

# DELIVERING IN-HOUSE JUSTICE? PRACTICE AND PROCEDURE IN UNIVERSITY HEARINGS

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*This paper reports on findings from a study into decision-making practices in quasi-judicial student disciplinary proceedings at two Australian public higher education institutions. These types of decisions occur in private and are commonly considered to be of a 'domestic' nature, although the outcomes can have wide-ranging consequences for the individuals (students) affected by them and occur within large publicly-funded institutions. The study sought to contribute to the base of empirical knowledge in the field, given little empirical research in this area to date. The research undertaken was based on analysis of a sample of internal case-files from student disciplinary hearings and appeals. Decision-making practices were considered in relation to the provision of procedural fairness. Other administrative law standards were considered as relevant to the cases. The study found that in a significant minority of cases some potential or arguable breach of legal standards arose. The findings may help inform improvements to institutional practice and procedure in this particular area of educational administration.*

## I INTRODUCTION

The present study sought to investigate decision-making practices in higher education institutions, specifically in the circumstances of quasi-judicial decision-making by student disciplinary bodies (tribunals). Little empirical study has been undertaken into the practices and conduct of universities in this sphere of decision-making, although other empirical work has occurred in relation to the quality and standards of rule-making<sup>1</sup> and analysis of student cases appearing before courts and public tribunals.<sup>2</sup> This study sought, then, to respond to this gap in the research literature.

## II RESEARCH METHODS AND QUANTITATIVE DATA

The study was based on an investigation of 38 individual student disciplinary cases at two Australian public universities. All cases commenced in the 2006 academic year. By agreement with the institutions, access was granted to case files, which contained all written materials relevant to and produced in the course of the proceeding. All material in the files was de-identified prior to access. Field notes obtained from these materials are the qualitative data on which the discussion in this paper is based. The institutions are referred to as University A and University B. From University A, 21 cases were investigated. From University B, 17 files were examined (Table 1).

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Table 1: Student Misconduct Cases, Universities A and B

<b>Cases</b>	<b>University A</b>	<b>University B</b>	<b>All</b>
Total Cases	21	17	38
Academic misconduct	16	12	28
General misconduct	5	5	10
Appeals	5	6	11
Finding of misconduct, or appeal dismissed	19	13	32
Misconduct not found, or appeal upheld	2	4	6
Penalties			
<i>Academic penalty</i>	13	8	21
<i>Exclusion</i>	15	1	16
<i>Fine</i>	2	1	3

At University A, of the 21 cases available, 14 involved allegations of academic misconduct perpetrated in examinations. Only one case concerned plagiarism, and one other matter involved another allegation of academic misconduct (misconduct on a practicum, analogous to ‘unprofessional conduct’). Five cases related to allegations of general misconduct. Five matters involved an action taken on appeal. At University B, of the academic misconduct cases seven concerned exam misconduct, four plagiarism and one case involved falsification of a medical certificate.

General, or ‘non-academic’, misconduct involved what may be termed ‘traditional’ disciplinary breaches relating to improper conduct in an educational setting and/or ‘offences’ against persons or property.<sup>3</sup> New forms of misconduct, such as misuse of the electronic communications systems, are also evident. Two cases at University A are analogous to instances of fraud (in both, the matters were also referred to the police).

The institutional sources of data (that is, cases from two universities) are limited for two reasons. First, it was necessary to proceed where institutions consented to participate. For practical reasons, a limited number of institutions were approached about participation and only two agreed to do so. Secondly, the nature of the (qualitative) data was such that the number of cases investigated represented a balance between a reasonable or representative sample and a manageable amount of material. Cases covering the range of relevant procedures (academic misconduct, general misconduct, appeals) were considered to be an important to representativeness of the sample. Given the generally common nature of student disciplinary arrangements in Australian public universities, the present sample was considered to be both quantitatively sufficient and representative of the sector (that is, public higher education providers).

It may appear surprising, on the basis of the academic literature on student misconduct (which tends to focus on plagiarism), that the largest proportion of files concern exam cheating. This may be explained by the operation of internal jurisdiction. There is a tendency, as a matter of policy, in both institutions for decision-making regarding plagiarism to be delegated to a ‘local’ (School or Faculty) level. It is only where plagiarism actions are taken on appeal that they tend to appear at the ‘central’ university tribunal. All cases investigated were heard before ‘central’ tribunals.

In all but six cases the student was found to have breached the discipline rules and a penalty (or penalties) was applied, or their appeal against a primary decision was dismissed. At University A, no appeals were upheld. At University B, two cases concluded with no finding of misconduct at the original hearing, and in two appeals the tribunal found in favour of the student and overturned the original decision. In one other case, a finding of misconduct was made but no penalty was imposed. In one case, an appeal against a finding of misconduct was notified and subsequently withdrawn.

Penalties ranged from a reprimand to exclusion from the University for not less than five years. In general, the penalties at University A were more severe than those applied at University B. For example, in only one case at University B was a student excluded from the University — in this case expelled. Most penalties at University B were academic, such as imposing fail grades, or reprimand. At University A, in 12 cases students were excluded from the University (in some cases, those exclusions were suspended on conditions). In two appeal cases at University A, penalties were varied (and mitigated) on appeal. In several of the appeal cases, review was sought for mitigation of penalty, which was submitted as unreasonably harsh or disproportionate to the offence. In mitigation, it is common for students to cite financial and professional consequences of penalties, notably those that include action to exclude the student from the University for a period of time. Some appeal cases also make submissions in mitigation of penalty having regard to personal circumstances.

### III DISCIPLINE RULES

Within universities' establishing legislation there is typically provision, consistent with the wide discretion granted to the governing body (or bodies), for the institution to enact subordinate legislation (and/or by policy instrument) for the purposes of guaranteeing the 'good order and discipline of the University'.

The Discipline Rules contain a number of components:

- A disciplinary code for students, including a range of proscribed conduct and behaviours. Both sets of rules contain a broad 'general article' provision.
- Delegated disciplinary powers distributed among various officers of the University as well as to a disciplinary tribunal. The rules establish a disciplinary tribunal and its jurisdiction. All cases considered in the present sample refer to matters dealt with by one or more internal disciplinary tribunals. Powers include powers and duties to impose penalties, which may range from reprimand and academic penalties to expulsion.
- Procedure for the conduct of proceedings, which will include procedures for handling a disciplinary matter other than before a tribunal (eg, emergency action), procedure for bringing a matter before a tribunal (eg, referral), hearing procedures (including requirements for procedural fairness and excluding the rules of evidence), and appeal procedures.<sup>4</sup>

### IV SCOPE OF POTENTIAL LEGAL ISSUES

In the *majority* of cases investigated in this study there is no compelling evidence of breaches of legal standards (with the exception of provision of notice at University A: see below). Nevertheless, evidence of *prima facie* legal problems emerged in 16, or 42 per cent, of cases.

Other shortcomings were revealed in decision-making practices. The scope of these problems in particular cases is outlined in Table 2.

Insight into the decision-making process and ‘state of mind’ of the tribunal is influenced by the nature of the record contained in the case files. There are no requirements for provision of reasons or publication of decisions. There is no evidence of a student asking for written reasons. At University B, detailed minutes are available and proved a valuable source of information into the conduct and approach of tribunals. No such record was available at University A. In significant part, this particular practice (providing a record of proceedings) explains the different

Table 2: Prima Facie Legal Problems in Student Discipline Cases, Universities A and B

<b>Case</b>	<b>Nature of misconduct</b>	<b>Nature of principal issue(s) and/or arguable defect(s)</b>
A6	Academic misconduct; analogous to ‘professional misconduct’ on practical placement	Disciplinary action beyond power; tribunal lacks jurisdiction
A10	Exam cheating	No evidence; evaluation of evidence; bias
A16	General misconduct (attempted theft from university bookshop)	Failure to take into account relevant consideration; retrospective application of penalties
A20	Academic fraud (misrepresented residency status and undergraduate qualifications)	Failure to disclose material relied upon; failure to discharge a duty to inquire; bias
B2	Exam cheating	Denial of procedural fairness (failure to provide an opportunity to meet charge)
B3	Plagiarism	No evidence (of probative value); reversal of burden of proof; failure of disclosure (taking evidence from other ‘party’ in absence of student); bias
B4	Plagiarism	Misconception of rules (plagiarism); excess of jurisdiction
B6	Plagiarism	Misconception of rules (plagiarism); excess of jurisdiction
B7	Exam cheating	Failure to discharge a duty to inquire.
B9	Plagiarism	Failure to discharge a duty to inquire; reversal of onus of proof.
B10	General misconduct (misuse of email to send threatening communications)	Denial of procedural fairness (hearing proceeded in absence of accused student); bias
B11	General misconduct (assault against another student)	Breach of rules (failure to provide timely hearing subsequent to summary suspension); failure to supply adequate notice.
B14	Plagiarism	Misconception of rules (plagiarism); excess of jurisdiction; bias
B15	General misconduct (misuse of internet, accessing pornography)	Denial of procedural fairness (failure to provide for cross-examination of relevant witness)
B16	Exam cheating	Misapplication of rules (finding of misconduct overturned on appeal)
B17	Exam cheating	Bias; failure to discharged duty to inquire (findings of misconduct overturned on appeal)

volume of cases exhibiting prima facie legal issues. It is reasonable to assume, therefore, potential for under-reporting of problems in the present sample of cases.

## V PROCEDURAL FAIRNESS

It is well-established that the rules of procedural fairness apply to university decisions affecting students, that is, ‘domestic’ decisions.<sup>5</sup> The content of the duty varies in relation to the precise nature of the institutional decision being made,<sup>6</sup> but in respect of student disciplinary decisions the application of the doctrine can be quite rigorous.<sup>7</sup> There is insufficient space to consider the applicable extent of the rules here. Nonetheless, certain basic elements of the doctrine can be considered and/or arise in the present cases, both in relation to the hearing rule and the rule against bias.

