

# Designing Ethics Indicators for Legal Services Provision

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All errors and opinions are our own.

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## EXECUTIVE SUMMARY

Market liberalisation of legal services is being accompanied by key changes in professional regulation, notably outcome focused regulation, prioritised through risk-assessment and invoking stronger elements of relationship management. These suggest changes in the nature of professionalism. For some at least, market liberalisation in particular threatens to weaken professional ethics.

Because of the transitions underway in the legal services market, there is a need to better understand the ethics of legal service providers. This report examines ways of doing that. Regulators (and businesses) in other fields and jurisdictions have begun to recognise the limitations of command and control regulation and as a result, an interest in tools which seek to deepen understandings of ethics has grown.

Systematic understanding of ethics in the legal services market is remarkably thin. Debate about ethics is often based on anecdote and argument and where it is evidenced at all it usually derives from data on complaints and regulatory enforcement. These are limited sources, subject to limited analysis. Some more detailed specific analyses have been undertaken relevant to particular market sectors (wills) or themes (referral fees).

This document reviews how empirical research can be used to track ethics across a legal services market consisting of a range of different markets and provider types, both professional and non-professional.

We set out tools that can enable regulators and legal service providers to:

- better understand ethical risk;
- better target regulation; and,
- better support ethical environments and cultures within legal service providers.

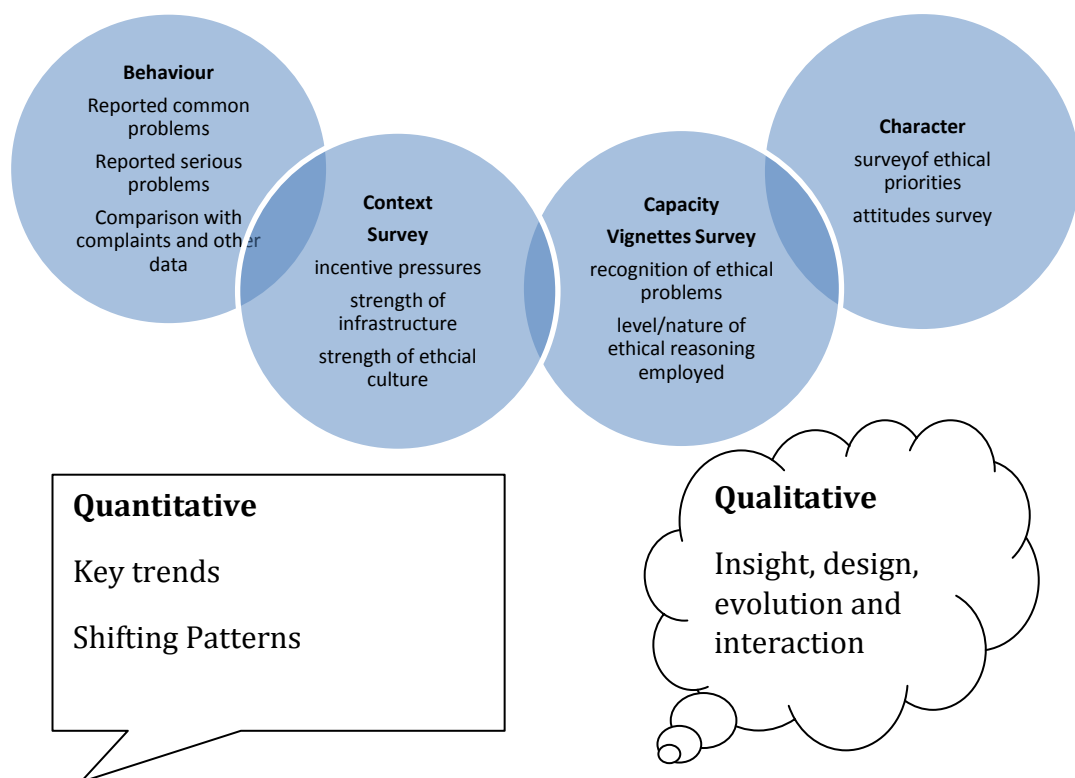
These tools are about informing regulatory and professional practice not policing providers or regulators. Ethics is complex and best understood as multi-dimensional and interactive phenomenon. To understand behaviour involves understanding the precursors of behaviour. Our model emphasises three dimensions (the “3Cs”):

- **character** (individuals and professional dispositions to regard something as ethical or unethical);
- **context** (incentives, infrastructure and culture); and
- **capacities** (how we recognise and reason on decisions).

It is important to emphasise that behaviour and the 3Cs **interact**. So our tendency to see something as ethical or unethical is determined by our own character; the context within which we work and our capacities (what we know and how we reason about ethical issues). An individual's behaviour can influence her own and her colleagues' context. In developing indicators to track ethics within the legal services market all four should be examined.

The report discusses available approaches to looking at the 3Cs and behaviour and makes recommendations as to how to approach sampling and develop tools appropriate to the legal services market. The model is illustrated in Figure 1.

FIGURE 1: AN INTERACTIVE MODEL OF PROFESSIONAL ETHICS



We set out proposals for integrating these four dimensions into a programme of work.

This would begin with a feasibility study which would:

- develop survey instruments for reporting perceived ethicality of behaviour in the respondents' field; examining their perception of ethical priorities and the relevance of context (infrastructure, incentives and culture) to the perceived ethicality;

- develop vignettes for general application across legal fields that enable the examination of recognition and resolution of ethical problems;
- test the appropriateness of web-based surveys in this context; and,
- relate the data to available information on complaints and other risk indicators where available (say from regulators and COLPs).

There is the potential to develop interactive tools for collecting data via electronic means which can serve both as research tools and CPD/self-development tools for practitioners as well as being useful for educators; firms when recruiting and managing staff (including to senior positions); and for sophisticated clients when selecting legal services providers.

Once the tools have been robustly designed and tested, there is the potential for regulators to significantly increase their insight into the ethical challenges facing legal practitioners.

# 1 INTRODUCTION

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This chapter discusses the background to the research and its aims. It explains the case for regulators taking ethical monitoring more seriously and reviews approaches in other jurisdictions and analogous sectors.

The Legal Services Board commissioned this research to begin development of tools to assist in monitoring the core ethical obligations of legal service providers. This paper informs key stakeholders of our initial analysis. It seeks to:

- identify and analyse the key issues posed by such a project;
- identify and analyse potential ways forward;
- facilitate a debate with key stakeholders to subject these ideas to initial scrutiny as part of the development of these tools; and,
- assist the LSB in deciding whether and how to advance ethical benchmarking of legal services with a view to data collection taking place.

Ethics is a complex, and contested, phenomenon. “Measuring” it will provoke controversy. It is important to acknowledge both the controversy and the complexity of the subject.

We discuss different approaches to understanding ethics in the early sections of this report but in broad terms we define ethical issues as arising when the public interest in the administration of justice, the client’s interest and the provider’s interests (in profit or survival) are in tension. Ethical problems arise where there is a significant risk that the need to balance conflicts between these interests has not been properly calibrated. Our definition is wider than compliance with professional rules. We discuss why below, but one reason is that the legal services market covers a range of providers, some with different rules, some without rules at all. It is focused on ethics rather than the service and quality issues which are the focus of Inadequate Professional Services regulation, for instance.<sup>1</sup>

Our approach is to develop tools that inform rather than judge professional practice. There are a series of practical and intellectual reasons which militate against developing tools which ‘judge’ the ethicality of a provider, which we discuss below. We aim to develop indicators which can be used to track ethical pressures and concerns within the system.

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<sup>1</sup> Quality problems would often, but not always, be ethical problems.

Empirical understandings of ethics show that it is possible to develop such indicators. The literature is vast, although on legal services it is more modest.<sup>2</sup> It suggests the importance of understanding behaviour but also the precursors of that behaviour. Ethical decision making is best understood as an interactional process which is also multi-dimensional. It is affected by three elements: **character** (our own and our profession's values or dispositions); our **context** (incentives, infrastructure and culture); and our **capacities** (how we recognise and reason on decisions). Behaviour and the 3Cs interact. These interactions and the complexity of ethics suggest a need to look at a balance of all four elements in developing indicators to track ethics within the legal services market.

The report is structured as follows:

- In the remainder of this introduction we consider why it is important for regulators to take a harder look at ethics. As part of this we review existing approaches across a range of different sectors and countries.
- Chapter 2 discusses conceptual issues, in particular what we mean by ethics and how that relates to an understanding of compliance (Chapter 2).
- Empirical approaches to assessing the ethicality of behaviour are then discussed (Chapter 3). We set out an interactional, multidimensional model of precursors to ethical action. A set of example instruments from key approaches are set out in the appendices (page 112 onwards).
- Chapter 4 draws together the implications from this analysis and identifies potential methods applicable to legal services.
- Chapter 5 contains an overview of our main thinking and is recommended for those who do not wish to read the entire report (p. 88 onwards). We make recommendations as to the development and testing of instruments through a feasibility study.

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<sup>2</sup>See APPENDIX E, Bibliography.



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## OVERALL AIMS OF THE PROJECT

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In commissioning this project, the LSB's stated aim was:

***“to develop tools which will assist legal services regulators in monitoring the core ethical obligations of legal service providers. The ultimate aim is to develop tools that can be applied across the legal services market.”***

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It is worth emphasising some consequences that flow from this for our analysis of likely approaches:

- Use of the tools sends a signal that ethics is important.
- The tools are not being developed to monitor individuals or organisations. They are tracking and insight tools to assist the regulators in understanding ethical challenges posed by changing market and regulatory dynamics. The tools would not be used to provide judgments on the ethicality of a particular organisation or individual.
- They can inform educational and regulatory approaches as well as encouraging practitioner dialogue and improvement on ethical practice. Some tools may help firms/organisations and even individuals improve their practice. We can envisage some tools being developed to aid organisations in self-assessing ethical risk.
- The tools would inform judgments about whether market liberalisation does or does not degrade ethicality and whether such degradation is associated with particular practices or sectors of the market.

To further those aims, this report:

- sets out the range of issues ethical benchmarking might cover;
- sets out the range of potential methods currently available;
- explains why a multi-dimensional approach is necessary;
- sets out our model of the different dimensions of ethical behaviour that might be measured (character, capacity, context);
- recommends a dashboard of tools to do so and approaches to evolving and testing those tools; and,

- provides a basis for discussions with stakeholders including a proposed methodology for proceeding further.

## WHY IS A REGULATORY INTEREST IN ETHICS IMPORTANT?

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A defining feature of a profession is that its members behave in an ethical manner, properly balancing the public interest, the client's interest and its own interests. Law and justice constitute vital public goods. Legal practitioners must honour their custodianship of those goods by facilitating access to services which are both competently and ethically provided.<sup>3</sup>

A persistent concern raised by the ongoing liberalisation of legal services is that competition may have a detrimental impact on ethical standards within the legal services market. Too fierce an economic orientation can have a poor effect on ethical standards, although evidence on the point is complex and far from unequivocal.<sup>4</sup> Equally, economic incentives are a fact of life. Regulators cannot simply turn off economic incentives, but they can understand and account for them in regulatory approaches.

For understandable reasons, the strategy of the LSB and the Legal Services Consumer Panel in their early years has been to focus on encouraging competition and a stronger consumer-service orientation in legal services. Arguably, developments in the market place are also heightening a 'consumer service' orientation. There has been much less of a focus on ethical responsibilities more broadly conceived. Egregious conduct aside, clients are not always well placed to judge either the technical quality of the work they purchase or its ethicality.<sup>5</sup>

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<sup>3</sup> (The Legal Services Act 2007 emphasises regulatory objectives and key professional principles (s.1(3)) relevant to the promotion of ethical standards in legal services.)

<sup>4</sup> Abratt and Penman, 'Understanding Factors Affecting Salespeople's Perceptions of Ethical Behaviour in South Africa' (2002) 35(4) *Journal of Business Ethics* 269 'questionable sales practices against customers and employers judged as less ethical than if used against competitors'. Cf: Butterfield and others, 'Moral Awareness in Business Organizations: Issues of Business Related and Social Context Factors' (2000) 53(7) *Human Relations* 981: 'when individuals perceive highly competitive practices, they become more aware of the moral issues'; Verbeke and others, 'Exploring the Contextual and Individual Factors on Ethical Decision Making of Salespeople', (1996) 15(11) *Journal of Business Ethics* 1175: – 'competition did not affect ethical decision making'; Hunt and Jennings, 'Ethics and Performance: A Simulation Analysis of Team Decision Making' (1997) 16(2) *Journal of Business Ethics* 195: 'high performing teams do not tend to make the most ethical decisions'. See generally, O'Fallon and Butterfield, 'A Review of the Empirical Ethical Decision-Making Literature: 1996-2003' (2005) 59 *Journal of Business Ethics* 375

<sup>5</sup> Solicitors' Regulation Authority, 'Attitudes to Regulation and Compliance in Legal Services: 2011 Research Findings' (Solicitors Regulation Authority, 2012).

Equally, consumer interests may sometimes conflict with public interests (a client who wishes to make a fraudulent claim, for example). There is the potential for new providers to enter the market with 'different' ethical attitudes: these new approaches may rejuvenate or be in tension with the needs of the justice system. If, market dynamics threaten a race to the bottom, regulators may need to act. If no race to the bottom is evidenced, greater confidence is engendered in the legal services market.

Alongside market liberalisation, a shift towards Outcomes-Focused Regulation seeks to move professional ethics away from historical notions of rule-based compliance. It aims to be more proportionate but also more meaningful.<sup>6</sup> In theory, a principled approach encourages professionals to take greater responsibility for, and apply greater discretion to, ethical problems through the application of overarching principles (in addition to rules/outcomes and indicative behaviours). Should such an approach succeed professional ethics shifts from a concern with compliance with 'the rules' towards 'doing the right thing' by clients and the public interest.

Institutional frameworks are also important to the implementation of Outcomes-Focused Regulation. The SRA now employs a more relational approach to regulating firms and aims for a stronger institutionalising of ethics within firms through the appointment of Compliance Officers for Legal Practice (COLPs).<sup>7</sup> COLPs may improve the flow of information to the SRA about compliance and ethics concerns but they also have the potential to mediate or even distort that information flow.

The success of outcome-focused regulation is yet to be evaluated.<sup>8</sup> A further element of the picture is that regulators are developing a more risk-based approach to regulatory strategy.<sup>9</sup> Deepening understandings of ethical risk are, and should be, a part of that strategy. The SRA, for example, has begun to develop approaches such as risk management database and its benchmarking study;<sup>10</sup> and regulators have used traditional avenues such as complaints and complaints monitoring and market intelligence to act as signals of ethical problems.

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<sup>6</sup> See generally the SRA Handbook and Code of Conduct 2012 and the BSB Consultation on the new BSB Handbook and proposals to become a regulator of entities: <http://www.barstandardsboard.org.uk/about-bar-standards-board/consultations/open-consultations/new-bsb-handbook-and-entity-regulation/>

<sup>7</sup> See also the BSBs plans in consultation paper n. 6.

<sup>8</sup> Paterson, *Lawyers and the Public Good: Democracy in Action?* (The Hamlyn Lectures), (Cambridge University Press, 2011).

<sup>9</sup> SRA, Risk-based Regulation, <http://www.sra.org.uk/sra/strategy/risk.page> as at 09/5/2012.

<sup>10</sup> SRA Benchmarking Study, cited n 5.

Whilst evidence supports the importance of regulatory attention (monitoring, enforcement and sanctioning) in reducing ethical risk,<sup>11</sup> it is impossible for regulators to rely on 'bad cop' regulatory strategies alone. Motivation can be an important element driving good practice within the professions: moral conscience and reputational concerns appear to be important drivers encouraging legal services to be delivered within the spirit of the law as well as the letter of the law.<sup>12</sup> It is not just rules that foster the ethicality of legal service providers. There is also, currently, no means of comparing ethical attitudes, approaches, behaviours or pressures across the legal services market.

### CURRENT APPROACHES TO ASSESSING ETHICS BY REGULATORY BODIES AND RELEVANT ORGANISATIONS

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In the course of our research, we reviewed the approach of a wide range of professional regulators domestically and internationally:<sup>13</sup> across the United Kingdom,<sup>14</sup> Ireland,<sup>15</sup> the United States,<sup>16</sup> Canada,<sup>17</sup> Australia<sup>18</sup> and New Zealand.<sup>19</sup> We sought out relevant literature from these organisations' websites and where possible, meetings and telephone discussions were also arranged.

In large measure, those we engaged through this process tended to emphasise the following approaches to understanding ethics amongst their memberships as standard:

(a) complaints monitoring;<sup>20</sup>

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<sup>11</sup> See for example, Carlo Patetta Rotta, *A Short Guide to Ethical Risk* (Gower, 2010).

<sup>12</sup> Tenbrunsel and others 'Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation' (1998) 41(3) *Academy of Management Journal* 330; SRA study cited n 5.

<sup>13</sup> National Association of Bar Counsel: <http://www.nobc.org/>

<sup>14</sup> General Medical Council, British Medical Association, Law Society of England and Wales, British Psychological Society, the Institute of Engineering and Technology, the Chartered Insurance Institute, the Chartered Institute for Securities and Investment, Royal Institution of Chartered Surveyors and Chartered Institute of Management Accountants.

<sup>15</sup> Law Society of Ireland; Bar Council of Ireland.

<sup>16</sup> We spoke to a wide array of state bars as well as the American Bar Association, American Medical Association and the American Psychological Association.

<sup>17</sup> Canadian Bar Association.

<sup>18</sup> Legal Services Commission (Queensland); Office of the Legal Services Commission (New South Wales); Legal Services Commission (Victoria); Legal Services Board (Victoria); Law Institute of Victoria and the Victorian Bar; Queensland Law Society and Bar Association; Law Society and the Bar Association of New South Wales.

<sup>19</sup> New Zealand Bar Association and Law Society.

<sup>20</sup> See for example, complaints used to determine levels of good practice in 'The State of Medical Education and Practice' (General Medical Council Report, 2011).

- (b) publicising the outcomes of lawyer discipline;
- (c) reliance on a pre-qualification ethics curriculum with varying levels of assessment;<sup>21</sup>
- (d) unassessed post-qualification ethics CPD requirements;
- (e) operation of ethics helplines (where these existed, they offered some informal oversight of ethical concerns being generated within practice);<sup>22</sup>
- (f) review of financial accounts (to manage financial probity); and ,
- (g) public consultations on specific issues.

Model ethics opinions are generally given greater prominence outside the United Kingdom, with the National Association of Bar Counsel (covering USA, Canada and Australia) and the ABA Standing Committee on Ethics and Professional Responsibility publishing ethics opinions.<sup>23</sup>

Overall, the emerging picture was that regulators relied on regulating ethics through training and complaints monitoring. Very few regulatory bodies took monitoring further than that. The kinds of assessment methods being considered by this research had not received much proactive attention, although several regulators expressed an interest in how they could use empirical methods in the future. Conversely, there are indications that some regulators in other jurisdictions and consonant fields are beginning to adopt a broader approach to ethics.

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## AUSTRALIA

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In the context of legal professions, Australia proved a somewhat exceptional case. Here regulatory bodies have been more active in applying various methods to testing ethics. The Queensland Legal Services Commission provides access to a series of ethics checks on its website which can be used anonymously to assess supervision practices; workplace culture; complaints management systems and billing practices.<sup>24</sup> It also has a link to interactive ethical case studies,<sup>25</sup>

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[http://www.gmc-uk.org/State\\_of\\_medicine\\_Final\\_web.pdf](http://www.gmc-uk.org/State_of_medicine_Final_web.pdf) 44213427.pdf. See chapter 3. Accessed on 26<sup>th</sup> April 2012. The Law Society of Ireland published statistics as did most state bars in the United States. The Chartered Insurance Institute monitored disciplinary processes.

<sup>21</sup> Law Society in Ireland referred to their closed book exam and ethics assignment.

<sup>22</sup> The Law Society of Ireland.

<sup>23</sup> [http://www.americanbar.org/groups/professional\\_responsibility/publications/ethics\\_opinions/aba\\_formal\\_ethics\\_opinions\\_index\\_by\\_issue\\_dates.html](http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/aba_formal_ethics_opinions_index_by_issue_dates.html) accessed 10th May 2012

<sup>24</sup> <http://www.lsc.qld.gov.au/ethics-checks> accessed 26th April 2012.

as well as collaborative surveys on topical issues.<sup>26</sup> The Queensland Legal Services Commission has invited academic input to help analyse the data yielded by its website ‘tools’ and to begin an understanding of their efficacy.<sup>27</sup>

Queensland Law Society also offers various web-based tools including a ‘lawyers’ compass’<sup>28</sup> (an ethical deliberative questionnaire which is intended to be used as a decision aid for working through the various dimensions of an ethical problem and arriving at a solution)<sup>29</sup> and an ethics self-audit with a questionnaire for self-assessment.<sup>30</sup> In New South Wales, the Office of the Legal Services Commissioner’s website contains a checklist of “ten areas to be addressed to demonstrate compliance with ‘appropriate management systems’ (which relates to a specific requirement of Incorporated Legal Practices) and a self-assessment questionnaire designed to assist firms in rating their own compliance and identify necessary improvements.<sup>31</sup> Here too, there has been academic involvement in evaluating the efficacy of self-assessment in reducing complaints.<sup>32</sup>

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## UNITED KINGDOM

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In the United Kingdom legal profession, the approach is largely along conventional lines although the Solicitors Regulatory Authority has

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<sup>25</sup> Developed in conjunction with the Centre for Biological Information Technology at The University of Queensland and the Law School at Queensland University of Technology, [http://scenarios.sblinteractive.org/law/intro/pbl\\_legal.html](http://scenarios.sblinteractive.org/law/intro/pbl_legal.html) accessed 1st August 2012

<sup>26</sup> <http://www.lsc.qld.gov.au/projects/web-based-surveys/occasional-surveys-on-topical-issues> accessed 3rd August 2012

<sup>27</sup> Parker and Aitken, ‘Workplace Culture Check: Learning from Reflection on Ethics Inside Law Firms’ (2011) 24 *Georgetown Journal of Legal Ethics*, issue 2; Parker and Haller ‘Inside Running: Internal Complaints Management Practice and Regulation in the Legal Profession’ *Monash Law Review*, forthcoming; Parker and Ruschena, ‘The Pressures of Billable Hours: Lessons from a Survey of Billing Practices within Law Firms’ (available at [http://www.lsc.qld.gov.au/\\_data/assets/pdf\\_file/0020/106058/pressures-of-billable-hours.pdf](http://www.lsc.qld.gov.au/_data/assets/pdf_file/0020/106058/pressures-of-billable-hours.pdf)); see also Fortney and Levin’s forthcoming work on regulation under the new regime.

<sup>28</sup> <http://ethics.qls.com.au/content/thelawyerscompass> accessed 27th April 2012

<sup>29</sup> <http://ethics.qls.com.au/content/materials/deliberative-model.html> accessed 26th April 2012.

<sup>30</sup> <http://ethics.qls.com.au/content/qes> accessed 26th April 2012

<sup>31</sup> [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll\\_olsc.nsf/pages/OLSC\\_ilp](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_ilp) accessed 26th April 2012.

<sup>32</sup> Parker, Gordon and Mark, ‘Regulating Law Firm Ethical Infrastructure: An Empirical Assessment of the Potential for Management Based Regulation of Legal Practices’ (2010) 37 *Journal of Law and Society* 466

undertaken some initial work on benchmarking attitudes to regulation which is discussed elsewhere in this report.<sup>33</sup>

In the medical profession, there has not been much focus on research-based assessment of ethics in practice. The General Medical Council (UK) has an interactive section of its website called 'Good Medical Practice in Action', presented as a series of 'waiting rooms' which users can enter to practise dealing with ethical issues.<sup>34</sup> This is currently being used for educational rather than assessment purposes but it has potential to offer a framework for self-assessment.

The shift towards interactive or 'real-life' ethics case studies is also reflected in the Institution of Engineering and Technology's use of interactive case studies available to its members on its website.<sup>35</sup> Similarly, the Chartered Insurance Institute, told us their focus was being increasingly drawn towards more practical help for members which equated to 'bring this to life' case studies, workshops lectures, online debates and practical CPD ethics workshops. In 2008, the CII commissioned an independent report on its approach to ethics which focused on suggesting improvements to education and training, communication and enforcement.<sup>36</sup>

The Chartered Institute for Securities and Investments have developed an 'IntegrityMatters' Test<sup>37</sup> which has evolved from an industry magazine initiative to an online tool and works by asking members to assess case studies which have been developed to encourage participants to employ their ethical reasoning skills in situations where there is not an obvious regulatory answer. It is a test which adapts to the answers given. Although not used to inform risk assessment, this is an example of how ethical monitoring tools can have a role to play in the pre-qualification stage since accreditation depends on a convincing performance on the test. The Royal Institution of Chartered Surveyors uses vignettes and online guidance to encourage its members to stay informed about ethical issues.<sup>38</sup>

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<sup>33</sup> See pp. 78.

<sup>34</sup> [http://www.gmc-uk.org/guidance/case\\_studies.asp](http://www.gmc-uk.org/guidance/case_studies.asp) accessed on 26<sup>th</sup> April 2012.

<sup>35</sup> <http://www.theiet.org/membership/career/ethics/values/honesty/case-study/index.cfm> (access members only)

<sup>36</sup> Open Road Research, 'Getting Professional About Ethics: An Independent Report for the CII' (2009).

<sup>37</sup>

[http://www.cisi.org/bookmark/genericform.aspx?form=29848780&URL=integrity\\_matters](http://www.cisi.org/bookmark/genericform.aspx?form=29848780&URL=integrity_matters) accessed 26 May 2012

<sup>38</sup> [www.rics.org/ethics](http://www.rics.org/ethics) accessed 19 May 2012

The Chartered Institute of Management Accountants, jointly with the American Institute of Certified Public Accountants have recently undertaken a survey titled *Managing Responsible Business: A Global Study of Business Ethics*.<sup>39</sup> The survey's content is discussed elsewhere.<sup>40</sup> Beyond the survey, various 'tools' are made available on the resources section of the CGMA's website including checklists and vignettes which are recommended for monitoring ethics via improved governance and risk assessment.<sup>41</sup> The CIMA's approach to ethics monitoring includes a website animation designed to highlight the five principles on which the CIMA code of ethics is based,<sup>42</sup> an ethics checklist<sup>43</sup> and various ethical-content 'webcasts'.<sup>44</sup> Further, ethical vignettes are contained in its guidance document, 'Ethical Dilemmas: What Would You Do?'<sup>45</sup>

The Financial Reporting Council does not appear to benchmark ethical performance within accounting or actuarial firms. The continuing focus of the FRC on ethics has been on revising the Ethical Standards promulgated by the Audit Practices Board.

In the context of retail financial services, the Financial Services Authority has adopted a process-based approach to regulation through its Treating Customers Fairly initiative (TCF).<sup>46</sup> TCF involves the specification of targeted outcomes which are required in order for firms to treat customers fairly. The approach is designed to achieve the regulatory outcomes through cultural change within financial services firms.<sup>47</sup> Accordingly, in order to assess compliance with TCF, the FSA incorporates an assessment of culture when carrying out firm

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<http://www.cgma.org/Resources/Reports/Pages/ManagingResponsibleBusiness.aspx>; see coverage in the Times, Monday 21 May 2012.

<sup>40</sup> See 'Context' section of this report, pp 52-73.

<sup>41</sup> <http://www.cgma.org/Resources/Tools/Pages/tools-list.aspx> accessed 26 May 2012.

<sup>42</sup> <http://www.cimaglobal.com/Professional-ethics/> accessed 26 May 2012.

<sup>43</sup> <http://www.cimaglobal.com/Professional-ethics/Ethics/Ethics-checklist/> accessed 26 May 2012.

<sup>44</sup> <http://www.cimaglobal.com/Professional-ethics/Ethics/Responsible-business/ethicswebcasts/> accessed 26 May 2012.

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<http://www.cimaglobal.com/Documents/Professional%20ethics%20docs/dilemmas%20FINAL.pdf> accessed 26 May 2012.

<sup>46</sup> Financial Services Authority, 'Treating Customers Fairly: Towards Fair Outcomes for Consumers', 2006 ([http://www.fsa.gov.uk/pubs/other/tcf\\_towards.pdf](http://www.fsa.gov.uk/pubs/other/tcf_towards.pdf) accessed at 11 June 2012).

<sup>47</sup> Financial Services Authority, 'Treating Customers Fairly – Culture' 2007 ([http://www.fsa.gov.uk/pubs/other/tcf\\_culture.pdf](http://www.fsa.gov.uk/pubs/other/tcf_culture.pdf) accessed at 11 June 2012). See also speech of 5<sup>th</sup> June 2007, 'Delivering Fair Outcomes for Consumers' [http://www.fsa.gov.uk/library/communication/speeches/2007/0605\\_ve.shtml](http://www.fsa.gov.uk/library/communication/speeches/2007/0605_ve.shtml)



assessments.<sup>48</sup> A central part of this assessment is focused on controls and procedures and specific evidence of managerial involvement and leadership in these controls and procedures. It appears as a result that cultural assessments are less assessments of culture and more assessments of the pre-requisites to positive culture formation. However, the FSA also observe that as part of their assessments they spend 'time talking to middle management and frontline staff...to see if their behaviours and actions are appropriate and consistent with the values expressed by senior management and whether these would lead to fair consumer outcomes'.<sup>49</sup>

Where TCF failings are identified subject firms may be subject to enforcement action. It is noteworthy in this regard that firms' attempts to effectively implement TCF controls and procedures will be taken into account by the FSA in determining whether to bring, and the nature of, enforcement action.<sup>50</sup>

TCF is an interesting development especially given the well-known failing in the financial services industry in both retail and 'wholesale' sectors. As far as we are aware TCF has not been subjected to a testing evaluation.

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## UNITED STATES

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In the United States, the approach follows the established pattern. The ABA Center for CLE encourages ethics awareness through webinars and teleconferencing. The ABA Center for Professional Responsibility operates ETHICSearch<sup>51</sup> a helpline which also provides support to the ABA Standing Committee on Professional Responsibility.

The ABA stressed its continuous process of monitoring ethical culture on a project-driven basis. Examples include the Ethics 2000 Commission; the ABA Ethics 20/20 Commission and the ABA Commission on Multidisciplinary Practice. The ABA Center for

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<sup>48</sup> FSA (2006), cited n 46; FSA (2007) cited n 47.

<sup>49</sup> Cited n 47 (2007) pp 9

<sup>50</sup> Cited n 47 (2007)

<sup>51</sup> [http://www.americanbar.org/groups/professional\\_responsibility/resources.html](http://www.americanbar.org/groups/professional_responsibility/resources.html).

The ABA tell us that ETHICSearch is staffed by one full time and two part time lawyers and responds within 24 hours to two to three hundred calls per month.

Professional Responsibility publishes the Survey on Lawyer Discipline (SOLD) annually, and surveys dating back to 1998.<sup>52</sup>

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## CANADA

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The Canadian Bar Association Ethics and Professional Responsibility Committee provides online professional development and podcasts on issues such as conflicts of interest<sup>53</sup> including a conflicts of interest toolkit.<sup>54</sup>

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## NEW ZEALAND

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In New Zealand, when a solicitor reaches partnership level they are assessed through the 'Stepping Up' course which includes an interview with the candidate where he or she is required to answer questions on the rules of contact and client care.<sup>55</sup> Lawyers with responsibility for trust accounts are evaluated by specially designated trust account inspectors and ethical breaches which come to light in this way are brought to the attention of the lawyers and possibly then referred to a standards committee.

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## SUMMARY

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This review of other professions and jurisdictions, suggests that the dominant approach of professional regulators is reliance on prequalification training and testing, supplemented by some in-practice requirements or opportunities for ethical development by way of CPD. This is accompanied by modest levels of monitoring of

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<sup>52</sup>[http://www.americanbar.org/groups/professional\\_responsibility/resources/survey\\_lawyer\\_discipline\\_systems\\_2009.html](http://www.americanbar.org/groups/professional_responsibility/resources/survey_lawyer_discipline_systems_2009.html) accessed 10th May 2012

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2010\\_sold\\_finalreport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_sold_finalreport.authcheckdam.pdf) accessed 10th May 2012

<sup>53</sup> <http://www.cba.org/cba/PracticeLink/podcasts/conflictsreport.aspx> accessed 1st August 2012

<sup>54</sup> <http://www.cba.org/CBA/groups/conflicts/toolkit2.aspx> accessed 1st August 2012

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<http://www.legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437806.html> accessed on 5th June 2012.

complaints and helpline data. Some more innovative approaches have begun to develop in Australia and in the other service sectors.

## 2 CONCEPTUAL ISSUES: WHAT DO WE MEAN BY ETHICS?

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Measuring ethical risk means understanding what we mean by ethics. In this chapter we discuss our approach to the key conceptual questions that underpin an empirical understanding of ethics which is consonant with the aims of the project.

