



Ethics and health – a comprehensive perspective, Part 1

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Must conditions worsen before they improve? Ethics, conundrums, symptoms of sickness, an ethical safety algorithm and recommendations for a way forward. The first of a two-part article.

You've heard it all before: 'Business ethics is a contradiction in terms', which you get told is 'an oxymoron'. Then there are others as well: 'Business ethics is head office's new flavour of the month, but it will die when the next thing hits the agenda'. Or perhaps 'Ethics is really a personal thing: you're honest or you're not' and 'If its already a dilemma you're already too late to fix it!' We will all reach our own conclusions, which in this instance doesn't need to take too long. Offshore, there's the recent ENRON and Worldcom scandals, and the dot.com bubble bursting. Back home, the national media now maintain ethics – and the corporate executives, entrepreneurs or public officials subjected to it – in the front pages, on television, on computer and now even on cellphone screens.

So ethics has arrived. Necessarily so, given our nation's founding constitutional values: 'human dignity, the achievement of equality and the advancement of human rights and freedoms'¹. Ethical awareness and the need for ethically defensible practices are also developing fast. Rapidly developing public awareness is improving consumers' diagnostic skills, and the symptoms of good and bad ethical practices are becoming more readily recognisable to patients, providers and colleagues. Although the focus seems to be on medical practitioners, it is on lawyers too. Financial advisers, for example, now have their own legislation.

OBJECTIVE OF THESE ARTICLES

Many corporates, businesses, public sector ministries and departments at national and provincial level, NGOs and voluntary associations are facing the need to upskill to understand ethics, install interventions and manage ethical contraventions within their operations. The King Report on Corporate Governance was the spur that has moved ethics and good governance onto the board agenda.

The author of these articles served as legal and industrial relations consultant on a team that developed and installed a strategic ethics policy and

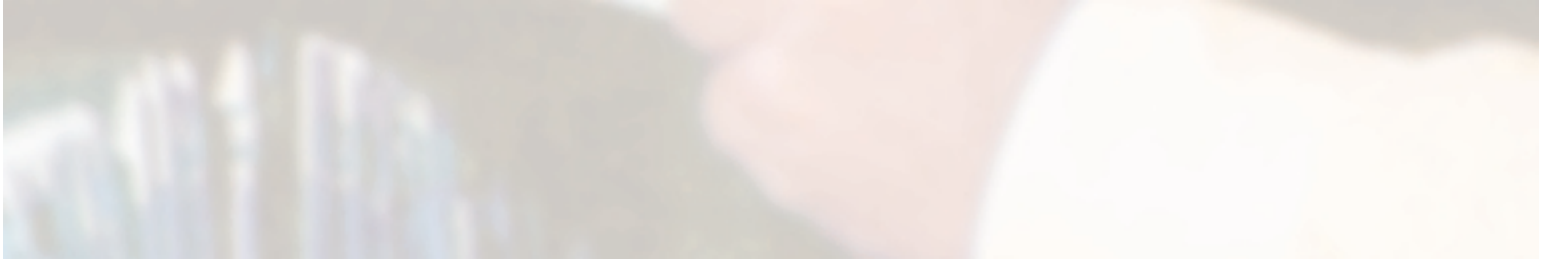
programmes in a major parastatal that faced ethical challenges in the mid-1990s. The process involved research, consultation, workshopping, planning and development of a comprehensive Ethics Policy, of Compliance Guidelines and Implementation Training. The intervention was later adopted in revised form by Parliament.

These articles aim to offer some of the learning about ethics and the advantages of ethical programmes, as well as for the employers they work for or with. There appear to be advantages for occupational health medical practitioners, nursing practitioners and the allied professionals that are involved in health, safety and compliance in the world of work. The benefits of ethical practice and decision-making are also available to employers, practitioners and the managers that are involved in occupational health and safety.

SOME RECENT MEDIA HEADLINES

In relation to medical practitioners, a recent scan of some local daily newspapers from June 2003 reported: 'Clampdown on Medical Fraudsters'²; 'Medical Aid Fraud Swallows Up R2bn'³; 'Several Witnesses Plead for Doctors' Careers to be Spared'⁴; 'Big 3 Pathology Labs Accused of Collusion'⁵; 'We Nail Kickback Doctors'⁶; 'Forensic Fraud Unit to Cure Healthcare Ills'⁷; 'Owning Up Saves Kickback Medics a Fortune'⁸ and, finally, 'Health Care Bodies Face Price-Fixing Charges'⁹. Ethics seems here to stay.

Medical practitioners are not the only professionals coming under review: recent media reported on 'Lawyers' Tariffs Rules as Price-fixing'¹⁰; as well as 'Lawyers Targeted in Latest Price-Fixing Probe'¹¹. Now financial advisers have their own legislation, in the form of the Financial Advisers and Intermediary Services Act ('FAIS' for short) and a new Ombudsman to handle public complaints, who gets appointed by the Financial Services Board¹². However, should matters concerning ethics have to get worse before they get better?