### A *The Hearing Rule*

#### 1 *Particulars*

Satisfactory particulars are a component of the provision of adequate notice to a person whose rights, interests or legitimate expectations are affected by a decision. An accused student is entitled to know at least the ‘substance’ of the charge against him/her and the case s/he is to meet.<sup>8</sup> A simple recitation of a rule allegedly breached would not likely be sufficient,<sup>9</sup> as the basic procedural requirement is that a student is given a ‘real and effective opportunity to correct or meet any adverse statement made’.<sup>10</sup> The requirement to supply particulars is expressly stated in the rules of both institutions.

There is a systemic failure formally and sufficiently to particularise ‘charges’ at University A. I refer here to particulars of allegations of fact, act or omission on the part of a student, in addition to the notice of the rules alleged to have been breached. The University’s standard practice is to issue a compendious ‘charge sheet’ against the student, comprising in effect a schedule of alleged ‘disciplinary offences’ derived from both the Discipline Regulation and (in many instances of academic misconduct), by cross-reference, from alternative internal rules governing academic assessment. In general, this schedule of rules is unaccompanied by express reference to facts, actions or omissions on the part of the student. The student is presented with a considerable (and probably intimidating) list of rules alleged to have been broken. It may be that the relevant facts can be reasonably inferred from other documents, such as, in the case of exam misconduct, invigilator reports. But, as Forbes<sup>11</sup> has remarked:

A person accused of misconduct is entitled to know in advance not only the rule allegedly broken but also the particulars of how it was broken. A charge is not the same thing as particulars. A charge identifies the legal prohibition; particulars inform the person charged of the facts that are said to constitute the breach.

Even where the facts constituting the breach may be reasonably inferred from other materials, the student would likely face the further task of responding to charges implicit in all the rules notified, or alternatively second-guessing which are the appropriate rules to respond to. For example, in a relatively simple exam misconduct case, the student is confronted with allegations of a breach of the ‘general article’ and 20 other rules or sub-rules under two different statutory instruments. While the absence of factual allegations may create a real risk of leaving a student ‘in the dark’ as to what is alleged against him, the proliferation of rules cited against him/her are in practice ‘so complex or so numerous as to confuse a party or otherwise deprive him of a fair

hearing'.<sup>12</sup> The 'guesswork' required to decipher and respond to the notice means that, in nearly all cases at this institution, *adequate* notice is not supplied.<sup>13</sup>

The provision of particulars is generally more satisfactory at University B. Of 17 cases, questions regarding satisfactory particulars of allegations might reasonably be raised in four cases. In three of those cases, better particulars may have been requested, including more accurate details of alleged actions of events. In another case (at the School level), notice arguably failed to give an accurate representation of proceedings, referring to its purpose simply 'to investigate the matter', and with no regard to the disciplinary nature of the action.

## 2 *Other Deficient Notices*

In the case just referred to, a student was summoned, without notice, to an 'informal meeting' regarding exam misconduct, which staff members appear to have used as an investigation. This 'meeting' appears to have been conducted in much the same manner as a formal hearing. There is no provision for this inquiry procedure in the relevant rule or delegations. Material from the meeting led to formal allegations being made at the School level and formal notice of a hearing issued. The student indicated verbally she was unable to attend the hearing. As a result of administrative breakdown, this was not communicated to the relevant School tribunal, which proceeded in her absence and found misconduct. On appeal, by majority, the School's decision was upheld. The appeal committee did not consider the question of whether, in the face of administrative failure, an opportunity to be heard was not given, whether an adjournment the student sought was not given, or whether the matter should be re-heard. Additionally, it did not consider whether the informal investigation was appropriate or *ultra vires* the University's disciplinary procedures. Serious questions of correct procedure and conduct on the part of the University appear to have been disregarded, to the student's detriment, notwithstanding for the moment more detailed questions as to when, in the course of an inquiry, notice should be given.

In another case at University B, a student was summarily suspended from the University following an allegation of physical violence against another student. The rules required subsequent notice of a hearing and the hearing to be convened within 10 days. The 'emergency' action can last no longer than 14 days. The student countered that she was not provided notice of the rules under which the suspension occurred and was suspended for 30 days, in which case she had 'effectively failed the semester'. The tribunal issued a reprimand and arranged (presumably with consent) the student's withdrawal without financial or academic penalty. The University sought, it would appear, to apply some principles of restitution to its own breach of the rules and its unsatisfactory notice.

## 3 *Disclosure*

The requirement to disclose material or information that may be relied upon by a decision-maker is a cornerstone of administrative justice,<sup>14</sup> and a logical extension of proper notice and the entitlement of an affected party to know the case they need to meet.<sup>15</sup> Universities are generally quite conscious of the need to provide relevant documentation and in 'routine' discipline matters, such as plagiarism or exam cheating, this occurs as a matter of course.

There are two circumstances in which unfairness in this respect occurs: one exceptional, the other recurrent. In one case (A20), a Chinese student was excluded for at least 5 years for 'academic fraud'. The student had misrepresented himself as a permanent resident when he held only a temporary resident visa. It was also alleged that he had misrepresented his academic qualifications

by submitting a false certificate of an undergraduate degree in China.<sup>16</sup> The documents suggest complex, unfortunate and matrimonial causes to his situation. In particular, it could be inferred from information on the file that his ex-wife wrote to the University bringing these issues to its attention. An official receiving the information referred the matter to the discipline tribunal, with the advice that the source and existence of the correspondence not be disclosed to the accused student. The conduct of the proceedings would suggest that the letter and its author were not disclosed to the student, and he had no opportunity to contend with its contents (nor with the author or her motives). It seems likely that this material had considerable impact on the case and on the student's fortunes. For instance, it may have exposed malice and/or misinformation on the part of the estranged wife. It may have given greater scope for the student to bring to light the role of his estranged wife in the process of his application and enrolment at the University. In short, the student may have tested, or may have wished to test, the credibility of this evidence.<sup>17</sup> Additionally, it would appear the Panel made no effort to hear from the wife or seek to have her appear as a witness.<sup>18</sup> Such an appearance may have allowed cross-examination by the student or his representative. There are various other potential breaches of law in this case.<sup>19</sup>

In the second set of circumstances there is a practice by tribunals to take evidence or receive oral submissions in the absence of the student. This occurs in five cases at University B. This kind of conduct tends to contravene directly the admonition of Lord Denning in *Kanda v Government of Malaya*<sup>20</sup> that a decision-maker must not 'hear evidence or receive representations from one side behind the back of another'. Alternatively, it may be argued that, even where information of substance is not revealed or at issue in the student's absence, proceeding in the presence of one 'party' (or even where they are solely considered an informant) may lead to claims of bias. In at least three cases, the tribunal's exchange with School officials contains matters the student may wish to know, correct or contend with. In two cases, the student and their representative were expressly required to leave the proceedings while the tribunal took further evidence from representatives of the relevant School. No record of any additional matters of substance appears to have been provided to the student. In another situation, two students were investigated over exam cheating allegations, in which one was alleged to have sent a text message to the other containing answers to exam questions. The matters were heard at separate hearings, and evidence and submissions were taken from both students in their own hearings. The tribunal appeared to act on knowledge elicited from the first hearing in the second. No record made available to the second affected student. Neither student, however, sought to call the other to give evidence before the tribunal.

### B *A Precarious Impartiality?*

The 'second limb' of procedural fairness ensures a prohibition at law on a decision-maker acting partially, or, by interests, conduct, association, or consideration of extraneous information,<sup>21</sup> failing to approach a matter with a mind open to persuasion. Bias may be actual (prejudgement) or ostensible (reasonable apprehension of bias 'on the part of fair-minded, informed lay observer'<sup>22</sup>). The applicable test will vary depending on whether the decision-maker is exercising a statutory duty or giving effect to the rules of a private organisation. Although they bear certain characteristics of 'domestic' tribunals,<sup>23</sup> the test for bias in university disciplinary tribunals is absence of apparent as well as actual bias.<sup>24</sup>

Problems of the 'reasonable apprehension' of bias can be especially sensitive in the context of inquisitorial proceedings where active participation of the adjudicator in the proceedings is expected or required.<sup>25</sup> Interventionist conduct by decision-makers in administrative review or

adjudication has led to tribunal decisions being struck down for appearances of bias,<sup>26</sup> although discretion to engage in active lines of inquiry has been advocated in other quarters.<sup>27</sup>

Arguably, the question of bias arises in seven cases, across both institutions, and questions regarding actual and apprehended bias arise. In addition, the approach of the tribunals in adopting a limited inquisitorial procedure has the potential to raise questions of bias, if proceedings are not handled in a sufficiently prudent manner.<sup>28</sup> The cases involve a range of potential circumstances of bias, in particular allegations of prejudgement, a decision-maker with a direct interest in the proceeding, and conduct by a tribunal that may bring its impartiality into question.

