WEEK 1

ETHICAL APPROACHES

a. Ethics

Philosophical Ethics

- Utilitarianism and Consequentialism (Bentham; JS Mill) will the consequence result in better being done than harm? If so, then do it view a good moral decision as being an outcome of the greatest happiness for the greatest numberBenthamJS Mill
    - But how is that defined? Concept of the ends justifying the means does not have great support in professional conduct law
- Deontological Ethics (Kant) Refutes the notion that the ends justify the means, rather the means are just as important as outcomes and consideration is given to whether the action (or omission) is right in and of itself
- Virtue ethics (Plato; Aristotle) a person makes sound moral decisions if imbued with virtues gives discretion to individual

Legal Ethics

- Brennan CJ Ethics are not what the lawyer knows he should do but what the lawyer does
- Lawyers may have to reconcile their personal and professional values in circumstances where the client or their views are inconsistent with the lawyers own
    - Personal values may result from larger political or self-interested perspectives
- Professional standards of conduct provide minimum standards
    - They are mostly stated at a high level of generality to provide maximum flexibility and allow for different situations which confront lawyers
    - BUT Brogan (Professional Responsibility and Legal Ethics) argues that ethics should not be conflated with rules of conduct legal ethics is more than a set of rules and is not just about purely individual values
        - Lawyers who observe the law of lawyering are minimally ethical but perhaps no more

Ethical Approaches

1. Parker and Evans The law of lawyering is significant as one way in which lawyers ethics are institutionally enforced or regulated, and can certainly be helpful in guiding behaviour BUT do not provide a basis for considering what values should motivate lawyer behaviour and choices about what kind of lawyer to be

- 3 step process of ethical reasoning:
    - 1. Awareness be aware of the ethical issues that arise in practice, and of our own values and predispositions
        - Engage in ethical audit appreciate there may be different views to those held by the practitioner personally
    - 2. Take into account a range of standards and values that are available to help resolve those ethical issues and make a choice between them
    - 3. Implement that resolution in practice

2. Adversarial advocacy rests on principles of partisanship (lawyers put their clients interests, including their values, above all else) and non-accountability (lawyers are not morally accountable for either the means used to advocate of the ends pursued, provided both are lawful)

- Facilitates access to justice, means lawyers do not impose their own moral views on clients, respects client autonomy and enables lawyers to fulfil their role in the adversarial system
- Raises questions whether the adversarial process is the most effective way to discover the truth and preserve rights and creates problems for lawyers who cannot separate their personal and professional selves

3. Moderated adversarial advocacy proposes that lawyers owe duties to the court and more generally, to the administration of justice

- Places limits on the lengths to which lawyers may go to achieve their clients objectives
- This is the approach most evident in the rules of conduct the lawyers duty to advocate for his client is subject to an overriding duty to the court
- Approach addresses problem of helping clients escape, manipulate or abuse the legal system (however what that means is open to debate)

4. Contextual approaches appropriate action on the lawyers part is to be determined by reference to the circumstances of the particular case. They should make decisions either:

- By reference to legal merit or legal values lawyers should only take those actions seem likely to promote justice (which is not a personal preference but an application of ordinary morality grounded in methods and sources of authority of the professional culture)
- By reference to broader societal interests at issue in particular practice contexts (i.e., responsibility to prevent unnecessary harm to third parties, promote a just and effective legal system and respect core values such as honesty, fairness and good faith)

5. Moral activism approach to practice in which lawyers view themselves as co-equal agents of their clients (and thus as equally accountable) lawyers who find the ends/means objectionable must engage their client in dialogue and may refuse representation if no morally just method can be reached. /

- Impractical, uncertain and expensive

6. Ethics of care envisages the lawyer-client relationship as one in which there is an exchange of views and lawyers do not have to act in a vacuum but rather focus on the client and the clients relationships and on non-legal as well as legal aspects of their situation.

- Need to identify the central issue of care, consider alternative course of action to determine which is loving and just, and select an alternative from those deemed acceptable

Approach in Australia

- Conduct rules reflect adversarial and moderated adversarial advocate approach
- Alternative visions
    - Multiple codes of conduct to account for different roles and different kinds of practice (e.g., negotiation, mediation, arbitration etc., each of which require different standards)
    - Contract model replace current system (under which regulation is under one set of ethical rules which apply to all lawyers regardless of circumstance) with a system in which lawyers and clients contractually choose the ethical obligations under which they wanted to operate
        - Rife with problems of interpretation, regulation and enforcement

DIVERSITY AND THE ROLE OF LAWYERS

a. Definitions in the Uniform Law

Uniform Law = Legal Profession Uniform Law 2014 (NSW) S 6 Definitions

- Australian lawyer means a person admitted to the Australian legal profession in this jurisdiction or any other jurisdiction;
- Australian legal practitioner means an Australian lawyer who holds a current Australian practising certificate;
- engage in legal practice includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy);
- legal services means work done, or business transacted, in the ordinary course of legal practice.

