Introduction: Values in Practice

Introduction: Ethics and Lawyering

CASE STUDY 1.1 The Jewish QC and the Alleged Nazi War Criminal

In early 2001, newspapers reported that a leading Melbourne criminal barrister and civil rights advocate had been asked to represent suspected war criminal Konrad Kalejs in a hearing to determine whether Kalejs should be extradited to Latvia to face charges over the deaths of tens of thousands of Jews and others during World War II. The relevant barrister was a Queens Counsel and was also prominent in the Jewish community, a former president of Liberty Victoria (a civil rights organisation) and well known for representing a variety of high-profile criminal accused including Julian Knight (in his trial for the Hoddle Street massacre), John Elliott (who was cleared of corporate fraud), and members of Hells Angels. The barrister was, reportedly, born in 1946 in Russia. His parents fled to Germany when he was six weeks old and later settled in Israel. They migrated from there to Australia in 1959. In 1997 he ‘was quoted as telling The Herald Sun that elderly Jews living in Melbourne would be having sleepless nights knowing Mr Kalejs was walking free in Melbourne.’ Mr Kalejs was 87 at the time of the extradition proceedings. He denied the allegation that he had served as an officer in a death squad within a Latvian war camp where an estimated 20,000 to 30,000 Jews, Gypsies, Red Army soldiers and others were executed, or died of starvation or torture at the camp. However, Kalejs had previously been deported from the US, Canada and Britain because of findings that he had been involved in war crimes. From newspaper reports at the

time, it seemed that Kalejs’ defence to the extradition would be that his health was too poor for extradition to Latvia. His health problems included legal blindness, dementia and prostate cancer. Jewish leaders, however, pointed out that it was not uncommon for war crimes suspects in other countries to make claims of unfitness for trial that later proved to be unfounded. The legal process for extradition could easily have dragged on for eighteen months, if Kalejs chose to fight it. Should the barrister have acted for Konrad Kalejs in the extradition proceedings, and if so, how might he proceed?

This situation raises a range of questions about the proper role and conduct of lawyers: To what extent is it our role as lawyers to act as a zealous advocate for any client that comes along? Should we advocate for clients and causes that we personally find morally repugnant? Can we trust the legal system to sort out issues of truth and justice? To what extent should we consider broader duties to society, our relationships with our own families and communities and our religious faith and personal beliefs in deciding what clients to take on, or how to act for them?

Many of the questions raised by this scenario are ethical questions. They raise issues like: Is it possible to be a good person and a good lawyer? What interests should we spend our life serving as a lawyer? How should we relate to clients? To what extent should we consider non-legal, particularly moral, relational and spiritual, factors in attempting to solve clients’ problems? What obligations do we, as a lawyer, owe to others beyond our clients, for example, opposing parties, colleagues, the public interest, the courts, our family, the communities (of social interest, faith, geography, sexuality etc) that we are a part of?

We might find answers to these questions in various ways that do not invoke ethics – our own financial interests, what others expect of us, what we find most convenient or fulfilling, and so on. Ethics is concerned with deciding what is the good or right thing to do – right or wrong action, and with the moral evaluation of our own and others’ character and actions – what does it mean to be a good person? In deciding what to do and how to be, ethics requires that we look for coherent reasons for our actions and character that show why it is right or wrong to act according to our financial interests, or to do what others expect in certain situations etc. It asks us to examine the competing interests and principles at stake in each situation and have reasons as to why one should triumph over the other, or how they can be reconciled.

In Case Study 1.1, it is not enough to say that the QC should not represent the alleged criminal because he finds it distasteful to do so, or because he might anger his friends or lose business. The anger of friends or personal distaste are not independent ethical reasons for refusing to do something. We need to look more deeply to determine whether they indicate that some ethical principle is at stake; for example, disloyalty to family or community. If so, is this ethical principle more or less important than the values that might be furthered by representing the client, such as protecting civil liberties or lawyers’ responsibility for ensuring that criminal accused have fair hearings? Similarly, we cannot simply say that the QC needs to earn a living and therefore should take every paying customer. We need to consider whether there is any justification for a Jewish lawyer, or indeed any lawyer, to earn money to feed himself and his family by arguing
that someone who likely participated in the genocide of Jews and others during World War II should not be held accountable for those crimes. Does the need to earn money override loyalty to religious and racial community? Can a personal commitment to civil liberties be more important than community identity? What about a personal commitment to earning money or arguing challenging cases? Are these good reasons for choosing certain cases over others?

