

70103: Ethics, Law & Justice: Questions

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Week 2: Introduction & Legal Writing

James & Field, 2013, 334-339

- Practise teams: govt. departments work in teams
- Group contract: Planning to identify strengths

Tracy Booth, 'Crime Victims and Sentencing: Reflections on Borthwick' (2011) 36:4 *Alternative Law Journal* 236-239, 236.

1. Victim Impact Statement (VIS) has little impact within a court case, yet causes distressed and anger for the victims & their families
2. Thesis: 'Questions are raised about the role of VISs in an adversarial legal framework and the requirement of fairness in the conduct of the proceedings'
3. ***Introduction: road map...VIS's' role in the courtroom → purpose of VIS → connection to the major issue (criminal justice) → why its an issue (challenging for the court) → what issues it affects (fairness) → summary

Footnote: Tracy Booth, 'Crime Victims and Sentencing: Reflections on Borthwick' (2011) 36:4 *Alternative Law Journal* 236, 236.

Bibliography with headings:

Articles/ Books/ Reports, Cases, Legislation, Treaties, Other

Booth, Tracey 'Crime Victims and Sentencing: Reflections on Borthwick' (2011) 36:4 *Alternative Law Journal* 236-239, 236

In-Class Writing Exercise

- Asylum seekers won't be eligible for free help under the Immigration Advice and Application Assistance Scheme (IAAAS)
- Cut will save federal govt. \$100 million over 4yrs
- Designed to deter asylum seekers
- Has not blocked community organisations from providing free immigration advice, but these over-stretched organisations are unlikely to provide the help without the govt. funding
 - o Refugee Council – claims organisations relying on IAAAS funding were already struggling with the same funds prior
- Asylum seekers struggle to understand the intricacies of the status determination regime
 - o Govt. will provide asylum seekers with info in their own language, however this is insufficient
 - o Studies have proven there is a correlation btw legal advice and recognition of refugee status
- Australia signed onto refugee convention (requires refugee protection) – rejection of refugees because of inability to state their need for protection, without help, is illegal
- UNCHR – does not provide funded independent legal advice to asylum seekers in its own status determination process – Scott Morrison's argument
 - o UNCHR: response: lack of resources
 - o Asylum Seekers Resource Centre: lack of immigration advice will make the job for decision makers harder – applications are poorly written, unfocused – increasing processing times, likelihood of review, length of detention
- Places refugees in danger of persecution, torture, death

12. What lessons can be learned from the Milgram Experiment about working in a law firm? Do you think 'obedience' is part of a lawyer's role? If so, can this 'obedience' lead to injustice?

- The Milgram experiment on obedience to authority figures was a series of social psychology experiments conducted by Yale University psychologist Stanley Milgram. They measured the willingness of study participants to obey an authority figure who instructed them to perform acts conflicting with their personal conscience.
- Milgram devised his psychological study to answer the popular question at that particular time: "Could it be that Eichmann and his million accomplices in the Holocaust were just following orders? Could we call them all accomplices?"
- Banality of Evil – Ordinary people can be evil
- Ethics: raised questions about the research ethics of scientific experimentation because of the extreme emotional stress and inflicted insight suffered by the participants.
- Milgram said the ethical criticism provoked by his experiment was because his findings were disturbing and revealed unwelcome truths about human nature

'Obedience' as part of lawyers role:

- This relates to developing a 'professional identity' and becoming away of your self-concept as a member of the legal profession and your internalised beliefs, values, expectations motives and behaviour that arise from how you perceive yourself in your professional role (Kath Hall, 2010).
- 'Obedience' in the sense of the Milgram Experiment is not necessarily part of a lawyers role, it is more a duty that is owed to your client and the courts which means at times you will be faced with ethical dilemmas of what is right by them versus what is right by you

Structural injustice

13. What does 'structural injustice' mean? Refer to Nora Hanagan's article

- Injustices people experience at the personal, institutional and structural level – example racism: can be both positive and negative e.g. political laws enforcing segregated education or failure of the state to create laws against prejudice. This structural injustice is both self-imposed (as the victim does not make more of his circumstances), promoted through the actions of institutions and society as we sustain the conditions that make it harder for the disadvantaged to achieve a respectable middle class lifestyle pp. 3-11, SM

14. "If I put a gun to someone's head, say, a 30-Year-old healthy male, pull the trigger, and kill him, assuming an average life expectancy of 84, You can argue that possibly 54 Years of life were stolen from that person in a direct act of violence. However, if a person is born into poverty in the midst of an abundant society where it is statistically proven that it would hurt no one to facilitate meeting the basic needs of that person and yet they die at the age of 30 due to heart disease, which has been found to statistically relate to those who endure the stress and effects of low socioeconomic status, is that death, the removal of those 54 Years once again, an act of violence?

