THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

ACN 099 158 620

AUSTRALIAN LEGAL HISTORY ESSAY COMPETITION 2008

A BACKGROUND INFORMATION PAPER

A QUESTION OF CONSCIENCE, A QUESTION OF TRUST: Honesty, Legal Ethics and the Limits of a Guilty Secret

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INTRODUCTION

A Statement of the Question to be Addressed

1. This paper provides background information to assist consideration of the following Essay Question:

> ***Honesty, Legal Ethics and the Limits of a Guilty Secret***
>
> *How can a lawyer defend somebody he or she "knows" is "guilty"?... What is it to "know" that somebody is "guilty"?... Okay, to be more precise: What, are, or should be, the ethical obligations of a lawyer acting for a client who, after being charged with a crime, makes a confidential confession of guilt?*
>
> *Discuss this question from the perspective of a member of the community (who is not a lawyer) using examples drawn from the Dean Controversy (1895-1896) and/or Tuckiar's Case (1932-1934).*

Questioning the Question

2. This question, in its more precise form, contemplates the possibility that the "ethical obligations of a lawyer" might be, or appear to be, different depending upon whether they are assessed from the perspective of a "lawyer" or from the perspective of a "real person", a member of the broader community. Some people might think that that is a real possibility, others that it is not. Any difference between the two views might depend upon personal predisposition and the factors taken into account (or not) in the formation of an opinion.

3. The more precise form of the question should be read – as it would by most people – as referring to a confession of guilt made by a client to the lawyer whose ethical obligations are under consideration. It does happen however (as the Dean Controversy demonstrates) that a lawyer might learn of a "confidential confession" of his or her client only indirectly, or (if his or her client is a lawyer) the client's confession might expose another person's "confidential confession". Those possibilities lurk beneath the surface of the question.

4. Some people might think that the scope of the question is limited by its assumption that a confession of guilt is made only after a charge of criminal conduct has been laid against the lawyer's client. That possibility might lead, tangentially, to a question whether a lawyer has any (and, if so, what) different ethical obligations – including,

for example, an obligation to report a crime to the police – if the recipient of a confidential confession before any charge is laid against the client. An ordinary citizen who conceals knowledge might, personally, be charged with an offence in some circumstances. Should a lawyer be in any different position? And, if not, how could that impact on the preparedness of a client to speak to a lawyer in confidence?

5. By inviting consideration of "what are, or should be, the ethical obligations" of a lawyer the question leaves open the character of a response to it. It might be descriptive, or critical of the law or ethics. As the serpent said in George Bernard Shaw's play *Back to Methuselah* in an effort to seduce Eve: "You see things; and say 'Why' But I dream things that never were; and I say 'Why Not'"[1].

6. Another important issue sleeping in the text of the question is whether, in the real world, a "confession of guilt" can be taken by anybody (let alone a lawyer) at face value. That invites a warning that, in forming an opinion on questions of law or ethics and much else besides, allowance must be made for uncertainty in identification of the facts upon which an opinion must be founded.

Confessions: Not all that Glitters is Gold

7. A salutary warning against taking a "confession" at face value might be found in historical experience of reactions to conviction for capital crimes. Was it contrition, heroics, bravado or mischief that regularly induced condemned men, in the shadow of the gallows, to "confess" to a multitude of unsolved capital offences, including crimes they could not possibly have committed? In the shadow of death, it was not uncommon for a "dead man walking" to make a "confession" intended to deflect blame from a friend still at liberty. Sometimes they sought to salve their consciences by attempting to vindicate the reputation of an innocent man already hung.[2] Is it never too late to say "sorry"?

[1] In 1968 Bobby Kennedy famously adapted this, during his fatal campaign for US Presidency, as, "Some men see things as they are and say 'Why?' I dream of things that never were and say 'Why not?'": Arthur M Schlesinger Jnr, *Robert Kennedy and His Times* (Boston, 1978) page 886 (Chapter 40, Part V).

[2] An example is the gallows confession of William Geary intended to clear the name of the late George Bowerman: *R v Geary* (1821) *Kercher Reports* (Macquarie University, Division of Law, "Decisions of the Superior Courts of NSW, 1788-1899", www.law.mq.edu.au/scnsw).

8. One gallows "confession" in early Australian history was the post-conviction confession of the flamboyant John Jenkins, hanged (with his accomplice, Thomas Tattersdale) in Sydney on Monday, 10 November 1834 for the murder of Dr Robert Wardell, one of the first barristers to practise as such in Australia and the co-founder (with his fellow barrister W C Wentworth) of *The Australian* newspaper. He "confessed" to protect a fellow bushranger. At the time of the crime to which he confessed he was in custody for the murder of Wardell.[3]

9. The trial of Jenkins and Tattersdale was conducted in the Supreme Court of NSW, by Chief Justice Francis Forbes and a jury, on Friday, 7 November 1834. One of Forbes' biographers, C H Currey, tells the story in these terms:

> *"His Honour… summed up with meticulous regard to the evidence, and the jury retired. Very shortly afterwards their foreman announced that they found both men guilty. The latter were then called upon to make any statements they wished in arrest of judgment [that is, to identify any legal reason why the then mandatory sentence of death should not be imposed upon them]. Jenkins at once loudly proclaimed that he had 'a great deal to say on the subject', and forthwith released a stream of invective, garnished with uncouth adjectives. Striking the rail of the dock with his fist, he declared, in conclusion, that if he had his gun he would shoot 'the whole bloody court'. Tattersdale, in much more subdued accents, begged for mercy….*
>
> *The Chief Justice sentenced them 'to be taken from gaol whence they came, and thence, on Monday morning, to the place of execution, there to be hung by the neck until dead, their bodies to be delivered to the surgeons for dissection'. Unabashed, Jenkins then said that he wished to disclose the circumstances of several robberies he had committed and so save innocent persons from prosecution. The Judge declined to hear him further, saying that the clergymen who would attend them to afford them religious instruction and consolation in their last moments were the only persons who could communicate with them on such matters…"*[4].

10. Come Monday, Jenkins mounted the scaffold, and submitted to his fate, as unrepentant as ever. That, however, is another story. The point for present purposes is that Jenkins had his own reasons for making a "confession"; the fact that he

[3] *R v Jenkins and Tattersdale* (1834) *Kercher Reports* (Macquarie University, Division of Law, "Decisions of the Superior Courts of NSW, 1788-1899") footnote 9.
[4] C H Currey, *Sir Francis Forbes* (Sydney, 1968), pages 468-469.

"confessed" to guilt did not make him guilty; and, with a reserve borne of disbelief, Forbes CJ left him to console his conscience in a religious setting. This points to the fact that not only lawyers hear "confessions" in confidence. Not only lawyers are bound, by their profession, to bear the burden of struggles of conscience and a guilty secret.

11. Closer to home for a lawyer, one might think, is the disconcerting possibility that, although a confession of fact might be both true and reliable evidence of moral guilt, it might, in law, be consistent with innocence of a crime charged. A person who kills another might be overcome with remorse, whether or not the law attaches "guilt" to the deed. A perfectly good defence of "self-defence" to a charge of murder might demand an acquittal in a court of law but attract condemnation from an unforgiving (or ignorant) community. A lawyer cannot assume that a "confession of guilt" is any such thing in the eyes of the law. It might have been made involuntarily: under compulsion or undue influence; under the influence of a delusion; under a mistaken view of the facts; or induced by a trick. It might be the "confession" of a crazy person. A lawyer must bring to his or her task legal knowledge and professional experience before acting upon a "confession of guilt" as any foundation at all for a verdict of "Guilty".

12. Particular care is required because, in the hands of a prosecutor, a "confession" is gold. Standing alone, without any supporting evidence, it might be capable of securing a conviction. Even if only a confession of "moral guilt", it could carry with it a "consciousness of guilt" upon which a skilful advocate might persuade a jury to infer guilt in the eyes of the law. Let everybody beware! "All that glitters is not gold"; not every "confession of guilt" must, on close consideration, bear that character.

Law, Morality and Ethics

13. The large, perennial questions of "law", "morality" and "ethics" that entertain humanity across generations, and inform the conduct of each generation, must make their way, case by case, with an unremitting examination of particular facts.

14. Minds might reasonably differ about the meaning of the expression "ethical obligations". That is probably as it should be, given the nature of the concept it

describes. It has a loose relationship with each of the concepts, "law" and "morality", neither of which philosophers have ever been able satisfactorily to define with precision. All three concepts have something to do with "right" and "wrong", but what that something is might differ in the minds of different people.

