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978-1-107-42343-5 - The Good Lawyer
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Chapter 1

GOOD LEGAL EDUCATION

1.1 Introduction: Forget money

There are a range of reasons for choosing to study law. Some students are just unsure what to do and some are really interested in the idea of law as a concept and do not intend to become lawyers, but many are in the middle somewhere – they are attracted to the possibility of courtroom excitement and have a desire to 'make a difference'. Advocacy in courts, in negotiation, mediation and in numerous lawyers' offices has a marvellous potential to change the law and improve the lives of others. Assuming you have a choice, how will you decide which law school will be best for you?

All law schools must cover a specific set of subjects[1] which will develop a base level of legal knowledge and some skills. Many will prepare you for the broad range of lawyers' roles. Some do it better than others. If you can comfortably make a decision about which law school to go to on your own, then go ahead. But some parents and families also want to get involved with choosing law schools and while they (of course) want a rewarding and secure career for you, they are sometimes thinking about big incomes too. When that happens, identifying preferences for a particular law school can get more complicated. The important thing is to know what your own motives are for aiming at a particular law school and law degree. Large incomes are available in some types of legal practice, but not as commonly as you may think. A

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small number of lawyers make a great deal of money, but most do not. If you think your priority is to make a lot of money quickly from business and you don't really mind how, then this book will not assist you greatly. However, if you like reading, problem solving, negotiating, arguing, working independently and as a team; if you want to be a lawyer and make a reasonable income that is less likely to disappear when the economy turns down; if you want to contribute to society and do justice, but not at the cost of your self-respect or your friends and relationships, then keep reading.

Law students and new lawyers will also find much to engage them in this book, because the primary focus is on the moral (ethical[2]) challenges of legal practice. There are many publications and short courses which address the technical knowledge and skills of lawyering, but fewer in the area of ethics and morality. Morality remains uncomfortable for many people, including many lawyers, and represents a professional risk that is often left lying around until a problem appears. The main problem areas are in truthfulness and lying, in keeping and divulging secrets, and in conflicts of interest, though these do not exhaust the list.

Australia has a considerable number of lawyers relative to total population and more are immigrating every day. But there are too few of us in regional and rural areas and in key justice occupations, and probably too many in banking and finance. The competition among us for legal work is fierce, particularly in commercial and corporate areas. Sometimes, that competition causes problems. Even though many lawyers are vaguely aware of ethical danger, corners are cut, bills overloaded, reputations are damaged and justice suffers. As a consequence, the wider community is wary of us and wary of our priorities, even if everyone wants to know and trust their own lawyer. So while Australia overall probably has enough lawyers, what our communities actually need is *better* lawyers. This book aims to make you a better person and, I hope, a better lawyer. 'Better' does not mean clever or more highly skilled – although that is necessary and should go without saying; it means more socially and morally responsible. That is, a 'good' lawyer. This focus on the *good lawyer* should guide you in a decision to study law and help you to decide what type of law practice to aim for and how to be ethical in whatever field you subsequently choose.

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1.2 Types of law degrees

You may think you want to be a lawyer, but don't really know what is involved in studying law or the 'lawyering' that comes afterwards. You may decide not to practise law at a later date or might think, correctly, that knowledge of law will be useful in some other occupation. Ethical lawyering capacity will be very valuable in a range of occupations, particularly finance, accounting, auditing, estate planning, taxation, sustainable development, management and banking. So it does not matter whether you are a senior secondary student who wants to go straight to law school at the age of 17, 18 or 19, or a mature-age graduate with qualifications in another discipline.

What degree options are available? The LLB (Bachelor of Laws)[3] in Australia is classified at Level 7 by the Australian Qualifications Framework (AQF).[4] The LLB is usually chosen by students who want to study law as soon as they finish secondary education.[5] An alternative route for graduates who have a bachelor's degree in another discipline is the Juris Doctor (JD) degree, which will be taught at the higher Masters standard (AQF Level 9), as from 2015. JD courses are usually more expensive than LLB degrees,[6] but both lead to a right to seek admission as a legal practitioner, after completion of various practical legal training (PLT), undertaken at the end of either degree.[7] The problem, however, is that neither offers an easy or automatic way to work out whether it will provide you with a good legal education, as defined above.

