

ADMISSION AS A LAWYER: THE FEARFUL SPECTRE OF ACADEMIC MISCONDUCT

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Notwithstanding a cultural critique of the concepts that underpin the values of academic integrity, both the university, as a community of scholarship, and the legal profession, as a vocation self-defined by integrity, retain traditional values. Despite the lack of direct relevance of plagiarism to legal practice, courts now demonstrate little tolerance for applicants for admission against whom findings of academic misconduct have been made. Yet this lack of tolerance is neither fatal nor absolute, with the most egregious forms of academic misconduct, coupled with less than complete candour, resulting in no more than a deferral of an application for admission for six months.

Where allegations are of a less serious nature, law schools deal with allegations in a less formal or punitive fashion, regarding it as an educative function of the university, assisting students to understand the cultural practices of scholarship. For law students seeking admission to practice, applicants are under an obligation of complete candour in disclosing any matters that bear on their suitability, including any finding of academic misconduct.

Individual legal academics, naturally adhering to standards of academic integrity, often have only a general understanding of the admissions process. Applying appropriate standards of academic integrity, legal academics can create difficulties for students seeking admission by not recognising a pastoral obligation to ensure that students have a clear understanding of the impact adverse findings will have on admission. Failure to fulfil this obligation deprives students of the opportunity to take prompt remedial action as well as presenting practical problems for the practitioner who moves their admission.

I BACKGROUND

Perhaps the most spectacular instance of academic misconduct in the last hundred years lies in the allegations of academic fraud levelled posthumously against Sir Cyril Burt involving his publication of false data and invention of ‘crucial facts to support his controversial theory that intelligence is largely inherited.’¹ Burt had

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¹ O Gillie, ‘Crucial data was faked by eminent psychologist’, (1976) *Sunday Times*, London, 24 October 1976. There are of course, other contenders – notably Dr Martin Luther King’s plagiarism in his doctoral thesis at Boston University: see ‘Boston U panel finds plagiarism by Dr King’, *New York Times*, 10 November 1991,

published studies on monozygotic twins separated at or near birth to establish the relative significance of inherited as opposed to acquired intelligence as part of the then heated scientific nature versus nurture debate.² Investigations by the British Psychological Society following the allegations concluded that his research was tainted, leaving Burt's reputation permanently tarnished.³

II THE SCOPE OF THE PROBLEM

For students anticipating admission as a lawyer, the implications of academic misconduct, though less spectacular than Burt's, nonetheless represent a substantial threat to their ambitions, with the Queensland Court of Appeal having signalled, in 2004, its discomfort with admitting applicants to practice where adverse findings of academic misconduct were before the Court.⁴ In a broader academic context, Bowers had, as early as 1963, reported that three out of four university students surveyed had engaged in some form of 'questionable' activities,⁵ and Bowers and McCabe (in 1993) subsequently found that the proportion of students admitting to cheating was 'remarkably constant.'⁶ There was, however, a 'dramatic increase in [impermissible] student collaboration' where individual work was required,⁷ with the 11 percent figure in 1963 rising to 49 percent in 1993.⁸

<<http://www.nytimes.com/1991/10/11/us/boston-u-panel-finds-plagiarism-by-dr-king.html>>. More recently, Annette Schava, Germany's education minister was forced to resign when Henrich Heine University revoked her doctorate for 'systemic [*semble* systematic] and intentional plagiarism' (Pauls, Karen, CBC News, 10 Feb 2013, 'German education minister resigns amidst plagiarism scandal', <<http://www.cbc.ca/news/world/story/2013/02/10/pauls-berlin-minister-resigns.html>>).

² The substance of the allegations lay on three fronts: firstly, Burt had eventually reported, in 1996, on 53 sets of such twins raised separately, despite having offered the view in relation to his earlier research reporting on 21 sets that even that number was 'unusual'; secondly, the researchers named as assisting Burt in his work (Miss Margaret Howard and Miss Jane Conway) could not be located, despite intensive searches; and thirdly, that the co-efficients of correlation reported by Burt were, in effect, too good to be true. As the number of twins incorporated in the study grew from 15 to 53, the co-efficients remained suspiciously stable (rather than increasing in variability as the number of subjects increased). Although at one stage Burt's reputation was largely in tatters, there have been efforts to re-investigate the research in an attempt to rehabilitate Burt's position in the field of psychology – see 'The Cyril Burt Affair', *Human Intelligence: historical influences, current controversies, teaching resources*, <<http://www.indiana.edu/~intell/burtaffair.shtm>>.

³ The British Psychological Society did not, however, conduct an independent study, endorsing rather the conclusion of Burt's biographer, Leslie Hearnshaw: see John Rushton 'New evidence on Sir Cyril Burt: His 1964 Speech to the Association of Educational Psychologists' (2002) 30 *Intelligence* 555, 557.

⁴ See below, Part VII 'Forensically Speaking'.

⁵ WJ Bowers, *Student dishonesty and its control in college*, (Bureau of Applied Research, New York, 1964) cited in Donald L McCabe and Linda Klebe Trevino, 'What we know about cheating in College: longitudinal trends and recent developments' (1996) 28(1) *Change*, 28, 30.

⁶ Overall rates on 'cheating' were 63% in 1963 (Bowers, above n 5) and 70% in 1993 – see Donald McCabe and William Bowers 'Academic Dishonesty Among Male College Students: A Thirty Year Perspective' (1993)35(1) *Journal of Higher Education* 3, cited in McCabe and Trevino, above n 5, 31.

⁷ *Ibid*, 31.

⁸ *Ibid*.

Perceptions of academic misconduct in the modern university suggest that it remains ‘rife.’⁹ Law schools are clearly not immune from this problem: Queensland’s Chief Justice observed in 2008 that he was ‘especially surprised’ by the frequency of academic misconduct disclosed in applications for admission.¹⁰ The current literature records that, since the turn of the century, academic misconduct is (again?) assuming ‘epidemic proportions.’¹¹ It is driven by the ‘swirling currents of [the] information revolution,’¹² the explosion in electronically available resources,¹³ and the increasing commodification of education,¹⁴ with extrinsic factors (such as money and status) rather than intrinsic goals (community involvement, competence, affiliation and autonomy) motivating students,¹⁵ as well as the reimagining of the relationship between text, authors and audiences.¹⁶ These factors, it is claimed, have created an environment where the appropriation of others’ work ‘is deployed by students as a tactic to achieve educational success.’¹⁷ The cost of degrees has created a climate

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- ⁹ Mark Brimble and Peta Stevenson-Clarke, ‘Perceptions of the Prevalence and Seriousness of Academic Dishonesty in Australian Universities’ (2005) 32(3) *The Australian Educational Researcher* 19, 20; see also Lillian Corbin and Justin Carter, ‘Is Plagiarism Indicative of Prospective Legal Practice?’ (2008) 17(1&2) *Legal Education Review* 53, 64; Carol Bast and Linda Samuels, ‘Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty’ (2007-2008) 57 *Catholic University Law Review* 777, 778. See Wilfried Decoo, *Crisis on Campus: Confronting Academic Misconduct* (Cambridge, Mass, MIT Press, 2002) 23; Julia Christensen Hughes and Donald McCabe, ‘Understanding Academic Misconduct’ (2006) 36(1) *Canadian Journal of Higher Education* 49, 50; Neil Selwyn, ‘Not necessarily a bad thing: a study of online plagiarism amongst undergraduate students’ (2008) 33(5) *Assessment & Evaluation in Higher Education* 465, 466. Chanock observes that the ‘widespread perception that plagiarism among university students is increasing’ has created a ‘growing literature on the subject’ – citing special issues of the *Journal of University Teaching and Learning Practice* (2005) and *Assessment and Evaluation in Higher Education* (2006) and the establishment of the *International Journal for Educational Integrity*) as evidence of the increasing pre-occupation in academia with the challenges of increasing academic misconduct: Kate Chanock, ‘When students reference plagiarised material – what can we learn (and what can we do) about their understanding of attribution?’ (2008) 4(1) *International Journal for Educational Integrity* 3, 3.
- ¹⁰ Chief Justice Paul de Jersey, ‘Integrity in Legal Practice’ (QSC) [2008] *Queensland Judicial Scholarship* 76, 1 (Speech delivered at the Third International Legal Ethics Conference, Gold Coast, 14 July 2008). The speech referred to the frequency with which applicants disclosed academic misconduct following the Court of Appeal’s signalling that the disclosure obligation extended to findings of academic misconduct – see below *Re AJG*.
- ¹¹ Lisa Emerson, Malcolm Rees and Bruce MacKay, ‘Scaffolding academic integrity: Creating a learning context for teaching referencing skills’ (2005) 2(3a) *Journal of University Teaching and Learning Practice*, 12, 12:
<http://jutlp.uow.edu.au/2005_v02_i03a/emerson005.html>.
- ¹² Jon Ramsay, ‘Students and the Internet: The Dissolution of Boundaries’ in Tim Roberts (ed), *Student Plagiarism in an Online World: Problems and Solutions* (Roberts, IGI Global, 2008) 244, 244.
- ¹³ Maria Melchionda, ‘Librarians in the age of the internet: their attitudes and roles: A literature review’ (2007) 3(4) *New Library World* 123, 125; Brimble and Stevenson-Clarke, n 9, 20
- ¹⁴ Simon Marginson, ‘Nation-building universities in a global environment: the case of Australia’ (2002) 43 *Higher Education*, 409, 416.
- ¹⁵ Helen Stallman, ‘A qualitative evaluation of perceptions of the role of competition in the success and distress of law students’ (2012) 31(6) *Higher Education Research & Development* 891, 892.
- ¹⁶ See below, Part III ‘The challenge to conventional values of scholarship: text, plagiarism and postmodernism.’
- ¹⁷ Sue Saltmarsh, ‘Graduating Tactics: theorizing plagiarism as consumptive practice’ (2004) 28(4) *Journal of Further and Higher Education* 445, 446.

where '[s]tudents are faced with many temptations to plagiarize,'¹⁸ responding to the pressures of studying while working and an increasing pressure to 'succeed' and provide a return on investment.¹⁹ In the commercialised environment of modern university study, plagiarism and other forms of misconduct have been re-conceived as 'consumptive practices,'²⁰ rather than failures of traditional scholarly culture. In a credentialist educational paradigm, academic misconduct becomes more easily rationalised.²¹ For the law student, the ramifications of a finding of academic misconduct are potentially more serious than in any other discipline.

