

Discussion Paper:

# **POLICY OR POLICE STUDENT DISCIPLINE PROCESSES – WHAT NEXT?**

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**ADVOCACY & LEGAL**

Level 3, Union House  
University of Melbourne  
Victoria 3010

**p** 03 8344 6546

**w** [umsu.unimelb.edu.au/advocacy](https://umsu.unimelb.edu.au/advocacy)

**UMSU**  
UNIVERSITY OF MELBOURNE  
STUDENT UNION

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*"I would like to acknowledge the important contributions of the Senior Advocates: Paul Hornsby, Donna Markwell and Alanna Smith and the Student Services Officer, Nadia Di Battista."*

**Phoebe Churches**

Manager, Advocacy & Legal  
University of Melbourne Student Union

22 April 2015

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## I. INTRODUCTION

It is uncontroversial that academic integrity and ethical conduct is important to both the University and students alike. However students' experience and understanding of these concepts, as well as the value they place on them can diverge significantly from the University's view. It is the student perspective we wish to focus on in this paper; and to explore the issues which might be addressed in the move from Statute 13.1 Student Discipline to new regulations, policy and procedures dealing with student misconduct. To do this, we aim to set out and make explicit some of the relevant principles and assumptions and provide some evidence-based recommendations that may improve practice and fairness in this area. In the context of ever increasing student cultural diversity, and major changes to administrative resource allocation, we are of the view that it is a particularly important time to re-evaluate the University's approach to student discipline.

We believe it is crucial that the University's approach to student discipline be informed by a coherent and consistent philosophy which has regard to basic considerations of integrity and education. More than this – we believe that it is fundamentally important that the University's approach to student discipline be underpinned by restorative rather than retributive justice. As an educational institution, its focus should be remediation and - unsurprisingly - education. We readily acknowledge that the pedagogy in some parts of the University incorporates a sophisticated understanding of the causes of and best approaches to educatively tackling academic integrity. These parts of the University are not at issue. Rather this paper will have most relevance to the Schools and Faculties that, for reasons of lack of resources or inclination, may be able to improve the student experience in the area.

We would particularly like to take this opportunity to set to one side some of the moral panic that tends to characterise discussions of academic

integrity. The NSW Independent Commission into Corruption's recent report *Learning the hard way: managing corruption risks associated with international students at universities in NSW*, for example, highlights the importance of the proper resourcing of the area,<sup>1</sup> urging universities to take responsibility for this.

Ultimately, if academic integrity standards slip when students cut corners, surely it is counter-productive, even hypocritical for the University to do its own corner cutting. However, by short changing the educational supports required to educate students about academic integrity and ethical behaviour, the University is effectively guilty of its own shiftlessness. It may seem more cost efficient to attempt to use disciplinary controls to combat this issue, however, we are of the view it is neither efficient nor effective. This approach simply shifts the burden elsewhere.

This discussion aims to unpack some of the underlying assumptions about student conduct and pose a more rigorous framework for responding to these issues. This paper barely scratches the surface of the literature and research in the area; however we think it could act as a useful starting point, and not an end in itself.

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## II. GENERAL PRINCIPLES

### A. Definition and causes

Academic misconduct may include findings of plagiarism, collusion or unauthorised collaboration between students, cheating on examinations (including bringing unauthorised materials into examinations), and falsification of research data. General misconduct potentially covers a far wider range of conduct, from relatively minor misdemeanours to, at its margins, conduct which may overlap with criminal offences (including fraud, theft and assault).

Current attitudes to student misconduct fall along a continuum. At one end, the problem is regarded as stemming from students' own moral and/or intellectual failures.<sup>2</sup> Some studies suggest that

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1. NSW Independent Commission into Corruption, *Learning the hard way: managing corruption risks associated with international students at universities in NSW* (2015) <[http://www.icac.nsw.gov.au/component/docman/doc\\_download/4595-learning-the-hard-way-managing-corruption-risks-associated-with-international-students-at-universities-in-nsw](http://www.icac.nsw.gov.au/component/docman/doc_download/4595-learning-the-hard-way-managing-corruption-risks-associated-with-international-students-at-universities-in-nsw)>.

2. See e.g. Lindsay's discussion of studies comparing Machiavellianism of US college students with students in the 1960s; Bruce Lindsay, *Student Discipline: A Legal and Empirical Study of University Decision-Making* (A thesis submitted for the degree of Doctor of Philosophy of the Australian National University, November 2009).

misconduct occurs in a milieu of decreased moral and ethical weight on integrity and fairness, and greater emphasis on success'.<sup>3</sup> In other words, students regard academic 'success' as more important than competing fairly. In this scenario, students fail to recognise that they are effectively cheating themselves when they cut corners and seek unfair advantages in their studies.

However since the 1990s, much research on the causes and motivations of student misconduct suggests that rather than moral decrepitude, a key motivating factor is systemic pressure from the institution's own priorities.<sup>4</sup> These studies cite institutional emphases on high achievement in a context of restricted educational support as primary reasons students seek unfair advantages. An example of this is the enormous importance many students place on a good grade point average in order to access the graduate course that will allow them access to their chosen vocation. These factors are amplified by time pressures and intensified by students' imperative to work to fund their studies. There frequently remains a lack of meaningful acknowledgement of these difficulties.

Difficulty accessing support when it is needed seems to be one major factor in some students' - often desperate - attempts to avoid failure. Last years' spate of international students falsifying special consideration documentation is a case in point. These students consistently reported that they had given up on legitimate requests for the University to recognise and accommodate their difficulties, as they perceived the University would ultimately refuse to grant special consideration *no matter what their problem or the documentation they furnished*.

The Senate Employment, Workplace Relations and Education Committee's report: *Universities in Crisis* posited that the plunge in government funding and concomitant commercialisation of the sector is connected to weakening academic standards and the ability of universities to perform thoroughly their educational role.<sup>5</sup> This affects international and domestic students alike. Resources are there – but they are not always enough. While the Academic Skills Unit provides support to students, the number of visits is limited and some students under time pressure will inevitably leave it too late and find the service cannot accommodate their needs at the last minute. These students may well need assistance with time management among other things; however their very problem may exclude them from the help they seek. The NSW Independent Commission into Corruption's report cited above notes that universities may benefit by 'understanding the full-cost profile of international students, particularly the ongoing and significant cost of managing the gap between student capability and academic demands'.<sup>6</sup>

A survey of some of the literature exploring the motivating factors behind academic dishonesty for students indicates the following is at play:

- students claimed they wanted to help a friend;
- they had a health or other crisis;
- the assessment was too hard, too time-consuming or due all at once; and simply
- it was an accident.<sup>7</sup>

Ultimately all of these explanations are plausible, and to some extent likely. Accordingly the challenge in formulating policy is to ensure that

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3. See e.g. John G. Bruhn, Gary Zajac, Ali A. Al-Kazemi & Loren D. Prescott, 'Moral Positions and Academic Conduct: Parameters of Tolerance for Ethics Failure' (2002) 73 *The Journal of Higher Education* 461.

4. See eg. Helen Marsden, Marie Carroll and James Neill, 'Who Cheats at University? A Self-Report Study of Dishonest Academic Behaviours in a Sample of Australian University Students' (2005) 57 *Australian Journal of Psychology* 1; Roger Bennett, 'Factors Associated with Student Plagiarism on a Post-1992 University' (2005) 30 *Assessment and Evaluation in Higher Education* 137; and Arlene Franklyn-Stokes and Stephen Newstead 'Undergraduate Cheating: Who Does What and Why?' (1995) 20 *Studies in Higher Education* 159.

5. Senate Employment, Workplace Relations and Education Committee *Universities in Crisis*, Ch 5.

6. NSW Independent Commission into Corruption, above n 2, 6.

7. Mark Brimble and Peta Stevenson-Clarke, 'Perceptions of the Prevalence and Seriousness of Academic Dishonesty in Australian Universities' (2005) 32 *The Australian Educational Researcher* 19.

it is not purely reactive and punitive, but takes a more holistic approach to the problem of academic integrity. Both experience and research supports the contention that most students are not serial offenders operating in a moral vacuum, and hell bent on strategically grabbing every unfair advantage they can obtain. Instead, the picture we see is students who - from time to time and under extreme pressure - resort to tactical behaviour that crosses an ethical line in order to cope with the demands of their studies. Clearly students who are under stress may look for the easiest alternatives. Additionally, where students have inadvertently committed plagiarism for example, due to unfamiliarity with the requisite conventions, it is unreasonable to expect that the next work they hand in will be totally without problems. There are stages of learning and there needs to be a graduated response which creates space for this learning to occur.

