past misconduct, as discussed in Reid Mortensen, ‘Lawyers’ Character, Moral Insight and Ethical Blindness’ (2002) 22 *The Queensland Lawyer* 166.

140 That is, the need to be satisfied at the time of the tribunal hearing that the practitioner will be fit to practise at the end of the suspension period: *Mellifont v The Queensland Law Society Inc* [1981] Qd R 17.

141 Unreported, QCA 10787/1997, 27 April 1998 (orders by consent).

142 *Re Henry William Smith* (1998) 2 Disciplinary Action Reports 12, SC 384, 11 November 1997. *Re Henry William Smith* had been preceded by *Re Bartlett* (1994) 24 QLSJ 594, SC 360, 31 May 1994, in which a female practitioner who had admitted misappropriating \$82864.02 of client monies was suspended ‘until such time as she is able to satisfy the [Law Society] that she is a fit and proper person to hold a practising certificate’. The tribunal noted that it had taken into account the ‘practitioner’s medical condition ... and other facts of mitigation’. The nature of these other mitigating factors is not disclosed by the report, although in *Smith* the Law Society submission suggested that the medical evidence in *Bartlett* showed that she ‘either did not know what she was doing or was incapable of controlling what she was doing and was incapable of distinguishing from right and wrong’: *Re Henry William Smith* (1998) 2 Disciplinary Action Reports 12, 13. It does not appear that any appeal was lodged in *Re Bartlett*.

A similar 'open-ended' suspension was ordered by the tribunal in *Re Nettleton*,<sup>143</sup> where the practitioner was suspended

until the later of 30 June 2001 or such time as he is able to satisfy the Council of the Queensland Law Society Incorporated that he is a fit and proper person to hold a Practising Certificate.<sup>144</sup>

By failing to nominate an exact date upon which the suspension will end, the tribunal could be said to imply that, at the time of the hearing, the tribunal was unable to determine when the practitioner would be fit to practise again, if at all. This arguably suggests that the practitioner should be struck off rather than suspended.<sup>145</sup> Open-ended suspensions are also open to attack on the basis that the suspension could in fact last for a long period of time, a practice which was criticised in *Mellifont*.<sup>146</sup> While the Attorney-General did lodge an appeal against the open-ended suspension in *Re Smith*,<sup>147</sup> no appeal was lodged in *Re Nettleton*.

In the 1800s, the Full Court of the Supreme Court of Queensland, in its inherent jurisdiction, made open-ended suspension orders by suspending practitioners until monies owing to the client were repaid.<sup>148</sup> This may suggest that the Supreme Court would not be hostile to such open-ended suspensions, when such a case finally comes before it on appeal. However, these cases in 1868 and 1878 predated the *Queensland Law Society Act of 1927*, and were therefore heard at a time when only the Supreme Court had jurisdiction over solicitors and only it had power to determine whether a suspended solicitor could resume practice. Nor was there any 'second line of defence' through a requirement that solicitors hold an annual practising certificate.<sup>149</sup> Presumably the solicitors in those cases were found to be fit to practise at the time of the disciplinary hearing, and the suspension was used as an effective device to ensure that client monies were repaid. This is also suggested by the fact that it was not until 50 years later, in *Re M, A Solicitor*<sup>150</sup> that the Supreme Court of Queensland identified the protective function of disciplinary proceedings. Thus, during the 1800s the Court's focus may have been on the need to compensate clients.

It should also be noted that, should a similar order be made by the tribunal today, it would not require any assessment of fitness to practise, merely the determination as to whether or not monies had been paid. Thus such an order even today, may not offend the ruling in *Mellifont*.

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<sup>143</sup> (2001) 7 Disciplinary Action Reports 18, SCT 42, 21 November 2000.

<sup>144</sup> Ibid 19.

<sup>145</sup> *Mellifont v Queensland Law Society Inc* [1981] Qd R 17.

<sup>146</sup> Ibid.

<sup>147</sup> The appeal was discontinued when the practitioner consented to an order that he be struck off: *Queensland Law Society v Henry William Smith* (Unreported, Queensland Court of Appeal, Appeal 10787 of 1997, orders by consent, 29 April 1998).

<sup>148</sup> The solicitor in *Re Batho* was suspended until he repaid monies owing to a client: *Re Batho* (1868) 1 QSCR 196. A similar order was made in *Re Knapp* (1878) BCR, 21 May 1878.

<sup>149</sup> See discussion in text below at n 159.

<sup>150</sup> [1938] St R Qd 454. The court explicitly stated that an order striking a practitioner from the roll was not imposed by way of punishment: 461 (Hart AJ), citing *Incorporated Law Institute of New South Wales v Meagher* [1909] 9 CLR 655, 680 (Isaacs J): 'The question is whether he is fit and proper to remain on the roll.'

