

Meeting: Legal Services Board

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Item: Paper (23) 25

Title: Professional ethics, rule of law and regulation update

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Status: Official

Introduction:

1. The purpose of this paper is to update the Board on the progress and next steps for the LSB's programme of work in respect of professional ethics, rule of law and regulation (PERL) which the Board approved in October 2022. It includes information on our Call for Evidence in respect of the misuse of non-disclosure agreements (NDAs), reflections from our recent roundtable with PERL stakeholders and the LSB-led sanctions work.

Recommendation

2. The Board is invited to **discuss** and **note** the progress of the work and next steps.

Background

3. Supporting the constitutional principle of the rule of law, promoting, and maintaining adherence to the professional principles, and encouraging an independent, strong, diverse, and effective legal profession are three of the eight regulatory objectives the LSB shares with the regulators we oversee. Our PERL work promotes these objectives and supports the challenge to ensure high quality services and strong professional ethics set out in our sector-wide strategy, which identifies how regulators, often in collaboration with others, can reshape legal services to better meet society's needs.
4. The PERL programme seeks to;
 - explore and gain consensus across the sector on what upholding the rule of law means for expectations of professional ethical conduct of legal professionals;
 - ensure that the important role that legal professionals play in society to uphold the rule of law and further the public good, is adequately

promoted in the profession by enhancing the regulatory infrastructure¹ to support and incentivise legal professionals to identify, navigate and respond to professional ethical issues;

- explore the role of leadership in the sector to improve the embedding of professional ethical decision-making in practice; and
- respond to specific manifestations of conduct which may undermine the rule of law, which are of significance to the public, and may negatively impact trust and confidence in the legal sector, such as the sanctions regime, the misuse of NDAs, and Strategic Lawsuits Against Public Participation (SLAPPs).

PERL

Professional ethical obligation to uphold the rule of law, regulation, and leadership.

5. As a foundation for our engagement with the sector we have conducted;
 - desk research, including an academic literature review and identifying lessons from regulators from other jurisdictions and in other sectors to inform future policy development; and
 - wide-reaching engagement 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 or be consistent with it. This includes attending and speaking at external events,² and building a network of interested PERL stakeholders.³
6. On 27 March 2023, we hosted a roundtable event with 30 stakeholders, alongside the International Bar Association, which launched a project last year examining the role of lawyers as ethical gatekeepers within wider society. The main themes arising from the discussion are set out in Annex A and include;
 - The need for a cultural shift in the profession towards the understanding of their role as lawyers in society to uphold the rule of law and consider the public interest;
 - A clear framework is required to allow legal professionals to proactively navigate and test their professional ethical decision making and guide how they will take these decisions (depending on context and facts) and for regulators to address manifestations of poor conduct as they arise; and

¹ Regulation and possibly legislation, although that ultimately is a matter for Government.

² Including the Westminster Legal Policy Forum event 'Next steps for legal ethics' on 27 March 2023 and TLS Risk & Compliance conference on 17 March 2023.

³ Stakeholders included senior legal professionals, academic leaders in the field of legal professional ethics, legal service regulators, representative bodies, civil society groups and the Legal Services Consumer Panel; some of which we engaged with for the first time. We will meet with other stakeholders as part of this work and welcome other interested parties to be part of future discussions.

- Any solutions should respond to the disempowerment of legal professionals in the face of powerful clients, strong commercial and reputational pressures, including law firms' remuneration policies, and governance structures to support ethical decision-making in all settings (i.e. in-house or in firms/chambers).
7. The discussions supported our emerging view that the regulatory interface between the rule of law and professional ethics may need to be strengthened across the legal professions, and we recognise that some parts of the sector have already been working towards this. We consider that professional ethics and the important role that legal professionals play in upholding the rule of law should be further promoted in education and training, and ongoing ethical competence should be undertaken to support this throughout a legal professional's career; the standards of conduct and supporting guidance should make the expectations of legal professionals clearer; and supervision and enforcement have a role to gain assurance that the expectations of legal professionals are understood, embraced and that good practice is embedded in the workplace.
8. The ways in which leadership in the sector could achieve this was also explored with some clear actions materialising. We welcomed the strong support from the profession for this work and will continue to engage further with PERL stakeholders as our work develops.

Call for Evidence on misuse of NDAs

9. While NDAs are lawful and can legitimately be used (e.g. to protect confidential business information), evidence that they are misused to conceal misconduct or other wrongdoing is an example of a specific manifestation of professional ethical conduct which may undermine the rule of law and reduce public trust and confidence in the profession. The Board will recall that in January 2023 it agreed we should carry out a call for evidence to build on the existing data we have⁴, and invite up-to-date evidence on the misuse of NDAs (including, but not limited to misuse relating to sexual misconduct, harassment, and discrimination) to further our understanding of the:
- the legitimate use of NDAs (where no clauses are likely to be void under law);
 - the unethical use of NDAs to conceal unlawful activity and other wrongdoing, and the impact of this on individuals concerned as well as wider impacts and the scale of this misuse;
 - the conduct of legal professionals in drafting, enforcing and otherwise advising on NDAs;

⁴ This includes but is not limited to evidence contained in the [House of Commons Women and Equalities Committee Report 2019](https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/215/215.pdf); <<https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/215/215.pdf>> complaints data from the SRA, and information from groups and organisations we have received about misuse in particular contexts and sectors.

- the existing regulatory response, such as what happens when misuse is reported; and
- respondents views on the potential regulatory solution(s)⁵ to address the role of legal professionals involved in the misuse of NDAs.