There are many definitions and approaches to ethics. They all involve some analysis of 'good' or 'justice' in relation to a decision or behaviour but this simply begs the question: by what standard is 'good' or 'justice' to be measured? In broad terms, ethics involves balancing the public interest in the administration of justice, against the client's interest and the provider's interests.<sup>56</sup> Ethical problems arise where there is a need to balance conflicts between these interests. Broadly, where there is conflict, it can be argued that the public interest in the administration of justice is stronger than the client interest, which in turn is stronger than the provider interest.<sup>57</sup> In understanding how these conflicts are or ought to be resolved, there are a number of competing and overlapping frameworks for deciding what the standard is:

- have key rules or duties been adhered to (akin to either deontological or compliance approaches)?
- are the consequences of actions ethical (usually seen as a utilitarian approach);
- does character, experience and thoughtful reflection on experience suggest the approach is ethical (broadly, the virtue ethics approach)?
- is a decision sufficiently informed by one's relationships with all interested parties (the relational approach)? and,
- a combination of all or some of the above in the light of a particular ethical problem's context (the contextual approach).

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<sup>56</sup> Conflicts between clients can arise which we see as fitting with a tension between provider and clients' interests.

<sup>57</sup> There are legitimate debates to be had over the balance between client interest and public interest; with zealous advocacy models prioritising client interest more strongly but all models emphasise some situations where public interest trumps client interest. Equally, some duties in professional codes may prioritise professional self-interest over client interest (such as the duty not to bring the profession into disrepute; or freedom to decline instructions on conscience). See n 169 for literature on emphases of various professional role ethical models.

None of these frameworks fully dominates either theoretical or empirical approaches to understanding ethics. Arguably, all are reflected in parts of the regulatory framework governing legal ethics.<sup>58</sup> They indicate the complexity of ethics and of the limits of a single approach.

Empirical approaches to evaluating ethics draw on ideas contained within each of these approaches. Philosophically grounded empirical approaches have tended to frame 'being ethical' as having sophistication in ethical reasoning. Organisationally focused approaches have tended to emphasise 'good processes' for ethical decision-making. Psychological approaches have emphasised the characteristics of individuals and their biases as a way of understanding or predicting ethical behaviour. Behavioural and socio-legal approaches have tended to emphasise the interactions between an individual's character, context (social and economic environments) and capacities (their knowledge of rules and their reasoning).<sup>59</sup>

Most methods rely on measuring proxies or precursors for ethicality rather than ethical behaviour. Certain types of unethical behaviour are concealed and difficult to observe directly. The professions typically measure knowledge of ethical rules as an entry requirement for qualification. Knowledge of ethical rules may be a necessary precursor to being ethical,<sup>60</sup> but it is not sufficient in itself. That I know what it means to be ethical does not mean I am ethical. Motivation to be ethical is derived from one's own values and intuitions,<sup>61</sup> and from the social, economic and cultural contexts within which one works. Values, context and knowledge interact with each other to shape our understandings of what is problematic and how to 'solve' that problem.

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<sup>58</sup> Rules and duties are a key part of the professional codes. Consequences are more explicitly a part of Outcome Focused Regulation (particularly the obligation to have regard to the public interest and the rule of law) but are also an element of rule formulation when regulators seek to predict the outcomes of rule changes. Experience and reflection often plays a part in rule creation (through consultation with experienced practitioners) and through some processes of adjudication of complaints. Relational concerns may be addressed in rule formulation (where regulators engage with consumers and other stakeholders), in the rules themselves or in dispute resolution processes (mediation and adjudication). Outcome focused regulation appears to give more space for practitioners to reflect on and justify ethical approaches to business in the context of their own clients and practice. It may involve a step towards and more contextual in its approach.

<sup>59</sup> Economides and Rogers, 'Preparatory Ethics Training for Future Solicitors' (2009) (London: Law Society Report); Evans, *Assessing Lawyers' Ethics: A Practitioners Guide* (Cambridge, University Press, New York, 2011); Stern, (ed) *Measuring Medical Professionalism* (Oxford: OUP, 2006).

<sup>60</sup> Surdyk, 'Educating for Professionalism: What Counts, Who's Counting?' (2003) 12 *Cambridge Quarterly of Healthcare Ethics* 155 and Thomasma, *The Virtues in Medical Practice*, (OUP: Oxford, 1993), pg 179. Both cited in Economides, cited n 59 at pg 46)

<sup>61</sup> Haidt, 'The Righteous Mind' (Allen Lane: London, 2012).

The ability to reason ethically has been demonstrated as being linked to behaving ethically, but it is obviously possible to reason ethically but behave unethically.<sup>62</sup> Indeed, there is evidence that much ethical decision-making is intuitive rather than rational.<sup>63</sup> Rational application of ethical principles (or professional rules) can be a key part of the process of ethical decision making, but it is not the only part and it may not be the dominant part.

Most methods, especially quantitative indicators of ethicality, rely on proxies that look at character, context or capacity and do not directly assess behaviour. Studies have demonstrated plausible links between these proxies and behaviour,<sup>64</sup> but usually in the context of experimental, class-based studies.

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<sup>62</sup> See bias experiments in Bazerman and Gino, 'Behavioural Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty' (2012) Harvard Business School Working Paper, 12-054 and also, Banaji and others, "How (Un)ethical Are You?" (2003) 81(12) Harvard Business Review 56.

<sup>63</sup> See Kahneman, *Thinking, Fast and Slow* (Allen Lane, 2011) generally and also Haidt, cited n 61.

<sup>64</sup> From the socio-legal approach, see Palermo and Evans, 'Relationships Between Personal Values and Reported Behaviour on Ethical Values for Law Students' (2007) 25 Behavioural Science and the Law 121: This study used ethical dilemmas to evaluate law students' ethical values, demonstrating which values were predictive of reported behavioural choices. Palermo and Evans, 'Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill Towards Lawyers' Professionalism' (2008) 17 Griffith Law Review 252 suggests a link between increased awareness of values and better behaviour.

More generally see Barnett and others, 'Religiosity, Ethical Ideology and Intentions to Report a Peer's Wrongdoing' (1996) 15(11) Journal of Business Ethics 1161 – 'ethical judgments associated positively with behavioural intentions to report a peer's unethical behaviour'; Robin and others, 'The Empirical Performance of Cognitive Moral Development in Predicating Behavioural Intent' (1996) 6(4) Business Ethics Quarterly 493 – 'perceived importance of an ethical issue positively relates to behavioural intentions'; Rallapalli and others, 'The Influence of Norms on Ethical Judgments and Intentions: An Empirical study of Marketing Professionals' (1998) 43 Journal of Business Research 157 – 'ethical judgment significantly affected intentions'; Bass and others, 'Individual Difference Variables, Ethical Judgments and Ethical Behavioural Intentions' (1999) 9(2) Business Ethics Quarterly 183 – 'individuals more likely to state intentions to perform an action if they judged it as ethical'; Barnett, 'Dimensions of Moral Intensity and Ethical Decision Making: An Empirical Study', (2001) 31(5) Journal of Applied Social Psychology 1038– 'ethical judgments predicted behavioural intentions'; Wagner and Sanders, 'Considerations in Ethical Decision Making and Software Piracy' (2001) 29(1/2) Journal of Business Ethics 161 – 'where individuals judged an unethical action as unethical, they also indicated an intention not to behave unethically'; Shafer and others, 'Effects of Personal Values on Auditors' Ethical Decisions' (2001) 14(3) Accounting, Auditing and Accountability Journal 254 – 'positive relationship between intentions and actions'; Flannery and May, 'Environmental Ethical Decision Making in the US' Metal Finishing Industry' (2000) 43(4) Academy of Management Journal 642 – 'intentions to engage in unethical behavior positively affected by attitudes to that behaviour' (all above citations in O'Fallon cited n 4 ); Blasi, 'Bridging Moral Cognition and Moral

We discuss how and when collecting data on the ethicality of actual behaviour may be advisable or possible below. Such data, too, has its limitations. To give one example, complaints data might be considered a useful component in any benchmarking mechanism but what is recognised as an ethical complaint depends on an ordinary complaint passing through a number of filters. How often do clients identify an ethical issue as a problem? How do firms deal with ethical complaints before they get to regulators? When regulators deal with complaints how do they identify them as ethical matters?

There is a second problem with seeking to measure ethicality empirically. This argument takes two forms. One is the argument that ethics is essentially a philosophical endeavour: reason not facts determine what is accepted as ethical.<sup>65</sup>

Empirical techniques vary in their attempt to cross the 'normative' gap between evidencing when something might be unethical and the reasoning necessary to decide definitively that which *is* unethical. Formally only the professions' regulators *determine* whether something is actually unethical or not. They decide the rules and the application of those rules (although outcome focused regulation shifts some of the discretion back to individuals and their firms). Research cannot decide whether something is ethical or not, it can only present evidence that is more or less persuasive that something should be thought of as unethical.

Where evidence on ethicality is available, it is almost always capable of different normative interpretations: once data collection has stopped, facts still have to be applied to standards of one sort or another. Relatedly, answers to ethical problems are often controversial or contested. There may not be a right or wrong answer. We often rely on decisions well taken as a proxy for them having been right: did the decision maker collect the right information; apply it to the right tests and do so in a procedurally just manner?

Getting the evidence necessary to make a more persuasive normative judgment drives researchers towards narrowing the focus of their enquiry. They focus on particular types of law,<sup>66</sup> and/or particular

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Action: A Critical Review of the Literature' (1980) 88 Psychological Bulletin 1; Higgins and Others, 'The Relationships of Moral Atmosphere to Judgments of Responsibility', in Kurtines and Gewirtz (eds.), *Morality, Moral Behavior, and Moral Development* (Wiley, New York. 1984) pp. 74-106 and Rest and others, *Moral Development: Advances in Research and Theory* (Praeger: Milwaukee, New York, 1986).

<sup>65</sup> See, Holm, *Ethical Problems in Clinical Practice: The Ethical Reasoning of Health Care Professionals* (Manchester University Press: Manchester. 1997) for a discussion.

<sup>66</sup> McConville and others, *Standing Accused: The Organization and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, 1994); Eekelaar and Maclean, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing: Oxford. 2000); Genn,

types of ethical problem<sup>67</sup> and/or particular types of provider,<sup>68</sup> thus contextualising their judgment in a narrower section of the messiness of the 'real world'.

Three particular implications flow from this analysis:

- (1) Available methods, when applied across the whole legal services market, are not likely to provide definitive indications of the ethicality or otherwise of an individual, organisation or sector within that market. Indicators can signal risks or potential pressure points in the system but need to be interpreted against a range of information available to regulators.
- (2) Unless methods are very detailed (and resource intensive) and specifically targeted at narrowly defined ethical issues, evidence collected under most methods needs to be seen as an indicator of ethicality or ethical risk, rather than a definitive statement.
- (3) There needs to be a range of methods applied for a meaningful understanding of ethical tensions within the system which reflects the recognised importance of context, capacity and character as dimensions influencing the ethicality of behaviour.

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*Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1988).

<sup>67</sup> Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart: Oxford. 2002); Shapiro, *Tangled Loyalties: Conflict of Interest In Legal Practice* (Ann Arbor: University of Michigan Press; Kritzer, 2002); Moorhead and Cumming, 'Damage-Based Contingency Fees in Employment Cases: A Survey of Practitioners' (2008) <http://www.law.cf.ac.uk/research/pubs/repository/1996.pdf>; Moorhead and Cumming, 'Something for Nothing? Employment Tribunal Claimants' Perspectives on Legal Funding' (2009) ERRS No.101: <http://www.bis.gov.uk/files/file51880.pdf>.

<sup>68</sup> Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (Rutgers University Press: New Brunswick. 1962); Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* (Russell Sage Foundation. New York, 1966); Seron, 'Managing Entrepreneurial Legal Services: The Transformation of Small Firm Practice' in Nelson and others (eds) *Lawyers' Ideals/Lawyers' Practices: Transformation in the American Legal Profession* (Cornell University Press: Ithaca. 1992); Seron, *The Business of Practicing Law: The Work Lives of Solo and Small Firm Attorneys* (Temple University Press: Philadelphia. 1996); Carlin, *Lawyers on Their Own: The Solo Practitioner in an Urban Setting* (Austin and Winfield: San Francisco. 1994); Macey and Sale, 'Observations on the Role of Commodification, Independence and Governance in the Accounting Industry 48(4) Villanova Law Review 1167.



## COULD A NARROWER APPROACH FOCUSING ON COMPLIANCE BE MORE APPROPRIATE?

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It might be argued that theorising ethics, and professional ethics, has tended to focus too much on unusual ethical dilemmas<sup>69</sup> where there is no 'true' answer and that a benchmarking of ethics should focus more on mundane ethical problems where compliance could be measured more objectively. Focusing on these problems might also be regarded as more legitimately the concern of regulators, and the oversight regulator in particular. Also, perhaps, it may be more important to focus on prevalent issues than it is to focus on less common, but more serious problems.

There are a number of counterarguments to this view. It has been argued that viewing ethics simply as practical problems which can be solved denies the practice of law its complex character.<sup>70</sup> More pragmatically, concentrating only on compliance issues may not necessarily make it significantly easier to yield right or wrong answers. Routine problems may be contestable in ethical terms. As an example, historically, conflict of interest rules were repeatedly breached in larger law firms (at least on one researcher's assessment).<sup>71</sup> Breach investigations were rare, resisted or difficult to prove.<sup>72</sup> There is also the potential for unusual or 'new' problems to become apparent quickly and damagingly for the reputation of the profession. Sometimes this is associated with large numbers of cases but limited numbers of providers (miners' compensation and the ACS law case come to mind, as do the stamp duty avoidance schemes currently the subject of SRA concern).

Furthermore, to focus on what is easily provable may also present a skewed picture of actual behaviour and the most potent risks. The SRAs monitoring of compliance which accompanied its benchmarking study<sup>73</sup> tended to concentrate only on non-compliances which were revealed by file inspection. Unsurprisingly, such inspections tended to reveal higher levels of breach around client information requirements. This would be as expected: files have to include client care letters

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<sup>69</sup> See, Markovits, *A Modern Legal Ethics: Adversary Advocacy In a Democratic Age* (Princeton University Press, 2008)

<sup>70</sup> Economides, cited n 59, pg 47 is here paraphrasing Castles, 'Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia' (2001) 12 Legal Education Review 82.

<sup>71</sup> Griffiths-Baker, cited n 67.

<sup>72</sup> Some notable exceptions aside, see Flood on Barry O'Brien for example: Flood, 'Transnational Lawyering: Clients, Ethics and Regulation' in Mather and Levin (eds) *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012) pp 16-17.

[http://www.johnflood.com/pdfs/Transnational\\_Lawyering\\_2010.pdf](http://www.johnflood.com/pdfs/Transnational_Lawyering_2010.pdf) downloaded 22 May 2012.

<sup>73</sup> SRA Benchmarking Study, cited n 5.

and/or advice notes satisfying particular rules (or outcomes) and where those letters either do not exist or are non-compliant then breaches are easier to observe. Other non-compliances are likely to have been more difficult to pick up.

Even if these arguments are not accepted, looking solely or mainly at compliance also involves the assessment of actual behaviour against specific standards with sufficiently focused data collection to enable definitive application of standards to any given set of facts. This need to study in-depth to measure compliance is complicated further by the applicable rules not being consistent across the legal services sector. So whilst an advantage of the compliance approach may be it potentially comes closest to evaluating whether (some) actual behaviours breach ethical rules, it is particularly resource intensive, especially when projected across the entirety of the legal services market. A range of issues would have to be selected for examination in depth across a range of providers in a range of markets with an emphasis on context specific research methods.

Designing a compliance-based approach which looked across legal service sectors would oblige the channelling of different standards in each profession and provider with consequent detail and complexity. Then, either the different standards are treated as equivalent or the analysis encompasses an informed assessment of those standards. Any such assessment implies an analysis against some overarching standard which is not specific to the standards within the particular provider. The question then comes full circle: what is the standard that the standards are being assessed against?

Attempts to remedy this tautology might well lead to a principles-based approach similar to the broad principles contained in the Legal Services Act 2007 and some of the professional codes of conduct. It might also seek to balance empirically the views of different stakeholders in the system: e.g. clients, professions, adjudicators, and funders. The key point, though, is that in seeking to encompass a wide range of providers and legal service markets an empirical approach necessarily moves away from a specific, compliance type approach towards asking questions about ethicality and behaviour against generic principles applicable to legal services or it involves a detailed assessment of selected behaviours in relation to narrowly-defined areas of ethical concern.

Given the impracticality of seeking to apply a compliance type approach across the legal services market, and the current emphasis of regulators on principle-based approaches, it appears that a predominantly compliance type approach is less appropriate to this project. By comparing benchmark data with compliance data, though,

regulators could better understand the gaps between ethical practice and compliant practice.

Nevertheless, compliance type approaches might well be appropriate at a front line regulator level, or as a means of exploring areas of particular ethical concern and dissonances of approach between regulators whenever particular risks are apparent or when regulation in an area is being reformed. Similarly, should any ethical benchmark build in data from existing mechanisms (such as complaints and risk assessment) compliance issues are likely to form part of the ethical benchmarking process.

Having considered the background to this project and our approach to defining ethics we now discuss how empirical data can be collected on ethical decision making by legal service providers.

### 3 ASSESSING ETHICALITY

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Collecting meaningful data on ethical behaviour across the entire legal services market is extremely difficult.<sup>74</sup> One difficulty is the incentive on the part of research subjects to conceal or minimise behaviour that the researcher sees. Typically studies of ethics which have looked most closely at behaviour have relied on a combination of observation of lawyers in practice;<sup>75</sup> interviews;<sup>76</sup> file review and/or outcome measures.<sup>77</sup> They have usually relied on triangulation between a range of these methods and the critical acumen of the researchers to subject practitioner views to an analysis of whether lawyers behave ethically.

**Observation** relies on researchers embedding themselves in research contexts for sufficient periods to enable the research subjects to become less wary of the presence of the observer and begin to approximate their normal behaviour. Observations are also usually context specific and depend on the quality of researcher's judgment and data recording capacities in generating data which is useful and capable of meaningful analysis. Whilst embedding can overcome the circumspection of research subjects, researchers have still tended to triangulate their findings with file reviews and interviews.

**Interview** approaches indicate what a practitioner says they do rather than what they do; although done carefully and especially when done alongside other methods the approach is still revealing. Conscious and deliberate breaching of ethical principles or rules is more likely to be concealed with this method than with observation, but it is much less costly. Response biases are not all deliberate: an interviewee is likely to overestimate their own ethicality (the 'halo effect').<sup>78</sup> Nevertheless

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<sup>74</sup> Carlin (1966), cited n 68, pp 41-42.

<sup>75</sup> Sarat and Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press: Oxford. 1995)

<sup>76</sup> Spangler, *Lawyers for Hire* (Yale University Press: New Haven. 1986); Carlin, (1966), cited n 68.

<sup>77</sup> McConville, cited n 66; Chartered Institute of Internal Auditors (ILA) Ethics Reporting: A Review of FTSE 100 Annual Reports, 2011 (UK) examined the number of companies reporting on their own ethics and integrity performance in their annual reports with low numbers reporting on employees training or understanding of the code; Weber and others, 'Why Do Employees Steal? Assessing Differences in Ethical and Unethical Employee Behaviour using Ethical Work Climates' (2003) 42(3) *Business and Society* 359.

<sup>78</sup> Fernandes and Randall, 'The Nature of Social Desirability Response Effects in Ethics Research' (1992) 2 *Business Ethics Quarterly* 183; De Maio, 'Social Desirability and Survey Measurement: A Review', in Turner and Martin, (eds) *Surveying Subjective Phenomena*, Volume 2 at 257 (New York, Russell Sage Foundation, 1984). Confirmed in Cohen and others, 'A Validation and Extension of a Multidimensional Ethics Scale' (1993) 12(1) *Journal of Business Ethics* 13. Also mentioned by Schminke, 'Considering the Business in Business Ethics: An Exploratory Study of the

they can reveal important insights into ethical behaviour both because they can reveal descriptive information which helps build up a picture of ethical practice<sup>79</sup> and because interviews can also reveal ethical problems where the interviewee does not appreciate or accept the problematic nature of their own (self-described) behaviour.<sup>80</sup> Such differences of view may indicate when practice norms are different from official norms: indicating either that the official norms are wrong or that there are particular ethical risks.<sup>81</sup> The SRA has recently used an interview-based approach to assess general attitudes to regulation (see below).<sup>82</sup> Good interviewing can also reveal the rationalisations and justifications that interviewees use to convince themselves that they are doing the right thing. Handled sensitively, it can be helpful in seeing how respondents might be deceiving themselves and susceptible to unethical behaviours.

**Survey** approaches<sup>83</sup> are less commonly used, being thought more prone to biases including both the halo effect and self-selection. The most famous are the Chicago Lawyer's studies which asked respondents to evaluate legal specialisms on a number of factors

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Influence of Organizational Size and Structure on Individual Ethical Predispositions' (2001) 30 Journal of Business Ethics 375, at pg 377. See also, Tenbrunsel and Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behaviour' (June 2004) 17(2) Social Justice Research 223; Bazerman and Gino cited n 62; Bazerman and Tenbrunsel. *Blind Spots: Why We Fail to Do What's Right and What to Do about It* (Princeton University Press, 2011); Bazerman and Tenbrunsel. 'Ethical Breakdowns: Good People Often Let Bad Things Happen. Why?' (2011) 89 Harvard Business Review 4; Bazerman, 'Bounded Ethicality in Negotiations' 4(1) Negotiation and Conflict Management Research 8; Milgram, *Obedience to Authority: An Experimental View* (Harper and Row: New York. 1974); Gino and others, 'See No Evil: Why We Fail to Notice Unethical Behavior.' in Kramer, Tenbrunsel and Bazerman (eds) *Social Decision Making: Social Dilemmas, Social Values, and Ethical Judgments*, (Routledge, 2009) pp 241-263; Shu and others, 'Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting.' (March 2011) 37(3) Personality and Social Psychology Bulletin 330; Tenbrunsel and others, 'The Ethical Mirage: A Temporal Explanation as to Why We Are Not as Ethical as We Think We Are.' in Staw and Brief (eds) (2010) 30 Research in Organizational Behavior 153; Prinz, *The Emotional Construction of Morals* (Oxford University Press, 2007).

<sup>79</sup> Shapiro, cited n 67.

<sup>80</sup> Griffiths-Baker, cited n 67; Moorhead and Cumming, cited n 67.

<sup>81</sup> Griffiths-Baker's work on conflicts of interest being a case in point, cited n 67. After her research the conflicts of interest rules were significantly modified partly in response to concerns amongst City firms about the inflexibilities in the old rules.

<sup>82</sup> SRA Benchmarking study, cited n 5.

<sup>83</sup> Used for example by Griffiths-Baker, cited n 67. Questionnaires may be perceived as more irritating than interviews – Argyris, 'Some Unintended Consequences of Rigorous Research' (1968) 70 Psychological Bulletin 185, cited in Mercer and others, 'The Practice of Ethical Precepts: Dissecting Decision Making by Lawyers' (January 1996) 9(1) Canadian Journal of Law and Jurisprudence 141, pp 144 as the reason interviews were used over questionnaires in a study of ethics in the Canadian legal profession.

including ethical conduct.<sup>84</sup> The study has tended to suggest a relationship between perceived ethicality and the economic status of particular work-types as well as the social status of the client groups served. Being only an indication of ethical reputation it is similarly controversial. A further study, based on the views of Michigan graduates about their *own* specialisms revealed a different set of rankings.<sup>85</sup>

Whilst these rankings are interesting evidence of perceptions, their reliability is untested. Professional informants may have a better grasp of the ethical dimensions and pressures in particular areas of work, particularly where it is their own field that they are discussing, but as the SRA benchmark study shows, they also suggest limited ability to identify professional non-compliance by their opponents and peers in other firms.<sup>86</sup>

Reputational concerns might be particularly strong where legal service providers split into serving one side or the other of a case. In the personal injury field claimant and defendant practitioners have visibly low levels of faith in each other and one might expect that to show up in any reputational indicator of ethicality. Whether this mistrust is well founded or the product of cognitive biases associated with routinely advocating one side or the other is a matter for debate. Conversely, shifts over time in ethical reputation might indicate important trends and the data is relatively easy to collect. Furthermore, a belief that the 'other side' is getting away with unethical practice may encourage tit-for-tat declines in standards.

Simply asking about knowledge of ethical misconduct can reveal some level of misconduct. Satterwhite found 58% of medical students reported observing unethical conduct by a practitioner at least once during medical school; 16% had been directed to do or say something unethical themselves; and 13% admitted having resorted to unethical conduct motivated by fear of receiving poor evaluations.<sup>87</sup> 12% had acted unethically to 'fit in with the team'. Examples included being asked to pretend to a patient they were a qualified doctor and being asked to forge resident signatures on prescriptions.

Problems with retrospective recall; and under/over reporting (either because students did not always know what was unethical or because

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<sup>84</sup> The second study is Heinz and others, *Urban Lawyers: The New Social Structure of the Bar* (University of Chicago Press: Chicago. 2005).

<sup>85</sup> Mather, 'How and Why Do Lawyers Misbehave?' in Cummings, (ed) *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge University Press: New York. 2011), p.114

<sup>86</sup> SRA Benchmarking Study, cited n 5.

<sup>87</sup> Satterwhite and others, 'Medical Students' Perception of Unethical Conduct at One Medical School' (May 1998) 73(5) *Academic Medicine* 529.

they concealed events where they felt they were culpable) are a factor to bear in mind but such a study illustrates that simply asking about unethical behaviour, particularly where the respondent can distance themselves from it, does reveal unethical conduct. There is some literature on scientific misconduct where this approach has been used successfully to develop surveys and improve self-reflection.<sup>88</sup>

**File review** has been applied to reality-check observation and interview data<sup>89</sup> and has been used for some time as a means of peer reviewing quality.<sup>90</sup> We understand that the Legal Services Commission's peer review programme managed by Professor Avrom Sherr has revealed some potential ethical breaches by practitioners, especially around funding issues.<sup>91</sup> There is similar work in Scotland.

Another approach is to **ask stakeholders** about the ethics of lawyers. '360 evaluation' can be employed to assess character over a period of time<sup>92</sup> and might be more effective at identifying "deficiencies in professionalism"<sup>93</sup> which would only be revealed by repeated application of other methods, if at all. The 360 method involves collecting information on an individual (or a group) from those who have had sustained contact with them such as peers, judges and clients, so it potentially has some of the advantages of observation. The advantage is that the range of evidence sources might be "flexible enough to capture opportunistic evidence as it arises".<sup>94</sup> The value of such feedback depends on the knowledge of participants in the process. Clients, judges and other firms do not always, arguably usually, have the information necessary to form judgments on an

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<sup>88</sup> See for instance Kalichman, 'Surveys as a Tool for Training in Scientific Integrity' in Macrina (ed). *Scientific Integrity: Text and Cases in Responsible Conduct of Research* (ASM Press, Washington DC, 2005): pp 297-320.

<sup>89</sup> McConville, cited n 66; Griffiths-Baker cited n 67.

<sup>90</sup> Moorhead and others, 'Contesting Professionalism: Legal Aid and Non-Lawyers in England and Wales' (2003) 37(4) Law and Society Review 765; Avrom Sherr's ongoing work at IALS.

<sup>91</sup> Quantitative data on the extent of such potential breaches has not been collated. The LSC's need to target resources has meant the sampling approach of peer review is risk-based and so concentrates on firms where the LSC believes there may be greater potential concern. We have discussed the possibility of interviewing/surveying peer reviewers to ascertain their experiences. Another approach would be to review old peer review records. Given the targeted nature of the sample, and its confinement to legal aid work we doubt the efficacy of taking this further.

<sup>92</sup> Duff, 'Teaching and Assessing Professionalism in Medicine' (2004) 104 Obstetric Gynecology 1362.

<sup>93</sup> Economides, cited n 59.

<sup>94</sup> Economides, cited n 59, (Postgraduate Medical Education and Training Board, 2004).

individual's ethicality.<sup>95</sup> Candidates with stronger interpersonal and networking skills or those more powerful over their networks are likely to benefit from better reviews. A subtler approach would be to ask what they think the ethical values of the lawyers they have come into contact with should be and contrast that with the espoused values of the lawyers themselves.<sup>96</sup>

**Model clients** (or mystery shoppers, where a researcher pretends to be a client and seeks advice from a lawyer) have been used to monitor quality and service observation in legal aid initially<sup>97</sup> and latterly in the wills writing research.<sup>98</sup> They have the potential to override research subjects' self-censoring of unethical behaviour inherent in observation and interviews. Such research has revealed some ethical concerns (e.g. the IFF research on wills raises the possibility of inappropriate cross-selling<sup>99</sup>). The ability to control fact scenarios enables comparisons to be made across a number of providers. Model clients can also yield rich data, but are sometimes criticised for their artificiality since they insert a simulation into reality. There are certain elements of ethical obligation which might well be explored by model clients (such as disinterested costs advice or conflicts of interest).

Model clients are necessarily confined to episodic elements of service (usually the initial telephone calls or interview) to limit the invasiveness of the technique. Similarly, for pragmatic and ethical reasons, including the possible co-opting of third parties and opponents, they are usually employed only in the early stages of a case. Furthermore the approach is context specific (scenarios have to be developed for particular areas of law and this involves considerable time and expense).

Standardised patients or objective structured clinical examinations (OSCEs) are an established method in medical education and assessment and have been used to evaluate the application of

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<sup>95</sup> See, SRA Benchmarking Study, cited n 5; Devereux and others, Quality Assurance for Advocates (London: LSC, 2010):[http://www.legalservices.gov.uk/docs/cds\\_main/Annex\\_Ci\\_QAAFinalReportNovember2009.pdf](http://www.legalservices.gov.uk/docs/cds_main/Annex_Ci_QAAFinalReportNovember2009.pdf)

<sup>96</sup> O'Connor and others, 'What We Want to Do versus What We Think We Should Do' (August 2002) 15(5) Journal of Behavioral Decision Making 403.

<sup>97</sup> Moorhead cited n 90; Moorhead and Sherr, 'An Anatomy of Access: Evaluating Entry, Initial Advice and Signposting Using Model Clients' (Ministry of Justice, 2003): <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2003/modelclientpaper.pdf>.

<sup>98</sup> IFF Research, Understanding the Consumer Experience of Will-Writing Services. [http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/Publications/pdf/lwb\\_will\\_writing\\_report\\_final.pdf](http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lwb_will_writing_report_final.pdf).

<sup>99</sup> Cited n 98.



professional principles.<sup>100</sup> In law, simulation-based critical incident<sup>101</sup> tests are used on some vocational level courses and accreditation schemes. Campbell et al, 2007 considered such direct observation to be the best means for eliciting evidence of behaviour.<sup>102</sup>

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## COLLECTING DATA ON BEHAVIOUR OTHER THAN THROUGH RESEARCH INTERVENTIONS

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It is important also to consider other available sources of data which might be used to help build up a picture of ethical behaviour across the legal services market.

Some elements of legal work are routinely observable. Open court advocacy work is one example where judges are to be used in the Quality Assurance Scheme for Advocates (QASA) to evaluate the quality of advocates. It is likely that such observation will sometimes yield information on ethical breaches; although judges may often be unaware of concealed breaches. They may also be reluctant to phrase concerns about advocacy practice in ethical terms where they are not aware of the whole picture (because they do not know the client's instructions for instance). We do not rehearse here the controversies surrounding QASA.<sup>103</sup> The QASA criteria identify ethical/conduct concerns but only in general terms.<sup>104</sup> The extent to which QASA data will be collated and reviewable is not yet known; neither is the volume of data that may be produced. The way in which appearances are selected for assessment may militate against the robustness of this as an indicator of ethical concerns during criminal advocacy but it is worth continuing to bear in mind as the scheme develops.

Police station work is another area in which there are observation opportunities (if regulatory hurdles could be overcome it might be theoretically possible to listen to large numbers of police station tapes

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<sup>100</sup> Also suggested as viable for ethics by Wong and Cheung, 'Ethics Assessment in Medical Students' (2003) 25(1) *Medical Teacher* 5. See also Campbell and others, 'How Can We Know that Ethics Education Produces Ethical Doctors' (2007) 29 *Medical Teacher* 431. Cited in Economides, cited n 59.

<sup>101</sup> First developed by Flanagan, 'The Critical Incident Technique' (1954) 51(4) *Psychological Bulletin* 327; see also Newble, 'The Critical Incident Technique: A New Approach to the Assessment of Clinical Performance' (1983) 17(6) *Medical Education* 401.

<sup>102</sup> See also Eekelaar, cited n 66, pp 31.

<sup>103</sup> Devereux cited n 95; Moses LJ (2012) *The Ebsworth Lecture: Looking the Other Way*: <http://www.judiciary.gov.uk/media/speeches/2012/lj-moses-speech-ebsworth-lecture-13022012>.

