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Impacts of Clinical and Ethics’ Curricula on Lawyers’ Ethical Decision-Making

ABSTRACT

It is not unreasonable to assume that lawyers’ moral reasoning might play some role in the decisions that are made in everyday legal practice. However, until now, there has been a dearth of research into ethical responses of lawyers or law students. A longitudinal study exploring the relationships between values and ethical behaviour for early-career legal practitioners has recently been concluded. This study comprised a representative Australian cohort of final year law students and tracked them through their first two years of employment or further study.

This study examined changes to ethical decision-making, by situating participants within contexts that provided for ethical dilemmas. A questionnaire utilising hypothetical situations was presented in eleven scenarios. This paper examines reported behaviour on scenarios across the three years of the study, particularly exploring changes over time. Of particular interest was the affect of gender and prior ethics education on changing responses. Findings suggested significant differences between males and females in their ethical responses. They also suggest that involvement in clinical practice, in particular, during the law degree may have a positive impact on future willingness to assist access to justice. The implications of results are discussed in the contexts of ethics education in a tertiary educational environment, and post-admission to legal practice.
1 Introduction

Post-Enron, some say that ethical sensitivity has become significantly more important to both business and the legal profession in western jurisdictions, but this is a doubtful proposition. When things get tough, lawyers still tend to retreat into the bunker, with the statement that ‘ethics are no more than what the law requires.’ The reality that legal ethics is/are considerably more than what the law requires, is confronting because such a focus requires an adherence to notions of justice which can edge out some powerful client demands. The actual relationship between the quality of justice and the values and behaviour of its (legal) practitioners is accordingly of obvious importance to an international ‘justice priority’, arguably even more so, now that we are facing a painful choice between whether or not to fully support the Rule of Law within a ‘War on Terror’ context.

Law schools have generally assumed homogeneity in values and it has suited the profession to go along with this view. An initial task in our investigation was to establish whether there is an empirical basis for the assumption that lawyers’ aspirations are based on shared personal and professional values. Having established that this assumption is empirically incorrect, we then asked ‘what role does education play in the reinforcement of personal values appropriate for the legal profession?’ and, ‘what attitude can the profession play to values, in the post-admission context?’

In some countries the role of the university as nation builder is clearly understood. For example, in South Africa universities are mandated to apply their moral force to ‘contribute to the socialisation of enlightened responsible and constructively critical citizens’. In other countries, the role of nation builder is left for the school system. Australia has now followed the UK and US, through a major Values Education Study in the promotion of values education in school curricula to explicitly ‘teach about values’, to ‘promote students understanding and knowledge of values and to inculcate

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1 See, for example, Leon Gettler, ‘Just a Degree of Smoothing Means More Enrons Will Come: Author’, 3 October 2005. The Age, Business, p 3, which confirms the prospects for further Enron-Like collapses.
the skills and dispositions of students so that they can enact particular values as individuals and as members of the wider community”⁴.

Globalisation, ethical lapses and loss of public confidence in many institutions in both corporate and public spheres has precipitated the need for universities to better understand their role in the preparation of future decision makers⁶. Robert Scott refers to the ‘university as a moral force’ because it ‘constantly extends the boundaries of what is known and it challenges societal rules describing desirable states of behaviour’.⁷ Reporting on the 2000 collapse of HIH Insurance, Justice Neville Owen has linked the failure of the insurer, in part, to the lack of sufficient tertiary ethics education in Australia and called for particular attention to the ethical failings of lawyers.⁸ This observation is even more acute for Australian universities now suffering under national government pressure to ‘do more with much less’. However, whilst values education work is continuing to some extent in universities in Australia, particularly through graduate skills programs, it is at best intermittent across the higher education sector and uncoordinated at the national or professional level. In other words, the impact of post-secondary education on values development and ethical understandings in the preparation of lawyers, teachers, engineers, scientists and business professionals, is unknown.

Over the period 2001-2003 a large group of Australian final-year undergraduate law students/early year practitioners were surveyed in a longitudinal study of Australian lawyers’ values. This study was undertaken in an effort to understand what values are empirically important in determining lawyers’ attitudes to difficult behavioural choices confronting them in legal practice. Final-year law students were asked to rate

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⁷ Scott, Note 6, p 1
⁸ Note this comment by Justice Neville Owen concerning the involvement of lawyers in the recent HIH implosion: ‘The Lawyers: HIH approached various legal advisers from time to time to provide guidance on particular matters. There were occasions when the legal advice given fell short of what one would expect in the circumstances. One such occasion involved the provision of advice in a situation where the potential for a conflict of interest was obvious. Another entailed advice that sought to explain how to effect an arrangement in a way that would ‘get around’ certain provisions of the Corporations Law that otherwise prohibited the arrangement. It is also disappointing that lawyers were among those involved in what I call the ‘dash for cash’ in the days leading up to 15 March 2001.’ Report of the HIH Royal Commission, at http://www.hihroyalcom.gov.au/finalreport/ accessed at 22 September 2004.
instrumental and terminal values.\textsuperscript{9} ‘Terminal’ values are descriptive of general goals or end states of existence (e.g. equality, freedom, inner harmony). ‘Instrumental’ values are descriptive of modes of conduct (e.g. being broadminded, capable, loving). Comparisons with Australian and American-normed data showed that Australian final year law students tended to rate ‘equality’ more and ‘freedom’ less than other populations.\textsuperscript{10}

