

CM - Lamb & Littrich – Legal Culture**What is culture? What is Legal Culture?**

- Thus 'legal culture' relates to behaviours and values of the legal profession in its social context – eg its language or legalese, its modes of address, dress codes, rituals, ways of work and interpersonal relationships, its code of ethics → to outsiders features of legal culture suggest elitism
- For most of 20th century Aus legal profession was perceived as 'white, male, middle class', but demographic change in social, gender and ethnic profiles has been gradually occurring in the recent decades
- To the lay person, law and lawyers are perceived as having a specialist and unique knowledge of the law and the legal system, beyond their understanding – Sexton and Maher described this as 'the legal mystique' where lawyers reveal these principles to the layman, seemingly always with a remoteness and neutrality and transcend any personal values or interest
- But reality may be different – Sexton and Maher argue the perception of neutrality and objectivity is a myth, criticism here is that legal system and lawyers are not simply neutral and objective social institutions but represent and mirror a cultural viewpoint dominated by a limited social and ethnic elite.

Social and ethnic profiles of Aus lawyers

- There's assumption that if the legal profession is open to a broader cross-section of the community, it'd become more responsive to the community, more reflective and understanding of the different norms and cultures within the community.
- The most recent survey in 2000 indicate while there's been some gradual change with more students reflecting national demographics, the key indicators of private school attendance and high status parental occupations and key connections in legal profession continue to reflect and perpetuate an elitist profile of lawyers in Aus.

Long hours, workplace conditions and lifestyle

- The long working hours are correlated with need to budget time and cost, and paralegals and lawyers are generally required to meet budget of a specific number of billable hrs each day or week. Since not all work is billable, this generally leads to long hrs.

Indigenous Lawyers

- Number of indigenous lawyers in Aus is unlikely to be high – the treatment of Abos through dispossession and disempowerment deprived generations of opportunities to complete secondary, let alone tertiary studies.
- Unlike Anglo/Celtic law students, there's no background or network of qualified relatives who can demystify the legal culture for indigenous law students – instead many Abos have negative connotations of the legal system from personal experience or experiences of family and community, including legacies of dispossession and dislocation.
- Those few indigenous students who make it into law schools often find the experience alienating, despite initial support through university admission programs.

CM – Parker, 'Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour'

- Since ethical behaviour in large law firms are influenced by the cultural environment of the firm, it's argued law firms should put in place 'ethical infrastructures' – formal and informal management policies, procedures and controls, work team cultures, and habits of practice that support and encourage ethical behaviour.
- Ethical infrastructures would likely be most effective where they ultimately aspire to equip and encourage each individual to develop and put into practice their own ethical values in dialogue with others in the firm, profession and community – law firms with successful ethical infrastructures need to understand ethics in broader terms than rule compliance.

The need for an Ethical Infrastructure to Evolve with the Large Law Firm

- Law firms must formalise and systematise ethical infrastructures as they change and grow larger

- Increasing degree of mobility in legal profession makes it difficult to transmit a positive ethical culture throughout a whole firm
- Law firms increasingly use bureaucratic management practices that incorporate commercial pressure into legal practice – if these don't incorporate controls aimed at promoting ethical behaviour, they may undermine ethical behaviour by putting pressure on lawyers to cut corners and thereby undermine value of the firm's organisational capital.
- Now legal practices can incorporate and listed on stock exchange, it brings greater pressure on professional ethical responsibilities as the firms adopt more commercial business structures and encourage outside investors to become shareholders

Beginnings of Ethical Infrastructure in Aus Law Firms

- Most Aus firms already recognize aspects of ethical infrastructures that are desirable and necessary for good practice, eg screening for conflict of interest when taking on new client
- Although Aus regulations do not explicitly require law firms to have complaint procedures, it's now seen as a basic requirement for any business to have a basic complaints handling system in place and to let customers know about it
- In Aus, no obligation for legal practices, except for incorporated and multi-disciplinary firms, to have in place an overarching ethical infrastructure

