

It is not for lawyers to decide what the community interest is at the expense of their client, argues MICHAEL EBURN.

# Protecting a client's interests

The question of ethics



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DR LONGSTAFF OF THE ST JAMES ETHICS Centre, in an article in the February issue of *The Law Society Journal*, advocates:

- That lawyers should not act in accordance with a client's wants where such wants are contrary to the client's interests; and
- That lawyers should not facilitate unethical behaviour by clients.

If these principles are followed, so it is argued, the status and privilege of the profession within the community will be maintained.

On the first point, Dr Longstaff assumes that it will always be in the client's interest to act ethically.

It may be common experience however that this is not always the case. Many people would argue that tax minimisation schemes, although legal, are unethical and yet such schemes may clearly be in the interests of the client.

Even if it appears that the proposed action is contrary to the client's interest, the lawyer must defend that client's right to act. For the interest that is being protected is the interest that the client has in being an autonomous individual who has control over their own life and responsibility for their decisions.

## Inappropriate role for lawyers

Naturally enough, any lawyer, like any other individual, is free to dissociate him or herself from any cause that they find personally objectionable. To do so is right and proper, not because the lawyer is the judge of the client's matter, but because the client cannot get the service that the client is entitled to from a lawyer who has strong personal objections to the matter at hand. If, however, all that Dr Longstaff is advocating is that lawyers must act in accordance with their own good conscience then, with respect, he is adding nothing to the debate. The lawyer who believes that pursuing recalcitrant debtors on behalf of mega-banks is ethically correct, will continue to do so and the lawyer who advocates civil disobedience in order to further social reforms will continue to do so. On the other hand, if Dr Longstaff is advocating that there is some external, identifiable community interest that must be imposed by lawyers upon their clients then he is advocating a role for lawyers that is inappropriate. Even if lawyers could agree on what is right, they do not, by virtue of their profession, have the right to substitute their own interpretation of 'right' for that of their client.

## Community interest not defined

Dr Longstaff fails to address who is to interpret what is the community interest. What is morally acceptable varies across cultures and across times, and lawyers are not blessed with a particular insight into moral righteousness. To ask lawyers to impose their own judgment may well

see minority and unpopular causes denied access to law on the basis that they are morally wrong. Some, for example, may argue that the Gay and Lesbian Mardi Gras Committee should not be assisted in what they may regard as unconscionable (but strictly legal) behaviour. It is not only actions that maximise wealth and promote trade that are considered (by some) as ethically doubtful. If lawyers are to gauge their client by the community interest, then those ideas that are losing ethical acceptance will no longer be represented, and neither will the ideas that will become accepted into the mainstream in due course. We may agree that the ethic "greed is good" is no longer acceptable and clients that hold that view should no longer be assisted, but not so long ago, the greenies would have faced the same fate.

If one does accept that there is a moral truth that can be obtained by ethical debate, then one cannot accept that the community interest represents the true ethical position, for merely being the attitude of the majority does not make an attitude correct. If, on the other hand, one rejects the notion of ethical realism then one cannot impose the community interest for there is no ground for accepting one ethical doctrine (however defined) over another. What is required is for all ethical views to be put forward for examination; this in turn requires an advocate for each position. In a legal system, what is required is a lawyer to fearlessly protect the client's interest, irrespective of the perceived community interest. The law is properly influenced by the community interest and should reflect it, but that is a role for the law, not the lawyers acting for a particular client.

Ultimately, whether or not there is an ethical truth, it is not up to lawyers (who are said to be white, middle class, unrepresentative men) to determine in their offices what is a harmful activity according to the community interest. Such judgments are inconsistent with what may be considered the fundamental philosophical basis of Australian law and society. It is certainly open to society to change that philosophical basis, and remove individual freedoms on behalf of the community, but if that is what is wanted, it should be done by public reform and not by the subtle subjective judgment of individual lawyers.

#### Law and ethics are different

If it is the fact that the law is out of step with community interest, then it is for parliament, subject to political pressure, and representative groups to determine what is and is not permissible. Public discussion, and centres like the St James Ethics Centre may well assist the community to develop ethical ideas and ethical consistency (and lawyers have a role

to play in these discussions) but it is unlikely that we, as a community, will ever establish a universal moral code. It is not for lawyers to determine for their client what is, or is not, ethical or in that client's interest. The lawyer may advise, but in a society that attempts to value each individual, and each individual's right to choose, the final decision must be that of the client. Representing each individual, both the despicable and the courageous, against the moral condemnation of the community is the 'public service' that lawyers provide. To put it in Dr Longstaff's terms, the community may want a legal profession that attempts to constrain individuals in accordance with the community interest, but such a legal profession may not be in the community's interests.

As Dr Longstaff says, law and ethics are different. What is the correct ethical position is always open to debate and so one of the roles of law in a free society is to provide a public benchmark; an objective limit of personal behaviour. It is the role of lawyers to act in their client's interest and their duty to put that interest above their own and (except as limited by law and by a lawyer's duty to the court) above what may be perceived by some people to be the need of the community. It is not for lawyers to decide what the community interest is at the expense of their client. □

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