UMSU Position Paper:

The Stream Cannot Rise higher than its Source: the case for review of student appeal processes at the University of Melbourne

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Introduction

Strictly speaking, the maxim 'the stream cannot rise higher than its source',[1] expresses the principle that the validity of legislation cannot be dependent on the opinion of a lawmaker. To the extent the doctrine expresses the notion that a 'power to make laws with respect to lighthouses does not authorise the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse',[2] the maxim is apt in respect of the current situation with student appeals at the University.

Currently, it is the view of the UMSU Advocacy Service that the Regulations that provide for the conduct of student appeals do not authorise the manner in which appeals are being determined by the Academic Secretary.

History and Context

To understand how we have arrived at the need to address this issue, it is useful to set out the background and development of the existing practice.

The current Academic Board Regulation (the Regulation) commenced on 21 July 2016. The *Student Appeals Policy* (the Current Policy) – a new Policy arising from the university's Policy Consolidation Project which incorporated the former *Appeals to the Academic Board Procedure* (MPF1023) (the Previous Policy) commenced on the same date. Notably, the Current Policy introduced some significant changes in respect of the power of the Academic Secretary to executively decide appeals.

The Previous Policy

Subject to **2.3** of the Previous Policy, the ***Academic Secretary, or nominee****, will acknowledge the notice of appeal within five working days of receipt.*

By **2.4** of the Previous Policy, *the* ***President of the Board (or Board officer)***[3] *will consider whether grounds for appeal have been demonstrated.*[4]

The decision to convene a hearing remained in the hands of the President or Officer of the Board, and provided that if *the President (or Board officer) finds there are grounds, an appeal committee will be convened within 21 working days of receipt of the appeal.*

Importantly under the Previous Policy, there was no provision to dismiss an appeal without a hearing, although from time to time, the President of the Academic Board (Board) did refuse to hear appeals *on the papers* during this time. This option appears to have been exercised conservatively, and without limiting the appellant from resubmitting an appeal that was able to be heard by an appeal committee.

[1] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
[2] Ibid, at 258.
[3] A Board Officer is one of the President, Vice-President or Deputy Vice-President of the Academic Board.
[4] Emphasis added.

Academic Board Reports

To better understand how these powers were exercised, it should be possible to review the deidentified data from reported outcomes. Under the Previous Policy, the Academic Secretary, or nominee was required to submit a combined report of outcomes to the Board following each round of appeal hearings arising from unsatisfactory progress, and a summary report of the outcomes of appeal committee hearings heard in the previous year to the first meeting of the Board each year. In 2011 there were summary reports of appeal determinations in February, March, May, and December. In 2012's first meeting the agenda item *Academic Board Appeals Committee Reports* indicates "No Report". The following year, the first meeting agenda does not even mention these reports.

2014 and the BIP years

A survey of Board papers from 2014 reveals that the April meeting reported on Academic Progress appeals from Sem2/2012 and Sem1/2013, and in June there was an overlapping report of *Terminations and Appeal Outcomes - Sem1/2012 - 2/2013*. The report on appeals in the June President's report notes that there 'has been a sharp increase in the number of general appeals received in the first half of this year'. The Minutes for the July 2014 meeting also indicate 'the Board received a summary of general appeals heard from 2011 until May 31, 2014, and appeals arising from academic progress reviews (termination of enrolment) from 2012 and 2013 noting that the number of appeals upheld by the Board had remained stable'.

The minutes of the September 2014 meeting include an update on arrangements made for the administrative support of the Board subsequent to the Business Improvement Program (BIP) restructure. The report notes:

> *The conduct of student appeals work is to be overseen by the Academic Secretary, but the staffing of that work (approximately one EFT), and the location of that work, are yet to be decided. The same is true of the administrative work associated with preparing and retaining the papers for this appeals work; it is not yet decided where and how that work will be done.*

The report goes on to say that the Academic Governance Unit (AGU) of five skilled administrative staff managed by the Academic Secretary would be disbanded and no longer 'provide organisational, secretarial and research support to the seven major committees of the Academic Board'. The work of the AGU in research and investigation was to be reallocated to a single role - the new Academic Governance Officer - and the secretarial support to the Board's committees will be done by professional staff located in relevant parts of University Services.

