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University

Nottingham Law School

Upholding Professional Ethical Duties: response to LSB consultation

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1. Introduction

Nottingham Law School (NLS) is the law faculty of Nottingham Trent University¹ (NTU) in the United Kingdom. NTU, which has its origin in the Nottingham Government School of Design, opened in 1843, and is a statutory Higher Education Corporation (HEC) established under the Education Reform Act 1988. Its powers are specified in section 124 of that act. The university title and degree-awarding powers were granted under the Further and Higher Education Act 1992. NTU began to offer a law degree in 1964. NLS has 106 teaching staff (excluding hourly paid lecturers) and more than 3,000 full time, part time and distance learning students including:

- undergraduate students on a variety of LLB law degrees and a solicitor apprenticeship;
- postgraduate PGDL, LPC and BTC students whose courses are accredited as pre-qualification routes by the Bar Standards Board (BSB) and Solicitors Regulation Authority (SRA);
- SQE preparation students;
- trainee trade mark attorneys on a course accredited as the sole national prequalification course by the Intellectual Property Regulation Board (IPReg);
- students on LLM programmes; and
- Ph D and professional doctorate candidates.

NLS also provides CPD activity and bespoke programmes for law firms and similar organisations, including courses for trainee solicitors. Many students participate in work placements and in NLS Legal, which operates as a “teaching law firm” regulated by the SRA. The school is also accredited as a provider of the rights of audience in the higher courts’ qualification for solicitors.

This response is convened by NLS’ research Centre for Legal Education which has a track record of research into legal and professional education, ethics and regulation in over twenty countries worldwide and for the BSB, SRA, CILEx Regulation, IPReg and the Legal Services Consumer Panel (LSCP) and Legal Services Board (LSB). Publications with particular significance in this area are the 2013 Legal Education and Training Review report² and our more recent access to justice report to the LSCP and LSB.³ The response group comprises colleagues with significant practitioner experience as well as those with expertise in legal professional regulation, ethics and legal education in the UK and elsewhere. It also includes a colleague with experience in the medical sector and a colleague with expertise in the defence of professional indemnity claims against lawyers.

References are given as endnotes to streamline reading of the main text.

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2. Professional Ethical Duties

[T]he teaching and maintenance of professional ethics and values are central to the assurance of integrity in the administration of justice and quality across the entire legal services sector⁴

It is necessary to distinguish between different dimensions of ethical conduct for lawyers. We think it is important to acknowledge that those dimensions extend beyond detailed and possibly mechanical compliance with rules of professional conduct and legislative requirements such as anti-money-laundering legislation. The American Bar Association, for example, refers to “rules of professional conduct, *and* the values and responsibilities of the legal profession and its members” [our italics].⁵

In this document, therefore, we divide the ethical dimensions into three categories:

- **Values:** general societal values of a mature society: integrity, concern for others, honesty. These are enhanced for lawyers, of whom a higher standard of integrity is required: “the word ‘integrity’ in a professional code of conduct means something more than mere honesty. It involves adherence to the ethical standards of one’s own profession.”⁶
- **Macro-ethics:** broader professional principles (which may be stated as overarching factors in codes of conduct but, as we note below, can be overlooked), including commitments to the rule of law, administration of justice and duty to the court. Moorhead et al have noted challenges to this category⁷ and it is discussed in detail in paras 49-56 of the consultation paper.
- **Professional conduct rules,** we treat this as referring to precise rules about matters such as due diligence, confidentiality and acting in the best interests of the client. Such normative rules may be necessary but are not sufficient to assure ethical behaviour.⁸

Taken as a group, these might be described as components of an appropriate “professional identity” identified as one of the key professional apprenticeships for lawyers in the Carnegie report⁹ and on which there is significant US commentary. The question of professional identity has been added to Miller’s Pyramid,¹⁰ used in medical education and in the Solicitors Qualification Examination (SQE), as an additional outcome (“is”) of education beyond “knows”; “knows how”; “shows how” and “does”.¹¹

That said, we recognise that each of these dimensions relates to and informs the others, and must ultimately be treated holistically:

Legal ethics is a much broader and more complex phenomenon than simply a set of codes/rules of ethics and requires integrated research: from an understanding of the particular impact and significance of legal education, ethical rules, and personal morality to ethical decision-making processes, cognitive and social factors.¹²

The relevance of the different dimensions, and their interaction, is starting to be recognised by regulators. So, for example, the BSB cites a need to move beyond professional conduct rules towards macro-ethics in its strategy into the 2030s:

- In the past, our primary focus (originally delegated by the Bar Council) was as a conduct regulator, focused on gatekeeping and discipline.
- These remain very important, but in carrying out our regulatory functions, we also have to have regard to the wider public interest objectives set out in the Legal Services Act 2007.¹³

