

Meeting: Legal Services Board

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Title: Rule of Law and regulation

Author(s): Sally Al-Saleem, Regulatory Policy Manager, Margie McCrone, Head Strategy and Policy.

Status: Official

Introduction:

1. The purpose of this paper is to set out the scope of the rule of law and regulation project. In scoping this project we explored,
 - (i) how regulation is ensuring that there is a sufficiently strong connection between the legal profession, individual lawyers and legal businesses and their underlying public purpose of upholding the rule of law and;
 - (ii) what more, if anything, could be done to better promote this.

Recommendation

2. The Board is invited to discuss and note the scope of the project and proposed next steps.

Background

3. Supporting the constitutional principle of the rule of law is one of the LSB's shared regulatory objectives with the regulators. Ensuring high quality services and strong professional ethics is one of the nine challenges set out in our sector-wide strategy – Reshaping Legal Services.
4. There have been a range of high-profile matters¹ which have contributed to a broader concern about whether regulation has been effective in ensuring the legal profession is acting as guardians of the rule of law. While there is evidence of lawyers championing the rule of law and promoting professional ethical practice, these other matters have exposed the sector to the criticism that some lawyers have acted as “professional enablers” which have exploited loopholes in the law and operated on the boundaries of legality. Further, the Post Office

¹ For example, the misuse of non-disclosure agreements, the emergence of Strategic Lawsuits Against Public Participation (SLAPP)¹, tax avoidance and the leaked Pandora and Panama papers¹, and concerns about sanctions and anti-money laundering (AML) regulation compliance.

scandal² and Royal Institute of Chartered Surveyors case³ have highlighted both professional ethics and corporate governance failures where legal professionals have failed to balance their professional duties.

5. These are illustrative of the difficult professional ethical questions that legal professionals, but in particular those employed in-house or in large and mid-tier firms, may face when balancing the tensions between their professional obligations, such as acting in the best interest of the client and upholding the rule of law, as well as against commercial and reputational pressures. However, the need to balance professional obligations, is applicable to all legal professionals whether practising as sole traders in high street firms, in public sector organisations or at the Bar.
6. To understand if the matters above are isolated events, or indicative of wider systemic issues, and if there are adequate measures in place to prevent them arising again (or indeed in the first place), we undertook a rapid evidence review to scope our potential work in this area. This wide-ranging review included consideration of the existing regulatory infrastructure (education, training, codes of conduct/principles, supervision, and monitoring by regulators), a review of recent academic literature and stakeholder discussions to inform ourselves on,
 - what upholding the constitutional rule of law means for lawyers
 - whether the regulatory infrastructure is sufficient to ensure that legal professionals understand their professional obligation to uphold the rule of law and how to balance this against other professional obligations
 - the types and scale of conduct that may not be consistent with upholding the rule of law
 - the extent to which professional ethics which uphold the rule of law are embedded in day-to-day legal practice (workplace culture) and
 - potential remedies including regulatory, leadership, and advocacy to be further explored.

What does “upholding the rule of law” mean for lawyers?

7. There is no comprehensive definition of the rule of law although it is still the subject of lively debate. The principles that make up the rule of law have been stated in many different ways, the most famous being the statement of eight specific principles by Lord Bingham⁴. Last year, the Law Society commissioned independent research⁵ into the public’s understanding of the rule of law, which showed that 97% of adults in the UK agreed or strongly agreed with the statement that “everyone should be treated equally under the law”. However, the

² The Post Office inquiry is still underway. The evidence unearthed by the enquiry may lead to criminal prosecution as well as regulatory action against those lawyers involved.

³ <https://www.postofficehorizoninquiry.org.uk/about-inquiry>.

⁴ <https://www.rics.org/globalassets/rics-website/media/news/press-releases/210907-rics-independent-review-open-version.pdf>

⁵ <https://www.binghamcentre.biicl.org/our-vision?cookieisset=1&ts=1663699300>

⁶ <https://www.lawsociety.org.uk/topics/human-rights/the-rule-of-law-what-does-it-really-mean>

research also revealed that rather than seeing it as a matter of high principle, the public very clearly sees the law in terms of “the rules of the game” or the principle of “fair play”.

8. We also note that upholding the rule of law might need to be interpreted in line with the values of wider society as they evolve over time. To date, none of the regulators have comprehensively spelt out what is required of lawyers to uphold the rule of law in the context or circumstances they find themselves in⁶, and most regulators do not have a core duty or rule that references the rule of law. This is key for the legal profession to understand what is expected of them and we will explore this as part of this work.
9. By upholding the rule of law, legal professionals ensure the essential role they are entrusted to play in the functioning of society and furthering the public good continues to be valued and promoted. Legal professionals, whether they are operating in commercial, civil, or criminal spheres, make complex decisions that draw on their technical knowledge, skills, and informed judgement. A legal professional’s ways of thinking and acting is shaped by their education and experience of being trained as a lawyer, from roles and experiences in the workplace, its culture, and the expectations from their employer, clients, and regulator.

