VIEWS FROM INSIDE: A COMPARISON OF ADMISSION PROCESS IN NEW SOUTH WALES AND VICTORIA BEFORE AND AFTER THE *UNIFORM LAW*

LINDA HALLER* AND FRANCESCA BARTLETT**

I INTRODUCTION

On 1 July 2015 the *Legal Profession Uniform Law* ('*Uniform Law*') came into force in Victoria and New South Wales.[1] The *Legal Profession Uniform Admission Rules 2015* (NSW) ('*Uniform Rules*') came into force the same day.[2] This article considers differences in approach to admission of lawyers in Victoria and New South Wales in the past in regards to assessment of applicants' 'character' so as to be considered 'fit and proper' to practise law. It speculates as to how uniform these approaches will become in the future as a result of the *Uniform Law* and *Uniform Rules*. We base our comparison on the comments made in interviews conducted with past and present administrators of the system. In 2013 we reported on just how different processes applied in New South Wales, Victoria and Queensland are in regards to assessment of applicants' 'character' and 'capacity' despite apparent uniformity in their legislation and case law.[3] We speculated that these differing approaches may have contributed to the jurisdictional discrepancies in the figures released by the Law Admissions Consultative Committee ('LACC') for 2009.[4] This article provides further data about outcomes of the admission

* Senior Lecturer, Melbourne Law School, University of Melbourne, l.haller@unimelb.edu.au.

** TC Beirne School of Law, University of Queensland.

1 The *Uniform Law* is a schedule to the *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ('*Uniform Law*') and adopted in the *Legal Profession Uniform Law Application Act 2014* (NSW) s 4.

2 *Legal Profession Uniform Admission Rules 2015* (NSW) r 2.

3 Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 *Federal Law Review* 227. In June 2014, the Law Admissions Consultative Committee ('LACC') produced the 'Uniform Admission Rules 2014' which provides principles to be uniformly adopted rather than a prescriptive code. These 'rules' were first produced by LACC in 1993, and then revised in 2002 and 2008. Although an authoritative document as to the basic requirements for admission to practice, it simply states that the local authority must be satisfied that the person applying is a 'fit and proper person to be admitted'. It does not provide any indication of how and by what principles this is to be determined. The latest version concedes that there are, and will continue to be, jurisdictional differences: 'while each jurisdiction generally complies with the principles which underlie the *Uniform Admission Rules* as revised in 2002, they do so in a wide variety of ways': LACC, 'Uniform Admission Rules 2014' (Consultative Paper, Law Council of Australia, June 2014) 1, 3 ('*Uniform Admission Rules*') <http://www.lawcouncil.asn.au/LACC/images/pdfs/Uniform_Admission_Rules_2014_-_June2014.pdf>.

4 Bartlett and Haller, above n 3, 256–7, citing LACC, Submission to Taskforce on National Legal Profession Reform, 19 July 2010, 4–5 <http://www.lawcouncil.asn.au/LACC/images/pdfs/NationalLegalProfessionReform.pdf>. The LACC is an umbrella body made up of all admitting authorities across the country, Law Council, Law Deans and Practical Legal Training (PLT) providers. It provides an opportunity to meet and forge consensus across the country. One of the LACC's important achievements was the development of disclosure guidelines for applicants for admission: see LACC, 'Disclosure Guidelines for Applicants for Admission to the Legal Profession' (Law Council of Australia, November 2015) <http://www.lawcouncil.asn.au/LACC/images/211114458_20_LACC_Disclosure_Guidelines.pdf>. This document was achieved after a lot of hard work and 'many, many meetings': Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013). The Disclosure Guidelines have been adopted across the country with minor changes.

system from further searches of the public record and from interviews conducted with past and present administrators of the system.

In the first part of this article, we explain these regulators' role through a brief description of the legal purpose of admission controls. We then sketch the structure of the organisations that administer admission regimes in Victoria and New South Wales. Our interviewees provided insider perspectives on the constraints facing administrators of the regime, including the reliance on large amounts of pro bono contribution from the legal profession. We question whether this is an appropriate regime, as it relies on the goodwill and available time of office holders. This may in turn influence how much time is spent on, and their approach to, deciding applications.

The article then examines how those administering the system put the policy goals of the 'character test' into practice. Academic commentators (including us) have studied the case law and criticised its underlying rationales in various ways.[5] This article provides a unique glimpse into what actually happens in practice and the views of those involved, with the exception of the applicants themselves.[6] The regulators we interviewed exhibited a strong commitment to the 'protective' function of their role. However, they differed as to how this is best achieved. Those in Victoria claimed there were 'educational' benefits of a rigorous and in-person process of (moral) self-revelation and reflection for applicants. Previous regulators in New South Wales did not agree with this on practical as well as principled grounds, as we explain below.

II BACKGROUND

Over the last 10 years or so, many Attorneys-General across the country sought to introduce national legislation to centralise lawyer regulation, including the

5 See Bartlett and Haller, 'Disclosing Lawyers', above n 3. Other academic critiques of the 'character' test include: its seeming lack of evidentiary basis (study of the Connecticut Bar): Leslie C Levin, Christine Zozula and Peter Siegelman, 'The Questionable Character of the Bar's Character and Fitness Inquiry' (2015) 40 *Law & Social Inquiry* 51; lack of theoretical justification, and how it seemingly ignores a weight of psychological theories about ethical behaviour (it is arguably a 'fundamental attribution error' at work): Alice Woolley and Jocelyn Stacey, 'The Psychology of Good Character: The Past, Present and Future of Good Character Regulation in Canada' in Kieran Tranter et al (eds), *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Routledge, 2010) 165, 171; Alice Woolley, 'Can Good Character Be Made Better? Assessing the Federation of Law Societies' Proposed Reform of the Good Character Requirement for Law Society Admission' (2013) 26 *Canadian Journal of Administrative Law & Practice* 115. Historical critiques point to the use of the character test as a veil for politically motivated exclusion: see, eg, James E Moliterno, 'Politically Motivated Bar Discipline' (2005) 83 *Washington University Law Quarterly* 725.

6 Hearing from applicants (with or without disclosures) would be a fascinating insight into the admission process and one for future research. This is not part of the scope of research reported on here.

admission process.[7] The approach was to establish a national body to, among other things, issue compliance certificates to those seeking admission to practice.

The national approach did not attract sufficient state support and so a 'Uniform Law' approach was substituted, to which only Victoria and New South Wales signed up. A number of rounds of consultation have taken place in relation to the *Uniform Law* and *Uniform Rules*; the most recent consultation has been in relation to the *Uniform Rules*, which received a number of submissions before it closed in January 2015.[8]

In 2013 we reported on the very different processes that applied in New South Wales, Victoria and Queensland in regards to assessment of applicants' 'character' and 'capacity', despite apparent uniformity in their legislation and case law.[9] For instance, as between these states, we described differences in types of documentation required of applicants; advertising requirements; language used in application forms; and use of investigative powers. We argued that divergent processes may account for large statistical differences in disclosure rates by applicants revealed in figures released by the LACC[10]

7 The proposed national law was a comprehensive effort to regulate the legal profession. It related to most aspects of licensing and practising of lawyers (not just admission). The title of the proposed nationalising project for regulating Australian lawyers was Legal Profession National Law ('LPNL') as it was drafted by Attorneys-General and the Taskforce over a number of years. As only New South Wales and Victoria have implemented the regime so far, it was renamed the *Uniform Law*. It is not the first attempt to harmonise regulation of lawyers across Australia. The 'Model Laws' was a regulatory design of the Law Council of Australia which was then adopted in most jurisdictions (except South Australia). However, the regime allowed for different jurisdictions to make changes from the template. This has resulted in substantive differences in regulation in certain areas. For a background on this process of reform, see Reid Mortensen and Linda Haller, 'Legal Profession Reform in Queensland' (2004) 23 *University of Queensland Law Journal* 280.

8 Legal Services Council, *Submissions* (17 June 2015) <http://www.legalservicescouncil.org.au/Pages/public-submissions.aspx>.

9 Bartlett and Haller, 'Disclosing Lawyers', above n 3. See also discussion of the Queensland admission process and cases in Francesca Bartlett and Linda Haller, 'Admission to Legal practice in Queensland — Cases and Process' (2015) 35 *The Queensland Lawyer* 170.

10 See above n 4 and accompanying text.

for 2009.[11] This article reports on views from inside the admission system. In 2013 we interviewed people involved in the admission system in Victoria and New South Wales. We conducted face-to-face, semi-structured interviews with past and current secretariats and board chairpersons of New South Wales[12] and Victoria[13] and others involved in advising applicants and who sometimes accompanied applicants to meetings with admission authorities in Victoria.[14]

Those involved with admission who we interviewed in the period leading up to the newly implemented *Uniform Law*, articulated significant differences in their practices and views as to what works best. Since those interviews, the *Uniform Law* and *Uniform Rules* have come into force in New South Wales and Victoria. This article draws on those interviews, as well as other material, to reflect on the degree to which practices are likely to remain distinct in New South Wales and Victoria, despite the move to uniform legislation and rules. At least in the short term, it appears that differences remain between the states, but we document

11 We reported in our previous article that Australian authorities provide very little in the way of information about disclosure rates or admission outcomes: Bartlett and Haller, 'Disclosing Lawyers', above n 3, 255. We are not aware of another countrywide dataset from another period except the one reported by the LACC: LACC, Submission to National Legal Profession Reform Taskforce, above n 4. However, we argued that this small dataset indicated some profound differences among applications as to how much and what sorts of disclosures are routinely made across the country: Bartlett and Haller, 'Disclosing Lawyers', above n 3, 255–60. Further data about outcomes of the admission systems in New South Wales and Victoria is now more crucial than ever if we are to properly evaluate claims of Victorian regulators that their approach to admission is both proportionate and required. Nevertheless, there are some figures available across the country. The New South Wales Legal Profession Admission Board's Annual Reports are available on its website and provide data about numbers of admission applications: Legal Profession Admission Board (NSW) *Publications and Resources* (17 March 2016) <http://www.lpab.justice.nsw.gov.au/Pages/lpab/legalprofession_publications.aspx>. However, the then Secretariat told us in an interview in 2013 that the Board refused 19 applications for admission during the period 2006–July 2013: Interview with Robin Szabo, Secretariat, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013). Other jurisdictions publicly provide more detailed data on admissions, such as Western Australia and Queensland: see Legal Practice Board of Western Australia, *Annual Reports* <https://www.lpbwa.org.au/For-The-Public/Annual-Reports>; Legal Practitioners Admissions Board, *Corporate Documents*, Queensland Law Society <http://www.qls.com.au/Knowledge_centre/Admission_Board/Corporate_documents>. In contrast to the above jurisdictions, Victorian data of any sort is difficult to obtain. There is no information about the number of applicants or their disclosures, or rates of success, as the Board does not make any Annual Report publicly available.

