

Lawyers and Lawyering

Lawyers

Who are lawyers and what do they do?

- Lawyers aren't seen as very honest. In 2014 34% respondents to a survey (Roy Morgan Image of Professions Survey 2014) said that lawyers were honest and ethical. The lowest rating was in 1998 with 26% and the highest rating was in 1976 with 43%.
- Due to personal experiences, pop culture and experiences of friends and family many people have inaccurate or distorted views of who lawyers are and what they do.
- Lawyers: know the law; members of the legal profession known as barristers, solicitors or legal practitioners that have the required qualifications to be admitted for practice. They have graduated with academic qualifications in law allowing them to become a member of the legal profession. They possess a law degree.
- Law degrees were not seen as essential to practice law until the mid-20th century. The original purpose of legal education was to qualify persons for admission to practice as barristers or solicitors (until the early 20th century, only available for men).
- The knowledge gained from legal qualifications is applied in other careers and professions (members of parliament, business leaders, law academics, teachers, industrial officers, journalists, court administration personnel, publishers, researchers and public policy advisers).
- The purpose of a law degree is forever developing, expanding and broadening. Therefore, law students are now exposed to interdisciplinary and the social and contextual approaches to law. An increasing amount of people are choosing to study law and use their law degree in careers and professions other than to practice law.
- The number of law graduates is increasing; with 12,000 graduating in 2012 (Edmund Tadros, 'Law Degree the New Arts Degree, Students Warned' Australian Financial Review (14 February 2014)). About 70% of graduates are trying to find work in the legal profession (both in the private practice and public sector or community legal centre).
- October 2014; 66,211 practicing solicitors in Australia (2014 Law Society National Profile (April 2015)). September 2014; 5,668 practicing members according to the Australian Bar Association.
- 5,569 private law firms (69.8% solicitors in private practice, 10.9% government, 19.3% corporations, 53.7% in CBH, 29.2% suburbs of Sydney and 11.3% country areas of NSW) (Law Society of NSW profile (2014)).

What's in a name?

- All jurisdictions (except SA) define an Aust. lawyer as one admitted to the Australian legal profession (Uniform Law s 6).
- An applicant for admission to practice becomes a lawyer when they are admitted to practice. When an admitted lawyer holds a practicing certificate they become a legal practitioner (Uniform Law s 6), entitling them to practice as a barrister or solicitor.
- Titles are relevant to regulation, complaints and discipline of a legal practitioner and those who provide legal services for a fee (work done, business transacted in ordinary course of legal practice – Uniform Law s 6).

What is legal work?

- Law is the framework in which a society regulates behaviour and values and rules that provide that framework. A system that involves courts, legislature, lawyers and profession. It is social activity and construct.
- Work done by legal practitioners as barristers and solicitors. Advise and represent clients for fees for service. Legal practice is the integration of many key variables some legal and others non-legal.
- Legal practitioners are problem solvers; resolve disputes, investigate claims, avoid disadvantage, recover loss or compensation, negotiate settlement or agreement, draft new document, expand opportunities, assist a client to plan or manage personal or financial affairs, develop public policy, law reform. Described as litigious (involving court process) or non-litigious.
- Lawyers must understand what their client's needs are and how they can help meet those needs.
- Integrate professional knowledge with skills of legal and fact investigation and analysis, communication, advising and strategic planning. Lawyers must understand how to integrate different areas of the law.
- The ideal career would be one that integrates interests, values and skills.

The influence of lawyers in society

- Influential because of their relationship with the legal system and administration of justice (officers of the court). It is their duty to uphold the rule of law in the defence of a just and democratic society and fearlessly promote the interests of their client within this (utilising the law and legal system in best interests of client).
- Lawyers have concurrent responsibilities; legal system, courts and client within an ethical and moral framework to preserve integrity of system. They have a professional and social role in the community.
- Judges, magistrates and tribunal members are also part of the legal profession; acting impartially and independently to determine facts and legal issues that need adjudicating. They contribute to the development of law and justice.
- Government legal officers; develop policy, guide legislators, parliamentary drafters, departmental legal officers (decision making, represent departments in review of decisions).

→ Journalists (report, investigate, expose, highlight problems, commentators, law reform), law reformers (research, discuss, make submissions, propose, examine, recommend), academic lawyers (help determine the professionalism and ethical values which characterise the legal profession; research, influence and teach future legal profession).