We have seen students who have attended an educative meeting about a piece of work, and on handing in their next assessment they have found that any referencing imperfection, regardless of the overall improvement, has seen the matter progressed into a formal and punitive process. It is our view that penalising students in this way, just as they are beginning to engage with the conventions they need to learn, sends completely the wrong message. It is rather like learning a new language and being given one chance to get the grammar correct. If making any further mistakes resulted in punishment, most of us would quickly give up.<sup>8</sup>

None of this is to exculpate individual student responsibility. Not all students - no matter how pressured they are – resort to cutting corners or cheating. However, if the University wants to curb the motivating forces for such behaviour it needs to consider the broader context in which it is occurring. There is a large volume of research indicating that punitive and retributive approaches in themselves

generally fail to influence the degree to which students adhere to academic integrity principles and ethical conduct.<sup>9</sup> More importantly, recent studies support the contention that the primary responsibility lies with universities to properly resource teaching and learning in this space.<sup>10</sup>

## RECOMMENDATION

That serious consideration is given to whether existing supports are sufficiently accessible to students. The current special consideration and SEAP schemes are failing to provide an adequate safety net for struggling students. Academic Skills provides a range of resources, however students frequently describe difficulty accessing help when they need it.

## B. Underlying Assumptions

As discussed above, attitudes to students suspected of academic misconduct tend to polarise into two camps. On one end, those students are regarded as little more than dishonest cheaters and the problem of academic integrity is an entirely ethical one. On the other end, students are situated as learners who need guidance and support, and academic honesty is seen as a problem of pedagogy. The language of the current statute 13.1 locates the discipline process rather more in the first camp. The term 'misconduct' and the language of 'allegation' and 'penalty' do not intimate a pedagogical approach.

We are of the view that there is opportunity for a more holistic approach to student discipline addressing itself to a range of causative factors. In the large body of academic work on plagiarism and academic integrity policies at Australasian tertiary institutions, the prevailing wisdom is that academic integrity is a far broader issue than simply a student discipline matter.<sup>11</sup>

8. Of course if you have ever been to France you would have experienced this very phenomenon.

9. See e.g. Jennifer Martin & Karen van Haeringen, 'Policy is not enough: a Holistic Approach to Promoting Academic Integrity among Students' (Proceedings of the Australian Quality Forum 2010), 74; Academic Integrity Project (2005); *The Exemplary Academic Integrity Project at UniSA* <<http://resource.unisa.edu.au/course/view.php?id=6633>> and *Academic Integrity Standards Project: Aligning Policy and Practice in Australian Universities 2010-2012* <<http://www.aisp.apfei.edu.au/>>.

10. NSW Independent Commission into Corruption, above n 2; Tracy Bretag, 'Australian unis should take responsibility for corrupt practices in international education' <<http://theconversation.com/australian-unis-should-take-responsibility-for-corrupt-practices-in-international-education-40380>>.

11. Martin & van Haeringen, above n 9.

Most commentators agree that to effect a holistic approach

*standards of academic integrity... need to be embedded in the curriculum implicitly as learning outcomes, or explicitly as assessment marking criteria (e.g. students' own work, independent research, acknowledgement of sources).*<sup>12</sup>

There are a number of tenets which inform principles of academic integrity and while some may seem trite or obvious; it is useful to make underlying principles explicit when critically evaluating the current procedures.<sup>13</sup>

1. There is a value judgement inherent in the formal approach to student discipline that maintains that 'to claim the intellectual outputs of others as your own is somehow wrong'.<sup>14</sup> A study by Fielden and Joyce indicates that a significant majority of staff involved in academic integrity processes made moral and value judgements about the students involved. This can have real consequences for the impartiality required for fairness and suggests that misconduct matters should be dealt with by staff who are properly trained.
2. There are many stakeholders in Universities: professional and academic staff, students, legal advisers, commercial interests (such as the developers of Turnitin) and both public and private funding bodies. Stakeholder views may inform attitudes in this area and should be identified and made express rather than assumed as norms.
3. The act of producing a piece of academic writing requires the use of conventions or rules on how to access and record the work of others. Maintaining academic integrity requires access to full knowledge of these rules.

4. 'Human information seeking ... follows the path of least resistance'.<sup>15</sup> Therefore, it is a natural inclination to 'cut corners' and the maintenance of absolute rigor requires constant effort. Students need active support to maintain this effort, and the University must consider and accommodate legitimate circumstances which present challenges to this.
5. There has been an 'explosion in the number of academic research outputs being produced in most disciplines and many of these research outputs being freely available electronically',<sup>16</sup> and this 'appears to be correlated with greatly heightened and widespread concerns about academic integrity'.<sup>17</sup> This may contribute to the moral panic – but does not necessarily mean there is an actual increase in plagiarism.
6. 'In any economy when a product is available free of charge, assumptions may be made about the worth of the item'.<sup>18</sup> The attitudes to what is freely available on the internet inform beliefs about how that work may be used in the production of academic outputs. It is important to make expectations around this explicit when educating students about academic integrity.

The University holds itself out as providing a well-rounded educational experience to its students. While positing the role of the University as *in loco parentis* is overstating the current position, and students would undoubtedly reject the paternalism of this attitude, it remains that many students are young and inexperienced, still developing their personal integrity and 'moral compass'. To this end, they generally require support to become socially and ethically responsible citizens. Consequently, it is of primary importance that the University has due regard to its overall approach

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12. Tracey Bretag, Saadia Mahmud, Julianne East, Margaret Green, Colin James et al, *Academic integrity standards: A preliminary analysis of the Academic integrity policies at Australian Universities* (Proceedings of AuQF 2011 Demonstrating Quality, Melbourne) 48, 50.

13. Kay Fielden and Donald Joyce, 'An analysis of published research on academic integrity' (2008) 4 *The International Journal for Educational Integrity* 4.

14. *Ibid*, 6.

15. *Ibid*, 7.

16. *Ibid*, 8.

17. *Ibid*.

18. *Ibid*.



to student discipline: whether to punish, educate, minimise risk or develop integrity.<sup>19</sup>

Additionally, we are of the view that gatekeeping entry standards is only part of the solution.<sup>20</sup> Even when entry standards are strictly maintained, there are a range of reasons students may continue to need support once in the institution. Language competency for example – is not a fixed attribute – it may wax and wane depending on many variables over the life of a student’s study. Students will typically be at the University for a number of years and much will change in their lives in that time. The impact of these changing circumstances cannot be ignored or simply subsumed as solely the student’s problem and responsibility to manage.

## RECOMMENDATION

1. That staff involved in the formal aspect of misconduct processes should be properly trained and familiar with the basic principles of procedural fairness to avoid moral pre-judgement.
2. That caution needs to be exercised to make stakeholder interests (such as anti-plagiarism software developers like Turnitin) express and not merely assumed as norms.

## C. Procedural fairness

It is settled administrative law that all formal processes undertaken concerning formal student discipline (i.e. those which may attract a sanction or penalty) attract the right to procedural fairness. The two crucial rules of the doctrine are *audi alteram partem* – to hear the other side and *nemo iudex in causa sua* – no one may be judge in his [sic] own case.

With regard to the first rule – the right to be heard – satisfactory notice is critical, as is the issue of sufficient particulars. The current statute provides at 13.1.7:

- (1) *Where an allegation of general misconduct or academic misconduct against a student is to be investigated, the senior officer or the relevant dean, as the case may be, must provide the student with a written notice (the “allegation notice”):*
  - a) *setting out the alleged general misconduct or academic misconduct, as the case may be;*
  - b) *in the case of academic misconduct, attaching copies of any documents of which the relevant dean is aware relating to the alleged academic misconduct, and in the case of general misconduct informing the student of any evidence of which the senior officer is aware relating to the alleged misconduct;*

and

- (6)(d) *must, unless the matter is dealt with in the absence of the student, inform the student of the evidence it intends to take into account in making its decision and give the student the opportunity to present the student’s case and to respond to any relevant evidence or allegations orally and/or in writing;*<sup>21</sup>

With regard to (6)(d) however, there needs to be clarification of the procedures about exactly what circumstances the matter might be held in the absence of the student.

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19. Bretag et al, above n 13.

