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BOOK REVIEWS

YSAIAH ROSS, *ETHICS IN LAW: LAWYERS' RESPONSIBILITY AND ACCOUNTABILITY IN AUSTRALIA* (SYDNEY: LEXIS NEXIS BUTTERWORTHS, 4TH ED, 2005), PP. VII–XLVII, 1–632. ISBN 0 409 32144 3.

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'This book is intended as another contribution to the development of ethical training and ethical awareness in Australia'.[1] It is the most recent update of a text first published in 1995 and has two foci – first, the regulatory regime under which the legal profession in Australia operates, and, second, the relationship between this regime, the professionals who practice under it and society at large. Ross ranges widely in the text and details a number of significant recent developments directly and indirectly impacting upon the ethical conduct of members of the legal profession. The work is, however, a disappointing 'contribution' in several respects.

Ethics in Law is divided into four parts. Part One, *Accountability and Responsibility – The Framework*, is defined by three closely related tenets set out and discussed over three chapters and which inform the remainder of the text.

Tenet one provides that legal training in Australia has been and remains inadequate. Until the recent past legal training in Australia has been constituted by training in practical skills identified as necessary by the profession. This 'trade school mentality'[2] resulted in a pedagogy that ignored, on the one hand, the personal development of the student and, on the other, the

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1 Ysaiah Ross, Ethics in Law: Lawyers' Responsibility and Accountability in Australia (2005) 9.

2 Ibid 4.

social responsibilities of the student post training and admission. This approach is changing but the perception of the lawyer as 'the agent of the client'[3] remains the predominant one in Australian law schools. The fallout from this is a legal profession largely divorced from the society it is meant to serve.

Tenet two provides that the missing link in the education of legal students has been attention to their ethical orientation. Ethics, it is argued, is a ubiquitous concept but can be defined as:

> a system of conduct that sometimes is the same as the law, and supports its aims by giving publicity to the rules of conduct, while at other times it goes beyond the law and sometimes conflicts with the law. Ethics includes concern for the welfare of others which combines with an inner reflection.[4]

Law schools should not be charged to teach this system of conduct. However, they must ensure that it infuses the method of teaching and presentation of the material studied so that no student can attain a law degree without giving some attention to their ethical compass and developing an appreciation both that the law is a social construct and that it, the legal practitioner and the client are members of a team who must work together for moral outcomes. This is particularly important as, first, we live in a society 'preoccupied with the importance of power and money'[5] and, second, the value of ethical codes in a regulatory regime for the legal profession is, at best, limited. Lawyers, that is, will not look to these codes for guidance in their professional practice. Rather their guidance will come from 'rulings, disciplinary proceedings, statutes … case law', the conventions of the profession and their aforementioned moral compass.[6]

Tenet three builds from one and two above and Larson's view as reported by Ross that the professional is a deluded servant of the capitalist society. Tenet three provides that the legal professional is part of a machine manipulating social structure in a losing and destructive battle to perpetuate its existence as a profession. During the 1900s, the legal profession fell into 'deprofessional'

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3 Ibid.

4 Ibid 9–10.

5 Ibid 8.

6 Ibid 71.

status. It sought to counter loss of economic power 'by controlling specialised knowledge or cultural capital'[7] and was disturbed but not characterised by calls to 'old values'. These calls necessarily failed and professionals have increasingly gone on search for meaning in their respective lives. The individual professional, Ross continues, will not find nirvana in the traditional notion of 'the profession'. This is an anti-democratic and elitist image. The professional, rather, will be saved by removing him or herself from that notion and by anchoring in an approach that espouses a oneness with the public that the profession has erstwhile sought to control. Ross does not then explain that this undefined 'ism' will save the profession that it appears to disregard. This conclusion, though, is a logical one to draw.

PART 1 IS DISAPPOINTING

Ross' definition of ethics is not unsound and has the advantage of circumventing the argument that lawyers can operate ethically while acting in a manner society may see as immoral. It also recognises that lawyers may be working contrary to a client's best interests by merely 'lawyering' a problem. This theme is well entrenched in the literature on lawyers and ethics and is not in itself offensive. Ross, however, justifies the uniform acceptance of the definition and a moral ethical training base for law students on the bases that:

1. the vast majority of law students have unacceptable values:

> Even with the adoption of compulsory professional responsibility courses there will still be a need to change the educational philosophy in most of our law schools. An isolated course on professional responsibility may not by itself change the attitudes of the vast majority of law students. Students will have been moulded by community values and their individual upbringing. This does not mean that young adults cannot change their ethical values.[8]

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7 Ibid 65.