The need for a sharper focus on the character virtues and attributes of the professional, whether in law or similar occupations has been recognised in a number of studies which look to a practical moral wisdom:

attention is often given in such education to the more general principles, or ‘do’s’ and ‘don’ts’, of good practice, there seems to be less exploration of the morally problematic dimensions of professional engagement – especially of those in which there may be real tension between best ‘situated’ professional judgement and received convention, and in which practitioners may

precisely require personal initiative, integrity and courage to counter unhelpful institutional and social trends and pressures.¹⁴

There are references throughout the consultation paper to these different dimensions, but we are not certain (see our answer to Q1 below) that they are fully captured, especially for non-contentious lawyers, in the definition at para 25 of the consultation paper. Consequently, we think there is scope - and an opportunity for enhancement of - both the macro-ethics and the values dimensions which are critical to the formation of sound professional and ethical judgment under pressure beyond familiarisation with any Code of Conduct.

Consideration must also be given to the variety of business models used by the legal services sector, from sole practice through chambers (as co-operatives); partnerships, LLPs, charities (including law centres and clinics) and limited companies, and with both lawyer and non-lawyer ownership. Alongside improved regulation of partnerships and LLPs (including professional service firms and other authorised corporate service providers). The latter are also gatekeepers for the formation of firms providing legal services. In particular, there is a need to develop a comprehensive ethical framework both to close loopholes in and improve compliance with regulation, and to raise standards above the current regulatory minimum. The treatment of ethical practice for in-house lawyers, whose context may include the ethical rules of the organisation¹⁵ or of another profession, or none, and where pressures to act unethically may be different,¹⁶ must also be taken into account (see also references to this on pp 14, 16 and 28 of the consultation paper).

Finally, there is a need to consider the effect on practitioners' ethics of outside factors, be they financial¹⁷ or the result of discrimination in recruitment and support within the professions, pushing some groups into inherently more risky areas of practice.¹⁸

3. Responses to questions

Q1. Do you agree with our proposed definition of professional ethical duties?

The definition largely tracks the statutory professional principles. Although the definition has its merits, the definition does not fully acknowledge obligations to society and to the rule of law (macro-ethics). The focus on the duty to the court is appropriate, but not relevant to all practitioners or professions. The proposed definition does, in some respects, take statutory principles defined only in the context of litigation and advocacy (the duty to the court) and seek to apply them to those practitioners (possibly a majority) who do not undertake contentious work. We think it could go further to accommodate all the ethical dimensions identified in section 2 above.

Finally, a duty to take appropriate action to uphold the professional principles if they have been or could be compromised would highlight the need to be alert to ethical risks in legal practice. The professional principles defined in the Legal Services Act 2007 are, of course, a regulatory objective, but they are not the only regulatory objective related to matters of ethics. The public interest and access to justice regulatory objectives also involve ethical considerations. When part of the challenge in this area is that lawyers can focus on the best interests of their clients (professional conduct rules) bringing them into conflict with wider principles,¹⁹ strong emphasis should be placed on values and macro-ethics. Importantly, the omission of reference to the access to justice, legal profession and public legal education statutory objectives detracts from the proposed definition.

We note that the proposed statement of policy refers at paragraph 6 to all the statutory objectives, although the definition on p 19 of the consultation paper seems more limited. Our views are supported by mapping the statutory objectives and professional principles of the Legal Services Act 2007 against the proposed definition. We make further specific comments below the table.

Regulatory objective (s 1(1))	Related statutory professional principle (s 1(3))	Proposed regulatory definition (contentious work)	Proposed regulatory definition (non-contentious work)
[P]rotecting and promoting the public interest			
[S]upporting the constitutional principle of the rule of law	[T]hat persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice	<ul style="list-style-type: none"> • [A]uthorised persons have a duty to act with independence and integrity • They must ensure that the duty to act in the best interests of their clients does not override their duty to the court, or their duty to act with independence and integrity where these come into conflict 	<ul style="list-style-type: none"> • [A]uthorised persons have a duty to act with independence and integrity • They must ensure that the duty to act in the best interests of their clients does not override their duty to act with independence and integrity where these come into conflict
[I]mproving access to justice			
[P]rotecting and promoting the interests of consumers	<ul style="list-style-type: none"> • [T]hat authorised persons should maintain proper standards of work, that authorised persons should act in the best interests of their clients 	<ul style="list-style-type: none"> • [M]aintain proper standards of work • [A]ct in the best interests of their clients 	<ul style="list-style-type: none"> • [M]aintain proper standards of work • [A]ct in the best interests of their clients
	<ul style="list-style-type: none"> • [T]hat the affairs of clients should be kept confidential 	<ul style="list-style-type: none"> • [K]eep the affairs of clients confidential 	<ul style="list-style-type: none"> • [K]eep the affairs of clients confidential
[P]romoting competition in the provision of services within subsection (2)			
[E]ncouraging an independent, strong, diverse and effective legal profession			
[I]ncreasing public understanding of the citizen's legal rights and duties			
[P]romoting and maintaining adherence to the professional principles	<ul style="list-style-type: none"> • [A]ct with independence and integrity 	<ul style="list-style-type: none"> • [A]uthorised persons have a duty to act with independence and integrity 	<ul style="list-style-type: none"> • [A]uthorised persons have a duty to act with independence and integrity
	<ul style="list-style-type: none"> • [T]hat authorised persons should maintain proper standards of work 	<ul style="list-style-type: none"> • [M]aintain proper standards of work 	<ul style="list-style-type: none"> • [M]aintain proper standards of work
	<ul style="list-style-type: none"> • [T]hat authorised persons should act in the best interests of their clients 	<ul style="list-style-type: none"> • [A]ct in the best interests of their clients 	<ul style="list-style-type: none"> • [A]ct in the best interests of their clients
	<ul style="list-style-type: none"> • [T]hat persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice 	<ul style="list-style-type: none"> • [C]omply with their duty to the court to act with independence in the interests of justice 	
	<ul style="list-style-type: none"> • [T]hat the affairs of clients should be kept confidential 	<ul style="list-style-type: none"> • [K]eep the affairs of clients confidential 	<ul style="list-style-type: none"> • [K]eep the affairs of clients confidential

