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DISCLOSABLE, BUT NOT NECESSARILY FATAL? WELFARE OVERPAYMENTS IN THE UNCERTAIN LANDSCAPE OF FITNESS FOR PRACTICE

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I INTRODUCTION

Recently, media reports and a Senate Inquiry[1] raised the issue of widespread errors by Centrelink[2] in sending out 'debt recovery' letters to recipients of social security benefits alleging overpayments.[3] Even in the absence of automated systems, overpayments arise under a wide range of circumstances in relation to welfare benefits accessed by students either before or during the course of study,[4] ranging from administrative errors by Centrelink to calculated fraud by the recipient. Most overpayments exist against a background of financial hardship or troubled personal circumstances.[5]

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1 Sarah Martin, 'Senate to Assess Centrelink's Automated Welfare Crackdown', *The Australian* (Canberra), 20 January 2017, 8.

2 Centrelink (formerly the Department of Social Security) is the Australian government agency which provides financial assistance to students subject to an income test. It is analogous to systems that exist in most common law jurisdictions, administering either income support, student loans or a combination of these: see, eg, the United Kingdom, where student loans and grants primarily provided by the government through the Student Loans Company ('SLC'), a non-departmental public body; and New Zealand, where the Ministry of Social Development administers student allowances ('Studylink').

3 Peter Martin, 'Centrelink's Robo-Debacle is a Litany of Inhuman Error', *The Sydney Morning Herald* (online), 4 January 2017 <http://www.smh.com.au/comment/centrelinks-robodebacle-is-a-litany-of-inhuman-errors-20170103-gtl77k.html>.

4 The form of benefit most relevant to law students is Austudy or, in the case of Indigenous students, ABSTUDY, but significant numbers are also eligible for Family Tax Benefits. Less frequently utilised programs include Student Start-up Loans, Student Start-up Scholarships, and Rent Assistance.

5 See Greg Marston and Tamara Walsh, 'A Case of Misrepresentation: Social Security Fraud and the Criminal Justice System in Australia' (2008) 17 *Griffith Law Review* 285, 289.

Admission to the legal profession universally involves some form of assessment of character by reference to a range of terminologies ('fit and proper', 'moral character', 'good character') which are intrinsically ill-defined, unamenable to precise 'semantic exegesis'.[6] This very imprecision renders them as legal artefacts of indeterminate scope, and able to be arbitrarily deployed, possessing as they do 'the widest scope for judgment and indeed for rejection' of an application for admission.[7]

The mere existence of a welfare benefits overpayment carries the potential for an adverse character assessment during the application process which may render the applicant unsuitable for admission, or subject them to a period 'in the wilderness' while they demonstrate rehabilitation.[8] As such, overpayments are among the incidents which are required to be disclosed. Yet the treatment of welfare overpayments is arguably piecemeal, with the approaches of admitting authorities unpredictable due to the range of circumstances under which the overpayments might occur, and the lack of any clear principles (other than the vague propositions regarding character) against which suitability for admission is measured. There is, moreover, a dearth of judicial or academic writing regarding the principles which apply in determining fitness in the face of welfare irregularities, in stark contrast to the wealth of material addressing academic misconduct – an issue of similar scope and seriousness.

This article seeks to redress the lack of consideration of welfare matters in the context of admission. Part II addresses the obligations of disclosure imposed on applicants for admission to the legal profession, including the inconsistent guidance which is provided to applicants as to what is disclosable. Part III considers the lack of clear and objective definitions of the core concepts relating to character and misconceptions about fundamental assumptions relating to 'character' as a static concept, and the potential ineffectiveness of past conduct as a predictor of future conduct. Part IV examines underlying issues of the frequency and causes of welfare overpayments based on the available data for Australia. Part V considers prosecutorial issues flowing from overpayments, including the mental elements incorporated into relevant offences, and Part VI examines the limited case law available,[9] concluding that a conviction for welfare fraud is neither a necessary nor a sufficient condition, in itself, for a refusal to admit an applicant. While the diverse range of circumstances under which

6 *R v Warrington* [2002] 1 WLR 1954, 1960 [9] (Lord Bingham).

7 *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127, 156 (Dixon CJ, McTiernan and Webb JJ).

8 While there is theoretically no permanent refusal in admission application – merely a finding of a lack of fitness at the time of the application – adjournment for a stated period (or sine die) is often utilised by the admitting body to signify its displeasure: see, eg, *In the Matter of an Application by Carol Jennifer Draper for Admission to the Legal Profession* (Unreported, Supreme Court of Queensland, Holmes CJ, Fraser JA and Henry J, 26 October 2015).

9 Any analysis of the rationale applied in determining fitness for practice or 'moral character' in the context of welfare payments is significantly hampered, in that only instances where a court has refused or deferred admission are generally reported, so the scope of disclosed matters is confined to egregious conduct where an applicant has persisted with an application (usually resisted by a regulatory body): see Michael K McChrystal, 'A Structural Analysis of the Good Moral Character Requirement for Bar Admission' (1984–1985) 60 *Notre Dame Law Review* 67, 69–70.

welfare irregularities might arise is such that no clear formula can be framed, the character test will continue as a necessary part of the admission process, and welfare irregularities will remain a disclosable issue in admission proceedings, although they need not prove fatal.

II OBLIGATIONS OF DISCLOSURE

Disclosure for the purpose of admission as a legal practitioner is a universal feature of common law jurisdictions, and while this article focuses on Australian commentary on disclosure, similar issues affect applicants in other jurisdictions where state-supported financial assistance analogous to Centrelink benefits is provided to students, or analogous programs such as student loans are an integral part of university education.[10] New Zealand's admission regime mirrors closely the form of the majority of Australian states, where the onus rests on the applicant to disclose relevant information.[11] In the United Kingdom ('UK'), disclosure requirements broadly parallel those in Australia, although it is arguable that the proactive UK regime is stricter than in Australia.[12] In some states of the United States ('US'), admission also requires a proactive assessment of 'moral character' by regulating authorities, while requiring self-disclosure of matters bearing on suitability.[13] Canada relies primarily on self-disclosure,

10 Financial instability, which may appear from mismanagement of student loans, may raise similar concerns that, as a lawyer, an individual may present greater risks when dealing with a client's money or charging for time spent on a case, conduct which features prominently in cases of professional discipline: see Jonathan D Glater, 'Finding Debt a Bigger Hurdle Than Bar Exam', *The New York Times* (online), 1 July 2009 <http://www.nytimes.com/2009/07/02/business/02lawyer.html?_r=0>. Issues of integrity relating to management of finances are often closely analogous to the obligation of reporting income to Centrelink: see *Re the Application of T Z-A O for Admission to the Bar of Maryland* (Md Ct App, Misc No 3, September Term, 22 December 2014), concerning a consistent pattern of fiscal irresponsibility.

11 Fitness requirements for admission in New Zealand are governed by the *Lawyers and Conveyancers Act 2006* (NZ) ss 49(2)(b), 49(3)(c), 55.

12 The Solicitors Regulation Authority conducts a Disclosure and Barring Service pursuant to the *Solicitors Act 1974* (UK) which involves active screening including verifying identity and searching relevant third-party databases: Solicitors Regulation Authority, *Pre-Admission Applicant Screening and Disclosure and Barring Service (DBS) Check* <http://www.sra.org.uk/trainees/admission/dbs-check.page>. See also the Solicitors Regulation Authority's Handbook which states that applications *will be refused* where you have been convicted by a court of a criminal offence (specifically including offences of dishonesty) unless *there are exceptional circumstances*, together with the observation that an application will *more likely than not* be refused if applicants have been convicted of any offence which impacts on character and suitability. The guidance also observes that '[f]ailure to disclose material information will be treated as prima facie evidence of dishonest behaviour': Solicitors Regulation Authority, 'SRA Handbook' (Handbook, 1 November 2016) [1.1] <http://www.sra.org.uk/solicitors/handbook/suitabilitytest/part2/content.page>.

13 See, eg, in California, where the Subcommittee on Moral Character conducts an extensive investigation over a period of four to six months in which 'candor and honesty, respect for the law and the rights of others, fiscal responsibility, and records of fidelity and trustworthiness in other professions' are considered: The State Bar of California, *Statement on Moral Character Requirement for Admission to Practice Law in California* (2017) <http://admissions.calbar.ca.gov/MoralCharacter/Statement.aspx>. Cf New Hampshire, where 'Supreme Court Rule 42 places the burden of proof on the applicant to establish good moral character': New Hampshire Judicial Branch, *Petition and Questionnaire for Admission to the New Hampshire Bar* (January 2015) <http://www.courts.state.nh.us/nhbar/petition.pdf>.

although that is guided by varying degrees of detail in the framing of the questions which prompt disclosure (which include whether an applicant has ever been 'discharged, suspended or asked to resign from any employment', mental health and past or present substance dependencies).[14] Most jurisdictions also have mechanisms by which third parties may draw the admitting authorities' attention to perceived shortcomings.[15]

In *Re Bell*, the Queensland Court of Appeal stressed the significance of this heavy onus, and the breadth of the matters caught by the obligation of disclosure:

> an applicant for admission as a legal practitioner must be candid and act with the utmost good faith in making comprehensive disclosure of issues relevant to *any matter which might reasonably be regarded as touching on the applicant's fitness to become a legal practitioner* ...[16]

In considering the requirement of candour in disclosure, the Supreme Court of Victoria in *Frugtniet v Board of Examiners* ('*Frugtniet*') further adverted to the possibility (if not the probability) that matters disclosed might frequently involve a degree of sensitivity, given that disclosure in the Affidavit of Compliance is incorporated in the court file, and thus available to public view:

> the applicant must have the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a [lawyer] … At the heart of all of [the relevant] duties is a commitment to honesty and, in those circumstances when it is required, to open candour and frankness, *irrespective of self-interest or embarrassment*.[17]

Such candour is demanded notwithstanding the obvious temptation to remain silent 'because [the applicant] feared that disclosure would be against his interests'.[18] Indeed, it is precisely this potential for disclosed matters to affect the assessment of character that fuels the demand for candour: the interaction between the applicant and admitting bodies foreshadows the relationship applicants will have with the courts, and the system of administration of justice once admitted. In this sense, at least, there is a clear proximate relationship between concepts of honesty and candour in application and similar obligations assumed as a lawyer.