The proposal to amend the Barristers Conduct Rules stems from, among other matters, the ABAs consideration of the Australian Human Rights Commission (AHRC) National Inquiry into Sexual Harassment in Australian Workplaces. The ABA considers the Rules should be amended to: ABA (AHRC) ABA

- expand the application of rule 123 beyond conduct in the course of practice to include conduct in connection with a barristers profession; 123
- provide some inclusive examples of what that broader expression is intended to capture; and
- expand the application of rule 123 to prohibit bullying in connection with a barristers profession, rather than workplace bullying. 123

b. The current rules

Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126 (Hughes v Hill)

The Facts:

In May2015, Mr Hughes employed Ms Hill as aparalegal in his boutique firm located near Byron Bay in northernNSW. Ms Hill was recently separated from her husband and residing in northernNSWso that her children could maintain arelationship with their father. Jobs were scarce for junior lawyers in that area, and Mr Hughes had promised that he would train Ms Hill as asolicitor. 2015 5

The power differential between the parties was both obvious and significant.Ms Hill then commenced proceedings in the Federal Circuit Court. At first instance, the trial judge accepted that Mr Hughes had subjected Ms Hill to sexual harass-mentincluding:

- sending repeated, unsolicited emails to Ms Hill in which he professed his love and offered romanticrelations;
- entering Ms Hills room while on awork trip to Sydney and waiting on her bed in his underwear for herreturn;
- preventing Ms Hill from leaving her office until she gave him ahug; and
- making thinly veiled threats to Ms Hill to the effect that her employment was contingent upon them entering aroman-tic relationship.

The trial judge accepted that at no point had Ms Hill encouraged Mr Hughes and that her behaviour unambiguously rejected Mr Hughesadvances.

Mr Hughes appealed this decision to the Federal Court on threegrounds:

Defining SexualHarassment:

By way of background, section28B(1)(a) of theSexual DiscriminationAct provides that it is unlawful for aperson to sexually harass an employee of the person. Section28Bis contained within PartIIof theSDAct. Conduct which is unlawful under PartIIof theSDAct is included within the definition ofunlawful discrimination in s3of the*Australian Human Rights Commission Act1986*(Cth) (*AHRCAct*). This means that aperson in breach of s28Bis simultaneously considered to have engaged inunlawful discrimination for the purposes of theAHRCAct. In certain circumstances, this empowers the Federal Circuit Court or Federal Court to make orders including the award ofdamages by way of compensation for any loss or damage suffered because of theconduct.SD 28B(1)(a) 28B SD SD SD 3 1986 AHRC 28B AHRC

On appeal, Mr Hughes did not allege that the conduct towards Ms Hill did not occur. Rather, he submitted that the conduct could not be characterised assexual for the purposes of theSDAct. SD

s28Aof theSDAct provides the following definition of what constitutes sexual harassment under s28B(1) of theSDAct:

*(1) For the*purposes*of this Division, aperson sexually harasses another person (theperson harassed) if:*

- *(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed;or*
- *(b) engages in other unwelcome conduct of asexual nature in relation to the personharassed;*

in circumstances in which areasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, thefollowing:

- *(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the personharassed;*
- *(b) the relationship between the person harassed and the person who made the advance or request or who engaged in theconduct;*
- *(c) any disability of the personharassed;*
- *(d) any other relevant circumstance.*

(2) In thissection: conduct of asexual natureincludes making astatement of asexual nature to aperson, or in the presence of aperson, whether the statement is made orally or inwriting.

