

Closing Address to Qld Symposium

Friday 19 March 2021, 5:20pm

"Shaping Legal Minds - the ethical mind"

**The Hon Susan Kiefel AC
Chief Justice of Australia**

There can be little doubt that the experience of the COVID-19 pandemic has taught lawyers and the courts much about the need to be adaptable to changing circumstances. For the courts it has meant expanding upon existing methods of conducting hearings remotely by the use of technology. For the High Court such hearings have involved judges sitting in court in different capital cities and lawyers appearing in multiple locations remote from the court. For many in the legal profession it meant working in a home environment and conducting conferences and relaying information in different formats. For all of us it involved testing the technological capabilities of our machines and ourselves.

There has and will be much said about what has been learned from these experiences so far as concerns future work practices. So far as concerns the High Court, I can say that it has confirmed it is our view that oral argument made in the presence of the Court is far superior. This is the situation to which we have recently returned and which we hope will be maintained. That is not to say that valuable lessons have not been learned which may alter future practices at institutions like the courts and in law firms. By way of example, it has been realised that people might work in more than one environment and that for some the choice is truly beneficial. Institutions and firms have found, perhaps to their surprise, not only that

they can accommodate these changes in work practices but that they might be of benefit to them as well. It might also be that there will be more thought given to the need to fly to other locations for the purpose of a meeting, at least when it can be managed well enough by videolink.

Generally speaking, we are rather better positioned now for the effects of restrictions on movement as may occur from time to time. Even when this pandemic has passed, there remains the possibility of another occurring in the future. At that point the High Court will be able to bring out of storage and dust off the demountable extensions which have been made to the timber bench in the main courtroom in Canberra, which enables seven justices to sit at a COVID-safe distance. There are of course other steps that can be taken which have resulted from the experience of this pandemic.

Others at this Symposium (including the previous speaker, whose presentation I found most interesting) have addressed questions such as how lawyers might adapt their thinking and actions to meet the challenges presented by a crisis such as a pandemic. I will not attempt to add to this discussion. I propose to address the theme of this Symposium which is about "Shaping Legal Minds" by reference to an important and enduring topic. It concerns the ethical mind. I wish to discuss how the study and expression of ethics shapes the mind of a lawyer. The journey starts from student days and continues throughout a lawyer's professional life. Ethical conduct is a critical aspect of the legal profession. It is an important part of what sets the profession apart from a business.

Sir Owen Dixon once said that "[t]o be a good lawyer is difficult. To master the law is impossible". The first rule of conduct (which he described as itself an ethical rule) is for the lawyer to "know his work" "to do his best to acquire such knowledge of the law so that he knows what he is doing"

when he acts for a client in court or advises that person whether to go to court¹. To acquire such knowledge, he said, requires "hard work for a long time"². He said "a law school cannot give you the necessary knowledge; it is only acquired through practising law"³. What a law school does is to provide the lawyer with a body of fundamental principles and teach them how to use those principles to obtain a more extensive and detailed understanding of the law.

Sir Owen Dixon's view of legal formalism may not have paid much regard to the principles of legal ethics as guiding both an understanding of the law and its practise. But no one can doubt the importance of legal ethics. The requirement that all lawyers act ethically is one of the distinctive features of the profession. And the legal profession understands this to be the case, for it has always required it long before the regulation of professional conduct was imposed upon it. A student at law seeking admission as a lawyer must meet the "fit and proper person" standard⁴. The standard has ancient roots. As early as 1275 a statute provided for the imprisonment of and suspension from practice of lawyers who deceived the court or their client (LRO footnote 56). However for the most part in the common law tradition, regulation of fitness for practice was left to autonomous professional bodies.

Australian universities recognise the importance of legal ethics to the practice of the law. Their law faculties seek to prepare students for the possibility of joining the legal profession by courses such as "Ethics and the Legal Profession"⁵, "Lawyers, Justice and Ethics"⁶ and "Ethics, Social Responsibility and the Law"⁷. The last-mentioned subject title captures an important aspect of the legal profession: that it has a strong public dimension. To practise as a professional lawyer is to make available skills to

the state and to the community. It involves obligations which are founded on the public interest, such as that in the proper administration of justice.