Our legal system has conditioned us to think that violence is a direct behavioral act. The truth is that violence is a process, not an act, and it can take many forms. You cannot separate any outcome from the system by which it is oriented" - Peter Joseph, 'Economic Calculation in a Natural Law/Resource-based Economy' (2013)

What is this quote saying about how violence is perceived in our legal system? What is this quote saying about injustice in our legal system? How well do you think our legal system deals with structural injustice?

- Structural injustice is a form of violence on the disadvantaged. Our legal system is structured to not protect those or provide opportunities to those that are disadvantaged, so that they could achieve more. The moderate citizen seeks to preserve these institutions – works within political institutions, obeys established laws and puts faith in rational arguments – cannot effectively resist racism and exploitation.

15. Can you think of examples of laws that perpetuate injustice or inequality?

- Law – gay marriage rights, have not changed in Australia
- Asylum seeker law
- Marriage laws in the constitution
- Migrant laws

16. Some critics suggest that injustices perpetuated/sanctioned in the legal system are not accidental. That is, injustices are intentionally in place in our legal system to hold the interests of the powerful at the expense of the powerless. Do you think these criticisms have merit? Can you think of any examples? Who are the beneficiaries

- Big emphasis upon candour and disclose in admissions which court look fondly towards
 - Because role of board not inquisitorial
 - Full and frank disclosure of past conduct may also indicate an applicants insight as to relevant of that past conduct for admission purposes
- I.e. if don't disclose – lack ethical culpability, lacking proper insight into relevant ethical considerations

6. In the following cases, what was the Court's decision in regard to admission? What were the reasons (values, morals, ethics) for admission or refusal for admission? Do you agree?

- **Re Davis (1947) 75 CLR 409**
 - Regarding the admission of legal practitioners and the jurisdiction of courts over barristers. Davis admitted to Bar in 1946 following completion of all necessary requirements. He was disbarred in 1947 for failure to disclose that in 1935 he was pleaded guilty to a charge of breaking, entering and stealing.
 - Had been admitted as a barrister in 1946 without disclosing conviction for breaking and entering, which occurred in 1934, when he was 20 year old. Subsequent conduct had been beyond reproach. Nevertheless, failure to disclose incident called into question his 'intrinsic character'
 - FACT: charged with break, enter, steal. Didn't disclose → struck off later. Had difficult past – left school at 14 yo, poor, disabled siblings, mental breakdown.
 - HELD: failure to disclose = character flaw (need complete candour) → not fit/proper
 - HC disbarred Davis (lack of candour about past conduct)
- **Re B [1981] NSWLR 373**
 - Cause include a person seeking admission who had led a life of political activism. Her pursuit of her political motives was seen as incompatible with the pursuits of a barrister.
 - Conduct relating to truthfulness and honest, covering a wide range of situations has found to be professional misconduct for purposes of status
 - In this case, giving of false or misleading evidence
 - FACT: convicted of offences in political activism (all disclosed – claim prev attitude changed). Also did bogus bail application (pretending money was her own) a few yrs before admission application.
 - HELD: not fit/proper
 - Deceitful conduct in bail matter → not fit/proper (prev attitude not changed) – still prepared to break law in zealous pursuit of political goals
 - Political radicalism etc NOT a barrier to admission, BUT – if they will break law to do so! not fit/proper
 - 'The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty in the public interest is to conduct himself in relation to those privileges and otherwise in a manner which will uphold the law and further its pure administration.'
 - **Wendy Bacon:** Candour is an aspect of trust (per previous class on the role of trust in a profession) which is critical to admission to practice.
 - In the judgment of Moffitt J there is extensive discussion about the apparently fraudulent bail transaction that Bacon was involved with that involved an attempt to deceive the Court and then lie about it to the Supreme Court during the proceedings she brought for a declaration that she was a "fit and proper" person to be admitted as a barrister. (Wendy Bacon, 2003)
- **Del Castillo (1998) 136 ACTR 1**
 - "a candidate who shows candour in disclosing potential issues, remorse for past wrongdoing and a change of conduct is more likely to be successful than a candidate who seeks to hide 'information which may raise eyebrows'
- **Law Society of Tasmania v Richardson [2003] TASSC 9**
 - Richardson failed to disclose a finding of misconduct by the UOT during his legal studies- his admission presented by his parents who were both aware of his omission in his application
 - Crawford J dismissed claims by Law Society that practitioner was not fit and proper person to practice for failing to disclose this incident.
 - Facts: collusion in uni assignment. Uni's disciplinary process was very disorganised – just did supp exam. Lawyer parents said not to disclose. Didn't disclose – thought he didn't need to. Also claim against parents for prof misconduct
 - HELD: fit/proper – also costs order against LS

