

STUDENT MISCONDUCT AND ADMISSION TO LEGAL PRACTICE – NEW JUDICIAL APPROACHES

FRANCESCA BARTLETT*

The recent Victorian Supreme Court decision in Re Legal Profession Act 2004; re OG, a lawyer caused a stir among educators of legal ethics. This decision, like another decision in 2007, Re Humzy-Hancock, concerns student misconduct as a relevant matter for consideration in admission proceedings. It has been recognised for some time that student misconduct is significant evidence as to the character of an applicant in admission proceedings. In order to be admitted as a legal practitioner, the court must be satisfied that the applicant is 'a fit and proper person' to practice, which involves in-depth inquiry into that person's moral character. Re OG indicates that we must now consider student misconduct to be relevant in any admission considerations and that non-disclosure of such incidents will be grounds for a person not to be admitted. In Victoria, the legislature has now codified consideration and disclosure of 'disciplinary action' against an applicant.

However, Re Humzy-Hancock demonstrates that while the courts are taking an ever stricter line on disclosure as evidence of honesty of character, this does not mean that the court will not permit the applicant to defend his or her character with regard to the prior offence. Indeed, this article contends that the decisions discussed herein demonstrate that the courts in this area are intruding further than ever into what may be considered 'issues of academic or pastoral judgment'.

I INTRODUCTION

The decision of the Victorian Supreme Court in *Re Legal Profession Act 2004; re OG, a lawyer*¹ late in 2007 has been received with much interest among educators of legal ethics.² This decision, like several recent Queensland decisions also discussed here, concerns the relevance of student misconduct in considerations as to whether to admit a person to legal practice.³ For the purposes of admission in any Australian jurisdiction, an applicant must demonstrate that he or she has obtained the necessary qualifications,⁴ and that he or she is a 'fit and proper

* Lecturer in Law, The University of Queensland. I gratefully acknowledge the insightful comments provided on this article by Professor Reid Mortensen. I would also like to thank the anonymous reviewer for his or her useful comments on the first version of this article.

1 [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007) (*Re OG*).

2 This case has also interested legislators in Victoria such that the *Legal Profession Act 2004* (Vic) has been amended, by *Legal Profession Amendment (Education) Act 2007* (Vic), to insert an explicit consideration of student misconduct for the purposes of admission to practice.

3 Henceforth described as 'admission'.

4 See, eg, *Legal Profession Act 2004* (Vic) s 2.3.2(1)(b).

person' for the purposes of practising law.⁵ Thus the statutory requirements apply an expansive understanding of what is required for legal practice, including an ability to provide legal services in an everyday sense *and* – by seeking to take an early measure of the applicant's 'intrinsic character' – a minimum level of personal fitness and propriety.⁶ The rationale for this rather paternalistic investigation by the court is not firmly articulated in the jurisprudence, but appears to flow from the concern of professional regulation to 'protect the public' and to a lesser extent to maintain the reputation of the profession.

This article examines this developing area of law which has received scant academic attention.⁷ It attempts to map the legal reasoning of the courts in a rich new area of intersection between legal ethics and professional regulation. This article scrutinises several recent decisions in detail, explaining their approach to the definition of 'fit and proper'; what sorts of evidence is found to be relevant in deciding this minimum criterion and the policy considerations underpinning the reasoning. There has been more attention paid to the law relating to disqualification proceedings,⁸ which apply the same concern of protecting the public when deciding whether to remove a practitioner from the roll.⁹ The legal test as to whether a person ought to be allowed to practice – at the stage of admission or removal – appears to be the same. However, it is contended that an examination of recent decisions relating to admission indicates that, by virtue of differing matters arising, there are a few distinctions to be made between the different stages of qualification proceedings.

First, the admission stage requires the court to consider a range of matters relating to the applicant's personal life. As the role of the court is not an inquisitorial one, it largely relies on the disclosure of such matters by the applicant. Therefore, the law requires the applicant to also engage in an ethical consideration as to his or her own character. As applicants have not begun their legal career, these matters relate to non-professional incidents. In contrast, disciplinary action against legal practitioners for non-professional matters tends to relate only to serious

5 See, eg, *Legal Profession Act 2004* (Vic) s 2.3.6(1)(a)(ii).

6 In all jurisdictions, the admitting court must consider issues concerning an applicant's mental or physical health or other matters which may affect their ability to perform their legal role should this be drawn to the attention of the admitting authority; see, eg, *Legal Profession Act 2004* (Vic) s 1.2.6(1) (m).

7 For a recent discussion of *Re Humzy-Hancock*, see L Corbin and J Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2007) 17 *Legal Education Review* 53.

8 See for example the work of Linda Haller in relation to professional discipline in Queensland: Linda Haller, 'Smoke and Mirrors: When Professional Discipline May Cause Harm' (2005) 8 *Legal Ethics* 70; Linda Haller, 'Dirty Linen: The Public Shaming of Lawyers' (2003) 10 *International Journal of the Legal Profession* 281. However, this is also an area which has received little academic comment in Australia.

9 There are many other disciplinary orders that may be made by the court or disciplinary tribunal prescribed in the governing Acts and the inherent jurisdiction of the courts in all states. Other orders include suspension of or conditions placed on a practitioner's practising certification, imposition of a fine or a public reprimand; see, eg, *Legal Profession Act 2004* (Vic) pt 2.4, div 6.

issues such as convictions for serious offences.¹⁰ Therefore the development of judicial opinion as to the relevance and weight of a range of non-professional matters in admission proceedings is more advanced.¹¹ Similarly, the requirement for applicants to be aware of such considerations is arguably more demanding. The most significant non-professional matter to be considered in recent years is student misconduct. This article focuses on admission cases concerning student misconduct and contends that the courts' recent considerations of such matters represent an expansion of the reasoning behind and content of the fitness requirement.

A second distinction arises in relation to the nature of relevant matters in admission and discipline cases. Where admission decisions relate to student misconduct, courts have engaged in a thorough consideration of the details of the incident with often little regard to the findings of the university at which the conduct occurred. These decisions have not only reviewed in detail the evidence relating to the conduct in question, but have made findings as to whether this constitutes 'misconduct' such as plagiarism. In contrast, where a disciplinary action relates to a finding of guilt in a criminal matter the court will not seek to disturb or question the decision of another court (while it *will* consider what, if any, conclusions as to a person's character to draw from the nature and timing of the offence).¹² This article suggests that the recent development of admission law may (inadvertently) trespass into the area of academic decision-making which has hitherto been regarded by the courts as outside their purview. It is not implied that courts have intended to cast doubt on university processes for considering student conduct (such as suggesting a lack of procedural fairness) or their administrative policies and procedures. Nevertheless, such judgments re-examine all aspects of

10 In Victoria, a finding of guilt in relation to a serious offence (including a tax offence) or bankruptcy will place an onus of proof on the practitioner to explain why the practitioner considers him or herself to be a fit and proper person: *Legal Profession Act 2004* (Vic) ss 1.2.1, 2.4.26(2). Such incidents may cause the practicing certificate of the practitioner to be cancelled: *Legal Profession Act 2004* (Vic) s 2.4.20. Further, a practitioners' certification may have conditions imposed on it where the practitioner is charged with an offence: *Legal Profession Act 2004* (Vic) s 2.4.16. However, there do not appear to be any proactive duties of disclosure of any matter after admission expressly provided for in the Act. In contrast, the Queensland Act requires disclosure by a practitioner of conviction of an offence that would have to be disclosed under the admission rules or a serious offence: *Legal Profession Act 2007* (Qld) s 57. The Queensland Act does not require disclosure of more minor non-professional matters.