Milton Rokeach’s seminal work on values and ideology\textsuperscript{11} suggests that overvaluing equality is predictive of more liberal (in the American sense) political leanings, whilst overvaluing freedom is indicative of a conservative ideological orientation. Our discrete analysis of Year 1 findings suggested that educational experiences may contribute to the value hierarchies that are developed and used within the context of responding to ethical scenarios. They showed that whilst there were no significant differences between students who had or had not completed an ethics subject during their law degree on the importance they placed on a selection of instrumental and terminal values, there was a significant difference for students who had completed a clinical placement.\textsuperscript{12} These students were more likely to value ‘helpfulness’, ‘responsibility’, ‘equality’, ‘happiness’ and ‘wisdom’. These values reflect a socially responsible orientation which may also appear to be more salient for women. In previous studies, females were more likely to express socially responsible values when weighing social dilemmas and were likely to be more aware of environmental cues.\textsuperscript{13}

Having established a trend that suggests that educational experience and gender may affect changes in value bases over time, we were interested in investigating how these variables affect the actual responses to ethical dilemmas over time as law graduates transition into their early careers. We investigated any differences in ethical responses over time between males and females, participants who had or had not completed an ethics subject, and those that had or had not completed a clinical placement during


\textsuperscript{12} Opct No. 10

their law degrees. We also wished to explore individual variation within these groups of participants to further understand how prior experience might impact on decision making in the years after the law school experience. We hope this study will enable better-targeted ethics awareness education in both pre and post-admission contexts.

2 Method

2.1 Participants

Year 1

Law faculties across Australia were asked to assist in distributing surveys to students enrolled in the final year of their law degrees. 700 individuals responded to the mail questionnaire, representing approximately 18% of the population of 4000 Australian final year law students. All jurisdictions were represented in the final sample, although most respondents came from NSW, Victoria, and Queensland. Females accounted for 61 percent and males 39 percent of respondents. 60 percent of the sample categorized themselves in the 18–25 years age group and 72 percent classified themselves as “Australian”.

The majority of the sample were single (70%) and had no children (84%). Most had parents with professional, teaching, or business backgrounds. Based on the Australian Bureau of Statistics (Index of Education and Occupation) classification of socio-economic status as derived from postcodes of residence, most of the sample was classified as residing in homes with a high socio-economic status classification (61%).

Nearly 70% of respondents had completed an “ethics” course and might therefore be thought to have had some exposure to the ethical issues of practice, while only 40% had experienced a “clinical” course in law. Overall, we concluded the sample was generally representative of the population of law graduates in Australia.

Year 2

Year 1 respondents who had indicated their consent to participation in the longitudinal study were contacted via email, phone or by mail. 412 participants returned completed surveys in year 2 (conducted on paper or on-line). The sample characteristics mirrored these of the sample in year 1. Variations from this were that females accounted for a
slightly higher proportion of the sample (64%) and more of the younger participants continued with the study in year 2 (56.4 %). Table 1 presents the distribution of occupational classifications of the sample in the second year of the study. It shows that the great majority of the sample had gained employment in legal practice / law and business settings.

Year 3

362 participants returned completed surveys in year 3 (either by mail or an on-line basis). Sample attrition appeared to be spread evenly across characteristics of the sample so that the year 3 sample appeared well representative of the sample in year 2.

Table 1

Distribution of participants into occupations in the second year of the study (i.e. year after graduation)

<table>
<thead>
<tr>
<th>Industry</th>
<th>Frequency</th>
<th>Valid %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Academic /Teacher</td>
<td>8</td>
<td>2.27</td>
</tr>
<tr>
<td>Accountant</td>
<td>9</td>
<td>2.55</td>
</tr>
<tr>
<td>Admin / Public service</td>
<td>20</td>
<td>5.67</td>
</tr>
<tr>
<td>Business</td>
<td>17</td>
<td>4.82</td>
</tr>
<tr>
<td>Health</td>
<td>5</td>
<td>1.42</td>
</tr>
<tr>
<td>Legal practice / Law</td>
<td>231</td>
<td>65.44</td>
</tr>
<tr>
<td>Science and Computing</td>
<td>7</td>
<td>1.98</td>
</tr>
<tr>
<td>Army</td>
<td>2</td>
<td>0.56</td>
</tr>
<tr>
<td>Student</td>
<td>43</td>
<td>12.18</td>
</tr>
<tr>
<td>Unemployed</td>
<td>7</td>
<td>1.98</td>
</tr>
<tr>
<td>Farmer</td>
<td>1</td>
<td>0.28</td>
</tr>
<tr>
<td>Police</td>
<td>1</td>
<td>0.28</td>
</tr>
<tr>
<td>Policy</td>
<td>2</td>
<td>0.56</td>
</tr>
<tr>
<td>Missing / unknown</td>
<td>59</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>412</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

2.2 Procedure

2.2.1 Effects of values on ethical decision making

To examine the effects of value ratings on ethical decision making, it was necessary to situate respondents’ responses within contexts that provided for ethical dilemmas. The survey utilised an oblique measurement of law students’ values, based upon responses to survey questions which were piloted in a 1998 survey of Monash law graduates.15 Rather than directly ask students about their values, we deployed the practice of the hypothetical situation, adding a personal dimension to further reduce the level of abstraction and assist in actual values identification. Full scenarios presented to participants are attached in the Appendix 1. It is suggested that these scenarios be perused before proceeding with the remainder of this paper.