12 We interviewed the then Chair and the Secretary of the New South Wales Legal Profession Admission Board (New South Wales Board) in July 2013. The Chair, the Hon Justice Slattery, retired from that position in May 2014. The Secretary, Robin Szabo, who occupied the position for around eight years, finished in the position at the end of 2014.

13 We interviewed the Chief Executive Officer, Richard Besley, and the Chairman, Justice Bernard Teague, of the Victorian Legal Admissions Board in early 2013. These two interviewees remain in similar, though differently constituted, positions (described later). We checked the accuracy of the quotes taken from the 2013 interviews with each of them in late 2014 and provided a copy of this article in draft form for further comment in September 2015.

14 We provided a list of questions to each prior to the interview and information about relevant ethics clearances from our universities. Ethics approval for the interviews was obtained through the University of Melbourne and University of Queensland. In most cases the interviews were recorded and transcribed. Otherwise detailed notes were taken or written responses provided, and we obtained the approval of interviewees for any direct quotes or attributed views in August 2015.

changes introduced by the *Uniform Rules* which may engender future process reforms.[15]

The *Uniform Law* only governs legal practitioners in Victoria and New South Wales, at least in the short term. And despite the earlier intention to move to a national processing body, the *Uniform Law* maintains a decentralised approach to considering applications even for Victoria and New South Wales. Thus, compliance certificates will continue to be issued by local regulatory authorities, rather than a central body.[16] This article considers the views of those local regulators (and others) in Victoria and New South Wales with regard to how they approach their role and what they see as its aims, and its strengths and weaknesses. We argue, first, that their accounts of what they do are starkly divergent; applicants are dealt with dissimilarly and disclosures handled in different ways. Second, the regulators we spoke to in each state seemed to hold diverse, and at times opposing, views about the most effective exercise of their powers, the objectives of their function, and whether much could or should change under a Uniform Law. At least in Victoria, where the office holders remain the same, these attitudes are likely to remain for the near future.

Victoria's approach has for some time required certain applicants to appear in person before regulators. The *Uniform Rules* codify the Victorian approach by including an express power to require an applicant to appear in person before the Board or a committee of the Board.[17] Hence, New South Wales now has the power to follow the Victorian practice. For the reasons explained below, we do not believe New South Wales will do so. At the current time, their process remains the same. We predict that New South Wales will continue to consider applications for admission on the papers alone. We note also the differing practice of New South Wales and Victoria in relation to student misconduct. Again, while the *Uniform Rules* allow for the adoption of the Victorian practice of investigating allegations of misconduct afresh, for the reasons explained below, we predict that New South Wales will continue past practice in this regard.

15 The Chief Executive Officer of the New South Wales Board informs us that 'admission practices remain essentially the same at this point in time, apart from the introduction of new requirements and procedures as a result of the *Uniform Law* and *Uniform Admission Rules*, which are reflected in the Guide for Applicants for Admission that is available on the Board's website': Interview with Robin Szabo, Chief Executive Officer, Legal Profession Admission Board (NSW) (Email Interview, 18 August 2015). We have been informed by the Chief Executive Officer of the New South Wales Board that they are 'embarking on a transformation of … operations over the next six to nine months, which is likely to alter the current admission process. This is separate to the recent implementation of the recent *Uniform Admission Rules*': Interview with Robin Szabo, Chief Executive Officer, Legal Profession Admission Board (NSW) (Email Interview, 7 August 2015).

16 *Uniform Law* s 19; *Legal Profession Uniform Law Application Act 2014* (NSW) ss 17, 19. The *Uniform Law* provides for the establishment of an Admissions Committee to develop admission rules and give advice to the centralised Legal Services Council about 'guidelines and directions of the Council relating to admission': *Uniform Law* s 402; Legal Services Council, *Admissions Committee* (1 October 2015) <http://www.legalservicescouncil.org.au/Pages/about-us/admissions.aspx>. The Council or the Uniform Legal Services Commissioner is empowered to also give general, binding 'guidelines and directions' to the local admission authorities as to the exercise of their functions: *Uniform Law* s 407.

17 *Uniform Rules* r 22(1)(d); Legal Services Council, *Admission Rules* (29 September 2015) <http://www.legalservicescouncil.org.au/Pages/uniform-rules/admission-rules.aspx>.

The reasons for continuing process differences may be both practical and philosophical. We believe that the New South Wales approach, in current conditions, is preferable. Ultimately, we agree with concerns raised about a lack of due process which we report here. There is a potential for misconstruing evidence, and the administrative and financial burdens are high in the Victorian approach.

III ADMISSION LAW AND PROCESSES

A *The Legal Test of 'Character' on Admission*

The legislative purpose of admission controls under the *Uniform Law* is to 'protect the administration of justice and the clients of law practices'.[18] How this dual protective purpose is to be achieved is only explained in legislation by various process requirements and legislative statements that only those who are 'fit and proper' are to be admitted. Case law fills the gap in logic, describing a system that seeks to allow only those with integrity and honesty to be lawyers, as the 'entire administration of justice … depends upon the honest working of legal practitioners who can be relied upon to meet high standards of honesty and ethical behaviour'.[19]

A court or admitting authority has to be satisfied that the applicant is 'a fit and proper person to be admitted'.[20] This is often called the 'character test' because applicants have the onus of proof of establishing their 'intrinsic character' or moral self-awareness sufficient to practise law. In practice, lack of relevant adverse past conduct leads to a finding that a person is of sufficient character (ie 'fit and proper'). In accordance with the *Uniform Law* s 17(2)(b), the *Uniform Rules* set out 'suitability' matters which the admitting authority or court must consider.[21] These include such things as breaches of a regulatory regime, criminal offences and financial incompetency. Importantly for the discussion that follows, the *Uniform Law* confers wide discretion on those assessing applicants for admission, allowing the Admission Board to go beyond the listed suitability matters and 'have regard to any matter relevant to the person's eligibility or suitability for admission, however the matter comes to its attention'.[22] Similarly, the *Uniform Law* preserves the inherent jurisdiction of State Supreme Courts to refuse admission[23] and the authority of common law decisions pre-dating the *Uniform Law*. For reasons that will become clear, we believe this wide discretion and preservation of inherent

18 This is the 'purpose' of the admission regime as stated in the *Uniform Law* s 15.

19 *Frugtniet v Board of Examiners* [2002] VSC 140 [10] (1 May 2002), cited in LACC, 'Disclosure Guidelines for Applicants for Admission to the Legal Profession', above n 4, 2.

20 The other limb of the test is 'eligibility' which considers whether the applicant has fulfilled the education and training requirements specified by legislation, *Uniform Law* ss 17(1)(a)–(b).

21 *Uniform Rules* r 10.

22 *Uniform Law* s 17(2)(a).

23 Ibid s 16(4).

powers and prior doctrine means that important aspects of practice in New South Wales and Victoria are likely to remain distinct.

There is established doctrine for a decision-maker to legitimately consider a wide array of matters as relevant to an assessment of a person's character or capability.[24] Applicants must disclose past or present matters themselves and the act of identifying and describing the relevant conduct is a key part of assessment of the person's current fitness. The process of adequate self-disclosure is thought to indicate that the applicant has the requisite ethical self-awareness.[25] Conversely, incomplete disclosure can result in a finding that the person is unfit.[26]

While the stated policy goals of the law are clear in the cases, we have been critical of the lack of assistance to applicants across Australia as to exactly what matters they need to disclose and how these disclosures will be weighed.[27] However, the consistent curial view is that wide discretion, and a case-by-case approach, is appropriate to allow proper in-context consideration of an applicant's internal character.

B *The Structure of Admission*

As noted earlier, the *Uniform Law* maintains the previous structure, whereby application for admission to legal practice is undertaken in Australia at a state and territory level, and it is ultimately the local Supreme Court that admits persons to the Australian legal profession as an Australian lawyer.[28] Admissions Boards assume a key role in assessing applications and providing compliance certificates to the local Supreme Court.[29] Thus admission authorities also occupy a central regulatory role in terms of dealing with applicants, considering evidence,

24 These include convictions for serious offences such as 'house breaking' (*Re Davis* (1947) 75 CLR 409); issues relating to dishonesty such as student plagiarism (*Re OG (A Lawyer)* (2007) 18 VR 164); overpayments of government support (*Re Saunders* (2011) 29 NTLR 204); behaviour not leading to criminal changes but reflecting on capacity (*Re Gadd* [2013] NTSC 13 (20 March 2013)); *Re Application for Admission as a Legal Practitioner* [2014] ACTSCFC 4 (12 December 2014))). For a more detailed discussion see Bartlett and Haller, 'Disclosing Lawyers', above n 3, 237–43.