The test for inclusion in disclosure is not, however, a subjective assessment of relevance by the applicant in the form of 'selecting or editing from life's events only some events that might be relevant to the question' but to include '*every* matter that might fairly assist in deciding whether the applicant was a fit and proper person'.[19] Nor should disclosure be affected by a personal belief that conduct was innocent or careless (rather than actively dishonest), a sense that an

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14 Alice Woolley, 'Tending the Bar: The "Good Character" Requirement for Law Society Admission' (2007) 30 *Dalhousie Law Journal* 27, 31–2.

15 See, eg, Woolley's discussion of third parties bringing to the notice of the authorities adverse material relating to an applicant for admission in Upper Canada: ibid 45–50. See also *Law Society of Upper Canada v Shore* [2006] ONLSHP 55, cited in ibid 46.

16 *Re Bell* [2005] QCA 151, [5] (McMurdo P, Keane JA and Wilson J) (emphasis added).

17 *Frugtniet* [2002] VSC 140, [10] (Pagone J) (emphasis added).

18 *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253, 274 (The Court).

19 *Frugtniet* [2002] VSC 140, [11] (Pagone J) (emphasis added). See also *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145; *Legal Services Commissioner v Turner* [2012] VSC 394.

adverse inference would be unjust,[20] or that the matter had been successfully resolved, and therefore no longer relevant.[21]

In Queensland, where no proactive examination of character is undertaken in the absence of objections received after public notification of an intention to apply for admission,[22] Mortensen observes that, while the limited range of 'suitability matters' incorporated in the Queensland legislation,[23] and the breadth of the residual matters which the Supreme Court might consider relevant, might well be an improvement on the previously largely inchoate law as to what was disclosable, it would nonetheless require an 'intimate knowledge of the case-law on lawyers' admission and discipline' to understand exactly the ambit of disclosure requirements.[24] Yet gaining an intimate knowledge of how welfare overpayments are treated is hampered by the limited reporting of unsuccessful applications, with reporting of the decisions limited to instances where an application attracts a contested hearing.[25]

The approach to the level of disclosure required is epitomised by the observations of the Western Australia State Administrative Tribunal in *Jarvis*,[26] that 'honesty and integrity would [be] better demonstrated by disclosing everything and providing explanations, rather than taking the approach of deciding … what should or should not be disclosed'.[27] Essentially, over-disclosure (ie, disclosure of matters which subjectively might have no apparent capacity to reflect adversely on the applicant, but fall within a broad category of conduct flagged as relevant) is a better option than not disclosing and potentially

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20 *A Solicitor v Council of Law Society of New South Wales* (2004) 216 CLR 253, 272 (The Court). See also *Jackson v Legal Practitioners Admission Board* [2006] NSWSC 1338, [60] (Johnson J).

21 See, eg, *Re Saunders* (2011) 29 NTLR 204.

22 As is the case in many jurisdictions, notification of an intention to apply operates as a public invitation to anyone who is aware of matters bearing adversely on the applicant's fitness to lodge an objection with bodies associated with the admissions process, which are then explored (for example prior to making any recommendation to the admitting authority as to fitness). See, eg, *Supreme Court (Admission) Rules 2004* (Qld) rr 12–12B on notification in determined media. In Queensland, the objection process requires objections to be lodged 10 days prior to the admission sitting in order for the Legal Practitioners Admission Board to consider them when making recommendations to the Court: r 14. Where reference has been made to Queensland legislation, such legislation is indicative of statutory provisions governing admission in other jurisdictions. Where applicable, parallel legislation in other jurisdictions is noted.

23 In Queensland, see *Legal Profession Act 2007* (Qld) s 9. Broadly similar statutory provisions regarding suitability matters exist across all Australian jurisdictions: see, eg, *Legal Profession Uniform Law* (NSW) s 16–17; *Legal Practitioners Act 1981* (SA) s 15; *Legal Profession Act 2008* (Tas) s 26; *Legal Profession Uniform Law* (Vic) s 16–17; *Legal Profession Act 2008* (WA) s 22. For NSW and Victoria, see Legal Services Council, *Legal Profession Uniform Admission Rules 2015* (at 1 July 2015) r 10.

24 Reid Mortensen, 'Becoming a Lawyer: From Admission to Practice under the *Legal Profession Act 2004* (Qld)' (2004) 23 *University of Queensland Law Journal* 319, 333.

25 Such instances are rare: many applications which disclose suitability matters are successful, with an unconditional certificate being issued by the Legal Practitioners Admission Board, while others may receive a qualified certificate, but nonetheless be admitted or adjourned and subsequently relisted. Others may well abandon the attempt to be admitted. In none of these circumstances is any record published. The unavailability of records where no formal proceedings have considered fitness is not restricted to Australia; a similar situation applies in Canada, where Woolley discusses how '[law societies in Canada] maintain almost total secrecy with respect to the administration and enforcement of the good character requirement': Woolley, above n 14, 29, 34–5.

26 *Jarvis v Legal Practice Board (WA)* [2012] WASAT 28 ('*Jarvis*').

27 Ibid [68] (Sharp J, Senior Member Spillane and Member Moore).

being faced with an examination after admission as to why a matter was not disclosed at the time of admission. Such an examination creates a risk that an admitted practitioner might be struck off on the basis not of the conduct disclosed, but the absence of openness regarding its existence in the application process.[28]

III FITNESS TO PRACTICE: AN ELUSIVE CONCEPT

Across common law jurisdictions, a number of terms are used to refer to an applicant's qualities in the affective domain beyond mere cognitive or intellectual achievement in academic qualification, which are an additional prerequisite for admission (although not as susceptible to objective assessment). In practice, the major categories of conduct which have been considered by admitting authorities as potentially leading to a refusal of admission (or at least deferral until such times as the applicant might reasonably be considered rehabilitated) are past illegal conduct,[29] financial malfeasance,[30] misconduct in the bar admission process, political beliefs and conduct,[31] emotional or mental instability,[32] and academic misconduct.[33] Irregularities relating to welfare payments may constitute illegal conduct and/or financial malfeasance (or both). In England and Wales, admission is predicated on satisfying the Solicitors Regulation Authority that an applicant possesses appropriate qualities of 'character and suitability'.[34] In Australia and New Zealand, such qualities are captured by the term 'fit and proper'.[35] In Canada, the term 'good character' is generally used to convey

28 As an example of a judicial examination of matters which were clearly relevant to the assessment of fitness, but which were not disclosed at the time of admission, see *Legal Services Commissioner v Scott* [2014] QCA 266. With respect to the question of removal from the roll on the basis of non-disclosure, Wilson J (with whom Fraser JA and Atkinson J concurred) observed '[t]he non-disclosure was serious. Absent a satisfactory explanation, the admissions process was tainted to a degree which would warrant setting it aside': *Legal Services Commissioner v Scott* [2014] QCA 266, [50]. In the particular circumstances of the case, the practitioner provided an explanation for the non-disclosure in the admission process which was corroborated by medical evidence and her current employer: [51] (Wilson J). See also *Re OG (A Lawyer)* (2007) 18 VR 164; Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 *Federal Law Review* 227, 238.

29 See, eg, *Re Owen* [2005] 2 NZLR 536, 543 (Panckhurst and Fogarty JJ).

30 See cases regarding non-disclosure of income to Centrelink discussed in Part IV(B) below.

31 See, eg, *Re B* (1981) 2 NSWLR 372. In the US, rejection of applicants on the basis of political activism have focussed on issues such as draft resistance, membership of the Communist Party, and the impact of refusing to answer questions put during the application process on the basis of the Fifth Amendment: see, eg, *Konigsberg v State Bar of California*, 366 US 36 (1961); *Re Anastaplo*, 366 US 82 (1961); *Application of William George Walker for Admission to the State Bar of Arizona*, 112 Ariz 134 (1975).

32 See *XY v The Board of Examiners* [2005] VSC 250.

33 See, eg, *Re Liveri* [2006] QCA 152. See also McChrystal, above n 9, 67: with exception of academic misconduct, McChrystal's taxonomy is drawn from the US jurisdiction and mirrors the common experience of the types of matters disclosed and considered by the courts in reported and available unreported decisions across all jurisdictions.

34 See Solicitors Regulation Authority, *SRA Admission Regulations 2011* (at 1 November 2016) r 6.1(b) <http://www.sra.org.uk/solicitors/handbook/admissionregs/content.page>.

35 For Australia, see above n 23; for New Zealand, see *Lawyers and Conveyancers Act 2006* (NZ) s 55.

the requirements of fitness,[36] while 'moral character' is widely used by Bar Associations in the US.[37] Disclosure itself, as part of an applicant's interaction with the admission authorities, is inherently one aspect of an applicant's conduct (possibly the only one) which can be directly observed and assessed.

Demonstration of appropriate character requirements and the disclosure process are claimed to serve a number of important, if not vital, purposes: to protect the reputation of the legal profession by excluding those whose past might raise significant public concern as to the ethical standards of members of the profession as a whole; to protect the public from applicants whose history suggests a lack of honesty or integrity;[38] to foster public confidence in the system of justice;[39] and to provide the judiciary and professional colleagues with confidence in the honesty and trustworthiness of newly admitted lawyers.[40] Such purposes rely on a predictive capacity which past conduct is supposed to have on future behaviour.

