What drives ethical error?

Frail lawyers and their fearless logics:

Richard Moorhead, Professor of Law and Professional Ethics

Thank you very much. It is wonderful to be in Brisbane, one of the homes of a very rich tradition of legal ethics research in Australian Universities.

I'd like to begin by acknowledging the Traditional Owners of the land on which we meet today, the Turrbal and Yuggera peoples and pay my respects to Elders past and present.

I also offer my thanks to the University of Queensland and the Chair and discussant, Graham Gibson KC and Richard Douglas KC.

As a stranger to you all, and a Pom, I should introduce myself, or rather the background to what I am saying.

I am a former solicitor, but I have spent most of my career researching lawyers and access to justice. Over the last 15 years or so, I have focused on researching lawyers' ethics.

The last five years have been concentrated on the Post Office scandal.

A sprawling miscarriage of justice. It began as story about a faulty accounting system that created phantom debts. Thousands of lives have been ruined by the Post Office demanding phantom debts from its postmasters, terminating their contracts, ruining them financially, suing them, and, for about a thousand, prosecuting them.

There were hundreds of prison sentences, and thousands of lives have been ruined. Astonishing levels of associated mental health problems remain. There have been upwards of 11 suicides.

I say it began as a computer scandal, because it has become a scandal in which lawyers play a central role, not just as adjuncts, but – it seems – as architects of a cover-up.

Like your Robodebt scandal, it has prompted much soul-searching in the professions. It has also prompted attempts to minimise the problem: it is sometimes said it's one case, when in fact it's thousands. Or that it was one or two isolated lawyers when: it involves many different lawyers across a wide time-span and different kinds of case. Lawyers working in-house, and in several law firmsand chambers, including GCs and several leading KCs.

It has even involved one former Supreme Court President.

The regulators are poised to investigate and discipline, I would estimate, upwards of a dozen lawyers. I know of three that the police are believed to be investigating, and I expect that number to grow.

For many years, I have worked with policymakers and practitioners.

With Stephen Vaughan, now Dean of Monash law school, we wrote a report for one of our regulators, looking at how excessive lawyering could sometimes pose a threat to the rule of law. That work, the Post Office scandal, and widespread concerns about the abuse of nondisclosure agreements, lawyers aiding grand corruption, and the abuse of defamation and data protection law in so-called SLAPP suits is driving increased scrutiny and change.

I have also written on a range of other scandals involving lawyers and: the press, professional regulators, banks (many times), lawyers helping out politicians, and assorted examples of greed driving egregious conduct.

For those of you baffled that I have left out tax lawyers, my favourite piece of research, albeit I say this somewhat tongue in cheek because the research is very experimental, suggests that tax lawyers have the moral reasoning skills of any other mature adult in normal life, but when solving tax problems, their moral reasoning skill regresses to that of a teenager.

Dan Neidle, pictured here, hates me saying that, he's a former tax partner at Clifford Chance, but is a reminder of the good that lawyers do: he now fights cant and dishonesty in tax advice. He even managed to bring down a former Chancellor and his lawyer for attempts to silence him improperly about tax reporting.

Lawyers are on the back foot, worried about political overreach, but also – at least those that talk to me – are worried that professional values have been, if not lost, diminished. That money trumps independence. [CLICKS] The Trump example may just be one very public one..

What drives ethical error? The reaction

Before I get into that, I want to acknowledge that when anyone stands up and accuses you, or even just your profession, of being unethical, you will feel a bit like this.

Under the microscope.

I know when I am challenged by strangers, on ethics, I feel a surge of electricity, a very visceral reaction, pass through my body. It is adrenaline, the fight or flight response.

There is not much we can do about it, but I wanted to acknowledge that and urge you to try to put either fighting or flighting out of your mind at least until questions.

I also want to emphasise the idea of error over evil.

Much of professional misconduct, which is what I mean when I talk about ethics generally, and certainly tonight, is based not on malevolent people, but on poor decisions in difficult situations. Sometimes those poor decisions are intentional, sometimes reckless, sometimes negligent, sometimes simply the kind of everyday error that people can slip into.

Thinking in terms of ethical error comforts us a little, but also warns us we are all prone to ethical error, and more prone than we likely think we are. Later, I will show you an example. If you are not feeling uncomfortable enough, we can watch a man's career implode in a few minutes.

In my time this evening, I am going to concentrate on two interrelated sets of explanations as to why lawyers fall into ethical error.

One of those is centred on individual lawyers. I talk suggests one reason lawyers fail is a combination of complacency, psychological vulnerabilities, and a frail professional self-concept marked by what I will call here for ease *unbalanced* zeal.