25 The Court in *Frugtniet v Board of Examiners* [2002] VSC 140 (1 May 2002) [11]–[12] explained that disclosure of 'embarrassing' and even minor matters indicates the applicant is truthful and providing such evidence about themselves as to allow the court to properly judge them. Unless the conduct revealed is of such a serious nature itself, and continues to indicate unfitness, this fulsome revelation evidences good character.

26 In recent cases, where there has been a matter relating to an applicant's 'character' which has not been disclosed, and is subsequently discovered after the person has been admitted, they face removal from the Roll of Practitioners: *Re OG (A Lawyer)* (2007) 18 VR 164 (removed); *Legal Services Commissioner v Grosser (Legal Practice)* [2014] VCAT 1533 (10 December 2014) (removed). But see *Montenegro v Law Society of NSW* [2015] NSWSC 867 (2 July 2015) (not removed).

27 Bartlett and Haller, 'Disclosing Lawyers', above n 3.

28 *Uniform Law* s 16.

29 Ibid s 16(1)(a).

investigation and making findings.[30] While the *Uniform Law* and *Uniform Rules* may appear to prescribe a level of uniformity between participating states that has not existed in the past, those rules also allow each Board to determine the form and content of any application or other document,[31] and to dispense with or vary any requirement of these rules.[32]

We believe state differences will continue. For instance, our interviews in 2013 revealed unique processes adopted by the Victorian admission authority requiring applicants to meet in person with the Chief Executive Officer and Chair of the Victorian Legal Admissions Board ('Victorian Board') and separately the Victorian Board as a whole, where matters relevant to fitness to practice were disclosed and discussed. Victorian applicants have also been required to provide more documentation than their New South Wales counterparts.[33] (We document how this occurs in detail in later sections.) In comparison, the practice of New South Wales' admission authorities has been to decide applications for admission on the papers and not hold any formal or informal hearings or invite applicants to meet with any member of the secretariat or appear before the Board.

While it is the Supreme Court that has the power to admit and keep the Roll of Practitioners, all admission authorities occupy a central regulatory role in terms of dealing with applicants, considering evidence, investigation and making findings. Currently, admission authorities have limited inquisitorial powers, relying on the process of self-disclosure.[34] The consultation draft of the 'Legal Profession Proposed Admission Rules' which will form part of the new regime in Victoria and New South Wales from July 2016 does not substantially change this approach. However, we note that it allows for implementation of the Victorian approach of

30 The previous governing Acts have provided limited investigative powers such as requesting police reports or health reports only when they reasonably consider these are needed: *Legal Profession Act 2004* (NSW) s 9, as repealed by *Legal Profession Uniform Law Application Act 2014 No 16* (NSW) s 167(a). Admission authorities and courts have relied on self-disclosure by applicants. Victoria has had an added power for the Board of Examiners to request reports by education or training bodies associated with the applicant's academic misconduct, and any relevant documents: *Legal Profession Act 2004* (Vic) ss 2.3.3(3), 2.5.3 (police reports), 2.5.4 (health assessment). See the discussion in our earlier article, Bartlett and Haller, 'Disclosing Lawyers', above n 3, 260. These powers are continued under the *Uniform Law* and *Uniform Rules*.

31 *Uniform Rules* r 28.

32 Ibid r 27. This is subject to the Board being satisfied that this does not detract from the requirements for the compliance certificate, the *Uniform Law* or the *Uniform Rules*.

33 Prior to the *Uniform Law*, Victorian law provided that the Board only request police checks when it had 'reasonable grounds' to believe that person has, or will have, a conviction (*Legal Profession Act 2004* (Vic) s 2.5.3(1)). However *Practice Direction No 1 of 2008* provided that all applicants provide a criminal report: Supreme Court of Victoria, *Practice Direction No 1 of 2008*, 26 May 2009. Similarly, all applicants were required to submit a report from educational institutions as to any student misconduct: *Legal Profession Act 2004* (Vic) s 2.3.3(3); Supreme Court of Victoria, *Practice Note 3 of 2009*, 26 May 2009.

34 The Acts provide limited investigative powers such as requesting police reports or health reports only when they reasonably consider these are needed: *Legal Profession Act 2007* (Qld) ss 86 (police reports), 87–91 (health assessment); *Legal Profession Act 2004* (NSW) s 9, as repealed by *Legal Profession Uniform Law Application Act 2014 No 16* (NSW) s 167(a). In regard to investigative powers in Victoria, see above n 30. See also the discussion in our earlier article, Bartlett and Haller, 'Disclosing Lawyers', above n 3, 260.

routinely requiring police record checks and information from universities about any form of student misconduct.[35]

Local regulators play, and will continue to play, an important role. The current Acts in New South Wales and Victoria refer to investigations by the Board (rather than the Court). In New South Wales the Court is only empowered to admit if the Board advises that it considers the applicant eligible and suitable.[36] The Act (using the word 'may') allows the Court discretion to refuse to admit, or apply conditions to an admission not recommended by the Board. However, we understand from our interviews in New South Wales (and Victoria) that a court is likely, as a matter of course, to admit an applicant who has been given a recommendation or compliance certificate. Under the *Uniform Law*, the New South Wales approach is adopted; the state courts will decide appeals by applicants, and the Boards will generally make submissions where they wish to oppose the admission.[37] Hence, on the face of the new law, the role of Boards in New South Wales and Victoria will continue in much the same way as in the past.

This is not the only model available. In Queensland, the admitting court takes a more active role in considering evidence of applications where there are disclosed 'suitability' matters and in deciding whether to admit or not or to impose conditions. This may be a product of a differently worded Act to both Victoria and New South Wales which refers to the Supreme Court (rather than the Board) considering the 'fitness' of applicants,[38] and expressly requires the court to 'hear and decide each application for admission'.[39] The role of the Board is described as being 'to help the Supreme Court'.[40] The Secretary told us that, where there is a 'qualified certificate' recommending admission or the Board opposes the application, the Court of Appeal will convene as a formal (public) hearing later in the day of the admissions sittings.[41] The lawyer moving the application for admission is required to draw and file submissions. In serious cases, there will be argument by counsel before the court by both the applicant and the Board (sometimes represented by the Secretary).

This regime allows for procedural fairness for an applicant in terms of rules of evidence applying and the advantage of proper representation. As we will explain in regards to the Victorian process, which arguably does not provide these safeguards, the Queensland approach seems to be appropriate and fair.

35 These rules will be made under s 149 of the *Uniform Law*. For instance, Legal Services Council, 'Legal Profession Proposed Admission Rules' (Explanatory Paper, November 2014) 23, r 17 allows each state-based board discretion to 'require, either generally or in a particular case', a police report.

36 *Legal Profession Act 2004* (NSW) s 31(2), as repealed by *Legal Profession Uniform Law Application Act 2014 No 16* (NSW) s 167(a).

37 Indeed, the *Uniform Law* makes it clear that the local Supreme Court may admit a person 'but only if' the Board has provided a compliance certificate: at s 16(1).

38 *Legal Profession Act 2007* (Qld) s 31(2).

39 Ibid s 35(1), even though s 35(4) permits the court to 'rely on a recommendation' of the Board. Section 41 also expressly empowers the Board to appear before the court.

40 Ibid s 39.

41 Interview with Melissa Timmins, Secretary, Legal Practitioners Admission Board (Qld) (Brisbane, 4 September 2013); *Supreme Court (Admission) Rules 2004* (Qld) s 15(2).

Nevertheless, it may require the applicant to brief counsel at what we presume to be a considerable cost. Sensitive matters are also canvassed in open court and it is arguable that greater privacy is accorded applicants in other states.

C *Available Data about Current Practice*

We have reported that Australian authorities provide very little in the way of information about disclosure rates or admission outcomes. They examined a rare countrywide snapshot of admission applications in 2009 — including how many and what sort of suitability disclosures were made by applicants — provided in a LACC report.[42] They were not aware of another countrywide dataset from another period. However, they argued that this small dataset indicated some profound differences among applications as to how much and what sorts of disclosures are routinely made across the country.

We report here on our efforts to obtain data about outcomes of the admission systems studied, and argue further that this is crucial in order to properly evaluate claims of regulators that the current approaches to admission are proportionate and required. For instance, we argue that figures reveal that while few applicants are refused admission by the courts, some are turned away early in the process, and an unknown number discouraged from applying. This may reflect an appropriately functioning system, or one that has perverse outcomes, in ways we examine here.

The New South Wales Legal Profession Admission Board's Annual Reports are available on its website and provide data about numbers of admission applications.[43] The reports do not disclose the nature or rate of character or fitness disclosures by applicants or how many incidents of refusal to provide a compliance certificate occurred. However, the Secretary told us that the Board refused 19 applications for admission during the period 2006 – July 2013.[44] Other jurisdictions publicly provide more detailed data on admissions, such as Western Australia.[45] Queensland's Annual Report similarly provides numbers of applications considered each year, and the Board's recommendations.[46] The Queensland Secretary told us that they do not keep records of the number of matters in which disclosures have been made, and the nature of these, in order

42 Bartlett and Haller, 'Disclosing Lawyers', above n 3, 229.

43 Legal Profession Admission Board (NSW), *Publications & Resources* (17 March 2016) <http://www.lpab.justice.nsw.gov.au/Pages/lpab/legalprofession_publications.aspx>.

