

CLANT 2009 BALI CRIMINAL LAWYER'S CONFERENCE

'PRACTICAL ETHICAL DECISION MAKING IN CRIMINAL LAW PRACTICE'

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Public perception of lawyers is not always rosy. Some, if not most lawyers at this CLANT conference would have at some stage in their criminal law careers been asked *The Question*: how can you defend an accused who has committed a terrible crime, like murder? Or worse: how can you defend an accused person who pleads not guilty but has admitted to you that they committed the crime? *The Question* clearly must have prompted the intriguing study into the motivation of some Australian defence lawyers called *Defending the Unpopular Down Under*.¹ At the heart of *The Question* is the subtext: how can an *ethical* lawyer represent a person who has committed a grave offence? And as lawyers we know the answer to that, and it is easy: every accused person has the right to representation, to a fair trial, has the right to silence and so forth. But *The Question* does raise the point that in the practice of criminal law, lawyers, on occasion or more often, tread a very fine ethical line.

There is a growing body of literature on lawyers' ethics, and a recurrent theme is often that the public think that lawyers, generally, are unethical. The lawyer jokes represent us as bottom-of-the-sea-dwelling- blood-suckers, or over-working-overcharging-ambulance-chasers. Ethics? What ethics? My intention is not to discuss how lawyers can clean up their image because I don't believe that lawyers are generally unethical. What I do believe is that in criminal practice, lawyers are going to be faced with tough ethical decisions. I suspect most lawyers do indeed conduct very ethical practices, however it is guaranteed that at some stage there will be an ethical dilemma that will need to be resolved. By ethical dilemma, I mean a collision of two or more ethical values of similar or equal weight that is not easily resolved by reference to legal obligations or professional conduct rules. Any discussion about ethical dilemmas, by its very nature, has two sides to it, or maybe more. Ethical dilemmas have the propensity to provoke emotive and sometimes intense reactions about what is right or wrong, and what I am presenting in this paper is a view about how to approach such ethical dilemmas.

In this paper I argue, as have many commentators on this subject, that ethics and ethical theories should be more blatantly incorporated into criminal law education and practice. I argue that law and professional codes do not comprise the entirety of a lawyer's decision making, and that a lawyer retains a certain amount of discretion. Ethical discourse and theory may assist in decision making where the law or

¹ Abbe Smith 'Defending the Unpopular Down Under', (2006) *Melbourne University Law Review*, 16. Some of our colleagues present at the 2009 CLANT conference were interviewees in that study.

professional codes are deficient, and provide some insight into how these ideals may be incorporated more explicitly into criminal practices.

At the outset it is necessary to make a couple of further distinctions, first, between ethics and morals, and second between ethical theories (ethics) and professional codes.

- ***Ethics v Morals***

Whilst there is a philosophical debate about the definitions of ethics and morals, the position I adopt in this paper is that first, morals are personal values of an individual, and in this context, the values of a particular lawyer. Morals tend to be shaped by cultural and societal influences and may also incorporate any spiritual or religious dimensions. Second, ethics are those that are common to a group or profession. Legal ethics, for example, is the ethics of the legal profession and the practice of law.

- ***Ethical theories/Ethics v professional codes***

The traditional view, I suggest, is that legal ethics is considered to comprise professional rules of conduct contained in codes. Indeed law schools that teach ethics primarily focus on this. The professional codes such as the *Model Rules of Professional Conduct and Practice* established by the Law Council of Australia, and indeed adopted in part or in whole by other jurisdictions in Australia, outline aspirational ethical rules of conduct for practitioners written by members of that profession. Ethics, however, is a branch of philosophy that is concerned with morality, and in particular, applied ethics is concerned with determining a moral outcome.