The court in *Clough v Queensland Law Society Inc*<sup>151</sup> was not critical of a tribunal order which required the Law Society to exercise some discretion before issuing a practising certificate at the expiry of the suspension period. The tribunal had found the practitioner guilty of unprofessional conduct and had suspended him for 12 months.<sup>152</sup> In addition, the tribunal ordered that, ‘prior to application for a new Practising Certificate, [the practitioner] attend a legal education program in civil litigation and complete that program to the satisfaction of the Queensland Law Society Inc.’<sup>153</sup> In its cross-appeal to an appeal by the practitioner, the Law Society argued that the practitioner was not fit to practise and should have been struck from the roll.<sup>154</sup> Muir J thought that the practitioner would be fit to practise once he attended and completed, to the satisfaction of the Law Society, a course in civil litigation, as had been ordered by the tribunal.<sup>155</sup> The other members of the court agreed with the reasons of Muir J and dismissed the appeal and cross-appeals.<sup>156</sup> This would suggest that the court in *Clough* condoned some delegation of responsibility to the Law Society. Arguably, however, this is not a delegation of the determination of ‘fitness to practise’, which the tribunal cannot delegate, but something narrower: a determination as to whether the practitioner had ‘satisfactorily completed’ the legal education program in civil litigation. It may be that the narrower determination is acceptable. However, it is submitted that, should the Court of Appeal be called upon to determine the validity of open-ended suspensions such as in *Smith*<sup>157</sup> and in *Nettleton*,<sup>158</sup> the court is likely to hold that this is an improper delegation of authority by the tribunal.

#### IV LAW SOCIETY’S POWER TO ISSUE PRACTISING CERTIFICATES

Decisions by the disciplinary tribunal not to strike a solicitor’s name from the roll or to suspend her right to practise do not automatically give her the right to practise. This is because of the Law Society’s extensive powers in relation to practising certificates. It is an offence for a solicitor in Queensland to practise without a current practising certificate.<sup>159</sup>

Since the *Queensland Law Society Act 1952* (Qld) was first introduced in 1927, the Law Society has had some power in relation to the right of solicitors to practise law and over the years, those powers have increased. Although the Act of 1927 gave the Law Society the power to prescribe an annual practising fee,<sup>160</sup> much more extensive powers were granted to the Society by amendments in 1930, making it an offence to practise without a practising certificate<sup>161</sup> and giving the Law Society the power to refuse a certificate if the applicant is an undischarged bankrupt, in prison, in breach of trust account obligations, in default of the Act, refusing to explain his conduct to the Law Society, or

<sup>151</sup> [2002] 1 Qd R 116, 7 July 2000. The case is discussed more fully in text above at n 84.

<sup>152</sup> SCT 6204, 24 August 1999.

<sup>153</sup> *Re Clough* (1999) 5 Disciplinary Action Reports 15, 17.

<sup>154</sup> [2002] 1 Qd R 116, 118.

<sup>155</sup> *Ibid* 139.

<sup>156</sup> *Ibid* 120 (Pincus J); 139 (Douglas J).

<sup>157</sup> *Re Henry William Smith* (1998) 2 Disciplinary Action Reports 12, SC 384, 11 November 1997.

<sup>158</sup> (2001) 7 Disciplinary Action Reports 18, SCT 42, 21 November 2000.

<sup>159</sup> *Queensland Law Society Act 1952* (Qld) s 39.

<sup>160</sup> *Queensland Law Society Act of 1927* (Qld) s 4(9)(i)(g).

<sup>161</sup> *Queensland Law Society Act Amendment Act of 1930* (Qld) s 26.

sharing receipts with an unqualified person.<sup>162</sup> Further amendments in 1938 allowed the Law 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 Legal Practitioners' Fidelity Guarantee Fund.<sup>163</sup>

In 1974 a significant legislative step was taken, by recognising the danger posed to clients by a solicitor who is unwell rather than in deliberate breach of their professional obligations. The 1974 amendments to the Act gave the Law 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.<sup>164</sup> A failure to undergo a medical examination requested by the Law Society could be taken as evidence of such infirmity.<sup>165</sup>

The Law Society could also suspend a practising certificate if the Council had decided to lay disciplinary charges or had taken control of the practitioner's trust account, 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.<sup>166</sup> The 1974 amendments also formalised the procedures for notifying practitioners of the cancellation or refusal of certificates<sup>167</sup> and imposed a 28 day time limit for any appeal against a Law Society refusal to grant a practising certificate.<sup>168</sup>

In 1985, the Law Society's powers to refuse a certificate were further extended to situations where the applicant had taken advantage of 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.<sup>169</sup>

Admittedly, an investigative body such as the Law Society should have some powers to impose interim suspensions given the time delay which can occur before formal disciplinary proceedings are held.<sup>170</sup> Equally, if the body which issues practising certificates does not suspend or cancel a practising certificate in the period leading up to the disciplinary hearing, it may have difficulty convincing the disciplinary tribunal that the practitioner is in fact unfit to practise.<sup>171</sup>

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<sup>162</sup> *Queensland Law Society Act Amendment Act of 1930* (Qld) s 29. This section was renumbered s 41 in 1952: *Queensland Law Society Act 1952* (Qld).