20. As suggested in the recent University-wide email from the Vice-Chancellor entitled ‘A Debate About Standards’.

21. Emphasis added.

## RECOMMENDATION

That the latter provision is revised to remove the caveat 'unless the matter is dealt with in the absence of the student' as, even if the hearing itself is heard *ex parte*, the student must still know the case to be met in order to have an opportunity to address the allegation in writing.

Discipline procedures should make it unambiguous that the University is obligated to provide both sufficient detail about the allegation of fact or action as well as documentary evidence which is 'credible, relevant and significant to the decision to be made'.<sup>22</sup> Anecdotally, it is not uncommon for us to see allegation notices that fail to set adequately out the allegation and/or do not set out the evidence relied upon with sufficient particularity. It is also important in practice that, if oral evidence is to be adduced in the hearing; there must be an opportunity for the student to know of its contents prior to a hearing so they may meet it.

## CASE STUDY <sup>23</sup>

A student was presented with the examiner's report on the allegedly plagiarised assignment while she was sitting outside waiting for the Committee meeting to commence. As there were a number of issues that the student was unprepared to discuss or defend, her right to be heard was effectively negated by the lack of opportunity to prepare and seek advice.

## CASE STUDY

A student faced an allegation of general misconduct in which CCTV footage was listed as evidence in the investigation. However, the student was denied access to the footage.

## RECOMMENDATION

1. That allegation notices include not only the rules which are alleged to have been breached, but also all relevant allegations of fact, action or omission.
2. All relevant evidence must be produced to the student with the allegation notice. This should include opportunities to view anything the discipline committee has had access to in coming to its determination – including CCTV footage, witness statements and any other forms of evidence.

The second limb of procedural fairness involves 'a prohibition at law on a decision maker acting partially, or by conduct, association or consideration of extraneous information, failing to approach a matter with a mind open to persuasion'.<sup>24</sup> This is seen at times in academic misconduct procedures where the staff member who raised the allegation remains with the committee while they deliberate, or even participates in those deliberations. The Latin for the rule against bias is *nemo iudex in causa sua* – 'let no one be judge in his own case' – so allowing the person bringing the case to be a member of the Discipline Committee is a very literal breach of this rule.

The current Statute is inconsistent, where at 13.1.4(2) with respect to general misconduct it provides:

*The committee referred to in sub-section (1)(a) cannot include the senior officer who refers the allegation to the committee and must comprise three members...*<sup>25</sup>

There is no such provision in 13.1.5 for academic misconduct committees.

22. Bruce Lindsay, 'University discipline and the "higher education crisis": student advocates' experiences and perceptions of quasi-judicial decision making in the university sector' (2009) 31 *Journal of Higher Education Policy and Management* 327 – citing *Kioa v West* (1985) 159 CLR 550 at 629.

23. All case studies are used with permission of the student, however some identifying details have been changed to protect confidentiality.

24. *Ibid*, citing *Webb v R* (1994) 181 CLR 41 at 74.

25. Emphasis added.



Under the Statute, there is no requirement that allegation notices advise the student of their right to seek independent advice and support from the Advocacy Service. While this may not be critical to ensuring procedural fairness, it would undoubtedly enhance the student's capacity to be heard in relation to the allegation.

### CASE STUDY

An honours student attended a Discipline Committee hearing where the honours supervisor was a member of the Committee. The student's defence to the allegation was that he had relied on the feedback from the supervisor for guidance with referencing. The student claimed that the area where the plagiarism was alleged had been approved by the supervisor prior to thesis submission. In this case, the supervisor had a potential interest in defending himself against the implication that he had not appropriately performed his role.

### RECOMMENDATION

1. That discipline procedures should explicitly state that a staff member on a Faculty Discipline Committee should not have been involved with the allegation prior to it being heard. A member of the Discipline Committee who was involved in the conduct or marking of the assessment subject to the alleged misconduct is very likely to induce an apprehension of bias. The examiner of an assignment subject to an allegation of plagiarism might provide a report and evidence for the Committee, but should not be an adjudicating member of the Committee.
2. That all allegation notices include information about the student's right to seek independent advice and support from the

Another manifestation of bias, and a legal error in itself, is to shift the burden of proof to the student, rather than requiring the complainant (the University) to adequately prove the allegation on the evidence before it.

### CASE STUDY

At appeal, the record of the faculty discipline hearing was included as part of the Faculty's response to the student's appeal submission. The record of the hearing concluded with the reason for the finding of plagiarism, in this case, to be 'there was no real evidence to support that she did not plagiarise'.

While it is fair to expect students to provide some corroboration of their submissions in response to an allegation, it is manifestly unfair to require them to rebut comprehensively or disprove allegations. Where there is a lack of convincing evidence either way, the Discipline Committee should dismiss the allegation for lack of evidence.

Finally, while University internal proceedings are conducted tribunal style and are inquisitorial, there should be flexibility in serious misconduct cases for a more adversarial approach, especially where adverse oral evidence is being relied upon and the student wishes to contest it.<sup>26</sup>

### RECOMMENDATION

1. That there is an express requirement that Discipline Committees bear the burden of proof rather than requiring the student to prove no wrongdoing.
2. Where the evidence of misconduct fails to meet the standard of the balance of probabilities, the Committee must dismiss the allegation for lack of evidence.

26. See e.g. *Simjanovski v La Trobe University* [2004] VSC 180.

## D. Interplay between criminal and internal misconduct processes

There are potential legal consequences for students that may flow from the University's misconduct proceedings. Regard should be had to the possibility that proceeding with student discipline matters when there is an actual or anticipated criminal or civil matter on foot could pose a real threat to the doctrine against self-incrimination. For example, the very act of providing a candid submission in response to a misconduct allegation or appeal may require the student to make admissions that breach this doctrine. There is no privilege attaching to such documents, and as such anything produced in the course of the internal University investigation, hearing and appeal may become evidence in criminal or civil proceedings.

The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.<sup>27</sup> University investigations and penalties requiring admissions of wrong doing are a particular concern.

### CASE STUDY

A student faced an allegation of sexual harassment that was not referred to the University policy and procedures which allow for mediation and conciliation, but rather progressed directly to formal general misconduct procedures pursuant to Statute 13.1. The letter detailing the complaint that prima facie formed the basis for the allegation of general misconduct also explicitly stated that further legal action may issue as a result of the alleged conduct.

On referral of the matter to a General Misconduct Committee, it met with the student as part of its investigations. The General Misconduct Committee, in finding the misconduct was substantiated, subsequently applied a penalty (among others) requiring the student to write a letter of apology to the complainant.

In this context, such a letter would be effectively an admission of wrongdoing that could potentially have further legal consequences for the student should the complainant proceed with the threatened civil action against the student.

### CASE STUDY

A student faced general misconduct allegations with respect to a breach of Regulation 8.3.R2. The student had his access to IT facilities suspended as a result of alleged conduct that may attract a criminal prosecution for obtaining financial advantage by deception. We asked on the student's behalf that the General Misconduct Committee had regard to the potential criminal consequences for this student of making a written submission to the Misconduct Committee. In this instance, requiring frank disclosure by the student of the relevant conduct may have the effect of abrogating the student's privilege against self-incrimination in a criminal setting.

Additionally when issuing a penalty subsequent to a criminal finding, regard should be had to the rule against double jeopardy to avoid the student effectively being penalised twice for the same misconduct.<sup>28</sup> There will necessarily be a distinction in extremely serious cases impacting safety or other reasons where an emergency power to exclude should be exercised. However, criminal penalties should be taken into account in any further penalties being considered by the university (see also *Proportionality of Penalties* at I below).

27. Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 136–137 [104] (Hayne & Bell JJ).

28. Double jeopardy laws perform a role in protecting citizens against multiple prosecutions by authorities.

## RECOMMENDATION

1. That the University's misconduct provisions are framed with respect to potential interaction with criminal investigations or other legal proceedings. Regard should be had to the timing of any University investigation. The Chair of the Discipline Committee should, as a matter of course, consult with University General Counsel and Legal Services to identify any relevant legal risk for the student.
2. Any criminal or civil sanctions already issued against the student for the alleged conduct should be taken into account when penalising the student under University discipline procedures in order to avoid disproportionate or manifestly harsh penalties.

### E. 'Start as you mean to go on': Informal 'educative' processes distinguished from investigation leading to formal processes

Despite the research situating the objective of student discipline as educational rather than punitive,<sup>29</sup> the current procedures under Statute 13.1 continue to resemble an adversarial trial, pitting the University and the student against each other.