The second reason focuses on the context within which lawyers work and how professional frailties and organisational cultures can combine to disastrous effect. I will briefly explain how "awful orthodoxies" are created out of frail professionalism and mutual irresponsibility.

Let me move then to argue that (some) lawyers are too complacent.

What do I mean?

Complacency

First is what psychologists call the self-concept.

There is research that shows thinking of yourself as a professional makes you more inclined to lie and cheat.

Yes, the concept which is supposed to raise our standards may diminish them.

Maryam Kouchaki has done research on this. She primed students and real workers/professionals to think of themselves as a professional. She then gave them tasks, for monetary reward, that incentivise lying and cheating.

In one experiment, the sweetie jar experiment, one for questions, the "professionals" lied 41% of the time the employees about 6% of the time. The professional's lies, just to make us feel better, were much bigger.

Backing up Kouchaki, Sunitah Shah has shown managers who think they are more professional are, in fact, more, not less, prone to conflicts of interest.

There is an antidote to the problem, at least a partial one. Having a well-developed, actualised concept of professionalism mitigates the problem.

Here, a second complacency rears its ugly head. Knowledge of one's own rules. In research I did on barristers within three years call, about half either did not know or could not always adequately apply professional rules to realistic entry – level scenarios.

The SRA in a recent review of professional obligations found solicitors' who said their knowledge was very good tended to have inadequate knowledge. Moreover, 20% of COLPs (senior compliance and ethics officers in the firm's) did not understand their obligations to report serious misconduct.

In workshops I have run for hundreds of, often experienced, lawyers, I would describe their own grasp of professional rules and principles, without being too censorious, as…. Mixed.

Watch a lawyer being examined on their work, as we will in a moment or two, and you will quite often see them get key professional basics wrong.

A related phenomena is what I call the professional imaginarium.

What I mean by that is this: when lawyers describe how they work, generally or in particular cases, it is sometimes described in idealised terms. During the Post Office inquiry, lawyers giving evidence often said "what I would have done was…" And then described their practices in textbook terms.

They had, after all, had time to prepare. Unfortunately, the documentation available to the Inquiry, and, interestingly, the lawyers themselves, painted a rather different picture.

Not uncommonly, the lawyers were forced to explain documents at odds with competence or propriety and conceding, "things could have been better in hindsight" and so on.

Warwick Tatford, a barrister at the private bar, claimed he'd handled the central expert witness in the Post Office scandal properly. In fact he and others had engaged in arguably improper manipulation of the witnesses statement, alongside disclosure failures and other problems.

Faced with this, at one point Mr Tatford admits his work was 'nowhere near' and advice given 'risible' and 'disastrous'.[1] It leads to one of more meaningful apologies given to the Inquiry:

> I've actually found – I've actually found the exercise… [preparing his evidence] clarified my mind as to what happened and, when I said I felt ashamed, I do. I actually feel worse because it's become quite clear in the way that the evidence is properly been put before me that there are many failings that I had ignored on my part and I perhaps created a rosier version in my memory that wasn't really there.
>
> I apologise unreservedly for what happened. …
>
> …I have changed my view. It's taken me a long time. I suspect I was in denial for a long time, perhaps in a self-justificatory way….

There are other psychological processes probably at work here. As well as the frailty of memory, we naturally think of ourselves and analyse our own behaviour in terms favourable to ourselves.

The likelihood is that Tatford rationalised his own behaviour at the time, and certainly only remembered his behaviour in favourable terms.

It is against that background that I offer one further statistic which, in a fuzzy way, helps us understand the extent of professional ethics problems. In its thematic review of in-house lawyers, the SRA surveyed in-house counsel and 10% said their regulatory objectives had been compromised trying to meet organisational priorities. That's an estimated 3,500 in-house

---

[1] Transcript - Warwick Tatford, 15 November 2023, https://www.postofficehorizoninquiry.org.uk/hearings/phase-4-15-november-2023.

lawyers who realise, and are willing to admit, that they have breached their rules.

I leave it to you to decide if that's an underestimate and whether that figure is worrying or not.

Frail professionalism

So shallow professionalism is dangerous and complacency doubly so.

I suspect both may contribute to my next point.

The professional ideology around professionalism may be faulty.

I speak in particular of what us academics like to refer to as the standard conception of legal ethics. The idea is that a lawyer may, or must, do absolutely anything for the clients unless it is clearly prohibited by law or rules of professional conduct. And they are not morally responsible for the client's actions. Fearless advocacy is venerated.

There are a number of ideas associated with this; sister concepts or scripts, that guide professional thinking when justifying aggressive legal tactics. David Luban calls these adversary system excuses because they are often tied up with the ethics of the court room.