15. The least abstract of the concepts is probably "law" because, as a last resort, it can be defined as being whatever a court will, by orders giving effect to a judgment, enforce. That is not so much a definition as a description of its sphere of operation; but it is, perhaps, as practical a definition as can be had in everyday life.

16. The concept of "morality" operates at a higher plane of ideas. It focuses on the really big questions of right and wrong; "ultimate questions" such as the ultimate, "ultimate question" that many people phrase as, "What is the meaning of life"?

17. The realm of "ethics" is a step down from that. If "law" and "morality" define "ends", "ethics" defines honourable "means" to those ends. If "law" and "morality" mark a destination to which we must, or should travel, "ethics" speaks about road rules according to which we should travel. Ethical rules are practical guidelines about how to live a good life. Ethics brings to mind the concept of a standard against which "correct behaviour" might be judged, or a set of rules that provide practical guidance about what to do, or not to do, in order to act correctly. Ethical rules might, or might not, be "law" in the sense of something enforceable by a judgment or order of a court, but they are no less real for that. The closest they might come to being "law" is in disciplinary proceedings against a lawyer (or another professional person) for misconduct. If a lawyer seriously does the wrong thing, the courts might impose a fine or, by "disbarment" (removal of his or her name from the "Roll of Legal Practitioners" that they recognise as officers of the court), deny his or her right to act any further as a lawyer.

A Classic Discussion of "Legal Ethics"

18. It was in this context that the High Court of Australia made, for lawyers, a classic statement about "legal ethics" in a judgment published in the law reports as *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 199-201 (Volume 104 of the *Commonwealth Law Reports* at pages 199-201 of a judgment that commences at page

186). The word "ethics" was not used at all, but it was "ethics" that the Court was talking about:

> *The rules which govern the conduct of the members of a body of professional men [we would, these days, speak of 'men and women'], such as the Bar of New South Wales, may (though there is, of course, no logical dichotomy) be divided roughly into two classes. In the one class stand those rules which are mainly conventional in character. To say this is not to deny their importance from the point of view of the client. They are designed primarily to regulate the conduct of members of the profession in their relations with one another. Many of these rules are reduced to writing, and they are from time to time interpreted, and perhaps modified to fit specific cases, by resolutions of the governing body of the profession…A breach of any of these rules is treated seriously, but would not warrant disbarment – at least unless it was shown to be part of a deliberate and persistent system of conduct.*
>
> *Rules of the other class are not merely conventional in character. They are fundamental. They are, for the most part, not to be found in writing. It is not necessary that they should be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness. To the Bar in general it is more a matter of 'does not' than not. A barrister does not lie to a judge who relies on him for information. He does not deliberately misrepresent the law to…[a] court or to a lay tribunal…. He does not, in cross examination to credit [that is, cross examination relevant not to a fact in issue in the case, but to whether a witness should be believed], ask the witness if he has not been guilty of some evil conduct unless he has reliable information to warrant the suggestion which the question conveys.*

19. *Clyne* was a case in which the name of a barrister was removed from the Roll of Legal Practitioners (more particularly, in those days, the Roll of Barristers) because, in an opening statement of his client's case to a court, he made, without any supporting evidence, extravagant allegations (alleging fraud, perjury and blackmail) against an opponent. That was found to be "professional misconduct" or, we might say, a very serious breach of legal ethics.

YOU WOULDN'T TRUST A LAWYER WOULD YOU? BET YOUR LIFE ON IT

20. Few people would be surprised by the idea that they should be able to speak privately to a lawyer, to share a burden, to obtain advice about legal problems, and to do so in the belief that what might pass between them in secret will remain a secret. However much they might join in abstract criticism of lawyers in general, for most people the landscape looks different when they focus attention on their own personal problems and their own particular lawyer: "If I can't trust my lawyer, who can I trust?" Questions of trust are important.

21. Lawyers serve the public as officers of the courts and, as such, as intermediaries (middlemen) between individuals and the State. By virtue of their profession, they owe duties of good faith (honesty) to their clients, to the courts and to the public. They are constrained by ethical rules that are enforceable by the courts.

22. A lawyer's client is entitled, within limits defined by the law, to insist that confidential communications between lawyer and client remain confidential. That entitlement is governed by the law of "legal professional privilege". Confidential communications protected from disclosure are said to be "privileged" against demands for compulsory disclosure. A person who refuses to disclose privileged information is immune from prosecution. If prosecuted for non-disclosure of the information, the status of the information as "privileged" provides a defence. A lawyer who discloses privileged information without his or her client's consent is liable to be disciplined for professional misconduct.

23. The basic legal principles that lawyers call "the law of legal professional privilege" are essentially commonsense, ethical rules about reconciliation of conscience and competing duties – about honesty and trust – viewed from different perspectives: the perspective of a client, who has a secret and wants it kept; the perspective of a lawyer, who has to reconcile a duty to the client to keep a secret and, as an officer of the courts, a duty to serve the law; the perspective of third parties, or the community at large, in whose interests it might be to expose a secret; and the perspective of courts, whose duty it is to apply the law to particular facts, to uphold standards of conduct and to resolve disputes.

24. This can more readily be seen if, instead of speaking as lawyers do about "confidential legal advice", "privileged communications" or "privileged information", problems

about the law of privilege are discussed in terms of "secrets": whether a secret told to a lawyer should be a secret kept, and why. Instead of speaking about the "rationale of legal professional privilege" we might more simply speak of the "reason" why legal advice, communications or information should be kept a secret. Questions about "legal professional privilege" are not questions that concern lawyers alone or that can be debated only by lawyers. They are questions that anybody, and everybody, can discuss. They are, at heart, questions about ethics.

HISTORICAL EXAMPLES IDENTIFIED

25. Two episodes in Australia's legal history provide an opportunity to explore that truth. The first relates to events in Sydney in 1895: when a popular local identity, George Dean, was prosecuted for the attempted murder of his young wife shortly after the birth of their child. Dean was convicted at trial and sentenced to hang. His solicitor, R D Meagher, campaigned for a Royal Commission and, by that campaign, secured a pardon on the basis (known by him to be false) that Dean was an innocent man. The two men came unstuck because Meagher, believing that their "guilty secret" was protected by privilege, revealed it to his own legal adviser, Sir Julian Salomons QC. An extraordinary saga by which the truth unfolded in public was played out in the NSW Parliament because, exceptionally, most of the lawyers involved were members of Parliament. They shared their agonies of conscience in parliamentary debates. When that was done, in a series of cases in 1896 the Full Court of the Supreme Court of NSW laid down the law. In the early stages of a long and controversial political career, Richard Meagher was struck off the Roll of Solicitors.

26. The second episode relates to events in the Northern Territory in 1932-1934, and in the High Court of Australia sitting in Melbourne in 1934. An Aboriginal warrior by the name of Tuckiar (Dhakiyarr Wirrpanda) was unfairly convicted in the Territory and sentenced to hang for the murder of a policeman. He was released on appeal to the High Court, but condemned by his success and the dark hand of fate to disappear. His disappearance, and presumed murder, tragically highlighted indiscretions and incompetence of his Defence Counsel at trial. A confidential confession of guilt was, in breach of an entitlement to privilege, publicly disclosed. A defence of self-defence (a complete answer to the charge of murder), entirely consistent with the alleged confession and evidence adduced at trial, was not brought home to the jury. By his

conduct of Tuckiar's defence, and by a public statement made in court after Tuckiar's conviction, Counsel conveyed to the public his belief in the guilt of his client. Who can say that public knowledge of the belief of Tuckiar's own barrister that he was guilty – a confessed murderer no less – was not a cause of Tuckiar's death? In every age lurks a volatile minority (self-styled "vigilantes") prepared to take the law into their own hands if and when, according to their lights, the courts fail to do justice.

27. Each of these stories has at its heart ethical struggles with conscience, questions of trust, and concerns about the limits of a guilty secret.

CHRONOLOGIES DEPICT SELECTION AND SEQUENCE OF FACTS DEEMED TO BE RELEVANT

28. The essential steps by which those struggles unfolded are set out in the "Chronologies" appended to this Background Paper. In each Chronology the specific focus is on those essential steps.

29. Both cases lend themselves to larger stories if a broader focus is taken. That is why the Dean Controversy takes its place in Cyril Pearl's *Wild Men of Sydney* (first published in 1958), a classic tale of corruption, politics and law in the decades before and after 1900. It is also why Tuckiar's Case is an important chapter in many books since written on Aboriginal affairs, and is worthy of a book or two in its own right.