We can also ethically evaluate social rules, practices or attitudes to determine whether they promote right action and good character. Most of us have our own ideas about the right thing to do or what good character is. Our personal ideas about ethics are likely to have come from our family upbringing, our friends and colleagues and any political or faith commitments we might have – our personal ethics. But depending on where we work and what we do, there are also likely to be more public or shared expectations that go along with our role. For example, the community has ideas about what it means to be a good friend, a good parent, a good citizen or a good doctor. Sometimes these public ideas about ethics go formally unstated. But some ethical norms are reflected in legal rules and regulation. And sometimes our personal ideas about ethics (for example, on issues like abortion and euthanasia) can come into conflict with community ethical norms and/or legal rules. Good ethical reasoning demands that none of these assumptions about the right thing to do or the right way to be should go unexamined.

For lawyers, apart from our own personal ethics, there are two potential sources of ethical expectations that might affect the way we do, or should, behave – professional conduct principles and social ethics.

Professional Conduct

The first is the principles of professional conduct. Professional conduct is the law of lawyering, the published rules and regulations that apply to lawyers and the legal profession. In Australia these rules and regulations can be found in the legal practice or legal profession statutes in each state, in the various professional associations’ self-regulatory professional conduct and practice rules and in the way the general law (particularly contract, tort and equity) apply to lawyers and their relationships with clients. In this book when it is necessary to refer to the statutory or self-regulatory rules governing Australian lawyers, we will generally refer to the National Legal Practice Model Bill (the ‘Model Laws’) (2004) and the Law Council of Australia’s Model Practice Rules (2002) (the ‘Model Rules’).  

2 The Model Laws have been agreed between the Attorneys-General of the Australian Commonwealth and each of the States and Territories with significant input also from the Law Council of Australia (the umbrella organisation for Australian lawyers and legal professional associations). As a result the provisions of the legislation governing the legal professions of the various states and territories are increasingly becoming consistent, although the ordering of provisions and section numbers will vary from jurisdiction to jurisdiction. Similarly, the Model Rules have been promulgated by the Law Council of Australia, and as a result the professional conduct rules of the various states and territories now increasingly copy this model. See G E Dal Pont, Lawyers’ Professional Responsibility (Lawbook Co, Pyrmont, NSW, 3rd edn, 2006) 16–18. See Chapter 3 for further discussion of the Model Laws and Model Rules.
Much teaching and practical discussion of lawyers’ ‘ethics’ in the legal profession is dominated by legalism. Legalism treats legal ethics as a branch of law – ‘professional responsibility’ or professional conduct. The professional conduct approach may cater to the need for certainty, predictability and enforceability in a context where people often consider ethics to be subjective and relative. However, it is, by definition, not an ‘ethical’ approach. It explicitly abandons ethics for rules. The law of lawyering is significant as one way in which lawyers’ ethics are institutionally enforced or regulated, and can certainly be helpful in guiding behaviour. We refer to the rules of conduct in this book as one of the sources of information that lawyers can and should use to make decisions about what is the right thing to do in different situations. But these rules do not provide a basis for considering what values should motivate lawyer behaviour and choices about what kind of lawyer to be. This is not to say that it is not important for society to have and enforce a law of lawyering. But lawyers must also have an ethical perspective on being a lawyer in order to judge what rules should be made (on a professional level) and also to decide (on a personal level) what the rules mean, how to obey them, what to do when there are gaps or conflicts in the rules and whether, in some circumstances, it may even be necessary to disobey a particular rule for ethical reasons. This book, therefore, will not provide a comprehensive coverage of the law of lawyering, but will provide a basis for ethical critique of professional conduct principles.

Social Ethics

The second source of ethics for lawyers (apart from their own personal ethics) is general philosophical theories of social ethics. Social ethics come from general moral theory or ethical theory, philosophical work devoted to understanding what it means for something to be good or right or a duty. Particularly relevant for lawyers are philosophical ideas about justice, social and environmental responsibility, minimising harm and respecting others.