8 Ibid 25.

2. any law course which separates law from morals will necessarily product graduates who, at best, are ethical deviants:

> [T]eachers [who embrace positivist philosophy] should not then wonder why their students become so unethical. The separation of law from morals leads to a very narrow view of law, which is corrupting on the human spirit.[9]

Preconception 1 is pejorative and has not been justified. Preconception 2 sees Ross, inter alia, ignoring his own position as noted above that 'community values and … individual upbringing' play a part in moulding students.

The unsatisfactory elements in these comments are found throughout this part. As to pejorative comment, Ross states without justification, for example, that ethical codes are of limited value in the regulatory regime for legal professionals because 'if lawyers are accused of some kind of unsavoury behaviour the profession can say it will amend the code and that will cure the problem'.[10] Similarly, while reference to Larson's position in this text is justified, Ross extends Larson's view by the unsupported statement that:

> The profession has tried to overcome [the problem of devalued status through oversupply] by increasing the public demand for its product, especially through legal aid and by opening new areas of work … and by increasing lawmaking to create many jobs, not only in the private practice, but also in government and the corporate sectors.[11]

It is disturbing that in this comment Ross has also, inter alia, misrepresented the lawmaking process.

As to contradiction, Ross states, for example, that '[m]ost law schools in the United States do not take seriously the requirement of a compulsory professional responsibility course'[12]. He also states that:

> [p]erhaps the most important reason for this shift [to an increased appreciation of the importance of professional

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9 Ibid 27.

10 Ibid 67.

11 Ibid 62.

12 Ibid 8.

> responsibility in Australian law school courses] is the increased interest in television programs, novels and films concerning legal ethical issues.[13]

How is this so when the 'television programs, novels and films concerning legal ethical issues' to which he refers have been equally if not more prominent in the United States than in Australia?

Further to the above, Ross seems to almost unfairly press his position in parts. He, for example, relegates contra evidence as regards the portrayal of lawyers in modern film to footnote status[14] while in referencing the frequently noted position that many lawyers are dissatisfied with their present work environment, he fails to reference the NSW Law Society's inaugural 'Remunerations and Work Conditions Survey' conducted in 2001. This survey found that, inter alia, '[t]he majority of employed solicitors reported that they were either satisfied or very satisfied with their position'.[15] It would, too, have been pleasing to see on the subject of job satisfaction in the legal profession, some discussion on the impact on lawyers of the inherent stresses in legal practice, the commercial imperatives under which most law firms are bound to operate and the adequacy of law training in light of these ever more immutable realities of practice. Arguably, without this discussion the redemptive power of the ethical training which Ross espouses and the moral/cooperative client communication model he endorses later in the text could appear to some readers as an overly simplistic comment on the teaching of law in Australian law schools and the practice of law today.

Finally, the approach of Ross in this section is didactic. This is unfortunate on two grounds. First, it sees Ross channelling thought rather than encouraging students to think. This is, arguably, inappropriate in a text on legal ethics at this level. The second ground speaks to the internal harmony of the work. By using a didactic approach, Ross is supporting the control model of communication that he later disapproves.

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13 Ibid 6.

14 Ibid 19 (footnote 43). Ross gives the list in this footnote as definitive.

15 (2002) 40 *Law Society Journal* 38.

PART 2

In Part 2, *The Ethical Framework*, Ross turns to the defining characteristics of the legal profession. Specifically, he describes its structure (ch 4), its system of internal regulation (ch 5), the requirements for admission to the profession (ch 6) and the discipline of the profession (ch 7). In each of these chapters Ross details the applicable rules, standards and "law" operating throughout Australia and, in some instances, the US, gives numerous appropriate and current examples of this law in operation, which facilitates understanding, and notes where reform is needed.

The tenor in Part 2 is a muted form of that found in Part 1 and the arguments introduced in that part are developed here.

Chapter 4, *Structure*, is primarily concerned with restrictive practices. The public pays dearly for legal services provided to it. Therefore, it has strong grounds for being given a part in the regulation of the legal profession. This regulation should have a net overall effect of 'reduc[ing] or eliminat[ing] market distortions or otherwise [producing] public benefits'.[16] The profession has been faced in recent years with a public less inclined to be faithful to a single lawyer or firm and, generally, more inclined to be consumer savvy in its approach to the provision of legal services. This change in the public's approach to the legal profession, together with a greater appreciation by the legal fraternity of the worth to be had in competitive behaviour, has resulted in the reform of the legal profession as regards restrictive practices. The legal profession has not, though, embraced the notion of competition. This is evidenced by the profession's insistence that its lodestar remains the solicitor's traditional fiduciary and ethical duties.