Participants were asked to indicate their probable behaviour in each scenario as a ‘yes’ or ‘no’ response. Since the scenarios were also relatively commonplace, it was reasoned that a degree of personal identification with the lawyer’s dilemma (in each scenario) would emerge. These hypotheticals were changed slightly across the three years of the study period to reduce the effects of learned behaviour. That is, slight variations in ethical scenarios limited the potential for respondents to simply repeat from memory, their prior year decisions and values choices.

Analysis

Cross tabulations were produced for scenario responses over each of the three years of the study, to ascertain changes in the distribution of responses over time. This data is displayed in bar graphs in the results section and elucidates changes at a group level, for males and females, and participants with differing educational experiences.

However this analysis is limiting in that it does not show how individual participants changed their mind over time. To ascertain the magnitude of change in individual results from one year of the study to the next, Kappa coefficients were produced. The kappa coefficient is a measure of association or correlation between variables measured at the categorical level. In this study, it denotes the proportion of agreement between an individual’s response in year1 and their response in year1+n after chance

agreement has been excluded. In other words, it describes the level of agreement or
disagreement of an individual’s response from one year to the next. It is therefore a
useful statistic for describing the magnitude of change over time\textsuperscript{16}. Kappa coefficients
are presented as line graphs for ease of interpretation. All statistics were produced in
SPSS with an alpha of 0.05. Statistical tables related to results presented are available
on request.

3 Results

3.1 Section 1: Changing responses to reported behaviour over time

3.1.1 Differences over time for males and females

Figure 1 below displays the proportion (or distribution) of ‘yes’ responses in scenarios
for males and females in the three years of the study. Chi Square tests were conducted
to investigate whether changes in frequencies over time were significantly different
for women. Results suggested that women were more likely, over time, to strengthen
their choices than men, to:

- Take on the pro bono case (with a decrease in Year 3); ($X^2 (df=2) = 12.95,$
  $p<.05$);
- Refrain from acting for the corporation; ($X^2 (df=2) = 17.81,$ $p<.05$);
- Not represent the friend (in years 1 and 3), ($X^2 (df=2) =8.33,$ $p<.05$);
- Break client confidentiality and inform a welfare department, ($X^2 (df=2) =
  8.10,$ $p<.05$).

The same Chi Square tests were performed for men’s responses over time. Whilst
there were significant differences in frequency distributions over time for men these
did not differ to differences found for women. Results suggested that men and women
were equally likely to strengthen their choices to:

- Report a nephew for a trust account deficiency, ($X^2\text{females} (df=2) = 19.43,$
  $X^2\text{males} (df=2) = 20.94,$ $p<.05$);
- Not purchase shares on the basis of insider information, ($X^2\text{females} (df=2) =
  10.82,$ $X^2\text{males} (df=2) = 7.36,$ $p<.05$);

\textsuperscript{16} for more information about Kappa see Becker, L.A (1999). Crosstabs: Kappa
http://web.uccs.edu/becker/SPSS/ctabk.htm sourced 1/12/2004, Kraemer1;H.K., Vyjevanthi S. Periyakoll, V.S.

Comment [jp1]: Adrian, I think your confusion here has been because the title
misrepresented the following text – the differences that the Chi Square test has
investigated are between women’s responses in yr1-3, and then again between
men’s responses in years 1-3. NOT the difference between men’s response in year
1 compared to women’s responses in year 1 and so on. We can see by the graph that
women tend to be ‘scoring’ higher – but does that change over time significantly. In
other words, what is being reinforced and what is diluting in their responses.
I have added some supplementary text here that might make this clearer, but am happy
for you to offer suggestions.
- Not round up hours on a bill, \((\chi^2_{\text{females}} \text{ (df=2)} = 21.80, \chi^2_{\text{males}} \text{ (df=2)} = 10.60, \ p<.05)\); and
- Decrease the likelihood of referring the colleague for counselling, \((\chi^2_{\text{females}} \text{ (df=2)} = 45.32, \chi^2_{\text{males}} \text{ (df=2)} = 24.42, \ p<.05)\);

Comment [jp2]: Magnitude of Chi Square does not translate to magnitude of the difference between sets of data (i.e. between men and women). Chi Square statistic is heavily influenced by sample size.
Figure 1 - Proportion of males and females who responded ‘yes’ on ethical scenario indicators for Years 1 – 3.

