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978-0-521-17769-6 - Ethics and Law: For Australian Nurses

Kim Atkins, Bonnie Britton and Sheryl De Lacey

Excerpt

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INTRODUCTION

This book has been written specifically for nurses training and practising within Australia, to assist and encourage them to develop a strong and well-defined sense of professional and moral identity. It endeavours to provide an integrated, practical framework for understanding the ethical and legal dimensions of nursing practice in Australia by referencing Australian law and reflecting the Australian clinical context and cultural norms.

This book refers to ‘patients’ rather than ‘clients’. The question of which term is most appropriate is not easily resolved – if it can be at all – because there are many ways to interpret both terms. Consequently, we have made the decision to use the term ‘patients’ because it best approximates our use of the concept of vulnerability. We do not regard patients as people who are either in a contract with the nurse or merely passive and dependent on the nurse; rather, patients are people who are in a relationship of power with the nurse because they are in specific situations of need. Under Australian law, this is considered a fiduciary relationship – that is, one in which the nurse is recognised as having superior knowledge and therefore more power than the patient, but the patient’s authority in decision-making carries more legal and moral force. To represent patients as people who have a merely contractual or dependency relationship with a nurse would be to misrepresent their situation and to obscure the ethical and moral implications of the context of care. A patient’s need and vulnerability in the context of a nurse’s power constitute the source of the nurse’s moral and legal obligations. Therefore, throughout this book the nurse–patient relationship occupies centre stage.

This book takes a ‘relational’ approach – that is, it emphasises the centrality of relationships to nursing practice at both the theoretical and practical levels. For example, at a theoretical level the book explains personhood as a set of capacities that develop from birth and are sustained throughout life through relationships with other people. It traces the moral basis of law to our need as human beings to live together in societies, and the accompanying need to be protected from harm produced through the activities of people living in close proximity to each other. It also describes how, at a personal level, particular

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[More information](#)

2 ETHICS AND LAW FOR AUSTRALIAN NURSES

relationships can facilitate or erode an individual's sense of self and self-respect. This can occur, for example, through giving recognition of achievement and providing affection and encouragement, or by withholding these. The ability of relationships to impact profoundly on our lives underpins the importance of having professional boundaries and legal constraints on what nurses can do in their clinical relationships with patients.

Nurses are required to care for and protect the interests of people who are sometimes vastly different from themselves. How the nurse responds to these differences is a measure of his or her humanity. In being permitted to take a role in the innermost personal lives of people, nurses have an uncommon opportunity to experience a relationship that can be emotionally and morally profound. Some of the most intimate experiences of life can be found in nursing: delivering a new child into the world; holding the hand of a dying man as he takes his final breath; restarting a person's heart; or consoling someone after a death in the family. In sharing these fundamentally defining experiences of human mortality, the nurse–patient relationship can be one that deeply affirms our connections to one another.

Nurses discover that relationships work in both directions. Nurses receive far more from their patients than is often understood, because when nurses honour their patients' needs – their feelings, their hopes and fears, and their bodies – they show themselves to be trustworthy, compassionate, respected and professional. By having the opportunity to act with integrity, compassion, confidentiality and competence, nurses make themselves worthy of trust and respect, and experience their lives as worthwhile and meaningful. This is why so many find nursing to be a deeply satisfying and sustaining occupation.

We begin by setting out a description and philosophy of what a person is, and endeavour to show throughout the book how that understanding of persons underpins the moral and legal obligations of nurses. Understanding persons also means understanding the different stages of life and the different needs, concerns aspirations and possibilities that people have at different stages of their lives. Rather than proclaim what those needs and possibilities are, this book encourages nurses to talk to their patients, to listen to them and to learn from them. Patients teach nurses much more, and do so far more effectively, than any book ever could. To this end, case studies in this book have been taken from real life, many of them providing a view of the clinical setting from the patient's point of view.

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This book does not set out to provide a narrative of the good nurse. Rather, it provides a coherent set of conceptual resources and information to guide nurses in their relationships with vulnerable people in the clinical context. Although this book does not explicitly promote a patient-centred approach, the ethical framework it provides is consistent with such an approach. For example, the book emphasises the need for decisions about care to be informed by the patient's perspective and personal circumstances; for the patient to actively participate in decision-making; and for the patient to set his or her own terms for the clinical relationship and treatment, wherever possible.