Some commentators on lawyers’ ethics go to the opposite extreme from legalism, and propose that general and abstract moral theories or methodologies should be applied, without elaboration, to the practice of law. These fundamental moral theories generally divide into ‘deontological’ or rule-based theories, on the one hand, and ‘teleological’ or consequentialist theories, on the other. Kantian ethics and utilitarian ethics are used, respectively, as the main examples of each approach. According to Kantian ethics, ‘right’ actions or policies are those that primarily respect individual autonomy. Kantian methods refute the notion that ‘the end justifies the means’. Kantian theory argues that the means, since they often involve what happens to individuals, are at least as important as outcomes.

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3 Other books already provide adequate coverage of the law of lawyering, particularly Dal Pont, Lawyers’ Professional Responsibility.

4 For a good overview, see Noel Preston, Understanding Ethics (Federation Press, Leichhardt, NSW, 2nd edn, 2001).
In a teleological approach, by contrast, right actions or policies are those that bring about desirable consequences. On this approach the ends can justify the means. Utilitarianism, a type of consequentialism, proposes that ‘maximising the public good’ should be the criterion for ethical action.

Standard deontological and teleological moral theories can be contrasted with a third set of theories, including virtue ethics and the ethics of care, that take a different approach. Virtue ethics shifts the focus of ethical attention from particular conduct and its impact to the quality or character of the actor. Virtue ethics approaches derive from Aristotle’s emphasis on right character as a personal virtue and look to how an individual is motivated at a profoundly personal level. The ethics of care focuses attention on people’s responsibilities to maintain relationships and communities, and show caring responsiveness to others in specific situations. It is proposed as a correction to the traditional emphasis in ethical theories on individual rights and duties and formal, abstract, universalist reasoning. However, these theories raise the question of how we can know what is a virtuous or caring thing to do without some sort of criteria as provided by deontological or utilitarian theories?

The trouble with the moral theories approach to legal ethics is, as is evident from the summaries above, that moral theories are so abstract that it is difficult to apply them to concrete situations. Furthermore, simply applying general moral theories to legal practice also begs one of the main questions debated in lawyers’ ethics, which is: To what extent should lawyers’ ethics be determined by the idea that lawyers should play a special and particular social role, or to what extent should lawyers be held to the same general ethical standards as anyone else (be they deontological, teleological or some type of virtue ethics)?

An Applied Ethics Approach

In this book we take a more practical and applied approach to examining lawyers’ ethics. Our aim is to enable lawyers and law students to critique and evaluate professional conduct and lawyers’ behaviour in practice by combining their own personal ethics with professional conduct rules and social ethical considerations. Our focus will be on using real-life case studies to help practise an ethical evaluation process that involves awareness of the ethical issues likely to arise for lawyers in practice, the standards and values available to resolve those issues, and consideration of how we might implement our ethical decision-making in practice.

In this chapter and the next we introduce four main ethical approaches, derived from the theories mentioned above, which can help lawyers when making ethical decisions:


Adversarial advocacy; 
Responsible lawyering; 
Moral activism; and 
Ethics of care.

In the following chapters we examine a number of substantial topics in lawyers’ ethics through case studies, and analyse the professional conduct principles and ethical approaches that might apply in each area. In each chapter we will introduce some of the major ethical issues facing lawyers in relation to that topic, and set out the conventional (‘current’) values that are commonly applied to resolving those issues. Then we will compare current approaches with alternatives derived from our four ethical approaches (‘alternative values’). Finally we will give readers a chance to work through the current and alternative values that might apply to the area by means of specific case studies (usually based on real cases) and questions designed to clarify and challenge readers’ own stance on each area. Our aim is to make explicit the sort of values awareness and decision-making processes we go through (or ought to go through) in order to make decisions about what is the right thing to do or the right sort of person to be in legal practice.

**Process of Ethical Reflection and Decision-Making**

In order for ethical considerations to make a real difference to lawyers’ behaviour, we need to think about what ethical decision-making steps we must go through in applying ethical considerations to real-life situations. It has been suggested that in any practical endeavour ethically responsible decision-making requires at least three different steps. We must:

1. Be aware of the ethical issues that arise in practice, and of our own values and predispositions;
2. Take into account a range of standards and values that are available to help resolve those ethical issues and make a choice between them; and
3. Implement that resolution in practice.  

It is very well for philosophical theorists to propose certain theories or principles of ethics that people ought to act on (the second step). But in practice ethical decision-making also requires us to be aware that an ethical dilemma or choice even exists in the first place (the first step), and to have the creativity, skills and will to put our ethical principles into practice (the third step).

