

## EVIDENCE IN LEGAL PROFESSION DISCIPLINARY HEARINGS: CHANGING THE LAWYERS PARADIGM

SCOTT MCLEAN\*

### I INTRODUCTION

From 1 December 2009 the discipline of legal practitioners in Queensland will be governed by two pieces of legislation – the *Legal Profession Act 2007*<sup>1</sup> (*LPA*) and the *Queensland Civil and Administrative Tribunal Act 2009* (*QCAT Act*).<sup>2</sup>

The importance of the new legislation to lawyer regulation in this State is twofold. Firstly, the Legal Practice Tribunal (*LPT*) will be abolished and its functions replaced by the newly created Queensland Civil and Administrative Tribunal (*QCAT or Tribunal*).<sup>3</sup> Secondly, new procedural provisions will apply to disciplinary proceedings before the Tribunal. In particular, section 28(3) of the *QCAT Act* provides that the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.<sup>4</sup> Importantly, the *QCAT Act* expressly provides that the Tribunal must ensure, as far as practicable, that all relevant material is disclosed to it so that it can decide the matter with all relevant facts. This provision suggests that, as noted by the Attorney General in his second reading speech, *QCAT* is meant to provide for ‘more flexible procedures than are used in courts and will have a more inquisitorial approach compared with the traditional court based processes’.<sup>5</sup>

Though these provisions are not novel, it will be interesting to observe the approach of the Tribunal in exercising its inquisitorial procedures in proceedings under the *LPA*. There is an inherent risk that the Tribunal, like many tribunals before it, may fall into the ‘trappings of judicial decision-making’<sup>6</sup> with both lawyers and decision makers reverting to formal practices and procedures more appropriate to the traditional adversarial systems common with criminal and civil proceedings – the adversarial paradigm. As, notwithstanding the importance of the disciplinary process to the protection of the public and the integrity of the legal system in all Australian jurisdictions, it is apparent that there continues to be a misunderstanding or ‘default position’ by some policy makers, investigators, respondents and decision makers as to the purpose and nature of disciplinary proceedings – especially in the context of practice and procedural matters.

It is suggested that the prime source of this misunderstanding flows from the adversarial paradigm which informs much of Queensland’s (and, in fact, all common

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\* BA. LLB. LLM.

<sup>1</sup> As amended by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009*.

<sup>2</sup> Introduced into the Queensland Parliament on 19 May 2009. Date of assent 26 June 2009

<sup>3</sup> See the Second Reading Speech for the *Queensland Civil and Administrative Tribunal Bill 2009*. In addition to establishing *QCAT*, the Bills also amend 216 pieces of legislation; amalgamate the jurisdictions of 23 different bodies and abolish 18 existing tribunals. The Legal Practice Committee will continue to exist and operate under the provisions of the Act.

<sup>4</sup> A similar provision applies to discipline applications heard before the Legal Practice Committee - Section 645 *Legal Profession Act 2007*.

<sup>5</sup> Second Reading Speech *QCAT Bill* Hansard 19 May 2009, 1.

<sup>6</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 65 (Bowen CJ and Deane J).

law jurisdictions) legal system so that legal profession disciplinary hearings are viewed as either criminal or civil proceedings with outcomes seen as civil penalties or punishment in a quasi-criminal sense.<sup>7</sup>

The adversarial paradigm is itself based on a number of key concepts. At its simplest, the adversarial system is generally recognised as being a contest between parties such as a prosecutor (or a plaintiff) on one side and the accused (or defendant) on the other. In most cases, both civil and criminal, the judge will take only a minimal role in the investigation of the issues in dispute or the calling of the evidence. Further, in civil<sup>8</sup> and criminal proceedings, the issues are defined by the parties through an indictment or pleadings<sup>9</sup> and these are the only issues presented to a Court for consideration.

The problem is that, on almost every point, the factual assumptions underlying the adversarial paradigm (in which lawyers are educated and practice) are seriously flawed when viewed in the context of legal profession disciplinary proceedings<sup>10</sup>. A review of the legislation and disciplinary case law throughout the country demonstrate that this paradigm can impact on a wide range of decisions including:

- The adoption of an unnecessarily adversarial approach by respondent's to either the investigation or to the disciplinary proceedings themselves;
- The practice and procedure adopted by a disciplinary body in hearing discipline applications;
- Whether or not to commence disciplinary proceedings;
- The characterisation of conduct by disciplinary bodies together with the appropriate sanctions to be imposed on a finding of guilt;
- Whether or not the rules of evidence are applicable to disciplinary proceedings;
- Whether or not certain evidence should be admissible in disciplinary proceedings.

<sup>7</sup> To understand the difference between a civil penalty and a protective order *Rich v ASIC* (2004)220 CLR 129, [42] (McHugh J). See also: *Council of NSW Bar Association v Power* [2008] NSWCA 135, [13] – [19]; *Bowen James v Walton* (2001) unreported decision of NSWCA 5 August 2001, CA40432/9.

<sup>8</sup> *Uniform Civil Procedure Rules* (1999) Rule 3, provides that the rules does not apply to discipline applications before the Tribunal.

<sup>9</sup> It is important that a respondent, in order for there to be a fair hearing, to be fully aware of the allegations against them. However, the legal profession disciplinary jurisdiction is not a jurisdiction of pleadings as in civil or criminal proceedings. J.R.S Forbes, *Justice in Tribunals* (2<sup>nd</sup> ed, 2006) 133, fn 11; *Mitchell v Royal Canine Council Ltd* [2001] NSWCA 162; *Woods v Legal Ombudsman* (2004) VSCA 247.

<sup>10</sup> For greater detail on some of the essential features of the adversarial system and the problems claimed to be associated with it see: Law Reform Commission of Western Australia Consultation Paper, 'Review of the Criminal and Civil Justice System in Western Australia – Chapter 1.2: Advantages and Disadvantages of the Adversarial System in Civil Proceedings' (June 1999); T Thawley, 'Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61; D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation - Part I' (1995) 69 *Australian Law Journal* 705, 712; Justice G Nettle, 'Ethics – The Adversarial System and Business Practice' (2005) 68 *Deakin Law Review* 67, 68; Australian Law Reform Commission, 'Review of the adversarial system of litigation: Rethinking the federal civil litigation system' Paper 20, ch 1-2; Justice M Gleeson, 'Beyond the Adversarial System' (Speech delivered at the launch of the Victorian Bar Legal Assistance Scheme, Melbourne, 16 February 2001); H Stacey and M Lavarch (eds), *Beyond the Adversarial System* (1999).

Though each of these points is worthy of its own paper, it is the last which is perhaps the most relevant to those practitioners who appear in legal profession disciplinary hearings. As it is now 5 years since the commencement of the *Legal Profession Act 2004* and with the commencement of QCAT together with renewed efforts at introducing truly uniform legislation across Australia dealing with the regulation of the legal profession, it seems appropriate to examine in greater detail an aspect of disciplinary procedure in Queensland which has not been the subject of detailed discussion or debate<sup>11</sup> – the admissibility of evidence in legal profession disciplinary hearings.

Section 28(3) (b) provides that the Tribunal is not bound by the rules of evidence. So what are the rules of evidence? As pointed out in a recent article, the rules of evidence ‘may mean those rules which govern the admissibility of evidence, the manner of presenting evidence, and it may extend to those rules which govern the manner in which evidence may be used to determine questions of fact.’<sup>12</sup>

This paper will consider section 28(3)(b) in the context of the admissibility of evidence in the Tribunal and the possible implications it has for the conduct and hearing of discipline applications under the LPA. In doing so, this paper will seek to dispel any lingering concerns regarding the nature or purpose of legal profession disciplinary proceedings. This article suggests that when considering the admissibility of evidence in such proceedings practitioners and decision makers must step outside of the adversarial paradigm. The paper argues that the issue of the admissibility of evidence must not be lost in the debate regarding any new uniform laws and, importantly, that decisions not be made on the basis of the lowest common denominator. It argues that the Queensland approach on this aspect of disciplinary procedure is the most appropriate model to achieve the policy objectives of lawyer discipline.

In considering these issues, the paper is divided into four parts. The first part examines the nature and purpose of legal profession discipline. The second part then goes on to explore the legislative provisions applicable to lawyer discipline in Queensland in greater detail. The third part examines the general principles relevant to the admissibility of evidence in a tribunal where the rules of evidence do not apply. Finally, in understanding those principles, the fourth part explores particular rules of evidence in the context of section 28(3) with reference to relevant case law.

The first step towards appreciating the issues relevant to the admissibility of evidence in the Tribunal is understanding the policy behind the discipline of legal practitioners.

## II BACKGROUND TO LEGAL PROFESSION DISCIPLINE

The conduct of legal profession disciplinary proceedings is underpinned by two major public policy considerations. The first and paramount is that the purpose of the jurisdiction is not about punishment or retribution but protection. As a protective jurisdiction, legal profession disciplinary hearings have different functions and processes to criminal or civil proceedings. For example, civil

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<sup>11</sup> Though the admissibility of evidence in Tribunals generally has been the subject of previous articles and discussion: N Rees, ‘Procedure and Evidence in “Court Substitute” Tribunals’ (2006) 28 *Australian Bar Review* 41; K Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) *Australian Institution of Administrative Law Forum* 18; Justice Giles, ‘Dispensing with the Rules’ (1991) 7 *Australian Bar Review* 233.