The term 'fit and proper' is highly elastic. It has been held that it should be construed expansively, and that 'standing alone, [it] carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities'.[41]

As such, its construction takes on an interpretive cast, necessarily undertaken 'in the absence of inflexible rules and policy', where each exercise of determining fitness is a discretion which 'falls to be exercised anew in the circumstances of each application'.[42] Similarly, the assessment of 'moral character' has been described in the US as possessing 'shadowy rather than precise bounds',[43] requiring 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions',[44] its criteria remaining 'notably indeterminate'.[45] Woolley describes a lack of consistent practical

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36 See, eg, *Law Society Act, RSO 1990, c L-8,* s 27(2).

37 See, eg, the American Bar Association's *Code of Recommended Standards for Bar Examiners*, amended in 1987 to include a 'moral character' requirement: American Bar Association, 'Comprehensive Guide to Bar Admission Requirements 2015' (2015) vii–x.

38 The protection of the public has been identified as the sole basis for removal from the Roll: see *The Prothonotary of the Supreme Court of New South Wales v Ritchard* (Unreported, New South Wales Court of Appeal, McHugh JA, 31 July 1987) 21, citing *New South Wales Bar Association v Evatt* (1968) 117 CLR 177, 183–4 (Barwick CJ, Kitto, Taylor, Menzies and Owen JJ).

39 See *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128 (9 September 2015) [57] (Gray ACJ).

40 These interrelated interests are set out in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 284 (Spigelman CJ). See also *Legal Services Commissioner v CBD* [2012] QCA 69, [18] (Muir JA).

41 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 380 (Toohey and Gaudron JJ).

42 *Tavelli v Johnson* (Unreported, Supreme Court of Western Australia, 25 November 1996) cited in *Jarvis* [2012] WASAT 28, [60] (Sharp J, Senior Member Spillane and Member Moore) as to the breadth of factors which might bear on an assessment of fitness.

43 McChrystal, above n 9, 67, quoting *Schware v Board of Bar Examiners*, 353 US 232, 249 (Frankfurter J) (1957).

44 See *Konigsberg v State Bar of California*, 353 US 252, 263 (1957), citing *Chicago, Burlington & Quincy Ry Co v Babcock* 204 US 585 (1907).

45 Matthew A Ritter, 'The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions' (2002) 39 *California Western Law Review* 1, 11.

assessment of the abstract notion of 'good character' in the admission process in Canada,[46] concluding that 'the good character requirement in its current form is unjustifiable because it provides no meaningful review of the "character" of most applicants'.[47] The vagueness of these terms is exemplified by McChrystal's observation that the American Bar Association's definitions of 'good moral character' and 'moral turpitude' amount to no more than identifying the former with 'goodness', the latter with 'badness',[48] and in the absence of clear criteria, such a 'vague qualification … can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law'.[49]

The lack of clarity of the terms used,[50] the absence of any underlying rationale regarding precisely what quality is being assessed,[51] the value-laden nature of the inquiry,[52] the fluidity of the concept as a social construct,[53] and the at times lack of a rational connection between the impugned conduct and likelihood of future ethical violations,[54] militate against there being any reasonably objective and predictable application of character requirements in determining suitability for admission in specific instances. Between the extremes of conduct that is clearly inimical to practice (such as deliberate fraud in a position of trust) and essentially trivial misconduct which invokes the *de minimis* axiom, there is an 'extraordinary diversity'[55] of circumstances which yield little concrete guidance as to when disclosed conduct should prevent or delay admission.[56] Screening (particularly in the context of criminal records) has been criticised as largely 'meritless',[57] 'unrealistic and perverse',[58] giving little (or inadequate) recognition to 'forgiveness' and 'redemption',[59] and impacting disproportionately on some racial and socio-economic groups.[60] Similarly, there

46 Woolley, above n 14, 28–9.
47 Ibid 30.
48 McChrystal, above n 9, 87, where 'moral turpitude' is characterised by McChrystal as 'a virtually useless standard for establishing lack of moral character'. See Bruce E May, 'The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities' (1995) 71 *North Dakota Law Review* 187, 197–200; American Bar Association, *Model Code of Professional Responsibility 1983* (1 March 2013) EC 1-3, DR 1-102 <https://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM>.
49 *Konigsberg v State Bar of California*, 353 US 252, 263 (1957). See also Leslie C Levin, 'The Case for Less Secrecy in Lawyer Discipline' (2007) 20 *Georgetown Journal of Legal Ethics* 1, 45.
50 Woolley observes that notwithstanding an apparent (subjective) consensus as to the meaning of such terms, a review of relevant cases causes any clarity to 'evaporate' in terms of the practical application of such standards: Woolley, above n 14, 30, 40.
51 Ritter, for example, points to the lack of published standards in nearly half of the US states, and the absence of what types of conduct the different bar associations find relevant: Ritter, above n 45, 15.
52 See Bartlett and Haller, above n 28, 232, citing Gino Dal Pont, 'Ethics: Fit to Practise' (2007) 81(10) *Law Institute Journal* 76.
53 See, eg, G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 5th ed, 2013) 40.
54 McChrystal, above n 9, 74.
55 Ibid 89.
56 Ibid, citing *Re G S*, 291 A 2d Md 182, 433 (1981); *Re G L S,* 292 A 2d Md 378, 439 (1982).
57 Keith Swisher, 'The Troubling Rise of the Legal Profession's Good Moral Character' (2008) 82(3) *St. John's Law Review* 1037, 1059.
58 Ibid 1052. See also ibid 1054.
59 Ibid 1060, 1063.
60 Ibid 1064.

is little, other than 'intuition', to guide the recognition of rehabilitation, much less counter the proposition of irredeemable conduct which creates an 'indelibly negative mark' on character.[61]

In the context of such imprecision, the observations of the Commissioner for Uniform Legal Services Regulation – that there are significant differences in the practices of Australian jurisdictions in investigating particular disclosures relating both to what types of matters are considered sufficiently serious as to warrant further investigation, and the means by which those investigations are made[62] – might be said to apply across most, if not all, common law jurisdictions, and apply equally to welfare irregularities.

There is no literature which specifically considers student engagement with the welfare system in the context of admission. A further hindrance to a clear understanding of the nexus between welfare irregularities and admission is that decisions are reported only where the most egregious forms of misconduct in dealings with the welfare system have occurred, and the applicant has sought admission in the face of adverse reports or recommendations, resulting in a contested hearing or an appeal against an adverse ruling.[63] As McChrystal observes, there are 'a host of cases in which bar admission was granted notwithstanding blemishes relating to moral character' which, in the absence of published decisions, 'evade evaluation'.[64] Instances where applicants have disclosed irregularities in their dealings with the welfare system but have been admitted without resistance from the Legal Practitioners Admission Board or the court (or whose application has been adjourned for a period to demonstrate rehabilitation, and subsequently admitted without contest) would provide valuable insight into the currently unknowable boundaries of fitness as it is revealed through interactions with the welfare system.

The beginnings of any analysis of whether these observations hold true in the context of welfare irregularities requires an examination of the limited data which is available on the frequency and cases of welfare overpayments and reported cases where welfare issues are raised. Given the small number of instances in which welfare overpayments have figured in judicial consideration of fitness, it might be thought that consideration of the circumstances leading to irregularities amount to little more than academic curiosity. However, the sheer scale of overpayments considered below leads to the inevitable conclusion that a substantial number of applicants for admission will have been involved with the welfare system, and that there is a demonstrable, though unquantifiable, probability that a significant number of law students will have been in receipt of overpayments, potentially exciting the admitting authorities' interest. There

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61 *Re Dortch*, 486 SE 2d 311, 321 (W Va, 1997), quoting *Re Avcollie*, 637 A 2d 409, 412 (Conn, 1993), cited in ibid 1063 n 102.

62 See Commissioner for Uniform Legal Services Regulation, 'Legal Profession Proposed Admission Rules' (Explanatory Paper, Legal Services Council, 24 November 2014) 3 [2.1], 6 [2.6].

63 A consistent thread of lack of reporting except where applications are refused (which involve conduct at the more serious end of the spectrum) appears in many jurisdictions: in relation to the US, see, eg, McChrystal, above n 9, 69–70. See also Woolley as to the 'secretive' nature of good character assessment generally in Canada: Woolley, above n 14, 59.

64 McChrystal, above n 9, 70.

remains, then, a significant gap between what is known from the few, arguably extreme, cases which figure in reported decisions, and other instances of welfare irregularities which remain in the shadows.

IV HOW WELFARE IRREGULARITIES ARISE

In 2014–15, the number of claims for Youth Allowance and Austudy – the forms of benefit most relevant to intending applicants for admission – was 496 000.[65] Claims have steadily increased, from 468 000 in 2012–13 and 475 000 in 2013–14.[66] In 2014–15, there were 72 000 *new* claims for Austudy.[67] Since law students comprise about 5 per cent of all tertiary education students,[68] it is likely that new applications for these benefits by law students are measured in the thousands.[69] Additionally, benefit recipients are subject to periodic assessment regarding the amount of benefit, if any, to which the claimant is entitled, based on, inter alia, disclosed income. Each of these calculations of ongoing payments involves an administrative decision based on complex criteria in the *Social Security Act 1999* (Cth).