The December report includes minutes from the October 2014 meeting which note a question from the then Vice President of Board to the Provost on the functions of the Board and in particular where student appeal committees would be managed as they were not visible in any of the organisational charts post restructure. The report goes on to say:

> *The Provost stated that there would be a period of transition and training of staff until 1 February 2015, but that this was a grey area. The Provost referred the question to the Academic Registrar, Mr Neil Robinson. Mr Robinson stated that what it looks like subsequent to 1 February 2015 was still under consideration.*

Appeals Post BIP

In the Minutes of the February 2015 Board meeting, a question about the administration of student appeals appears to reveal some teething problems processing student appeals in the new structure.

> *A question was put to the President about the turn-around time for faculties to respond to student appeals with less than 48 hours' notice. The President thanked the member for raising the question but noted that the practice was not consistent with the published process, they should be managed in such a way as to be compliant with published procedure. She also noted that the Academic Secretary was not aware of the issues raised and that appeals were*

now supported by Academic Services following the disestablishment of the Academic Governance Unit under BIP.

After this restructure, and in the seven years from 2015 to date, no reports of student appeals are included in any Board papers.

Available Data

The lack of quantitative or even deidentified qualitative reporting on this important issue is disappointing, both from a transparency point of view, but also as it would have allowed us to normalise our casework data against the complete figures. In our view, it also indicates a rather lackadaisical approach to compliance with the very policies the University enforces so strictly against students, and a disappointing attitude to transparency and accountability.

The scant data from Board reports does indicate that subject to the Previous Policy, in 2011 **no appeals** were refused a hearing by the Board Officers. In 2012 only **one appeal** (2%) was not heard, in 2013 **four** were declined a hearing (10%), but by the first quarter of 2014 – **nine** appeals were refused a hearing (22%). The trend is quite obvious – with the proportion of declined hearings more than doubling between 2013 and the first quarter of 2014. One might be forgiven for speculating that an idea was forming that it would be desirable that appeals could be decided without a hearing in order to reduce the burden of convening appeals committees at all.

From 21 July 2016, the power to disallow a hearing for an appeal was vested in the Academic Secretary, not an Officer of the Board. However, this power has been interpreted to create authority to *dismiss* the appeal authoritatively, not simply disallow a hearing. To *dismiss* an appeal has the effect of extinguishing any right to have the decision reviewed within the University.

Since the change to the Regulation and Policy in mid-2016, custom and practice has been that, upon receipt of an appeal notice from a student, the Academic Secretary both assesses the notice for conformity with the policy, and additionally makes a decision on the merits of the arguments put forward. Where the Academic Secretary believes the appeal notice "does not disclose sufficient merit to be heard",[5] the appeal is summarily dismissed without further chance to be considered.

We do not have access to data in relation to all appeals lodged during this period, however according to our casework data, under the new powers vested in the Academic Secretary since July 2016, we have seen the following proportion of all appeals dismissed, executively dismissed without hearing by the Academic Secretary:

August 2016- Dec 2017	48%
2018	45%
2019	63%
2020	67%
2021(to date)	81%

Notwithstanding, the data includes only those appeals presenting to the Advocacy Service – this is a stark trend. Considering that, anecdotally at least,[6] those students assisted by the Advocacy Service will generally have better framed, grounded and argued appeals – the trend to find appeal notices "without merit" is all the more concerning.

Our concerns about this trend were first reported in the *July-September 2018 Service Report* under the title ***Hard of hearing on the papers.***[7] The report concerned an appeal being executively dismissed on the basis of erroneous reasoning by the Academic Secretary. Further incidents were reported in the same quarter the

[5] Words used routinely in the outcome notice provided to the appellant.

[6] Based on feedback from Staff and Student survey results for the UMSU Advocacy Service.

[7] Available at: https://umsu.unimelb.edu.au/wp-content/uploads/2018/10/Student-Union-Advocacy-Service-Quarterly-Report-July-September_2018.pdf

following year.[8] In the year to October 2021, the Advocacy Service has seen 81% of presenting appeals dismissed by the Academic Secretary without a hearing. A number of these involve termination of enrolment and other significant impacts on students' rights and interests. Importantly, some of these decisions purport to have been made in reliance on adverse information provided by faculties in response to the appeal notice, but not put to the student for response.

The Source of Power

Administrative decision-makers must act within the limits of the statutory authority (jurisdiction) that has been conferred on them. They are not at liberty to simply exercise statutory discretionary powers in any way that they want. Accordingly, a critical question for decision-makers and those affected by their decisions is by *what authority* a decision is made.