<sup>163</sup> *Queensland Law Society Acts Amendment Act of 1938* (Qld) s 9.

<sup>164</sup> *Queensland Law Society Act Amendment Act 1974* (Qld) inserting new s 41A.

<sup>165</sup> *Queensland Law Society Act Amendment Act 1974* (Qld) s 41A (3).

<sup>166</sup> *Queensland Law Society Act Amendment Act 1974* (Qld) s 41B.

<sup>167</sup> *Ibid* s 19.

<sup>168</sup> *Ibid* s 20 replacing ss 42 and 43.

<sup>169</sup> *Queensland Law Society Act Amendment Act 1985* (Qld) s 34 amending s 41 (refusal or cancellation), s 35 amending s 41A (suspension).

<sup>170</sup> The issue of delay following large trust account defalcations was of concern in the early 1970s Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1974, 2987 (William Knox, Minister for Justice and Attorney-General).

<sup>171</sup> *Walsh v Law Society of New South Wales* (1999) ALJR 1138, 1153, [76] (McHugh, Kirby and Callinan JJ): 'The fact that, without objection by the Law Society [Walsh] has been allowed to continue to practise during the entire course of the proceedings suggest that the removal of his

It is notable that, while the issue of ill-health is not explicitly dealt with in the disciplinary regime, it has been dealt with in relation to practising certificates since 1974. This suggests that, whilst there is no doubt that ill-health can lead to unfitness, 'discipline' carries overtones of moral turpitude which limits its protective ability. This strengthens the argument that a strong element of retribution pervades the use (or non-use) of disciplinary proceedings.

Apart from those solicitors who have had their practising certificate cancelled by the Law Society, a number of others have voluntarily removed themselves from practice by the time of the disciplinary hearing,<sup>172</sup> thus strengthening the argument that much of the role of disciplinary proceedings is a demonstrative rather than a practical one.

## V BARRISTERS

It is rare to find examples of the suspension of barristers. The suspension imposed by the High Court in *Ziems* has been referred to earlier. But for the imprisonment of *Ziems*, it is unlikely that any suspension would have been ordered.

In Queensland, any suspension of barristers, as with any disbarment, can only be imposed by the Supreme Court pursuant to its inherent jurisdiction. A barrister was suspended by the Supreme Court in *R v Byrne; in re Swanwick*<sup>173</sup> and although a barrister was suspended in *Re Perske*,<sup>174</sup> he was practising as a solicitor at the time, and the proceedings were instituted by the Queensland Law Association, the professional organisation representing solicitors prior to the Queensland Law Society.

The Statutory Committee did suspend a barrister for three years in 1932 during a period when the legal profession in Queensland was fused,<sup>175</sup> but no barrister has been suspended in Queensland since that time. A reading of the cases at first suggests that the court may not have countenanced the option of suspending a barrister. However in *Barristers' Board v Darveniza*<sup>176</sup> Thomas JA<sup>177</sup> closely examined the types of disciplinary order that could be imposed upon a barrister. He analysed cases involving not only barristers but also solicitors<sup>178</sup> and cited a South Australian decision involving a solicitor<sup>179</sup> for the proposition that suspensions were not appropriate where a

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name from the roll has not, until now, been regarded as an urgent necessity to protect the public from dealing with him as a legal practitioner.'

<sup>172</sup> In the period 1977-2000, 22 per cent of solicitors were no longer practising at the time of their appearance before the disciplinary tribunal: Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis', above n 65, 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 Law Society.

<sup>173</sup> (1882) 1 May 1882, QLJ 66.

<sup>174</sup> (1896) 7 QLJ 73.

<sup>175</sup> 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).

<sup>176</sup> [2000] QCA 253.

<sup>177</sup> With whom McMurdo P and White J agreed.

<sup>178</sup> Haller, 'Disciplinary Fines: Deterrence or Retribution?', above n 112, 155.

