

LAWS 334 Test 1 Revision

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What is Ethics?

Ethics is the philosophical study of morality.

Conceptions of morality differ depending on the culture. Tikanga Māori is its own unique ethical framework, relying on “accessing repositories of cultural knowledge and experience that can be used to inform ethical deliberations.”

Deigh

- Ethics is a study of what are good and bad ends to pursue in life, and what is right and wrong to do in the conduct of life
- “[T]he word is commonly used as a synonym for morality, and sometimes it is used to more narrowly to mean the moral code or system of a particular tradition, group, or individual... professional ethics [is an example.]”

Fieser

The field of ethics (or moral philosophy) involves systematizing, defending, and recommending concepts of right and wrong behaviour

Legal Ethics

- Principles of conduct members of the legal profession are expected to observe in their practice (Glendon)
- Principles of legal ethics, whether written or unwritten, not only regulate the conduct of legal practice but also reflect the basic assumptions, premises, and methods of the legal system within which the lawyer operates. They reflect the profession’s conception of its own role as well in the administration of justice (Glendon)
 - Lawyers have to comply with ethical standards so the system can continue to be considered legitimate. The compliance is for a larger purpose.
 - The operation and meaning of justice may vary. This requires reflection on our assumptions.

Legal ethics have now been set out in the Conduct and Client Care Rules as part of the Lawyers and Conveyancers Act 2008.

Renshaw and Edwards scandal

- In the early 90s, two partners were discovered to have been misusing trust funds.
 - At trust account is like the law firm’s bank account, but the client’s money is held on trust.
- As a response a fidelity fund was put in place that all lawyers have to pay into for these sorts of issues. But there was not enough money, so all lawyers had to pay an extra \$10,000.
- Legal ethics also became compulsory.

Allan Beever – The Teaching of Legal Ethics in New Zealand

- Beever discusses the CLE’s requirement to study the traditional moral theories of ethics.

- “The fundamental problem is that most traditional ethical theory is of, at best, distant relevance to legal ethics.”
- Beever argues that all you need to do is follow the code of conduct rules and you will be fine.

Christine Mary Venter

- Not enough to teach the 'law of lawyering', i.e., not just professional responsibility but also personal responsibility because professionalism is not a neutral moral value.
- Debating morality in the practice of law is necessary if legal education is to produce competent, caring and thoughtful professionals.
- You need a broader sense of morality and skills from across your life when being a lawyer, not just the rules set out in black and white.

Scragg on whether you can always bring in your own personal morality when working as a lawyer:

- Partisanship: the lawyer's sole allegiance is to the client but within the limits of the law
- Neutrality: lawyer must remain professionally neutral in respect of the client's objectives or moralities. They are not there to judge, but to help with the problems.
- Non-accountability: the lawyer's moral character is not to be identified by the client, object or purpose the lawyer represents.

Theories of Moral Philosophy

Consequentialist Theories

Consequentialist theories require a determination of the morality of an action or rule by reference to its consequences. It is a cost/benefit weighing process, where the goal is to determine which action will lead to the greatest good, or help the most number of people (even if some suffer).

R v Dudley & Stephens

- Shipwreck case, where 3 men lost at sea kill and eat another man.
- The 3 were charged with murder.
- Utilitarian perspective: it was better that 3 people survived than no one surviving. It is a question of weighing up what action best serves the greater good, even if it is illegal.
- Alternative perspective: murder is too grave and serious a crime to justify on a utilitarian ground.
- Self defence?
- Perhaps it is best not to justify it but understand it. It is definitely a valid excuse.

The NATO bombing of Serbia in 1999 is another example. The NATO campaign was launched without UN approval, and the strike killed approximately 500 civilians. But it did protect the Ethnic Albanians in Kosovo. Some thought this was illegal because it had no UN approval. Others believe it was legal because it saved lives. Others said it was illegal, but permitted and legitimate in the circumstances. These cost/benefit analyses occur a lot in military conflicts – what actions save the most lives? **But how do we determine whose life should be sacrificed? How do we even know if greater good will be achieved.**

Utilitarianism

- Introduced by Jeremy Bentham, who argued that an action should be approved if it provides/enables the most happiness.
- John Stuart Mill later developed on this idea.
- The Ends justify the means.
- “Utilitarianism holds that the most ethical choice is the one that will produce the greatest good for the greatest number.”
- “Utilitarianism judges consequences by a ‘greatest good for the greatest number’ standard.”

Criticisms

- Not much respect for a person’s individual dignity
- There are plenty of things that we do that are not for our pleasure.
- How can someone have a complete knowledge of the consequences of one’s actions?
 - It is difficult to know whether an act was good or bad until we know the final outcome.
- What is the unit of measurement? What is included in the weighing process?
 - Lives
 - Happiness
 - Pleasure/pain (Bentham)
 - Utility/usefulness/worth outcomes (JS Mill)
 - Fulfilment? Human flourishing
 - Money
 - Any metric can be coherent when you think about it.
- What about same consequences done with different motives
 - Under utilitarianism, motivation does not matter. The ends justify the means.
 - So sometimes the better consequences may have been inspired by repugnant motivations.

Classic example: organ donation

- The majority rules may lead to unjust results.
- In the organ donation example, sacrificing one person to take their organs to give four other people those organs would be a utilitarian outcome.
- But in our society, we respect the inherent dignity of the individual.
- There is also an issue stemming from the idea of the tyranny of the majority. Minorities are often victimised by the majority.

It could be said that utilitarianism is too black and white—but it is frequent in human thinking. It is the approach taken in Government funding for example.

Sub-theories of utilitarianism

- Act utilitarianism: individual acts are assessed on a case-by-case basis. One act is looked at and then the direct consequences of that act.
- Rule utilitarianism: The results of act repeated through time are assessed. One steps back to form a general policy/rule that would lead to the most utility overall/globally; broader policy level. From here, a general rule is established which can be applied forever and universally that would lead to the most utility.