- Majority: never be an end to litigation, alternative measures to report incompetency

Duty of Confidentiality

4. What is the duty of confidentiality? What is the principle of legal professional privilege? How are the two distinct?

- Confidentiality: btw client & lawyer is protected by law, lawyer can not reveal confidential info obtained from client, without client's authority, continues after termination/ completion (LLM, p. 305)
- Professional privilege: right of the client to protection from disclosure of confidential info & advice passing btw lawyer and client. Only client can waive privilege. (LLM, p. 309)
- Making client comfortable
- Confidentiality
 - Confidence
 - Fiduciary duty
 - Encourages full disclosure btw the client & their lawyer
 - Sources:
 - Contract – term implied in law into the retainer agreement
 - Equity – protection attaches to info capable of meeting the legal test of confidentiality
 - ASCR Rule 9

5. Can you think of ways where the application of 'legal professional privilege' can be used as an abusive device?

- Legal professional privilege: right of the client to protection from disclosure of confidential information & advice passing btw lawyer and client. Only client can waive privilege (LLM, p. 309)
- Client legal privilege: so client is aware that it is their privilege
- "Dominant purpose" test: information is confidential, prepared for the dominant purpose of litigation so other side is not entitled to that information
- Govt.: via leg. powers obtain disclosure & production of docs (LLM, p. 310)
- In-house lawyers: does not apply if they do not have a current practicing certificate (these individuals are subject to professional discipline)

6. In discussions between a solicitor and client, the client makes threats of harm against the other party, for example, in Family law matters, threats such as 'I'd rather kill the kids and myself than have them live with him/her.' "or" 'If I can't have the property, either will he/she - I'll put a match to it.'

How would you determine whether the confidentiality should be breached to inform the Police or other side of your client's threats?

- ASRC Rule 9.2
 - 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
 - 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person
- If a specific person is threatened, usually the best response would be to contact that person or their solicitor. If they are represented, Rule 33 of the ASCR (the "no-contact" rule) is relevant but the purpose of Rule 33 is to protect the opposing client's entitlement to counsel, and an urgent warning that they are under threat does not offend that purpose
- Crimes Act s 316: concealing serious indictable offence – (1) imprisonment for 2yrs if person does not bring information to Police
- ASCR 20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:
 - 20.3.1 advise the client against that course and warn the client of its dangers;
 - 20.3.2 not advise the client how to carry out or conceal that course; and
 - 20.3.3 not inform the court or the opponent of the client's intention unless:
 - (i) the client has authorised the solicitor to do so beforehand; or
 - (ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

7. George, a representative from Chemtal Pty Ltd, discusses sensitive matters about Chemtal's dire financial situation with Avanti, a lawyer from the firm Ladbroke Lawyers, a firm Chemtal has hired to deal with contractual disputes. Is Avanti allowed to divulge these matters to:

