Week 3(b): Legal Education – Pre and Post Admission to the Profession 2

Admission [Overview – from last class]

Recall from last class

- Class 3(a) established that admission serves a gate-keeping function to protect the administration of justice and clients.

- The two-fold requirements are **character** (**fit and proper person** under **LPUAR r 10**) and **competence** (academic and PLT qualifications under **s 17 LPUL**).

Statutory Authority

The legal basis for admission is found in three primary instruments:

- **Legal Profession Uniform Law (NSW) (LPUL): Sections 15–25** provide the overarching legislative requirements for admission and the issuance of compliance certificates.
    - **LPUL s 17** – need degree, PLT, satisfy the "fit and proper" person test
- **Legal Profession Uniform Admission Rules 2015 (LPUAR):** These rules provide the procedural detail for admission and specify the prerequisites for academic qualifications (rule 5) and practical legal training (rule 6).
    - **LPUAR r 10 -** to make a determination about whether someone is fit and proper to practice need to look at r 10 under the LPUAR
- **NSW Admission Board Rules 2015:** These govern the operation of the Legal Profession Admission Board (LPAB) and specific assessments, such as those for "stale" qualifications or incomplete studies.

Key principles

- Honesty & integrity in character is key
- Honesty in disclosure
    - Should be full & frank
- **Mitigating factors are important** – ***don't forget to mention this in an exam***
    - Context/explanation/external stressors – age/lapse of time
    - Understanding of behaviour/taking responsibility/contrition
    - Redemption/rehabilitation/rectification

Factors relevant to good fame & character – ordinary meaning

- **Non-disclosure** of prior impropriety on admission application
- Factors relevant to good fame & character – **ordinary meaning**
- *Previous criminal behaviour/charges - **Del Castillo***
- Previous improper conduct in the course of a profession or *employment* – ***Re Lenehan***

- Disclosure of prior professional disciplinary proceedings
- *Previous improper conduct in curial process - **Re B***
- *Disclosure of academic misconduct – **OG**, **Richardson***
- *Mental health – **Skerritt**, **XY v Board of Examiners***

LPUAR Rule 10: Determining whether someone is a fit and proper person

(1) For the purposes of section 17(2)(b) of the Uniform Law, the following matters are specified as matters to which the Board must have regard—

(m) any **statutory declaration** as to the **person's character**, referred to in rule 16,

(n) any **disclosure statement** made by the person under rule 17,

(o) any **police report** provided under rule 18,

(p) any **student conduct report** provided under rule 19,

(q) any **certificate of good standing** provided under rule 20,

(r) whether the person is **currently of good fame and character**,

(s) whether the person is or has been a **bankrupt** or subject to an arrangement under Part 10 of the Bankruptcy Act or has been an officer of a corporation that has been wound up in insolvency or under external administration,

(t) whether the person has been found **guilty of an offence** including a spent offence in Australia or in a foreign country, and if so – nature of the offence, and – how long ago the offence was committed, and – the person's age when the offence was committed

(u) whether the person has been the subject of any **disciplinary action**, howsoever expressed, in any profession or occupation in Australia or in a foreign country,

(v) whether the person has been the subject of **disciplinary action**, howsoever expressed, in any profession or occupation that **involved a finding adverse to the person**,

(w) whether the person is **currently unable satisfactorily to carry out the inherent requirements of practice** as an Australian legal practitioner,

(x) whether the person has a **sufficient knowledge of written and spoken English** to engage in legal practice in this jurisdiction.

Mental Health and Admission

- **Relevance:** Mental health is relevant to an applicant's **capacity** to carry out the **inherent requirements of practice**. These requirements include the ability to perform day-to-day legal tasks, communicate professionally with courts and colleagues, and discharge fiduciary duties to clients. The inquiry is directed at whether a person is *currently* unable to practice due to serious, untreated illness.

- **Disclosure:** Applicants should disclose past or current **acute mental health injury or mental illness** (e.g., bipolar, severe personality disorders, dementia, psychiatric disorders) or current **substance use disorders**. However, if a condition is adequately treated and managed, it does not prevent admission.