<sup>12</sup> Rees, *ibid*, 70.

proceedings are generally brought by one party to protect, enforce, or obtain redress in respect of private rights or to seek compensation for a wrong done by another whilst the criminal jurisdiction's objective is to control, deter and punish the commission of crime.<sup>13</sup>

It is only natural when people hear of a lawyer losing their right to practice, being suspended or fined that they will see this as the disciplinary body punishing the practitioner. However, that is not the intention or purpose of disciplinary proceedings.

This position is well recognised in Australian case law. For example, in *New South Wales Bar Association v Evatt*<sup>14</sup> the High Court of Australia remarked:

The power of the Court to discipline a barrister is, however, entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved.

Likewise, in *Ziems v The Prothonotary of the Supreme Court of New South Wales*.<sup>15</sup>

The jurisdiction the court exercises has nothing to do with punishment. The purpose of the power to remove from the roll of barristers is simply to maintain a proper standard, and that is a necessarily high standard, for the Bar is a body exercising a unique but indispensable function in the administration of justice.

The protective nature of the jurisdiction was explored by the New South Wales Court of Appeal in *NSW Bar Association v Meakes*<sup>16</sup> which remarked:

That being said, it may also be noted that the protective purpose may operate in different ways. First, by its direct effect upon the practitioner, the order will either remove that practitioner from membership of the profession (by disbarment or suspension) or will provide a deterrent against the repetition of such conduct (in the case of a fine or reprimand). There are also important but indirect effects to be considered. First, the order reminds other members of the profession of the public interest in the maintenance of high professional standards. Secondly and more specifically, it may give emphasis to the unacceptability of the kind of conduct involved in the disciplinary offence. Thirdly, by speaking to the public at large, it seeks to maintain confidence in the high standards of the profession. The underlying purpose is not self-aggrandisement on the part of the profession, but a recognition of the social value in the availability of the services provided to the public, combined with an understanding of the vulnerability of many who require such services.

That decision demonstrates that the protective purpose of legal profession disciplinary proceedings is really twofold. Firstly, they are important in examining the conduct of lawyers with the purpose of protecting members of the public from

<sup>13</sup> Australian Law Reform Commission Report 38, *Evidence*, [35] ch 3.

<sup>14</sup> (1968) 117 CLR 177, 183–4.

<sup>15</sup> (1957) 97 CLR 279, 286, 289. See also: *Smith v NSW Bar Association* (1992) 176 CLR 256, 270 per Deane J; *Legal Practitioners Conduct Board v Thomson* (2009) SASC 149; *Re A Solicitor v Law Society of NSW* (2004) 216 CLR 253; *Southern Law Society v Westbrook* (1910) 10 CLR 609; *The Attorney-General v. Bax* [1999] 2 Qd.R. 222; *Legal Services Commissioner v Baker* (2005) LPT 2; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239; *Law Society of New South Wales v. Foreman* (1994) 34 NSW Reports 408.

<sup>16</sup> (2006) NSWCA 340, [114].

misconduct.<sup>17</sup> As the Queensland Court of Appeal in *Legal Services Commission v Madden*<sup>18</sup> recognised:

Disciplinary penalties are not imposed as punishment but rather in the interests of the protection of the community from unsuitable practitioners.

The second purpose, and allied to the first, is the importance of protecting the reputation of the legal profession so as to maintain community confidence in the rule of law. It is well understood that unethical behaviour by members of the profession can have symbolic effect on the public confidence in the rule of law.<sup>19</sup> As stated by His Honour Mr Justice Marks in *Hercules v Phease*.<sup>20</sup>

The regulation of the legal profession and supervision over disciplinary procedures is an integral part of the judicial arm of government which is dependant for its proper service to the public, not only on the integrity of the courts, but on the integrity of all those who practice before them and provide legal services.

However, it is surprising that, given the numerous decisions by Courts and legal profession disciplinary bodies about the protective objectives of professional disciplinary proceedings, there still appears to be an entrenched view within some quarters of the profession as well as policy makers that proceedings before legal disciplinary bodies are quasi-criminal and punitive. Unfortunately, this view is not assisted by findings of ‘guilt’ or to the language adopted by regulators, respondents and decision makers in disciplinary hearings which are more consistent with criminal or civil penalty proceedings.

As will be argued later in this paper, the protective purpose of legal profession disciplinary hearings is highly relevant to the issue of determining the admissibility of evidence in the context of section 28 – just as it is to other aspects of disciplinary tribunal practice and procedure such as:

- (a) The rules of double jeopardy or *autrefois acquit* do not apply;<sup>21</sup>
- (b) Stay of proceedings pending appeal;<sup>22</sup>
- (c) Sanction.<sup>23</sup>
- (d) Costs.<sup>24</sup>

Though the purpose of disciplinary proceedings is generally well known, they may (and do) become frustrated when the *nature* of the proceedings is not appreciated by practitioners or the relevant disciplinary body. This is the second of the public policy considerations relevant to legal profession disciplinary hearings.

<sup>17</sup> *Weaver v Law Society of New South Wales* (1979) 142 CLR 201, 207.

<sup>18</sup> [2008] QCA 301, [122].

<sup>19</sup> Gino E Dal Pont, *Lawyers Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001) 578.

<sup>20</sup> (1994) 2 VR 41, 423.

<sup>21</sup> *HCCC v Litchfield* (1997) 41 NSWLR 630.

<sup>22</sup> *Legal Services Commissioner v Madden* [2008] QCA 52; *Legal Services Commissioner v Baker No 1* [2006] 2 Qd R 107.

<sup>23</sup> *Re A Solicitor v Law Society of NSW* (2004) 216 CLR 253.

<sup>24</sup> *Legal Profession Act* (Qld) s 452 as amended by *QCAT Jurisdiction Provisions Act* 2009 (Qld) s 1516. *QCAT Act* (Qld) s 100. See also: *Legal Services Commissioner v Sing* (2007) LPT; *Baxendale-Walker v The Law Society* [2006] EWHC 643; *New South Wales Bar Association v Tedeschi* (No.3) [2003] NSWADT 174

The nature of legal profession disciplinary hearings has been commented upon widely and described as non-adversarial and more akin to an inquiry. Though proceedings are referred to as disciplinary proceedings, to describe them as such has potential to mislead<sup>25</sup> those not familiar with the jurisdiction. The jurisdiction is a 'special one'<sup>26</sup> which should not be mistaken as a dispute inter-parties but are, as has been regularly explained, *sui generis*.<sup>27</sup>

The description of the nature of the proceedings as a non-adversarial inquiry is demonstrated practically in two ways. The first is the respondent's obligation to assist the investigation<sup>28</sup> into his or her conduct, rather than adopting an adversarial approach as is the case in civil or criminal proceedings. There are a number of authorities which discuss the duty of legal practitioners to co-operate both with investigations and hearings undertaken by the Tribunal.

In *Council of the Law Society of Queensland v Whitman*,<sup>29</sup> the Chief Justice remarked:

That leads into an overarching consideration. The respondent was generally uncooperative with the appellant, and apparently took an unduly combative approach before the Tribunal. Neither the investigation, nor the hearing, is criminal in nature: it is a process directed towards protection of the public. Recognizing that, a practitioner is duty bound to cooperate reasonably in the process.

Likewise, in *Malfanti v Legal Profession Disciplinary Tribunal*,<sup>30</sup> Clarke JA remarked:

The Tribunal is bound to mould its procedures to enable it efficiently and effectively to carry out its functions in an expeditious manner. In making these comments I have not overlooked the principle that a solicitor who appears before the Tribunal is bound to assist it in its investigations. (See *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1, 6 per Moffitt P).

Similarly, in *Re: Veron; Ex Parte Law Society of NSW*<sup>31</sup> the Court made the following observations:

The jurisdiction is a special one and it is not open to the respondent when called upon to show cause as an officer of the Court to lie by and engage in a battle of tactics as was the case here, and to endeavour to meet the charges by mere argument. We are well aware that if a solicitor is called upon to show cause he may do so in several ways. He may:

- a) argue that the material before the Court discloses no evidence of misconduct;
- b) argue that the facts adduced in evidence do not warrant a finding of misconduct;
- c) meet the decision by denial or explanation, in either case upon oath of the truth or of the significance of the facts deposed to.

<sup>25</sup> *Martin v Medical Complaints Tribunal* [2006] TASSC 73, [21].

<sup>26</sup> *Ibid* [21].

<sup>27</sup> *Weaver v Law Society* (1979) 25 ALR 359, 363: 'Disciplinary proceedings under the Legal Practitioners Act and in the exercise of the Supreme Court's inherent jurisdiction are not criminal proceedings, they are proceedings *sui generis*'. In *McCarthy v Law Society of New South Wales* (1997) NSWLR 42 the Court noted that disciplinary proceedings are more analogous to civil proceedings.

<sup>28</sup> *Legal Profession Act 2007* (Qld) s 443.

<sup>29</sup> (2003) QCA 438.

<sup>30</sup> [1993] 1 LPDR 17, 19.

<sup>31</sup> (1966) WN NSW 136.

It is the last alternative in the main with which the Respondent was faced here. Yet as we have said, no denial or explanation was forthcoming, the Respondent having sought what refuge was available in argument from the bar table.