III THE CHALLENGE TO CONVENTIONAL VALUES OF SCHOLARSHIP: TEXT, PLAGIARISM AND POSTMODERNISM

Confounding further the traditional values underpinning the institutional virtues of proper academic conduct are critical cultural attitudes which characterise 'originality and individual authorship as mythologies.'²² Postmodernist writing challenges at a fundamental level the concepts of original authorship of text,²³ with concepts of attribution inevitably becoming equally contested. Barthes, for example, describes text not as 'a line of words releasing a single "theological" meaning (the "message" of the Author-God) but a multi-dimensional space in which a variety of writings, *none of them original*, blend and clash.'²⁴ Similarly, Bakhtin sees all language as infused with linguistic baggage: '... *all our utterances ... [are] filled with others' words*.'²⁵ Plagiarism is, in such a context, postmodern textual liberation, recognising the continuous intertextual interplay of ideas, and the words which concretise them, as against a contested personal authorship.

The intersection of such critiques and the culture of the academy has thus seen an assault in some quarters on the implied political stance inherent in the concept of academic integrity.²⁶ Plagiarism and other forms of academic misconduct are

¹⁸ Chris Park, 'Rebels without a clause: towards an institutional framework for dealing with plagiarism by students' (2004) 28(3) *Journal of Further and Higher Education* 291, 293, cited in Saltmarsh, above n 17, 448.

¹⁹ See Stallman, above n 15, citing Perry *et al*, 'Type A behavior, competitive achievement-striving and cheating among college students' (1990) 66(2) *Psychological Reports* 459.

²⁰ Saltmarsh, n 17, 448

²¹ Sarah Nonis and Cathy Swift, 'An examination of the relationship between academic dishonesty and workplace dishonesty: a multi campus investigation' (2001) 77(2) *Journal of Education for Business* 69, 74.

²² Ramsay, above n 12, 245.

²³ Alastair Pennycook, 'Borrowing Others' Words: Text, Ownership, Memory, and Plagiarism' (1996) 30(2) *Tesol Quarterly* 201, 204 and 210.

²⁴ Roland Barthes, 'The Death of the Author' in *Image, music, text* (Stephen Heath trans, Fontana/Collins, Glasgow, Scotland, 1977), 146 (emphasis added). Barthes continues, 'the text is a fabric of quotations, resulting from a thousand sources of culture.'

²⁵ Mikhail Bakhtin, *Speech genres and other late essays* (University of Texas Press, Austin, 1986) 89 (emphasis added).

²⁶ *Ibid.* Bakhtin argues, for example, that such approaches are 'oppressive and exclusionary "gatekeeper" pedagogies, as opposed to "facilitative" teaching goals that emphasize "intertextual" and collaborative creation over a privatized model of learning'. See also Ramsay, above n 12, 245.

thus identified as ‘insurrectionary’ in university culture,²⁷ with its ideological fascination with reason, autonomy, originality and objectivity. That culture is predicated on a ‘common *ideological* ground in the creative, original individual who, as an autonomous scholar, presents his/her work to the public in his/her own name.’²⁸ The author as ‘the manufacturer’²⁹ of texts is, it is argued, an artefact of the ‘economic/ideological system which arose in [Enlightenment] Europe.’³⁰

Such critique, combined with the general lack of referencing and validation practices which inform the internet publication of opinions, arguments and criticism, has created a sharp divide between the ‘public’ world of writing, and writing within the scholarly disciplines. Such a boundary, however, is not necessarily understood by modern students, whose primary mode of communication is technological, and whose primary connection to information is electronic.³¹ Students thus often view copying from online sources as being ‘significantly less dishonest than similar offences using printed sources,’³² since it comes from a platform where the interchange of ideas is not governed by principles of ownership, but by free interchange and recombinant or pastiche expression.

Such critical analysis of language (and the underlying reference to the psycholinguistic modes of generating language informing such approaches) presents a picture which is antithetical to the strict boundaries of authorship that underpin the paradigm of knowledge and scholarship on which proper academic conduct is predicated.³³ As products of the Enlightenment, the modern (and modernist) university retains, at the institutional level, conventional understandings of authorship, where words, ideas and arguments are discretely attributable to specific sources, requiring acknowledgement as an integral part of the value

²⁷ Stuart Cosgrove, ‘In praise of plagiarism’ (1989) *New Statesman and Society*, 1 September 1989, 38, 38. Cosgrove’s (and others’) critique of plagiarism is primarily directed to creative, artistic and cultural activities, rather than law.

²⁸ Ron Scollon, ‘Plagiarism and Ideology: Identity in intercultural discourse’ (1995) 24(1) *Language in Society* 1, 1 (emphasis added).

²⁹ Mark Rose, ‘The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship’ (1988) 23 *Representations* 54: In answering Foucault’s question, ‘What is an author?’, Rose responds that the ‘distinguishing characteristic of the modern author ... is that he is a proprietor, that he is conceived as the originator and therefore the owner of a special kind of commodity, the “work”.’

³⁰ Scollon, above n 28, 24. Any idea of plagiarism as modernity understands it is, understandably, unthinkable in pre-modernity terms (as any even casual student of Shakespeare would realise). Perhaps most famously, Shakespeare’s *King Lear* was substantially ‘indebted’ to a source-play in *Holinshed’s Chronicles*, but also to Samuel Harsnett’s *A Declaration of Popishe Impostures*, and a range of other sources – an example not only of the Renaissance concept of the ‘transformative genius’ in Shakespeare as playwright, but also intertextuality in action: see Kenneth Muir, ‘Samuel Harsnett and King Lear’ (1951) 2(5) *The Review of English Studies* 11, 11ff.

³¹ See Sonia Livingstone and Ellen Helsper, ‘Gradations in digital inclusion: children, young people and the digital divide’ (2007) 9(4) *New media & society* 671, 677, who conclude that while a binary divide exists among adults (in the sense of user|non-user), no such divide applies to children and younger people.

³² Shifra Baruchson-Arbib and Eti Yaari, ‘Printed Versus Internet Plagiarism: A Study of Students’ Perception’ (2004) 1 *International Journal of Information* 1, 5, <http://www.i-r-i-e.net/inhalt/001/ijie_001_05_baruchson.pdf>.

³³ Ramsay, above n 12, 244.

system underpinning scholarly culture.³⁴ It is here, for the law student, that the spectre of academic misconduct crystallises.

IV THE FEARFUL (AND TEARFUL) SPECTRE OF ACADEMIC MISCONDUCT

As the unit co-ordinator for Professional Responsibility at the Queensland University of Technology (QUT), the author teaches the subject in which the regulation and discipline of the legal profession, including a substantial component on the admission process. The author has therefore had occasion to deal with instances of academic misconduct – ironically, even in the unit which deals with professional ethics. As a barrister, the author is frequently consulted by students seeking admission who have suddenly realised that they have ‘suitability matters’,³⁵ including academic misconduct, which now assume fearful (and not infrequently tearful) proportions. The author has moved a substantial number of admissions before the Court of Appeal, including significant numbers of admissions where findings of academic misconduct have been disclosed.

Where an application involves suitability matters, the tenor of the occasion shifts from the routine ceremonial to something of a prosecutorial/adversarial process, taking on at least metaphorical resonances with a plea in mitigation by defence counsel. Yet what might be thought of as conventional mitigating factors (such as stress, illness, workload etc) are clearly not available to limit the culpability of a student who has disclosed academic misconduct. Indeed, they are the antithesis of mitigation in the courts view, demonstrating a preparedness to act dishonestly in stressful situations to achieve specific ends.³⁶

The Queensland Court of Appeal has clearly signalled that academic misconduct is a factor bearing on fitness for practice.³⁷ It is not, however, automatically disqualifying. Developing appropriate submissions is often hampered, though, by the way in which academics have framed the documentation of their findings – with unintended ramifications for the student’s admission. While adverse findings of egregious plagiarism attract the Court’s full attention, they will also have been made within a formal committee process, and be accompanied by detailed documentation.³⁸ Conversely, for lesser transgressions, the very informality which university policies mandate, and the scholarly values which academics bring, quite properly, to managing minor misconduct can problematise the presentation of persuasive submissions.

V PRIOR TO POLICY: ACADEMIC MISCONDUCT FROM THE STUDENT PERSPECTIVE

As Chanock observes, the experience of academic standards which students bring with them from secondary school are ‘startling’.³⁹ Most are used to referencing

³⁴ See Corbin and Carter, above n 9, 63 and 75.

³⁵ ‘Suitability matters’ relating to admission are set out in the *Legal Profession Act 2007* (Qld), s 9.

³⁶ See *Re: AJG* [2004] QCA 88, 3. See also Jacqueline Cumming, ‘Where Courts and Academe Converge: Findings of Fact or Academic Judgement’ (2007) 12(1) *Australia and New Zealand Journal of Law and Education*, 97, 102.

³⁷ *Legal Profession Act 2007* (Qld), see s 21(1)(b), s 28(a), s 31(1).

³⁸ This is not always the case: see *Law Society of Tasmania v Richardson* [2003] TASSC 9.

³⁹ Chanock, above n 9, 4.

practices substantially less rigorous than those which apply at university. Chanock's research showed that a third of students surveyed had not been expected to attribute direct quotations, and two-thirds had not been expected to reference sources of the materials included in submitted work. Referencing by means of a bibliographical entry was reported as sufficient even for direct quotation by a quarter of those surveyed.⁴⁰

Despite differing reports of the intended destinations of law students, it seems that somewhere around a half of undergraduate law students undertake their LLB with the intention of seeking admission as lawyers.⁴¹ Few enter law school already focussed on an academic career. Many arrive in tertiary education without a clear understanding of the unique view of academic propriety which is embedded deeply in university culture, and do not generally anticipate remaining within that culture once qualified. The intrinsic values of academic propriety are to their minds a relatively brief engagement with an alien world for largely pragmatic purposes.

