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## IS PLAGIARISM INDICATIVE OF PROSPECTIVE LEGAL PRACTICE?

LILLIAN CORBIN\* AND JUSTIN CARTER\*\*

Plagiarism has become increasingly pervasive in Australian law schools.<sup>1</sup> Universities have implemented policies and procedures at both the institutional and faculty level to combat the menace to academic integrity.<sup>2</sup> Plagiarism is elusive, however, in terms of both conceptualisation and detection. The greatest difficulty in identifying instances of plagiarism is the lack of clarity as to its definition. At its most basic, plagiarism is defined as the theft of literary property without attribution.<sup>3</sup> While the authors contend that offenders ought to be held strictly liable, some commentators, discussed below, insist that an element of intention must be present to make a finding of plagiarism, or they identify negligence as an excuse for plagiarism.

To plagiarise in law school is to demonstrate a lack of constant vigilance in abiding by the ethical dictates of one's professional community. Such disrespect for ethical standards is thus reflective of a lack of ethical integrity or compliance to university rules. In *Re Humzy-Hancock* the Honourable Justice Philip McMurdo found that an applicant for admission as a legal practitioner, who had been disciplined for instances of academic misconduct during his law degree, had not in fact plagiarised because he did not deliberately, knowingly present the work of another person as his own; instead it was 'poor work', 'carelessness' and a 'misunderstanding of what

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<sup>1</sup> As to universities generally, see eg, Shelley Yeo, 'First-Year University Science and Engineering Students' Understanding of Plagiarism', (2007) 26 *Higher Education Research & Development* 199, 201. In relation to law schools in particular, see the comments of de Jersey CJ in *Re AJG* [2004] QCA 88 (Unreported, de Jersey CJ, Jerrard JA, and Philippides J, 15 March 2004).

<sup>2</sup> See eg, the policies adopted at Griffith University: Griffith University, *Policy on Academic Misconduct* (2007) <<http://www62.gu.edu.au/policylibrary.nsf/alldocs/cat/352f26aa1a1011e64a256bbb0062fd5f?opendocument>> at 8 December 2007; Griffith Law School, *Law School Assessment Policy* (2007) [4.0] <[http://www.griffith.edu.au/school/law/assets/assessment\\_policy\\_mar07.pdf](http://www.griffith.edu.au/school/law/assets/assessment_policy_mar07.pdf)> at 8 December 2007. It is interesting to note that these policies have both been altered as a direct consequence of the instant case under consideration.

<sup>3</sup> Debbie Papay-Carder, 'Comments: Plagiarism in Legal Scholarship' (1983) 15 *University of Toledo Law Review* 233, 234.

was required'.<sup>4</sup> While the authors recognise that the Court was simply obliged to apply the definition of plagiarism prescribed by the Griffith Law School to the facts of the case, the matter, it is contended, prompts a reconsideration of the extent to which the commission of plagiarism reflects the ethical compass of law students as prospective legal practitioners.

To that end, the authors respectfully disagree with the decision in *Re Humzy-Hancock*,<sup>5</sup> which ultimately removed the impediment to the applicant's admission. The authors suggest that the Supreme Court ought to have exercised its inherent jurisdiction over the legal profession to disallow admission (or at least delay admission). Chief Justice de Jersey of the Supreme Court had previously promoted a zero tolerance policy towards academic misconduct.<sup>6</sup> Had the Supreme Court followed that policy in *Re Humzy-Hancock*,<sup>7</sup> it would have made a clear statement that, whether due to a lack of ethical integrity (intention) or unsatisfactory compliance (negligence), such applicants are unfit for legal practice.

## I PLAGIARISM — A MATTER OF LEGAL ETHICS

While plagiarism is a universal concept, this paper, having been prompted by a recent Supreme Court case that examined whether or not a law student had plagiarised, will particularly consider its significance in relation to law students and legal practice. In doing so, this paper will consider whether a lack of intention on the part of the individual concerned should result in a decision that the student has merely been 'sloppy' as opposed to having plagiarised.

Plagiarism, in general, is a matter of morals: a view that sees it as a form of misconduct or poor behaviour.<sup>8</sup> Notwithstanding actual practice in law schools, there are compelling reasons to suggest that these institutions ought to do all they can to guard against plagiarism occurring. One reason is that the reputation of these institutions can potentially be damaged if students are found guilty of plagiarism.<sup>9</sup> Therefore law schools would benefit from endeavouring to educate students about what it entails and alerting students to its significance by having students sign a statement that certifies that the work they are submitting is their own, for example, thereby adding dishonesty

<sup>4</sup> [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

<sup>5</sup> [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

<sup>6</sup> *Re AJG* [2004] QCA 88 (Unreported, de Jersey CJ, Jerrard JA, and Philippides J, 15 March 2004).