Policy alone is not a source of power in administrative law.[9] While the Policy provides guidance on the procedures involved in the student appeal process, the powers of the Academic Secretary in this context are set out in the Regulation.

Until October 6, 2021, the Regulation provided:

> ***50 Reference to a student appeal panel***
>
> *(1) The Academic Secretary may accept appeals lodged with the Board provided the notice of appeal contains:*
>
> > *(a) a description of the decision being appealed; and*
> >
> > *(b) a statement of the grounds of the appeal.*
>
> *(2) Upon receipt of the notice of appeal, the Academic Secretary must consider the merits of the notice of appeal and either allow or disallow the appeal to be heard by an appeal committee and notify the student within 15 business days of the decision to allow, or disallow, the appeal to be heard by a student appeal panel.*
>
> *(3) The Academic Secretary must, within 15 business days after allowing an appeal to be heard, refer the appeal to a student appeal panel.*

On October 6, 2021, the Regulation was amended to expand the power of the Academic Secretary by inserting:

> *(3) In considering the merits of the appeal in (2) the Academic Secretary is required to take into account:*
>
> > *(a) the notice of appeal and any supporting documents; and*
> > *(b) related information and/or documents on the University record including, but not limited to, the process/es followed, and the decision/s made.*

Subsection (2) was also amended to remove the word "notice" from the second reference to appeals:

> *(2) Upon receipt of the notice of appeal, the Academic Secretary must consider the merits of the ~~notice of~~ appeal and either allow or disallow the appeal to be heard by an appeal committee and notify the student within 15 business days of the decision to allow, or disallow, the appeal to be heard by a student appeal panel.*

This creates an ambiguous relationship between the first subsection regarding the notice of appeal, and the second part of the subsequent subsection which appears to provide that the Academic Secretary - since 6 October 2021 - has the same powers to decide the merit of an appeal as a duly constituted student appeal panel.

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[8] Available at: https://umsu.unimelb.edu.au/wp-content/uploads/2019/10/Student-Union-Advocacy-Service-Quarterly-Report-July-September_2019.pdf

[9] Above, n 1.

This expansion of the powers of a non-member of the Academic Board is unquestionably more than editorial. However, unlike policies, there is no requirement for substantive changes such as this to go through any public consultation, resulting in a lack of scrutiny which is unhelpful for transparent and robust complaint and dispute handling at the University. The University Council, responsible for creating or amending Regulations, does not make its agenda or minutes publicly available, so these changes to regulations "pop up" overnight without any accountability to the University body politic.

This represents a significant expansion of the powers of the Academic Secretary to act in the same capacity as a student appeal panel. While the rationale for the change is not known, we assume it is related to a complaint to the Ombudsman Victoria for which the Advocacy Service provided assistance earlier in the year. The complaint was in respect of the Academic Secretary dismissing an appeal on the basis of viewing adverse information and failing to allow the student to be heard in relation that that information. The student was ultimately given a hearing after the Ombudsman's intervention. Minimally, it appears to be aimed at expanding the powers of the Academic Secretary under the Regulation to match the *ultra vires* custom and practice in recent years. Of course, this does not apply retrospectively to the decisions of the Academic Secretary prior to October 6, 2021, and neither does it address the other very significant problems with the process identified in this paper.

The Regulation expressly provides that **two elements** must be satisfied for an appeal notice to be valid. They are that:

1. there is a description of the decision being appealed, and
2. the grounds are stated.

The recent addition of 50(3)(b) provides an unfortunate basis for the Academic Secretary to consider material adverse to the appellant and make an executive decision without affording procedural fairness, effectively codifying breaches of procedural fairness into the Regulation.

Additionally, 50(3)(b) appears to confer a new power upon the Academic Secretary - beyond determining the merit of the **notice of appeal** consistently with 50(2) - to consider the merit of the appeal itself, although the inconsistent terms between the subsections creates significant ambiguity. In any event, it is unclear how these expanded powers to consider materials additional to those required in a valid notice of appeal are to be used to determine whether an appeal is allowed to be heard by a student appeal panel. Neither is it clear how the Secretary's exercise of administrative decision making is distinguished from the powers exercised by a student appeal panel.