In A10, an examination cheating case, the chair of the discipline tribunal would also appear to have been the examiner, among whose tasks it was to provide a written report on the allegation of misconduct. He provided a report tentatively in support of the invigilator's allegations. This case would appear to be a classic instance of a person acting as 'a judge in their own cause', that is, as having a direct interest in the proceeding over which he was presiding, a ground for automatic disqualification. It would not be arguable that the rule of necessity could be invoked in this circumstance.<sup>29</sup>

In cases B3 and B10, the tribunal proceeded in the students' absence, in the former case against the protestations of the student's representative. The tribunal examined the representative from the academic department (the party 'referring' the charge) in the students' absence. In the latter case, the tribunal summarised the proceedings to that point once the student have arrived. This type of conduct may be distinguished from that in case B13, where a tribunal proceeded in the student's absence after the student had been effectively given notice of the hearing on two occasions and failed to appear both times.<sup>30</sup> The tribunal appears to have made inquiries as to whether the student would be participating. In B3 and B10, a claim might be made that a decision-maker is taking evidence 'behind the back' of one party (the student), thus not affording him/her a fair hearing, although summarising the material (especially adverse elements) would tend to mitigate the possibility of unfairness. In respect of the bias rule, partiality may be attributable to the tribunal because of improper communications with a person effectively in the position of accuser, notwithstanding that their prosecutorial role is limited to bringing the charge and proffering evidence adverse to the student (or potentially doing so).<sup>31</sup> That fact that this conduct occurred in the context of a hearing is different to inquiries that a tribunal might reasonably conduct *ex parte*, on its 'own motion', or outside of the context of a hearing.<sup>32</sup>

In cases B14 and B17 allegations of bias and 'ill-will' are directed against primary decision-makers at the School level. Subsequently, those decisions were taken on appeal. Case B14 is of limited value as the student withdrew from the University and the case not heard before the appeals tribunal. It is not possible to make any assessment of the allegations. In Case B17, the rather exceptional circumstances arise where patent claims of bias against a decision-maker are made and dealt with. In that case, a student was found to have committed exam misconduct by a 'local' (School) panel, specifically for taking an annotated sample exam paper into an examination. The student took the matter on appeal, and at the latter hearing was accompanied by a solicitor. In a rare outcome, the Appeals Board found for the student (by majority) on the ground *inter alia* that the primary decision-maker acted with bias and 'ill-will'. On the materials available, two grounds of bias appear to be made out: first, that a remark by the original decision-maker that 'Asian' students' handwriting all look alike gave rise to the apprehension of bias on the decision-maker's part; second, on evidence adduced from a Student Rights' Officer in attendance at the original hearing, that it was apparent the decision-maker was already predisposed to a guilty finding. The appeals board, however, appears only to make a finding of bias in respect of

the former circumstances. The board does not appear to deal with the latter claim in its recorded deliberations.<sup>33</sup>

### 1 *A20: Bias and Inquisitorial Bodies*

Finally, I think case A20, the Chinese student academic fraud case, presents challenges on the question of bias. It brings into relief problems of impartiality for those tribunals adopting inquisitorial procedures. Adoption of a limited, if not truncated, form of inquisitorial procedure may well present problems in the appearance of ‘disinterested’ conduct,<sup>34</sup> where the procedure (or some element of it) disadvantages one side or the other.

In A20, allegations were made and evidence supplied against an international student. There are inferences that the allegations came to light by way of a letter to the University from the student’s estranged wife. The allegations were investigated but apparently their source was not disclosed to him (although the complaint was disclosed to the tribunal). There is some inference that the complaint was motivated by malice, although it was also not without substance. The University’s investigations principally went to immigration authorities, the relevant educational institution in China (undertaken by administrative sections of the University) and examination of the student himself at the hearing. The student supplied documentary evidence in support of his character and marital circumstances. There was no indication that the original complainant was interviewed, let alone examined before the tribunal. Additionally, there appear to have been irregularities in administration of the student’s enrolment, and there is no suggestion that any evidence was taken from relevant administrative staff. The student appears to have been unrepresented.<sup>35</sup>

The manifest problem is that the procedure adopted lends itself to a charge of ostensible bias. At worst, especially taking the anonymity and non-disclosure of the original complainant into account, there is an appearance of the tribunal conducting itself as a partisan in the proceedings. In any case, the question of procedure adopted (and hence the decision-maker’s conduct) raises the prospect of a reasonable suspicion that the tribunal had not brought an open mind to its task. This nexus between the procedure adopted by a decision-maker and the appearance of bias arose in *R v Optical Board of Registration; ex parte Qurban*<sup>36</sup> (‘*Qurban*’) and has been considered since.<sup>37</sup> In *Qurban* the decision of the tribunal was quashed for bias, as it had so actively engaged in the process of investigation its conduct amounted to assuming the role of prosecutor as well as adjudicator. If literal breach of the *nemo iudex* rule can be achieved by the investigative zealotry of a disciplinary tribunal, then arguably a procedure that effectively amounts to *abstention by a tribunal from considered fact-finding* produces the same impartiality by different, indeed contrary, means.<sup>38</sup> Such an effect might reasonably have been alleged in the Chinese student’s case. The tribunal’s decision, on its face, reveals a mind not open to persuasion, and that appearance substantially derives from the procedure adopted in practice by the tribunal, whose operation constrained the inquiry, effectively limited information available to itself (including any contradictory information put by the student to the original complaint), and thereby might be said to have closed its mind.

Problems of reconciling procedure and impartiality in student disciplinary actions, I suggest, go beyond the particular circumstances (and failings) of this Chinese student’s case. As with the disciplinary schema at issue in *Qurban* and *ex parte S*,<sup>39</sup> the student discipline procedures under investigation contain no formal provision for a separation of roles or powers between preliminary investigator and adjudicator. In matter of fact, in A20 the preliminary investigations were handled (for good or ill) on an informal, ad hoc, basis by university administrators. Tribunals are therefore

left to conduct the proceedings, including enquiries, as best they can. In most cases, where extensive investigations do not appear to be required, this may be satisfactory. But that outcome is contingent on the circumstances of particular cases as much as (if not more than) on the design of procedure.

Student disciplinary proceedings generally consist of exchanges between the tribunal and the student (and his/her representative, as the case may be). This inquisitorial character of proceedings contains a substantial, if not inherent, tension between fairness and impartiality, notably in the propensity of an active adjudicator being seen to be acting in the role of ‘prosecutor’, or advocate for the case against the student. Precisely this issue arose in *Simjanoski v La Trobe University*,<sup>40</sup> an academic misconduct case, but the claim of apparent bias failed because the interventionist conduct of the tribunal was held to be within its powers and interpretation of the proceedings as adversarial was rejected.<sup>41</sup> Fairness does not require ‘non-intervention’ by the decision-maker in the proceedings, but, as Professor Allars has remarked, ‘situations may arise where it is difficult for an umpire to comply with both the hearing rule and the bias rule at the same time, or at least an umpire must tread a narrow and dangerous path between infringing either rule’.<sup>42</sup> This type of inquisitorial procedure has been more roundly criticised in respect of US administrative appeal jurisdictions. Wolfe and Proszek<sup>43</sup> have argued that the inquisitorial ‘judge’ in ‘single-party’ proceedings necessarily tends to conduct matters as a ‘moving party’, if not in a prosecutorial fashion. This conduct is a *structural corollary* of the need to engage in fact-finding and adduce evidence for the purposes of attaining the complete ‘administrative record’,<sup>44</sup> where an accusatorial party is absent. In resolution of these tensions, Professor Allars proposes that the concept of ‘non-intervention’,<sup>45</sup> or ‘neutrality’, on the part of the decision-maker is the wrong way to approach the problem. Given that what is substantively at issue in administrative proceedings (and recognised in the doctrine of procedural fairness) are *interests*, the proper role of the adjudicator is ‘disinterestedness’, not neutrality.<sup>46</sup> This may also be seen as synonymous with ‘even-handedness’.<sup>47</sup> The treatment of Refugee Review Tribunal decisions, for instance, by Australian superior courts would indicate that active adjudication in ‘single-party’ actions can be accommodated within the bounds of impartiality and fairness.<sup>48</sup> Wolfe and Proszek argue that the tendency to ‘predisposition’ (that is, bias) in administrative-inquisitorial proceedings cannot effectively be avoided, and a more sweeping reform of procedure in administrative adjudications is warranted.

## VI ISSUES ASSOCIATED WITH INQUISITORIAL AND ADMINISTRATIVE PROCEEDINGS

### A *The Legal Burden*

In a number of cases, argument is made on behalf of a student that the tribunal has either incorrectly imposed the burden of proof on the student, or alternatively, failed to impose the onus on the School or other ‘party’ bringing the allegations of misconduct to prove their case. In what is available in the files, misapplication of the onus of proof is a problem in some cases, especially plagiarism and/or ‘collusion’ cases.

In administrative proceedings it is frequently the situation that, in order for a tribunal to be satisfied as to a finding, no burden lies on one ‘party’ over another to persuade the tribunal of its position and therefore to discharge an onus of proof.<sup>49</sup> This is especially the case where the curial sense of a *lis inter partes* does not apply.<sup>50</sup> However, obligations vary with the nature of the proceedings and the duty to discharge the legal burden operates in disciplinary proceedings, especially as a result of the accusatorial character of the proceedings.<sup>51</sup>

It would be strange if, even allowing for the administrative nature of the proceedings, the general onus, based on common sense and considerations of justice and summed up in the phrase 'he who asserts must prove,' did not apply.<sup>52</sup>

In student discipline proceedings, the onus of proof of a breach of university discipline lies on the 'prosecuting' School or other body bringing the accusation, or alternatively, on the tribunal itself if, in substance, it is the accuser.<sup>53</sup>

This question arises for A10, B3, B7, B9, B12 and B17. In A10, the student conceded misconduct in respect of one minor charge of the 19 alleged. The student disputed the 'general article' and serious charges, such as cheating, committing academic misconduct or breaching the 'good order' of the University. Neither the complainant nor the tribunal appeared to possess evidence regarding the contents of 'unauthorised materials', whether the student had used the materials or gained any advantage from them, or whether her story (having gone to the toilet with menstrual cramping and unwittingly taken 'unauthorised' materials with her) was implausible or lacked credibility. On appeal several of these factors were cited as grounds that the penalties imposed were disproportionate.<sup>54</sup> It is difficult to say, on the documentary evidence at least, that it could have been discharged in regards to many, or most, of the 'charges', presuming the burden is on the complainant in these circumstances,

The situation at University B is more mixed. In two plagiarism cases (B3 and B9), the misconduct was alleged to have involved more than one student, and the findings appear to be primarily based upon similarities between, or copies of, other students' work. Prima facie evidence of misconduct exists but the complainant adduced no evidence to attribute misconduct to the accused student. In B3 the matter is decided against him.<sup>55</sup> The file includes correspondence with the University Solicitor's Office concerned that the matter has not been correctly decided. There is no record that the matter was re-heard. In B9 the presumption seemed to lie against the student and at times the line of questioning from the tribunal appears hostile to him. The student was unable to answer why his work (construction of a web site) was the same as that of another student (who had already completed the course). The tribunal decided against him on the basis of the strong similarities and the inference that the accused student had committed the plagiarism. Significantly, there was no evidence adduced by the 'complainant' School, nor the tribunal, as to *how* the student had, or could have, gained access to the original work.

