

**COMMENTARY UPON THE PAPER BY PROFESSOR RICHARD MOORHEAD
“FRAIL LAWYERS AND THEIR FEARLESS LOGICS”**

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1. Good evening. I appreciate the opportunity to meet Professor Moorhead, and to comment on his lecture delivered this evening.
2. Can I make it plain that my comments this evening are submitted on the assumption – without any aspersion cast on any individual – that some lawyers involved in the UK Post Office – or Horizon IT – scandal, and the Robodebt scandal respectively were guilty of ethically wrongful conduct.
3. Axiomatically, such persons are entitled to a presumption of innocence until adverse adjudication in any regulatory or other proceeding in which ethical misconduct on their part may be alleged.
4. Professor Moorhead’s thesis - and I quote from his paper - is that lawyers’ “complacency, zeal and human frailties – [are] a heady cocktail pushing towards ethical error”.
5. Such thesis, therefore, must be that fresh measures – presumably statutory in character – ought be deployed to encourage all lawyers – necessarily harbouring common “human frailties” – to be less “complacent”, and also exercise diminished “zeal”, in the discharge of their professional obligations to clients who engage their services.
6. That – too – is a “heady cocktail”!!
7. Professor Moorhead points also to the need for lawyers – in giving advice to clients – to “morally influence” their client.
8. In 43 years of practice, I never knew my barristers’ fee on brief extended to assumption of such a heavy burden!

9. With such matters in mind, my overarching comments concerning Professor Moorhead's thesis are threefold.
10. First, Professor Moorhead points to the professional obloquy of some lawyers engaged in the Post Office and Robodebt scandals as evidencing flaws pregnant in the approach of all lawyers to the discharge of their statutory ethical obligations.
11. Such stance, with respect, is ipse dixit.
12. Second, he acknowledges – but then quickly dismisses as ineffective – the core tenet of lawyers' ethical code that the duty to the system of justice unequivocally trumps, without exception, the obligations owed by the lawyer to the retaining client.
13. Such stance is wholly inapt and – as far as I understand the thesis – not evidence based. Such obligation lies at the heart of ethical regulation of lawyers.
14. Third, he posits that a lawyer – in advising or acting for a client – need harbour and practice some abstract notion of morality in giving advice to the client.
15. Such stance is enigmatic, if not meaningless.
16. What are the metes and bounds of such moral touchstone?
17. In the result, while inimical conduct of the lawyers involved in the Post Office and Robodebt scandals properly draws strong criticism, there is not posited by Professor Moorhouse any alternative structure to regulate the conduct of lawyers to avoid the outcomes identified.
18. Put another way: to achieve such a paradigm, shift you need a mechanism!
19. I cannot see that mechanism in the thesis presented.
20. Thus, with respect, the thesis posited requires close scrutiny, and indeed challenge [I say that despite the risk of visceral reaction!].
21. Let me explain, further, why that is so.

22. The Post Office scandal was truly that: prosecutions and jailings based upon information yielded by flawed computer programs, and some highly questionable legal advice. Destruction of livelihoods and family units. Suicides.
23. The scandal was well discussed, in Queensland, in the March 2024 edition of the Bar Association of Queensland electronic magazine, Hearsay, in an article by Tony Morris KC titled "Lessons from the UK's Post Office Scandal". Despite being lengthy, it repays reading.
24. In Australia, the Robodebt scheme scandal – as reported on upon Commission of Inquiry – also reflects poorly upon some of the lawyers involved in government deployment, and enforcement, of the federal Robodebt policy.
25. Commissioner Holmes – the former Queensland Chief Justice Catherine Holmes AC – in her Robodebt Scheme Inquiry report, deprecated the ineffectiveness of – and I quote – "institutional checks and balances – the Commonwealth Ombudsman's Office, the Office of Legal Coordination, the Office of Australian Information Commissioner and the Administrative Appeals Tribunal – in presenting any hindrance to the scheme's continuance".
26. These scandals demonstrate, however, there is nothing new Under the Sun!
27. The classic literary exposition of a wrongful, and politically motivated, prosecution – within an inquisitorial system – is a fundamental part of Emile Zola's novel, *La Bête Humaine* translated – *The Human Beast*, or *The Beast Within*.
28. There, set just before France so foolishly declared war on Prussia, we see – in the context of two murders – the examining magistrate, Denizet, viewing the investigation and prosecution as simply a way to gain recognition and, in turn, promotion.
29. In doing so, his self-interest means that he ignores evidence that does not go to prove what he has determined to be the best answer for his career.
30. Similarly, Denizet's superior, Camy-Lamotte, destroys evidence that he fears would harm the interest of the Empire and Louis-Napoleon (the then Emperor).

