At last, reform has begun in the legal profession in Queensland. The *Legal Profession Act 2004* (Qld) ('the Act') came into force on 1 July 2004, the second of three promised steps in reorganising and modernising the regulation of the profession.\(^1\) It has been a long and tortuous path. A Discussion Paper was released in December 1998,\(^2\) a Green Paper in June 1999,\(^3\) further State Government proposals in December 2000,\(^4\) and a National Competition Policy Review in November 2001.\(^5\) These were followed by the first stage in the reform process: the passing of the *Legal Profession Act 2003* (Qld). The Act of 2003 provided for new arrangements for the admission of lawyers, the conduct of legal practice, the rights and duties of interstate lawyers, the roles of the Bar Association and Law Society, professional conduct rules, complaints and discipline, interest on lawyers’ trust accounts (IOLTA), and incorporated legal practices (ILPs).\(^6\) However, the release of national *Model Laws*\(^7\) in April 2004 meant the second stage of reforms was ready in May 2004 — before the Act of 2003 commenced. The Government, rightly aiming to begin this era for the legal profession with one statute, produced a bill that restated, and finessed, the provisions of the Act of 2003, and added arrangements for multidisciplinary partnerships, the fidelity fund, the practice of foreign law, and the status and corporate powers of the Queensland Law Society. This became the *Legal Profession Act 2004* (Qld).

Why Queensland was presented with a *Legal Profession Act* in 2003, only for it to be replaced only months later, in May 2004, requires some explanation. Two developments, one local and the other national, impinged on the rate of reform in Queensland and eventually contributed to the shape of the reformed profession.

---

1 BCom (Hons), LLB (Hons), PhD (UQ), Legal Practitioner (Qld), Reader in Law, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland.
2 BA, LLB (Monash), LLM (UQ), Lawyer (Qld), Lecturer in Law, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland.

---

1 *Explanatory Memorandum, Legal Profession Bill 2004* (Qld) 3.
First, through the late 1990s and early 2000s, the Queensland Law Society—the professional guild and regulator for solicitors in the State—struggled to maintain positive public relations against bad press about defalcations and its handling of complaints about solicitors. The condition of the Law Society’s fidelity fund (an administrative scheme for compensating those who have lost money from a solicitor’s misappropriation) also became a major concern for the Society and an increasingly interventionist Government. Adrian Evans’ article\(^8\) recounts the fidelity fund’s growing instability and incapacity over this period, and the crisis for the fund created by a Coolangatta solicitor, Harry Smith, who misappropriated $6 million from his clients. The Law Society naturally should not be blamed for the Smith defalcation, and it rightly pursued Smith’s removal from the profession all of the way to the Court of Appeal.\(^9\)

However, problems more directly within the Law Society’s control arose when, in 2002, the press began to report unheeded and poorly managed complaints about the billing practices of Brisbane law firm Baker Johnson.\(^10\) The media pressure was intense\(^11\) and led to the establishment of two special inquiries into ‘the Baker Johnson affair’: an internal Law Society inquiry conducted by retired District Court judge Patrick Shanahan QC,\(^12\) and another inquiry by the Legal Ombudsman, Jack Nimmo.\(^13\) Shanahan and Nimmo reported their findings in late 2002. They effectively agreed that the Law Society’s handling of complaints had been inadequate, and noted at times it operated as little more than a postal service — conveying the complaint to the solicitor in question, and relaying the solicitor’s response to the complainant.\(^14\) The Shanahan Report, though, concluded (somewhat incongruously) that these inadequacies suggested that the Law Society’s powers to deal with complaints needed to be enlarged,\(^15\) where the Nimmo Report recommended that the handling of complaints be removed from the Society altogether.\(^16\)

In May 2003 the Government announced that a new Legal Services Commission would be operational by January 2004\(^17\) and, with a State election looming in February 2004, it could not afford to wait for the final draft of Model Laws, which were still in the process of being drafted by the Standing Committee of Attorneys-General (SCAG). Hence the first stage of the reform process, the Legal Profession Act 2003 (Qld), based on a consultation draft of the Model Laws

---


\(^9\) The Solicitors Complaints Tribunal gave the solicitor an indefinite suspension (Re Smith (1998) 2 QDAR 12), which the Society vigorously challenged on appeal, where the solicitor consented to an order that he be struck from the roll: Re Smith (1998) 3 QDAR 4.