Regardless of the provisions under 50(3)(b) operative since 6 October, it seems unfathomable that the University is contemplating that there is no distinction between an assessment of the merits of the notice of appeal and the substantive merit of the appeal itself. Clearly the Regulation sets out the power of the Student Appeal Panel to hear and determine appeals on the merits of the grounds argued. By 52(2) of the Regulation

> *The student appeal panel must dismiss the appeal unless a majority of the members of the* ***student appeal panel is satisfied that a ground of appeal has been established.***[10]

Given the Regulation sets out the power of the student appeal panel to hear and determine student appeals on their merits, it cannot contemporaneously confer this same power on the Academic Secretary. Logically, while the Regulation confers on the Academic Secretary the power to assess the merit of the **notice of appeal**, the power to make substantive determinations in relation to the merit of the arguments in support of the grounds of the appeal can be a power vested in a student appeal panel alone.

Vesting the same power to substantively consider and determine appeals in both the Academic Secretary and the Student Appeal Panel without distinguishing these powers would be perverse - and potentially render the entire process open to arbitrary and capricious action.

[10] Emphasis added.

To reinforce this interpretation the Regulation expressly limits the power of the President of the Board to act executively in this way – *7(2) For the avoidance of doubt, the Board President alone cannot hear or decide an allowable student appeal*. It seems ludicrous that the same Regulation that expressly prohibits the President of the Board from hearing or deciding an appeal does allow a non-member of the Board to effectively make the same determinations on behalf of the Board.

In respect of the powers of the Academic Secretary under section 50 of the Regulation it is necessary to look at subsection (2). The term 'merit' in subsection (2) - while it unhelpfully imports the notion of substantive worth - can reasonably only refer to whether the two elements in subsection (1) have been satisfied. It would be bizarre to argue that the Academic Secretary need not have regard to the requirements of 50(1) when determining whether to allow or disallow an appeal to be heard. The addition of subsection (3) widening the scope of consideration to *related information and/or documents on the University record including, but not limited to, the process/es followed, and the decision/s made* does not provide clarity as to how that information is to be weighed - and given the preceding subsections - it is reasonable to interpret that it is to be considered in respect of the validity of the notice of appeal, not the merit of the substantive arguments. To interpret this part as giving authority to the Academic Secretary to exercise the same powers as a student appeal panel would create significant ambiguity and uncertainty in the respective roles of these parties.

The Policy

While it is uncontroversial that the Regulation is the source of the Academic Secretary's power in respect of student appeals, the *Student Appeals Policy* (MPF1323) builds out from the provisions of the Regulation, adding additional powers and elements for valid notice of appeal. The additional requirements are highlighted.

> *4.8. Decisions of Council to revoke an award cannot be appealed.*
>
> ***Lodgement of notice of appeal***
>
> *4.9. A person who wishes to appeal a decision under section 4.2 must lodge a notice of appeal with the Academic Secretary via the Case Management System within 20 University business days of the original decision.*
>
> *4.10. In accordance with University Regulations, the notice of appeal must:*
>
> > *(a) describe the decision being appealed;*
> >
> > *(b) clearly state the ground or grounds for appeal;*
> >
> > *(c) summarise the basis for each ground or grounds;*
> >
> > *(d) attach the notice of the original decision; and*
> >
> > *(e) include any relevant material on which the student or eligible person wishes to rely.*
>
> *4.11. The Academic Secretary will acknowledge the notice of appeal within five University business days of receipt.*
>
> ***Consideration of notice for appeal***
>
> *4.12. Upon receipt of a notice of appeal that meets the form prescribed at section 4.8 [sic – should be 4.10], the Academic Secretary considers the notice of appeal and any relevant documents.*
>
> *4.13. If, after considering the notice of appeal, the Academic Secretary finds that the notice of appeal lacks merit, the Academic Secretary may disallow the appeal, and give notice of that decision.*

4.14. If the appeal is not dismissed, the student appeal panel will hear the appeal in accordance with this policy.

…

4.16. If the Academic Secretary allows the appeal, the Academic Secretary must refer the application to a student appeal panel.

4.17. The student appeal panel must be convened within the timelines set out in the relevant Regulation, except for appeals arising from academic progress decisions in coursework courses which are held on set dates and scheduled for the period following the assessment period of each progress review period and published on the Board's website.

There are additional ambiguities introduced in the Policy by use of the term "disallow the appeal" in 4.13 – which is consistent with the term used in the Regulation at 50(2) which provides for the power to *either allow or disallow the appeal* ***to be heard by an appeal committee,*** and 4.14 which abruptly introduces the term "dismissed". Clearly these terms are not interchangeable. This is discussed further below.