The Australian National Audit Office ('ANAO') has observed that:

> Debts for [Centrelink] customers can arise from … overpayments, because customers have not notified [the Department of Human Services] of a change in their circumstances or have provided incorrect information; or, less often, through administrative errors being made by departmental staff.[70]

The scope of Centrelink debt is evident from figures from the ANAO Report which records relatively consistent figures over the period 2007–08 to 2012–13:

65 Department of Human Services, '2014–15 Annual Report' (24 September 2015) 16. *Relevant benefits are not restricted to these forms: irregularities in other forms of benefits, such as Family Tax Benefits do figure in disclosures made in the course of admission.*

66 Ibid.

67 Ibid 25.

68 Australian Bureau of Statistics, 'Australian Social Trends 2013' (Publication No 4102.0, 4 March 2014).

69 Estimates are difficult in the absence of direct data, given that law students may not apply for these forms of benefit in the same proportion as students in other disciplines.

70 Australian National Audit Office, 'Recovery of Centrelink Payment Debts by External Collection Agencies' (Audit Report No 40, 2012–13) 10.

Table 1: Five-year overview of Centrelink payment debts raised and recovered[71]

Year	Debts Raised Number (million)	Value ($billion)	Debts Recovered Value ($billion)
2007–08	2.2	1.8	1.1
2008–09	2.2	1.9	1.1
2009–10	2.2	1.7	1.1
2010–11	2.0	1.7	1.1
2011–12	1.8	1.8	1.1

The range of circumstances under which these debts arise,[72] and the differential impact which the raising of a debt might have on an applicant for admission are not, however, captured by these figures. Among the common (and relevant) reasons for the incurring of a debt through overpayment are the incorrect or non-disclosure of earnings or other relevant information and the discontinuation of studies, or changes to enrolment.[73] To these, of course, error on the part of Centrelink must be added.

A Error on the Part of Centrelink

In 2003, Creyke observed that Centrelink processed 6.5 million *new* claims for all forms of benefit each year.[74] Although Creyke concedes that accurate estimation of the error rates which occur in such high-volume decision-making is difficult, she points to a Commonwealth Auditor-General report estimating the 'actionable error' rate in new claims for aged pensions was 52.1 per cent.[75] A more conservative estimate, compiled by a company engaged to develop expert-software systems to improve the accuracy of decision-making was that 'in most agencies', errors would be in the order of 20–25 per cent for primary decisions/assessments.[76] Centrelink's own estimated 'actionable error' rate,[77]

71 Ibid 24.

72 An example includes failure to advise Centrelink of a change of situation relevant to the calculation of benefit, including departure overseas, any change to enrolment status, mistakenly declaring net, rather than gross income, or a mistaken belief, on the strength of Centrelink officer's discussion of data-matching, that Centrelink would itself gather information through data-matching processes with the Australian Tax Office.

73 Answer to Question on Notice, HS 176, Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 12 December 2014, (Rachel Siewert).

74 Robin Creyke, 'Current and Future Challenges in Judicial Review Jurisdiction: A Comment' (2003) 37 *Australian Institute of Administrative Law Forum* 42, 42. That, of course, is in addition to the ongoing periodic calculation of benefits on the basis of disclosed information for clients already in receipt of benefits.

75 Ibid 43, citing Australian National Audit Office, 'Assessment of New Claims for the Age Pension by Centrelink' (Audit Report No 34, 21 May 2001) 8. Although the estimate relates specifically to aged pensions, there is no reason to suspect that the accuracy of decision-making across the range of Centrelink programs is not relatively consistent.

76 Creyke, above n 74, 43.

assessed through its internal audit system, was (perhaps unsurprisingly) low, estimated at 3.2 per cent.[78]

These figures are admittedly now dated, and there may have been significant improvements following the introduction of rule-based expert-system technology, which 'produce[s] more consistent and accurate outcomes at the initial decision-making stage'.[79] However, applying the middle estimate across over approximately the 70 000 new Austudy applications each year, 18 000 initial applications generate actionable error – to which must be added a presumably similar proportion of errors in the ongoing recalculation of periodic payments. Based on the premise that law students represent about 5 per cent of all students in tertiary education,[80] new applications by law students in any given year could be expected to be approximately a thousand (with periodic assessments adding to the potential number of errors).

The Senate Estimates Committee was advised in 2015 that 19 372 recipients of Austudy and 5962 recipients of ABSTUDY recipients had received overpayments (approximately 23 per cent and 12 per cent of recipients respectively).[81] Across the population of law students who have at some time engaged with the welfare system, there is a substantial (although unquantifiable) probability of clerical error in the assessment of eligibility for, or quantum of, benefits. Unfortunately, no data exist which measure the frequency of disclosure at a level of disaggregation sufficient to identify to what extent Centrelink debts might figure as disclosable events in the context of admission. Such figures as do exist are no finer in resolution than the characterisation of disclosed matters as minor or serious.[82]

Equally, it can be assumed that most overpayments will be uncovered – either by self-disclosure or (more commonly) Centrelink's extensive quality and integrity assurance processes.[83] On discovery of an overpayment, a debt will

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77 'Actionable assessment error' is defined by the ANAO as '[a]ctionable errors [that] include instances of incorrect payment, but also include instances where there was the potential for incorrect payment when important information was not provided by the customer': Australian National Audit Office, 'Assessment of New Claims', above n 75, 8.

78 Creyke, above n 74, 43.

79 Ibid, citing Administrative Review Council, 'Automated Assistance in Administrative Decision-Making Issues Paper' (Report No 46, 12 November 2004) 3. See generally at 9. See also D Baker, 'The Probable Impact of Legal Expert Systems on the Development of Social Security Law' (Paper, Australian National University, October 2001) 6: 'a computer program that performs tasks for which the intelligence of a legal expert is usually thought to be required – whether the legal expertise be that of a lawyer or of a non-lawyer with legal expertise in a particular area of the law', cited in Creyke, above n 74, 53 n 8.

80 See Australian Bureau of Statistics, above n 68.

81 Answer to Question on Notice, HS 201, Senate Community Affairs Legislation Committee, Parliament of Australia, Canberra, 21 January 2015 (Rachel Siewert).

82 See Law Admissions Consultative Committee, Submission to Standing Committee of Attorneys-General, *Submissions to Taskforce on National Legal Profession Reform*, 19 July 2010, which records comparative rates of disclosure against the major/minor characteristic for the Queensland, New South Wales and Victoria in 2009. In the absence of more detailed information, these figures reveal nothing about the incidence of Centrelink disclosure.

83 Data-matching is principally performed by comparing information held by Centrelink with that held in databases maintained by Australian Tax Office and the Departments of Social Services, Employment, Education and Training, Human Services, Health, and Veterans' Affairs. Banks have been an increasingly

be raised,[84] and the Department of Human Services is required to recover all payments made by Centrelink which have been made incorrectly. While it is advisable, given the terms of the Disclosure Guidelines of LACC and judicial commentary regarding overpayments,[85] to disclose such overpayments, no adverse inference could be drawn with respect to the applicant's conduct and disclosure should have no impact on an application for admission.

B Error in Reporting by the Applicant

As Marston and Walsh observe, media reporting of social security fraud suggests that it is of epidemic proportions, driven overwhelmingly by calculating recipients – '"scroungers" or "cheats"' intent on taking advantage of the system.[86] Public discourse is often driven by the demonisation of perpetrators as deviant or 'morally deficient',[87] creating a preoccupation in western democracies with welfare fraud constructed in an atmosphere of 'moral panic'.[88] Yet dealing with Centrelink is generally considered to be a complex process, and a failure to comply strictly with the obligations associated with the receipt of benefits need not be indicative of any moral defect,[89] but may rather derive from other, less damning, circumstances deriving from relatively innocent failure in compliance.[90]

Casual and irregular employment creates particular compliance problems. The nature of casual employment means that 'people's earnings fluctuate, which presents potential for [innocent] error in terms of under-reporting income'.[91] The level of complexity involved in compliance is exacerbated where casual and irregular income does not synchronise with reporting periods.[92] As observed by

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effective mechanism of identifying and recovering overpayments: see, eg, Ellen Whinnett, 'Centrelink Uncovers $329 Million in Overpayments Welfare Recipients Will Have to Pay Back' *Herald Sun* (online), 2 March 2016 <http://www.heraldsun.com.au/news/welfare-recipients-ordered-to-pay-centrelink-back-329-million-in-wrongful-payments/news-story/de7cf0491a22893e4e291ba1d7619c1b>; Tim Prenzler, 'Welfare Fraud in Australia: Dimensions and Issues' (Trends & Issues in Crime and Criminal Justice 421, Australian Institute of Criminology, June 2011) 2–3. Marston and Walsh found that data-matching with the Australian Tax Office was the mode of identification for over half (55 per cent) of the charges, and other Centrelink processes detected a further 30 per cent; only three per cent were identified by self-disclosure: Marston and Walsh, above n 5, 295. The 2015–16 Budget provided for increased funding for programs designed to capture irregular payments (including welfare fraud), maximising the amount of overpayments recovered: see Department of Human Services, *Strengthening the Integrity of Welfare Payments* (15 March 2016) <https://www.humanservices.gov.au/corporate/budget/budget-2015-16/budget-measures/compliance/strengthening-integrity-welfare-payments>.

84 *Social Security Act 1991* (Cth) s 1222A.

85 See *Jarvis* [2012] WASAT 28.

86 Marston and Walsh, above n 5, 286–7.

87 Ibid 286; cf Roy Sainsbury, 'Putting Fraud into Perspective' (1998) 21 *Benefits* 2, 18.

88 Marston and Walsh, above n 5, 287.

89 Ibid 290.

90 The complexity of the legislation and reporting requirements and the mismatches between reporting periods and payment schedules (considered in detail elsewhere) lead to the conclusion of (possible) innocent error rather than moral defect (which implies conscious deception).