30. Broader perspectives than those adopted in the Chronologies might be used, according to taste and inclination, to colour any picture of the ethical questions which arose in the Dean Controversy or Tuckiar's Case.

31. Three illustrations of this reinforce the point. The first involves the selection of facts about a particular case. The second involves the selection of a general policy issue affecting the particular case. The third involves the selection of facts about historical context.

32. The first illustration: On one view of "the facts" of the Dean Controversy and Tuckiar's Case, for example, it should not matter to any assessment of the "rights" and "wrongs" of anybody's conduct that both men were illiterate. The confidential character of a communication should be respected whether or not a client is able to

read. Nevertheless, it is difficult to overlook entirely the fact of a client's illiteracy because it colours our assessment of his or her vulnerability; helps to explain how he or she might have fallen into difficulties; and aggravates any moral culpability associated with an adviser's breach of an obligation of confidentiality. Our assessment of right and wrong can depend on our perception of "the facts" upon which an opinion must be formed or is stated: what we see or choose to see; what we identify as relevant or emphasise as important; and how we define our "questions" and frame our "answers".

33. The second illustration: Any assessment of the "rights" and "wrongs" of the Dean Controversy and Tuckiar's Case is likely to be affected by core attitudes to the question whether, as a matter of general policy, capital punishment is right or wrong. Dean's solicitor, Meagher, saw himself as a crusader fighting to save a man from the gallows; Salomons QC thought that Dean deserved to hang, in accordance with the law of the day. Tuckiar was sentenced to hang: was that the fate of a warrior (bound to live and die by the brutality of war), was it a cruel fate for a man innocent of any wrongdoing, or is "judicial murder" wrong in all cases?

34. The third illustration: For some people, the Dean Controversy becomes more interesting if placed in its historical context. What was happening in Australia had parallels or analogies elsewhere. As Dean transfixed the Australian public, Oscar Wilde was coming undone in a series of English court cases arising from his foolish decision to commence proceedings (for defamation) based on a lie.[5] Dean came undone in much the same way, without commencing any proceedings, when he retained Salomons QC to advise him about his prospects of success in a proposed defamation action. He proposed suing a newspaper for defamation, harbouring the guilty secret about Dean that led to his downfall in the hands of Salomons. And while this was happening, in France Alfred Dreyfus was beginning his decade-long fight against a wrongful conviction for treason at the hands of a corrupt military tribunal.[6]

[5] H Montgomery-Hyde (Ed), *The Trials of Oscar Wilde* (London, 1948), published as a volume in the *Notable British Trials* series.

[6] *Emile Zola, The Dreyfus Affair* (Yale, 1996), edited by Elaine Pages; Justice Michael Kirby, "The Dreyfus Case a Century On – Ten Lessons for Ireland and Australia" (2006), published on the website of the High Court of Australia: www.highcourt.gov.au (Publications/Speeches).

35. In the law, as in life, experience teaches (against logic alone) that the shortest distance between two points is not necessarily a straight line. A timely digression can serve a purpose – to lend memorable colour to a debatable point or to distract attention from an inconvenient fact – but its value to an argument depends upon whether it serves the story-teller's purpose. In the law, a hallmark characteristic of an advocate is an ability to have a purpose and, through any digression, to sustain pursuit of that purpose.

36. So it is with an essayist responding to a set question. At the end of day, the focus of attention in this year's Australian Legal History Essay Competition must be on the topic of "honesty, legal ethics and the limits of a guilty secret" in particular cases.

JUSTIFICATION MAY BE FOUND IN A "HIGHER" MORAL PURPOSE

37. One feature of the struggles of conscience epitomised by the Dean and Tuckiar cases is worthy of particular mention because it demonstrates a tendency of human thought. People who feel the pull of an obligation of confidentiality, but want or need to justify steps taken, or contemplated, in defiance of any subsisting obligation tend to look for a higher moral ground to occupy. They do not always simply deny the existence or legitimacy of an obligation of confidence – although they certainly often do that. They tend to suggest that they are morally bound to expose a secret. Sometimes the language used changes from talk of things said "in confidence" to talk of "secrets". Subtleties of language can expose the course of hidden thoughts. In the Dean Controversy, Sir Julian Salomons found his higher moral purpose in vindication of the reputations of Dean's much maligned wife and mother in law. In Tuckiar's Case, Defence Counsel found his in vindication of the posthumous reputation of "the murder victim", Constable McColl and, by extension, the forces of "law and order".

38. The two cases demonstrate, however, that not everybody is persuaded by this sort of appeal to the high ground. The judges who found that the solicitor Meagher had been guilty of professional misconduct, and ordered that his name be removed from the Roll of Legal Practitioners (or, more particularly, the Roll of Solicitors) were. The judges who allowed Tuckiar's appeal against an unjust conviction procured, *inter alia,* by the unsatisfactory professional conduct of his Defence Counsel were not.

39. In disciplining Meagher the Full Court of the Supreme Court of NSW published Reasons for Judgment in which Chief Justice Darley wrote this, very much in support of the reasoning of Sir Julian Salomons as he exposed the "guilty secrets" of Dean and Meagher:

> *"Did [Meagher] consider what he was doing in procuring the release of Dean? Did he not see that by doing so he was charging Dean's wife and her mother with a crime equally atrocious as that committed by Dean – a foul conspiracy to bring about the conviction and execution of Dean. His whole conduct had been to bring upon the innocent contumely, which now, thank God, rests upon Dean…. What would he have done if the mother and daughter had been arrested on a charge of conspiracy?"*[7]

40. In Tuckiar's Case the leading judgment of the High Court of Australia contained the following passage in a discussion about irregularities in the conduct of Tuckiar's trial:

> *…[Although] the evidence of McColl's good character and moral tendencies was not objected to [by Dean's Counsel at trial], it clearly should have been disallowed. The purpose of the trial was not to vindicate the deceased constable, but to inquire into the guilt of the living Aboriginal. Before he could be found guilty it was necessary that by admissible evidence the jury should be finally satisfied to the exclusion of reasonable doubt that he had killed Constable McColl in circumstances which amounted to murder. By leading evidence that the prisoner told a story that he killed the Deceased in circumstances supporting a plea of self-defence and involving a reflection upon the moral conduct of the dead man, the prosecution could not make relevant the latter's reputation and moral tendencies. The prisoner should not have been exposed to the danger of the jury's regarding the matter as a dilemma between an imputation on the dead and the conviction of the Aboriginal…."*[8]

41. To some minds these two different approaches might seem fundamentally inconsistent. To others, they might not. The resolution of any conflict between them requires that attention be given to the nature of the proceedings before each court, and the object or purpose of those proceedings. What was the Court's focus in each case? What were the judges trying to do? What was the question they were required to answer? The Supreme Court's focus was on whether a solicitor should be

[7] *In Re Meagher* (1896) 17 NSWLR 157 at 165.
[8] *Tuckiar v The King* (1934) 52 CLR 335 at 345.

disciplined for misconduct. The High Court's focus was on whether a man's conviction for murder was unjustly obtained. Context is important.

BEWARE THE "HIGHER MORAL PURPOSE" THAT BLINDS AS WELL AS ILLUMINATES

42. Such is the complexity of life, that the light we shine on one "right" or "wrong" can sometimes blind us to another. Try as we might to avoid that, we still stumble in the dark.

43. An illustration of this phenomenon can be drawn from each of the Dean Controversy and Tuckiar's Case.

44. For all the light shone on the wrongful conduct of Dean and Meagher, nobody at the time seems to have been much concerned about the fact that Meagher tricked Dean into making a confession of the crime of attempted murder, that Salomons tricked Meagher into a confession of professional misconduct, or that Dean's "Defence Committee" forced him (without the independent legal advice that modern lawyers might regard as essential to fair play) into signing a Petition to Parliament (which was treated by Salomons as a waiver of privilege) and to a public confession of perjury. Not every conscience is tender in the same spot. In their search for "truth" did the authorities blind themselves to fair play in dealing with Dean (and, to a lesser extent, Meagher)?

45. In Tuckiar's Case the light shone by the authorities on their perceived need to vindicate "law and order" blinded them to an injustice that Tuckiar could reasonably have characterised as "a trick". He (and other members of his Aboriginal community) travelled to Darwin voluntarily, at the urging of a civilian "Peace Expedition", to discuss means by which frontier conflict could be avoided. When they got there the police, with the support of the "law and order lobby" and public agitation, immediately threw them into prison on charges of murder. Institutions, no less than individuals, can be affected by moral blindness. Decisions made by an Institution are nonetheless decisions made by individuals (in the name of their Institution).

