FOREWORD

A reference to ethics in a Law Review may lead one to think of the subject in terms of the relatively narrow perspective of ethics in their application to everyday legal practice. Happily, no such restriction was placed on the contributors to this special issue of the Victoria University of Wellington's Law Review. The result is a remarkable diversity of approaches, fully illustrative of ethics as the branch of philosophy concerned with human behaviour and conduct. A handful of examples follows.

R P Boast in his paper "Lawyers, Historians and the Judicial Process" has focused on the responsibilities of lawyers to the Courts and to the public when engaged in the presentation of historical evidence before the Waitangi Tribunal, and the duties of the historians themselves. From a wider perspective the author has given a valuable account of the development and change of approach in the presentation of cases before the Tribunal, to the point where (so it is argued) lawyers and historians now play a dominant role. The ethical problems which in the author's perception historians face could be translated to most if not all expert witnesses. Lawyers and Judges will empathise with the comment that to a degree, such witnesses are inevitably "advocates"; some of the country's most respected experts have also been the most persuasive.

Ms O'Brien's treatise on professionalism in New Zealand lawyers is particularly timely, having regard to the New Zealand Law Society's current reconsideration of its structure and functions. Ms O'Brien grapples with the problem why there should be a differentiation between public expectations of the standards to be observed by professionals, and those in fact observed by the community as a whole. Those who believe there has been a recent decline in professional standards will benefit from the reminder that one hundred years ago, an American commentator complained that the legal profession had become "increasingly contaminated with the spirit of commerce"; and that the term "law factory", which many believe to be a relatively recent Auckland invention, was already current in 1931. The author argues, persuasively, that running an efficient law firm is not incompatible with professionalism; but makes the equally valid point that subservience to valued corporate clients may lead to a compromise of the wider obligations lawyers owe.

When I was in practice a story current at my old firm concerned that formidable advocate G G G Watson. It dated back to the days when many law offices had large wooden trays containing clients' files, with convenient handles so that the trays could be locked away in the office safe overnight. When the manager of a particular client declined to accept his advice Watson placed the client's entire tray of files in the manager's lap and showed him the door. The manager found himself in Brandon Street, somewhat bewildered, still carrying the tray. He returned the next day, saying that on reflection he had seen the wisdom

of the advice, and asking if Mr Watson would kindly receive back the client's files. The story was recounted with admiration and one hopes that in any modern partnership it would be received in the same spirit. Quoting Professor C E F Rickett Ms O'Brien poses the question "if in trying to achieve her client's objective the lawyer would be achieving an unfair, unconscionable, or unjust, though not unlawful, end, or the lawyer would have to use unfair, unconscionable, or unjust, though not unlawful, means, should the lawyer decline to act?". An uncomfortable question which most lawyers have had to face, the discomfort heightened by the truism that what is unfair, unconscionable, unjust or unlawful is often incapable of black and white definition. However, as Duncan Webb points out in his thoughtful article ("Why Should Poor People Get Free Lawyers?"), the community of individuals who constitute a profession needs to espouse and promote the kind of ethics to which members ought to aspire.

Tim Dare's paper ("Virtue Ethics and Legal Ethics") should be considered in conjunction with Ms O'Brien's. It grapples with the concept of "role differentiation", the thesis that the obligations and privileges to which people are subject vary as they move from one role to another. Thus obligations attach to lawyers in their work role which do not apply to their personal life, or to non-lawyers engaging in similar activity. Mr Dare discounts the now widespread criticism of this standard conception, criticism said to be connected with the rebirth of the Aristotelian concept of *phronesis* or practical wisdom. The paper makes the important point that since ordinarily the client is unaware of the professional's personal values, there must be some method by which the client can assess what values will feature in the professional's dealings with the client, and how they will be applied. Thus an official code of ethics, publicly notified, is a necessity.

The existence of a strong separate Bar is often said to be an essential component in the ability of the law profession to give truly independent and unbiased advice. Since the separate Bars in England and Australia particularly pride themselves on their adherence to the cab rank rule, which they regard as underpinning their independence, there will not be universal acceptance of Maree Quinlivan's conclusion (in her stimulating paper "The Cab Rank Rule: A Reappraisal of the Duty to Accept Clients") that the rule neither respects the moral autonomy of the individual practitioner nor guarantees access to legal process. The conclusion that the structure of the American profession is more successful in the achievement of these aims, might lead to questioning the rationale for a separate bar. If I may make a personal observation, the growth of a separate bar in New Zealand has provided, among other benefits, a healthy counterbalance to the inevitable expansion of firm size, and has helped to preserve the independence of the profession as a whole, an objective which incidentally I do not believe would be assisted by allowing the Queen's Counsel to practise in firms.