Further to this, the Policy broadens the Academic Secretary's powers considerably beyond those allowed by the Regulation. In addition to the form of the Appeal Notice required by the *Academic Board Regulation*, the policy additionally requires:

- a summary of the basis for each ground or grounds of appeal,
- the notice of original decision and
- any relevant material on which the appellant seeks to rely.

It is obvious that the requirements of 4.10 (c)-(e) are beyond the powers set by the Regulation.

Consequently, the Policy seeks to empower the Academic Secretary to do a number of things which are beyond the scope of the powers provided by the Regulation. The most troubling extension is the introduction of the purported power to *dismiss* the appeal.

Unlawful decisions

To disallow a hearing is not to dismiss

The Regulation does not provide for any power of the Academic Secretary to dismiss appeals. It simply requires that the Academic Secretary either allows or disallows the appeal to be heard. If the intention of the Regulation were to give the Academic Secretary the power to dismiss the appeal – a decision which is not reviewable within the University – then the Regulation would use the term "dismiss". Importantly, this is not merely a semantic distinction. Disallowing an appeal from progressing to a hearing is not inconsistent with allowing the appellant an opportunity to revise an invalid notice of appeal and resubmit it once the defects are remedied, at which point the appeal could be heard. A decision to disallow a hearing due to a defective appeal notice is a procedural decision, whereas, to dismiss an appeal is a substantive and final decision.

The obvious analogy would be where a Court Registry was empowered to not only determine whether documents filed with the court fulfilled procedural requirements but went on to make substantive decisions about the merit of the case.

Significantly, it had once been custom and practice that where the Academic Secretary found the notice to be defective, in that it did not satisfy criteria for valid notice of appeal, the appellant would be directed to the UMSU Advocacy Service in order to receive assistance to lodge a valid appeal notice. However, this has not been the case for some time. On this basis it is reasonable to surmise that the number of appeals summarily dismissed by the Academic Secretary overall is even greater than the proportion of those appeals supported by the Advocacy Service which have been dismissed without a hearing.

It is our view that the following critical issues arise from the current practice of allowing the Academic Secretary to act beyond the powers provided in the Regulation:

1. it promotes breaches of the rules of procedural fairness;
2. the decisions are not authorised by the Regulation in pursuance of which they are purported to be made;
3. the making of the decisions are an improper exercise of the power conferred by the Regulation in pursuance of which they are purported to be made; by virtue of:
    a. taking irrelevant considerations into account in the exercise of the power; and
    b. failing to take relevant considerations into account in the exercise of the power.

We have set out below several case studies illustrating these problems.

1. Breaches of natural justice

The rules of natural justice or procedural fairness apply to the majority of appeals in that they concern a decision affecting an appellant's rights, interests or legitimate expectations. In 1985, the High Court decided that natural justice is presumed to apply to any administrative decision.

In the case study below the Academic Secretary considered material from a faculty which was adverse to the student, and subsequently decided on that basis to dismiss the appeal without a hearing, without allowing the appellant to respond to that information.

Case Study 1

The Academic Secretary, in exercising her authority under 50 of the Regulation, originally allowed the appeal to proceed to a hearing, at which point she was required by the policy to refer it to a Student Appeal Panel. However instead of convening the panel and contacting the faculty for a response to provide to the panel, she first reviewed the faculty's response herself, and then decided to dismiss the appeal without a hearing. The outcome letter from the Academic Secretary stated "I have considered your appeal in accordance with sections 4.11 and 4.12 [sic] of the Student Appeals to the Academic Board Policy and have decided that you have not demonstrated any grounds for the appeal to proceed to a hearing. As part of that consideration I reviewed your appeal letter, supporting documentation, the CAPC appeal report, your academic record ***and the response from the faulty to your appeal****" [emphasis added]. This was further confirmed by the University Secretary in her response when the Advocacy Service raised this as a breach of the appellant's right to procedural fairness. The University Secretary confirmed "I understand the appeal was going to be heard until the Academic Secretary received further advice from the Faculty…"*

The appeal was dismissed and not subject to further review at the University. Upon intervention from the Ombudsman Victoria, the student was eventually offered an appeal hearing.

The two propositions which apply in this case were set out by Brennan J in *Kioa v West:*

> *in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made;*

and

> *[i]nformation of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information.*[11]

The reason for this is clear:

> *[a] failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power.*[12]

The recent addition of 50(3)(b) now codifies this potentially unlawful practice.