46. Society needs to be eternally vigilant against the possibility that we might be blinded by our own light and, overcome by one revelation of truth, rendered blind to another.

ISSUES IN HISTORICAL EXAMPLES

47. The cases of Dean and Tuckiar both illustrate the tragic consequences that might follow upon steps taken, or not taken, in dealing with confidential information about the legality of conduct, legal rights and legal obligations.

48. The Dean Controversy is an illustration of a succession of debatable points: Whether, on the facts of the case, a client's entitlement to legal professional privilege, and a lawyer's related professional obligations of confidentiality, did, and should have been found to, exist; Whether, on the facts of the case, any entitlements to privilege and any professional obligations of confidentiality, were, and should be found to have been, lost by a "waiver" or "release" of rights by the client entitled to claim privilege; and Whether, on the facts of the case, loss of the confidential character of privileged information (eg, by publication of it in parliament) did destroy, and should be found to have destroyed, any entitlements to privilege and any associated professional obligations of confidentiality.

49. Tuckiar's Case contains an authoritative affirmation of the duty of an advocate to do his or her best for a client consistently with obligations of confidentiality to the client and an obligation not to mislead the court. This duty is not always easily performed. That is, perhaps, one reason why lawyers sometimes take refuge in an emphasis on the evidence adduced at trial, rather than slippery questions of abstract truth. They remind themselves, and the world, that courts can, and must, make difficult decisions "on the evidence", not on speculation about unproven facts. That sometimes leaves lawyers open to charges of dishonesty based upon non-disclosure of privileged information which, if disclosed to the court, would paint a picture quite different from the one presented to the court. Such a charge might be quite unfair, but it does highlight the need for lawyers to be very careful not to mislead the court, not to advance a case which they know to be false. A lot can hang on the difference between a submission that "the Accused must be found not guilty because the prosecution has failed to adduce evidence necessary to establish guilt" and a submission that "the Accused must be found not guilty because he is, in truth,

innocent". A lawyer who makes a submission of the latter kind treads upon dangerous ground, and misunderstands the lawyer's function.

AN EXPLANATION OF THE MODERN LAW OF LEGAL PROFESSIONAL PRIVILEGE[9]

50. An understanding of the ethical issues raised by the Dean and Tuckiar controversies can be assisted by a general understanding of themes that underpin the law of legal professional privilege in modern day Australia. That is not to say that a lawyer would have thought, or spoken, in precisely the same terms in 1895-1896 or 1934 as today. Principles of law evolve, case by case. However, just as the Dean and Tuckiar cases helped to form the views lawyers hold today, so might the mindset of current day lawyers inform their search for meaning in the controversies of yesteryear. This process is, itself, part of the fascination of any study of history. Lessons about life emerge from contrasts between past and present.

51. Throughout their history Australian Courts have traditionally accepted that the proper administration of justice, in the interests of the whole community, is generally assisted by each person being entitled to communicate freely with a legal adviser without fear that what is communicated might be disclosed, without permission, to others. That is the *raison detre* (the reason for existence) of the law of legal professional privilege.

52. For that reason the law, as laid down by the courts, has developed four distinctive features. First, it has respected the right of a person to object, without penalty, to a demand (for example, by a government, a competitor or by the courts themselves) that confidential legal advice be disclosed. Second, where an objection has been taken in court proceedings it has required the courts to draw no inferences (that is, to make no decisions) against the objector based only on the fact that an objection has been

[9] This thematic explanation of the law of privilege is complete as far as it goes, but it is not exhaustive. It does not, for example, deal with the status of communications between a lawyer and client for purposes that are mixed; some legal, some not. In *Grant v Downs* (1976) 135 CLR 674 the High Court of Australia held that privilege attaches to a communication if it is for "the sole purpose" of seeking or obtaining legal advice. In *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 the Court overruled *Grant v Downs*, and held that it is enough to attract privilege if the "dominant purpose" of a communication is the seeking or obtaining of legal advice. This is an example of how the law can change from time to time to meet contemporary demands of the justice system. The whole law of privilege was referred to the Australian Law Reform Commission for report in November 2006. The final report (numbered ALRC 107 of 2007), dated 21 December 2007, found general support for maintaining privilege as a fundamental right of clients which should only be abrogated or modified by legislation in exceptional circumstances. The Commission's deliberations can be followed on its website: www.alrc.gov.au

taken.[10] Third, it has recognized the right of a client to enforce the confidentiality of legal advice by obtaining a court order (an injunction) to restrain (prevent) inequitable (unfair) disclosures of the advice. Fourth, it has imposed upon each lawyer a professional obligation (breach of which might result in disciplinary proceedings against a defaulting lawyer) to keep confidential legal advice confidential.

53. A communication between a lawyer and his or her client which is protected from disclosure in this way is said to be "protected" by "legal professional privilege" or "client legal privilege". Its confidentiality is privileged against otherwise compulsory demands for disclosure.

54. The High Court of Australia has described the right to claim the benefit of legal professional privilege as an important "civil right".[11] In an era in which many commentators call for the rights of citizens to be protected by a constitutional "Bill of Rights" or a statutory "Charter of Rights", care needs to be taken to ensure that this important "civil right", developed by the courts as a principle of the common law of Australia, is not lightly taken away or diminished by regulatory legislation.

55. The touchstone of the right to claim the benefit of legal professional privilege lies in the public interest purpose it serves: facilitation of the proper administration of justice by allowing a person to communicate freely with a lawyer, for the purpose of seeking or obtaining legal advice, without fear that what is communicated might be, without the person's consent, disclosed to others. The existence and maintenance of an entitlement to privilege is governed by that purpose. It defines the circumstances in which a claim to privilege can be upheld by a court.

56. This can be illustrated by two examples of claims to privilege that must wholly fail because, although a communication might have been confidential, it was outside the purpose served by the law of privilege. First, the fact that a person met with his or her lawyer to seek or obtain confidential legal advice is not generally itself privileged, even if the advice sought or obtained is. The law protects confidential

[10] This does not mean that a party who, by taking an objection, declines to give evidence on a topic will not, by a refusal to give evidence, leave unexplained doubts that require an explanation if that party is to win a case, or allow inferences to be drawn from other evidence: P W Young, "Practical Evidence – Taking the Fifth" (1991) 65 ALJ 412 (Vol 65 of the *Australian Law Journal*, published in 1991, commencing at page 412 of the volume).
[11] In *Baker v Campbell* (1983) 153 CLR 52 at 111-116 and 118-120 Sir William Deane (Deane J) reviewed the history of legal professional privilege in this context.

communications between lawyer and client, not the fact that they meet or communications unrelated to the seeking or receiving of legal advice. Not everything said to or by a lawyer is privileged. Second, the courts do not acknowledge the existence of any right to privilege in a communication (however confidential) between lawyer and client for furtherance of an improper purpose such as the commission of a crime.[12] It is one thing (and quite acceptable to the law) to seek advice about whether particular conduct is or was criminal, or about how to defend a criminal prosecution. It is quite another (and not acceptable) to seek advice about how to commit a crime.

57. The purposive nature of the law of legal professional privilege can also be illustrated by two examples of circumstances in which an entitlement to privilege will be lost. First, as the law protects confidential communications, an entitlement to claim privilege will be lost if a communication ceases to be confidential. This could happen against the wishes of both lawyer and client if, for example, what has passed between them is fully reported in Parliament or the media. Once information is in the public domain, confidentiality is lost and, with it, any entitlement to privilege. Second, a person entitled to privilege might lose it if he or she agrees to disclosure of privileged information or if (by selectively publishing some of privileged information or by using it publicly to attack somebody, such as a lawyer, disabled from mounting a defence while bound by an obligation of confidentiality) he or she acts in a manner inconsistent with the underlying purpose served by the law.[13] In these circumstances a court will not uphold a claim to privilege if it would be unfair to do so.

58. The law of privilege represents a policy choice made by those responsible for administration of the law, balancing (on the one hand) the ability of the State to attempt to compel an individual to disclose everything relevant to a question of interest and (on the other hand) the freedom of individuals to take advice and to plan their affairs without undue interference from others.