In focusing on the nurse–patient relationship, this book foregrounds the patient's vulnerability. Vulnerability is here used in a technical sense, and it is important for readers to understand this. Vulnerability refers to the fact that we are constantly affected by, and responsive to, other people and the world around us, in both positive and negative ways. In other words, vulnerability simply means *being affected by* people and things. We can be affected positively – for example, by the pleasure and nutrition of good food. We can be affected negatively by the pain and disability of injury or disease. This book presents the view that no person is immune to being affected and influenced by others. This view is significant because it underpins the central claim of this book: that it is our ability to be affected by each other that makes it possible for us to care for each other.

The vulnerability of people receiving nursing care is recognised in law. There are some specific pieces of legislation that relate to some specific situations of vulnerability, such as the *Mental Health Act* and the *Children and Young Persons Act*, while other situations of vulnerability are recognised more generally in common law. Because nurses are also vulnerable, they have certain legal and moral entitlements and protections. For example, nurses have a moral entitlement to be treated with respect, and have legal protection from accusations of assault in relation to certain professional activities – for example, some that involve touching or restraining patients. The connections between each clinical situation and its relevant legislation will be explained throughout the book.

Chapter 1 describes how we each *become* persons over time and through our relations with other people. This makes personhood fundamentally relational and interpersonal: we become who we are, with our tastes, talents and abilities, as a result of our interactions with the environment around us and the people in it. Moreover, this is a

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Excerpt

[More information](#)

4 ETHICS AND LAW FOR AUSTRALIAN NURSES

lifelong process. The idea that we are always in formative relations with the environment and other people is part of the concept of human vulnerability. Vulnerability can be understood as an expression of our belonging to the world with other people. It is this belonging together in the human world that drives our capacities to care for one another. This is why skills in managing interpersonal relations and communication are central to the nursing role.

Chapter 2 provides a historical and philosophical overview of our contemporary notion of rights as legal entitlements, tracing its development from the beginnings of democratic thought to show how rights are a function of social existence. This chapter builds upon the account of personhood to show how the law is also an expression of our belonging together in the world. Law is a means of regulating the conduct of people within a society. Ideally, it should regulate conduct fairly and in such a way that everyone can get on together and flourish in their pursuit of a good life. When the legal system does this, its laws are morally justified.

Chapter 3 provides an overview of the Australian legal system. It explains the function of the Australian Constitution and describes the difference between statute law, common law, criminal law and civil law, and illustrates how these relate to Australians as well as to the role of the nursing profession in general.

Chapter 4 focuses more closely on the nurse–patient relationship. This relationship is called a therapeutic relationship because its function is to have a beneficial effect on the patient. In other words, the nurse–patient relationship is itself a form of therapy because nursing care is inseparable from the relationship. This chapter explores several different models of professional relationship, and explains the nature and obligations of the fiduciary relationship. It then discusses how the therapeutic relationship embodies moral principles of non-maleficence, beneficence, autonomy and justice. Consistent with the two-way direction of relationships, it also considers some moral dangers of the relationship to both nurse and patient, and concludes with a consideration of the ways in which the therapeutic relationship can promote capacity-building in patients.

Chapter 5 addresses the legal framework for valid consent to treatment and refusal of treatment, which is based on the right to autonomy (as discussed in Chapter 4). It considers situations where a person cannot legally consent – for example, where the person is a child or

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unconscious, as well as situations where consent is not needed, such as in a medical emergency, serious mental illness or where a patient needs to be restrained for the patient's own safety. The chapter also explains the place of guardianship, advocacy and the use of advance directives in protecting a person's autonomous decision-making.

Chapter 6 takes a detailed look at nurses' duty of care towards their patients, and explains how a failure to meet that duty of care can lead to a legal finding of negligence against a nurse. It describes how a nurse's required standard of care is determined in law, and how negligence is proven (or disproved). It also explains a nurse's legal liability and professional indemnity, as well as the employer's vicarious liability for the actions of nurses.

Chapter 7 continues the focus on the nurse–patient relationship by examining legal and moral requirements around patient privacy and confidentiality, and mandatory reporting. It explains requirements in relation to the management of patient information, including reporting of child abuse, family violence and professional misconduct.

Chapter 8 takes up themes of power, autonomy and advocacy in decision-making about care. Trust is central to negotiating treatment in the nurse–patient relationship, because the patient does not choose to enter into a relationship with the nurse. The chapter looks at the nature and scope of trust, and considers the extent to which nurses can be expected to accommodate patients' wishes.

