

**LAW5015 –
PRINCIPLES OF ETHICS
IN LEGAL PRACTICE**

**SEMINAR NOTES
STREAM 1**

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TOPIC 1: INTRODUCTION – APPROACHES TO LAWYERS' ETHICS AND ETHICAL DECISION-MAKING

Sources of Professional Ethics

- The ethical values that guide lawyers in their day to day practise of the law come from a number of sources:
 - Role morality: the ethical approach we adopt in our professional capacity
 - How do we think through moral issues
 - Personal values: developed through family, education, life experiences, and work
 - Moral theory: approaches to assist in thinking about issues
 - Professional rules and standards
 - Legislation

Overview of Ethics and Moral Theory

Why do we Consider Moral Theory?

- Moral theory provides:
 - A rationale for many of the rules of professional conduct, and
 - Reasoning tools that can help us resolve novel or complex ethical issues
- Ethics is the moral principles that guide our actions as individuals, but also the rules of conduct recognised in a particular profession
 - Moral principles are concerned with distinguishing between behaviour that is good or bad, right or wrong, fair or unfair
- Ethics is concerned with what we ought to do, not what is about is acceptable or expedient
 - In our case, ethics is about professional behaviour

The Four Cardinal Values

- In Western classical antiquity of Greece and Rome, the four basic virtues required for a virtuous life were:
 - Prudence (wisdom, the ability to make sound judgments)
 - Justice (fairness, ensuring each receives their due)
 - Justice was considered the most extensive and important of the cardinal virtues
 - Temperance (moderation and self-control)
 - Courage (including fortitude, strength & perseverance)
- The term 'cardinal' comes from the Latin *cardo* (hinge)
- What virtues are missing?
 - What about virtues as towards others?
 - Beyond the Western, male, canon, might other traditions inform our ethic considerations?

TOPIC 3: ADMISSION TO PRACTICE

Character Requirements for Admission to the Profession (Parker & Evans)

- Required knowledge (law degree)
- Completed PLT
- Have proficiency in English
- 'Fit and proper' to be admitted

Fit and Proper

- Generally demonstrated by the absence of anything that would cast doubt on the suitability of the person for admission to the profession
 - Eg. Prior criminal history or any other indication of dishonesty
 - Eg. Mental illness that makes the candidate unfit to practise law
 - Eg. Continued disregard for the political and social norms of the era → Including membership of suspect political organisations (*Wendy Bacon*)
 - This suggests that one of the implicit intentions of the admission requirements is to ensure that only those who are not only trustworthy but also conventional in their political allegiance, and unlikely to ridicule or cause embarrassment to the rest of the legal profession, are able to enter

The Admission Process

- Application for a compliance certificate for admission as a lawyer
- Disclosure Guidelines for Applicants for Admission to the Legal Profession
- Disclosure statement (Statutory Declaration)

Political Activity

- Holding extreme political views does not make a person unfit for practice provided that in expressing those views a person does not engage in unlawful activity
- Candour in disclosing any political conduct that might bear on fitness to practice is essential

Re B [1981] 2 NSWLR 372

- Throughout the 1970s while in her mid 20s to early 30s, Wendy Bacon campaigned on behalf of causes such as the repeal of pornography laws, the preservation of accommodation in the Rocks and Kings Cross, the dismissal of the Whitlam Government, nuclear materials exports, campaigns on behalf of certain prisoners and prison reform generally
 - Her various political campaigns led to convictions for 10 offences (none involving dishonesty) and many other charges which were either dismissed or did not proceed
 - In 1972 she published a writing in which she expressed her contempt of the law and at various times she had made statements defiant of the courts and authority generally
 - She commenced her law degree in 1977, graduated in July 1979 and applied for admission to practise
- She said in evidence: *It was not until the latter stages of my law course, that I made a decision to apply to be admitted to practice as a lawyer. This decision came about as a result of my greater understanding of the law and of the legal system. I came to a deeper appreciation than I had previously had of the ways in which I could pursue the interests of disadvantaged clients and my own ideas through the legal system*
- CoA: Of itself being a political radical or holding extremist views on sex, religion or philosophy was no bar to admission
 - **Reynolds JA:** *'It is not a question of any difference of view as to her political ideology or indeed a dislike of the vigour with which she has pursued the many causes she has espoused. It is rather a question of whether a person who aspires to serve the law can be said to be fit to do so when it is demonstrated that in the zealous pursuit of political goals she will break the law if she regards it as impeding the success of her cause.'*
- Crucial to the question of fitness was an incident in 1979 when Bacon had stood bail for a prisoner
 - She told the court that she had borrowed the bail money from a mutual friend
 - However, CoA concluded that B had not told the court the truth about the bail money
- CoA: Held that B was not a fit and proper person to be admitted to practice
 - **Moffatt P:** *'That a person can be trusted to tell the truth and, regardless of the ends, not participate in a breach of the law is fundamental to being a barrister . . . The bail matter and her evidence in respect of it establish she is not fit to be a barrister.'*
- There were indications in the CoA's judgments that had the case against B been solely based on her political activity she may have been admitted

Re Julius [1941] St R Qd 247

- During World War 2 Max Julius applied for admission to the Qld Bar → Some barristers objected on the grounds that he was a member of the Communist Party and therefore a disloyal subject of the King
 - The Communist Party had been outlawed in 1941
- Court held that the holding of extreme political views does not make a person unfit for practice provided that in expressing those views a person does not engage in unlawful activity

Trust Accounts

Position at General Law

- When a practitioner, as the agent of a client, receives money or other property on behalf of a client (either from the client or a third party) they do so in the capacity of a **trustee**
- A practitioner therefore has a fiduciary obligation to hold it for the client's purposes
- A fiduciary has four basic duties:

1. Confidentiality

- Applies to information concerning money received in trust
- Exceptions:
 - External examination (audit) and external investigations requirements of the Uniform Law and the Uniform Rules
 - *Financial Transactions Reports Act 1988* (Cth) which requires solicitors to report significant **cash** transactions of A\$10,000 or more (or the foreign currency equivalent) to AUSTRAC

2. Loyalty

3. To avoid conflicts of interest

4. To account

Position at General Law – Duty of Care

- The usual professional duty to exercise reasonable care applies in relation to the handling of trust money
- The standard of care is that of the ordinary qualified, competent and careful lawyer

Trust Money Regulatory Regime

- The trust money regulatory regime is contained in:
 - The *Legal Profession Uniform Law Application Act 2014* (**Application Act**)
 - Chapter 4 of Schedule 1 of the Application Act (**Uniform Law**)
 - The *Legal Profession Uniform General Rules 2015* (**General Rules**)
- **Uniform Law s 127**: Objective → To ensure that trust money is held by law practices in a manner that protects the interests of the person on whose behalf it is held
- **Application Act ss 88 and 89**: The regime also applies to 'approved clerks' nominated by the Victorian Bar to hold trust money on behalf of barristers

Index of Provisions of the Application Act

- Part 5: Trust Accounts
- Division 1: Statutory deposits into the Public Purpose Fund
 - ss 78-86
- Division 2: Authorised deposit-taking institutions (ADI) - s 87
- Division 3: Approved clerks - ss 88-90
- Division 4: External examinations and investigations - s 91

Index of Provisions of the Uniform Law

- Chapter 4: Business Practice and Professional Conduct
 - Part 4.2: Trust Money and Trust Accounts