The fact that the nature of proceedings before the Tribunal are to be approached as a non-adversarial inquiry is further supported by a close inspection of the QCAT Act which specifically provides the Tribunal with extensive investigative powers. These include the ability to:

- issue directions on its own initiative;<sup>32</sup>
- inform itself on any matter in such manner as it thinks appropriate;<sup>33</sup>
- require a person on its own initiative to attend before the Tribunal to give evidence or produce documents or things.<sup>34</sup>
- act with as little formality and technicality as possible;<sup>35</sup>
- vary a discipline application on its own motion;<sup>36</sup>
- 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.<sup>37</sup>

Given that the statutory function of the Tribunal is protective and its nature inquisitorial, it follows that the Tribunal must form its own views about the evidence, the characterisation of the conduct or the appropriate orders notwithstanding any agreement between the Commissioner and the respondent.<sup>38</sup> It

<sup>32</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 62.

<sup>33</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(c).

<sup>34</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 97.

<sup>35</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s28(3)(d).

<sup>36</sup> *Legal Profession Act 2007* (Qld) s 455, as amended by *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1513. This is a new investigatory power for disciplinary bodies in Queensland. Previously the LPT and LPC did not have power to vary a discipline application on their own motion. A provision such as this would have avoided the problems which were faced by the LPT in *Legal Services Commissioner v Madden* (2008) LPT 1. In that case the respondent accepted 4 charges contained in a discipline application which included two allegations of acting without instructions. The Commissioner and the respondent agreed a statement of facts as the factual basis for determining the application. The parties had also agreed to the sanctions to be submitted to the Tribunal. However, when the matter came on for hearing, the LPT raised for the first time with the parties an inference from the statement of facts that the respondent acted deceitfully. The Tribunal provided to the parties a document headed '*Arguable inferences from agreed facts*' and invited the Commissioner to amend the discipline application so that the issue of deceit could be explored. The Commissioner declined. Notwithstanding that, the Tribunal embarked on an inquiry into this issue of dishonesty which resulted in the respondent providing an affidavit and being subject to cross-examination. At the conclusion of the hearing, the Tribunal found that there was dishonesty in the respondent's conduct and he was subsequently removed from the roll. On appeal, the Court of Appeal overturned the LPT's decision and found that without the Commissioner seeking to vary the discipline application to allege dishonesty, the LPT had no power to go beyond the terms of the allegations on its own.

<sup>37</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(e).

<sup>38</sup> Though there was no express provision in the *Legal Profession Act 2007* (Qld) the LPT would ensure that sufficient evidence was before it to make a decision. This was a recognition by some members of the inquisitorial and protective role of the LPT. For example *Legal Services Commissioner v Hackett* (2006) LPT 15. A different approach was taken in *Legal Services Commissioner v Galitsky* [2008] NSWADT 48. The NSWADT was called on to determine whether the respondent barrister overcharged his

is likely that, in keeping with the practice of the LPT before it, the Tribunal will generally be guided by the parties as to the relevant issues and accept admissions of fact but will not permit parties to place it in the position of deciding a case on an artificial or inadequate factual basis.

However, the nature and purpose of legal profession disciplinary proceedings do not exist in a vacuum and must be understood within the legislative framework for lawyer discipline in this State which is explained below.

### III LEGISLATIVE FRAMEWORK

In Queensland, the disciplinary system is set out in Chapter 4 of the LPA which, as most practitioners are aware, commenced on 1 July 2007 and represented the (then) final stage of reforms for the legal profession. The purpose of the chapter is three-fold:<sup>39</sup>

- a) to provide for the discipline of the legal profession;
- b) to promote and enforce the professional standards, competence and honesty of the legal profession;
- c) to provide a means of redress for complaints by consumers of the services of the legal profession.

The LPA established an independent Legal Services Commissioner<sup>40</sup> and Legal Services Commission<sup>41</sup> to act as the sole body to receive and deal with complaints about lawyers and law practice employees. The Commissioner's functions include:

- receiving complaints of unsatisfactory professional conduct<sup>42</sup> or professional misconduct<sup>43</sup> against legal practitioners;

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three clients by failing to apportion costs common to the three matters. The background to the case was that the respondent appeared in a 6 day trial in the District Court on behalf of three Plaintiffs, members of the same family, who sustained injuries in similar circumstances on different days. As a result, the barrister sought to charge the three clients each \$2,000 a day (in accordance with the separate client agreements). As the tribunal recognised, the applicant's case necessitated a careful examination of matters of principle and appropriate practice. In the course of the proceedings, the Commissioner's case was heavily criticised as "*ill conceived and ill prepared*" as he did not lead expert evidence which could ground any finding of professional misconduct on the part of Mr Galitsky.

Putting to one side whether the criticism of the Commission's case was warranted, it is suggested that the tribunal's approach to the disciplinary application in this case appears to be inconsistent with its statutory function as it adopted an adversarial as opposed to inquisitorial approach to the proceedings. If the hearing had been before a court, and was based on issues framed by the parties' pleadings, there would be force in the argument that the application should be fought and decided on the evidence presented by the parties. However, as this was a legal profession disciplinary hearing then arguably, given the seriousness of the allegations and the fact that the tribunal 'could not have been expected to possess the necessary expertise to determine this question, bearing in mind that any adverse finding could have resulted in a determination that the respondent was guilty of professional misconduct and lead to grossly serious consequences for him' the tribunal should have required further evidence so as to satisfy its protective role. Cf, *Law Society of NSW v Maria Bechara* [2008] NSWADT 215.

<sup>39</sup> *Legal Profession Act 2007* (Qld) s 416.

<sup>40</sup> *Legal Profession Act 2007* (Qld) Division 2 Part 7.1 of Chapter 7.

<sup>41</sup> *Legal Profession Act 2007* (Qld) Division 4 Part 7.1 of Chapter 7.

<sup>42</sup> *Legal Profession Act 2007* (Qld) s 418; see also: *Legal Profession Act 2007* (Qld) s 420.

- investigating complaints and investigation matters either through the Commission's investigators or by referring investigations undertaken by professional associations including the Bar Association of Queensland and Queensland Law Society;
- commencing and prosecuting disciplinary proceedings in the Tribunal or Committee.

Part 4.4 of Chapter 4 deals with the practicalities of undertaking an investigation of a complaint or investigation matter. At the conclusion of an investigation the Commissioner must decide whether or not to file a discipline application with a disciplinary body. As stated in the Commissioner's prosecution policy,<sup>44</sup> the Commissioner will not commence disciplinary action unless satisfied that the evidence after investigation establishes that:

- there is a reasonable likelihood of a finding by the disciplinary body of unsatisfactory professional conduct or professional misconduct (the reasonable likelihood test); and
- it is in the public interest to make a discipline application (the public interest test).<sup>45</sup>

If the answer to both questions is yes, then the Commissioner may apply by way of a discipline application<sup>46</sup> to one of the two disciplinary bodies being the Legal Practice Committee and, as of 1 December 2009, the Tribunal.

The Commissioner will commence proceedings in the Tribunal<sup>47</sup> if the allegations relate to professional misconduct or unsatisfactory professional conduct<sup>48</sup> or the Committee<sup>49</sup> if the allegation is unsatisfactory professional conduct only.

The Tribunal's jurisdiction in respect of the LPA is to hear and decide any discipline applications made to it. Importantly, the Tribunal is constituted by a judicial member of QCAT who is a Supreme Court Judge.<sup>50</sup> There are also two panels appointed by Governor-in-Council<sup>51</sup> to help the Tribunal. There is a lay member panel<sup>52</sup> made up of people who are not lawyers but who have a high level of experience and knowledge of consumer protection, business, public administration or other relevant area<sup>53</sup> and also a practitioner panel.<sup>54</sup> The Tribunal therefore acts as a specialist tribunal comprised of one Supreme Court Justice and helped by one lay member and one practitioner member<sup>55</sup> responsible for determining issues relating to the conduct of legal practitioners.

<sup>43</sup> *Legal Profession Act 2007* (Qld) s 419.

<sup>44</sup> See also: LSC Prosecution Policy, Prosecution Guideline <<http://www.lsc.qld.gov.au/policies/prosecution-guidelines>> at 4 August 2009.

<sup>45</sup> *Legal Profession Act 2007* (Qld) s 448; 452. See also *ibid*.

<sup>46</sup> *Legal Profession Act 2007* (Qld) s 452(2).

<sup>47</sup> *Legal Profession Act 2007* (Qld) s 452(1)(a).

<sup>48</sup> See the Legal Services Commissioner's prosecution policy for guidelines on when allegations of unsatisfactory professional conduct will be referred to the Tribunal.

<sup>49</sup> *Legal Profession Act 2007* (Qld) s 452(1)(b).

<sup>50</sup> *Legal Profession Act 2007* (Qld) s 598(1) as amended by *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) s 1525.

<sup>51</sup> *Legal Profession Act 2007* (Qld) s 608.

<sup>52</sup> *Legal Profession Act 2007* (Qld) s 607(1)(a).

<sup>53</sup> *Legal Profession Act 2007* (Qld) s 608 (2)(a).

<sup>54</sup> *Legal Profession Act 2007* (Qld) s 607(1)(b).

<sup>55</sup> *Legal Profession Act 2007* (Qld) s 599 as amended by s 1525 *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld).

The orders which the tribunal may make following a finding that a practitioner has engaged in professional misconduct or unsatisfactory professional conduct are set out in section 456 of the Act and include removal from the roll,<sup>56</sup> suspension,<sup>57</sup> financial penalty up to \$100,000.00,<sup>58</sup> reprimand and compensation orders.<sup>59</sup>

The procedures for hearings before the Tribunal<sup>60</sup> which are held in public<sup>61</sup> and where the civil standard of proof applies<sup>62</sup> and are set out in Part 7.4A of Chapter 7 of the LPA together with Parts 2-4 of Chapter 2 of the QCAT Act. For the purposes of this paper, the relevant procedural provision is section 28(3)(b) which provides that the Tribunal:

(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.