<sup>104</sup> The Criminal Advocacy Evaluation Form allows judges to grade an advocate as not competent against the criterion "was professional at all times and sensitive to equality and diversity principles".

and deduce some ethical issues from those). The incentive to conceal poor ethical decisions and the fact that most of the crucial work and ethical decisions will be taken outside of the interview room militate against this being a useful approach.

Regulators may also collect data. The SRA collects data on the complaints that it deals with and the helpline calls it receives. Tracking the level and nature of help requests and complaints over time may provide some indications of ethical pressure (at least in so far as they manifest in complaints or pleas for help). The level of information available on these currently is fairly modest but **Table 1**, shows the breakdown of helpline calls for most of 2011 (in October the SRA shifted its approach to reflect the new Handbook and Code of Conduct).

**Table 1: Helpline Calls data: 2011 to October 2011 (more than 2% of calls)**

Helpline call coded as	N	%
Confidentiality and disclosure	2807	10.8%
Miscellaneous	1951	7.5%
Retainer (inc termination)	1401	5.4%
Accounts Rules	1347	5.2%
Conflict of interests	1371	5.3%
Practising certificates	1325	5.1%
Publicity	1052	4.0%
Call wrongly directed	851	3.3%
Requirements of practice	869	3.3%
Core duties	701	2.7%
In-house practice	590	2.3%
Clients documents	560	2.2%
Incorporated practice	569	2.2%
Setting up in practice	571	2.2%
Queries from accountants	542	2.1%

The utility of this kind of data is limited by potential inconsistencies in the way recorders code the information. Coding is not a key task of helpline advisors and the data is not put to significant use. It is interesting to note that the data is not apparently produced or collated on kinds of firm giving rise to concerns, for instance, or broad categories of work. Coding categories also overlap. An issue for consideration is whether such data collection could be redesigned and

more closely aligned with risk management functions within the SRA and data coming from the Legal Ombudsman.

The Legal Ombudsman (LeO) is now the main port of call for consumer complaints about legal services and has the advantage of straddling a range of regulated providers of legal services. There is potential for LeO to provide additional insights into the level of ethical concern in lay-consumer expressions about quality of service. Some data has been made available on complaints made about solicitors through the cooperation of LeO and the SRA. For this reason, we concentrate on complaints about solicitors here.

Only about 1.5% of the complaints that LeO investigates are referred to the SRA for investigation.<sup>105</sup> There is no break down into *types* of conduct complaint. Similarly, complaints dealt with by LeO without referring to the SRA, a more significant proportion (about 7% on our analysis of data supplied by LeO) contained some element of misconduct concern. Again the nature of the actual or potential misconduct is not coded.

The low level of information collected on the referrals is of some concern. One would expect the nature of complaints being referred through to be of greater interest to the Ombudsman and the frontline regulators, particularly as both Ombudsman and Frontline regulator may regard misconduct complaints as generally at the more serious end of the spectrum of complaints.

We saw no Legal Ombudsman data that enabled us to understand what *types* of conduct complaints were referred. Such information would provide useful evidence of misconduct trends within complaints and allow the front line regulators to understand how and when Leo refers. Further, it would assist LeO in understanding how those referrals are dealt with (by linking up referrals with outcomes). There was however the potential to do some analysis by case types (although the coding of case types employed overlaps). So for example, we conducted some preliminary analysis of the percentage of complaints accepted by LeO which are coded as containing some element of (potential) misconduct, in the following case types:

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<sup>105</sup> No data is currently available for the Bar Standards Board.

TABLE 2: PROPORTION OF ACCEPTED LEGAL OMBUDSMAN COMPLAINTS CODED AS CONTAINING SOME MISCONDUCT

		N
Property	10%	363
Criminal	9%	454
Probate	9%	1,026
Employment	8%	450
Conveyancing	7%	1,538
Commercial	7%	289
Family	6%	1,228
Matrimonial	6%	149
Personal Injury	6%	701
Immigration	5%	259

Perhaps as interesting as the proportion of complaints with potential misconduct is the number of complaints accepted in each area, although to be really meaningful one would need the volumes of work conducted in each area to understand which areas of work were giving rise to most complaints.

We understand that the proportion of complaints being referred through to the SRA has dropped since complaints handling transferred to LeO. Our understanding also is that the drop in conduct referrals may exceed the more general drop in levels of complaints made about solicitors once LeO took over. The extent to which complaints are recognised as conduct issues is dictated by training and guidance from the front line regulators and some checking of complaints handling to see that misconduct issues are being properly picked up. In any event, LeO sees itself as primarily investigating poor service.

As noted already, complaints are limited indicators of ethical concerns.<sup>106</sup> They require clients to identify elements of complaint consistent with misconduct, for firms not to have resolved those complaints during their complaints process, or for clients to have not given up,<sup>107</sup> and then for regulators to pick up the misconduct

<sup>106</sup> For more detailed thoughts on complaints as research tools see Parker and others, Cited n 32; Arnold and Hagan, 'Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers' (1992) 57 American Sociological Review 771; Lerman, 'The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money and Professional Integrity' (2002) 30 Hofstra Law Review 879; Levin, 'The Ethical World of Solo and Small Law Firm Practitioners' (2004) 41 Houston Law Review 309.

<sup>107</sup> Internal complaints systems are sometimes said to be designed to 'exhaust clients': Gilad, 'Accountability or Expectations Management? The Role of the Ombudsman in Financial Regulation' (2008) 30(2) Law & Policy 227; Nader, *No Access to Law: Alternatives to the American Judicial System* (Academic Press, 1980).

elements. Furthermore, the role of the Legal Ombudsman operates only in relation to the regulated sector and is concentrated on individual clients (with some exceptions) and those individuals who have had the benefit of the service (like beneficiaries of wills).

Research suggests that client complaints are often prevented by early complaints-avoidance management strategies.<sup>108</sup> Even when the client does realise he has a claim,<sup>109</sup> internal complaints mechanisms may “exhaust” clients<sup>110</sup> and enable firms to manage out ethical complaints before they come to the regulator’s attention. Other lawyers (and judges) often may not have the requisite information to know when competitors or opponents breach rules.<sup>111</sup> Clients may not have the necessary motivation to complain when ethical breaches favour them but damage the public interest (or the duty to the court).<sup>112</sup> The complaints that regulators see also miss the success stories: where firms deal with complaints well.<sup>113</sup> Finally, complaints may go through mechanisms other than the regulator (e.g. through civil claims or the termination of retainers).<sup>114</sup>

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## OUTCOMES

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Some studies have sought to use outcome data as indicating ethical issues. One particular area is quite sophisticated analysis of how personal injury cases are dealt with in terms of cost and settlement which could be used to explore the ethicality of particular fee arrangements.<sup>115</sup> Other studies use outcomes as one part of their analysis alongside more conventional approaches.<sup>116</sup> Outcome type approaches can be applied more broadly than to case results. The IFF work on will writing, for instance, shows differential patterns in terms

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<sup>108</sup> See for example, Rosenthal, *Lawyer and Client: Who’s in Charge* (Transaction Books: New Brunswick, New Jersey. 1974), pp 111; Mather and others, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press: Oxford, 2001), pp 92-93

<sup>109</sup> Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (Oxford University Press: Oxford. 2008), pp 499.

<sup>110</sup> Gilad, cited n 107; Nader, cited n 107.

<sup>111</sup> SRA Benchmarking Study, cited n 5; QASA Study, cited n 95.

<sup>112</sup> Parker cited n 32; Abel, cited n 109, pp 52.

<sup>113</sup> Parker and Haller, ‘Inside Running: Internal Complaints Management Practice and Regulation in the Legal Profession’ (forthcoming, 2012) Monash University Law Review.

<sup>114</sup> Parker, cited n 32.

<sup>115</sup> See, for example, Thomason, ‘Are Attorneys Paid What They Are Worth? Contingent Fees and the Settlement Process’ (January 1991) 20(1) *The Journal of Legal Studies* 187. Paul Fenn and Neil Rickman’s work on conditional fees could be interpreted through an ethical lens.

<sup>116</sup> Kritzer, *Risks, Reputations and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press: Stanford. 2004); Moorhead and Cumming, cited n 67.

of the appointment of executors which may raise ethical concerns.<sup>117</sup> There is not however significant volumes of existing outcome data that could form a basis for benchmarking ethics across the legal services sector.

Having considered ways of monitoring the ethicality of behaviour we now consider approaches which look at precursors to ethical decision making.

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<sup>117</sup> IFF, cited n 98.

Having considered some of the difficulties in looking directly at behaviour, we now look at a broader literature which suggests that expected behaviour can be inferred by looking at the character, capacities and contexts of decision makers. These approaches rely on theories of ethical action which suggests that ethicality requires ethical *motivation* (the desire or incentive to act ethically) and ethical *capacity* (the knowledge, skills and resources to be able to decide to act ethically).

It is important to emphasise that motivation and capacity can and do interact. If I know something is regarded as unethical by my peers or my professional body, I may be less likely to do that unethical act. That will depend partly on my motivations. How strongly do economic incentives push me in a particular direction? How strongly does my character or environment encourage me to be ethical? How capable am I of reasoning ethically? Do I want to apply my knowledge and reasoning skills to avoid being found out as being *unethical*, to “creatively comply”<sup>118</sup> or to do the right thing?

These interaction effects are significant because they emphasise the importance of understanding a range of elements if one is to predict likely behaviour. Interactions also create some unsettling, even counter-intuitive effects (e.g. having a *process* which appears fair to determine an ethical dilemma may sometimes encourage unethical behaviour; the fairness of the process enables the decision-makers to ignore, excuse or fail to appreciate an unethical outcome).<sup>119</sup> Nor is it always the case that action will be the product of conscious reflection on knowledge, as capacity implies).<sup>120</sup>

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## THE 3CS MODEL OF PRECURSORS TO ETHICAL ACTION

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There are various models for understanding ethical action. A well-known one is the ‘know, can, do’ pyramid especially popular in the educational literature. This suggests a linear relationship between knowledge, capacity and decision making and is founded on a number of assumptions which look increasingly suspect. Our preferred model emphasises the interactions between the individual, their environment and their decision-making. The model manages but emphasises the

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<sup>118</sup> To borrow a concept from McBarnet, see for example, ‘It’s Not What You Do but the Way That You Do It: Tax Evasion, Tax Avoidance and the Boundaries of Deviance’, in Downes (ed), *Unravelling Criminal Justice* (MacMillan: 1992), pp 247-268.

<sup>119</sup> Bazerman and Gino, cited n 62.

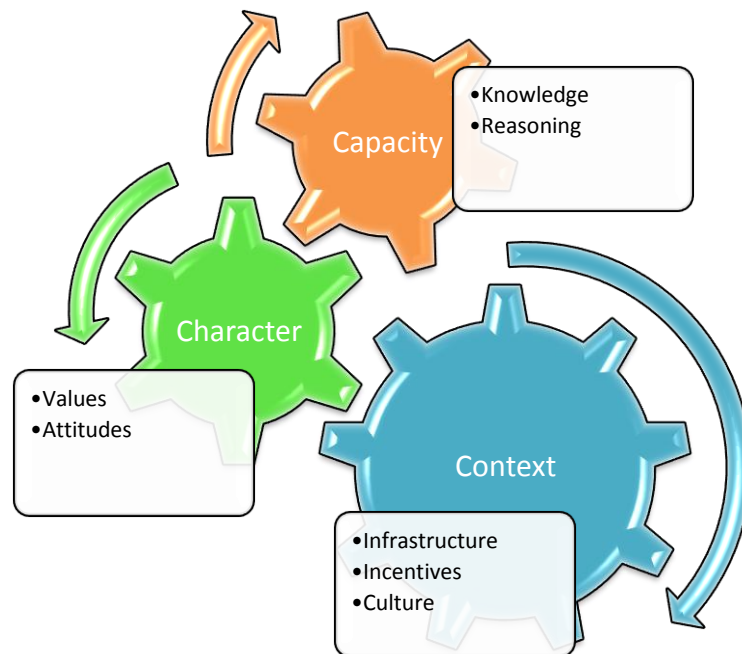
<sup>120</sup> Kahneman cited n 63.

complexities underlying ethical decisions. This involves emphasising three predictors of ethical decision making, which we call, for convenience, **the 3Cs**:

- individual characteristics of the decision maker (for convenience we label this '**character**'. It refers to psychological dispositions such as personal values or attitudes to risk);
- the **context** in which the decision is taken (ethical infrastructure, economic incentives and cultural influences on ethical decision-making and behaviour); and,
- the **capacities** of any individual (what they know and how they reason).

Figure 2 provides a visual representation of the model.

FIGURE 2: THE 3CS AN INTERACTIVE MODEL



Whilst character and capacity concentrate on individuals, context focuses on an individual's relationships with their environment, recognising that it is partly through environmental factors that an individual's capacity is framed. Similarly, the values underpinning a person's character are not immutable, they can change over time<sup>121</sup> and depend on the environment and stimulus (the problem faced).<sup>122</sup> For our purposes environment might include individual work teams, the organisations they work with and individuals they interact with

<sup>121</sup> Rezler and others, 'Professional Decisions and Ethical Values in Medical and Law Students' (1990) 65 Academic Medicine S31. See also Rezler and others, 'Assessment of Ethical Decisions and Values' (January 1992) 26(1) Medical Education 7.

<sup>122</sup> Haidt cited n 61.



(funders, opponents, witnesses, adjudicators, regulators, educators). The factors influencing decision-making may be social (the need to secure status, approval or cooperation); economic (the need to hit targets or to remain profitable); or cultural (ideas about what constitutes tolerable, appropriate or praiseworthy behaviour).

Importantly, these processes may be more intuitive than rational. Haidt in particular, emphasises that intuitions shape how problems are perceived (or indeed whether they are perceived as problems at all).<sup>123</sup> He also demonstrates that ethical decisions can, he would suggest usually do, predate the judgments used to justify those decisions. Rational thought, engagement with others, the behaviour of those around us and material incentives can influence our intuitions and sometimes intervene to challenge and reshape our judgments. However, if Haidt's findings can be generalised to a professional sphere - they are not pre-eminent. Similarly, there are also potentially a number of unconscious biases at work.<sup>124</sup>

There is a second point. Each of the three dimensions influences the other. My character values are influenced by my environment; my environment is influenced by my behaviour; my capacities influence how I interpret my environment and the problems it presents me; and so on. The dimensions of ethicality are mutually constitutive of each other.

In describing the 3Cs as precursors of ethicality, we have simplified somewhat. Each of Character, Capacity and Context has been measured in different ways, or ways that explore different sub-dimensions of the main concepts. We set some of these in Table 3.

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<sup>123</sup> Haidt cited n 61. Cf, Pizarro and Bloom 'The Intelligence of the Moral Intuitions: A Comment on Haidt (2001)' (2003) 110(1) *Psychological Review* 193.

<sup>124</sup> Bazerman and Gino, cited n 62. Kahneman cited n 63.

TABLE 3: CHARACTER, CAPACITY AND CONTEXT: SUB-DIMENSIONS

	Examples/Sub-dimensions
Character	Personal Values  Attitudes to (say) regulation and risk
Capacity	Knowledge  Reasoning
Context	Ethical Infrastructure  Economic Incentives  Ethical Culture

There is some overlap between the three dimensions, especially at the sub-dimension level. Attitudes to risk and personal values, for instance are likely to overlap. The ethical culture of an organisation is influenced and constituted by attitudes within that organisation.

There are three reasons for emphasising the utility of measures which look at the 3Cs:

- the research supports a plausible link between the 3Cs and ethical behaviour;
- the 3C dimensions are less dependent on context specific detail than a compliance style approach;
- the 3Cs are more easily measurable than behaviour, particularly at a general/market wide level;
- the 3Cs don't simply evaluate ethical risk, they look at what underlies ethical risk and so provide insights into what may be improved; and,
- in particular, elements of the 3C dimensions (especially around context) may provide feedback to the professions and their regulators on areas where improvement might be sought in institutional arrangements.

We begin our discussion of these measures of the sub-dimensions with a discussion of measures of Capacity as this is an area where there is a particularly large volume of research.

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## CAPACITY

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One of the three dimensions relates to the capacity of individuals. Assessments of capacity tend to focus on knowledge and levels of reasoning.

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## KNOWLEDGE

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The knowledge component of Capacity recognises a distinction between mainstream morality and professional ethics.<sup>125</sup> There are specific rules and principles which govern the ethics of a lawyer when they take on a professional role. Knowledge of those rules is a necessary but not sufficient element of ethics that helps practitioners recognise and, if so motivated, act on ethical dilemmas.<sup>126</sup> To a certain extent, baseline ethical knowledge amongst professionals is tested by the requirements for qualification and embedded within assessment in vocational education.

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## EXAMINATIONS

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Essays, substantive exams and multiple choice tests are used for testing knowledge.<sup>127</sup> Essays, used in universities for testing critical evaluation, coherence and structure, might be considered particularly impractical for time-impooverished practitioners.

Whilst knowledge tests are not very sophisticated indicators of ethicality, lack of knowledge is one barrier to solicitor compliance with their own code and other regulatory requirements.<sup>128</sup> Applying tests of knowledge across the legal services market would represent a significant practical challenge: deciding which knowledge was necessary in which elements of the legal services sectors under scrutiny. Knowledge alone is not sufficiently context-proof, in that it does not take account of particular pressures or ethical infrastructure factors which are known to impact on individual behaviour. As Evans points out, “while knowledge of ethical doctrines can be tested as readily as any piece of substantive information, such knowledge does not indicate whether a lawyer, particularly a new lawyer, is more or

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<sup>125</sup> Rhode and Luban, (eds) *Legal Ethics*. Fourth Edition (Foundation Press, New York. 2004).

<sup>126</sup> Singhapakdi and others, ‘Ethical Decision Making: An Investigation of Services Marketing Professionals’ (1996) 15(6) *Journal of Business Ethics* 635 – perception of ethical problems is correlated with more ethical outcomes; cf, Valentine and Fleischman, ‘Ethical Reasoning in an Equitable Relief Innocent Spouse Context’ (2003) 45(4) *Journal of Business Ethics* 325 – recognition of ethical issues unrelated to ethical judgment. Cited in O’Fallon and Butterfield, cited n 4.

<sup>127</sup> Economides, cited n 59.

<sup>128</sup> SRA Benchmarking Study, cited n 5.

less likely to behave ethically, when they are struggling under the considerable pressure of the practice environment.”<sup>129</sup> Lawyers in Evans’ study were sceptical about the value of additional testing of knowledge, noting that its predictive validity would likely be circumvented by ‘cramming’ and stated a preference for peer review which they felt would be more sensitive to the nature of ‘ethical complexity’ and situational pressures.<sup>130</sup>

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### PROBLEM IDENTIFICATION TESTS/ VIGNETTES

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Approaches which look at reasoning (see below) can also be used to test knowledge. Vignette-based approaches can be used to test the selective application of knowledge and reasoning.<sup>131</sup> Some have been web-based.<sup>132</sup> There is some evidence that they might also usefully assess ethical culture because they can replicate scenarios likely to occur in practice.<sup>133</sup> Vignette-based approaches can also be blended into more sophisticated research instruments, for example, Akabayashi et al merged a test of knowledge (which assessed whether practitioners identified particular ethical problems) with assessments of moral reasoning based on the Defining Issues Tests (see below). Vignettes have also been included in ethical infrastructure inventories.<sup>134</sup>

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### PORTFOLIOS AND REFLECTIVE LEARNING LOGS

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Portfolios are regularly used in educational and assessment processes (e.g. police station accreditation schemes). They can be viable tools for assessing the reasoning and experience of an individual because they involve the selective application of knowledge<sup>135</sup> (those being assessed choose their examples and, to a point, how they describe them). As such portfolios can reveal knowledge, reasoning and perhaps attitudes. Portfolios can also encourage subjects to take

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<sup>129</sup> Evans, cited n 59, pg 5.

<sup>130</sup> Evans, cited n 59, pp 135-136.

<sup>131</sup> Wong, cited n 100.

<sup>132</sup> Zairiski, ‘Teaching Legal Ethics Online: Pervasive or Evasive’ (2001) 12 Legal Education Review 131. The Queensland Ethics Check, see n 134 and Evans, cited n 64 are examples of the use of web-based surveys for maximizing data collection.

<sup>133</sup> Green and others, ‘Lying to Each Other: When Internal Medicine Residents Use Deception with their Colleagues’ (2000) 160 Archives of Internal Medicine 231; Feudtner and others, ‘Do Clinical Clerks Suffer Ethical Erosion? Students’ Perceptions of their Ethical Environment and Personal Development’ (1994) 69 Academic Medicine 670.

<sup>134</sup> See Queensland Workplace Culture Check Surveys, <http://www.lsc.qld.gov.au/ethics-checks>; <http://www.lsc.qld.gov.au/ethics-checks/surveys> accessed on 23February2012.

<sup>135</sup> Wong, cited n 100.

responsibility for charting ethical issues in their own practice and reflect on their own thinking and behaviour (engendering 'reflective practice').<sup>136</sup> They have weaknesses associated with being self-reporting mechanisms.<sup>137</sup>

Unless regulators were to mandate the keeping of portfolios, however, they cannot be used as a benchmarking tool. A modified approach would be to ask respondents to recall and reflect in writing on an ethical dilemma as part of an interview or survey-based approach of looking at ethics in practice.

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## TESTS OF MORAL REASONING

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A second way in which capacity has typically been assessed is to look at moral reasoning.

Two tests have been widely used across disciplines to understand ethical reasoning.<sup>138</sup> The first is Kohlberg's Moral Judgment Interview (MJl) and the second, Rest's Defining Issue Test (DIT).<sup>139</sup> The higher a person scores on these tests the more ethically sophisticated their reasoning is and, impliedly, the more ethical they are likely to be. Both instruments rely on a particular conception of ethics and measure ethical reasoning ability relative to that conception. In spite of their widespread use, they have been subject to criticism. Gilligan famously criticised the approach as androcentric and Haidt cautions against overestimating the influence of rational moral judgment as a precursor to ethical behaviour.<sup>140</sup>

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## THE MORAL JUDGMENT INTERVIEW

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The Moral Judgment Interview takes the form of a moral dilemma presented to an interviewee who is asked to explain how they would

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<sup>136</sup> Hinett, *Developing Reflective Practice in Legal Education* (Warwick: UKCLE, 2002).

<sup>137</sup> Webb and others, 'Project to Support Implementation of a New Training Framework for Solicitors Qualifying in England and Wales' (London: The Law Society: 2004): [www.lawsociety.org.uk/documents/downloads/becomingtfrwebb.pdf](http://www.lawsociety.org.uk/documents/downloads/becomingtfrwebb.pdf) as at 4th March 2012.

<sup>138</sup> Cf, Au and Wong, 'The Impact of Guanxi on the Ethical Decision-Making Process of Auditors: An Exploratory Study on Chinese CPA's in Hong Kong' (2000) 28(1) *Journal of Business Ethics* 87: negative relationship between cognitive moral development and ethical judgment, cited in O'Fallon and Butterfield, cited n 4.

<sup>139</sup> For Kohlberg, see n 141 and Rest, cited n 146. See also Elm & Weber, 'Measuring Moral Judgment: The Moral Judgment Interview or the Defining Issues Test' (1994) 13 *Journal of Business Ethics* 341.

<sup>140</sup> See Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge MA, 1993); Menkel Meadow, 'Portia Redux: Another Look at Gender, Feminism and Legal Ethics' in Carle (ed) *Lawyers Ethics and the Pursuit of Social Justice: A Critical Reader* (New York University Press: New York, 2005) and Haidt, cited n 61.

decide the dilemma. It is followed by probe questions which are completed in a 45 minute tape recorded interview. Their moral reasoning is ranked on a 6 point scale.<sup>141</sup> It thus:

“elicits a subject’s (1) own construction of moral reasoning; (2) moral frame of reference or assumptions about right and wrong and (3) the way these beliefs and assumptions are used to make and justify moral decisions”<sup>142</sup>

Under the scale, a process of moral development is assumed: individuals move up the scale<sup>143</sup> and remain at the highest point of their evolution across all decisions which they take. A primary use has been in assessing an individual’s level of moral reasoning over time (their development).

Disadvantages of the Moral Judgment Interview include that the interviewer must be trained in the technique. The time taken for an interview and the training element increases the cost of the method. Ethical dilemmas used in the test are general in nature rather than professionally specific. A problem with this approach is that it engages less strongly with role morality concerns (the obligations of a lawyer as a lawyer over ‘ordinary’ moral obligations of familial ties for instance). Conversely, developing similar professionally relevant vignettes (short case stories based on real-life situations) would be

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<sup>141</sup> Colby and Kohlberg, *The Measurement of Moral Judgment: Theoretical Foundations and Research Validations*, volume 1 (Cambridge University Press, Cambridge, MA, 1987). See also Kohlberg, ‘Stage and Sequence: The Cognitive-Developmental Approach to Socialization’, in Goslin (ed) *Handbook of Socialization Theory and Research* (Rand McNally, Chicago. 1969), pp 347-480; Kohlberg, *Collected Papers on Moral Development and Moral Education* (Laboratory of Human Development, Harvard University, Cambridge, MA. 1973); Kohlberg, ‘Moral Stages and Moralization’, in Lickona (ed) *Moral Development and Behaviour* (Holt, Rinehart and Winston, New York. 1976), pp. 31-53; Kohlberg, *Essays in Moral Development, Volume 1: The Philosophy of Moral Development* (Harper and Row, New York. 1981); Kohlberg, *Essays in Moral Development, Volume II: The Philosophy of Moral Development* (Harper and Row, New York. 1984). Kohlberg, Levine and Hewer, *Moral Stages: A Current Formation and a Response to Critics* (Karger, New York. 1983). Although Kohlberg’s theories have dominated moral psychology, even Kohlberg considered them unsettled in form: see Rest and others, ‘A Neo-Kohlbergian Approach to Morality Research’ (2000) 29 *Journal of Moral Education* 381.

<sup>142</sup> Colby cited n 141.

<sup>143</sup> See, Crain, *Theories of Development* (Prentice-Hall, 1985), pp. 118-136. The stages of the scale are (1) seeing right and wrong as being determined simply by what authorities permit and punish; through (2) seeing punishments as a risk that have to be factored into the decision rather than a signal that something is wrong; to (3) being guided by the expectations of the family and community to behave in “good” ways; and then (4) seeing compliance with rules as good where they promote social order; with (5) moral decision-making involving the considering of the rights and values that a society ought to uphold; and (6) being concerned with the universal principles: which define how we achieve justice; treat everyone impartially and respect individual dignity.

relatively unproblematic and would engage with professionally relevant role morality concerns.

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### DEFINING ISSUES TEST

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The Defining Issues Test (DIT) began as a quantitative evolution of the MJL. Respondents are asked to consider a series of 3 or 6 dilemmas. Subjects consider these, decide how they would act (they are usually given three choices: to act, to not act or 'don't know'). They are then provided with a series of reasoning statements which reflect particular approaches to ethical reasoning which they then rate and rank in order of importance.<sup>144</sup>

The DIT is well established and tested<sup>145</sup> and techniques have been developed to ensure respondents take the tests seriously. As a self-administered multiple-choice, the DIT is cheaper. It measures *recognition* of ethical knowledge rather than verbalisation.<sup>146</sup> The DIT has also been configured to take account of Rest's belief that moral reasoning was more contingent or context specific than Kohlberg believed it to be.<sup>147</sup> In particular, for a variety of reasons, people may reason less ethically than their capacity suggests they can.

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<sup>144</sup> See Appendix B for an example of capacity methodology, pp 105.

<sup>145</sup> Davidson, 'The Internal Structure and the Psychometric Properties of the Defining Issues Test' in Rest (ed) *Development in Judging Moral Issues* (University of Minnesota Press, Minneapolis, 1979); Davidson and Robins, 'The Reliability and Validity of Objective Indices of Moral Development' (1978) 2(3) *Applied Psychological Measurement* 391.

<sup>146</sup> Rest and others, *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (Lawrence Erlbaum Associates, 1999); Thoma, and others, 'What Does the DIT Measure?' (1999) 38(1) *British Journal of Social Psychology*, pp 103-111 and Rest, *DIT Manual* (University of Minnesota Press, Minneapolis, 1990). See further, Rest, *Development in Judging Moral Issues* (University of Minnesota Press, Minneapolis, 1979); Rest, 'Morality', in Musson (gen ed) and Flavell and Markman (eds), *Manual of Child Psychology, Vol III: Cognitive Development* (Wiley, New York, 1983), pp 556-629; Schlaefli and others 'Does Moral Education Improve Moral Judgment: A Meta-Analysis of Intervention Studies Using the Defining Issues Test' (1985) 55(3) *Review of Educational Research*, pp 319-352.

<sup>147</sup> Rest saw moral reasoning as being manifested more contingently than Kohlberg. Sometimes individuals will reason ethically, sometimes not. He identifies four components to understanding this: Moral Sensitivity (identifying moral situations); Moral Judgment (which available action is most justified?); Moral Motivation (prioritising moral over other concerns); and Moral Character (constructing and implementing actions consistent with the moral choice). For more on this see Rest, in Musson, cited n 146, pp. 556-629; Bebeau, 'The Defining Issues Test and the Four Component Model: Contributions to Professional Education', (2002) 31(3) *Journal of Moral Education* 271 and Rest and others, 'A Neo-Kohlbergian Approach: The DIT and Schema Theory' (1999) 11(4) *Educational Psychology Review* 291.

The contexts that MJIs and DITs have been applied across<sup>148</sup> range from: the ethical development of medical students,<sup>149</sup> business,<sup>150</sup> accounting,<sup>151</sup> pharmacy,<sup>152</sup> nursing<sup>153</sup>, as well as examining intercultural variation in ethics.<sup>154</sup> Professionally specific variants of DITs have been developed in pharmacy<sup>155</sup> and in law: Daicoff used DIT type questionnaires amended to a legal context to demonstrate lawyers used different kind of moral reasoning in their public professional and private lives.<sup>156</sup> She suggested that lawyers view the codes as a minimum standard of ethicality and are sometimes prepared to impose 'more ethical and restrictive choices' on themselves in certain situations.

Various tests have been used to establish the validity of DITs.<sup>157</sup> They successfully differentiate age/education groups (as one would expect age and education partly predicts performance). The studies show longitudinal gains in DIT score (moral reasoning of subjects improves over time). DIT scores are strongly related to other more involved assessments of moral reasoning. Educational interventions designed to improve moral reasoning are demonstrated with DIT data; and,

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<sup>148</sup> Snarey, 'Cross Cultural University of Socio-Moral Development: A Critical Review of Kohlbergian Research' (1985) 97 *Psychological Bulletin* 202.

<sup>149</sup> Self and others, 'Clarifying the Relationship of Medical Education and Moral Development' (May 1998) 73(5) *Academic Medicine* 517.

<sup>150</sup> Pennino, 'Is Decision Style related to Moral Development Among Managers in the US' (2003) 41(4) *Journal of Business Ethics* 337 and Mudrack, 'The Untapped Relevance of Moral Development Theory in the Study of Business Ethics' (2003) 42(3) *Journal of Business Ethics* 225.

<sup>151</sup> Falk and others, 'Auditor Independence, Self-Interested Behaviour and Ethics: Some Experimental Evidence' (1999) 18 *Journal of Accounting and Public Policy* 395.

<sup>152</sup> Latif, 'The Relationship Between Ethical Reasoning and the Perception of Difficulty with Ethical Dilemmas in Pharmacy Students: Implications for Teaching Professional Ethics' (2001) 5(1) *Teaching Business Ethics* 107.

<sup>153</sup> Krawczyk, 'Teaching Ethics: Effect on Moral Development' (1997) 4(1) *Nursing Ethics* 56.

<sup>154</sup> Endicott and others, 'Moral reasoning, Intercultural Development and Multicultural Experiences: Relations and Cognitive Underpinnings' (2003) 27(4) *International Journal of Intercultural Relations*.

<sup>155</sup> Chaar and others 'Professional Ethics in Pharmacy Practice: Developing a Psychometric Measure of Moral Reasoning' (2009) 31(4) *Pharmacy World and Science* 439.

<sup>156</sup> Daicoff, '(Oxymoron?) Ethical Decision-making by Attorneys: An Empirical Study' (1996) 48(2) *Florida Law Review* 197. See Appendix B, pp 106 for an example. See also Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 *American University Law Review* 1337 which investigates whether there is a 'lawyer personality' and makes some tentative links between personality conflicts and moral crises. See also Granfield and Koenig's "'It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice' (2002-2003) *West Virginia Law Review* 495.