11 While there is no doubt that non-professional matters may have a bearing on a practitioner's fitness to practice, professional misconduct 'must have a much more direct bearing on the question of a man's fitness to practice': *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 290 (Fullagar J). Thus it is arguable that the significance of non-professional conduct differs in admission and discipline proceedings. The author is not aware of any other authority for this approach. Indeed, courts deciding on a person's fitness at all stages assume that the law, derived from a shared public policy, is the same and refer to dicta from a range of qualification decisions without distinction. It is not within the scope of this article to examine this interesting point in any depth. The description of admission law in this article assumes that greater development of the reasoning relating to fitness in admission cases is simply a product of the differing factual circumstances arising. Therefore, this description of these cases is equally applicable to disqualification proceedings.

12 It is conceded that there are discipline decisions which arguably impose a higher (ethical) threshold than other areas of law. For instance, in *Barristers Board v Young* [2001] QCA 556 (Unreported, de Jersey CJ, Davies JA and Mackenzie J, 7 December 2001), Young, a young barrister, was disbarred for deliberately lying under oath at the Criminal Justice Commission's Inquiry into Electoral Fraud, while the Commission declined to prosecute Young for perjury.

any incident raised in an admission application to draw their own conclusions. The recent cases examine documentary, affidavit and oral testimonies given in relation to incidents, as well as testimonies pertaining to the misconduct processes undertaken by universities. This appears to be a form of merits review, albeit for a different purpose. This article concludes by raising questions as to the implications of these decisions when viewed from the perspective of a university or a student who has a finding of misconduct by the university against them.

II THE STATUTORY REGIME FOR ADMISSION

While admission is a matter for each State and Territory in Australia, the statutory regime relating to admission is similar across all jurisdictions. This article refers specifically to the Victorian and Queensland provisions as the cases examined herein were decided in these States. To be admitted as a legal practitioner in all jurisdictions in Australia a person must have gained the relevant education and practical legal training requirements,¹³ as well as be considered 'suitable' to practice.¹⁴ The suitability requirement, whether a person is 'fit and proper person' to practice, is a separate and additional criterion that must be satisfied. Section 2.3.3 of the *Legal Profession Act 2004* (Vic) ('the Act') provides that when deciding whether a person is a fit and proper person to be admitted, the Board of Examiners must consider each of the suitability matters and any other matters it considers relevant. The Board of Examiners must then make a recommendation to the Supreme Court as to whether a person should be admitted. Section 2.3.6(1) of the Act allows the Supreme Court to rely on the recommendation of the Board of Examiners.¹⁵ However, the admitting authority is the Supreme Court and this section requires that the Court must only admit a person if it is satisfied that the person is a fit and proper person to be admitted.¹⁶

The suitability matters are defined in s 1.2.6 of the Act. Prior to the decision in *Re OG*, none of the listed matters directly referred to student misconduct as found by a university in which the applicant completed his or her law degree.¹⁷

13 A person is eligible for admission if they have attained approved academic qualifications and satisfactorily completed approved practical legal training: *Legal Profession Act 2004* (Vic) s 2.3.2; *Legal Profession Act 2007* (Qld) s 30. In Queensland, for examples of the requirements, see the *Supreme Court (Admission) Rules 2004* (Qld) rr 6, 7 and Attachment A.

14 In Queensland, a person is suitable for admission only if the person is 'a fit and proper person to be admitted': *Legal Profession Act 2007* (Qld) s 31(1). 'Suitability' is further defined, providing an inclusive list of issues the Court of Appeal must consider when assessing whether the applicant is a fit and proper person to practice: *Legal Profession Act 2007* (Qld) s 9. The Supreme Court is required (in its appellate role) to decide on an applicant's fitness by considering each of the suitability matters listed in s 9 and any other matters which the Supreme Court considers relevant: *Legal Profession Act 2007* (Qld) s 31(2).

15 See also the *Legal Profession Act 2004* (Vic) s 2.3.10.

16 The cases discussed in this article are examples of where the Board of Examiners contests an application. In these cases, the Supreme Court decides on the application in its inherent jurisdiction rather than as a review of the Board's decision.

17 Being found guilty of an offence is listed as a suitability matter: *Legal Profession Act 2004* (Vic) s 1.2.6(1)(c). An 'offence' is not defined in the Act, but appears not to refer to a breach of university rules, as there is no judicial authority for this interpretation.

However, the list of suitability matters is not exclusive and s 2.3.3 of the Act permits the Board of Examiners (and the court) to consider any other matter it considers relevant. It is on this basis, that the courts have expanded their inquiry to other considerations which are deemed relevant to fitness and propriety. Therefore, courts have considered indiscretions such as academic misconduct, as well as how the applicant undertakes a self-assessment of such conduct. This article is concerned to examine the development of the common law surrounding matters that are relevant to fitness and to trace underpinning public policy considerations. While a change has been made to the relevant Act in Victoria to explicitly require consideration of ‘disciplinary action’ arising out of tertiary or practical legal training undertaken (s 2.3.3(1)(ab)), no such similar change has occurred in other jurisdictions. Similarly, the importance of such an incident in determining a person’s character in Victoria and other jurisdictions appears to remain subject to judicial reasoning.

The first ‘suitability’ matter listed, whether the applicant is ‘of good fame and character’,¹⁸ brings in previous statutory and common law tests of the applicant’s character, which have considered a range of matters not listed in the Act.¹⁹ While the phrase ‘good fame and character’ may suggest that a person’s reputation is a relevant consideration,²⁰ typically there is little weight placed on reputation, although applicants are required to submit two affidavits as to character in support of the application.²¹ Reid Mortensen contends that the referees’ assessment that the applicant is a fit and proper person to practice is typically not questioned and bears little weight.²² This is borne out in the decisions where an application is opposed by the Examiners Board (in Victoria) or Legal Practitioners Admissions Board (in Queensland), which rarely refer to such references.²³

Rather courts have historically understood their admissions role as one of inquiring into an applicant’s ‘intrinsic character’.²⁴ The goal of the moral judgments

18 *Legal Profession Act 2004* (Vic) s 1.2.6(1)(a); *Legal Profession Act 2007* (Qld) s 9(1)(a).

19 While the statutory regime differs somewhat between jurisdictions, courts routinely refer to interstate decisions as forming a body of relevant common law reasoning in relation to ‘fitness’.

20 ‘Reputation’ is considered here as referring to esteem or honour of the applicant in the opinion of his or her peers or community.

21 *Legal Practice (Admission) Rules 1999* (Vic) r 4.03(b)(iv). The Queensland rules require a certificate in support of the application by three persons (not relatives) who have known the applicant for at least two years: *Supreme Court (Admission) Rules 2004* (Qld) r 13(2)(m).

22 Reid Mortensen, ‘Lawyers’ Character, Moral Insight and Ethical Blindness’ (2002) 22 *Queensland Lawyer* 166, 169.

23 However, there is some consideration of character references in *Law Society of Tasmania v Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) (‘*Richardson*’), [3]. This is another point on which this decision may be regarded as anomalous (as discussed later in this article). In most disqualification cases, reliance on personal references is similarly considered of little weight: Linda Haller, ‘Imperfect Practice Under the *Legal Profession Act 2004* (Qld)’ (2004) 23 *University of Queensland Law Journal* 411.