<sup>7</sup> [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

<sup>8</sup> William Harris, *Plagiarism in Academe* (2007) <<http://community.middlebury.edu/~harris/plagiarism.html>> at 8 December 2007.

<sup>9</sup> Robert A. Lupton and Kenneth J. Chapman, 'Russian and American College Students' Attitudes, Perceptions and Tendencies towards Cheating' (2002) 44 *Educational Research* 17.

to the student's repertoire if plagiarism occurs. Griffith Law School already adopts this practice.<sup>10</sup>

While it is obviously important that students acquire the legal knowledge required for admission as solicitors,<sup>11</sup> the law schools also see their role as one of encouraging their students to develop the characteristics of integrity and honesty that go into producing the kind of legal practitioners that meet the admission requirements. It is understood that part of the usual process is for law schools to report, via a notation on a student's transcript, any issues that are relevant to the requirement that applicants need to be of good character and considered fit to practice law.<sup>12</sup>

The requirement that practitioners are to be persons of good character is reflected in the *Legal Profession Act 2004* (Qld),<sup>13</sup> and this is taken very seriously by the Admissions Board of the Supreme Court of Queensland. Chief Justice de Jersey, as the chair of this Board, has taken a strict line with applicants who have been found to be plagiarists in recent years. In an oft-cited statement from a case in 2004 he said:

Legal practitioners must exhibit a degree of integrity which engenders in the Court and in clients unquestioning confidence in the completely honest discharge of their professional commitments. Cheating in the academic course which leads to the qualification central to practice and at a time so close to the application for admission must preclude our presently being satisfied of this applicant's fitness.<sup>14</sup>

Thus the Court, and Chief Justice de Jersey in particular, see plagiarism as conduct that questions the applicant's integrity. In a speech in December 2004,<sup>15</sup> His Honour again asserted his belief that disclosure of these offences is vital in determining whether applicants are worthy of admission as practitioners in Queensland. His Honour stated that practitioners are expected to act ethically and be professionally efficient as officers of the court. In other words, it is his view that the public has a right to expect a high standard of behaviour from legal practitioners. It is suggested that the public's confidence in the legal profession could be undermined if the court

<sup>10</sup> See eg, Griffith University: Griffith University, *Assignment Cover Sheet* (2007) <<http://www.griffith.edu.au/ins/assignments/forms/fa-003.pdf>> at 8 December 2007.

<sup>11</sup> *Supreme Court (Admission) Rules 2004* (Qld) r 6.

<sup>12</sup> It should be noted, however, that a notation about plagiarism is only made on the student's transcript when students are removed from their program of study for a period.

<sup>13</sup> *Legal Profession Act 2004* (Qld) s 13(1)(a). The same requirement is reproduced in the current Act: *Legal Profession Act 2007* (Qld) s 9(1)(a).

<sup>14</sup> *Re AJG* [2004] QCA 88 (Unreported, de Jersey CJ, Jerrard JA, and Philippides J, 15 March 2004) [4].

<sup>15</sup> Chief Justice Paul de Jersey, 'Queensland Law Society Christmas Breakfast' (Speech delivered at the Brisbane Club, Brisbane, 8 December 2004) <<http://www.courts.qld.gov.au/publications/articles/speeches/2004/dj081204.pdf>> at 8 December 2007.

admits those who have plagiarised without some sort of rebuke. In the context of the profession of social work, Saunders comments that professional bodies ought to require prospective entrants to have achieved ‘scrupulous adherence ... to ethical codes of conduct’ which in turn is evidenced in honesty.<sup>16</sup>

While Chief Justice de Jersey has not outlined the specific consequences that might occur if people who lack integrity are admitted to the legal profession, the work of Parameswaran in a recent article mentions some possibilities.<sup>17</sup> By referring to the work of numerous academics who have taken an empirical approach, he argues that a vigilant approach to cheating is the most influential determinant and warns that a lenient approach to cheating<sup>18</sup> — one that allows students to simply suggest that the offending behaviour was caused because they were stressed — is perceived by the student body as a devaluing of honesty and integrity of those in authority.<sup>19</sup> Parameswaran also posits that students who successfully use other people’s work are more than likely going to continue their dishonesty when they enter the workforce.<sup>20</sup>

In other words it is thought that people who cheat in law school may have a propensity to engage in unsatisfactory professional conduct — defined usually as a breach of the ‘standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner’.<sup>21</sup> Cheating in law school may also amount to the more serious standard of ‘professional misconduct’ which involves conduct that amounts to ‘a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’.<sup>22</sup> A failure to meet the latter standard is considered to logically result when a person resorts to cheating in their studies. They will not have the requisite knowledge necessary to fulfil their future role, thereby questioning their ability to be proficient practitioners.<sup>23</sup>

<sup>16</sup> Peter J. Larkham and Susan Manns, ‘Plagiarism and Its Treatment in Higher Education’ (2002) 26 *Journal of Further and Higher Education* 339, 341.