In chapter 5, *Regulation*, Ross considers 'the institutions that regulate lawyers, how the power to regulate is distributed and the reasons for granting those powers'.[17] The legal profession self regulates and self governs. This is not acceptable – there must be 'outside involvement in the regulation of the profession'[18] and

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16 Ross, above n 1, 87.

17 Ibid 101.

18 Ibid 112.

lawyers must loose themselves as a body from the unique 'fear of government interference and the loss of independence'.[19] Outside involvement is necessary to ensure efficient and cost effective service. It will also increase public confidence in the profession. As for government involvement in regulation, this is desirable as governments are accountable to the public, have a wider perspective than non-government bodies and have the resources for accurately forecasting community needs. Moreover, the profession cannot maintain an argument for self-regulation. In particular, it has denied itself reference to traditional arguments in this regard by not fulfilling its duty of disinterested service to the public.

Chapters 6 and 7 are less coloured by argument than any chapters thus far in the text.

Chapter 6, *Admission*, is dedicated to the rules applicable to those seeking to become members of the legal profession. The formalities of the admission process are outlined, the idea of nationwide admission discussed and the law on foreign lawyers practising in Australia noted. The system underlying the admission process, Ross contends, has the potential to be anti-competitive and the composition of admission boards has been and remains inappropriate. Moreover, successful admission is not an indicator to the public that a practitioner is competent. In particular, the practitioner will likely have had no training in the 'human and service aspects of lawyering'[20] and will likely not be prepared to perform in the international arena.

Chapter 7, *Discipline*, examines the standards of behaviour expected of legal practitioners both in practice and in their personal lives. The categories of behaviour that fall short of the expected standard are defined and explained by reference to both relevant legislation and case law. A growing awareness of obligations to consumers is noted. Despite the systems in place, Ross argues, there are 'too many large defalcations and too many cases of professional incompetence' in the Australian legal profession.[21] This can be attributed to, in part, the culture of the legal profession and problems unique to that profession which

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19 Ibid.

20 Ibid 133.

21 Ibid 200.

discourage the reporting of colleagues for professionally aberrant conduct. The rules, too, are inadequate and '[t]he Law Council of Australia may need to adopt a specific rule in the Model Rules concerning sexual relationships with clients'.[22] Indeed, 'in the area of family law … [t]here is an urgent need for an adoption of a complete ban on such relationships'.[23]

Part 2 is not characterised by the same disquieting features found in Part 1. The flaws which mark out Part 1 do, though, exist here. Why, for example, is there such an urgent need to direct family law practitioners on appropriate behaviour with clients, bearing in mind that Ross himself has not given any examples of misconduct by Australian practitioners in this regard? More generally, the flaws are exemplified by the discussion Ross gives in Ch 5 on pro bono services.

Ross defines pro bono work as 'free legal work for the public'.[24] More 'widespread involvement' in the provision of pro bono work is required.[25] This will go some way towards lawyers meeting the professional ideal of providing 'disinterested service to the community'.[26] Other suitable acts towards this end include making cash donations to any of the various providers of legal aid.[27] Ross briefly notes that commercial and other realities must be taken into account when assessing the adequacy of the profession's commitment to pro bono work. He does not, though, present or discuss either these realities nor the limitations to any pro bono programme. Law firm Gilbert + Tobin notes that these realities include not only time but conflict of interest issues. It further notes that the provision of pro bono services 'does not always meet [a client's] entire need in respect of pursuing their legal issues', and that 'access to disbursements for barristers' fees, court filing fees, interpreters' fees and in many other areas

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22 Ibid 176.

23 Ibid 176.

24 Ibid 114.

25 Ibid 115.

26 Ibid 113.

27 Ibid 116.

remains a major barrier to the provision of pro bono services by private firms'.[28]

In addition to this disappointing omission, Ross contends without attempt at justification that:

> Lawyers who are made to give free services will seek ways of meeting the requirements by doing the least possible work, will refrain from voluntarily doing other pro bono work and invariably will not perform as well as they can.[29]

Finally, rounded discussion on this subject necessitated mention of the "other" pro bono activities in which members of the legal profession engage.

PARTS 3 & 4

In Parts 3 and 4, Ross moves from the topography of the legal profession to its demography. Part 3, *The Lawyer-Client Relationship*, is constituted by synopses of particular aspects of the ethical and professional duties of the legal practitioner, namely, the duty to represent and to continue to act, the duty to obey and keep clients informed, the duty to conduct a matter competently, the duty to maintain client confidentiality and the duty to avoid conflict.