The University's Guidelines on Academic Integrity clearly state

*An allegation should not be made against a student suspected of involvement in academic misconduct unless the lecturer and/or Head of Department decide to proceed with the discipline process, having considered fully the above factors.*

While we welcome the educative rather than punitive approach to academic honesty, it is critical that a so-called educative meeting does not become a de facto investigation and culminate in a formal allegation being issued. Otherwise, this is no more than an educative response to plagiarism becoming a fishing

expedition. A thorough investigation of potential misconduct should be undertaken *prior* to determining whether the appropriate response is an informal educative one or to issue a formal allegation. Once a decision had been made *prima facie* to proceed educatively, or formally, these processes should not overlap.

### CASE STUDY

A course coordinator, concerned by circumstances they considered suspicious in relation to a group assignment, emailed one of the students requesting an explanation. The student was subsequently advised that an educative response would be taken on the condition that they volunteer information about the potential breach. The student then entered into email correspondence with the course coordinator in what amounted to an investigation of the allegation. However, contrary to the initial undertaking to maintain an educative approach, the allegation was subsequently formalised and preceded to a hearing.

Cases such as this raise significant procedural issues. Firstly, an educative response should not be predicated on any action by the student. While the above process may have been undertaken in good faith, it had the effect of coercing and entrapping the student. It also put the Faculty into a situation where it was unable to honour its original commitment to proceed informally. For this reason it is important that decisions made on whether to proceed with an educative response or a formal process should be made only after a preliminary investigation of the alleged conduct establishes there is a *prima facie* case to either deal educatively or formally.

It is our view that there may be a number of irregular processes undertaken at faculty level. Anecdotally, UMSU student office bearers who sit on faculty based discipline committees have reported on occasions that the staff members constituting these committees – including the chair from time to time – appear to lack confidence

29. See e.g. Centre for the Study of Higher Education material at <<http://www.cshe.unimelb.edu.au/assessinglearning/03/plagMain.html#def1>>

in and basic familiarity with the norms and best practice of determining misconduct allegations.

## RECOMMENDATION

1. That it is clear in the procedures that informal/educative and formal processes do not overlap.
2. That there is a review of the training and resourcing of these local discipline committees and the staff who are charged with investigating such matters at first instance.
3. That the Advocacy Service is involved in any training initiated as a result of this review.

## F. Standards of Persuasion

The standard of proof required in student discipline cases is 'on the balance of probabilities' consistent with the usual civil/tribunal conventions. However regard should be had to both the seriousness of the allegation and the gravity of the consequences when determining allegations, consistent with Briginshaw principles.<sup>30</sup>

For example, misconduct outcomes may have the effect of terminating a student's status or even collaterally, extinguishing their right to be in the country.<sup>31</sup> Accordingly, where findings may have an impact on student visas or professional registrations, the interests involved are much higher stake than where the consequence is minor. In this context, consideration might be given to whether Committees charged with determining such matters should be directed that a finding will require stronger evidence than might be necessary for a matter with less onerous consequences.

The Administrative Review Council recommends:

*If a fact in issue involves serious wrongdoing, is inherently unlikely or has grave consequences, better evidence might be required to establish the fact. For example, it would be unsound to make a finding based solely on uncorroborated hearsay evidence that a person forged a document.*<sup>32</sup>

## RECOMMENDATION

That Committees charged with determining such matters should be directed that a finding will require stronger evidence than might be necessary for a matter with less onerous consequences.

Under current custom and practice, any breaches of examination rules are dealt with as strict liability matters. That is, regardless of intention or extenuating circumstances – the mere fact of the breach will raise a finding of misconduct. The majority of examination related misconduct arises due to the presence of unauthorised materials in the examination venue. These cases almost always arise from an invigilator report. The role of examination invigilators is restricted solely to surveillance and reporting. They are not required to make judgements about misconduct – but rather they are obliged to report anything they suspect may be a breach of examination conditions. All such reports must be determined by investigation on behalf of the relevant Dean.

Where unauthorised material is confiscated or otherwise clearly documented, it may be a straightforward determination. In some cases, the only evidence is the report of the invigilator itself.

30. The Briginshaw principle is understood as requiring care in cases where serious allegations have been made or a finding is likely to produce grave consequences. It does not change the standard of proof required, but goes to the notion that, the more serious the allegation, the more probative or stronger the evidence needs to be. See for more information: <[http://www.leg.justice.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011711808/pepper\\_briginshaw%20standard\\_for%20judicial%20commission%20talk\\_nov2013.pdf](http://www.leg.justice.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011711808/pepper_briginshaw%20standard_for%20judicial%20commission%20talk_nov2013.pdf)>.

31. It is also particularly important in ensuring no potential law graduates are unduly affected in their application to practice without proper cause. The pathway to law now lies via the graduate Juris Doctor, meaning any number of undergraduate or other courses may be undertaken by the student prior to law –effectively meaning all courses may impact on law students' admission at some point in the future. While a diversion style program does not obviate the student's requirement to disclose to the Board of Examiners, it would create a far less onerous case to show cause than a full formal process.

32. Administrative Review Council, *Decision Making: evidence, facts and findings* (Best-practice guide 3), 8.

How should such evidence be evaluated? The *prima facie* investigation must give appropriate weight to the various types of evidence. Invigilator reports, while undoubtedly made in good faith – should not be accepted as unqualified fact or given more probative value than the student’s account. Things are not always as they seem, and investigation needs to maintain an open mind to plausible alternative explanations.

For example, how should the following invigilators’ reports be evaluated *prima facie*?

- illegible writing on a student’s arm – with no photographic evidence;
- a student spending “too long” in the toilet (with no indication of the time or the student’s response if questioned) or students going to the toilet “too many times” during the exam.

These are all examples of invigilator reports we have seen which were the sole evidence relied upon to formalise an allegation of academic misconduct against the student. Clearly an investigator should have regard to whether it is open to find that the student did not have cheat notes on their arm in plain view or that the student was in the toilet because they had an upset stomach due to exam nerves or an illness.

## RECOMMENDATION

That in cases of untested invigilator evidence the student’s written submission in response to the allegation is evaluated giving benefit of the doubt to the student’s account to determine whether the matter should proceed to hearing or should be dismissed *prima facie*.

## G. Intent – accident, ignorance and motive to deceive?

It is our view that intent is a critical issue. Under the current statutory regime, intent is not required for a finding of misconduct. This University is not alone. In his comprehensive study of student discipline processes in Australian universities, Lindsay found that only two of 15 institutions surveyed included the requirement that intent to breach the published rules of academic integrity was required to constitute academic misconduct.<sup>33</sup> Just under half expressly established any threshold at all for these breaches to be considered misconduct.

The obvious problem is ‘the question of intent imports a student’s state of mind into the decision-making process’.<sup>34</sup> Few discipline committees have either the experience or resources to know what lies in the heart of students. Determining the requisite intent in order to sustain an allegation is simply too onerous for a quasi-legal university tribunal. Unlike the criminal courts that employ rules of evidence and have the power and resources to establish intent, the University’s process is significantly less likely to allow for real certainty on the issue.

This effectively establishes a strict or absolute liability which, while it operates in the external legal world in particular areas such as traffic infringements and parking fines, is also frequently acknowledged to be an undesirably blunt instrument. Such an approach necessarily lacks granularity. In reality intent exists on a continuum spanning from absolutely accidental/ignorant, through reckless indifference, wilful blindness finally arriving at deliberate intention to deceive and gain an unfair advantage.

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33. Lindsay, above n 3.

34. Ibid, 75.



There are other reasons for the application of a strict liability approach. For example, the effect on both academic integrity of the University at large and fairness for other students is the same regardless of the intention of the respondent. If a student gains an unfair advantage in assessment, it is immaterial whether it was by design or ignorance. Additionally, where students are not held accountable for academic rigour in their assessment, the University arguably fails in its duty to educate the student in essential academic conventions. These points are well made and must be addressed.

However, the threshold needs only to be an objective assessment of the likely intent of the student on the balance of probabilities. This is arguably no more elusive than any of the other determinations on fact made in a misconduct investigation. A solution which may satisfy both the necessity for a just and fair outcome in all cases without uniformly requiring intent to be established would be to ensure that the procedures allow leeway to incorporate situations where a lack of intent or recklessness should clearly result in the allegation being dismissed.