The substantive content of this book (as reflected in the chapter template outlined above) critically examines the second step, the standards and values that

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should apply to different ethical issues that arise in practice. But learning to reason
ethically also involves practising the identification of ethical issues in the first
place and creating practical resolutions to ethical dilemmas that respect ethical
values. That is one of the reasons that we have included a number of scenarios
throughout this book. These case studies are designed to help us learn to become
aware of ethical issues, to reflect and decide on what ethical standards and values
should apply to those issues, and to consider how we might put those resolutions
into practice. We will often learn more about these aspects of ethical reasoning if
we can discuss case studies with other people with different knowledge, values
and experiences from our own. For that reason the case studies include questions
that can be used in a classroom or law firm.

These three steps in ethical reasoning are explained in further detail below,
and illustrated with a case study scenario and questions typical of those pro-
vided throughout the book, Case Study 1.2: Lawyers, Gunns and Protests. In
the remaining chapters the focus will generally be on the second step. But our
case studies and questions in each chapter are also designed to improve readers’
ethical awareness and their ability to plan and implement practical resolutions
to ethical problems.

**CASE STUDY 1.2 Lawyers, Gunns and Protest**

Gunns Limited, a Tasmanian sawmiller and hardware retailer, is Australia’s biggest
woodchip exporter and probably Australia’s most profitable timber company with prof-
its that grew from $53m to $105m between 2002 and 2004, according to the company’s
annual reports. At the same time the logging of old growth forests has become a very
contentious issue in Tasmania, with regular protest action. Amongst other things, envi-
ronmentalists claim that many rare species are being destroyed by Gunns and other
sawmillers in Tasmania, and they also express concerns about the effects of clearfelling
on the ecosystem and issues like local water catchments. During the 2004 federal
election campaign, the Liberal–National Party Coalition (which was re-elected to gov-
ernment) promised to act immediately to make another 170,000 hectares of Tasmanian
forest protected old-growth forest by 1 December 2004. However the federal Coalition
government did not do so until mid-May 2005. In the meantime, environmentalists
claimed that the Tasmanian State government was allowing sawmillers like Gunns to
log areas that ought to have been protected. In mid-2004 Gunns attracted bad publicity
in Tasmania when a helicopter accidentally doused a Tasmanian farm with a potentially
carcinogenic herbicide while spraying a Gunns forestry plantation.8 At the end of 2004
a public consultation phase began for a decision about a new Gunns $1 billion pulp
mill in Tasmania.

On 13 December 2004, Gunns lodged a writ in the Supreme Court of Victoria seek-
ing injunctions and damages of $6.36 million against twenty defendants in relation to
‘campaign activity’ against Gunns. The defendants included Doctors for Native Forests
Inc, the Huon Valley Environment Centre Inc, The Wilderness Society Inc, and some
of its staff, Green Members of Parliament Bob Brown and Peg Putt, and a number of
individuals who had allegedly been involved in protest activities. The damages claimed

included about $1 million for actual losses and more than $5 million in aggravated and exemplary damages.

The writ was unusually long and complex at 216 pages. It was later expanded to 350 pages. It claimed that the 20 defendants engaged in a campaign against Gunns that amounted to, firstly, a conspiracy to injure Gunns by unlawful means organised by The Wilderness Society and its staff; and, secondly, interference with Gunns’ trade and business by unlawful means. The alleged campaign activity included:

(a) logging operations disruption campaigns and actions at Lucaston, Hampshire, Triabunna, and the Styx – including allegations of machinery sabotage, destruction of property, trespassing, blocking bridges, taking keys from cars, damaging property, ramming mud into exhaust pipes, pulling down direction signs, people locking themselves to or inside items and obstructing police officers;

(b) corporate vilification campaigns relating to Gunns’ exclusion from the Banksia Foundation’s environmental awards shortlist, and allegations that a woodchip pile could harbour harmful bacteria;

(c) campaigns against overseas customers of Gunns including customers in Japan and Belgium – including allegations that conservationists had tried to pressure Japanese woodchip customers to stop buying from Gunns via threats of adverse publicity, consumer boycotts and direct action against the Japanese customers and all their operations;

(d) corporate campaigns targeting shareholders, investors and banks – some of the defendants were accused of ‘publicly denigrating, vilifying and criticising’ Gunns and encouraging others to boycott or protest against it.