24 *Re Bell* (Unreported, Supreme Court of Queensland, Thomas, Williams and Derrington JJ, 6 December 1991) 5; *Janus v Queensland Law Society Inc* [2001] QCA 180 (Unreported, de Jersey CJ, Williams JA and Mackenzie J, 15 May 2001) [12] (de Jersey CJ), [50] (Williams JA), [59] (Mackenzie J); *Gregory v Queensland Law Society Inc* [2002] 2 Qd R 583, [18] (Thomas JA); *Barristers Board v Young* [2001] QCA 556 (Unreported, de Jersey CJ, Davies JA and Mackenzie J, 7 December 2001) [22] (de Jersey CJ), [24] (Davies JA), [48] (Mackenzie J).

that courts make about an applicant's 'good character' is 'the protection of the public'.²⁵ This is the mantra for all decisions as to a person's fitness to practice, either at the stage of admission, disqualification or readmission. While the goal of 'protection of the public' is a somewhat undefined one (and is not mentioned in the statute), in deciding admission applications, the courts have given content to it as requiring that only those who display a high degree of honesty and integrity as well as a history of abiding by the law will be admitted.²⁶ The court then decides whether the applicant displays these necessary qualities by demanding that the applicant recognise the protective premise 'in word and deed'.²⁷

First, the applicant must not hinder court processes by demonstrating a general obedience to the law and a respect for the admission process.²⁸ How applicants conduct themselves during the course of their admission (which includes their conduct in responding to inquiries by the Examiners Board or Admissions Board and in any examination by the court), has received considerable recent attention. This factor is not only another example of obedience to the law, but is a product of the system for admission. In order to conduct an investigation of the applicant's character, the court relies heavily on the disclosures made by the applicant. While the court ultimately passes judgment on the applicant's fitness, in practice it is the applicant who decides what matters in his or her past will be considered. Rule 5.02(1)(b) of the *Legal Practice (Admission) Rules 2008* (Vic) requires an applicant to disclose any matter that is relevant to his or her fitness and to provide a sworn affidavit attesting to compliance with these disclosure requirements. The Act does not specify which matters are 'relevant' for disclosure. However, courts have found that the applicant must disclose any suitability matter (listed in s 1.2.6 of the Act) and any other matter which may cast doubt on their character (honesty or obedience to the law). It is unsurprising then that courts have taken a dim view of an applicant who is found to have failed to disclose a relevant matter. Indeed, in many cases, this may be enough evidence of a lack of obedience to the law to refuse admission.

25 In *Clyne v NSW Bar Association* (1960) 104 CLR 186, 202, the Court (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ) described a disbarment order as made 'from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege'. See also *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 681 (Isaacs J); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 251 (Deane, Dawson, Toohey and Gaudron JJ); *Gregory v Queensland Law Society Inc* [2002] 2 Qd R 583, [18] (de Jersey CJ).

26 Obedience to the law is to some extent codified in both Victoria and Queensland, which both require consideration of whether the applicant has been previously disqualified from practice and has been convicted of an offence: *Legal Profession Act 2004* (Vic) s 1.2.6; *Legal Profession Act 2007* (Qld) s 9. However, the development of the common law appears to go beyond simply statutory interpretation with a rich history of judicial reasoning as to the import and impact of differing crimes as a common law doctrine. The High Court decision in *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 is the most well known, though controversial, decision in relation to the intersection of the nature of the offence and understandings of fitness to practice.

27 Mortensen, above n 22, 167.

28 For instance, in *Re Bell* (Unreported, Supreme Court of Queensland, Thomas, Williams and Derrington JJ, 6 December 1991), a lack of respect for the integrity of Family Court processes was found to be a sufficient indicator of unfitness to practice.

The case of *Re OG*,²⁹ which will be discussed in detail in a later section, concerned such a failure to disclose a relevant matter. The decision in this case required demonstration of obedience to the law and honesty as necessary criteria for determining fitness as flowing from duties as an ‘agent of justice’.³⁰ Thus it appears the reasoning behind requiring lawyers to demonstrate the protective principle is their relationship to the law as an officer of the court. While this is somewhat circular logic in admission cases, which requires an applicant to observe duties as an officer of the court before he or she is granted such an office, the rationale appears to be that where an applicant displays a lack of understanding or respect for such duties, this can be taken as evidence of a lack of ability to fulfil such future duties.³¹

Second, if the applicant’s conduct indicates that he or she does not appreciate the necessity for honesty when dealing with the admission process, this will be a relevant issue as to his or her fitness. Similarly, if there is an incident in the applicant’s past which indicates that he or she is dishonest, this will be relevant to admission. Courts have understood their role as not merely deciding on whether the conduct in question disturbs the court’s processes, but requiring an inquiry into intrinsic *moral* character of the applicant. The rationale again appears to flow from the protective principle: that protection of the public does not only rely on the integrity of court processes, but that the public expects that their interests are best served by honest lawyers.³² Qualification decisions therefore go further than the legal requirements of abiding by the law. They require that the applicant demonstrate a high degree of honesty and candour as an assumed prerequisite for the position of legal practitioner (an applicant is *prima facie* not a ‘fit and proper person’ if he or she is dishonest).

III DISHONEST STUDENT CONDUCT WILL RENDER A PERSON UNFIT

Both indicators of appropriate character, respect for court processes and honesty, have received particular judicial attention in admission cases relating to previous student misconduct. Recent cases involving student misconduct have demonstrated that courts will engage in a thorough analysis of the ethical nature of behaviour in an applicant’s past, their honesty in the application process and their ability to engage in ethical insight by identifying relevant matters which must be disclosed (even where they are not listed in the Act). There is now a body of cases which have found that incidents of student misconduct are evidence

29 [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007).

30 *Ibid* [123].

31 The High Court’s findings in the early case of *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655, 681 (Isaacs J), illustrates this reasoning when it stated: ‘There is therefore a serious responsibility on the Court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential.’

32 Mortensen suggests that a second rationale that a lawyer enjoys great privileges in this office may underlie a requirement that the lawyer demonstrate honesty in this office: Mortensen, above n 22, 174.

of dishonesty indicating a faulty character.³³ For instance, in *Re AJG*,³⁴ the Queensland Court of Appeal found that even a single incident of ‘cheating’ at university was evidence of an applicant’s unfitness to practice because of the dishonest nature of the incident. The Court decided that a proven case of such dishonesty rendered an applicant unfit because ‘[l]egal practitioners must exhibit a degree of integrity which engenders in the Court and in clients unquestioning confidence in the completely honest discharge of their professional duties’.³⁵ In a later case, *Re Liveri*,³⁶ the Court similarly found that plagiarism on three occasions was sufficient to render the applicant unfit to practice by nature of the offence. The Court also based its decision on how the applicant herself understood the incident, as it noted that her character was further impugned by her ‘unwillingness, subsequently, to acknowledge that misconduct’.³⁷ The Court concluded that the lack of self-awareness as to the nature of such an event ‘establishes a lack of genuine insight into its gravity and significance: for the present purposes, where the Court is concerned with fitness to practice, that aspect is at least as significant as the academic dishonesty itself’.³⁸ How the applicant characterises the relevant incident has then been taken as strong evidence as to whether the person has sufficient moral character to be a lawyer. This is an illustration of the depth of the requirement for the applicant to fulfil the protective principle by also acknowledging the importance of honest behaviour. Courts have understood a failure to do so as either engaging in another incident of dishonesty or demonstrating that the applicant does not possess the requisite moral character of a lawyer in failing to understand that plagiarism (and other forms of student misconduct) is a crime of dishonesty. Either finding usually renders the applicant unfit to practice.