Evolving Ethical Infrastructures

- Ethics Partners –
 - Large law firms have begun to address gaps in internal supervision by appointing individual partners to be responsible for monitoring compliance with professional regulation
- 2 important areas important for large law firms to think about beyond conflicts of interest are billing and litigation practices
- Billing
 - ethical law firm would want to ensure fees it charges were not only authorised by a properly constituted contract but also that the fees are actually reasonable in all the circumstances – firm concerned with ethical billing may not provide ethical disincentives, reconsider the need for hourly billing, and would set billable targets with a view that lawyers can achieve them without padding or unR working hours.
- Litigation
 - Ethical infrastructure might include internal firm control on use of certain litigation tactics

Conclusion: Dangers of Bureaucratising Ethical Infrastructure

- Danger that in increasingly commercialised and bureaucratised law firm environment, ethical infrastructure will major on spelling out and enforcing beyond compliance devotion to clients, but minor on lawyers' overriding ethical obligations to court and the law.

Nelson & Nielsen – 'Constructing Role of Inside Counsel in Large Corporations'

Introduction

- Inside counsel once relegated to routine tasks have assumed new power and status within the legal profession and now make decisions about allocating legal work to outside law firms – outside law firms have lost function of general counsel and focus on specialized services on a case by case basis

3 Ideal Types of Corporate Counsel: Cops, Counsel and Entrepreneurs

- Interviews suggested lawyers played 3 ideal typical roles:
 - Narrowly legal role
 - Mixing legal and business advice
 - Entrepreneurial or profit-generating uses of the law
- The inside counsel plays different roles in different circumstances.

Cops

- primarily concerned with policing conduct of their business clients (even though both lawyers and business personnel are employees of the same organisation).

Counsel

- This is the role corporate lawyers most often play.
- Counsel most often confine advice to legal Qs, yet this role implies a broader relationship with business actors that affords counsel an opportunity to make suggestions based on business, ethical and situational concerns.

Entrepreneurs

- Entrepreneurs emphasize business values in their work – they say law is not merely a necessary complement to corporate functions, but law itself can be a source of profits and an instrument to be used aggressively in the market place
- This role in a corporation goes well beyond giving legal advice.

Distribution of Respondents by Ideal Type

- Ideal types – set of roles the same lawyer may play at different times in different contexts, or as a dominant tendency or role pattern for given individuals.
- Only approximately 17% play the role of the cop in their organisation
- 33% meet the definition of the entrepreneurial role.
- About 50% fall in the counsel category – but this was because it was the default category.

Constructing the Role of Inside Counsel

The Gate-keeping Function: Pervasive but Circumscribed

- When corporate lawyer acts as a gatekeeper, he monitors legal compliance and serves as a final hurdle or 'gate' through which business ideas must pass prior to implementation,
- Inside counsel are under the same intense pressure to meet business objectives like their business peers – these constraints and pressures affect all 3 types of inside counsel, rendering gatekeeping functions and other advisory functions more difficult to perform.

'IN-HOUSE' LAWYERS

- There is increasing prevalence of employed ('in-house') lawyers in Aus legal society – this trend appears to be driven by companies wishing to have ready access to legal advice, to which strict duties of confidentiality apply and the mantle of legal professional privilege may attach, from a person who's committed to the corporate cause and whose fees, via a salary, are determined
- That a lawyer is employed by a non-lawyer, whether in private enterprise or in govt, in no way diminishes or alters his professional responsibility to the client, court or general public (*Re Bannister*)
- Unless statute provides otherwise, in event of conflict btw duty to employer and duty as lawyer, it's the duty as lawyer that must prevail
 - This point is highlighted by SR 4 which says 'A practitioner, who is employed by a corporation (not being a solicitor corporation or an incorporated legal practice) or by any other person who is not a practitioner, must not, despite any contrary direction from the practitioner's employer, act as a practitioner in the performance of any legal work or service in breach of any of the provisions of the Legal Profession Act 2004 or these Rules.'

Ethical Issues specific to employed lawyers

- Ethical issues peculiar to employed lawyers stem largely from the status of the lawyer as an employee.
- Employed lawyers are rarely the subject of complaints to professional or disciplinary bodies as much of their work is therefore hidden from scrutiny of regulators –but this does not deny seriousness of these ethical issues.

