

Ethics and Professional Conduct Notes

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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?

3) Consequentialism/Utilitarianism (**Mill 1806-1873**) “The Consequences”

- 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
 - Infirmary (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