Ethical Theories in Detail

There are many ethical theories, and some of the general and more famous theories include:

1. Deontological (or rule based) theories – a notable example of this is Kantian ethics. The basic thrust of the theory is that the ends do not necessarily justify the means. The means is as important as the ends and consideration should be given to whether the act or omission is right in and of itself, not just the good that might result from the act or omission.
2. Telological theories- the most famous is Utilitarianism. Utilitarianism at its simplest comprises two aspects: first, it focuses on the outcome and not the means, so according to this theory the ends justify the means. Thus an action is right if the consequences are right (no matter what the means to get there are); and second, the more morally correct decision is one that maximises the public good, this is encapsulated in the widely known maxim ‘the greatest good for the greatest number’.

Some theories of applied ethics in law include² Adversarial Advocacy, Moderated Adversarial Advocacy, Moral Activism, Ethics of Care, and Contextual theories. These are discussed further below. While the theories differ, often widely, in their approach to decision making, their approach is to construct universal principles and values that can make up a framework for decision making in ethical dilemmas. The theories ask common questions such as: what are the values and characteristics of an ethical lawyer, how should a lawyer conduct their practice, how should a lawyer balance competing values, how should an ethical lawyer make tough decisions. Not only do the theories provide a framework for decision making, but they also provide a point of reference for discussion about ethical practices and moral behaviour.

It is these ethical theories and discussions about moral behaviour that I focus on. I argue that they should be incorporated into any discussion about legal ethics as well as the professional codes, general law and legislation concerning the conduct of lawyering. Discussion and consideration of ethical decision making should become more conscious because as we move further into the new century and closer to a more commercialised and complex practice of the law, and where most parties involved in the criminal justice system have competing pressures and almost certainly economic and resource ones, it may assist in making the tough decisions.

Criminal lawyers may not perceive themselves as highly ethical

In 2001 Ben Clarke conducted a survey on 20 delegates at the CLANT Bali conference with respect to legal ethics in their practice of the criminal law. The results were published in the *Criminal Law Journal* in 2003.³ In the survey instrument Clarke did not define 'ethics' however Clarke in his paper uses the following definition: 'Legal ethics demands a level of conduct which is consistent with the legal profession conduct rules.' Clarke's definition is notably different to that of this paper.

Criminal lawyers are most certainly aware of the important ethical issues they may face in their practice. Thirty percent of Clarke's respondents stated that the most common ethical issues confronting them in their practice were those associated with potential or actual conflicts of interests between co accused persons. Other issues cited included:

- deciding whether to reveal evidence that you know will assist the defence;

² It is not suggested that this represents all of the ethical theories relating to the practice of law. This represents some of the major theories, and indeed time and space do not permit the detailed discussion that these theories deserve.

³ Ben Clarke 'An Ethics Survey of Australian Criminal Law Practitioners' (2003) *Criminal Law Journal*. It should be noted at the outset that, with all due respect, the study was not a large and particularly powerful or representative one. The sample size represented only 25% of the total number of conference delegates; 50% were aged 40-45 years, another 25% over that age (so one would say experienced to very experienced at least); and 75% of respondents were male. Despite the shortcomings in sample, the study was an interesting one and provided valuable insights. It would be very useful to replicate this study on a larger, Australia-wide scale.

- acting in child sex matters (though this does not raise an ethical issue per se, it seems the situation raises ethical dilemmas);
- pressure by police to prosecute even though there is a lack of evidence;
- how to defend the poor and survive financially; and
- acting for, and taking instructions from, persons suffering mental illness.

What is concerning however, is that when asked to rate their own ethical conduct in criminal matters (where the scale was exceptionally high to non-existent), 50% stated they conducted themselves highly ethically (though not the ultimate category of exceptionally high), 35% were moderately ethical, and 5% rated themselves as achieving low ethical conduct. While this may be representative of a small group of lawyers and their self-perceptions (and lawyers can be high achievers and potentially overly self-critical) not one lawyer could put their hand on their heart and say that they were exceptionally ethical. Perhaps that means that they realise they can't please everyone and indeed can't always choose between two equal and competing ideals. But 50% of respondents did not rate themselves as highly ethical, and 5% said they were in the low ethical category!