Note: ‘yes’ responses to Scenarios denote:
1. would take on Pro Bono case
2. would not act for the corporation
3. would report the nephew
4. would not purchase shares
5. would not take on extra hours
6. would not continue to represent the friend
7. would report the daughter
8. would not round up hours
9. would not make misrepresentation to potential donors
10. would refer the colleague
11. would break confidentiality and inform welfare department
Figure 2 utilises Kappa coefficients and presents responses over time at the individual level for males and females. By way of illustration, see the first scenario, Pro Bono, on the far left of Figure 2. Notice that coefficients for males were higher than those of females across the years of the study. This indicates that males had a higher level of agreement between their responses to this scenario over time. Conversely, Kappa coefficients for females were lower (indicating less agreement), and they actually decreased in years 2-3 of the study. This suggests that females tended to change their mind over time about this scenario at a greater rate than did males.

Figure 2 shows that females were more likely to report more consistently (that is, have more agreement between responses over time) than males in scenario 3 and 7, particularly from years 2-3. Women also particularly changed their mind on scenarios 1 and 10 from year 1-2, more so than males. Males tended to change their mind more so than females over the course of the study on responses to scenario 5.

**Figure 2**

Kappa coefficients: the level of association between responses from Years 1-2 and Years 2-3 of males and females.

Note: +1.00 = total agreement
Associated cross tabulations and Chi Square statistics are available on request.
Summary
Together, results from Figures 1 and 2 show some interesting patterns of change over time in relation to reported decisions on ethical scenarios. In Scenario 1, females tended to increase the likelihood of taking on the Pro Bono case in the second year of the study, but then changed their response to resemble that of males, that is, decreasing the likelihood of choosing this option by year 3. We speculate whether this result may be a consequence of the reality of pressures in relation to work / firm demands becoming more compelling as participants mature in their work context.

In Scenario 5, whilst there was no significant difference between males and females who indicated they would not take on extra hours, males in fact changed their mind about this decision over the course of the study. Initially, males were more likely to increase their likelihood of taking on extra hours but then changed direction and became less likely to do so. The workload pressures of the ‘first year out’ experience may have come to bear on males’ responses as they moved into their second year in the workforce.

In scenario 10, women in year 2 were less likely to refer their colleague for counselling, but changed direction in the third year, with responses in relation to referring the colleague likely to increase. This result may be related to workplace norms in relation to maintaining peer confidentiality, mediating women’s responses in the first year of work. We further speculate that it is perhaps more likely that by the second year of work, these effects were less influential and responses were restored to reflect women’s core values in relation to this scenario. Further research is required to test these hypotheses.

3.1.2 Differences between participants who had and had not completed a clinical placement
Initial results from this study and the pilot investigation, did not give a consistent picture as to the effect of clinical experience or workplace attitudes. Examination of the time series in this study, allows slightly more definition. Figure 3 displays the proportion of ‘yes’ responses in scenarios for participants who had and who had not completed a

17 See Notes 3 and 15
clinical placement during their law degree. Response distributions show that overall, participants who had experienced some clinical education reported ‘yes’ in higher proportions than those that had not. Chi square tests showed that there were significant changes in responses across the three years of the study for participants who had completed a clinical placement. They were more likely than those who had not completed a clinical placement, to strengthen their choices to:

- Take on a pro bono case ($\chi^2 (df=2) = 11.52, p<.05$).

Participants who had not completed a clinical placement were more likely than those who had completed a clinical placement, to strengthen their choices to:

- Refrain from reporting a nephew for a trust account deficiency, ($\chi^2 (df=2) = 40.30, p<.05$);

Participants who had not completed a clinical placement were as likely as those who had completed a placement to strengthen their choices to:

- Act for a corporation at the cost of an old friendship, ($\chi^2_{placement} (df=2) = 8.66$, $\chi^2_{none} (df=2) = 8.85, p<.05$);
- Refrain from purchasing shares on the basis of inside information in Scenario 11, ($\chi^2_{placement} (df=2) = 6.79$, $\chi^2_{none} (df=2) = 8.81, p<.05$).
- Not round up hours on a bill ($\chi^2_{placement} (df=2) = 18.88$, $\chi^2_{none} (df=2) = 12.08, p<.05$);
- Not refer a colleague for counselling ($\chi^2_{placement} (df=2) = 34.44$, $\chi^2_{none} (df=2) = 31.62, p<.05$); and
- Break client confidentiality and report a matter to the welfare department, ($\chi^2_{placement} (df=2) = 8.81$, $\chi^2_{none} (df=2) = 7.92, p<.05$).
Figure 3
Proportion of participants who did and did not complete a clinical placement who responded ‘yes’ on ethical scenario indicators for Years 1 – 3

Note: ‘yes’ responses to Scenarios denote:

1. would take on Pro Bono case
2. would not act for the corporation
3. would report the nephew
4. would not purchase shares
5. would not take on extra hours
6. would not continue to represent the friend
7. would report the daughter
8. would not round up hours
9. would not make misrepresentation to potential donors
10. would refer the colleague
11. would break confidentiality and inform welfare department

While grouped data does not show large variation between responses for participants who did and did not do a clinical placement, results in Figure 4 presenting measures of association at an individual level, do elucidate hidden differences.
Figure 4

Kappa coefficients: the level of association between responses from Years 1-2 and Years 2-3 of participants who did and did not complete a clinical placement

Note: +1.00 = total agreement

Associated cross tabulations and Chi Square statistics are available on request.

Figure 4 shows that participants were more likely to report consistently in scenarios 3, 4, 5 and 7 if they had experienced a clinical placement. Conversely they were also more likely to change their minds in Scenarios 2 and 10, particularly between years 1 and 2.