Legal Education in Australia

Thinking like a lawyer

→ Common law systems; adversarial, developed from 2 sources (legislation, precedent) and administered by hierarchy of courts (stare decisis).

→ Legal education: refers to what is taught and how it is taught in undergraduate law degrees.

Historical background

→ Initially it was the profession itself that trained and socialised trainees; 5 years of articles of clerkship (apprenticeship).

→ Modern requirements of tertiary qualifications, 1 year of practical legal training (PLT).

→ Law schools were established in 1852 in Sydney with the aim of teaching academic theory of law. Aim of the curriculum was to provide knowledge of the law for subsequent application in practice. Legal professional bodies prescribed the essential subjects (Priestly 11; criminal law and procedure, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil procedure, evidence and legal ethics and professional conduct) to be studied as part of the law degree.

→ 1950-60s: continuum of legal education theory – legal education had 3 phases; academic (learn what law is and how it is made; law schools), professional post-graduation training-for-practice (learn to apply law, develop practical skills; profession), post-admission continuing education (maintain and upgrade knowledge, skills and competence; academy and profession).

Law school curriculum

→ Submission of the Australian Law School Deans to the Review of Australian Law Schools, Pearce Committee, 1986: curriculum adopted by law schools was too narrow as it concentrated on the 'black letter' of the law and failed to take account of the social, political and economic contexts in which law is practiced and applied. Law graduates aspire to a variety of careers and the degree must meet the broader aim of equipping graduates for a variety of careers law degrees can be applied.

○ Recommendations and suggestions: focus on theory of law, emphasising policy and social context, needs to take into account changes in the nature of legal practice and technological impacts, adopt the practical skills required and the research and analysis of facts and law.

→ Priestly 11 is still followed (teaching what the law is). Allows lawyers to sensibly apply critical thinking and analysis.

Legal education since the Pearce Report

→ Several new law schools were established in the years after the report, adopting the recommendations (encouraging diversity and promoting better understanding of the nature and function of law). By 1993 12 new law schools were established. There are currently 38 law schools in Australia.

→ Adoption of multidisciplinary approach: combined or double degree (more opportunities).

→ Provide quality education, research and analysis to expanding student numbers with dwindling resources.

→ Online education and resources now available.

→ Minimum 3 year degree incorporating Priestly 11.

→ Must be an accredited degree (Australian Qualifications Framework).

→ Growing areas of law that are introduced to law students (due to globalisation of legal practice and new technology).

Although international learning options are available the focus remains on domestic law. Focus slowly towards law within social and cultural context and its relationship with the international market.

→ 2014 graduates: 37.6% male and 62.3% female (Graduate Careers Australia, Graduate Destinations (2014)).

Skills and values in tertiary legal education

→ Clinical training provides a background against which to place substantive law taught; encouraging perceptive discussion on the purpose of legal rules.

→ Initially law schools accepted that legal research and mooting were relevant to study however skills such as drafting, advising, negotiating and advocacy were not. By the 1990s law schools began to accept the need to relate the theory of law to its practical application; understanding rationale and practicing skills of advocacy, negotiation, interviewing and communication.

→ 1994 Sackville Report recommended wider use of ADR methods to resolve disputes; education in the purpose and techniques of ADR methods became necessary. It also became necessary to be aware and sensitive of issues relating to Indigenous Australians (Council for Aboriginal Reconciliation 1996).

→ ALRC 2000, Managing Justice: A Review of the Federal Civil Justice System: recommended emphasis on ethics and professional responsibility and skills.

→ Values has also been integrated into the curriculum (including focus on pro-bono work).

→ Australian Learning and Teaching Council; Learning and Teaching Academic Standards Project 2010: establish standards based quality assurance framework against which performance of tertiary institutions and study programs are evaluated against

range of standards criteria. Threshold Learning Outcomes developed; balancing outcomes with professional and regulatory standards required for law degrees.

→ Helps develop skills and characteristics of lawyers: hard working, people skills, long hours, intellectual challenge, problem-solving skills and have ability to deal with complex problems. Builds self-awareness, explore opportunities and make decisions and transitions.

Focus on wellbeing

→ High levels of stress and depression due to high demands, ethical dilemmas, competitive environment and long hours.