There does not appear to be a study conducted that objectively measures whether criminal lawyers (or lawyers in general) conduct ethical practices. Indeed such a study would be difficult to design because the very first hurdle would be an appropriate and accepted definition of 'ethical'. However we know anecdotally that lawyers generally do not bask in the warmth of a public perception as being ethical, and as Clarke's study seems to suggest, criminal lawyers do not think that they have attained optimal ethical status. The question is then of course, how do we improve this?

Traditional Notions of Lawyers' Ethics Do Not Always Cover the Field

The Law of Lawyering⁴

In this paper I argue that ethics and ethical conduct extends beyond what is prescribed by law and professional rules of conduct that regulate the practice of law, that is, beyond the 'law of lawyering'. The law of lawyering includes the multifactorial obligations imposed upon a lawyer, including: the general law governing the lawyer-client relationship (ie tort, contract, equity and fiduciary obligations); the *Legal Profession Act* (NT); the Northern Territory Law Society's *Rules of Professional Conduct and Practice*; and the Northern Territory Bar Association's *Barrister's Conduct Rules*. A lawyer's ethical obligations are commonly said to be contained in the conduct rules which govern relations with clients, advocacy and litigation rules/practitioners duties to the court, relations with other lawyers, relations with third parties, and rules relevant to legal practice. The solicitors' and barristers' conduct rules provide guidance on a range of ethical issues, and are considered to be minimum standards of conduct. They do not provide the exhaustive

⁴ A term coined by Parker and Evans.

code of conduct for practitioners because their nature is aspirational and flexible. Indeed, the preamble to the Barristers Rules states:

These Rules are not, and should not be read as if they were, a complete and detailed code of conduct for barristers. Other standards for, requirements of and sanctions on the conduct of barristers are found in the inherent disciplinary jurisdiction of the Supreme Court, and in the general law (including the law relating to the contempt of court).⁵

The conduct rules are cast in flexible language. True it is that they have ethical values embedded in them such as commitment to justice and fairness, commitment to competence to the client, client loyalty, client confidentiality and respect to other members of the profession.⁶ These values are often enunciated in the preamble which is not proscriptive in itself, but an aid to interpretation. The conduct rules are a set of ethical values designed by lawyers to represent a set of values common to and shared by lawyers as a whole.

How the Lawyer's Discretion May Arise

This brings me to the lawyer's discretion. By discretion I don't mean discretion in any legal sense. The reality is that prosecutors, defence lawyers and judges have a great deal of discretion in 'making and interpreting law'.⁷ The law is not neutral and stagnant but is 'a dynamic, ever-changing symbol of political will',⁸ and discretion is an inevitable part of the system. As Pollock has stated:

Professionals at each stage have the opportunity to use their discretion wisely and ethically, or, alternatively, they may use their discretion in an unethical manner. In courts, prosecutors have discretion to charge and pursue prosecution or not, defense attorneys have discretion to accept or refuse cases [in Australia they do not] and choose trial tactics, and judges have discretion to make rulings on evidence and other trial procedures, as well as dispense convictions and sentences.

Thus the discussion needs to be about how to use that discretion and make ethically correct decisions. The difficulty with discretion is, of course, that it is without discrete rules or norms, and is often subject to the whims of personal choice. However ethics may provide a framework within which to make decisions, so that in the difficult ethical dilemmas guidance may be sought from that ethical framework.

The medical profession's framework of bioethics may provide a useful model for what I (and others) propose. Doctors often have to deal with difficult decisions that may not easily fit into a positivist legal principle. Those decisions may be concerning life and death, such as turning off life support to assist with multi organ transplantation. In criminal law, one may argue that a lawyer's decisions do not involve such dramatic life and death decisions, however most of us would not discount that at least in criminal law practice, our decision making can affect at least

⁵ Northern Territory Bar Association's *Barrister's Conduct Rules*, preamble.

⁶ Bobette Wolski, *Skills, Ethics and Values for Legal Practice* (2nd ed), 91.

⁷ Jocelyn Pollock, *Ethics in Crime and Justice: Dilemmas and Decisions* (4th ed), 217.