Impact on liability of client

- Because employed lawyer is an employee, his employer is vicariously liable for lawyer's defaults in the course of his employment – whereas outside employment context, client is liable for defaults of his lawyer only via the law of agency.

Impact on pressure to behave unethically

- That an employed lawyer acts for only 1 client upon whom his livelihood depends presents serious ethical challenges – any refusal by lawyer to act unethically or for benefit of management at expense of workers may be precarious to his continuing employment – hence more pressure on corporate lawyers than

private lawyers to ignore ethical standards – there's tremendous peer pressure on them to toe the line and maintain secrecy of corporate activities

- Employed lawyers will also have access to informal sources of info concerning the client (employer) which are usually unavailable to outside lawyers, exacerbating likelihood of ethical dilemmas
- if faced with irreconcilable conflict btw his instructions and what's proper professional conduct, employed lawyer's only alternative is to resign - Consequences of such conflict are far more serious for employed lawyer than private lawyer, potentially sacrificing a career as opposed to losing a client
- This has led to calls for some protection for employed lawyer whistleblowers at least in contract of employment – *Public Service Act 1999* (Cth) s.16 provides statutory protection for public service lawyers which prohibits a person performing functions in or for agency from victimising or discriminating against an Aus Public Service employee who has reported an alleged breach of Code of Conduct → *Protected Disclosures Act 1994* (NSW) protects public official lawyer whistleblowers

Impact on professional independence

- There's no professional prohibition against employed lawyer appearing on the record for his employer – however they may be incapable, by virtue of his relationship with employer, of bringing to the litigation the requisite independence
- Lack of independence may not only negatively impact on quality of the advice, but may also serve to undermine a claim to legal professional privilege over the terms of that advice

Impact on claims to legal professional privilege

- Legal professional privilege applies to advice supplied by employed lawyers also, provided in giving the advice they act in their capacity as legal advisers.
- Legal professional privilege extends legal advice given by employed lawyers providing in doing so they act in their capacity as legal advisers – hence applies to communications btw employed lawyer and his employer where its requirements are satisfied → also attaches to confidential professional communications btw govt agencies and their salaried legal officers for purpose of seeking or giving legal advice → the same is replicated in evidence legislation for employed lawyers in both private and public sectors via definition of 'client'
- Capacity
 - Employed lawyer may, due to his position, act in more than merely a legal capacity in exercising his functions and is more likely to act for non-legal purposes than external lawyers – hence status of the lawyer is relevant in determining whether or not a document was brought into existence for a privileged purpose (*Sydney Airports v Singapore Airlines*)
 - Employed lawyers may be in a closer relationship to management than external lawyers, so may be more exposed to participation in commercial aspects of the enterprise
 - Concern is that employers should not be able to shield activities from scrutiny that are not lawyer's activities simply because those activities had the input of a lawyer-employee – advice will not be privileged if the legal adviser gives it in some other capacity and will be privileged only if the lawyer who gives it has been admitted to practise and remains subject to the duty to observe professional standards and the liability to professional discipline: this may be substantiated in part by lawyer holding current unrestricted practising certificate, although this is not essential (*Cth v Vance*)
- Independence
 - Even if advice is prepared in an employer's lawyer's capacity as a lawyer, it may not be privileged if the lawyer is not 'independent' of the employer – in *Duggan* it was observed that an employee lawyer when performing his role in a legal matter must act independently of any pressure from his employer and if it's established he was not acting independently at the time then the privilege would not apply
 - If employed lawyer is part of senior management, owns significant number of shares in employing entity and his remuneration depends on performance of the entity then risk of lack of independence increases

1D. REGULATION OF THE LEGAL PROFESSION

KEY Q: evaluate the adequacy of the current regime for regulating the legal profession in NSW.

- I.e. how good this national model is – given that we have these areas needing regulation.

WHAT IS REGULATED?

- Many different aspects of our profession are regulated.
 - Ethics - Standards of practice; what standards the consumers can expect
 - Client-lawyer relationship - costs
 - Lawyer-courts and others - Duty of the lawyer to the court in the administration of justice.
 - Competency requirements
 - Pro-bono – controversial. Room for greater regulation
 - Discipline & Complaints – mostly complaints are centred on the lawyer's competency and about fees.