<sup>179</sup> *In Re a Practitioner* (1984) 36 SASR 590, 593 (King J).

practitioner has shown that he 'lacks the qualities of character and trustworthiness'.<sup>180</sup> His Honour then catalogued the evidence which showed that Darveniza had 'an easy familiarity with the drug scene'<sup>181</sup> and an 'utter disrespect for the law.'<sup>182</sup> 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.<sup>183</sup> The court proceeded to order that Darveniza's 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*.<sup>184</sup> De Jersey CJ<sup>185</sup> only mentioned in passing that Young would no doubt prefer to be suspended than struck off<sup>186</sup> 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.<sup>187</sup> However, Mackenzie J concluded that, although Young may be 'well thought of by friends and workmates and has innate qualities upon which she could build ...',<sup>188</sup> her conduct before the Shepherdson inquiry showed flaws of character and therefore a suspension order would not be sufficient to protect the public.<sup>189</sup>

Thus, whilst 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 court when imposing discipline within its 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 use of suspensions may be even greater, as the survey of the case law suggests that the court may treat the conduct of barristers in a more absolute way, but recognises a wider range of disciplinary responses to misconduct by solicitors.

Of course, no barristers are suspended by their professional body, the Bar Association of Queensland, as it has no statutory, only consensual, powers over those barristers who choose to become members.

## VI CONCLUSIONS

This article has 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 article has also 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 dealt with harshly, through a strike off order, rather than suspended or fined.

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180 Ibid, cited in *Darveniza* at [38].

181 [2000] QCA 253, [46].

182 Ibid [48].

183 Ibid.

184 [2001] QCA 556.

185 With whom Davies JA agreed.

186 Ibid [19].

187 Ibid [44]-[45].

188 Ibid [48].

189 Ibid [49].

However, the article has provided evidence to show that the tribunal which disciplines solicitors has continued to impose suspensions at a higher rate than would be expected. The use of suspensions is not consistent with a legitimisation theory because of the ambiguous message which it sends to the public. An examination of some cases in which suspensions have been imposed also raises questions as to whether a suspension was an appropriate order in the particular case.

One possible explanation for the high rate of suspension is that the tribunal has operated under a more retributive model than has been previously conceded. In other words, in cases in which the tribunal would otherwise strike a solicitor from the roll, the tribunal may have taken personal mitigating factors into account to spare the individual the greater shame of being struck off. The tribunal may hope that the solicitor will choose to retire from practice voluntarily following the suspension. In addition, given the high rate of sole practitioners who appear before the tribunal,<sup>190</sup> the tribunal may believe that the practical effect of the suspension order will be to remove the solicitor from practice, as it may be difficult for a sole practitioner to resurrect their practice after a period of suspension. Although it is unknown how many suspended solicitors do resume practice, if a number of them do voluntarily retire from practice, a suspension order may be of greater protective *effect* than it initially appears. This is particularly true when combined with the fact that the Law Society has extensive statutory powers to refuse practising certificates, even when a period of suspension has been completed.

In addition, the tribunal, as part of its suspension order, may refer back to the Law Society decisions about when a solicitor is ready to resume practice, as when the tribunal imposes an open-ended suspension. Therefore in practical terms, a decision as to whether an individual will or will not be allowed to practise becomes an administrative rather than a judicial decision and the tribunal plays a demonstrative rather than a practical role.

By comparison to the suspension of solicitors, this article has shown that barristers are rarely suspended. Whilst very few barristers face formal disciplinary proceedings, those who do are much more likely to be struck off. The obvious explanation would be that only the most serious disciplinary matters involving barristers are brought before the court, lessening the likelihood of a suspension order. In addition, it must be noted that it has been the solicitors' disciplinary tribunal which has imposed suspensions whilst the Supreme Court of Queensland has generally discouraged their use. The Bar Association of Queensland has no power to suspend a barrister from practice. Such an order can only be imposed by the Supreme Court, hence the low rate of suspensions is consistent with the court's position in relation to the suspension of solicitors.

Another reason why the Supreme Court has not suspended barristers could be the absence of practising certificates for barristers, meaning that there is no 'second line of defence' as there is in relation to solicitors. Equally, the Supreme Court may be loath to extend the same 'mercy' to barristers as the solicitors' disciplinary tribunal appears to sometimes extend to solicitors.

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<sup>190</sup> Between 1977 and 2000, 60 per cent 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 65, 16.



This article has sought to enlighten the debate on professional discipline by providing information about the actual use of suspensions by the solicitors' disciplinary tribunal. Such a close examination raises questions as to whether a suspension was the most appropriate order in particular cases. It is tentatively suggested that, given the practical impact of Law Society powers in relation to practising certificates, disciplinary proceedings involving solicitors may play a greater demonstrative role than is normally conceded. The use of suspensions in circumstances which suggest that a strike off order may have been a more appropriate order also suggests that an element of retribution may exist in the disciplinary system, despite protestations that the proceedings are to protect, not punish.<sup>191</sup>

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<sup>191</sup> Haller, 'Disciplinary Fines: Deterrence or Retribution?', above n 112.