Though the section is a usual feature of the practice and procedure of many tribunals, the fact that the Tribunal is not bound by the rules of evidence appears to be, of all the Australian jurisdictions, unique to Queensland. As many practitioners will be aware the current framework for the regulation of the legal profession flowed from the work of the Law Council of Australia for the Standing Committee of Attorneys-General preparing model laws. These national model laws had as their dual aims ensuring consistent laws for the regulation of Australia's legal profession as well as the reduction in regulatory compliance costs.<sup>63</sup> The model laws themselves were made up of three types of provisions:

- Core Uniform (CU) – core provisions that are to be adopted in each State and Territory, using the same wording as far as practicable.
- Core Non Uniform (CNU) – core provisions that are to be adopted in each State and Territory, but the wording of the model provisions need not be adopted
- Non Core (NC) – States and Territories can choose the extent to which they will adopt these provisions.

Unfortunately, the section dealing with the applicability of the rules of evidence to disciplinary proceedings was a 'non-core' provision. As a result, what could be admissible in Queensland and lead to disciplinary sanction may not be admissible in New South Wales or Victoria. Though Queensland is unique in its approach to the issue in Australia, it is not alone amongst common law jurisdictions as illustrated by the following table.

<sup>56</sup> *Legal Profession Act 2007* (Qld) s 456.

<sup>57</sup> *Legal Profession Act 2007* (Qld) s 456.

<sup>58</sup> *Legal Profession Act 2007* (Qld) s 456.

<sup>59</sup> The Act further provides for an appeal to the Court of Appeal against any finding or order made by the Tribunal, *Legal Profession Act 2007 (Qld)* s 468.

<sup>60</sup> In respect of the practice and procedure of the Committee see: *Legal Profession Act 2007* (Qld) Division 1 of Part 7.4.

<sup>61</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 90.

<sup>62</sup> *Legal Profession Act 2007* (Qld) s 656C(1).

<sup>63</sup> Second Reading Speech, *Legal Profession Bill 2007* (Qld) The Honourable Mr Kerry Shine Hansard on 19 April 2007.

State	Legislation	Admissibility
National	Section 4.9.7 of the National Model Bill	Provides that a Disciplinary Tribunal is bound by the rules of evidence but that jurisdictions may provide that the Tribunal is not bound by the rules of evidence
Qld	Section 28(3)(b) QCAT Act	Not bound by the rules of evidence
NSW	Section 558 Legal Profession Act 2004	Rules of evidence apply
Tasmania	Section 424 Legal Profession Act 2006	Rules of evidence apply ( <i>cf</i> <sup>64</sup> Section 60(7) <i>Legal Profession Act 1993</i> ).
Northern Territory	Section 521 Legal Profession Act	Rules of evidence apply
ACT	Section 424 Legal Profession Act 2006	Rules of evidence apply
Victoria	Section 98(1)(a) Victorian Civil and Administrative Tribunal Act 1998	Rules of evidence apply ( <i>cf</i> <sup>65</sup> Section 408(1) <i>Legal Practice Act 1996</i> )
South Australia	Section 366 Legal Profession Bill 2007	Upon commencement of the Act, the rules of evidence will apply before the Legal Practitioners Disciplinary Tribunal ( <i>Cf</i> <sup>66</sup> Rule 11 <i>Legal Practitioner Disciplinary Tribunal Rules 1983</i> )
Western Australia	Section 32(1), State Administrative Tribunal Act 2004 (WA).	Rules of evidence apply ( <i>cf</i> <sup>67</sup> Section 184 <i>Legal Practice Act 2003</i> )
England & Wales	Rule 13(10) The Solicitors (Disciplinary Proceedings) Rules 2007	Not bound by the rules of evidence

The fact that the other Australian jurisdictions have adopted provisions explicitly stating that the rules of evidence apply to disciplinary proceedings is surprising. This is especially so given that, during the last review of the New South Wales LPA in 2000, the New South Wales Law Reform Commission recommended that the rules of evidence should not apply to disciplinary proceedings against

<sup>64</sup> Previously legal profession disciplinary hearings in Tasmania were not bound by the rules of evidence.

<sup>65</sup> Previously legal profession disciplinary hearings in Victoria were not bound by the rules of evidence.

<sup>66</sup> In South Australia, the Legal Practitioners Disciplinary Tribunal has discretion as to whether or not it will be bound by the rules of evidence.

<sup>67</sup> Previously legal profession disciplinary hearings in Western Australia were not bound by the rules of evidence.

lawyers. In making that recommendation it recognised the protective purpose of the legislation and noted that other protective professional disciplinary tribunals did not apply the rules of evidence.<sup>68</sup>

The question which naturally follows is why, then, has there been a move in the other jurisdictions to adopt the rules of evidence in legal profession disciplinary proceedings. The importance of answering that question has become more relevant with the establishment by COAG on 30 April 2009<sup>69</sup> of the National Legal Profession Reform Project which has charged the Project Taskforce to draft simplified uniform national legislation by 30 April 2010. It is hoped that as part of that exercise that the question of the applicability of the rules of evidence in disciplinary proceedings will be re-visited. Though the inclusion of the rules of evidence in the other jurisdictions could be for any number of reasons, it is argued that policy assumptions based in the adversarial paradigm could be informing policy decisions in respect of this issue.

In the writers view, there are no strong policy reasons why legal profession disciplinary hearings should be bound by the rules of evidence. If one accepts that the practice and procedure of a tribunal should be designed to serve the purpose and nature of the proceedings before it, the question must become – what purpose is served by applying the rules of evidence to disciplinary proceedings? The rules of evidence were developed as exclusionary rules in the context of an adversary system<sup>70</sup> designed to serve the purpose of criminal and civil proceedings. As argued earlier, the nature and purpose of those proceedings differ significantly from legal profession disciplinary hearings which are purely protective and by nature a non-adversarial inquiry. Section 28(3)(b) is consistent with both those policies. Applying these principles, the dispensation from applying the rules of evidence is warranted and appropriate. It follows, then, that a provision requiring a disciplinary body be bound by the rules of evidence is inconsistent with the well recognised policy objectives of legal profession disciplinary proceedings.

Perhaps one argument in favour of the approach adopted by the other States is concern that the proceedings would be unfair if a disciplinary body was not bound by the rules of evidence given the serious consequences to the reputation and livelihood of practitioners. Perhaps there is concern that unfairness would result from decisions which would appear to be arbitrary and subjective

As will be explained in the following part, such concern is simply not sustainable on any proper interpretation of section 28(3)(b).

#### IV PRINCIPLES OF LAW

It is important at the outset to appreciate that section 28(3)(b) provides that the Tribunal is not ‘bound’ by the rules of evidence not that they do not apply. A statutory provision such as section 28(3)(b) does not mean that the Tribunal is an evidential free fire zone. It does not mean, as noted in one English disciplinary

<sup>68</sup> New South Wales Law Reform Commission Report, *Complaints Against Lawyers* (2000) Recommendation 31 which states: ‘Section 168 of the *Legal Profession Act 1987* (NSW) should be repealed so that the Legal Services Division of the Administrative Decisions Tribunal is not bound by the rules of evidence in any proceedings so long as the rules of natural justice are followed. The privilege against self incrimination in other proceedings must also be preserved’.

<sup>69</sup> Attorney-General for Australia, *National Legal Profession Reform* (30 April 2009) <[www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2009\\_SecSecondQuar\\_30April2009-NationalLegalProfessionReform](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecSecondQuar_30April2009-NationalLegalProfessionReform)>.

<sup>70</sup> Australian Law Reform Commission Report, see above n 13, [52] ch 3.

decision that ‘anything goes’<sup>71</sup> such that a paper dart thrown in a window by someone outside could be taken as evidence of anything which ‘*chanced to be written on it*’.

The principles governing the admissibility of evidence in circumstances where the Tribunal is not bound by the rules of evidence have been examined in a large number of cases and commentary from a wide variety of tribunals. The legal principles governing the admissibility of evidence in tribunals not bound by the rules of evidence are not controversial but are perhaps not generally appreciated by those caught in the adversarial paradigm. The case law demonstrates that a tribunal which is not bound by the rules of evidence may have regard to evidence which is logically probative regardless of whether or not it is legally admissible<sup>72</sup>. In short, admissibility is generally to be determined by relevance.

It is not the purpose of this paper to engage in a thorough review of the relevant cases. However, in order to explain the principles in greater detail, some review is necessary. In Australia, the starting point in a discussion on this issue is often *Casey v Repatriation Commission*.<sup>73</sup> In that case, the court was concerned with an appeal by Mr Casey from the decision of the Administrative Appeals Tribunal which confirmed a decision of the Repatriation Commission that certain health issues were not war caused. One of the grounds of appeal was that the Administrative Decision Tribunal, though not bound by the rules of evidence<sup>74</sup>, allowed a statement of principles adopted by the Commission into evidence notwithstanding objection by the appellant’s counsel as it afforded assistance to the Tribunal in coming to its decision. In rejecting this ground of appeal, His Honour Hill J remarked:

However, section 33 of the *AAT Act* means what it says. The fact that material may be inadmissible in accordance with the laws of evidence does not mean that it cannot be admitted into evidence by the Tribunal or taken into account by it. The criterion for admissibility of material in the Tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance.