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor

- DPP (Dept. of Public Prosecutors) = prosecutors in indictable matters (police carry out prosecution of summary matters) (*ASCR r 29: Prosecutor's duties*)
 - Priority: 'fair trial', aim for 'justice' not 'conviction'
 - *Uniform Conduct Rules (Solicitors) r. 29.1*: a prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court & must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts. (*LLM, p. 350*)
- DPP only has allegiance to a fair trial and this seems like a much more impartial and less empathetic feat than a lawyer that has pressures from his client, other lawyers and the court to argue the case in a specific way or become too attached to a case and an outcome.
- *Uniform Conduct (Barristers) Rules 83-95: Prosecutor's Duties*
 - **83.** A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
 - **84.** A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
 - **85.** A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
 - **86.** A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.
 - **87.** A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.
- *The ABC 7:30 Report video, 2012*
 - Mark Tedeschi, prosecutor
 - Murder conviction of Gordon Wood
 - Demolished the prosecution case in which Wood had been accused of hurling his girlfriend, model Caroline Byrne, to her death at The Gap
 - Formal complaint over his conduct after the appeal judges found he relied on fiction and dangerous reasoning in the Wood case
 - Judges accusing the prosecutor of failing his most basic obligations to put the case fairly to the jury. Instead, they said, Mr Tedeschi had tried to bolster the Crown case by resorting to fiction, impermissible reasoning and innuendo, including rumours Wood had been in a sexual relationship with Rivkin and a series of unsophisticated experiments which were used to convince the jury Caroline Byrne could not have committed suicide.
 - Professional misconduct – brought all his cases into the limelight

- NB fiduciary duty of loyalty ceases upon termination of the retainer, but that duty to keep confidences continues on the basis that it is an implied term of the retainer
- Strict professional conduct rules and underlying principle that lawyer's fiduciary duty to avoid acting for clients where conflicts may arise → may be access to justice issue
 - So client consent is important in these situations (regional areas)

Independence

7. What is meant by 'lawyer independence'? Why is the concept of lawyer independence important? In what ways might lawyer independence be compromised?

- Lawyers are able to act in their client's best interest without fear of interference. A lawyer must be free to put the client's interest first, free from political or governmental influence, pressure or control.
- 'Avoidance of personal bias' (**Bar Rules r 41**), which requires lawyers to consider carefully the instructions given by the client and not simply do what the client wants, or, as the rules states, 'act as the mere mouthpiece of the client'. There is an acknowledgement within the textbook that lawyers are meant to act as 'double agents' concurrently having a duty to act for the client and a duty to the law/court. It is an important concept because if you do not have 'lawyer independence', you could potentially be breaching your duty to the client.
- **S 17 ASCR: independence**
- **Law Society of New South Wales v Waterhouse [2002] NSWADT**: undertaking should never be given unless the lawyer has complete control over the subject of the undertaking. (LLM, p. 359)
- Acting for friends or family is not wise
- If conflict of interest refer them to another lawyer & that its in there best interest that you don't act for them
- Professional identity issue
- Avoidance of personal bias, overlaps with competence
- Education of client – they need to know what you can & can't do (retainer agreement – what are ethical responsibilities & to manage expectations)
- Surety – never put money up for a client

ADR

8. What is the role of negotiation, mediation and ADR in ethical legal practice?

- Negotiation, Mediation, ADR (alternative dispute resolution): less capable of clear articulation than litigation, as these methods are newer, less developed areas of legal practice, the issues confronting ADR specialists are extremely broad. They are faced with challenge of adjusting to new, non-litigious role. As such, the 'fight or settle' decision is an issue. Litigation poses risks for client (financially & emotionally costly, extended process) but stands to make lawyer more money than successful ADR settlement is quick & produces finality.
- Most cases settle with negotiation & mediation

9. Consider the case of *Legal Services Commissioner v Mullins* [2006] QLPT 12. How did the Tribunal view the barrister's breach of duty to his opponent? If there had not been a specific conduct rule in relation to making false statements, do you think the Tribunal would have found a breach of duty of candour?

Legal Services Commissioner v Mullins [2006] QLPT 12 (23 November 2006)

- Authority for the proposition that, where the other party is relying on information previously provided by your client, but which is no longer accurate, leaving them to rely on the information at the mediation can constitute misleading and deceptive conduct as well as professional misconduct.
- In conference he explained that the non-disclosure of the cancer facts might provoke a challenge were Suncorp subsequently to discover the truth. He was instructed not to disclose the information unless legally obliged to do so. The client wished to proceed with the mediation, and to finalise his claim as soon as possible.
- [1] The Legal Services Commissioner contends that the respondent, a barrister, is guilty of professional misconduct in connection with negotiations for the compromise of a claim for compensation for personal injuries. Essentially, the complaint is that the respondent knowingly misled an insurer and its lawyers about his client's life expectancy.
Client's claim
- [31] The fraudulent deception the respondent practised on Mr Kent and Suncorp involved such a substantial departure from the standard of conduct to be expected of legal practitioners of good repute