2. Decisions not authorised by the Regulation

By virtue of the Policy purportedly extending the powers of the Academic Secretary to consider matters beyond those authorised by the Regulation, there are decisions being made about appeal notices which are out of authority. Importantly, these decisions are considered final and not subject to review within the University and frequently involve serious impacts on appellant's interests, including the termination of their enrolment.

This is not only a matter of acting beyond the source of power; it represents a further breach of procedural fairness. The rules of natural justice require more than simply affording those affected by a decision a chance to have their say. Procedural fairness requires that decision makers give 'proper, genuine and realistic consideration' to any submissions advanced on behalf of a person affected by a decision and importantly to obtain any further evidence, if required.[13]

It is undeniable that a simple review of a decision on the papers cannot satisfy these requirements.[14]

Limitation on specified grounds not authorised by the Regulation

The Regulation does not set out specific or limited grounds for an appeal, and neither does it provide that the Policy can delimit the available grounds. Accordingly, in the same way the Policy's limitations serve to curtail students' access to a hearing by adding additional requirements for a valid notice of appeal, the Policy also seeks to bar appeals which are not made subject to four grounds specified in the Policy alone.

Notwithstanding the Policy's effect of restricting access to a regulatory right, the way these grounds are framed serves to provide another specious reason to summarily dismiss arguable appeals. In many cases, these rigidly defined grounds will not neatly apply to an appellant's circumstances, and/or there may be a combination of grounds which apply. This is evidenced in the following extracts from the Academic Secretary's correspondence with a student notifying them of the outcome of an appeal:

> *You appealed on the grounds that:*
> *(a) the decision was manifestly wrong;*
>
> *(b) the penalty imposed was manifestly excessive, inappropriate or not available in the circumstances.*

It should be noted that this is the terminology in the policy and the *only* available "grounds" which could reasonably have been argued. The notice continues:

[11] (1985) 159 CLR 550 at 584 at 629.

[12] Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (2014) 25, 47.

[13] *Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 457 per Gummow J at [25].

[14] Noting too that 'the papers' in this instance are an appeal notice which minimally requires very little information.

In accordance with sections 4.11 and 4.12 of the Student Appeals to the Academic Board Policy, I have reviewed your appeal, and have determined that your case does not possess sufficient merit to proceed to a hearing.

The decision to apply a late withdrawal is not manifestly wrong as it is the only permissible outcome in your circumstances. There has been no penalty imposed, as late withdrawal for the subject is not a penalty, and so the grounds of "the penalty imposed was manifestly excessive, inappropriate or not available in the circumstances", is not relevant to your case.

Your appeal is dismissed without a hearing.

The decision uses the poorly formulated and unnecessarily restrictive language of the University's policy to justify dismissing the appeal. It completely ignores the discretion available to a student appeal panel in making its determinations under the Regulation, which must not be fettered by rigid adherence to policy alone.[15] The statement "*The decision to apply a late withdrawal is not manifestly wrong as it is the only permissible outcome in your circumstances"* is simply not borne out by the many discretionary decisions made by decision makers in academic divisions and in appeals which can and do allow other outcomes in certain circumstances. Moreover, the proper consideration of the appellant's specific situation is critical to decision making in conformity with the University's obligations under the *Disability Discrimination Act 2006.*

Manifest inadequacy of a "decision on the papers"

Importantly, the Academic Secretary is making *executive* determinations against the limited grounds available under the Policy. Even where these grounds were empowered by Regulation, it is not feasible to give appropriate, authentic, and thorough consideration to any submissions on the basis of an appeal notice alone.

The following example illustrates the manifest inadequacy of a decision on the papers.

In response to an appeal regarding incorrect advice received by a student, the grounds argued in that case was that the decision was manifestly wrong (because the decision was predicated on the basis that the student had acted with accurate advice, whereas in fact the advice was erroneous, and they had acted in detrimental reliance on incorrect advice). The outcome notice indicates that the appeal was dismissed:

As the faculty's decision was consistent with the advice about CSP transfers provided to you, there is no evidence that the decision was manifestly wrong. Consequently, I find that your appeal possesses no grounds, and is dismissed without a hearing.

Clearly this reasoning fails to engage with an appeal argued on detrimental reliance and is completely misconceived.