- Decision utilitarianism: Judicial decisions considering public policy outcomes. Judges have to keep in mind the overall policy outcomes of a decision, rather than just the direct consequences for parties in a case.

It could be argued that at the heart of deontology and virtue ethics is utilitarianism. Ties in to Phronesis, the concept of using your brain to determine what to do in certain situations, rather than using a formula.

Deontological/Non-consequentialist/Rights and Duty-based Theories

With this approach, there are some absolute rules/principles/rights that temper the ethical analysis.

The most famous is Kant's categorical imperative. Kant believed people must always be treated as ends and not as a means to an end. This meant respecting individual dignity and not taking advantage of people. **The means justify the ends.**

The criticism of the categorical imperative is that we do not consider the consequences of our actions and only follow rigid rules, there could be horrific consequences. I.e., there are many instances where it may be good to lie.

The prohibition on torture in NZ suggests there is a deontological approach in NZ law. NZBORA and other rights are also deontological, although not all are absolute.

Virtue Ethics

In virtue ethics, the question is what a good, charitable, benevolent person would do in a situation.

Alice Woolley – Tending the Bar: The 'Good Character' Requirements for Law Society Admission

- Woolley discusses virtue ethics/good character and admission to the Bar.
- Argues that whilst circumstances are relevant, that does not mean that character is not.
- Virtue ethics looks at both character and circumstances to predict future behaviour.
- This means that there is a place for good character assessments, but how do they properly is difficult.
- "Virtue ethics posits that a person of good character will have virtues that orient him towards conduct consistent with the maintenance of those virtues. This is not the significance or purpose of the virtues (which is rather their contribution to human flourishing), but is an observable effect that virtues have. A person with the virtue of honesty, for example, will tend to choose conduct consistent with honesty over conduct which is not."
- Woolley suggests that virtues get baked into your personality. For example, the more honest a person you are the more honestly you will act. Woolley also suggests that displaying virtues will lead to humans flourishing.
- "Virtue ethics eschews the notion of specific rules as the source of ethical guidance – the Kantian position that, for example, because honesty is required by the categorical imperative there are no circumstances in which a lie is justified – and argues instead that it is our virtues of character which, when exercised through our practical judgment, will lead us to ethical action."

Daniel Bibb

Woolley gives the example of former NYC Assistant District Attorney Daniel Bibb. He was convinced some men he was prosecuting was factually innocent but was not allowed to drop the case. Bibb decided to help the defence making sure they had everything they needed and helped to prep the defence witnesses. The men were acquitted. Bibb was investigated for disciplinary purposes but found not guilty.

- Duty of Care?
 - His client was the State of New York so seems a bit different.
 - But he does have a duty to the people of New York.
- Alternative argument
 - The system is in place for a reason.
 - Arrogant to assume you should make the decision.

Woolley: 3 views on relationships between personal morality and formal legal ethics

1. Role morality

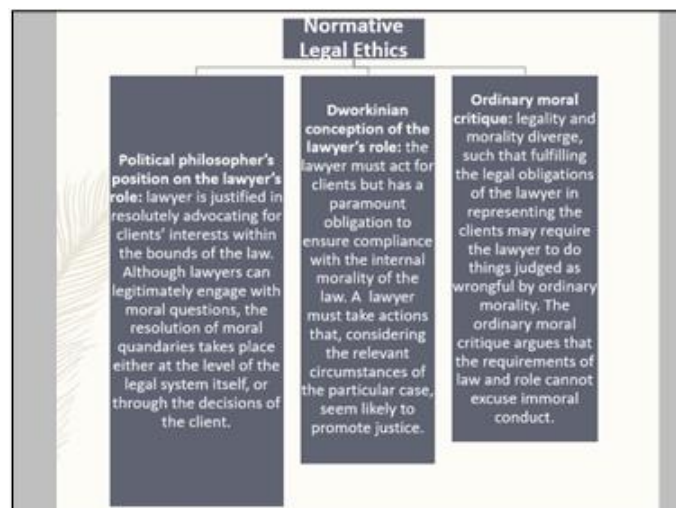
- "Standard conception of lawyer's role" is that it is ethical for lawyer "to resolutely advocat[e] for clients interests within the bounds of the law because of role in larger, just legal system."
 - Being a lawyer is a job where there are rules to follow.

2. Internal Morality of Law

- Dworkinistic
- Duty to client
- But "paramount to ensure compliance with internal morality of law"
- Always working in a way that will ensure morality, justice and the rule of law from within the legal system itself.
- The system would become unworkable if everyone brings in their own morality.
- Questionable assertion that if you think the system is so bad, why are you working in it in the first place?

3. Ordinary morality

- Morality and legality sometimes diverge.
- Sometimes legal obligations of lawyer are wrongful by ordinary morality.
- Requirements of law cannot morally excuse immoral conduct.
- I.e., morally judge lawyers by same rules as anyone else.



'Internalised' point of view (Woolley)

- Figure out the normative perspective that accords with own moral intuitions = your “ethical identity.”
- Will help with your moral decision-making and help you "buy in" to the ethical rules.
- Linking plurality of intuitive processes with strong and defensible normative frameworks translates norms/ideas of ethical theory into practice.

Other virtue ethics readings

- Menkell-Meadow - "Private Lives and Professional Responsibilities"
 - Probably want to keep our morality quiet.
 - To what extent should we be forced to have it as part of our role our outwards part of our character.
- Baron and Corbin - "Ethics Begins at Home"
 - Australian NARS report
 - Ethical climate of a workplace
 - Bad barrels rather than bad apples?
- Duncan Webb - Judicial Conduct in a very Small Place...
 - Two Judges expense claims: Beattie & Hesketh
 - NZ as a small and therefore unique place?
 - Thinking about people's character rather than their actions per se is something real we do?

