

**Briginshaw & Disciplinary Proceedings**  
**Paper to Queensland Law Society 18 June 2019**  
**By Judge P.E. Smith<sup>1</sup>**

**Introduction**

- [1] I have been asked today to examine the so called *Briginshaw*<sup>2</sup> principle in its application to disciplinary proceedings.
- [2] It is an important topic for those who practice in the Disciplinary jurisdiction.
- [3] It is important when one considers that the High Court in the recent case of *R v Dookheea*<sup>3</sup> noted that the criminal standard of proof is much higher than the civil standard.
- [4] As will be later seen, there are a variety of legislative provisions in Queensland where the principle has relevance.
- [5] It will also be seen the standard of proof in such proceedings has not been without controversy.
- [6] In this paper I intend to cover:
  - (a) High Court jurisprudence on the issue
  - (b) How for serious matters, appellate courts have confirmed that the standard of proof is not the criminal standard but the civil standard.
  - (c) Examples of disciplinary proceedings in Queensland.

**Jurisprudence from the High Court**

- [7] *Briginshaw* itself involved a case where the husband Mr Briginshaw filed a petition in the Supreme Court of Victoria seeking dissolution of his marriage on the grounds of adultery. The only evidence placed before the court was an admission by Mrs Briginshaw that she had kissed the co-respondent and hearsay evidence from Mr Briginshaw's sister that the co-respondent told her that he and Mrs Briginshaw had engaged in sexual intercourse.
- [8] The trial judge dismissed the petition on the grounds he could not be satisfied beyond reasonable doubt that adultery had occurred. The High Court held this was the wrong test but agreed that evidence should be clear and compelling in such a case in light of the significant consequences involved.
- [9] Latham CJ said at p 347 that the ordinary standard of proof applied subject to the rule of prudence that any Tribunal should act with much care and caution before finding that a serious allegation such as adultery is established.
- [10] Dixon J noted that in civil cases the degree of satisfaction may depend on the nature of the issue at hand. He said:

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<sup>1</sup> Judge Administrator, District Court of Queensland.

<sup>2</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>3</sup> (2017) 262 CLR 402; [2017] HCA 36 at [41].

“Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Every one must feel that when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.”<sup>4</sup>

[11] In essence therefore, it may be seen that the approach in *Briginshaw* is that a court in a civil action should not easily find that a party has committed a serious wrong such as a crime without exact proofs.

[12] Since *Briginshaw* was decided, the High Court on a number of occasions has had to consider the application of *it*, although not specifically in the context of disciplinary proceedings.

[13] The High Court next examined the issue again in the 1940 decision of *Helton v Allen*.<sup>5</sup>

[14] In this case, Ms Allen alleged that Mr Helton had murdered her daughter. Mr Helton had been acquitted by a jury of the charge of murder. Ms Allen disputed Mr Helton’s rights under a will in which the daughter had left much of her estate to Mr Helton. The appeal to the High Court was allowed and a retrial ordered because of an error in the summing up.

[15] It is clear that the appeal was reluctantly allowed because the case against Helton seemed to be a strong one, but the Trial Judge in his directions to the jury gave confusing directions as to the onus of proof.

[16] The High Court approved the decision of *Briginshaw* and its application to a case such as this.

[17] Starke J said at p 701:

“Jordan C.J. pointed out in *In Re a Solicitor*, (1939) 56 WN (NSW) 53, a judicial tribunal in a civil case is ordinarily satisfied of the existence of a fact if it finds that the preponderance of evidence points to its existence. But the nature of the fact to be proved affects as a matter of common sense the process by which reasonable satisfaction is

<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pp 361-362.

<sup>5</sup> (1940) 63 CLR 691; [1940] HCA 20.

attained. Hence where the matter to be proved is a grave fraud or a crime, the tribunal ought not to be satisfied that it has been established unless the preponderance of evidence is so substantial as to establish it clearly.”

- [18] Dixon, Evatt and McTiernan JJ at p 712 also applied the statements of Dixon J from *Briginshaw*.
- [19] The High Court next examined the issue five years later in 1945 in the decision of *Hocking v Bell*.<sup>6</sup> Ms Hocking claimed damages for negligence against a surgeon alleging that after he performed the operation of thyroidectomy he left part of a drainage tube in her neck and ultimately some 18 months after the operation it came through a tonsil, passed through her stomach and was evacuated per rectum which left her seriously ill and in great pain. At the trial the jury gave a verdict for the plaintiff in the sum of 500 pounds. This was set aside by the full court of the Supreme Court of New South Wales and a new trial was ordered. At the second and third trials the jury disagreed. At a fourth trial the jury gave verdict for the plaintiff once again in the sum of 800 pounds. The full court unanimously set aside the verdict by majority and directed that the verdict be entered for the defendant. On appeal to the High Court in a 3:2 decision the appeal was dismissed.
- [20] The defendant, amongst other submissions, submitted that the jury should have been directed that a higher measure or a standard of persuasion was required by law in a case or charge of neglect causing bodily harm.
- [21] Dixon J<sup>7</sup> held this was not supported by authority. *Helton v Allen* and *Briginshaw v Briginshaw* were followed.
- [22] The next consideration of the matter was some 20 years later in 1965 in the case of *Rejfeek v McElroy*.<sup>8</sup>
- [23] In *Rejfeek* the High Court repeated that “when the matter so serious as fraud is to be found, is an acknowledgment that the degree of satisfaction may vary according to the gravity of the fact to be proved.”<sup>9</sup>
- [24] *Rejfeek v McElroy* involved a matter where the Rejfeeks sued the McElroys for rescission of a contract to purchase a milk run in Brisbane. The basis of the action were alleged fraudulent untrue representations. In that case the trial judge said he simply had the uncorroborated oath of one party against the uncorroborated oath of the other and in those circumstances found for the respondents. The trial judge held that for the appellants to succeed the action for deceit had to be established to his satisfaction beyond all reasonable doubt. The appeal was allowed by the High Court.
- [25] In following *Helton v Allen*, the court noted that in a civil proceeding facts which amount to the commission of a crime have only to be established to the

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<sup>6</sup> (1945) 71 CLR 430.

<sup>7</sup> In dissent as to the result.

<sup>8</sup> (1965) 112 CLR 517; [1965] HCA 46.

<sup>9</sup> *Ibid* at p 521.

reasonable satisfaction of the tribunal of fact, a satisfaction which may be attained on a consideration of the probabilities.<sup>10</sup> And further,

“But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.”<sup>11</sup>

- [26] Although *Briginshaw* was not directly considered in *Weaver v Law Society of New South Wales*<sup>12</sup> the High Court noted at p 207 that:

Disciplinary proceedings under the Legal Practitioners Act 1898 (NSW) and in the exercise of the Supreme Court’s inherent jurisdiction are not criminal proceedings; they are proceedings *sui generis*.”