<sup>17</sup> Ashvin Parameswaran, ‘Student Dishonesty and Faculty Responsibility’ (2007) 12 *Teaching in Higher Education* 263, 267–68.

<sup>18</sup> *Ibid* 267.

<sup>19</sup> *Ibid* 268.

<sup>20</sup> *Ibid* 267–68.

<sup>21</sup> *Legal Profession Act 2004* (Qld) ss 244. See also *Legal Profession Act 2007* (Qld) ss 418.

<sup>22</sup> *Legal Profession Act 2004* (Qld) ss 245(1)(a). See also *Legal Profession Act 2007* (Qld) ss 419.

<sup>23</sup> Parameswaran, above n 17, 268.

## II DEFINING PLAGIARISM

Plagiarism comes from the Latin word ‘plagiare’ meaning to trap or snare something and use it for your own purposes.<sup>24</sup> Initially this referred to the kidnapping of a person to make them a slave.<sup>25</sup> More recently, this concept has been adopted in a literary sense, that is, thieving the ideas and imaginings of others.<sup>26</sup> While there are many definitions, plagiarism is generally defined as the use of another’s words, research or ideas without attribution to the original author.

However, the matter is now more complex than this. As Hawley notes, ‘definitional precision constitutes one of the most salient problems in any discussion of acceptable versus unacceptable documentation’.<sup>27</sup> All universities now articulate what they mean by plagiarism, many of which are open to an interpretation that suggests that without intent there is no plagiarism. This implies, then, that careless work does not constitute plagiarism. Mawdsley has written extensively on this topic and he divides the approaches taken as objective and subjective. The objective approach entails simply proving plagiarism by examining the paper and the source, whereas the subjective inquiry entails determining whether students have intended their actions.<sup>28</sup>

The latter approach was taken in the recent Supreme Court case of *Re Hunzy-Hancock*.<sup>29</sup> While there were numerous occasions where the student did not correctly attribute the words to the correct authors, it was found that he did not mean to represent the work as his own. This was a case that arose from an application for admission as a solicitor in the State of Queensland, Australia, where the person’s transcript from Griffith University, noted that he had been held guilty of three instances of academic misconduct. Justice Philip McMurdo correctly considered the student’s application in accordance with the law school’s own definition of plagiarism: ‘Plagiarism is the knowing presentation of the work or property of another person as if it were the student’s own’.<sup>30</sup> Using this definition His Honour found that in each of the three instances of academic misconduct, the student was

<sup>24</sup> Harris, above n 8. See also Henry Goudy, ‘Plagiarism – A Fine Art’ (1909) 20 *Juridical Review* 302.

<sup>25</sup> Robert D. Bills, ‘Plagiarism in Law School: Close Resemblance of the Worse Kind?’ (1990) 31 *Santa Clara Law Review* 103.

<sup>26</sup> Papay-Carter, above n 3, 234: suggesting a Roman poet named Martial was the first to use the word in the literary sense of ‘literary kidnapping, or the theft and enslaving as one’s own the free ideas of another or his servants of the imagination’.

<sup>27</sup> Larkham and Manns, above n 16, 340.

<sup>28</sup> Ralph Mawdsley, ‘Plagiarism Problems in Higher Education’ (1986) 13 *Journal of College and University Law* 65, 67–68.

<sup>29</sup> *Re Hunzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

<sup>30</sup> Griffith Law School, above n 2, [4.1.5].

careless in failing to attribute the words that he used to the authors.<sup>31</sup> An objective approach was adopted insofar as the student was held to have used the words of others, which a reader would believe were his own words, but His Honour also adopted the subjective approach in noting that the student had ‘no intention to pass off the work of another’ as his own.<sup>32</sup>

This can be compared with the objective approach taken by the Appellate Division of the Superior Court of New Jersey in the case of *Napolitano v Princeton University Trustees*.<sup>33</sup> In that case, however, it seems that there were two definitions of plagiarism operating, including an earlier version that mentioned an ‘absence of intent’ which was later replaced with ‘deliberate’.<sup>34</sup> In that case the court preferred this objective approach, an approach that does not require the institution to look further than the documents presented by the students.

