

D&E

Essay Notes

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0. Foundational concepts

0.1 Interconnectedness

Civil justice **system** - 'a group of interacting, interrelated, or interdependent elements forming a complex whole or a functionally related group of elements. Disturbance in one part of the system will procedure sometimes unpredictable consequences for other parts of the system.' (Genn 11)

- *Sexual misconduct or law as a business seep into substantive justice*
- *One party's abuse affects another party's access*
- *Not correctly navigating confidentiality can undermine public trust in system*

'The legal system, being a human system, is inevitably fallible' (Hayne 9)

0.2 Why civil procedure?

If evaluate value of civil procedure rules, come here for the actual purpose of them -> do they adequately achieve these purposes?

- Guarantee procedural fairness -> *consistent application* (Genn 13)
- Ensure judges have all appropriate evidence available - links to substantive outcome -> *discovery*
- Reflect a sense of justice -> *remains central tenant of justice system*
- Means by which substantive rights are enforced -> *case management and 3D*
- Perceived fairness by litigants (Genn 14) -> *perception is important*

Inherent tension

- Procedure requires reasonable balance between cost and accuracy (Solum quoted in Genn 15)
- 'There is no perfect rectitude of decision, justice cannot be dispensed instantly without some delay, and justice cannot be absolutely free of cost constraints. Each system has had to balance the competing demands and strike a compromise.' (Zuckerman quoted in Genn 16)

HAC recognises the application of procedural fairness as a right (Z 91)

0.3 Justice

A fair trial

Elements of a fair trial

1. Unbiased and independent adjudication
2. Open Justice (Z 104)
3. D's right to be heard (Z 109)
 - Can present defence
 - Must have timely notice of case -> service
 - Ex parte or default only in exceptional circumstances
4. Judge provides reasons for a decision (Z 115)
 - Can appeal
 - Judicial accountability
 - Develops the law (Genn 18)
 - Distinguishes fair trial from vigilante justice (Raz)

Victorian Charter of Human Rights and Responsibilities: s 8 (recognition and equality before the law) s 24 (fair hearing)

Constitution: Ch III on judicial power

Why justice?

Genn argues justice is a public good because its purpose is to:

- Provide legal structure for economic operation and government scrutiny (16)
- Provide peaceful, authoritative dispute resolution between actors in society
- Reflects and promotes social change (17)
- Safeguards individuals' rights
- Social justice, economic stability, social order
- People arrange their affairs in the light of its rules (20)
- Allow judges to clarify, develop and apply the law (Jolowicz) (18)

Raz's 8 principles of the rule of law:

1. All laws should be prospective, open and clear
2. Laws should be relatively stable -> predictable bc backwards looking and independent (Hayne 8)
3. The making of particular legal orders should be guided by open, stable, clear and general rules -> CPA, SCR
4. Guaranteed judicial independence
5. Observe principles of natural justice
6. Courts can review the implementation of other principles
7. Courts easily accessible -> costs
8. Discretion of crime-preventing agencies should not be allowed to pervert the law

Tribunal 'is tasked not with the independent pursuit of truth but with the arbitration of a contest between parties who assert different versions of the truth' (Gageler 249)

- *This arbitration requires accessing relevant information (discovery)*

Open justice

A system of justice can only be respected by society if they trust it is impartial, equal, transparent and principled (*Rares* [3])

Open justice principle in Australian law (Z 101)

- Public has right to access to court proceedings and materials (Z 104)
- 'justice must not only be done, it must be seen to be done' (Perram J in *EOX17 v Cth* [12])

ASCR r 5.1
<p>5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:</p> <ul style="list-style-type: none"> 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or 5.1.2 bring the profession into disrepute.

Justice system less adversarial

CPA 21: not mislead or deceive

ASCR 19.6: inform court of authorities against their client's case

ASCR 24: not advise witness to give false or misleading evidence, not coach witness

ASCR 29: prosecutor not inflame or bias the court

0.4 Professional conduct rules

Purpose of professional conduct rules

- Standards expected of members [DP 1.125]
- Guide for disciplinary proceedings
- Help inexperienced lawyers understand their professional responsibility
- Highlights the seriousness with which lawyers view their responsibilities
 - Fosters trust

Professional conduct rules have an ethical dimension, they reflect the profession's collective judgment as to expected standards, ethos rather than exhaustive [DP 1.130]

