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INSIDE LAWYERS' ETHICS



Christine Parker
Adrian Evans

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and
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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521546645

© Christine Parker, Adrian Evans 2007

First published 2007

Printed in Australia by Ligare Pty Ltd

A catalogue record for this publication is available from the British Library

National Library of Australia Cataloguing in Publication data

Parker, Christine, 1969–.

Inside Lawyers' Ethics.

Bibliography.

Includes index.

ISBN-13 978-0-52154-664-5 paperback

ISBN-10 0-52154-664-8 paperback

1. Legal ethics – Australia. I. Evans, Adrian Hellier II. Title.

174.30994

ISBN-13 978-0-52154-664-5

ISBN-10 0-52154-664-8

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Inside Lawyers' Ethics

Legal ethics is often described as an oxymoron – lay people find the concept amusing and lawyers can find ethics impossible. But the best lawyers are those who have come to grips with their own values and actively seek to improve their ethics in practice. *Inside Lawyers' Ethics* is designed to help law students and new lawyers to understand and modify their own ethical priorities, not just because this knowledge makes it easier to practise law and earn an income, but also because self-aware, ethical legal practice is right, feels better and enhances justice. Packed with case studies of ethical scandals and dilemmas from real-life legal practice in Australia, each chapter delves into the most difficult issues lawyers face. From lawyers' part in corporate fraud to the ethics of time-based billing, the authors expose the values that underlie current practice and set out the alternatives ethical lawyers can follow.

This book is a compact, usable resource for all students, teachers and practitioners in the disciplines of law and ethics.

Christine Parker is Associate Professor and Reader in the Faculty of Law at the University of Melbourne. She is also an Australian Research Council Fellow.

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To
Greg Restall
and
Maria Bohan

Preface

We are very grateful to Camille Cameron, John Howe and Rob Rosen who very kindly read and helpfully commented on previous incarnations of various chapters of this book. Linda Haller at the University of Melbourne deserves an extraordinary vote of thanks for her extremely helpful and detailed comments on drafts of almost all chapters, and for going on to try out the drafts in the classroom before publication. We are also grateful to those colleagues with whom we have each taught legal ethics or researched with over the years, whose companionship and ideas have helped encourage and inspire us in the development of much of the material published here, including John Braithwaite, Camille Cameron, Andrew Crockett, Linda Haller, Matt Harvey, John Howe, Joanna Krygier, Suzanne Le Mire, Guy Powles, Stephen Parker, Josephine Palermo, Ysaiah Ross, Michelle Sharpe and Michelle Taylor-Sands. We have also benefited greatly from the insight and experience of many legal practitioners and regulators to whom we have talked during the course of writing this book. Particular thanks are due to Janet Cohen and also to Brind Zwicky-Woinarski QC, Greg Connellan, James Leach, Richard Meeran, and Pam Morton as well as some others who should remain anonymous. Zoe Jackson (research assistant and 'Footnote Queen') made the final preparation of the manuscript so much easier and more pleasant, for which we are extremely grateful. Needless to say, all mistakes, misjudgements or infelicities of expression remain our own responsibility.

We also thank law students at Monash University, University of Melbourne and the University of New South Wales who have 'road tested' much of the material in this book and goaded us (with their enthusiasm, vigorous disagreement or sometimes lack of interest) into improving our ideas, arguments and, particularly, our case studies through class discussions and their responses to assessment tasks. The precept of this book is that readers will wish to make ethical choices in good faith, rather than seek only to avoid obligations in their professional behaviour. We are especially grateful to the many students and lawyers we have known who have encouraged us that this is often true.

Finally, we dedicate this book to our partners, Greg Restall and Maria Bohan, thanking them, and also each other, for helping us to keep on going in the faith that it is worthwhile to spend much of our time in ethics education and discussion with law students and lawyers.

Christine Parker and Adrian Evans
Melbourne, July 2006

Acknowledgments

An earlier version of Chapters 1 and 2 was published as Christine Parker 'A Critical Morality for Australian Lawyers and Law Students' (2004) 30 *Monash University Law Review* 49–74.

Material from the *Australian Lawyers Values Study* used in this book has been previously published in Adrian Evans and Josephine Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103–29; Adrian Evans and Josephine Palermo, 'Zero Impact: Are Law Students' Values Affected by Law School?' (2005) 8 *Legal Ethics* 240; Josephine Palermo and Adrian Evans, 'Preparing Future Australian Lawyers: An Exposition of Changing Values Over Time in the Context of Teaching About Ethical Dilemmas' (2006) 11 (1) *Deakin Law Review* 104–30.

The authors wish to thank the following people for their kind permission to reproduce cartoons: Kahlil Bendib (p. 9), John Spooner (p. 75), Michael Leunig (p. 101) and Jenny Coopes (p. 214).

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Introduction: Values in Practice

Introduction: Ethics and Lawyering

CASE STUDY 1.1 The Jewish QC and the Alleged Nazi War Criminal

In early 2001, newspapers reported that a leading Melbourne criminal barrister and civil rights advocate had been asked to represent suspected war criminal Konrad Kalejs in a hearing to determine whether Kalejs should be extradited to Latvia to face charges over the deaths of tens of thousands of Jews and others during World War II. The relevant barrister was a Queens Counsel and was also prominent in the Jewish community, a former president of Liberty Victoria (a civil rights organisation) and well known for representing a variety of high-profile criminal accused including Julian Knight (in his trial for the Hoddle Street massacre), John Elliott (who was cleared of corporate fraud), and members of Hells Angels. The barrister was, reportedly, born in 1946 in Russia. His parents fled to Germany when he was six weeks old and later settled in Israel. They migrated from there to Australia in 1959. In 1997 he 'was quoted as telling *The Herald Sun* that elderly Jews living in Melbourne would be having sleepless nights knowing Mr Kalejs was walking free in Melbourne'.¹ Mr Kalejs was 87 at the time of the extradition proceedings. He denied the allegation that he had served as an officer in a death squad within a Latvian war camp where an estimated 20,000 to 30,000 Jews, Gypsies, Red Army soldiers and others were executed, or died of starvation or torture at the camp. However, Kalejs had previously been deported from the US, Canada and Britain because of findings that he had been involved in war crimes. From newspaper reports at the

¹ Quotation from D Farrant, 'Leading QC May Defend Kalejs', *The Age* (Melbourne), 23 January 2001, 1. All information in this paragraph from that article and from Richard C Paddock, 'Case Tests Australian Protection of Nazi War Criminal', *The Washington Post* (Washington DC, USA), 21 January 2001, A21; 'Jewish Leaders Warn Govt to Beware Kalejs Health Defence', *AAP News* (Australia), 2 January 2001. See the following newspaper articles for accounts of how the case ended: Nick Lenaghan, 'Vic - Accused Nazi Dies, War Crimes Debate Continues', *AAP News* (Australia), 30 December 2001; "'Witch-hunt' Over Kalejs', *Newcastle Herald* (Newcastle), 10 November 2001, 2; 'Kalejs No-Show Thwarts Watchers', *The Age* (Melbourne), 26 January 2001, 3.