44 Interview with Robin Szabo, Secretary, Legal Profession Admission Board (NSW) (Sydney, 8 July 2013).

45 Legal Practice Board of Western Australia, *Annual Reports* <https://www.lpbwa.org.au/For-The-Public/Annual-Reports>.

46 For instance, the Queensland Admission Board reported for 2013–14: recommended 943 applicants; recommended 38 applicants 'on condition the applicants seek an exemption from the Supreme Court in respect of an eligibility matter or draw relevant suitability matters to the attention of the Court as part of their application; such applications requiring the Board to prepare written submissions to the Court'; and opposed 11 applications 'pending the provision of additional information … or due to an applicant's non-compliance with the procedural requirements': Legal Practitioners Admissions Board (Qld), 'Annual Report: 2013/2014' (Annual Report, 2014) 9.

to generate quantitative data.[47] The Chair of the Board also expressed a cautious approach to disclosing raw figures out of context.[48]

In contrast to the above jurisdictions, Victorian data of any sort is difficult to obtain. There is no information about the number of applicants or their disclosures, or rates of success, as the Board does not make its annual report publicly available, although the Chair told us he would support aggregate figures being made available in Victoria in the future.[49] We believe similar figures as are disclosed in Queensland and Western Australia could be easily and safely reported about applications in New South Wales and Victoria. This data would provide dual objectives of demonstrating administrative openness and information on which authorities (and others) could understand and assess the regime.

For instance, we were informed by our interviewees that in many cases applications for admission are delayed in various ways. The Victorian Chair reported that, in the period July 2008 – March 2013 there had only been one applicant who had had a decision made against them.[50] When, late in 2014, the Legal Services Council sought submissions on proposed Admission Rules, there was no suggestion that admission authorities should take a more inquisitorial approach; generally, the New South Wales approach appeared to have greater support from key stakeholders. For instance, the Law Council of Australia argued that the New South Wales practice be adopted, such that police reports and student conduct reports only be required where the applicant has made a relevant disclosure[51] and argued that a requirement that all applicants provide a student conduct report appeared to create 'red tape for law graduates and educational institutions which may not be justified'.[52] The Leo Cussen Centre for Law made similar submissions.[53] The Council of Australian Law Deans[54] and Australasian Professional Legal Education Council[55] made similar submissions in relation to

47 Interview with Melissa Timmins, Secretary, Legal Practitioners Admission Board (Qld) (Brisbane, 4 September 2013).

48 In so far as the entry control performs a protective function by sending a signal about rigorously maintaining standards of the profession: Interview with Greg Maroney, Chair, Legal Practitioners Admission Board (Qld) (Brisbane, 10 December 2013).

49 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013)

50 Ibid.

51 The Law Council of Australia, Submission to Legal Services Council, *Proposed Admission Rules under the Legal Profession Uniform Law*, 4 February 2015, 4 <http://www.legalservicescouncil.org.au/Documents/admin-rule/Law_Council_of_Australia_ar.pdf>.

52 Ibid.

53 Leo Cussen Centre for Law, Submission to Legal Services Council, *Legal Profession Proposed Admission Rules*, 2 February 2015, 5–6 [5.4] <http://www.legalservicescouncil.org.au/Documents/admin-rule/Leo_Cussen_Centre_for_Law.pdf>.

54 Council of Australian Law Deans, Submission to Legal Services Council, *Legal Profession Proposed Admission Rules*, January 2015, 3 [3.4] <http://www.legalservicescouncil.org.au/Documents/admin-rule/Council_of_Australian_Law_Deans.pdf>.

55 The Australasian Professional Legal Educational Council, Submission to Legal Services Council, *Draft Uniform Admission Rules*, 29 January 2015, 4 <http://www.legalservicescouncil.org.au/Documents/admin-rule/APLEC.pdf>.

student conduct reports. Some key stakeholders also expressed concern about extending powers in relation to health assessments.[56]

The *Uniform Law* has given admission authorities some greater powers and clarified others. For instance, it allows admission authorities to 'communicate with and obtain relevant information from Australian or foreign authorities or courts in connection with the consideration of an application for a compliance certificate'.[57] The *Uniform Rules* also allow Boards to obtain further information from academic and practical legal training institutions about an applicant.[58] Despite the momentum in favour of New South Wales' approach, the Victorian approach appeared to win the day in the final version of the *Uniform Rules*, as they facilitate the longstanding Victorian approach of routinely requiring police reports and student conduct reports from any tertiary institution attended by the applicant.[59] They also facilitate the Victorian approach of being able to require an applicant to undergo a health assessment.[60]

However, consistent with our argument that New South Wales will not necessarily fall into line with the Victorian approach, the New South Wales Board has already exercised its powers under the *Uniform Rules* to vary these requirements,[61] so that only applicants who disclose in their application that they have been the subject of disciplinary action at a tertiary institution need attach a student conduct report.[62] The *Uniform Rules* also allow Boards to 'jointly determine Disclosure Guidelines'.[63] However, at this stage Victoria and New South Wales have decided to publish separate Disclosure Guidelines.[64] Other separate publications that appear on the websites of the New South Wales Board and Victorian Board include a 'Guide for Applicants for Admission as a Lawyer in NSW',[65] separate and distinct pro forma applications for admission in New South Wales and

56 Law Institute of Victoria, Submission to Legal Services Council, *Draft Admission Rules: Proposed Health Assessment Powers*, 23 January 2015 <http://www.legalservicescouncil.org.au/Documents/admin-rule/Law_Institute_of_Victoria.pdf>; The Law Society of New South Wales Young Lawyers, Submission to Legal Services Council, *Legal Profession Uniform Law Consultation*, 13 January 2015, 3, 10 <http://www.legalservicescouncil.org.au/Documents/admin-rule/NSW_Young_Lawyers.pdf>.

57 *Uniform Law* s 437(1).

58 *Uniform Rules* r 22(1)(c).

59 Ibid rr 18–19.

60 Ibid rr 23–4.

61 The power to vary or dispense with any rule is contained in ibid r 27.

62 Legal Profession Admission Board (NSW), *Application for Admission as a Lawyer for Applicants Never Previously Admitted Anywhere (Form 10)* (25 September 2015) 6, question 14 <http://www.lpab.justice.nsw.gov.au/Documents/Form%2010_7%20Oct%202015.pdf>. The application form warns applicants that the New South Wales Board will conduct random audits, by obtaining student conduct reports directly from tertiary institutions.

63 *Uniform Rules* r 17(5).

64 LACC, 'Disclosure Guidelines for Applicants for Admission to the Legal Profession' (Victorian Legal Admissions Board, December 2015) <http://assets.justice.vic.gov.au//councillegal/resources/766e3ad0-9f30-4be0-ac8d-deae550b963d/disclosure+guidelines+for+applicants.pdf>; LACC, 'Disclosure Guidelines for Applicants for Admission to the Legal Profession' (NSW Legal Profession Admission Board, July 2015) <http://www.lpab.justice.nsw.gov.au/Documents/LACC%20Disclosure_Guidelines_3%20July%202015.pdf>

65 Legal Profession Admission Board (NSW), 'Guide for Applicants for Admission as a Lawyer in NSW: In Accordance with the *Legal Profession Uniform Admission Rules 2015*' (Guide Version 1.4, 15 February 2016).

Victoria,[66] as well as other guidance for applicants.[67] In addition, the Victorian Board continues to publish on its website for the information of applicants a number of documents that predate the *Uniform Law* and *Uniform Rules*. For the reasons explored further below, we anticipate this separate approach to continue for some time. All of this adds to the evidence that the admission process will be far from uniform for some time yet.

IV THE REGULATORS OF ADMISSION OF LAWYERS

The Secretaries and Chairs of Boards we interviewed in New South Wales and Victoria in 2013 pointed to resourcing of the administration of the admission system and ever-increasing demands on the system due to more applications and more disclosures of more complexity. All of the office holders we spoke to were long serving and expressed a sense of dedication to their role in terms of its importance in achieving a protective purpose for the profession.

On the other hand, they explained their role in differing ways, with diverse responsibilities and (sometimes) aims to achieve different ends. At that time, it was expected that a number of states and territories would join a national scheme for admission. We asked them whether a unified system that could be better funded would be preferable to their state-based schemes. Each expressed concerns about nationalisation of admission regulation. These ranged from concerns about increased costs and the integrity of the process if applications were sent around the country, to the sheer enormity of the task for a central body to assess some 5000 applications from around Australia. As has been widely reported, there are ever increasing numbers of law schools producing more trained lawyers each year.[68] Admission Boards are reporting increases in applicant numbers each year.[69]

Thus, they were in agreement that there are significant differences in their practices, but seemed to see this as a lesser evil than a centralised regulator. Even though now only New South Wales and Victoria are part of a uniform approach, we believe state-based schemes remain the preference of those in Victoria and

66 Legal Profession Admission Board (NSW), *Application for Admission as a Lawyer for Applicants Never Previously Admitted Anywhere (Form 10)*, above n 62; Victorian Legal Admissions Board, *Application for a Compliance Certificate for Admission as a Lawyer (Schedule 5)* (10 December 2015) <http://assets.justice.vic.gov.au//councillegal/resources/31b17839-c893-4741-99a5-05f73a06aef3/schedule+5+application+for+a+compliance+certificate.pdf>. Victoria had not previously used a pro forma application form.

67 Victorian Legal Admissions Board, *Appearing Before the Board* (10 December 2015) <http://www.lawadmissions.vic.gov.au/home/admission+process/appearing+before+the+board/>.