- [27] In 1992 the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*<sup>13</sup> again considered the issue. In *Neat Holdings* the appellant sued the respondents with respect to the purchase by the appellant from the respondent of a family amusement centre at Mandurah south of Perth. During negotiations the respondents made representations to the appellant alleging that there was an average weekly turnover of \$5,793. After the appellant took over the business the takings were in the order of only \$3,000 per week. An action was brought for deceit. The trial judge had found the respondents liable in deceit because if the weekly takings book had been shown the true position would have been known. The respondents’ appeal to the Western Australian Full Court was upheld by a majority. Ultimately the appellant succeeded in the High Court. The plurality<sup>14</sup> noted:

“The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. ... On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found.” Statements to that effect should not,

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<sup>10</sup> Ibid at p 519.9.

<sup>11</sup> Ibid at p 521-522.

<sup>12</sup> (1979) 142 CLR 201.

<sup>13</sup> (1992) 67 ALJR 170; (1992) 110 ALR 449; [1992] HCA 66.

<sup>14</sup> Mason CJ, Brennan, Deane and Gaudron JJ at [2].

however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.”

[28] Two years in 1994 later came the case of *G v H*.<sup>15</sup>

[29] This was a case which involved H, the mother of a male child, claiming that G was the child’s father. She brought proceedings against him in the Family Court of Australia for maintenance of the child and for an order he submit to testing procedures to assist in determining the parentage of the child. Parentage was in issue because H had worked as a prostitute during her relationship with G. The matter was heard by a trial judge who harboured grave doubts as to the credibility of H. The trial judge found that G’s refusal to submit to testing was unreasonable but he was not prepared to draw the inference the test was refused because G believed he was the father. The trial judge applied *Briginshaw* in reaching his decision. H successfully appealed to the full court of the Family Court and G then appealed to the High Court. G’s appeal was dismissed.

[30] The court found that the trial judge had erred in approaching the case on the basis of *Briginshaw v Briginshaw*. At p 399 Deane, Dawson and Gaudron JJ held:

“Not every case involves issues of importance and gravity in the *Briginshaw v Briginshaw* sense. The need to proceed with caution is clear if, for example, there is an allegation of fraud or an allegation of criminal or moral wrongdoing, as in *Briginshaw v Briginshaw* where the allegation was adultery by a married woman, an allegation involving serious legal consequences when that case was decided. Paternity is a serious matter, both for father and for child. However, it is not clear that the question of paternity should be approached on the basis that it involves a grave or serious allegation in the *Briginshaw v Briginshaw* sense when what is at issue is the maintenance of a child and the evidence establishes that the person concerned is more likely than anyone else to be the father. After all, paternity can be determined easily and, for practical purposes, conclusively. ...”

## **Application of the principles in disciplinary proceedings**

### **Early tensions about the standard to be applied**

[31] I now wish to turn to how these principles have been applied in various kinds of disciplinary proceedings.

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<sup>15</sup> (1994) 181 CLR 387; (1994) 124 ALR 353; [1994] HCA 48.

- [32] It is to be noted that the standard of proof in such proceedings was not entirely clear (at least in Queensland) until 1990.
- [33] Early after *Briginshaw* was decided the issue was examined in the context of misconduct proceedings against a solicitor in New South Wales.
- [34] In New South Wales it was not disputed that the *Briginshaw* test applied to misconduct proceedings involving a legal practitioner.
- [35] In the 1939 case of *Re a Solicitor; ex parte The Prothonotary*<sup>16</sup> a motion was brought before the New South Wales' Supreme Court to remove a solicitor from the roll on the grounds of fraud and perjury. Jordan CJ referred to *Briginshaw* and noted:
- “Hence where the matter to be proved is a grave fraud or crime, the Tribunal ought not be satisfied that it has been established, unless the preponderance of evidence is so substantial as to establish it clearly.”
- In that case the evidence was insufficient to establish the allegations and the solicitor was not removed from the roll.
- [36] However the matter was not at that stage straight forward. Courts in Queensland seemed to take a different approach to the issue.
- [37] In the 1940 case of *Re N.E.G., A Solicitor*<sup>17</sup> the Full Court of the Supreme Court considered an appeal from the Statutory Committee of the Queensland Law Society. The solicitor has been found guilty of five charges including failing to keep books to show the state of his trust account; failing to keep proper records as to monies coming into his practice; failing to produce his accounts for audit; wrongfully converting 32 pounds 18 shillings and 11 pence and failing to pay monies received from clients into a trust account. He was suspended for two years but the Attorney-General appealed on the grounds the penalty was inadequate.
- [38] It was held by E.A. Douglas J at p 38 that the charges ought to have been proved as strictly as in a criminal trial where the charges are of a criminal matter.
- [39] Then in 1942 in *Michel v Medical Board of Queensland*<sup>18</sup> the Full Court of the Supreme Court of Queensland considered a case where a medical practitioner was charged before the Medical Assessment Tribunal with professional misconduct. It was alleged he falsely told his patient that she was suffering cervical cancer and rendered irrelevant treatment to her.
- [40] The majority set aside the Tribunal decision. The majority held that the proceedings were criminal proceedings because there was a power to impose a pecuniary penalty. It was held the criminal standard applied.

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<sup>16</sup> [1939] 56 WN (NSW) 53.

<sup>17</sup> [1940] QWN 25.

<sup>18</sup> [1942] St R Qd 1.

[41] However in 1967 the New South Wales Full Court of the Supreme Court decided the case of *Re Evatt; Ex parte New South Wales Bar Association*.<sup>19</sup>

[42] In *Evatt* the Full Court found Evatt (a barrister) guilty of professional misconduct in that between 1 February 1963 and 30 August 1965 he had knowingly been a party to a system whereby two solicitors charged grossly excessive fees to lay clients. He was suspended for two years. Evatt appealed to the High Court but the High Court upheld the Supreme Court's findings but set aside the suspension and disbarred him.<sup>20</sup>

[43] It was observed by the New South Wales' Court of Appeal at p 238:

“The onus of proof is upon the Association but is according to the civil onus. Hence proof in these proceedings of misconduct has only to be made upon a balance of probabilities... Reference in the authorities to the clarity of the proof required where so serious a matter is the misconduct (as here alleged) of a member of the Bar as to be found, is an acknowledgement that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved...”

[44] It was not suggested by the High Court in *Evatt* that the approach on the onus of proof below was wrong.

[45] Similarly, in the 1972 case of *Ex Parte Attorney-General (Cth) Re a Barrister & Solicitor*<sup>21</sup> the ACT Supreme Court considered a case where, on application of the Attorney General, the barrister/solicitor was required to show cause why he should not be removed from the roll or suspended. It was a case where the respondent had acted for both the vendor and purchaser in a conveyancing transaction and failed to carry out his duties to both the purchaser and the vendor.

[46] At p 246 the court held:

“The question of the standard of proof in disciplinary proceedings against a legal practitioner has been discussed in *Bhandari v. Advocates Committee*, in *In the Matter of a Practitioner of the Supreme Court*, and in *Re Evatt; Ex parte New South Wales Bar Association*. In the last-mentioned case, the Court of Appeal in a joint judgment said:

“The onus of proof is upon the Association but is according to the civil onus. Hence proof in these proceedings of misconduct has only to be made upon a balance of probabilities: *Rejtek v. McElroy*. Reference in the authorities to the clarity of the proof required where so serious a matter as the misconduct (as here alleged) of a member of the Bar

<sup>19</sup> (1967) 67 SR (NSW) 236 at p 238.