- BUT they are also very technical and specific

Regulate professionals through a complaints process

Disciplinary options include suspension, removal, fines, restriction, education and criminal conviction (ASCR 2)

1. Access to Justice

1.1 Notes

Access to justice - equal access to authoritative, enforceable rulings and outcomes that reflect the merits of the case in light of relevant legal principles (Genn 115)

Overarching obligation: justice should be 'timely, cost effective and efficient' (CPA s 7)

No requirement in Australian civil procedure that parties have equality of arms [DP 3.128]

- BUT they do need to be treated impartially by the Court [DP 3.130]

Barriers to justice:

- Costs (*Simic*)
- Slow
- Inequality of arms
- Complex -> e.g. navigating commencing proceedings
- Adversarial -> family law
- Lack of certainty
- Susceptible to exploitation -> abuse of process (*Flower & Hart*)

For self-represented litigants (some have no choice), Court needs to ensure that they have sufficient information about practice and procedure, so that meritorious claims/defences do not fail for lack of understanding of procedure (Z [3.137])

Family law case study

Disproportionately high legal costs of parties to family matters (Joint Select Committee on Australia's Family Law System)

- Some people were spending up to \$200 000 in legal fees
- In one case, the committee heard of a separated couple spending nearly \$900 000 in legal fees against an asset pool of \$1 million
- The majority of parties in family court proceedings are average income earners. Legal firms cannot justify the very high legal fees of greater than \$350 per hour. Nor Barristers that charge >\$2000 per day (Submission 123)
- The legal system has a vested interest (more fees) in prolonging cases, which only adds to the financial costs of both parents at a time when the finances are strained. It also adds to the tensions between the parties (Submission 559)

Case	<i>Simic v Norton</i>
Facts	<ul style="list-style-type: none">• Family law solicitors charged exorbitant costs• Sent multiple letters a day to each other, not all necessary, ran up hourly costs
Held	Solicitors' conduct amounted to professional misconduct
Reasoning	<ul style="list-style-type: none">• Critical of a culture of bitter, adversarial and highly aggressive family law litigation

	<ul style="list-style-type: none"> ○ Win at all costs ○ Concede little or nothing ○ Hang the consequences ● Total costs: \$352,744 for mother, \$506,000 for father <ul style="list-style-type: none"> ○ Outrageous levels of costs for ordinary people involved in family law proceedings ○ Limits parties' ability to support their children by draining their wealth ● Parties to family law litigation can be emotional and have little experience with the court process ● Refer solicitors to Legal Services Commissioner to consider: <ul style="list-style-type: none"> ○ Whether work was necessary for pursuit of legitimate client needs ○ Whether work was done in a reasonable manner, considering parties are unsophisticated in terms of family litigation and highly emotion ○ Whether legal costs claimed were fair and reasonable ○ Whether costs were proportionate to overall issues
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Wilmot-Smith

A just justice system is one where victims of injustice get justice, and no one suffers injustice at the hands of the system (2)

- Even a legal system with the perfect set of law can still be unjust, e.g. if it excluded claimants based on race or religion (1)

'legal systems are both a solution and a problem' (12)

Justice should not be thought of as a consumer good to be left unregulated in a free market (3)

- That way, the richer someone is, the better their lawyers are likely to be
- Instead, justice should be prioritised over other goods, bc it is the basis on which other goods are distributed in society
 - *How would this affect freedom of choice?*

Publicly-distributed system instead?

Public	Private
General access to legal services and levels the playing field.	Imbalance in quality of lawyers -> business
Promotes the idea of calling to account institutions and individuals, disincentivizes bad behaviour -> gender	Firms are difficult to regulate -> gender, business
Protects the vulnerable,	Only the poorest get legal aid and CLC

Legal services less distorted by commercial interests -> business, family law, <i>Flower</i>	Lawyers focus on making \$ rather than justice
Less waste of resources on unmeritorious cases	Disincentivise frivolous claims
Limit the need for dispute resolution bc litigation less of a threat	Encourage ADR
Claims against the state would then interfere with the separation of powers because the state would be determining legal representation for cases against itself,	Lawyers are independent from the state
Issues with rolling out the services (administrative issues), delays,	Market is inherently efficient
Law profession would not attract the same level of quality students etc,	\$ encourages people to be lawyers BUT altruistic?
Higher taxes,	Create more jobs
Lack of freedom to choose lawyer (concern in <i>Flower</i>)	People can choose their own lawyers

Best option is probably limiting the amount that can be spent on legal representation, creating a publicly funded base-line system (more reliable and available than legalaid)

1.2 Key questions

What are the major barriers inhibiting access to justice?