- 33 Student misconduct is referred to here as knowingly attempting to present another’s work as one’s own or another form of dishonest behaviour. Of course, each admission case concerning student misconduct will vary. However, cases that have resulted in a refusal to admit or a strike off order involve proven incidents in which an applicant claimed credit for work that was not hers or his thereby seeking to gain an academic advantage. In *Re AJG* [2004] QCA 88 (Unreported, de Jersey CJ, Jerrard JA and Philippides J, 15 March 2004) the application was refused and adjourned for 6 months on the basis of an incident where the applicant copied the work of another student. In *Re Liveri* [2006] QCA 152 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 12 May 2006) the application was refused and adjourned for not less than six months on the basis of three incidents of plagiarism of published work. The more recent cases of *Re OG* [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007), *Re Humzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007) and *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) will be discussed in detail in the text of this article.
- 34 [2004] QCA 88 (Unreported, de Jersey CJ, Jerrard JA and Philippides J, 15 March 2004).
- 35 *Re AJG* [2004] QCA 88 (Unreported, de Jersey CJ, Jerrard JA and Philippides J, 15 March 2004) [3]. The incident was considered more reprehensible given that the applicant knew at the time of committing the offence (during a practical legal training course) that this was a relevant matter as to his fitness to practice.
- 36 [2006] QCA 152 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 12 May 2006).
- 37 *Re Liveri* [2006] QCA 152 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 12 May 2006) [21].
- 38 *Ibid.*

A Must all Student Misconduct be Disclosed? An Alternative Line of Authority

The recent decision of the Full Bench of the Supreme Court of Victoria in *Re OG*³⁹ provides an example of a further development of admission law in relation to the requirement for honesty. In particular, it concerns whether failure to *disclose* student misconduct is sufficient evidence of dishonesty to deny admission. For the ethical and practical reasons cited above,⁴⁰ recent decisions such as *Re OG* have placed equal weight on how the applicant demonstrates their honesty in such disclosures. In *Re OG* the Court appears to assume that it is a settled area of law that any student misconduct, as found by the university, is evidence as to character and must be disclosed. This conclusion is now enshrined in legislation by making it a requirement of the court to consider the matter (s 2.3.3(1)(ab) of the Act) and the applicant to disclose it (r 5.02(1)(c)(v) of the *Legal Practice (Admission) Rules 2008* (Vic)). For other jurisdictions, the case suggests that student misconduct of any sort now represents a ‘suitability matter’ for the purposes of s 1.2.6 of the Act.

However, before turning to an examination of this most recent authority, it is worth discussing an earlier decision which suggests an alternative strand of judicial reasoning in relation to the relevance of student misconduct. In *Richardson*⁴¹ the court found that a failure to disclose a finding against him by the academic misconduct committee of the University of Tasmania was not sufficient grounds to refuse his admission. Indeed, the court found that ‘[t]he most severe criticism that arguably may be made against Scott Richardson is that he made an error of judgment, a mistake, based largely on the advice of two experienced practitioners who were also his parents’.⁴²

The case concerned an application by the Law Society of Tasmania for an order to remove from the Supreme Court roll of admissions the names of Anita Betts, Scott Richardson and Gregory Richardson. This case arose in relation to the admission of Scott Richardson in 2000 in which he failed to disclose a finding of misconduct by the University of Tasmania during his legal studies.⁴³ Scott Richardson’s admission was presented by his parents Anita Betts and Gregory Richardson,⁴⁴ who were both aware of this omission in his application. The application of the Law Society was made on the basis that each practitioner was not a fit and proper

39 [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007).

40 The court requires applicants to honour the protective principle (either as a future officer of the court or by demonstrating themselves to be sufficiently honest) as an ethical rationale, and to facilitate the application process which relies heavily on such disclosures.

41 [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003).

42 Ibid [88].

43 The Supreme Court of Tasmania must only admit as a practitioner a person who is of good fame and character and a fit and proper person to be admitted: *Legal Profession Act 1993* (Tas) s 31(1). The Supreme Court may admit as a legal practitioner a person who has completed the academic and practical legal training requirements as determined by the Board of Legal Education: *Legal Profession Act 1993* (Tas) s 23.

44 Scott Richardson’s parents are both legal practitioners and therefore moved his admission in this capacity.

person to practice for failing to disclose this incident.⁴⁵ Crawford J dismissed the Law Society's application against each practitioner.

While the finding of the Court in relation to Gregory Richardson and Anita Betts is unsurprising,⁴⁶ the decision in *Richardson* provides authority for a very different approach to student misconduct and disclosure than *Re OG* and other Queensland decisions described above. As Suzanne Le Mire points out, the decision in *Richardson* suggests that the duty of disclosure, far from being taken as separate evidence of character, can be shifted onto the shoulders of others (legal practitioners and university teachers),⁴⁷ as the decision stated:

[H]e was a 22 year old student and not a legal practitioner. He owed none of the duties of a practitioner and he had no experience as a practitioner. His knowledge of the law was limited. His appropriate response to the determination was to seek advice from those he thought would know and whose advice would readily be forthcoming.⁴⁸

This approach is, as Le Mire contends, out of step with the assumption which underpins most admission decisions that disclosure is required in order to facilitate the procedure for assessing candidates for admission (as one which relies heavily on disclosure by the applicant to be notified of any relevant matters).⁴⁹ Indeed, as Crawford J found in his decision as to costs to be awarded in the case, Scott Richardson was aware of a finding of misconduct by the university against him and had received written advice from the university expressing 'its expectation that he would disclose the determination to the Court when he applied for admission'.⁵⁰ Thus the requirement that an applicant demonstrate the protective principle in word and deed in his disclosures appears to be waived.

45 In relation to the applicant, Scott Richardson, this allegation related to his failure to disclose a relevant matter as to his character for admission. In relation to his parents, Anita Betts and Gregory Richardson, the allegation was that each failed to draw to the attention of the admitting Judge the determination of academic misconduct and this failure to do so was advertent, reckless or made with wilful blindness to the issue of disclosure: *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [74], [90], [97].

46 The applicant bears the duty to disclose relevant matters in his application. There are no other cases known to the author of similar applications for removal from the role against those moving admissions. However, Crawford J found as a matter of fact that Gregory Richardson and Anita Betts were aware of the finding of the university against Scott Richardson and that they did not reveal this matter to the court nor advise their son to do so. As this article contends that the application of the law is inconsistent with other recent admission cases, it is also contended that it remains an open question as to whether a practitioner may have duties to disclose relevant matters when moving an admission. There are no such statutory requirements in this area. (In Queensland, for instance the legislature has introduced whistle blowing provisions in relation to solicitors holding trust money: *Legal Profession Act 2007* (Qld) s 260.) However, this article's description of the fulsome approach to honesty of applicants should also apply to practitioners and may be found to encompass such a proactive duty.

47 Suzanne Le Mire, 'Striking Off: Criminal Lawyers and Disclosure of Their Convictions' (2005) 79 *Australian Law Journal* 641, 647.

48 *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [85].

49 Le Mire, above n 47, 647. This presumably rests on the rationale of duty to the court as discussed earlier.

50 *Law Society of Tasmania v Richardson (No 2)* [2003] TASSC 71 (Unreported, Crawford J, 19 August 2003) [18]. See also *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [19].

While the Court noted a statutory distinction in Tasmania, which did not at the time have specific requirements for matters to be disclosed on admission,⁵¹ there is extensive common law authority that courts may inquire into any relevant matter as to the character of the applicant and the matters which courts have demanded disclosure of. Crawford J accepted that the broader inquiry at common law applied.⁵² However, *Richardson* appears to distinguish the facts of the case from previous cases in which non-disclosure was a basis for not admitting an applicant. It is implied that these cases concerned more serious matters; although it is unclear in the judgment on what basis this distinction is made. As in *Re OG*, Crawford J emphasised that ‘all aspects of his or her past life that might be open to criticism or arguably amount to examples of imperfections of character or performance’ do not need to be disclosed.⁵³ Student misconduct appears, at least where the student does not believe the conduct is relevant to his character, to be characterised as simply an ‘imperfections of character or performance’.⁵⁴ This case implies that the notion of ‘honesty’ required by the fitness criterion may be discharged by technical compliance to the words of the statute (there was no reference to misconduct in the Act) and complete reliance on advice. It imposes no burden on the applicant to demonstrate his awareness of and commitment to the protective principle.