→ Law schools focus on eliminating risks and encourage sharing and recognition of risks (along with coping mechanisms).

Professional legal training for admission to practice

→ PLT: institutional training courses since 1970s. Initially conducted by organisations associated or working cooperatively with solicitor branches of the legal profession. Received accreditation from admission authorities, ensuring it provided lawyers with an acquaintance with procedures, practices and cultures of legal practice.

→ Originally introduced as addition, alternative or substitute to articles. Now always followed by period of restricted practice.

→ Australian Professional Legal Education Council (APLEC) was formed in 1974. Developed general statement to define aim; overcome inadequacy of articles, ensure competency, recognise working knowledge, skills and attitudes of an effective junior practitioner, introduction to nature, organisation, skills and attitude of legal work.

→ Several universities developed PLT programs; involving skills training and clinical education subjects.

→ Articles now abolished and to be admitted as a legal practitioner a tertiary law qualification and PLT course must be completed. After admission solicitors must practice under supervision for 1 or 2 years.

→ Focus = skills development; helping also to recognise and adapt to change.

→ Employers want legal practitioners who are multi-skilled, have a basic understanding of the way legal practice is conducted, and can function in a national legal services market.

→ 2000 APLEC and Law Admission Consultative Council developed Competency Standards for Entry Level Lawyers (Standards); setting out standards of competency to be demonstrated by applicants after PLT. Revised and reviewed in 2015 (PLT Standards); specifying need for formal training program, training and demonstration of competence acquired in special skills, practice areas and values.

→ 1996 APLEC adopted inclusion of cross-cultural awareness training on Indigenous issues (awareness and sensitivity to cultural matters). This is recognised in standards (part of communication element).

→ Since 2010 all admission authorities have adopted uniform principles for admission to practice in Australia; incorporating academic and practical training curriculum standards necessary for competent practice (Law Admissions Consultative Committee, Background Paper on Admission Requirements).

Ethical Framework

Ethics, Values and Professional Responsibility

What is the nature of legal ethics?

- Ethics is moral philosophy or principles, a code of framework of behaviour in a particular context.
- Legal ethics are the ethical principles adopted by the legal profession. Understood as professional responsibility and professional conduct. Values and standards for legal practice that turn into legal and professional duties.
- Ethics is the capacity to choose values that are meaningful → Law + Morality = Legal Ethics.
- Positive morality (the dominant moral values of a particular society) and critical morality (a systematic examination of those tradition and enquiry into whether they should be followed, abandoned or modified).
- There is a close relationship between law and ethics. The development of the law has been influenced by ethics, but ethics is not derived from the law. The reasons for the significant laws governing human beings and their institutions are overwhelmingly ethical reasons. Law is commonly a public expression of and sanction for the morality of a given society. The law should be continually subject to scrutiny of ethical critique (Noel Preston, *Understanding Ethics* (Federation Press, 4th ed, 2014) 21).
- Ethics helps understand the law's role as a social instrument.
- Morality (customs or conventions of a social group, distinguishing right and wrong) v Ethics (character, practice or custom of community, science of morals or rules of conduct).
- Theories of legal ethics;
 - Teleological theory: consequentialist theory, utilitarianism (action causing most wellbeing and least suffering), desirable consequences, maximising public good is ethical.
 - Deontological theory: rule-based theory, positivism and legalism, means v ends, professional responsibility, if it is permissible it is right.
 - Virtue ethics: altruism theory, personal motivation is the important factor, good ethics are for the public good and personal flourishing.
 - Economics theory of ethics: costs and benefits analysis, rational choices.
- Statement of Ethics (Law Society NSW, 2009): honourable service, serve administration of justice, protect rights and freedoms of society, high standards of conduct and behaviour, serve interests of justice, act competently and diligently, advance clients interests above own, act confidentially, act for mutual benefit of profession, charge fairly, highest standards of integrity honesty and fairness in all dealings and observe duty to court and proper administration of justice.