Justice Perram provided an exposition of the three elements at play in s28Aof theSDAct asfollows:

[22] First, the Court is directed by subs (1) to ask itself whether there has been any of three identified forms of conduct: asexual advance, arequest for sexual favours or other conduct of asexual nature. Each of these concepts involves the applica-tion of adefined legal standard to the facts as found. The Court must determine, on those facts, whether there was asexual advance, arequest for sexual favours or other conduct of asexual nature. It is aquestion for the Court and it is aquestion of fact. In determining whether there has been conduct of asexual nature the Court applies, of course, the definition of that term in s28A(2). (1) 28A(2)

[23] Secondly, if an identified form of conduct is established subs (1) also requires that it must beunwelcome to the person allegedly harassed. This is aquestion of fact which is subjective and which turns only on the allegedly harassed persons attitude to the conduct at the time. Even if the Court has concluded under the first limb that one person has engaged in conduct of asexual nature towards another person, this will not constitute sexual harassment under the provision if it was not actually unwelcome in this sense. Ordinarily this will be proved by the person allegedly harassed giving evidence that the conduct was

unwelcome but that mode of proof is not dictated by the statute and proof of this fact, like proof of any other fact, may be done by avariety of means. In some cases, Isuspect this is one, the unwelcome quality of the conduct will be painfullyobvious. (1)

[24] Thirdly, once it be established that there was conduct of asexual nature towards another and that the conduct was unwelcome, the provision imposes an objective delimitation on the provisions ambit. Thecircumstances must be such that areasonable person would have anticipated the possibility that the person allegedly harassed would be offended, humiliated or intimidated by the conduct. Thecircumstances are defined broadly in s28A(1A) and include, importantly for this case, the relationship between the harasser and theharassed. 28A(1A)

The profound power imbalance should be observed. The Appellant was the principal of the practice. The Respondent was hired as his paralegal, new to the legal profession, unable to move away from the area due to her two children she had to look after and was suffering from an anxiety disorder. A decent person would not have exploited the power imbalance. As the events in this case show, and as the trial judge correctly apprehended, the Appellant is not a decent person. [10]

Society affords to the members of the legal profession privileges. These consist in the exercise of powers not possessed by the community at large: the power to transact, to act in litigation and to argue cases. The possession of these privileges is apt to confer status on those that hold them. But the status is not held for themselves but for the community which they serve. The use of this status for tawdry personal ends is an abuse of it. In this case, the trial judge was right to measure in general damages the power differential that lay between the Appellant and the Respondent not only by the fact that he was her employer but by the fact of his status as a solicitor. [51]

Council of the New South Wales Bar Association v EFA [2021] NSWCA 339

In sum: An appeal of the Tribunals decision was dismissed with costs. Barrister EFA was found to have engaged in unsatisfactory professional conduct, arising from a sexual act committed in relation to an assistant clerk at a dinner. The Court held that it was an isolated incident which was out of character; and accordingly did not warrant a finding of unfitness or removal from the roll. The Court declined to recognise a discrete common law species of professional misconduct drawn from English authority, which centred on peer review disgraceful or dishonourable conduct. The Court confirmed the crucial criterion for a determination of professional misconduct to be the fit and proper person test provided in s 297 of the Legal Profession Uniform Law (LPUL). EFA(LPUL) 297

Facts: The Council of the New South Wales Bar Association (the Council) commenced proceedings in the Tribunal against EFA for professional misconduct. EFA was a barrister attending a dinner associated with a barristers clerks conference, during which he became intoxicated. In the course of the dinner, EFA greeted a colleague with a ritualised greeting which parodied oral sex. It was then alleged that he moved toward a female colleague, placed his hand behind her head and said suck my dick. The Tribunal found that he had not placed his hand on the clerks neck, but had said the words suck my dick. EFA EFA EFA

Issues on Appeal: The key issues were: did EFA use the words suck my dick; whether there was a distinct category of professional misconduct which extended beyond the statutory scope of s 297; whether the conduct of EFA met the threshold for unfitness; and whether the Tribunal had erred in only reprimanding EFA by way of penalty. EFA suck my dick 297

Held: The appeal was dismissed with costs and the notice of contention (filed by EFA) was dismissed. EFA

Article: K Pender (2019) Us Too? Bullying and Harassment in the Legal Profession

- Survey of nearly 7000 legal professionals from 135 countries by International Bar Association1357000
- Sexual harassment
    - 1/3 female respondents and 1/14 male respondents had been sexually harassed in a workplace context
- Bullying
    - 1 in 2 female respondents and 1 in 3 male respondents experienced bullying

c. Recent changes to sexual harassment laws in Australia

Changes include:

- Expands protections to all people conducting business or undertaking (PCBU) captures barristers
- positive duty on employers to take reasonable and proportionate measures to eliminate as far as possible sex discrimination and sexual harassment new S 47C SDA

d. Organizational Diversity

R Graycar, Gender, race, bias and perspective: how otherness colours your judgment

- Graycar makes the argument that the legal system is inherently suspicious of otherness and most specifically so when others occupy positions of judgment. The consequence is to render decisions made by otherised judges liable to attack for bias in a way that decisions made by insiders simply are not.