<sup>157</sup> See for example n 145, 148-156.



perhaps most importantly, “DIT scores are significantly linked to many “prosocial” behaviours and to desired professional decision making”.<sup>158</sup> DIT scores correlate with political attitudes and political choices (but are better predictors of decisions than those indicators; and satisfy reliability tests.)<sup>159</sup>

Both MJIs and DITs rely on self-reporting. When used in their conventional form (general ethical dilemmas exploring general ethical reasoning) there may be some scepticism about whether responses to vignettes in a survey reliably explain a *lawyer’s* ethical reasoning.<sup>160</sup> This would be a reason for developing professionally relevant vignettes using a DIT or MJI style approach. There are also other variants on the MJI and DIT which have sought to simplify the methodology.<sup>161</sup>

Lawyers will be sensitive to the difference between the ‘can’ and ‘do’ nature of the tests: sophisticated actors may be able to reason ethically in a test but not do so in practice or may reason sloppily in a test (where they have no incentive to do well but be more careful in practice). Such problems are however evident in most interview and self-completion approaches and can be controlled for through a degree to ensure answers are consistent with taking the test seriously. Similarly, just because an individual can function at a certain level of ethicality, it does not follow that they always will. If the approaches are perceived as artificial or irrelevant, it would be more difficult than normal to get practitioners to respond. There is some evidence that lawyers might be averse to psychological approaches due to cynicism about the way such evidence has been used in courts<sup>162</sup> but also reasons for being optimistic about the utility of such testing to identify psychological attributes which are thought to have a particularly strong correlation with ethics, such as ‘honesty’ and ‘integrity’.<sup>163</sup>

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<sup>158</sup> Rest and Others, ‘A Neo-Kohlbergian Approach to Morality Research’ (2000) 29 *Journal of Moral Education* 381, pp 7.

<sup>159</sup> Rest and others, p. 390. Rest and Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, New Jersey, Lawrence Erlbaum, 1994).

<sup>160</sup> Evans, cited n 59.

<sup>161</sup> Gibbs and Widdeman, *Social Intelligence: Measuring the Development of Socio-Moral Reflection* (Prentice Hall, New Jersey. Basinger and Gibbs. 1987), pp 191-211

<sup>162</sup> Evans, cited n 59 pp 136.

<sup>163</sup> See n 162.

The second dimension in the proposed model is character. Whilst character, or values, are part of an individual's internal endowment (what is 'brought to the table'<sup>164</sup>), they can also change over time.<sup>165</sup> Ways of describing characteristics relevant to ethics include personal values, principles and attitudes, cultivated or aspirational virtues, moral or emotional intelligence,<sup>166</sup> moral courage and conscience.<sup>167</sup> Individuals with strong ethical values tend to recognise ethical issues more readily than those who do not have such values.<sup>168</sup> Lawyers might align themselves with different professional philosophies which underpin what they see as ethical.<sup>169</sup> Some people experience moral

<sup>164</sup> See also Daicoff, 'Asking Leopards to Change their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism with Reference to Empirically-Derived Attorney Personality Attributes' 11 *Georgetown Journal of Legal Ethics* 547; Solkoff and others, 'Personality Characteristics of First Year Medical and Law Students' (1967) 42 *Journal of Medical Education* 195 and Segal, 'The Hard Effects of Soft Skills – Just How Serious is Ethics?' (2001) 45 *Living Ethics* 8.

<sup>165</sup> Rezler and others, 'Professional Decisions and Ethical Values in Medical and Law Students' (1990) 65 *Academic Medicine* S31. See also Rezler and others, 'Assessment of Ethical Decisions and Values' (January 1992) 26(1) *Medical Education* 7.

<sup>166</sup> Lennick and Kiel, *Moral Intelligence – Enhancing Business Performance and Leadership Success* (Wharton School Publishing, 2008) and Prinz, 'The Emotional Basis of Moral Judgements' (March 2006) 9(1) *Philosophical Explorations* 29.

<sup>167</sup> For approaches which prioritise emotionally-driven explanations for moral decision-making see Moll and others, 'Morals and the Human Brain: A Working Model' 14 *Neuroreport* 299; Berthoz and others, 'An fMRI Study of Intentional and Unintentional (Embarrassing) Violations of Social Norms' (2002) 125 *Brain* 196; Greene and others, 'An fMRI Investigation of Emotional Engagement in Moral Judgment' (2001) 293 *Science* 2105 cited by Prinz cited n 166.

<sup>168</sup> Singhapakdi, cited n 126; Singhapakdi, Vittel and others, 'Moral Intensity and Ethical Decision Making of Marketing Professionals' (1996) 36 *Journal of Business Research* 245.

<sup>169</sup> Atkinson, 'A Dissenters Commentary on the Professionalism Crusade (1995) 74 *Texas Law Review* 259 on classification of three ethical types: (1) Neutral partisan (client aligned); (2) 'officers of the court' (public interest) and (3) individualist (exploits legal loopholes to further own conception of what is 'right'). See also, Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers Ethics' (2004) 30 *Monash Law Review* 49, pp 53-6: ((1) adversarial/zealous advocate/ (2) responsible lawyer/officer of court/ (3) moral activist motivated by social justice and (4) 'ethicist of care' furthering holistic lawyer/client participatory outcomes). Cited in Evans, cited n 59. See also Gordon, 'Why Lawyers Can't Just Be Hired Guns' in Rhode (ed) *Ethics in Practice: Lawyers Roles Responsibilities and Regulation* (Oxford University Press, 2003); Simon, *The Practice of Justice: A Theory of Lawyers Ethics* (Harvard University Press, New Edition, 2000); Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613; Markovits, cited n 69; Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083; Gunz and Gunz, 'Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations' 60 *Human Relations* 6; Mather, 'Lawyerly Fidelity: An Ethical and Empirical Critique' (2012) SUNY Buffalo Legal Studies Research Paper No. 2012-044.

guilt or a more developed conscience and some do not.<sup>170</sup> Whilst it is tempting to reduce morality to a question of more or less; understanding values can be more complex:

“Professionalism is best evaluated when values conflict with one another... challenges rarely appear as simple choices between right and wrong; they are more often choices among equally worthy values... physicians demonstrate professionalism by resolving a dilemma wisely.”<sup>171</sup>

There is a significant social psychology literature on values, which Rokeach suggests “serve as standards or criteria to guide not only action but also judgment, choice, attitude, evaluation, argument, exhortation, rationalisation and...attribution of causality.”<sup>172</sup> This work tends to suggest that there are a small number of standard human values which vary between individuals. The Rokeach Value Survey (RVS) is one popular way of categorising an individual's values.<sup>173</sup> Critique of the RVS<sup>174</sup> has ensued with Schwartz's model of values sometimes preferred because it is able to examine the relationships between values<sup>175</sup> and is so thought to be a better tool for analysing the predicted impact of values on behaviour.

Work on values has been undertaken by Evans who used ethical dilemmas on a large sample over a prolonged time period to evaluate law students' ethics, demonstrating that values were predictive of behavioural choices (as reported by those same students).<sup>176</sup> Students

<sup>170</sup> Beans and others 'An Experiment Testing the Determinants of Non-Compliance with Insider Trading Laws' (2003) 45(4) Journal of Business Ethics 309 – 'those believing they would feel guilty less likely to engage in unethical conduct than those who believed they would not', cited in O'Fallon and Butterfield, cited n 4.

<sup>171</sup> Stern, cited n 59, pp 8-9. Stern further cites Coulehan and Williams, 'Conflicting Professional Values in Medical Education' (2003) 12 Cambridge Quarterly of Healthcare Ethics 7 on this point. Some studies, such as Abel, prioritise those cases involving real conflicts and ambiguities, rather than cases where the rules are clear and motives transparent: Abel, cited n 109, pp. 56.

<sup>172</sup> Rokeach, *The Nature of Human Values* (The Free Press. NY: Free Press. 1979); see also Rokeach, *Understanding Human Values: Individual and Societal* (Simon and Schuster, 1979).

<sup>173</sup> This system was based on value words which represented eighteen Terminal Values which refer to desirable end-states of existence and eighteen Instrumental Values which refer to preferable modes of behaviour.

<sup>174</sup> See, for example, Maio and others, 'Rankings, Ratings and the Measurement of Values: Evidence for the Superior Validity of Ratings' (1996) 18 Basic and Applied Social Psychology 171 and Schwartz and Bilsky, 'Toward a Theory of the Universal Content and Structure of Values: Extensions and Cross-Cultural Replications' (1990) 58 Journal of Personality and Social Psychology 878.

<sup>175</sup> Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' (1992) 25(1) Advances in Experimental Social Psychology 1.

<sup>176</sup> Evans, 'Lawyers' Perception of their Values: An Empirical Assessment of Monash University Graduates in Law', 1980-1998' (2001) 2(1/2) Legal Education Review

were asked to indicate what they would do in response to ethical dilemmas and then rate the different values which informed their answer for each scenario. The most important values associated with ethical conduct were found to be honesty and equality. The vignettes were supplemented by focus group interviews designed to reduce discomfort arising from the 'forced choice' vignettes and no doubt also to illuminate aspects of the participants reasoning which might otherwise be opaque to the researchers.

Evans' work provides some evidence of the link between character and *reported* conduct (in effect they showed that people with certain values say they will do different things from those with other values).<sup>177</sup> For example, respondents indicating 'equality' was prominent in their decision-making were more likely to indicate a willingness to take on a pro bono case.

Some of the research prioritises certain values in ethical decision-making.<sup>178</sup> An ethic of care stresses the importance of relationships with others and interpersonal skills such as empathy, altruism and sensitivity.<sup>179</sup> An ethic of care interview has been developed to help

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219. See in addition, Evans and Palermo, 'Lawyers' Perceptions of their Values: An Empirical Assessment of Australian Final Year Law Students – Some Interim Results – 2001' (2002) 5(1/2) Legal Ethics 102 and Palermo and Evans (2007). Evans, cited n 64 (based on Rokeach, response rate of 703 (18%), 70% had completed an ethics course but only 40% had any practice experience. Participants rated importance of values on scale of 1 ('irrelevant to me in relation to my approach to the practice of law') – 5 (very important to me in relation to my approach to the practice of law). The scenarios used went beyond coded rules. Scenarios were adapted from earlier study). For a discussion, see Evans, cited n 59, pp 38-48.

<sup>177</sup> See also, Palermo and Evans, (2008) cited n 64 suggests a link between increased awareness of values and better behaviour.

<sup>178</sup> 'Integrity' for example, has attracted some attention as a particularly important value or quality. See Uhr, 'Getting the Measure of Integrity: The Two Faces of Ethics and Corruption' (Paper presented at the Reconstructing the Public Interest in a Globalising World: Business, the Professions and the Public Sector, Brisbane, Australia, 4-7 October 2002). See [www.iipe.org.au](http://www.iipe.org.au) > accessed at April 2012 (cited in Evans, cited n 59 pp 58). For discussion of 'empathy' see Prinz, 'Is Empathy Necessary for Morality?' in Coplan and Goldie (eds.), *Empathy: Philosophical and Psychological Perspectives* (Oxford University Press. 2011).

<sup>179</sup> Gilligan, 'In a Different Voice: Women's Conceptions of Self and Morality' (Winter, 1977) 47(4) Harvard Educational Review 481; Skoe and Marcia, 'A Care-Based Measure of Morality and its Relation to Ego Identity' (1991) 37 Merrill-Palmer Quarterly 289; Skoe and Diessner, 'Ethic of Care, Justice, Identity and Gender: An Extension and Replication' (1994) 40 Merrill-Palmer Quarterly 102; Skoe, 'Sex Role Orientation and its Relationship to the Development of Identity and Moral Thought' (1995) 36 Scandinavian Journal of Psychology 235; Skoe and others, 'The Ethic of Care: Stability Over Time, Gender Differences and Correlates in Mid to Late Adulthood' (1996) 11 Psychology and Aging 280; Skoe, 'The Ethic of Care: Issues in Moral Development' in Skoe and von der Lippe (eds.) *Personality Development in Adolescence: A Cross National and Life Span Perspective* (Routledge. London. 1998), pp. 143-171.

determine the balance of self and other concerns. Empathy indicators have also been developed in a professional context.<sup>180</sup> It is suggested under ethics of care approaches that legal ethics would benefit from a broadened definition which recognizes the importance of traditionally feminine values, such as empathy, and the contribution to the cause of client-centred lawyering which such values promise to make.<sup>181</sup> The ethic of care may be in tension with conceptions of lawyers as ‘thinkers not feelers’<sup>182</sup> within the legal professional community.

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### VIRTUE (OR PRINCIPLES) INDICES

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Another way of defining character is to look at what virtues an individual regards as most important. Here we begin to see the interactions between character and environment. A number of studies have sought to define what their researched constituencies regard as constituting the key virtues, or ethical principles, governing their field. This method could be employed to develop with separate groups of practitioners’ and other stakeholders definitions of legal ethics which can then be contrasted and compared as a way of understanding, but not evaluating, the way different groups prioritise ethical principles.

Evolving virtue scales involves identifying what qualities are regarded as important not on evaluating specific acts or decisions:

“A person of virtuous character, an ethical person regularly and consistently exhibits the character traits in conduct, in compliance with the associated principles calling for honest, fair, reliable, trustworthy commitment to others.”<sup>183</sup>

Whilst the idea of virtue ethics draws on notions of character, the scales developed appear to be most appropriately thought of as guides to the factors that should influence ethical decisions.

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<sup>180</sup> Stern, cited n 59.

<sup>181</sup> Gachenga, ‘Stein’s Ethic of Care: An Alternative Perspective to Reflections on Women Lawyering’ in Bartlett and others (eds) *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge: New York. 2011) pp 156, citing Menkel-Meadow, cited n 140.

<sup>182</sup> Janoff, ‘The Influence of Legal Education on Moral Reasoning’ (1991) 76 Minnesota Law Review 193; Peters and Peters, ‘Maybe That’s Why I Do That: Psychological Type Theory, the Myers Briggs Type Indicator, and Learning Legal Interviewing’ (1990) 35 New York Law School Law Review 169; Daicoff, ‘Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism’ (1997) 46 American University Law Review 1337.

<sup>183</sup> Paine, ‘Ethics as Character Development: Reflection on the Objective of Ethics Education’ in Freeman (ed.) *Business Ethics: The State of Art* (Oxford University Press, New York, NY. 1991), cited in Chun, ‘Ethical Character and Virtue of Organizations: An Empirical Assessment and Strategic Implications’ (2005) 57 Journal of Business Ethics 269.

Virtue scales have been developed mainly in a business ethics context,<sup>184</sup> although sometimes in medicine;<sup>185</sup> pharmacy;<sup>186</sup> accounting<sup>187</sup> and psychology.<sup>188</sup> Typically, a list of character traits is devised from, for example, reviews of previous literature, interviews with practitioners<sup>189</sup> or website text searches. Once a working list has been determined, this is consolidated and tested by a number of methods: e.g. cross-checking researcher lists against practitioner focus-group generated lists; asking respondents to rate and rank lists; factor and content validity analysis during piloting.

Research describing the ethical traits important in particular groups has not usually been developed into a means of measuring levels of ethicality. Phelan et al is a notable exception<sup>190</sup> in which tutors evaluated medical students with criteria defining the traits through observable negative behaviours. Behaviour was observed over time in the evaluation system.

Another approach once scales have been developed would be to analyse responses to ethical problems (presented as case studies or vignettes to research subjects) against the scales. This would work by asking a practitioner to read a vignette which presents a decision with ethical dimensions to it and then indicate or rate which principles are important to taking a decision. This has some similarities with the approach to Defined Issues Tests (above), swapping professionally

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<sup>184</sup> Chismar, 'Vice and Virtue in Everyday (Business) Life' (2001) 29 *Journal of Business Ethics* 169; Dyck and Kleyson, 'Aristotle's Virtues and Management Thoughts: An Empirical Exploration of an Integrative Pedagogy' (2001) 11(4) *Business Ethics Quarterly* 561; Whetstone, 'How Virtue Fits within Business Ethics' (2001) 33 *Journal of Business Ethics* 101; Shanahan and Hyman, 'The Development of a Virtue Ethics Scale' (2003) 42 *Journal of Business Ethics* 197; Chun cited n 183; Thun and Kelloway 'Virtuous Leaders, Assessing Character Strengths in the Workplace' (2011) 28 *Canadian Journal of Administrative Sciences* 270.

<sup>185</sup> Shelton, 'Can Virtue Be Taught' (1999) 74 *Academic Medicine* 671; Phelan and others, 'Evaluation of the Non-Cognitive Professional Traits of Medical Students' (Oct 1993) 68(10) *Academic Medicine* 799; Pellegrino and Thomasma, *The Virtues in Medical Practice* (Oxford. Oxford University Press. 1993); Arnold and others, 'Can Professionalism Be Measured? The Development of a Scale for Use in the Medical Environment' (1998) 73 *Academic Medicine* 1119; Arnold, 'Assessing Professional Behaviour: Yesterday, Today and Tomorrow' (2002) 77 *Academic Medicine* 502; Rowley and others, 'Professionalism and Professional Values in Orthopedics' (2000) 387 *Clinical Orthopaedics and Related Research* 90.

<sup>186</sup> Chisholm and others 'Development of an Instrument to Measure Professionalism' (2006) 70(4) *American Journal of Pharmaceutical Education* 85.

<sup>187</sup> Christensen and others, 'Developing the Resolve to Have Moral Courage: An Experiment with Accounting Students' (2007) 7(1) *Journal of Accounting, Ethics and Public Policy*, 1.

<sup>188</sup> Peterson and Seligman, *Character Strengths and Virtues* (Oxford University Press. Oxford. 2004).

<sup>189</sup> See Shanahan, cited n 184.

<sup>190</sup> Phelan, cited 185.

identified virtues (or principles) for the more abstract moral reasoning schema applied by Rest and Kohlberg.

Our team has undertaken some exploratory work towards developing a list of “virtues” for legal services professionals, derived from the Legal Services Act and the Bar and Solicitors Codes. It can be seen at Appendix A.<sup>191</sup>

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### MULTIDIMENSIONAL ETHICS SCALE

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Reidenbach and Robin developed what they called multidimensional ethics scales. They have been used in business,<sup>192</sup> accounting ethics,<sup>193</sup> tax<sup>194</sup> and IT.<sup>195</sup> They start from the premise that “the breadth and complexity of the construct [‘ethics’] dictates the breadth and complexity of the measure used to capture it.”<sup>196</sup> Multidimensional Ethics Tools purport to identify five ethical philosophies (justice, relativism, utilitarianism, egoism and deontology) and test the extent to which participants rely on these when debating ethical issues.<sup>197</sup> Initially, a panel of philosophers defined the relevant content of the five philosophies<sup>198</sup> which were then tested on business students

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<sup>191</sup> See APPENDIX A: a Draft distillation of legal ethics concepts applicable to legal services, pp 108.

<sup>192</sup> Reidenbach and Robin, ‘Some Initial Steps Toward Improving the Measurement of Ethical Evaluations and Marketing Activities’ (1998) 7 Journal of Business Ethics 871; Reidenbach and Robin, ‘Toward the Development of a Multi-Dimensional Scale for Improving Evaluations of Business Ethics’ (1990) 9 Journal of Business Ethics 639; Reidenbach and Robin, ‘A Comment on A Multi-Dimensional Scale for Measuring Business Ethics: A Purification and Refinement’ (1993) 12 Journal of Business Ethics 663; Reidenbach and others, ‘An Application and Extension of a Multi-Dimensional Ethics Scale to Selected Marketing Practices and Marketing Groups’ (1991) 19(2) Journal of the Academy of Marketing Science 83.

<sup>193</sup> Cohen, cited n 78.

<sup>194</sup> Cruz and others ‘A Multi-Dimensional Analysis of Tax Practitioners’ Ethical Judgments’ (2000) 24(3) Journal of Business Ethics 223.

<sup>195</sup> Ellis and Griffith, ‘The Evaluation of IT Ethical Scenarios Using a Multidimensional Scale’ (2001) 32 ACM SIGMIS Database Archive 75.

<sup>196</sup> Reidenbach and Robin (1990) cited n 192.

<sup>197</sup> Ferrell and Gresham, ‘A Contingency Framework for Understanding Ethical Decision-Making in Marketing’ (Summer 1985) 49 Journal of Marketing 87; Hunt and Vitell, ‘A General Theory of Marketing Ethics’ (1986) 48 Journal of Macromarketing 30.

<sup>198</sup> A priori normative philosophy scales are shown in a table in Reidenbach cited n 192. Participants would put a tick on the scale to show where their judgment was pitched. For ease of reference: **Justice** (Rawls, 1971; Nozick, 1974; Kristol, 1978): Just/unjust; fair/unfair; does result/does not result in equal distribution of good and bad). **Relativist** (Hoffman & Moore, 1984, pg 3-5; Stace, 1937; Brandt, 1959): culturally acceptable/unacceptable; individually acceptable/unacceptable; acceptable/unacceptable to people I most admire; traditionally acceptable/unacceptable; Acceptable/unacceptable to my family. **Egoism** (Beauchamp & Bowie, 1983; Donaldson & Werhane, 1983, pp 21-23) Self-

(using vignettes) and managers. Findings included that notions of duty, for instance, were less important when making decisions than “a broad sense of moral equity” as well as “relativistic and social contract dimensions.”<sup>199</sup> In an accounting context<sup>200</sup> utilitarian approaches were more prevalent.<sup>201</sup>

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## DEMOGRAPHY AND DIVERSITY - CHARACTERISTICS LINKED TO ETHICALITY

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A number of studies have looked at whether demographics influences approaches to ethics. It has often been suggested that women’s ethical reasoning is different to men’s, emphasising care, empathy and compassion over rights, justice and fairness.<sup>202</sup> Many studies look at whether women are more ethical than men.<sup>203</sup> Whilst there are often

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promoting/not self-promoting; selfish/not selfish; self-sacrificing/not-self-sacrificing; prudent/ not prudent; under no moral obligation/morally obliged to act otherwise; personally satisfying/not personally satisfying; in best interests of company/not in best interests of company). **Utilitarian** (Smart, 1973; Sartorius, 1975; Singer, 1976) efficient/inefficient; ok/not ok if actions can be justified by their consequences; compromises/does not compromise an important rule by which I live; on balance tends to be good/bad; produces the greatest/least utility; maximizes/minimizes benefits whilst minimizes/maximizes harm; leads to the greatest/least good for the greatest number; results in a positive/negative cost benefit ratio; maximizes/minimizes pleasure). **Deontology** (Ross, 1930; Kant): violates/does not violate an unwritten contract; violates/ does not violate my ideas of fairness; duty bound/not duty bound to act in this way; morally right/not morally right; obligated/not obligated to act in this way; violates/does not violate an unspoken promise. (Reidenbach, cited n 192).

<sup>199</sup> Reidenbach cited n 192, pp 649.

<sup>200</sup> Cohen, cited n 78.

<sup>201</sup> Cited n 200.

<sup>202</sup> Gilligan, *In a Different Voice* (Harvard University Press, Cambridge MA, 1982); Langdale, ‘Moral Orientations and Moral Development: The Analysis of Care and Justice Reasoning Across Different Dilemmas in Females and Males from Childhood through Adulthood’ Unpublished Doctoral Dissertation, Harvard University (1983); Lyons, ‘Two Perspectives: on Self, Relationships and Morality’ (1983) 53 Harvard Educational Review 125 (cited by VanSandt and others, ‘An Examination of the Relationship Between Ethical Work Climate and Moral Awareness’ (2006) 68 Journal of Business Ethics 409).

<sup>203</sup> Arlow, ‘Characteristics in College Students’ Evaluation of Business Ethics and Corporate Responsibility’ (1991) 10 Journal of Business Ethics 63; Ruegger and King, ‘A Study of the Effect of Age and Gender Upon Student Business Ethics’ (1992) 11 Journal of Business Ethics 179; McNichols and Zimmerer, ‘Situational Ethics: An Empirical Study of Differentiators of Student Attitudes’ (1985) 4 Journal of Business Ethics 175; Fritzsche, ‘An Examination of Marketing Ethics: Role of the Decision Maker, Consequences of the Decision, Management Position and Sex of the Respondent’ (Fall, 1988) 8(2) Journal of Macromarketing 29; Derry, ‘An Empirical Study of Moral Reasoning’ (1989) 8 Journal of Business Ethics 855 (cited by VanSandt cited n 202).



no differences, where differences are found, women tend to be more ethical.

Age too has been a focus.<sup>204</sup> Again, the results are mixed. Sometimes, age or experience seems to reduce ethicality. At other times, age relaxes the extent to which ambition exerts a negative effect on ethicality.

The length of formal education has been singled out as the most important factor in developing moral reasoning capacity.<sup>205</sup> Religion and “spirituality” have also been found to influence ethical reasoning and behaviour (usually positively).<sup>206</sup> Various studies have looked at nationality; some suggest a degree of cultural specificity to ethical standards.<sup>207</sup>

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<sup>204</sup> England, ‘Managers and their Value Systems: A Five Country Comparative Study’ (1978) 13 *Columbia Journal of World Business* 35; Johnson and others, ‘Developing the Executive Resource’ (1986) 29 *Business Horizons* 33; Barnett and Karson, ‘Managers, Values, Executive Decisions: An Exploration of the Role of Gender, Career Stage, Organizational Level, Function and the Importance of Ethics, Relationships and Results in Managerial Decision-Making’ (1989) 8 *Journal of Business Ethics* 35 (cited in VanSandt, cited 202); Latif, ‘Ethical Cognition and Selection-Socialization in Retail Pharmacy’ (2000) 25(4) *Journal of Business Ethics* 343; Eynon and others, ‘Factors that Influence the Moral Reasoning Abilities of Accountants: Implications for Universities and the Profession’ (1997) 16 (12/13) *Journal of Business Ethics* 1297; Weeks and Others, ‘The Effects of Gender and Career Stage on Ethical Judgment’ (1999) 20(4) *Journal of Business Ethics* 301; Wimalasiri and others, ‘An Empirical Study of Moral Reasoning Among Managers in Singapore’ (1996) 15(12) *Journal of Business Ethics* 1331 (cited in O’Fallon and Butterfield, cited n 4).

<sup>205</sup> Kohlberg, *The Psychology of Moral Development 2* (Harper and Row, San Francisco, 1984) (cited in VanSandt cited n 202).

<sup>206</sup> Wimalasiri n 204; Kennedy and Lawton, ‘The Effects of Social and Moral Integration on Ethical Standards: A Comparison of American and Ukrainian Business Students’ (1996) 15(8) *Journal of Business Ethics* 901; Giacalone and Jurkiewicz, ‘Right from Wrong: The Influence of Spirituality on Perceptions of Unethical Business Activities’ (2003) 46(1) *Journal of Business Ethics* 85; Clark and Dawson, ‘Personal Religiousness and Ethical Judgments: An Empirical Analysis’ (1996) 15(3) *Journal of Business Ethics* 359 (cited in O’Fallon and Butterfield, cited n 4).

<sup>207</sup> Christie and others, ‘A Cross-Cultural Comparison of Ethical Attitudes of Business Managers: India, Korea and the United States’ (2003) 46(3) *Journal of Business Ethics* 263; Cherry and others, ‘A Cross-Cultural Application of a Theoretical Model of Business Ethics: Bridging the Gap Between Theory and Data’ (2003) 44(4) *Journal of Business Ethics* 359 (US v Taiwanese); Ford and Richardson, ‘A Review of The Empirical Ethical Decision-Making Literature: 1996–2003’ (2005) 59(4) *Journal of Business Ethics* 375. Further, see Loe and others, ‘A Review of Empirical Study Assessing Ethical Decision Making in Business (2000) 25 *Journal of Business Ethics* 185; Kennedy cited n 206; Volkema and Fleury, ‘Alternative Negotiating Conditions and the Choice of Negotiating Tactics: A Cross-Cultural Comparison’ (2002) 36(4) *Journal of Business Ethics* 381; all articles cited in O’Fallon and Butterfield, cited n 4. See also examples given by Prinz to ethically acceptable practices within various cultures which might be considered objectionable by the mainstream: Prinz, cited n 166, pp 33.

Character traits and values are an important element in ethical decision-making. However, the mechanism through which these factors exert an influence is complex. Approaches which rely on an individual's characteristics as being determinative (x is like this so will do that) should obviously be viewed with caution.

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## CONTEXT

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The relevance of the character component cannot be fairly assessed outside of the context that individual is placed within. As Heath points out:

“What the criminological literature tells us ... is that it is not about character and it is not about values. On the contrary, it is various aspects of the situation that individuals find themselves in, what they think about this situation, and what they expect others to think about the situation, that plays the major role in determining how they conduct themselves.”<sup>208</sup>

The context within which individuals take ethical decisions influences their behaviour.<sup>209</sup> Studies such as Heinz et al<sup>210</sup> and the Michigan Law

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<sup>208</sup> Heath, 'Business Ethics and Moral Motivation: A Criminological Perspective' (2008) 83 *Journal of Business Ethics* 595, cited by Mather, cited n 85, pp 131. According to Mather, the quote draws on the works of Coleman, *The Criminal Elite: The Sociology of White Collar Crime* (St Martin's Press, 1985) and Sykes and Matza, 'Techniques of Neutralization: A Theory of Delinquency' 22 *American Sociological Review* 664.

<sup>209</sup> Derry, 'Moral Reasoning in Work-Related Conflicts' in Frederick (ed), *Research in Corporate Social Performance and Policy: Empirical Studies of Business Ethics and Values*, vol. 9 (JAI Press, Greenwich, CT. 1987) pp 25-50; Higgins, cited n 64; Trevino, 'Ethical Decision-Making in Organizations: A Person-Situation Interactionist Model' (1986) 11(3) *Academy of Management Review* 601; Trevino, 'Moral Reasoning and Business Ethics: Implications for Research, Education and Management' (1992) 11 *Journal of Business Ethics* 445; Landon, *Country Lawyers: The Impact of Context on Professional Practice* (Greenwood Press, 1990); Jones, 'Ethical Decision-Making by Individuals in Organizations: An Issue Contingent Model' (1991) 16(2) *Academy of Management Review* 366 (Ethical reasoning of business managers is issue dependent); Ferrell and others, 'A Synthesis of Ethical Decision Models for Marketing' (1989) 9 *Journal of Macromarketing* 55; Hunt cited n 197; Thielens, 'The Influence of the Law School Experience on the Professional Ethics of Law Students' (1969) 21 *Journal of Legal Education* 587; Hoffman, 'Are Women Really More Ethical than Men? Maybe it Depends on the Situation' (1998) 10 *Journal of Managerial Issues* 60.

However, it is also important not to overplay the extent to which organisational or environmental factors are decisive: Weaver and Angle, 'Religiosity and Ethical Behaviour in Organizations: A Symbolic Interactionist Perspective' (2002) 27(1) *Academy of Management Review* 77 – 'expectations of one's own behaviours based upon one's religious identity interact with organisational contextual factors' (see Dean and others, 'Mid-Level Managers, Organizational Context and (Un)ethical Encounters' (2010) 97 *Journal of Business Ethics* 51); Daicoff (1996), cited n 156 –

School data<sup>211</sup> suggest that contextual factors may be at least as important as individual characteristics as predictors of ethicality. Mather argues that 'bad barrels' rather than 'bad apples' may often be a significant predictor of low standards.<sup>212</sup>

In this section we divide context into three areas: economic incentives; formal systems and institutions that promote decision making (what we call ethical infrastructure); and, cultural/interpersonal influences (which includes how economic incentives and formal systems are interpreted). Approaches which emphasise the interactions or blurry boundaries between these sometimes refer to concepts like ethical climate or culture.<sup>213</sup>

Ethical context may derive from an individual's work organisation.<sup>214</sup> A point not strongly acknowledged in the business ethics literature, is that for lawyers other contexts such as interactions with clients,<sup>215</sup>

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role morality is not conclusive of lawyers' moral reasoning; Weber and Wasieleski, 'Investigating Influences on Managers' Moral Reasoning: The Impact of Context and Personal and Organizational Factors' (2001) 40(1) *Business and Society* 79. Further, Corbin, 'How 'Firm' Are Lawyers Perceptions of Professionalism?' (2005) 8 *Legal Ethics* 265; Gunz and Gunz, 'Organizational Influences on Approaches to Ethical Decisions by Professionals: the Case of Public Accountants' (2002) 19(1) *Canadian Journal of Administrative Sciences* 76; Levin and Mather (ed) 'Why Context Matters' in *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012), pp 1-24.

<sup>210</sup> Heinz and others, cited n 84.

<sup>211</sup> Reported in Mather, cited n 85, pp 114 (previously unpublished).

<sup>212</sup> See also: Trevino and Youngblood, 'Bad Apples in Bad Barrels: A Casual Analysis of Ethical Decision Making Behaviour' (1990) 75(4) *Journal of Applied Psychology* 378; Levin, 'Bad Apples, Bad Lawyers or Bad Decision Making: Lessons from Psychology and from Lawyers in the Dock' (2009) 22 *Georgetown Journal Legal Ethics* 1549; Gunz and Gunz also pick up this dichotomy: "is the apparent misfeasance by professionals the case of a few bad apples... or is there at issue a more deep seated problem?" as a basis for their analysis of in-house lawyers mis-advising clients in Gunz and Gunz, 'Client Capture and the Professional Service Firm' (Winter, 2008) 45(4) *American Business Law Journal* 685.