Regulatory objective (s 1(1))	Related statutory professional principle (s 1(3))	Proposed regulatory definition (contentious work)	Proposed regulatory definition (non-contentious work)
		<ul style="list-style-type: none"> They must ensure that the duty to act in the best interests of their clients does not override their duty to the court, or their duty to act with independence and integrity where these come into conflict 	<ul style="list-style-type: none"> They must ensure that the duty to act in the best interests of their clients does not override their ... duty to act with independence and integrity where these come into conflict
[P]romoting the prevention and detection of economic crime			

The statutory objectives relating to the public interest and the rule of law involve a duty to society that is over and above – and may conflict with – the interests of individual clients. So, for example, solicitors often have obligations to persons/organisations who are not their clients in the strictest sense and therefore may experience confusion/conflict over the duty to act in the best interests of their clients. For example, this occurs when a solicitor is acting for personal representatives (PRs) or trustees in probate and trust administration matters. The PRs/trustees are the solicitor's clients, but they also have responsibilities in law to the beneficiaries.²⁰ Appearing against an unrepresented litigant also raises ethical questions about appropriate treatment of that litigant.²¹

It is not just clients (or opposition), or even the justice system, which is harmed by unethical behaviour, it is society. Unethical behaviour may distort the application of the law or social norms. It can create an inappropriate competitive disadvantage, reduce tax income and facilitate wrongdoing which is harmful in other ways (e.g. crimes). Such activity may have adverse effects for multiple non-client stakeholders, including, in the commercial sector, suppliers, creditors, employees, partner/LLP members, the families of all of these, the government and the wider public.²² In the access to justice sector, unethical behaviour has an impact not only on individuals experiencing disadvantage, but on society and on stakeholders such as the NHS. Unethical behaviour in England and Wales may have effects elsewhere in the UK, and overseas.

Unethical behaviour has knock-on effects on, for example, junior lawyers who may then face disciplinary sanctions. There are also potential impacts where lawyers act as gatekeepers, for example, in forming businesses for clients, and facilitating their operation. If the lawyers act unethically this facilitates wrongdoing by the firms they have formed.

Q2. Do you agree with our proposal to set general outcomes?

Yes. General outcomes across the regulated sector help differentiate between the regulated sector and non-regulated sector and promote consistency within it. A challenge may, however, be for ICAEW members and some in-house lawyers, if they are subject to more than one set of regulations or outcomes simultaneously, and to organisations employing members of different regulated professions, where the application of the outcomes differs.

Q3. Do you agree these proposed outcomes address the harms and behaviours presented in the evidence? Are there any further outcomes we should consider?

As in our answer to Q1, outcomes should be developed to relate to the rule of law and public interest specifically (macro-ethics) and recognising access to justice and duties to society and the need for a moral framework in exercising professional judgment in the face of pressure.

A fundamental problem is that some activities are reserved, and others are not. This places firms and individuals under various pressures/conflicts (commercial, structural as well as ethical) and clouds the waters when firms and individuals see clear examples of non-regulated persons supplying legal services and “getting away with it”.

Q4. Do you agree that the proposed general outcomes should be met by regulators through a set of specific expectations?

In principle, this is a positive move but will be undermined if it results in further rigidity or substantial differences in interpretation between different front-line regulators. If a regulator is enabled to appear to be upholding standards, but is in fact targeting low-hanging fruit (junior lawyers, sole practitioners, small firms) so as to present itself as being active in upholding ethical standards, the more vulnerable are disproportionately punished and the professions are starved of innovation and new blood.