<sup>20</sup> (1968) 117 CLR 177.

<sup>21</sup> (1972) 20 FLR 234.

is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: *Briginshaw v. Briginshaw* per Dixon J., as he then was; *Helton v. Allen*; *Smith Bros. v. Madden Bros.* per Dixon J.”

This decision went on appeal to the High Court, where, although the facts were fully gone into, no disagreement was expressed with the test thus propounded by the Court of Appeal. In the circumstances we believe we should follow and apply the view expressed by that court.”

- [47] This case was followed in the 1978 ACT Supreme Court decision of *Re A Barrister and Solicitor*.<sup>22</sup> In this case the respondent was removed from the roll by reason of irregularities in his trust account.
- [48] Despite this, Queensland remained out of kilter in the 1989 decision of *Queensland Law Society Incorporated v A Solicitor*.<sup>23</sup> In that case the Statutory Committee of the Queensland Law Society dismissed allegations of professional misconduct against the respondent. McPherson J distinguished *NSW Bar Association v Evatt* holding that that proceeding was in the original jurisdiction of the Supreme Court while this was not. He also held at p 337 that the court was bound to apply *Michel* and held the proceedings were criminal in character.
- [49] However, in light of the ACT authorities, the matter was finally put to bed by the Full Court of the Supreme Court of Queensland in 1990 in *Adamson v Queensland Law Society Inc*.<sup>24</sup>
- [50] In *Adamson* the practitioner’s name was ordered by the statutory committee of the Queensland Law Society to be struck from the roll of solicitors. The essence of the allegations brought against him were that he had shared receipts from his practice with an unqualified person breaching the rules of the law society; and he had endeavoured to cover up his misconduct by making false and misleading statements to the society.
- [51] The appellant submitted in reliance on *N.E.G.* and *Michel* that the allegations needed to be proved beyond a reasonable doubt.
- [52] Thomas J at p 503 noted that despite the decision of *Helton v Allen* in 1940, the Queensland Courts have continued to apply the criminal standard in civil proceedings where the issue involved proof of criminal activity. His Honour also noted that the High Court had made the issue clear in 1965 in *Rejfeck v McEllroy*.
- [53] His Honour said at p 504:

“It is true that prior to *Rejfeck’s* case there was a divergence of approach between courts in different States as to the standard

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<sup>22</sup> (1978) 40 FLR 1 at p 21.

<sup>23</sup> [1989] 2 Qd R 331.

<sup>24</sup> [1990] 1 Qd. R. 498.



of proof applicable in disciplinary proceedings when breach of a penal provision was in issue. In contrast to the Queensland decisions in *Re N.E.G. A Solicitor* [1940] QWN 25 and *Michel v Medical Board (Qld)* [1942] St R Qd 1, the civil standard was applied in some other jurisdictions. Although due recognition was given to what might be called the serious civil standard of proof in relation to allegations involving moral turpitude or breach of a statutory prohibition.”

[54] His Honour however applied *Re Evatt* and noted at p 505.40:

“In my view disciplinary proceedings before a professional tribunal (as distinct from proceedings in a court for a penalty) cannot generally be regarded as “criminal proceedings” whether or not the tribunal happens to have the additional power of imposing a fine. The superior courts, in their inherent power to discipline legal practitioners, possess the power to fine as well as strike off... and many statutory committees have the express power to impose a fine... It can no longer be suggested that in exercising functions of discipline the courts or the statutory committees are conducting criminal proceedings or that the golden thread of *Woolmington v DPP* [1935] AC 462 runs through their proceedings. The power of a disciplinary tribunal to order a practitioner to pay a pecuniary penalty to the professional body (as s 41 of the *Medical Act* does) may be regarded differently from the recording of a conviction and the imposition of a fine by a court, as the former proceedings are still essentially disciplinary in nature and are a form of self-regulation by a profession. On this basis the *Briginshaw* standard may satisfactorily accommodate all proceedings before professional disciplinary tribunals. ...[at p 506] I conclude therefore that in the absence of clear legislative indication to the contrary the approach expressed in *Evatt* and *Ex parte Attorney-General; Re a Barrister and Solicitor* [1972] 20 FLR 234 at 246 ought to be followed in proceedings involving the discipline of professional persons by statutory tribunals. Specifically in the case of the legal profession the *Briginshaw* standard is that which should be applied by the Statutory Committee, the Solicitors’ Disciplinary Tribunal and the Courts.”

[55] The issue was put beyond doubt insofar as lawyers are concerned in the 1996 South Australian Supreme Court case of *Kerin v Legal Practitioners Complaints Committee*.<sup>25</sup>

[56] In *Kerin*, the Legal Practitioners Complaints Committee of South Australia made a complaint against him pursuant to the *Legal Practitioners Act* 1981 (SA). He was charged with unprofessional conduct in that he sought to arrange for the importation to Australia of firearms or parts of firearms which he believed were prohibited imports and proposed to dishonestly avoid duty payable on the imported goods and he made false statements to a customs

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<sup>25</sup> (1996) 67 SASR 149; [1996] SASC 5650.

officer. He pleaded guilty to some of the allegations but not to others. He contended he was guilty of unprofessional conduct as distinct from professional misconduct. The evidence established that the appellant was a shooter and collector of firearms.

[57] The appellant submitted that proof in the matter was to be proof beyond reasonable doubt.

[58] However Duggan J at p 158.9 noted that disciplinary proceedings of this type were not criminal proceedings.

[59] Nevertheless at p 159 his Honour noted:

“Nevertheless it is well settled that, particularly in cases where fraud or moral turpitude is alleged, the considerations referred to in *Briginshaw v Briginshaw* are applicable.”

[60] His Honour then referred to the decisions of *Adamson*, *Evatt* and *Re a Barrister & Solicitor* and concluded that the *Briginshaw* standard was applicable in the case.

[61] It is patently clear then that the *Briginshaw* standard applies to legal practitioners.

### **Health practitioners**

[62] Similar issues have arisen concerning the standard when it comes to health practitioners.

[63] As recently as 1992 in *T v Medical Board (SA)*<sup>26</sup> the Full Court of the Supreme Court of South Australia considered a case in which the appellant doctor had been charged with unprofessional conduct comprising three separate acts of sexual misconduct with a patient. He was found guilty of two of these by the South Australian Medical Practitioners Disciplinary Tribunal. A single judge of the South Australian Supreme Court dismissed his appeal and he then appealed to the full court of the Supreme Court.