XY v Board of Examiners VSC 250 – mental health not an automatic bar to admission + role in mitigating moral culpability of past conduct	

Facts	• Long standing mental health and alcohol issues linked to history of CSA/sexual assault.
	• Some violence related convictions also
	    ◦ such as assaulting police, resisting arrest, and damaging property, most of which occurred during periods of ill health
	• Most critically, she also had a conviction for dishonesty relating to a false statement made to obtain social security benefits
	• The Board of Examiners refused her application, leading her to appeal to the Supreme Court of Victoria
	    ◦ Board denied admission due to mental health issues and failure to disclose certain matters.
	• Mental illness assisted XY in this application – offset some of her conduct in the past
	    ◦ Court able to justify some of her conduct on this basis
	• Rehabilitated herself over a period of time to treat her mental illness and make sure it was managed
	• Lack of disclosure?

Held	XY **was now a fit and proper person to be admitted**, as: • Mental health issues addressed/strategies in place • Time lapse • Remorse
Principle(s)	• Established that **mental illness is not an automatic or permanent bar to admission**. • The court's role is to assess whether the applicant's condition is <u>currently</u> stable and whether their past conduct—even if it includes dishonesty—reflects a permanent character flaw or was a result of a specific, managed illness. • It emphasises that **insight, candour, and current stability** are the key metrics for suitability.
Judgement / Reasoning	The Supreme Court of Victoria (Habersberger J) **granted the application and admitted XY**. The court's reasoning included: • **Link Between Illness and Conduct:** The Court accepted medical evidence that the applicant's criminal behavior, including the act of dishonesty, was **directly related to her mental illness** and substance abuse at the time. • **Rehabilitation and Stability:** The Court found that the applicant had shown **"complete and long-standing reformation"** and that her mental health was now being managed effectively. • **Exceptional Candour:** XY was noted for her **extreme honesty** in her disclosure to the Board. The Court viewed this transparency as strong evidence of her current good character and ethical awareness. • **Public Interest and Capacity:** The Court held that admitting a person who has overcome such significant hurdles, and who possesses the

	necessary insight and commitment to treatment, does not diminish public confidence in the profession. *[This case is often cited alongside discussions on* ***"capacity"*** *(the ability to carry out the inherent requirements of practice) and the trend toward treating mental health conditions as manageable health issues rather than absolute moral failures]* **Past conduct:** • *"Although some of the criminal offences committed by the appellant were undoubtedly serious, there was no suggestion that they were a permanent impediment to the appellant being admitted to legal practice. This is particularly the case where the* ***offences in question do not show dishonesty****. I do not consider that any of the offences committed by the appellant, including the telephone calls threatening suicide in which the appellant used a false name, are evidence of dishonesty in the relevant sense. Furthermore, I accept Dr Freckleton's submission that the appellant's* ***<u>moral culpability was less</u> given her poor mental health at the time she committed the offences****. Therefore, I am quite satisfied, in all the circumstances, that these past offences should not prevent the appellant's admission." [31]* **Mental health and addiction:** • **Undertakings:** *"…she would be prepared to give an undertaking to the Court that as long as she holds a practising certificate she will* ***maintain her involvement and participation in the Twelve Step Program and Alcoholics Anonymous****. In my opinion, although it might be unusual, the proffering of such an undertaking is an* ***appropriate safeguard in the circumstances****. The undertaking, together with the statement in evidence by Ms XY that she would not drink alcohol again, give me the* ***required satisfaction that Ms XY will be able to practise as a lawyer without suffering from further mental health problems****." [52]* **Lack of disclosure:** • Failure to disclose the 4 additional matters treated as the "more difficult issue… Sometimes it is the failure to disclose some past events which is the basis of a finding that an applicant is not a fit and proper person to be admitted rather than the past event itself" (at [53]) • Particular focus on legal service incident and meditation retreat incident - both should have been disclosed but: • **The Legal Services Incident:** o *"In my opinion, however, a careful reading of the pro forma affidavit should have indicated to her that she had to refer to the legal service incident. Moreover, the appellant agreed that she had been expressly advised by the Secretary of the Board that if she was in doubt about a matter to put it into the affidavit of disclosure, and clearly, the appellant was in doubt about whether this incident should be mentioned.* ***It is troubling, therefore, that it was not referred to in her initial affidavit of disclosure****. However, as I view this failure to disclose, for the reasons explained above,* ***as more of an error of judgement than a deliberate attempt to mislead****, I do not consider that it would be appropriate to treat it as a bar to the appellant's fitness to be admitted to legal practice." [71]*