If, for example, a question arose as to the relationship between cancer, on the one hand, and passive smoking on the other, there could be no objection to the Tribunal having regard to reports published, for example by the National Health and Medical Research Council to inform itself: cf *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1, 54 et seq. Such reports would be relevant, albeit inadmissible in a court, to prove the relationship. The weight to be given to the report would be a matter for the Tribunal.

In *Minister for Immigration and Ethnic Affairs v Pochi*<sup>75</sup> the Court heard an appeal from a decision of the Administrative Appeals Tribunal (Cth) which had reviewed a decision to deport the respondent under the *Migration Act 1958*. In supporting the Minister’s decision to deport the respondent, hearsay evidence was heard that the respondent had engaged in illegal drug activities. The procedure in the AAT Act provided that the tribunal was not bound by the rules of evidence but was under a duty to observe the requirements of natural justice. His Honour Deane J, in discussing the application of that section, referred with approval to a statement by

<sup>71</sup> *Re Fraser Health Authority* (2006) CANLII 32976, [13]; *Re A Solicitor* (1996) EWHC Admin 193, [19].

<sup>72</sup> *The King v War Pensions Entitlements Appeals Tribunal ex parte Bott* (1933) 50 CLR 228, 257.

<sup>73</sup> (1995) 60 FCR 510 at 514. Mason, see above n 11, 21.

<sup>74</sup> *Administrative Appeals Tribunal Act 1975* (NSW) s 33.

<sup>75</sup> (1980) FCA 85.

Lord Justice Diplock in *R v Deputy Industrial Injuries Commissioner*;<sup>76</sup> *Ex parte Moore* where the court remarked:

These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.

However, though admissibility is primarily to be determined by relevance and logical probity, a tribunal must also consider at least two other factors. The first is that a legislative provision such as section 28(3)(b) does not mean that the rules of evidence may be ignored by a tribunal.<sup>77</sup> As is pointed out by the learned author in '*Justice in Tribunals*',<sup>78</sup> provisions such as section 28(3)(b) do not mean that rules that apply to courts are not relevant to Tribunals but that they remain a useful guide to weight and probity.<sup>79</sup>

The continued importance of the rules of evidence was observed by His Honour Evatt J in *R v War Pensions Entitlement Appeals Tribunal; ex parte Bott*<sup>80</sup>, where he stated:

Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.

The second important matter to appreciate is that procedural fairness or natural justice remains perhaps the greatest factor in determining whether or not a tribunal will admit evidence notwithstanding that it is not bound by the rules of

<sup>76</sup> (1965) 1 QB 456, 488.

<sup>77</sup> *Chandra v Brisbane City Council* (2002) QADT 1; *Marotta v Richards & Warner Bros Movie World* [2000] QADT 9; *R v The War Pensions Entitlement Appeal Tribunal* (1933) 50 CLR 228, 256.

<sup>78</sup> Forbes, see above n 9, [12.44]; *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 256, Brennan J remarked that 'to depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force'.

<sup>79</sup> Cf, noted in *Cross on Evidence 7<sup>th</sup> Australian Edition Butterworths* (2004) para 11120: 'It is interesting to note in proceedings where the general exclusionary rules of evidence do not apply, for example in some tribunals, there is no room for an exclusionary discretion. Where statute has sought to extend the range of material available to the tribunal, it is not for the tribunal to cut it down as it chooses by the exercise of any such discretion. *Rosedale Mouldings Ltd v Sibley* [1980] ICR 816, 822'.

<sup>80</sup> (1933) 50 CLR 228, 256.

evidence. In another deportation case on appeal from the Administrative Appeals Tribunal, *Re Saverio Barbaro and Minister for Immigration and Ethnic Affairs*,<sup>81</sup> the court made the following remarks regarding the issue of the rules of natural justice and admissibility:

In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits.

Likewise, in *Minister for Immigration and Ethnic Affairs v Pochi* His Honour Brennan J noted:

That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence.

In considering the admissibility of evidence in the Tribunal, it is suggested that a broad reading of section 28(3)(b)<sup>82</sup> is justified when one considers these principles not in the context of an adversarial hearing but rather in proceedings made to protect both the public and the reputation of the profession. In summary then, the following general principles are suggested as being relevant to the Tribunal's considerations when applying section 28(3)(b) to disciplinary proceedings under the Act:

- (a) The intent of the legislation and the purpose of legal profession discipline;
- (b) The nature of the proceedings as being a protective inquiry as opposed to an adversarial criminal or civil hearing;
- (c) The Tribunal may disregard the rules of evidence provided that the evidence sought to be lead can logically prove or disprove the existence of facts in issue;
- (d) The rules of evidence remain a useful guide to weight and probity;
- (e) The Tribunal must continue to observe procedural fairness so that a respondent who is faced with adverse evidence which has been admitted into evidence by the section is given the opportunity of testing that evidence.

<sup>81</sup> (1980) 3 ALD 1, 4; *Ileris and Comcare* [1999] AATA 647, 25.

<sup>82</sup> What the section does not permit is evidence in breach of the privilege against self incrimination or legal professional privilege.

## V PRACTICAL EXAMPLES

To date there has been no need for the LPT (or LPC) to consider at length its powers to receive evidence and information notwithstanding the determination of approximately 90 discipline applications which covered a wide range of conduct alleged to amount to professional misconduct<sup>83</sup> or unsatisfactory professional conduct<sup>84</sup> including convictions for criminal offences, swearing false and misleading affidavits, overcharging, trust account violations, lack of supervision and poor professional service generally.

As a result, in order to consider the application of rules of evidence in the context of section 28(3)(b) in disciplinary proceedings commenced under the LPA it is necessary to examine the case law of other jurisdictions with similar procedures - these are discussed below.

## A Hearsay

Hearsay, as a rule of evidence, is defined in Cross on Evidence<sup>85</sup> as follows:

The law is that assertions by persons other than the witness who is testifying are inadmissible as evidence of the facts asserted. To this rule there are many common law exceptions.

Practically, what is the effect of section 28(3)(b) in respect of the rule against hearsay? Does it mean that the Tribunal may rely on statements of a complainant or other witnesses when that person is not called for cross-examination? Can the Tribunal have regard to documents when the makers of those documents are not called?

The answer, in short, is yes provided of course that the evidence is logically probative of the facts in issue. However, that does not mean that the Tribunal may wholly disregard the rule<sup>86</sup>. The principles governing the admissibility of hearsay are demonstrated in the following two decisions. Firstly, in *Minister for Immigration and Ethnic Affairs v Pochi*, His Honour Brennan J noted:

[Hearsay] 'has a wide scale of reliability'...and there is no reason why logically probative hearsay should not be given credence. However, the logical weakness of hearsay may make it too insubstantial, in some case, to persuade the Tribunal of the truth of serious allegations.

In *T.A. Miller Ltd. v. the Minister for Housing and Local Government and Another*<sup>87</sup> Lord Denning M.R. remarked:

A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, and even though it is not evidence in a court of law, see *R. v Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456. ...Hearsay is clearly

<sup>83</sup> *Legal Profession Act 2007* (Qld) s 420.

<sup>84</sup> *Legal Profession Act 2007* (Qld) s 418.

<sup>85</sup> LexisNexis 7<sup>th</sup> edition, para 1260.

<sup>86</sup> *Board of Professional Engineers of Queensland v Tregenza* (2006) QCCTE 3.

<sup>87</sup> (1968) 1 WLR 992.

admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it...

The principles established by these decisions as well as those referred to in the previous part of this paper have been applied in a large number of matters before a wide range of tribunals which are not bound by the rules of evidence. Though the purpose of this paper is not to delve into the case law surrounding the admissibility of hearsay in those jurisdictions, the following are some useful and practical illustrations of the application of the relevant principles.

In *The Victorian Bar Inc v Perkins Ruling No 4*<sup>88</sup> the Victorian Civil and Administrative Tribunal was called upon to determine the admissibility of certain documentary material in the course of disciplinary proceedings against a legal practitioner. The respondent objected to the admission of a letter written by the complainant (Anderson) to the Bar Association which was in answer to a response by the respondent. The respondent also objected to some file notes of conversations between the Bar and the complainant. The respondent argued that it would be unfair for the evidence to be admitted given that the makers of those documents were not to be called at the final hearing. The Tribunal accepted the Bar's submission that it was not bound by the rules of evidence and could admit hearsay material. In respect of the first document, the Tribunal found that there was no unfairness warranting the exclusion of that material. However, in respect of the file note the Tribunal remarked:

The note of 13<sup>th</sup> September 2004 contains florid language used by Anderson. It refers in part to matters otherwise unsubstantiated and, in some instances, irrelevant to the issue before us. The whole impression given is of remarks made in anger or outrage. On balance, and again given that the maker of the oral statements is not to be called as a witness and will not be subject to cross-examination, we consider that the possible prejudice to Perkins and the unfairness of allowing the document to be placed before us is sufficient for us to exercise our discretion against admissibility. Accordingly, we rule that the typed file notes of September 2004 are not admissible.