<sup>213</sup> Literature is divided on whether climate and culture are essentially the same thing: those perceiving little difference include Ashkanasy and others, 'Predictors of Ethical Code Use and Ethical Tolerance in the Public Sector' (2000) 25(3) *Journal of Business Ethics* 237; Tenbrunsel and others, 'Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations' (September 2003) 16(3) *Social Justice Research* 285; Denison, 'What is the Difference Between Organizational Culture and Organizational Climate? A Native's Point of View on a Decade of Paradigm Wars' (1996) 21 *Academy of Management Review* 619. Those who point to a more marked distinction include: James and others, 'The Meaning of Organizations: The Role of Cognition and Values in Schneider (ed) *Organizational Climate and Culture* (Jossey-Bass, San Francisco, CA 1990); Rousseau, *Assessing Organizational Culture: The Case for Multiple Methods* in Schneider (ed) *Organizational Climate and Culture* (Jossey-Bass, San Francisco, CA 1990).

<sup>214</sup> Carlin (1966), cited n 68, pp 101.

<sup>215</sup> Eekelaar, cited n 66; Carlin, cited n 68; for in-house lawyers, see Gunz and Gunz, 'The Lawyer's Response to Organizational Professional Conflict: An Empirical Study

witnesses,<sup>216</sup> opponents,<sup>217</sup> adjudicators, and regulators<sup>218</sup> may also be important. There are also factors which are likely to be particularly acute within legal practice environments. For example, time pressure which can cause or contribute to ethical difficulties which might not otherwise have occurred.<sup>219</sup> The prevalence of relationships involving agency can also be problematic.<sup>220</sup> Agents may be prone to rationalise immoral actions taken for clients on the basis of their role obligations ('I was only following instructions').

Whilst the immediate context of the law firm may be commercial, a culture of professionalism may also influence behaviour. The profession imposes 'collegial control'<sup>221</sup> because its continued existence hinges on the good reputation of its members.<sup>222</sup> It protects the profession from regulation by the State<sup>223</sup> and promotes the value

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of the Ethical Decision Making of In-house Counsel,' (2002) 39(2) American Business Law Journal 241; Gunz and Gunz, 'Ethical Implications of the Employment Relationship for Professional Lawyers' (1994) 28(1) University of British Columbia Law Review 123; Gunz and Gunz, 'Ethical Decision Making and the Employed Lawyer' (2008) 81(4) Journal of Business Ethics 927; Gunz and Gunz, cited 212.

<sup>216</sup> Wydick, 'The Ethics of Witness Coaching' (1995) 17 Cardozo Law Review 1.

<sup>217</sup> Sarat and Felstiner, cited n 75; Baldwin and McConville, 'Plea Bargaining and Plea Negotiation in England' (1979) 13 Law & Society Review 287.

<sup>218</sup> Carlin (1966), cited n 68.

<sup>219</sup> An example is given in Shapiro, cited n 67, from an interview in which a lawyer talks about accepting a case at short notice and then turning up at court to find his own firm was on the other side: "There was no time. Everything was happening within a matter of hours and the petitioner [in scenario akin to an interim injunction application] was us and when ... the opponent contacted its lawyer, its lawyer was us... They both go charging into the courtroom and it's we!" Time was also raised as a factor weighing on failure to meet minimum competence standards in this recent report commissioned by the Bar Standards Board:

[http://www.barstandardsboard.org.uk/media/1402386/orc\\_international\\_-\\_perceptions\\_of\\_advocacy\\_report.pdf](http://www.barstandardsboard.org.uk/media/1402386/orc_international_-_perceptions_of_advocacy_report.pdf).

<sup>220</sup> Gino and others, 'Nameless + Harmless = Blameless: When Seemingly Irrelevant Factors Influence Judgment of (Un)ethical Behavior' (March 2010) 111 (2) Organizational Behavior and Human Decision Processes 93; Paharia and others, 'Dirty Work, Clean Hands: The Moral Psychology of Indirect Agency' (July 2009) 109(2) Organizational Behavior and Human Decision Processes 134.

<sup>221</sup> Mather and others, cited n 108; Mather, Plea Bargaining or Trial? The Process of Criminal Case Disposition (Lexington, 1979); Seron (1996), cited n 68; Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press, 2004). All cited in Mather, cited n 85; See also Smigel, *The Wall Street Lawyer* (Indiana University Press, 1969), pp 262-263 and Lazega, *The Collegial Phenomenon: The Social Mechanisms of Cooperation Among Peers in a Corporate Law Partnership* (Oxford University Press, 2001).

<sup>222</sup> See Kritzer, cited n 116 and Daniels and Martin, 'It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiff's Practice in Texas' (2004) 80 Texas Law Review 1781. Both cited in Mather, cited n 85.

<sup>223</sup> Abel, *American Lawyers* (Oxford University Press, New York, 1989); Abel and Lewis (eds), *Lawyers in Society* (in 3 volumes) (University of California Press: Berkeley, 1988-89); Friedson, *Professionalism Reborn: Theory, Prophecy and Policy* (University of Chicago Press: Chicago, 1994).

of its services within the market.<sup>224</sup> Collegial control is largely cultural, built on “shared identities and knowledge, repeated interactions in social networks, informal norms, and the need to maintain a quality reputation in order to attract clients.”<sup>225</sup> It has been suggested that the strength of collegial control may fluctuate according to such factors as the size and proximity of the professions within relevant networks or organisations.<sup>226</sup> Equally, the degree to which the lawyer associates himself with his own firm may be important.<sup>227</sup> Self-employed barristers, may be more likely to consider themselves independent practitioners, for example, competing within chambers whilst having some common interests in good reputation.<sup>228</sup> Reputation for some individuals may also be more individual than (say) chambers (or firm) based.<sup>229</sup> These examples show that collegial control, if it exists, may be complex.

Contextual factors interrelate and are both formal and informal.<sup>230</sup> The appropriateness of an employee or owner/partner’s behaviour is interpreted through “formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour”.<sup>231</sup> Structural factors can encapsulate “[s]ituational moderators” which include “one’s immediate job context, the organization’s cultures and norms, characteristics of an individual’s work [and] ... the structure of the organization itself.”<sup>232</sup> Economic incentives which influence behaviour naturally include fee types and referral fees practices<sup>233</sup> but also internal mechanisms such as billing and work-in-progress targets. Interpersonal and cultural dynamics might focus on hierarchical dynamics,<sup>234</sup> such as the significant gaps in the way senior and lower

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<sup>224</sup> Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press: Berkeley, 1977).

<sup>225</sup> Mather, cited n 85, pp 120.

<sup>226</sup> Heinz cited n 84.

<sup>227</sup> Mather, cited n 85, pp 118.

<sup>228</sup> See Griffiths-Baker, cited n 67, pp 59.

<sup>229</sup> Griffiths-Baker, cited n 67, pp 59-60.

<sup>230</sup> Tenbrunsel, cited n 213.

<sup>231</sup> Parker, cited n32.

<sup>232</sup> See Pfeffer, ‘Organization Theory and Structural Perspectives on Management’ (1991) 17 *Journal of Management* 789. See also Pfeffer, *Power in Organizations* (Pitman: Marshfield, MA. 1981). Carlo Patetta Rotta cited n 11, suggests ‘participatory’ models of managements increase communication and transparency and are therefore more ethical, which is supported by research in other fields suggesting the benefits of participatory models such as Rosenthal, cited n 108.

<sup>233</sup> Moorhead, ‘Filthy Lucre: Lawyers’ Fees and Lawyers’ Ethics – What is Wrong with Informed Consent?’ (2011) 31 *Legal Studies* 345.

<sup>234</sup> Trevino and others ‘It’s Lovely at the Top: Hierarchical Levels, Identities and Perceptions of Organizational Ethics’ (2008) 18(2) *Business Ethics Quarterly* 233; Dukerich and others, ‘Moral reasoning in Groups: Leaders Make a Difference’ (1990) 43 *Human Relations* 473 (role of leaders in ethical decision-making groups); Milgram, cited n 78 (submission to authority can lead to remarkable reductions in individual standards of ethical behavior); Trevino, 1986 cited n 209 and Kelman and

level employees perceive organisational ethical issues<sup>235</sup> and communication or the “social contagion process which diffuses ethical norms through organizations”.<sup>236</sup> Communication, surveillance and sanctioning systems can all be important.<sup>237</sup>

There are two reasons for emphasising contextual factors in an ethical benchmark. Firstly, as already noted, situational influences may shape individuals’ ethical behaviour.<sup>238</sup> firm culture may load allegiances too heavily in favour of their own or clients’ objectives;<sup>239</sup> and courts and

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Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven, CT: Yale University Press, 1989) have argued that Milgram’s findings apply to hierarchical power structures within organisations.

<sup>235</sup> Parker and Aitken, cited n 27; Carroll, ‘Linking Business Ethics to Behavior in Organizations’ (1978) 43 *SAM Advanced Management Journal* 4 (managers blame unethical behaviour on pressures imposed on them from external sources and superiors).

<sup>236</sup> Burt, ‘Social Contagion and Innovation: Cohesion Versus Structural Equivalence’ (1987) 92 *American Journal of Sociology* 1287; Trevino and others, ‘The Ethical Context in Organizations: Influences on Employee Attitudes and Behaviours’ (1998) 8(3) *Business Ethics Quarterly* 447; Victor and Cullen, ‘A Theory and Measure of Ethical Climate in Organizations’ in Frederick (ed) *Research in Corporate Social Performance and Policy* 9 (JAI Press, Greenwich, Ct. 1987); Wech and others, ‘Does Work Group Cohesiveness Affect Individuals’ Performance and Organizational Commitment? A Cross Level Examination’ (1998) 29 *Small Group Research* 472 cited in Cullen and Others, ‘The Effect of Ethical Climates on Organizational Commitment: A Two Study Analysis’ (2003) 46 *Journal of Business Ethics* 127.

<sup>238</sup> Verbeke and others, cited n 4 – ethical climate positively affected ethical decision making; Singhapakdi and others ‘How Important are Ethics and Social Responsibility? A Multinational Survey of Marketing Professionals’ (2001) 35(1/2) *European Journal of Marketing* 133; Singhapakdi and others, ‘Is Cross-Cultural Similarity an Indicator of Similar Marketing Ethics?’ (2001) 32(1) *Journal of Business Ethics* 55 (ethical climate strongly influences perceived importance of ethics). Cf. Douglas and others, ‘The Effect of Organizational Culture and Ethical Orientation on Accountants’ Ethical Judgments’ (2001) 34(2) *Journal of Business Ethics* 101 (ethical culture did not directly impact ethical judgments); Retinger and Jordan, ‘The Relations Among Religion, Motivation and College Cheating: A Natural Experiment’ (2005) 15(2) *Ethics and Behaviour* 107 (college students rated scenarios, what constituted ethical behaviour in organisational setting shown to be important); Trevino and others, ‘Managing Ethics and Legal Compliance: What Works and What Hurts’ (1999) 41(2) *California Management Review* 131 (aspects of ethical context were the most important variables (as a set) influencing a battery of organisational ethical outcomes including willingness to report ethical violations, making better individual decisions, increasing organizational commitment, and behaving in unethical ways themselves’, summaries from Dean, cited n 209). See also, McCabe and others, ‘The Influence of Collegiate and Corporate Codes of Conduct on Ethics-Related Behaviour in the Workplace’ (1996) 6(4) *Business Ethics Quarterly* 461 (formal ethics systems increases desirable behaviour).

<sup>239</sup> See literature on Enron, including Rapoport, ‘Enron, Titanic and the Perfect Storm’ in Rapoport and Dharan (eds) *Enron: Corporate Fiascos and their Implications* (Found Press 2004), 77; Gilman, cited n 308; Bost, ‘The Lawyer as Truth Teller: Lessons from Enron’ (2005) 32(2) *Pepperdine Law Review*; Regan, cited n 221 and promotion to partnership tournaments in Galanter and Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (University of Chicago Press: Chicago. 1991); Ferrell and others, *Business Ethics: Ethical Decision Making and Cases*, 7th ed. (Boston:

prosecutors may push administrative expediency over client rights.<sup>240</sup> Secondly, contextual factors might be harnessed to positively influence ethical behaviour.<sup>241</sup> If, “as social entities, organizations exert collective forces on their members which are greater than the simple sum of individual attitudes and beliefs,”<sup>242</sup> then probing the ethical climate of a firm can tell us something about what kinds of individuals are able to function within it and how they are encouraged or allowed to behave.<sup>243</sup>

Table 6 sets out some of the elements that have been considered by studies looking at the influence of context on ethics and which may be susceptible to data collection.

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Houghton-Mifflin. 2007); ‘Conversations with Ken Lay and Reflections One Year Later, <http://www.e-businessethics.com/ConversationswithKenLayAACSB AUG2007.pdf> referenced in Dean, cited n 209; Sims and Brinkmann, ‘Enron Ethics (Or Culture Matters More than Codes)’ (2003) 45(3) *Journal of Business Ethics* 243; see also Gunz, cited n 212.

<sup>240</sup> McConville, cited n 66; Blumberg, ‘The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession’ (1967) 1 *Law and Society Review* 15; Alschuler, ‘The Defence Attorney’s Role in Plea Bargaining’ (1975) 84 *Yale Law Journal* 1179; Mather, cited n 169 and Stryker and Burke, ‘The Past, Present and Future of an Identity Theory’ (2000) 63 *Social Psychology Quarterly* 284 on balancing conflicting loyalties.

<sup>241</sup> Trevino and others, cited n 238 – ‘aspects of ethical context were the most important variables (as a set) influencing a battery of organizational ethical outcomes including willingness to report ethical violations, making better individual decisions, increasing organizational commitment and behaving in unethical ways themselves’ (summarized by Dean, cited n 209); see also Parker, cited n32. Cf/ Tenbrunsel and Messick, ‘Sanctioning Systems, Decision Frames and Cooperation’ (1999) 44 *Administrative Science Quarterly* 684: Mechanisms designed to enforce ethical behaviour can sometimes have detrimental effect by increasing undesirable behaviours.

<sup>242</sup> Blau and Scott, *Formal Organizations* (Chandler, San Francisco. 1962).

<sup>243</sup> There seems to be an inverse relationship between higher ethical infrastructure and lower [individual] complaints: Parker, cited n32.

Table 6: Three Dimensions of Context

Type of CONTEXT	Examples
<b>ECONOMIC INCENTIVES</b>	Profit; job-security; business models; targets; billable hours; formal requirements of stakeholders.
<b>ETHICAL INFRASTRUCTURE</b>	Codes; policy statements; compliance officers; inspection; reporting hotlines; advice hotlines; investigation and sanctioning of misconduct training; self-assessment; evaluations.
<b>CULTURAL AND INTERPERSONAL INFLUENCES /DYNAMICS</b>	Ethical climate; leadership signals; supervisors; observed misconduct; perceived handling of misconduct; peer group behaviour and influences; client and stakeholder behaviour and influences; perceptions of attitudes of others; cultures.

Various approaches to measuring ethical context have been employed.<sup>244</sup> They generally rely on collecting survey data<sup>245</sup> from

<sup>244</sup> Randall and Gibson, 'Methodology in Business Ethics Research: A Review and Critical Assessment' (1990) 9 Journal of Business Ethics 457 found 81% of the business ethics studies they examined were survey-based. These included Baumhart, 'How Ethical Are Businessmen?' (1961) 39(4) Harvard Business Review 6; Brenner and Molander, 'Is the Ethics of Business Changing' (1977) 55 Harvard Business Review 57; Fritzsche and Becker, 'Linking Management Behaviour in Ethical Philosophy – An Investigation' (1984) 27 Academy of Management Journal 166; Lincoln and others, 'Ethical Beliefs and Personal Values of Top level Executives' (1982) 10 Journal of Business Research 475. Only 6% of the studies were laboratory experiments or simulations and there were no field experiments.

<sup>245</sup> Queensland surveys cited n 134; Weaver and others, 'Corporate Ethics Practices in the Mid-1990s: An Empirical Study of the Fortune 1000' (1999) 18 Journal of Business Ethics 283; Victor and Cullen have devised an Ethical Climate Questionnaire, a 36 item survey designed to draw out firm culture. This has been



respondents within organisations, typically key individuals responsible for ethics or compliance and sometimes others at various points in the hierarchy within the organisation. In better studies that data is compared with data from other measures (gained either by testing responses to ethical vignettes, by self-reported levels of ethical behaviour within their organisation or complaints data).<sup>246</sup> Some studies assume the existence of particular ethical policies and structures is indicative of a more ethical institution<sup>247</sup> and so simply

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used to test the dynamics of work climate and individual moral awareness. Victor, 1987, cited n 236; Victor and Cullen, 'The Organizational Bases of Ethical Work Climates' (1988) 33(1) Administrative Science Quarterly 101; Cullen and others, 'The Ethical Climate Questionnaire: An Assessment of its Development and Validity' (1993) 73 Psychological Reports 667. See also Cullen and others, 'An Ethical Weather Report: Assessing the Organization's Ethical Climate' (1989) 18 Organizational Dynamics 50. The ECQ has been validated in Argawal and Malloy, 'Ethical Work Climate Dimensions in a Not for Profit Organization: An Empirical Study' (1999) 20 Journal of Business Ethics 1; DeConick and Lewis, 'The Influence of Deontological and Teleological Considerations and Ethical Climate on Sales Managers' Intentions to Reward or Punish Sales Force Behaviour' (1997) 16 Journal of Business Ethics 497; Deshpande, 'Ethical Climate and the Link Between Success and Ethical Behaviour: An Empirical Investigation of a Non-Profit Organization' (1996) 15 Journal of Business Ethics 315; Deshpande, 'The Impact of Ethical Climate Types on Facets of Job Satisfaction: An Empirical Investigation' (1996) 15 Journal of Business Ethics 655; Schwepker and others, 'The Influence of Ethical Climate and Ethical Conflict on Role Stress in the Sales Force' (1997) 25 Journal of the Academy of Marketing Science 99; Sims and Keon, 'Ethical Work Climate as a Factor in the Development of Person-Organization Fit' (1997) 16 Journal of Business Ethics 1095; Trevino, cited n 236; Weber, 'Influences Upon Organizational Ethical Subclimates: A Multi-Departmental Analysis of a Single Firm' (1995) 6 Organization Science 509; Wimbush and others 'An Empirical Examination of the Multi-dimensionality of Ethical Climate in Organizations' (1997) 16 Journal of Business Ethics 67; Wimbush and others, 'An Empirical Examination of the Relationship Between Ethical Climate and Ethical Behaviour from Multiple Levels of Analysis' (1997) 16 Journal of Business Ethics 1705; VanSandt cited n 202. The Questionnaire is on a six point (completely false-completely true) Likert scale. There are 36 statements which they must evaluate as completely false-completely true for their own firm. Examples include: 'in this company people are mostly out for themselves', 'there is no room for one's own personal morals or ethics in this company', 'work is considered sub-standard only when it hurts the company's interest', 'successful people in this company go by the book' etc, see the appendix A to VanSandt cited n 202. See also Ethics Resource Center, National Business Ethics Survey (US):

<http://www.ethics.org/nbes/>; Baxter and others, 'Real Integrity: Practical Solutions for Organisations Seeking to Promote and Encourage Integrity' (ICAEW, 2012).

<sup>246</sup> Parker, cited n 32 (survey and complaints); Parker, cited n 27 **Error! Bookmark not defined.** (online survey and vignettes); Dean, cited n 209 (survey and semi-structured interview: surveys on size, formalisation and centralisation compared against Measure of Ethical Viewpoints for individual ethical predisposition); Vansandt cited n 202 (surveys on ethical climate compared to participant moral awareness responses derived from identifying and rating ethical issues from video vignettes); McCall and Lombardo (eds), *Leadership: Where Else Can We Go?* (Durham, N.C: Duke University Press, 1978) (simulation with memos manipulating participants' perception of ethical climate and questionnaires used to determine participants' ethical decision making criteria).

<sup>247</sup> The focus being instead on 'the degree to which those firms have adopted various practices associated with corporate ethics programs', Weaver and others, cited n 245

describe ethical infrastructure and attitudes of key personnel.<sup>248</sup> Where studies do compare context and decision-making interesting findings can result. For instance, Dean et al suggest that a culture of following the letter rather than the spirit of ethical codes renders unethical situations more likely.<sup>249</sup>

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### ECONOMIC INCENTIVES

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Whether publicly owned or a private business, legal practice takes place in an environment which is governed by economic pressures.<sup>250</sup> To some extent, competing interests and priorities make ethical conflicts inevitable.<sup>251</sup>

Various measures have either been used to examine the impact of economic incentives on ethical decision making or related to ethicality of decision making:

- General perceptions of economic outlook for the business;<sup>252</sup>
- fee types;<sup>253</sup>
- resource levels of clients;<sup>254</sup>
- whether reward systems have been shown to drive up support for that company's ethical vision.<sup>255</sup>

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<sup>248</sup> Baumhart, cited n 244; Brenner, cited 244 cited in Trevino, 'Experimental Approaches to Studying Ethical-Unethical Behaviour in Organizations' (1992) 2(2) Business Ethics Quarterly 121.

<sup>249</sup> Dean cited n 209.

<sup>250</sup> See for example, commercial pressures and risk-taking behaviours documented in Carlin (1966), cited n 68.

<sup>251</sup> Shapiro, cited n 67, pp 54

<sup>252</sup> NBES 2011, cited n 245.

<sup>253</sup> Moorhead and Cumming, cited n 67; Moorhead and Hurst, 'Improving Access to Justice Contingency Fees: A Study of Their Operation in the United States' (2008); Kritzer, *Rhetoric and Reality... Uses and Abuses... Contingencies and Certainties: The American Contingent Fee in Operation* (Institute for Legal Studies: Madison. 1996); Kritzer and others, *The Impact of Fee Arrangement on Lawyer Effort* (University of Wisconsin Law School, Disputes Processing Research Program: Madison. 1984).

<sup>254</sup> Cf/ Mann, *Defending White Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, 1985).

<sup>255</sup> Hegarty and Sims, 'Some Determinants of Unethical Decision Behaviour: An Experiment' (1978) 63 Journal of Applied Psychology 451; Hegarty and Sims 'Organizational Philosophy, Policies and Objectives related to Unethical Decision Behaviour. A Laboratory Experiment' (1979) 64(3) Journal of Applied Psychology 331; Trevino and Youngblood, 'Bad Apples in Bad Barrels: A Casual Analysis of Ethical Decision Making Behaviour' (1990) 75(4) Journal of Applied Psychology 378.

The tendency of incentives to drive behaviour is widely acknowledged:

“The problem with incentives is that they are often linked to short-term profits rather than long term ones. This fact pushes individuals to take on investments and business with risk profiles higher than the ones they would have normally considered reasonable.”<sup>256</sup>

Their potential relevance in relation to fee types in lawyers’ business<sup>257</sup> and referral fees is well documented, though the impact within ‘ordinary’ business structures is less well considered.<sup>258</sup> Interactions between financial and other incentives or appraisal mechanisms may be important and it has also been suggested that unrealistic targets for billable hours might be a driver of dishonesty amongst lawyers who then feel less guilt about ethical erosion in other areas too.<sup>259</sup>

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### ETHICAL INFRASTRUCTURE

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A number of studies focus on formal structures and systems as predictors of ethicality. These studies have examined the following kinds of factors:

- **the existence of codes, policies and other statements of ethical purpose.**<sup>260</sup> Evidence suggests that codes can influence

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<sup>256</sup> Carlo Patetta Rotta, cited n 11, pg 96.

<sup>257</sup> See, Moorhead (2011) cited n 233; Moorhead and Hurst, cited n 253.

<sup>258</sup> See Grout, ‘The Clementi Report: Potential Risks of External Ownership and Regulatory Responses’ Working Paper 05/135 (Constitutional Affairs. 2005): <http://www.bristol.ac.uk/cmpo/publications/papers/2005/wp135.pdf>.

<sup>259</sup> Adam Liptak, ‘Stop the Clock? Critics Call the Billable Hour a Legal Fiction’, New York Times, 29 October 2002; cited in Stefancic and Delgado, *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds* (Duke University Press: Durham and London. 2005) pp 54; Fortney, ‘I Don’t Have Time to Be Ethical: Addressing the Effects of Billable Hour Pressure’ (2003) 39 Idaho Law Review 305. See also Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Carolina Academic Press: Durham NC. 1996); Fortney, ‘The Billable Hour Derby: Empirical Data on the Problems, Pressure Points and Possible Solutions’ (2005) 33 Fordham Urban Law Journal 171; Abel, cited n 109, pp 209-210. Unrealistic expectations on time and performance as drivers of future ethical misconduct have also been investigated in the area of law students’ resumes, see Millich, ‘Ethical Integrity in the Legal Profession: Survey Results Regarding Law Students’ Veracity on Resumes and Recommendations for Enhancing Legal Ethics Outside the Classroom’ (1992) 24 Arizona State Law Journal 1181. See further, Parker and Ruschena, ‘The Pressures of Billable Hours: Lessons from a Survey of Billing Practices from Inside Firms’, available at [http://www.lsc.qld.gov.au/\\_data/assets/pdf\\_file/0020/106058/pressures-of-billable-hours.pdf](http://www.lsc.qld.gov.au/_data/assets/pdf_file/0020/106058/pressures-of-billable-hours.pdf) accessed 27 May 2012.

<sup>260</sup> Weaver cited n 245 at 285; Carlo Patteta Rotta, cited n 11; Baxter cited n 245.

the way managers' perceive wrongdoing<sup>261</sup> although they are not conclusive in informing the reasoning process of even those who adhere to them.<sup>262</sup> The evidence on whether codes actually do influence behaviour is mixed<sup>263</sup> but is generally positive on the relationship between codes and ethics attitudes/behaviour.<sup>264</sup>

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<sup>261</sup> Stohs and Brannick, 'Codes of Conduct: Predictors of Irish Managers' Ethical Reasoning' (1999) 22(4) *Journal of Business Ethics* 311.

<sup>262</sup> Daicoff, cited n 156, professional codes influence ethical reasoning, but lawyers treat them as minimum standards.

<sup>263</sup> Udas and others, 'An Investigation of Ethical Perceptions of Public Sector Professionals' (1996) 15(7) *Journal of Business Ethics* 721 - codes of ethics had no bearing on perception of ethical issues; Nwachukwu and Vittell, 'The Influence of Corporate Culture on Managerial Ethical Judgments' (1997) 16(8) *Journal of Business Ethics* 757 - no significance between existence or non existence of a code and judgment; Douglas cited n 238 - Codes of conduct did not sufficiently affect ethical judgments; Akaah and Riordan, 'Judgments of Marketing Professionals about Ethical Issues in Marketing Research: A Replication and Extension', (February 1989) 26 *Journal of Marketing Research* 112; Allen and Davis, 'Assessing Some Determinant Effects of Ethical Consulting Behaviour: The Case of Personal and Professional Values' (1993) 12 *Journal of Business Ethics* 449; Badaracco and Webb, 'Business Ethics: A View from the Trenches' (1995) 37(2) *California Management Review* 8; Brief and others, 'What's Wrong with the Treadway Commission Report? Experimental Analyses of the Effects of Personal Values and Codes of Conduct on Fraudulent Financial Reporting' (1996) 15 *Journal of Business Ethics* 183; Callan, 'Predicting Ethical Values and Training Needs in Ethics' (1992) 11 *Journal of Business Ethics* 761; Chonko and Hunt, 'Ethics and Marketing Management: An Empirical Evaluation' (1985) 13 *Journal of Business Research* 339; Clarke, 'Can Corporate Codes of Ethics Influence Behaviour?' (1998) 17(6) *Journal of Business Ethics* 619; Ford and others, 'Do Organizational Codes of Conduct Really Affect Employees Behaviour?' (June 1982) 77 *Management Review* 53; Hunt and others, 'Ethical Problems of Marketing Researchers' (August 1984) 21 *Journal of Marketing Research* 309; Farrell and others 'Can Codes of Ethics Really Produce Consistent Behaviours?' (2002) 17(6) *Journal of Managerial Psychology* 468 (questionnaire survey 545 employees and 25 managers of 8 large Australian firms - no discernible effect); McKendall and others 'Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines' (2002) 37(4) *Journal of Business Ethics* 367 (108 US corporations examined and no link found between codes and regulatory breaches). See O'Fallon cited n 4.

<sup>264</sup> Ferrell and Skinner, 'Ethical Behaviour and Bureaucratic Structure in Marketing Research Organizations' (February 1988) 25 *Journal of Marketing Research* 103; Hegarty (1979) cited n 255; Kitson, 'Taking the Pulse: Ethics and The British Cooperative Bank' (1996) 15(9) *Journal of Business Ethics* 1021; Laczniak and Inderrieden, 'The Influence of Stated Organizational Concern Upon Ethical Decision Making' (1987) 6 *Journal of Business Ethics* 297; McCabe and others, cited at n 238; Pierce and Henry, 'Computer Ethics: The Role of Personal, Informal and Formal Codes' (1996) 15(4) *Journal of Business Ethics* 425; Rich and others, 'Are Corporate Codes of Conduct Effective?' (September 1990) 72 *Management Accountant* 34; Adams and others, 'Codes of Ethics as Signals for Ethical Behaviour' (2001) 29 *Journal of Business Ethics* 199; Boo and Koh, 'The Influence of Organizational and Code-Supporting Variables on the Effectiveness of a Code of Ethics' (2001) 5 *Teaching Business Ethics* 357; Peterson, 'The Relationship Between Unethical Behaviour and the Dimensions of the Ethical Climate Questionnaire' (2002) 41 *Journal of Business Ethics* 313; Valentine and Barnett, 'Ethics Codes and Sales Professional Perceptions of their Organizations Ethical Values' (2002) 40(3) *Journal*

- Communication and training around ethics issues<sup>265</sup> (how much occurs, when and of what nature).
- Ethics and compliance roles: the existence of ethics or compliance officers (in the legal field the SRA will require COLPs, the Queensland Legal Services Commission recommends 'survey managers' responsible for reviewing their firm's performance using the ethics check surveys and instigating discussions with colleagues).<sup>266</sup> Whether businesses had a single person or a team responsible for ethics compliance<sup>267</sup> how much of their time is devoted to ethics work by relevant personnel.
- 'Demonstrations' or exemplifying (whether and how behaviours are punished or rewarded).<sup>268</sup>
- The existence of anonymous reporting and advice systems (such as hotlines).
- Whether there is self-assessment or evaluation of ethical policies, procedures and cultures and whether there is external involvement in self-assessment, evaluation or ethical policies.<sup>269</sup>

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of Business Ethics 191; Pflugrath and others, 'The Impact of Codes of Ethics and Experience on Auditor Judgments' (2007) 22(6) *Managerial Auditing Journal* 566; McKinney and others, 'The Effect of Ethical Codes on Ethical Perceptions of Actions Toward Stakeholders' (2010) 97 *Journal of Business Ethics* 505; Murphy and others, 'Executive Attitudes, Organizational Size and Ethical Issues: Perspectives on a Service Industry' (1992) 11 *Journal of Business Ethics* 11; Weeks and Nantel, 'Corporate Codes of Ethics and Sales Force Behaviour: A Case Study' (1992) 11 *Journal of Business Ethics* 753. Also see, Gilman, 'Ethics Codes and Codes of Conduct as Tool for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons' Prepared for World Bank

<sup>265</sup> See for example, Greenberg, 'Who stole the Money and When? Individual and Situational Determinants of Employee Theft' (2002) 89 *Organizational Behaviour and Human Decision Processes* 985 (reduction in employee theft following introduction of ethics program). Cf, Sparks and Hunt, 'Marketing Researcher Ethical Sensitivity: Conceptualization, Measurement and Exploratory Investigation' (1998) 62(2) *Journal of Marketing* 92: negligible effect of further training on ethical sensitivity. This seems to be supported also by Baxter and others, cited n 245.

<sup>266</sup> Parker, cited n 27.

<sup>267</sup> Weaver cited n 245; Carlo Patetta Rotta, cited n 11.

<sup>268</sup> Trevino, 1986 cited n 209; Fritzsche and Becker, 'Ethical Behaviour of Marketing Managers' (1983) 2 *Journal of Business Ethics* 291; Schneider, 'The Climate for Service: An Application of the Climate Construct' in Schneider (ed) *Organizational Climate and Culture* (Jossey-Bass, San Francisco, CA. 1990), pp 383-412; Jones, cited n 209; Abel, cited n 109; Baxter and others, cited n 245.