There must be proportionality in the application of sanctions, particularly where junior and trainee lawyers have been adversely affected by inadequacies in supervision. More robust practical (and possibly legal) support is required for those facing pressure from firm or clients. This could entail, e.g. reinforcing confidential helplines, providing plenty of online advice and practical examples to make it clear when there may be an issue so that lawyers need to access further help.

The lack of professional indemnity defence cover for junior lawyers who may be caught up in disciplinary matters places them in an especially vulnerable position.²³

Q5. Do you agree that regulators should demonstrate that evidence-based decisions have been taken about which expectations are appropriate to implement for those they regulate?

Yes, in principle all decisions should be evidence-based. However, when the overarching values and macro-ethics are concerned, it should be assumed that these are expectations of every regulated lawyer as a minimum and a foundation of the right to practice. Beyond this the question is not which expectations a regulator should *opt* to apply – with the exception of the straightforward question of whether their regulated community does contentious work or not – but *how* those expectations apply to their particular work type and community. Evidence should be empirical and may involve material from non-law disciplines such as psychology.²⁴

4. Outcome 1

Outcome 1: authorised persons have the right knowledge and skills on professional ethical duties, both at the point of qualification and throughout their career.

Q6. Do you agree with the proposed outcome 1?

Yes, however the question of ethics is not confined to the “knowledge and skills” identified in the question but, fundamentally, to attitudes, values and behaviours. The latter is the foundation of an appropriate and resilient professional identity. All those dimensions must be addressed, developed, and reinforced, throughout the career.

In 2013, the Legal Education and Training Review (LETR), commissioned on behalf of the LSB by the SRA, BSB and what was then IPS, noted deficiencies in more than one ethical dimension:

A number of gaps and deficiencies are identified in the knowledge, skills and attributes currently developed by [legal services education and training] (LSET). The centrality of professional ethics and legal values to practice across the regulated workforce is one of the clearest conclusions to be drawn from the LETR research data, and yet the treatment of professional conduct, ethics and ‘professionalism’ is of variable quality across the regulated professions. There was general support in the research data for all authorised persons receiving some

education in legal values and regulators are encouraged to consider developing a broad approach to this subject rather than a limited focus on conduct rules or principles.

Consequently, it made the following recommendations:

Recommendation 6

LSET schemes should include appropriate learning outcomes in respect of professional ethics, legal research, and the demonstration of a range of written and oral communication skills.

Recommendation 7

The learning outcomes at initial stages of LSET should include reference (as appropriate to the individual practitioner's role) to an understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values.

Recommendation 9

Learning outcomes should be developed for post-qualification continuing learning in the specific areas of:

- Professional conduct and governance.
- Management skills (at the appropriate points in the practitioner's career. This may also be targeted to high-risk sectors, such as sole practice).
- Equality and diversity (not necessarily as a cyclical obligation).²⁵

These recommendations remain relevant, and they, and the evidence base underpinning them, should be taken into account by the LSB in formulating its new policies. We add to this our proposal (recommendation i) in our recent report on access to justice to the LSCP and LSB:

The front-line regulators, with strategic direction and research leadership from the LSB, should revise codes of conduct, conflict of interest rules, associated ethics training and approaches to compliance monitoring for greater focus on access to justice, the rule of law and equality before the law. This can include reference to understanding the law, rights and duties, promotion, and maintenance of the professional principles for clients/consumers.²⁶

We consider this outcome by reference to the different stages of post-school legal education.

The undergraduate law degree (and conversion course)

None of the regulated legal professions in England and Wales require all, or even any, of their members to have a law degree.²⁷ A minority of law graduates become lawyers. Unlike the USA and some other jurisdictions, discussion of ethics in the undergraduate curriculum is at one remove from practice. Nevertheless, for those who do take law degrees, the current benchmark statement requires that they graduate able to “identify and examine underlying values and ethics within law, culture and society and on a personal level” (values and macro-ethics).²⁸ Those undertaking placement or clinical experience may also come into contact with professional conduct rules.

It is, in our view, however, difficult to divorce academic education in the law from its societal, political and ethical context. Especially in a common law system, it is important to understand the role of actors in the legal system – including lawyers and judges – the choices they make and the ethical constraints on them, including the place of character education as part of the values dimension.²⁹ There is an interest in, and a literature on,³⁰ – including substantial resources held by the International Forum on Teaching Ethics and Professionalism³¹ – teaching ethics at undergraduate level, even if the focus is on values and macro-ethics. To do otherwise creates the possible paradox that an undergraduate might leave their degree, having taken the appropriate elective module, with a stronger understanding of medical ethics than of legal ethics. An appropriate model might be found in the requirements of the Law Society of Scotland:

Display critical thinking about laws, their place, and the role of solicitors in Society in society by: ... - Showing awareness of the ethics and standards applying to the legal profession in Scotland. - Showing awareness of how professional ethics interplay with the commercial work of the legal profession.³²

That said, a recent survey identified 56 undergraduate modules, at different institutions in England, Wales and Northern Ireland, offering elective modules with an ethics component.³³

The LSB has, however, no direct regulatory remit over universities and the front-line regulators – with the exception of the BSB³⁴ – do not mandate undergraduate law degree content, although they may provide partial exemptions for degrees, or particular modules. In 2021 the Society of Legal Scholars suggested the formation of an expert panel of educators to assist its work, which could assist in understanding and evaluating the transition between the law degree and vocational education (in those professions for which it is relevant).