91 Marston and Walsh, above n 5, 290.

92 Significantly, the most common form of employment where undisclosed income leads to prosecution is in the hospitality industry: see Freda Hui, Lee Moerman and Kathy Rudkin, 'Centrelink Prosecutions at the Employment/Benefit Nexus: A Case Study of Wollongong' (Report No 1, Social Accounting and Accountability Research Centre, 2011) xi.

Senator Siewert, the confusion 'is compounded when people work irregularly or are paid irregularly or when their payslips lag behind reporting requirements'.[93] Industries in which such employment is common include retail and hospitality – employment which, by its nature, attracts considerable numbers of students. Add in an accrual, rather than cash, accounting system and the probability of inadvertent error in income disclosure rises. Errors in reporting arising from what is, in effect, innocent non-compliance ought not to give rise to an adverse inference as to the applicant's character. The worst that might be said is that they demonstrated a lack of attention to detail in navigating a regulatory framework: not a desirable characteristic in a practitioner, but equally, one not inevitably visited by an order for striking off.

Yet, notwithstanding the mental states defining offences against the Commonwealth *Criminal Code 1995*,[94] 'minor offenders and those who end up in debt *via error* make up a huge proportion of those investigated [by Centrelink] and prosecuted [by the Commonwealth Director of Public Prosecutions'.[95] The fault, it appears, may be attributable to structural and administration issues which make perfect compliance with the complex legislation and accounting mechanisms for calculating disclosable income difficult, and failure to comply not intrinsically indicative of moral deficiency.[96] However, a hard line on prosecution, where an extraordinarily high proportion of prosecutions result in conviction,[97] 'easily criminalises recipients who have made genuine errors in reporting their circumstances and this potential is exacerbated by [inter alia] the casualisation of labour'.[98] Yet such criminalisation presents serious issues for applicants for admission.

V PROSECUTION AND ITS CONSEQUENCES

The clearest threat to admission arising from welfare irregularities occurs when an applicant has been convicted of an offence relating to welfare benefits. Conviction of such offences is, at least prima facie, an indication that, at the time, an applicant would not have been a fit and proper person to be admitted. Notwithstanding the approach of admitting authorities where an applicant discloses (or, more significantly, fails to disclose) a conviction, significant numbers of applicants for admission do disclose welfare debts without attracting

93 Commonwealth, *Parliamentary Debates*, Senate, 6 July 2011, 4135 (Rachel Siewert).

94 See generally Part V below.

95 Above n 92 (emphasis added).

96 Marston and Walsh, above 5, 298.

97 A study of Commonwealth Director of Public Prosecutions cases in Wollongong reported a conviction rate of 99 per cent: see Hui, Moerman and Rudkin, above n 92, xii. A similar assessment of conviction rates across a longer time frame and across the whole of Australia (98.5 per cent) is reported in Tim Prenzler, 'Responding to Welfare Fraud: The Australian Experience' (Research and Public Policy Report No 119, Australian Institute of Criminology, 2012) 44.

98 Hui, Moerman and Rudkin, above n 92, 1.

either a refusal by the admitting authority to admit the applicant, or, indeed, even the grant of a qualified certificate by the Legal Practitioners Admissions Board.[99]

A The Basis of Prosecution: Welfare Offences

The offences in Australia which are designed to criminalise conduct within the welfare system are primarily housed in the Commonwealth *Criminal Code 1995*.[100] Section 134.2(1) creates the offence of '[o]btaining a financial advantage by deception', section 135.1(1) creates an offence of 'dishonestly obtaining a benefit' from the Commonwealth, and section 135.2(1) '[o]btaining [a] financial advantage' knowing or believing that they are not entitled to that benefit.[101] The point of differentiation between the offences is that section 134.2 incorporates a positive element of deception calculated to gain a benefit to which the accused was not entitled, whereas section 135.1 contains no explicit element of deception, relying merely on the mental state of dishonesty. Section 135.2(1) contains no explicit element of deception or dishonesty, referring only to the relatively inchoate mental states of either knowledge or belief that the financial advantage obtained is one to which the accused is not entitled. The relative seriousness of the offences is reflected in the relative maximum sentences: 10 years' imprisonment for section 134.2 (deception), five years' imprisonment for section 135.1 (dishonesty), and 12 months' imprisonment for section 135.2 (obtaining a financial advantage). However, the lines between deception, dishonesty and mere knowledge of a lack of entitlement are hard to define – an interpretive problem not confined to Australian regulatory regimes. Marston and Walsh observe that while different countries have jurisdiction-specific regulatory formulae relating to welfare fraud, the issue of '"knowingly" defrauding the government is critically important, and yet contestable'.[102]

B Conviction and Admission: Past and Future Conduct

The nature of such distinctions is, arguably, more critical in the context of admission, where conviction for an offence of this nature is read as prima facie

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99 The mechanics of admission under the regime which applies in Queensland, including the distinction between the issue of an unconditional certificate or a qualified certificate of the LPAB pursuant to *Legal Profession Act 2007* (Qld) ss 35(3) and 39, are set out in Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Lawbook Co, 2nd ed, 2014) [2.05] ff. The observation as to the frequency is based on the author's experience of applicants for admission: no data are available on what proportion of intending applicants disclose Centrelink matters.

100 A number of alternative offences are created by *Social Security (Administration) Act 1999* (Cth) ss 212–16. However, these offences are little used, with most offences charged under the *Criminal Code* provisions discussed above.

101 Recipients of benefits who have received amounts to which they are not entitled might also be charged offence provisions: *Social Security (Administration) Act 1999* (Cth) ss 212–16. Although research suggest that these options are utilised far less frequently than the *Criminal Code* offences: see Marston and Walsh, above n 5, 293. Similar criminal charges exist in other jurisdictions: in England and Wales under the *Theft Act 1978* (UK), or the *Fraud Act 2006* (UK); through various state legislation in the US; and in Canada under either *Provincial Offences* Act RSO 1990, c P-33, the *General Welfare Assistance Act* RSO 1990, c G-6, or the *Criminal Code* RSO 1985, c C-46.

102 Marston and Walsh, above n 5, 286.

evidence of faulty moral agency, demonstrating 'an indication of human frailty or defect of character' inconsistent with professional practice.[103] It might be thought that conviction of an offence specifically involving dishonesty (or some closely related mental state) would be wholly inimical to admission to a profession 'in which absolute trust must be of the essence'.[104] However, in *Ziems*, Fullagar J took the view that it was appropriate to look behind the 'plain fact' of conviction and that a conviction, even for a serious criminal offence, should not inevitably lead a finding of lack of fitness.[105] It was necessary, rather, to determine whether the conduct *in itself* spoke to unfitness.[106] Similarly, Taylor J considered that a conviction, while a *factor* to consider in determining fitness, needed to be viewed in the light of other evidence 'concerning the nature and character of the appellant's conduct on that occasion'.[107]

The central question in cases of admission where criminal offences involving dishonesty are disclosed is whether 'the frailty or defects of character' of an applicant are now a thing of the past, and the previous dishonesty of the applicant could 'be viewed as entirely historical'.[108] While, for example, misappropriation of over $8000 of an employer's money might suggest 'unsuitability to practise in a profession in which absolute trust must be of the essence',[109] the focus of the inquiry relating to fitness for admission is concerned with *present fitness* – to which past conduct might prove an indication, but is not in itself determinative.[110] Rehabilitation is therefore a significant concept when considering past conduct in admissions involving criminal convictions – a point given added weight when, as observed by de Jersey CJ in *Kilroy*, it is given statutory recognition as one of the purposes for which punishment is imposed for criminal offences.[111]

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103 *Re Owen* [2005] 2 NZLR 536, [34] (Panckhurst and Fogarty JJ).

104 *Thomas v Legal Practitioners Admission Board* [2005] 1 Qd R 331, 334 (de Jersey CJ).

105 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 289 ('*Ziems*').

106 In *Legal Services Commissioner v CBD* [2012] QCA 69, Muir JA at [24] quoted Fullagar J in *Ziems* (1957) 97 CLR 279, 288:

> is it the conviction that is the vital thing, unchallengeable and conclusive of the ultimate issue? Or must we look beyond the conviction, and endeavour to ascertain, as best we can on the material before us, the facts and circumstances of the particular case?

The Queensland Court of Appeal considered *Ziems* in this context to draw the distinction between a conviction and the relevant conduct (in this case, being in possession of child pornography).

107 *Ziems* (1957) 97 CLR 279, 303. Statutory criteria for considering the effect of a conviction on the assessment of fitness appear in all Australian jurisdictions: *Legal Profession Act 2007* (Qld) s 9; *Legal Profession Uniform Law 2014* (NSW) s 16; *Legal Profession Act 2004* (Vic) s 1.2.6; *Legal Profession Act 2008* (WA) s 22; *Legal Practitioners Act 1981* (SA) s 15; *Legal Profession Act 2008* (Tas) s 26.

108 *Re Owen* [2005] 2 NZLR 536, 543 [35], 544 [37] (Panckhurst and Fogarty JJ).

109 *Thomas v Legal Practitioner's Admission Board* [2005] 1 Qd R 331, 334 (de Jersey CJ).

110 See *A Solicitor v Law Society of NSW* (2004) 216 CLR 253, 275 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ). Cf similar sentiments expressed in relation to assessment of character in Canada: see *Preyra v Law Society of Upper Canada* [2004] ONLSHP 8, [12]–[13].