10. The Call for Evidence will be published in April and run for 10 weeks. We will continue to engage with interested groups who can inform our approach to policy development on NDAs for the duration of the Call for Evidence, to ensure we hear from a broad range of stakeholders. Subject to the evidence received, we will develop any proposed policy response for consultation in late summer 2023. A similar exercise may be worth considering to better understand legal professionals' ethical conduct with regards to SLAPPs⁶ at a later date.

Sanctions

11. Board will recall that last year, following a series of roundtables we convened with the legal service regulators and the Office of Financial Sanctions Implementation (OFSI), all regulators submitted their action plans for ensuring awareness raising, compliance and enforcement of the sanctions regime amongst their respective regulated community. We scrutinised these plans and provided feedback on them which the regulators responded to. The SRA has supplemented their plan by conducting a thematic review last year and publishing further guidance to help its regulated community to understand its obligations and how to comply with them. The BSB is due to publish the findings of its thematic review shortly. OFSI has set up a new engagement forum to enhance its engagement with the legal sector. We attended the first meeting is on 6th April.

12. We intend to follow up with a meeting with OFSI and MoJ colleagues, ahead of convening the next LSB-led roundtable in May,

- to build on our continuing work to secure improved information sharing between OFSI and the legal service regulators, which is something the Board has stressed the importance of. We intend to write to MoJ on behalf of the regulators to highlight the need for better information sharing ;
- for the SRA and BSB to share the findings of their thematic review with the other regulators; and
- to invite MoJ to explain its policy on the [government's ban](#)⁷ on providing "transactional legal advisory services for certain commercial activity" to Russian businesses, which will be implemented by OFSI at the end of this month.

⁵ The Government has proposed a legislative package to make legally void NDAs that prevent victims of workplace abuse, harassment, or discrimination from disclosing relevant information to the police, regulated health and legal professionals and set out the limitations on the use of NDAs, but there is currently no update on the legislative opportunity for this.

⁶ The Government announced a legislative package to address SLAPPs last year following a call for evidence.

⁷ <https://www.gov.uk/government/news/sanctions-in-response-to-putins-illegal-annexation-of-ukrainian-regions>

Next steps

13. The next steps for the PERL programme of work include the following;

- further engagement with interested stakeholders, including on the Call for Evidence;
- commissioning 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
- convening the next sanctions roundtable in May; and
- the Economic Crime and Transparency Bill, which will introduce a new regulatory objective to the Legal Services Act 2007 focusing on promoting the prevention and detection of economic crime is currently before Parliament. In anticipation of this Bill being enacted by Parliament, we will be working up our policy and expectations around this new regulatory objective.

Risks and mitigations	
Financial:	N/A
Environmental:	The role of legal professionals in respect of climate change is being brought into focus by the work on PERL and the role of regulation in this area may warrant further exploration in the future.
Legal:	We intend to engage with the legal team in future to mitigate any legal and to ensure compliance with the legislative framework .
Communications and engagement:	We will continue to engage with a range of stakeholders as part of this work. We will ensure that we are taking account of a broad range of perspectives and providing regular opportunities for stakeholders to shape our work in this area.
Equality and diversity:	The NDA work is consistent with one of the nine challenges set out in our sector-wide strategy, to dismantle barriers to a diverse and inclusive profession at all levels. This is because amongst other matters it will seek to address misconduct, discrimination, and harassment against those with protected characteristics as well as others.
Resource:	N/A

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

Annex A

Summary of discussions at the roundtable discussion

Attendees were asked to consider two broad questions:

- i) what does upholding the rule of law mean for legal professionals?
- ii) how can regulation and leadership in the sector, support legal professionals to identify, navigate and respond to professional ethical issues?

Themes arising from the discussion;

- The difficulty in understanding the rule of law as a concept and how it should apply to professional ethical decision making needs to be addressed to bring the rule of law to life in everyday legal work, whether the context is criminal, civil, commercial, and in-house or private practice;
- Some considered the rule of law is different to ethics, but professional ethical failures do undermine the rule of law;
- There is a need for a cultural shift for some in the profession towards the understanding of their role as lawyers in society to uphold the rule of law and consider the public interest⁸;
- Recent events have tested the neutrality of legal professionals acting in a client's best interests and their professional ethical obligations;
- Arguments about the ethics of client selection are not black or white. There is a spectrum, on the one hand a client accused of a criminal offence must have access to legal representation, but this becomes less clear for some practitioners, for example where the client needs legal representation for commercial reasons;
- A clear framework is needed to allow legal professionals to proactively navigate and test their professional ethical decision making and guide how they will take these decisions (depending on context and facts) and for regulators to address manifestations of poor conduct as they arise;
- This needs to be supported by education and training and a combination of mandatory and voluntary expectations that a legal professional remains up-to-date with ethical training throughout their career as occurs in other professions (e.g. accountancy);

⁸ One participant said that this was not an issue for all parts of the profession, and that there was a difference between the solicitor and barrister professions, for example.

- The importance of ensuring regulation and leadership equips legal professionals to act lawfully and in line with their professional ethical obligations and in a multi-jurisdictional context;
- There is a need for consistency of approach by the regulators⁹;
- Any solutions should respond to the disempowerment of legal professionals in the face of powerful clients, strong commercial and reputational pressures, including law firms' remuneration policies and governance structures to support ethical decision-making;
- A culture which embraces awareness, guidance, perspective on professional ethics and incentives that are not purely being driven by profit and poor culture; and
- There is a risk that the sector is conflating professional ethics and reputation management.

⁹ One participant disagreed with this.