3. Decisions made with an improper exercise of power

An improper exercise of power does not require malfeasance or wilful abuse of process. It is sufficient that the decision maker either takes irrelevant considerations into account; and/or fails to take relevant considerations into account in making the decision.

When the Academic Secretary is deciding to dismiss an appeal solely on the notice of appeal and using the additional out of authority criteria in the Policy, it is arguable that the decision is made with an improper exercise of power *in every case.* The minimal information required in a notice of appeal under the regulation is manifestly insufficient to make a *prima facie* assessment of whether an appeal should be *dismissed*.

[15] The inflexible application of a policy without regard to the merits of the particular situation is a jurisdictional error. See: *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610; *Green v Daniels* (1977) 51 ALJR 463; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at [52] quoting Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 287 [17].

Arguably, the requirements in the Regulation of a valid appeal are sufficient *prima facie* to assess whether the matter should be heard or not, but no more than that.

Evidence that the Academic Secretary is substituting herself for the powers of a student appeal panel can be found in decisions such as the following:

> *In accordance with sections 4.11 and 4.12 of the Student Appeals to the Academic Board Policy, I have reviewed your appeal, and have determined that your case does not possess sufficient merit to proceed to a hearing.*
>
> *The University will never condone academic misconduct. The University places a high value on academic integrity and honesty and expects its students to abide by these values. Even if you did not gain any academic advantage from your actions, you have nonetheless committed academic misconduct according to section 42 of the Academic Board Regulation. Phones are to be left under the desk and turned off in the exam venue, and yet you contravened this rule. As a third-year student, you would have been cognisant of this requirement. Contrary to the assertion in your appeal letter, exam regulations preclude the possession of unauthorised materials* ***on your person****, not just in the toilet.*
>
> *The Assessment and Results Policy states that "unauthorised materials taken into an examination venue must be placed beneath a student's desk before the commencement of reading time."*
>
> *You have not provided any new information in your appeal which would have affected the decision made by your faculty, and in light of these considerations, I believe your appeal possesses no grounds and is therefore dismissed without a hearing.*

This outcome evidences consideration of far more than the adequacy of the notice of appeal. For a start, the student is not required to provide an exhaustive explanation of all arguments, even under the *ultra vires* requirements of the policy. Further, some evidence relied upon may not be capable of being provided in documentary form at the time the notice of appeal is lodged. The decision demonstrably fails to engage with the potential for compelling mitigating circumstances presented by the student which could render the penalty disproportionate in the circumstances. This is a decision open to a student appeal panel, and indeed where those panels have had the opportunity to consider the often complex circumstances put forward by an appellant, these penalties have been overturned.

Case Study 2

The student received an allegation of academic misconduct for plagiarism and collusion. It was alleged that they had provided their assignment to another student to copy. Included with the allegation notice was a statement from the faculty which described similarities between the student's assignment and another student's work, and a Turnitin report. The Turnitin report only showed the assignment submitted by the student facing the allegation. The report did not show the alleged similarities between the two assignments.

The student subsequently submitted a written response to the allegation and attended a hearing with the faculty Academic Misconduct Committee. In the response, the student denied providing the assignment to the other student.

The faculty Academic Misconduct Committee ultimately upheld the allegation and issued a penalty of zero for the assignment.

The student then submitted an appeal to the Academic Board, grounded on new information and a procedural irregularity. The appeal was lodged within the specified limitation period and was a valid

notice of appeal for the purposes of both the Regulation and the Policy.

The Academic Secretary responded to the notice of appeal dismissing the appeal without a hearing.

In the appeal outcome notice, the Academic Secretary states "I note that you were provided with a copy of the Turnitin Report (Attachment 3), which you provided with your appeal. The report identified the similarities in the work you submitted and your paper returned an overall 22% similarity with 14% matching another student's paper." However, this assertion was factually incorrect, as the only substantial similarities identified by the Turnitin report were to the assignment cover sheet and the reference list. These two areas comprised the entirety of the 14% match to another student's paper upon which the allegation had been based.

The faculty statement accompanying the allegation notice speculates that the student had provided their assignment to the other student to copy, and that there were "strong similarities" between the two works. Given the Turnitin report in fact revealed nothing substantial about the kinds of similarities that could substantiate a plagiarism/collusion allegation, it appeared open that the faculty's allegation was based on a side-by-side comparison of the two student assignments, not the similarity report from Turnitin which was itself wholly irrelevant to the allegation. The faculty's statement included in the initial allegation states that the other student submitted their assignment late – two months after the student facing the allegation. The Turnitin report which was included therefore could not highlight any similarities because the other student had not yet submitted their assignment.