Chapter 9 turns the focus more closely on to the nurse through a discussion of issues of professional self-respect, with a special focus on reporting mistakes and clinical incidents. It looks at factors that influence nurses' decisions about reporting, and explains the importance of dealing effectively and ethically with clinical errors and incidents – both for the patients' sake and that of nurses. Admitting to mistakes has a number of important moral and practical effects for nurses, including restoring their self-respect and putting the patient back at the centre of care. The chapter concludes with an explanation of the 'Open Disclosure' process as a means of restoring trust and justice to the clinical relationship.

In any book that attempts to discuss law or ethics in relation to nursing practice, there is always much more that can be said – and so much more in a book that attempts to discuss both. This book has tried to steer a path between the need for detail and the need for economy

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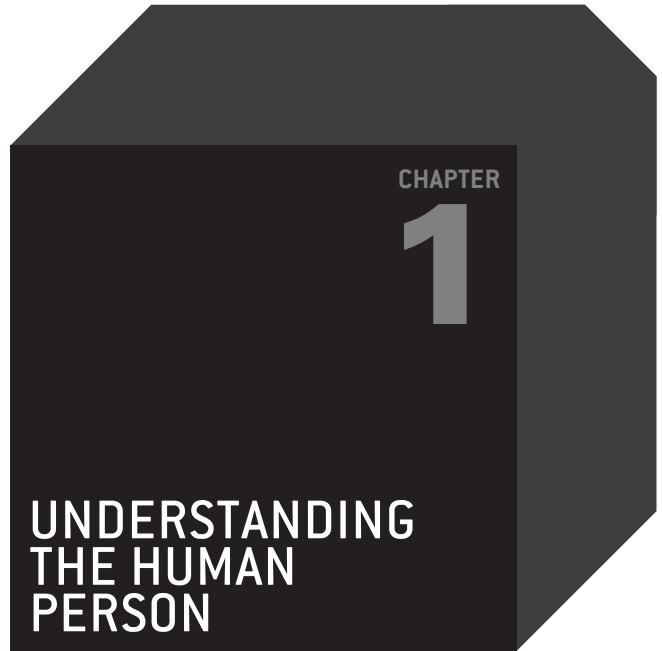
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[More information](#)

6 ETHICS AND LAW FOR AUSTRALIAN NURSES

of explanation in order to assist new nurses to orient themselves to the complex and sometimes perplexing world that lays before them: the world of living and working with fellow human beings. The world of nursing can be like the cosmos in miniature: stunningly beautiful, utterly amazing, compelling, alarming, hilarious and frightening.

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LEARNING OBJECTIVES

In this chapter, you will:

- Develop your appreciation of the complexity of the concept of 'person'
- Develop your understanding of 'personhood' as a relation between biological, interpersonal and social aspects of a human being
- Develop an understanding of human vulnerability, and how this makes possible the capacity to care for each other
- Gain a sense of the ways in which your beliefs about yourself affect your capacity to care for yourself and others

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Excerpt

[More information](#)

8 ETHICS AND LAW FOR AUSTRALIAN NURSES

In 2004, the Chief Justice of the Family Court of Australia, Alistair Nicholson, made a determination that a 13-year-old child (known as Alex) could proceed with medical treatment that would permanently change that child's gender from female to male. Justice Nicholson noted that Alex had the physical appearance of a girl and normal female chromosomes, but had a 'longstanding, unwavering and present identification as male' (*Re Alex* [2004] FamCA 297, para 80).

In coming to a coherent determination of what was in Alex's best interests, Justice Nicholson gave due consideration to Alex's personal and family history; Alex's subjective perception of his situation; the nature of Alex's relationships with family and friends; and the relevant scientific and medical information pertaining to Alex's mental, physical and sexual health.

Experiences such as Alex's raise questions about the nature of human identity:

- What is the connection between the physical body and a person's psychological outlook?
- What part do early life experiences play in shaping a personality?
- What part do social influences play in shaping a personality?
- Is there an essential defining quality that all persons share?
- Is there a proper or an improper way to be a male or female?
- Where do we get our ideas about persons and gender, as well as what is proper or improper?

As a nurse, you will be called upon to support, care for and protect people who are vastly different from yourself. How you respond to the diversity of human beings will be a measure of your own humanity as well as your professionalism. Certainly, caring does not come as easily to some nurses as it does to others. After all, it is not always pleasant being around incapacitated, sick or grieving people. So why do people want to support the ill or incapacitated? What is it about human nature that causes people to care for each other *at all*?