B A Stricter Approach to Student Misconduct and the Importance of Frank Disclosure

Re OG, while not considering *Richardson*, appears to overturn this reasoning.⁵⁵ The long joint judgment of Warren CJ, Nettle JA and Mandie J in *Re OG* recounts a complicated set of events occurring between an alleged event of cheating and the hearing of the case. OG had been admitted in Victoria not long before the hearing, on 14 December 2006. After finding OG unfit to practice, the Court

- 51 Crawford J noted in his decision that s 29A of the *Legal Profession Act 1993* (Tas), which empowers the Court to make rules governing application processes, had not been made. He therefore distinguished the legal position in Tasmania from other states which ‘have made rules specifying what must be revealed by an applicant’: *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [77]. Section 33 of the *Legal Profession Act 1993* (Tas) provides that a person is ineligible for admission on certain grounds including ‘having been convicted anywhere of a crime’. While this may be understood as the only matter for disclosure, the court accepted that the Tasmanian statute, like other statutory regimes, did not exclude the operation of the common law which has considered other matters.
- 52 See discussion of the common law approach earlier in this article. It is contended that this is the proper finding, as the *Legal Profession Act 1993* (Tas) s 31(1) provides for admission of persons of ‘good fame and character’, which brings in common law authority.
- 53 *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [80].
- 54 *Ibid*. The decision appears to have been heavily influenced by his finding that the university processes for deciding on the incident were deficient. Indeed, the original misconduct finding was overturned on appeal on the grounds of a lack of natural justice being accorded to Richardson. However, it is important to note that this finding by the university occurred *after* Richardson had decided not to disclose the incident in his application for admission: *ibid* [25]–[27].
- 55 Indeed, it has been noted by several commentators that *Richardson* may be regarded as ‘anomalous because of its strange facts’: Adrian Evans, ‘Disclosure of an Uncomfortable History’ (2003) 77 *Law Institute Journal* 77, 77. It is also contended here that the reasoning of this decision is ‘anomalous’ within the body of case law in this area. See also Gino Dal Pont, *Lawyers’ Professional Responsibility* (3rd ed, 2006) 36–7.

revoked the order to admit OG.⁵⁶ OG had disclosed in his application for admission (on 10 September 2006) that he had been awarded a grade of 'zero' for a for 'an assessment component in a Marketing subject at [Victoria] University for a misunderstanding that occurred'.⁵⁷ He explained that the 'misunderstanding' was due to his non-attendance at tutorials (which was untrue, but which he later explained as an error and that he had meant to say a lecture) and that as a result he had undertaken the assignment individually when it was intended that it be a group assignment (which was also untrue). He stated:

No record of the event was recorded and at no time was it suggested to be plagiarism or the like. I did not go before the University Board, nor did I fail the subject for my misunderstanding. It was an internal matter with the subject coordinator.⁵⁸

OG was referring to an incident in which he and a fellow student, GL, were called by the coordinator of the subject at Victoria University to account for substantial similarities in their individual assignments for a Bachelor of Business degree. As Victoria University could not decide which student had copied from the other, each student was awarded zero for the assignment but no record of the incident was recorded on OG's file.

In the course of the Board of Examiners' investigation of disclosures made by GL (at the same time as OG), it discovered that OG's application for admission was likely to have substantially misrepresented the event. In particular, the Board of Examiners pointed to the factual errors in the disclosure as well as the statement that there was no suggestion of plagiarism, to contend that the disclosure falsely represented the incident and that this was deliberately or recklessly made to disguise the true nature of the event. On this basis, the Board of Examiners claimed that OG was unfit to practice and requested that the court set aside the order made for his admission. Having considered the events and evidence in detail, the Court found that the Board of Examiners' case was made out and ordered that OG's name be struck from the role.

The most significant aspect of this case is that the Court appears to have lifted the bar for the scope of matters that must be disclosed. In this case, there was no record of misconduct on OG's student file. While his description in his admission application was clearly inaccurate,⁵⁹ he did mention the incident and correctly reported that there was no record of misconduct. There was no finding that OG engaged in plagiarism or similarly dishonest behaviour. Therefore, the Court displayed little concern for assessing the nature of the misconduct, but was satisfied to rest its order (to strike OG from the role) on evidence of his misrepresentation

56 The court referred to the decision in *Re Warren* [1976] VR 406 as precedent for its authority to do so.

57 *Re OG* [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007) [50].

58 *Ibid.*

59 The court accepted evidence of witnesses and other documentation adduced that accusations of collaboration had been raised with the students. The assignment, like an exam, was to be completed individually and therefore collaboration was in clear contravention of the assignment rules: *Re OG* [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007) [100], [110]–[111].

in his application. The logic of this decision appears to impose a heavy burden on applicants. That is, it suggests that even where the applicant may deny that he had engaged in any dishonest activity, he must nevertheless disclose such an incident so as not to attract a charge of dishonesty in the act of this omission. Does this mean that any incident where a student has received a failing grade or breached university rules must be revealed? It might be that any contravention of university rules is to be treated as though it were a finding of guilt for a criminal offence.⁶⁰ If this is the implication of the decision in *Re OG* it appears to significantly extend the concept of ‘honesty’ beyond its earlier legal interpretation. The amended Act in Victoria now refers to ‘disciplinary action, however described’ (s 2.3.3(1)(ab)). It is suggested that *Re OG* indicates an expansive understanding of this term is to be employed.

Previous cases in the area articulated a clear rationale for the relevance of student misconduct to fitness to practice because it was by nature dishonest practice. Where the element of dishonesty has been removed, it is difficult to see how student conduct can be relevant to admission to practice unless it is now to be understood as an independent aspect of fitness which is based in some other underlying policy rationale.

While the decision in *Re OG* addresses the scope of matters relevant to fitness, it is disappointingly silent on how it arrives at the requirement to disclose student conduct which the applicant may not consider to involve dishonesty. However, the Court indicated that in this case OG may have realised that his conduct was questionable and therefore possibly relevant to his character. The brief discussion of applicable law indicates that the court was firmly focused on the aspect of honesty in determining character:

Nice questions sometimes arise as to how much that [disclosure] entails. Increasingly, there is an expectation that even ancient peccadilloes should not be left out. In the past, perhaps, the obligation was not always seen as going quite so far. But the need for honesty has never been in doubt. Admission to practice is conditioned upon an applicant having a ‘complete realization [...] of his obligation of candour to the court in which he desire[s] to serve as an agent of justice’. An applicant must at least disclose anything which he or she honestly believes should not be left out. Plainly, candour does not permit of deliberate or reckless misrepresentation pretending to be disclosure.⁶¹

A reading of this statement of law, consistent with the trend in earlier discipline cases, is that the court requires the applicant to make such disclosures so as to empower the court to decide on fitness. In this case, the court proceeded on the

60 A finding of guilt for an offence must be disclosed as it is listed as a suitability matter: *Legal Profession Act 2004* (Vic) s 1.2.6(c). Being found ‘guilty’ of an offence is defined as including a guilty plea: *Legal Profession Act 2004* (Vic) s 1.2.8(1). The Queensland *Legal Profession Act 2007* (Qld) refers to a ‘conviction’ in s 9 and is defined more expansively as including plea of guilty and findings of guilt without a recorded conviction in s 11.

61 [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007) [123] (Warren CJ, Nettle JA and Mandie J) (citations omitted).

assumption that where a university has made a determination of misconduct (even of a very minor nature) this will be a matter that must be available for the court to consider. Thus, at the disclosure stage, the court demands a high level of ethical awareness by the applicant in identifying relevant matters and full disclosure of them in order to fulfil the honesty requirement. However, paradoxically, this duty overrides any ethical self-assessment the applicant might make about the weight of the matter as to his or her character. That is, the student may correctly identify that the incident is relevant (and must be disclosed), but is not permitted to then consider this incident for themselves and decide that it is not conduct that will make them unfit (and so not disclose).⁶² This interpretation appears to demonstrate the statement of law made some 20 years ago in *Re Evatt*,⁶³ that 'it is not for an applicant to decide what is or is not relevant to place before the Court on the question whether that person is a fit and proper person to be admitted to practice'.⁶⁴

If this interpretation of *Re OG* is correct, this directly contradicts the reasoning of the court in *Richardson*, which permitted the applicant to assess the conduct and decide it was not relevant (and needn't be disclosed). Indeed, Crawford J commented on the statement of law in *Re Evatt*, concluding that this 'could not, with respect, be right, for it is obvious that applicants must in fact make such a decision when considering the extent of their duty of disclosure to the Court'.⁶⁵ While Crawford J's observation is undoubtedly correct to a degree, it is contended that the application of the law in that case was incorrect. For reasons discussed above, *Re OG* appears to be more consistent with other cases and is a logical construction so as to facilitate the court's role as custodian of the protective principle.