Summary

Participants who had not completed a clinical placement appeared to respond with most variation to the scenarios over time. This may suggest that the attitudes they brought to decision making on these scenarios was less fixed than that of participants who had completed a placement while still at law school. Whilst completion of a clinical placement appeared to differentiate participants on the pro bono and trust deficiency scenarios, it did not significantly differentiate responses on other scenarios. However, there were some interesting patterns of change in attitude for this group. For example, in Scenario 2, participants who had completed a clinical placement reported a decreased likelihood of acting for a corporation over a friend in year 2, but then changed their minds about this by year 3. In Scenario 10, participants who had completed a clinical
placement reported a decreased likelihood of referring a colleague for counselling, particularly in year 3 of the study. Perhaps the business case, which prioritises business and self interest over more collective interests, became more salient in this scenario as participants became more socialised into work norms.

3.1.3 Differences between participants who had or had not completed an ethics course

Figure 5 displays the proportion of ‘yes’ responses in scenarios for participants who had and who had not completed an ethics course during their law degree. Chi Square tests show that there were significant differences between responses across the years for participants who had completed an ethics course. They were more likely to strengthen their choices to:

- Act for a corporation at the cost of an old friendship ($\chi^2 (df=2) = 15.32$, $p<.05$);
- Not purchase shares on the basis of inside information, ($\chi^2 (df=2) = 17.00$, $p<.05$); and
- Not make a misrepresentation to political party potential donors ($\chi^2 (df=2) = 6.83$, $p<.05$); and
- Break client confidentiality and inform a welfare department ($\chi^2 (df=2) = 12.19$, $p<.05$)

Further, there was a significant difference between responses across the years for participants who had not completed an ethics subject. This group was more likely than participants who had completed an ethics course, to strengthen their choices to:

- Not take on a pro bono case ($\chi^2 (df=2) = 10.46$, $p<.05$).

However, participants who had completed an ethics course were as likely as those who had not completed an ethics course to:

- Report a nephew for a trust fund deficiency, ($\chi^2 \text{ethics} (df=2) = 29.20$, $\chi^2 \text{none} (df=2) = 12.20$, $p<.05$);
- Not round up the hours on a bill, ($\chi^2 \text{ethics} (df=2) = 19.33$, $p<.05$) $\chi^2 \text{none} (df=2) = 12.18$, $p<.05$); and
- Not refer the colleague for counselling, \( \chi^2 \text{ethics} (df=2) = 53.00, \chi^2 \text{none} (df=2) = 16.10, p<.05; \)

Figure 5

Proportion of participants who did and did not complete an ethics course who responded ‘yes’ on ethical scenario indicators for Years 1 – 3

Note: ‘yes’ responses to Scenarios denote:

1. would take on Pro Bono case
2. would not act for the corporation
3. would report the nephew
4. would not purchase shares
5. would not take on extra hours
6. would not continue to represent the friend
7. would report the daughter
8. would not round up hours
9. would not make misrepresentation to potential donors
10. would refer the colleague
11. would break confidentiality and inform welfare department

Figure 6 presents the variation of responses over time at the individual level for participants with differing legal ethical educational experiences.
Figure 6
Kappa coefficients: the level of association between responses from Years 1-2 and Years 2-3 of participants who did and did not complete an ethics course

Note: +1.00 = total agreement
Associated cross tabulations and Chi Square statistics are available on request.

Figure 6 shows that participants were more likely to report consistently in Scenarios 3 and 8 if they had completed an ethics subject. Conversely, they were also more likely to change their mind in scenarios 6, 7 and 10, particularly between years 1 and 2.

Summary
Together, results from Figures 5 and 6 show contrasting patterns of change over time. Completion of an ethics course appeared to differentiate participants’ responses on some scenarios in a direction that may be aligned with professional codes of conduct (see Figure 5). However, not completing an ethics course also appeared to differentiate responses in that direction. In addition, the coefficients displayed in Figure 6 do not at a glance suggest a consistent pattern of responses that can be attributed to the dependent variable in question.
For example, in Scenario 3, participants who had completed an ethics course were more consistent in their responses over time than participants who had not completed an ethics course. The latter were much more variable in their responses, increasing and then decreasing their likelihood of reporting a nephew from year 1 to 3. Conversely, participants who had completed an ethics course were equally likely to change their mind in relation to reporting criminal activity in their own child. These scenarios, which personalise issues to one’s own family, appeared to raise more variation in response than other less personalised dilemmas. This is further reinforced by the scenarios that produced variations at the individual level, that is, the scenarios dealing with representing a friend and referring a colleague.

4 Discussion

This study aimed to investigate the variables that mediate change over time in responses to ethical dilemmas. Results presented suggested that there were significant differences in responses by men and women, with women responding in ways that are more aligned with ethical codes of conduct. However given that women are under-represented in leadership positions in the legal profession, more research is required to untangle the effects of social desirability (that is, the propensity to respond in ways that are aligned to socially sanctioned norms and behaviour) from gender. While noting these cautions, the results do appear compelling, in that they confirm prior studies of gender differences that suggest that women place more importance on relational rather than individualistic characteristics in forming their vocational identity.18

Results also suggested that to some degree, the experience of having completed a clinical placement during the law degree appears to mediate responses towards some aspects of ethical conduct. However, these results should be interpreted cautiously in light of clinical placement being an optional part of the law degree in most Australian universities. It is difficult to untangle the effects of any clinical placement from the selection bias inherent in the sample of participants who had self-selected their clinical experience.