59. It is generally the province of the courts to decide the content and limits of the law of privilege. However, the courts do not have a monopoly of lawmaking in this area. Although the general contours of the law have been developed by judges adjudicating

[12] *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382; *Attorney General (Northern Territory) v Kearney* (1985) 158 CLR 500; *Commissioner of Australian Federal Police v Propend Finance Ltd* (1997) 188 CLR 501.
[13] *Mann v Carnell* (1999) 201 CLR 1 at 13.

individual cases over many years, parliaments have developed an increasingly critical role in defining the law. In recent years, legislation enacted by parliaments throughout Australia has limited the circumstances in which privilege can be claimed. This has been done, for example, to assist investigations into insolvent companies. Sometimes legislation abolishes a right to claim privilege in defined circumstances. At other times, it modifies it by demanding that questions be answered despite an objection taken on the ground of privilege, but limiting the use that can be made (for example, in a criminal prosecution) of evidence obtained over objection. In all of these cases, policymakers must strike a balance between an individual's right to confidentiality and the rights of others to uncover the secret or to discover the truth.

60. A close examination of the rationale ("reason for"), and the practical operation, of the law of privilege reveals the central importance of the concept of "trust". The law recognizes that the administration of justice is generally assisted by people having an opportunity to talk things over, on the quiet, with someone they trust. With someone, moreover, who is trusted by the courts and others responsible for administration of the law. A lawyer is a person who, by study and experience, has knowledge of the law and who is held out by the courts as a "fit and proper" person to be "an officer of the court". A lawyer is a person trusted by both sides to stand between individuals and the State. A lawyer, by definition, must be an honest broker between the two or forfeit the status of a lawyer. A lawyer who abuses his or her status by seeking to commit a crime under cover of privileged communication is unlikely, in any age, to retain the status of lawyer.

A LAYMAN'S VIEW OF LEGAL PROFESSIONAL PRIVILEGE

61. Mysteries associated with the law spring, sometimes, from an apprehension that legal principles are complex and, at other times, from the difficulty of applying legal principles to facts.

62. Much of the mystery surrounding the law of legal professional privilege stems more from the difficulty of applying principles to facts than from the definition of legal principles.

63. In everyday life every person over the age of understanding, sometime or another, has sought or given "advice" on a "confidential" basis.

64. "Advice" is simply guidance – a helpful word, a helping hand – about what to do or not to do about a problem. Advice can be sought about a small problem or a big one. Advice might be about relationships; for example, how to deal with the love of our life or someone hassling us. It might be about property; something that we own or want to own; how can we arrange our lives to keep or to get that something? It might be something we have done wrong or an accusation of wrongdoing; should we say sorry, what do we need to do to stay out of trouble, to minimise damage or to cut losses? It might be about anything really. Life is full of things we need to think about carefully; problems best solved by sharing with a friend or, at least, someone we trust; someone we can rely on to help us without blabbing about it; someone who can keep a secret.

65. "Secrecy" and "confidentiality" are closely related ideas. To keep something "confidential" is to keep it a secret. When asking for advice on a confidential basis we might begin our request by asking our chosen adviser, "Can I trust you to keep a secret?" For his or her part, an adviser might provide us with an assurance, a promise: "You can trust me to keep your secret". In each case what is important is that the person whose secret it is – let's call him or her (or us) the "client" – can rely upon (that is, trust) the adviser to keep the secret as something special between the two of them. The client might decide to tell others about it. It is his or her secret, after all. But an adviser who learns of something as a secret ("in confidence") must keep it so ("confidential") while ever it remains a secret.

66. The word "confidential" comes from the Latin "con" (together) and "fides" (faith). Its Latin roots suggests that the word "confidential" means "together faithful". That is an idea worth exploring.

67. So far we have looked at the word "confidential" only from the point of view of a person <u>seeking</u> advice, the client. The idea that confidentiality suggests "together faithful" invites us to look also at the viewpoint of a person <u>giving</u> advice on a confidential basis, the adviser.

68. One way of adopting the perspective of an adviser is to examine limitations on the "right" of a client to insist that his or her adviser maintain a secret. To adopt that approach is to recognise an important idea: in a free society (not only in our country as a whole, but in our homes, schools and clubs) there <u>are</u> limits on secrecy. We mostly

accept that everybody is entitled to have some secrets; but, if the point is pressed, we generally favour openness. If secrecy is to be maintained it has to be justified by a reason. "What is the purpose of maintaining secrecy?", we might ask. In the give and take of everyday life we generally accept that "little secrets" are part and parcel of ordinary living. The purpose they serve is simply to allow people space to enjoy a measure of privacy, which we all value. For that reason alone they are tolerated. If someone answers a question of no particular importance by a refusal to answer "because that's my secret", we generally do not make an issue of the refusal. It is only if the business at hand is important that we make an issue of a refusal. It is at that point that we might press for a reason for respecting a claim to secrecy. The acceptability or otherwise of that reason will decide whether or not we make a fuss about maintenance of the secret.

69. On reflection, it seems, the limits of a "right" to secrecy are defined by our preparedness to accept that there is a good reason for respecting a claim to secrecy, for acknowledging that secrecy serves an acceptable purpose.

70. So it is with the respect we allow to the "confidentiality" of advice sought or given on a "confidential" basis. If a person tells or learns of a secret for the purpose of seeking or giving confidential advice, we may respect a claim of confidentiality (secrecy) because we acknowledge the desirability of allowing people to share a secret for the purpose of obtaining or giving advice.

71. In a number of ways, that purpose defines the limits of confidentiality. Before we explore them we should notice a subtle shift in the picture being painted. We started by looking at life from the perspective of a "client". We moved, then, to adopt the perspective of an "adviser". In making that move we stumbled upon the idea that the concept of "secrecy" might be measured against the "acceptability" or otherwise of the purpose it serves. Who determines acceptability? It is unlikely to be a client and adviser alone. They don't exist in a vacuum. Nor does the secret. That is the clue. A secret is not a secret if it is not kept from somebody; somebody who wants to know what it is. Let's call that person "the Inquisitor". That title sounds ominous, but it makes a point. It does not have to be anybody nasty, just someone who wants to know the secret and, so, inquires what it is and insists on an answer. It might be a busybody or somebody with good reason for wanting to know whatever is withheld as

a secret. It might be someone who wants to help, or to harm, another. It might be a friend or foe. It might be anybody. The point is that there is someone who asks a question – a question that gets a refusal to answer based upon a claim to secrecy – and someone challenges the claim of secrecy. So the concept of "confidential advice" may involve three people: Client, Adviser and Inquisitor.

72. The old adage that "two's company, three's a crowd" applies here as well as elsewhere. It only takes two to get into a fight, but three parties pulling in different directions make a fight more likely. So it is with a dispute about the confidentiality or otherwise of a secret.

73. A client and his or her adviser might be able to work things out between themselves, although their interests are different. The client "owns" the secret. The adviser, as someone who merely shares the secret with the client, is likely in most cases to be more disinterested about it. He or she, mostly, just wants to do the right thing, whatever that might be. In the absence of a third party Inquisitor, what is "the right thing" for the adviser is, in most cases, clear enough. It is the client's secret. The adviser is honour bound to keep it a secret.

74. Things might change if the client lets all the world know what it is, or if the client attempts to use the secret against the adviser by making false claims about the adviser's role in it. If the whole world knows the "secret" it is no longer a secret. If a client attacks his or her adviser in the belief that, bound by continuing obligations of confidentiality, the adviser will be unable to mount a defence, common justice suggests that the adviser should be freed from any obligation to the extent necessary to defend against attack. In either of those situations most people might generally think that the adviser should, in fairness, be released from any obligation to keep quiet. However, unless something like that happens, good manners and fair play require the secret to be kept for the benefit of the client.

75. Introduction of an Inquisitor's demand for disclosure of the secret complicates the picture, especially if the Inquisitor is somebody who the client and the adviser are bound to respect. Take a policeman or a doctor for example. Assume that, as Inquisitors, they are not acting simply as busybodies, but they are trying to perform a public duty by tracking down a sick person who has become lost, or by doing

something good for the community as a whole. That sort of thing does happen. Not every demand for the disclosure of a secret is a demand by somebody who wants to do harm to the client, an adviser or somebody else. Not everybody who refuses to disclose a secret is motivated by a fear of being done harm. Sometimes people just have different ideas about what should be done, and they want to be left alone to do it their way.