In any event, the custom and practice of strict liability may be at odds with the wording of the current statute. According to statute 13.1.1 (1), academic misconduct includes, but is not limited to, cheating, plagiarism and any other conduct *by which a student seeks to gain for himself or herself, or for any other person, any academic advantage or advancement to which he or she or that other person is not entitled* and includes any conduct that constitutes a breach of the regulations relating to assessment made under statute 12.2.10.<sup>35</sup>

There is an implied intent required by the construction 'by which a student seeks to gain for himself or herself'. It is difficult to reconcile how this is intended to capture unintentional conduct. Certainly in the case of *Humzy-Hancock* the Queensland Supreme Court looked at the Griffith University Law School Assessment Policy and Procedures,<sup>36</sup> and found that the definition of plagiarism as 'the knowing presentation of the work or property of another person as if it were the student's own' implied that intent was required for a finding of misconduct.

In the light of the *Humzy-Hancock* decision, a number of institutions reviewed their definitions of misconduct, seeking to remove any implication that intention is required. We are of the opposite view – any definition in statute or policy should clearly elucidate that some evidence of intention is required. Intention can include not only deliberate acts but also wilfully reckless or negligent conduct, and this may achieve the level of liability desired while still protecting those students who have committed misconduct wholly in ignorance of the required conventions. This is discussed further below.

## RECOMMENDATION

That any definition of misconduct include an element of intent to ensure it catches only wilful conduct, not wholly accidental behaviour.

The current statutory regime automatically includes plagiarism as academic misconduct, as though it is a straightforward and unproblematic phenomenon. This is inconsistent with a significant amount of research in the area, suggesting the exact opposite.<sup>37</sup> For example, some researchers believe that certain forms of plagiarism are a necessary step in developing competence in academic English.<sup>38</sup>

35. Emphasis added.

36. *Re Humzy-Hancock* [2007] QSC 34 at [14].

37. Ursula McGowan, 'Academic Integrity: an Awareness and Development Issue for Students and Staff' (2005) 2 *Journal for University Teaching and Learning Practice* 48; Celia Thompson, 'Discourses on plagiarism: To discipline and punish or to teach and learn?' (2002), Australian New Zealand Communication Association (ANZCA) Conference, Queensland, Australia, 10-12 July 2002; Kerry O'Regan, 'Policing - or, at Least, Policing - Plagiarism at one Australian University' (2006) 3 *Journal of University Teaching & Learning Practice*, 113.

38. Margaret Price, 'Beyond "Gotcha!": Situating plagiarism in policy and pedagogy (2002) 54 *College Composition and Communication* 88.



Plagiarism or 'textual borrowing' (a less value-laden, more descriptive term) is the practice of representing the work of another as one's own work without appropriately acknowledging, citing or otherwise referencing the original source. This may come about by wholly intentional or recklessly indifferent conduct, or it may be careless or negligent,<sup>39</sup> or it may equally be an inadvertent consequence of ordinary ignorance of the academic conventions required to avoid it.

Students tend to expect, not unreasonably we think, that the University will make a distinction between misappropriation or poor referencing due to ignorance, inexperience or socio-cultural dislocation and intentional or reckless attempts to gain unfair academic advantage. The former being an educational problem and the latter falling more clearly into the disciplinary space. Constructing plagiarism this way requires proper regard to the (presumed) knowledge and educational background of the student. Given 'that learning how to cite sources may be the result of a complex, contextualised interplay of cultural, linguistic, educational, disciplinary influences',<sup>40</sup> a 'one size fits all' or 'one strike and you're out' approach to the threshold of plagiarism is a blunt instrument indeed. Lindsay suggests a model of understanding plagiarism which is effectively borrowed from the law of torts.<sup>41</sup>

He suggests that,

*at its limits, academic plagiarism might be considered as arising from careless or negligent conduct of a person toward the use of intellectual sources employed in their own work. The inherent character of intellectual development, or 'formation', among university students further means that such standards have to be applied with regard to the practical knowledge students are assumed to have acquired in their course of studies.*<sup>42</sup>

Similarly, even students who are relatively well versed in the required conventions may not share the same view of what is common knowledge and does not require citation. This distinction is also very discipline specific.<sup>43</sup> Determining plagiarism that has crossed the discipline threshold is intrinsically, but not impossibly complex. While matrices and tables may assist as guidelines – there is little question that a considerable degree of discretion is required when allegations of plagiarism are involved.

Another area that is fraught for students, even those relatively experienced in the relevant academic conventions, is self-plagiarism.

## CASE STUDY

1. A student who completed simultaneous assessments in two subjects where the same topic was available received a penalty for self-plagiarising that was applied to both assignments.
2. A number of students from a particular discipline faced allegations of self-plagiarism, where they felt they were being asked to convey personal philosophies and ideas about the same topic in two different assignments, and they did not understand how else they could have addressed them.

39. This may be the sort of conduct referred to by McMurdo J in *Re Humzy-Hancock* as 'poor referencing' or 'poor work' (*Re Humzy-Hancock* [2007] QSC 34, [14].)

40. Suh, Soo Jung, *Plagiarism, Textual Borrowing, Or Something Else?: An L2 Student's Writing-from-sources Tasks* (2008), 89.

41. Bruce Lindsay, 'Student Plagiarism in Universities: The Scope of Disciplinary Rules and the Question of Evidentiary Standards' (2011) 16 *International Journal of Law and Education* 27.

42. *Ibid*, 40.

43. Lynn Errey, 'Plagiarism: Something Fishy?...Or Just a Fish Out of Water?' (2002) *Teaching Forum* 50 (Oxford Centre for Staff and Learning Development) 17.

## RECOMMENDATION

1. That careful consideration is given in framing plagiarism related policy to avoid using disciplinary controls to address primarily academic problems. For example, development of mechanisms to ensure that inadvertent plagiarism is properly distinguished from intentional passing off of other's words or ideas.
2. That plagiarism as a disciplinary concept should be limited to circumstances where student conduct amounts to intentional or negligent breaches of relevant academic conventions. Negligent breaches should be judged having regard to the level of educational development the student has – from first year undergraduate with international academic background at one end to domestically educated final year research high degree candidate at the other.

There has been a recent focus on the recruitment and support of international students.<sup>44</sup> We hope the reaction to this attention will not be to demonise those students currently in our University, or to concentrate solely on the entrance and English language requirements. Nonetheless, the recent reports on this issue do highlight the rather simple fact that not all students have studied under the Australian educational paradigm. Many international or overseas educated students have studied using very different academic conventions. The majority of international students do not come from an educational system that recognises the Western academic paradigm that informs our understanding of plagiarism. Brennan and Durovic's study of Confucian Heritage Culture Background (CHCB) students and their perceptions of what constitutes cheating is instructive.<sup>45</sup>

While we note that the concept of grouping students under the rubric of CHCB is not uncontroversial,<sup>46</sup> there is still value in this study. They point out that CHCB students (from China, Singapore and Malaysia) are no more likely to believe cheating was acceptable than their western peers, however their educational backgrounds generally do not prepare them well for the western academic paradigm. For example, CHCB students have usually experienced an education that is almost entirely reliant on examinations to assess knowledge. They note 'students who are assessed by examinations are trained from a young age to seek only that knowledge that is important in passing'.<sup>47</sup> This creates a very strong emphasis on memorisation and rote learning and creates real conceptual challenges for those students in comprehending the western preoccupation with originality and ownership of intellectual property.

Westernised individualism can create a culture shock for CHCB students who may find the emphasis on working alone very alien indeed. Getting the 'right' answer may be valued more highly than originality and the 'skills required to produce an original piece of work...require the ability to challenge, criticise and speak up when a mistake appears to be made'.<sup>48</sup> This may be the opposite of these students' previous experience and requires extra effort to learn and acclimatise to.

Other issues for International and overseas educated domestic students can be summarised as follows:

- a. Some students for whom English is another language may not have achieved confidence or proficiency in paraphrasing. Further, they may feel that the standard of their English is sufficiently inferior to that of the author of the source material that they avoid paraphrasing and prefer to copy (but either deliberately or

44. See e.g. ABC Four Corners programme *Degrees of Deception* <<http://www.abc.net.au/4corners/stories/2015/04/20/4217741.htm>>.

45. Linda Brennan and Juliana Durovic, "'Plagiarism' and the Confucian Heritage Culture (CHC) Student: Broadening the Concept before Blaming the Student' (Paper delivered at ANZMAC 2005 Conference, December 2005, Fremantle).