Virtues

Virtues are exercised through practical judgment, in real circumstances with varying contexts.

What does it take to be a virtuous person?

1. Person of good character (having virtues that orient you to good conduct)
 - Aristotle: can develop these virtues through practice over time.
2. Phronesis/"practical judgement"/"practical wisdom" - perceptual sensitivity to what a situation requires (common sense element?)
 - Sometimes it is good to lie etc. (i.e. Do I look ugly?)

Virtue and Vice

- **Virtue:** socially approved character trait/habit/disposition/tendency to act/feel certain way

- E.g. honesty, courage
 - But these qualities become bad qualities when displayed in excess
- **Vice:** socially disapproved character traits
 - E.g. dishonesty, cowardice
- Not a focus on a single action, but rather looking at a long-term trait or traits



**ARISTOTLE'S ETHICS
TABLE OF VIRTUES AND VICES**

DEFICIENCY	MEAN	EXCESS
Cowardice	Courage	Rashness
Insensibility	Temperance	Licentiousness/Self-indulgence
Illiberality/Meanness	Liberality	Prodigality
Pettiness/Stinginess	Magnificence	Vulgarity/Tastelessness
Pusillanimity	Magnanimity	Vanity
Unambitiousness/undue humility	Proper ambition/pride	Ambition/empty vanity
Lack of spirit/unirascibility	Patience/Good temper	Irascibility
Understatement/mock modesty	Truthfulness	Boastfulness
Boorishness	Wittiness	Buffoonery
Cantankerousness	Friendliness	Obsequiousness
Shamelessness	Modesty	Shyness
Malicious enjoyment/Spitefulness	Righteous indignation	Envy

Aristotle (1955). *The Ethics of Aristotle: The Nichomachean Ethics*. (rev. ed.) (J. K. Thomson, trans.). New York: Viking. p. 104.

Requirements for the law profession in New Zealand

Lawyers and Conveyancers Act 2006

- Section 49: admission to the bar requirements
 - CLE-approved qualification
 - Fit and proper person
- Section 51: evidence of suitability, certificate from NZLS that applicant is a fit and proper person
- Section 39(4)(b)(ii): once admitted, NZLS can still refuse to issue a practicing certificate to an enrolled barrister and solicitor if not a fit and proper person to hold a practicing certificate
- Section 55: requires that for a person to be admitted to the Bar, the Law Society must consider the applicant to be a fit and proper person. The Law society takes account of: good character; declared bankruptcy; offences (incl. nature of offence, age when offended, time elapsed since); engaged in legal practice in New Zealand without practicing certificate; engaged in legal practice outside New Zealand without practicing certificate equivalent.

Good character can be assessed through a utilitarian approach (although probably not the best), a deontological approach, or a virtue ethics approach. Whilst the results may be the same (esp. deontological and Virtue Ethics) the motivations behind the results differ.

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

The rules are based on the fundamental obligations of lawyers set out in section 4 of the Act, namely—

- to uphold the rule of law and to facilitate the administration of justice in New Zealand;
- to be independent in providing regulated services to clients;
- to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;
- to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interests of clients.

The rules are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standards that lawyers must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and a conviction may be obtained despite the charge not being based on a breach of any specific rule, nor on a breach of some other rule or regulation made under the Act.

Critiques of virtue ethics

- VE asks what a virtuous person would do in the circumstances. But how do we know what a virtuous person is? For this reason, VE can only take us so far.
- Because there are an infinite number of different circumstances possible there can never be a set roadmap or guide
- Who decides what is virtuous? Perspectives on virtues may vary from person to person. Aristotle reckons courage is a virtue, but sometimes courage can be foolhardy.
- The notion that conduct is a product of character is a central tenet of VE. Virtues are used to predict future behaviour (i.e., character reference). But how do you judge someone who has not been in the legal position about how they will act in the legal profession? If you cheat in a pub quiz, that doesn't mean you are going to act unethically as a lawyer.
- There is also a social psychology research-based critique. There is empirical evidence to suggest "it is situations and circumstances, not character" which dictate how people behave. This indicates that conduct does not necessarily flow from character. Instead, it is more to do with the situations and the circumstances that we face. The good Samaritan/Milgram experiments are examples.

There are important implications that stem from the social psychology research. It suggests that the focus should shift from bad apples to bad barrels. This is particularly prevalent in the law firms context.

"Organisational Climate"

- Baron and Corbin: "Ethics begins at home."
- Shift the view from individual making moral choices to the organisation's ethical culture
- Asks what link there is between ethics of legal workplace cultures and legal professional ethics?
- "Ethical climate theory"
 - Proposition that personal characteristics alone cannot fully explain moral/immoral behaviour.
- Finding that ethical climate is a predictor of ethical behavior.
- This finding challenges the individualist discourse of legal ethics. **Looks at bad barrels, rather than bad apples.**

Deborah L Rhode – Virtue and the Law: The Good Moral Character Requirement

- Discusses virtue ethics/good character and admission to the bar.
- Asks whether character is truly predictive.
- Discusses the 'situationalism' critique.
- Discusses the experiment examples (Milgram experiment, good Samaritan in a hurry)

- Begins to mention the reputation of the legal profession. Asks whether it is an appropriate concern for admission criteria.

Ethic of Care

Ethic of Care is a whole different approach to moral philosophy

Leslie Bender, in her article, discusses the work of Carol Gilligan who was a psychologist and feminist theorist. Gilligan presented two distinctive perspectives on approaching moral dilemmas: Ethic of Justice and Ethic of Care.