Moreover, law students frequently do not see the relevance of plagiarism to the practice of law, considering that neither the judicial system nor the practice of law seem to place similar strictures on the re-use of material originating from another author. Bast and Samuels cite no less an authority that Judge Richard Posner for the proposition that a judge is 'not expected to produce original scholarship,'⁴² and Le Clercq observes of legal writing that 'it is no embarrassment to lean on another's opinion: it is a requirement.'⁴³ Indeed, a Dworkinesque view of the judicial enterprise provides some support for the view that legal judgments are the product of combined minds over a significant period of time.⁴⁴ Lest this seem to suggest that intertextuality (in the postmodern sense) is, in fact, a characteristic of common law judgments, it should be remembered that the persuasiveness of a judgment lies in the ideas and views relied on being identified with great precision. The resignation of Federal Magistrate Rimmer in 2006 suggests that both Posner's and Le Clercq's views ought not to be read as excluding the concept of plagiarism from judicial practice.⁴⁵ Indeed, it is from the very

⁴⁰ Ibid.

⁴¹ 'La Trobe University's director of undergraduate studies, Heather King, said, "It's a well-acknowledged fact that 40-50 per cent will not end up in a traditional law practice"; while managing editor SurviveLaw.com, Kathryn Crossley said the relatively low numbers entering the profession was not a response to declining opportunities, but that 'many law students simply did not aspire to become lawyers': Jane Lee, 'Graduates shun legal profession' *The Age* 20 May 2010 <<http://www.theage.com.au/victoria/graduates-shun-legal-profession-20120519-1yxt0.html>>.

⁴² Bast and Samuels, n 9, 22.

⁴³ LeClercq, Terri, "Failure to Teach: Due Process and Law School Plagiarism" (1999) 49 *Journal of Legal Education* 236, 240

⁴⁴ Ronald Dworkin's analogy of the judicial enterprise is that of the writers of a chain novel, where each of the writers is given the novel as it currently stands, and is required to add a further chapter - a task which by its definition requires that certain limitations be placed on the new chapter to retain coherence and flow: see R Dworkin, "Law as Literature" (1982) 60 *Texas Law Review* 531, 531.

⁴⁵ For a general discussion of plagiarism and the judicial practice, see Bast and Samuels, above n 9, 800-803. Note however that, in a widely publicised incident involving a Federal Magistrate, Jenny Rimmer, allegations which eventually were to lead to her resignation lay in her having plagiarised 'more than 2,000 words from a colleague's decision in a different case

attribution of ideas, arguments and explicit text to identified authoritative sources that such ‘borrowed’ ideas gain their traction.

By contrast, the imperatives of professional legal practice are driven not by scholarly values, but by the need for persuasiveness and efficiency,⁴⁶ with many documents generated in practice being the product of multiple authors signed off by a supervising practitioner, or through the liberal utilisation of unacknowledged precedents prepared for previous legal transactions and or litigation, not necessarily authored by the current user.⁴⁷ Scholarly practice must, therefore, seem quite alien to students who are focused on a career in legal practice.

VI ACADEMIC MISCONDUCT, PLAGIARISM, CHEATING: UNIVERSITY POLICY

Once at university, students are confronted by a bewildering array of terminology used to describe academic misconduct: cheating (in a ‘traditional’ sense involving exams, and as a generic term covering any form of gaining an unfair advantage in assessment);⁴⁸ academic dishonesty; excessive collaboration; collusion; copying; plagiarism; inadequate citation; and non-attribution of sources.⁴⁹ Yet despite all universities having policies on academic misconduct which set out definitions of academic misconduct inviting disciplinary action, it has been suggested there is ‘justifiable confusion’ as to the fundamental principles of intellectual honesty,⁵⁰ and that students often do not understand the ‘full set of behaviours that constitute

for one of her judgments’ - see ‘Magistrate accused of plagiarism quits’, *Sydney Morning Herald*, (online) 19 December 2006,

<<http://www.smh.com.au/news/National/Magistrate-accused-of-plagiarism-quits/2006/12/19/1166290517592.html>>. For a discussion of the issues and the history of the incident, see Radio National transcript, 9 May 2006,

<<http://www.abc.net.au/radionational/programs/lawreport/magistrates-and-plagiarism/3333974#transcript>>.

⁴⁶ Bast and Samuels, above n 9, 803, citing K Du Vivier, ‘Nothing New Under the Sun – Plagiarism in Practice’ (2003) 32 *University of Colorado Law Review* 53, 53.

⁴⁷ Plagiarism here needs to be distinguished from infringement of copyright laws: see Bast and Samuels, above n 9, 805.

⁴⁸ Academic misconduct policies in universities are often framed around the concept of ‘gaining an unfair advantage’ –: see for example, QUT *MOPP C/5.3.5*; cf Monash University *Student Discipline Guidelines*: Part 10: Definitions and key concepts: “‘Academic misconduct’ means conduct that seeks to gain for the student or another person an unfair or unjustified academic advantage in a course or unit of study,’ 45. Researchers themselves often use some terms more or less interchangeably, with McCabe and Trevino, for example writing about ‘Academic misconduct (student cheating)’, see McCabe and Trevino, above n 5, 30.

⁴⁹ In proposing a ‘general’ definition of academic misconduct or dishonesty, Christensen Hughes and McCabe cite a range of behaviours, many of which are not specifically referred to in traditional institutional definitions, but nonetheless fall within the umbrella definitions predicated on academic misconduct being any behaviour which is designed to defeat the purposes of assessment, including ‘impersonating another to take a test,’ ‘padding a bibliography,’ ‘asking for an extension by citing a bogus excuse,’ see Christensen Hughes and McCabe, above n 9, 50, citing Anne Mullens, ‘Cheating to win’ (2000) *University Affairs*, 22, 23.

⁵⁰ Bast and Samuels, above n 9, 777,

cheating.’⁵¹

Traditional concepts of academic and scholarly standards emphasise that plagiarism (as one of the paradigm examples of academic misconduct) is ‘theft, an offence, with effective sanctions in [appropriate] socialising and disciplining domains.’⁵² More than the mere breach of a rule, plagiarism is the disregard of the normative values of the university as an institution imbricated in a global community of scholarship, reflecting its dedication to authenticity and integrity in both its learning, teaching, and research aspects.

Not that universities are oblivious to the discourse surrounding authorship and originality. Indeed, it is within universities that the critical discourse is propagated, informed by a mix of intellectual, social, professional and moral and or philosophical issues.⁵³ As yet, however, the traditional values of scholarship are still primary discourses informing universities’ expectations of student conduct, and the very scholars who question plagiarism’s provenance (perhaps ironically) nonetheless comply with its dictates.⁵⁴

University policies on academic misconduct generally define such misconduct as a breach of academic integrity.⁵⁵ Failure to maintain academic integrity is subdivided into three forms: cheating in examinations; plagiarism; and other forms.⁵⁶ Cheating in exams is defined as including ‘any action or attempted action on the part of a student which might gain that student an unfair advantage in the examination.’⁵⁷ Plagiarism is defined as ‘representing another person’s ... ideas or work as one’s own,’⁵⁸ with an inclusive list of five forms of plagiarism, of which three are referable to the study of law:

direct copying, summarising, or paraphrasing another person’s ... work without appropriate acknowledgement ... using or developing an idea or hypothesis from another person’s ... work without appropriate acknowledgement, ... [and]

⁵¹ Robert Burrus, KimMarie McGoldrick and Peter Schuhmann, ‘Self-Reports of Student Cheating: Does a Definition of Cheating Matter?’ (2007) 38(1) *Journal of Economic Education*, 3, 4.

⁵² Stuart Hannabus, ‘Contested texts: Issues of plagiarism’ (2001) 22(6/7) *Library Management*, 311, 311.

⁵³ Ibid.

⁵⁴ Peter Larkham and Susan Manns, ‘Plagiarism and its Treatment in Higher Education’ (2002): 26(4) *Journal of Further and Higher Education* 339, 347; Scollon, above n 28, 25.

⁵⁵ References to specific aspects of academic policy in relation to academic misconduct are based on the policy in operation at Queensland University of Technology, as contained in the *Manual of Policies and Procedures (MOPP)*: Chapter C, *Academic Integrity*, unless otherwise noted.

⁵⁶ Ibid, *MOPP C/5.3.5*.

⁵⁷ Ibid, *MOPP C/5.3.5(a)*: the policy identifies ‘bringing unauthorised material into the exam room, having access to unauthorised notes during the examination, unauthorised communication with others or copying or reading another student’s work during the examination’ as specific examples of cheating.

⁵⁸ Ibid, *MOPP C/5.3.5(b)*.

representing the work of another person ... as the student's own work.⁵⁹

The residual category, other forms, includes, as relevant:

giving or providing for sale one's own work to another person, company or web-site etc for copying or use by another person, ... purchasing or otherwise obtaining assessment material through individuals, companies or web-based tools/services, ... [and] collusion or collaborating with others where not authorised in the assessment requirements.⁶⁰

In most universities, academic misconduct is classified as major or minor,⁶¹ with disciplinary responsibility for dealing with minor misconduct generally vested in the unit co-ordinator.⁶² An example given of minor academic misconduct relevant to law is 'incidental plagiarism (inadequate, incorrect or inconsistent citation and/or referencing of sources, paraphrasing too close to the original).'⁶³ This may include copying a few sentences, and includes inadvertent copying, such as where a student's notes do not differentiate between a copied passage and the student's own commentary. This was always possible in the non-technological era but the probability of inadvertent copying has risen considerably with the advent of the copy and paste function, on-screen windows showing documents under construction, and electronic sources from which text can be copied and pasted, or dragged, directly into another document.

Minor plagiarism thus has a number of different faces. It may be minor by virtue of its extent (with a rough guide of 'a few sentences'). It may be minor if it lacks intent. Or it may be essentially technical, taking the form of incorrect citation, without intent to pass the work off as one's own.