### III INTENTION AS AN ELEMENT OF PLAGIARISM

There appears to be a trend in higher education circles to try to educate students on the meaning of plagiarism.<sup>35</sup> There is also the view that there needs to be a recognition that students live in a pressured environment. A statement made by Saltmarsh illustrates this view:

In this context, students-as-consumers in turn find themselves under growing pressure to compete and excel in their studies, often in addition to working to meet the not inconsiderable costs associated with higher education. In a climate which measures ‘success’ (rather than learning) according to quantifiable ‘results’, in which the process of learning is reconstituted as a financial transaction for which individuals are increasingly responsible and in which the urgency to complete and progress is mirrored in a competitive results-driven labour market, it is hardly surprising that plagiarism has come to be seen by some as a viable alternative to overload, poor performance or failure.<sup>36</sup>

To a certain extent this approach could be perceived as ‘watering down’ the seriousness of plagiarism. There are authors who take

<sup>31</sup> *Re Humzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007) [42].

<sup>32</sup> *Ibid.*

<sup>33</sup> 453 A 2d 263 (NJ, 1982). This case has featured in a number of articles on plagiarism, but was analysed in depth by Mawdsley, cited in Bills, above n 24, 113. Mawdsley’s arguments are more succinctly made in Mawdsley, above n 27, 67–68.

<sup>34</sup> Bills, *ibid.* Although as note 77 of Bills’ article reports, note 6 of Mawdsley’s article states that the University, after this case, removed the word ‘deliberate’ from its plagiarism definition.

<sup>35</sup> Australian Universities Teaching Committee, *Minimising Plagiarism* (2003) <<http://www.cshe.unimelb.edu.au/assessinglearning/03/plagMain.html>> at 27 January 2007.

<sup>36</sup> Sue Saltmarsh, ‘Graduating Tactics: Theorizing Plagiarism as Consumptive Practice’ (2004) 28 *Journal of Further and Higher Education* 445, 448.

a strict approach to plagiarism believing that, although intent is an important factor in considering plagiarism issues, it is not an essential element that must be present ‘for the wrong to exist’.<sup>37</sup> More specifically, one author clearly states: ‘It is *no defense* for the plagiarist to say “I forgot.” or “it is only a rough draft.” or “I did not know it was plagiarism”’.<sup>38</sup> Another implicates the institution involved by stating: ‘Instead of condemning all plagiary, a school signals that some transgressions are acceptable, and that sloppy or careless work could be claimed as an “accident” that provides a defense’.<sup>39</sup>

Two authors, writing in support of this view, take a novel approach. Parameswaran reasons that a person allowing something to happen is just as bad as doing the act. He argues that if parents fail to feed their children they will die and if a gardener fails to water houseplants, they will wilt.<sup>40</sup> He then reasons that inaction caused these results and therefore concludes that a student’s excuse that he did not do it, is not a ‘valid defence for shirking moral responsibility’.<sup>41</sup>

Papay-Carder extends this line of thinking. She suggests that plagiarism is not the ‘use of another’s words or ideas, but in the passing them off as *one’s own*’.<sup>42</sup> Passing off occurs when there is no accreditation given to the original source.<sup>43</sup> She reasons therefore that any reader assumes that the work produced is that of the person writing it, regardless of whether or not the writer intended this to happen.<sup>44</sup>

While it is acknowledged that the court in *Re Humzy-Hancock*<sup>45</sup> were tied to the definition inserted into the Griffith Law School’s academic misconduct policy, it is still useful to note that the arguments presented in this article would not support a finding that accepted

<sup>37</sup> Bills, above n 24. See also Hawley, cited in Larkham and Manns, above n 16: ‘views plagiarism as being a continuum ranging from sloppy paraphrasing to verbatim transcription with no crediting of sources’. See also Steve Buttry, *When Does Sloppy Attribution Become Plagiarism?* (2006) <[http://www.americanpressinstitute.org/pages/resources/2006/09/when\\_does\\_sloppy\\_attribution\\_b](http://www.americanpressinstitute.org/pages/resources/2006/09/when_does_sloppy_attribution_b)> at 8 December 2007. Rawson reports that the American Historical Association ‘considers plagiarism to be the failure to properly acknowledge the work of another, regardless of intent’: Michael Rawson, *Plagiarism: Curricular Materials for History Instructors* (2005) <[http://www.historians.org/governance/pd/Curriculum/Curriculum\\_Plagiarism.pdf](http://www.historians.org/governance/pd/Curriculum/Curriculum_Plagiarism.pdf)> at 8 December 2007; Joe Mirarchi, ‘Plagiarism: What is It? How to Avoid It? And Why?’ (2001) 4 *Thomas M. Cooley Journal of Practical and Clinical Law* 381, 383: states that the element of ‘intent to plagiarize is irrelevant’. See also Ronald B. Standler, *Plagiarism in Colleges in USA* (2000) <<http://www.rbs2.com/plag.htm>> at 8 December 2007.

<sup>38</sup> Ibid.

<sup>39</sup> Bills, above n 24, 114.

<sup>40</sup> Parameswaran, above n 17, 265.

<sup>41</sup> Ibid.