It should be noted that the decision in *Re OG* was informed by the deeply critical view formed of OG's honesty in his conduct during the university and Board of Examiners investigations.⁶⁶ Having reviewed the incident in detail (which included reviewing correspondence, university records and hearing from witnesses), the court rejected much of OG's account of the facts and strongly suggested that OG may have copied his assignment from GL's work. Thus, the decision may represent a finding of dishonesty on the face of the disclosure in OG's application. While the court's reasoning, cited above, indicates that it considered disclosure of the incident at university to be necessary, this decision is also significant as an

62 This is, of course, now clearly the law in Victoria.

63 (1987) 92 FLR 380.

64 Ibid 383 (Miles CJ, Kelly and Gallop JJ).

65 *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [80].

66 While the decision strongly suggested that much of OG's testimony was untruthful, it declined to draw conclusions as OG's character on this basis. This seems an unfortunate omission as cases such as *Re Liveri* provide authority for such behaviour being additional evidence as to the character of the applicant (in terms of their honesty and obedience to the law). One explanation for this omission may be the peculiar facts of the case. The Court appears to have been concerned with OG's conduct up to the date of his admission rather than his conduct after that time. This approach may have been adopted because the court considered that its decision as to whether to revoke an admission order must only consider the applicant's fitness when he first applied for admission. The judgment, however, refers to no legal principle by which it considered itself bound not to consider this later conduct.

illustration of the strict requirement that applicants refrain from engaging in *any* dishonest conduct.⁶⁷

Dishonest disclosure has for some time been a strong determinant of moral character in decisions not to admit a person. For instance, in *Re Hampton*,⁶⁸ the court found the applicant possessed a lack of moral awareness (which made him unfit to practice) when he claimed that he thought a previous unrecorded criminal conviction was not relevant to his application for admission.⁶⁹ The court in *Re Hampton* observed:

The court must take the opportunity to emphasize the primacy of the proactive obligation of an applicant to make candid, comprehensive disclosure. If it emerges an applicant has not, in some significant respect, been frank with the court, then the application should ordinarily be rendered doubtful at least.⁷⁰

Re OG refers to similar findings in other qualification decisions⁷¹ that disclosure which seeks to obscure the truth should be understood to be the same as non-disclosure. In *Thomas v Legal Practitioners Admission Board*,⁷² the applicant had failed to properly disclose the nature of (unrecorded) criminal convictions in the Magistrates Court for fraudulent misappropriation and had been slow to disclose details of the convictions when repeatedly requested to do so by the Queensland Legal Practitioners Admission Board (the Board). The Full Bench of the Supreme Court of Queensland agreed that while the conviction which had occurred some seven years previously would not be grounds to refuse admission to practice, the failure to disclose fully and frankly this conviction on his application made him unfit to practice. McMurdo P commented of this conduct: '[h]is lack of disclosure does, however, demonstrate a lack of insight into his serious past misconduct and a lack of understanding of his duty to make full and accurate disclosure to the Board.'⁷³ In *Re OG* the court similarly found that inadequate disclosure, significantly designed to mislead the court as to the seriousness and nature of the incident disclosed, was sufficient grounds to refuse admission. Therefore, there was no necessity for the court to draw a conclusion as to whether the student misconduct was sufficient grounds to refuse OG's application. This aspect of the case adds to the building authority in admissions cases that a nuanced and demanding conception of honesty underlies the notion of 'fitness' to practice.

67 The court also stated in the second paragraph that the 'principal question is whether OG adequately disclosed to the Board of examiners the circumstances in which he came to be awarded a zero grade or mark for an assignment': [2]. It is also interesting to note that the decision refers to the decision by the Board of Examiners not to grant GL a certificate supporting his application to practice: [66]. Therefore, it appears that GL was not admitted on the basis of his rather more comprehensive disclosure of the incident.

68 [2002] QCA 129 (Unreported, de Jersey CJ, Moynihan SJA and White J, 5 April 2002).

69 This matter has been clarified by *Legal Profession Act 2007* (Qld) s 11(1).

70 [2002] QCA 129 (Unreported, de Jersey CJ, Moynihan SJA and White J, 5 April 2002) [27]. See also *Re Davis* (1947) 75 CLR 409; *Ex parte Lenehan* (1948) 77 CLR 403.

71 *Re Davis* (1947) 75 CLR 409, 426 (Dixon J); *Thomas v Legal Practitioners Admission Board* [2005] 1 Qd R 331 (de Jersey CJ).

72 [2005] 1 Qd R 331.

73 *Ibid* 336.

IV THE LIMITS OF 'HONESTY' – CAN APPLICANTS DEFEND THEMSELVES IN RELATION TO STUDENT MISCONDUCT?

Unlike the applicants in *Re OG* and *Richardson*, the applicant in *Re Humzy-Hancock*⁷⁴ fully disclosed the nature of allegations of misconduct made against him by his university. This decision then begins with the assumption that the student had demonstrated an appropriate ethical awareness of relevant matters for the assessment of his fitness to practice. This decision is, rather, concerned with characterising the nature of the student conduct (as a technical breach of university rules or dishonest conduct) in order to determine its weight for the purposes of admission considerations. It demonstrates that while courts are taking an ever stricter line on disclosure as evidence of honesty of character, this may not prevent an applicant from defending her or his character with regard to the import of the prior offence.

Re Humzy-Hancock is the most recent case in Queensland concerning an application for admission which was opposed by the Board on the basis of alleged student misconduct. The Board objected to the application on the basis of three occasions of alleged misconduct during the course of Humzy-Hancock's legal studies at Griffith University. In relation to the first incident, which involved collaboration in breach of university rules for the subject, the Law School Assessment Board imposed a penalty of failing him in the subject. In relation to the two later incidents (occurring in the same subject), the Law School Assessment Board found that allegations of plagiarism had been made out but, due to his candid disclosure, treated this as 'one charge of academic misconduct' resulting in a lesser penalty of failure in the subject and suspension from enrolment in the law program for a period of six months.⁷⁵ On his application for admission, Humzy-Hancock revealed the incidents and action taken by the university. However, he denied that he was guilty of any misconduct; specifically, that he was not guilty of plagiarism or any dishonesty during his studies. He therefore disputed allegations that he was unfit on the basis of the dishonest character of past conduct. The question for the Court of Appeal was whether such conduct rendered the applicant unfit to practice.

The Court of Appeal ordered on 3 November 2006 that the matter be remitted to the Trial Division of the Court of Appeal for determination as to 'whether or not the applicant was guilty of plagiarism or other relevant misconduct'. The reported decision therefore considers the factual nature of the Board's objections to Humzy-Hancock's admission rather than providing further jurisprudence as to whether student misconduct will be *prima facie* evidence of unfitness to practice. McMurdo J found that while it was clear that the student collaborated with another student in breach of the university rules, this was insignificant and was reasonably explained by a plausible case that the other student copied his work.⁷⁶ The other two allegations of plagiarism (citing published work without attribution) were

74 [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

75 *Ibid* [11], [34].