76. The minute we think about the existence of a dispute – whether it is between friends or foes, people of goodwill or otherwise – other things come to mind if we live in a peace-loving, law-abiding environment. Of course, not everybody does live in a place like that. Some people live in a world torn by war or in a society where people are intimidated by mob rule, or by thugs of one description or another. That is never to be forgotten. For the moment, however, let's assume that we live in a well-intentioned, orderly setting. In that case, it is more likely than not we will tend to believe that any dispute should be decided peacefully, and fairly, by a neutral referee, an umpire or a judge. Depending on context, we give these sorts of people different names. Whatever they are called, their job descriptions are very similar. We trust them to weigh everything in the balance, and to make an honest, fair-minded decision. Because we trust them, we accept their decision and everybody is able to get on with life. For the sake of convenience only, let's call this trusted person "the Judge".

77. He or she "judges" between competing arguments. But how is this to be done? In the sort of society we have here assumed to exist, the game must be played according to "rules" which are known to, and accepted by, everybody. That is another thing the existence of a dispute brings to mind.

78. Who, then, makes the "rules"? Like most things, the answer to that question depends upon the context in which it is asked. At the end of the day, however, the rules of any society (any game, really) are made by or on behalf of the community comprising the society – the people playing the "game" of everyday life. And, mostly, the way they go about making the rules is to try to work out, in a commonsense way, a fair way of operating; to promote the welfare of the community as a whole, and fair-dealing between each member of the community, weighing up the pros and cons of what has been done in the past and what is generally accepted should be done in the future. A "rule-maker" might be the same person as the Judge, or it might somebody else. In a

family situation, even if one person takes on the role of the judge there is usually some agreement between everybody about the rules to be applied by the Judge. In that context the family, taken as a whole and perhaps sorting things out over the dinner table, is the rule maker.

79. Taking all this on board, we return to the question of "confidential advice". If there is a dispute about whether or not it should be kept a secret, and that dispute cannot be worked out by agreement, it might be left to a judge to decide, applying commonsense rules accepted by the disputants.

80. What will be accepted, and applied, as the rules governing such a dispute will ultimately depend upon fundamental ideas about standards of behaviour and ethical duties owed between members of society.

81. So it is with disputes about confidential <u>legal</u> advice. Rule-makers (judges and parliaments) have decided that justice might best be done to the community as a whole if individuals (clients) are able to speak freely to an adviser (a lawyer) trusted by everybody. This assessment of how the world works is, at least in part, affected by the fact that the subject matter of "confidential advice" in this context is "legal" rights and obligations. That lies at the very centre of the business of the courts. They are charged with the responsibility of determining whether "legal rights" and "legal obligations" do, or do not, exist. They are likely to be assisted in their discharge of that responsibility if parties who appear before them to argue the pros and cons of a case are themselves able, outside Court, to argue the pros and cons of controversial questions in private, and without fear that every loose comment might be misconstrued in public as a fatal admission.

82. There might be some cases in which that does not work out, but we intuitively suspect (we have a gut feeling) that it must, and does, work out in most cases. After all, "honesty is the best policy" and the policy of the law is to promote honesty between lawyer and client, between each of them and the court, and throughout society as a whole. People are most likely to tell the truth – we might well believe – if they are not forced to live a lie. The law of legal professional privilege is designed to allow people space to collect their thoughts in private. Without that space people might be driven to desperation and, from desperation, to crime or other anti-social behaviour.

With a little space – we hope – they might be encouraged towards moderation in all their thoughts, words and deeds; they might see, more readily, that they have a personal interest (a stake) in everybody demonstrating respect for law and order. The purpose of the law in allowing "secrecy within defined limits" is to promote honest, informed decision-making so far as possible. The purpose of the rule-makers in allowing some secrets to remain a secret is to promote the smooth and fair operation of the justice system. If the machinery of the justice system is allowed to operate smoothly and fairly, there is a better than even chance that justice will more readily be done.

83. Of course, "all things in moderation" is a motto that even lawyers sometimes live by. The law and its proper operation need to be guarded against abuse. Society cannot allow the idealism of "the rule of law" to be frustrated by people (lawyers or lay people) committing crimes or acting unethically, or by lawyers acting incompetently. So, if a client and his or her lawyer conspire against the legal system by planning in secret to commit a crime, they can hardly expect responsible people to acquiesce in their claims of confidentiality (to sit idly by, no questions asked about this guilty secret). And if a lawyer does, through negligence, breach a client's legitimate claim to confidentiality, few people would expect the lawyer to be above criticism or, in an appropriate case, legal consequences.

84. These are the sorts of problems that might have to be grappled with by anybody, and everybody, who engages with the legal system. We all have an interest in how they are resolved. We can all learn by example.

HISTORICAL EXAMPLES: LIVING ON THE EDGE OF KEEPING A SECRET

85. The course of events in each of the Dean and Tuckiar controversies demonstrates that the conduct of individual lawyers – how they resolve crises of conscience – can profoundly affect the fates of people who trust them with their secrets, and community perceptions of justice. What individuals do, or fail to do, can profoundly affect others.

86. Because the Dean and Tuckiar controversies unfolded in a very public way, the struggles with conscience experienced by individual lawyers were exposed for public debate. That rarely happens in so dramatic a fashion. Few cases are played out in

parliamentary debates or in the highest courts. That does not mean that other cases are less important to the people affected by them. The pain of injustice suffered by any person is like pain of any type, very personal.

87. The law of professional privilege and the ethical considerations that go hand in hand with it apply in all cases, big or small. Nobody can escape the dilemmas they address. Anybody who imagines otherwise could get a rude shock. Ultimately, if brought before a court, such a person is likely to find the laws of the land applied without fear or favour. Moral laws operate with no less rigour. The court of public opinion can impose a moral judgment more harsh than any court of law might impose. An individual's remorse for a lapse of judgment can be harsher still.

88. The controversies whipped up by the Dean and Tuckiar Cases involved a lot of politics. In the Dean Case, it was pure politics. Although the "party system" of politics we know today did not emerge for another decade, politicians still scrambled for advantage; parliamentarians still formed "government" and "opposition" ranks; and newspapers still made hay by talking things up, and coming down hard, to sell a few papers. The legal community was, by today's standards, small. Prominent, practising lawyers not uncommonly sat in parliament. There they acted according to roles assigned to them. Sometimes, not quite sure whether they were lawyers or politicians, they courted public favour by promotion of themselves as lawyers. The idea that self-effacing humility becomes a lawyer was not universally accepted. The solicitor Meagher never really grasped that point. In 1895 his failure to do so brought him down, and his client Dean. Others suffered collateral damage, including the very upright Sir Julian Salomons QC, whose integrity and mental stability were challenged and, for a time, ridiculed by Meagher and his senior partner, Crick.

89. The politics of the Tuckiar Case were more "social" or "cultural" than "parliamentary" in character. The fact that Tuckiar was brought in from a remote Aboriginal community by a "Peace Expedition" lends weight to descriptions of Tuckiar as a "warrior". To speak of a "war" between Aborigines and other Australians might be too strong a use of language, but it is not without foundation. Some sections of the general community dealt unfairly with their Aboriginal compatriots. That is one dimension of the case. There was a clash of cultures and, it might be said, a clash of expectations and perceptions about justice, law and order. Overtones of racial

discrimination were undoubtedly present, but "blacks" and "whites" were active in both the prosecution and defence of Tuckiar.

90. Although he was convicted of the murder of a policeman, the very day before that conviction he and a mate were acquitted of the murder of a drifter, a white man who had provoked a fight. Perhaps, when all is said and done, the political controversy surrounding Tuckiar's conviction had at its core all the force of perennial disputes about "law and order" and the practical dilemmas of "community policing".

91. That Tuckiar had killed a policeman was public knowledge before his trial for the policeman's murder. He had, however, to be tried according to law, on evidence adduced at trial. In the eyes of the law, evidence of guilt was required. If found to have acted in self-defence he would have been acquitted. That defence had stood him in good stead against the drifter. His plea of "not guilty" required the prosecution to prove its case against him. The Crown Prosecutor did not bring to court all the witnesses who might reasonably have been expected to give evidence. Instead he relied upon evidence of confessions Tuckiar was alleged to have made. How Tuckiar's Defence Counsel dealt with that evidence was critical. In his anxiety to protect the reputation of a dead policeman, and to conform to social pressure for vindication of the policeman, he sold his outcast client short. Then the better angels of the law's nature intervened on appeal, only to be trumped by the dark side of community "justice".

Dean's Case, 1895-1896

92. Following exposure of Dean's guilt of an attempt upon his wife's life, his imprisonment for perjury and Meagher's "disbarment" as a lawyer, the position taken by Sir Julian Salomons towards exposure of the "guilty secret" of Dean and Meagher must be taken as having been vindicated in the eyes of the law. Meagher's public confession of misconduct – when he admitted the truth of Salomons' account of their dealings and resigned from Parliament – demonstrates that the law's judgment was in tune with communal sentiment about the morality of what had occurred.