Vocational courses and assessments (face to face, online or hybrid)

By Legal Services Act 2007, s 4, the LSB must “assist in the maintenance and development of standards in relation to ... the education and training of persons [authorised to carry out reserved legal activities]”. By s1(1)(f), the LSB and the other front-line regulators must “encourage[e] an independent, strong, diverse and effective legal profession”. The word “ethical” is omitted but, we submit, is inherent in this statement, particularly where “independence” amounts to disappointing a client. The consultation paper refers on multiple occasions to the duty to act “independently” and it appears in the definition in para 25 of the consultation paper.

Vocational courses inevitably involve some kind of coverage of at least the professional conduct rules, if not macro-ethics and values.³⁵ Coverage may be in separate courses and assessments or pervasive, possibly as determined by the front-line regulator.³⁶ It has not been clearly demonstrated, either in law or in medicine³⁷ that ethical failures at university or in a vocational course (see p 15 of the consultation paper) can be taken as predictive of a propensity to act unethically in later practice. The regulator’s interest in such coverage may, therefore, be defensive: that the practitioner cannot claim not to know the professional conduct rules exist, or what they say.

For those professions that mandate, and quality assure, a vocational course (i.e. those other than the SRA or the patent attorneys), there is space to include treatment of all three ethical dimensions in the safe space of the classroom, and in the explicit context of the profession concerned. This is also possible in student clinics, where real ethical issues arise and appropriate responses are modelled by practitioners skilled in supporting young lawyers. This can be very different from the workplace, and where the vocational course precedes work experience, several years distant from that classroom.

In our work in this area, we have suggested that Rest’s four component model of ethical behaviour is a useful way of explaining the precursors to ethical behaviour in the workplace, including in particular, what is needed to supplement what is possible in the classroom.³⁸ That then provides a roadmap for approaches that can be taken in work experience and after qualification. We have summarised Rest’s four components as:

- (1) Moral sensitivity (the ability to identify that a situation engages ethical considerations).
- (2) Moral judgment (the ability to evaluate alternative courses of action in response to that situation as more or less ethically justified).
- (3) Moral motivation (in choosing an alternative, prioritising ethical values above others such as personal success, personal protection, loyalty to the firm).
- (4) Moral character (‘having the strength of your convictions, having courage, persisting, overcoming distractions and obstacles, having implementing skills’³⁹).

Our work indicates that vocational education addresses components 1 and 2. This leaves young lawyers – in the absence of strong support in the workplace or a specific intervention such as “Giving Voice to Values”⁴⁰ (GVV) – vulnerable in the workplace. GVV provides a tool kit for people to feel empowered to have difficult conversations when their ethics, values are being challenged or they are otherwise being urged to do something wrong. It provides strategies to help them articulate and maintain an ethical stance in the face of opposition from clients and seniors. It

explores the skills needed to deal with ethical challenges and values conflicts and sees people practice and rehearse various strategies for having constructive conversations. It is a form of applied ethics as it assists in managing ethical conflicts. It involves analysing the problem, the laws or ethics as application, perspectives, rationalisations, and concerns in a constructive

format that helps people know what to say, who to say it to, and how to say it, when you know it is right in a particular situation.⁴¹

Members of the response group have used this approach in the UK, Australia and in Armenia. This includes work by Curran with senior partners in law firms, middle level legal managers, in-house teams, junior lawyers and trainees and law students in Australia and by Jarman with junior and senior lawyers in Armenia.

Regulators could pay greater attention not only to what is covered in vocational education, but how it links to the workplace and, in particular, equips the new lawyer with strategies to withstand ethical pressure in their later careers. The potential for GVV or other character-based education for professional judgment and action, to play a part in the curriculum should be explored.⁴² We have suggested, in our answer to Q14, that information on what is taught and how it is assessed should be collected from educators. Where training is sequential (e.g. where a vocational course precedes a period of workplace experience), there should be a smooth progression across Rest's four components. This requires clarity and liaison between those responsible for the different stages.

Vocational assessments in ethical reasoning also require attention. Most licensing assessments focus on the application of the relevant Code of Conduct and compliance frameworks, either in short form or multiple-choice questions (Rest's components 1 and 2). Consequently, only a limited inference can be taken from a pass in any of the vocational assessments aligned to the course specification which often have a narrow focus on professional conduct rules as set out in a code of conduct. There is little additional support for ethical decision-making and inner dialogue during the decision-making process. The problems associated with specific areas of legal practice such as conflicts, litigation conduct, legal professional privilege, sanctions and anti-money laundering legislation and prosecutorial discretion⁴³ also need to be placed within the context of ethical duties and challenges.