Ethic of Justice

- The Ethic of Justice is the traditional Anglo-American legal approach
- It has certain ideas about what “rational” moral decision-making looks like
 - Rights-based model.
 - Focus on problem-solving and reasoning. Also a focus on rules and principles
 - Abstractions and drawing inferences are common.
 - “Serious thinking” – learning “legal thinking/analysis?”
 - There is some VE overlap – there is a question of what a lawyer would do in a certain situation.
 - Ethic of Justice is unemotional. The focus is on being sensible, fair and just
 - **Hyper-rationality is elevated and has become dominant in legal reasoning.**

Ethic of Care

- Scholars working with feminist approaches observed that this rights-based, abstract kind of thinking was not always their lived experience.
- The focus is on relationships/connections, and therefore also context.
- Understands human relationships and emotion as central to morality.
- The Ethic of Care questions the assumptions of the liberal, rational approach that we are equal autonomous individuals.

Carol Gilligan – “In a Different Voice”

- Gilligan was a Social Psychologist. In 1958, her mentor Lawrence Kohlberg studied stages of moral development in children.
- Kohlberg’s theory was that children’s moral development becomes more principled/abstract/universalised as they mature.
- The original study only focused on boys in 3 age groups. Kohlberg was interested in the process used to reach decisions in moral dilemmas. They were lots of levels of sophistication depending on the factors considered.
- Subsequent studies concluded that girls demonstrated slower moral development/sophistication.
- Gilligan uncovered that girls often had an alternative reasoning process in place, with a focus on relationships between people over time and less reliance on abstract rules.
- Concludes Kohlberg had gender bias in his work.
- Criticism (Leslie Bender article):

- Essentialising (portraying or explaining in terms of one or more stereotypical or supposedly intrinsic traits.)
- Ties women to a subordinated position
- “Moral maturity probably requires the use of both perspectives, even though they are often in conflict. The hallmark of mature judgement in the justice perspective (detachment) is *the* moral problem to the care perspective (failure to attend to need). In contrast, the justice perspective considers the mark of mature judgement in the care perspective (attention to the particular circumstances and needs of the party) as *the* paradigmatic moral failing (treating people unequally).”
- Alternative, but equally valid mod of moral reasoning

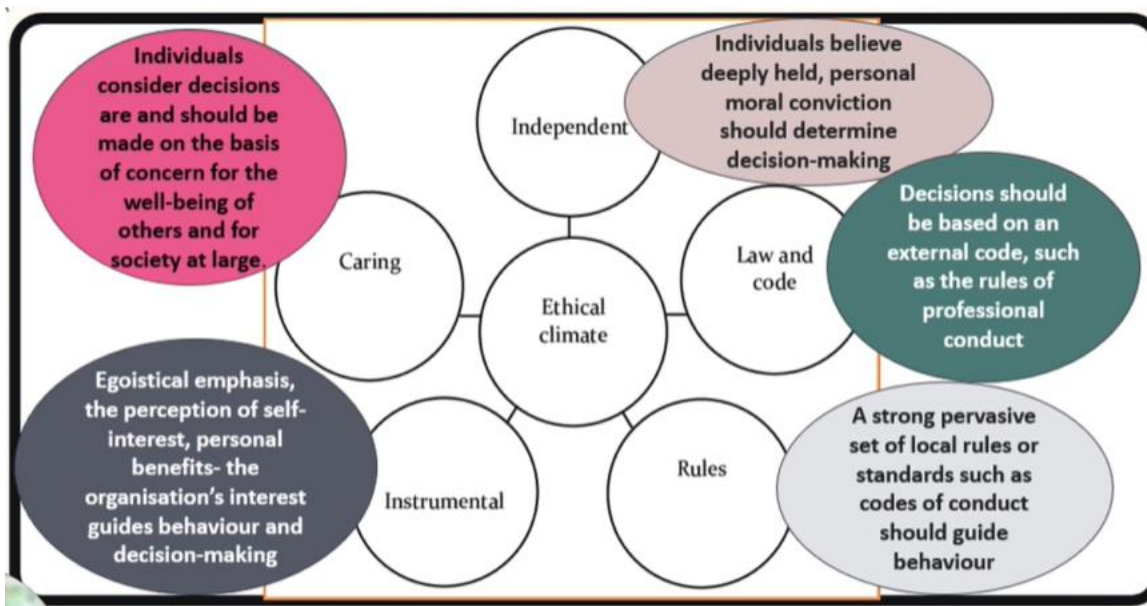
The Ethic of Care approach thinks the problem with the ethic of justice approach is that it is too detached. Alternatively, Ethic of Justice thinks that Ethic of Care treats people unequally because everyone is treated differently depending on the circumstances and needs.

Ethic of care and legal practice

- Seems to fit well the ideas of responsibility and service.
 - Lawyer has a duty of care to the client.
- There should be a space for the legitimisation of emotion, relationships and communication.
- This approach seems to emphasize context.
- Seems to allow space for refocusing on different perspectives, including those of people not well represented by the legal system (women, minorities, etc.)
- Interesting links with ideas/values of other systems/cultures/other world views

Other concerns

- The client might not engender sympathy.
- It is important to put aside feelings and do a job.
- The importance of predictable and consistent decisions cannot be understated.



Fit and proper person test

Statutory Provisions

Key provisions in the Lawyers and Conveyancers Act 2006

- Section 21 Provision of legal services
- Section 6 Interpretation 'lawyer'
- Section 39 Issue of practicing certificates
- Section 40 Effect of application for practicing certificate
- Section 41 Power to refuse to issue practicing certificate
- Section 42 Right to Appeal

Section 7

- Misconduct that occurs whilst doing legal work
- Test: objective; would legal peers consider it to be misconduct/disgraceful?
- Section 7(1)(b)(ii):
 - Includes conduct unconnected with provision of legal services which justifies a finding that a practitioner is not a fit and proper person.