Often, penalties cannot be applied to minor academic misconduct,⁶⁴ the policy response being conceived as educative, rather than punitive. Records must, however, be kept of the management of the incident.⁶⁵ The form of such records is not generally prescribed, and may range from detailed emails through to a simple notation in the university's records management system.

Major academic misconduct is generally dealt with by a formal investigation process at a committee level, involving procedures modelled on quasi-judicial

⁵⁹ Ibid, *MOPP C/5.3.5(b)*: further examples of plagiarism are not generally applicable in the study of law, relating to artwork, musical scores or audiovisual materials etc, and empirical research data.

⁶⁰ Ibid, *MOPP C/5.3.5(c)*: further examples not generally applicable in the study of law relate to empirical research data.

⁶¹ See, for example, *ibid, MOPP C5.3.6*

⁶² Alternative terminology is used at some universities (*eg* 'Course Convenor' at Griffith University, 'Subject Co-ordinator' at the University of Wollongong), but the term is designed to cover the academic staff member who has responsibility for design, delivery and assessment of a particular subject in the Law degree.

⁶³ QUT, above n 55, *MOPP C/5.3.6(a)*.

⁶⁴ Ibid, *MOPP C/5.3.6(a)*.

⁶⁵ Ibid, *MOPP E/8.1.6*. Generally the recording obligations for minor incidents of academic misconduct are in the form of emails and a short entry, usually without specifics, in the university's formal records system.

proceedings required to afford natural justice to the student;⁶⁶ and an obligation to make a decision based on ‘logical, credible and relevant evidence.’⁶⁷ The discipline committee must routinely make available a report of its findings to the student. For law students seeking admission, however, the matter does not end here.

VII FORENSICALLY SPEAKING

It is quite rare for the details of academic misconduct to be placed on the public record as a result of an application for admission, although universities themselves keep confidential records when any adverse findings are made against a student.⁶⁸ Details of academic misconduct disclosed in an application for admission are generally not readily accessible to the public. Such details appear in judicial decisions only in the limited number of cases where either the local professional body (in Queensland, the Legal Practitioners Admissions Board (LPAB))⁶⁹ has actively opposed admission or the Court has exercised its discretion to explore an applicant’s suitability by way of a full hearing or by remitting the matter to a Judge of the Supreme Court to make specific findings of fact.⁷⁰

There is, therefore, a dearth of written judgements relating to academic misconduct as a suitability matter relevant to admission. Many of the textbooks on professional ethics deal with admissions in little detail, focusing on criminal convictions (primarily because these have been the subject of high profile cases such as *Re B*⁷¹ or *Wentworth*⁷²). Texts prior to 2004, indeed, generally make no

⁶⁶ Ibid, *MOPP* E/8.1.7(c): as to the generality of quasi-judicial disciplinary proceedings in academic misconduct cases, see Larkham and Manns, above n 54, 347.

⁶⁷ Such a requirement is consistent, for example, with the decision in *Minister of Immigration and Ethnic Affairs and Pochi* [1980] FCA 85; (1980) 44 FLR 41 (31 July 1980), per Deane J, [15].

⁶⁸ See QUT, above n 55, *MOPP*, E/ 8.1.11 Recordkeeping and reporting: ‘Records must be maintained for minor and major cases of misconduct ... Records of minor breaches must be maintained in the corporate records system.’ In the course of application, such details must be disclosed (Queensland, Form 7 re suitability matters); cf Victoria, where applicants must attach an official report from the University <<http://www.liv.asn.au/For-Lawyers/Careers-Centre/Admission-to-practice/Admission-Requirements>> and addressed in the Affidavit and any related submissions. While these are technically on the public record, they are not easily accessible, compared, for example, with judicial commentary in (the much rarer) published decisions where admission is contested. Judicial commentary is, of course, far more significant than the bare facts as disclosed in the documentation associated with applications.

⁶⁹ Prior to the passage of the *Legal Profession Act 2004*, the role assumed by the LPAB was carried out by either the Queensland Law Society/Solicitors’ Board (in the case of applicants seeking admission as solicitors) or the Bar Association/Barristers Board (where applicants sought admission to the Bar.)

⁷⁰ In *Re: AJG* [2004] QCA 088, the Court considered the implications of the disclosed misconduct, even though the Law Society had raised no objection. In *Re: Humzy-Hancock* [2007] QSC 034, the Court ordered a hearing before a single judge (Philip McMurdo J) to look behind the findings of plagiarism of a Griffith University Committee, and in a fully contested hearing in *Re: Liveri* [2006] QCA 152 the Court of Appeal referred to events which occurred during a similar hearing before a single judge.

⁷¹ *Re B* [1981] NSWLR 372 (New South Wales Court of Appeal) – concerning the application for admission of the political activist and journalist Wendy Bacon.

⁷² *Wentworth v New South Wales Bar Association* (SC (NSW) Full Court No 4044 of 1993, 14 February 1994).

mention of academic misconduct. The author has identified 2004 as the watershed on the basis that in the decision in *Re AJG* that year that the Chief Justice of Queensland observed:

Over the last couple of years, the Court has, in strong terms, emphasised the unacceptability of [academic misconduct] ... on the part of an applicant for admission to the legal profession. At the last Admissions Sitting, the Court indicated a strengthening of its response to situations like this on the basis adequate warning had been given.⁷³

However, unlike ‘critical’ academics, the courts have not embraced, either in the admission process or in the general mode of legal analysis, a postmodern view of the nature of reality. The legal system is (and will presumably remain) steadfastly a creature of the Enlightenment, its analysis Cartesian in origin and its goal objectivity.⁷⁴ Like the university *qua* institution, its values are unsurprisingly conventional.

Prior to 2004, academic misconduct had been largely beneath the radar, and *Re AJG* became the seminal statement of principle which would be developed significantly in Queensland and in other jurisdictions.⁷⁵

A *Re AJG*

Little factual detail appears in the decision in *Re AJG*. Griffith University had made a finding that AJG had, during the Practical Legal Training Course, copied substantial amounts of the work of another student, M. M had been admitted at the previous sittings, despite disclosing a finding of academic misconduct arising out of the same incident. The Court did not consider that, having admitted M, it was bound to admit AJG: AJG’s offence was ‘graver’,⁷⁶ insofar as he understood the potential impact of his conduct, and that his application was made at a time when the Court had signalled its intentions to treat academic conduct more seriously.⁷⁷

Apart from articulating the harsher stance to be adopted, the decision also enunciated a fundamental statement of the principles that apply to findings of academic misconduct:

... [c]heating in the academic course which leads to the qualification central to practice and at a time so close to the application for admission must preclude our

⁷³ *Re: AJG* [2004] QCA 88: de Jersey, CJ, delivering the *ex tempore* judgement of the Court of Appeal, 2.

⁷⁴ See, for example, Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices*, (Lawbook Co, Sydney, 2009) 195ff.

⁷⁵ See, for example, *Legal Services Commissioner v Keough (Legal Practice)* [2010] VCAT 108 (3 February 2010) [38] *per* Malcolm Howell, Senior Member and Chairperson.

⁷⁶ *Re: AJG* [2004] QCA 88, 3.

⁷⁷ See also Francesca Bartlett, ‘Student Misconduct and Admission to Legal Practice -New Judicial Approaches’ (2008) 34(2) *Monash University Law Review* 309, 316. Although not explicit, a further basis for refusing AJG’s admission may also have been a recognition that M, as the source of the copied material, had been more sinned against than sinning.

presently being satisfied of this applicant's fitness.⁷⁸

AJG's application was adjourned, not to be relisted for six months. There is no subsequent published judgement, so one must assume either that he was admitted on relisting or that he abandoned a legal career.

Re AJG is of particular significance since the Solicitors' Board had not opposed the application,⁷⁹ arguing the conduct was a 'one-off aberration,' and that 'the applicant was clearly experiencing significant external stressors of a financial and domestic nature at the time.'⁸⁰ Not only did the Court reject the proposition that external stressors mitigated the offence, but held rather that misconduct in such circumstances was symptomatic of unfitness:

[i]t is inappropriate that we should, without pause, accept as fit to practise an applicant who responds to stress by acting dishonestly to ensure his personal advancement.⁸¹

The underlying reasoning of the Bench (in the following form):

- P₁ X was subjected to stress and X cheated
- P₂ Lawyers are subjected to stress
- ∴ X will cheat if they become a lawyer, and are therefore unfit to practise

is intuitively reasonable, buttressed by empirical research showing a relationship between cheating at university and misconduct in subsequent professional practice. Nonis and Swift suggest that 'it is likely that students who do not respect academic integrity ... will not respect integrity in their future professional ... relationships;'⁸² that 'students who cheated in the academy tended to cheat in the corporate setting;'⁸³ and that a predisposition to cheating will, in all probability, manifest itself in all aspects of a person's life rather than being

⁷⁸ *Re: AJG* [2004] QCA 88, 4. Similar sentiments have been expressed in United States where applicants have plagiarised during their law degrees: see *In re KSL*, 495 S.E.2d 276, 277-78 (Ga. 1998); *In re Widdison*, 539 N.W.2d 671, 672-73 & n.2 (S.D. 1995); *In re Harper*, 645 N.Y.S.2d 846, 847-48 (N.Y. App. Div. 1996), although it is claimed by Bast and Samuels that it is 'rare for bar associations to deny a license to an applicant who committed plagiarism while in school', above n 9, 806 and notes 120-124. Note that the Court's concern with plagiarism is not, as one might imagine on the basis of the Chief Justice's reference to the 'qualification central to practice,' limited to academic misconduct in a law degree and academic misconduct in a different degree may have an equal significance in relation to fitness to practice (see *Re:OG – A Lawyer* [2007] VSC 520; *Jarvis and Legal Practice Board* [2012] WASAT 28)

⁷⁹ The Solicitors Board was the precursor of the Legal Practitioners Admissions Board in the pre-2004 environment when admission was as either a solicitor or a barrister, and the relevant admission boards reflected the specific branches of the profession.

⁸⁰ *Re: AJG* [2004] QCA 88, 3.

⁸¹ *Re: AJG* [2004] QCA 88, 3.