76 *Ibid* [13].

also dismissed as ‘the result of poor work’ rather than ‘an intention to pass off the work of another as the applicant’s work’.⁷⁷ McMurdo J determined that ‘none of the allegations of plagiarism is proved’.⁷⁸

As discussed above, in qualification proceedings, the court has considered not only the nature of the incident, but also how the applicant or practitioner characterises the nature of this incident. As Mackenzie J said in *Young v Barristers Board*: ‘[a]ssessment of the extent of a practitioner’s appreciation of the significance of his or her actions and their nature and quality can be a relevant issue’.⁷⁹ In *Re Humzy-Hancock*, the Court of Appeal found that the applicant should be granted the right to dispute the nature of the incident, even where the university had adjudged it to be (serious) misconduct. This raises an initial issue of onus of proof regarding fitness to practice. Few admissions decisions consider the issue of on whom the burden rests to demonstrate fitness. *Re OG* indicates that the applicant ‘proves’ his or her fitness by attesting to there being no matters that would speak against his fitness.⁸⁰ However, in practice the onus often rests with the admitting body (where it contests the application to demonstrate lack of fitness) because the court will assume fitness in the absence of evidence to the contrary. In this case, where there was no suggestion that the applicant was dishonest in his disclosure (or any other matter), the court was determining the strength of evidence presented against the applicant by the Board.⁸¹ While this appears to be consistent with the ordinary principle of law that an allegation against a person must be proven, professional regulation often applies a higher standard. That is, decisions as to a person’s fitness to practice are guided by the protective principle which may impose more onerous obligations of honesty and integrity. The preceding discussion of *Re OG* illustrates this point as it appears to require that applicants demonstrate a high level of self-awareness about the nature of incidents in their past at least for the purpose of disclosure.⁸²

In *Law Society (NSW) v McNamara*, Hutley JA found that the privilege against self-incrimination was not present in qualification proceedings as the jurisdiction is to protect the public rather than being punitive.⁸³ Thus it is not enough to simply comply with the law, the applicant must display an inherent understanding of the honesty required of a lawyer and be able to engage in self-assessment as to

77 Ibid [41].

78 Ibid [42].

79 *Barristers’ Board v Young* [2001] QCA 556 (Unreported, de Jersey CJ, Davies JA and Mackenzie JA) 7 December 2001) [38].

80 This decision now appears to be confirmed by the recent changes to the Act and the *Legal Practice (Admission) Rules 2008* (Vic).

81 This was the logic of Crawford J in *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [80]. However, as discussed earlier, this conclusion appears to be based on an insufficient understanding of the role the applicant plays in facilitating the court’s decision.

82 See also de Jersey CJ’s discussion in *Janus v Queensland Law Society Inc* [2001] QCA 180 (Unreported, de Jersey CJ, Williams JA and Mackenzie J, 15 May 2001) and Mahoney JA in *Law Society of NSW v Foreman* (1994) 34 NSWLR 408 as to the high standard of profession honesty and integrity required of lawyers which may exceed legal requirements applying in criminal or civil matters.

83 (1980) 47 NSWLR 72, 78–9.

the moral nature of their actions. In *Gregory v Queensland Law Society Inc*,⁸⁴ the court drew a negative inference as to the candidate's character based on his contention that he had not intended to engage in conduct that suborned the court processes. This contention was supported by Judge Forno's findings in contempt of court proceedings relating to his conduct. Nevertheless, the Court of Appeal found that Gregory's lack of awareness that his conduct had been wrong was sufficient for him not to be readmitted. In contrast, in *Re Humzy-Hancock* the court accepted that the protective principle can accommodate an argument by the applicant that the misconduct did not take place, while there remains a requirement that the applicant show sufficient recognition that, theoretically, this conduct, if proven, would be wrong.

This decision is a logically sound one. While at first glance it appears to be inconsistent with the decision in *Re OG*, the law can be explained as a two-step test to honesty. In disclosing the university findings against him, the applicant is taken to have understood that findings of misconduct by the university are relevant to his character. *Re OG* is authority that courts will adopt a strict approach to applicants' honesty when it comes to revealing all allegations against them that may impugn their character. This is chiefly because the court has the sole jurisdiction to decide who is a fit and proper person to practice. The applicant must honour this role (and its underlying policy rationale of protecting the public) by facilitating it with honest disclosure. The second step is how the disclosed matter is characterised by the court in relation to an applicant's fitness. *Re Humzy-Hancock* explains the limits of inferences that can be drawn from tough disclosure requirements as in *Re OG*. Not all indiscretions at university will automatically render the applicant unfit to practice. The nature of the incident (in particular, whether it had a dishonest tenor) will be relevant, just as courts examine the nature of any criminal offence. Not all criminal convictions will render the applicant unfit to practice,⁸⁵ and therefore neither should all student misconduct. In its admissions role, the court must consider the incident with an eye to protecting the public rather than punishing the offender. Therefore, while the judgment in *Re Humzy-Hancock* found that the applicant had breached university rules (by collaborating and failing to properly attribute work), its finding that the student had not engaged in any dishonest conduct (by trying to pass others' work off as his own or otherwise deceive the university) leads to the conclusion that this does not render him unfit to practice. While the other cases discussed in this article suggest that student misconduct alone may render an applicant unfit to practice, these earlier authorities are consistent with this reasoning as they concern proven cases of dishonest behaviour.

84 [2001] QCA 499 (Unreported, McPherson and Thomas JJA, White J, 13 November 2001).

85 The most notable example of this is in relation to professional discipline in *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 which concerned a conviction for involuntary manslaughter while driving under the influence of alcohol. As there was no element of dishonesty or a perceived disregard for court processes, the practitioner was not struck from the role. This decision is a rather controversial one. However, it remains the leading authority that the court must engage in a thorough analysis of the nature of the offence as it pertains to fitness to practice.

V DO THESE CASES CONSTITUTE REVIEW OF ACADEMIC JUDGMENTS?

Re AJG and *Re Liveri* were decided on the basis that the findings of student misconduct were proven. In these cases the applicants admitted that the conduct had occurred and the characterisation of the conduct as dishonest.⁸⁶ In these circumstances, the court did not have cause to re-evaluate the findings of the university and its decision-making process. However, the decisions in *Re Humzy-Hancock*, *Re OG* and *Richardson* contain an extensive review of the facts surrounding incidents of student misconduct and the university processes for determining the nature of the incident. *Re OG* and *Re Humzy-Hancock* did not concern any allegation that the university processes for deciding on student conduct were suspect in any way. In contrast, the decision in *Richardson* appears to be heavily influenced by the finding that the original finding of the University of Tasmania's academic misconduct committee was 'difficult to understand'⁸⁷ and inconsistent with how the course in question was assessed. The court also took particular notice that the decision of the academic misconduct committee was set aside on appeal on the grounds that it was not conducted according to the rules of natural justice.⁸⁸ Nevertheless, the application in *Richardson* was not one seeking administrative review of the university decision. Nor was it a form of appeal of the university decision on a point of law.

Similarly, the decisions in *Re OG* and *Re Humzy-Hancock* do not suggest that the courts considered themselves engaged in any review of the decision-making process of the universities (as administrative review) or acting in an appellate role on a question of law. Even in an appellate jurisdiction courts will generally not conduct the proceedings as hearing the matter *de novo* thereby overturning the finding and any penalty imposed on the student as a result of these findings (as a form of merits review).

However, the decision in *Re Humzy-Hancock* in particular raises the question of whether the decision for the purposes of determining fitness trespasses into academic questions which have generally been considered a matter for the universities. The argument of Humzy-Hancock in his defence of his application for admission was not only that he was not dishonest by virtue of a proper understanding of the events in his studies, but by implication that Griffith University's Law School Assessment Board had made incorrect decisions. In light of the unequivocal finding of 'academic misconduct' and the penalty imposed by

86 In *Re Liveri* [2006] QCA 152 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 12 May 2006) the applicant had initially disputed the nature of the offences, but in her final application had admitted the seriousness and dishonesty of the incidents.

87 *Law Society (Tas) v Richardson (No 2)* [2003] TASSC 71 (Unreported, Crawford J, 19 August 2003) [7].

88 *Richardson* [2003] TASSC 9 (Unreported, Crawford J, 18 March 2003) [25]–[27]. However, as discussed earlier in this article, the appeal was not decided until after the applicant had submitted his application for admission. Thus it appears that the reasoning of the court as to what matters must be disclosed was unaffected, or ought not to have been affected, by any insufficiencies in the university process. The weight of any findings it made, on the other hand, may have been questionable.

the university (of suspending him from the program), this is a big claim. However, he was successful on each count.