In *Margot Marshall v Discrimination Commissioner*<sup>89</sup> the Administrative Appeals Tribunal was determining an application under the *Discrimination Act (1991)* which involved allegations of sexual harassment. The applicant's affidavit material contained irrelevant and hearsay material. In dealing with that material, the Tribunal stated that it did not see any benefit in combing through each affidavit to determine what material should be admitted into evidence. In particular, it made the following comments regarding the applicant's hearsay material:

Further, having regard to the seriousness of the allegations made, the Tribunal will ordinarily require direct evidence of the impugned conduct where this is reasonably available. Reliance on hearsay, in cases where direct evidence is reasonably available, will not ordinarily be accepted as sufficient to establish the truth of the allegations. Thus where reliance is sought to be placed on the fact that a person complained of activities by another person amounting to unlawful conduct under the Discrimination Act, the Tribunal will expect that the person

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<sup>88</sup> (Legal Practice) [2006] VCAT 460. As the matter was commenced in the Legal Profession Tribunal but ultimately decided in VCAT, section 408(1) of the *Legal Practice Act 1996* applied to the proceedings which provided that the tribunal was not bound by the rules of evidence.

<sup>89</sup> (1998) ACTAAT 258.

complaining of those activities is brought before the Tribunal to give direct evidence. Where the person complaining of the conduct is not reasonably available to give evidence, the Tribunal must be prepared to have regard to hearsay material, but what weight might be placed on hearsay evidence depends on the circumstances of the case and the nature of the hearsay material.

In proceedings before the Tribunal, documentary hearsay is obviously an important source of evidence (for example: investigation files; solicitors' files; investigation reports and complaints history).<sup>90</sup> The use of hearsay complaint evidence was examined in *Saddick v Director General, Department of Transport*.<sup>91</sup> In that case, the New South Wales Administrative Appeals Tribunal was concerned with an investigation into whether or not the respondent taxi driver was a fit and proper person to hold a taxi licence. The relevant Department sought to rely on first hand hearsay records of complaints by passengers to demonstrate unfitness. The tribunal allowed evidence of the hearsay file records of the Department to be received in evidence even though the makers of the complaints were not called for cross-examination.

Second hand opinion hearsay has also been admitted in certain circumstances. In *Voon v Medical Board of the ACT*<sup>92</sup> the Territory's Administrative Appeals Tribunal was determining an appeal from a finding by the Medical Board of unprofessional conduct. During the course of oral evidence before the Tribunal, a witness for the Board said that he had discussed the respondent's case with professional colleagues and the general opinion was that what the respondent had done was ill-advised. Despite objection by the respondent that the evidence was hearsay, the Tribunal allowed the evidence. The issue for the Tribunal was what weight could be given to the statement. The Tribunal accepted that though the statement could be given little weight it was admissible.

The principles relevant to the Tribunal's discretion to admit hearsay evidence pursuant to section 28(3)(b) can be therefore be summarised as follows:

- There is no reason why hearsay should not be admitted where it can fairly be regarded as reliable;
- Hearsay evidence may be excluded where it would be unfairly prejudicial to the respondent given that the Tribunal is obliged to afford procedural fairness;
- Material is not necessarily unfairly prejudicial only because the maker of a hearsay statement is not available for cross-examination. However, there will need to be an explanation as to why the maker is not available for cross-examination. The absence of cross-examination is relevant to the weight to be given to the evidence.

<sup>90</sup> See, eg, *Roberts v Balancio* (1987) 8 NSWLR 436 where three reports prepared by a counsellor of the Family Court of Australia were admitted into evidence, even though the counsellor was not available for cross-examination. In *K v Commission for Children and Young People* [2002] NSWADT 74, the Tribunal allowed hearsay affidavit material as was the case in *Hardy v Comr of Police* (2006) NSWADT 167; *Curcio v BLA* [2001] VCAT 423 (31 March 2001); *Chan v Kostakis* (2003) VCAT 951.

<sup>91</sup> [2002] NSWADT 88.

<sup>92</sup> (1993) ACTAAT 60.

### B Previous Civil Proceedings as Evidence

The rule in *Hollington v Hewthorn*<sup>93</sup> provides, in short, that factual findings and conclusions in previous proceedings (civil or criminal) are not admissible as evidence of the facts in the current proceedings.

What, then, is the effect of section 28(3)(b) on this much criticised rule of evidence in the context of disciplinary proceedings before the Tribunal? Does section 28(3)(b) allow the Tribunal to admit evidence of decisions from other Courts or Tribunals in determining a discipline application. Could the Tribunal, say, simply rely on the transcript of the proceedings, and nothing else in support of an application? Or would the Tribunal require the same evidence to be led which was heard at the original civil<sup>94</sup> hearing?

For example, if there is an appeal against conviction on the basis of incompetence of counsel, could the affidavit material, transcript of evidence and findings of the Court of Appeal be relied upon in the Tribunal? Could evidence of negligence in civil proceedings which demonstrated a lack of diligence and competence be received in the Tribunal in support of a discipline application? Could findings as a result of civil penalty proceedings which demonstrate that a practitioner is not a fit and proper person to engage in legal practice be admissible? What about evidence from civil proceedings which result in a person becoming insolvent<sup>95</sup> or disqualified from managing a Corporation?<sup>96</sup> Could decisions of other disciplinary bodies (for example findings of misconduct from overseas or educational institutions for plagiarism) be admissible prima facie evidence before the Tribunal?

<sup>93</sup> In that case Goddard LJ said: 'A judgment obtained by A against B ought not be evidence against C for in the words of the Chief Justice in the *Duchess of Kingston's Case* [(1776) 2 Sm.L.C., 13th ed., 644] "it would be unjust to bind any person who could not be admitted to make a defence or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore ... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers". This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who is not a party'. Giles, see above n 11, 239-240; *Cross on Evidence*, see above n 79, para 5200- 5215.

<sup>94</sup> *Evidence Act 1977* (Qld) s 79, appears to abrogate the rule in respect of criminal proceedings. In respect of criminal proceedings, a respondent is not automatically entitled to lead evidence challenging the finding of a criminal conviction in any subsequent tribunal proceedings as such evidence may amount to an abuse of process by being a collateral attack on the earlier Courts findings. Public policy requires that, save in exceptional circumstances; a challenge to a criminal conviction should not be entertained by a disciplinary tribunal. See *Shepperd v Law Society* (1996) EWCA Civ 977; *Secretary of State for Trade and Industry v Birstow* (2003) EWCA Civ 321; *Prothonotary of the Supreme Court of New South Wales v Pangallo* (1993) 67 A Crim R 77; *Mullally v Legal Practice Committee* (1997) WASCA BC 9706748; *Mullally v Legal Practice Committee* (1998) High Court Transcripts P56/1997; *Re Del Core and Ontario College of Pharmacists* (1985) 19 DLR (4<sup>th</sup>) 68; Cf, *Re Morgan* (1998) CanLII 2446. The Tribunal may receive evidence in mitigation or by way of excuse for the criminal conduct. For example, evidence can be received which goes to show that the facts which led to the criminal conviction do not demonstrate unfitness. *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279; *Mullally v Legal Practice Committee* (1998) High Court Transcripts P56/1997; *Prothonotary of the Supreme Court of New South Wales v Pangallo* (1993) 67 A Crim R 77.

<sup>95</sup> *Legal Profession Act 2007* (Qld) s 420(d).

<sup>96</sup> *Legal Profession Act 2007* (Qld) s 420(e).

It is suggested that, when applying the principles discussed earlier, such evidence could be permitted by section 28(3)(b) and used by the Tribunal in determining a discipline application. However, though the evidence used in previous civil proceedings may be admitted in the Tribunal, it is important to appreciate that the evidence and findings of another court are not conclusive of the issues before the Tribunal but is prima facie evidence of the facts which underpin the allegations contained in a discipline application.

There are no decisions from Australian legal disciplinary jurisdictions which have addressed this issue directly. However, the relevant principles were examined in *Re Rosenbaum and Law Society of Manitoba*<sup>97</sup> In that case, the Court discussed the relevance of evidence and findings given in civil proceedings by a solicitor where an issue was whether or not the solicitor had falsified records to alter a company's share structure. The trial judge found that the lawyer falsely denied making various changes and referred the solicitor to the law society.

In the subsequent disciplinary proceedings, the solicitor sought an order preventing the law society from accepting the trial judge's finding as conclusive proof of the charge of giving false testimony. At page 357, His Lordship Scrollin J made the following remarks:

The committee, like any other professional disciplinary body, is bound to conduct its proceedings fairly, but it is not bound by the whole panoply of procedural and evidentiary constraints which apply to the courts. Subject only to observance of its paramount duty to be fair to the lawyer, the committee is entitled to arrive at its decision on any reliable source of facts of which the lawyer is made aware in advance and can challenge, and it is for the committee to assess the weight or cogency to be accorded to the evidence given in a prior proceeding to which the lawyer was a party and to take proper account of the conclusions of fact arrived at by the judge...

However, the availability to the committee of the previous proceedings does not mean that the judgment of this court, any more than the judgment of any other tribunal, merits treatment as conclusive evidence. In this case some guidance is afforded by the fact that s 42(9) of the *Law Society Act* provides that for the purposes of the inquiry a certified copy of conviction of crime is conclusive evidence that the person charged committed the crime. Significantly, the statute does not deal with the effect of a finding or judgment against a person by any tribunal other than a criminal court. In England, prior to the making of a statutory provision as to the conclusiveness of a finding in a matrimonial cause, the House of Lords held that the General Medical Council erred in refusing to hear fresh evidence offered by a doctor to dispute a finding of adultery by a divorce court: *General Council of Medical Education & Registration of United Kingdom v Spackman*.