7 Misconduct defined in relation to lawyer and incorporated law firm

- (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm,—
- (a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
- (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
 - (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
 - (iii) that consists of a wilful or reckless failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject; or
 - (iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm; and
- (b) includes—
- (i) conduct of the lawyer or incorporated law firm that is misconduct under subsection (2) or subsection (3); and
 - (ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.
- (2) A lawyer or an incorporated law firm is guilty of misconduct if, at a time when he or she or it is providing regulated services, and without the consent of the High Court or of the Disciplinary Tribunal, the lawyer or incorporated law firm knowingly employs, or permits to act as a clerk or otherwise, in relation to the provision of regulated services, any person who, to the knowledge of the lawyer or incorporated law firm,—
- (a) is under suspension from practice as a barrister or as a solicitor or as a conveyancing practitioner; or
 - (b) has had his or her name struck off the roll of barristers and solicitors of the High Court; or
 - (c) has had his or her registration as a conveyancing practitioner cancelled by an order made under this Act; or
 - (d) is disqualified, by an order made under [section 242\(1\)\(h\)](#), from employment in connection with a practitioner's or incorporated firm's practice.
- (3) A person is guilty of misconduct if that person, being a lawyer or an incorporated law firm, shares, with any person other than another lawyer or incorporated law firm, the income from any business involving the provision of regulated services to the public.
- (4) Despite subsection (3), a lawyer or an incorporated law firm is not guilty of misconduct under that subsection by reason only of sharing with a patent attorney (in the circumstances, and in accordance with any conditions, prescribed by the practice rules) the income from any business involving the provision of regulated services to the public.
- (5) Despite subsection (3), neither an incorporated law firm nor a lawyer who is actively involved in the provision by an incorporated law firm of regulated services is guilty of misconduct under that subsection by reason only of the incorporated law firm making a distribution to shareholders of that firm.

Purposes under s 3 of the Lawyers and Conveyancers Act 2006

- Maintain confidence in the provision of legal services.
- Protect consumers.
- Recognise the status of the legal profession.

What is a responsive regulatory regime under s 3?

- Efficient and quick
- Less rigid and more nimble to new developments

Part 1 **Preliminary provisions**

3 Purposes

- (1) The purposes of this Act are—
 - (a) to maintain public confidence in the provision of legal services and conveyancing services:
 - (b) to protect the consumers of legal services and conveyancing services:
 - (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.
- (2) To achieve those purposes, this Act, among other things,—
 - (a) reforms the law relating to lawyers:
 - (b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:
 - (c) enables conveyancing to be carried out both—
 - (i) by lawyers; and
 - (ii) by conveyancing practitioners:
 - (d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:
 - (e) repeals the [Law Practitioners Act 1982](#).

Fundamental obligations of lawyers under s 4

4 Fundamental obligations of lawyers

Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:

- (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- (b) the obligation to be independent in providing regulated services to his or her clients:
- (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

Section 12

- Covers conduct that is unbecoming of a lawyer.
- Conduct that falls short of diligence and competence that a member of public would come to expect.

12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under [section 7](#)); or
- (d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under [section 7](#)).

Part 2

Part 2 of the Act covers the regulations around offering legal services (ss 39-42 are about practicing certificates).

Section 39(4)(b)(ii)

- Once admitted, NZLS can still refuse to issue a practicing certificate to enrolled barrister and solicitor is not a fit and proper person to hold a practicing certificate

Part 3

Meanwhile, Part 3 is about admission to the Bar.

- Section 49: qualifications for admission to the bar
 - CLE-approved qualification
 - Fit and proper person for admission
- Section 51: evidence of suitability, certificate from NZLS that applicant is a fit and proper person
- Section 49 is important. Must have the correct qualifications
- Section 51 requires evidence of suitability (i.e., being a fit and proper person)
- Section 55 sets out the elements to look at to determine whether someone is a fit and proper person.

S 55 Fit and Proper Person

- Law Society especially takes account of:
 - Good character
 - Declared bankruptcy.
 - Offences (nature of offence, age when offended, elapsed since)
 - Engaged in legal practice in NZ without practicing certificate.
 - Engaged in legal practice outside New Zealand without practicing certificate equivalent.
 - "Whether, because of a mental or physical condition, the person is unable to perform the functions required for the practice of the law"
 - Contentious whether mental health issues should be a bar.
 - Not just depression, but also mental faculties worsening through age.

- Disclosure is important.

Purposes of fit and proper person requirements?

- Protect public/clients.
- Promote ethical conduct by lawyers, allow existing judiciary and lawyers to have confidence in newly admitted lawyers.
- Maintain good reputation of profession.
 - Who's reputation?
 - What is the reputation supposed to look like?
- Foster public confidence in the justice system
- "Symbolic importance, aspirational norm that lawyers are especially ethical" - *Rhode*
- "Can the fit and proper person requirement achieve these stated purposes?" – *Woolley*

S 55(2)

- High Court of NZLS may determine that person is a fit and proper person to be admitted as a barrister and solicitor even though the person-
 - (a) is within any of the categories mentioned in any of the paragraphs of subsection (1); or
 - (b) does not satisfy all of the criteria prescribed by rules made under section 54

Sections 65-66 set out the regulatory and representative functions. Part 9 is the home of the provisions where the complaints and discipline procedures are set out.

Case Law

Disciplinary hearings

The good character requirement is vague. Precedent is useful for conduct that is the borderline.