    - By other, here I mean people who are other than white, male, able bodied, heterosexual etc.
- To put it another way, there is simply no corresponding assumption Indeed, it would probably be considered absurd in legal circles to assume that white male decision-makers will be blinded by their race or their gender. Nor does it ever seem to be assumed that white people are not in a position to fairly impose judgment on non-white people.
- Greycar goes on to explain a number of examples The argument is illustrated by a review of a number of challenges made on the ground of bias or recusal motions to judges whose failure to match the white Anglo hetero-normative standard of the judge is seen as a limit on their ability to be impartial.

Seuffert et. al., Diversity policies meet the competency movement: towards reshaping law firm partnership models for the future

- Scholarship in the competencies movement has responded to this need for skills reassessment.
    - Competencies: identifies, categorises, and measures competencies necessary for particular jobs.
- At the same time, there has been a focus on the lack of gender diversity at senior levels on corporate boards, in government agencies, and at partnership level in law firms.
- However, little attention has been paid to analysing synergies in the competencies and diversity movements
- The article argues that the collaborative research should focus on synergies between the competencies and diversities movements. They provide the greatest potential for reshaping law firm practice and partnership models to respond to issues of advancement, attrition, and lack of re- engagement, particularly by women in law firms.
- For example, the identification of all the competencies necessary to the success of law firms in the twenty-first century may assist with shifting firm culture to recognise and value more of the work typically done by women.

The Law Society of NSW, Diversity and Inclusion in the Legal Profession: The Business Case

- Diversity and inclusion are of increasing importance for the legal profession. Australian society is culturally and socially diverse and this is reflected in both the demographics of legal practitioners and their clients.
- The Value of Diversity and Inclusion
    - Recruitment and retention of highly skilled staff
        - Employers that have diverse and inclusive work cultures, policies and practices attract more people and are able to draw from a larger recruitment pool.
        - Diverse and inclusive work cultures can be related to increased staff retention. Employees who feel valued and respected by their organisation are likely to remain in their role for a longer period of time.
        - As well as the opportunity cost of losing talented staff, there are costs associated with recruiting and replacing staff, and a potential loss of clients.
    - Improved productivity and performance
        - Data from one organisation suggests that if just 10% more employees feel included, the company will increase work attendance by almost one day per year (6.5 hours) per employee. 10% 1 6.5
        - Diverse workforces that include people with global experience and multicultural identities display more creativity, are better problem solvers and are more likely to create new businesses and products.
    - Increased competitiveness and growth
        - Firms and solicitors with diverse and inclusive workplaces and practices can expect to benefit from an enhanced reputation in the broader community and improved access to an increasingly diverse client base. A diverse workforce has knowledge of communities and sectors that they represent and can help your organisation expand beyond traditional markets and customers, promoting itself in a culturally appropriate way.
        - Conversely, complaints or findings of discrimination or harassment can cause serious reputational damage to a law firm or organisation, reducing your ability to attract and retain clients and adversely impacting business outcomes.
    - Compliance with legal obligations
        - Commonwealth and NSW anti-discrimination laws make it unlawful to discriminate, harass, victimise or vilify anyone in certain areas of public life on the basis of specific characteristics.
        - Promote diversity and inclusion, both internally and in the way that you engage with clients, the risk of breaching existing legislation is dramatically reduced. This reduces the risk of costly liability for the organisation and individuals.

WEEK 2

LEGAL NEEDS, ACCESS TO JUSTICE AND DELIVERY OF LEGAL SERVICES IN AUSTRALIA

a. Legal Needs

What are legal needs?

Coumarelos et al, 2012: 3

Unmet legal need is defined as the legal problems that remain unresolved or are resolved unsatisfactorily, regardless of whether any action is taken and regardless of whether there is any involvement of lawyers or the justice system

The concept of legal capability

Law Council of Australia (2018) 'The Justice Project, Final Report: 68

Legal capability = the personal characteristics or competencies necessary for an individual to resolve legal problems effectively. It generally comprises capabilities across several domains, including knowledge, skills and psychological readiness to act. Individuals legal capabilities incorporate their ability to: =

- identify the legal dimensions of problems and situations
- recognise that they may have a legal right or responsibility;
- know and understand the justice system and the tools and services available to solve problems;
- communicate and explain their legal need;
- know to act in a timely manner; and
- perceive a just outcome

What are the legal needs of Australians?