⁸ *Ibid.*

one person's livelihood, liberty and psychological well being. These decisions concern not only accused persons, or experienced practitioners dealing with less experienced, but tactical decisions in dealing with witnesses, proofing witnesses, dealing with victims of crime and their families. Their involvement in the criminal justice system more often than not is a potentially life changing experience.

Medical practitioners not only have to abide by Australian Medical Association *Code of Conduct*, but they are also routinely educated in bioethics- a field of applied ethics that concerns difficult decision making in the context of medicine and health practice. Usually law students who study medical law are given an introduction to the study of bioethics, and this is partly recognition of the fact that much of the law in the area of medical law is derived from various applied ethics traditions. The principles and values of bioethics guide the difficult decision making. Often difficult questions and decisions are referred to an ethics board who are specially trained in the application of bioethical principle. The introduction of more formalised values and structures, as can be found in the medical profession, may assist in solving ethical dilemmas faced by criminal practitioners.

'Mind the Gap': How Ethical Theories and Discourse May Assist to Fill the Gap

The law and professional codes should be the first 'port of call' in difficult decision making in criminal practice. However, as I have already argued, the codes may not provide the answer. I emphasise ethics as an important aspect to professional responsibility because ethics may provide a means to articulate values behind a lawyer's decision. The hope is that lawyers will use them *before* the decision rather than ad hoc and post-decision.

Parker and Evans advocate 'a process of ethical reflection and decision making' and use of documented theories of applied ethics as assistance.⁹ This could be used as a model for introducing a more structured process of decision making using ethics. Parker and Evans, for example, advocate a lawyer engaging in a threefold decision making process:

1. Lawyers should be aware of ethical issues that may arise and of their own values and predispositions, and should not be amoral. Discuss ethical issues amongst peers (and not only when the ethical dilemmas arise), and be aware of stakeholders, which may not be limited to the client.
2. A lawyer should take into account a range of standards and values that are available to assist in resolving those issues and make a choice (this is the source of the ethical dilemma)
3. A lawyer should then implement that resolution in practice.

⁹ See Adrian Evans and Christine Parker *Inside Lawyers Ethics* (2007).

Some of the ethical theories and values that could be used at stage 1, above, include¹⁰:

- ***Adversarial advocacy***

Adversarial advocacy is based on partisanship. A lawyer should be client focused and act in a way that will promote their client's interests. Lawyers must act with the maximum zeal permitted, and the lawyer is also not morally accountable for the means used to advocate for their client. Such non- accountability and neutrality is said to underpin the adversary system and the professional conduct rules (thus assumes that the adversary system is the best way to discover the truth and promote rights).

This approach criticised as the 'hired gun' approach, that is, that lawyers must do anything legal to obtain a success (by whatever definition) for their client. The lawyer is thus 'amoral' because they have to disregard their own morals or personal ethical views of their client. As RW Gordon states:

[lawyers] are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents tactical mistakes or oversights, and stretch every legal or factual interpretation in favour of their clients'. The guiding premise of the entire system is that maintaining the integrity of the rights-guarding procedures is more important than obtaining convictions or enforcing substantive law against its violators.¹¹

- ***Moderated Adversarial Advocacy***

Moderated Adversarial Advocacy is, as the name suggests, a moderate version of adversarial advocacy. According to this theory, lawyers are officers of the court as well as advocates of their clients, and as such they owe duties to the court and the administration of justice.

- ***Contextual approaches***

Contextual approaches take into account in a more defined way the circumstances of each case. For example:

Legal merit: a lawyer should take actions that, considering the circumstances of the case, are likely to promote justice, where justice is determined in the basis of legal merit. Thus a lawyer should exercise discretion on the basis of competing legal values and should act in accordance with the values inherent in law.

Societal interests: a lawyer's decision should be made on the basis of broader social interests. A lawyer should not impose their moral beliefs upon their client but they

¹⁰ For a more detailed discussion of these theories see Adrian Evans and Christine Parker *Inside Lawyers Ethics* (2007).

¹¹ Cited by Evans and Parker, *Inside Lawyers Ethics* (2007).

must accept personal moral responsibility. The lawyer should also act within the confines of law and rules.