In the matter of Edward E Johnston [2013] NZLCDT 30

- Facts:
 - Issues about financial dealings, lack of proper advice, poor documentation, did not respond to client's requests.
 - Did not put client's interests ahead of own interests.
 - Pretty clear cut, Johnston did not contest.
- Para 15: Disclosure is important for the fit and proper person test.
- Para 12: risk of reoffending must be considered, need to maintain reputation and standards of the profession, would a lesser punishment suffice?
- Approach
 - S 244
 - S 7
 - S 12
 - S 6
 - S 216
 - S 136 onwards
 - S 190
 - S 226

L v Canterbury District Law Society [1999] 1 NZLR 467

- Facts
 - Under the Old Act

- Unsuccessful appeal
- Restriction had been in place of L since 1990 that prevented him from practicing by himself.
- Appealed to have restriction lifted
- Tribunal refuses, because L had had another misconduct allegation in 1995. Fraudulent behaviour (forgery)
 - Also, in 1997 a minor issue of drawing cheque from trust account – set aside
- What is the process of the fit and proper purpose assessment.
 - *Lundon*: held that it is for the applicant to show they had improved since being struck off.
 - L argued that case is distinguishable because L was not struck off
- Question of whether negative characteristics that had led to restriction were still relevant.
 - Court said they were.
 - Onus on L to prove they had improved.
 - Seems like a higher threshold than just proving there have been no issues.
 - Seems quite demanding.
 - The purpose of the requirements is discussed again when going through the analysis.
 - Legal purpose is not to punish.
 - Reasons for restrictions were still relevant. L did not discharge these reasons

Fit and Proper Person Cases - Johnston and L

- Striking off/suspending an admitted lawyer
 - Nature and gravity of charges, especially dishonesty (*Hart*)
 - “by reason of his or her conduct the person accused is of a fit and proper person to be a practitioner: (discussed in *Dorbu*)
 - Not any misconduct
- Risk of re-offending (no part misconduct? Past misconduct?) (discussed in *Hart*)
- Would a lesser penalty suffice? (Censure, fine, supervision, suspension) (discussed in *Dorbu*; *Daniels*)
- Onus on applicant to show reasons for restriction are no longer relevant/restriction is no longer required.
- Disclosure/frankness/recognition of misconduct when dealing with disciplinary process is very important (*Hart*)
- Underlying purpose is the need to maintain reputation and standards of the legal profession (discussed in *Dorbu*)

Otago Standards Committee v Duff [2022]

- Facts
 - GST issue case.
 - Money had come in and Duff had coded it in the wrong way. Because of this he did not pay GST on that income.
 - He had been working as a lawyer for a long time, had several businesses going on at the same time.
 - Lawyer in Auckland, also involved in various businesses; director in about 15 companies.
 - Charge of misconduct related to attempts to evade paying tax, unconnected with legal services (s 7(1)(b)(ii) LCA 2006).

- **Finding that he was not a fit & proper person or was otherwise unsuited to engage in practice as a lawyer.**
 - He was censured. Not fined or suspended.
- Reasons for Penalty Orders – process
 - Assess gravity of misconduct – [4]
 - Recall purposes of penalties – [5]
 - Aggravating and mitigating circumstances – [6]
 - Was suspension necessary? – [7]
- Question was one of integrity, not competence as a lawyer.
 - Suspending him would be a loss to the profession.
 - He was doing a lot of work with Māori and Pasifika clients, as well as pro bono.
 - So censure was deemed to be the best option.
- Court held this was not at the most serious end of the scale
 - Other business issues, not to do with clients
 - Court differentiate between the two. The former is less serious. The latter is to do with legal services so more serious.

National Standards Committee No. 1 v Gardner-Hopkins [2022] NZLCDT 2 (decision on penalty)

- Facts
 - Partner at Russell McVeagh who was found to have been inappropriately touching summer interns.
 - Found to be unfit to be a lawyer.
 - Russell-McVeagh partner.
 - Six charges of misconduct related to intimate non-consensual touching activity affecting junior colleagues.
- Finding that he was unfit to engage in practice as a lawyer at time of this misconduct (hearing was 6 years later)
- Suspended for two years (may increase to 3). Cross-appealed recently, upgraded to 3 years
- Reasons for Penalty orders - process
 - Assess gravity of misconduct – [5]
 - Aggravating and mitigating circumstances – [6]
 - The involvement of alcohol – which was it?
 - Was the conduct part of the provision of legal services?
 - Apply general principles of penalties – [7]. I.e., deterrence (protective not punitive), consistency with precedent, least restrictive outcome
 - While recalling purposes of penalties – [8]
- When they are thinking about purposes, would they put the clients at risk? Probably not. – [105]-[106]
 - However, the need to protect the profession’s reputation remains.
- Side note: changes have now been brought in to include protections with the workforce. Now there is a duty to report workplace misconduct.
 - Would more general duty of care to all those who lawyers’ professionally interact with be a good idea?

Process for determining penalty (*Duff, Gardner-Hopkins*)

- Assess gravity of misconduct
- Discuss aggravating and mitigating circumstances.
- Apply general principles of penalties i.e.
 - Deterrence (protective not punitive)
 - Consistency with other decisions
 - Least restrictive outcome required to meet purposes.
- Always recall purpose of penalties throughout

National Standards Committee v Poananga [2012]

- Facts
 - New lawyer who travelled across North Island doing Treaty of Waitangi work. Statutory changes had led to a massive increase in workload for Poananga
 - Application for legal aid required statutory declaration.
 - Declaration that something is true and correct. Has to be done in front of a particular person (i.e., a lawyer)
 - Poananga ends up signing the forms herself, without the power of attorney to do so. She forged the signatures, but the clients did not seem to be fussed about it.
 - Admitted to 4 charges.
- Legal Aid forms
 - Process: claimants sign forms, she would witness signatures, main firm in Auckland would sign off as lead provider
 - Forms included a statutory declaration.
 - Forms also included a statement that the form contains no false statements.
- Charges
 - Became too hard and not enough time to physically get all the claimants (cultural protocol was that she would go to them)
 - Signed the forms herself (clients seem to be okay with this) including statutory declarations.
 - Faced charges on incompetence and/or negligence regarding duty of fidelity to court, forgery and false statutory declaration.
- Poananga was struck off

Feelings on Poananga?

- Perhaps not as morally bad as other cases
- Does seem to trivialise Treaty of Waitangi claims – brings the whole space into disrepute
- Tikanga issues?
 - Possibly different discussion if heard today.
 - Court rejected out of hand the idea that it is common for lawyers in the Treaty space to forge signatures.
 - Is there a different sense of ethical rules in different cultures?
- Aggravating factors?
 - She had not been on her best behaviour during the hearing/process.
 - She had not been entirely truthful – seemed to suggest there were medical issues in place.
 - She died not long after
- The way people interact with the complaints hearing is very important.