[64] His appeal was allowed. Matheson J at p 391 said:

“A charge against a medical practitioner of sexual misconduct with a patient is a very serious charge, and the consequences flowing from a finding of guilt are inevitably very grave. It was assumed in *Re Frederick* [1957] SASR 149 that such a charge must be proved beyond reasonable doubt, but that there does not appear to be any clear authority on the appropriate degree of proof. We are not, of course, concerned here with the proof of a crime in civil proceedings or with the proof of adultery under old and repealed divorce laws. I do not regard cases such as *Briginshaw v Briginshaw* as very helpful in this context. I can find no authority that prevents me from holding, which I do, that the charges here must be proved beyond reasonable doubt.”

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<sup>26</sup> (1992) 58 SASR 382.

[65] Olsson J did not agree with Matheson J. At p 404 he held that the application of *Briginshaw v Briginshaw* was appropriate. Debelle J simply agreed with the orders proposed by Matheson J.

[66] But it is clear this is not good law.

[67] In *Versteegh v The Nurses Board of South Australia*<sup>27</sup> Mullighan J heard an appeal by the appellant against a decision of the Nurses Board that she was guilty of unprofessional conduct. The nature of the allegations against her were a failure to administer medication to a resident of a nursing home; failure to ensure medication prescribed for a resident was taken; failure to sight and count all drugs of dependence and make an appropriate record; failure to adhere to guidelines for drug store and administration; failure to adhere to the policy of a nursing home with respect to signing records at the time of administering drugs; breach of patient confidentiality and failure to ensure a “resident-centred” approach to a resident causing pain, suffering and acute embarrassment.

[68] Mullighan J at p 132 referred to the decision of *T v The Medical Board* and said:

“It is unnecessary to discuss the reasoning of Matheson J in T’s case. I do not think that I am bound by his decision as to the standard of proof to be applied even though the relevant provisions of the Medical Practitioners Act and the Nurses Act are to the same effect. Olsson J took a different view and Debelle J did not express a view. ... I have some difficulty in accepting that there may be different standards of proof depending upon the nature of the alleged unprofessional conduct. The standard must be the criminal or the civil standard. It would appear that the court in T’s case was not referred to the decision of *Re Ward* [1953] SASR 308. There the court was concerned with a finding by the Physiotherapist Board of unprofessional conduct by a member of that profession where it was said:

“I think that it is wrong to say that the charge requires the same strictness of proof as in the case of a criminal charge.”

[69] Ultimately his Honour considered that it was not necessary for the board to prove the allegations on the criminal standard.

[70] A similar approach was taken in Victoria in *Basser v Medical Board* (VIC).<sup>28</sup> In *Basser*, the Medical Board of Victoria had removed the name of the appellant from the registrar of legally qualified medical practitioners. It was alleged that the appellant was guilty of infamous conduct in that he prescribed drugs for improper purposes, prescribed drugs without proper medical examination of the recipient; prescribed drugs without sufficient knowledge of

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<sup>27</sup> (1992) 60 SASR 128.

<sup>28</sup> [1981] VR 953.

the medical condition of the recipient, and became a willing and indiscriminate supplier of drugs to persons addicted to drugs.

- [71] The appellant appealed the decision to the Supreme Court of Victoria. O'Brien J at p 969 said:

“I am satisfied that the civil standard of proof is applicable here. The decision in *Mercer v Pharmacy Board of Victoria*<sup>29</sup> requires that, where the allegations are serious and grave, involving professional misconduct and incompetence, the court should not be satisfied that the allegations are true unless the evidence is precise and can survive careful scrutiny. That is proof on the balance of probabilities, the civil standard of proof, with the proviso that the evidence must produce a reasonable state of satisfaction in one's mind: *Briginshaw v Briginshaw*.”

- [72] A similar approach was taken in *Hobart v Medical Board of Victoria*.<sup>30</sup>

- [73] Also in *Kerin v Legal Practitioners Complaints Committee*<sup>31</sup> Duggan J referred to *T v The Medical Board (SA)* but ultimately held that disciplinary proceedings are not criminal proceedings and considered that *Briginshaw v Briginshaw* was applicable.<sup>32</sup>

- [74] As to Queensland, in *Medical Board of Queensland v Cooke*<sup>33</sup> the decision of *Adamson*<sup>34</sup> was applied to proceedings involving the Medical Board. In *Cooke's* case the appellant was the Medical Board. The board had formed the opinion that the respondent, a specialist orthopaedic surgeon, had been guilty of misconduct in a professional respect. The charges related to advertising on large billboards, advertising by print media releases, radio, interviews on the radio and canvassing.

- [75] The matter came before the Medical Assessment Tribunal and the judge stated a case for consideration by the full court of the Supreme Court. At p 616 Thomas J noted:

“It was common ground that the appropriate test is that stated in *Adamson v Queensland Law Society Incorporated*: the test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency. In accordance with *Adamson* and *Rejfeek v McElroy*, the Tribunal applied a civil standard of proof where under the necessary degree of satisfaction may vary according to the gravity of the fact to be proved.”

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<sup>29</sup> [1968] VR 72.

<sup>30</sup> [1966] VR 292 at p 296.

<sup>31</sup> (1996) 67 SASR 149.

<sup>32</sup> *Ibid* at pp 158-159.

<sup>33</sup> [1992] 2 Qd. R. 608.

<sup>34</sup> [1990] 1 Qd. R. 498.

- [76] In *Ooi v Medical Board of Queensland*<sup>35</sup> the appellant was charged with misconduct in that he procured the miscarriage of a woman. The appellant submitted that criminal standard should apply by reason of *Michel's* case. This argument was rejected.
- [77] Finally in *Purnell v Medical Board of Queensland*<sup>36</sup> the appellant, a medical practitioner, had been charged with criminal with counts of sexual assault against patients. He was acquitted of one count and the crown discontinued others. Proceedings were brought against him before the Medical Assessment Tribunal for misconduct arising from the sexual assaults. His counsel argued that *Cooke* and *Adamson* should be reconsidered in light of the criminal allegations against the doctor. Also it was contended that the Tribunal erred in relying upon the fact there were a number of complaints. It was submitted this was contrary to High Court authority.<sup>37</sup>
- [78] The Court of Appeal rejected the appellant's contentions. The President noted that the standard of proof was on the civil standard and in effect held that the principles in *Pfennig* did not apply.<sup>38</sup> Mackenzie J noted that the proceedings were not criminal in nature but their object was to protect members of the public and the integrity of the profession.<sup>39</sup>
- [79] It seems patently clear also then that the *Briginshaw* test is to apply to proceedings of a disciplinary nature involving health practitioners.

#### **Issues of issue estoppel *autrefois acquit***

- [80] In the context of the *Briginshaw* question it had been argued that where a person had been acquitted of criminal charges and subsequent disciplinary proceedings had been brought, then the disciplinary Tribunal was estopped from considering the matter.
- [81] In *Re Seidler*<sup>40</sup> the applicant, a hospital employee, had been charged with stealing hospital property. After legal argument a *nolle prosequi* was entered. He was then dismissed from his employment under the discipline provisions of the *Hospitals Act*. He argued that he was entitled to rely on the principle of *autrefois acquit*.
- [82] Carter J rejected the applicant's argument noting firstly that the mere entry of a *nolle prosequi* does not affect subsequent criminal proceedings for the same matter (subject to any abuse of process arguments). Secondly, his Honour held at p 490 that because the standard of proof in disciplinary proceedings differed (i.e. on the balance of probabilities and disciplinary proceedings were not criminal) disciplinary proceedings could be brought. There could be no successful plea of *autrefois acquit* or *autrefois convict*.