The professional responsibility framework

- Professional responsibility framework for legal practitioners is defined by a duty matrix (a concurrent set of duties owed by the legal practitioner to each of the client, the court and the administration of justice and to other practitioners. However the primary duty of the practitioner is owed to the court and the administration of justice.
- Legal ethics is the code of conduct, proscribing the professional ethical framework that legal practitioners are expected to observe (Mirko Bargaric and Penny Dimopoulos, *Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics* (2003) 3(2) *Law and Justice Journal* 367, 368).
- RULES;
 - No uniform set of professional conduct rules for solicitor's nationwide. In 2015 an attempt was made, however NSW and Victoria are the only states to date who have enacted legislation to see the *Legal Profession Uniform Law* and conduct rules (*Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* and *Legal Profession Uniform Conduct (Barristers) Rules 2015*).
- Rules are often changed to meet an external stimulus. The current rules show how critical examination can lead to a change in the perceived set of ethical obligations.
- Ethics or professional responsibility is not about observing formal rules of conduct, it is a persuasive part of all legal practice. Legal practitioners must adopt an ethical stance to maintain competence.

Making ethical choices

- Legal practitioners will often be confronted with real ethical dilemmas; revealing inconsistency between professional obligations and personal values. There are various modes of pressure (clients, commerce environment of practice, peers and employers). The manner and methods of legal practice can intrinsically create ethical dilemmas.
- In introductory paragraphs of conduct rules the fundamental duty of a solicitor is to the court and the administration of justice; prevailing to the extent of any inconsistency with any other duty (*Uniform Conduct Rules (Solicitors) r 3-6*).
- *Giannerelli v Wraith* (1988) 165 CLR 543, 556: the duty to the court is paramount and must be performed, even if the client gives instructions to the contrary.
- A solicitor must always act in the best interests of the client in any matter; be honest and courteous in all dealings with clients, other solicitors and third parties; deliver legal services competently, diligently and as promptly as reasonably possible; avoid any compromise to integrity and professional independence and comply with the rules and law (*Uniform Conduct Rules (Solicitors) r 4*).

- Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 31-50;
 - There are four considerations available for laws: adversarial advocacy (advocates on clients behalf within bounds of the law, regardless of outcome or effect on others), responsible lawyer (accepts there is also an obligation to facilitate the administration of justice), moral activism (takes the opportunity to improve justice through law reform, public interest law and client counselling) and ethics of care (preserves relationships with clients, between parties and the community).
 - Legal practitioners recognise there are different approaches for different circumstances that could be adopted to achieve client interests as well as the interests of the community and justice.
- Positive Professional Identity (Rachael Field et al, *Lawyering and Positive Professional Identities* (LexisNexus, 2014);
 - Personal identity - values
 - Role identity - expectations
 - Social identity - influences
- Legal practitioners must find a positive fit for their personal values and ethics into the values and ethics of the profession in order to maintain positive wellbeing and achieve long term success.
- While a solicitor must follow a client's lawful, proper and competent instructions (*r 8.1*) they must not act as the mere mouthpiece of the client, but exercise independent forensic judgement (*r 17.1 (solicitors), r 23 (barristers)*) and must not engage in conduct which is likely to be prejudicial to or diminish the public confidence in the administration of justice or bring the profession into disrepute (*r 5.1 (solicitors), r 8-9 (barristers)*).
- Legal practitioners must have an ethic of integrity and are personally bound to the code of legal ethics.
- The globalisation of legal practice and globalised society places additional pressures in terms of ethical boundaries. When a legal practitioner begins to act for a morally repugnant or socially unacceptable client they get scrutinised closely.
- Ethical reflection and decision making: be aware of ethical issues arising in practice and of own values and predispositions, take into account a range of standards and values that are available to help resolve ethical issues and make choices, and implement resolution in practice.

Can ethics be taught?

- Legal practitioners have personal values and ethics; influences varying greatly. However the moral and ethical values expected of legal practitioners, the ethical dilemmas that could be faced and how they could be dealt with still need to be addressed. Values will be communicated throughout learning, education and life; it is ever evolving.
- Understanding personal and professional values helps to understand the nature and purpose of law and its role in society.
- Therefore legal education must aim to develop the moral capabilities as well as the technical abilities of lawyers. This ensures awareness of the ethical framework legal practitioners are expected to conduct themselves in. It will help identify ethical dimensions of a particular situation and respond in an ethical manner.
- Ethics education must enable individuals to reflect on the differences between their own intentions and social norms in order to lead to a change in understanding and behaviour when acting as a legal practitioner.
- Ethics is a combination of laws and rules as well as personal values.

Ethical drivers: personal upbringing, individual morals and values, society, profession, client and firm.