Potential idea: can we expand protection to include protection of the lawyer themselves and those the lawyer professionally interacts with?

Admission cases

Fit and Proper Person Cases - Admission to Bar

- Focus of inquiry is **forward-looking**, not to punish for past conduct
- **Onus on candidate** to show they are fit & proper (but lighter onus than an admitted practitioner?)
- Give recognition to fact conduct of concern happened in person's **youth**
- Consider **entire circumstances**, not just fact of previous convictions.
- Were the "defects of character" "entirely" spent?
- Would admission undermine the reputation of the profession?

Re Owen [2005] 2 NZLR 526

- Facts
 - Troublesome youth becomes a lawyer
 - Had convictions for burglary, arson, fights, drugs
 - Turns life around, goes to law school
 - Applies for admission, found not to be a fit and proper person
 - Owen had disclosed everything when he applied
- "When exercising this judgment the Court has to pay careful attention to the expectations of the community at large and of the legal profession as to the standards assumed to be possessed by a person holding the office of a Court as a barrister and solicitor."
- Ultimately found to be a fit and proper person by the Court

Dame Goddard on *Re Brown*

- Owen had a long history of criminal offending from a young age (esp. burglary – includes intrusion and invasion)
- HC found these convictions were particularly relevant
- However, he was young, and had managed a complete turnaround so criminal convictions could be ignored
- Had a clean and inspiring life since starting law school.
- Draws on *Re M*
 - Focus is forward looking.
 - The onus on a person who has erred in a professional sense after admission is more stern.
 - Due consideration should be given to youth.
 - Must pay attention to facts in the round.
- HC hold Owen was a fit and proper person.
- More difficult question was whether the public would share this view.
 - The benefit of knowing his recent life story.
 - Satisfied the public would share the view that Owen was a suitable candidate for admission.
 - Court was cognizant of the need to protect the wider image of the profession at large.

Brown v New Zealand Law Society [2018] NZHC 1263

- Facts
 - Police officer sexual misconduct case
 - Lots of complaints about him
 - Most serious was from a woman who had been 13 at the time (he claims he thought she was 16)
 - Brown had resigned from the police, end of contract was supposed to bring the case to a close
 - Goes to law school.
 - Applies to the Bar.
 - Law Society checks in with the police who reveal all
 - Was working in a regulated profession. Wasn't legal work, but past conduct still seems to be an issue.
- Held not to be fit and proper person

Fit and Proper Person – Dame Goddard

- No slide rule approach in cases determining whether someone is a fit and proper person.
- Can past wrongdoing be safely considered spent? Or does this interfere with the rule of law?
- Regulations
 - Law is a regulated profession.
 - Regulations designed to protect the public interest.
 - Lawyers enjoy special privileges afforded to them (monopoly over providing legal services for remuneration)
 - Lawyers and Conveyancers Act 2006
 - Purpose to protect consumers of legal services.
 - Maintain public confidence.
 - Set out in s 4 of the Act.
 - Be independent
 - Observe fiduciary duties and duty of care.
 - Obligations to protect interests of the client.
 - There is an obligation to promote justice first and foremost, even over the interests the client.
 - Have to be scrupulous in discovering and disclosing legal documents. Must bring to the attention of the judge, even if they are unfavourable to your case.
- The reason there is a high threshold is because of the position of trust the lawyer is in
 - Finances, reputation and liberty can be at stake
 - Lots of responsibility
- Cannot risk bringing profession into disrepute
- Long Bingham in *Bolton*: protect the reputations of the profession so every member is trusted to the ends of the Earth.
- Integrity is an important principle.
- Lawyers and Conveyancers Act 2006
 - Section 49: candidate must be a fit and proper person.

- Criteria under s 55
- The applicable s 55 criteria in both cases:
 - Whether the person was of good character
 - Whether the person has even been bankrupt or put company into liquidation/receivership
 - Whether the person has been guilty of an offence, the nature of the offence, the time of the offence, the age at time of the offence.
- S 55 is a guideline only
- Law Society is not limited by the guidelines. Can take other things into consideration.
- Cases are to be judged on individual merits.
- It is not a discretionary exercise, but an evaluative process of each member.
- Mental and physical conditions are also relevant under s 55.
 - Includes impairment by alcohol or drug abuse
 - Does impairment interfere with the functions required to practice law

Stanley

- 3-2 decision in the NZSC that Stanley was a fit and proper person to hold a practicing certificate.
- Law Society has refused to grant Stanley a certificate.
- Stanley brings an application to HC. Clark J denies the application.
- Stanley successfully persuades the CA that he was entitled to be considered a fit and proper person.
- Appealed to NZSC, where appeal is narrowly dismissed.
- Stanley had been initially refused to 7 drink driving conditions over 37 years, the most recent of which was in 2014.
- Law Society was concerned that the focus of Mr Stanley on why he had been caught, not why he was drunk at all. The second concern was that the most recent conviction was when he was mature. The third concern was the most recent conviction occurred after he had completed his law degree
- Committee found he had showed a lack of insight and judgement.
- HC was not satisfied that he was reformed, and that his poor attitude meant there was a high risk of reoffending that would bring the profession into disrepute.
- Candidate must be assessed as they are now, not on past actions. The question is whether the wrong doing can be confidently considered as safely stemmed
- Argued that he did not know he was over the limit, it was on the less serious scale, he had not been imprisoned.
- CA held that would not bring into disrepute. Law Society did not ordinarily remove the certificate of an existing lawyer who had been convicted of drink driving
- Case goes to NZSC.
- NZSC refer to s 55 factors
- In terms of approach, court say:
 - Fit and proper standard must be interpreted in light of the act
 - The need to protect the public.
 - Maintain public confidence in the person.
- NZSSC upholds decision of NZCA