\(^10\) For litigation on one of these practices, see Baker Johnson v Jorgensen [2002] QDC 205.

\(^11\) Typical of at least 16 articles which appeared in the Courier Mail (Brisbane) between 9–14 August 2002 is H Thomas, ‘Charge! Law of the Jungle’, Courier Mail (Brisbane), 10 August 2002.


\(^14\) Shanahan, above n 12, 12–13; Legal Ombudsman, above n 13, 6.

\(^15\) Shanahan, above n 12, 14–15, 16–20.

\(^16\) Legal Ombudsman, above n 13, 10–11, 12.

circulated by SCAG in August 2003, was passed in November 2003, just months before the State election.

The second, more positive, development was an Australia-wide move towards improving conditions for national legal practice. After the High Court decided in *Street v Queensland Bar Association* that State (and specifically the Queensland) professions could not insist that rights of legal practice be confined to in-State residents, more serious efforts were made to help lawyers practise across State borders. The *Mutual Recognition Acts* assisted this, but still required separate registration in every State where the lawyer wished to give legal representation or advice. Nor did they cure communication problems between the States about the status of lawyers removed or suspended for misconduct in the State. Further legal practice reform was carried out by SCAG, which settled on a scheme under which the legal professions would remain State-based but would have to meet uniform national standards relating to admission, rights of practice (including the practice of foreign law), professional conduct rules and discipline. Importantly, so long as entry and certification standards were uniform, admission as a lawyer in any one State would qualify a person to be certified to practise in any other, and certification in any State would, without more, entitle a person to practise in all others. The central vehicle for national legal practice is a recommended bill of *Model Laws* that sets the legislative framework for each State’s legal profession, and which allows each State to build its own professional peculiarities (such as a divided or fused profession) inside it. Inevitably, the Queensland reforms were best implemented within the structure of the *Model Laws* and the 2004 Act was able to implement the final form of the *Model Laws* adopted in April 2004. The detail of the more specific professional structure set by the Act, however, owes much to the *Legal Profession Act 1987* (NSW). Still, there remain aspects of the *Model Laws* that are not adopted in the Act, in particular those relating to lawyers’ billing and accounts and the management of trust accounts and client money. It is expected that these will be adopted in the third stage of reforms.

II THE SPECIAL EDITION

This special edition of the *University of Queensland Law Journal* marks, within the TC Beirne School of Law, the establishment of the Centre for Public, International and Comparative Law. The centre’s work potentially

---

21 For an example of a solicitor struck from the roll in Queensland, but remaining a lawyer in another State, see *Attorney-General & Minister for Justice v Gregory* [1998] QCA 409 (Unreported, de Jersey CJ, McMurdo P and White J, 4 December 1998), and *Gregory v Queensland Law Society Incorporated* [2002] 2 Qd R 583.
22 *Model Laws*, above n 7.
covers the field of comparative, domestic and international public law, including the law regulating institutions like the legal profession. Its Legal Profession Program is dedicated to developing a body of scholarly work on the legal profession generally, and the Queensland legal profession in particular. In this respect, the program perpetuates the Law School’s scholarship on the profession that began in 1947 with Professor Walter Harrison’s ‘small book’ on the Law and Conduct of the Legal Profession in Queensland.23 However, Harrison — re-edited in 1984 and long a primer for lawyers in the State — belongs to a different era of small, homogeneous professional communities and, for solicitors, simple external regulation. In 1960, the High Court claimed that it was ‘not necessary that [fundamental rules of lawyers’ conduct] … be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness.’24 No court would make such a claim today, and nor could a ‘small book’ like Harrison provide adequate preparation for legal practice. In the mid-2000s, Queensland lawyers, like their interstate counterparts, need at least to consult Gino Dal Pont’s encyclopaedic Lawyers’ Professional Responsibility25 and, if further thought is required, the burgeoning literature penned by the growing numbers of legal ethicists in Australian universities.

This special edition aims to initiate the scholarly literature on the reformed profession in Queensland, with contributions from academics in the TC Beirne School of Law — Michael White and the present writers — and a group of interstate scholars of high repute — Christine Parker, Adrian Evans and Gino Dal Pont. We are also fortunate to have comment from the Honourable Paul de Jersey AC, Chief Justice of Queensland, on the position of the Supreme Court under the Act. The present Chief Justice has had an instrumental role, through the processes and standards he has introduced in admission and disciplinary proceedings, in elevating the court’s ethical expectations of lawyers.26 Moreover, the Chief Justice has led the profession from inside, and not from a position of lofty detachment — travelling the State and being closely involved in the profession’s educational and collegiate life. His injunction to lawyers to cooperate in achieving the Government’s plans for reform27 is certainly worth the most serious consideration.