⁸² Nonis and Swift above n 21, 74

⁸³ *Ibid*, 75.

confined to any specific aspect of it.⁸⁴

B Re Liveri

*Re Liveri*⁸⁵ is the leading case on academic misconduct in Queensland, considering academic misconduct in perhaps its most egregious form. And how academic misconduct, the duty of candour, the need to demonstrate insight into the nature of the conduct, and rehabilitation interact in the determination of suitability.⁸⁶

Liveri had been the subject of an adverse finding by James Cook University in relation to a second year Trusts assignment. The document she had submitted was substantially a direct copy of an article by Professor Derek Davies downloaded from the internet. The only differences were:

the omission of two paragraphs and a heading, and the alteration of the first sentence of the next paragraph ... to make the paragraph appear to flow on from the previous included paragraph.⁸⁷

Ms Liveri's final application, on 11 April 2006, acknowledged for the first time that she was guilty of the academic misconduct offences, having previously referred only to charges having been 'levelled' at her. The Court refused the application, holding that it could not be satisfied of Liveri's fitness. The Court observed that she had committed serious plagiarism on three occasions; she was

⁸⁴ Edward Saunders, 'Confronting academic dishonesty' (1993) 29(2) *Journal of Social Work Education* 224, 231. For an analysis of cheating during training and subsequent professional disciplinary action in the medical profession, see M Papadakis et al, 'Unprofessional Behaviour in Medical School Is Associated with Subsequent Disciplinary Action by a State Medical Board' (2004) 79(3) *Academic Medicine*, 244, 249: 'We have shown that problematic behaviour at medical school ... predicted subsequent disciplinary action of the physician by the state medical board'; M Papadakis et al, 'Disciplinary Action by Medical Boards and Prior Behavior in Medical School' (2005) 353 *The New England Journal of Medicine* 2673, 2679 - 'physicians who were disciplined by state medical-licensing boards were three times as likely to have displayed unprofessional behavior in medical school than were control students.'

⁸⁵ [2006] QCA 152.

⁸⁶ *Liveri's* impact has not been confined to Australia: the case is used as a "cautionary tale" for law students in the South Pacific region – see A Jowitt, "The Impact of Plagiarism on Admission to the bar: *Re Liveri* [2006] QCA 152", (2007) 11:1 *Journal of South Pacific Law*, 213, 217.

⁸⁷ *Re Liveri* [2006] QCA 152, [6], the Court citing the findings of the University delegate responsible for the investigation and finding of academic misconduct. Liveri had sworn on oath that the submission of the assignment in that form was inadvertent, although the University delegate rejected the claim. Four days after being notified of the adverse finding, Liveri had sought to submit what she claimed to be her 'original' assignment as proof of inadvertence, although of course it could have no such probative value. As the University delegate had made clear in the formal reasons for the finding of academic misconduct, the assignment submitted could have been written in the four days between notification and the request, and indeed, when the assignment was handed to another member of the teaching team for the subject for review, it was found to have been of a 'very poor standard' and could easily have been written after notification of the University's findings [9]. Liveri's problems were exacerbated when the University reviewed other assignment work which she had submitted, uncovering two further instances of academic misconduct related to quoting 'substantial commentary' of an academic publication without attribution and quoting verbatim from a government publication without acknowledgment [12].

of mature years (25 and 27 years old) at the relevant times; she had consistently failed to acknowledge her conduct or display appropriate candour in her disclosure of the incidents;⁸⁸ and she showed no genuine insight into its gravity and significance.⁸⁹ The first of these factors is identified with honesty, the core characteristic required to be demonstrated by applicants.⁹⁰ The second recognises that ‘ancient peccadilloes’⁹¹ might be excused on the basis of youth and immaturity, but that at some point, the leniency which might be shown in the case of youthful errors of judgement evaporates.⁹² The final factor is concerned with the applicant’s understanding of the relevance of academic dishonesty to their professional obligations, and the need for complete candour, which Liveri had failed to demonstrate until late in the protracted applications for admission.⁹³

The Court refused the application, although it was not an outright rejection. Liveri’s application was adjourned *sine die*, not to be relisted for at least six months. The Court added, however, that ‘the mere lapse of time would not, without more ... warrant the Court’s concluding that fitness has been demonstrated’.⁹⁴ Ms Liveri has apparently made no further applications for admission, and she is not listed in either the Bar Association or Queensland Law Society directories.

C *Re: Humzy-Hancock*⁹⁵

Humzy-Hancock had disclosed three findings of academic misconduct by Griffith University. The first related to excessive collaboration with another student of a 2003 assignment.⁹⁶ The second involved alleged plagiarism in an October 2005 assignment. The third involved alleged plagiarism in a take home exam, also in

⁸⁸ Prior to *Re Liveri* [2006] QCA 152, it was quite clear from decisions which were not related to academic misconduct that applicants for admission were under the highest possible obligation of disclosure of matters which might bear on their fitness to practise: see for example, *Re Hampton* [2002] QCA 129 [28] where de Jersey CJ had observed, ‘An applicant for admission is obliged to approach the Board and later the Court with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment for fitness to practise.’

⁸⁹ *Re Liveri* [2006] QCA 152, [21].

⁹⁰ In fact, it is more a negative test, in that there must be nothing disclosed which demonstrates dishonesty. There is no positive obligation to provide evidence of honesty.

⁹¹ *Re: OG* [2007] VSC 520 (Unreported, Warren CJ, Nettle JA and Mandie J, 14 December 2007) [I23].

⁹² See, for example, the South Australian decision in *Re Application for Admission as a Legal Practitioner* ([2004] SASC 426, in which Doyle CJ, with whom Perry and Debelle JJ agreed, observed [37], ‘the ordinary member of the public would ... accept, as I have, that the deficiencies in the applicant’s conduct are due to immaturity and misjudgment, and do not point to the conclusion that the applicant is not a fit and proper person to be admitted.’ Note that the offences of which the applicant had been convicted *inter alia* of three counts of larceny, but that he was nonetheless admitted.

⁹³ The lack of candour was, in the Court’s view, demonstrated by Liveri’s persistence with the assertion that the Trusts assignment had been submitted ‘inadvertently’ in the face of overwhelming evidence to the contrary, and her insistence, as late as October 2005, that ‘the JCU Law School leveled [*sic*] three instances of academic misconduct against me’ when, at the time, the charges had been determined and she had been found guilty on all three.

⁹⁴ *Re Liveri* [2006] QCA 152, [24].

⁹⁵ *Re: Humzy-Hancock* [2007] QSC 034.

⁹⁶ *Re: Humzy-Hancock* [2007] QSC 034, [2].

October 2005. Having disclosed these findings, Hancock contended that he was ‘for the most part ... not guilty of any misconduct.’⁹⁷

The first allegation concerned excessive collaboration involving ‘the format and structure of the assignment,’ and similarities in the discussion of relevant journal articles. Humzy-Hancock conceded both aspects of the allegation.⁹⁸ He maintained, however, that collaboration involving discussing interpretations and approaches to assignments was normal practice, and that he was unaware that the University policy on academic misconduct included a section dealing with collaboration. Significantly, the Assessment Board indicated that the most likely explanation for the similarities was that Humzy-Hancock had provided an electronic copy of his work to the other student, who had copied portions of that work.⁹⁹

McMurdo J was not prepared to find that Humzy-Hancock had *actively* provided a copy of his work to the other student, accepting that the other student was often at Humzy-Hancock’s house, accessed the internet from his computer, and had ready access to the assignment in electronic form. None of the other evidence rendered that explanation improbable. Accordingly, his Honour’s found that the allegations were not established.¹⁰⁰

The second allegation involved nine particularised instances of plagiarism in a 2005 assignment. As an example of those matters, a publication by M Cebon was cited in the bibliography, and there were a number of appropriate citations to the article in the assignment. However, there were also a number of instances where it was apparent that words used in the assignment were sourced in the Cebon article, but were not appropriately referenced. McMurdo J accepted the assignment demonstrated characteristics included in the Assessment Policy as examples of plagiarism, specifically ‘paraphrasing from sources without appropriate acknowledgement.’¹⁰¹ Humzy-Hancock’s explanation was that for a number of reasons, the preparation of the assignment had been hurried, and ‘without proper care and attention for what was required.’¹⁰²

McMurdo J considered that the level of referencing in the article was ‘objectively ... inadequate,’¹⁰³ but that the applicant’s intention was a necessary component of a charge of plagiarism under the Griffith Policy.¹⁰⁴ In relation to the Cebon allegation, his Honour found that if the failure to cite Cebon were plagiarism, ‘it was an unusual form because it sought to disguise the use of the work while at the

⁹⁷ *Re: Humzy-Hancock* [2007] QSC 034, [1].

⁹⁸ *Re: Humzy-Hancock* [2007] QSC 034, [3]-[4].

⁹⁹ *Re: Humzy-Hancock* [2007] QSC 034, [7].

¹⁰⁰ *Re: Humzy-Hancock* [2007] QSC 034, [13].

¹⁰¹ *Re: Humzy-Hancock* [2007] QSC 034, [14], referencing Griffith Law School Assessment Policy and Procedures 4.1.5.4.

¹⁰² *Re: Humzy-Hancock* [2007] QSC 034, [16].

¹⁰³ *Re: Humzy-Hancock* [2007] QSC 034, [16].

¹⁰⁴ The definition of plagiarism in the Griffith Law School Assessment Policy and Procedures; para 4.0, cited by McMurdo at *Re: Humzy-Hancock* [2007] QSC 034, [14], was ‘the knowing presentation of the work or property of another person as if it were the student’s own.’

same time directing the examiner ... to that very work.’¹⁰⁵ His Honour found that the conduct was ‘the result of carelessness and his misunderstanding of what was required, and not plagiarism as alleged, having concluded that there was no relevant intention.’¹⁰⁶

The third allegation, on discovering that the 2005 assignment had been referred to the School Misconduct Committee for alleged plagiarism, Humzy-Hancock had reviewed other items of assessment which he had submitted, and realised the answer to his take home exam exhibited similar shortcomings. He had written to the Chair of the Misconduct Committee to inform him of this.