- Rule of law is relevant.
- Drink driving is a grave matter.
- Mr Stanley had more focus on the issue of police vigilance.
- Also blamed his metabolism.
- Concerned about lack of insight.
- Majority thought issues had to be assessed in the round.
- Dissent
 - Questioned whether the bad behaviour was spent.
 - Multiple drink driving cases indicates either a contempt for the law or a drinking problem or both.
 - Either undermine the ability of Stanley to perform his duties as a lawyer
 - Not convinced that he had changed enough. Thought there might be a long-standing drinking problem.
- In *Re Landon*, a 1920s CA found that the bar for readmission is high. Have to be of complete integrity and excellent moral character.
- When someone is struck off for misconduct, issue is what is considered as misconduct.
 - What is disgraceful or dishonourable.
- In *Re Landon*, a 1920s CA found that the bar for readmission is high. Have to be of complete integrity and excellent moral character.
- When some is struck off for misconduct, issue is what is considered as misconduct.
 - What is disgraceful or dishonourable?
- Edward (Eb) Leary
 - Became lawyer of Terry Clark, a notorious drug ringleader.
 - His relationship with Clark led to him being struck off the roll by the CA.
 - 7 charges
 - Taking possession of enormous amount of cannabis plant
 - Deceiving IRD
 - Deceiving Royal Commission
 - Leary eventually seeks readmission.
 - Says he will only hold position as barrister. No trust account.
 - Provides 81 glowing testimonies from high position figures.
 - Appeal to HC
 - Full bench of HC allows appeal.
 - Demonstrated acceptance of wrongdoing and need for reform + efforts to reform.
 - However, a year after readmission he was charged with money laundering.
 - Dismissed after evidence was found to be hearsay.
 - Wife pleaded guilty, although eventually found innocent.
- Courts have a flexible approach in determining what is in the public interest.

Other cases

Re Landon

- “Relations between a solicitor and [their] client are so close and confidential, and the influence acquired over the client is so great, and so open to abuse, that the Court ought to be satisfied that the person applying for admission is possessed of such integrity and moral rectitude of character that [they] may be safely accredited by the Court to the public to be entrusted with their business and private affairs.”

Bolton v Law Society

- "to maintain the reputation of the solicitor's profession as one in which every member, or whatever standing, may be trusted to the ends of the earth" – at 518

Analysis

Duncan Webb: "It... appears that the courts and professional tribunals - perhaps understandably - will be more reluctant to discipline a lawyer in respect of conduct undertaken in a personal capacity than similar conduct undertaken professionally. The reasons for this may be manifold."

- Meadows reading: private lives vs public lives
 - Issues of privacy

Alice Woolley's three approaches to legal ethics (role morality, 'Dworkian' approach, ordinary morality) do any of the cases demonstrate one of these, or its opposite?

- Ethical climate of workplaces can vary.
 - It's not all about personal virtues or character, environment can have a big effect.
- Admission cases possibly fit more within the ordinary morality approach.
 - But once you're in the system, seems to switch more to role morality.

Transnational and International Lawyering

- Admission in more than one jurisdiction?
 - Yes it is possible.
 - In some countries it will be easy to be qualified if you are qualified in NZ (i.e. UK)
 - Not Civil Code
 - May have to fulfil different requirements
- If you are a lawyer coming to NZ
 - You have to take additional courses (i.e. legal ethics)

Foreign practice and activities are relevant criteria for the fit and proper person test under s 55.

International Lawyering

- No international bar
 - Oscar Schacter's famous description of an "invisible college" of international lawyers
 - Self-identification
 - No formal enrolment or admittance
 - "legal advisor" rather than lawyer or solicitor
- No international conduct rules or general admission requirements
 - Legal advisors do not always have an underlying law degree
 - But not the same consumer protection of lawyers
- Compare: Domestic lawyer doing international law e.g. MFAT, Defence, Immigration, civil society
 - Day to day work may be international law
 - But still need practicing certificate to practice in NZ

Catherine A Rogers - Ethics/Professional Conduct in International Arbitration

- Para 1.05: "no one seems to know what, if any, ethical rules apply to attorneys in international arbitral proceedings"

Notes on Chapter 1, Catherine A Roger's book *Ethics in International Arbitration* (OUP, 2014):

- Used to be okay because it was a closely-knit "invisible college" of people who knew each other, had shared understandings of conduct rules and 'nobility' and 'honour', and didn't want to ruin their reputation. So self-regulation worked. [1.19]
 - BUT increase in reliance on arbitration, involvement of US firms/actors with perhaps a more adversarial approach, and globalisation = diversity of actors. She describes also greater use of complaints (and dubious conduct) as a tactic. [1.24 ff]
 - Tension between national rules and disciplinary bodies (resources, capabilities, interests = "eroding authorities of national or bar associations"? and international arbitration (and its commercial/entrepreneurial features) [1.58 ff; 1.39] Note, discussion of differences between "in-bound" and "out-bound" lawyers and level of interest/concern of country/national bar association)
 - Some attempts to make some international rules but high level/incomplete/sometimes unsuccessful? Rules became stricter, more precise, more complex, more transparent? Critique: does this make arbitration more like litigation? [1.34]
 - Her overall argument – greater attention to professional conduct in int arbitration is needed (meaning for counsel, not just arbitrators) and this will need to be done through some kind of self-regulation [1.10]
- Para 1.03: "tacit understandings about what constituted proper ethical conduct in arbitral proceedings... Invisible College... dwell in an ethical no-man's land"
 - She also looks at through the perspective of local bar associations as well.
 - The tension is that the beauty of arbitration is that there isn't as strict rules of court. So you would lose the benefit
 - Concludes that there needs to be greater attention to ethics in transnational legal setting. But probably needs to be done by self-regulation.

The IBA Guidelines on Party Representation in International Arbitration is best practice, not binding.