III THE ACT AND THE COMMENTARY

The Act is a weighty piece of legislation, spanning 643 sections and five schedules. Despite its length, though, the Act is largely empowering. It relegates much of the reform work to regulations and rules. In the week before

23 See GN Williams, Harrison’s Law and Conduct of the Legal Profession in Queensland (2nd ed, 1984) v.
the Act commenced, the Government introduced the *Legal Profession Regulation 2004* (Qld), the *Legal Profession (Tribunal and Committee) Rule 2004* (Qld) and the *Legal Profession (Barristers) Rule 2004* (Qld). The Act’s provisions for the common admission of legal practitioners would also have been ineffective without changes to the admission rules (which are made under a different statute), and the *Supreme Court (Legal Practitioner Admission) Rules 2004* (Qld) were introduced at the same time. More regulations and rules, especially for the solicitors’ branch, need to be introduced before the promise of the Act is fulfilled.

The Act divides the regulatory labour for the profession between the Supreme Court, the Legal Practitioners Admissions Board, the Queensland Law Society and the Bar Association of Queensland, the Legal Services Commissioner, the Legal Practice Tribunal (which is a Supreme Court judge in a different guise) and the Legal Practice Committee. The Justice Department is also given direct control of IOLTA, although the State Government generally has an overarching regulatory role. Also, as the Government makes all regulations and rules, it potentially has powers for the micro-management of the profession without having to involve the Law Society or Bar Association or seeking an express mandate from Parliament to do so. Evidently, this poses some risk to the legal profession’s independence from the Executive. That has been reflected in the Law Society’s concerns about losing control over the administration of IOLTA — albeit that Evans gives good reasons for this development — although it does mean that the Society will have to depend on the Government’s good graces if it is to receive any of this largesse. The Bar Association and, as the Chief Justice points out, the Supreme Court Library also depend on the Government’s favour for access to IOLTA funds.

However, the Supreme Court’s independence does not seem to be compromised by the Act. The continuing central role of the court in the process for admission to practise law and its enhanced role in discipline should dampen exaggerated claims about the loss of professional independence. The

---

28 *Supreme Court of Queensland Act 1991* (Qld) s 118(1).
29 *Legal Profession Act 2004* (Qld) ss 34, 37, 281, 292, 294, 352, 579–582.
30 *Legal Profession Act 2004* (Qld) ss 33, 41, 487–505.
35 *Legal Profession Act 2004* (Qld) ss 202(b), 207, 209.
36 *Legal Profession Act 2004* (Qld) ss 215, 595.
37 See *Legal Profession Act 2004* (Qld) s 220, under which the Law Society or Bar Association ‘may’ propose a rule.
38 G Ferguson, ‘From the President: *Legal Profession Bill 2003* — The Major Provisions’ (2003) 23(11) Proctor 2, 3. The Law Society’s control over IOLTA was formerly given by the *Legal Practitioners Act 1995* (Qld) s 51, and the *Queensland Law Society Act 1952* (Qld) s 36E.
39 Evans, above n 8, 404–405.
40 de Jersey, above n 27, 294–295.
41 *Legal Profession Act 2004* (Qld) s 209.
Chief Justice’s article details the implications that the Act has for the court in the admissions process, complaints and discipline, and the funding of the Supreme Court Library. At the time of the Green Paper in 1999, the Government was proposing a managerial role for the judges in administering the regulatory bureaucracy for the profession. Plainly, the judges resisted this distraction from the judicial task. The Chief Justice believes that the Supreme Court’s status and position are preserved by the Act, alongside its role in legitimating the standards set for the profession. Indeed, as the Chief Justice’s and Linda Haller’s articles explain, the court is drawn even more closely into the ethical decision-making of the profession in that the primary disciplinary body — the Legal Practice Tribunal — is constituted by a Supreme Court judge. Strangely, this completes a circle, bringing the Supreme Court into a more active role in lawyers’ discipline than it has had since the passage of the Queensland Law Society Act 1927 (Qld).