93. The ethical correctness of Salomons' conduct is not, however, beyond debate. On one view of the facts he, as a lawyer, received information of a privileged character about past crimes of Dean and Meagher (not an invitation to participate in, or witness,

a crime in the making) and he schemed to trap them into a public disclosure of their guilt by selective leaks. He was motivated, perhaps, by a desire to seek political advantage for the Government which had retained him to appear at the Royal Commission into Dean's trial, conviction and sentence. He was, perhaps, offended by the political self-promotion of an Opposition politician, Meagher, in the conduct of Dean's Case. He nurtured a rumour, in legal and political circles, that exposed both Dean and Meagher to public demands for full disclosure of "the truth". He manouvered them into a response to the rumour – Dean's petition to Parliament for particulars of a rumoured confession and Meagher's political attacks on him in Parliament – a response that he and the Government construed as a waiver of privilege. Then, with the legal establishment on side (including an informal ruling by the Chief Justice on the propriety of his proposed disclosure of "the truth"), he dumped on Dean, Meahger and Crick in an elaborate speech in Parliament. The persuasive rhetoric of that speech was powerful. It reads well in *Hansard* even today. Salomons was a great advocate and an honourable man. That should not, however, blind us to another view of the ethical choices he made.

94. The clarity of events in retrospect dims recollections of struggles of conscience confronted along the way.

95. The nature of those struggles is, perhaps, best seen through the eyes of four individuals: Dean, Meagher's client; Meagher, Dean's solicitor and Salomons' client; Salomons, Meagher's legal adviser; and Pilcher, Dean's counsel. They were not the only lawyers or parliamentarians confronted by the demands of confidentiality in the Dean Case. The guilty secrets of Dean and Meagher were at one time or another communicated to others under obligations of confidentiality. The focus of attention on Dean is necessary lest we forget that he was, in an ultimate sense, the client whose interests were affected by the conduct of lawyers. Meagher, Salomons and Pilcher attract attention because they not only received confidential information, but did so as a lawyer for a client. Their struggles were marked by a need to reconcile "duty to client" with "duty to the public".

96. The nature and quality of the conduct of the lawyers cannot simply be deflected by condemnation of Dean for the attempted murder of his wife or for his subsequent perjury. What he did was wrong, profoundly wrong. Nevertheless, any guilt

associated with the attempted murder of his wife arose before the involvement of any lawyer. And, it seems, he made no confession of guilt to anybody until after his trial and conviction for murder. It was at that point that Meagher first suffered a crisis of conscience, and it was from that time that Meagher and other lawyers were called upon to exercise professional/moral judgments about "guilty secrets".

97. Each lawyer, in facing up to his particular dilemma, had to weigh up the possibility that Dean might really have been innocent of any wrongdoing. At the time Dean made a confession of guilt to Meagher, he might have been traumatised by the sentence of death so recently pronounced upon him (unable to think clearly) and the chemist who sold poison to Dean had yet to corroborate Dean's assertion that he had bought poison. Salomons was one step removed from Dean, confronted as he was by Meagher's bragging about Dean's (alleged) confession. A braggart might also be a liar. Pilcher was even further removed from Dean's alleged confession than was Salomons in the sense that he had to consult his conscience based upon what Salomons had told him what Meagher had told <u>him</u> what Dean had told <u>him</u>; hearsay upon hearsay. A crisis of conscience can arise even if all the facts are known beyond dispute. However, in assessing the dilemma of a person who faces a difficult choice, allowance must be made for any uncertainty in his or her knowledge of the facts at the time a choice must be made. We live in an imperfect world.

98. In this imperfect world each man's perception of his own self-interest played a part – even if a silent part – in moulding his conscience, his crisis of conscience and his responses to the crisis. Confronted by a "guilty secret", what <u>should</u> he do? What <u>could</u> he do?

99. <u>Dean's perspective</u> of the legal system might be thought to call for sympathy on this basis at least. He was tricked into a confession by his own lawyer, Meagher. Meagher, in turn, was tricked by Salomons into elaboration of Dean's confession. Pilcher, in his turn, acted upon Salomons' disclosure of the confession, not by speaking to Dean personally, but by encouraging the Dean Defence Committee to confront Dean without him having the benefit of independent legal advice. All three lawyers (Meagher, Salomons and Pilcher) claimed to have kept Dean's secret until Dean petitioned parliament to particularise the foundation of rumours against him. None of them in fact kept the secret. Meagher bragged to Salomons. Salomons

disclosed Dean's secret selectively to a range of lawyers under cover of confidentiality. Pilcher spoke to Dean's Defence Committee. They were under no professional obligation to Dean. They were not lawyers. In the fullness of time, they imposed moral pressure on Dean to petition parliament – which Salomons and those to whom he had made disclosures took as a "waiver" of any privilege by Dean and a release of them from any obligation of confidentiality – and to make a full confession, which led to Dean's imprisonment for perjury.

100. He was not to know whether his pardon for the crime of attempted murder would hold up against revelations of his confession of guilt and perjury. The government might have argued, with public support, that a pardon obtained through fraud – perjured evidence – could and should be revoked. His neck was on the line, literally. The sentence of death imposed upon him at his trial might still be carried out, even though he had told the truth to his lawyer (Meagher) and relied upon his lawyer's encouragement to keep his guilt a secret. Salomons had appeared for the Government at the Royal Commission that had led to his pardon. Salomons told Parliament that he had always believed Dean was guilty, and that Dean should have been hung for the attempted murder of his wife. Salomons was not known to Dean as a friend. Dean feared for his life and liberty.

101. From Meagher's perspective, his problems began when he chose to conceal Dean's confession from his partner, Crick, and to campaign for Dean's release on the basis (known by him to be false) that Dean was innocent. He made that choice, perhaps, for vanity's sake. He had told the world that Windeyer J had conducted Dean's trial unfairly and, being politically ambitious, he wanted to prove to the electorate that he could secure Dean's release. It was a mistake to mix "politics" and "law". He could have campaigned for commutation of Dean's sentence of death to a period of imprisonment. He could have done so consistently with Dean's confidential confession of guilt. He could still have argued that the trial was procedurally unfair. He chose not to take that modest path, but to assert Dean's innocence.

102. That provided him with two or three guilty secrets with which to contend. The first was Dean's post-conviction confession of guilt. The second was his active collaboration with Dean in agitating for a Royal Commission and a pardon upon the express (false) basis that Dean was an innocent man. The third, produced by his

bragging to Salomon, was the fact that he had deliberately breached Dean's secret to a man well placed to do harm to Dean, and the fact that he had thereafter invited Salomons to collude in a cover up of Dean's guilt and his own misconduct. Against that, the harsh reality was that Dean stood condemned, or at least exposed, to death by hanging. Meagher fought against capital punishment. His misconduct might have let a guilty man live – but could he, after saving the man's life, expose the same man once more to the law's harsh demands for retribution? Could he himself live with the humiliation of a personal confession of wrongdoing?

103. From Salomons' perspective, his dilemma was that, in the course of a confidential relationship with Meagher, he was the recipient of knowledge about Dean's guilt of attempted murder and a subsequent perversion of the course of justice by Dean and Meagher. What could he do to bring them to justice, which he earnestly wanted do? He had, after all, appeared for the Government against Dean at the Royal Commission. He had not sought the confidence that Meagher had placed in him. He did not trust Meagher. On the contrary, he feared that Meagher was setting him up. He feared that, were Meagher's misconduct ever to become known to the public, Meagher might defend himself by saying that he had told all to Salomons as the leader of the Bar and received Salomons' blessing. Quite apart from that, if Meagher was actively engaged in a cover-up it might involve commission of a crime of a continuing nature; Salomons did not want himself to be accused of a crime in concealment of the crimes of Dean and Meagher. He feared also that any attempt by him to go public with what Meagher had said to him could expose him to allegations of professional misconduct (for breaching a client's confidence) and personal attacks. By sharing his dilemma with colleagues he was, perhaps, inviting trouble as much as trying to forestall it. That his fear of personal attacks was well founded was proven by the fact that Meagher, and Meagher's partner Crick, subsequently made speeches in parliament attacking his sanity as well as his integrity. According to his lights, he could not allow Dean to go unpunished or to allow Dean's wife and mother in law to continue to suffer the public acrimony they had suffered for their initial accusations against Dean.