1.3 Being good requires more than expertise

If your ambition is to be a good lawyer and to find the right law degree for this, then knowing what good *is* seems important. Over 30 years ago, US legal ethicist David Luban edited a book entitled *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*.[8] Luban's objective was to set out, for that era and culture, what good lawyering was and all the reasons why good lawyering makes more sense than any other approach. Luban defined a good lawyer as a moral (ethical) person, not just someone who knows the law well. His radical – and some said his heretical[9] – prescription was to turn legal ethics on its head by suggesting a move away from dependence on sets of rules about what to do or not do in difficult or dodgy situations, or

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simply prioritising their client no matter what, and look carefully at the idea of goodness. He and his co-authors proposed a difficult question: *who* is the good lawyer? Luban and his colleagues hoped the ground would shift under legal ethics to such an extent that *who* we are as lawyers, rather than *what* we do, would be the first concern. Luban's approach followed *virtue ethics*, derived from Aristotle in the pre-Christian era,[10] which asserts that goodness depends on character and that good character is shown by the virtues we display in our behaviour. His argument, simply stated, was and is that we lawyers cannot get away from wider moral obligations that impact on the rest of society and claim that we are permitted (almost automatically) to lie and cheat, providing we do it within rules.

You may think that Luban's recipe for goodness is a bit weak or soft or idealistic, and certainly his conception is very remote and detached from the 'cut and thrust' image of the trial lawyer portrayed in the media, particularly television or novels. You would be right, and this reality tends to show that Luban was not overly successful in his quest.[11] But the impact of this book was still considerable. Interest in who we are as lawyers – and not just in what we do and what rules apply to us – has never disappeared.

As Joseph Tomain indicated when he reviewed Luban's book:

> *The Good Lawyer* is about being a lawyer, and its thesis is astonishingly simple. Being a lawyer is not unconnected with being a person . . . Further, being a good person does not preclude you from being a good lawyer – if anything, lawyers should be "more moral" . . . These assertions are not astonishing because of their simplicity but rather because of the heresies they contain and because of their complexity. They are heretical because they are contrary to over 100 years of orthodoxy in the thought, writing, and institutionalization of professional ethics.[12]

Despite the thousands of Australian lawyers who struggle conscientiously with ethics, there have been both major and minor moral disasters in the 30 years since Luban's book was published. Notorious cases and headlines have demonstrated a lack of interest in who we are as lawyers and a too-common readiness by our fellow lawyers to argue that 'no rules were broken', or that the rules were ambiguous. Some of the more notable instances, covered later in this book, have resulted in much injustice and

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billions of dollars in losses. There is now not just a moral reason to revisit good lawyering, but a powerful economic incentive as well. To address this need, a variety of topics are covered, as set out in the next section.

1.4 Coverage of this book

The following sections of this chapter discuss the questions that you should consider asking a law school in order to get an idea of its credentials and capacity for teaching 'goodness'. There is no website that provides the answers. Not surprisingly, just as law firms tend not to proclaim their attitudes to ethics to prospective clients, law schools slip in behind them and emphasise other things, such as their 'commerciality', excellence, and graduate career destinations. All of these claims are possibly true, but they not about being a *good* lawyer. So you need to investigate this issue for yourself, using a questionnaire set out below (at 1.6).

Later, the issues involved in selecting so-called elective subjects are also addressed, along with the hot topics of:

- what is involved in 'thinking like a lawyer' – benefits and disadvantages?
- the essence of how to study law – continuous assessment; on campus or online study
- life-study and part-time paid work – keeping balance
- why volunteering in the law – in addition to undertaking seasonal clerkships – is healthy
- the emotional and physical stress of individual subject demands
- consciousness of depression risks – keeping talking
- the benefits of PLT *versus* a traineeship – pay or be paid
- seeking 'admission to practice' – what it means and what to beware of!

Chapter 2 turns to the moral realities of legal practice. Recent 'headline' cases emphasise the risks and opportunities in the many types of 'lawyering'. The managing partners of large firms and global firms tend to consider law as pure business. They have very different attitudes from other lawyers, for instance criminal and family lawyers. As a generalisation, the larger the firm the more pressure there is for each lawyer to complete daily timesheets – where they must record what they do in *six-minute* intervals.

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There are other particular ethical issues associated with larger legal practices, especially a degree of nervousness among new lawyers about exercising ethical choice in the face of the business priorities of the firm.

Chapter 2 also explores a range of economic and structural challenges to lawyering, including so-called legal process outsourcing. This trend became prominent in India, where lawyer–IT entrepreneurs saw an opportunity to industrialise and automate transactional and litigious legal work with the aid of artificial intelligence, to the point where the lawyer's contribution in major transactions – ethical judgment – is not as obvious as it used to be. Now many large and mid-tier Australian law firms are sending slabs of routine commercial legal work to India in an effort to cut their local lawyer labour costs. Over time, this may reduce demand for local commercial lawyers. The financial challenges to good lawyering are also considerable, because no one can afford to be a good lawyer at the cost of going broke.