Ross does not attempt a detailed analysis of any of these duties. Rather, he gives a broad overview of his subject matter and, where possible, uses case law to illustrate the operation and scope of each particular duty. He enlivens this overview by reference to well known cases and topical law. For example, in discussing the right to representation, reference is made to *Attorney General for NSW v Milat*[30] and, in more general discussion of this right, the problems of representing those held on terrorist charges. Similarly, in discussion on exceptions to legal professional privilege, Ross references the US Sarbanes-

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28 Gilbert + Tobin, 'Submissions to Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice' [14–15] <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/submissions/sub57.doc> at 20 March 2006.

29 Ross above n 1, 119.

30 [1995] 37 NSWLR 370.

Oxley Act 2002 (**S-ox**), the US Government's corporate governance reform legislation enacted in response to recent and spectacular US corporate collapses. S-ox, amongst a number of other things, obligated the Securities and Exchange Commission to introduce rules requiring company attorneys to 'report evidence of a material violation of securities law or breach of a fiduciary obligation or similar duty by the company or an agent thereof'[31] regardless of how that evidence was obtained.

Focus on the duties and illustration of subject matter with current examples makes this an attractive section. The material though, cannot be read without qualification. With S-ox, for example, Ross argues that '[s]ince 2002 corporate lawyers around the world have been keeping an eye on developments in the United States after the adoption of the Sarbanes-Oxley Act'.[32] While this comment is too vague to be labelled as untrue, there is strong argument that, as a group, corporate lawyers in Australia have been paying less attention to S-ox than to our Corporate Law Economic Reform Program (**CLERP**) and, in particular, CLERP 9, the Australian Government's corporate governance reform legislation effective (with the exclusion of certain sections) from 1 July 2004.

Ross also uses Part 3 to argue that lawyers have favoured an inappropriate communication model in dealing with clients. Lawyers encourage clients to submit to legal advice given, particularly where the client 'is poor and uneducated'.[33] This model has engendered a wide disregard for the client who, Ross continues, may not be informed of offers for settlement or about statutes of limitations. Failure to inform in these regards may be the result of, respectively, the lawyer wishing to 'gain experience' or 'public recognition'[34] and self interest.[35]

In Part 4, *The Adversary System*, Ross, first, discusses the nature and adequacy of the adversary system in general and in its

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31 S-ox s 307.

32 Ross above n 1, 392.

33 Ibid 252.

34 Ibid 260.

35 Ibid 262.

Australian form, and, second, examines at length the legal practitioner's duties of fairness and candour.

The adversarial and inquisitorial systems are parts of a continuum, not intrinsically different creatures. The former 'has possibly had a detrimental effect on the ethical behaviour of lawyers'[36] and must be bolstered by a rule wherein the lawyer is obligated to 'discharge with integrity all duties owed to clients, the court, other members of the profession and the public'.[37] The system, too, continues to reward 'the party who can best persuade that it has truth, rather than the party that in fact has truth'.[38] The supremacy of the adversarial system has been usurped by alternative dispute resolution (**ADR**) in certain areas. The ADR approach has merit but, in particular, may have an ethical standard for disputants and their representatives that has been set too low. Regardless, lawyers cannot be allowed to corrupt ADR practices and procedures with 'adversarial values'.[39]

Ross discusses the duties of fairness and candour by reference to the conduct of practitioners in negotiations, to hopeless cases, tactics engaged in by legal practitioners both in a courtroom and more generally, the giving of evidence and the guilty accused. The approach for this discussion is similar to that of Part 3 although the discussion of the duties more detailed. The framework for this discussion is that lawyers will sometimes 'breach both their duties of fairness and candour'. This is an effective framework and in keeping with the view of lawyers given throughout the text. It is a dangerous framework, however, and some practitioners may find it offensive.

CONCLUSION

The 4th edition of *Ethics in Law* has a place on the reading list for courses in legal ethics and professional responsibility. The tone

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36 Ibid 483.

37 Ibid 482 (being a reproduction of a clause in Chapter 1 of the Canadian Bar Association Code of Profession Conduct as of June 2005).

38 Ibid 485.

39 Ibid 496.

of the text is conversational, material is generally well ordered and law is not only explained but explained by reference to current examples. This makes for a text that is both easy to read and informative. It will likely, too, make the text a popular choice for students. Ross' views, though, are consistently close to the surface of the work and his position is not argued with academic rigour. The text should be promoted to students with these latter points in mind.

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