Emerging themes

Professional ethics in practice

10. Recent academic literature, research, stakeholder discussions⁷ and data from the SRA and BSB on disciplinary cases suggest there are risks of professional ethical failures occurring in the sector⁸. These include concerns that,
 - a significant number of cases are being or have been investigated in connection with conduct that undermines the rule of law
 - there is a lack of professional ethical infrastructure and leadership in large firms to drive decision making in practice
 - there is a lack of interest about ethics, particularly from corporate lawyers
 - lawyers were more strongly influenced by the principles of serving client interests and integrity than independence
 - professional ethics has become more focussed on procedural compliance and legality rather than contending with the bigger value professional ethical questions

⁶ The SRA has provided fragmented guidance on this, for example relating to conduct in disputes and non-disclosure agreements.

⁷ Regulators, the Law Society, leaders in legal professional ethics (academics and those with experience in corporate law firms).

⁸ Although these focus on legal professionals working in mid-tier/large firms and in-house, there may evidence of ethical failures in other parts of the legal sector, such as high street practices, which we will explore as part of the project.

- the support for, and accountability of in-house lawyers to, regulators is currently insufficient⁹ and
- even workplace cultures¹⁰, that promote professional ethics can be subject to threats such as, working in silos (large firms), hybrid working or activities such as on-shoring¹¹.

Strengthening the regulatory infrastructure

11. A review of the current regulatory infrastructure demonstrates that

- education and training on professional ethics is taught and assessed throughout both academic and vocational training in most cases¹². However, rather than being focussed should on teaching abstract moral principles, education and training should empower students to engage with, and commit to, professional ethics in the complex conditions of the “real world”.
- post-qualification ongoing competence in professional ethics is not required by regulators¹³
- not all of the regulators’ codes of conduct specifically refer to the obligation to uphold the rule of law¹⁴
- there is an absence of comprehensive guidance to explain the types of conduct (and across different types of legal service) that would be considered to be inconsistent with upholding the rule of law (beyond criminal convictions).
- supervising and monitoring professional ethical issues across the profession to gain assurance that any guidance and expectations is understood and embraced, and that good practice is embedded in the workplace is not a clear priority for regulators.

⁹ The SRA has recently conducted a thematic review on the role of in-house and is due to publish in autumn.

¹⁰ The SRA has published a thematic review on workplace culture which considered how firms can create such a workplace, where employees feel supported, risks are managed. It has also published guidance setting out its expectations and case studies to assist firms to create a positive workplace culture which promotes ethical decision making.

¹¹ The practice of opening satellite offices in the UK to do commoditised work or routine tasks from firms outside London to lower costs.

¹² Most regulators have a standalone statement¹² which describes the knowledge, skills, and attributes (including professional ethics) regulated individuals must have on “day one” of practice. We are currently undertaking a review of our existing Education and Training Guidance.

¹³ See Ongoing Competence Policy statement <https://legalservicesboard.org.uk/wp-content/uploads/2022/07/Final-OC-statement-of-policy-July-2022.pdf>

¹⁴ Only SRA, CILEx Regulation and the Faculty Office set this out in their respective codes of conduct.

Emerging conclusions and remedies

Training and education providers, legal practitioners, law firms and regulators all have a role in ensuring the rule of law is upheld.

Education and vocational training need to instil the important role that lawyers play in society to uphold the rule of law and further the public good.

Regulators should ensure that post-qualification, professional ethics is subject to continuing competence obligations so that legal professionals receive up-to-date professional ethics training throughout their careers¹ (this has important linkages to the ongoing competence policy statement and the education and training review).

Ambiguity around what upholding the rule of law means for legal professionals and how it should shape their actions, needs to be addressed.

As a starting point all regulators should ensure that their codes of conduct/core duties include a principle specifically on upholding the rule of law, and supplement this by providing guidance on lawyers' professional obligations to the rule of law.

Regulators need to collaborate and gain meaningful commitment from the sector to embed professional ethical behaviour and require details on how outputs are to be delivered and monitored with a visible means of monitoring compliance.

Supervision and monitoring by regulators should be enhanced to ensure professional ethics are being driven in practice and are sub-ordinating commercial and reputational pressures.

In-house lawyers may need to be subject to enhanced accountability and support given evidence that they experience multiple, and possibly conflicting, spheres of influence that shape how they balance difficult ethical questions.

Law firms and organisations need to show leadership on matters of professional ethics and create a safe space for discussion, learning and reporting conduct which may breach professional ethics. Threats to workplace cultures that promote professional ethics will need to be managed.

The LSB has an important role in ensuring that regulators' policies that are being developed in connection with these matters fully address them.

Proposed next steps

12. As Board will be aware, professional ethics and the rule of law will be debated at the LSB's Reshaping Legal Services conference on 13 October, which will further inform this work. Our emerging themes suggest that there is a policy imperative to be tested with regulators and other stakeholders. Therefore we intend to,

- conduct further engagement with other regulators, representative bodies, city firms, leaders in the field of legal professional ethics and consumer groups
- seek to learn lessons from regulators from other jurisdictions and sectors to inform future policy development
- commission academic research to inform a cross-sector discussion on what is required by legal professionals to uphold the rule of law and the conduct that may undermine it and
- utilise the public panel to allow us to test the public's expectations around professional ethics to ensure they have kept pace with society's values.

Risks and mitigations	
Financial:	N/A
Legal:	N/A
Communications and engagement:	We will continue to engage with a range of stakeholders as part of this work.
Equality and diversity:	N/A
Resource:	N/A

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
N/A	N/A	N/A