This chapter will provide a response to this question through a description of the human person as a dynamic unity of personal factors (such as your biology and psychology); interpersonal factors (such as your relationships with your immediate family and close friends); and social factors (such as your type of education, or your socioeconomic status). We each become individual persons with a unique identity as a result of complex processes involving all of these factors. The formation of our identities begins with the biological processes of sexual reproduction, followed by our early life experiences in the care of our

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parents. Later, we come under the influence of formative relationships of friendship, schooling and other social interactions. In addition, our personal identities are formed within our social context, which is itself the outcome of powerful historical and cultural forces. Consequently, a basic feature of being human is to be constantly affected by, and responsive to, other people and the world around us – in both positive and negative ways. This feature of human life – being affected by people and things around us – is called vulnerability. Vulnerability will be discussed in more detail later in the chapter, where you will see that it is vulnerability that gives us the capacity to care for each other.

Central to this approach to the human person is the idea that we each *become* persons through a complex range of developmental processes. Becoming a person entails the acquisition of a range of physical, cognitive, emotional and interpersonal capacities. These capacities develop over time as the human body develops, and through relations with other people. For example, as young children grow, they develop the ability to walk and climb, to communicate and to self-regulate some emotions. These skills allow a child to grasp the rules of a simple game, to understand the actions of others, and thereby to join in cooperative activity. As a result of participating in simple cooperative activities, children acquire the capacity for more sophisticated social skills such as sharing, empathy and negotiating conflict. The philosophical point here is not simply that a person has to acquire social skills to get on in life, but rather that the individual acquires the skills of personhood in a social context. Furthermore, it is from their social context that individuals develop the beliefs, attitudes and expectations that go towards making up their personalities. Understanding individuals as (partly) the product of the society in which they grow and learn reverses the commonly held assumption that a society is the result of individuals who come together in an effort to secure goods that the individual could not acquire alone. This book takes the approach that persons only ever emerge *from* societies.

The decision made by Justice Nicholson regarding Alex can be seen to draw upon the personal, interpersonal and social factors that have influenced Alex's personal identity. Justice Nicholson considered Alex's physical condition, and the biological and medical data related to it. He also considered Alex's early life relationships, especially his relationship with his father. Finally, he considered Alex's experiences at school and his current (as well as possible future) social situation. Justice Nicholson placed these considerations in the context of the

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Excerpt

[More information](#)

10 ETHICS AND LAW FOR AUSTRALIAN NURSES

requirements of law, including relevant legal precedents, and current medical consensus. In doing so, he put together a picture of Alex as a young person who is affected by and is responding to his circumstances. Specifically, he put together a picture of Alex as a young person with certain physical and psychological states, who is part of a circle of family and friends, who has certain social responsibilities and disadvantages, and who – like most other people – simply wants to live a life of his own that will allow him to overcome his personal and social difficulties.

In setting out guidelines for nurses' conduct when caring for persons, the Australian Nursing and Midwifery Council's (ANMC) *Code of Professional Conduct* and *Code of Ethics* recognise the personal, interpersonal and social factors that comprise a person (ANMC 2008b). These have been set out in Table 1.1.

Each of the chapters in this book is informed by this picture of the human person. Chapter 2, for example, looks at our legal rights and obligations, and explores the idea that their moral justification lies in the prevention of harm to each other. Chapter 4 focuses on the interpersonal nature of the nurse–patient relationship, and Chapter 6 looks at the legal obligations and implications of that relationship. The understanding of the human person as embodied, social and vulnerable is central to the discussions of consent and autonomy in Chapters 5 and 7, and the role of confidentiality, trust and respect in Chapters 8 and 9.

Nursing is a profession that encompasses a huge diversity of practices and practice settings. As the population of Australia ages, the focus of health care is turning increasingly to the management of chronic disease through primary health care, self-management and disease prevention through health promotion. That means that we can expect to see more nursing practices in the broader community rather than in acute care settings such as hospitals. This cultural shift highlights the importance of nurses having a good understanding of the nature and diversity of human beings, and of the many ways in which people live, flourish and die.

WHAT IS A PERSON?

Some background to the concept

Since the purpose of nursing is to support and promote the health and well-being of persons across the lifespan, it is important to good nursing