McMurdo J found that the first decision that he had engaged in collaboration was incorrect as he found that the evidence did not satisfactorily prove this charge.⁸⁹ Significantly, his detailed analysis of correspondence, university policy and the applicant's oral testimony identifies no procedural defects in the Assessment Board's handling of the matter or criticises the Law School's policies or procedures. Interestingly, the judgment specifically refers to the applicant's right of appeal which the applicant declined to pursue. McMurdo J concluded that 'the fact that he did not appeal [does not] reliably indicate that he was guilty'.⁹⁰ Indeed, it appears that the court drew *no* negative inference as to the nature of the applicant's conduct from his failure to avail himself of the university's appeal procedures.

The court also disagreed with the two other findings by the Law School Assessment Board in *Re Humzy-Hancock*: that the applicant engaged in 'plagiarism'. Again, McMurdo J's decision reviewed the student's work, his submission to the Law School Assessment Board and its process. The court did 'note' that some minor breaches of procedural fairness may have occurred (as the applicant had not been provided with a complaint or particulars);⁹¹ however, there is no suggestion that this may have resulted in any unfair process or result. The judgment refers to the definition of 'plagiarism' in the Law School's Assessment Policies and Procedures as appropriate and (presumably) the definition was applied by the court.⁹² Thus, the court's decision appears all the more reminiscent of a form of merits review. However, there is no mention in this or other admission decisions, or any legal precedent, of a right of appeal for the court to decide *de novo* on a university tribunal's finding of academic misconduct. Yet this appears to be the result of this decision, particularly where the court drew different conclusions (based on the same evidence) as to whether the conduct in question fits within an agreed definition.

Does the legal reasoning extend the professional regulation jurisdiction of the court beyond previously accepted limits of judicial review? In *Mathews v University of Queensland*, Spender J of the Federal Court considered the 'question as to the jurisdiction of the court in questions of academic assessment'.⁹³ He referred to a number of international decisions which are considered to have been received into Australian law which emphasise a reticence of the court to intervene in disputes

89 *Re Humzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007) [11].

90 *Ibid.*

91 *Ibid* [34].

92 *Ibid* [14]. 'Plagiarism' is defined as 'the knowing presentation of the work or property of another person as if it were the student's own'. The court accepted that in 'many instances' *Humzy-Hancock* had cited verbatim or paraphrased others' work without attribution. However, the court concluded that this conduct did not constitute 'plagiarism' as it placed a heavy emphasis on 'intent' of the applicant and found that there was no intention to represent the work as his own.

93 [2002] FCA 414 (Unreported, Spender J, 8 April 2002) [25].

concerning academic judgments.⁹⁴ As Justice Kirby (in dissent) commented in *Griffith University v Tang*:

I recognise that universities are in many ways peculiar public institutions. They have special responsibilities [...] to uphold high academic standards about which members of the academic staff will often be more cognisant than judges. There are issues pertaining to the intimate life of every independent academic institution that, sensibly, courts decline to review: the marking of an examination paper [...] Others might be added: the contents of a course; particular styles of teaching; and the organisation of course timetables.⁹⁵

Kirby J continued that as a matter of administrative law, the court distinguishes between ‘issues of academic or pastoral judgment’ in relation to such matters and ‘disciplinary type of case[s]’.⁹⁶ He found that ‘[a]n appeal to “academic judgment” does not smother the duties of a university, like any other statutory body, to exhibit [...] the basic requirements of procedural fairness’.⁹⁷ As the court in *Tang* found, universities have a duty to deliver procedural fairness when acting ‘under an enactment’ and their decisions are susceptible to administrative review if they fail to do so.⁹⁸

Matters of academic misconduct will often fall within the ‘disciplinary type of cases’ when students allege a miscarriage of natural justice. However, it is arguable that where the issue concerns assessment of the nature of the facts of alleged misconduct, this falls within the area of ‘academic or pastoral judgment’. While the detailed analysis of the facts and hearing of oral testimony may alleviate policy concerns about a court deciding on matters of which they have little evidence, courts do not possess the ‘intimate’ knowledge of the university as to issues that relate to student conduct.⁹⁹ However this question is answered, the policy concerns of the court in *Tang* in relation to whether a court should allow for judicial review of university decisions seem to be rather compelling and relevant to this case. As they concern a different jurisdiction, they only provide useful insight into the policy considerations which courts in their admission jurisdiction might take into account. This article raises the different legal concern that the admissions decisions are substituting their decision as to the nature of student conduct for any university finding. This is not a form of judicial review or

94 *Norrie v Auckland University Senate* [1984] 1 NZLR 129, 134 (Woodhouse P); *Clarke v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, 1992 (Sedley LJ), 1996 (Lord Wolfe).

95 *Griffith University v Tang* (2005) 221 CLR 99, 156–7 (Kirby J) (footnotes omitted) (*‘Tang’*).

96 *Ibid* 157.

97 *Ibid*.

98 While it is not within the scope of this article to comment further on the decision in *Tang* or administrative law principles generally applying to universities, it is noted here that this decision was determined on the basis that Griffith University made the relevant decision ‘under an enactment’ rather than policy. Universities have differing procedures for hearing academic misconduct allegations and may not always be obliged to act in accordance with rules procedural fairness. This issue does not affect the argument in this article about admission decisions.

99 Indeed, it is interesting to note in relation to *Re Humzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007) that the procedures for appeal of Griffith University decisions were those being considered in *Tang*.

an appeal on a point of law. It is contended, at the very least, that courts in their admissions role might consider the implications of their decisions in this broader policy context.

VI CONCLUSION

This article has been primarily concerned with mapping the complex reasoning of courts in their admission role. When taken together, *Re OG* and *Re Humzy-Hancock* demonstrate that there are two steps in the court's evaluation of honest character in application processes – the applicant's honesty in revealing all prior incidents that may be taken against his or her character and the nature of any prior event in the applicant's life. This is nothing new in jurisprudence on admission to legal practice. However, these cases provide further weight to earlier jurisprudence that dishonesty is a key indicator of 'unfitness' and provide new insights into the judicial reasoning in determining honesty. In particular, the two cases confirm that *any* student misconduct will be a relevant matter for disclosure when applying for admission, and that the disclosure required must be honest and fulsome. This approach is based on a well-articulated concern to protect the public and a clearly defined understanding of how this is best achieved. While *Richardson* represents an alternative line of reasoning which adopts a softer approach, this authority appears to have little weight in the light of more recent decisions. Recent decisions demonstrate that courts in admission proceedings 'go behind' university determinations of misconduct in order to divine the true character of the applicant. This inquiry into 'intrinsic character' is based on a fulsome approach to the ethical underpinnings of professional regulation.

However, while this article does not seek to criticise this development in the law, it raises a concern that it may have unintended practical as well as doctrinal consequences. Do these decisions represent a new incursion into academic decision-making? That is, do the policy concerns articulated by the High Court in relation to judicial review of university decisions have some significance for the exercise of the court's admission jurisdiction? It is contended that the concerns identified in *Tang* have relevance in admissions cases. Thus, should courts consider the impact of these decisions on the integrity of university procedures to decide academic matters? For instance, what is the status of the findings of 'academic misconduct' against Humzy-Hancock by Griffith University's Law School Assessment Board and the penalty imposed given that a court has made contrary findings? Do these decisions provide a precedent for students to seek to appeal university findings or penalties (possibly without going through the university appeal procedure) in other contexts? The recent changes to the statutory law in Victoria suggest a more important role for the university in deciding an applicant's character (honesty). It is suggested a similar change is needed in Queensland. However, it will remain within the court's discretion to consider student conduct as in *Re Humzy-Hancock*.