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<sup>35</sup> [197] 2 Qd R 176.

<sup>36</sup> [1999] 1 Qd R 362.

<sup>37</sup> *Pfennig v R* (1995) 182 CLR 461 and *Hoch v R* (1988) 165 CLR 292.

<sup>38</sup> [1999] 1 Qd R 362 at pages 368-369.

<sup>39</sup> [1999] 1 Qd R 362 at pages 383-384.

<sup>40</sup> [1986] 1 Qd R 486.

[83] Despite this, in *Purnell v Medical Board of Queensland*,<sup>41</sup> the appellant also submitted to the Court of Appeal that by reason of his acquittal on one count and the *nolle prosequis* on the others, issue estoppel should apply. Abuse of process was not argued.

[84] This argument was rejected. Fitzgerald P at p 377 held that the principles of double jeopardy did not apply. McKenzie also held this at p 383 noting that different parties were involved and that the proceedings before the Board were not criminal in nature. Evidence of a charge on which the practitioner has been acquitted can be admitted in disciplinary proceedings (see p 384).

### **Relevant Queensland legislation**

[85] In Queensland there are a number of pieces of legislation under which disciplinary proceedings may be brought and in which the *Briginshaw* test may be relevant.

### **Police**

[86] In so far as police officers are concerned, disciplinary action may be brought under s 7.4 of the *Police Service Administration Act 1990 (Q)* and *Police Service (Discipline) Regulations 1990 (Q)* .

[87] QCAT has a review jurisdiction under Chapter 5 Part 2 of *the Crime and Corruption Act 2001 (Q)* (CCA)<sup>42</sup>.

[88] Section 219H of the CCA provides:

#### **“Conduct of proceedings relating to reviewable decisions**

- (1) A review of a reviewable decision is by way of rehearing on the evidence (original evidence) given in the proceeding before the original decision-maker (original proceeding).
- (2) However, QCAT may give leave to adduce fresh, additional or substituted evidence (new evidence) if satisfied—
  - (a) the person seeking to adduce the new evidence did not know, or could not reasonably be expected to have known, of its existence at the original proceeding; or
  - (b) in the special circumstances of the case, it would be unfair not to allow the person to adduce the new evidence.
- (3) If QCAT gives leave under subsection (2), the review is—
  - (a) by way of rehearing on the original evidence; and

<sup>41</sup> [1999] 1 Qd R 362.

<sup>42</sup> See sections 219BA and 219G of the CCA.

(b) on the new evidence adduced.”

[89] Section 20 of the QCAT Act 2009

**“Review involves fresh hearing**

- (1) The purpose of the review of a reviewable decision is to produce the correct and preferable decision.
- (2) The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.”

[90] Section 28 QCAT Act

**“Conducting proceedings generally**

- (1) The procedure for a proceeding is at the discretion of the tribunal, subject to this Act, an enabling Act and the rules.
- (2) In all proceedings, the tribunal must act fairly and according to the substantial merits of the case.
- (3) In conducting a proceeding, the tribunal—
  - (a) must observe the rules of natural justice; and
  - (b) is not bound by the rules of evidence, or any practices or procedures applying to courts of record, other than to the extent the tribunal adopts the rules, practices or procedures; and
  - (c) may inform itself in any way it considers appropriate; and
  - (d) must act with as little formality and technicality and with as much speed as the requirements of this Act, an enabling Act or the rules and a proper consideration of the matters before the tribunal permit; and
  - (e) must ensure, so far as is practicable, that all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts.
- (4) Without limiting subsection (3)(b), the tribunal may admit into evidence the contents of any document despite the noncompliance with any time limit or other requirement under this Act, an enabling Act or the rules relating to the document or the service of it.”

[91] The *Briginshaw* principle has been examined in a number of police discipline decisions.

[92] In *Chapman v Crime and Misconduct Commission and Rynders*<sup>43</sup> the appellant police officer had been found guilty of improper conduct in using excessive force whilst arresting a 15 year old in Clontarf. The youth suffered a ruptured spleen.

[93] Wilson J in dismissing the appeal noted at [13]:

“In a case in which the livelihood and career of a police officer was an issue, a high degree of caution and restraint in the fact finding process was both required and appropriate. That was acknowledged by the members, as was the need to apply the proper standard of proof. The reasons observe that the principles referred to in *Briginshaw v Briginshaw* and subsequent clarification such as those in *Rejtek v McElroy* and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* are to be applied; and, that because the proceeding was a disciplinary one capable of producing serious consequences for Mr Chapman, the necessary reasonable satisfaction was not to be reached lightly or on flimsy evidence.”

[94] In another case (*DA v Deputy Commissioner Stewart*<sup>44</sup>) the appellant police officer was successful on appeal in a case which involved allegations of misconduct concerning: his conduct towards his ex-partner; whether he was truthful in answering questions of investigating officers; and his work performance. Kingham DCJ at [35] said:

“The Tribunal must be satisfied the alleged conduct occurred, on the balance of probabilities. Although the purpose of a disciplinary is not punitive, disciplinary orders may operate as a penalty on the individual, including, as here, preventing the individual from pursuing their occupation. The Tribunal must bear in mind that that factor when deciding whether it is satisfied the conduct alleged against a person subject to disciplinary proceedings has been proved.”

[95] Her Honour then referred to Dixon J in *Briginshaw* and said at [37]:

“His Honour’s reference to inexact proofs, indefinite testimony or indirect references has particular resonance in this case. Where the evidence on critical points has been untested before the Tribunal, particular care should be taken to properly weigh the evidence, such as it is.”

[96] In *Officer JXR v Deputy Commissioner*<sup>45</sup> in connection with an allegation of perjury against the officer Senior Member O’Callaghan stated:

It is well-established that the standard of proof in disciplinary proceedings is the civil standard, that is, the balance of probabilities applying *Briginshaw* as modified by later decisions. Given the

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<sup>43</sup> [2012] QCATA 16.

<sup>44</sup> [2011] QCATA 359. Note an appeal was allowed by the Court of Appeal in *Deputy Commissioner Stewart v Dark* [2012] QCA 228, but not on this point.

<sup>45</sup> [2018] QCATA 55 at [158].



seriousness of the consequences of a disciplinary proceeding, reasonable satisfaction is not to be reached lightly or based on flimsy evidence. The learned Member correctly articulated the relevant standard in his reasons and made findings accordingly.

### **Health practitioners**

[97] In so far as health practitioners are concerned, division 12 of the *Health Practitioner Regulation National Law Act 2009* (Q) provides for disciplinary proceedings.