46. See e.g. Jianli Wang, 'Confucian Heritage Cultural Background (CHCB) as a Descriptor for Chinese Learners: The Legitimacy' (2013) 9 *Asian Social Science* 105.

47. *Ibid*, 31.

48. *Ibid*, 33.

through lack of skill get the reference incorrectly or not at all and thus mislead the marker as to the nature of the material being marked);

- b. Some students may have experienced a discrepancy between formal rules and actual practices in relation to plagiarism in their previous tertiary and possibly secondary educational history. This inhibits their acceptance of the extensive communications provided (e.g. in orientation events, assessment criteria, coversheets, lectures, tutorials, or during pre-examination announcements) that the University takes academic integrity seriously—at least until they face a misconduct allegation.

Professor Ouyang Huhua from Guangdong University of Foreign Studies provides a perspective of plagiarism from a Chinese point of view.<sup>49</sup> Professor Ouyang makes the following observations:

- The notion of plagiarism is unheard of in China.
- Knowledge-making is not open to everyone in China. Only a few exclusive and elite academics create knowledge.
- The system is very hierarchical; authors are seen as superior, in a different way to the West.
- Everyone knows what academics have said and who said what; quoting without referencing is common practice.
- Exams are usually purely about reciting and memorising.
- Individuals, culturally, cannot claim to own their thoughts. It is accepted practice to defer claims to any works, and the ownership of works is potentially politically dangerous in China.
- People are socialised to work towards a collective voice being spoken.
- It is extremely difficult for Chinese students

beginning studies in [Anglo-Australian Academic conventions] to understand and adapt to [Anglo-Australian] approach to referencing.

Professor Ouyang emphasises the need for training of International students in the expectations of the relevant academic paradigm. He suggests that the implementation of a 'buddy system' whereby more experienced Chinese students assist new students would be very helpful. For domestic students, there is also a notable difference between VCE and University attribution practices that students must be actively taught.<sup>50</sup>

Song-Turner argues that when international students resort to misappropriation, it typically arises from social and cultural dislocation (as well as academic and linguistic difficulties) as distinct from wilful or negligent misconduct.<sup>51</sup> Many international students lack confidence and

*[I]ost in a sea of a new environment, language issues, cross-cultural misunderstandings, and other problems, sometimes copying from a written text seemed to be not so much an issue of improper behaviour, as, rather, a safe and viable course of action in what often seemed to be a time of confusion and uncertainty.<sup>52</sup>*

Many universities now use text matching software programs like Turnitin to assist in plagiarism detection. Turnitin, while it is frequently described as 'anti-plagiarism software', neither detects nor impedes plagiarism *per se*. Some faculties and schools at this University use the software as an educational tool – allowing students to conduct self-assessment prior to submission of final drafts. Others use it primarily for *ex post facto* detection as well as having a kind of 'panopticon' effect.

There is conflicting evidence on the efficacy of

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49. Michael Reddy Josef Leidenfrost (eds.), 'Universities, Students and Justice ENOHE' (European Network for Ombudsmen in Higher Education) Occasional Paper No. 5, 130; see also *Understanding the Chinese Learners' Community of Practices: An Insider-Outsider's View*. Keynote speech at the International Students, Academic Writing and Plagiarism Conference, Lancaster University Management School and the London School of Economics and Political Science, 5-7th September 2007, Lancaster, UK

50. For example, at VCE referencing of direct quotes is done inline, but all other paraphrasing is simply referenced in a bibliography. Doing this at tertiary level will surely get you into hot water, but students genuinely believe it is the right thing to do.

51. Helen Song-Turner, 'Plagiarism: Academic Dishonesty or Blind Spot of Multicultural Education?' (2008) 50 *Australian Universities Review* 2.

52. *Ibid*, 46.

Turnitin and similar programmes. Some studies have found it highly effective as a deterrent,<sup>53</sup> others not so much.<sup>54</sup> Generally however, there is agreement that Turnitin works best as an educative tool rather than a detection system due to the large margin for error in interpreting the 'similarity index'. For example, the Advocacy Service has seen a number of cases where the similarity index was regarded as a measure of plagiarism. This is clearly not the case and betrays a lack of training and familiarity with the software.

In one case, we saw a student whose paper indicated an index of almost 40% match with other student papers. It was the cover sheet. In another case, the software was calibrated to pick up any two words in a row, and this showed an index of almost 90%. A further example is where a student inadvertently submitted an early draft of their paper – they realised and alerted their subject coordinator who allowed them to resubmit the correct draft. They were subsequently sent an allegation notice for plagiarism - the sole evidence was a 73% similarity index in Turnitin. On further investigation – this match was almost entirely to the previous version of the paper they had submitted. Clearly these interpretation errors are at the extreme end of the spectrum. However, they are nevertheless illustrative of the difficulties busy academics may encounter with the extra requirement of mastering text-matching software. However, even among staff who are reasonably well versed in the interpretation of Turnitin results, the path is fraught with danger.

Turnitin may show 'false positives' such as a recent case where, *prima facie*, Turnitin showed a very high similarity between two student papers – one from several years earlier. The student was adamant they had never seen the other paper. Ultimately it was established on appeal that the matching areas were common to a

primary source both students had used. Turnitin will simply preference the largest amount of matching text. This can have the effect of masking properly attributed quotes and citations to another student's paper if they too have referenced that source extensively.

Accordingly

*plagiarism-detection tools work best when they aren't used as a mysterious plagiarism cop designed to play "Gotcha" with plagiarists... Instead, they need to be incorporated into plagiarism education and used as a tool to teach what plagiarism is, how to cite sources, when to cite and so on. This is why many schools are actually incorporating plagiarism detection into the writing process, having students submit their work to the system so they can get results before grading.*<sup>55</sup>

## RECOMMENDATION

That where Turnitin is used – it is provided for students to check (and correct) their work prior to submission.

Finally, intent is fundamental to proportionate penalties. The range of penalties available under the current statute is too limited and inflexible. This has resulted in Faculty Discipline Committees issuing inappropriate or disproportionate penalties for the lack of a better option. This is discussed further below.

## H. De Facto Penalties – a thin blue line

It is clear that penalties for misconduct can only issue only as a result of a formal process pursuant to Statute 13.1. This is consistent with the requirements of procedural fairness.<sup>56</sup> However in some cases an educative or informal process may culminate in a penalty being issued without

53. Paul Stapleton, 'Gauging the effectiveness of anti-plagiarism software: An empirical study of second language graduate writers' (2012) 11 *Journal of English for Academic Purposes* 125.

54. Robert Youmans, 'Does the adoption of plagiarism-detection software in higher education reduce plagiarism?' (2011) 11 *Studies in Higher Education* 749.

55. Claire Shaw quoting Jonathan Bailey, founding editor of the Plagiarism Today website, in 'Use of Turnitin software does not deter cheating, study finds' *Times Higher Education Supplement*. 19th January 2012 <<http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=418740>>.

56. Where any decision affecting a student's rights, interests or legitimate expectations is at stake – see *Kioa v West* (1985) 159 CLR 550.

authority. For example – a student is invited to an informal meeting by her lecturer to discuss her essay, during which the student is advised that she has committed plagiarism, and she will be denied credit for the assessment. This is distinguished from a mark reduction for poor scholarship as a mark of zero is clearly a penalty.

In past years, we saw a number of students regularly presenting with this issue. In more recent times, however, it is far less frequent as general awareness about the application of penalties has increased. However from time to time we do see matters that look suspiciously as though a *de facto* penalty has been issued without authority.

### CASE STUDY

A student presented late last year, distressed about receiving a mark of 50% for an essay. While this was characterised initially as an assessment dispute, on further examination it became clear there may be other elements to the situation. The student had been asked to attend an educative meeting regarding plagiarism concerns raised by the examiner. This included having her sign a document that stated she had attended an educative meeting. She subsequently received a grade of 50 for the essay, well below her honours average of high 70s.

While she conceded it might not have been her most scholarly work, she remained convinced that the mark represented a penalty. On our advice, the student requested particularisation of the grading of the paper against the marking rubric. The response to this request was an email from the original examiner advising the student that she should accept the mark or else the paper would be re-graded, and she would receive 30%. The examiner did later provide more detailed feedback on the essay, but no indication of how the grade of 50% had been derived against the marking rubric. The matter was ultimately referred to the Head of School, who indicated that on investigation they were satisfied that everything was in order.