Results suggest that participants who had completed an ethics subject may be more resolved in their views, especially for scenarios that do not deal with individualised concerns. This could be a consequence of greater exposure to ethical scenarios during ethics courses, however more research is required to move beyond speculation. The following section discusses these results in the context of each scenario, in turn.

**Pro Bono: Would agree to work pro bono:** Pro bono activity may be considered a primary indicator of a professional attitude. Indeed, some writers are adamant that the quality of ‘altruism’ – which for the purposes of this study we have compacted somewhat into a forced choice about whether to give something to the community or not – is an archetype of professionalism. However results for the Pro Bono scenario were concerning. Women and participants who had completed a clinical placement were more likely to increase their resolve to take on the Pro Bono case over time in the second year, with a weakening of this resolve in the third year. Participants who had not completed an ethics course were least likely to take on the Pro Bono case in this scenario, especially by year 3.

**Corporation vs. Personal:** Women, participants who had completed an ethics course, particularly in year 3 and those who had not completed an ethics subject were more likely to increase their resolve over time, not to act for the corporation in this scenario. In addition, participants who had completed a clinical placement were more likely to change their mind about this scenario over time. This is contrary to the trend shown in some of the other scenarios in relation to the clinical placement group being more consistent in their resolve to maintain responses formed in their final year of the law degree.

**Reporting Trust Acc Deficiency:** The question posed in this scenario sought to explore the connection between personal integrity - involving a relatively close family member - and the specific requirements of trust account administration. Trust defalcations have been a major embarrassment to the Australasian legal profession over the years.

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In all Australian jurisdictions the requirement to report a trust deficiency is mandatory, no matter the size of the deficiency or its possible cause. Findings suggest that male and females were equally more likely to choose to report the nephew, than not, in this scenario. In addition, females were more consistent in their responses to this dilemma over the three years of the study. Yet the overall proportion of participants willing to keep the deficiency secret was still very high: at least 50%.

Whilst there appeared to be no differences between responses for participants according to whether they had completed a clinical placement or not, those that had completed a clinical placement were more consistent in their responses over time in this scenario. The same result was found for participants who had completed an ethics subject. Perhaps these groups had had more knowledge of cases of trust defalcations.20

Insider Trading: This scenario is directed towards the broad issues of business ethics. Although Enron, Worldcom and related corporate failures were an international scandal only after this survey was completed, there were many signs in Australian corporate experience that the last two decades of the century were marked by an excess of what must be defined as corporate greed.21 We considered that it was important to attempt to measure the extent to which students – many of whom would be going to business/ law

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20 In New Zealand in 1992 a small Upper Hutt firm managed to steal over NZ$65 million, causing the entire New Zealand fidelity fund to become insolvent (Evans 1997). In Victoria, the local fidelity fund went into technical deficit in 1993 after a series of major thefts. The political fallout was enough for the then conservative state government to put in place a review of the system of self-regulation of the fidelity compensation process, leading in due course to legislation establishing co-regulation across all aspects of legal professional regulation in that state (Legal Practice Act 1966 and 2004 Vic.).

21 A major Australian Insurer, HIH was beset by archetypal breaches of governance during the late 1990’s, as this quote from The Age (Melbourne) shows: ‘Rodney Adler summoned Brad Cooper to a hotel room early yesterday morning to warn him against telling the truth about an alleged insider trading deal, Mr Cooper told the HIH Royal Commission today. The entrepreneur and long-time associate of Mr Adler is appearing at the commission for the second time to answer questions about a $1 million short-trading share deal to prop up HIH's ailing share price in August 1999.’ The Age, Melbourne Australia, October 14 2002; http://www.theage.com.au/articles/2002/10/14/1034561084719.html.
firm related workplaces—were sensitized to the values inherent in the phenomenon of greed.

Findings suggest that men and women were equally likely to strengthen their resolve to not purchase shares based on inside knowledge over the three years of this study. Participants who had completed an ethics course were (thankfully), more likely to increase their resolve not to purchase shares when responding to this scenario over time. In addition, whilst their responses did not differ from participants who had not experienced a clinical placement during their law degrees, those that had clinical placement experience were more consistent in their response to this scenario over time. However it is likely that women and people with clinical practice experiences may have been more aware of the slippery slope represented by access to inside share market information.

Work vs. Family: There appeared to be no differences between males and females and participants with differing educational experiences on responses over time for this scenario. However, males were more likely to change their mind over the course of the study.

Represent friend in Divorce: Results suggested that women were more likely to increase their resolve not to represent the friend in this scenario over time. No other group or individual differences were apparent.

Conceal Criminal Activity in own child: The scenario is similar to the above ‘nephew/trust deficiency’ and is designed to push respondents towards the limits of what might be called ‘personal-professional tension’. Whilst there were no significant differences across groups in responses over time, findings suggest that women and participants who had completed a clinical placement were more consistent in their responses to this scenario.