[98] Section 193 provides:

#### **“Matters to be referred to responsible tribunal**

- (1) A National Board must refer a matter about a registered health practitioner or student to a responsible tribunal if—
  - (a) for a registered health practitioner, the Board reasonably believes, based on a notification or for any other reason
    - (i) the practitioner has behaved in a way that constitutes professional misconduct; or
    - (ii) the practitioner’s registration was improperly obtained because the practitioner or someone else gave the Board information or a document that was false or misleading in a material particular; or
  - (b) for a registered health practitioner or student, a panel established by the Board requires the Board to refer the matter to a responsible tribunal.
- (2) The National Board must—
  - (a) refer the matter to—
    - (i) the responsible tribunal for the participating jurisdiction in which the behaviour the subject of the matter occurred; or
    - (ii) if the behaviour occurred in more than one jurisdiction, the responsible tribunal for the participating jurisdiction in which the practitioner’s principal place of practice is located; and
  - (b) give written notice of the referral to the registered health practitioner or student to whom the matter relates.”

[99] Section 196 of the *Health Practitioner Regulation National Law Qld* provides:

**“Decision by responsible tribunal about registered health practitioner**

- (1) After hearing a matter about a registered health practitioner, a responsible tribunal may decide—
  - (a) the practitioner has no case to answer and no further action is to be taken in relation to the matter; or
  - (b) one or more of the following—
    - (i) the practitioner has behaved in a way that constitutes unsatisfactory professional performance;
    - (ii) the practitioner has behaved in a way that constitutes unprofessional conduct;
    - (iii) the practitioner has behaved in a way that constitutes professional misconduct;
    - (iv) the practitioner has an impairment;
    - (v) the practitioner’s registration was improperly obtained because the practitioner or someone else gave the National Board established for the practitioner’s health profession information or a document that was false or misleading in a material particular; or
- (2) If a responsible tribunal makes a decision referred to in subsection (1)(b), the tribunal may decide to do one or more of the following—
  - (a) caution or reprimand the practitioner;
  - (b) impose a condition on the practitioner’s registration, including, for example—
    - (i) a condition requiring the practitioner to complete specified further education or training, or to undergo counselling, within a specified period; or
    - (ii) a condition requiring the practitioner to undertake a specified period of supervised practice; or
    - (iii) a condition requiring the practitioner to do, or refrain from doing, something in connection with the practitioner’s practice; or

- (iv) a condition requiring the practitioner to manage the practitioner's practice in a specified way; or
  - (v) a condition requiring the practitioner to report to a specified person at specified times about the practitioner's practice; or
  - (vi) a condition requiring the practitioner not to employ, engage or recommend a specified person, or class of persons,
- (c) require the practitioner to pay a fine of not more than \$30,000 to the National Board that registers the practitioner;
  - (d) suspend the practitioner's registration for a specified period;
  - (e) cancel the practitioner's registration.
- (3) If the responsible tribunal decides to impose a condition on the practitioner's registration, the tribunal must also decide a review period for the condition.
  - (4) If the tribunal decides to cancel a person's registration under this Law or the person does not hold registration under this Law, the tribunal may also decide to—
    - (a) disqualify the person from applying for registration as a registered health practitioner for a specified period; or
    - (b) prohibit the person, either permanently or for a stated period, from—
      - (i) providing any health service or a specified health service; or
      - (ii) using any title or a specified title.”

[100] The *Briginshaw* principle has been examined in a number of health practitioner decisions.

[101] In *Cooke v The Psychologist Board of Queensland*<sup>46</sup> the applicant sought to appeal the decision of the Queensland Health Practitioners Tribunal, cancelling his registration as a psychologist. The complaint related to a complainant who suffered a mental breakdown which led to his admission to a psychiatry ward and, according to the complainant, the relationship between he and the applicant became more than that of patient and psychologist. The applicant would regularly discuss his own personal problems with the complainant during counselling sessions and in fact borrowed money from

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<sup>46</sup> [1992] 2 Qd R 608.

the complainant. It was accepted that the *Briginshaw* standard applied to Tribunals such as the Medical Assessment Tribunal.<sup>47</sup>

[102] In *Dental Board of Queensland v B*<sup>48</sup> the Health Practitioners Tribunal had found the respondent had improperly taken hold of a patient's breast during a dental consultation. By way of sanction, various conditions on his registration were imposed including a requirement for a chaperone but that no record of the disciplinary action be placed on the register. The appeal by the Board was allowed and the matter remitted for further determination by the Health Practitioners Tribunal. It was accepted that the *Briginshaw* standard applied in the appeal.<sup>49</sup>

[103] More recently in *Medical Board v Rall*<sup>50</sup> the allegations against the Doctor involved allegations of inappropriate vaginal examinations of female patients. Judicial Member Thomas stated at [46-47]:

“[46] A finding of improper sexual invasion should not be made lightly, and must be approached on the basis commonly referred to as the *Briginshaw* Standard. The standard of proof in such a matter remains the civil standard, but the Tribunal must be conscious of the nature, gravity and consequences of the relevant findings. As Dixon J observed in *Briginshaw*, in relation to such matters – “*reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences*”.

[47] I do not understand this view to have been displaced by later decisions on the standard of proof in civil proceedings, such as *Rejtek v McElroy* and *Neat Holdings v Karajan Holdings Pty Ltd*. The present litigation is civil and the standard of proof is on the balance of probabilities. It is, however, a disciplinary proceeding with very serious allegations capable of producing serious consequences, and accordingly the necessary “reasonable satisfaction” is not to be reached lightly or on flimsy evidence. It is well established that the *Briginshaw* civil standard applies generally to disciplinary proceedings such as the present.”

[104] Other QCAT cases involving health practitioners have also clearly adopted the standard in Queensland. For example *Medical Board of Australia v Vucak*,<sup>51</sup> *Medical Board of Queensland v Broadbent*<sup>52</sup> and *Broadbent v Medical Board of Australia*.<sup>53</sup>

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<sup>47</sup> Ibid at p 616.

<sup>48</sup> [2003] 1 Qd. R. 254; [2003] QCA 294.

<sup>49</sup> Ibid at [48]-[50].

<sup>50</sup> [2016] QCAT 228 at [46-47].

<sup>51</sup> [2015] QCAT 367 at [7].

<sup>52</sup> [2010] QCAT 280.

<sup>53</sup> [2018] QCAT 25.

## Teachers

[105] Likewise, the *Education (Queensland College of Teachers) Act 2005 (Q)* relates to disciplinary actions against teachers.