111 See Transcript of Proceedings, *Re Kilroy* (Supreme Court of Queensland, de Jersey CJ, Keane JA and Wilson J, 13 December 2007) 3. In that case, Kilroy had been convicted of drug trafficking in 1989, and was sentenced to four years' imprisonment. While in prison, she had begun a degree in social work, which she subsequently completed. On her release, she had founded an organisation, Sisters Inside, dedicated to advocating for the rights of women prisoners and providing welfare services to them which were not otherwise available. She had subsequently qualified for admission as a legal practitioner. At her admission ceremony, Chief Justice Paul de Jersey had observed '[r]ehabilitation is an important

However, the assessment of rehabilitation inevitably involves highly speculative judgments,[112] colourfully adverted to by de Jersey CJ in *Kilroy*: 'Only a fool would offer a guarantee of future human behaviour but allowing for my own inadequacy I accept that all pointers favour a strong conviction this rehabilitation has worked'.[113] There is no standard period which indicates successful rehabilitation, rendering judicial consideration of when a past welfare conviction might be 'overlooked' effectively arbitrary. Such an arbitrary approach to rehabilitation parallels that of employers utilising criminal background checks in selecting employees who, in the absence of reliable empirical date, are left with no choice 'but to set their own arbitrarily selected cutoff points based on some *intuitive* sense of how long is long enough – inevitably with a conservative bias'.[114]

The entire process of disclosure of suitability matters is predicated on an assumption that past misdeeds are indicative of a propensity to unethical conduct. However, the underlying logic which accepts (almost as an article of faith) that past misconduct is a reliable predictor of future conduct may not be as reliable as is assumed.[115] This should be approached with one caveat: the assumption that misconduct is a reliable predictor of future misconduct in a wholly different setting (ie, professional practice) is quite distinct from the question of recidivism *within* the profession, and observations that it is not uncommon for lawyers appearing in disciplinary matters to have a history of prior misconduct.[116]

The predictive value of past conduct – particularly conduct at a time when late adolescents/young adults are still within a formative process of ethical development – is however itself a contestable proposition, proving 'highly inexact',[117] and described by Ritter as an 'ethical fallacy' unsupported by empirical evidence.[118] Indeed, a correlation between prior conduct and future transgression has proved elusive, with Rhode observing that '[e]ven trained psychiatrists, psychologists, and mental health workers have been notably unsuccessful in projecting future deviance, dishonesty, or other misconduct on the basis of similar prior acts'.[119] Even the most sophisticated nonclinical

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consideration in the criminal justice process. It has statutory recognition': at 3. See *Penalties and Sentences Act 1992* (Qld) ss 3, 9.

112 See McChrystal, above n 9, 89.

113 See Transcript of Proceedings, *Re Kilroy* (Supreme Court of Queensland de Jersey CJ, Keane JA and Wilson J, 13 December 2007). As de Jersey CJ observed, characterisation of an applicant as a fit and proper person involves an inherently risky speculation as to future conduct: at 3.

114 Alfred Blumstein and Kiminori Nakamura, 'Redemption in the Presence of Widespread Criminal Background Checks' (2009) 47 *Criminology* 327, 332 (emphasis added).

115 The prevailing view of the predictive value of past conduct was expressed in *Re Applicants for License*, 55 SE 635, 642 (NC, 1906).

116 The frequency of such recidivism is not generally, however, quantifiable: see Leslie C Levin, (2009) 'Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from *Lawyers in the Dock*' (2009) 22 *Georgetown Journal of Legal Ethics* 1549, 1551 n 17.

117 See McChrystal, above n 9, 86.

118 Ritter, above n 45, 48. See also Woolley, above n 14, 48: 'the nature of the past misconduct has little predictive force in determining whether an applicant will be found to have good character or not'.

119 Deborah L Rhode, 'Moral Character as a Professional Credential' (1985) 94 *Yale Law Journal* 491, 559. There is substantial evidence that while repeat offending is probable in the short term after an episode of

predictive techniques have proven 'highly inadequate for identifying future … offenders unless [the subjects] have high rates of recidivism'.[120] Furthermore, there are clear indications that the probability of future dishonest conduct declines over time from the last instance, reaching a point where a former offender is 'of no greater risk than a counterpart of the same age – an indication of redemption from the mark of crime'.[121]

Admitting authorities also tend to view honesty as a static or immutable aspect of personality. In *Attorney General v Bax*, the court rejected any suggestion that 'basic honesty' was acquired through 'through experience, or by lengthy practice of trying one's best to be honest'.[122] However, just as achievement in the cognitive domain is a dynamic phenomenon, increasing dramatically during tertiary education, so moral development is equally subject to growth and development over time,[123] emphasising the variability and contextualised nature of moral behaviour. Difficulties of prediction are heightened where assessment of character frequently seeks to draw inferences about how individuals will cope with the pressures and temptations of the unknown future context of practice while relying on prior acts committed under significantly different circumstances,[124] often at a time of a less than fully developed moral sense.

The subjective and potentially arbitrary nature of the use of past conduct as a predictor of conduct as a practitioner is illustrated by the observation that over 40 per cent of reviews of adverse character determinations by the California Bar resulted in reversal by the courts,[125] suggesting the limitations of intuitive assessment of risk. In a practical context, the lack of predictive reliability of the corollary – that the absence of previous misconduct is predictive of a future free

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offending conduct, probability of recidivism declines 'monotonically with time' free and clear of further contact with the criminal justice system: Blumstein and Nakamura, above n 114, 332.

120 Rhode, above n 119, 560 n 314; Daryl J Bem and Andrea Allen, 'On Predicting Some of the People Some of the Time: The Search for Cross-Situational Consistencies Behavior' (1974) 81 *Psychological Review* 506, 506–7.

121 Blumstein and Nakamura, above n 114, 327.

122 *Attorney General v Bax* [1999] 2 Qd R 9, 13 (McPherson J). Such a static model of an innate moral sense is at odds with views of educational and developmental science, which suggest that mental characteristics in the affective domain, including the acquisition of values, is developmental: see, eg, Lawrence Kohlberg and Richard H Hersh, 'Moral Development: A Review of the Theory' (1977) 16(2) *Theory into Practice* 53.

123 See generally Wolfgang Althof and Marvin W Berkowitz, 'Moral Education and Character Education: Their Relationship and Roles in Citizenship Education' (2006) 35(4) *Journal of Moral Education* 495, 496 ff.

124 Rhode, above n 119, 560.

125 Ritter, above n 45, 12. Ritter points further to the 'remarkable' statistic that between 1966 and 2000, *every* application to the State Supreme Court of California reviewing an initial adverse decision as to character reversed the original decision, often in robust terms: at 27–9. For example, in *Hall v Commission of Bar Examiners*, 602 P 2d 768, 777 (Cal, 1979), the Court found that the applicant's refusal to retract his claims of innocence were not indicative of any moral deficiency, but rather evidence of good character, insofar as he had 'refused … to become a fraudulent penitent for his own advantage': quoted in Ritter, above n 45, 29. See also *Re Gossage*, 5 P 3d 186 (Cal, 2000), where the original assessment of character was adverse, at the first level of review, the decision was reversed, and the Supreme Court of California finally reversed the review decision, holding that Gossage was unsuitable for admission: cited in Ritter, above n 45, 33.

of misconduct – is evidenced by the significant numbers of practitioners who, having been found fit at the time of their admission, subsequently find themselves before disciplinary bodies for dishonest practices.[126] Assessments of character are thus prone to false positives (assessments that an individual is at risk of engaging in professional misconduct which are not realised) and false negatives (assessments that an individual is free of the defects of character being assessed who subsequently engage in misconduct, for which alternative explanations might be needed).[127]

Such evidence as exists which supports the predictive value of student misconduct and professional misconduct is related to the medical profession, where a study by Papadakis et al in 2004 claimed such a predictive relationship.[128] The Papadakis study, however, was limited. Its statistical significance has been questioned and, in reviewing the methodology and results, Colliver concluded that any relationship 'between unprofessional behavior in medical school and board action is too weak to be of any prognostic value'.[129] In this context, Woolley has expressed concern that character assessment, as it is currently applied, 'is unjustifiable because it provides no meaningful review of the "character" of most applicants and results in what is, arguably, excessive scrutiny of others'.[130] Such a view is, perhaps, extreme if it were to lead to a conclusion that no character test at all should be (or need be) included as part of the admission process.

In addressing rehabilitation, it is conventional to require open acknowledgement of fault, expressions of remorse (not merely regret at the matter having unfortunate consequences) and an indeterminate period of 'blameless conduct', seemingly as a demonstration of reform, and to some extent a form of penalty, signifying the court's displeasure with the disclosed conduct. It is, perhaps, no accident that the process maps closely to religious concepts of sin, requiring confession in the first instance, some form of penance followed eventually by absolution (and admission) once released from the stain of past sins.[131] Contrition, however, is a difficult concept to identify in any objective sense if one is concerned with an assimilated and transformative internal attitude to past conduct, rather than the mere rehearsal of what can easily become a formulaic recitation of regret and remorse, and a determination to change. Rarely

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126 At page 6, the Legal Services Commission Queensland, '2014–15 Annual Report' (31 October 2015) shows that 15 per cent of investigations carried out by the Commission related to trust account matters – one of the most fundamental obligations of a solicitor, demanding absolute integrity, and an area of professional ethics in which there are, in effect, no grey areas, as the obligations relating to the management of trust accounts are highly specific.

127 Rhode, above n 119, 561–2.

128 Maxine A Papadakis et al, 'Unprofessional Behavior in Medical School is Associated with Subsequent Disciplinary Action by a State Medical Board' (2004) 79 *Academic Medicine* 244.

129 Jerry A Colliver et al, 'The Prognostic Value of Documented Unprofessional Behavior in Medical School Records for Predicting and Preventing Subsequent Medical Board Disciplinary Action: The Papadakis Studies Revisited' (2007) 19(3) *Teaching and Learning in Medicine* 213, 214. See also Thalia Arawi and Philip M Rosoff, 'Competing Duties: Medical Educators, Underperforming Students, and Social Accountability' (2012) 9 *Bioethical Inquiry* 135.