68 See Margaret Thornton, 'The New Knowledge Economy and the Transformation of the Law Discipline' (2012) 19 *International Journal of the Legal Profession* 265. It is a contemporary phenomenon across the common law world: see, eg, discussion in Hilary Sommerlad et al (eds), *The Futures of Legal Education and the Legal Profession* (Hart Publishing, 2015).

69 For example, the New South Wales Board notes steady increases (2185 applicants in 2014, up from 2115 in 2013): Legal Profession Admission Board (NSW), 'Annual Report 2013–2014' (Annual Report, 2014) 15.

New South Wales and will continue. We draw out our reasons for this belief in the discussion that follows.

A *Secretariat of Boards*

On 1 July 2015 the Victorian Legal Admissions Board replaced the Council of Legal Education and the Board of Examiners. The Victorian Board then established the Victorian Legal Admissions Committee (VLAC) to assess applicants for admission in Victoria and grant compliance certificates.[70] It operates with a legally qualified CEO and Registrar — who has occupied the role since its inception in 2007 and who we interviewed in 2013 — and six support staff.

B *Board Membership and Contribution*

The membership of the Admission Boards in New South Wales and Victoria has varied in the past.[71] Some of those differences will continue despite the passing of the *Uniform Law*. For instance, New South Wales will continue to have a wide range of members on its Board, including representatives from law schools, the Attorney-General and a number of current judges of the Supreme Court, including the Chief Justice.[72] Victoria is now required to include the Chief Justice or nominee and nominee of the Attorney-General on its Board.[73] However, the Victorian legislation still declines to include any representatives from law schools in Victoria. Victorian legislation also requires a retired judge to be a member of its Board.[74]

Nevertheless, in Victoria, in many ways the Board appears to be redundant to the current discussion, as it will not be assessing applications for admission

70 VLAC is an initiative of the Victorian Board exercising its general powers to delegate under the *Legal Profession Uniform Application Act* (Vic) s 27 — there is no express provision for such a committee under the *Uniform Law*.

71 Prior to the *Uniform Law*, Victorian legislation required membership to consist of a retired judge as chair and six practitioners: *Legal Profession Act 2004* (Vic) s 6.5.9. New South Wales has had a larger and wider range of membership, including nominees of the Attorney-General and Law Deans. When interviewed in 2013, the then Chair of the New South Wales Board described this as advantageous because having academic input into academic misconduct disclosures was 'extremely helpful'.

72 *Legal Profession Uniform Law Application Act 2014* (NSW) sch 3 s 1:

(1) The NSW Admission Board is to consist of 11 members, being:
- (a) the Chief Justice of New South Wales, and
- (b) 3 Judges of the Supreme Court for the time being nominated by the Chief Justice of New South Wales, and
- (c) the Attorney General or a person for the time being nominated by the Attorney General, and
- (d) 2 persons for the time being nominated by the Council of Australian Law Deans, being members from New South Wales, and
- (e) 2 barristers for the time being nominated by the Bar Council, and
- (f) 2 solicitors for the time being nominated by the Law Society Council.

73 *Legal Profession Uniform Application Act* (Vic) s 21(1).

74 Ibid s 21(1)(b).

and granting compliance certificates; instead the Board has delegated those tasks to VLAC. It seems that the power of Victoria's Board to delegate to such a committee is much clearer than the powers of the Board in New South Wales,[75] where indications are that the Board will continue to hear applications as in the past, and not create a similar committee to that in Victoria. While the Victorian Board has five members, VLAC has 14 members.[76] This includes long-serving senior counsel who were members of the Board of Examiners that was replaced by the *Uniform Law*. The Chair of both the Board and the Committee is the Hon Bernard Teague, who had been Chair of the Board of Examiners since 2008. In contrast, the Chair of the New South Wales Board interviewed in 2013, was replaced by another Supreme Court justice, Justice Emmett, in that role in May 2014, and New South Wales has also had a new Secretary since the end of 2014.

C *Resourcing*

Members of Boards and Committees in both jurisdictions will continue to work on a pro bono basis.[77] Fees payable by applicants remain largely unchanged. No funding has been offered by consolidated revenue to process applications.[78]

In addition to the significant reliance on the goodwill of the profession, the workload of Board members in Victoria and New South Wales appears to vary depending on many factors, including:

- the number of applicants for admission in that jurisdiction;
- the degree and type of administrative support provided to the Board; and,
- most importantly, the way in which applications are processed.

For instance, even though we estimate that Victoria has only about half the number of applicants for admission as New South Wales,[79] members of the Victorian Board have traditionally spent many more hours considering applications than their New South Wales counterparts. The delegation of this task from the five-

75 Legal Services Council, Legal Profession Proposed Admission Rules, above n 35, 27–8.

76 Victorian Legal Admissions Board, *About the Victorian Legal Admissions Board* (28 July 2015) <http://www.lawadmissions.vic.gov.au/find/about+the+victorian+legal+admissions+board/>.

77 In 2010, the LACC made a submission to the Taskforce on National Legal Profession Reform in which it noted the voluntary contribution already made to the consideration of admission applications and thought the continued involvement of judges and lawyers essential when assessing disclosures and suitability: LACC, Submission to Taskforce on National Legal Profession Reform, above n 4.

78 Some start-up funding for policy development has been developed: Legal Services Council, 'Bilateral Agreement on the Legal Profession Uniform Framework' (Intergovernmental Agreement, 4 December 2013) 9 [8].

79 This must be estimated because no annual report is published in Victoria. The only way to calculate numbers would be to add the names of applicants for admission listed for each admission ceremony. For instance, in 2012–13, New South Wales processed 2115 applications, twice the number in Victoria that year: Legal Profession Admission Board (NSW), 'Annual Report 2012–2013' (Annual Report, 2013) 15. The numbers for Victoria are those given during interviews with Victorian admission authorities. As noted previously, statistics for Victoria are not routinely reported: Bartlett and Haller, 'Disclosing Lawyers', above n 3, 257 n 176. This year was selected as we had comparative figures for all jurisdictions.

member Board to a newly created, much larger 14-member committee (VLAC) suggests that this practice is likely to continue in Victoria. The discrepancy in workload between Victoria and New South Wales seems to be largely because in Victoria a number of applicants for admission who have made disclosures will continue to be required to attend a hearing in person,[80] and because the Victorian Board appears likely to continue its practice of always considering evidence about student misconduct afresh.

This can be a time-consuming process. Fortunately, the Victorian Chair (a retired judge) is a 'workaholic' (as he describes himself);[81] in 2013 the then New South Wales Chair (a current judge of the Supreme Court) described the number of hours donated by the Victorian Chair as 'an astonishing commitment'.[82]This is a commendable commitment to the profession, but one that may prove to be unsustainable.

The funding and structure of an admission bureaucracy can have profound consequences. New South Wales is very conscious of the high number of admission applications that it must process every year and the tenuous nature of its funding. New South Wales prides itself on being self-funded from fees charged on certificates, the Diploma in Law, assessments of overseas qualifications, public notaries' fees and admission application fees.[83] When interviewed in 2013, the Secretary and Chair of the New South Wales Board both expressed concerns about the resource implications of following Victorian practices, such as requiring tertiary institutions to send academic reports in relation to each applicant directly to the admission authority,[84] or meeting applicants personally.[85]

The distinction between the Victorian and New South Wales approach throws into light important questions as to the sustainability and appropriateness of any system which relies on unremunerated positions. For instance, we question whether it is appropriate for the level of investigation of applications to vary depending on the capacity of individual members to volunteer their time.

V DIFFERING PROCESSES OF TAKING AND DECIDING APPLICATIONS

In any admission process, some applicants for admission will provide insufficient information to allow a decision as to whether their admission should be

80 We describe this further later in the article. See also Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67.

81 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013).

82 Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013).

83 See financial statements in the New South Wales Legal Profession Admission Board's Annual Reports: Legal Profession Admission Board (NSW), *Publications and Resources*, above n 11.

84 Interview with Robin Szabo, Secretary, Legal Profession Admission Board (NSW) (Sydney, 8 July 2013).

85 Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013).

recommended. In New South Wales, requests for further information are transmitted by support staff, either by letter or at the front counter. However, a profound difference in Victoria is the practice of hearing from applicants in person at various stages of progression of an application. This does not occur at any stage throughout the investigation or decision-making process in New South Wales. The Victorian position was described by some interviewees in 2013 as having a number of benefits. The Victorian website now sets out this process as well as its perceived benefits.[86] We consider these claimed advantages below, as well as what other regulators and educators have said in response. We then turn to describing the Victorian process in more detail with reference to the specific case of student misconduct.

A *Administrative Efficiency*

One stated advantage of meeting applicants in person early in the Victorian admission process was administrative efficiency. In 2013 the CEO of the Victorian Board, who attends early informal chats with the applicant, along with the Chair, saw them as

> a massive improvement for applicants and for the Board because we've achieved the same purpose but saved the applicant the stress of [appearing at] formal board hearings and it's saved the Board a lot of time. The big thing is education and communication about the process before applicants hit it. We're not seeking to trap people, we want people to understand what they're doing. [87]

The Chair said in 2013 that early discussions with applicants were an opportunity to

> give applicants an indication as to what additional information might be needed or how to put their material together or to probe to find out more information. For instance, has the applicant applied to Centrelink or made an FOI application or taken steps to get the primary sources and material in an academic misconduct situation and highlight the material in a way that gives us an idea as to just how serious the collusion or plagiarism was. [88]

The Victorian website now explains that such a meeting 'will help the applicant understand the requirements of the Board so that, if appropriate, he or she can provide a more detailed explanation and be better prepared for a full meeting of the Victorian Legal Admissions Committee (the Committee), if referred to one'.[89]

In contrast, in New South Wales neither now nor in the past, has the Secretariat or New South Wales Board ever heard from an applicant in person. For reasons explored below, we doubt that the Victorian practice is likely to be adopted in

86 Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67; Victorian Legal Admissions Board, 'Direction 4: Assessment Guidelines for Disclosure Statements' (Direction, 18 June 2015) <http://assets.justice.vic.gov.au//councillegal/resources/4ae2e53d-c774-4532-b519-4189ebd0d10e/direction+4+-+disclosures.pdf>.