<sup>42</sup> Papay-Carder, above n 3, 234.

<sup>43</sup> Ibid 235.

<sup>44</sup> Ibid 236.

<sup>45</sup> [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

the student's careless work habits as a defence to plagiarism. These arguments assert that the words 'intent' or 'knowing' ought to be deleted from definitions of plagiarism.<sup>46</sup> This will have the effect that 'any student who is found to have used another's literary property without attribution for academic credit is automatically guilty of plagiarism'.<sup>47</sup> This may sound harsh at first blush, but it should be noted that this course of action does not eliminate a consideration of 'intent' altogether. It simply reduces it to the role of a mitigating factor in determining the penalty that should be applied.<sup>48</sup> This proposition is often expressed by suggesting that 'there are different degrees of plagiarism ...'.<sup>49</sup>

This approach would make explicit the standard of behaviour that ultimately determines whether or not an applicant is admitted as a legal practitioner in Queensland. This approach very clearly represents to students that they are entering a culture where integrity is valued.

However, is this really the case? Does the legal profession keep to the same standards as those that would be demanded of students in training to be legal practitioners?

#### IV PLAGIARISM AND LEGAL PRACTICE

Despite the concerns of academics to protect scholarship from plagiarism, many of the practices in the legal profession do not conform to a strict definition of it.<sup>50</sup> In fact, the practice is systemic; more than that, it is inherent.<sup>51</sup> Consider the use of forms and precedents in the legal profession. In the interests of preventing the reinvention of the wheel,<sup>52</sup> solicitors have increasingly moved to a knowledge management model. Pursuant to this model, firms have appointed specialised lawyers whose primary task it is to draft precedents and manage the legal documents used by the firm.<sup>53</sup> It is

<sup>46</sup> Bills, above n 24, 114.

<sup>47</sup> Terri LeClercq, 'Failure to Teach: Due Process and Law School Plagiarism' (1999) 49 *Journal of Legal Education* 236, 245.

<sup>48</sup> Bills, above n 24, 111–15.

<sup>49</sup> Larkham and Manns, above n 16, 346.

<sup>50</sup> See eg, Jeanne L. Schroeder, 'Copy Cats: Plagiarism and Precedent' (Working Paper No 185, Benjamin N. Cardozo School of Law, Yeshiva University, 2007).

<sup>51</sup> Cf, however, the position in the United States. There the latest edition of the Bluebook referencing system incorporates the 'Bluepages', which were developed to provide 'easy-to-comprehend instruction' in the intricacies of legal referencing for legal professionals: see, eg, *The Bluebook: A Uniform System of Citation* (2007) <<http://www.legalbluebook.com/index.shtml>> at 8 December 2007.

<sup>52</sup> On the functional nature of legal documents, see Jonathan Band and Matt Schruers, 'Dastar, Attribution, and Plagiarism' (2005) 33 *American Intellectual Property Law Association Quarterly Journal* 1, 14.

<sup>53</sup> See, eg, 'The Management of Legal Knowledge', *Lawyers Weekly* (Australia), 15 September 2006 <<http://www.lawyersweekly.com.au/articles/30/0C044E30.asp?Type=53&Category=853>> at 8 December 2007, and Papay-Carder, above n 3, 245, referring to the American context.

believed this practice is becoming increasingly widespread in the legal profession, without question as to any ethical dilemmas.

A similar absence of ethical inquiry pertains to ghost-writing within the firm. Often junior lawyers research and prepare draft legal documents that are ultimately presented under their supervising lawyers' name.<sup>54</sup> The justification for such a practice is that these tasks are undertaken pursuant to their service contract with the firm and, upon production, intellectual property in the document vests in the firm to dispense with as it pleases.<sup>55</sup> Such an argument, however, focuses on the legal aspect of the scenario without sufficient regard to the ethical quandary that attaches.

The ethical question appears to be this: beyond the legal justifications for the practice of junior lawyers ghost writing for senior partners, do lawyers feel an innate wrongness about this practice? The answer, resoundingly, is no. Justice Philip McMurdo extols the ethical neutrality of such a position in *Re Humzy-Hancock*<sup>56</sup> where he states:

It is significant that this was an answer to a legal problem; it was not an essay. Had the applicant made the attribution ... I do not see that it would have affected the assessment of his answer. He was to be assessed for his ability to identify the relevant terms and to apply them to the facts of the hypothetical problem, which it seems that he did.<sup>57</sup>

Thus, answers to legal problems require no attribution. The economic reality is that there is no currency — that is, value — in the legal documents composed by lawyers. The business literature that has developed a dichotomy between goods and services speaks to this: what lawyers are selling is not a good, but a service.<sup>58</sup> The legal documents alone are worthless. They are not marketable products. The achievement of some result, however, is that lawyers market their ability to deliver a particular result.<sup>59</sup> That is their product. The legal documents produced in the process of achieving that goal are valueless, divorced from the wider project. In such circumstances, '[t]o impose ... a cost when there is no appreciable benefit is inefficient and prevents productive reuse of information'.<sup>60</sup>

<sup>54</sup> Band and Schruers, above n 51, 21.