Further, at page 358 His Lordship found that though the evidence was not conclusive proof, the Committee was '*entitled to exercise its discretion to rely upon the civil proceedings as evidence in support of the charge*' provided the solicitor was provided a fair opportunity to lead further evidence and submissions to dispute the accuracy of the findings.

The same approach was followed in a number of English disciplinary decisions. In *Re A Solicitor*<sup>98</sup> the English and Wales High Court heard an appeal

<sup>97</sup> (1983) 140 DLR 352.

<sup>98</sup> (1992) 2 All ER 335. See also *Re A Solicitor* [1996] EWHC Admin 193; *General Medical Council v Spackman* [1943] 2 All ER 337; *Choudry v The Law Society for England & Wales* (2001) EWCA Civ 1665; *Secretary of State for Education & Skills v Mairs* [2005] EWHC 996.

from the English Solicitors Disciplinary Tribunal which had ordered that a solicitor be struck off for conduct unbecoming a solicitor. The original application was based on the decision of the Barristers' Board of Western Australia where the practitioner was struck off for perjury. In the English proceedings, Counsel for the practitioner objected to the admission of the decision of the Barristers' Board on the basis that such evidence would breach the rule in *Hollington v Hewthorn*. Both the Tribunal and the Court rejected that submission and allowed the evidence. The Court held that the Solicitors Disciplinary Tribunal was free to use the Barrister Board's findings since the strict rules of evidence did not apply.

Likewise, in *Constantinides v The Law Society*<sup>99</sup> the England and Wales High Court heard an appeal from a decision of the Solicitors Disciplinary Tribunal. At issue was the admissibility of a judgement from related civil proceedings in which the trial judge made findings of dishonesty against the respondent. In the disciplinary proceedings, the Law Society alleged dishonesty and sought the respondent's removal from the roll. His Honour Lord Justice Moses rejected the solicitors appeal and stated:

The judgment was admissible to prove background facts in the context of which the appellant's misconduct had to be considered. But that was the limit of its function, in the particular circumstances of this case. The judge's views as to the appellant's dishonesty and lack of integrity were not admissible to prove the Law Society's case against this appellant in these disciplinary proceedings. We are far from ruling that a judge's conclusions as to dishonesty cannot amount to findings of fact within the meaning of Rule 30. There will be cases when a finding of fact, be it in a civil or criminal case, of dishonesty will be prima facie evidence of that dishonesty. But in the instant case the judge's conclusions were far more wide ranging than the allegations made against the appellant in the disciplinary proceedings.

In Australia, the admissibility of prior evidence from a previous decision was considered in the medical disciplinary decision of *Medical Board of Western Australia v Valibhoy*.<sup>100</sup> The West Australian State Administrative Tribunal examined allegations of gross carelessness and incompetence in the care of a patient by a medical practitioner. In the course of the proceedings the Court permitted the transcript of evidence of a number of persons given in both a Coroner's Inquest and in the earlier Medical Board proceedings concerning the respondent as s 32(4) of the *State Administrative Tribunal Act 2004* provided that the tribunal could inform itself as it thinks fit.

### C Illegally Obtained Evidence

An area which is often the source of much discussion is the admissibility of illegally obtained evidence for use in disciplinary proceedings. For example, could the Tribunal receive and admit evidence over objection which contravened section 46 of the *Invasion of Privacy Act 1971*(Qld)<sup>101</sup> or evidence obtained through the

<sup>99</sup> [2006] EWHC 725. See also the case of *Simms v Conlon & Anor* [2006] EWCA Civ 1749 where it was held that where the issues in a civil action overlap to a significant degree with those in disciplinary proceedings (in this case a finding of dishonesty) and it would be expensive and time-consuming to require the parties to prove them in the normal way they may be admissible in the proceedings.

<sup>100</sup> [2008] WASAT 17.

<sup>101</sup> It provides that, '(1) Where a private conversation has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device used in contravention of section 43, evidence of that conversation may not be given by that

execution of search warrant issued under the Act<sup>102</sup> which was defective in a material particular.

To date, the question of illegally obtained evidence has yet to be addressed by a disciplinary body in Queensland. However, the starting point to understanding how a disciplinary body would deal with answering these questions is in understanding that even in criminal proceedings (as in civil proceedings) illegally obtained evidence is not automatically excluded. Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts are not, for that reason alone, inadmissible. Instead, the question of admissibility is determined by a range of discretionary factors.<sup>103</sup> It is suggested that among those factors to be weighed by the Tribunal in exercising its discretion must include the nature and purpose of disciplinary proceedings in a similar way in which they are given substantial weight in applications to stay disciplinary proceedings or orders.<sup>104</sup>

The relevant principles in exercising the discretion to admit illegally or unfairly obtained evidence in the context of professional disciplinary proceedings was discussed in *Martin v Medical Complaints Tribunal*.<sup>105</sup> In that case, the Tasmanian Supreme Court was called on to hear an appeal from the Medical Complaints Tribunal in which the tribunal was not bound by the rules of evidence. The main ground of appeal was the admissibility of DNA evidence which was obtained in contravention of the *Forensic Procedures Act 2000*. The allegation against the medical practitioner was that he had maintained a sexual relationship with a female patient. The tribunal proceeded on the basis that it had a discretion to exclude the evidence based on the common law discretion to exclude illegally obtained evidence or otherwise by section 138 of the *Evidence Act 2000*<sup>106</sup>. In deciding that the Medical Complaints Tribunal was correct in refusing to exercise its discretion not to reject the DNA evidence the court took into account the following factors:

- (a) The protective nature of the jurisdiction;
- (b) The nature of the proceedings being an inquiry rather than criminal or civil hearing;
- (c) The probative value of the DNA evidence in proving the medical practitioner's misconduct;
- (d) The importance of the evidence in the proceedings;
- (e) The difficulty in obtaining the DNA evidence other than by methods which would bring the medical council itself into disrepute;
- (f) Given the nature of the proceedings, the fact that the medical practitioner was obliged to provide the DNA evidence in any event so as to co-operate with the investigation;
- (g) Whether or not the contravention was deliberate or reckless.

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person in any civil or criminal proceedings'. See also *Telecommunication (Interception) Act 1979* (Cth) which also provides interceptions without warrant are inadmissible in a court.

<sup>102</sup> *Legal Profession Act 2007* (Qld) s 548.

<sup>103</sup> For example is the illegal evidence the only evidence of guilt; is the illegality the result of a deliberate conduct or a mistaken belief; Is the conduct alleged serious; Is the cogency of the evidence affected by the nature of the conduct. See, *Bunning v Cross* (1978) 141 CLR 54; *R v Swaffield* (1998) 192 CLR 159.

<sup>104</sup> *Legal Services Commissioner v Baker* (2005) QCA 482; *Legal Services Commissioner v Madden* (2008) QCA 52.

<sup>105</sup> [2006] TASSC 73.

<sup>106</sup> The equivalent provision, *Evidence Act 1977* (Qld) s 130.

There have also been a number of decisions from the Administrative Appeals Tribunal (where the tribunal is not bound by the rules of evidence) which also provide some practical examples of the exercise of the discretion to exclude illegal or improperly obtained evidence. The first is *Robert Parsons and Comcare*<sup>107</sup> where the Administrative Appeals Tribunal exercised its discretion to exclude evidence of a medical examination which had been conducted contrary to the provisions of section 57 of the Safety Rehabilitation and Compensation Act 1988. The unfairness occurred as the applicant had attended the medical examination after receiving a letter from Comcare which misrepresented the powers available to it.

Similarly, in *Salter and Telstra Corporation Ltd*<sup>108</sup> the Administrative Appeals Tribunal considered whether or not a psychiatric report which was obtained unfairly<sup>109</sup> could be admitted. After considering the relevant discretionary tests, the Tribunal concluded that the evidence should not have been admitted.

However, in *Workers Rehabilitation and Compensation Corporation v York Civil Pty Ltd*<sup>110</sup> the tribunal allowed video evidence which was obtained by way of a trick and considered to have been unfairly or illegally obtained. The tribunal allowed the evidence as it did not affect the respondent receiving a fair hearing.

At the end of the day, a review of those decisions demonstrates that an important question for admissibility will be whether or not the respondent practitioner can receive a fair hearing. As with any exercise of discretion, the Tribunal in deciding whether or not to admit illegally obtained evidence will need to weigh the competing public interests in disciplining a legal practitioner for the protection of the public against the apparent condoning of illegal or unfair practices. As I have suggested throughout this paper, these considerations should be afforded greater weight given the protective character of such proceedings.

#### D Similar Fact Evidence

As with illegally obtained evidence, another area in which a misunderstanding of the nature of disciplinary proceedings as being quasi-criminal can cause confusion for respondents and investigators alike is the admissibility of similar fact evidence in disciplinary proceedings.

There is any number of situations where similar fact evidence may be relevant in proceedings before the Tribunal. In legal profession disciplinary hearings, the use of similar fact evidence will more often than not be relevant to prove an actual act or omission; to strengthen the credibility of a complainant; or to prove allegations regarding systemic issues such as supervision,<sup>111</sup> appropriate management systems<sup>112</sup> or overcharging.<sup>113</sup> Further similar fact evidence may also be relevant to determining whether or not the respondent is a fit and proper person.<sup>114</sup>

<sup>107</sup> [1997] AATA 36.

<sup>108</sup> [2000] AATA 734.