Coumarelos et al, Law Survey (2012)

- 50% respondents experienced 1 or more legal problems
- More than 25% experienced a substantial legal problem
- Overwhelmingly, legal problems were of a civil law nature.
- Most problems were related to:
    - Consumer issues (20.6%)
    - Housing (11.8%)
    - Government (10.7%)

The 2019 World Justice Project Report

- 62% of respondents (n = 1067) experienced a legal problem in the previous two years Most problems were of a civil nature.
- The most common problem types were:
    - Consumer issues (38%)
    - Housing (32%)
    - Money and debt (27%)
- Only 33% were able to access help

Legal need and disadvantage

Law Council of Australia (2018) 'The Justice Project, Final Report p. 56

- Legal problems are not evenly spread across the population
- People experience multiple disadvantage are more likely to experience multiple legal problems
- People experiencing multiple disadvantage are also the least likely to access legal services in response to a legal problem

What are the costs and consequences of unmet legal need?

Law Council of Australia (2018) 'The Justice Project, Final Report: 16 (bullets added)

- According to the LAW Survey, legal problems often have adverse impacts on many peoples lives. These include
    - financial strain (29 per cent),
    - stress-related illness (20 per cent),
    - physical ill-health (19 per cent),

- relationship breakdown (ten per cent) and
- moving home (five per cent).

Law Council of Australia (2018) 'The Justice Project, Final Report: 57

- ..For disadvantaged groups, the costs and consequences of an inability to resolve legal problems compounds inequality and feeds into chronic cycles of disadvantage. The relationship between disadvantage and legal need appears to be bidirectional not only are disadvantaged people more vulnerable to a wide range of legal problems, but the experience of legal problems can further entrench disadvantage and heighten risk of further legal problems.

b. What does access to justice mean?

What is access to justice? **Toohey et al (2009) citing Cappelleti and Garth** set out two requirements for access to justice:

- First the system must be accessible, with access not contingent on financial means or expertise. Secondly any system delivering access to justice must ensure that results 'are individually and socially just'.

What are some barriers to access to justice?

Cost as a barrier to accessing justice

Community Legal Centres Association WA Annual Conference 2012, Perth

- The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance. Wayne, Martin, Creating a Just future by Improving Access to Justice.

Facilitating access to justice?

- In 2019, 72% of community legal and advocacy centres reported being unable to completely meet the demand for their services [ACOSS, 2019] 2019 72%
- In 2016-17, more than 112,700 people were turned away from 62 different Community Legal Centres [NACLC, 2019] 2016-17 112,700 62
- An estimated 30-40% of Aboriginal and Torres Strait Islander women seeking assistance on family violence matters are turned away from some National Family Violence Prevention Legal Services [NACLC, 2017] 30-40%

c. How can access to justice be improved?

Community Law Australia, Unaffordable and Out of Reach

- Improving access to legal information and advice
- Promoting early intervention and preventative legal services
- Promoting alternative dispute resolution schemes
- Simplifying court procedures
- Improving pro bono schemes
- Significant increase to funding of legal services: LACs, ALSs, CLCs LACALSCLC
- Educating judges, lawyers and legal actors

d. The Hidden Whiteness of Law Ransley & Marchetti (2001)

Contrary to the positioning of people as either belonging or not belonging to White culture: 'There is no more powerful position than that of being "just" human.' When a particular group of people is viewed as human, all others are then categorised as being something less than human unless they too can behave, think, feel and look the same as the dominant group. This hegemony allows the dominant group to speak for all others. (pg 142 citing Dyer (1997))

In some cases, there has been an acknowledgment that cultural differences also have an effect on the ability of Indigenous people to effectively present their claims. But these difficulties have often been viewed by judges as being embedded in legal institutions and in legal reasoning, rather than as the result of cultural bias in the legal system itself. Thus the recognition of cultural differences is superficial, and the underlying Whiteness of the legal system remains unchallenged. (pg 142)

e. Access to justice and technology

Digital inclusion

... technological innovations can affect societal inequality ... A key concern identified by Justice Project stakeholders was that policymakers frequently overlook the realities of target groups' digital exclusion (and underlying language and literacy barriers), in their overreliance on online solutions at the expense of more effective and targeted strategies.