There is occasional evidence of decision-makers' frustration with requirements of proof. This sentiment is exemplified in material from a School hearing at University B (B17). The allegation facing the student (which she disputed) was that she had taken a 14-page marked up exam booklet into an examination. The student's representative asserted that the handwriting on the unauthorised material and the student's exam differed. The School found against the student on the basis inter alia that '*...someone* brought the sample paper into the exam room'.<sup>56</sup>

A burden of proof lies against a person or body bringing misconduct charges against a student and there is evidence that the burden has been ignored, if not reversed, by some university tribunals. Where this problem does arise, it does so notably where the case against the student is circumstantial, where there are no direct proofs of the student's misconduct. It may be that decision-makers in those situations do not sufficiently grasp the nuance and balance of their role which is to arrive at a state of reasonable satisfaction that the accused student has engaged in misconduct. They may expect to be persuaded definitively, or sufficiently, one way or the other but find themselves 'unpersuaded either that a circumstance exists or that it does not exist'.<sup>57</sup>

Allocation of the burden of proof to the accuser, in that case, becomes a precursor to the tribunal's state of mind: that, if unpersuaded, it must find for the student.

### B *The Evidentiary Burden*

In respect of administrative tribunals charged with regulating their own proceedings, the general rule at common law is that the formal rules of evidence do not apply but that decisions made by those bodies must be based on evidence that is credible, relevant and logically probative.<sup>58</sup> As it has been famously stated, administrative tribunals cannot ignore the rules of evidence 'as of no account'.<sup>59</sup> They must be accorded at least some 'persuasive value',<sup>60</sup> depending on the circumstances, as they have evolved as a key mechanism for the testing of proofs and attainment of truth in adjudicative action.

The analysis supports the notion that there is *some* basis<sup>61</sup> for findings of misconduct in these student cases.<sup>62</sup> In many exam cases, misconduct findings appear to be uncontroversial, based on written reports from invigilators and examiners, and the availability of confiscated materials (eg, 'unauthorised' materials taken into exams). In some cases, misconduct is not disputed (although penalty may be), and students may even exhibit contrition or mitigating circumstances.

### C *The Treatment of Evidence*

Yet, the general approach of disciplinary bodies is susceptible to criticism on a number of grounds. There are particular cases where material facts are disputed (15 cases) and/or there is contest over the evaluation of evidence which may go in the student's direction. In addition, there are also circumstances in which further evidence may have been adduced by the student (or by the tribunal itself) but was not. The more systemic criticism lies in those cases where credibility or reliability of evidence would typically be at issue, especially where evidence is provided by witnesses or might reasonably be provided by witnesses. Exam misconduct cases<sup>63</sup> and incidents of general misconduct are the obvious circumstances where credibility or reliability of witnesses would be at issue. Leaving aside School/Department evidence, the potential for witness evidence to be adduced and/or cross-examination to be conducted, in respect of incidents of alleged misconduct, appears relevant to seven cases. It is openly drawn into dispute in only one case. Yet in none of those cases was witness evidence adduced either by a student in support of their own case, a School/Department in support of their referred allegation, or a tribunal in the course of inquiry.

The role of School/Departmental representative is ambiguous. On the face of it, they have a prosecutorial function (referring the case, presenting argument and/or evidence in support of the case for misconduct, etc). In practice they may also act as an 'expert' witness<sup>64</sup> for the tribunal, for example in considering assessment or pedagogical methods, or academic content. There is no evidence of formal cross-examination of those representatives by a student or a student's representative.<sup>65</sup> The process of examination is conducted primarily, and led by, the tribunal. The tribunals possess their own 'expert', or at least 'inside', knowledge, which they are entitled to bring to bear on the investigation and on the tribunal's decision-making.<sup>66</sup> This expert knowledge may include knowledge of academic procedure (eg assessment, teaching methods) or course content. However, this knowledge does not preclude disagreement and/or uncertainty over key academic concepts such as plagiarism.

In short, issues arising on the treatment of evidence particularly concern problems of evidentiary practice and procedure, namely, the question of the testing of evidence, especially

for reliability and in respect of witnesses.<sup>67</sup> The cases do not advert to findings of misconduct made in the face of obvious ‘unreasonableness’, such as in the absence of *any* reliable, relevant and logically probative evidence. In some cases where ‘not guilty’ findings are made, it would appear to be on the basis of ‘no evidence’. In other cases, where questions over, for instance, weight of evidence affect decision-making, it is not possible to assess the process of evaluation as no written reasoning is available. Information available from University B in written minutes would suggest, however, cursory evaluation of evidence before decision-makers and a general absence of deliberation taking into account appropriate standards or measures in that process of evaluation.<sup>68</sup>

#### D *The Duty to Inquire*

In recent years, the question of a duty to inquire (or enquire) has exercised judicial<sup>69</sup> and academic<sup>70</sup> minds extensively, especially in the context of tribunals with a remit to govern their own procedure and/or where inquisitorial procedure is, expressly or impliedly, an appropriate mode of procedure in the (statutory) context in which the particular tribunal operates.<sup>71</sup> An inquisitorial approach is available to student disciplinary tribunals (and it is the approach used in practice), and this approach may well be influential on the existence and operation of a requirement to make due inquiries.

The scope and content of a duty to inquire is not straightforward, and it is not possible to undertake an extended discussion of that duty here. Suffice it to say a tribunal with wide discretion to regulate its own procedure has a limited duty to make inquiries and undertaken investigations,<sup>72</sup> having regard to the nature and functions of that body.<sup>73</sup> In limiting that duty, the courts are influenced by the prevalence of the adversary method in adjudication. A duty to inquire is viewed as a correlate of the requirement to take into account relevant considerations,<sup>74</sup> or a failure to act reasonably,<sup>75</sup> and the duty to act fairly.<sup>76</sup> While the duty may be enlivened by facts that are constructively known to the decision-maker, and there may even be circumstances in which ‘own motion’ inquiries are warranted,<sup>77</sup> the general rule is that a tribunal is not required to make a party’s case for it.<sup>78</sup>

The scope of the duty in *Prasad* applied to ‘obvious’ inquiries, where information was ‘readily available’ and ‘centrally relevant’.<sup>79</sup> The more recent (High Court) variation on this principle was that the duty may apply to ‘an obvious inquiry about a critical fact, the existence of which is easily ascertainable’.<sup>80</sup>

A problem arising in the present student discipline cases is that fact or inference may advert to further relevant information, often in support of a student’s case, but not put before the tribunal by the student nor dealt with in argument, examination or deliberations. The problem, in my submission, is both one of legality in decision-making and of practice and procedure crafted to achieve what, on the face of it, student disciplinary tribunals seek to achieve: an adjudicative inquiry, with an accusatorial character. In this respect, the situation in these tribunals is not dissimilar to flaws found in the approach of a public service appeals committee in *Finch v Goldstein*,<sup>81</sup> including that the inquisitorial body might ‘[absolve] itself from the need to inquire further into the truth or otherwise of ... allegations’<sup>82</sup> or that a variable standard of enquiry might apply depending on all the circumstances.<sup>83</sup>

In five cases, the issue as to whether the tribunal has conducted a sufficient inquiry arises. The outcome of all five cases goes against the students involved.

Case 20 at University A has been referred to already. In that case, a student was found to have committed misconduct through misrepresenting himself as a domestic student and, as a basis for admission, as a graduate of a Chinese university. Among the various developments of this case, express reference is made in the case to the involvement of the student's (estranged) wife in these actions, and indirect inference is made to her involvement in these misrepresentations coming to the attention of the University administration. Additionally, the student's own evidence included the claim that there was little oversight or proper assessment of the student's application by internal administrators at the time he came to enrol.<sup>84</sup> There is no information as to whether the student's ex-partner or the relevant administrator(s) was called to give evidence.<sup>85</sup> The inferred actions of the ex-wife and suggestions of internal maladministration are troubling aspects of this case.<sup>86</sup> They are matters to which the tripartite test of inquiry ('obvious', 'centrally relevant' or 'critical', 'ascertainable') may well have applied.<sup>87</sup> In the face of the possible consequences,<sup>88</sup> the student was entitled to have the case heard rigorously, to a high standard of proof.<sup>89</sup>

In Case 7 at University B a finding of misconduct was made against a student where he had received an SMS message from another student in the course of an examination and the message had assisted him with the exam. Case 8 is the converse case of the student sending the message. The students disputed that they had intended to cheat or that the timing of the message would have provided any advantage. In addition, they claimed animosity of the part of the tutor making the allegation. The charges against the students were heard separately, and neither student was called to give evidence in the other hearing despite the matters being inter-related. No record of evidence in one hearing was provided in the other. A 'department representative' was present at both hearings, although it does not appear this was the tutor in question. In any case, they are only reported to have answered elementary questions regarding the conduct of the exam. On the same materials, the first student was found to have committed misconduct; the second student was not. In the proceeding minutes, references were made by both students to the need to make inquiries of the tutor as to his/her motivations for making the allegations. The tutor's report states that he was 'suspicious about them before [the exam]'. No evidence was adduced from the tutor as to the allegations or his 'suspicions'.