Chapter 3 addresses the core complexities of values, ethics and virtue arising from a choice to be a good lawyer. The major systems of *general morality* (*consequentialism*, *Kantianism* and *virtue ethics*) are analysed and compared in a large table (Table 3.2) for their potential to cut through these debates about what is 'legal' or 'ethical'. In the face of all the 'system' challenges which lawyering throws up to income, wellbeing and our personal relationships, being a good lawyer is just smart. But that does not mean it's easy to do. Ethical concepts are often difficult to 'see', and if seen, are then avoided because the essence of goodness involves making a judgment. Exercising judgment is hard because it's difficult to reduce any particular situation to a formula or rule. Superficially, we often prefer to work with legal rules because they give the illusion that no judgment is required. Law students are known for saying in ethics classes 'just give me the rules'. But rules can only rarely be applied without judgment – that is, without ethical awareness and conscious choice. There is judgment involved in acting intentionally in all ethical decision making, rather than just lazily 'going with the flow' or doing what one is told (that is, following a command or rule without thought). Here, the major challenge for some commercial lawyers is their appreciation of the difference between something that is legal but unethical, a point eloquently emphasised by Abraham Lincoln[13] but not so often taken to heart. In our communities, proposals for new development projects versus the need for environmental sustainability frequently throw up this difference.

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In Chapter 4 general morality is tied into sub-frameworks of legal ethics that have been developed to help lawyers decide what to do in difficult cases. General morality can seem remote to lawyers, but is made more accessible when considered alongside other frameworks. For this reason, a four-part category popularised by Christine Parker – so-called zealous advocacy, responsible lawyering, moral activism and the ethics (or relationship) of care[14] – helps us appreciate general morality and make difficult ethical choices. Such choices have to be truly intentional rather than based in fuzzy thinking or feelings, or unthinking obedience to whatever a superior might tell us to do.

While Chapter 4 also suggests that virtue and character are a more stable foundation for modern legal ethics, the temptation to simply adopt virtue ethics as the framework of choice and not bother with consequentialism or Kantianism is resisted. It may be that virtue alone is sufficient to guide all decisions, but as will be seen, our tolerance and judgment are important virtues in themselves. Our capacity to make the truly good decision is likely to be enhanced if we allow ourselves to compare, in each case, what each of these three approaches – virtue, consequentialism and Kantian methods – would suggest is appropriate. But it is still important to identify the virtues as they are known and attempt a justification of virtue ethics in response to the criticism, often (erroneously) made, that something as apparently amorphous as a virtue can hope to provide a practical guide to action in tough situations.

While Parker's four types (see Appendix A) are easily understood and therefore useful for increasing awareness of your own preferences as a lawyer, they were not intended to provide an active guide for decision making in complex and ethically confused situations. The comparison of virtue ethics, consequentialism and Kantian ethics provides a framework for doing this.

Prominent among these traditional categories is the concept that Luban was so critical of: zealous advocacy, or role morality. Role morality, also known as the 'dominant' form of legal ethics, allows lawyers to say and do things on behalf of a client that they might not be able or willing to say or do in their private lives. Some have described role morality as nothing more than licensed lying and cheating,[15] but a milder description tones this down a bit to merely passionate advocacy and involves the justification (in its simplest form) that lawyers on both sides of a dispute should *properly* put their client's case as strongly as possible. For example, a criminal defence lawyer may – and sometimes must – hassle, accuse and even trick prosecution witnesses in an effort to make sure they are not lying. A zealous advocate does this because

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they are confident in the knowledge that a sensible judge (and sometimes jury) will work out which version of events and which interpretation of the law is most credible. Role morality is accepted throughout Australia and New Zealand as important for the defence of criminal charges because the state (that is, the prosecution) often has greater power to pursue a defendant than he or she has to defend themselves. Role morality is a balancing mechanism that has stood the test of time over the last several hundred years of English criminal trial history.[16] But it is not appropriate for all lawyers in all situations. This book does not discount the importance of role morality, but it is insufficient for a good lawyer. When a zealous advocate subjects themselves to the scrutiny of general morality, even better lawyering will result.

Chapter 4 then covers the relatively recent insights of positive psychology, which is not the same as the increasingly discredited notion of 'positive thinking'. Positive psychology provides a respectable method to connect us to our own sense of general morality and allows us to be – and remain – 'positive' about life as a lawyer. Chapter 4 concludes by centring the whole debate about morality and law inside the special case of the large law firm. These are the workplace settings where it seems that new lawyers are under the most pressure to conform to a culture that is intrinsically profit focused.

Chapters 5 to 8 deal sequentially with specific areas of legal ethics that provide you with many opportunities to demonstrate general morality, even though few will see you functioning in this holistic manner. Since good lawyering tends to be less visible, these chapters must unfortunately make use of examples of bad lawyering in order to get the point across. In each of these chapters, the choices open to us in determining a course of moral action are illustrated with specific cases and analysed according to the three general moral approaches discussed above, in the light of the *Australian Solicitors' Conduct Rules* (ASCR).[17] These cases also refer to the four legal ethics sub-categories, where appropriate. The method used to analyse the illustrations in each of these chapters involves reflection on the contrasting ethical approaches in order to discern the mature decision.