- ***Moral Activism***

According to the moral activism theory, a lawyer does not act in order to zealously and unquestioningly pursue the client's goals. Instead, the lawyer is accountable for both the means and ends of their actions. Central to this theory is a moral discourse that should take place between the lawyer and the client in order to determine what outcomes the client desires, and to provide moral guidance to the client. The lawyer may be concerned with a certain social cause and so long as their client's cause is in alignment with that they may use the adversarial advocacy approach to achieve it. Where the law is unjust they may challenge the law, the legal system and other legal practitioners.

- ***Ethics of care approach***

Like moral activism, the ethics of care approach also involves an exchange of moral views between lawyer and client, however here the focus is on the client and the client's relationships, and the legal and non legal aspects of their situation. Once determining all affected parties, the lawyer then discusses the moral consequences of their client's choices on a wider group of persons.

Of course, it is overly simplistic to assume that lawyers would adopt one or another of these approaches. More often a lawyer might unconsciously adopt one or more of the approaches, and in most cases the lawyer would make the ethically correct decision. Parker and Evans suggest that, overall, lawyers tend to focus on the moderated adversarialism and the advocacy ideals. However they also argue that in the really tough cases perhaps moral activism should play a larger role, because lawyers ultimately are responsible for improving the way justice is done between individuals and the world at large.

Ethical Discourse Should Become More Explicit and Institutionalised

My belief, and it is shared by other commentators such as Parker, Evans et al¹² is that ethical discourse is underemphasised in legal education and practice. This could be improved by incorporating ethical theories into undergraduate training in addition to any discussion of professional codes of conduct, encouraging more explicit discussion about lawyer's ethics in law firms and organisations, especially with newly graduated lawyers, and introducing ethical infrastructures into law firms or organisations. I discuss each of these in turn.

¹² See a recent article by Christine Parker, Adrian Evans et al 'The ethical infrastructure of legal practice in larger law firms: values, policy and behaviour', (2008) *UNSW Law Journal* 31 (1), 158.

- *Ethics training at undergraduate level*

Ethical discourse may underpin or may be implicit in the teaching of undergraduate subjects when they are taught, for example in teaching students about the law of negligence and how it may affect a professional's conduct toward their client, and more importantly, why. However, ethical discourse in law subjects and training tend to focus on whether the particular law is just or unjust, and tend to promote an awareness of the law's role in society, rather than how a practicing lawyer may make just, moral, good decisions. As we know, often those decisions are very difficult to make.

Until recently professional responsibility was not necessarily taught as a compulsory undergraduate subject at Australian Law Schools. Although professional responsibility was a subject of the Graduate Diploma of Legal Practice, it focussed on professional conduct rules. Those who endure articles are left to rely on the effectiveness of mentorship to instil ethics of professional practice. Ninety five percent of the respondents in Clarke's study stated that they thought that legal ethics (of some sort) should be incorporated into undergraduate *criminal* law courses; 5% disagreed.

It is high time and a relief to know that law schools around Australia will be reinforcing professional responsibility in their undergraduate degrees and not only post graduate GDLP. I argue that this instruction should go further to incorporate ethical theories and moral discourse in a similar fashion as is taught in medical schools. Ethical decision making should be taught in each undergraduate subject (depending on need and feasibility), but particularly in subjects such as criminal law. Ethics training should also not be limited to the law of lawyering as it is traditionally taught.

- *Ethical discourse should be encouraged in law firms and other types of legal organisations*

Any ethics education should be ongoing in a lawyer's career, and should be especially encouraged during the first few years of practice when a lawyer's values are shaped. In my experience in various types of practice of the law such as in commercial litigation firms and as a DPP prosecutor, ethics was not discussed, nor was professional conduct ever a question asked by any selection panel I was submitted to. This is not a criticism. I accept that historically there may not have been any perceived need for it, and indeed perhaps many lawyers believe that professional conduct rules cover the field. It is also probably assumed that a new employee to a law firm or legal organisation already has the knowledge of ethics and knows how to implement it.