This problem is not unique to lawyers, as recent research on the ethical dilemmas faced by doctors and a perceived gap in their training shows. There is evidence that new doctors require additional support in managing ethical dilemmas and decision-making when confronted with live issues in practice. One study pointed to a sense of fear and a perception that medical training has failed to equip them to navigate real moral and ethical challenges in practice.⁴⁴

Furthermore, evidence from university medical schools' points to an appetite amongst educators and students for a need to utilise a more varied approach to assessment.⁴⁵ The engineering of questions on the nuance of moral decision-making (Rest's component 3), rather than just the clear identification of a specific rule or guidance note, is challenging. Further work will need to be undertaken to decide upon the most appropriate method, but some may be via the use of reflective logs, small peer review groups, and simulated case study 'serious games' could be considered.⁴⁶

The consultation paper promotes a need for engagement with ethical duties and challenges akin to Rest's model (especially components 3 and 4) and the GVV framework. However, the current vocational assessment models tend to focus on the professional conduct rules dimension, which has the potential to narrow the frame of reference of the tests to, arguably, only components 1 and 2 in Rest's model.⁴⁷

Pre-qualification/pre-licensure work experience

In the course of articling, students are exposed to the culture and language of the profession, the norms of practice and the values and beliefs of practitioners. These matters cannot be taught – they must be experienced.⁴⁸

All regulated professions under the Legal Services Act 2007 require a period of supervised work experience prior to qualification or, in the case of the Bar and notarial profession, prior

to independent practice. The ethical climate in employing organisations is a contributor to young lawyers' wellbeing as well as to their professionalism.⁴⁹

This period is, however, critical in socialisation and in developing a professional identity. If the classroom has only so far covered professional conduct rules and Rest's components 1 and 2 (see p 16 and para 46 of the consultation paper), it is the place where those conduct rules are applied, where macro-ethics and values are established and where – with or without the aid of GVV – lawyers acquire Rest's components 3 and 4. Indeed, a former president of the Law Society has commented:

Education and training are foundational building blocks, but to apply and maintain ethical competence, we need the informal learning that happens at work when supported by a healthy culture.

Our solutions can't simply rely on more training or compulsory education on ethics, which can sometimes focus too narrowly on the application of regulations.

Such an approach is likely to miss out the influence organisational values and expectations have on professional practice in real life, where pressures from clients, courts or our employers can compete and create tensions.

Some of the dilemmas arising out of these competing pressures can't be fully solved only by paying close attention to the Code of Conduct.⁵⁰

The workplace is, however, also the place where the new lawyer is at their most vulnerable, personally, professionally and ethically (see p 17 of the consultation paper). The workplace experience is not necessarily quality-assured or inspected by the front-line regulator, and the employer has the power to grant or withhold the certification that is necessary to qualify. The workplace may or may not exhibit and transit appropriate values and macro ethics.⁵¹ The trainee may be shielded from even the most basic interaction with professional conduct rules.

The frequency with which trainees had directly encountered ethical and conduct issues themselves, beyond standard matters such as client confidentiality, was typically very low for a number of reasons, including:

- no such issues had yet arisen on the files they were working on;
- in their organisation, standard processes such as conflict checks for new clients, were carried out by someone else before the file was allocated to a fee earner;
- when issues arose, the organisation's processes required this to be escalated to a more senior colleague for resolution.⁵²

To this extent, the type of ethical learning or development during the work experience – despite ethics requirements in the competence statement – may not be measured or validated.

We can compare the Law Society of Scotland's approach to the outcomes of the solicitor's training contract.⁵³ These are consciously designed to follow on from the outcomes of previous stages of education and include macro-ethics as well as professional conduct rules. In England and Wales, CILEX and the BSB are unusual in requiring evidence of engagement with the professional conduct rules prior to qualification. CILEX does this by portfolio.⁵⁴ The BSB requires pupils to pass two ethics assessments, one during the vocational course and the other during pupillage.

We suggest that this is a critical period. To the extent that front-line regulators withdraw from oversight of vocational courses and of work experience, it is the point which requires not only flexibility in the approach to sanctions (see our answer to Qs 4 and 10), but clarity and independence of support resources for young lawyers. Such support must go beyond the application of professional conduct rules and engage macro-ethics and values.