31. The accused do not have the benefit of a defence at all, much less one capable of challenging and entitled to challenge the prosecution case and evidence.
32. In any particular instance, however, unethical conduct by some – not all – lawyers acting for government agencies ought not condemn the ethics of all legal practitioners nor, *a fortiori*, the system of ethics that govern us as practitioners.
33. Rather, it is a reflection of the reality of the inevitable and limitless potential for corruption in human nature.
34. Surely the best – and indeed only – defence against the odious ethical behaviour seen in such cases is an independent and disinterested private legal profession in an adversarial system – closely statutorily regulated as to their ethical obligations – as we have in England and Australia.
35. In most democratic societies there exists – in respect of the raft of professions – a system of statutory practitioner registration based on satisfaction that the registrant is a “fit and proper person”, and that they engage in ongoing compliance with the requisite prescribed standards.
36. Failure to adhere to such standards attracts penalties, including cancellation or suspension of registration.
37. Across the Australian states and territories, we have a largely uniform, and prescriptive, statutory template for regulation of lawyers.
38. The core ethical obligation is enforced by identification of “professional misconduct” which principally comprises – and I quote – “conduct ... whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice”.
39. The lesser identified conduct is that of “unsatisfactory professional conduct” which includes – and I quote – “conduct ... happening in connection with the practice of the law that falls short of a standard of competence and diligence

that a member of the public is entitled to expect of a reasonably competent ... legal practitioner”.

40. Such concepts have a well traversed jurisprudential content.
41. in turn, each of the solicitors' and barristers' branches of the profession are regulated being by statutory ethical rules which are prescriptive in relation to obligations, and which are founded primarily on the paramount obligation being to the system of justice (including the court), but also accompanied by obligations to the client and the opponent.
42. From the statutory Barristers' Rule Queensland 2011 – again, largely uniform across the Australian states and territories, but also internationally – can I mention four rules pertinent to my commentary upon Professor Moorhead's thesis, because they are central to a barrister's ethical obligation content (likewise for a solicitor).
43. Rule 25 provides:

A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.
44. Rule 41 provides:

A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and instructing solicitor's wishes where practicable.
45. Rule 59 provides, in part:

A barrister must take care to ensure that the barrister's advice to invoke the powers of the court ... is reasonably justified by the material then available to the barrister; [and] is appropriate to the robust advancement of the client's case on its merits.
46. Rule 82 provides:

A prosecutor must fairly assist the court to arrive at the truth, must seek impartiality 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.

47. Could there seriously be any doubt as to the content of such ethical rules?
48. Unethical conduct is routinely prosecuted in Queensland by the Legal Services Commissioner. Likewise interstate.
49. Judgments apropos of such prosecutions are published and widely circulated.
50. Every day on my computer inbox there pops up the latest decision decided somewhere in Australia in that regard.
51. Thus, the Sword of Damocles of such prosecution hangs – visibly – over the head of every lawyer.
52. Is it to be seriously suggested that all of this established statute law – and the jurisprudence emanating therefrom – ought be tossed aside or caveated by novel statutory prescriptions which are designed to introduce notions of uncharted morality – and to temper lawyers' complacency or zeal – in advising or acting for a client?
53. Tell that to the accused client of a lawyer, where the client – natural person or corporation – faces a term of imprisonment or substantial financial impost.
54. The client is not guilty until proven so by the State, which bears the persuasive onus.
55. Likewise, where the State seeks to prove a tax liability in a citizen based – perhaps – on a flawed statute or inadequate factual proof.
56. Colleagues, we live in a democracy, not Putin's Russia!
57. To adopt Professor Moorhead's approach to proper lawyer conduct, in my view, would involve utilising the scandals identified – where the system has failed to

quell inimical professional conduct of a minority of lawyers – to, as it were, “throw the baby out with the bath water”.

58. What the Post Office and Robodebt scandals demonstrate, in truth, is the pervasive reluctance of democratic government – including its ever-multiplying quango emanations – to confront public scrutiny and explanation of its actions.
59. Again, that is not new Under the Sun!
60. James Madison, writing in *The Federalist Papers* in 1788, famously observed that (and I quote):

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but ***experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.***

61. The same reasoning applies by clear analogy to answering the question before us this evening: how do you best prevent legal practitioners acting unethically?
62. You do so by ensuring that those against whom unethical behaviour is perpetrated can defend themselves by exposing that behaviour using the skills of independent lawyers, not by asserting that our extant system of legal ethics is not fit for the purpose of ensuring proper behaviour by legal practitioners, only by dint of the misbehaviour of some?
63. It is inevitable that some lawyers – like some doctors, engineers, or other professionals – may act in an ethically improper way.

64. The answer, and solution, to such potential misbehaviour is not even more regulation – over and above the extant proven structure of ethical prescription – but rather rigorous adherence thereto and enforcement thereof.
65. Nor does such misbehaviour demonstrate a fundamental problem with legal practitioner ethics, but rather only the inexorable sins of a few.
66. Thank you for the opportunity to comment.