In two cases at University B (3, 9), students were found guilty of misconduct on the basis of work similar to, or reproduced, from other students. These are cases of plagiarism or 'collusion'. The facts of Case 3 are reproduced above. In that case, no other students allegedly involved in the collusion (or alleged as the source of the material copied) provided evidence. In Case 9 at University B, a student was found to have committed plagiarism by submitting an assignment on 'web page construction' based on another student's work (coding). The work submitted was substantially the same. The student admits to poor referencing but denies appropriating the work of the other student. In the course of proceedings, the student notes an antagonistic relationship with the other student. That information is dismissed by the tribunal. Following an adjournment to allow the two bodies of work to be submitted to, and compared by, the tribunal, it appears further material was submitted electronically on the student's account. The student denies he was the person who submitted the material. No evidence is adduced from the student whose work is alleged to be the source of the plagiarism, nor in relation to the submission of the additional materials.

In her critical examination of Administrative Appeals Tribunal practice, Dwyer<sup>90</sup> advocates 'adoption of an inquisitorial role' for the Tribunal, presenting an interesting point of comparison to university tribunal practice. In comparison to Dwyer, typical intervention by a tribunal in university discipline proceedings occurs by direct examination and questioning of parties,

principally the student. For Dwyer, the scope of intervention (or participation) is considerably wider, necessitating judicious and skilful action by the decision-maker at various points in the proceedings. The tribunal may take a role in the ‘formulation of the issues’, assistance to unrepresented parties, intervention in decisions about calling witnesses, and involvement in the conduct of investigations. The schema of functions articulated by Dwyer in inquisitorial conduct contrasts critically with the pattern of practice employed in student disciplinary actions, especially in what may be taken to be a *selective and unsystematic adoption of inquisitorial methods*. In particular, while student tribunals may be involved in the conduct of investigation at an oral hearing, there is little evidence, where it may be appropriate for such intervention to be employed (eg, where issues are in dispute, or further argument or evidence may be warranted), of them actively ‘formulating the issues’, intervening in decisions about calling witnesses or adducing evidence, or assisting an unrepresented party. Inquisitorial procedure may well be open to university tribunals — and it may be well advisable for decision-makers to take this approach — but there is evidence that it is employed, at best, in an unsystematic manner, and, at worst, in an incoherent, even partial, manner.

### E Representation

As a general rule, representation in this type of hearing is not available as of right. However, at University B the right to representation exists under the rules; at University A, there is no such express right, although a student is entitled to an adviser. In the latter context, representation appears to be generally permitted in practice by discretion of the tribunal.

The availability of representation for student ‘defendants’ has a significant impact on the nature of a student’s participation in the proceedings, if not in the outcome of a case. At University A, student representation is only indicated by written submissions (or appeal documents) presented on the student’s behalf; at University B, it is, additionally, indicated by minuted account of their participation in the proceedings. Typically, representation is (or appears to be) provided by a student organisation. In one instance, representation was by a legal practitioner. The value of representation to a student is evident in the substance and detail of written submissions on the student’s behalf in disputed cases, which includes the presentation of argument as to fact as well, on a number of occasions, as to law. Where the evidence is available it is clear also that student representatives may play an active role in oral argument before the tribunal, including contending with the tribunal on questions of interpretation of the rules (eg, plagiarism), the burden of proof, procedural failings, and bias. In many instances, it is by way of submission and/or challenge on behalf of students that issues in the proceedings are on the record.

The impact of student representation on the outcome of proceedings is more difficult to gauge, although research in the UK has identified that skilled representation before informal tribunals has a significant impact on the likelihood of success of applicants.<sup>91</sup> Given the overall trend toward misconduct findings, the capacity of representatives to sway tribunal opinion toward the student appears to be limited in the present cases. An obvious departure from this pattern appears in relation to case B17, the sole case in which a student is known to be represented by a lawyer. In that case, a finding of misconduct was overturned on appeal (the student was represented at the appeal), on the ground that the original decision-maker had manifested bias (in the form of racial prejudice). This case is the strongest indication that (legal) representation made a material difference to student outcomes in misconduct actions.

## VII ISSUES ASSOCIATED WITH UNIVERSITY PROCEEDINGS

### A *Substantive Unfairness*

#### 1 *Plagiarism*

Universities exercise broad powers in fulfilling statutory duties to conduct higher education and research. Disciplinary codes refine that jurisdiction. There are two circumstances in the present cases where limits of jurisdiction are tested by tribunal decisions. Arguably, the decision-makers exceed their powers on both sets of circumstances.

One of those (which is likely to be the more common) is a misconceived understanding of plagiarism. The issue is likely to have substantial and wide-ranging implications for university practice and rules.

The first point to make is that confusion, ignorance or misapplication of the concept of plagiarism can arise under the discipline rules.<sup>92</sup> The key problem that arises is distinguishing action that may be considered plagiarism from that which may be considered as poor academic work. This is an issue that I have dealt with at some length elsewhere<sup>93</sup> and will not consider at length here, other than to say that where a tribunal misconceives or misapplies plagiarism it is arguably acting beyond the power granted it by the relevant authority (University Council).

The distinction of misconduct and academic judgement here may seem fine, or even tenuous. However, it is important not least because the consequences for misconduct may be far more severe than for poor academic work, including the prospect of exclusion from the university, the end of career prospects (eg law students), and/or an impact on migration status.<sup>94</sup>

In two cases, misconduct is found against students for plagiarism (both cases concern poor referencing). Confusion over the concept of plagiarism is captured in the minutes of proceedings. In one of those cases there is a debate within the tribunal itself over the question of whether poor referencing equates to plagiarism or not.

#### 2 *Jurisdictional Fact: Who is a Student?*

A nursing student, in a midwifery program, was on practical placement at a hospital. She was held to have breached the discipline rules when she visited a patient outside of the organised activities and requirements of her academic course, whom she was observing as part of that program. The student had been ‘observing’ the patient (an expectant mother) during the course of the semester, and she was witness to an ‘adverse’ event during the birth of the mother’s child. At the invitation of the mother, the student visited her some weeks after the birth, ‘for coffee’, in a public place. The main charges against the student were that she had had contact with a patient, known to her through her program, against the ‘direction’ of relevant staff and that would have constituted a ‘risk’ to the student, the patient, and the reputation of the University. The student contended the visit was purely ‘social’ and she acted in her capacity as a ‘private citizen’. There was no dispute that the visit took place, nor that the student was a student in good standing at the University. The University, it was argued on her behalf, had no jurisdiction to discipline her for misconduct, thereby falling into legal error for want of jurisdiction. The tribunal found against her. The student was represented at the hearing and substantial written submissions were made on her behalf.

In these circumstances, the student's status appears as a question of jurisdictional fact, a 'condition precedent' to the exercise of power by the disciplinary tribunal. As the High Court stated in *Corporation of the City of Einfeld v Development Assessment Commission*:<sup>95</sup>

The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion. Used here, it identifies a criterion, satisfaction of which mandates a particular outcome.<sup>96</sup>

Spiegleman CJ stated in *Timbarra Protection Coalition Inc v Ross Mining NL*<sup>97</sup> that the issue of jurisdictional fact arose out of the process of statutory interpretation: 'Whether or not a particular finding of fact is jurisdictional in the requisite sense, depends upon the proper construction of the factual reference in the particular statutory formulation in which it appears'. As it may go to the issue of whether an authority has acted correctly or not according to law, that process of interpretation and fact-finding is susceptible to review by the courts, 'which decides whether it thinks the fact existed at the relevant time'.<sup>98</sup>

At its widest, the University's disciplinary jurisdiction applies to student conduct that may disturb the 'good order and discipline of the University'. Under the University's Act, student is defined as an 'enrolled student'. Disciplinary action must be protective of the University rather than punitive toward the student. This will include the need to maintain academic standards and safeguard its reputation and/or relationships with other bodies necessary to the performance of its functions (as, in this case, the hospital where the placement occurred). In this latter respect, the disciplinary criterion is similar to disreputable conduct clauses operating in the rules of sporting codes or other voluntary associations.<sup>99</sup> Yet, in regard to the student's 'private' visit to the mother, was she relevantly a 'student'? By way of comparison, if a student should threaten a staff member, with whom they are otherwise unconnected, with violence on a public street near the University, is he or she subject to the University's disciplinary jurisdiction? In effect, the fundamental question arising in this case is the limit of the university's capacity to regulate the conduct of individuals who happen to be students. Alternatively, in what respects are the behaviours of private citizens who are also students specific or *peculiar* to their status as students, or in other words, in what ways are the behaviours (or even disposition and manner of conduct) of students *more* than would be expected, appropriate or possible of ordinary citizens?

It is no doubt true that the 'social' visit would not have occurred other than by the a priori fact of the student's participation in the course and the particular unit. There is no suggestion on the file that the student and patient were acquainted prior to the events concerned. It is also the case that the precise scope of 'domestic' jurisdiction, as it concerns the management or 'good government' of the university, may, at the margins, be unsettled.<sup>100</sup> Finally, it appears as common ground on the file records that the student<sup>101</sup> disregarded a relevant direction from an academic staff member not to participate in the 'visit' (an action that may enliven the disciplinary jurisdiction, in certain circumstances, where applicable to a student). Yet none of these facts or concessions resolves the key issue as to where the boundary between student and private citizen lies.