IS ETHICS REALLY IMPORTANT?

For occupational health medical practitioners (OHMP), professional reputation and credibility will always be important, whether as a full-time employee, an independent contractor on a fixed term contract, a task-based service provider, or an ad hoc provider. For some, reputation and credibility maintenance may be about providing a professional service to the employer and an ethical medical service to the patient in order that a salary is paid, or so that payment for services is made.

For others, the issues go far beyond professionalism and medical ethics: they feel that the issues involve questions about how to behave, based on moral duties and virtues arising from principles about right and wrong. Things can change fast in a unionised work environment, where key service receivers also include trade unions, occupational health nursing practitioners ('OHNP'), shop-stewards and industrial relations ('IR') or employee relations ('ER') managers. A complaint from any one of these or a grievance against the OHMP can lead to evidence in an internal disciplinary or grievance enquiry, a Occupational Health and Safety Act ('OHSA') investigation or a starring role in the Commission for Conciliation, Mediation and Arbitration ('CCMA') or the Labour Court ('LC').

ETHICAL AWARENESS – SOME EXAMPLES

Ethical issues – and how they are responded to – can lead to an enhancement of professional reputation, personal credibility and patient service, or to a disciplinary inquiry into the OHMP's conduct as employee, or the termination of a long-term service contract. For OHMPs the way to take advantage of the benefits and to avoid the pitfalls is to become ethically aware.

Many OHMPs face ethical issues, and have over time gained the experience and the insight to work them out in ways that have fair and moral outcomes for all. Other employed practitioners such as IR and ER Managers, and in-house lawyers and corporate counsels have very similar ethical dilemmas. For OHMPs, and often OHNPs also, the following hypothetical examples of scenarios in which ethics and ethical thinking is involved might be familiar:

- A Safety, Health and Environment ('SHE')

manager who the OHMP reports to and assesses her performance instructs the OHMP to do something unlawful;

- A line manager tells the OHMP to instruct an employee injured in an accident not to take sick leave as time would be lost and safety awards will be forfeited;
- A line manager refuses to hire or retain a disabled employee who is vocationally and functionally qualified for the job;
- A line manager dismisses an employee with a terminal illness for incapacity, causing the family to lose the death benefit, although the employee could have been retained until demise;
- A Safety, Health, Environment, Risk and Quality ('SHERQ') manager places pressure on an OHMP to disclose confidential health information;
- An independent contractor OHMP decides to side with the IR Manager in a disciplinary enquiry into an allegation of misconduct for intoxication at work, to maintain good relations;
- A SHERQ manager ignores an OHMP's Health Risk Report, or fails to respond within a reasonable time (or to respond at all) to the key OHSA-related safety and health compliance recommendations by the OHMP in it;
- An HR manager pressurises the OHMP to declare an employee unsafe, to enable removal from their post and to dismiss or retrench them;
- In a legal High Court case or CCMA dispute, the IR manager or legal representative decides not to call the OHMP as a key witness, and crucial information is not given which leads to an unfair outcome;
- An employed OHMP decides not to confront the SHE /SHERQ manager because the annual performance review cycle is coming up;
- A line manager refuses to establish posts which can be used for return to work from benefits or sick leave, or to provide alternative duties;
- An OHMP comes into a conflict of interest when they assess disability / impairment for the insurer and incapacity for dismissal for the employer.

AN ETHICAL FINE LINE: WHAT APPROACH TO TAKE?

Ethical awareness involves sensitivity to the following realities:

- Decisions do not only impact the bottom line but

also on others who have no commercial relationship to the decision;

- Decisions need to be taken based on a balance between conflicting demands;
- Decisions need to be reached through a process of ethical thinking;
- What support is needed to help make tough decisions?

What approaches are possible, moral, ethical and legal? Does one do nothing? Will inaction make things worse or better? What ethical courses are available to employed and contracted OHMPs in relation to the new focus on ethics in our constitutional democracy? Some references to history may assist.

ETHICS IN HISTORY

It seems that the professions may benefit from some guidance on what's simply right and what's plain wrong. This could evolve on a case by case basis, and lurch from scandal by scandal, but it need not. A good place to look for guidance on best practice is to history. Four thousand years ago, Mesopotamian rulers had similar problems to those today, and sought to establish more honest trading practices. They produced the Code of Hammurabi, with penalties a little harsh for now; death was the consequence for most infractions. Later on, Aristotle and Plato¹³ argued about whether a code of ethics would not be better as a guide on the fine points of rights and wrongs than an individual's own discretion and judgement. Our own media headlines signal that they might.

Plato took the position that the ideal decisions could be made by a 'philosopher-king' who had special insights above other people into good governance and the truth. Rules, he said, could not produce the correct decisions, only wise and good humans could. Therefore, morals and just outcomes were to Plato a result of having the right people in the right positions at the right time. He thought that people who knew 'the good', or what the right thing to do was, would do it.