[106] There are rights of appeal to QCAT against suspensions. Section 55 provides:

### **“QCAT’s decision about continuation of suspension**

- (1) After considering any submissions made by the approved teacher within the stated time under section 54, QCAT must decide—
  - (a) if the review is of the suspension of an approved teacher under section 48—whether it is an exceptional case in which the best interests of children would not be harmed if the suspension were ended; or
  - (b) if the review is of the suspension of an approved teacher under section 49—whether the teacher does not pose an unacceptable risk of harm to children.
- (2) QCAT must order the suspension be ended if—
  - (a) if the review is of the suspension of an approved teacher under section 48—QCAT is satisfied it is an exceptional case; or
  - (b) if the review is of the suspension of an approved teacher under section 49—QCAT is satisfied the teacher does not pose an unacceptable risk of harm to children.
- (3) QCAT’s decision must be made not later than 14 days after the earlier of the following to happen—
  - (a) QCAT receives the approved teacher’s submission under section 54;
  - (b) the stated time under section 54 ends.
- (4) If QCAT does not make a decision within the 14 day period under subsection (3), QCAT is taken to have made an order ending the suspension.
- (5) QCAT must, as soon as practicable, give notice of its decision to the approved teacher and the college.
- (6) The notice must state each of the following—
  - (a) QCAT’s decision and the reasons for it;

- (b) if the decision is that it is not an exceptional case or that the teacher poses an unacceptable risk to children—that the teacher may apply, within 28 days after the notice is given and as otherwise provided under the QCAT Act, to QCAT for a review of QCAT’s decision.”

[107] For disciplinary action section 158 provides:

**“Decision about whether ground for disciplinary action is established**

- (1) As soon as practicable after finishing the hearing, QCAT must decide whether a ground for disciplinary action against the relevant teacher has been established.
- (2) In making its decision, QCAT must have regard to any relevant previous decision by a practice and conduct body of which QCAT is aware.
- (3) Subsection (2) does not limit the matters QCAT may consider in making its decision.
- (4) In this section—

**former PP&C committee** means the PP&C committee under the Act as in force before the commencement.

**former Teachers Disciplinary Committee** means the Teachers Disciplinary Committee established under this Act before its abolition by the QCAT Act.

**practice and conduct body** includes the former Teachers Disciplinary Committee and the former PP&C committee.”

[108] In the relatively recent case of *Queensland College of Teachers v CSK*<sup>54</sup> the College was successful in its appeal against the order of the Tribunal. The issue involved whether the teacher was suitable to teach in that it was alleged he: failed to maintain proper professional boundaries with students under his care and control; failed to maintain objective and impartial levels of disciplinary standards for year 7 students; and failed to address concerns within his knowledge and respect of alleged boundary violations with such students.

[109] At [35] it was said:

“Because of s 92(3) even if a teacher is not convicted of the serious offence with which he or she was charged, that is not the end of the matter. The QCT must nevertheless refer the relevant allegations as part of its disciplinary referral, so that (having regard to the relevant standard of proof), the relevant

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<sup>54</sup> [2016] QCATA 125.

disciplinary committee determines whether the evidence about the circumstances of the charge justifies a finding that the teacher is not suitable to teach. It is relevant to observed that the standard of proof is different in disciplinary proceedings than in criminal proceedings. In criminal proceedings, the charges must be proven beyond reasonable doubt. In disciplinary proceedings, it is well established that the regulator bears the civil onus of proof, on the *Briginshaw* standard.”

[110] Also in the case of *Queensland College of Teachers v Smith*<sup>55</sup> it was said:

“Because this is a disciplinary proceeding, the College bears the onus of proof and it must establish its case to a very high standard. For that reason, where there is a conflict of evidence between Mr Smith and a witness that he might have called, but did not, we have declined to apply the rule in *Jones v Dunkel*.”

### **Lawyers**

[111] For lawyers the *Legal Profession Act 2007* (Q) applies.

[112] Section 456 of the Act provides:

#### **“Decisions of tribunal about an Australian legal practitioner**

- (1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.
- (2) The tribunal may, under this subsection, make 1 or more of the following in a way it considers appropriate—
  - (a) an order recommending that the name of the Australian legal practitioner be removed from the local roll;
  - (b) an order that the practitioner’s local practising certificate be suspended for a stated period or cancelled;
  - (c) an order that a local practising certificate not be granted to the practitioner before the end of a stated period;
  - (d) an order that—

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<sup>55</sup> [2015] QCAT 426 at [17].

- (i) imposes stated conditions on the practitioner's practising certificate granted or to be issued under this Act; and
    - (ii) imposes the conditions for a stated period; and
    - (iii) specifies the time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed;
  - (e) an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner;
  - (f) an order that no law practice in this jurisdiction may, for a period stated in the order of not more than 5 years—
    - (i) employ or continue to employ the practitioner in a law practice in this jurisdiction; or
    - (ii) employ or continue to employ the practitioner in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.
- (3) The tribunal may, under this subsection, make 1 or more of the following—
- (a) an order recommending that the name of the Australian legal practitioner be removed under a corresponding law from an interstate roll;
  - (b) an order recommending that the practitioner's interstate practising certificate be suspended for a stated period or cancelled under a corresponding law;
  - (c) an order recommending that an interstate practising certificate not be, under a corresponding law, granted to the practitioner until the end of a stated period;
  - (d) an order recommending—
    - (i) that stated conditions be imposed on the practitioner's interstate practising certificate; and
    - (ii) that the conditions be imposed for a stated period; and



- (iii) a stated time, if any, after which the practitioner may apply to the tribunal for the conditions to be amended or removed.
- (4) The tribunal may, under this subsection, make 1 or more of the following—
  - (a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than \$100,000;
  - (b) a compensation order;
  - (c) an order that the practitioner undertake and complete a stated course of further legal education;
  - (d) an order that, for a stated period, the practitioner engage in legal practice under supervision as stated in the order;
  - (e) an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice;
  - (f) an order that the practitioner stop accepting instructions as a public notary in relation to notarial services;
  - (g) an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions;
  - (h) an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period;
  - (i) an order that the practitioner seek advice from a stated person in relation to the practitioner's management of engaging in legal practice;
  - (j) an order that the practitioner must not apply for a local practising certificate for a stated period.
- (5) To remove any doubt, it is declared that the tribunal may make any number of orders mentioned in any or all of subsections (2), (3) and (4).
- (6) Also, the tribunal may make ancillary orders, including an order for payment by the Australian legal practitioner of expenses associated with orders under subsection (4), as assessed in or under the order or as agreed.

- (7) The tribunal may find a person has engaged in unsatisfactory professional conduct even though the discipline application alleged professional misconduct.”

[113] It is to be noted that s 656C of the *Legal Profession Act 2007* (Q) now provides for the standard of proof before QCAT which is:

- “(1) If an allegation of fact is not admitted or is challenged when the tribunal is hearing a discipline application, the tribunal may act on the allegation if the body is satisfied on the balance of probabilities that the allegation is true.
- (2) For *subsection (1)*, the degree of satisfaction required varies according to the consequences for the relevant Australian legal practitioner or law practice employee of finding the allegation to be true.
- (3) In this section –
- “Australian legal practitioner” includes a person to whom chapter 4 applies as mentioned in section 417.”

[114] In *Legal Services Commissioner v Thomson*<sup>56</sup> Wilson J examined a case where it was alleged the practitioner misled a Federal Circuit Court Judge. His Honour said:

“[16] It is not disputed that Mr Thomson’s response was, on one construction, incorrect but a finding of actual dishonesty would not lightly be made. It is a serious allegation, and the Tribunal could not be reasonably satisfied of its truth without clear proof or testimony, or circumstances pointing to only one possible inference.