SELF-REGULATION V CO-REGULATION?

Parker, Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness

- It has been judicially observed that it is in the public interest, and for protection of the public, that the professional activities of lawyers be regulated and controlled more so than any other profession.

Traditional Controls – self Autonomy

- Traditional regulation of lawyer's ethics adopts a self-regulatory model –
 - profession decided for itself what was in the best interests of clients, public and administration of justice.
 - To allow the profession to remain independent of the government.
 - To promote the lawyer's role in society as the adversarial advocate – one of isolation from general community ethics and values.
 - Was predicated on the assumption that clients will be largely passive since they lack knowledge about the law and legal system, and that the general public lacks the expertise to contribute to the ethics and standards of the legal profession. → i.e. require little client participation and ignores client concerns about the quality and costs of legal services.
- Regulatory Authorities
 - The Law Society of NSW – self regulating professional association
 - Opts for self-regulation.
 - Argues that – legal profession has demonstrated throughout history that it is capable of setting, and enforcing compliance with, high standards of professional practice.
 - Argues that – the independence of the legal profession from the influence or control of the executive arm of government is essential not only to its effective self-regulation but also to the very maintenance of the rule of law.
- *Arguments for self-regulation:*
 - These ideas are espoused in the Law Council of Australia's Blueprint 1994:
 - Service ideal – lawyers have traditionally been altruistic and served the community.
 - Lawyers historically set a high standard and this standard has been maintained by disciplining members.
 - Non-lawyers cannot understand the applicable proper standards of the profession
 - Rule of law – government control and regulation would interfere with lawyers doing their work properly and protecting their clients rights against arbitrary government action.
- *Arguments against self-regulation:*

- Under the present system, the legal profession councils act not only as regulatory bodies but also as governing bodies.
 - As regulatory bodies – the council’s main function is to protect the public interest.
 - As governing bodies – the council’s main function is to look after their own members.
 - I.e. A conflict of interest exists when the Law Society wants to perform both functions.
- If the profession has complete power over the provision of its services – there is no accountability. To reach a balance between the ideals of the rule of law and accountability, there is a need for outside involvement in the regulation of the profession. → Currently, that outside involvement is in the form of lay membership.
- Potential for newer types of control to make the legal profession more responsive to community concerns.

Contemporary Regulatory Controls

- In opposition to the “adversarial advocate” idea of the traditional model – contemporary regulatory controls seek to make lawyer’s practices more responsive to consumer concerns, competition, economic efficiency, and the need for speed, fairness, and the appropriate use of alternatives to adversarialism
- Today – moving towards co regulation in 2 ways:
 - 1. Community representation – lay membership is a statutory requirement, but representation by lay members must not exceed 25% - but no same requirement on the admissions board- why?
 - 2. Legal services commissioner – does not need to be a lawyer
- Community representation –
 - community involvement can help the profession become sensitised to community needs and by responding to these needs reduce the likelihood of government interference that would weaken its independence.
 - Public confidence in the profession is more likely to increase.

Conclusion

- But, traditional control continue to operate as they have – modern controls have merely been grafted onto the traditional model, which make them weak, incomplete and overpowered
- E.g. Consumer complaints resolution –
 - Consumer complaints handling functions and independent ombudsmen have been patched onto the traditional self-regulatory disciplinary process.
 - But they have not been adequately resourced and legislatively empowered to effectively handle consumer complaint resolution.
 - Legal Services Commissioner in NSW – the LSC receives all complaints about lawyers in the first instance. Those complaints not easily resolved are still referred to the (self-regulating) Law Society and Bar Association Councils for investigation.
- traditional controls are justified by ethics of the autonomous legal profession and the adversarial advocate lawyer. But traditional model is not set up to be proactively responsive to issues. The community now expects lawyers to be more responsive to general community values.
- reforms have been incomplete, unsatisfactory and do not deliver effective consumer remedies, as they remain tied to self-regulatory disciplinary processes
- Arguably – this calls for government intervention to convene thorough reform process in order to determine which ethical values should ground regulatory controls and redesign conduct standards, disciplinary processes and consumer dispute resolution systems to achieve them.