The training and role of the supervisor (where one is required by the front-line regulator) in forming a professional identity should also not be overlooked:

By adopting a multi-functional understanding of supervision found in scholarship from professional disciplines, as well as taking guidance from the structured arrangements

comprising psychology internships, the legal profession could effectively utilise [work experience] as a means for assisting junior lawyers reach ethical maturity. What remains problematic is how legal practitioners, especially those in practice environments structured around the billable hour, could accommodate best practices in supervision.⁵⁵

At the point of qualification/independent practice

The professional competence statements are in the most part pegged at the scope and level of the point of qualification (the trade mark attorney and KC statements are an exception). Consequently, they do not of themselves assist with the additional responsibilities of a more senior lawyer in supervision and modelling a professional identity⁵⁶ for the team or organisation that accommodates Rest's components 3 and 4 or in fielding ethical problems escalated by more junior lawyers (see para 63 of the consultation paper). The regulation of post qualification demands not only a continual refreshing of and reflecting on the baseline of values, macro-ethics and professional conduct rules, but recognition and support of new roles and responsibilities. We cover continuing professional development/ongoing competence/continuing competence in our answer to Q8 below.

Q7. Do you agree with the specific expectations proposed under outcome 1?

Subject to our comments above about the definition, yes. Education and training should cover all three ethical dimensions. Education should cover all four of Rest's components to translate knowledge into resilience and action. Items 1b and c seem particularly important.

5. Outcome 2

Outcome 2: regulators have a framework of rules, regulations, guidance and other resources which make clear that professional ethical duties are integral to the way authorised persons are expected to behave and act throughout their careers.

Q8. Do you agree with the proposed outcome 2?

Yes. A focus on assessment at the point of qualification (or, in some professions, independent practice) and on competence statements pegged to the point of qualification (before the event regulation⁵⁷) may have tended to obscure what should be self-evident. Sanctions (after the event regulation) are no substitute for prevention. The majority of a practitioner's career is post-qualification.

The effectiveness of a post qualification (during the event) ethical framework:

will depend on the clarity and flexibility of its drafting in providing both general values reflecting the role of business as a good citizen and specific rules to implement these values, and in indicating how a balance between conflicting values or stakeholder demands should be resolved. Many of these values are already widely shared (such as honesty, integrity and fairness) but can easily be suppressed as a result of pressures on the business or the individuals within it, or socialization into acceptance of dubious practices.⁵⁸

New lawyers, fresh from training and assessment, may be better attuned to ethical demands than their seniors.⁵⁹ While juniors are as accountable to the front-line regulator as their seniors,⁶⁰ they are, however, often led to expect that their responsibility is discharged by referring ethical matters to their seniors.

Those seniors, subject to "ethical fading" (referred to in the consultation paper as "ethical apathy") over time, are in many respects more ethically vulnerable and the impact of their ethical failures more extensive than that of their juniors. The concept of ethical fear in the face of challenge was noted in a number of medical studies, especially for new doctors. It is important to factor in such problems at the point of qualification and the fact that new practitioners are often ill-equipped by their training to deal with the professional emotional strain of ethical dilemmas and they know it.⁶¹ We note in our answer to Q8 above, that there are limited requirements actively to reflect on or engage with ethical requirements of whichever dimension, in the majority of the current regulation structures, after qualification.

CPD requirements with a mandatory ethical component are rare amongst the regulated legal professions in England and Wales. CILEx requires that one CPD entry each year covers “professionalism” which can (but need not) include professional ethics.⁶² The majority of ICAEW members are required to undertake at least an hour’s CPD activity on ethics annually.⁶³

In Australia, the Victorian Legal Services Board and Commissioner has recently reported on the interaction between poor lawyer wellbeing and unethical behaviour.⁶⁴ Its CPD rules require at least one of ten total units be devoted to “ethics and professional responsibility”.⁶⁵ There is also guidance available on how ethics can be incorporated into CPD in substantive subjects.⁶⁶ While such requirements may act as a refresher on professional conduct rules, it seems less likely that they act to reinforce other ethical dimensions. Further, the “input” model of CPD, where this is used, generally measures attendance or participation and not necessarily what has been learned or applied in the workplace.

Front-line regulators should mandate and integrate more substantial ethical education throughout the career.

Q9. Do you agree with the specific expectations proposed under outcome 2?

Subject to our comments above about the definition, yes. Item III is particularly significant. It is very important to work out the ways in which ethics are undermined, and how to counteract this.

6. Outcome 3

Outcome 3: authorised persons are supported and empowered to uphold their professional ethical duties when they are challenged

Q10. Do you agree with the proposed outcome 3?