Michael White’s article gives the necessary context for understanding the reform. Presenting a defence of the divided legal profession, White’s account explains why the two branches of the profession evolved in their distinctive way. He notes that, although solicitors became subject to statutory control in 1927, ‘no change was made for barristers, as they preferred to continue with self-regulation.’ This suggests that it was for the two branches of the profession, rather than Parliament, to decide whether or not they would be subject to statutory control. Law societies had been seeking statutory control over solicitors for some time and were supportive of the passage of the Queensland Law Society Act 1927 (Qld), which brought regulation to the solicitors’ branch. But, given the level of public disquiet in relation to trust account defalcations by solicitors, it was perhaps inevitable that statutory regulation of solicitors would eventuate, regardless of the wishes of the Law Society. What is perhaps more surprising is that, until the Act of 2004, the bar’s ‘preference’ for self-regulation was apparently was respected by successive Governments.

Indeed, although public and parliamentary debate on the Act has been preoccupied with solicitors, the Act is arguably the most significant event in the history of the Queensland bar. Having escaped the twentieth century unregulated, and consequently struggling with a weak disciplinary system, the bar will now be regulated under similar conditions to, and be subject to the same entry standards as, the solicitors’ branch. Any further structural changes

---

42 de Jersey, above n 27.
47 Queensland, Parliamentary Debates, Legislative Assembly, 26 November 2003, 5240 (Lawrence Springborg); 27 November 2003, 5295 (Linda Lavarch), 5300 (Bill Fynn), 5300 (Michael Choi), 5301 (Rachel Nolan), 5302 (Elizabeth Cunningham), 5302–5303 (Neil Roberts), 5302–5304 (Barbara Stone), 5305 (John English), 5306–5307 (Kerry Shine), 5309 (Peter Lawlor), 5310 (Peta–Kaye Croft).
to the profession seem unlikely in the immediate future. The empowering character of the Act still leaves much of the profession’s organisation to the ‘preference’ of the two professional associations. And, for the most part, the Bar Association has pursued conservative arrangements for the bar and, with its new powers, has reinforced its traditional structures — especially sole unincorporated practice. Reid Mortensen\(^\text{48}\) therefore asks the question: Why then did the Act introduce common admission? Accepting that the most likely reason was to introduce uniform entry standards for the profession, Mortensen suggests that this could also help to reduce the costs of moving from one branch of the profession to the other. The new Admission Rules have properly raised formal standards for admission to the bar, but the Bar Association also plans to use its new powers to require further education and training after admission for those taking barristers’ certificates. While acknowledging that post-admission training cannot be eliminated altogether, Mortensen argues for most practical legal training to take place prior to admission. This would require, not only some amendment of the legislation, but greater coordination between those responsible for the education and training of lawyers — universities, government and professional associations.

In at least three respects, nevertheless, the Act does bring significant changes to the profession. Christine Parker’s article\(^\text{49}\) deals with the introduction of ILPs.\(^\text{50}\) There have certainly been fears that ILPs will lead to lower ethical standards for the lawyers concerned. But, drawing on her earlier work on corporate regulation, Parker documents the evidence that it is organisational structure, rather than its legal identity, which leads to a breakdown in ethical decision making. She uses the Foreman\(^\text{51}\) and McCabe\(^\text{52}\) cases to demonstrate that many of the perceived dangers of incorporation are already present within existing legal practices, particularly those which mimic the structure of a corporation. One of these dangers is too strong an association between lawyer and client, with inadequate controls for what are sometimes referred to as externality problems\(^\text{53}\) — breach of the duty to the court, to the administration of justice and to the public. Parker notes that even the self-audits implemented by the New South Wales Office of the Legal Services Commissioner reinforce duties owed to the client but overlook these broader obligations.

Parker argues that discussion of the merits of incorporation over other business structures misses the point when it comes to ethical issues. Instead, she suggests that the introduction of ILPs be used as an opportunity to instil


\(^{50}\) The provisions of the Act relating to incorporation are yet to commence.

\(^{51}\) Law Society of New South Wales v Foreman (1994) 34 NSWLR 408.

\(^{52}\) McCabe v British American Tobacco Australia Services Ltd [2002] VSC 73 (Unreported, Eames J, 22 March 2002).

organisational responsibility for decision making, whatever the structure within which a legal service is provided.