This is not held out as a definitive example of a penalty being issued out of authority, but it clearly illustrates a grey area of assessment in which it can be extremely difficult for students to know for certain if their mark has been derived according to a marking scheme or a penalty has been applied. This sort of issue is not without impact on the student's interests and consequently attracts the rules of procedural fairness. For this student, the potential repercussions were that the grade affected their GPA and potentially jeopardises an offer for a Commonwealth Supported Place in the Juris Doctor. This would have a substantial impact on her future. Unfortunately, it also created a very poor impression of university processes for both the student and her parents.

### RECOMMENDATION

That academic staff are provided with clear guidelines about acceptable educative outcomes to avoid issuing *de facto* penalties.

#### I. Let the punishment fit the crime – proportionality of penalties

There is no shortage of research supporting the premise that a positive, educative approach to academic integrity is more effective at encouraging the uptake of good academic conventions than punitive and threatening practices.<sup>57</sup> Nevertheless, we recognise that there are cases that are sufficiently egregious or wilfully dishonest to warrant serious sanction. Alternatively there may be evidence that an isolated instance of inadvertent plagiarism is, in fact, part of a pattern of serial 'inadvertent' plagiarism. In these circumstances, formal action is clearly required.

Where it is apparent on objective evidence that a penalty should be applied, the critical considerations become consistency and proportionality. Consistency of penalties is necessary for fairness – but should not be applied without proper account of the sometimes competing factors involved in ensuring proportionality. There are several fundamental

57. Tricia Bertram Gallant, *Academic Integrity in the Twenty-First Century: A Teaching and Learning Imperative* (2008); Jude Carroll, *A Handbook for Deterring Plagiarism in Higher Education* (2002).



considerations in respect of proportionality: the nature of the misconduct itself, intent, gravity and mitigation.

The difficult issue of intent is discussed extensively above. The gravity of the misconduct may turn on whether it is a second or subsequent allegation of *substantially the same kind* and the extent of the misconduct if it is wilful. Aggravating factors including criminality or manifest dishonesty will also go to the gravity of the conduct. An area frequently overlooked in determining the seriousness of misconduct is taking proper account of the extent of the affected work and its importance in the context of the subject (see case study below). As discussed above, the threshold of evidence required to establish the gravity of misconduct should be necessarily higher than mere speculation or opinion.

Mitigating factors include the student's experience - including their stage in their studies and the extent of their knowledge of the academic conventions or rules that have been breached. Other aspects of mitigation are those factors influencing the student's behaviour at the time of the misconduct. Such factors will range from circumstances under which they lacked capacity to make sound judgements to types of defences - such as threats or coercion by undue influence. Where mitigation is sufficiently compelling to regard it as a defence - it should be open to committees not to make a finding of misconduct. A student's insight and genuine contrition should also be given weight in determining a penalty.

In establishing whether a penalty is proportionate - issues of both substantive and formal fairness must be taken into account. That is, regard must be had to whether the penalty is both fair in form (consistent with penalties issued for the same type conduct) as well as fair in effect (the actual consequence of the penalty in the particular circumstances).

With regard to the latter - the same penalty applied in different circumstances may have very divergent effects. A penalty that is relatively minor for one student may have very dire or onerous consequences for another.

## CASE STUDY

A graduate student in a yearlong 100 credit point subject was found to have committed plagiarism in a case report - one of three submitted throughout the year that constituted 10% of the total grade - or approximately 3.33% each. The student had a finding of academic misconduct six years previously in their first year of their undergraduate degree. Accordingly the Faculty Discipline Committee considered the matter sufficiently serious to warrant the penalty of loss of credit for the whole subject. This had the effect of requiring the student to repeat the entire year of study.

The current Statute has been construed to mean that where a finding of misconduct has been made, a penalty must be applied. This fetter on the Committee's discretion means that there is no appropriate response to mitigation that may act as a full defence or exculpation of the misconduct. The following case study is drawn from a case a number of years ago - but remains a clear illustration of the potential problem with the current regime.

## CASE STUDY

A Faculty Discipline Committee upheld an allegation of misconduct against a student, on the basis of their strict liability application of the statute. The Committee accepted as a matter of fact that the extreme extenuating circumstances in the case operated in complete mitigation of the conduct. At appeal, the Chair of the Committee stated categorically that - had there been the option - the Committee would have dismissed the allegation. He said the Committee was bound, however, by the wording of the definition of academic misconduct in the statute - which allowed no defence and consequently no way to dismiss an allegation where there was a finding on the facts. The Appeal Committee agreed, and the student was penalised with a reprimand. The student was a law student, and this penalty was significant for her mandatory disclosure for Supreme Court admission.



A greater range of penalties is required to allow more granularity of outcome. In the absence of formally available penalties, faculty committees will sometimes substitute their own outcomes that militate against consistency. For example, it is common custom and practice in some schools and faculties to make “resubmission” an outcome of an academic misconduct allegation. Rather than record the outcome as a reprimand, and then making a subsequent ruling to allow the student to resubmit, they just provide a single ‘penalty’ of resubmission. Other students who have requested resubmission at appeal have been denied the outcome on the basis the penalty is not available.

To obtain both consistency and fairness in issuing penalties, it is necessary first to determine the seriousness and extent of the alleged conduct. This can effectively divert students to an educative response or, according to the gravity of the conduct - progress the matter to a formal and potentially punitive process. Currently, this may be the custom and practice, but it would be beneficial to codify this into guidelines and procedure.

Yeo and Chien have developed a classification framework for determining the seriousness of plagiarism allegations,<sup>58</sup> included at Appendix A.

Appendix B is a list of matters that we believe should be considered when determining proportionate and consistent penalties.

## RECOMMENDATION

1. That criteria are established to guide decision makers in the matters to which they must have regard when applying a penalty.
2. That there is a range of graduated penalties, from educative including resubmission to the purely punitive.

## J. Outcome notices and reasons

Currently, there is a requirement that the student is notified of a Committee’s decision in an outcome notice that includes ‘the terms of the decision’. A better provision would be to make express the decision-maker’s obligation to provide their reasons for the finding.

There is no general rule at common law that reasons must be given as part of procedural fairness. However, there is consensus among administrative policy commentators that providing reasons for determinations both shows respect to the subject of the decision and assists them to understand the basis for the outcome. Additionally, properly constructed reasons lead to more considered and better quality decisions in themselves. For example, providing written reasons allows for scrutiny of a determination for correctness and propriety.<sup>59</sup> Finally, clearly set out reasons will potentially have educative value for students.

The Administrative review Council recommends that the following be included:

- the decision;
- the findings on material facts;
- the evidence or other material on which those findings are based; and
- the reasons for the decision.

58. Shelley Yeo & Robyn Chien, ‘The seriousness of plagiarism incidents: Making consistent decisions across a university’ (paper delivered at 2nd Asia Pacific Educational Integrity Conference. Newcastle 2-3 December 2005).

59. Administrative Review Council, *Best Practice Guide 4* (2007) <<http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide4Reasons.aspx>>.

## CASE STUDY

In a perfect example of both good administrative decision-making and the provision of an outcome notice with detailed reasons (running to several pages) of its decision, a recent Research Misconduct Committee has demonstrated what we might consider best practice in the area.<sup>60</sup> The matter involved possible falsification of research data and plagiarism in a PhD. The Committee, through a painstaking exercise of assisting the student to adduce the relevant evidence, ultimately made a decision that, although it was of the view that plagiarism had occurred, it was not a wilful or dishonest attempt to deceive but rather a culmination of a string of errors, including poor record keeping practices, poor editing, poor judgement and poor interpretation and application of the Code of Conduct for Research and the University's Policy on Management of research data and Records.

On the evidence, the Committee did not find research data had been falsified. The student was allowed to make revisions and resubmit.

## RECOMMENDATION

1. That Outcome Notices include the decision; the findings on material facts; the evidence or other material on which those findings are based; and the reasons for the decision.
2. That feedback, review and reform mechanisms are established in order to identify systemic issues raised in disciplinary cases (and with a view, ultimately, to reducing rates of misconduct and/or disciplinary action).

## K. Grounds for Appeal and de Novo Hearings

Currently under Statute 13.1, appeals lie from faculty discipline decisions only where certain grounds are satisfied. While this may help focus the basis upon which a student wishes to dispute a finding, grounds must be sufficiently broad to ensure an impartial review is afforded to all students. Additionally, discretion should be available for de novo hearings where the correctness of the finding of misconduct itself is the issue in dispute.