Gunns’ executive chairman was reported as saying that the company was taking the action to protect the interests of its employees, contractors and shareholders:

Gunns Limited and the majority of Tasmanians are sick and tired of the misleading information being peddled about our industry and our state . . . The company’s claim includes allegations concerning risks to the health and safety of our employees and contractors, unauthorised entry to private property and damage to equipment owned by Gunns Limited and our contractors. These activities have been going on for years and it is about time they were stopped.9

On the other hand, the Gunns action was heavily criticised in the media as a ‘SLAPP’, a ‘strategic lawsuit against public participation’. A SLAPP is when a corporation or government agency makes a civil claim, such as defamation, conspiracy, malicious prosecution or nuisance, against individuals or organisations in order to punish them for voicing their criticisms, or silence them. In some SLAPP situations (but not the Gunns case), the lawyers acting for the plaintiffs have even threatened social commentators and academics with defamation proceedings if they make adverse comments on the ethics of the litigation.10 In Australia there is no constitutional right to freedom of expression.

able to afford adequate legal representation or claim tax deductibility, and could even face bankruptcy if the case is upheld against them. In the Gunns case, however, the Hobart Mercury reported that 'dozens of lawyers, from top silks to eager law students, are offering to fight the Gunns writ for nothing'.

Nevertheless some of the defendants felt threatened by the case:

There was a general feeling amongst folk [among the defendants] who hadn't been faced with this situation before; they were stunned. One of them wandered around her house thinking that this lounge suite, my TV, the things she'd worked years to get, now inherently are not hers; the cloud of Gunns ownership hangs over them. And people were very frightened because it's not just you that's being effectively, potentially taken to the cleaners by a court case like this – and indeed into potential bankruptcy – but your loved ones, your family, other people.

On 19 July 2005 Justice Bongiorno of the Victorian Supreme Court ordered that Gunns' writ should be struck out because it failed to set out with sufficient clarity the case which the defendants must meet. He suggested 'that the conceptual basis of the plaintiffs' case be subjected to serious reconsideration'. Gunns was given twenty-eight days to file a new writ if the proceeding was to continue.

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Step One: Awareness of Ethical Issues

What ethical issues have arisen or might arise in the future in this situation?

- Who are the stakeholders, i.e., whose interests are affected?
- What interests or values are at stake in this situation from the perspective of the different stakeholders?
- Are there any other principles or values at stake in this scenario?
- Are there any conflicts between those interests or values of different stakeholders?
- What are your own interests and values in this scenario?
- What are the different options as to what you (the lawyer) should do (or should have done) in this scenario?

In this first stage, we are simply auditing the ethical issues that have or might have arisen, and what interests and values they raise, not trying to resolve them. The aim is to become aware of what interests and values (including our own personal interests and values) could apply to a scenario. In order to identify what values and interests might apply to a scenario, it is often helpful to start by thinking about all the different people who might have an interest in the outcome of the scenario (the ‘stakeholders’) and what values and interests they represent. Usually there will be a range of conflicting and complementary values and interests at stake in any situation suggesting a variety of alternative and contradictory courses of action—this is what makes something into an ethical dilemma.

In practice, the problem is that often we (and some theorists) forget that there are other genuine ethical perspectives on what to do in certain situations, other than our own, or that of those we spend most time with. Sometimes, there are very major differences between our own values and those of others. In the 1960s, Stanley Milgram conducted a series of famous (and highly unethical, but effective) experiments on volunteers who were asked to administer electric shocks to another person. The experiments showed that people are quite willing and able to inflict progressively more pain on another human being, up to very dangerous levels, where the initial level of pain is insignificant, each increase in pain is small, and it is accompanied by reassurance by someone in authority that it should be done.14 Uncontrolled police and military interrogations are another example of situations in which unethical behaviour such as torture and violence can be seen as normal in the context of police or military sub-cultures. At a more mundane level, lawyers can have their ethical awareness and imagination dulled by working in firms or being with people who see ethically questionable behaviour as ‘the way lawyers do things’ or ‘the way we do things around here’. Ethics education can help improve ethical behaviour by making us more aware of our own value.

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14 The experiment was actually a hoax—the person receiving the electric shocks was an actor who pretended to suffer the pain of each shock. However, the volunteer subjects of the experiment did not know this. For a description of the experiments and their applicability to lawyers’ ethics, see David Luban, ‘The Ethics of Wrongful Obedience’ in D. Rhode (ed), Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation (Oxford University Press, Oxford, 2000) 94, 96–7.