87 Interview with Richard Besley, CEO, Victorian Board of Examiners (Melbourne, 31 January 2013).

88 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013).

89 Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67.

New South Wales, despite the power given to New South Wales by the *Uniform Rules* to meet applicants in person.[90]

B *Better Evidence*

Another stated attribute of the Victorian approach was as a tool to gather better evidence about the applicant than could be gleaned from the written disclosures on prescribed forms, as described by the Victorian Chair:

> There are a number of things that would make a difference but you wouldn't say that they were a requirement; for example, telling your employer about the academic cheating you were found guilty of [which] hasn't been told at the time of employment and it hasn't subsequently been told. The employer who's saying this is a great person doesn't know of that particular cheating — should the applicant be required [to tell them]? We never require them to but it's likely to be a thing that would operate in their favour [if they told]. Some people, particularly with a certain cultural background, haven't told their parents. That's one thing that we're interested in finding out about in relation to virtually anyone — have they told their parents? We wouldn't be requiring that, it's just if you put all these different things together and you can see that some things have been and some things haven't been done, it can make a difference. [91]

Similarly, a display of (what is conceived to be) the right kind of passion, remorse or emotion about the matter seems to be taken into consideration in Victoria:

> The more they're prepared to beat their breast, the better, because what they then say is … that there are higher [standards] in law and I really am prepared to respect them. 'I'm really extremely embarrassed and ashamed of what I've done'.[92]

These questions could be asked, and observations made, in any of the in-person discussions with regulators. It appears from the interviews with Victorian regulators that the demeanour and body language of applicants in any of these meetings can also form part of the decision-making process including decisions about the process track applicants are put on (ie more appearances before the Board or not)[93] and about their present 'fitness'.

In contrast to the Victorian approach, the New South Wales authorities have preferred to investigate and decide applications on the papers alone. This may have been a function of the empowering legislation, which did not expressly allow for meetings with applicants; the *Uniform Rules* now allow for such meetings.[94] Given the time and cost implications, their process is also more efficient. The former Chair indicated that he thought this factor would remain important, especially given the absence of additional funding.[95] Notwithstanding

90 *Uniform Rules* r 22(1)(d).

91 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013).

92 Ibid.

93 As set out in Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67.

94 *Uniform Rules* r 22(1)(d).

95 The fees for applicants have remained relatively similar to the fees charged prior to the *Uniform Law*.

these practical impediments, in our interviews in 2013, the then New South Wales Chair indicated that the on-the-papers approach was also sufficient to achieve the regulatory purpose. He told us he thought adequate expressions of self-reflection and remorse — as key indicators of present fitness — could be identified through the paper documents submitted by applicants:

> You can see [contrition] and it's there in the way people write letters and give their own history about matters, it just comes leaping out of the pages at you and you can't miss it.[96]

While there was an obvious disagreement among regulators about what is needed to elicit sufficient evidence to judge character, there was a more profound difference to be noted in 2013. The then New South Wales Chair also expressed the view that their approach was not just economically efficient and evidentially sufficient, but also avoided evidential difficulties that may be encountered in the Victorian approach:

> Our presumption on the whole is that we are not the police. We are assessing your candour and we expect you to be candid and emphasise in several forum how candid you must be and if you're not, someone will move the Court for your removal from the Roll later. … It's harder to deal with them if you've been involved and got your hands dirty by asking all these questions. If the Board hasn't been told it's a bit cleaner and simpler.[97]

The then New South Wales Chair continued:

> We don't [meet them personally] because if we're not satisfied, we knock them back and they have a right of appeal and in a forum which is more rigorous and testing and honest for them and for us than simply having a meeting across the table — that is in a court room. They have a right of appeal under s 28 of the *Legal Profession Act 2004* (NSW),[98] which, particularly in complex commercial cases where someone has gone bankrupt and hasn't paid the Tax Office, you've got to unravel what happened. The Board is not a particularly appropriate venue to decide all of that. So if it just looks unsatisfactory and the explanation for it is not satisfactory, we've had a couple of examples in recent times where we've knocked them back … and they have to then appeal and they go before a judge in the Supreme Court and they put their evidence. The Board often is not the opposing body, sometimes it is, it's usually the Law Society or the Bar Association, they often take a position, and so there is a context and the person is cross-examined. So if we're not satisfied that's what happens.[99]

As implied above, the in-person meeting is less procedurally clear. It also appears in the past that applicants in Victoria were sometimes unaware that a face-to-face meeting could be probative as to their character, thus leading to different processing of their application or even a different result (ie issuing or refusal to issue a compliance certificate). This has been made clearer, with statements

96 Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013).

97 Ibid.

98 The right of appeal is now contained in *Uniform Law* s 26.

99 Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013).

on the website that a meeting with the Chair and CEO is partly to assess the applicant's insight into their past conduct.[100]

In addition to concerns about procedural fairness, substantive issues arise regarding the drawing of inferences from applicants' reactions in personal meetings. Differing personal or cultural attitudes might impact on how applicants react, leading to wrong assumptions by the decision maker. The Victorian Chair acknowledged this in the context of self-disclosure:

> A lot of [the attitude to disclosure] goes to the individual personality. Some people want to only disclose little by little. Some have a tough attitude, some have an extraordinarily emotional attitude, some will cry through a hearing and others will just sit there with their jaw out …[101]

We appreciate that what is said on paper could be equally misleading about a person's true character and that regulators must exercise discretion, irrespective of the process adopted. However, we note that efforts to assess character through emotional responses in an arguably confronting environment (as in Victorian in-person meetings) are more likely to lead to inconsistent and unfair results. It also produces a regime which assesses character evidence of applicants in different ways — some applicants are assessed only on what they write or the paperwork they submit; and some applicants are assessed on their paperwork and on how they perform in person.

C *Educative Role*

Victorian regulators emphasise the benefits of personal moral education for applicants who lack personal awareness. On his retirement in 2014 a Board member argued that appearing before the Victorian Board for 'often intensive cross-examination'[102] was part of an applicant's legal education:

> As much as any of the subjects now required to be studied in their [law] degree, I believe the Board's counselling and guidance of students forms part of these wayward students' education. Helping the Board put students on the right path by having them acknowledge their mistakes and encouraging them to show remorse equips them for a lifetime of responsible practice of the law …[103]

A review of the Victorian admission process was conducted in 2006 by Professor Susan Campbell of Monash University.[104] As part of the *Campbell Report*, Campbell acknowledged that meeting applicants in person may have some educative value,[105] but did not take up this issue — for instance by recommending

100 Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67.

101 Interview with Bernard Teague, Chair, Victorian Board of Examiners (6 March 2013).

102 Bruce Pippett, 'Council Milestone' (2014) 88(7) *Law Institute Journal* 83.

103 Ibid.

104 Susan Campbell, Department of Justice (Vic), *Review of Legal Education Report: Pre-Admission and Continuing Legal Education* (2006) ('*Campbell Report*'). This was part of a broader review of legal education in Victoria, tasked by the Victorian Attorney-General.

105 Ibid 73.

that an educative role be included in the stated functions of the Board. Yet this seemed to remain a prime outcome sought in the Victorian process, as justified by one long-serving Victorian Board member:

> You've got to make them understand that this is serious. The penny has got to drop sometime. I think sometimes getting a huge grilling changes people's lives because they realise that while they may have messed around before, this is serious. [106]

Even today neither the *Uniform Law* nor the *Uniform Rules* make any mention of an educative role.

The Victorian approach has some strong critics. One educator interviewed in 2013 expressed the following view:

> The Board sees themselves as having an educative role … Where in the Act does it say that the Board has an educative role? I don't think it is legitimate. If their educative role was merely information, I wouldn't have a problem. But I don't think it is. I think part of their educative role is to terrify the candidate and their justification for that would be if they're terrified they're not going to do it again. … I don't think it's their role. I think that it is often hit or miss as to which ones they pick. … I don't think there is any evidence to suggest what they're doing is effective and I think it is in breach of the rules of natural justice. To reduce someone to tears is just horrendous. … If that's the way we want the profession to run, I don't want to be a part of it. [107]

In Victoria, face-to-face meetings are only held for applicants who have made disclosures. In 2013, the then Chair of the New South Wales Board told us that he could see the advantage of face-to-face meetings — if resources allowed. However, he thought a general educative role for *all* applicants was most appropriate:

> It's probably hard to argue with face to face meetings if it can be done and you have the resources, but how do you structure it? You're not really improving the state of the world if the only people that you are interviewing are those who have already disclosed because their duty of candour is already up and has been tested. If the logic is to impress people about the duty of candour, you've got to interview everyone don't you? So at the end of the day, I think it's a resources-based judgement. If the LPAB had a lot more staff and time probably it might happen but, on the other hand, I don't think the LPAB members themselves could do it.[108]

This view was echoed by the Leo Cussen Centre for Law in January 2015, when it called for procedures for admission adopted under the *Uniform Law* to

> not have the unintended effect of unfairly targeting those applicants who seek to fulfil their obligations in disclosing everything the Board might consider as

106 Bruce Pippett, former Victorian Board member, quoted in Christopher Holmes, 'Dealing with Disclosure' (2010) 46 *Young Lawyers Journal* 6, 7.