As already mentioned, Adrian Evans addresses the expectation that solicitors be ‘vicariously’ liable for trust account fraud by professional colleagues through fidelity compensation schemes. Evans explains how the crisis in the Queensland fidelity compensation fund in the 1990s — largely due to private mortgage lending by solicitors — led to Law Society and Government demands that solicitors return to more traditional, less entrepreneurial, work. Either the Queensland Law Society or the State government would be held accountable by the public for client losses in the 1990s, and Evans convincingly explains why that was more likely to be the Law Society. He also suggests this may partly clarify why the Law Society has not only lost the battle to control fidelity compensation and to use IOLTA for broader Law Society purposes, but has also lost the political debate over self-regulation.

The third improvement is undoubtedly in the disciplinary arrangements for the profession, the subject of Linda Haller’s article. As Haller explains, one of the most significant improvements the Act has brought to the profession is the introduction of a statute-based disciplinary system for the bar. The appointment of a Legal Services Commissioner, devoted almost exclusively to receiving and addressing complaints and prosecuting disciplinary charges, adds to the Government’s plan to distance the professional associations from the disciplinary process. This may be window-dressing, responding directly to the Nimmo Report and the politics of the Baker Johnson affair. The Law Society and Bar Association have still been given strong regulatory powers through the issue, conditioning, suspension and refusal of practising certificates, and these are as effective in removing lawyers from practice as the most serious sanctions that can be imposed through formal discipline. Haller also thinks that the effectiveness of the Act’s disciplinary system is compromised by the fact that the commissioner has no soft options for discipline before a full hearing in the Legal Practice Tribunal or Committee, and doubts the utility of re-introducing two disciplinary bodies — one for minor matters only — after the failure of a similar binary system for the discipline of solicitors which existed between 1984 and 1997.

IV The Future

The reform agenda in Queensland is far from complete. The third stage of reforms promised by the Attorney-General includes reforms to trust account regulation, client agreements and cost review. The Law Council of Australia was adamant that the regulatory provisions for billing and trust account

---

54 Evans, above n 8.
55 Haller, above n 43.
management should be identical across the country,\textsuperscript{56} and this hopefully adds to the pressure on the Government to adopt the complete \textit{Model Laws} provisions on handling money. If the National Competition Review has also had its effect, the reforms to come should also put barristers' relationships with solicitors and clients on a contractual and commercial footing.\textsuperscript{57} Gino Dal Pont's article\textsuperscript{58} highlights the many anomalies that remain in relation to barristers' fees, given that solicitors' fees have been heavily regulated for decades. As Dal Pont points out, this is particularly so in relation to direct access clients, where it is extremely difficult to justify why the nature of the legal relationship between barrister and client should be any different to the relationship between solicitor and client. Dal Pont demonstrates the lack of symmetry and many aberrations which remain in this area, in particular when the barrister's supposed inability to sue to recover fees is considered in light of the court's costs and taxation regimes and the modern nature of the relationship between lawyer and client. Not only do barristers sometimes now have direct access clients, but many solicitors perform the role of advocate much more often than in the past. Dal Pont discusses the various rationales for the Queensland \textit{status quo}, but reaches the compelling conclusion that a barrister's right to sue for fees would be the most rational and coherent response for the law to make. It is difficult to imagine that Parliament would continue to allow barristers to remain less accountable than solicitors for fees and the review of costs, especially given that barristers can now have direct access clients. But, given the success of the Bar Association in maintaining other conservative positions with the reform of the profession, it would be unwise to assume that the Government will align the position of barristers and solicitors — as rational and coherent as \textit{that} would be.

Some of the articles in this issue highlight anomalies — the resolution of which have not been promised in the third stage of reforms — as well as anomalies created by the new regulatory regime. The Act was always an ambitious undertaking, an ongoing project which the Chief Justice describes as daunting.\textsuperscript{59} All the more reason, as His Honour says, for the profession, academy, judges and the Government to work together to ensure the Act becomes a 'working and worthwhile reality.'\textsuperscript{60}

\begin{flushright}
\textsuperscript{57} Cf \textit{Legal Practitioners Act 1987 (NSW)} s 184. This should allow the termination of the arguably anti-competitive 'Private List'. For an assessment of arrangements like the Private List under State competition laws, see S Corones, 'Solicitors Subject to the Trade Practices Act' (1996) 16(6) \textit{Proctor} 10-11.
\textsuperscript{59} de Jersey, above n 27, 289.
\textsuperscript{60} Ibid 295.
\end{flushright}