The third allegation, then, arose from Humzy-Hancock’s ‘confession’, rather than being identified by an examiner and raised with a relevant disciplinary body.¹⁰⁷ McMurdo J noted that the Board’s findings were made without any notification of a complaint in relation to the take-home exam, relying solely on the facts volunteered by Humzy-Hancock and an examination of the exam script itself.¹⁰⁸ For similar reasons to those which had applied to the alleged plagiarism in the assignment,¹⁰⁹ his Honour concluded that the inadequacies of referencing were again the result of poor work, rather than plagiarism.¹¹⁰ Humzy-Hancock was subsequently admitted as a legal practitioner, presumably without demur by the Court following McMurdo J’s findings that no plagiarism had occurred.

What is significant about *Humzy-Hancock* is that, like *Liveri*, it demonstrates the courts’ preparedness to look behind the findings of academic bodies regarding academic integrity and make a *judicial* determination of the significance of the conduct as it bears on the applicant’s fitness. Courts, as noted by Cumming, have traditionally shown a strong disinclination to trespass into matters of academic judgement,¹¹¹ a practice identified by Lord Justice Sedley as ‘jejune and inappropriate.’¹¹² Such commentary, however, was made in the context of attempts to have the courts intervene in the determination of academic grades (ie, the specialised skill of assessment), rather than the making of a conceptually distinct, though not unrelated, judgement about academic propriety as it bears on fitness for admission.

¹⁰⁵ *Re: Humzy-Hancock* [2007] QSC 034, [26]. The phenomenon of “unwitting plagiarism” is identified by Chanock, above n 9, 3.

¹⁰⁶ *Re: Humzy-Hancock* [2007] QSC 034, [30].

¹⁰⁷ That is not to say that it may not have surfaced in the ordinary course of events.

¹⁰⁸ *Re: Humzy-Hancock* [2007] QSC 034, [34].

¹⁰⁹ As an example of the similarity, the exam had made use of an article by one Dr Burton, including verbatim quotes or close paraphrases of Dr Burton’s words. However, as McMurdo J pointed out, Dr Burton’s article was listed as the first of the references at the end of the answer, and that there were a significant number of appropriately cited references to the same article in close proximity to the unattributed passages. His Honour’s conclusion was, as had been the case in relation to the Cebon article in the assignment, ‘the alleged plagiarism is of a work which was not only identified by the plagiarist, but frequently cited in nearby passages of the applicant’s work. That feature alone makes it unlikely that there was an intentional passing off’, *Re: Humzy-Hancock* [2007] QSC 034, [38].

¹¹⁰ *Re: Humzy-Hancock* [2007] QSC 034, [41].

¹¹¹ J Cumming, above n 36, 99.

¹¹² Lord Sedley’s comments as cited by Kirby J in *Griffith University v Tang* [2005] HCA 7 [165].

VIII ZERO TOLERANCE ... ?

Corbin and Carter claim that the Chief Justice's statement in *Re AJG* articulates a zero tolerance policy, arguing that such an approach should have been followed in *Humzy-Hancock*, signalling that intentional *or* negligent laxity with respect to academic misconduct rendered applicants unfit for practice.¹¹³ The demand for integrity in law students is, of course, axiomatic. In terms of professional education, a requirement of honesty is not confined to the legal profession.¹¹⁴

Yet Corbin and Carter's characterisation of the Chief Justice's statement as articulating a position of zero tolerance ignores the important qualification included in the statement – 'without pause'. While an adverse finding might raise a *prima facie* question as to an applicant's honesty, it does not, even in the light of the Chief Justice's comment, foreclose the question of an applicant's suitability. In determining whether *any* suitability matter is of such consequence as to warrant a refusal to admit or deferral of admission, the Court is empowered to exercise a discretion to admit an applicant *notwithstanding* the existence of a suitability matter 'because of the circumstances relating to the matter.'¹¹⁵

Here, indeed, is the 'pause' to which the Chief Justice referred: suitability matters, academic misconduct or otherwise, must be acknowledged, but also contextualised. To read the Chief Justice's comment without due weight being afforded to this qualification is to abandon underlying principles of proportionality,¹¹⁶ and the need for a determination of suitability to reflect moral culpability.¹¹⁷ Some relevant considerations were reflected in extra-judicial comments by the Chief Justice in 2008:

That generic description ['academic misconduct'] *embraces a wide range of dereliction*, from mere carelessness in the use of apostrophes, to out and out dishonesty in the presentation of another's scholarship as if it is one's own. We took the view... that to cheat, in any *substantial* way, in acquiring the qualification which bases admission to professional practice, bespeaks unfitness to practise.¹¹⁸

¹¹³ Corbin and Carter above n 9, 54.

¹¹⁴ Similar values are expressed, for example, with respect to the professional social worker, and the position of the social work student, in equally expansive terms, 'When social work students engage in dishonest behaviour—within the classroom or in their practicums—they dishonour the academic integrity of the program, the social work profession, and possibly put their clients in jeopardy,' Saunders above n 84, 224.

¹¹⁵ *Legal Profession Act 2007* (Qld) s 31 Suitability for admission, ss (3). Prior to the passage of the *Legal Profession Act 2004*, the same discretion would implicitly have been contained in the Supreme Court's inherent jurisdiction to control and discipline lawyers as officers of the court.

¹¹⁶ See, for example, the principle enunciated in a criminal context in *Veen v The Queen (No 2)* [1988] HCA 14 *per* Mason CJ, Brennan, Dawson and Toohey JJ, [8], 'The principle of proportionality [in sentencing] is now firmly established in this country.'

¹¹⁷ Again, in a criminal context, see *R v M (CA)* [1996] 1 SCR 500, 558 *per* Lamer CJ, '[r]etribution requires that a judicial sentence properly reflect the moral blameworthiness of [the] particular offender,' cited in *Ryan v R* [2001] HCA 21 *per* Gummow J [128].

¹¹⁸ Chief Justice Paul de Jersey above n 10 (emphasis added). For a similar approach in the United States, see *In re Zbiegien*, 433 N.W.2d 871, 877 (Minn. 1988), where it was held that 'a student's one-time incidence of plagiarism should not result in a denial of bar admission,' cited in Bast and Samuels, above n 9, 806.

The Chief Justice clearly indicated that there are many shades of ‘academic misconduct,’ more subtle than the major/minor binary underpinning most university policies, and that the circumstances must be examined to determine whether the applicant’s specific actions amount to substantial misconduct, demonstrating unfitness to practice.

The factors which might impact on the assessment of academic misconduct were revealed in the same speech, where the Chief Justice observed that ‘where the misconduct was old, and could be characterised as ... a “one off aberration”, with no adverse incident since, we have been inclined to admit the applicant.’¹¹⁹ Zero tolerance with respect to the entire spectrum of academic misconduct might seem somewhat draconian, when one considers that criminal offences (even those involving dishonesty) are not automatically disqualifying, requiring adequate demonstration of reform to counter the courts’ disinclination to admit ‘any person who has ever shown to have been guilty of improper conduct.’¹²⁰

In admissions, context *is* significant. It requires an exercise in discretion weighing the nature and seriousness of any misconduct against evidence of subsequent reform and rehabilitation,¹²¹ with the qualification that while candid disclosure will not ensure admission, any failure of candour in disclosure will be a considerable barrier to admission. Complete candour is a necessary, but not a sufficient condition of admission.

Clearly, the Chief Justice’s surprise at the extent of academic misconduct disclosed suggests that a significant number of candidates had included adverse

¹¹⁹ Chief Justice Paul de Jersey, above n 10, 2: Clearly, the statutory factors which apply to the assessment of the relevance of criminal convictions, such as how long ago the misconduct occurred and how old the applicant was at the time, have some bearing on the prospects of admission of an applicant disclosing academic misconduct - see *Legal Profession Act 2007* (Qld), s9(i)(c)(i)-(iii).

¹²⁰ *Re: Lenehan* (1948) 77 CLR 403, 420. Lenehan was admitted despite a series of dishonest acts, including three counts of larceny, which had led Jordan CJ in the NSW Supreme Court, who had seen Lenehan give evidence, to observe that when hard pressed, ‘he showed himself unscrupulous in misappropriating money belonging to his aunt, to his employers, and to his employers’ clients as and when he got the opportunity, and was equally unscrupulous in giving false explanations in endeavours to exculpate himself,’ as expressed by Latham CJ, Dixon and Williams JJ, (1948) 77 CLR 403, 421. In *Re Application for Admission as a Legal Practitioner* [2004] SASC 426, Doyle CJ had observed in relation to convictions from an earlier period of the applicant’s life, ‘the ordinary member of the public would ... accept, as I have, that the deficiencies in the applicant’s conduct are due to immaturity and misjudgment, and do not point to the conclusion that the applicant is not a fit and proper person to be admitted’ [37]. The occasional incongruity of courts in admitting those with criminal histories is illustrated by two US cases described by Deborah Rhode, ‘Moral Character as a Professional Credential’ (1985) 94 *Yale Law Journal* 491, 494, cited in Stan Ross (now Ysaiah), *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia*, (Butterworths, Sydney, 1995), 102 ‘Michigan’s repentant bomber was admitted to the Bar despite several years in maximum security facility while North Carolina’s unconfessed “peeping Tom” was thought too great a public threat to be certified.’