104. As it now appears, any crimes committed by Dean and Meagher were past, not continuing crimes unless, perhaps, Meagher decided (against Salomons' advice) to sue

the *Daily Telegraph* for defamation, and to pretend to the Court in the conduct of that suit that Dean was innocent. He could have contented himself by silence and simply advising Meagher not to pervert the course of justice any further by suing the newspaper on a false basis. He could have told Meagher to "go away and sin no more". He was not, however, content with that. He wanted Dean and Meagher (and Crick) exposed as criminals and punished.

105. From Pilcher's perspective: He had to struggle with the fact that, having appeared as Dean's counsel at the Royal Commission, he believed that he had continuing professional obligations to Dean. He did not know whether Dean had in fact confessed to Meagher or, if a confession had been made, it was well founded. He could not, with a clear conscience, fall in with Salomons' attempt to implicate him in encouraging Meagher to elaborate upon Dean's confession of guilt. He was reluctant by these means to go behind Dean's back in collaborating with "the prosecution", possibly exposing Dean to criminal punishment. On the other hand, although he had appeared for Dean, there was some confusion about whether he held a primary obligation, not to Dean, but to members of the Dean Defence Committee who had (through the solicitors Crick and Meagher) retained him to appear for Dean. He could not easily decide whether to remain silent or to speak. And, if he decided not to remain silent, to whom could he properly speak? He could have simply remained silent, waiting upon events. In support of this approach, he could have relied on the fact that his "retainer" (agreement) to appear for Dean, or to advise Dean's Defence Committee (whichever way his brief might be described), was fully performed. On that view, nothing more was required of him. He did not hold a continuing brief for anybody….Or he could have arranged to confer with Meagher, Crick, Dean and the Committee to disclose to all of them the rumour of Dean's confession, and to advise them each to get separate legal advice about their individual rights and duties, if any. To do this, however, might have jeopardised his personal relationship with Salomons, who had approached him, "in confidence". It would certainly have forewarned Dean, Meagher and Crick to cover their tracks against the possibility of prosecution for perversion of the course of justice, a criminal charge each of them was ultimately required to face. Did he owe a duty to anybody? If so, to whom? And what was his duty?

106. What is it about a guilty secret that sometimes tempts even senior lawyers to break its bonds, to share the load of carrying it alone? This question might be too big, and dig too deeply into the human psyche, to have a simple answer. The existence of a very human temptation, and the frailty of the human condition, underscores the importance of the availability of principled legal and ethical rules for the guidance of everybody. It also points to the desirability of professional people having access to a professional association to assist them in their understanding and application of those rules.[14] Only in the years following Dean's case was the NSW Bar Association established as a professional association of barristers, and the Incorporated Law Institute of NSW (now the Law Society of NSW) founded for solicitors. In more recent years, as Australia's legal profession has developed a national character, Australian lawyers are assisted by professional associations working together nationally.

Tuckiar's Case, 1934

107. For people fascinated by the ethics of advocacy, and the dilemmas of defence counsel to whom confessions of guilt may have been made, Tuckiar's Case speaks at no less than two levels: one simple, the other complex.

108. At one level, the case is quite simple. Its simplicity is most apparent in retrospect, in the "rear vision mirror" of history. The judgment of the High Court of Australia in Tuckiar's Case is now an authoritative statement of the law about the duties of advocates. Its recitation of the facts (about irregularities in Tuckiar's trial for the murder of Constable McColl) has stood the test of time; even though the Court's language now seems old-fashioned, and patronising in some respects, nobody suggests its findings of fact were fundamentally wrong. Insofar as the judgment expressed "grave misgivings" about irregularities in Tuckiar's trial, most Australians would share the sense of moral outrage that can be seen just beneath the surface of the

[14] Given the availability of these associations in modern times, a Chief Justice would nowadays be unlikely to provide legal advice to a barrister as Darley CJ did to Salomons QC. To do so might be thought, now, to be fundamentally inconsistent with the judge's duty, and to disqualify him or her from sitting on a case arising from any controversy about which advice was sought or given. Darley CJ gave advice to Salomons and subsequently sat as part of the Full Court Benches of the NSW Supreme Court that heard cases involving Dean and Meagher. No objection to his doing so appears in the law reports of the Court's judgments. A modern Chief Justice would be inclined to sidestep any potential objection by referring any request for "an ethical ruling" to the local Bar Association or Law Society. In conjunction with other public authorities, and under the ultimate supervision of the courts, they take day-to-day responsibility for disciplinary action against lawyers.

Court's restrained criticism of Tuckiar's counsel. It is not difficult to be aghast at his failure to protect the confidentiality and interests of his client. The only consolation to be drawn from the case might be a quiet sense of pride that the nation's highest court intervened so decisively to identify itself with an individual citizen, vulnerable and in need of protection.

109. At another level, Tuckiar's Case is very complex. Its complexity is most apparent if we transport our minds back to the time and place of Tuckiar's trial. It took place in a frontier town, in a frontier society, where law and order were not to be taken for granted. Glimpses of its complexity can be seen from two very different perspectives. One is that of Tuckiar's Counsel. The other is from the perspective of Tuckiar himself, looking at outcomes.

110. In adopting the perspective of Tuckiar's Counsel it is necessary to leave to one side the ultimate judgment of the High Court (after the event) and to focus upon the facts as and when he saw them during Tuckiar's trial. From his perspective, he was confronted by a confession of guilt (which he believed was conclusive) in the middle of a trial in which his client had entered a plea of "Not Guilty". Confronted with that "reality" – as it appeared to him – he was required to "think on his feet". Before, during and after the confession he had to grapple with language difficulties (which stood between him, Tuckiar, and each of the Aboriginal witnesses against Tuckiar); cultural differences between himself and Tuckiar; the heavy weight of social pressure for vindication of a dead policeman's reputation; and the clamour of the "law and order" debate.

111. He had, the previous day, secured an acquittal for Tuckiar in another murder trial; but in that case it was easier to see that the dead man (a drifter, living on the fringes of society) got what was coming to him when he provoked a fight. What to do now? This was a case in which a policeman had been killed in the performance of his duty; a good man whose reputation, and that of the police, some people had falsely called into question by suggestions that he had misconducted himself (as had the drifter) by sexual interference with Tuckiar's wife in the lead up to his death. Community safety (as well as respect for the dead man, his family and his colleagues) called for public vindication of the police. They had to be able to do their job without unjustified attacks. Unfair attacks on the policeman justified disclosure of Tuckiar's

confession or, at least, so his Counsel seems to have thought (until the High Court set him right).

112. It is easy, from afar and with the benefit of the High Court's judgment, to be critical of the choices made by Tuckiar's Counsel. We all believe, or hope, that we would have done things differently; that we would have kept our composure and vindicated Tuckiar's rights. But would we have done so?

113. From the perspective of Tuckiar's Counsel, the High Court's "counsel of perfection" must have seemed harsh. He had done his best in difficult circumstances. The standards demanded by the Court sitting in the comfort of a big city (Melbourne), might have seemed impossibly high to a lawyer struggling with everyday life in a frontier town (Darwin).

114. Then again is that not exactly the sort of place where the rule of law is most needed? Aren't lawyers trained to act in a disciplined, professional way come what may? An advocate cannot have too thin a skin when it comes to criticism of his or her performance of professional duties. With the privilege of being a lawyer comes the burden of public criticism.

115. From Tuckiar's perspective his Counsel's breaches of confidentiality produced a tragic outcome coloured by black irony. His Counsel's conduct might well have sacrificed his chances of acquittal and confirmed his prospects of conviction. There is little doubt about that. But Counsel's failings were also a significant factor in attracting the intervention of the High Court, and they were decisive in persuading that Court to direct an acquittal rather than merely a re-trial. The Court's judgment must have brought relief to the troubled minds of Tuckiar and his supporters: saved from death row by the incompetence of Counsel, what an irony! Sadly, that was not the final outcome. There was one more act to play, one more tragic irony. The notoriety Tuckiar must have acquired in some circles as an "acquitted murderer" (oxymoron though the label might be) cannot be excluded as a cause of his death. That notoriety came, in part, as a result of Counsel's irregular conduct. Denied a fair trial, Tuckiar won his release from the clutches of the law. Left to his fate in a hostile community, Tuckiar was denied even the possibility of a reprieve. He might have been treated with greater mercy had his conviction stood, and a term of imprisonment

been served, with prospects of an early release, quietly managed by those responsible for welfare of the community as a whole. Ultimately, we cannot know of course, but wonder we must or will.

15 February 2008
Words: 13,867