<sup>55</sup> Lisa G. Lerman, 'Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship' (2001) 42 *South Texas Law Review* 467, 470.

<sup>56</sup> *Re Humzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

<sup>57</sup> *Ibid* [36].

<sup>58</sup> As to the goods/service dichotomy, see generally James A. Fitzsimmons, *Service Management: Operations, Strategy, and Information Technology* (5<sup>th</sup> ed, 2006).

<sup>59</sup> See, eg, Connie Irwin, 'Twentieth Century Law Firm Marketing versus 21<sup>st</sup> Century Market: The Essential Differences' (2003) 22 *Of Counsel* 15; Connie Irwin 'A Simple Plan to Improve Your Firm's Marketing Results' (2007) 7 *Law Office Management and Administration Report* 1, which highlights the marketability of the service-dimension of legal practice.

<sup>60</sup> Band and Schruers, above n 51, 11.

Yet the position of judges is different. The defining feature of the common law — the doctrine of *stare decisis* — has resulted in the characterisation of common law judgments as one endless chain novel that is amended and added to by subsequent authors.<sup>61</sup> Judges are in error, however, if they fail to cite the requisite authority for the propositions they make. That is, the ultimate authority of the second judgment collapses without the support of an often lengthy chain of prior cases. It is thus necessary that judges, having left the ranks of academia for professional practice and subsequently being appointed to the bench, are aware of what conduct may amount to plagiarism.

Recent allegations against a Federal Magistrate are instructive on this point. It was reported that the Federal Magistrate had duplicated, without permission or attribution, 2000 words from the judgment of a fellow magistrate.<sup>62</sup> Upon further investigation, another two allegations of plagiarism were raised.<sup>63</sup> Echoing the necessity of citing valid authority in the common law tradition described above, Mr. Rob Davis, then President of the Queensland Law Society, commented that:

Our big concern is of course that wherever there is copying without attribution of sections of a judgment, then there must be a question as to whether or not appropriate judicial process has been entered into in arriving at the decision. And where there are sections of a judgment quoted without attribution, there must always be a question as to whether or not that appropriate judicial process has been undertaken.<sup>64</sup>

Further, Davis remarked that the ‘critical issue’ in the case was that of workload.<sup>65</sup> As discussed above, Justice Philip McMurdo in *Re Humzy-Hancock*<sup>66</sup> also referred to the pressures upon today’s law students.<sup>67</sup> Further, Saltmarsh comments that the emergent consumerism of higher education has resulted in the situation where ‘students-as-consumers’ are under growing pressure to compete and excel in their studies, often in addition to working to meet the not inconsiderable costs associated with higher education. This pressure turns ‘results’ (as opposed to ‘learning’) into a marketable product, which students-as-consumers can more easily acquire via plagiarism than more traditional means.<sup>68</sup>

<sup>61</sup> See Ronald Dworkin, ‘Law as Interpretation’ (1982) 9 *Critical Inquiry* 179; Stanley Fish, ‘Working on the Chain Gang: Interpretation in the Law and in Literary Criticism’ (1982) 9 *Critical Inquiry* 201.

<sup>62</sup> ABC Radio, ‘Magistrates and Plagiarism’, *The Law Report*, 9 May 2006 (2006) <<http://www.abc.net.au/rn/lawreport/stories/2006/1633885.htm>> at 8 December 2007.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Re Humzy-Hancock* [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

<sup>67</sup> *Ibid* [38].

<sup>68</sup> See, generally, Saltmarsh, above n 35.

Such views seem to indicate a relaxing of the applicable standards where one is faced with hardship or difficulty. This approach is concerning given that, taken to extremes, it can be seen to offer a justification for what is at best, negligence and, at worst, an ethical breach. Despite the allegations of plagiarism the Federal Magistrate remained in that role for a period of nine months before resigning.<sup>69</sup> In other words, the Federal Magistrate continued to carry out the duties associated with that role notwithstanding accusations that the legal profession was protecting one of its own.<sup>70</sup> In this respect there were implications that the system was treating law students applying for admission more harshly than established operators within the profession.<sup>71</sup>

The different standard was made explicit in the case of *Re Lamberis*<sup>72</sup> in the United States. In that case, an attorney was charged with plagiarising his Masters thesis, and claimed that he made no ‘intentional effort to deceive his thesis examiners’.<sup>73</sup> Whilst the court was not swayed by his arguments and did make a finding of plagiarism, a somewhat lenient penalty was applied. LeClercq suggests that new entrants to the profession are treated more harshly than practicing lawyers given the lighter sentence.<sup>74</sup> Yet contrary to such arguments that different ethical standards are applied in these respects, the authors contend that different ethical communities exist. The ethical standards being applied are in fact different, but they are being applied by different authorities: a community of scholars in the former case, and a community of legal professionals in the latter.