I would include in this list things like:

- Lawyers do law not morality.
- Lawyers merely advise the client decides.
- It is not for lawyers to judge their clients
- And, "client first was bred into me".

Putting to one side whether trial ethics might be different from the ethics in the boardroom or a firm's offices, I would say these sister concepts are not generally 'wrong' but they represent simplifications that can lead lawyers astray. They can become comfort blankets for bad actors.

The idea that the client always comes first is a very popular notion. It helps pay the bills after all; but it is not what the rules specify.

At least in England and Wales, the client's interests are vital but they do not take precedence over the rule of law, the public interest in the administration of justice, and so forth. Almost everywhere, I believe, the client interests do not override obligations to the court. In England and Wales lawyers must not mislead the court or third parties knowingly or recklessly. They also must not be complicit in misleading the court or third parties.

And Lawyers of course often do merely advise with the client deciding. But how, why and what they advise can be important. In the Post Office, for instance, a very senior KC advised the Board that they had a "duty" to do something which they did not have a duty to do.

The impression given was that he was brought in to tell the client to do something that the client didn't want to do rather than to advise them.

Who, in that circumstance, is deciding might be a subject for debate.

Indeed, that is part of the point: the situation can lead to what I call *mutual irresponsibility*.

The lawyer says I merely advised, the client says they had to do what the lawyer told them to do. Legal professional privilege

typically protects this from any scrutiny. The pretense is one of the awful orthodoxies at work in this case. Advice can lead rather than follow, be slanted rather than independent, provide a cover or 'insurance' for clients or an investigation which sanitises or conceals problems.

As a footnote, a Court of Appeal judge criticised the application made as a result of this advice, by the same barrister, as egregious and in some respects misleading.

Lawyers do principally advise on law rather than morality, and I am not one who argues in general that morality should trump legality, but I do think excluding moral influence is unwise.

There is an interesting hypocrisy in saying I do law not morality, when one is very keen to say too that one does law and commerciality. I have zero problem with commerciality if a lawyer advises independently and objectively, but there is an odd inconsistency in accepting that lawyers should be influenced by commerciality but not morality.

The idea that morality is subjective is also a bit of a red herring. Many lawyers do advise on morality because of reputational problems for the client for example. And of course morality can be important to legal tests (such as dishonesty or reasonableness); or progress in negotiations; or when persuading judges of the merits of a case.

One should also view moral clarity as an important trigger for deeper thought. Indeed, I would say that moral clarity can be important, particularly in situations of legal uncertainty.

US General Counsel Jordan Breslow famously kept his CEO out of jail. He felt uncomfortable about advice from outside counsel that a dubious employee share option scheme was probably lawful. All their competitors were using similar share

option schemes. Breslow's Company was at a significant disadvantage in recruitment.

Nonetheless, Breslow told his CEO that the approach could not be right. He didn't have a rule to point to; the client might have banged his fist on the table and asked where does the law say I cannot do that? But the CEO took his advice, and saw his own CFO go to jail for the same schemes because they had used them in their previous firm.

Unlike Mr Breslow, I would argue that lawyers overly influenced by notions of zeal, and the half-truths of the sister concepts that often accompany it, does not engage in a *balanced* application of lawyers' *actual* ethical obligations. Often, too, this involves a slanted interpretation of the facts. Whilst the law requires lawyers to take particular care not to mislead, zeal can push lawyers in the opposite direction. Let me illustrate this with…

The story of Alistair Brett

Alistair Brett was an experienced solicitor working in-house for the Times newspaper. He helped a Times journalist, Patrick Foster, run a story on Detective Constable Richard Horton.

Horton wrote an acclaimed blog under a pseudonym, Nightjack. Of great public interest, and without leaking details of cases, it shone a light on how the service was run. Some at the Times thought Nightjack deserved to be exposed for breaching confidentiality and embarassing his employers.

The journalist, Foster, got his story by hacking Horton's email account.

This was a criminal offence. His editor brought Foster to Brett for advice. Alistair Brett helped Foster get his story out but did so in a way that led to him recklessly misleading the court.

The first thing to understand is this Brett regarded Foster's confession of criminal hacking as confidential and privileged. That meant he could keep it secret.

Secrecy assumed, they created a different story so Foster could get his scoop.

Foster is told if you can identify Horton 'legitimately' from public sources, and then give him a chance to deny it, we can run the story.

Brett was cross-examined on all this during the Leveson Inquiry.

Lord Justice Leveson suggested that "legitimate identification" was a phoney process. "The map to the maze [is], he said, "already laid out". How can you claim to have identified Horton legitimately if you already know who he is?