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22 Nearly 75% of Australian law graduates were destined for legal professional and ‘business professional’ positions in 2000 and 2001, according to the Australian Graduate Careers Council. Misha Ketchell, ‘Race for That Dream Job Gets Tougher’, The Age, 9 November 2002, p 5
Round up Hours: Findings suggest that women were equal in their increasing resolve over time to not round up hours on a bill. Participants with differing experiences of clinical placement or ethics education were also equally likely to increase their resolve over time to not round up hours.

Proposals to Political Parties: Findings suggest that women and participants who had completed an ethics course were more likely to increase their resolve not to make a misrepresentation to a political party in this scenario over time.

Refer Colleague: Men, women and those who either had or had not completed a placement or ethics course, were equally likely not to refer the colleague for counselling, in the later years of the study. Across these groups, there was more agreement on this response achieved over time.

Client Confidentiality: Findings suggested that women and participants who had completed an ethics subject, were more likely to increase their resolve to break client confidentiality in this scenario. The results from this scenario were of considerable concern. The issue of child abuse is one of very high profile in Australia. The deaths of young children at the hands of their fathers or males known to their mothers, comprise regular features of metropolitan newspapers. Nevertheless, confidentiality has been described as one of the ‘core values’ of the Australian legal profession and, despite some policy concerns which now question the utility of confidentiality in achieving just results in the trial process, client confidentiality remains undeniably crucial as a lynch pin of common law systems of representation. However, it was not surprising that approximately 60 percent of participants in Year 1 indicated that they would break client confidentiality. In preliminary discussions about the Year 1 findings we attributed this finding to the fact that these respondents had not then, for the most part, experienced the realities of legal practice and in particular, the trust ordinarily placed in lawyers by their clients. Therefore the finding that individuals from all groups in this study achieved greater agreement over time in favour of breaking client confidentiality is of particular interest. We speculate that it may be that social and client contact in clinical settings

23 Ian Dunn, former CEO, Law Institute of Victoria, ‘Incorporation and MDP’s’, [2000] 74(9) LIJ 3
24 See Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 WLR 215 at 266, per Lord Millett.
entails more exposure to child abuse whilst conventional ethics teaching leaves people cool to the breaches of confidentiality.

4.1 Concluding remarks

The results of this study indicate significant differences between males and females and participants with differing educational experiences in their responses to ethical dilemmas over time. While the behavioural outcomes used in this study are limited due to their intentional rather than observed natures, the results do provide some evidence of the impact of participating in a clinical placement program in particular, and weaker evidence in relation to the effects of having completed an ethics course. These results should be interpreted cautiously considering that clinical placement in Australian legal education is an optional element of the program. Therefore the differences noted here may be a reflection of characteristics of those students who are more likely to volunteer to participate in clinical placement, rather than as a consequence of participation in the program itself. More research that utilizes controlled pre-post test designs is warranted to ascertain the efficacy of clinical placement as an effective intervention towards the development of professional ethical conduct.

Within these cautions the results may still be generalised in terms of their depiction of the current pool of early career lawyers in Australia and the patterns of change and persistence elucidated by the results presented in this paper. These highly variable results do not sit very well for evidencing the ‘moral force’ of Australian law faculties in their preparation of the next generation of legal practitioners, business professionals and the judiciary.

However, the findings presented in this study do suggest that ethics and clinical educational experiences may have some impact in the decision making processes for early career lawyers. What is also clear is the dilution of this impact as students’ transition to the workplace as legal practitioners. This finding alone is enough to support the need for systematic, ‘lifelong’ learning approaches to ethics education for practitioners.
Appendix 1

Scenarios Used to Elicit Ethical Responses

**Scenario 1 – Pro bono:** You are a new solicitor working in a large commercial law firm. A voluntary public-interest organisation approaches you to work on a prominent test case about women who kill in self-defence. Your interest in this area is well known. The work would be *pro bono* and very high profile for you personally but of little interest to your firm. The matter requires a lot of time and work. Your senior partner however wants you to increase your billable hours for the firm. The firm does not usually do any *pro bono* work but there is no actual policy against it. Your time is currently so limited you could only realistically do one or the other. Would you agree to work on the public interest case?

**Scenario 2 – Personal over corporation:** You are a junior associate of a small commercial law firm with a niche reputation in the area of privatisation tendering processes. Your firm has been tentatively approached by a significant corporation to help them draft their tender submission for a privatised public transport contract. Your firm would almost certainly gain an enormous amount of new work from this corporation if you were to take them on as a new client. At the same time you become aware that a close friend, who has not previously been a client, is about to request and will expect your help with their tender for the same government contract. You owe a great deal to this friend at a personal level. However, in your opinion the potential new corporate client is more likely to be successful in their tender due to size and experience. The work this corporation would generate far outweighs that of your old friend. The choice is yours alone in this case as you have been head hunted by the firm to take responsibility for developing this area of the practice. Thus in this situation it is of no assistance to decide solely on the basis of first come first served. Would you act for the corporation and therefore detrimentally affect the relationship with your old friend?