Thus, as noted previously, there is no value in the legal documents. For academics, publications are a measure of career performance.<sup>75</sup> An academic’s publication output is deemed to be indicative of their scholarly stature. It is the primary means by which an academic presents to the employment market, insofar as a strong research profile allows an academic to attract grants that ultimately benefits her host institution. To this end, as demonstrated previously, scholarly communities zealously protect authorship. These communities have thus developed strong defences against such misconduct in the form of plagiarism policies and an ethos that condemns the practice.

<sup>69</sup> ‘Magistrate Accused of Plagiarism Quits’, *The Australian* (Sydney), 19 December 2006 <<http://www.theaustralian.news.com.au/story/0,20867,20950913-1702,00.html>> at 8 December 2007.

<sup>70</sup> See eg, ‘Magistrate Has a Case to Answer’, *Courier-Mail* (Brisbane), 23 March 2006, 28; ‘Care Must be Taken with Precedents’, *Courier-Mail* (Brisbane), 20 March 2006, 18. In the United States context, see Papay-Carder, above n 3, and Le Clercq, above n 46, 250.

<sup>71</sup> Des Houghton, ‘Double standards – Plagiarism has very different consequences for two Queensland women’, *The Courier-Mail* (Brisbane), 27 May 2006.

<sup>72</sup> 433 NE 2d 549 (Ill, 1982).

<sup>73</sup> *Re Lamberis*, 433 NE 2d 549 (Ill, 1982) 500.

<sup>74</sup> See LeClercq, above n 46, 250. See also Gino Dal Pont, *Lawyers’ Professional Responsibility* (3<sup>rd</sup> ed, 2006) [2.95]–[2.105].

<sup>75</sup> Band and Schruers, above n 51, 13.

The concern with law students committing plagiarism is one of both ability and character. As Justice Philip McMurdo remarked in *Re Humzy-Hancock*,<sup>76</sup> ‘This was simply poor work’.<sup>77</sup> Yet according to the Honourable Murray Gleeson in a speech he delivered while Chief Justice of the Supreme Court of New South Wales and cited in a report of the Law Council of Australia — ‘Whilst, in practice, the great number of applications are processed by the Barristers Admissions Board or the Solicitors Admissions Board, which certifies to the court fitness for admission, the Court has the power to admit or decline to admit regardless of what the Boards certify.’<sup>78</sup> Therefore the court has an inherent jurisdiction to ensure that only applicants who meet the rigorous professional standards of the Supreme Court of Queensland are admitted. Insofar as the Supreme Court has this role as gatekeeper of the legal profession one must question the wisdom of allowing the admission of an individual who has already demonstrated a flagrant disregard for such standards of professionalism. This is especially so given the saturation of the market,<sup>79</sup> and the fact that there has been a steady increase in disciplinary hearings in recent years.<sup>80</sup>

Referencing effectively is a meticulous task. It requires a pedantic attention to detail. The Australian standard, the *Australian Guide to Legal Citation* (the Guide),<sup>81</sup> extorts an extensive framework for the authoritative citation of materials used in one’s work. The Guide, however, pales in comparison to the Bluebook used by American law schools.<sup>82</sup> One might suggest that ‘near enough is good enough’, though the authors would contend otherwise. It might seem unnecessarily strict to enforce referencing to this extreme, but law students are in training for immersion in a world that prides itself on rules and strict adherence to those rules. The legal universe is one of compliance. Failure to appropriately formulate pleadings, or lodge forms within limitation periods, or meet formal requirements in the preparation of documents are all pitfalls of practice. One who falls

<sup>76</sup> [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007)Ibid [38].

<sup>77</sup> Ibid.

<sup>78</sup> Law Council of Australia, *Policy Statement on Reservation of Legal Work for Lawyers: Explanatory Memorandum* (1998) <[www.lawcouncil.asn.au/get/policies/1957352961/2.pdf](http://www.lawcouncil.asn.au/get/policies/1957352961/2.pdf)> at 8 December 2007.

<sup>79</sup> The statistics available from Graduate Careers Australia indicate that the percentage of law graduates not in full-time employment upon graduation has increased slightly in recent years and, further, that the number of law graduates pursuing careers outside private practice have increased: Graduate Careers Australia, *GradsOnline* (2007) <<http://www.gradsonline.com.au/gradsonline/>> at 8 December 2007.