The legitimacy, as presented, is an illusion. Interestingly, it is the start of a slippery slope. More explicit problems manifest as the slope gets slippier.

The strategy runs into difficulty when Foster challenges Horton. Rather than cave in, as Brett expected, Horton goes to Olswangs solicitors and seeks an injunction.

The Times have to fight or fold. They choose to fight.

Olswangs say Foster has a history of hacking emails accounts. He was punished for it at University. And now, Brett knows, Foster has done it again. Brett says this by return…

> "As regards the suggestion that Mr Foster might have accessed your client's email address because he has a history of making unauthorised access into email accounts, I regard this as a baseless allegation with

> the sole purpose of prejudicing TNL's defence of this action."

Brett found sufficient excuse, in his own mind, if he thought about it clearly at all, to *say* this. Perhaps he thought doing it twice does not constitute *a history?* Or *Baseless* means Olswangs do not have the evidence for it, rather than it not being true. Quibbling about history aside, it was true.

Clever? Arguable? *Balderdash?*

There is worse to come.

When the case is presented to the court, Foster's statement, which Brett helps draft, explains searches were conducted. Not only were they conducted legitimately, indeed they were said to have *begun* that way.

He ignored the privileged information but also asserted something that was not true. Foster had *not* begun that way.

In this first clip we see Leveson challenge Brett's independence, asking if he is not too close to the situation. Here we see Brett in the thickets of his own subjective strategy, mired in his legal reasoning, parsing the truth into the one bit of the story he wants to tell:

> Mr Alastair Brett: My Lord, all I can do is, rightly or wrongly, I had believed that you could separate the earlier misconduct by Mr Patrick Foster and you could then say, once he had done this legitimately, that could be presented to the court perfectly properly as he had done it legally.
>
> Now, I accept that you say that the two inextricably intertwined, but that, if I may say so, is a subjective judgment.

> I happen to take the view that you could separate out the one from the other.

Leveson make one very short and powerful point.

> Lord Justice Leveson: Let's just cease to be subjective, shall we.
>
> Let's look at Mr Foster's statement….

There is a moment of terror, silence and panic. And it is only at that moment, I think, that Mr Brett realises what is about to happen.

> Lord Justice Leveson: …To put the context of the statement in, he's talking about the blog and he says that he decided that one or two things had to be true and that it was in the public interest to reveal it, so there he is wanting to find out who is responsible for NightJack.
>
> Then he talks about paragraph 9, which Mr Jay has asked you about, and then he goes on, "Only 24 hours to crack the case", which is a citation from the blog.
>
> Would you agree that the inference from this statement is that this is how he went about doing it?
>
> Mr Alastair Brett: Yes, it certainly does suggest --
>
> Lord Justice Leveson: And then he starts at paragraph 12:
>
> "I *began* to systematically run the details of the articles in the series through Factiva, a database of newspaper articles collated from around the country.
>
> I could not find any real life examples of the events featured in part 1 of the series."

That suggests that's where he's started and that's how he's gone about it, doesn't it?

Mr Alastair Brett: It certainly suggests he has done precisely that, yes.

Lord Justice Leveson: And that's how he's gone about it?

Mr Alastair Brett: Yes.

Lord Justice Leveson: That's not accurate, is it?

[Pause].

Mr Alastair Brett: It is not entirely accurate, no.

Lord Justice Leveson: Paragraph 15.

I'm sorry, Mr Jay, I've started now.

Paragraph 15:

"Because of the startling similarities between the blog post and the case detailed in the newspaper report, I began to work under the assumption" -- I began to work under the assumption -- "that if the author was, as claimed, a detective, they probably worked ..." et cetera.

Same question: that simply isn't accurate, is it?

Mr Alastair Brett: My Lord, we're being *fantastically* precise.

Lord Justice Leveson: Oh, I am being precise because this is a statement being submitted to a court, Mr Brett.

Mr Alastair Brett: Yes.

> Lord Justice Leveson: Would you not want me to be precise?
>
> Mr Alastair Brett: No, of course I'd want you to be precise.
>
> It's not the full story.
>
> Lord Justice Leveson: Paragraph 20. I repeat, I'm not enjoying this:
>
> "At this stage I felt sure that the blog was written by a real police officer."
>
> That is utterly misleading, isn't it?
>
> Mr Alastair Brett: It certainly doesn't give the full story.
>
> Lord Justice Leveson: Well, there are two or three other examples, but I've had enough.

Brett's final throw of the dice is to suggest Leveson's fantastic precision is unfairly skewering him. It is both desparate and, I think, hypocritical.

What lessons do I suggest this illustrates….?