<sup>269</sup> Parker, cited n 32; NBES 2011, cited n 245.. Questions in Weaver cited n 245 include: How often does the firm compare its ethical performance with that of other companies? How often does the firm survey external stakeholders regarding the firm's ethics and values? How often are external parties used to evaluate the ethics programme? Questions were answered on a Likert scale (1= never/5= very frequently) and percentages are available from Weaver cited n 245 pg. 289. Formal

The Queensland Legal Services Commission offers a series of online ethics check surveys designed to enable firms to anonymously 'audit' their own ethical infrastructure and compare it with competitors. These consist of: a supervision practices check, a workplace culture check, a complaints management systems check, a billing practices check and a supervision practices check.<sup>270</sup> The Work Place Culture Check includes questions drawing on Trevino's work into organisational ethics which uses various internal communication measures designed to promote ethical culture as indicators.<sup>271</sup> There are a number of ethical vignettes within the survey instrument. Although the culture check has been evaluated, the research team cautioned that it had not been intended as an inferential social science research instrument, rather as a tool for reflection. The evaluation was nevertheless able to undertake some qualified analysis, demonstrating gender, seniority and firm size variables on the responses given. For example, the most senior lawyers were more likely than the most junior lawyers to state that they perceived specific formal ethical supports to be implemented within their firms and also more likely to be comfortable raising, discussing and resolving ethical issues. There was significant variation in whether respondents knew of someone being disciplined during the past five years.<sup>272</sup> The researchers noted that differences in perspectives (within a single firm) can be a harbinger of problematic ethical culture.<sup>273</sup>

Other research which examines aspects of ethical infrastructure include the Institute of Leadership and Management (ILM) Index of Leadership Trust 2011 (UK) which measures trust in six aspects of leadership:

- ability of the leader to do their job;
- understanding: displaying knowledge and understanding to their employees' roles and responsibilities;
- Fairness: behaving fairly and showing concern for welfare of employees;
- Openness: being accessible and receptive to ideas and opinions;
- Integrity: striving to be honest and fair in decision making; consistency; behaving in a reliable and predictable manner.

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disciplinary measures are also mentioned as a factor bearing on ethics in the introduction to Carlin (1966), cited n 68, pp 6.

<sup>270</sup><http://www.lsc.qld.gov.au/ethics-checks>; <http://www.lsc.qld.gov.au/ethics-checks/surveys> as at 9.00 am, 23/2/12. See also Parker, cited n 27

<sup>271</sup> Parker, cited n32

<sup>272</sup> Parker, cited n **Error! Bookmark not defined.**, pp 417.

<sup>273</sup> As cited n 272, pp 420.

The Chartered General Management Accountant's Global Survey of Business Ethics<sup>274</sup> considered the situations most likely to exert ethical pressure, highlighting 'working with colleagues from different functional areas within the organisation' (22% overall, UK respondents found this amongst the least problematic), 'meeting reporting deadlines' (21%), 'compiling management accounts' (19%), 'dealing with customers' (19%), 'managing staff' (18%), 'awarding contracts to suppliers' (18%), 'working with partners internationally from different cultures' (17%), 'compiling year end accounts' (17%), reporting performance to external stakeholders (15%) and 'allocating bonuses' (13%) amongst the most problematic areas for ethical pressure.

PwC used an online survey of individuals from 111 organizations who reported on whistleblowing mechanisms and internal and external monitoring of effectiveness of such systems within their business, awareness and training and senior management involvement in such systems.<sup>275</sup> In the Global Business Ethics Survey, the authors noted an incongruity between ethical "architecture" such as strengthened codes and policies and monitoring implementation at the business level.<sup>276</sup>

Another example is the US National Business Ethics Survey designed to benchmark ethical behaviour in US corporations.<sup>277</sup> The survey seeks to triangulate findings on ethical infrastructure with findings from the same survey on levels of perceived misconduct and reporting of misconduct. There is a risk of circularity in this approach, given that any respondent who perceives high levels of misconduct is also likely to perceive weaknesses in ethical infrastructure. Another example is the recent ICAEW report<sup>278</sup>, 2012. This survey and interview based study which found just 24% of respondents stating their organisation rewarded ethical behaviour even though this was considered a good means of increasing integrity. Whistleblowing, was found to be more effective than survey respondents perceived it to be. Training and discipline were seen as counterproductive elements of ethical infrastructure, with responses suggesting the latter was perceived as disproportionately punitive whilst the former was just ineffective or even patronising. The role of ethical leadership in dictating ethical culture was also noted.<sup>279</sup>

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<sup>274</sup> Chartered General Management Accountant, Managing Responsible Business: <http://www.cgma.org/Resources/Reports/Pages/ManagingResponsibleBusiness.aspx> accessed on 3rd July 2012.

<sup>275</sup> PwC 'Striking a Balance': Whistleblowing Arrangements as Part of a Speak Up Strategy, 2011 (UK).

<sup>276</sup> Cited n 274.

<sup>277</sup> NBES 2011, cited n 245.

<sup>278</sup> Baxter and others, cited n 245.

<sup>279</sup> Cited n. 278.

The Ernst and Young 'European Fraud Survey: Recovery Regulation and Integrity, 2011 (Europe) carries out a biennial survey of 2365 employees of large companies in 25 European countries on the acceptability and prevalence of bribes, willingness to work in a company involved in corruption, willingness to hire individuals who have previously been involved in corruption incidence. The survey also audits infrastructure for anti-bribery and corruption including policy provision, codes and training and trust in management.

The KPMG Global Anti-Bribery and Corruption Survey, 2011 (UK and US) examines anti-bribery and corruption policies in UK and US. The 214 most senior employees dealing with bribery and corruption were identified and surveyed on the existence of written policies, distribution of these to third parties, certification of compliance by employees and third parties, ethics monitoring, risk assessments, designated anti-bribery/corruption staff and evidence of willingness to trade with countries with high incidence of bribery and corruption.

Finally, the Chartered Institute of Internal Auditors (ILA) examined the number of companies reporting on their own ethics and integrity performance in their annual reports with low numbers reporting on employees training or understanding of code.<sup>280</sup>

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### CULTURAL AND INTERPERSONAL DYNAMICS

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As well as considering the formal ethical infrastructure of organizations, many studies consider the ways in which infrastructure is interpreted.<sup>281</sup> These studies of ethical culture<sup>282</sup> are often derived from perceptions of wrongdoing amongst colleagues, relationships with supervisors and the signals sent by firm leaders.<sup>283</sup> As an analogue of culture, ethical climate has been defined as:

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<sup>280</sup> Chartered Institute of Internal Auditors, 'Ethics Reporting: A Review of FTSE 100 Annual Reports' (2011).

<sup>281</sup> See for example, Chugh and Bazerman. 'A Social Science Perspective to Understanding Ethics in Organizations: A Review of Social Influences on Ethical Behavior in Organizations' (2003) 48 Contemporary Psychology 426.

<sup>282</sup> For a discussion of ethical 'culture' with a professional context, see for example, Duncan Minty, 'Culture and Ethics: A New Crucible for Regulator Thinking?' Financial Services Industry Think Piece, No 49 (January 2011).

<sup>283</sup> See for example, Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' (2005) 35 University of Memphis Law Review 631. Carlo Patetta Rotta, cited n 11, submits that factors which undermine the management style and hence the ethical culture include: 'communicates untrue results on company management to employees, shareholders and the public'; 'does not comply with accounting standards in order to pocket higher bonuses'; 'abuses company perks'; 'does not state a conflict of interests with the company; does not comply with the code of ethics and company policies and procedures; avoids internal controls for direct or indirect



the “informal, harder to assess side of ethics ... including factors such as the norms of corporate cultures and subcultures,”<sup>284</sup>

“the unwritten rules and customs and behaviours that determine what actually happens in practice,”<sup>285</sup>

“all the unwritten rules, customs and styles which influence the expectations, thoughts and behavior of people who operate within its organized structure”<sup>286</sup> and

“those indirect signals regarding appropriate ethical conduct that are received by the organizational members... noticeable primarily to people inside of the organization, such signals cannot be verified through formal documents. Rather they are ‘felt’ ... through personal relationships.”<sup>287</sup>

There is research which links culture to ethicality<sup>288</sup> and also which suggests that within a legal environment, cultural controls might exert a stronger influence than the more formal infrastructural elements that we have discussed above.<sup>289</sup> Socialisation within law firms has been likened to a process of “experiential learning, in which practices (both technical and cultural) are modeled by the master... [to] break.. trainees down and remake... them in the image of the firm.”<sup>290</sup> The way that this process impacts on individual identity and professional ethics

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personal gain or to commit fraud; does not take responsibility for decisions taken that are relevant to its sphere of competence; uses company assets for personal purposes; uses its position to control and manipulate employees; uses working relationships (with suppliers, for instance) to obtain personal advantages.’

<sup>284</sup> Trevino cited n 238. Trevino here seems to conflate culture and interpersonal dynamics.

<sup>285</sup> Queensland ethics check surveys cited n 134.

<sup>286</sup> Carlo Patetta Rotta, cited n 11, pg 5. Rotta states the two primary elements of firm culture are company philosophy (ethos, branding) and management style.

<sup>287</sup> Tenbrunsel, cited n 213.

<sup>288</sup> Key, ‘Perceived Managerial Discretion: An Analysis of Individual Ethical Intentions’ (2002) 14(20) *Journal of Managerial Issues* 218: ‘individuals who rated their organization as more ethical demonstrated greater perceived discretion whereas those who rated their organization as less ethical had less perceived discretion’; Bartels and others, ‘The Relationship Between Ethical Climate and Ethical Problems within Human Resource Management’ (1998) 17(7) *Journal of Business Ethics* 799 – ‘strong ethical climates are associated with less serious ethical problems’; Weber and others, cited n 77 - ‘organizations with a morally preferred ethical climate did not have known employee theft’; Vardi, ‘The Effects of Organizational and Ethical Climates on Misconduct at Work’ (2001) 29(4) *Journal of Business Ethics* 325 – ‘the more positively the organizational climate is viewed, the less reported misbehaviour’ articles and summaries from O’Fallon and Butterfield, cited n 4.

<sup>289</sup> Suchman, ‘Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation’ (1998) 67 *Fordham Law Review* 837.

<sup>290</sup> Sommerlad, (quoted in Mather n 85).

can be corroborated in other studies,<sup>291</sup> although the master-servant model is probably too simplistic. Some studies have also pointed to entrant lawyers using their own values to negotiate and instigate change even as they assimilate to pre-existing cultural norms.<sup>292</sup>

Indicators of ethical climate can be measured at the individual<sup>293</sup> or team level<sup>294</sup> and findings can be aggregated to any level at which there is consensus.<sup>295</sup> There have been some interesting studies on how climate or “social context conditions” impact on whether individuals are prepared to report a peer for unethical behaviour.<sup>296</sup> Examples which have been shown to bear on ethical culture include ‘snitching’ which can attract negative reactions from other colleagues. It is theorised that for each negative reaction, the message ‘don’t snitch’ is reinforced and becomes part of the infrastructure via culture.<sup>297</sup> Other examples include an individual’s perceptions of the level of ethicality demonstrated by leaders and colleagues.<sup>298</sup> Pressure

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<sup>291</sup> See for example, Kirkland cited n 283 and Corbin cited n 209. Mather points to disparities in insurers’ risk assessment by practice size and services type as evidence of cultural conditioning, see Mather, cited n 85, pp 123.

<sup>292</sup> Mather, cited n 85.

<sup>293</sup> Burke and others, ‘Reconceptualizing Psychological Climate in a Retail Service Environment: A Multiple Stakeholder Perspective’ (1992) 77 *Journal of Applied Psychology* 717. For distinctions/discussion of psychological climate, see Field and Abelson, ‘Climate: A Reconceptualization and Proposed Model’ (1982) 35 *Human Relations* 181; James and Jones, ‘Organizational Climate: A Review of Theory and Research’ (1974) 81 *Psychological Bulletin* 1096; Schnieder, ‘The Perception of Organizational Climate: The Customer’s View’ (1973) 57 *Journal of Applied Psychology* 248.

<sup>294</sup> Colquitt and others, ‘Justice in Teams: Antecedents and Consequences of Procedural Justice Climate’ (2002) 55 *Personnel Psychology* 83.

<sup>295</sup> Chan, ‘Functional Relations Amongst Constructs in the Same Content Domain at Different Levels of Analysis. A Typology of Composition Models’ (1998) 83 *Journal of Applied Psychology* 246; Schneider, ‘The Climate for Service: An Application of the Climate Construct’ in Schneider, *Organizational Climate and Culture* (Jossey-Bass, San Francisco. 1990), pp 383-412, cited 213.

<sup>296</sup> Trevino and Victor, ‘Peer Reporting of Unethical Behaviour: A Social Context Perspective’ (1992) 35(1) *Academic Management Journal* 38 – two vignettes used to test social context conditions on ethical behaviour. Variables were role responsibility (were they required to report violations) and whether peer’s behaviour would harm group in some way. Both context variables influenced willingness to report; see also Gino and Bazerman, ‘When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others’ Unethical Behavior’ (July 2009) 45 (4) *Journal of Experimental Social Psychology* 708.

<sup>297</sup> Tenbrunsel cited n 213.

<sup>298</sup> Beans cited n 170 – ‘individuals cynical about colleagues ethics less likely to be ethical themselves’; Jones and Kavanagh, ‘An Experimental Examination of the Effects of Individual and Situational Factors on Unethical Behavioural Intentions in the Workplace’ (1996) 15(5) *Journal of Business Ethics* 511 – ‘in 1 of 2 experiments, peer and manager influence positively and significantly impacted on behavioural intentions’; Andersson and Bateman, ‘Cynicism in the Workplace: Some Causes and Effects’ (1997) 18 *Journal of Organizational Behaviour* 449 – ‘individuals high in cynicism more likely to perform unethical acts when requested to do so by management’; Jackson, ‘Management Ethics and Corporate Policy: A Cross Cultural

from co-workers, particularly in relation to expediency and corner-cutting, attempts to avoid unpleasant consequences and attempts by young lawyers to avoid revealing ignorances or to please clients or the court also form an important component of ethical cultural context. Finally, there is mixed research on the extent to which organisational factors permeate ethical climate.<sup>299</sup>

The kind of indicators that have been used include:

- The extent to which individuals observe unethical behaviour and whether it is perceived to be punished;<sup>300</sup>
- Beliefs that management rewards unethical behaviour and unethical behaviour on the part of individuals;<sup>301</sup>
- The location of telephone reporting or advice systems (internal ethics, a legal department or an audit departments were common choices) and the language by which such systems are labeled;<sup>302</sup>
- Perceived procedural fairness of misconduct mechanisms;<sup>303</sup>
- Whether respondents said their organisation had a compliance/policing culture and less of an encouragement approach to ethics.<sup>304</sup>
- Whether staff knew where to turn for advice about problematic

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Comparison' (2000) 37(3) Journal of Management Studies 349 – 'top management's attitude influences lower level managers behaviour', articles and summaries from O'Fallon and Butterfield, cited n 4.

<sup>299</sup> Schminke, cited n 78 looked at centralisation, formality and size of organisation as predictors of ethicality and found no relationship. Weber found that members of larger organizations displayed less sophisticated moral reasoning than smaller: Weber, 'Managers Moral Reasoning: Assessing their Responses to Three Moral Dilemmas' (1990) 43 Human Relations 687.

<sup>300</sup> Parker cited n **Error! Bookmark not defined.** – over half respondents (in 2009) reported that they were aware of someone having been disciplined for unethical conduct in past 5 years. See also Shafer, cited n 64 – probability and magnitude of consequences significantly influenced behavioural intention'; May and Pauli, 'The Role of Moral Intensity in Ethical Decision Making' (2002) 41(1) Business and Society 84 (moral intention is influenced by factors including consequences and social norms).

<sup>301</sup> Ashkanasy cited n 213 (an example would be promoting someone for remaining discreet about a CEO's unethical behavior, see Dean cited n 209; Barnett, cited n 64 – 'magnitude of consequences, social consensus and proximity were indicators of behavioural intentions'; Beams cited n 170: 'individuals expecting higher gains more likely to engage in unethical behavior; Shapeero and others, 'Underreporting and Premature Sign off in Public Accounting' (2003) 18(6/7) Managerial Auditing Journal 478 – 'greater likelihood of reward results in greater intention to engage in unethical behaviour' citations and summaries from O'Fallon and Butterfield, cited n 4.

<sup>302</sup> Weaver, cited n 245, pp 290.

<sup>303</sup> See n 302.

<sup>304</sup> See n 302.

issues; whether they felt able to discuss ethically complex work with senior staff; whether they could talk with colleagues about the ethical basis of decisions; whether they could raise ethical issues in confidence; whether they felt that their concerns once raised would be given due attention; whether they would be treated with respect and courtesy; and, whether, in the event of a conflict, the firm was likely to exert pressure to pursue its own over the client's interest.<sup>305</sup>

An organisation's ethical 'vision' - how an organisation sees itself and encourages its employees, customers, competitors and regulators to see it - is also suggested as important by the literature.<sup>306</sup> Some studies look for signs that vision manifests itself in formal structure and documents (through the existence of codes of conduct or relevant policy statements, as noted above or job descriptions)<sup>307</sup> as well as the extent to which they emphasise or make claims for 'ethicality' in their communications and policies;<sup>308</sup>

Usually the approach suggested is more nuanced and looks for:

- evidence of leadership (usually as perceived by 'ordinary' employees);<sup>309</sup>
- perceptions of communication,<sup>310</sup> education or active training of staff; and,
- leadership involvement in ethical training or 'role modelling' as

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<sup>305</sup> Parker, cited 27.

<sup>306</sup> Evans, cited n 59, pg 16 cites Anthony Kearns, National Risk Manager, Legal Practitioners' Liability Committee, Melbourne, March 2009. However, 'unethical' visions impact on employee ethicality in the same way. See Roozen and others, 'The Ethical Dimensions of Decision Processes of Employees' (2001) 33(2) Journal of Business Ethics 87: employees with a high organizational commitment behave less ethically than their low organizational commitment colleagues when working for an organisation which has profit maximisation as its organisational objective. See O'Fallon cited n 4.

<sup>307</sup> On organisational ethics policies, see also Chun, 'Ethical Character and Virtue of Organizations: An Empirical Assessment and Strategic Implications.' (2005) 57 Journal of Business Ethics 269; Peterson cited n 264; Carlo Patetta Rotta cited n 11 gives the example of BP: "BP wants to be recognized as a great company – competitively successful and a force for progress. We have a fundamental belief that we can make a difference in the world. We help the world meet its growing need for heat, light and mobility. We strive to do that by producing energy that is affordable, secure and doesn't damage the environment."

<sup>308</sup> *Gilman and others*, 'Ten Things You Can Do to Avoid Being the Next Enron' <http://www.ethics.org/resource/ten-things-you-can-do-avoid-being-next-enron> viewed at 12<sup>th</sup> February 2012.

<sup>309</sup> Vision and leadership are ethical indicators used in the National Business Ethics Survey cited n 245.

<sup>310</sup> Verbeke and others, cited n 4 – internal communication positively affected ethical decision making, cited in O'Fallon and Butterfield, cited n 4.

an important signal of ethical culture.<sup>311</sup>

An interesting question is what occurs in the absence of leadership. Weaver et al speculate that informal factors such as grapevines fill a vacuum left by lack of formal infrastructure. Employees ‘guess’ what their superiors think about ethics and act accordingly.<sup>312</sup> Other signals, such as economic incentives, may have stronger purchase in such a vacuum.

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## ATTITUDES

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As already noted, much of the business literature concentrates on an organisation’s ethical infrastructure and culture. The Table 11 Approach looks at regulatory culture in a way which stretches beyond the organisation to a broader regulatory context.

The Table 11 approach examines *attitudes* to compliance as an important indicator of actual compliance. The method was developed for the Dutch Ministry of Justice where it has been used as a tool to aid the formulation of regulatory policy.<sup>313</sup> As we will see, it has also been used in regulation of legal service providers here and in Australia.

The Table 11 approach sees compliance sometimes being influenced *spontaneously* (i.e. compliance occurs without any enforcement activity); and sometimes through *enforced compliance* (compliance occurs through enforcement activity). Thus, spontaneous compliance or non-compliance can be affected by:

- **Economic (material) motives** – the respondent’s commitment to maximizing its economic or material utility;
- **Social motives** - the respondent’s commitment to earning the approval and respect of others; and
- **Normative motives** - the respondent’s commitment to obeying the law because doing so makes the firm realise its normative understanding of what is it to “do the right thing”.

The importance of each factor can be more or less important for different sectors of the regulated community and interact with each other. They can be more or less important depending on the issue under consideration and the reasons for that can differ. A practitioner

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<sup>311</sup> Weaver, cited n 245; Trevino and others ‘Moral Person and Moral Manager: How Executives Develop a Reputation for Ethical Leadership’ (2000) 42 California Management Review 128; National Business Ethics Survey, cited n 245. See also Pfeffer, ‘Management as Symbolic Action’ (1981) 3 Research in Organizational Behaviour 1.

<sup>312</sup> Weaver cited n 245.

<sup>313</sup> Ruimschotel; Law Enforcement Expertise Centre, Dutch Ministry of Justice (2004), ‘The ‘Table of Eleven’: A Versatile Tool’. Available at [www.it11.nl](http://www.it11.nl).

might be more inclined to spontaneously comply with confidentiality obligations to a client, for instance, than with obligations under conflict of interest rules. The latter may be more expensive to comply with and the practitioners' normative belief that compliance is always important may be weaker. With confidentiality, the lawyer has a commercial and reputational interest in keeping a client's affairs confidential, but also probably has a strong ideological commitment to the importance of confidentiality. Thus, the instrument purports to isolate, define and quantify different sources of regulatory strength or weakness exposed by analysing respondent attitudes to a variety of factors discussed below.<sup>314</sup>

Table 11 has been used by the SRA on a stratified random sample of 200 firms and by Parker et al<sup>315</sup> in a qualitative study of conveyancing regulation involving 18 estate agents and agents' representatives and 20 conveyancers. The SRA in particular have sought to evidence a link between Table 11 findings and reported compliance within the firms' survey. Their findings were consistent with the view that:

“...many firms accept compliance as ‘the right thing to do’, rather than something imposed on them, indicating that they have strong ethical motivations to comply. Many firms accept regulation because of their pride in being part of the solicitor’s profession, and the role of regulation in upholding the standards of the profession. This relates to both upholding standards by removing any ‘rogue’ element (a common theme in responses), and contributing to public perception of solicitors as having high standards. We would expect most firms to want to protect their own reputation, and indeed this did come across, but there was an additional desire to protect the reputation of the profession as a whole, through regulation and through their own compliance.”<sup>316</sup>

Conversely, the findings need to be replicated without the “‘regulator bias’ that the SRA indicates is a feature of the methodology”.<sup>317</sup> Whilst these views are, to a degree, self-serving, they are supported by reality-testing. Firms’ awareness of their own level of compliance was generally reasonably accurate when compared with the level of compliance problems that the SRA found. Even so, about 40% were

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<sup>314</sup> Parker and others, see the Nielson-Parker model of holistic compliance at Parker and others, ‘Obstacles and Opportunities for Compliance: Estate Agents and Conveyancers: A Report on the Licensed Trader Study for Consumer Affairs, Victoria’ (2011). See also Parker and Vibeke Lehmann Nielsen, ‘Introduction: From Regulation to Compliance’ in Christine Parker and Vibeke Lehmann Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar Publishing, 2011).

<sup>315</sup> Parker and Nielsen, cited n 314 above.

<sup>316</sup> SRA Benchmarking Study, cited n 5, pg 10.

<sup>317</sup> SRA Benchmarking Study, cited n 5. pg 8.

poor at assessing their own compliance. The SRA also tested attitudes as measured with the best available evidence on actual behaviour: their inspection results. They found no link; although it should be noted that inspection results were themselves most likely to pick up obvious non-compliances revealed by paperwork on files (such as problems with costs letters). As such they are an incomplete indicator of behaviour. The interesting question this leaves unanswered is: which is a better test of the Table 11 tool; a comparison with actual (albeit limited) data on behaviour or a comparison with firms' own perceptions of compliance?

A difficulty with the Table 11 approach is that the interview instrument used to assess it can be very long. The SRA benchmarking study interview process took about three hours in a face to face context, though we suspect this time can be significantly reduced.

Furthermore, Parker et al, and the Dutch team responsible for evolving the instruments, identify a potential problem with using Table 11 to ascertain a general attitude to compliance. The risk is that firms may have specific attitudes to particular regulations which differ from their general attitude to compliance with professional regulation. So, for example, a firm's view of the legitimacy of regulation of referral fees might differ significantly from their general attitude to client care. City firms were revealed to have very specific attitudes to conflicts of interest regulation, which may or may not have been reflective of broader attitudes to professional regulation.<sup>318</sup>

One approach is to apply Table 11 in specific regulatory contexts where regulators wish to evaluate regulatory strategy (for example, referral fees; or referral fees in personal injury work). Parker et al recommend a qualitative process of refining the Table 11 indicators so that they are tailored to the more specific context and the particular regulated constituencies. In depth interviews are used to reduce and shape the number of questions asked so that they target the key issues identified under Table 11 that are relevant to any particular regulatory problem.

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### PERCEPTIONS OF TRUST/ETHICS

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There are various other studies which deal with ethics in a business context, tending to focus on perceptions of ethics or trust rather than infrastructure. IBE and Ipsos MORIs<sup>319</sup> annual survey of the British public focuses on perceptions of ethics in business. The Edelman Trust

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<sup>318</sup> Griffiths-Baker cited n 67; see also Loughley, 'Large Law Firms, Sophisticated Clients, and the Regulation of Conflicts of Interest in England and Wales' (2011) 14(2) Legal Ethics 215.

<sup>319</sup> IBE Ipsos MORI, 'Attitudes of the British Public Ethics in Business Survey' (2011) UK: [http://www.ibe.org.uk/userfiles/surveys\\_2011.pdf](http://www.ibe.org.uk/userfiles/surveys_2011.pdf).

Barometer (Global)<sup>320</sup> uses an online survey with an unusual sampling approach emphasising the views of the University educated.<sup>321</sup> Other surveys include *St Paul's Institute Value and Values: Perceptions of Ethics in the City Today* an online survey of 515 London financial services professionals dealing with views on remuneration, corporate ethics and corporate social responsibility. KPMG<sup>322</sup> analysed corporate responsibility reports of 3,400 large companies in 34 countries; Grant Thornton benchmarked 298 UK FTSE 350 companies, against the 2010 UK Corporate Governance Code.<sup>323</sup>

This review of the literature has discussed a wide range of possible methods for evaluating ethics. The next section discusses the implications of the main approaches for the legal services context.

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<sup>320</sup> Edelman Trust Barometer, 2012: <http://www.edelman.com/trust/2011/>.

<sup>321</sup> Questions include 'do you trust business to do what is right?' and ranking what companies need to do to improve trust.

<sup>322</sup> KPMG, International Survey of Corporate Responsibility Reporting, 2011: <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/corporate-responsibility/pages/2011-survey.aspx>.

<sup>323</sup> Grant Thornton, Corporate Governance Review: A Changing Climate Fresh Challenges Ahead, 2011, [http://www.grant-thornton.co.uk/pdf/corporate\\_governance.pdf](http://www.grant-thornton.co.uk/pdf/corporate_governance.pdf).



## 4. IMPLICATIONS FROM THE ANALYSIS

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This section of the report summarises the main issues of practical importance to taking forward an ethical benchmarking project. We list the main options identified as having potential application in the current contexts. There are a number of key arguments which inform this analysis:

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- Available methods, when applied across the whole legal services market, are not likely to provide definitive indications of the ethicality or otherwise of an individual, organisation or sector within that market. Indicators can signal risks or potential pressure points in the system but would need to be interpreted against a range of information available to regulators.
- Unless methods are very detailed (and resource intensive) and specifically targeted at narrowly defined ethical issues, evidence collected needs to be seen as an indicator of ethicality or ethical risk, rather than a definitive statement.
- There needs to be a range of methods applied for a meaningful understanding of ethical tensions within the system.
- Seeking to test compliance against specific rules in a range of contexts across the legal services market is impractical. It would require too many instruments with very detailed datasets. Similarly, the increasing emphasis of regulators on principle-based approaches, may make a compliance type approach less appropriate to this project. As a result, looking across legal service markets and suppliers is likely to mean that any content of ethical benchmarks specific to the ethics of the justice system are best constructed towards the general level of principles, rather than the specific detail of rules.
- Equally the very general statements of principles in the Legal Services Act and in, for example, the Solicitors' Code may not be sufficiently detailed for the purposes of a benchmark. It is possible to conceive of an intermediate level of ethical concepts somewhere between rules and principles which *might* be applicable across legal service providers and markets. To give the reader an idea of the kinds of concept that might emerge we have begun the process of reducing the professions' codes to a set of more common and simplified concepts (Appendix A, page 98). This process of reduction could be refined further. Nor would we preclude a wider set of concepts being drawn from beyond the codes. It is only an illustration.

The basic point is that, to assess across a range of markets and providers one has to collect and analyse data at a level of generality. Such general indicators would not be fine-grained enough to point to actual breaches of professional obligations but would indicate the risk that such breaches were more likely. More detailed investigations of compliance in a particular sector might well be suggested by such indicators; and then an approach more specifically targeted at the particular area would need to be devised. This is not to say that compliance is irrelevant to a benchmark. Complaints, risk assessment and monitoring data could be used as indicators of ethical concern and checks on the efficacy of benchmarking data. In this way compliance issues are likely to form part of the ethical benchmarking process without being the major thrust of it simply because it is impossible to research actual levels of compliance across the breadth of legal service markets.

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### ASSESSING THE ETHICALITY OF BEHAVIOUR

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There are limited opportunities for collecting data on the ethicality of behaviour. Collecting information which is comparable across different legal service markets is doubly difficult. Feasible options include:

1. Contrasting/scoping perceived ethicality by asking a representative sample of individual respondents to **rate the level of ethicality in their own area of work** against particular benchmarks (such as those in Appendix A<sup>324</sup>) by interview or survey. This would not involve them in reporting directly on their own ethics, so overcoming some of the likely biases against self-reporting. This might be supplemented by the collection of data from these respondents about common and serious ethical breaches in their fields of which they are aware.<sup>325</sup> These approaches are not likely to lead to a full disclosure of ethicality. Even if they disclose breaches of which they are aware, they will not disclose behaviour that they do not perceive as problematic. Similarly, the link between perceptions of ethicality and actual behaviour is untested. There is a particular risk of self-serving responses, especially in research commissioned by or for a regulator or the LSB. To a degree this is a problem with most methods, though more so with a method like this where the most favourable answer to a research question is very clear. Findings could be tested or compared against other data on risk and complaints available from regulators.

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<sup>324</sup> Appendix A, pg. 108.

<sup>325</sup> These two approaches build on the Michigan Study, cited n 211 and a modified version of Satterwhite's approach, see n 87.

2. Another approach is to **ask stakeholders** about the ethics of lawyers. This might involve asking stakeholders for their assessment of actual behaviour or asking them what principles or style of reasoning is or should be applied by lawyers. In large part, information asymmetries inhibit the meaningfulness of this information: stakeholders have, usually at best, hazy understandings of the ethicality of others. One area that is worth considering is collecting information from more sophisticated clients. Developing sample frames for these would be difficult. One approach would be to concentrate on in-house lawyers who are members of (say) the GC100. It might be said that this concentrates on too particular a segment of the market. Conversely, it is a segment of the market of interest in its own right (as a supplier and a purchaser of legal services). So GC100 members could be asked to go through a similar process to other lawyers as indicated above *and* be asked about ethical issues in the services they *buy*.
3. Model clients (simulated clients sent incognito to firms) would provide insight into ethical issues but are probably too expensive and context specific to be suggested as a benchmarking tool. They might be employed to investigate particular issues in particular sectors (e.g. cross selling wills/in probate services).
4. Simulated/hypothetical client encounters is another way of getting close to ethical behaviour.<sup>326</sup> These are like model clients but the research subject is aware that the encounter is simulated. In resource terms this is likely to be best employed by asking research subjects to engage with short case stories (vignettes) and could be used in conjunction with interviews surveys used in other items in this list (for example 1, 2, 8, 10 and 11).
5. There is some data on actual incidence of ethically questionable behaviour – such as complaints to LeO. Such data typically passes through a number of filters which inhibit its utility as a ‘pure’ indicator of ethical concern. Clients may not recognise ethical problems and complain, where they do complain firms may be able to manage out ethical complaints or clients may give up on their complaints. Further the Ombudsman may see the complaint as a service rather than a conduct complaint, and so on. Nevertheless such data could be included in a suite of data to be considered whenever a benchmark analysis is

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<sup>326</sup> Dobash and Wasoff, *The Simulated Client: A Method for Studying Professionals Working with Clients* (London: Avebury, 1996).

conducted. Some data is available for analysis already. It is possible to identify from LeO data:

- a. In broad terms, the types of work giving rise to conduct concerns;
- b. the number of such cases; and,
- c. the number of cases being referred onto the front line regulators.