	• **The Meditation Retreat Incident:**
	  ○ *"In my opinion, it is understandable that in preparing her application the appellant could have tried to put out of her mind the particular events whilst accepting that she had not altogether forgotten them…. The fact that the appellant was still suffering from psychiatric disorders means that the Board's refusal of her application was more than justified. But it also means, in my opinion, that her explanation for her ability to reveal all of her circumstances has to be considered in that context. Therefore, I* ***do not consider that the appellant's failure to disclose the meditation retreat incident should be regarded as a bar to the appellant's fitness to be admitted to legal practice****."*
	  ○ *"In my opinion, the appellant has learned, in a very hard way, the need for the utmost candour by legal practitioners. I do not believe that she will forget this lesson." [82]*
	• In the context of her history – less substantive events in relation to other things which she had disclosed

<u>**NOTE- Role of Mental Health**</u>

- Role mental health is to play when assessing whether someone is fit to practice doesn't have a bright line
  - Uncertain and unfixed – case by case basis
  - Suicide attempt some time prior and no evidence this is ongoing – not going to be relevant (***Skerritt***)
  - However, if still ongoing will be a relevant factor
  - May also be a mitigating factor in relation to someone's conduct - ***XY***

Academic Misconduct

Applicant must also:

- Provide signed consent to the LPAB arranging a compulsory National Police History Check of any police history information in Australia
- Provide signed consent to the LPAB obtaining student conduct reports directly from any tertiary institution or practical legal training provider attended
  - The application consists of a statutory declaration to be signed in the presence of an authorised witness.

What is academic misconduct?

- "Academic misconduct includes, but is not limited to, plagiarism, impermissible collusion, cheating and any other inappropriate conduct, whereby you have sought to obtain an academic advantage either for yourself or for some other person." ***Disclosure Guidelines for Applicants to the Legal Profession*** **(LACC, 2013)**

How & why is academic misconduct relevant to assessing character and fitness to practise as a lawyer?

- **Relevance:** It is relevant because it involves an **element of dishonesty** and the **misappropriation of another's work**, which reflects poorly on a person's character and their future ability to exhibit the integrity required for court and client confidence.
- **Degrees of Seriousness:** "Dishonest plagiarism"—premeditated acts with an intent to deceive—is viewed as more serious than unintentional errors stemming from poor referencing skills. The courts focus heavily on the **applicant's intent** both during the act and during the admission disclosure.
- **Absolute Bar:** Australian courts have generally not established any *absolute* bars, instead using a case-by-case approach. However, "serious plagiarism" committed multiple times by a mature student without insight into its gravity has led to findings of unfitness (*Re Liveri*).

Key Reading Details - Booth et al. (2020)

- **Definition Difficulty:** The article notes that "plagiarism" is notoriously difficult to define, leading to a regulatory gap where universities apply disparate standards.
- **Institutional Variation:** A core finding is that law students are subject to varied university policies that treat "intent" differently. Some universities (n=29 in the study) focus only on the produced work, while others require a "dishonest intent" to find misconduct.
- **Poor Academic Practice vs. Plagiarism:** Several universities (e.g., CQU, Monash, ANU) distinguish acts of "poor scholarship" or referencing errors from formal plagiarism based on the student's experience or lack of deceptive intent.
- **Disclosure Burden:** Because university policies vary so widely, the same act of plagiarism can lead to different findings (and different impacts on admission) depending on which institution the student attended.

Academic misconduct and character

- *"Academic integrity encompasses high level behavioural values including honesty, transparency, trust, autonomy, fairness and responsibility. Even though there is no empirical evidence of a correlation between academic misconduct and conduct as a professional…plagarisim may be relevant to assessing a person's character and fitness because "it ostensibly involves an element of dishonesty, stemming from misappropriation of another's work"*
  - **Booth, Stuhmcke and Wangmann (2020) (references omitted) pg 293**

Re Legal Profession Act 2004: Re OG, a Lawyer VSC 520 – undisclosed academic misconduct	
Facts	• OG and friend GL investigated for academic misconduct (inappropriate collusion/copying in a non-law subject). • Both were awarded marks of zero for the assignment in question. • Both disclosed this zero mark to the Board, but only GL disclosed the collusion allegation • OG did not fully disclose.
Issue	• Whether OG's disclosure was sufficiently candid or if he had deliberately "white-washed" the incident to appear more suitable for admission.