The proximity of personal and professional conduct has been considered in cases concerning nurse discipline. In *Yelds v Nurses Tribunal*,<sup>102</sup> for instance, it was held that misconduct need not occur 'in the course of nursing'<sup>103</sup> but may display conduct inappropriate to the profession.<sup>104</sup> Relevantly, of course, the student was not a registered nurse or midwife and therefore did not owe professional duties applicable at law by a registered nurse or midwife. There is no evidence on the file that the University issued instructions, promulgated policy or provided advice to students

generally regarding forms and/or standards of conduct applicable to students' involvement in, or proximity to, clinical or therapeutic settings, prior to engagement in those settings.<sup>105</sup> The production of such a policy, advice or instruction may have been invaluable to the characterisation of (students') conduct and approaches to the clinical and/or therapeutic situation, and dispositive of the present problem. It is unlikely that, in practice, a document might be produced to codify or prescribe the entire range of possible situations, conflicts or ambiguities in which a (midwifery) student may find himself or herself, in the clinical setting. Nevertheless, a relevant code might identify (and sanction) the *limits* of behaviour applicable to the clinical/therapeutic setting, giving regard to the particular (educational *and* clinical) circumstances of the student. While the student on practicum cannot be treated as a registered, clinical practitioner, subject to the entire gamut of professional conduct rules, the circumstances in which they relate to the clinical setting may be treated as *analogous* to those facing the registered professional. It is noteworthy therefore that the rules of conduct of registered nurses do include 'guidelines' in respect of 'professional boundaries', including boundaries between nurses and patients.<sup>106</sup> Such rules would be apposite to the facts of the present case, and arguably influential in determining the question of jurisdiction in the absence of anything more. In the case examined that point is, of course, moot.

Nevertheless, considering, for example, the 'professional boundaries' guidelines issued by the (then) Nurses Board of Victoria, it is possible, though arguably unlikely, that the student conduct would meet the tests of (mis)conduct provided for in those rules. In an underpinning definition, the *Guidelines* state:<sup>107</sup>

### 3. Professional Boundaries

Professional boundaries are defined as 'limits that protect the space between the professional's power and the patient's vulnerability' ... Maintaining appropriate boundaries manages this power differential and allows for a safe interaction between the professional and the patient based on the patient's needs and recognising the patient's vulnerabilities. The maintenance of boundaries need not be seen as an impediment to the professional relationship, but rather as facilitating it. Maintaining professional boundaries protects the safe space in the relationship and thereby enhances the building of the trust which is essential to enable patients to reveal their needs and have them met therapeutically.

Concepts of 'power differential' and patient 'vulnerability' are central to considerations of inappropriate conduct and/or misconduct. The *Guidelines* consider 'confusion between the needs of the registered nurse and those of the patient' as symptomatic of the 'breaching of boundaries'. Concurrently, they provide scope for 'dual relationships', including social relationships.<sup>108</sup> It may be arguable, if at the margins, that the student has 'crossed' the boundaries as indicated by these professional guidelines, having regard, for instance, to the fact that the 'dual relationship' problem would not have been inevitable,<sup>109</sup> and that the student was 'giving inappropriate ... status' to the patient. Yet a number of factors militate against a finding of misconduct, even using these *Guidelines*, and on balance it is more likely that, *mutatis mutandis*, the student's action could not be subsumed within the University's jurisdiction. First, such *Guidelines* would have been of themselves of limited interpretative value and would have to be read in the context of the *anomalous* situation of the student 'nurse', thereby taking into account the limited knowledge and clinical authority of the student, the various supervisory relationships (academic and clinical), and so on. Second, the student did in fact notify the relevant supervisor of the intended 'visit' and was initially granted 'permission' to attend it. That action was consistent with the approach in the Victorian *Guidelines* to 'dual relationship' situations.<sup>110</sup> The conduct and procedure of the supervising academic authorities were problematic at best. Finally, the standard of disciplinary

procedure (especially given its professional context and potential impact on future livelihood) would arguably require the tribunal's decision on the facts to be made having regard to a relatively high standard of proof, and specifically weight be given to the student's 'presumption of innocence'.<sup>111</sup> In this case, it would be a considerable task for the 'prosecuting' School or the tribunal itself to discharge a persuasive burden against the student on the information provided.

In all the circumstances, there appears a likely error of law in the decision made in this case, although it must be acknowledged that the case comprised difficult, complex issues, warranting more than strictly legal and administrative responses.

### B *The Imposition of Penalties*

In a strict sense, disciplinary action taken by university decision-makers is not 'penal' at all, but understood as a form of 'protective'<sup>112</sup> sanction intended to maintain the order of the institution and the integrity of its academic affairs.<sup>113</sup> It is significant then — if for no other reason than from the point of view of an institutional and disciplinary culture of practice — that the language of penalty is used, and, indeed, is used in combination with other language importing a 'quasi-criminal' flavour to disciplinary action.<sup>114</sup> Penalties issued in these cases range from reprimand to exclusion from the university. They also include academic penalties (which may have financial implications), such as those affecting grades, and fines. Discretion over penalty is wide and relatively unregulated (at the 'central' tribunal level). There is no reference to 'precedent' or comparable cases. A decision-maker in this situation faces the immediate problem, on finding a student 'guilty' of misconduct, of determining an appropriate or correct sanction. This task is, arguably, problematic for two reasons. First, a notable ground of appeal is for excessive or inappropriate penalty. Second, notwithstanding comparable patterns and forms of misconduct at the investigated universities, the pattern of sanction at University A is, in relative terms, consistently more severe than at University B. For comparable cases, the consequences at the former institution typically exhibit greater gravity than at the latter. Both of these circumstances raise the question of proportionality in the application of penalties for breaches of university discipline. The question of proportionality in Australian administrative law is not well-advanced,<sup>115</sup> although the test for proportionality of penalty in this context would have regard to the purposes of the university and its objects as expressed in its governing legislation.<sup>116</sup>

## VIII CONCLUSIONS

Investigation of student discipline case-files provides greater insight into the actual conduct and practice of decision-makers in these proceedings than is possible from mere scrutiny of rules or reported cases before the courts. This information is not without its limits — notably reliance in documentary records, which are occasionally incomplete — but it does present a microcosm of disciplinary practice and decision-making in this context. It was found that an arguable departure from various legal standards occurred in a *significant minority* of cases. Other problems of practice and procedure, outside of the scope of *prima facie* breach of legal standards, were also noted. Adherence to tenets of procedural fairness, in particular, appeared problematic in a number of discrete cases. In one aspect (provision of particulars at University A) in-house practice constitutes a systemic problem. It may be remarked that, on this evidence, there is room for improvement in disciplinary practices. Improvement might begin with greater education and training of decision-makers, but also needs to consider the role and training of

'preliminary investigators' and, indeed, the structure and operation of practice and procedure in formal university hearings more generally.

*Keywords:* student discipline; university; hearing; practice and procedure; administrative law; procedural fairness.

## ENDNOTES

- 1 Duke Law Journal Project, 'Procedural Due Process and Campus Disorder: A Comparison of Law and Practice' (1970) *Duke Law Journal* 763; James Branch, 'Student Discipline Cases at State Universities in New Mexico — Procedural Due Process' (1971) 1 *New Mexico Law Review* 231; E Golden, 'Procedural Due Process for Students at Public Colleges and Universities' (1982) 11(3) *Journal of Law and Education* 337; Ferdinand Dutile, 'Law, Governance and Academic and Disciplinary Decision in Australian Universities: An American Perspective' (1996) 13 *Arizona Journal of International and Comparative Law* 69; Curtis Berger and Vivian Berger, 'Academic Discipline: A Guide to Fair Process for the University Student' (1999) 99 *Columbia Law Review* 289.
- 2 Ira M Heyman, 'Some Thoughts on University Disciplinary Proceedings' (1966) 54 *California Law Review* 73; Robert Roberts, 'Public University Responses to Academic Dishonesty: Disciplinary or Academic' (1986) 15 *Journal of Law and Education* 369; JR Forbes, 'University Discipline: A New Province for Natural Justice?' (1970) 7(1) *UQLR* 85; Donald Ghering, 'The Objectives of Student Discipline and the Process That's Due: Are they Compatible?' (2001) 38(4) *NASPA Journal* 1; Clive Lewis, 'Procedural Fairness and University Students: England and Canada Compared' (1985) 9 *Dalhousie Law Journal* 313; Cynthia Chewter 'Justice in the University: Legal Avenues for Students' (1994) 3 *Dalhousie Law Journal* 105; Jim Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham, *Student Grievances and Discipline Matters Project: Final Report to the Australian Teaching and Learning Council* (2009), Ch 3.
- 3 The general misconduct cases may be summarised as follows:  
University A:
  - Disruptive behaviour in a lecture (Case 5);
  - Attempted theft from the University Bookshop (Case 16);
  - Disruptive and unruly behaviour on a field trip (Case 17);
  - Misrepresentation of residency status and of prior academic qualifications (Case 20);
  - Misrepresentation of qualifications to another university (Case 21).University B:
  - Misuse of the university email system (sending abusive emails) (Case 10);
  - Student assault (Case 11);
  - Misuse of email system (sending threatening emails) (Case 12);
  - Assault and threats to assault (Case 13);
  - Misuse of internet system (accessing pornography) (Case 14).
- 4 The precise content of hearing procedure varies in the present situations: at University A, a tribunal proceeds on the face of the rules in an adversary fashion, to the extent that the 'complainant' (or appellant as the case may be) and the student put their respective cases before the tribunal. While it is expected that proceedings will occur, as a form of domestic action, in private, the rules at University A (but not University B) provide for an open hearing as a general rule.
- 5 *University of Ceylon v Fernando* (1960) 1 All ER 631; *Glynn v Keele University* (1971) 1 WLR 487; *R v Aston University Senate; ex parte Roffey* (1969) 2 WLR 1418; *Bray v University of Melbourne* [2001] VSC 391.
- 6 See, eg, *Ivins v Griffith University* [2001] QSC 86, where the decision related to a student's complaint and it was held that an oral hearing was not required: also *R v Aston University Senate; ex parte Roffey* (1969) 2 WLR 1418.