## RECOMMENDATION

That there is discretion for de novo appeals where the correctness of the finding is at issue.

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60. I would like to acknowledge the carefully considered and exhaustively defensible work of the Research Misconduct Committee chaired by Professor Sundhya Pahuja from the Melbourne Law School.

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### III. Summary of Recommendations

The consequences of a misconduct allegation being upheld against the student may be grave and onerous. Not just in terms of the penalties, but beyond that into the student's future working life and career. Regulated professions such as Law require disclosure of any misconduct in the course of a student's degree.<sup>61</sup> International students may suffer very serious financial consequences, and their right to remain in the country can be impacted. Therefore, the University has a particular responsibility to its students to ensure that none are disadvantaged in the pursuit of their careers without proper cause.

1. That serious consideration is given to whether existing supports are sufficiently accessible to students. The current special consideration and SEAP schemes are failing to provide an adequate safety net for struggling students. Academic Skills provides a range of resources. However, students frequently describe difficulty accessing help when they need it.
2. That staff involved in the formal aspect of misconduct processes should be properly trained and familiar with the basic principles of procedural fairness.
3. That caution needs to be exercised to make stakeholder interests (such as anti-plagiarism software developers like Turnitin) express and not merely assumed as norms.
4. That, even if the hearing itself is heard *ex parte*, the student must still know the case to be met in order to have an opportunity to address the allegation in writing.
5. That allegation notices include not only the rules which are alleged to have been breached, but also all relevant allegations of fact, action or omission.
6. All relevant evidence must be produced to the student with the allegation notice. This should include opportunities to view anything the discipline committee has had access to in coming to its determination – including CCTV footage, witness statements and any other forms of evidence.
7. That discipline procedures should explicitly state that a staff member on a Faculty Discipline Committee should not have been involved with the allegation prior to it being heard. A member of the Discipline Committee who was involved in the conduct or marking of the assessment subject to the alleged misconduct is very likely to induce an apprehension of bias. The examiner of an assignment subject to an allegation of plagiarism might provide a report and evidence for the Committee, but should not be an adjudicating member of the Committee.
8. That all allegation notices include information about the student's right to seek independent advice and support from the Advocacy Service.
9. That there is an express requirement that Discipline Committees bear the burden of proof rather than requiring the student to prove no wrongdoing.
10. Where the evidence of misconduct fails to meet the standard of the balance of probabilities, the Committee must dismiss the allegation for lack of evidence.
11. That the University's misconduct provisions are framed with respect to potential interaction with criminal investigations or other legal proceedings. Regard should be had to the timing of any university investigation. The Chair of the Discipline Committee should, as a matter of course, consult with University General Counsel and Legal Services to identify any relevant legal risk for the student.

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61. See especially Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admission to Legal Practice: Lessons for Universities and The Courts' (2008) 8 *Queensland University of Technology Law and Justice Journal* 314; see also Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment' (2007) 12 *Australia and New Zealand Journal of Law and Education* 97.

- 12.** Any criminal or civil sanctions already issued against the student for the alleged conduct should be taken into account when penalising the student under University discipline procedures in order to avoid disproportionate or manifestly harsh penalties.
- 13.** That it is clear that these processes do not overlap in procedures.
- 14.** That there is a review of the training and resourcing of these local discipline committees and the staff who are charged with investigating such matters at first instance.
- 15.** That the Advocacy Service is involved in any training initiated as a result of this review.
- 16.** That Committees charged with determining such matters should be directed that a finding will require stronger evidence than might be necessary for a matter with less onerous consequences.
- 17.** That in cases of untested invigilator evidence the student's written submission in response to the allegation is evaluated giving benefit of the doubt to the student's account to determine whether the matter should proceed to hearing or should be dismissed *prima facie*.
- 18.** That any definition of misconduct include an element of intent to ensure it catches only wilful conduct, not wholly accidental behaviour.
- 19.** That careful consideration is given in framing plagiarism related policy to avoid using disciplinary controls to address essentially academic problems. For example, development of mechanisms to ensure that inadvertent plagiarism is properly distinguished from intentional passing off of other's words or ideas.
- 20.** That plagiarism as a disciplinary concept should be limited to circumstances where student conduct amounts to intentional or negligent breaches of relevant academic conventions. Negligent breaches should be judged having regard to the level of educational development the student has – from first year undergraduate with international academic background at one end to domestically educated final year research higher degree candidate at the other.
- 21.** That where Turnitin is used – it is provided for students to check (and correct) their work prior to submission.
- 22.** That academic staff are provided with clear guidelines about acceptable educative outcomes to avoid issuing *de facto* penalties.
- 23.** That criteria are established to guide decision makers in the matters to which they must have regard when applying a penalty.
- 24.** That there is a range of graduated penalties, from educative including resubmission to the purely punitive.
- 25.** That Outcome Notices include the decision; the findings on material facts; the evidence or other material on which those findings are based; and the reasons for the decision.
- 26.** That feedback, review and reform mechanisms are established in order to identify systemic issues raised in disciplinary cases (and with a view, ultimately, to reducing rates of misconduct and/or disciplinary action).
- 27.** That there is discretion for *de novo* appeals where the correctness of the finding is at issue.

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## IV. Conclusion

It is clear from the recommendations that robust and holistic student discipline processes require significant resources. If the University is serious about its mission to uphold integrity and ethics in its undertakings, then this will require that commitment. Sidelining the task to time-poor, frequently untrained or inexperienced academic and professional staff is not the way to achieve best practice. The system needs a pool of trained staff dedicated to these processes.

Decisions made with next to no reasons and processes without due regard or awareness of fairness and rigour only shift the burden to other areas of the University who must then attempt to second guess the original process. That not all cases of alleged misconduct would justify the effort undertaken by the Research Misconduct Committee (described above at II.J) is obvious, however it would be wrong to view an economy of scale operating purely in proportion to the scope of the students' undertaking. This degree of rigour in deliberations and thoroughness in both undertaking and documenting reasoning should not be limited to research higher degree students. As discussed above, the stakes are very high for virtually all students now; the outcome of these processes will potentially have profound effects on their interests well into the future.

## Appendix A

**TABLE 1.** Brief details of each criterion used in the scheme and proforma for classifying the seriousness of an incident of plagiarism

CRITERIA	DESCRIPTION	SCALE
Experience of the student (experience)	Relates to staff expectations that the student should be aware of the seriousness of their actions.	Ranges from new, inexperienced students in a course through to those nearing graduation (or completion of a research thesis).
Nature the act of plagiarism (nature)	Nature of the breach of academic scholarship.	Ranges from poor paraphrasing, citation and referencing skills through to wholesale copying or appropriation of others' works.
Extent of the plagiarism (extent)	Amount or proportion of the work that is not the student's own. Extent to which the assessment process is compromised.	Ranges from a few elements (having little impact on overall assessment) through to a significant proportion (greater than 10% or significantly compromising assessment)
Intention of the student to plagiarise (intent)	Intentionality of the act of plagiarism. Intent to cheat by way of plagiarism.	Ranges from unintentional or careless acts through to deliberate intent to commit fraud.

## Appendix B

Suggested issues to which committees must have regard when determining a proper penalty:<sup>62</sup>

1. Intention of the student to plagiarise or to gain an unfair academic advantage – which might include evidence of a degree of premeditation; e.g. evidence of pre-planned attempts at plagiarism might be considered more serious than those that are last minute, ill-considered breaches.
2. Specific instructions for completion of the assessment task – ignoring these may show reckless negligence or wilful intention.
3. Extent or amount of the work that is 'unoriginal';
4. Previous incidents of similar misconduct involving the student – previous misconduct of a wholly different nature may not be particularly relevant;
5. Role played by student where others are involved.
6. Mitigating factors;
  - a. Personal – health, emotional crisis.
  - b. Experience of the student – undergraduate/graduate, years of study at university and previous educational background – e.g. students new to Western academic culture. For HDR students—the stage in the journey of completing their thesis.
  - c. Degree of remorse shown.
  - d. The conduct committed under duress: evidence that the student was coerced by peers.

This is not an exhaustive list, although it is important that committees do not take into account totally irrelevant factors when determining a penalty. Ideally some weight should be given to all of these factors as they apply.

62. Shelley Yeo and Robyn Chien, 'The seriousness of plagiarism incidents: Making consistent decisions across a university' (paper delivered at 2nd Asia Pacific Educational Integrity Conference. Newcastle 2-3 December 2005).



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