Aristotle had perhaps a little more insight into the future dynamics of a post-modern globalised capitalist world in the 21st century. He argued from the position that there was actually no such thing as the benevolent and just 'philosopher-king', and that even if an individual did know what good was, there was that tricky matter of the 'weakness of the will'. So he concluded with what we all suspect: people could not be completely objective, and they tend to take a short-term view. He thought that they allow emotion and passions to intrude on a wise or moral or ethical decision. To Aristotle 'the frailties of human nature require that decisions

about ethics generally be a matter of law or rules'.

ETHICS IN A CONSTITUTIONAL DEMOCRACY

Over time, Aristotle's approach has prevailed, and it finds its ultimate expression in Western-style democratic constitutions with Bills of Rights such as in our Constitution in Chapter 2, from sections 7 to 39. In this way the excesses of our former state have been curtailed, as also the ability of any state to limit certain rights in line with popular opinion about what is right and wrong.

ETHICS, POSITIONS OF THE PRACTITIONERS AND POSITIONAL POWER

At its simplest, there seem to be four types of legal relationships through which OHMPs provide OH-related services to an employer:

- As an employee, in terms of a contract of employment, based on a job description;
- As an independent contractor (or an OHMP partnership), in terms of a contract, based on a service level agreement;
- As a task-based provider, in terms of an oral agreement, based on trust and mutual confidence.
- As an *ad hoc* service deliverer.

From an HR perspective, the employed and independent OHMP are 'persons in the middle'. Neither a member of either of the two main protagonist groups – 'management' and 'labour' – their position is like that of a supervisor, or a manager who is known to be a trade union member. The effect of this positioning reduces any possibility of significant positional power in the organisational sense. This in turn sets up a dependency and a vulnerability which makes their services and their decisions and their recommendations susceptible to control by others.

This positional weakness makes OHMPs and OHNPs more subject than many to the possibility of being overtly and subtly manipulated and becoming susceptible to it. Ethical awareness becomes a necessary competency. Most universities train in medical ethics but not for applying workplace ethics in competitive capitalism, against the dictates of downsizing and imperatives of production and productivity goals.

A direct consequence is that OHMPs need insight and understanding about the issues they face, and then empowerment with purpose-made strategies and tools to help them promote medical ethics, improve quality, reduce non-compliance risks, and to ensure constitutional and moral decisions and outcomes.

RED FLAGS – SOME SIGNS OF SICKNESS

In 'The Ethical Edge'¹⁴, the authors identify some

general 'red flags' that can alert diligent persons in responsibility about the actual or potential presence of ethical problems. The persons who would need to consider the red flags and then apply their minds to what to do and whether to act could include governing bodies, trustees, office bearers, directors, and so on. Anyone in a position of responsibility with fiduciary duties would need to react if there is an ethical issue to respond to and to find strategies to manage. The red flags they mention include the following:

- Conflicts of interests.
- Employee, patient, union or employer complaints.
- Use of assets.
- Complaints about privacy and confidentiality.
- Pressures on productivity.
- Downsizing and restructuring pressures.
- Compensation and benefits.
- Lack of full disclosure.
- Events affecting image and reputation.
- Institutional culture.

The corporate power position of the OHMP and OHNP establish many ethical red flags of this form.

THE ETHICAL NEED TO UNDERSTAND THE CHALLENGE OF CHANGE

The new democratic order has rightly and necessarily produced a large volume of long-overdue non-medical legislation that directly affects occupational health medical and occupational nursing practice. The rate and the complexity of the change are also daunting – even for lawyers. Everyone is on a new and often somewhat steep learning curve.

The challenge is to position a strategy and implement a plan to support members for legal and ethical compliance. This is made even more complex due to the inter-disciplinary nature of occupational medical and nursing practice. Legal practitioners specialising in health law, disability law and insured disability benefits laws are in a similar position. OHMPs and OHNPs occupy space where many fields of expertise converge, and the confluence produces conflicts in the currents and leads to muddled waters. What all this means is that there arises a responsibility to stay expert in the field of expertise the practitioner is specialised in, but to also become aware of others as well and to function effectively in relation to them. At the confluence, ethical conflicts between fields, perspectives and power positions are realities that have to be managed.

And these occupational medical and nursing practitioners do not carry the onus and responsibility alone: occupational therapists are affected very similarly and specifically those specialising in the growing field of insurance law, vocational

rehabilitation and disability consulting. Other professions are expected to experience similar challenges: industrial psychologists, ergonomists and psychiatrists specialising in work-based rehabilitation, disability claim assessment – and post-traumatic stress.

In the second part of this article, the new risks arising from the complexities of the new legislation will be looked at in the context of ethical duties to disabled employees. Then an 'ethical safety algorithm' is offered as a guideline for identifying ethical dilemmas and for responding appropriately. Finally, strategic recommendations for the future are outlined.

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