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Complaints data is only (currently) available for regulated providers. The available data could be improved and processes of training and auditing as regards the accuracy of coding would need to be considered. The nature of the information collected could also be improved. It is possible to envisage more detailed coding of conduct complaints data which is modest at the moment. There is no system of coding the nature and seriousness of conduct complaints within LeO for instance. Improving data capture and analysis would have resource implications for regulators and LeO. Review and coding of a sample of complaints would also be a possibility: conducted by the Ombudsman or (say) researchers.

6. Data might be collectable from other regulatory monitoring sources. Should the QASA scheme be established, judicial evaluation is required to record a judgment on whether an advocate, “was professional at all times and sensitive to equality and diversity principles” (as the forms currently stand). Given the stage that this scheme is in its development, we do not think this can be sensibly pursued at this stage. Legal Aid Peer Review data might be mined for ethics data, but this data source, if targeted through risk assessment, only covers legal aid work and is likely to prove expensive to mine (if indeed the data is available in researchable form).
7. Helpline data might also be used as an indicator of ethical pressure. It is determined by the kinds of concerns that practitioners seek advice on, rather than problems they are not aware of or do not wish to raise with the regulator. We suspect that it deals with pre-emptive breaches rather than advice after the event most of the time. This is coded by volume and nature of concerns by the SRA for example. An interesting issue is the extent to which helplines reveal different ethical issues from those the caller presents with. This might form one focus of further work developing data capture from helpline calls.

Beyond asking about or seeking to investigate behaviour one has to look at proxies or precursors for ethical behaviour. These will be

factors which can be expected to influence ethicality. This involves looking at the motivation and capacities of individuals and the systems they work in. Empirically, approaches tend to concentrate on: measurements of ethical **character** (values and attitudes); elements of **context** (infrastructure, economic and social incentives and cultures) and **capacity** (the extent to which individuals – are capable of ethical decision-making). These three elements interact suggesting that a range of precursors to ethicality might need to be examined. What approaches might be considered? And what do they tell us?

8. There are tests such as **values indicators** and indicators of propensity to risk which may give interesting indications of the underlying character dispositions of individuals relevant to ethicality. We suspect research subjects would be reticent about engaging with such measures. They are also less overtly linked to ethical behaviour than the other precursor indicators we have been considering.
9. There are various tests of **moral reasoning** which identify either qualitatively or quantitatively the level of moral reasoning that individuals are capable of. The Defining Issues Test in particular can be used to distinguish between those who see ethicality as complying with “existing rules and roles” and those who can recognise a ‘higher’ level of reasoning which is more principled in nature. The latter might be a good fit with Outcome Focused Regulation. Such a test can look at general moral reasoning or can be adapted to a professionally specific context. This adaptation would require development work.

We would anticipate this involving the evolution of statements about ethical concepts consistent with weaker and stronger practice (This would have significant overlap with the process outlined above at para. 1). A range of practitioners might be asked to reason their responses to legal ethics dilemmas; those responses could be analysed (perhaps with some peer review involvement from regulators) and formulated into ethical concepts that could be used in much the same way as the Defining Issues Test uses them. This would involve the researcher working with practitioners, regulators and other stakeholders to identify ‘better’ responses to ethical problems (such as outcome focused responses that accord with the general principles underpinning the Act and professional codes rather than compliance-focused responses).

10. Consideration could be given to including **broader sets of values than those identified in professional principles**. Multidimensional ethics scales have been used to successfully predict *why* research subjects form the view that a particular

decision is ethical or unethical. They rely on more general indicators of judgment around 'justice'; 'relativism'; 'egoism' (including commercial motivations); 'utilitarianism' and 'deontological' concerns. Applications of the approach suggest these criteria can be refined and produced for application in particular contexts. Interestingly, for our purposes they provide some insight into commercial and environmental influences on individual decisions (especially interpersonal/cultural issues). This may mean they have added utility when comparing across regulated and unregulated sectors.

11. It is possible to **test knowledge** of relevant ethical frameworks and knowledge is clearly a precursor to ethical behaviour. Existing systems of regulation contain entry level tests of some relevant knowledge. Testing knowledge requires different tests to take account of different fact circumstances and varied rules across different regulated sectors. The knowledge that should be expected of the unregulated sector is also open to question. To a degree, a vignette based approach that encourages respondents to identify ethical concepts, would test the application of underlying knowledge. It might also be possible to include some specific knowledge-based elements, though choosing and prioritising which should be included might be difficult.

12. It is possible to **examine ethical infrastructure** (the policies and institutional arrangements for dealing with ethical issues) within legal service providers. This could explore what ethical infrastructure is in existence and how/if that infrastructure is used. There are some existing frameworks which might be applied through surveys of individuals and organisations (say at COLP level for any SRA regulated providers, and senior level for others). Existing studies have concentrated on organisational ethics codes; compliance officers; inspection regimes; hotlines; internal enforcement; and self-assessment/internal evaluation of ethical compliance.

Such tools would need to be sensitive to organisational size and complexity. This can be achieved by appropriate analysis of data and designing interview/survey schedules which take account of different approaches. The research suggests the importance of looking at ethical infrastructure from a bottom up as well as a top down perspective. This would suggest either interviewing only individuals or interviewing samples of individuals within organisations and comparing their views with the views of senior manager(s) within the organisation to

see how far ethical systems are fully implemented within organisations.

13. A second level of **data about the context** within which individuals take decisions is built around economic and interpersonal influences and dynamics. This would involve looking at **social and economic incentives** likely to impact on ethicality. The kinds of things we might envisage collecting data on might include:

- a. Performance monitoring and incentives (such as billing, hourly charging, case closure targets and the like);
- b. Charging models;
- c. Approach to referrals in, within and without the organisation;
- d. Measures of culture/interpersonal relationships (such as instruments that measure concepts such as 'benevolence' in some business studies).
- e. Related to character and context, it is possible to measure regulatory leadership and 'ethical climate' indicators;
- f. Regulatory attitudes as a potential predictor of compliance. Table 11 is one particular approach which could be applied on sub-samples of respondents asked to focus on one particular ethical issue; with another sub-sample asked to look at a different issue. The tool is also long and would need simplifying in order to make it workable on large numbers of respondents.

We further distil this list of options into a set of recommendations in the next (and final) section.

## 5. OVERVIEW AND CONCLUSIONS

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This section draws together our analysis. It advocates an approach which is multi-dimensional and recognises the interaction between the dimensions underlying ethical behaviour. As such it recommends a suite, or dashboard, of indicators looking at behaviour; character values; context and individual ethical capacity.

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The issues we concentrate on are:

- Why ethics benchmarks are important to professional regulators in the current market and regulatory climate;
- Which tools are most likely to be effective; and,
- Sampling and methodological issues around delivery.
- A process for designing and testing the indicators is set out at the end of the chapter.

### WHAT ARE THE ADVANTAGES TO THE REGULATOR IN BENCHMARKING ETHICS?

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Frontline legal service regulators' understandings of the ethicality of their members are modest, yet common to many professional regulators. There are more developed approaches evolving in other jurisdictions and in other regulatory fields.

Most systematic information is derived from complaints and regulatory infractions. Complaints do not fully capture either the depth or breadth of ethical risk. Complaints data is only available in professional markets and is largely confined to lay clients.<sup>327</sup> Clients do not always recognise ethical problems and the same is true of lawyers. Even when they do recognise potential problems in other organisations a significant proportion of lawyers are reluctant to report them. Other options available to regulators such as risk assessment and monitoring visits build up a wider picture but also have their limitations. Outside of the regulated sector, obtaining meaningful complaints information presents an even greater challenge.

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<sup>327</sup> See for example, Mather, cited n 85, pp 118; Arnold and Hagan, 'Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers' (1992) 57 American Sociological Review 771.



The need for greater understanding of ethical risk is underlined by difficulties experienced in other sectors (banking and the press in particular, where lawyers have also been implicated<sup>328</sup>) as well as the potential for rapidly shifting business models associated with liberalisation of legal services. Risks include the following:

- Greater competition and weaker, more heterogeneous provider identities may lead to increased pressure and incentives for legal service providers to breach rules and principles governing the conduct of legal work (knowingly or unknowingly; willingly or with reluctance). Thus diversity and innovation may pose risks of ethical relativism. Competitive pressure and/or the fear that a new provider is 'getting away with it' may encourage more unethical conduct over time.
- The values of service providers and the legal system may disengage from the values of the public (sometimes problematically, sometimes not). Debates about adversarialism in litigation for example (contrast the debate about Counsel for Levi Bellfield's cross examination of Milly Dowler's father, the reception of ACS: Law's conduct of pornographic file sharing claims and the approach of some firms to miners' compensation claims). Where there is perceived to be regulatory failure, the legitimacy of law and legal services will be undermined. Greater sensitivity to ethics is likely to mitigate that risk.
- The evolution of ABSs, new models of funding and the greater use of information technology to manage or deliver services are likely to present challenges not yet comprehended by the rules.

Conversely:

- Encouraging ethicality, and monitoring it, may encourage an ability, amongst the regulated and the regulators, to spot problems which do not fit current regulatory categories and tackle them.
- Similarly, greater competition and innovation may improve the ethicality of legal services providers, but such improvement would go un-evidenced.

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<sup>328</sup> See, for example, Moorhead, 'On the Wire', *New Law Journal*, 2012, 1080–1081 and Kershaw and Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of The Legal Profession, *Modern Law Review*, forthcoming 2013. As well as Moorhead's various posts on the Hacking saga at <http://lawyerwatch.wordpress.com/category/hackgate/>

- There is the potential to monitor and support the implication of Outcomes Focused Regulation.
- There is evidence that the application of some tools can provide opportunities for engagement and reflection within the provider community, thereby improving ethicality of practice.<sup>329</sup>

For resource-limited risk-based regulators, it is not enough to suggest that ethical challenges are likely to be important to the evolving legal market place. A critical question is whether better monitoring ethics can improve their *ability to regulate*. This leads us into the next question: are there research tools that can deliver useful information to regulators?

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#### WHAT CAN AN ETHICS BENCHMARK DELIVER?

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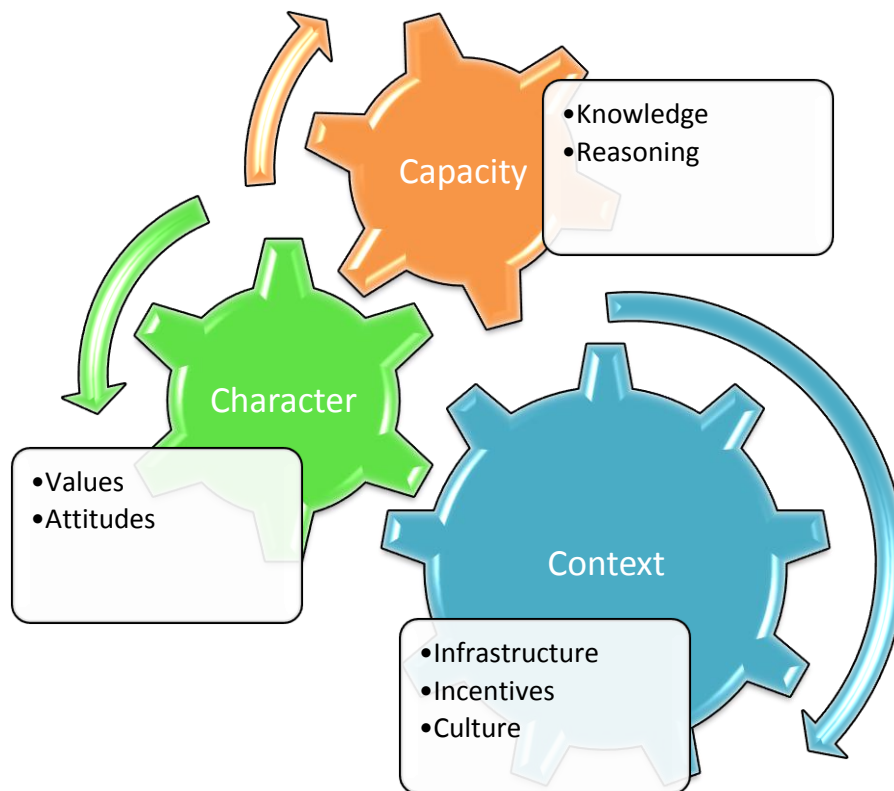
There are significant difficulties in identifying direct measures of ethical *behaviour*, though some survey/interview evidence may be usefully collected (see below).

More can be done on the *critical precursors* of ethical behaviour which it is possible to use as indicators of *likely* ethicality. As such these indicators would be evidence of risk. We have broken these down into three categories: character, contexts and capacities (the3Cs), whilst also emphasizing the potential for these to interact. They are represented in Figure 2. There is no implication to be drawn from the different size of the cogs in this drawing.

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<sup>329</sup> Parker cited n32

Figure 3: The 3Cs an Interactive Model



Understanding these three dimensions should significantly improve understandings of legal service providers' adherence to core ethical obligations. This assessment of regulatory risk would be significantly more informed and better targeted at relevant issues and/or sectors of the market.

There is another advantage to using precursors. Given that precursors look at underlying attitudes, systems and capacities, the approach should also lead to a more informed position when it comes to *improving* the ethicality of practice. In this sense, an indicator which says, behaviour is worsening is less helpful than an indicator which says improving *X* about lawyers working environments would reduce ethical risk. The approach provides a better understanding of the underlying dynamics between character, context and capacity.

Looked at this way, ethics indicators can address a range of important questions:

- Is **ethical character** (which here includes values and attitudes) changing and is this change towards or away from a more risky and/or less ethical disposition? Do some sections of the market have different ethical values or priorities when compared with another?
- Is the **capacity** of individuals to recognize and deal with ethical problems changing and is it increasing or decreasing? For

example, are individuals capable of taking a compliance or principled approach to ethical problems (I should not do this because it is harmful to my clients and/or the public interest vs I can do this because it is not forbidden).

- Is the **context** in which individuals work leading to increased or decreased risk of ethical behaviour? Capacity explores whether a person *can* behave ethically, but incentives, culture and ethical infrastructure exert influence on *how likely* a person is to behave ethically.

These broad indicators have, depending on how they are designed, their own constituent parts and can give rise to a finer-grained or more nuanced analysis. These three elements interact: I have to have the know how to be ethical; I have to want to be ethical; and I have to be allowed, encouraged or required to be ethical by my context if I am going to be ethical. These interactions strongly suggest the importance of developing a suite of indicators across the 3Cs.

In broad terms, it will be seen that analysis of these indicators can give a direction of travel which can sometimes be reduced to a positive or negative: (e.g. the evidence supports the view that ethical infrastructure is improving, say). However, a substantial qualitative understanding of ethical change is also important. We emphasise this partly as a reminder that, as is true for all indicators, they are not decisive and have to be supplemented by informed interpretation. Secondly, there is a methodological need in developing and evolving the instrument to build in understandings which are both quantitative and qualitative.

The interactions between character, capacity and context are evident but underexplored. Applied ethics work in the legal field, is underdeveloped. Qualitative data which enabled links to be drawn across the indicators would help place the benchmark at the cutting edge of regulatory practice. It would provide a much fuller understanding of the ethical climate than numbers on a chart. Qualitative depth within some of the instruments will also aid the evolution of any benchmark over time.

With appropriate sampling and depth, these approaches have utility for both the market as a whole and segmented, narrower regulatory issues. Indicators could also be tracked over time to see trends. Often these trends would suggest a shift from good to bad (or vice versa). Sometimes the tools identify qualitative shifts (say, from ethical issue x being important to ethical issue y now being more important).

## WHICH APPROACHES ARE LIKELY TO WORK BEST?

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The report has set out a wide range of approaches which have been employed in business, experimental or, to a lesser extent, legal contexts. We set out here a narrower range of the options which are most consonant with the overall project aims. That is, in our view, they fit best with legal services and can be applied to examine ethicality across the legal services market.

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This has led our focus away from the more abstract psychometric and applied philosophical approaches and the in-depth investigatory techniques of much socio-legal work. The latter may be more appropriate once particular areas of concern are identified and need to be explored in-depth. The former approaches have influenced some of the suggested design of instruments below, but adapted for legal contexts.

The main approaches we recommend below anticipate a qualitative design stage (interviews or focus groups) before proceeding to a survey/interview approach. There is potential to combine approaches within the same interview and survey processes; subject to not designing unwieldy, long instruments.

## CHARACTER, ATTITUDE AND VALUES

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General assessments of values have been developed in, for example, social psychology as have more business and profession-oriented tools for assessing values in particular contexts as well as tests of attitudes to regulation.

Social psychological approaches to understanding a person's values have the advantage of having been the most rigorously tested and related to behaviour (although these relationships have usually only been tested in experimental settings). They are however somewhat abstract (e.g. testing how individualistic a person is, for instance, can predict increased likelihood of ethicality).

They can also give the appearance of testing "character" as an immutable input which firms and regulators may regard as beyond their appropriate concern. In fact, indicators of underlying values can and do change in individuals and within organizations. Firms might sensibly want to have a mixture of character types in key positions where this has a demonstrable link with the ethicality of their performance. Nevertheless, regulators and firms might be concerned by the abstraction and matters which they cannot control (other than through recruitment decisions). We consider the more applied approaches to be more immediately viable and so we concentrate here on these.

## AN ETHICAL VALUES TOOL

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A survey tool could be developed which would explore the extent to which ethical values are constant or dissonant across the market and across different providers.

Interviews would first be used (or possibly focus groups) to explore which ethics concepts were a) relevant to the respondents' work areas and b) their relative importance. It would be useful to explore both professionally defined ethical obligations (perhaps a refined version of those set out in Appendix A<sup>330</sup>) and other approaches, such as those derived from business and elsewhere.

Sampling of interviews across the sectors would target diverse constituencies to look for potentially significant differences in how respondents conceived of ethics, or difference in emphasis.

From this, survey instruments could be designed for stratified random samples of relevant legal service providers to quantify the extent to which differences/similarities occur across legal services markets. Analysis would then provide a view on whether dissonance was problematic or explained by (say) structural conditions within the market.

This measure would not present a clear scale of ethicality, but it would provide a map of what is recognized as ethical within different markets which might shift over time. Such shifts could be tracked (so, for example, the importance of confidentiality, or excellent service, or independence might scale up or down over time and might vary across sectors).

## MEASURES OF REGULATORY ATTITUDE

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Attitudes to regulation may play an important part in predicting how ethical a person is likely to be. The SRA's use of Table 11 is discussed above. It identifies a link between attitude and perceived compliance but not between attitudes and available data on actual compliance. There are a number of possible explanations for this. An absence of a link may be because non-compliance revealed on inspection visits is not a good indicator of overall non-compliance. It may be that the attitudes revealed to a regulator in an inspection visit are not good indicators of actual attitudes or it may be that attitudes, as measured by the Table 11 approach are not –either generally or on their own – indicators of likely behaviour (or for our purposes ethicality).

The SRA is working to overcome some of the limitations of the initial survey and this may lead to greater confidence about the links

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<sup>330</sup> See Appendix A at pg 101.

between attitude and compliance behaviour as well as being able to 'refine down' the Table 11 instrument to a shorter and more manageable size. This work could inform the evolution of survey instruments that might be applied across the professions in any ethical tracking instrument. Other indicators of attitude are discussed under the heading of organisational cultures below.

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## CAPACITY

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Character may motivate someone towards or against being ethical but to be ethical a person has to have the necessary knowledge and skills to take ethical decisions. Methods applied across a range of disciplines suggests that asking respondents to a survey to provide responses to a vignette/case study can test both recognition of ethical problems (thus tapping into knowledge) and evaluate how well they reason or can recognise appropriate ethical reasoning in relation to those problems. Such an approach does not overcome self-serving responses but it is able to indicate how capable a person is of reasoning ethically.

Ethical dilemmas would need to be designed which could be applied across a range of suppliers and/or types of work. Legal ethics reasoning assessments would need to be recognisably legal but applicable across a range of areas of legal work (e.g. problems on charging, conflicts of interest, and cross-selling may not need to be context specific). Dilemmas could be selected via collaboration with regulator-complaints handlers as examples of typical and/or finely balanced cases which are based on real (anonymised) cases. Finely balanced cases have the advantage of not being a test of the 'right' answer but enabling a test of the extent of an individual's ability to reason through the problems.

As with the previous approach the instruments would profit from a careful, qualitatively informed design stage. Once appropriate problems could be identified, a range of practitioners would be asked how they would decide the issue (from a menu of options) and be asked to reason their responses to legal ethics dilemmas; those responses would be recorded and analysed (perhaps with some peer review involvement from practitioners and/or regulators). If, as we would predict, typical but distinct patterns of response emerged, these would be formulated into ethical concepts that could be used in much the same way as the Defining Issues Test uses them.

This can, we believe, be developed into a tool which could then quantitatively assess the extent to which respondents recognise and/or accept particular ways of reasoning. We would recommend that survey instruments contain some free text qualitative reasoning and explanation sections to aid development of the instruments and provide additional insight.

A legal vignette approach may also gauge, for example, the extent to which respondents are capable of the principled analysis expected under outcome focused regulation. If expert reviewers commenting on the design stage were confident that distinct approaches were better or worse, we would be able to develop a scale of ethical reasoning applicable in legal contexts.

The outcomes of this would depend on the precise design of the vignettes but possibilities include:

- a) Proportions recognising particular ethical problems;
- b) Capacity to recognise and apply relevant rules/outcomes.  
Levels of failure to recognise and apply particular concepts would suggest a greater risk of unethical behaviour (more non-compliance and greater harm to clients/public interest);
- c) A broad classification of the quality of reasoning

Vignettes are hypothetical situations, and might be criticised for their artificiality. Artificiality is likely to be a problem for all methods employed here (survey respondents can give an artificial, self-serving answer to a survey question). Artificiality can be mitigated by good design and possibly by the use of virtual reality techniques. Indeed, vignettes tend to be less vulnerable to the potential self-reporting biases of the earlier methods. In very crude terms, you would get an indication which said, providers of type X were more likely to reason in (say) a principled as opposed to formalistic way; they placed more emphasis on the interests of the public; their judgments were less in accordance with the judgment of our peer review panel.

A drawback of this approach is that it would require much significant work through the design and testing of vignettes, the evolution of ethical statements through qualitative work and then the testing in pilot form.

A modification of this approach would be to split the vignettes into those that are asked to be answered very quickly and those that are asked on the basis of reflection. The former would be a test of ethical intuition which might just ask what would you do, rather than what would you do and why. This would enable an assessment of the importance of intuition, rather than reasoning, to ethical decision making if compared against behavioural data.

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## INVOLVING CONSUMERS

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An interesting counterpoint to the approaches above would be to ask consumers what they thought were the appropriate answers to ethical



dilemmas, to see how their answers might be similar to and different from practitioners'. The values they find important do have some prima facie claim to be recognised,<sup>331</sup> whilst not being determinative of a 'correct answer'.

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## CONTEXT

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Character and capacity interact in a context: the environment within which the individual takes their decision. This context includes economic incentives to behave a certain way; the infrastructure – policies and management mechanisms – for supporting (or policing) ethicality of behaviour; and the culture of any organisational context (how infrastructure and incentives are interpreted and influenced in their social environment). There is some overlap between this element and attitudes as discussed in the character section above.

This would involve the design of a survey instrument that could include all or some of the following elements:

1. Measure the existence and perceived utility of ethical infrastructure in legal services organisations. Some elements of this would only be applicable to larger firms, but there would still be elements which would apply to all, or all but the smallest, firms.
2. Collect data on financial/economic pressures impacting on behaviour such as hours and billing targets; bonus payments; etc.
3. Collect data on culture and attitudes.

This element of a benchmark could yield data on the:

- strengthening or weakening of ethical infrastructures;
- what incentives operate on individuals;
- how incentives and infrastructures influence perceived behaviour; and,
- perceptions of ethical culture within organisations.

If such data were linked with other data from the tracking tools, it could also point to benefits or risks associated with particular systems, structures and cultures encouraging firms and/or regulators to

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<sup>331</sup> Holm, 'Who Should Decide the Content of Professional Ethics?' (2011) 3 Journal of Applied Ethics and Philosophy 2011 1.

develop their approaches. In other words, this would perform an important developmental function if it assisted our understandings of how incentives, structures and cultures influenced conduct within firms.

Once again, a qualitative design phase could be supplemented by a survey approach (with qualitative elements within it).

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## BEHAVIOUR

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As we have noted, there are significant difficulties in collecting and evaluating data on actual behaviour.<sup>332</sup> These difficulties are best overcome in the context of focused, area-specific studies, where a range of data can be collected and evaluation can be focused on the specific areas of practice under consideration. Nevertheless, there are ways of collecting general data on behaviour which might be used as part of the benchmark or as a means of providing some cross-check on the utility of Benchmark indicators. We here identify data which could be collected as part of a project

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## SELF REPORTING OF ETHICAL CONCERNS

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It would be possible to ask respondents about common and serious ethical breaches that a) they had committed themselves or b) that they were aware of in their organisation or area of practice.<sup>333</sup> A coding frame could be developed which would enable qualitative/interview data to be coded and so analysed into a quantitative indicator (this should be developed empirically but related to (say) the type of framework set out in Appendix A<sup>334</sup>).

The SRA also has risk coding approaches which could form a basis for sorting and rating breaches) for collecting such data by a survey instrument, although this would restrict the data somewhat.

The data could be contrasted over time. It would enable the LSB to track the nature of *reported* serious and common ethical problems over time and monitor whether they were getting less or more serious. The difficulty with this approach is it relies on self-reporting of ethical

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<sup>332</sup> See also Ginsburg and others, 'Basing Evaluation of Professionalism on Observable Behaviours. A Cautionary Tale' (2004) 10 (supplement) Academic Medicine S1.

<sup>333</sup> Clarke, 'An Ethics Survey of Australian Criminal Law Practitioners' (2003) 27 Criminal Law Journal 142.

<sup>334</sup> See Appendix A at pg 108.

breaches. We know from research in other fields that this can reveal some level of, and sometimes serious, misconduct.<sup>335</sup> As a benchmarking tool, this would indicate the types of misconduct people were willing to reveal; and trends over time may well relate to underlying behaviour (although this would still be conjecture) unless people's willingness to disclose breaches changed over time.

Asking respondents to report on their organisation or their area of practice removes some of the inhibition on reporting; although it also risks being more inaccurate or disingenuous given the likelihood that an individual knows relatively little about what breaches arise outside of their own work, especially beyond their own firm.<sup>336</sup> A related problem here, would be conducting the research for the LSB; although if data collection and analysis is handled by an independent organisation and the normal assurances of confidentiality and anonymity are given this may not be too significant.

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#### ASK STAKEHOLDERS FOR REPORTS ON THE ETHICALITY OF LEGAL SERVICE PROVIDERS

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A related approach would be to ask informed stakeholders about the ethics of lawyers.<sup>337</sup> Generally, information asymmetries suggest that third parties are not likely to be a good source of reliable information on the ethics of lawyers they come into contact with.<sup>338</sup> This is partly due to lack of professional expertise and partly because they rarely know the whole story in any one case. One group to whom this might not apply so strongly is general counsel/in-house lawyers who, as mentioned above, act as both providers of legal services to their clients and often as purchasers of legal services.

There will be some self-reporting biases here; any in-house lawyer clients who encourage their firms to inappropriately prioritise the client interests over the public interest in the administration of justice, may not be inclined to say so. Also the issue of information asymmetry may not disappear completely. Nevertheless, in-house counsel may provide an interesting source of data on commercial law firms. Similar approaches could be tried in relation to the perceptions of barristers

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<sup>335</sup> Satterwhite and others, cited n. 87.

<sup>336</sup> SRA Benchmarking Study, cited n 5.

<sup>337</sup> Kilpatrick, 'Professionalism from a Social Science Perspective' (2001) 52 South Carolina Law Review 473. A noted problem with clients is the potential for double standards: clients may tolerate or even prefer an unethical lawyer when that lawyer acts in their own interests whilst expecting the same lawyer to manifest integrity in his dealings with them. Equally, victorious clients might be more generous in their appraisal of their lawyer as a 'good' person than those who are unsuccessful in court. See Evans, cited n 59, pp 172-3.

<sup>338</sup> SRA Benchmarking study cited n 5; QASA cited n 95.

and solicitors of each other's ethicality; although intra-professional conflict may now militate against the utility of that.

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## HELPLINE DATA AND OTHER REGULATOR

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Dip sampling of helpline(s) calls which were then analysed and coded might provide an interesting indication of the problems that practitioners seek advice on outside of their firm. This is rather different from the problems that they experience but do not need advice on and the problems they do not in fact recognise (although our experience of helpline calls is that they may reveal some of those).

Complaints data and risk data might similarly be used. However, recording of conduct complaints is not available across the legal services market. LeO data would come closest to surveying the field but the nature of the information that might be available is modest and not fine grained. We doubt the potential to compare this, even at a general level, with data from benchmarking mechanisms as data collection currently stands.

A number of areas of information could be improved. As an example, information collected on the referrals from LeO to the front line regulators is limited. One would expect the nature of complaints being referred through (and those not being referred to that contain conduct elements) to be of greater interest to the Ombudsman and the frontline regulators. That there was no Legal Ombudsman data, on what *types* of conduct complaints were referred, for instance, is a notable omission in our view.

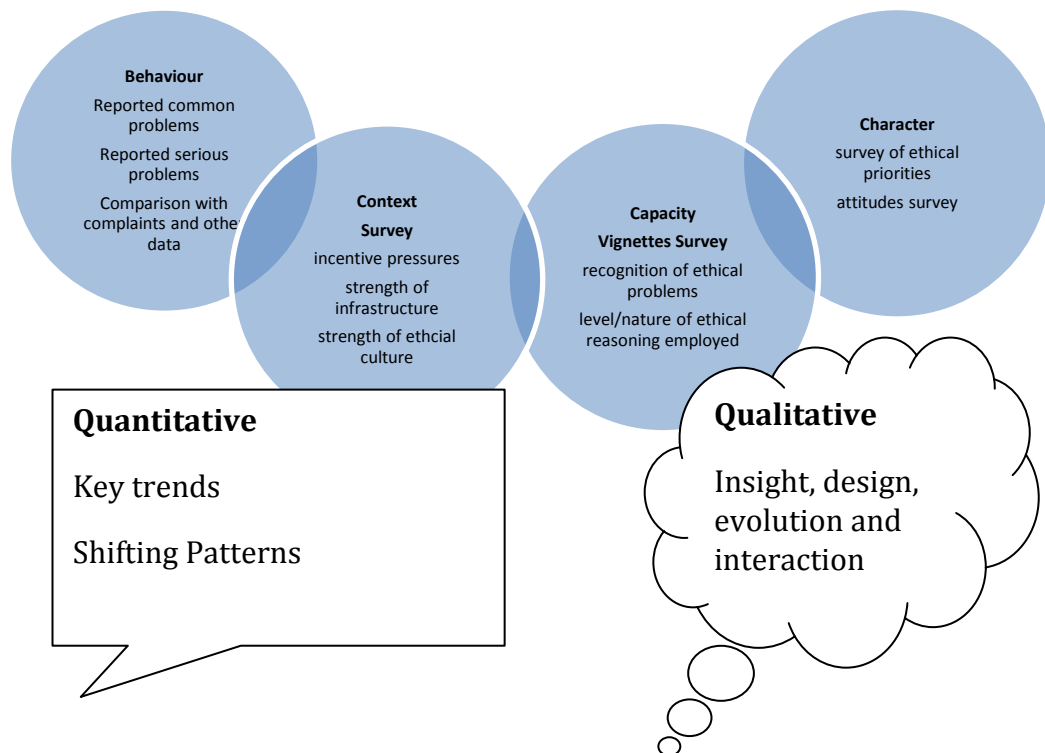
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## PUTTING THE INSTRUMENT TOGETHER

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We have conceived of the Benchmark as a suite of quantitative indicators; or dials on a dashboard (Figure 4). In the following diagram, those indicators are shown by the circles. Those indicators could provide key trends on character, capacity and the context of legal service providers, alongside data on behaviour that is already available or can be collected through surveys or interviews. The quantitative data will enable key trends and shifting patterns to be clearly articulated but it will be important for this information to be supplemented though insights from qualitative information to aid interpretation; as well as the ongoing evolution of the model.

FIGURE 4: AN INTERACTIVE MODEL OF PROFESSIONAL ETHICS FOR  
BECNHMARKING



## DESIGN PROCESS

As noted, data on the four elements can be collected through survey instruments which would ultimately, largely consist of structured questions on specific topics. Formulating the instruments to work across a range of contexts will require a qualitative design phase.

Interviews with a stratified sample of practitioners to represent a range of practice areas and practitioner types would be necessary. Whilst focus groups are sometimes more efficient as a means of collecting qualitative data, the sensitivity of the issues to be discussed in parts of this militate against use here.<sup>339</sup>

Interviews would explore:

- what ethical issues are important to practitioners on the ground and how they frame those issues to aid development of the ethical values tool and provide general context for the study;

<sup>339</sup> Although for an example of where focus groups have been used in ethics assessment, see Evans, cited n 59, pp 45-48.