[17] The allegation that Mr Thomson, a solicitor with an unblemished record in legal practice for almost 40 years, would lie to a judicial officer is a very serious one. A finding of professional misconduct on the basis of dishonesty is, on any view, a grave matter.”

[115] The *Briginshaw* test and its successor has been applied in QCAT in a number of other legal practitioner decisions. See for example: *Legal Services Commissioner v Mould*;<sup>57</sup> *Legal Services Commissioner v Laylee & Devlin*;<sup>58</sup> *Legal Services Commissioner v Sheehy*;<sup>59</sup> and *Legal Services Commissioner v Williamson*.<sup>60</sup>

### Public servants

[116] For public servants chapter 6 of the *Public Service Act 2008* (Q) applies.

<sup>56</sup> [2011] QCAT 127 at [16-17].

<sup>57</sup> [2015] QCAT 440 at [105].

<sup>58</sup> [2016] QCAT 237 at [27].

<sup>59</sup> [2017] QCAT 276 at [5].

<sup>60</sup> [2019] QCAT 82 at [9] where Daubney J referred to section 656C of the LPA.

[117] Section 187 of the Act provides:

**“Grounds for discipline**

- (1) A public service employee’s chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has—
  - (a) performed the employee’s duties carelessly, incompetently or inefficiently; or
  - (b) been guilty of misconduct; or
  - (c) been absent from duty without approved leave and without reasonable excuse; or
  - (d) contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person; or
  - (e) used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the employee’s duties; or
  - (ea) contravened, without reasonable excuse, a requirement of the chief executive under section 179A(1) in relation to the employee’s appointment, secondment or employment by, in response to the requirement—
    - (i) failing to disclose a serious disciplinary action; or
    - (ii) giving false or misleading information; or
  - (f) contravened, without reasonable excuse—
    - (i) a provision of this Act; or
    - (ii) a standard of conduct applying to the employee under an approved code of conduct under the Public Sector Ethics Act 1994; or
    - (iii) a standard of conduct, if any, applying to the employee under an approved standard of practice under the Public Sector Ethics Act 1994.
- (2) A disciplinary ground arises when the act or omission constituting the ground is done or made.
- (3) Also, a chief executive may discipline, on the same grounds mentioned in subsection (1)—
  - (a) a public service employee under section 187A; or

- (b) a former public service employee under section 188A.
- (4) In this section—
- misconduct means—
- (a) inappropriate or improper conduct in an official capacity; or
  - (b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.

*Example of misconduct—*

victimising another public service employee in the course of the other employee’s employment in the public service

**responsible person**, for a direction, means a person with authority to give the direction, whether the authority derives from this Act or otherwise.”

[118] QCAT has a review jurisdiction under Chapter 5 Part 2 of *the Crime and Corruption Act 2001 (Q)*.<sup>61</sup>

**Ambulance, firefighters and emergency workers**

[119] Division 4 of Part 2 of the *Queensland Ambulance Service Act 1991 (Q)* applies to ambulance officers, and division 3 of part 4 of *the Fire and Emergency Services Act 1990 (Q)* applies to firefighters and emergency workers.

[120] Section 30 of the Fire and Emergency Services Act provides:

**“Grounds for disciplinary action**

- (1) A fire service officer is liable to disciplinary action upon any of the following grounds shown to the satisfaction of the commissioner to exist—
  - (a) incompetence or inefficiency in the discharge of duties;
  - (b) negligence, carelessness or indolence in the discharge of duties;
  - (c) wilful failure to comply, without reasonable excuse, with a provision of this Act or an obligation imposed on the officer under—
    - (i) a code of practice; or

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<sup>61</sup> See sections 219BA and 219G of the CCA.

- (ii) a code of conduct— (A) approved under the Public Sector Ethics Act 1994; or (B) prescribed under a directive of the commission chief executive under the Public Service Act 2008; or
    - (iii) an industrial instrument;
  - (d) absence from duty except—
    - (i) upon leave duly granted; or
    - (ii) with reasonable cause;
  - (e) wilful failure to comply with a lawful direction of the commissioner or another person having authority over the officer;
  - (f) misconduct;
  - (g) use, without reasonable excuse, of a substance to an extent adversely affecting competent performance of duties;
  - (h) contravention of a requirement of the commissioner under section 25B(1) or 25C(1) by, in response to the requirement—
    - (i) failing to disclose a serious disciplinary action; or
    - (ii) giving false or misleading information.
- (2) A disciplinary ground arises when the act or omission constituting the ground is done or made.
- (3) Also, the commissioner may—
- (a) discipline a fire service officer under subdivision 2 as if a ground mentioned in subsection (1) exists; or
  - (b) discipline a former fire service officer under subdivision 3 or 4 on the same grounds mentioned in subsection (1).
- (4) If the commissioner is contemplating taking disciplinary action against a fire service officer on the ground of absence from duty, the commissioner may—
- (a) appoint a medical practitioner to examine the officer and to give the chief executive a written report about the officer's mental or physical condition, or both; and

- (b) direct the officer to submit to the medical examination.
- (5) In this section— misconduct means—
- (a) inappropriate or improper conduct in an official capacity; or
  - (b) inappropriate or improper conduct in a private capacity that reflects seriously and adversely on QFES.

*Example of misconduct—*

victimising another fire service officer in the course of the other officer’s employment in QFES”

- [121] QCAT has a review jurisdiction under Chapter 5 Part 2 of *the Crime and Corruption Act 2001 (Q)*<sup>62</sup>.

### **Engineers**

- [122] With respect to Engineers disciplinary proceedings are brought under the *Professional Engineers Act 2002 (Q)*.
- [123] In *Board of Professional Engineers v Knight*<sup>63</sup> Member Roney said:

“[10] It is well established that proceedings of a disciplinary nature such as the present, albeit civil proceedings, with the requisite civil standard of proof applying, that required to meet the standards of the so called *Briginshaw* test; *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Rejtek v McElroy* (1965) 112 CLR 517; *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498; *Re Seidler* [1986] 1 QdR 486.

[11] The *Briginshaw* principle so-called is understood as requiring care in cases where serious allegations have been made or a finding is likely to produce grave consequences. Importantly, *Briginshaw* does not alter the standard of proof, that is, on the balance of probabilities, as the High Court emphasised in its authoritative re-statement of the *Briginshaw* principle in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992).”

### **Other professions covered**

- [124] I have not covered all of those professions/occupations covered, but QCAT has a jurisdiction for architects, building contractors, motor dealers, nurses, pharmacists, plumbers, property agents, racing personnel, second hand

<sup>62</sup> See sections 219BA and 219G of the CCA.

<sup>63</sup> [2016] QCAT 493.

dealers, security providers, surveyors, tattooists, tour operators, travel agents, valuers and veterinary surgeons.

### **Conclusion**

- [125] In conclusion I hope you have understood how the *Briginshaw* standard applies in disciplinary proceedings
- [126] It is clear that although proof is not required beyond reasonable doubt, a high degree of certainty is required where serious allegations are made.
- [127] It is an important matter to be borne in mind when preparing and presenting your cases.