**Scenario 3 – Reporting trust account deficiency:** You are a Partner in the firm of AMBD. Your nephew (the son of your elder sister) is an associate in the firm. You discover your nephew has a minor gambling problem and has taken money from the firm’s trust account to cover his debts. Fortunately you discover the problem in its very early stages. Your nephew is now undergoing counselling for his gambling addiction and appears to be recovering. The amount missing from the trust account is relatively small and you are certain could be reimbursed without attracting any attention. Would you report the matter to the local law society?

**Scenario 4 – Insider trading:** Despite long hours and a great deal of work, you have been struggling for some months to make ends meet in your first couple of years as an employee lawyer. You have a HECS debt that you would like to clear...
and a close friend with whom you are very keen to move in and set up a home.

A corporate client of your firm, for whom you have done some useful work, takes the partner responsible, yourself and others in your section to lunch to celebrate (confidentially) the award of a tender. You know that the client is grateful and wants to recognise your collective contributions to this particular success. The client CEO says as much and, in addition to the usual hints about more work, speculates off-handedly that the price of the company’s shares is likely to reflect the win once it is all announced. Would you purchase shares in the company before the public announcement of the tender success?

Scenario 5 – Work vs. family: You are a junior solicitor working for a large city firm. The long working hours are causing a lot of pressure at home with your partner and your young children. This issue has been the topic of many recent conversations at home. The firm’s managing practitioner asks you to show commitment on a file. This would involve even longer hours than usual with many late nights for at least the next month. The managing practitioner has intimated that if you perform well in this task it could lead to a promotion. Working longer hours would cause a serious argument at home and be highly detrimental to your relationship with your family. Would you take on the extra hours?

Scenario 6 – Friendship challenged: You are a sole practitioner specialising in family law. A client approaches you to handle his divorce. You and your spouse have been good friends of this person and you also know his wife and children reasonably well. Whilst drafting the property settlement you suspect your friend has not declared all his assets. The settlement would leave his wife and children with little security and they would probably experience some financial hardship. Your friend says that his list of assets is complete. You are not convinced but you cannot realistically get more information. Would you continue to represent your friend?

Scenario 7 – Concealing criminal activity: You are a Deputy Public Prosecutor who has concentrated on drug trafficking cases. You have argued to many juries that every case of drug dealing harms society and must be reported and dealt with by the Police. You discover that your daughter has been selling cannabis to other students at her school. Your partner implores you not to report the matter and threatens to end your relationship (already strained by overwork) if you do. Would you report the matter to the Police?

Scenario 8 – Rounding up hours: While on a summer clerkship with a large and well-respected commercial firm, you are (naturally) concerned to make a good impression. It is your second last year of law school and you are desperate for Articles. The partner supervising you decides to give you some of her files to get ready for ‘costing’. She asks you to total the number of hours which she has spent on each file and, from her harried expression, it is pretty clear that she is
concerned to charge out a significant amount on each file. She asks you to ‘round up’ her hours to the next hundred in each file, saying that, on average, clients are happy because the main thing they demand is quality work. You know that these clients are entirely satisfied with the firm and that your supervisor is not about to debate the issue with you. **Would you round up the hours as requested?**

**Scenario 9 – Proposals to political party donors:** As a young and aware lawyer, you have for some years been anxious that the major political parties are unaware of or too nervous about the seriousness of global warming. You are in consequence very frustrated and personally despondent about your future and Australia’s future, to the point of a willingness to promote political change in any way possible.

As a *pro bono* contributor to the Greens’ election effort, you are asked to assist its local candidate by raising campaign funds from progressive law firms, barristers and old friends from law school. You know that significant funding is essential if the party is to have any chance in the likely ‘balance of power’ environment (with the Democrats in the centre, One Nation on the right and numerous independents, all seeking office).

You expect a major re-alignment of government policies if the Greens secure the balance of power. Your preferred approach, already quite successful, is to verbally represent to potential donors that you will ‘put in a good word’ for them when it comes to contracts and consultancies, in the event that the Greens are successful. You are receiving highly appreciative feedback from the candidate about the money already raised.

You fully intend to act on your promise to donors should the Greens achieve this balance, but you know that the party is very ‘pure’ and virtually certain to consider itself uncommitted to any corporate benefactor. **Would you make the proposed representation to potential donors?**

**Scenario 10 – Refer colleague for counselling:** You and your best friend founded a practice together 10 years ago. The practice has been moderately successful. Your friend (and Partner) has just been through a complex and bitter divorce. Since he has been separated from his family his only interest is work.

You have begun to notice personality changes which lead you to question his mental stability. His advice in some matters has become legally questionable and may be in breach of professional standards. He has rejected any suggestion of needing a break or some professional treatment. **Would you ask the local law society or regulator to arrange to counsel him?**

**Scenario 11 – Client confidentiality:** You are acting for a mother of three small children in a divorce and intervention order matter. Your client has previously shown you some old photographs of bruises and marks on the children which she claims were inflicted not by their father, but by her new boyfriend.
One of the children now has blurred vision. Your client now instructs you to stop all legal proceedings as she intends to return to the children’s father with her children. You believe the children will be at risk if this happens but you know “mandatory reporting” does not apply to lawyers in your state. Would you break client confidentiality and inform the relevant welfare department of your fears?