The reality is newly graduated lawyers probably do not know how to implement that knowledge and rely on the more experienced lawyers to guide them. Newly graduated lawyers are probably more concerned with understanding what it is they are required to do about the law on a day to day level.

- *Institutionalisation of ethics structures*

Building upon the point made above, Parker, Evans et al have argued that formal ethics structures need to be incorporated into law firms.¹³ Parker, Evans et al argue that law firms (they focus on commercial but I would argue criminal law practices both governmental and non) should implement structures within their organisations to incorporate fluid ethical discourse. They call them ‘ethical infrastructures’ that counteract pressures for unethical behaviour and positively promote ethical behaviour and discussion. The term ‘ethical infrastructure’ was originally coined in the US and referred to structures that support and encourage compliance with professional codes. But Parker, Evans et al argue that it should go further than professional codes and state:

In our conception, law firm ethical infrastructures would likely be most effective where they ultimately aspire to equip and encourage each individual to develop and put into practice their own ethical values in dialogue with others in the firm, the profession and the broader community. ...law firms with successful ethical infrastructures will need to understand ethics in broader terms than compliance.¹⁴

In formulating their view, Parker, Evans et al surveyed research into organisations and work teams and found that law firms and team structures could form an individual lawyer’s ethical decisions in the following ways:

1. by limiting individual lawyers capacity to ‘see’ ethical due to socialisation, work place culture, or because working as a team requires a team ethic which may be good or bad;
2. by constraining or creating options and opportunities for individual lawyers to make ethical judgements and act on them; and
3. by creating or intensifying internal and external incentives that pressure individual lawyers to choose certain ethical behaviours (eg time recording or promotions).

Thus ethical infrastructures would be particularly important for younger lawyers who struggle to come to grips with their first years as a practitioner let alone understand their wider ethical responsibilities both with respect to the matter they are involved in, and the wider community. However, Parker, Evans et al also warn against implementing too formalistic an infrastructure because there is a danger that it become a formal ethical structure that does not have any connection with informal team cultures or individual lawyers’ values in practice.

¹³ Christine Parker, Adrian Evans, Linda Haller, Suzanne LeMire & Reid Mortensen, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour’ (2008) *University of New South Wales Law Journal* 31(1): 158-188.

¹⁴ Christine Parker, Adrian Evans, Linda Haller, Suzanne LeMire & Reid Mortensen, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour’ (2008) *University of New South Wales Law Journal* 31(1) 158, 160.

Parker, Evans et al provide the following suggestions for implementing an ethical infrastructure:

- appointment of an ethics partner
- forming an ethics committee
- formulating written policies on ethical conduct in general, also perhaps including specific areas of conflict
- procedures for ensuring ethical policies are not breached
- encouraging the raising of ethical problems with colleagues and mentors
- monitoring of lawyer compliance with policies and procedures
- ethics education, training and discussion within the firm (or organisation)

Obviously these are suggestions only, and some or all of these suggestions may not suit a particular legal organisation. However I argue that discussion and consideration of ethical infrastructures is an important step in itself.

Some Conclusions

The point of this paper is not to assert that lawyers should achieve moral perfection. However given that the practice of criminal law raises often difficult issues and ethical dilemmas, lawyers need to be aware of ways to achieve the best ethical outcomes. There will always be room for improvement, and if anything Ben Clarke's study demonstrates that the lawyers studied realised that in criminal law, ethical dilemmas are difficult to resolve and there is room for improvement.

In this paper I have argued that professional responsibility is not only about obeying laws and professional conduct rules in practicing criminal law. Decision making and exercising discretion, particularly in ethical dilemmas, should not be done solely upon the basis of formalised rules so that an outcome can be justified upon the basis that one has followed formal rules to the letter. Thought should be given to ethical theories and discourses that may or may not conform to the major theories discussed in this paper. The point is, ethics should be discussed in the first instance, and this discussion needs to be ongoing, open and fluid with the realisation that ethical decisions are not always easy to make.

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