130 Woolley, above n 14, 30.

131 Blumstein and Nakamura, above n 114, 328.

will the substance, as opposed to the form, of an expression of remorse be clearly open to challenge as nothing more than a repetition of words and ideas adopted on the basis of advice as to what is required in the admission process.[132]

Again, the underlying assumption – that acknowledgement of fault and remorse is indicative of future behaviour – has little evidentiary basis. Indeed, faith in the process of confession and reform might be doubted in the face of findings that remorse for past conduct and resistance to the temptation of future misconduct are 'independent or at best only minimally interrelated'.[133]

VI WELFARE OVERPAYMENTS AS SUITABILITY MATTERS

Recently, the existence of Centrelink debts has become a more frequent item of interest in admission proceedings. Admitting authorities in Australia universally consider that the raising of a debt arising from an overpayment by Centrelink is potentially a suitability matter, with the capacity to bear on the court's determination of fitness,[134] analogous to failure to submit tax returns or dereliction of similar civic obligations which are the subject of disciplinary proceedings against practitioners.[135] Consequently, many relevant statutory authorities now generally provide online information regarding the admissions process. While such documents are not exhaustive, and do not 'diminish or supplant' the personal duty of disclosure owed by an applicant, many routinely include reference to the requirement to disclose welfare overpayments in the course of an application.[136] Such assistance, however, is not universal. Woolley notes, for example, that in Canada (with the exception of Manitoba), the law societies 'do not publish standards which indicate what good character means, or the types of issues which are relevant' to the concept,[137] while

132 Such a circumstance occurred in *Re Valvo* [2014] NTSC 27, which eventually became a court proceeding with the applicant giving evidence in support of his affidavit: it was evident under cross-examination that Valvo had clearly not understood the meaning of some 'key words' in his final affidavit, and Barr J had concluded it was 'unclear whether the [final] affidavit expressed the applicant's true insights, beliefs and views, as distinct from those which his legal advisors considered were necessary for the applicant to express': at [25].

133 Walter Mischel, *Personality and Assessment* (John Wiley and Sons, 1968) 26.

134 See, eg, *Re Valvo* [2014] NTSC 27; *Jarvis* [2012] WASAT 28; *Re Saunders* (2011) 29 NTLR 204; *Re Kennell* (Unreported, Supreme Court of Queensland, de Jersey CJ, Muir JA and Atkinson J, 30 January 2012), discussed at below n 168 and accompanying text.

135 See *Legal Services Commissioner v Hewlett* [2008] 2 Qd R 292; *Legal Services Commissioner v Lee* [2013] QCAT 447, where in each case, the respondent practitioner failed to lodge personal income tax returns over an extended period. In Hewlett's case, where his liability to the Australian Tax Office was over $500 000, his name was removed from the Roll. In Lee's case, the failure was of lesser proportions (although substantial nonetheless), but attracted only a $5000 fine and a public reprimand.

136 See, eg, the Admission Kit provided to Queensland applicants by the Queensland Law Society: Legal Practitioners Admissions Board, 'Admission Information Kit for PLT Students' (July 2016). See also Law Admissions Consultative Committee, 'Disclosure Guidelines for Applicants for Admission' (July 2015), as modified for the purposes of admission in NSW. Cf Australian Business Licence and Information Service 'Admission to the Legal Profession in Tasmania: Advice to Applicants' (Advice Document, 28 August 2014).

137 Woolley, above n 14, 35.

in England, the Solicitors Regulation Authority publishes a comprehensive guide to suitability.[138]

The principal ways in which an overpayment might adversely affect the court's view of an applicant's fitness arise where the applicant has been convicted of a relevant offence and/or where disclosure has been inadequate, disingenuous, or misleading. Three major Australian cases have all been decided in the context of convictions arising out of welfare overpayments, often in concert with other matters which also bear on the applicant's fitness. The focus of the courts' attention, however, differs according to the circumstances.

In *Jarvis*,[139] disclosed suitability matters included a range of earlier offences involving dishonesty,[140] a debt to the Commonwealth (approximately $5000) arising from non-disclosure of income, and a later failure to disclose reportable income, resulting in an overpayment of $6091.76, for which she was convicted in 2008. Jarvis had not disclosed the first debt in her application, claiming that she had not understood the debt to be 'an infringement [sic] on her character'.[141] When pressed, Jarvis had failed to demonstrate any insight into why it was relevant to admission,[142] or express remorse other than for the harm she had done to herself or her children.[143] The Tribunal noted that Jarvis' failure to disclose the first debt evidenced a lack of appreciation of the obligation of candour imposed on applicants for admission, but also a want of understanding of those qualities 'in the wider sense of understanding a lawyer's basic obligation of honesty and integrity'.[144]

As to the second debt, the Committee noted that Jarvis' subsequent failure to declare relevant income demonstrated 'a lack of regard for the law' and a level of wilful and reckless carelessness as to the honesty of her statements to Centrelink.[145] In finding that Jarvis was not a fit and proper person, the Tribunal observed that while it did not expect 'many years of blameless conduct' to demonstrate rehabilitation, it did signify that insufficient time had, as yet, passed to expiate the adverse findings.[146] The decision bears out the observation that not only is lack of candour a significant aspect of the assessment of fitness, but that determination of rehabilitation periods is essentially subjective and arbitrary, unsupported by anything but an intuitive sense of when 'long enough' is enough.

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138 The relevant regulations include 'strict stipulations of behaviour that will debar applicants' running to ten paragraphs 'setting out prohibitions and factors weighing on suitability decisions': see Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 3rd ed, 2014) 241, citing Solicitors Regulation Authority, above n 12.

139 *Jarvis* [2012] WASAT 28.

140 Notably, a conviction for giving a false name to police (1985); three counts of stealing as a servant (1989); 123 counts of stealing as a servant (2002); and a finding of academic misconduct (2002): ibid [10].

141 *Jarvis* [2012] WASAT 28, [51] (Sharp J, Senior Member Spillane and Member Moore).

142 Ibid [50], [54] (Sharp J, Senior Member Spillane and Member Moore); see also [73] as to the genuineness of insight and remorse when it is followed by further offending conduct of the same nature.

143 Ibid [50] (Sharp J, Senior Member Spillane and Member Moore).

144 Ibid [51] (Sharp J, Senior Member Spillane and Member Moore).

145 Ibid [52] (Sharp J, Senior Member Spillane and Member Moore).

146 Ibid [74], citing *Frugtniet* [2002] VSC 140, [70] (Gillard J).

By way of comparison, in *Re Valvo*,[147] the applicant was prosecuted in 2002 over a debt of $17 500 and convicted on a plea of guilty. He was sentenced to a period of five years' imprisonment, wholly suspended.[148] In total, Valvo had earned $56 265.26 in the relevant period, of which he had declared only $4993.[149] Valvo deposed that he understood that 'social security fraud is theft from the revenue of the Government', he was ashamed of and regretted his actions, and that he had repaid the money to Centrelink.[150]

Valvo claimed to have held a mistaken belief as to his reporting obligations, resulting in his failing to declare earnings from 1995 to 1999,[151] and his final affidavit had expressed considerable insight into his conduct. However, Barr J was unpersuaded that Valvo did not understand his obligations at the time he had failed to disclose income, and formed the view that the contrition expressed did not accurately reflect Valvo's own perceptions, but had been written on the advice of counsel.[152]

Despite the scale of the undisclosed income, however, Barr J acknowledged that, since the conviction, Valvo had been a 'model of rehabilitation', at least insofar as he had not reoffended.[153] Barr J would have been prepared to make a finding that he was a fit and proper person to be admitted had his disclosure been full and frank, and had he satisfied the Court as to his current beliefs and insights into his conduct.

In *Re Saunders*,[154] the applicant had disclosed a conviction of five counts of welfare fraud arising from non-disclosure of income between 2006 and 2008 while receiving Austudy benefits, and was sentenced to a good behaviour bond for 12 months.[155] Saunders was clearly aware of his disclosure obligations, as he had complied for approximately six years prior to the offences.[156] Saunders claimed that non-disclosure of income was 'common behaviour' resulting in no more than a requirement to repay the excess,[157] likening non-disclosure to a 'loan

147 *Re Valvo* [2014] NTSC 27.
148 Ibid [6] (Barr J).
149 Ibid. The specific nature of the charges is not apparent from the decision of the Supreme Court of the Northern Territory, other than an inference from references to 'fraud' that it would probably have been the most serious of the charges available to the Director of Public Prosecutions under the *Criminal Code 1999* (Cth): ibid [18], [23] (Barr J). Valvo had also disclosed a conviction for theft from 1988 (when he was 14 years old), which could reasonably be excluded from consideration of his present fitness: ibid [6].
150 Ibid [6] (Barr J).
151 Ibid, considered in further detail at [16]–[18] (Barr J).
152 Ibid [25].
153 Ibid [36].
154 (2011) 29 NTLR 204.
155 Ibid 208 (Riley CJ).
156 Ibid 210 (Riley CJ).
157 Saunders' claimed belief that repayment of any overpayment extinguishes any consequences for the incurring of the debt is reported as common among Centrelink clients: see Hui, Moerman and Rudkin, above n 92, 1. See also an online forum where a law student inquires as to whether a clear case of Centrelink fraud by a flatmate would 'just get some mere payment plan where she can pay back $50 a week and act like nothing ever happened': Aria-, 'Friend Ripping Off Centrelink?' on Finance, Whirlpool (19 January 2016) <http://forums.whirlpool.net.au/archive/2116012>.