Zeal, a sharp strategy poses explicit dangers to honesty and integrity. Here we see the strategy executed in a misleading.

As the High Court said subsequentlyCLICK], the evidence pointed *invevitably* to the conclusion he had allowed the court to be misled.

But there may also be more at work here.

Psychological and organisational frailities

Various psychological frailties magnify zeal. I cannot discuss all the possibilities but they include.

- Evidence that lawyers are subconsciously overly optimistic about their clients' prospects of success. Team loyalty bias renders our judgements weaker.

- Moral intensification – thinking our client a victim or our opponent a cheat - makes us less ethical.

- Pragmatism makes us more impulsive and less principled.

- We descend down slippery slopes: Strategies, reasonable when unchallenged or 'in our heads', like Alistair Brett's case strategy, become misleading in execution.

- As agents (of clinets) we will do unethical acts for others we would not do for ourselves (we can blame them, or we are morally justified because they need help).

- Competitiveness, adversarialism, 'thinking like a lawyer', and being too busy can dull our sensitivity to moral problems.

So, complacency, zeal, and human frailties: a heady cocktail pushing towards ethical error.

Those human frailties are, of course, mirrored and magnified, in organisations. Time is short, so let me sketch a few of the problems, quickly.

Decisions can pass through many hands. Organisations are systems of competing interests and people. Identifying the

organisation's true best interests or taking instructions from the 'real' client can be a challenge.

Organisations also typically want simple, positive answers. Can I invade Iraq? Can we draft our way around financial assistance? We investigated sexual misconduct properly, didn't we? They prefer optimism and confidence.

They tend to reward risk takers and forget their mistakes more readily. Naysayers successes tend to go unnoticed if they are kept on long enough. They like team players.

The way knowledge is organised and managed is messy, it is riddled with (sometimes sectional) self-interest, and it is capable of being manipulated and managed – particularly in preparation for litigation and investigations.

These preferences are often human rather than sinister but can lock into what Palazzo and Hoofrage call a dark pattern.

How zealous lawyers contribute to such patterns is interesting. I have suggested that lawyer's develop awfiul orthodoxies – legitimate tactics deployed in illegitimate ways or ciurcumstances. Document management policies that are designed to suppress material evidence including through the abuse of legal privilege. A do not tell me the true facts approach to investigation and litigation. And the deployment of slanted advice and fact interpretation to create legality illusions. Untorths magiced up with the help of lawyers. Post offices then CEO, Paula Venables, told a government minister that there was no evidence to suggest convictions were unsafe. Some say she was lying, she says she was just relying on legal advice and her PR team and lawyers to draft the statement. Mutual responsibility again. It was untrue.

In the litany of failures that make up the Post Office Scandal, and led to human carnage, I could take you to many instances

when the lawyer's initial, 'independenct' view of the case was raised tentatively with the client, and then dropped in favour of an approach that did not raise too many questions.

Culture (zeal and corporate behaviour) ate independence for lunch.

It led to Unfair contracts, aggressive enforcement of phantom debts, and making examples of litigants through the courts. Prosecutions lacked key evidence. Outrageous plea bargaining with. Terrified postmasters. There was regular and improper influencing of experts. Disclosure failures were endemic: they ranged from the unreasonable to indefensible suppression. Legal professional privilege was abused.

There were flawed and conflicted "independent" reviews. Reports to the board were sanitised, with serious, material matters missing. An attritional mediation scheme designed to exhaust and silence its opponents was followed by scorched earth litigation; its misleading arguments and evidence contributed to the judge saying the case had been run on a flat earth basis.

NDAs, libel, and improper guilty pleas used were used to silence people.

Some of the lawyers will be struck off. Some may go to jail. The tactics used are like Mr Brett's: over-cleverness and a surfeit of aggression, mixed with a dash of incompetence, and overconfidence, dressed up as business as usual.

The possibility is that in many ways for the lawyers, law firms and barristers involved it was business as usual. It's an ethical problem that has its roots in culture. Let me end by evidencing the cultural case circumstantially.

Law is bought and sold. It is a business, and an interesting question is what is being bought and sold by these businesses. Let me leave you with two clues. Two quotes used on the websites of two the leading barristers involved in the Scandal.

One services were marketed until recently as a steamroller that crushes anything getting in his way. And another leading KC was, again until recently, being sold as someone who can turn "a pile of refuse into something that looks great".

Steamrollers or a Midas with the brown stuff is, it seems, what sells or is sold. The question for the professions, for regulators, the Inquiry, and perhaps even the courts, is how orthodox is this orthodoxy. How honest is it, how lacking in integrity, and what if anything should be done about it?