107 Interview with educator (Melbourne, 11 February 2013). The interviewee was speaking of the legislation in force in 2013; the comments remain valid given the absence of any mention of an educative purpose in the new *Uniform Law*.

108 Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013).

> relevant to suitability, whilst applicants who choose not to disclose 'slip through the system'.[109]

The response of the current Victorian Chair, when asked to comment on these criticisms late in 2013, was of the view that no-one in Victoria was admitted without making proper disclosure, given the range of disclosable matters and level of documentation required in Victoria.[110] This seems to miss the point.

It is arguable that adopting an educative role at the time of admission does serve a stated regulatory purpose of broadly protecting the public by making entry-level lawyers engage in self-reflection. Another argument might be that this process functions as a signal to applicants about the ethical reputation of the profession and its jealousness in guarding its own good reputation. This is a recognised regulatory purpose in the common law through professional discipline cases.[111] However, the *Uniform Law* only refers to protection of consumers and administration of justice.[112] It may thereby serve several symbolic functions; as Leslie Levin suggests, this inquiry 'may also serve as a socialization process for new lawyers, signaling that they are expected to display "good character" throughout their careers'.[113]

However, there is no empirical basis on which to support this claim, except the anecdotal experience we heard from the regulators we interviewed. There is also nothing in the *Uniform Law* that empowers regulators to be moral educators. Given concerns about evenness of application and effectiveness, we agree with the New South Wales interviewees and Victorian educator that the practice does not seem a necessary or proportionate regulatory approach.

VI THE VICTORIAN IN-PERSON PROCESS IN DETAIL

A *'The Chat'*

In preparing the *Campbell Report* in 2006, Campbell attended a meeting of the Victorian Board. On that occasion, eight applications were scheduled for discussion and all eight applicants and most of their principals[114] were present outside the meeting room. Campbell observed that most of these applications involved 'fairly straightforward issues which could be decided quickly' and were

109 Leo Cussen Centre for Law, above n 53, 6 [5.9].

110 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013).

111 See, eg, *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239.

112 The 'objective' of regulation of admission is stated as to 'protect the administration of justice and the clients of law practices' by only allowing those that are eligible to be admitted: *Uniform Law* s 15.

113 See Levin, Zozula and Siegelman, above n 5, 79.

114 Campbell, above n 104, 73. In Victoria in 2006 these applicants would have been articled clerks, undertaking practical training under the guidance of a 'Master', or 'principal', usually a partner in the law firm in which they were employed.

in fact approved quickly by the Victorian Board in the absence of the applicant.[115] She therefore lamented the fact that the applicants and principals were kept waiting outside for up to two hours, only to be then called into the meeting room to speak to the Victorian Board. She recommended another stage be introduced into the consideration of applications whereby the Chair and Secretary of the Victorian Board first discuss applications that contained disclosures and the Chair 'refer [it] to a full Board meeting only where the Chair believes that an application would not routinely be approved'.[116] Subsequent to the *Campbell Report*, many Victorian applicants were called in for a meeting with the CEO and Chair of the Victorian Board. This meeting has come to be known as 'the chat'.

In 2012, 80–100 Victorian applicants who had made disclosures were asked to come in for 'the chat'.[117] Both the Chair and CEO of the Victorian Board saw the introduction of 'the chat' as valuable to glean additional information from the applicant that could obviate the need for the applicant to attend a Board meeting. This step in the process was in the applicant's favour as he or she could either be recommended for admission or sent away to take further steps to increase the likelihood of being admitted.

Yet, Campbell did not recommend 'the chat'; her recommendation only suggests that the CEO and Chair of the Board review applications *on the papers*. Only those applications unlikely to be routinely approved should be referred to a full Board meeting with the attendance of an applicant.[118] In addition, the perception of some of those called in for 'the chat' in Victoria is somewhat different to the perception of the Chair and CEO. One interviewee in 2013 thought all applicants were 'terrified' of undergoing this process,[119] rather than perceiving it as helpful.

Concern was also expressed in 2013 that the presence of 'the chat' as an administrative step in the application process, as well as its nature and purpose, was not made known to applicants by way of provision in legislation, policy guidance or elsewhere. We heard that the nature and formality of 'the chat' was understood to have changed in the two years since it was introduced.[120] In 2013, a Victorian educator perceived 'the chat' as taking one of three forms:

> 1. The first kind of chat is where the Chair and CEO are checking to see whether the person knows what's in their affidavit; as in, did the applicant have input into the affidavit. If it's a health issue, they check to see that the person is receptive to receiving treatment, even if that's dealt with in the affidavit and they also take the opportunity to tell applicants that there's plenty of help out there. That type of chat is alright, as they're just double checking.

115 Ibid.

116 Ibid 11.

117 Interview with Richard Besley, CEO, Victorian Board of Examiners (Melbourne, 31 January 2013): '23 applicants were required to attend a Board meeting in 2012 and at least triple to four times that number met with myself and the Chair.'

118 Campbell, above n 104, 73.

119 Interview with Victorian educator (Melbourne, 11 February 2013).

120 The interviewee perceived the chat as more informal when it was held in an office, but became more formal when it moved to the boardroom.

2. The second type of chat is where the application is borderline and the Chair and CEO vigorously question the candidate and, depending on how the candidate acquits themselves, they can say we are satisfied or we're not satisfied and you'll have to go before the Board.

3. The third situation is there was never any chance that this person was to get through on 'the chat' and 'the chat' is to tell them that and that their material is deficient in X, Y and Z or that their main concern is one, two and three.

The applicant never knows until they're in there, what type of chat it's going to be. They've got no idea. [121]

This account raises considerable concerns about whether procedural fairness is accorded. According to the CEO when interviewed in 2013, fewer than half of those who come in for 'the chat' have someone else attend with them, whether as a support person, friend or lawyer. He was concerned about these inconsistencies in the level of support:

> More fortunate ones are at a firm that offers very good support, and different practical legal training providers provide different levels of support, so we see some people who are very well prepared and others who aren't and that's not ideal.[122]

Since speaking to the CEO, it is pleasing to see more information available on the Victorian Board web page to advise Victorian applicants that they may be called in for a meeting with the CEO and Chair, and the further in-person meetings and other steps they may encounter.[123] The page *Appearing Before the Board* indicates that 'the chat' is about education for the applicant — to 'help the applicant understand the requirements of the Board'.[124] Its purpose is also to 'examine the applicant's insight into why the Board may have concerns about anything disclosed. The discussion is intended to be frank and honest, though informal.'[125] Hence, anything revealed in this 'informal' chat can form part of evidence considered by the Board.

B *Conduct of Board Meetings and Special Hearings*

In 2012, 23 Victorian applicants who made disclosures were required to attend a Board meeting. In the past the annual number has been as high as 40 but, as noted earlier, the introduction of 'the chat' reduced the number of applicants required to attend a Board meeting.

121 Interview with Victorian educator (Melbourne, 11 February 2013).

122 Interview with Richard Besley, CEO, Victorian Board of Examiners (Melbourne, 31 January 2013).

123 Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67.

124 Ibid.

125 Ibid.

Victoria continues to make a distinction between regular Board meetings and more serious, 'special hearings'.[126] As noted above, the Victorian Board has delegated all of its powers to assess applicants for admission to the 14-member VLAC which conducts the special hearings.[127] The formality of special hearings is emphasised on the Board's website:

> Special hearings are held in the Supreme Court. A transcript of the hearing is made. The Committee engages counsel to assist it. The role of counsel assisting the Committee is to question the applicant and make submissions to the Committee. Witnesses give sworn evidence. [128]

Even regular meetings of the Victorian Board or VLAC can be taxing, both emotionally and financially, for applicants required to appear in person.[129] Hearings have been described in the past as 'extremely intimidating', with applicants 'grilled about their past actions by seven senior practitioners with over 200 years of combined experience in the law, who make no apologies about being tough on people'.[130] In 2013, the Victorian Chair conceded that the questioning of some applicants in Board meetings had been too aggressive in the past.[131] Time will tell if a different approach will be taken by VLAC. However, it is worth noting that at least one Senior Counsel from the prior Board, with a reputation for vigorous cross examination of applicants, has been appointed to VLAC.

In the next section we consider a case study of student misconduct, to contrast the approaches in Victoria and New South Wales.

VII APPROACHES TO CONSIDERING EVIDENCE ABOUT STUDENT MISCONDUCT

A *Victoria*

The decision of the Victorian Court of Appeal in *Re OG (A Lawyer)*[132] in 2007 had a significant impact on the subsequent way that admission authorities in

126 The power to hold special hearings existed under *Legal Profession Act 2004* (Vic) s 6.5.15. It was not a power granted to the Board in New South Wales. For instance, *Legal Profession Act 2004* (NSW) s 37 did not refer to conducting hearings or inviting a person to appear before the Board. While all authorities have power to ask applicants for further documents and cooperate with inquiries, perhaps the Victorian Act helped engender the hearing approach.

127 Victorian Legal Admissions Board, *About the Victorian Legal Admissions Board*, above n 76.

128 Victorian Legal Admissions Board, *Appearing Before the Board*, above n 67.

129 The Victorian Legal Admissions Board's website, *Appearing Before the Board*, above n 67, previously made the following statement: 'Applicants appearing before the Board often attend with counsel and/or with their employer, supervisor or support person. The Board generally proceeds by asking questions directly to the applicant. If counsel attends, he/she will usually be invited to make submissions once the Board members have questioned the applicant.' This page has been updated and no longer contains this statement.

130 Holmes, above n 106, 7.

131 Interview with Bernard Teague, Chair, Victorian Board of Examiners (24 July 2013). This interview followed a visit by the Chair to New South Wales to compare its approach.

