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LECTURE 1: THEORIES

- Ethics is a combination of values, emotions and morals

WHAT ARE VALUES/EMOTIONS?

- Core values of legal profession include: (Carol Andrews in Standards of Conduct for Lawyers; an 800 Year Evolution):
  - Litigation Fairness
  - Competence
  - Loyalty
  - Confidentiality
  - Reasonable fees
    - Communications
    - Managing Client’s Expectations
  - Public Fees
- **NOTE**: Andrews fails to recognise honesty and integrity

- More values of lawyers:
  - Professional Detachment
    - “Seeing client as a blank canvas”
  - Honesty
  - Public Service
  - Integrity
  - Balancing
  - Empathy
  - Trust
  - Justice

- Values refer to the question of “how one should live and act”
  - Requires identification of one’s own …sentimental capacities rather than evaluation of the appropriateness of this sentimental capacity → to form a balanced value (Heidi Feldman, Codes and Virtues)
WHAT ARE MORALS?

- These are HUMAN rather than PROFESSIONAL values
  - Focus on conduct, duty, responsibility
- Apparent rejection of the moral aspects of lawyering result in a void of professional identity (McFarlane)
- Key component of ethics (Jennifer Robinson)
- Consists of the principles which dictate how serious conflict should be resolved (Bagaric and Dimopoulos pg 7)

WHAT ARE LEGAL ETHICS?

- Legal ethics is an oxymoron
  - Legal implies mandatory rules; ethics are seen as discretionary (Dal Pont)
- Law of lawyering – ethics are institutionally enforced or regulated
  - Guiding behaviour BUT need ethical perspective on being a lawyer (Parker & Evans – reinforces Dal Pont)

THEORETICAL APPROACHES

1) Virtue Ethics (Aristotle) “The Actor”
   - De-emphasises rules as a guide for ethical decision-making
   - Ethical decisions determined by one’s own character and virtues
     - EG: How we should live? What ought I do?

2) Deontology (Kant 1724-1804) “The Act”
   - Emphasises rules as a guide for moral decision-making
   - Fails to account for the consequences of these rules
     - EG: What are the rules? What is the moral rule here?

   - Decisions made based on outcome of actions, rather than adherence to rules
   - Decisions should strive to create a net utility → “desirable consequences”
     - EG: What will be outcome of my actions? What’s a good outcome?
The Value in the 3 Models

- It has been suggested that “any black letter statutory codification regulating lawyers’ conduct will be flawed as an instrument of ethics for lawyers” (Heidi Feldman, Codes and Ethics)
- No single ethical response to an issue
  - Ethics is a subjective discourse

CASE STUDY – Bushfire Claim

- Virtue Ethics = focus on actor
  - Assess claim and do right thing
  - Fulfill obligations to ALL (Shareholders, Staff, Clients)
- Deontology = focus on act
  - Apply rules of the insurance claim/AUS law
- Consequentialism = focus on consequences
  - Decision and its outcomes
  - Consequences – reputation, results

DEFINING THE PROFESSION AND LEGAL ETHICS

- Ethical responsibility of lawyers based in philosophy, professional responsibility, professional conduct
- Ethics are normative values which set standards
- Intersection of ethics and legal practice
- Public service
  - An ability to recognise and reflect upon professional responsibilities of lawyers in promoting justice/service in community
LECTURE 3: THE LEGAL PROFESSION

- AUSTRALIAN LAWYER = person admitted (to SC) to practise law (as solicitor/barrister)
- AUSTRALIAN LEGAL PRACTITIONER = Australian lawyer holding a current practising certificate (issued by profession body eg. Law Society/Bar Assn)
  - Renewed each year
- Supreme Court has inherent jurisdiction to admit and discipline lawyers

REQUIREMENTS FOR ADMISSION

1) Eligibility (s 24 LPA; Reg. 94 LPAR)
   - Academic requirements (s 24(1)(a))
     - Approved academic qualifications (Reg 95)
       - At least 3 years full time law study
       - Sufficient academic training in core areas
   - Practical requirements (s 24(1)(b))
   - Approved practical legal training requirements (Reg 96)

2) Suitability for admission (s 25 LPA)
   - Applicant must be “fit and proper” (s 25(1))
     - Determined by looking at suitability matters (s 25(1))
       - Matters relevant to consideration are listed in s 9
   - Person may be considered fit/proper despite suitability issue (s 25 (2))
     - Unsatisfactory beginning may be displaced by a satisfactory subsequent career (Ex Parte Lenehan) – upholds reputation
   - Early consideration of suitability application can be made to Admission Board (s 26)
     - Discovers concerns that may be held before a person completes their studies and applies for admission

- Factors negatively impacting on FP/GFC (role of these is to protect public)
  - Criminal Behaviour
  - Academic Misconduct
  - Infirmity (questionable fitness to practise)
    - Mental instability, not always = unfit (S v Legal Practise Board WA)
CORE VALUES AND THEMES FOR PRACTISE

- Subjective factors:
  - Honesty (dishonesty is considered a significant flaw)
  - Candour (acknowledgement of wrongdoing, frankness in disclosing)
- Objective factors:
  - Reputation of the profession (loss of public confidence)
  - Public protection