How do those barriers benefit and burden different interests?

How should society overcome the barriers?

Is there a right to legal representation? Should there be?

Should alternative civil justice systems be implemented?

2. Admission to practice and discipline

2.1 Notes

Admissions is important bc:

- 'The entire administration of justice in any community which is governed by law depends upon the honest working of legal practitioners who can be relied upon to meet high standards of honesty and ethical behaviour.' (Gillard J in *Frugtniet v Board of Examiners* [29])

Purpose of admissions process:

- Protect clients from dishonest or incompetent lawyers being admitted
- Protect the administration of justice in both operation and reputation

Admission

Only admit 'fit and proper person' to practice

- Means 'the applicant must have the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a barrister and solicitor' (Pagone J in *Frugtniet*)
- These qualities include:
 - Honesty, commitment to open candour and frankness, irrespective of self-interest or embarrassment (Victorian Legal Admissions Board)
- Onus is on applicant to establish their fitness (VLAB 3(a))

The Victorian admissions process meets applicants in person early on if there are concerns or disclosures (Haller and Bartlett)

Pros	Cons
Educative, encourage remorse, provide advice (128)	Education is an illegitimate role, not in the Act (129)
Administrative efficiency	Inefficient because meetings only held with those who have disclosed, but if someone has disclosed, they've already displayed candour Long wait times (130)
Better evidence from applicants (126)	Stressful for applicants, unclear if formal or informal (132)

After ^, may attend a full board meeting for a tough inquisitorial process

Victoria examines applicants' past student misconduct more carefully than NSW (Haller and Bartlett 135)

Vic (135)	NSW (136)
Need to mark-up assignments subject to allegations of academic dishonesty, colour-coded system	Require documentation to support their version of events
Essentially re-mark	Trust universities' processes
Encourages applicant to bring co-colluder to the meeting	

Disclosure

To be admitted, applicant has to disclose:

- Relevant past conduct, which may affect important but not decisive of their admission (VLAB 3(b))
 - Also show what applicant has done to redeem or rehabilitate themselves since past conduct (VLAB 6(n))

- Disabilities or conditions that may affect their current ability to carry out practice (VLAB 8)

Examples of what to disclose (VLAB 5)

- Social security overpayment
- Academic misconduct
- Inappropriate or criminal conduct
- Intervention orders
- Infringement or traffic offences
- Making a false statutory declaration
- Tax offences
- Corporate insolvency, penalties or offences

Gobbo disclosed matter against her at a Student Union Electoral Tribunal which was dismissed [2]

- ‘I am not sure whether this actually constitutes a matter for disclosure...however, my discussion with Mr Peter Ryan have encouraged me to bring this matter to your attention keeping in mind that full disclosure is required’
- ‘Revealing more than might strictly be necessary counts in favour of an applicant; especially where the disclosure still carries embarrassment or discomfort.’ (Page J in *Frugtniet v Board of Examiners* [11])

Gobbo also disclosed charges of possessing and using a drug of dependence but emphasised ‘my naïve behaviour and poor judgment’, ‘fully cooperative and assisted the Police’, and ‘I have not committed any offences since’ [3]

Particular emphasis on candour; no matter how worthy the cause, dishonesty is unacceptable (*Re: B*)

Case	<i>Re: B</i>
Facts	<ul style="list-style-type: none"> • Issue regarding barrister’s admission based on radical political views • Bacon was a well-known political activist and journalist • She participated in a string of activist causes, had ten convictions, but none related to dishonesty • She then lied about a bail application and the origin of where the money was coming from
Held	Her activism did not disqualify her, but her dishonesty did
Reasoning (Reynolds J)	<ul style="list-style-type: none"> • Why are barristers held to a standard? <ul style="list-style-type: none"> ○ They owe a duty to the public to uphold the law and the administration of the law (381) ○ They are given certain privileges like advocate’s immunity ○ They are unsupervised (382) • In itself, being a radical in a political sense or being what might be regarded by some as an extremist in views on sex, religion or philosophy provides no bar to admission as a barrister, unless the attitude of the applicant may render him not fit and proper (380) • If the conduct was when the applicant was young, less determinant of their ordinary character