Sooner or later the question has to be posed, are ethics taught or caught? In the days of a smaller, less market driven profession, skills were picked up on the job, and attitudes were absorbed osmotically from senior respected lawyers. Today it is readily accepted that skills need to be taught, and for myself I do not require much persuasion that ethics deserve and indeed require a place in the curriculum also. Indeed Professor Brian Brooks commences his paper "Ethics and Legal Education" with a challenging quotation to the effect that there may now be an undue emphasis on skills training at the expense of the transfer of values, wisdom and education for life. It is I suggest difficult to quarrel with his conclusions that every part of the legal landscape is illuminated by ethical considerations, and that it follows inexorably that ethics must be taught. Professor Brooks' themes that what should be encouraged, is a capacity to recognise the existence of ethical issues, and that the Law Schools have a part to play in that process, should be applauded.

The Law Commission's Consultation Paper The Education and Training of Law Students and Lawyers (Wellington, September 1997) quotes Judge Harry T. Edwards ("The Growing Disjunction Between Legal Education and the Legal Profession" [1992] 91 Mich LR 34, 38) as follows:

> Law students need concrete ethical training. They need to know why pro bono work is so important. They need to understand their duties as "officers of the court". They need to learn that cases and statutes are normative texts, appropriately interpreted from a public regarding point of view, and not mere missiles to be hurled at opposing counsel. They need to have great ethical teachers, and to have *every* teacher address ethical problems where such problems arise.

Constraints of time and space prevent fuller reference to the remaining papers; "Taking a Chance: A Proposal for Contingency Fees" (Kate Tokeley), "Typhoid Marys: The Ethical Dilemma of Lawyers who Switch Firms" (David Coull), "Moral Questions, Legal Answers and Biotechnological Advances" (Glenys Godlovitch), "Protecting "Killer Crocs" and "Fantasy Football": The Ethics of Copyright Law" (Susy Frankel), "The Moral Case for the Legalisation of Voluntary Euthanasia" (Professor Graham Oddie), "Dooyeweerd's Philosophy of the Law; the Jural and the Ethical Aspects" (Alan Cameron), and "A Doubter's Guide to Law and Natural Rights" (James Allan). They maintain a uniform standard of thought provoking excellence.

One may sense a recent increase in interest in subjects relevant to ethics. In part, this may have been stimulated by specific events in the public domain, but the upsurge in writing on the subject matter seems to have come about independently. As is well brought out in a number of the contributions, it is important to maintain and enhance the insistence on high ethical standards. The confidence which this maintains relates not only to the profession but, as the President of the American Bar Association pointed out recently (ABA Journal, March 1997, 8) public perception of lawyers is the foundation of confidence in the justice

system as a whole. And as has always been the case, our tradition of justice continues to depend heavily on the reliance the Courts are able to place on the accuracy and completeness of counsel's statements and submissions, as to both fact and law.

It is healthy that public expectations of the ethical standards of lawyers and judges remain high. However, a wider foundation for the discussion is desirable. While I do not wish to enter the virtue ethics vs legal ethics debate, so ably rehearsed in some of the papers, one must question whether it is possible to sustain special standards in any sector of a community unless the values in question are seen as desirable by a substantial proportion of people as a whole, or at least not as antithetical to widely held community attitudes. On this note I will close with a quotation from an address given recently by the Governor-General, Sir Michael Hardie Boys:

> ... New Zealand needs a restored consensus about what constitutes proper behaviour. The discussion, the consultation, about these ethical fundamentals must, and needs to be, quite explicit - our values, our virtues, both these expressed in common action and held individually, need once again to be spoken of, talked about, forthrightly, in public, and in detail.
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> (launching of "Church in the World", 9 December 1997)

This special issue of the Victoria University Law Review is a valuable contribution to the discussion His Excellency envisaged. I commend the Law Faculty, and especially Duncan Webb and the other members of the Editorial Committee, for a timely initiative.

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