¹²¹ See *Legal Profession Act 2007* (Qld) s 31(3). More recently, the highly publicised admission of Debbie Kilroy in December 2007, emphasises that even serious criminal conduct resulting in imprisonment is not necessarily inimical to admission— although Ms Kilroy’s situation and subsequent history are a quite extraordinary example of rehabilitation and redemption: see *In the Matter of an Application for Admission as a Legal Practitioner by Deborah May Kilroy*, unreported *ex tempore* comments of the Chief Justice, 13 December 2007.

findings in their disclosure documents.¹²² It is equally surprising then that since *Re AJG*, the Court of Appeal has refused admission in only one instance, that of *Liveri*. The remainder of those applications in which academic misconduct has been disclosed have presumably been admitted despite their having engaged in some form of academic misconduct.¹²³

In the most recent consideration of academic misconduct in the context of admission, *Jarvis and Legal Practice Board*,¹²⁴ the Western Australia State Administrative Tribunal refers to the applicant's misconduct in only three paragraphs of the 75 paragraph judgement, focussing its attention on the four criminal convictions disclosed.¹²⁵ The academic misconduct was found by the Tribunal to amount to a 'serious but not intentional error'¹²⁶ in the citation of sources, which, on the Tribunal's view, would not in itself warrant a finding that Jarvis was not a fit and proper person to be admitted.¹²⁷

IX MAKING THE ABSTRACT CONCRETE: THE PROCESS OF ADMISSION

In Queensland, an application for admission is accompanied by a parallel application to the LPAB for a certificate of recommendation.¹²⁸ Essentially, the Board has three options when making its recommendation to the Court. It may give an unqualified certificate indicating that it is satisfied that the applicant is a fit and proper person to be admitted. It may actively oppose the application, briefing counsel to appear in a full ventilation of the Board's concerns should the applicant proceed. Finally, it may give a 'qualified certificate', indicating to the Court that, while it does not consider the applicant unfit to be admitted, it requires the applicant to make full disclosure to the Court.¹²⁹ For the limited number of applications involving academic misconduct which generate a written decision, an unknown number of such applications for admission meet no significant resistance from the relevant Board or Court, and the applicants are admitted without the circumstances of the misconduct becoming part of the public record

¹²² Chief Justice Paul de Jersey, above n 10, 1.

¹²³ An alternative explanation is that faced with wholesale opposition from the Board, applicants have withdrawn their applications and either abandoned their legal careers, or undertaken sufficient remediation to re-apply at some later stage able to demonstrate the requisite rehabilitation.

¹²⁴ [2012] WASAT 28, the applicant had appealed the decision of the Legal Practitioners Admissions Board (WA) not to provide a compliance certificate for the purposes of admission.

¹²⁵ All four were offences involving an element of dishonesty: providing a false name to police; stealing as a servant from two separate employers; and a fraudulently obtaining a benefit from the Commonwealth (Centrelink).

¹²⁶ *Jarvis and Legal Practice Board* [2012] WASAT 28 [36].

¹²⁷ *Jarvis and Legal Practice Board* [2012] WASAT 28 [53], the Tribunal upheld the decision of the LPAB not to issue a certificate, but the finding of academic misconduct did not figure at all in the reasons for the Tribunal's decision.

¹²⁸ With respect to the Board's role in relation to suitability matters, see *Legal Profession Act 2007* (Qld) s 39(1); (2)(c); Form 22, Supreme Court (Admission) Rules, r15.

¹²⁹ In a practical sense, the requirement of full disclosure is somewhat redundant, since the documents on which the Board has made its determination, which include the applicant's Affidavit of Compliance (Form 46: Qld), have already been filed with the Court Registry, and are available to the Court. The practice nonetheless provides a filter for the Court which, in Queensland, may process as many as 200 or more applications in a sitting.

or entering the discourse on misconduct in the legal academy or the forensic process.¹³⁰

Where an applicant discloses a history of academic misconduct, the LPAB has indicated that it will continue to apply the policy of the former Solicitors' Board. As such, it will grant a qualified certificate unless of course it is of the view that the disclosure records academic misconduct of such severity to warrant outright opposition to the admission.¹³¹

At the admission ceremony, if the Court is satisfied, on the basis of the applicant's disclosure, that the academic misconduct is not fatal to the application, its usual approach is to admit the applicant notwithstanding the existence of a suitability matter. No specific mention of the nature of the suitability matter is ordinarily made at the admission ceremony.¹³²

On those occasions where applicants for admission, concerned about an incident of academic misconduct, have approached or be been referred to the author for advice on the preparation of their Affidavit, the author has almost without exception, confirmed the requirement of disclosure.¹³³ Given the views of the Board, and the approach taken by the Courts, the author generally prepares submissions for filing with the Court prior to the admission ceremony should the Board grant a qualified certificate.

Practical problems emerge frequently, however, where an incident has been characterised as minor academic misconduct. Generally speaking, the procedures for dealing with minor misconduct (whether academic misconduct or any other

¹³⁰ The decision of *Re: AJG* [2004] QCA 88, perhaps unsurprisingly, made no reference to any previous decision. *Re Liveri* [2006] QCA 152 makes reference only to *Re AJG*. *Re: Humzy-Hancock* [2007] QSC 034, being a hearing for the purposes of determination of facts, makes no reference to any decisions. *Re OG* [2007] VSC 520, technically an application regarding an admitted practitioner, but dealing with inadequate disclosure of academic misconduct, makes no reference to decided cases. *Law Society of Tasmania v Richardson* [2003] TASSC 9 refers to eleven decisions, none relating to specifically to academic misconduct. The most recent decision relating to academic misconduct, *Jarvis v Legal Practice Board* [2012] WASAT 28 refers to nine cases, but none are on the issue of academic misconduct, which forms, in effect, only a minor part of the disclosed suitability matters canvassed in the decision.

¹³¹ A warning to this effect is included (together with a copy of the decision in *Re: AJG* [2004] QCA 88) in the Guidelines to the Legal Practice course at QUT.

¹³² The (generally) formulaic expression in cases of qualified certificates is that, 'having regard to the submissions of the Board and counsel for the applicant, the Court is of the view that the applicant is a fit and proper person notwithstanding the disclosure of those [unspecified] suitability matter/s.'

¹³³ The author is aware of one instance of a mere allegation made against an entire cohort of students which was accompanied by a statement that the raising of the allegation would be required to be disclosed on application for admission where, in my view [i] the conduct described could not have amounted to academic misconduct under *any* of its defined forms at the university concerned; [ii] the form of the statement made by the academic did not contain any actual finding in relation to a specific individual; and [iii] that the manner in which the alleged incident had been dealt with did not, in any case, conform with the procedural requirements the university, and no records were kept (a requirement of the relevant procedures). No determination of misconduct by an individual could be discerned in the general communication.

form) are directed to dealing with the matter ‘promptly and informally,’¹³⁴ and are intended as ‘educative, raising a student’s awareness of relevant behavioral standards or expectations,’ rather than punitive.¹³⁵ Management of such incidents under university policies generally require that records be kept,¹³⁶ although the information recorded is generally of a minimal nature. While it is general practice to counsel students found guilty of any level of academic misconduct as to the requirements under the university’s policy, there is no parallel requirement relating to counseling students on the effect an adverse finding might have on an application for admission. Academics dealing with academic misconduct may indicate that the incident is disclosable, but there is no substantive requirement to counsel the student as to what steps he or she might take to begin the process of compiling material to offset the adverse finding, and legal academics, many of whom have never practiced, may not be in a position to provide such advice.

X A TALE OF TWO SITTINGS

The sometimes minimalist approach to documentation adopted in the educative mode of dealing with minor misconduct can present difficulties in framing appropriate submissions when a student applies for admission. As for any court proceeding, submissions must be made on the basis of facts in evidence. Despite the intellectual discourse surrounding the nature of authorship and postmodern interpretations of writing as ‘intertextual’, submissions which rely on postmodern theories of text liberated from their authors will find no sympathy with the court.

Where a finding of minor academic misconduct is concerned, the primary evidence is in the form in which the student was notified of the outcome of the investigation and the information which is sworn in the applicant’s Affidavit of Compliance. Obviously, it is preferable that the (in legal terms, self-serving) evidence of the applicant is bolstered by appropriate consistent official communication.

Consider the following three cases – each of which involved allegations of plagiarism.

Case 1: Applicant A had, in an assignment of 3,000 words, made extensive use of a scholarly article, citing it some 24 times. Despite this, there were a significant number of passages within the assignment which, although sourced from the same article, were not referenced. In some cases, the unattributed sections arose because, in the process of reducing the original draft to meet the word limit, a number of footnotes had been removed with text. Adjacent text which remained, equally attributable to the article, was thus left without acknowledgement or citation. In other instances, the reduction of words in particular sections of text had removed the student’s own commentary, and what was left naturally bore a more pronounced resemblance to the source material than was evident in the longer draft.

Case 2: Applicant B had been the subject of an investigation by a faculty committee regarding an allegation of plagiarism by the unit co-ordinator. In effect, the

¹³⁴ See QUT, above n 55, MOPP E8.1.6

¹³⁵ Ibid, MOPP E8.1.6

¹³⁶ Ibid, MOPP E8.1.6

submitted assignment was a pastiche of commentary and arguments derived from a range of sources (identified by submitting the assignment to a check using SafeAssign). The marker had identified every piece of text which had been copied from the identified sources (which, admittedly, represented a significant proportion of the assignment as submitted). B had, in fact, identified the relevant sources, and had footnoted paragraphs where the copied text appeared, although he had not identified the extent of the text or arguments sourced externally.

Case 3: Applicant C had, in an assignment of 2,500 words, quoted extensively from a government report which was one of the principal and obvious sources of background information relevant to the topic. C was an overseas student returning to study after a considerable break, and was unfamiliar with appropriate modes of citation for online resources. C had quoted directly from the report. While the paragraphs involved had footnotes to the report, the text sourced from the report was not delimited and there were no references to page numbers. There could be no realistic finding that there was a deliberate attempt to conceal the report as a source for the assignment, since it was clearly identified by its full title a few paragraphs into the assignment. Throughout the assignment, there were 16 footnotes (of a total of about 30) which identified the source of material in a paragraph but without a clear indication of the text quoted.

There is, obviously, a superficial similarity to these three incidents: each involved plagiarism in that while the sources of material were acknowledged, there was a degree of non-compliance with proper attribution. Each, by making some reference to the source of the unattributed text, exhibits similar characteristics which prompted McMurdo J in *Humzy-Hancock* to observe that ‘it would be a curious form of plagiarism’ which both sought to conceal a source and drew explicit attention to it.¹³⁷

Applicant A presented early in the admission process, and had already prepared a draft affidavit setting out in very precise detail the nature of the findings (including the identification of where each missing citation had been lost in the process of editing) and the explanation regarding the editing process. It was supported by documentation from the academic concerned which acknowledged the plausibility of the explanation. Moreover, A had already sought counselling from senior counsel on no less than three occasions, such advice covering not only the ethical issues raised by the incident and their relevance to admission, but also practical issues including document management (which had been the primary cause of the shortcomings in academic standards).