Regardless, the student was not provided with the other student's essay to properly understand the case to be met. The Student Academic Integrity Policy requires that the allegation notice provided to the student must attach "copies of any primary supporting documents of which the dean is aware relating to the alleged misconduct".

Given the side-by-side comparison of the two works was crucial information that was used to form the basis for the allegation and is presumably primary evidence to which the Committee had access in making its determination, it is a clear breach of the student's right to procedural fairness not to make it available. In other words, material adverse to the student's interests was not provided to inform a response.

Notably, in conducting itself in this manner, the faculty effectively reversed the burden of proof requiring the student to prove that they did not provide their work to another student, rather than providing specific evidence in support of the allegation that they did.

It is clear that none of this was considered by the Academic Secretary in deciding the appeal was without merit. The avenue in which these matters and further new information could be adduced was denied *on the papers*, in a process that did not engage with the matters argued, and despite a clear breach of the student's right to procedural fairness.

A feature of both case studies is that the Academic Secretary's summary dismissal of the appeals is based on circular and untested reasoning. That is, the decisions are made in reliance on the fact of the University decision itself, as evidence of the validity of that same decision. This is a fundamental reason that thoughtful, independent review and testing of evidence in the form of an appeal hearing is required.

Complaints handling and the 'what were they thinking' test

> *"… many of the decisions we see are fair, although all too often they have been poorly communicated, and occasionally it is the complainant who is unreasonable. But we do see some which plainly fail the 'what were they thinking' test — and many of these are about the exercise of discretion."*[16]

The quote above refers to decision making in local government, an area in which the Ombudsman Victoria has sought to enforce improvements in complaint handling through legislation. However, the final word on these matters is not about lawfulness, but rather about leading from the front. While the University regards itself as an elite institution, it also needs to act as one. It is disappointing that a university which purports to be world class would tolerate a process so lacking in integrity and rigour.

The case studies and examples included in this paper are illustrative of a concerning number of matters which have been unfairly, and potentially unlawfully decided over a number of years. The Service is committed to a full analysis in respect of the issues raised in the Academic Secretary's determinations for students we have assisted during this time. We will publish this report shortly.

We are of the view that section 50 of the Regulation envisages a system where a student seeks leave to appeal by submitting an appeal notice in the form prescribed by the Regulation at 50(1). The leave is granted or denied on the basis of an assessment by the Academic Secretary as to whether the two elements of a valid appeal notice specified in the Regulation are satisfied or not. If the notice of appeal is defective, leave is not granted. However, nothing then precludes a student from reformulating their notice of appeal such that it meets the form required in the Regulation and then submitting a new appeal notice.

Appeals are part of a robust and fair dispute resolution process. The matters submitted for appeal via the Advocacy Service overwhelmingly involve serious impacts on students' rights and interests and should not be superficially batted aside in the manner which is current custom and practice.

Of course, it is possible for University Council to continue to make *ad hoc* changes to the Regulations merely to endeavour to get ahead of some of these criticisms and without addressing the significant issues identified in a comprehensive and holistic way. A risk in this course of action, apart from the 'optics' of the approach, is that it will only further codify unfairness and potential unlawfulness of decision making in this process. However, we hope that the desire for fair, transparent, and rigorous processes will defeat any cynical response to the concerns raised. It is certainly an issue which the Advocacy Service intends to pursue until students' rights are properly respected by the University.

Recommendations

1. The Regulation should be independently reviewed and amended to ensure it meets the requirements of procedural fairness and good practice administrative decision making.
2. The Policy must be amended to ensure conformity with the Regulation from which it derives its powers.
3. The University should undertake an urgent and independent review of all decisions made by the Academic Secretary subject to section 50 of the Regulation and identify all decisions which have been erroneously or unlawfully made.
4. Anyone whose appeals have been erroneously or unlawfully dismissed should be contacted and offered an opportunity to be heard. In the interests of transparency and accountability, the University should report on how many of these decisions have been made and what reparations are being offered, or where no adequate restitution is available.
5. The University should commit to good practice complaint handling, including ensuring fair and transparent access for students to be heard in relation to matters about which they are aggrieved.

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[16] Victorian Ombudsman, Deborah Glass.