- test out willingness to disclose common and more serious ethical breaches of which they are aware and to explore the possibility of coding these and developing an instrument that would enable them to be coded;
- what contextual factors (what infrastructure, culture and financial incentives) exert influence on the ethicality of behaviour. There is a wide literature and range of models that could be applied here.

Interviews could also explore (possibly separately for time reasons):

- how practitioners respond to vignettes with a view to evaluating utility of those vignettes for a survey and formulating defined responses for that survey

Analysis of the vignettes could include peer assessment of sample answers to review approaches to coding and see if hierarchies of response are reliably identifiable (good answers contain these defined statements (or omit these)).

Following the design stage survey instruments would be designed, cognitively tested and piloted. The vignettes element would require a more extensive pilot to check defined issue responses would mirror more in-depth qualitative responses.

Surveys would then be run on stratified, but otherwise randomly selected, groups of legal services providers. At the moment the length of the survey is unknown. We would envisage being able to run at least some elements of the surveys together but that the level of detail that may be required would require separate samples being engaged in different parts of the survey.

We discuss sampling shortly but first let us consider the means of survey delivery.

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### WHAT KINDS OF SURVEY?

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Disclosing information about ethics can be sensitive and there is merit in using a web-based research tool to overcome some of the sensitivities.<sup>340</sup> Web-based surveys are a relatively new, although increasingly popular, method for collecting data. Surveys can be delivered by email or via the Web. Assurances around the confidentiality of data backed by independent delivery and analysis of the survey would increase reliability and, perhaps, take up. Although it is impossible to eliminate totally the tendency for research respondents to seek to answer questions in ways which show

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<sup>340</sup> See, for example, Mirrlees-Black, Domestic Violence: Findings from a New British Crime Survey Self-Completion Questionnaire (London: Home Office, 1999).

themselves in the best light, there is the potential for this method of delivery to lead to more honest answering of questions about ethicality.

There are some concerns about reliability. Participants might be tempted to respond to questions on web surveys by selecting the same response for multiple questions, or giving other 'junk' responses to questionnaires, in order to complete them as quickly as possible. However, there is evidence that junk responding is not particularly prevalent in online studies. It is also generally easy to detect, patterns of repetitive responding can be checked for.

A second potential reliability issue is repeat submissions. Participants might complete a survey and then try it again. Evidence suggests that it is not a prevalent problem.<sup>341</sup> Repeat submissions can be detected by recording IP addresses of survey respondents, and cookies can be set on the participant's computer to log whether several submissions from a given machine are being made.

A more difficult issue is the extent to which we can recruit a set of respondents who are representative of legal services fee earners. There would be some differences between online respondents and the population in general (respondents who reply within the professions might tend to be younger, for instance). Online surveys with professional target respondents tend to have low response rates. There are various things that can be done about this: keeping the survey very short by breaking it up into smaller constituent parts and targeting each bit at a random sample; ensuring easy transfer into the survey; careful framing of the survey title line; personalisation of email contact; and use of frequent reminders.<sup>342</sup>

There is the possibility of offering incentives, cash/gift vouchers are common in certain types of survey. Allowing a survey to count towards CPD hours would be legitimate if the survey(s) constitute a valuable opportunity for self reflection. It may be possible to design feedback mechanisms which enable individuals to benchmark their own answers against the sample of responders. Compulsion has been tried elsewhere: Queensland mandates the completion of some of its ethics checks for incorporated practices.<sup>343</sup>

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<sup>341</sup> Johnson cited n 204, found a repeat submission rate of 3.5%. See also Krantz and Dalal, 'Validity of Web-Based Psychological Research' in Birnbaum (eds) *Psychological Experiments on the Internet* (Academic Press. 2000) and Musch and Reips, 'A Brief History of Web Experimenting' in Birnbaum (ed) *Psychological Experiments on the Internet* (San Diego Academic Press. 2000).

<sup>342</sup> Parsons, 'Web-Based Surveys: Best Practices Based on the Research Literature' 10(1) Visitor Studies 13.

<sup>343</sup> Parker and others, cited n **Error! Bookmark not defined.**

Careful design of the survey including its visual presentation can also improve completion rates.<sup>344</sup>

It might be argued that lower levels of response may not be fatal to the use of web-based surveys here. If the aim is to compare across different parts of the sector, for instance, then differences between groups established under low response conditions may still be illuminating as benchmark indicators. The data would however not be representative of the populations from which the samples were drawn.

We see advantages in a web-based approach in terms of increased disclosure of ethical concerns (the main behavioural data in the indicator) and ability to engage with vignettes (which is less easily done by way of telephone interviews, but can be done face to face by showing people the vignettes) but the level of response may militate against its representativeness. The obvious approach is to work on mechanisms for encouraging responses alongside a telephone survey with some cross testing of results. Respondents could be sent an online survey (where email addresses are available) which is then followed up by a telephone interview for non-responders.

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### SAMPLING

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The brief for this research indicates a desire to develop tools capable of benchmarking legal ethics across reserved and non-reserved sectors, by authorised and non-authorised providers in the sector. Initially, however, it is recognised that there is a need to concentrate on reserved areas of activity. A limited number of areas of legal services where there are a range of different providers could be selected which are also (in part at least) reserved areas: say, from personal injury; employment; wills/probate; and, conveyancing. Sampling of either firms or individuals would take place within subject areas. As confidence in the use of the tools developed, they could be refined and rolled out to broader areas.

There are three main choices in relation to sampling: sample at the organisation (firm/chambers) level; sample individuals working within legal service organisations; or, sample organisations and then a sample of staff working within those organisations.

There are a number of reasons for preferring to sample individuals. Ethical or unethical behaviour is carried out by individuals, even if it is shaped by organisations and contexts; and it is necessary to understand both the individuals and their perceptions of their context

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<sup>344</sup> Bosnjak and Tuten, 'Classifying Response Behaviours in Web-Based Surveys' (2001) 6(3) *Journal of Computer-Mediated Communication*, available at <http://jcmc.indiana.edu/vol6/issue3/boznjak.html>, accessed 4<sup>th</sup> July 2012. Dillman, *Mail and Internet Surveys: The Tailored Design Method* (New York, Wiley, 2000)



to understand their propensity to be ethical. Also, a number of studies have shown hierarchical and fragmented approaches to ethics within organisations problematising the idea that organisation is uniformly ethical or unethical.<sup>345</sup> In particular, sampling organisations alone typically involves speaking to an authority figure and their view of ethics is significantly influenced by their role in the organisation.<sup>346</sup> There is merit in building up a picture of particular organisations from individual's accounts/data but to get a picture of legal service markets in this way can make for extremely large samples, which would have cost implications depending on the nature of the survey tool and data analysis needs in particular.

If an organisational focus was chosen then the obvious person to approach in solicitors and ABSs would be the Compliance Officer for Legal Practice, or equivalent in other forms of legal practice. Such roles will not be uniformly established across legal service providers, however, in the immediate future.

Sampling individuals poses its own problems of access. Whilst professional organisations typically have lists of their members from which it may be possible to derive contact details (albeit not always cheaply), there are a number of non-professionally qualified persons carrying out fee-earning working within such organisations who would not be apparent on such lists. Sampling strategies to overcome this problem can be devised but confidence about sampling and response bias will be significantly lower. They would involve recruiting organisations across sectors and asking them to either forward electronic surveys or provide lists so that researchers can access people direct.

Recruiting organisations for whom there are no lists will involve developing approaches to identifying those organisations. One approach is to sample from the Experian Business Database for available businesses.<sup>347</sup> Another approach is to sample from the Claims Management Regulators database, although this has not yielded high response rates in the past.<sup>348</sup> Other approaches involve greater reliance on convenience and snowball sampling.

Because of the problems of sampling, particularly of individuals, the most successful approach may be to sample organisations and then ask

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<sup>345</sup> Trevino and others, cited n 234. In the legal sphere see Parker and Aitken, cited n 27 **Error! Bookmark not defined.** See also, Chambliss and Wilkins, 'Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting' (2002) 30 Hofstra Law Review 691; Chambliss, 'The Nirvana Fallacy in Law Firm Regulation Debates' (2005) 33 Fordham Urban Law Journal 119.

<sup>346</sup> Parker, cited 27.

<sup>347</sup> IFF cited n 98.

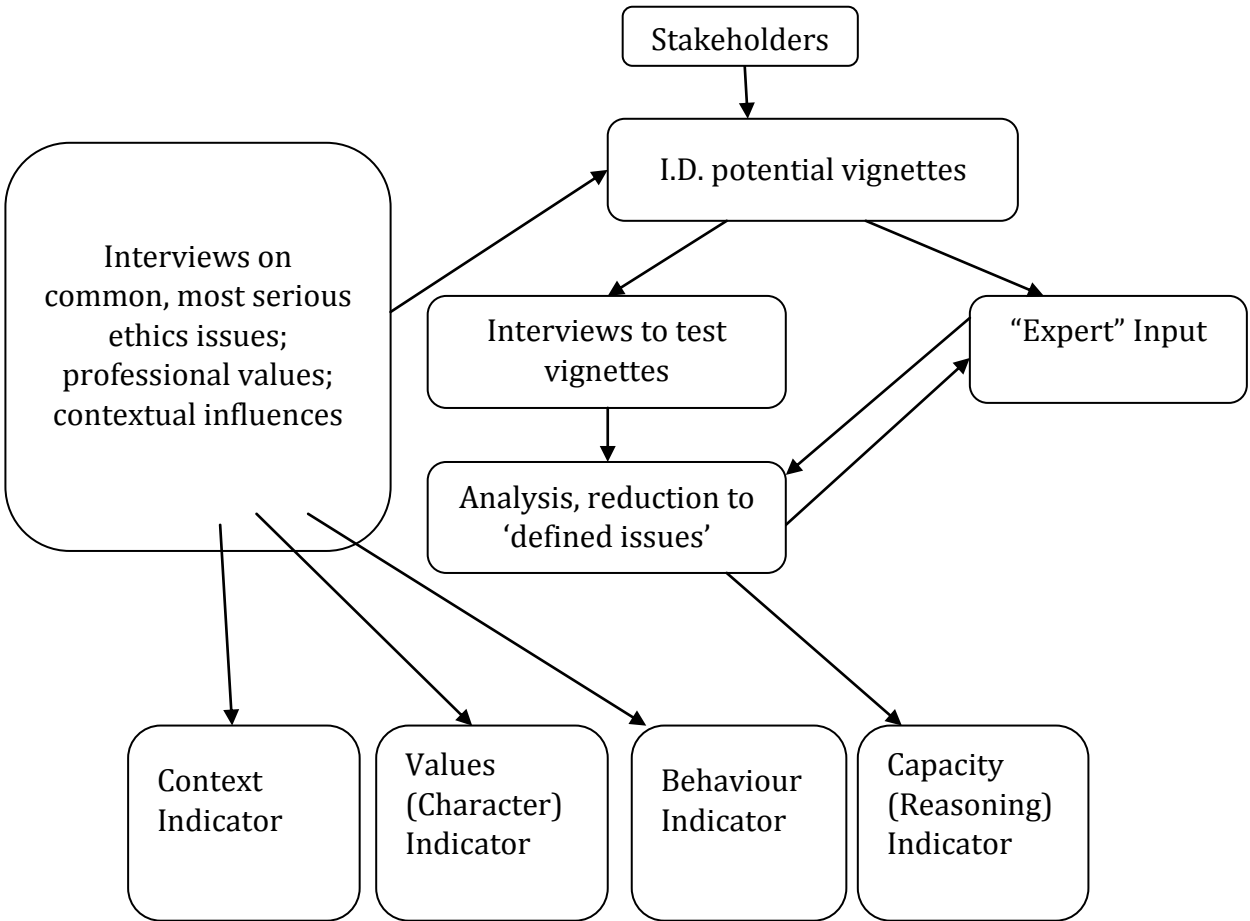
<sup>348</sup> Moorhead and Cumming, cited n 67.

those organisations to distribute electronic surveys within those organisations. There is a risk of accidental or deliberately selective dissemination, but controls could be designed in to address that. Working at an organisational and individual level would allow for the potential for organisational feedback and incentives to be built into computerised approaches. With the cooperation of regulators, CPD could be given for organisations that had sufficient levels of response (or for individuals, if this can be administered).

FEASIBILITY STUDY FIRST

This report reveals both the potential for, and difficulty in, examining ethical benchmarks across four dimensions, on a range of providers and in different legal service markets. A process map for the study is set out in Figure 5.

FIGURE 5: FEASIBILITY STUDY PROCESS MAP



The tools envisaged require development. The approaches on which they are based have been validated in other contexts, but their relationship with ethical behaviour relies largely on reported behaviour and experimental assessment of actual behaviour. To justify a fuller roll out, the evidence of the utility of ethical benchmarks needs

to be more robust. Also the weaknesses in available sampling approaches suggest difficulties currently in establishing random and representative samples of respondents who can then provide baseline data for the benchmark.

Initially, this suggests the need for a robust feasibility study which allows tools to be tested and evolved in one or two fields of practice across a range of providers. We see additional benefits in being able to work with legal service organisations in their development and for them to be able use the tools to benchmark and feedback performance against the broader group of respondents. By working closely with a smaller number of providers and testing out the approaches, the methods will become more focused, robust and workable. The feasibility study would:

- develop survey instruments for reporting perceived ethicality of behaviour in the respondents' field; examining their perception of ethical priorities; and the relevance of context (infrastructure, incentives and culture) to the perceived ethicality;
- develop vignettes for general application across legal fields that enable the examination of recognition and resolution of ethical problems;
- test the appropriateness of web-based surveys in this context; and,
- relate the data to available information on complaints and other risk indicators where available (say from regulators and COLPs).

There is the potential to develop interactive and relatively quick tools for collecting data via electronic means which can serve both as research tools and CPD/self-development tools for practitioners.

Once the tools have been robustly designed and tested, there is the potential for regulators to significantly increase their insight into the ethical challenges facing legal practitioners. It would also, we believe, provide a pathbreaking set of tools for legal regulators worldwide.

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## APPENDIX A: A DRAFT DISTILLATION OF LEGAL ETHICS CONCEPTS APPLICABLE TO LEGAL SERVICES

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This document sets out an initial exploration of what a distilled set of legal ethics concepts might look like. This distillation has been done for illustrative purposes only, to prompt thought and discussion. We expect some areas covered here to be subject to some controversy. We would also expect omissions to be raised and for there to be a debate about further simplification as well as alternative frameworks.

Distilling what core ethics concepts are which might be benchmarked is a difficult task. We have examined the Legal Services Act 2007 and the Codes of Conduct of the Bar and the Solicitors' Profession as a starting point for discussion. We have sought to distil those requirements down to the core requirements, reflecting something of the emphasis apparent in the Codes. It represents an early attempt at synthesis somewhere between the principles set out in the Act and the Codes, and the more detailed rules (and outcomes) contained within those Codes.

1. Where one or more of these rules conflicts, a lawyer should be guided by the following principles in order of importance:
  - 1.1. The public interest in the administration of justice and the rule of law;
  - 1.2. The public interest; and
  - 1.3. The client's best interests.
2. A lawyer will always advise and act independently of inappropriate influence
  - 2.1. A lawyer should avoid conflicts of interest between his/her own interests and his/her clients
  - 2.2. A lawyer shall advise the client on the basis of charging that is most appropriate to their needs.
  - 2.3. A lawyer should avoid conflicts of interest between one client and any other client
  - 2.4. A lawyer should not be influence in the discharge of his/her duties by anything other than his/her own professional judgment and the client's legitimate interests.

- 2.5. A lawyer should avoid the perception that their professional judgment has been improperly influenced as well as the reality.
  - 2.6. Conflicts of interest and commercial interests in the outcome of matters such as referrals and fees are permissible if the client is properly informed in advance of such interests.
3. A lawyer shall take all reasonable and lawful steps to promote the client's interests
  - 3.1. A lawyer shall act in the best interests of their client.
  - 3.2. A lawyer shall protect the client's money and assets
  - 3.3. A lawyer and anyone they are supervising shall have sufficient time, knowledge, experience and skill to deal with the client's problem
  - 3.4. A lawyer shall ensure that the client knows and understands information relevant to their case
  - 3.5. A lawyer shall ensure the client understands the advice they are given.
  - 3.6. A lawyer shall ensure the client gives informed consent to significant decisions on their case.
  - 3.7. A lawyer's costs information must be as clear, as full as possible and understood by their client.
  - 3.8. A lawyers advertising must be clear and honest
4. A lawyer will protect client confidentiality
  - 4.1. A lawyer shall keep the clients information confidential unless disclosure is required by law
  - 4.2. A lawyer shall keep the clients information confidential unless disclosure is permitted by law.
  - 4.3. A lawyer shall not act for clients when to do so risks breaching the client confidentiality of other clients.
5. A lawyer will act with integrity
  - 5.1. A lawyer shall be honest in his/her dealings with:
    - 5.1.1. the courts,

- 5.1.2. clients,
    - 5.1.3. third parties and opponents.
  - 5.2. A lawyer shall not mislead
    - 5.2.1. the courts,
    - 5.2.2. clients,
    - 5.2.3. third parties and opponents.
  - 5.3. A lawyer shall not be complicit in their client or any other person they are associated with misleading:
    - 5.3.1. the courts,
    - 5.3.2. clients,
    - 5.3.3. third parties and opponents.
  - 5.4. A lawyer's arguments or allegations must be supported by an appropriate level of belief in their truth, including sometimes reasonable evidence to support those beliefs.
  - 5.5. A lawyer shall not take unfair advantage of a third party or unrepresented opponent.
  - 5.6. A lawyer shall not discriminate in dealings with clients, colleagues or third parties.
  - 5.7. A lawyer shall make themselves available to all clients whom they are competent to serve if they have sufficient time and funding to do so.
  - 5.8. A lawyer shall not influence the evidence of any witness.
  - 5.9. A lawyer must not engage in conduct in or out of work likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
6. A lawyer must be appropriately accountable for his/her actions:
- 6.1. A lawyer must comply with professional rules.
  - 6.2. A lawyer must comply with the requests and decisions of their regulators.
  - 6.3. A lawyer must take personal responsibility for their own compliance with professional conduct requirements.

- 6.4. A lawyer must ensure any training, supervisory and/or management obligations or systems they are responsible for are effective.
- 6.5. A lawyer must ensure clients have appropriate mechanisms for expressing concerns about their service.
- 6.6. A lawyer must ensure clients understand those mechanisms.
- 6.7. Expressions of concern about service from clients should be dealt with in a timely, rigorous and fair manner.
- 6.8. A lawyer must report serious misconduct by other lawyers/regulated organisations or their employees to the appropriate bodies.
- 6.9. A legal services provider must have appropriate insurance to protect clients.

## APPENDIX B: EXAMPLE METHOD FOR EXAMINING CAPACITY

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The Defining Issues Test is a test of the ability of a respondent to recognize higher moral reasoning.<sup>349</sup>

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*“Mrs Bennett is 62 years old, and in the last phases of colon cancer. She is in terrible pain and asks the doctor to give her more pain-killer medicine. The doctor has given her the maximum safe dose already and is reluctant to increase the dosage because it would probably hasten her death. In a clear and rational mental state, Mrs Bennett says she realises this; but she wants to end her suffering even if it means ending her life*

*Should the Doctor now give her an increased dosage?” The following reasons are then each rated between 1- Great and 5 – No:*

- 1. Isn't the doctor obligated by the same laws as everybody else if giving an overdose would be the same as killing her?*
- 2. Wouldn't society be better off without so many laws about what doctors can and cannot do?*
- 3. If Mrs Bennett dies, would the doctor be legally responsible for malpractice?*
- 4. Does the family of Mrs Bennett agree that she should get more painkilling medicine?*
- 5. Is the painkiller medicine an active heliotropic drug?*
- 6. Does the state have the right to force continued existence on those who don't want to live?*
- 7. Is helping to end another's life ever a responsible act of cooperation?*
- 8. Would the doctor show more sympathy for Mrs Bennett by giving the medicine or not?*
- 9. Wouldn't the doctor feel guilty from giving Mrs Bennett so much drug that she died?*
- 10. Should only God decide when a person's life should end?*
- 11. Shouldn't society protect everyone against being killed?*
- 12. Where should society draw the line between protecting life and allowing someone to die if the person wants to?*

*Items are then ranked first to fourth most important consideration.*

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<sup>349</sup> DIT-2, Version 3.0. James Rest and Darcia Narvaez, Centre for the Study of Ethical Development, University of Minnesota, 1998



Daicoff, 1996, is an example of an approach which is somewhat analogous to Defining Issue Type tests in legal contexts.

*V. You are a partner in a medium sized law firm. You learn that one of your former partners (while he was your partner) failed to file a suit within the limitations period, failed to tell the client of this "oversight," then paid the client a sum of money and told the client that it was received in settlement from the putative defendant's insurer.*

*You SHOULD (circle your choice):*

- 1. Inform your former partner's client of his actions, but do not report him to the grievance committee of The Florida Bar.*
- 2. Report your partner to the grievance committee of The Florida Bar but do not report his actions to his client.*
- 3. Report the actions of your former partner to both his client and to the grievance committee of The Florida Bar, without contacting your former partner.*
- 4. Do nothing.*
- 5. Talk to your former partner and urge him to "come clean" with the client (but you don't report him to his client or to the Bar).*
- 6. Talk to your former partner before you contact his client or the grievance committee of The Florida Bar, and give him the chance to tell his client and The Florida Bar of his actions before you do. If he does not do so, you inform the client and the grievance committee of The Florida Bar of his actions.*

*Rationale for your decision (circle your choice):*

- A. Based on what the law provides or allows.*
- B. Based on what the Rules Regulating The Florida Bar (the legal code of ethics) provide or allow.*
- C. Based on personal values and/or standards.*
- D. Unable to identify a specific reason and/or intuition (i.e., it feels right).*

## APPENDIX C: EXAMPLE METHOD FOR EXAMINING CHARACTER/VALUES

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Schwarcz's values indicator is an example of an indicator of personal values. It uses the following questions to categorise a person's values on ten dimensions.

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- **Self-Direction.** Independent thought and action; choosing, creating, exploring.
- **Stimulation.** Excitement, novelty, and challenge in life.
- **Hedonism.** Pleasure and sensuous gratification for oneself.
- **Achievement.** Personal success through demonstrating competence according to social standards.
- **Power.** Social status and prestige, control or dominance over people and resources.
- **Security.** Safety, harmony, and stability of society, of relationships, and of self.
- **Conformity.** Restraint of actions, inclinations, and impulses likely to upset or harm others and violate social expectations or norms.
- **Tradition.** Respect, commitment, and acceptance of the customs and ideas that traditional culture or religion provide the self.
- **Benevolence.** Preserving and enhancing the welfare of those with whom one is in frequent personal contact (the 'in-group').

It can be assessed using the following instrument.

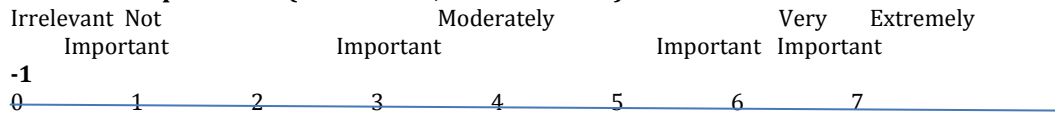
### Rating your values

- Please read through all the values first.
- Rate the values that are most important to you first and then rate those that are least important to you. Circle the relevant value.
- Then rate the remaining values that fall somewhere in between.
- Differences in the ratings should reflect differences in importance.
- **There are 31 values, please read all the values before you commence rating.**

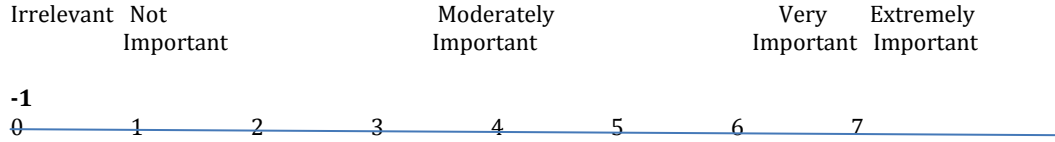
[We excerpt only part of the instrument below]

**Values**

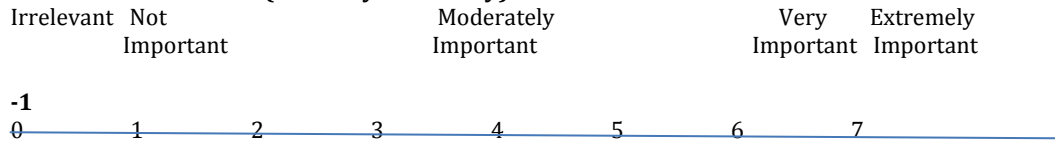
**9. Independence (Self-reliant, self-sufficient)**



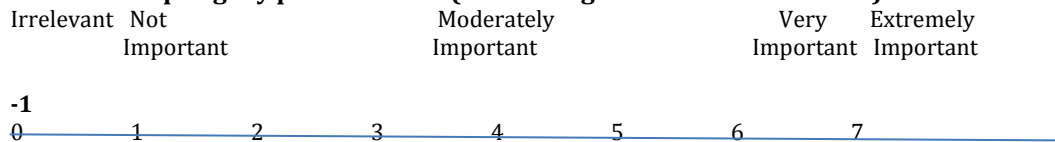
**10. Obedient (Dutiful, meeting obligations).**



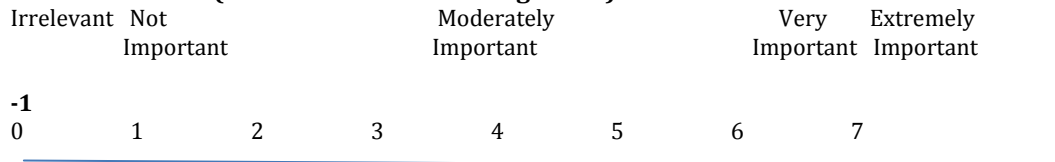
**11. Social Order (Stability of society).**



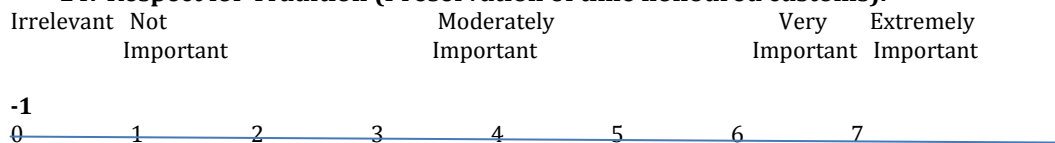
**12. Accepting my portion of life (submitting to life's circumstances)**



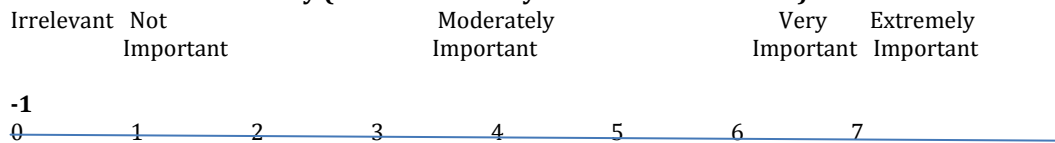
**13. Wisdom ( A mature understanding of life)**



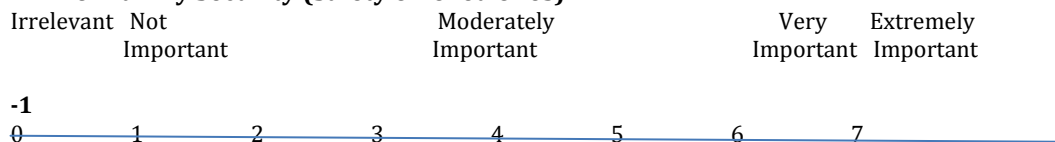
**14. Respect for Tradition (Preservation of time honoured customs).**



**15. National Security (Protection of my nation from enemies)**



**16. Family Security (Safety of loved ones)**



## APPENDIX D: EXAMPLE METHOD FOR EXAMINING CONTEXT

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An example of an instrument looking at context in the legal sphere is the Ethical (culture) Questions from the Queensland Workplace Ethics Culture Check.<sup>350</sup>

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*Tick all that apply:*

- *My firm provides in-house training about ethical issues that may arise in practice*
- *My firm has intranet resources to support ethical practice*
- *My firm has staff/consultants whose role is to support ethical practice*
- *My firm expects all staff to alert others to ethical issues whenever they see them arising*
- *My firm deals quickly with ethical issues that arise*
- *My firm is continually evolving better ways to support staff to act ethically*
- *My firm encourages and financially supports staff to attend external learning opportunities about ethical issues*
- *My firm's induction training for new staff includes substantial training on ethical issues*  
*(Please comment further if you wish)*

*To what extent do you agree with the following statements? (Strongly agree, agree, neither agree nor disagree, disagree, strongly disagree)*

- *All supervising partners within my firm encourage staff to raise any ethical issues with them*
- *All supervising partners within my firm see encouraging staff to raise ethical issues with them as part of their role*
- *Only some supervising partners see encouraging staff to raise ethical issues as part of the management role*

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<sup>350</sup> [http://www.lsc.qld.gov.au/\\_data/assets/pdf\\_file/0006/106818/workplace-culture-check.pdf](http://www.lsc.qld.gov.au/_data/assets/pdf_file/0006/106818/workplace-culture-check.pdf)

- *Supervising partners encourage staff to raise ethical issues with them only when it is part of their personal management style*
- *The firm has a system for staff to raise ethical issues independently of supervising partners (Please provide any additional comments you may wish to make)*

*What would happen if a staff member raised concerns about being asked to do something they perceived as ethically questionable? Please tick your agreement or disagreement with the following options. (Strongly agree, agree, neither agree nor disagree, disagree, strongly disagree)*

- *Their actions in raising the issue would be appreciated by our firm*
- *The staff member would experience adverse consequences*
- *Our firm would use their actions as an example for other staff of what not to do*
- *The issue would be ignored and not dealt with in an appropriate manner*
- *They would be told that such issues should not concern them*
- *Our firm would regard them as someone who can be trusted*
- *Our firm would be cautious about trusting anyone who raises such issues*
- *Their reasons and personal motives for raising issues would be questioned*
- *Our firm would demonstrate its endorsement of their actions by asking them to contribute to staff training in raising ethical issues*
- *They would suffer reprisal*  
*(Please provide any additional comment you may wish to make)*

*Does your firm use any of the following mechanisms to address ethical concerns of legal practitioners/staff members? (Please tick all that apply)*

- *Designated ethics partner/solicitor*

- *Ethics Committee*
- *Written policy encouraging reporting of misconduct*
- *Scheduled in-house meetings*
- *An in-house ethics hotline*
- *I don't know*
- *Other (please specify)*

*If your firm offers an in-house ethics training program for staff, how often does that training occur?*

*(At least once a month; At least quarterly; At least half yearly; At least annually; More than annually; Never; My firm does not have an in-house ethics training program)*

*(Please comment on whether this training if offered is offered to all staff, or to professional staff only)*

*Does your firm have an internal discipline process for staff who engage in unethical conduct?*

*(Yes; No; I don't know)*

*Are you aware of anyone in your firm having been disciplined for unethical conduct in the last 5 years? (Yes; No)*

*Does your firm measure performance by any of the following indicators? (Please tick all that apply)*

- *Number of pro-bono hours worked;*
- *The ethical reputation of the fee earner*
- *The amount of supervisory work undertaken*
- *The level of the fee earner's diligence and competence*
- *The amount billed by the fee earner*
- *Client feedback*
- *I don't know*
- *Other (please specify)*

Which of the following BEST describes the morale among employees at your firm?

(Excellent; Good; Average; Poor; Very Poor)

(Tick all that apply:)

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- *I am treated with respect and courtesy in my firm*
- *I am able to openly discuss pay and conditions*
- *My personal goals fit well with the firm's goals*
- *I am able to express honest opinions on issues that may have serious consequences even if others disagree*
- *I am treated fairly, in a consistent and predictable fashion*
- *I am able to raise ethical issues in confidence*
- *I can talk with others in my firm about the ethical bases of decisions we make or actions we take*
- *I think about the ethics involved before making a decision or taking action (eg is it honest, am I breaching trust etc)*
- *I am able to discuss ethically complex dimensions of my work with partners/senior members of the firm*
- *I know how to deal with ethical dilemmas that arise*
- *When a conflict arises I know that I will not be under pressure to put the firm's interests ahead of the client's*
- *I try to act in the best interests of consumers of professional legal services*
- *If I raise concerns they are given consideration*
- *I am helped to recognize when ethical dilemmas emerge*
- *I know where to turn to for ethical advice in my firm*

- *I know who can make a decision on the best course of action if an ethical issue arises for me in my work*
- *In our firm we try to do the right thing*



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