Sir Owen Dixon's statements point up the fact that in reality a lawyer is educated through the actual practise of the law and what is gained by experience. So too is the necessary depth of understanding of legal ethics gained by the experience and challenges to right-thinking on the part of a practising lawyer.

Every lawyer is taught that their overriding duty is that owed to the court, although litigators are more likely to be reminded of that duty in their daily practise than commercial lawyers. Duty to the court is characterised as an "overriding" or "paramount" duty in rules of professional conduct such as the Australian Solicitor Conduct Rules⁸. It is understood that it transcends the duty to the client. It recognises the role of a lawyer in the administration of justice.

The duty owed by a lawyer to the court is but one, albeit an important, aspect of the requirements of ethical conduct. The work of lawyers is of course not confined to the courts. Lawyers who advise all manner of clients on many topics help the client navigate their legal relationship with others. They identify the bounds of lawful conduct and assist their clients' appreciation of the law. In their contact with clients lawyers may be tempted to stray from what ethics requires, in the clients' pursuit of their interests. But the practise of law is a profession in the true sense, not just a business. Ethics understood and applied in the practise of the law is a felt commitment to honesty and integrity.

Because the practise of the law is a true profession, it has always functioned as something of a self-regulating society. It is understood that

more experienced lawyers have an obligation to oversee the conduct of fledgling lawyers, to promote in them a deeper understanding of what is required of them and to guide them where necessary. The young lawyer must also appreciate that their conduct is being monitored by their peers. Lawyers talk a lot amongst themselves about experiences with other lawyers. A reputation for proper conduct is one of the most important assets a lawyer can have and it is one which may irredeemably be lost.

Sir Gerard Brennan has expressed the view⁹ that ethics are not what a lawyer knows he or she should do; ethics are *what* they do. On this view ethics is not so much learned as lived. This view may imply that ethical conduct should be second nature to a lawyer, instinctive almost. And so it should. But I do not take it to mean that a person cannot be guided by and learn from others or that experience and the observation of the conduct of others in the profession cannot be instructive. Ethical conduct, like the rules of etiquette which are peculiar to the legal profession, is something of a construct. So while much of a person's tendency to adhere to honesty and integrity may derive from upbringing and the morals and values which have been imparted in that process, a person may also learn what is required of a professional lawyer.

What statements such as Sir Gerard's most clearly imply is that legal ethics cannot be reduced to a set of rules to be followed, although some stated rules of conduct may be indicative of the broader requirements of legal ethics. The fit and proper standard of a practitioner may be said to be one of character. But that character is shaped by a deeply-held commitment to honesty and integrity which is the basis of legal ethics.

It has often been recognised, because experience over the years shows, that for a profession to continue it requires high professional

standards to be maintained. If they are not, the trust and confidence of the community which it serves may well be lost¹⁰. The profession will then become irrelevant. There can be no higher or stricter requirement of a lawyer than that she or he behave honourably and ethically. And that requires that the values and principles which inform legal ethics are so well understood that they may be said to have shaped the professional lawyer's mind.

¹ Sir Owen Dixon, "Professional Conduct", in Susan Crennan and William Gummow (eds), *Jesting Pilate*, 3rd ed (Federation Press, 2019) 274 at 275-276.

² Sir Owen Dixon, "Professional Conduct", in Susan Crennan and William Gummow (eds), *Jesting Pilate*, 3rd ed (Federation Press, 2019) 274 at 276.

³ Sir Owen Dixon, "Professional Conduct", in Susan Crennan and William Gummow (eds), *Jesting Pilate*, 3rd ed (Federation Press, 2019) 274 at 276.

⁴ See, e.g., *Legal Profession Act 2007* (Qld) ss 9(1)(a), 31.

⁵ University of Queensland.

⁶ Australian National University.

⁷ University of Tasmania.

⁸ *Australian Solicitor Conduct Rules 2012* (Qld) r 3.

⁹ Sir Gerard Brennan, "Ethics and the advocate", Speech delivered to the Bar Association of Queensland, 3 May 1992, at 1-2.

¹⁰ Sir Owen Dixon, "The Profession of Accountancy", in Susan Crennan and William Gummow (eds), *Jesting Pilate*, 3rd ed (Federation Press, 2019) 279 at 279.