Yes. However, empowerment must be meaningful. The SRA statement of solicitor competence, for example, anticipates that all solicitors can “[resist] pressure to condone, ignore or commit unethical behaviour”. In practice, without mentoring, access to helplines and support networks outside their own organisation, and education that includes Rest’s components 3 and 4 and techniques such as GVV, lawyers are not so empowered. Those who experience or fear retribution are not so empowered.⁶⁷ If regulators are, or are perceived to be, heavy-handed in sanctions, that disempowers both those sanctioned and others who fear the same sanction being applied to them.⁶⁸ This issue could impact junior lawyers disproportionately.⁶⁹

Achieving this outcome is not simply about action by front-line regulators to ensure that regulation is proportionate and appropriate, that support is available to practitioners, and that whistleblowers will not be penalised⁷⁰ (see p 17 and para 62 of the consultation paper), but in educating the professions. As Berry has argued, this requires educating and, if necessary, sanctioning legal services organisations to

encourage [them] to reduce internal economic pressures on individuals within the business which might result in unethical or ethically dubious behaviour, in order to reduce the abuses which result from “tension between profit and professionalism”

[and]

enable [them to resist external competitive pressures which may otherwise result in anti-competitive and anti-social unethical practices, both because of the need to generate profits in a competitive market and because ‘[i]t is easy to fall into the trap of believing that because a practice is being done by many (bribes, kickbacks.....) that it is an acceptable practice’.⁷¹

Q11. Do you agree with the specific expectations proposed under outcome 3?

Yes, particularly III, IV and V.

7. Outcome 4

Outcome 4: regulators identify and use appropriate tools and processes to monitor and supervise the conduct of authorised persons, and where necessary, take effective action to address noncompliance with professional ethical duties

Q12. Do you agree with the proposed outcome 4?

Yes, steps must be taken to monitor and improve the current (inadequate) situation. What is learned through these processes should be fed back to the profession and embedded in training and authorisation processes.

Q13. Do you agree with the specific expectations proposed under outcome 4?

Yes. Evidence should also be collated from practitioners in at-risk categories and from practitioners who have been sanctioned. It should also be collected from organisations providing education and training, in the public and in the private sector, and from students and trainee lawyers. Evidence should also evaluate, over the medium and long-term the effectiveness of different interventions put into place by the front-line regulators (see our answer to Q14 below).

Regulators should be encouraged to utilise metrics and tools readily available to the authorised persons to facilitate their own real-time review of ethical risk and to support remedial action. Ethical risk can hide in plain sight as an undisclosed conflict or other default and any tools that can be repurposed to inform ethical decision making should be utilised. Reference to tools used in other contexts may be helpful. For instance, fee dependency on a particular client or work type could bring with it additional ethical risk. Recent work by the Financial Reporting Council⁷² for the audit profession highlighted the potential impact on independence of fee income dependency beyond 10% from a company or related group of companies. Similar, metrics that are easy to implement and use, and based on available data may serve to identify and manage ethical risk. The same may be true of activity codes within law firm case management systems that can flag work on ethical issues on a thematic basis, or via an ethical peer review, that would provide useful risk management data for authorised persons.

8. Outcome 5

Outcome 5: regulators regularly evaluate the impact of their measures to pursue outcomes 1 to 4 above and make changes, if required, to ensure that they remain fit for purpose

Q14. Do you agree with the proposed outcome 5?

Yes. However, steps must be taken to ensure that the evaluative processes used are literature- and evidence- informed and robust.

Q15. Do you agree with the specific expectations proposed under outcome 5?

Yes.

9. Final questions

Q16. Do you agree with our proposed timelines for implementation?

Yes. Action is required sooner rather than later. Mobilisation, commitment and allocation of resources are required to support effective action by authorised persons in the public interest. Without a timeline there is a risk of procrastination.

Q17. Is there any reason why a regulator would not be able to meet the statement of policy outcomes within the timeframes proposed? Please explain your reasons.

See our answer to Q 16 above. Front-line regulators, especially the smaller ones, should be encouraged to collaborate and share resources.

Q18. Have you identified any equality impacts, we haven't considered which, in your view, may arise from our proposed statement of policy?

There is an ethical aspect to the statutory objective relating to access to justice. Studies show that if people are experiencing disadvantage their experience of quality legal experience is low and trust in the legal profession is also low.⁷³ This has serious implications for the rule of law and equality before the law. In our recent report on access to justice to the LSCP and LSB, we suggested:

a stronger link between the role of ethics, vulnerability, trauma informed practice and access to justice service delivery could be explored in CPD. This was suggested by the front-line service agency participants in the research as a critical need to ensure quality service to the most vulnerable.⁷⁴

Q19. Do you have any evidence relating to the potential impact of our proposals on specific groups with certain protected characteristics, and any associated mitigating measures that you think we should consider?

Our response above has noted the special case of junior and trainee lawyers, especially in the workplace. Other groups may require tailored support, including recognition that they are more susceptible to being complained about than other groups.⁷⁵ Some of the recent studies of ethical challenge in the medical profession indicated a particular level of distress amongst female junior doctors and a perception that their medical training did not equip them for the ethical dilemmas encountered in practice.⁷⁶

Q20. Are there any other wider equality issues or impacts that we should take into account and/or any further interventions we should take to address these in our statement of policy?

See our answers above. Questions of sustainability and wider questions of legal ethics as they relate to climate change are also relevant.⁷⁷ As are issues relating to technology and AI.⁷⁸

Q21. Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and anticipated benefits?

No.

Q22. Do you have any further comments?

No.

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