<sup>109</sup> The interviewee was interviewed for the report without notice or informed consent.

<sup>110</sup> [1997] SAWCT 22. See also, *Edelsten v Investigating Committee of New South Wales* (1986) 7 NSWLR 222; *Celentano and Secretary, Department of Family and Community Services* [2005] AATA 772; *Fyshwick Sports and Social Club Inc v Liquor Licensing Board* (1998) ACTAAT 2; *Bowen-James v Walton NSW CCA* 5 August 1991 unreported, 6; *Zaidi v Health Care Complaints Commission* (1998) 44 NSWLR 82, 90.

<sup>111</sup> *Legal Profession (Solicitors) Rule 2007* Rule 37.

<sup>112</sup> *Legal Profession Act 2007* (Qld) s 117(3).

<sup>113</sup> *Legal Profession Act 2007* (Qld) s 420(b).

<sup>114</sup> *Eckersley v Medical Board of Queensland* (1996) QCA 528.

At criminal law the approach by Courts is generally one of exclusion of similar fact evidence due to concerns that juries will improperly use it as 'propensity evidence'. In short, similar fact/propensity/character evidence will be excluded unless the evidence is sufficiently highly probative of a fact in issue so as to outweigh the prejudice it may cause. In *Phillips v R*, the High Court remarked<sup>115</sup>:

The 'admission of similar fact evidence...is exceptional and requires a strong degree of probative force'. It must have 'a really material bearing on the issues to be decided'. It is only admissible where its probative force 'clearly transcends its merely prejudicial effect'. '[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind.' The criterion of admissibility for similar fact evidence is 'the strength of its probative force'. It is necessary to find 'a sufficient nexus' between the primary evidence on a particular charge and the similar fact evidence. The probative force must be 'sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused'. Admissible similar fact evidence must have 'some specific connexion with or relation to the issues for decision in the subject case'.

However, it is a different test in civil proceedings (and also it is submitted in the Tribunal) which is that as described in Cross on Evidence where it stated that in respect of similar fact:<sup>116</sup>

The main trends in the modern cases support the view that the criminal tests do not apply; that the essential criterion for admissibility is relevance; that there is no discretion to exclude the evidence on the ground that its prejudicial effect exceeds its probative value; but that there is a discretion to exclude evidence which is only remotely relevant or has small probative value compared to the additional issues which it would raise and the additional time required for their investigation, or which might tend to confuse the jury as to the real issues.

The admissibility of similar fact evidence in the context of professional disciplinary proceedings has been considered in a series of decisions involving the medical profession. In all these cases, the focus on admissibility was in the context of relevance together with the purpose of the proceedings.

In *Zaidi v Health Care Complaints Commission*<sup>117</sup> the NSW Court of Appeal considered the admissibility of similar fact evidence in disciplinary proceedings involving a medical practitioner before the medical tribunal. At issue was whether or not the tribunal was entitled to take into account the evidence of three separate complaints of unnecessary sexual stimulation by the appellant when considering the separate evidence of the three complainants. The Court held that the criminal law principles did not apply to medical practitioner disciplinary proceedings for the following reasons:

- (a) The medical tribunal was not bound by the rules of evidence;
- (b) The civil standard of proof applies in disciplinary proceedings;
- (c) The medical tribunal is not constituted by medical practitioners and lay persons but is chaired by a judge.

<sup>115</sup> *Phillips v R* (2006) HCA 4, para 54.

<sup>116</sup> Paragraph 21285; see also, *CDJ v VAJ* (No 1) (1998) 197 CLR 172, 215; *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23, 28.

<sup>117</sup> (1998) 44 NSWLR 82.

Likewise, in *Purnell v Medical Board of Queensland*,<sup>118</sup> the Court considered the admissibility of evidence of multiple allegations of indecent assaults on patients. In respect of the use to be made of the multiple complaints the Court remarked:

The strength of the inference will depend on the facts of the particular case. The number of complaints is not of itself critical. One similar allegation containing the same peculiar feature or features may have considerable weight in supporting a complainant's evidence. On the other hand where acts alleged do not contain any particularly unusual features but are similar, the fact that there are a number of allegations from different persons may assist in drawing an inference that the act with which the court or tribunal is concerned occurred to the required standard of proof. There is no doubt a spectrum of circumstances which require consideration on a case by case basis between those two positions.

Ultimately the question is whether the inference that the act complained of was committed upon the complainant can be properly drawn having due regard to the standard of proof applicable to the kind of case before the court or tribunal. Where credibility of a complainant's evidence is in issue the fact that complaints of similar acts have been made by other persons can provide strong support of the complainant's evidence in the absence of any factors diminishing the strength of the inference logically available from the fact that they were made independently of and unaffected by the complainant's own account.

Finally, in *Rivera v Health Care Complaints Commission*<sup>119</sup> a medical practitioner appealed from a decision involving disciplinary proceedings before the medical tribunal. The tribunal was not bound by the rules of evidence. The disciplinary proceedings alleged professional misconduct regarding complaints of unnecessary genital examination of two patients. The New South Wales Court of Appeal rejected the appellant's case that the medical tribunal wrongly permitted similar fact evidence. The court accepted that the tribunal was entitled to use the first complainant's evidence as lending compelling weight to the evidence of the second complainant.

## VI CONCLUSION

This paper has sought to provide a comprehensive review of the issues relevant to the admissibility of evidence in the legal profession disciplinary hearings in this State. As explained earlier, it was not intended to provide a treatise on all aspects of the rules of evidence and did not address in detail how section 28(3)(b) may impact many other well known rules of evidence such as expert evidence,<sup>120</sup> without prejudice discussions<sup>121</sup> or the rule in *Browne v Dunn*.<sup>122</sup>

<sup>118</sup> (1999) 1 QdR 362.

<sup>119</sup> (2006) NSWCA 216.

<sup>120</sup> It is suggested that the strict rules applicable to the admissibility of expert evidence would not apply in the Tribunal. As the Tribunal is an expert tribunal it would be entitled to inform itself by reference to matters of expert knowledge known to its members and not mentioned in evidence provided of course that procedural fairness is afforded to the parties. *Jager v Medical Complaints Tribunal* (2004) TASSC 58; *New South Wales Bar Association v Tedeschi* (2003) NSWADT 90; *Re Fraser Health Authority* (2006) CANLII 32976; Cf, *Legal Services Commission v Nikolaidis* (2004) NSWADT 195. See also Giles, see above n 11, 238.

<sup>121</sup> The 'without prejudice' rule is a rule of evidence: *Brunel University & Ors v Vaseghi & Ors* [2007] EWCA Civ 482; The privilege attaches to communications between parties to

In discussing the admissibility of evidence in the Tribunal, this paper has also attempted to dispel any lingering concerns or misunderstanding about the nature and purpose of disciplinary proceedings under the Act. The fundamental message for practitioners, decision makers, regulators, and policy makers is that legal profession disciplinary proceedings must not be viewed from within the adversarial paradigm as if they were like any other criminal or civil proceedings. The failure by those to step outside that paradigm or who simply provide 'lip service' to the public policy behind legal profession regulation has the potential to frustrate not only the legislative intention of the LPA but also the proceedings themselves.

The importance of not being captured by adversarialism is perhaps all the more relevant given current moves to implement further reforms which will impact upon the regulation of the legal profession at both the State and Commonwealth level. From the perspective of regulators and the profession alike, this reform is essential. However, any attempt as part of that reform to expand the rules of evidence into disciplinary proceedings in Queensland, as has been the case in the other Australian jurisdictions, must be resisted if the policy objectives of legal profession discipline are to be achieved in an efficient, effective and consistent manner. As COAG considers a new framework for uniform regulation of the legal profession it is hoped the issue of the applicability of the rules of evidence in legal profession disciplinary hearings will be considered in detail and not simply be left to the lowest common denominator.

As argued throughout this paper, it is difficult to understand how a contrary position can be advocated once it is clearly understood that a tribunal which is not bound by the rules of evidence does not mean unfairness to practitioners but involves decisions based on logical and probative evidence.

The adoption in Queensland of section 28(3)(b) to proceedings before the Tribunal reflects an understanding and appreciation by policy makers and the professional bodies of the intent and purpose of legal profession discipline and represents a departure from the lawyers paradigm evident in other jurisdictions. With the risk of sounding parochial, the writer contends that the Queensland approach to this issue is the most appropriate method to deliver the policy outcomes of professional discipline. It would be an anomaly if, as part of the reform agenda, form was to be victorious over substance in a jurisdiction which, at the end of the day, is designed to protect both consumers and the reputation of the legal profession.

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a dispute which have as their object the resolution of a dispute. It is the writers view that evidence obtained during the course of negotiations (not withstanding the without prejudice rule) may be admissible in the Tribunal. For example, it is unlikely that a letter to the Commission or the BAQ/QLS comprising admissions from a respondent's legal representatives which would otherwise be inadmissible in a court on the basis of without prejudice privilege would be excluded. Cf, *Law Society of New South Wales v Nair* (2007) NSWADT 190.

<sup>122</sup> In *Nunn v Daly-Thompson* (2001) QBT 155 the Queensland Building Tribunal (in which the rules of evidence did not apply) stated: There can be no doubt that strict compliance with the rule in *Browne v Dunn* is not necessary in the conduct of proceedings in the tribunal. However, that is not to say when parties are legally represented that a failure to put material issues to the opposing witnesses, particularly expert witnesses, does not have an impact on the weight to be given to the respondent's evidence.