<sup>80</sup> See, generally, Linda Haller, ‘“Solicitors” Disciplinary Hearings in Queensland 1930–2000: A Statistical Analysis’ (2001) 13 *Bond Law Review* 1.

<sup>81</sup> Melbourne University Law Review Association, *Australian Guide to Legal Citation* (2<sup>nd</sup> ed, 2002).

<sup>82</sup> Harvard Law Review Association, *The Bluebook: A Uniform System of Citation* (18<sup>th</sup> ed, 2005).

afoul of these requirements wastes both time and money for the courts and the client.<sup>83</sup> Such behaviour is not tolerated by practitioners and the propensity for such conduct should not be overlooked during the admissions process.

Beyond this, one must query the character of such an individual. Chief Justice de Jersey is cited above — and it warrants repeating — stating that ‘Legal practitioners must exhibit a degree of integrity which engenders in the Court and in clients unquestioning confidence in the completely honest discharge of their professional commitments’.<sup>84</sup> The ethical dilemma inherent in not properly attributing the work of another is that it constitutes a flagrant disregard of the ethical norms held by the community in which one is practicing.<sup>85</sup> Thus, though lawyers might not value authorship in this sense in the course of practice, whilst at law school the academic community places high priority on defending scholarly integrity. By acting contrary to this norm — whether due to intentional disregard or mere negligence — the individual in question has demonstrated a lack of commitment to those norms.

The field of legal ethics is a difficult one. As Canadian scholar Hutchinson has suggested, lawyers face countless discretions in daily practice.<sup>86</sup> Unrelentingly, legal practitioners are called upon to deliver their services in a manner congruent with the ethical dictates of the profession. There are numerous areas where the rules of professional responsibility fall short of providing a definitive course of action.<sup>87</sup> The major difficulty with plagiarism is that it is largely unenforceable: when it occurs, the only person aware of its occurrence is the perpetrator. Lawyers of good character are indispensable to practice in the vacuum that exists between legal and ethical obligations. To that end, we respectfully suggest that the Supreme Court should resume its zero tolerance policy regarding plagiarism and academic misconduct.

A legalistic reading of the case of *Re Humzy-Hancock*<sup>88</sup> would challenge this conclusion. Adopting such an approach, one would contend that on the basis that plagiarism was not in fact found to exist, the Court did not detract from its zero tolerance policy since it was merely interpreting the definition set out in the Griffith Law School’s assessment policy. It is respectfully suggested, however,

<sup>83</sup> In addition to wastage, both the solicitor at fault and her client can be subject to an adverse costs order where the solicitor’s errors cause undue costs to be incurred: see, generally, Gino Dal Pont, *Law of Costs* (2003).

<sup>84</sup> Above n 6, [4].

<sup>85</sup> Band and Schruers, above n 51, 13–15.

<sup>86</sup> Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (1999).

<sup>87</sup> The difficulties surrounding the application of principles stated in codes have been mentioned by Australian text writers such as Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (3<sup>rd</sup> ed, 2001) 198; Julian Disney, *Lawyers* (2<sup>nd</sup> ed, 1986) 598.

<sup>88</sup> [2007] QSC 34 (Unreported, McMurdo J, 26 February 2007).

that such an approach misses the broader point in terms of legal ethics. As a matter of the formal requirements of plagiarism as formulated in the university policy, plagiarism did not exist. The conduct alleged and ultimately found to have occurred nonetheless amounts to conduct that ought to be unacceptable to the Supreme Court on the basis discussed above insofar as the conduct in question demonstrated a disregard for the legal and ethical norms of the academic community. These are not characteristics becoming of a prospective legal practitioner.

## V CONCLUSION

Band and Schruers state that '[n]orms serve as society's means to fill in the gray area between what it wants people to do and what law can tell people to do.'<sup>89</sup> Norms develop because groups have incentives to regulate themselves beyond the extent of the law'.<sup>90</sup> The university policies that seek to subvert academic misconduct provide a black letter formulation of plagiarism. It forms part of the code of conduct that students are expected to adhere to in the pursuit of their studies. In a similar vein, the ethical guidelines promulgated by the professional bodies in the legal profession serve to shape practitioner behaviours. Both regimes recognise, however, that between regulation and enforcement, conduct occurs in the shadows of ethical discretion. Within each ethical community there are instances where individuals are prompted to make decisions beyond the watchful gaze of an authority figure. It is in these instances that we are comforted by the fact that the individuals we engage as both law students and legal practitioners are persons of integrity. In this way, law schools act as a crucible for the retention of people of strong character that have demonstrated, among other things, a commitment to a community ethos. Failure to live up to expectations at university thus raises serious questions as to a person's capacity for the similar dedication demanded of legal professionals.

<sup>89</sup> Band and Schruers, above n 51, 12.

<sup>90</sup> *Ibid.*