132 (2007) 18 VR 164.

Victoria went about their work. In that case OG made inadequate disclosure regarding allegations of collusion at his tertiary institution. This failure was not detected and OG was admitted. OG's inadequate disclosure only came to light because a classmate, GL, subsequently sought admission and disclosed more than OG about the alleged incident of collusion. The case attracted substantial academic comment,[133] and accounts for much of the rigour seen subsequently in the Victorian admission process. For instance, the Victorian admission authority actively sought and was given more legislative power to obtain information about an applicant's conduct during their tertiary studies.[134] The case of OG also affected the amount and presentation of evidence required in Victoria: applicants were required to 'mark-up' any assignments that were the subject of allegations of academic dishonesty, regardless of the outcome of investigations by the tertiary institution itself. This included colour-coding:

> [R]ed where it's a blatant cut and paste, and orange for that which is just a changing of the wording to some extent. Just so it gives us an idea, because sometimes when they do that, that process has then revealed to them in a little more objective way the extent of the failure to do the right thing and enables them to comment or reflect better and us to then challenge them if a challenge is called for.[135]

The need for colour-coded documentation is still not advertised on the Victorian website, but is presumably advised in communications with applicants who have disclosed allegations of academic dishonesty.

If the allegation of academic dishonesty centres on alleged collusion, an applicant in Victoria will sometimes be told that their application might be considered more favourably if the person with whom they were alleged to have colluded attends a Board meeting. In 2013 the Victorian Chair said:

> We can't subpoena somebody to attend our hearing if we wanted to check something out, we don't have that kind of power. What we do is to, in effect, say to the applicant it would help your case if you bring to the meeting, say in the case of OG, GL [the other student involved] to come along, because that kind of collusion situation is concerning where you have the potential for one saying, he copied from me, and the other saying the same. It's better to try and look into that. The general situation is that there's been stupidity on the part of A in providing the finished assignment to B, and dishonesty on the part of B in copying and pasting or with a bit of variation. We need to check that kind of thing out because sometimes the collusion extends further. [136]

This poses a number of difficulties for applicants. For instance, if the alleged co-colluder refuses to attend a meeting or to answer questions, the applicant may

133 Francesca Bartlett, 'Student Misconduct and Admission to Legal Practice — New Judicial Approaches' (2008) 34 *Monash University Law Review* 309; Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admission to Legal Practice: Lessons for Universities and the Courts' (2008) 8 *Queensland University of Technology Law and Justice Journal* 314; Lillian Corbin and Justin Carter, 'Is Plagiarism Indicative of Prospective Legal Practice?' (2007) 17 *Legal Education Review* 53.

134 *Legal Profession Act 2004* (Vic) s 2.3.3(3); *Legal Profession (Admission) Rules 2008* (Vic) s 5.02(c)(v).

135 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013).

136 Ibid.

be left with their application for admission refused or left in abeyance. It is also, or could be perceived to be, a lack of procedural fairness where the applicant is prejudiced by a matter they have no control over.[137]

The Victorian Chair did express concern at the fate of GL, who was turned away after disclosing allegations of student misconduct against him and OG:

> An example of someone who's not come back is GL [from *Re OG*], nobody knows what happened to GL. GL was just a bit unlucky that he got caught up in the OG situation. I think some attempts have been made to try and find out, but he would be an example of someone, if he came back and laid it on the line and indicated what he'd been doing and what measures had been taken, he'd almost certainly get through. [138]

The Victorian approach may have an unintended consequence of deterring more applicants from applying, or from pursuing their application for admission if initially turned away. If those who could be admitted are deterred by the process alone this appears to be an effect not contemplated by the purpose of the Act.

We were informed by interviewees in Victoria that applications for admission can be delayed in various ways. When interviewed in 2013, the Victorian Chair reported that, in the period July 2008 – March 2013, there had only been one applicant who had had a decision made against them.[139] The usual result is that applicants are told of the admission authority's concerns. It is suggested that they either withdraw or adjourn their application and perhaps do certain things of a rehabilitative nature to strengthen their application. If they return, they are likely to be given a further hearing before the Board and, if this goes well, they are likely to then be recommended for admission.

From discussions with the Chair of the Victorian Board it would seem that some applicants in Victoria are sent away more than once, and their application left in abeyance.

Will these views change now that Victoria is governed by the *Uniform Law*, along with New South Wales? We suggest not for a number of reasons that we elaborated above regarding the *Uniform Law* and *Uniform Rules* codifying the Victorian approach. The Chair of Victorian Board of Examiners quoted extensively above, has also been appointed as the current Chair of the Victorian Board.

A person with experience of the Victorian process, both before and after the implementation of the *Uniform Law* and *Uniform Rules*, commented to us in September 2015:

> To put an applicant making disclosures on the relatively minor end of the scale through what amounts to a mini-trial in a framework where there is very little information or guidance nor application of natural justice is not I believe a fair

137 For instance, it seems fair to conclude that OG's refusal to answer questions at a special hearing into GL's application for admission was at least part of the reason for GL's application to be refused: *Re OG (A Lawyer)* (2007) 18 VR 164, 180–1.

138 Interview with Bernard Teague, Chair, Victorian Board of Examiners (Melbourne, 6 March 2013).

139 Ibid.

system. The time and resources and misery caught up in this process continue to mount.[140]

B *New South Wales*

In contrast to Victoria, in the past, New South Wales placed greater trust in applicants and in the judgment of educational institutions, as conveyed on the face of the academic transcript required to be provided. The admission authority still expected applicants to make full disclosure of student misconduct incidents and to provide the Board with documentation to support their version of events, but was 'pretty comfortable'[141] with the thoroughness of law schools' and universities' own investigations of allegations of misconduct and, unlike Victoria, does not consider them afresh.

It remains unclear whether the further investigation in Victoria uncovered sufficiently more about applicants to make better decisions, so as to justify the additional cost and time involved. The Council of Australian Law Deans did not think it did. It made a submission to the Admission Committee of the Legal Services Council in January 2015 suggesting that the Victorian approach, proposed to be adopted in the *Uniform Admission Rules*,[142] created 'administrative and financial burdens with no evidence of benefit'[143] and was 'disproportionate to the limited benefit gained to the overall probity of the admissions process'.[144]

VIII CONCLUSION

The administrators of admission systems in Victoria and New South Wales whom we spoke to in 2013 appeared to be strongly of the view that assessing past conduct can indicate some sort of determined character of the applicant (ie as a dishonest person), and that this is predictive of future risk of that person as a lawyer perpetrating harms on the legal system and community. The Victorian office holders remain in these positions and have not provided any indications of changes in view since then.[145] In a previous article we,[146] like other academic critics before us,[147] provided arguments for disagreeing. Notwithstanding our own

140 Interview with an anonymous interviewee (email correspondence, 3 September 2015).

141 Interview with Justice Michael Slattery, Chair, Legal Profession Admission Board (NSW) (Sydney, 9 July 2013).

142 Legal Services Council, 'Legal Profession Proposed Admission Rules' (Consultation Draft, November 2014) r 18 <http://www.legalservicescouncil.org.au/Documents/admin-rule/Admission_Rules_Consultation_Draft.pdf>.

143 Council of Australian Law Deans, above n 54, 3.

144 Ibid 4.

145 We sought responses from the Victorian CEO and Chair (whom we interviewed in 2013) to draft versions of this article in August 2015.

146 Bartlett and Haller, 'Disclosing Lawyers', above n 3.

147 See ibid.

disagreement in principle, we end here by observing the common law position and the objectives under the *Uniform Law*.

This article has rather argued that there are jurisdictional differences in how these objectives are pursued through admissions processes. We have argued that the Victorian process has a range of drawbacks associated with according procedural fairness to applicants, appropriately assessing character evidence and the time and cost associated with administering this regime. There is also a question as to what resources we should devote to the admission process where resources are so scarce, and where those resources should be targeted. A case in point is 'the chat'. As the New South Wales Chair pointed out in 2013, if 'the chat' is part of admission process for all applicants this could be an invaluable opportunity for new entrants to meet with a senior lawyer or retired judge to discuss the obligations and ethical stresses of lawyers — an education about future practice. On the other hand, the Victorian educational approach only works to instil a greater ethical insight in those who have made disclosures. As observers, we are concerned about the approach in Victoria as it places what might be an unnecessary strain on only some applicants. It may also have various unintentional results, such as deterring applications by some who are likely to be admitted.

The need for insight into prior misconduct is a well-established criterion in both admission and disciplinary matters.[148] It is determined on past conduct and on what an applicant reveals about him or herself at the time of applying for admission. In addition to the paperwork submitted, Victoria judges the demeanour and body language of applicants in various formal and informal meetings; it considers whether the applicant has done things that are not indicated in any law or guidance notes (such as tell a family member about the incident). While we can see the relevance of this evidence indicating personal insight or truthfulness, and are pleased to see more information about these meetings on the Victorian website, we continue to have concerns about due process being accorded. We appreciate that the system requires the exercise of discretion by regulators in these matters. Yet, if this function can be adequately performed on the papers, as New South Wales authorities claim, this approach seems the most desirable to minimise adverse impacts on applicants.

Indications are that this approach is continuing in Victoria under the *Uniform Law*, even though there remains no express purpose of ethical education in that law. The New South Wales authorities are currently administering their regime largely as they have been. The current officer holders may or may not share the same concerns about the Victorian approach as the previous Chair (cited here). However, we call for consideration of these matters when it undertakes its review and transformation of the system into 2016.

148 Reid Mortensen, 'Lawyers' Character, Moral Insight and Ethical Blindness' (2002) 22 *Queensland Lawyer* 166.