SUITABILITY MATTERS (s 9(1))

RATIONALE

- Requirement is “directed at a concept different from academic or practical competence” (Dal Pont, 42)
- Legal professional represents the profession and must uphold the integrity of the system (Kennedy v LPAB)

FAILURE TO DISTANCE PERSONAL BELIEFS

- Beliefs are no bar to admission unless they have potential to intrude on professional conduct (Re Bacon)

FAILURE TO DISCLOSE/LACK OF CANDOUR

- Failure to disclose charge/conviction will likely mean an applicant is not of good fame and character (Re Davis; Re Hampton; Re Del Castillo)
  - “Character flaw”
  - Not a “serious defect” depending on nature of charge (Del Castillo)

PAST CRIMINAL CONDUCT

- Indecent assault - profession cannot permit public to believe it condones its members committing of any serious crime (A Solicitor)
- Failed to disclose past break and enter (Re Davis)
- Retained service on property, not of good character (Re Stephen)
- Admitted after not disclosing acquitted murder charge (Re Del Castillo)

ACADEMIC DISHONESTY

- Seen as against GFC especially when there is non-disclosure
  - Cheating in Exam = Jai Ram, Van Es
  - Colluding in Assignment = OG, Richardson (admitted)
OTHER PRINCIPLES

- **Error in Judgement** = miscellaneous case (as per Dal Pont) where an error in the applicant’s judgement did not disbar them (*Richardson*)
- **Dishonesty** = inappropriate to accept as fit a person who responds to stress by acting dishonestly (*Re AJG*)
- **Remoteness** = personal misconduct that is remote to the practice of law will not be PM (*A Solicitor*)
- **Changing Standards** = standards of profession change with community (*Pro v P*)
  - “What might have been considered disreputable by one generation may be accepted by a subsequent one”

STRIKING OFF

- Lawyers have exceptional privileges and exceptional obligations (*Ziems*)
- Enquire into conduct subject to the charge and even trial conduct (*Ziems*)
- Fact of conviction not necessarily inconsistent with fitness for practice (*Ziems*)
- Examples
  - Past criminal charge not disclosed (*Re Davis*)
  - Academic dishonesty (*Re OG*)
  - Fraudulently creating costs agreement (*Foreman*)
  - Influencing witness (*Kennedy v Law Institute*)
- Not struck off
  - Subsequent conduct is relevant = good character, remorse, degree of disgrace from being in jail and undertaking of urine analysis (*Pro v P*)

MENTAL HEALTH

- MH issues may impede admission – failure to be FP (*XY v Board of Examiners*)
  - BUT not mental illness itself but the implications behind it (*S v Legal Practice Board of WA – not depression but fitness to perform*)
- Must present expert evidence to prove ability to perform (*S v LPB*)
- CASE = *XY v Board of Examiners* [2005]
  - Victim of childhood abuse, psychiatric concerns, alcohol abuse, borderline personality disorder, criminal charges
  - Charges not dishonesty matters, explained by ‘poor mental state’
  - Medical evidence of ability to practise
  - Undertaking to attend AA ‘appropriate safeguard’
APPLICATION FOR READMISSION

- Striking Off
  - Removal from Roll of Lawyers held by SC (s 562 LPA 2004)
    - Does not prohibit application for readmission
  - Most severe disciplinary sanction for professional misconduct

- Re-Admission
  - Application for readmission imports a higher threshold than the initial threshold (Kennedy v LPAB)
  - Onus = lies with applicant to satisfy Court, admitting authority and association there are ‘solid and substantial’ grounds to allow readmission

- Relevant factors
  - Candour in readmission application
  - Re-establish reputation
    - ‘Greater the fall from grace the more ground to recover before reinstatement’ (V v Canterbury District Law Society)
    - Subsequent Career, eg. War service (Re Lenehan)
  - Acknowledge ‘wrongfulness’, show contrition, express regret
  - Restitution/compensation
  - Conditions placed on readmission (EG: not to practice on own account, not to have control of trust account, not to practice in certain matters)
CASES ON ADMISSION

- **Re Bacon (1981)** [Failure to Distance Personal Beliefs]
  - FACTS
    - Record of political activism
    - Was involved in a personal bail matter
    - Lied about bail money, said it was hers, but it was the accused’s
  - HELD
    - Not admitted
    - Lied to the court in disclosing so they felt could not be trusted
      - Issue not so much her political activism but non disclosure
      - Character, reputation, conduct falls short of standards expected of prospective barrister

- **Re Davis (1947)** [Failure to Disclose]
  - FACTS
    - Already admitted as barrister
    - 12 years prior conviction for break and enter not disclosed to court nor solicitors who wrote his character reference
  - HELD
    - Struck off from practise – not of GFC
    - Lack of consideration for the court

- **Re Del Castillo (1998)** [Failure to Disclose]
  - FACTS
    - Practitioner was charged with, and acquitted of, murder
    - No disclosure
  - HELD
    - Lie was not a serious defect
    - Applicant was not unfit and admitted

- **Re Hampton** [Failure to Disclose]
  - FACTS
    - Failure to disclose inappropriate behaviour as nurse
  - HELD
    - Lack of professional judgment “raises risks were he to practise”
    - Not admitted