which [he] always intended to declare and repay'[158] rather than being a 'sinister attempt to defraud the Australian social security system'.[159]

However, the Court observed that there were significant deficiencies in his disclosure as to the relevant amounts,[160] and that he had refused to supply the name of one employer.[161] Other aspects of his disclosure invited inferences that he sought to displace blame onto Centrelink for failing to follow 'proper administrative processes', and had attempted to create an impression that his cooperation with Centrelink was 'complete and unqualified', when it was anything but.[162]

Saunders had conceded that 'he was aware that a deliberate failure to declare income was a criminal offence "in an abstract sense"', but nonetheless maintained the irrational view that 'as long as the money was repaid it wasn't a criminal act as such'.[163] Such a 'fanciful' belief, in Riley CJ's opinion, was designed to minimise Saunders' moral culpability,[164] and his conduct during the application process did nothing to acknowledge fault or demonstrate rehabilitation.[165]

All three applicants were refused admission without any indication of when they might expect to be successful on a future application. What is common to the cases is that the applicant had been convicted of an offence arising out of non-declaration of income, and, given the emphasis placed by courts on honesty as a sine qua non of the profession, that is perhaps unsurprising. However, the immediate impact of the convictions is, in each case, at least partially obscured by occurring within a more complex matrix of matters relating to suitability. For example, such convictions might be disclosed in the context of other significant suitability matters or a substantial lack of candour in the admissions process, whether manifested in incomplete or inadequate disclosure, or as a transparent attempt to minimise the applicant's culpability. So while the fact of a conviction is common to all, it is clearly not determinative of a lack of fitness, which may depend on conduct in the intervening period as evidencing rehabilitation. Of more significance, however, is the manner of engagement with the court during the admission process. Notwithstanding Valvo's failure to disclose over $50 000 in relevant earnings, incurring a debt of $17 500 and being sentenced to five years' imprisonment (albeit wholly suspended), the finding that he was not a fit and proper person derived ultimately from his disingenuous and self-serving approach to disclosure.

The default position may well be described, as it was in *Shepherd*, that providing Centrelink with misleading information and accruing benefits to which

158 *Re Saunders* (2011) 29 NTLR 204, 209 (Barr J).
159 Ibid.
160 Ibid 210 (Riley CJ).
161 Ibid 212–13 (Riley CJ).
162 Ibid 211–12 (Riley CJ). At the time of making the sentencing remarks, the Magistrate was unaware of the inaccuracy of some of the information which had been provided to the Court, which would clearly have demonstrated that Saunders' cooperation was something less than complete.
163 Ibid 210 (Riley CJ).
164 Ibid 211.
165 Ibid 214 (Riley CJ).

an individual was not entitled would, if it involved serious deception, 'ordinarily be considered glaringly inimical to the honesty integral to fitness to practise as a legal practitioner'.[166] But to accept the proposition that fraudulently obtaining money from the welfare system is necessarily inconsistent with admission is to ignore the role of rehabilitation as an accepted aspect of any assessment of character, or that the admission process itself, and the manner in which the applicant engages with the authorities, is perhaps the most significant determinant. Unfortunately, that position cannot be verified in the absence of information about cases where applicants have been admitted despite welfare irregularities.

But if conviction is not a sufficient condition for refusal to admit an applicant at a particular time, neither is it a necessary condition. As observed by Young CJ:

> Conduct not occurring in the course of professional practice may demonstrate unfitness if it amounts to incompatibility with the personal qualities essential for the conduct of practice. *There may not even have been any criminal conviction with respect to that conduct.* This is particularly so where the conduct over a long period shows systematic non-compliance with legal and civic obligations.[167]

This approach was evidenced by the recent decision of the Queensland Supreme Court in *Re Kennell.*[168] As a result of underreporting of income, Kennell had accrued a debt of approximately $10 000 over a period of two and a half years between 2005 and 2008. The underreporting had ceased approximately three years before the application for admission. Kennell had not been charged with any offence, and the debt was repaid prior to her application. She had previously applied and disclosed the overpayment, but had not been advised of the necessity to provide a detailed account of the circumstances. The Board determined to oppose the application, and in response to the Board's position, Kennell had adjourned the application, waiting almost a year before relisting her application.[169]

On relisting, she had provided a 'very detailed accounting' of her interaction with Centrelink, as well as details of her life and circumstances at the time of the under-disclosure.[170] Kennell clearly understood the nature of her conduct, explaining, although not seeking to excuse, her under-reporting in terms of difficulties which she would have in meeting her living expenses if her benefit were reduced. Despite a considerable period having elapsed since the initial application, and full and candid disclosure having been made, the Court

166 *Re Shepherd* [2007] QCA 83, 1.

167 *Supreme Court Prothonotary (NSW) v P* [2003] NSWCA 320, [17] (emphasis added). While this was a disciplinary proceeding relating to a practising lawyer, the observation as to the significance of systematic failure to comply with civic obligations is equally relevant in the context of admission. Similarly, failures in relation to proper maintenance of tax affairs in not lodging income tax returns or business activity statement returns for a significant period has been held to be professional misconduct, the Court characterising such conduct as a failure to fulfil legal and civic obligations: see *Legal Services Commissioner v Bouhalis* [2015] VCAT 254, [45] (Member Wentworth); above n 135.

168 *Re Kennell* (Unreported, Supreme Court of Queensland, de Jersey CJ, Muir JA and Atkinson J, 30 January 2012).

169 Transcript of Proceedings, *Re Kennell* (Supreme Court of Queensland, de Jersey CJ, Muir JA and Atkinson J, 30 January 2012) 2.

170 Ibid 4.

adjourned the application for a further four months, indicating that, in the absence of any further adverse information coming to light, Kennel might be comforted by 'knowing that she would most likely be admitted' at that time.[171] It is hard to reconcile adjournments totaling about 15 months in circumstances where no charges were laid, where the amounts involved were objectively quite small (though not insignificant) and disclosure was properly made with the earlier decisions. Such a decision sits ill when considered against the background of Barr J's observation that Valvo would have been considered a fit and proper person had his conduct during the admissions process not revealed a lack of acceptance of responsibility, or insight into the obligations imposed on applicants.

VIII CONCLUSION

What emerges from this consideration of welfare irregularities in the context of professional admissions is a general lack of consistency in the approach (at least when viewed across jurisdictions) and an absence of any clearly identified and, more particularly, defined standards or criteria against which fitness or character is to be assessed. It would be inconceivable that admitting authorities would abandon the examination of the circumstances leading to welfare irregularities as part of the character test. The apparent failure of past conduct as a reliable predictor of future conduct notwithstanding, the other purposes which support the inclusion of an assessment of character, such as the requirement of retaining public confidence in the system of administration of justice and the profession, would justify demands of disclosure of matters bearing on character, and judicial consideration of their relevance to fitness to practice.

However, while a conviction which reveals a degree of dishonesty in relation to civic obligations (such as proper declaration of relevant income to welfare authorities) is relevant to an application, it need not, in itself, be fatal. Certainly, the Australian case law considered above suggests that there is a close correspondence between conviction of a relevant offence and deferral of admission. A conviction, while prima facie evidence of unfitness in the judicial imagination, must nonetheless be contextualised, whether by statutory requirements, or subjective and speculative criteria framing concepts of rehabilitation.

In that context, convictions which are substantially dated and occurred when the applicant was relatively young need to be considered in the light of the comments of Doyle CJ, with whom Perry and Debelle JJ agreed, in *Re Application for Admission as a Legal Practitioner*:

> the ordinary member of the public would … accept, as I have, that the deficiencies in the applicant's conduct are due to immaturity and misjudgement [sic], and do

171 Ibid 5.

> not point to the conclusion that the applicant is not a fit and proper person to be admitted.[172]

More significantly, however, *any* lack of candour or want of acknowledgement and understanding of the significance of the relevant conduct should be considered as the most significant aspect of an application for admission where welfare irregularities form part of the applicant's history, overshadowing in all but extreme circumstances the fact of a failure to declare reportable income.[173] There are sound reasons for emphasising deficiencies in disclosure, whether through non-disclosure on the initial application, inadequate (or quite fanciful) explanations for the relevant conduct, or palpable attempts to paint the conduct in a more benign light than warranted. As officers of the court, a lawyer's paramount duty is to the system of administration of justice and to the court itself. As such, courts must be confident that applicants for admission are a person in whom they can repose complete trust. The significance of candour, and the considerable weight ascribed to lack of complete candour as indicative of a lack of fitness, is justified by the admission process being the first point of direct engagement between the incipient lawyer and the judicial system, where misleading the court, even on the most trivial of matters, is considered professional misconduct. No deficiency of character more directly 'implicates ethical standards imposed upon lawyers than the prohibition against misconduct in the … admission process'.[174]

On that basis alone, more needs to be known about the instances of uncontested admission where welfare irregularities have been disclosed, so that both applicants and admitting authorities can be better informed about the detailed requirements of disclosure, the boundaries of fitness as defined by welfare irregularities, and the role of rehabilitation and contrition in that context.

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172 (2004) 90 SASR 551, 557.

173 *Re Liveri* [2006] QCA 152. While *Re Liveri* was an application for admission were the applicant had been found guilty of three charges of academic misconduct by James Cook University, including one finding of plagiarism of the worst kind imaginable, the principle which emerged, as expressed by de Jersey CJ, McMurdo P and Williams JA, was that her 'unwillingness … to acknowledge that misconduct, establishes a lack of genuine insight into its gravity and significance: for present purposes, where the Court is concerned with fitness to practise, that aspect is at least as significant as the academic dishonesty itself': at [21].

174 McChrystal, above n 9, 79.