- 7 See generally, Bruce Lindsay, ‘University Hearings: Student Disciplinary Rules and Fair Procedures’ (2008) 15 *Australian Journal of Administrative Law* 146; for one of the more rigorous applications of the standards, see *Flanagan v University College Dublin* (1988) IR 724.
- 8 Applicant *VEAL of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* [2005] 225 CLR 88; *Re La Trobe University; ex parte Wild* (1987) VR 447, 458.
- 9 JRS Forbes, *Justice in Tribunals* (Federation Press, 2002), [10.2]; *Gardiner v Land Agents’ Board* (1976) 12 SASR 458, 470–471.
- 10 *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3d) 311, 324.
- 11 Forbes, above n 9, [10.2].
- 12 Ibid [10.14].
- 13 See *Forest v La Caisse Populaire de Saint-Boniface Credit Union* (1962) 37 DLR (2d) 440, 445, which held that a person should not have to rely on ‘guesswork’ to determine what is alleged against them, and therefore that a satisfactory notice is one which ‘must be clear and definite and particularize the grounds of complaint’: *Vanton v British Columbia Council of Human Rights* [1994] CanLII 911 (BC S C), 18.
- 14 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J); the test applies to ‘adverse information that is credible, relevant and significant to the decision to be made’.
- 15 See the points made by Mark Aronson, Bruce Dyer, and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4<sup>th</sup> ed, 2009), [8.205].
- 16 On this point, certified documentation had been sent to the University in October 2002, although correspondence from the Australian Visa Office in Shanghai in May 2001 to the student suggested the student’s degree certificate was fraudulent.
- 17 Compare *Finch v Goldstein* (1981) 55 FLR 257, 273-76; *Hamblin v Duffy (No 2)* (1981) 55 FLR 228, 240:  
 I readily understand that for the Board to reveal to each appellant the names of all persons who gave evidence before it, on matters touching on the comparative efficiency of its officers, could cause disharmony between officers of the A.B.C. and an absence of frankness by witnesses. But an appellant should be told by the Board as fully as possible, without necessarily revealing the identity of the persons concerned, what allegations have been made against him sufficient to enable him to know the case he has to meet. That is not to say that in some cases the names of witnesses should not be revealed to an appellant. This must depend on the circumstances of the particular case.
- 18 While hearsay evidence is permitted in hearings of this type, the student may have diminished or discredited it in this case, or sought to diminish or discredit it. It was an opportunity never afforded him.
- 19 For example, the student states in a Statutory Declaration that he neither completed nor signed his enrolment documents, which raises questions of fraud in regards to the enrolment. Further, the student appears to have enrolled in rush and claims not to have understood the documents he was dealing with (or indeed the process generally) and was asked no questions by the University administration upon enrolment. These claims also raise the question of consideration, if not unconscionability, on the part of the University in regards to the contract it was entering into with the student.
- 20 (1962) AC 322, 337
- 21 *Webb v R* (1994) 181 CLR 41, 74 (Deane J).
- 22 Ibid 76 (Deane J).
- 23 Forbes terms them ‘hybrid’ tribunals: see Forbes, above n 9, [2.16]–[2.18].
- 24 *Simjanoski v La Trobe University* [2004] VSC 180; *R v Cambridge University; ex parte Beg* [1998] EWHC Admin 423.
- 25 See, eg, *Re Refugee Review Tribunal; ex parte H* (2001) 179 ALR 425 and *Re Ruddock; ex parte S154/2002* (2003) 201 ALR 437; Jeffrey Wolfe and Lisa Proszek, ‘Interactional Dynamics in Federal Administrative Decision-Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer’ (1997) 33 *Tulsa Law Journal* 293; *R Medical Board of South Australia; ex parte S* (1976) 14 SASR 360.

- 26 *R v Optical Board of Registration; ex parte Qurban* (1933) SASR 1.
- 27 See, eg, Joan Dwyer, 'Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal's Use of Inquisitorial Procedures' (2002) 22 *Journal of the National Association of Administrative Law Judges* 81.
- 28 See *Simjanoski v La Trobe University* [2004] VSC 180, *Re Refugee Review Tribunal; ex parte H* (2001) 179 ALR 425.
- 29 It would have been relatively straightforward for the chair to stand down and another presiding member appointed from among the tribunal members or other qualified persons (the tribunal is drawn from a wider pool of potential tribunal members). Compare *Cain v Jenkins* (1979) 26 ALR 652.
- 30 Hence, there is no arguable defect in this case. It is not included in the list of cases at Table 2.
- 31 Compare *Stollery v Greyhound Racing Board of Control* (1072) 128 CLR 509, 517 (Barwick CJ): 'the reasonable inference to be drawn by the reasonable bystander in that situation was that Mr Smith was in a position to participate in the Board's deliberations and at least to influence to result of those deliberations adversely to the appellant. The existence of that reasonable inference, in my opinion, is sufficient warrant for concluding that, in a matter in which the Board was bound to act in a judicial manner, natural justice was denied.'
- 32 Compare *R v Coburn; ex parte Fomin* (1981) 51 FLR 79. The student disciplinary rules at issue are silent on the question of *ex parte* communications or investigations, and do require a matter to proceed by hearing.
- 33 Although upholding the student's appeal that the original decision was void, the appeals board subsequently seeks to substitute an alternative sanction — that the student must undertake an alternative assessment. Following correspondence from the student's solicitor that their (appeal board's) finding meant no alternative penalty could be substituted, the Board appears to concede this point and withdrew any sanction.
- 34 Margaret Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure' (1991) 13 *Sydney Law Review* 3 377. Professor Allars concludes that, for decision-making exhibiting propensities to inquisitorial procedure, the concept of a judicial neutrality is less helpful or appropriate in arriving at an impartial proceeding than the concept of 'disinterestedness'.
- 35 For instance, there are no written submissions prepared on his behalf by a representative.
- 36 (1933) SASR 1.
- 37 Eg, *R Medical Board of South Australia; ex parte S* (1976) 14 SASR 360. In that case, similar procedural problems to those in *Qurban* arose, such as the means by which an investigation should be conducted. *Qurban* was distinguished, however, as the Board 'procured' the investigation into the matter from the Crown Solicitor, rather than attempting to conduct the investigation itself.
- 38 As well as an arguable claim for jurisdictional error on other counts, such as unreasonableness, irrationality or constructive failure to exercise jurisdiction: see discussion on a duty to inquire below. Compare also *Huluba v Minister for Immigration and Ethnic Affairs* (1995) 59 FCR 518, where a decision on review from an original decision to reject a refugee claimants' application for asylum was invalidated for bias, as the review decision plagiarised substantial sections of the original decision. Beazley J held that this approach denied the applicant procedural fairness because the reviewer failed to bring an 'independent mind' to the matter.
- 39 (1976) 14 SASR 360.
- 40 [2004] VSC 180.
- 41 The allegations related to cheating in examinations. The Chief Examiner attended the hearing and presented charges and evidence against the students. The Court stated ([23]): 'The request that the chief examiners attend and provide materials was, as the Board said in ruling on the application that it disqualify itself, to advise the chief examiners of the hearing and "to ensure that if they were to assist [a transcription error for persist?] in the allegation, that they would be required to produce material." It was a means of ensuring administratively that the hearing could proceed'.
- 42 Allars, above n 34, 398.
- 43 Wolfe and Proszek, above n 25.

- 44 The US Federal Courts have held a duty on administrative law judges to ‘fully and fairly develop the record as to material issues’: *Baca v Department of Health and Human Services* (1993) 5 F 3<sup>rd</sup> 476, 479–480. It has also been held that ‘This duty is especially strong in the case of an unrepresented claimant’: *Carter v Chaier* 73 F 3<sup>rd</sup> 1019, 1021. The duty has similarities to the duty under Australian common law to make inquiries and/or to assist unrepresented parties, although the duty on US administrative adjudicators in respect of the former goes further than in the Australian situation.
- 45 Or more accurately, borrowing from Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), a ‘principled neutrality’, aimed at helping or hindering parties ‘to an equal degree’: Allars, above n 34, 382–3.
- 46 Allars, above n 34, 412–413.
- 47 *Koppen v Commissioner for Community Relations* (1986) 67 ALR 315; Allars, above n 34, 399.
- 48 Compare the decisions of the High Court on the inquisitorial conduct of decision-makers in ‘single party’ proceedings in *Re Refugee Review Tribunal*; *ex parte H* (2001) 179 ALR 425 and *Re Ruddock*; *ex parte S154/2002* (2003) 201 ALR 437.
- 49 *McDonald v Director-General of Social Security* (1984) 1 FCR 354
- 50 See *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 369 (Jenkinson J). The concept of a *lis inter partes* in these types of proceedings was expressly rejected by the Canadian Supreme Court in *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3d) 311.
- 51 *Minister for Health v Thomson* (1985) 60 ALR 701, 712 (Beaumont J); *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211, 220 (Foster J).
- 52 *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211, 220 (Foster J).
- 53 See Enid Campbell, ‘Principles of Evidence and Administrative Tribunals’ in Enid Campbell and Louis Waller (eds), *Well and Truly Tried* (Law Book Company, 1982) 53: ‘This would be so notwithstanding that the accuser was also, of necessity, the person or body having authority to adjudicate’.
- 54 Conceding the student was in possession of the materials, submission was made at first instance that the appropriate penalty would be a reprimand. In the event, the student was reprimanded, lost credit for the examination and excluded for 12 months (with 6 months suspended). The appeal solely went to penalty and the assertion it was disproportionate.
- 55 Although the student’s representative expressly raises the point of a reversal of the burden of proof.
- 56 In this case, the misconduct finding was overturned on appeal, on the ground that the original decision was affected by bias.
- 57 *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 369 (Jenkinson J).
- 58 *R v Deputy Industrial Injuries Commissioner*; *ex parte Moore* (1965) 1 QB 456; *Re Pochi and the Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
- 59 *R v War Pensions Entitlement Appeals Tribunal*; *ex parte Bott* (1933) 50 CLR 228, 256 (Evatt J).
- 60 Forbes, above n 9, [12.44].
- 61 Compare the dictum of Lord Diplock in *R v Deputy Industrial Injuries Commissioner*; *ex parte Moore* (1965) 1 QB 456, 488; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.
- 62 This observation must necessarily be qualified by the limits of the materials available for analysis, in particular the absence of written reasons for decisions.
- 63 Exam disputes are typically brought by an invigilator and their written evidence (report) is normally important to the case.
- 64 Compare *Simjanoski v La Trobe University* [2004] VSC 180, [23].
- 65 Although in one circumstance there is evidence of direct, face-to-face dispute and challenge between the student ‘defendant’ and a School representative.
- 66 *Simjanoski v La Trobe University* [2004] VSC 180, [25]–[30]; *Khalil v Bray* (1977) 1 NSWLR 256.
- 67 Compare, for example, the significance of witness credibility and, subsequently, the role of cross-examination in fair proceedings in student cases in *Healey v Memorial University of Newfoundland* [1993] 106 Nfld & PEIR 304 and *Mohl v Senate Committee on Appeals on Academic Standing* [2000] BCSC 1849.
- 68 For example, there is a general absence of express reference to standards of probability or likelihood

in cases of disputed facts, or attempts to systematically weigh one set of facts against other (disputed) facts. This is not say, however, that some such process of evaluation did not occur in the minds of individual decision-makers.