Applicant B had sought advice effectively at the last minute. At the first (very informal) meeting with the author regarding his admission, he indicated that there were ‘some’ suitability matters, but specified only two traffic infringements. Only later did he ‘remember’ two plagiarism findings and realise that these were disclosable, at which time he sought further advice very close to his admission date. This was despite the formal communication from the university drawing attention to the need to disclose the incident to the LAPB on seeking admission. However, the committee’s comments lost some of their force by observing that the LAPB might choose not to oppose the application, and that B would have a

¹³⁷ *Re: Humzy-Hancock* [2007] QSC 034, [20].

chance to explain the circumstances at the time of application.¹³⁸ In doing so, the documentation may have inadvertently created the impression there was no immediate need to address the issue and that mitigating circumstances (such as stress) could be significant in terms of admission.¹³⁹

Applicant C had first sought advice at the start of the process of preparing documentation for admission, unsure of what impact the finding of academic misconduct would have. The circumstances were sufficiently similar to those of *Humzy-Hancock* (in the sense that the source of the text was identified) that submissions could be drafted based primarily on McMurdo J's comments in that case and the fact that the assignment was marked without penalty. The only remedial requirement was that the 'offending' parts of the assignment be resubmitted with appropriate attribution (ie, fulfilling and highlighting the educative, rather than the punitive, aspect of academic discipline).

The three incidents highlight the lessons which should be learned from judicial statements and practice in response to disclosed academic misconduct. Neither Applicant A nor Applicant B had been provided with adequate counselling at the time of the incidents as to the significance of the findings on their suitability for admission, beyond notification that they were disclosable. The university documentation in Applicant B's and Applicant C's case was provided by non-practising legal academics, and was understandably detailed with respect to the policies under which the action was being taken, reflecting the focus on standards of scholarship, but without a detailed apprehension of the ramifications in terms of admission. Applicant B had been ill-served, in that the information provided had not sufficiently alerted him to the seriousness of the findings, nor of the necessity of taking immediate steps to limit the impact of the findings on an application for admission.¹⁴⁰

Applicant A by contrast had been comprehensively and perceptively advised immediately the incident had occurred as to what steps should be taken to ameliorate the effects of the adverse finding and to maximise the possibility of a seamless admission ceremony. A had been advised to seek counselling from a senior member of the Bar, and had done so on no less than three occasions some time *prior* to seeking admission. The counselling was documented and indicated

¹³⁸ The information provided by the University included the advice that 'while [the LPAB] requires full disclosure it may not oppose an applicant's admission ... In making disclosure you will have the opportunity to explain the circumstances in which the misconduct occurred ...'

¹³⁹ Such a statement is misleading, in the sense that the court has repeatedly stressed that academic misconduct in response to external stressors is not an adequate explanation for breaches of academic policy: indeed, quite the opposite, in that it raises the suspicion that an applicant's reaction to stress is to take short-cuts, or to play 'fast and loose' with the institutional values at stake - see *Re: AJG* [2004] QCA 88, 3.

¹⁴⁰ Such a conclusion is effectively consistent with the view expressed by the Chief Justice in relation to the range of circumstances and actions comprehended by the term 'academic misconduct,' and that some instances which fall within this umbrella term do not in themselves, demonstrate unfitness to practice, see Chief Justice Paul de Jersey, above n 10, 1.

the specific areas in which senior counsel had provided assistance to prevent repetition of the referencing problem.¹⁴¹

Being able to present positive statements from a trusted source (senior counsel) objectively addressing precisely those issues which were highlighted in *Liveri* as being necessary before the applicant might anticipate a successful application for admission is a strongly persuasive component of any argument which seeks to establish rehabilitation. That highly specific counselling was sought as early as possible, rather than as an eleventh-hour attempt to escape the potential impact of a finding of academic misconduct on admission, added further to the persuasive potential of submissions in support of the application.

What is disturbing, in the context of the obligations which should rest on law schools as providers of professional education and training, is that the counselling provided to A did not come from an academic source, but from the student's parents (both of whom were lawyers).

The cases also demonstrate a shortcoming of the academic approach to handling investigations and findings of alleged minor academic misconduct. The level of documentation associated with adverse findings, while it meets the requirements of relevant policies referencing educative over punitive responses in the case of minor misconduct, may be inadequate in the context of admission.¹⁴² Counselling provided by academics is generally directed to values of scholarship, and does not routinely direct itself to the specific implications of adverse findings as they bear on admission. In the absence of such information, a student may be deprived of the opportunity to minimise the effect of the finding on their admission by taking immediate remedial action to assist in the demonstration of rehabilitation.

XI CONCLUSION: BEYOND MERE EDUCATION IN THE NORMS OF ACADEMIA

While not all law graduates seek admission, the conferral of a law degree is generally a prerequisite to admission as a lawyer. Clearly, the values of both the academy and the courts are aligned with traditional institutional values, uncomplicated by a cultural critique that problematises concepts of authorship and ownership of ideas and the words which embody them. The nomothetic values espoused by each institution, while not wholly co-extensive, nonetheless overlap in the context of involving an obligation of honesty (albeit instantiated under

141 Counsel had specified that the areas in which counselling had been provided were: proper techniques of research; technical aspects of writing which synthesised original material with sourced material, and document control.

142 That is not to say that where the handling of allegations is by a committee there will necessarily be the clarity or detail which would be desirable: see, for example, *Law Society of Tasmania v Richardson* [2003] TASSC 9 (18 March 2003) [16] where Crawford J described the shortcomings of the formal findings of the committee which determined charges against Richardson ('It is difficult to understand just what the academic misconduct committee determined the facts to be and the respects in which Scott Richardson's conduct was thought to amount to academic misconduct. The committee did not specify whether it amounted to cheating or plagiarism ...' Further, '[i]n finding that Scott Richardson was "in error" the committee did not identify in what way. In determining that his approach to the assignment "did not meet the expectations of the School of Law," the committee did not identify what those expectations were, nor why they were material to the determination of academic misconduct' [17].

different norms) and a requirement of adherence to institutional practices and values. The failure of students to abide by the norms of the university not surprisingly raises suspicions that they might be disinclined to adhere fully to the norms of legal practice.

For the purposes of preparing submissions in support of admission, the most significant difference between the cases does not lie in any arcane taxonomy of academic misconduct, nor primarily in any assessment of the comparative seriousness of the disclosed offences (although that is of course relevant). In the case of Applicant A, two major factors impact on the preparation of submissions in support of admission. Firstly, the documentation from the academic is more extensive, recording the explanation provided by the student for the errors in referencing, and at least tacitly accepting that the explanation offered was plausible and genuine - a statement which resonates deeply with McMurdo J's observation in *Humzy-Hancock* that the student's explanation was 'not so improbable in itself ... nor [was] it made improbable by other evidence.'¹⁴³

The common feature of all three cases is that the institutional response, even where giving basic advice about disclosure, had not involved specific counselling directed to those remedial or rehabilitative steps which might be taken by the student to ameliorate the effect of an adverse finding in the admissions context. Taking the cue from the closing observations in *Liveri*, the mere passage of time is not, in itself, sufficient to erase the inference which academic misconduct raises: what is required is some objective evidence from an independent source that the applicant now understands the significance of their actions in the context of the legal profession. Such evidence should, of course, be something more than a self-serving statement by the applicant or references, which are generally considered to be of little weight.¹⁴⁴

No case has yet signaled that a student once guilty of academic misconduct inherently lacks good fame and character at the time of applying for admission, although it is clear that they almost certainly lack suitability at the time of the misconduct. Indeed, the most egregious case of plagiarism to be dealt with by the courts, *Re: Liveri*, explicitly recognises that plagiarism (even of the extent and frequency exhibited by *Liveri*, together with other failings noted by the Court) does not present a permanent bar to admission. It is hard to envisage a more serious set of facts relating to academic misconduct, the failure of understanding of the nature and seriousness of the misconduct and the attempt to obfuscate the actual events in presenting material to the court in the course of application for admission. *Liveri*, then, leaves one with the clear impression that the ability to

¹⁴³ McMurdo J in *Re: Humzy-Hancock* [2007] QSC 034, [13].

¹⁴⁴ See Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness' (2002) 22 *Queensland Lawyer* 166, 169, to the effect that such references are routinely accepted without question, but bear little weight in the event of a contentious admission. There are, of course, exceptions, such as Kilroy, where the accumulation of about 40 numbers of references from highly regarded public figures, all of whom were acquainted with Ms Kilroy's history, was commented on at admission: they were, however, confirmation of matters which were easily inferred from Ms Kilroy's actions after conviction which themselves demonstrated rehabilitation: see *In the Matter of an Application for Admission as a Legal Practitioner by Deborah May Kilroy*, unreported *ex tempore* comments of the Chief Justice, 13 December 2007.

demonstrate rehabilitation by reference to external and independent assessment of the applicant's current understanding of these issues has the capacity to pave the way for an application with strong prospects of success.

The most significant conclusion arising from this discussion is that remedial action needs to be taken as soon as practicable, which of course cannot be done in the absence of clear guidance as to the appropriate steps to take. In considering applications for admission, the court is not unnaturally suspicious of eleventh-hour remorse. Seeking and documenting counselling at the earliest opportunity is obviously the best mechanism for offsetting the negative implications raised by a finding of academic misconduct. Yet in all the instances where the author has provided advice where academic misconduct was disclosed, only one applicant had received appropriate advice with regard to *timely* remediation and the form which it might take (and that did not emanate from the university, but from the student's parents).

The primary obligation of academics in law schools is, no doubt, to teach their respective subject matter, while ensuring that assessment processes conform to the institutional norms of academia. In the context of professional legal education, however, the engagement of disciplinary processes surrounding academic misconduct also obliges the relevant person or body to be cognizant of the intersection between events within the academic frame and those within the professional. We owe a pastoral duty to advise as fully as is demanded by the circumstances not merely of the academic consequences of misconduct, but also of how the relevant incident will affect a student's professional aspirations.