Chapter 5 tackles the painful agendas of truth and deception, often in a criminal law context. It might be said that role morality justifies just enough deceit to ensure a fair criminal law trial, but the concept still fails to satisfy almost every non-lawyer. Coping with the disguised suspicion you will receive at parties when you say you are a lawyer is just the start of it. Perhaps more than in any other area of legal ethics and lawyering, we need to combat the

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popular idea that as lawyers we are intrinsically crooked or dodgy and are profoundly unable to tell the truth. Key situations where this challenge must be taken up are discussed, including the difference between active and so-called passive deceit, the concealment of embarrassing documents, the disguising of the true purpose of a legal action, 'knowing too much' and evading tax.

Chapter 6 then explores the idea of professional secrecy, which can both support and confuse the subtleties of truth and deception by providing a justification for saying as little as possible. Lawyers' secrets now come in two varieties: the fairly bland concept of legal confidentiality, and its altogether sharper sub-category, client privilege. The former is said to underpin everything a lawyer does, which is accurate as far as it goes, but in practical terms it's really the narrower idea of client privilege that is vital. It is only privilege that allows a party to litigation to keep something secret from a court. Nevertheless both confidentiality and privilege have their limits, and in defining those limits general morality is useful, particularly where the ASCR prove again to be simply a set of rules, albeit rules that are enforceable by regulators. Three central examples are explored, where our capacity to keep quiet is linked to murder, corruption and finally to protection from the consequences of a hit and run killing.

Although truth-telling and secrecy are high in the public profile, there is a largely undiscussed underbelly of legal practice that has a more insidious effect on our character – conflicts of interest. Chapter 7 explores these conflicts of loyalty and interest as a recurring and sometimes nightmare challenge to large firms. We are constantly conflicted by our desire to do the best for our client but also to charge them enough for us to earn a living. Here the rules say we can charge a 'reasonable amount', but try working out what is reasonable without some wider general moral framework to guide you. Conflicts are also a challenge when we find ourselves suddenly acting for two clients who are in an argument with each other or who could be in such an argument – or a current client finds themselves opposed to a former client. Do we not owe some loyalty to the former client, or at least an obligation to keep their secrets secret from our newer and current client? The temptation for large firms to earn double fees by keeping all parties in-house in these situations is often seductive, but just as often the seduction leads to tears all round, and then winds up in public.

Chapter 8 addresses professional competence, something that is often taken for granted until you make your first significant mistake as a lawyer

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and it becomes necessary to claim on your employer's professional indemnity insurance policy. Remember that mistakes are inevitable for us as much as for anyone; they are not a sign of moral failure. Negligent advice is offered every day in the most respectable of firms, but at the same time, morality still plays a subtle role. If your attitude to the quality of your work is one of 'close enough is good enough' or you are untroubled that you are habitually late in meeting work-related deadlines, then it's likely that you will make more than your quota of mistakes and you may not care that much.

General morality, and particularly virtue morality, values a conscientious approach, and in this sense, competence requires morality. There are many implications explored in this chapter. In practical terms, we need to be competent despite the let-out clause of 'advocates' immunity', because individuals' carelessness will mean all of us must pay much higher insurance premiums even if our clients cannot always successfully sue us for negligence because of the immunity. We are required also to be financially competent by making sure we know how to keep our own money separate from our clients' money. Historically, failure to recognise this point has often led to theft and then jail – with all that that means for our families and our reputation. Over-charging and bribery are also challenges to competency, and there are several dimensions to this particular risk. For example, each of us will benefit from continuing professional development (CPD) training on a regular basis and will adopt risk management procedures so that we recognise an invitation to bribery when we encounter it. If we cannot connect our competence to morality, we may well recognise corruption as an opportunity rather than as something to be resisted.

Finally, Chapter 9, 'Practical wisdom', explains how lawyers are regulated and how the regulators deal with those of us who go off the rails, depending upon whether we are anxious, depressed, addicted, mentally unwell, careless or (for a few), just crooks. Most of us are not in any of these categories, but many of us will encounter one or another of these issues if we have a long career. If we are so affected, recovery is always possible. One can even be personally redeemable after criminality, and we need to remain resilient and positive about legal practice as one of the most important and even noble of human occupations. The book concludes with a review of emerging technological and cultural challenges to lawyering and a specific ethics assessment scale. This scale can be used by all law students and lawyers to expand and refine their knowledge of who they are and what they may become. Other appendices set out the features of our various professional safety

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