- 69 The leading case is *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 ('*Prasad*'), and the High Court has more recently sought to contend with and craft the duty in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39. See also *Azzi v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 48; *Dhiman v Minister for Immigration and Multicultural Affairs* [1999] FCA 1291; *Minister for Immigration and Citizenship v Le* [2007] 164 FCR 151; *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; *Kowalski v Military Rehabilitation and Compensation Commission* [2011] FCA 44; *Khant v Minister for Immigration and Citizenship* [2009] FCA 1247. Cases subsequent to *SZIAI* have been noted extensively in M Smyth, 'Inquisitorial Adjudication: The Duty to Inquire in Merits Review Tribunals' (2010) 34(1) *Melbourne University Law Review* 230, 231–232, footnotes 6–7.
- 70 Smyth, above n 69; M Groves, 'The Duty to Inquire in Tribunal Proceedings' (2011) 33(2) *Sydney Law Review* 177.
- 71 See *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, [18], [25]; Groves, above n 70, 184–191.
- 72 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549; *Azzi v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 48; *Dhiman v Minister for Immigration and Multicultural Affairs* [1999] FCA 1291; *Minister for Immigration and Citizenship v Le* [2007] 164 FCR 151.
- 73 Groves, above n 70, [25].
- 74 *Sullivan v Department of Transport* (1978) 1 ALD 383; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549.
- 75 In the *Wednesbury* sense and hence is a species of jurisdictional error: see *Minister for Immigration and Citizenship v Le* [2007] 164 FCR 151; Groves, above n 70, 203–207.
- 76 *Finch v Goldstein* (1981) 55 FLR 257; yet, see Groves' discussion of the unsettled and problematic derivation of the duty from this source: Groves, above n 70, 192–197. The prospect of the duty arising from procedural fairness was cursorily dismissed by the High Court in *SZIAI*, although with no particular reasoning: *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, [24].
- 77 See *Azzi v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 48, 74.
- 78 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549, 563.
- 79 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549.
- 80 *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, [25]; see also *Khant v Minister for Immigration and Citizenship* [2009] FCA 1247, [63]–[80].
- 81 (1981) 55 FLR 257, especially 278–80.
- 82 *Finch v Goldstein* (1981) 55 FLR 257, 278. A distinguishing feature in *Finch v Goldstein* is that the appeals body was under an express statutory duty to make 'full inquiries'.
- 83 Compare *Finch v Goldstein* (1981) 55 FLR 257, 279:  
To undertake such inquiries might mean delay, inconvenience and even embarrassment to members of the committee in having to decide on the credibility of fellow officers. It may have made no difference to their ultimate decision. But it is an inquiry, in my view, which, in the special circumstances of this case, they were bound to undertake. In not doing so they failed to fulfil their duty "to make full inquiries" into the complaint of Mrs. Finch. If the parties are not allowed to have legal representation or to be present when others are called and there is no power to summon witnesses, the need for the committee to inquire itself into relevant matters only becomes greater. It does not mean they must examine every detail but it does mean that in each case they should take sufficient steps to inquire so that what they undertake can reasonably be described as "full inquiries" into the claims of the parties.
- 84 Including that the student had not himself signed the enrolment forms. This claim was made in his own sworn statement.

85 On behalf of the student, an unsworn statement was made by a Salvation Army officer, and the student submitted his own sworn statement by statutory declaration.

86 Alongside the fact that a relatively senior University officer sought to withhold the source of the allegations and reports from the student.

87 The most challenging point would appear to have been whether information from the anonymous complainant/ex-wife was ‘easily ascertainable’ or ‘readily available’.

88 The student had been granted temporary residency under a Spouse Visa. It was unknown at the time of the hearing what type of visa he was in possession of. It may be that, in dissolution of the marriage and without a student visa, the student had no lawful residency status and may have been liable to deportation.

89 Compare *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 255 (Brennan J).

90 Dwyer, above n 27.

91 Hazel Genn, ‘Tribunals and Informal Justice’ (1993) 56 *Modern Law Review* 393, 400.

92 For instance, in Case B14, a matter of appeal from a School hearing, the original decision-maker is reported to have been ‘unclear about which policy should be used and told myself [student] and the Student Rights Officer ... to “take it up with the University”’. The student is minuted as saying in the appeal hearing, with some justification: ‘I don’t feel it is my responsibility to “take it up with the university”. The university has all the power, they make the rules, and if they don’t know which one applies, I’m not sure what I can do about it.’.

93 Bruce Lindsay, ‘Student Plagiarism in Universities: The Scope of Disciplinary Action and the Question of Evidentiary Standards’ (2011) 16(1) *International Journal of Law and Education* 27.

94 See *ibid* 37–40.

95 (1999) 199 CLR 135.

96 *Corporation of the City of Einfeld v Development Assessment Commission* (1999) 199 CLR 135, 148. [1999] NSWCA 8, [28].

98 Aronson et al, above n 15, [4.290].

99 Cf M Kosla, ‘Disciplined for “Bringing a Sport into Disrepute” — A Framework for Judicial Review’ (2001) 25(3) *Melbourne University Law Review* 654.

100 Consider the scope of the Visitor’s jurisdiction (which extends as far as management of the domestic sphere) in *Murdoch University v Bloom and Kyle* (1980) WAR 193, 199 (Burt CJ), where His Honour specifically refers to the ‘grey area’ on matters that fall within the domestic sphere and those that do not.

101 I use the term here for the sake of description rather than settling the legal status of the relevant actions or behaviors.

102 (2000) 49 NSWLR 491.

103 *Yelds v Nurses Tribunal* (2000) 49 NSWLR 491, 500.

104 See also *Childs v Walton* (unreported, NSW Court of Appeal, Samuels JA, 13 November 1990), 9.

105 On the contrary, there is evidence that the text of a *subsequent* ‘agreement’ between the student and the relevant academic area sought to contend with precisely these issues, by, for example, requiring the student to acknowledge the University’s ‘expertise’ and conduct herself in a manner comparable to relevant professional standards. This action appears to impose on the student an *ex post facto* and *ad hoc* ‘code of conduct’ as terms for suspension of an exclusion order against her. Also, the directions the student received prior to the ‘visit’ appear rather confused, if not contradictory. In the first instance, a supervising academic agrees to the ‘social visit’ where it is clear this is as a ‘private’ person. Following further internal discussions among academic staff, the contrary instruction is given. The student requests it in writing, but does not receive it until after the ‘visit’ has occurred.

106 Subsequent to development of national registration schemes for health professionals: see *Health Practitioner Regulation National Law Act 2009* (Q), including nurses, the various State Guidelines have been superseded by national guidelines: Australian Nursing and Midwifery Council *A Nurse’s Guide to Professional Boundaries* (2010). For present purposes, given that the regulatory regime in place at the time of this case pre-dated the national scheme, the State schemes are referred to: see,

- eg, Nurses Board of Victoria, *Professional Boundaries: Guidelines for Registered Nurses in Victoria* (2007); Nurses Board of South Australia, *Standard Therapeutic Relationships and Professional Boundaries* (2002); ACT Nursing and Midwifery Board, *Professional Boundaries for Enrolled and Registered Nurses* (2007); Nursing Board of Tasmania, *Professional Boundary Standards for Nurses in Tasmania* (2005).
- 107 Nurses Board of Victoria, *Professional Boundaries*, para 3.
- 108 The Nurses Board of Victoria *Professional Boundaries Guidelines* provided for a range of ‘indicative’ conduct that ‘cross’ the boundaries of the therapeutic relationship, including *inter alia* ‘giving inappropriate or special status to a patient’, ‘extending personal social invitations’, and ‘entering into a dual role with the patient or their family outside the scope of the therapeutic relationship’. These are perhaps behaviours most comparable to the circumstances of the present case. It may be arguable that the student’s conduct fell with the first of these categories, although unlikely to fall within the ambit of the latter two (the ‘social invitation’ was offered by the patient in this case).
- 109 That is to say, the ad hoc ‘social relationship’ could easily have been avoided, and the circumstances were not in, for example, a small country town (an example used in the *Guidelines* where the ‘dual relationship’ question would more likely arise).
- 110 Nurses Board of Victoria, *Professional Boundaries*, para 6.3
- 111 See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 363 (Dixon J),
- 112 Compare *New South Wales Bar Council v Evatt* (1968) 117 CLR 177,
- 113 Compare *Ex parte Forster; Re University of Sydney* (1963) SR (NSW) 723.
- 114 For example, terms such as ‘guilty’, ‘charge’, and disciplinary ‘offence’ are employed in the rules.
- 115 See Patrick Quirk, ‘An Australian Looks at German “Proportionality”’ (1999) 1 *University of Notre Dame Australia Law Review* 39.
- 116 *Leask v Commonwealth* (1996) 187 CLR 579.