Principle(s)	• OG's admission was revoked on the basis of deliberate or reckless misrepresentation. • OG struck off roll. • Continuing dishonesty – misinformation / lack of information coming from OG; repeated instances of dishonesty • Court's perception of plagiarism shifted in recent time – taken more seriously today
Judgement / Reasoning	• **The Collusion:** In a marketing subject, OG and GL submitted assignments with 26 detected similarities. The university found "inappropriate collusion" and gave them both zero. • **The Misrepresentation:** OG's disclosure letter to the Board claimed the zero mark was for a "misunderstanding" of assessment requirements because he hadn't attended tutorials. The Court found this to be a **deliberate fiction**; OG knew he was suspected of collusion. • **Court's Reasoning:** The Court emphasized that while "ancient peccadillos" might be forgiven, the **need for honesty** is never in doubt. OG's actions were the "antithesis" of the candour required of an agent of justice. He was struck off not necessarily for the original collusion, but for his lack of honesty with the Board. ***Re Legal Profession Act 2004: Re OG, a Lawyer* VSC 520** • *"Increasingly, there is an expectation that even ancient peccadillos should not be left out. In the past, perhaps, the obligation was not always seen as going quite so far. But the **need for honesty** has never been in doubt. **Admission to practise is conditioned upon an applicant having a "complete realisation….of his obligation of candour to the court in which he desire[s] to serve as an agent of justice**."""* • *"All things considered, we have concluded that we should revoke the order admitting OG to practise. As we have found**, he deliberately or recklessly misrepresented to the Board of examiners the circumstances in which he came to be awarded a zero grade or mark for his second assignment**. His actions, therefore, were the "antithesis of a "realization….of his obligations of candour to the court in which he desire[s] to serve as a agent of justice."""* **Comparing *OG* & *Richardson*?** The crucial difference between OG and Richardson is **intent and candour**. • In ***OG***, the applicant **misrepresented and minimized** the facts of his collusion to the Board, which was found to be a deliberate or reckless attempt to deceive. • In ***Richardson***, while the applicant **omitted** his plagiarism entirely, the Court found this was a **bona fide error of judgment** based on advice from his lawyer-parents and a professor that the matter was minor. Richardson had no intent to deceive, whereas OG sought to "white-wash" his history.

***Law Society of Tasmania v Richardson* TASSC 9** – plagiarism with lack of disclosure	
Facts	• Richardson, while a student, had been found guilty of **plagiarism** in one assignment. • He consulted his parents (who were both lawyers) and a professor, all of whom suggested the matter was minor and would not affect his future career.

	• When applying for admission, he followed this advice and **did not disclose** the university's finding of plagiarism. • The Law Society later sought to have him struck off the Roll for this non-disclosure.
Issue	• Did the failure to disclose the plagiarism finding demonstrate a lack of fitness and propriety, or was it a "mere error of judgment"? • Q re being fit & proper revolved around the issue of (lack of) disclosure in admission process.
Principle(s)	• OG's admission was revoked on the basis of deliberate or reckless misrepresentation. • OG struck off roll. • Continuing dishonesty – misinformation / lack of information coming from OG; repeated instances of dishonesty • Court's perception of plagiarism shifted in recent time – taken more seriously today

Judgement / Reasoning	The Supreme Court of Tasmania **declined to strike Richardson off**.
	• The Court found that **while he *should* have disclosed the matter**, his failure to do so was an **error of judgment** based on the poor advice he had received from trusted professionals (his parents and a professor).
	• Unlike in ***Re OG***, the Court was satisfied that Richardson had no **intent to deceive** the Board and that he genuinely believed disclosure was unnecessary.
	• More of a disclosure issue – plagiarism was very low-level
	• Both parents were also in question of being fit for practice
	• Two parents who are lawyers who should have known better
	• Expectations of honesty and plagiarism has likely increased since; and talking about two different jurisdictions
	
	Reasoning:
	• **The applicant's behaviour:** *"It is clear that an applicant is not obliged to disclose to the Court all aspects of his or her past life that might be open to criticism or arguably amount to examples of imperfections of character or performance." [80]*
	    o *"The most severe criticism that arguably may be made against Scott Richardson is that **he made an error of judgment, a mistake**, based largely on the advice of two experienced practitioners who were also his parents. Even if it is valid, it is no justification for removing his name from the roll." [88]*
	• The father's behaviour:
	    o *"I have no doubt that his failure ….would not reasonably be regarded by legal practitioners of good repute and competency as disgraceful or dishonourable." [92]*
	    o *"he had no doubt that his son had not cheated, committed plagiarism, been dishonest or broken any law. He may well have judged his son's conduct with the bias of a parent…but he does not deserve condemnation. His affection for his son was only natural…" [93]*
	    o *"…even if he ought to have ensured disclosure, **his failure to do so was at worst an error of judgment** and not capable of amounting to professional misconduct or deserving of discipline by the Court." [94]*