LEGAL SERVICES BOARD

Board paper (25) 03

Meeting: Legal Services Board

Date: 21 January 2025

Item: Paper (25) 03

Title: Professional Ethics and Rule of Law – Draft Policy Statement

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Status: Official

Introduction: Purpose of paper

1. This paper presents a draft statement of policy on professional ethics (Annex A) and the rule of law (PERL) and seeks approval to go to consultation on the proposed policy. The draft consultation is attached at Annex B.

Recommendation(s)

2. The Board is invited to:

- **Discuss** the proposed draft policy statement on PERL; and
- **Approve** the publication of a draft policy statement and consultation paper and **agree** to delegate to the Chief Executive the approval of any minor drafting changes prior to publication.

3. This paper summarises the rationale for intervention, as set out more fully in the consultation document. The Board is therefore encouraged to focus in particular on this cover paper and the draft statement of policy.

Background

4. The Board received an overview of the PERL programme including evidence we had collated on behaviours and harms relating to PERL in January 2024. At that meeting, it was agreed that we should explore the extent to which regulators' existing rules and codes of conduct can address professional ethical misconduct and to consider whether further regulatory intervention may be necessary to better incentivise and support legal professionals to identify, navigate and respond to professional ethical issues.

5. Since then, we have gathered and analysed further evidence, engaged stakeholders (including through engagement with the PERL Reference Group), and undertaken a gap analysis of regulators' current frameworks. All of this has enabled us to reach a view that there is a case for regulatory intervention, and we have therefore prepared a draft policy statement and consultation for the Board's consideration.

6. The PERL programme is grounded in the regulatory objectives to support the constitutional principle of the rule of law; promote and maintain adherence to the professional principles[1]; and protect and promote the public interest. It seeks to respond to the challenge in the LSB's sector-wide strategy to ensure strong professional ethics, in recognition of the central role that lawyers play in upholding the rule of law and supporting the effective administration of justice.

7. Behaviours which have the potential to undermine professional ethics and the rule of law have been brought into sharp focus in recent years through several high-profile examples, including the misuse of non-disclosure agreements (NDAs), and Strategic Lawsuits against Public Participation (SLAPPs). The conduct of solicitors and barristers related to the Post Office Horizon IT scandal has also been heavily scrutinised during a lengthy and ongoing Public Inquiry.

8. As oversight regulator, we wanted to understand how and why some of these examples of poor ethical conduct were occurring and to explore how regulation could play its part to address them. Since early 2022, we have engaged extensively and carried out wide reaching evidence gathering to understand the types of conduct that may lead solicitors, barristers, chartered legal executives and other regulated legal professionals (referred to in the Act and the statement of policy as 'authorised persons') to behave unethically, whether that is with respect to their clients, the courts and the administration of justice or in their different roles. Our evidence base comprises:

   - An independent literature review commissioned by the LSB, examining how the rule of law applies to authorised persons and how they might fail to uphold sufficiently high standards of professional ethical conduct in practice;

   - Our Call for Evidence on the misuse of NDAs;

   - Ongoing engagement and discussions with our PERL reference group which comprises over 50 senior stakeholders across the legal regulators we oversee, representative bodies, legal professionals, academics, and civil society groups, to consider; and,

   - Responses to information requests from the legal regulators we oversee, to better understand the prevalence of the examples of poor ethical conduct identified through the evidence, any other examples of poor ethical conduct, and to what extent existing regulatory frameworks address these.

9. To maintain public trust in the legal profession, regulators require authorised persons to meet a range of professional ethical obligations, including those enshrined in the Act's professional principles. Despite this, our evidence makes clear that some authorised persons fail to uphold them. Our evidence has

[1] Section 1 of The Legal Services Act 2007 (the Act) contains the regulatory objectives, including the "professional principles" which are— (a) that authorised persons should act with independence and integrity, (b)that authorised persons should maintain proper standards of work, (c)that authorised persons should act in the best interests of their clients, (d)that 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, and (e)that the affairs of clients should be kept confidential.

identified types of conduct that fall short of public expectations of lawyers to uphold professional ethical duties, ranging from unintentional behaviour, through to more severe, intentional and even criminal conduct, including:

- Abusing or taking unfair advantage through excessive conduct e.g. SLAPPs;
- Silencing those with valid legal claims and preventing victims speaking out e.g. misuse of NDAs;
- Poor case handling including misleading courts, making false claims, distorting evidence, and misrepresenting facts;
- Challenges maintaining independence, particularly for in-house professionals;
- Ethical apathy among lawyers about their work and the work of their clients, leading to a client-centred, ‘client-first’ outlook;
- Creative compliance to circumvent the intended purpose of the law;
- Client association or disassociation

10. The evidence and analysis are set out in full in Annex B. In essence, our analysis shows that the common reasons driving these behaviours are:

- a lack of understanding and/or due regard to the significance of what upholding professional ethical duties means in practice, and how to prioritise different duties when they come into conflict with each other, namely duties to the client, the court and the administration of justice.
- a disproportionate focus on preserving client interests to the detriment of duties to the court/public authorities, rule of law and administration of justice.
- a lack of empowerment and support to enable authorised persons to maintain their professional ethical duties in the face of commercial pressures and powerful clients, particularly for those working in an in-house capacity.

Gap analysis: the case for regulatory intervention

Defining *professional ethical duties*

11. The need to uphold the fundamental principle of professional ethics is applicable to all authorised persons. Our evidence shows that authorised persons’ way of thinking and acting is shaped by: their education and training; their roles and experiences in the workplace; the cultures in those workplaces; and, the expectations set by employers, clients, and regulators. However, beyond standards set through Codes of Conduct and Guidance at the point of qualification, our evidence and analysis show there is limited bespoke PERL education and training and regulatory support and guidance, both at the point of qualification and throughout an authorised person’s career to help them understand and maintain the overarching principle of professional ethics: that the duties to uphold the rule of law and the administration of justice supersede the duty to the client when they come into conflict.

12. To put this beyond doubt, we have therefore explained in our draft policy statement what we mean by adherence to *professional ethical duties* based on the professional principles in the Act, as follows: *authorised persons have a duty to act with honesty, independence and integrity; maintain proper standards of work; keep the affairs of clients confidential; and comply with their duty to the*

court to act with independence in the interests of justice. They must place their duty to the court and their duty to act with honesty, independence and integrity above the duty to act in the best interests of their client where these come into conflict

13. We have considered what form of regulatory intervention is likely to be most effective in remedying the issues identified. In doing so, we have been guided by the better regulation principles to ensure that any regulatory intervention is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

14. The primary options available to us are the issuing of a statutory statement of policy or statutory guidance. In our view, a statutory policy statement is a more appropriate tool, given the extent of the evidence available to us and the importance of establishing clear outcomes, underpinned by expectations of action against which we can hold regulators to account.

15. We have further considered whether it would be more effective to issue a single policy statement or separate policy statements each addressing different aspects of poor conduct. In our view, a single statement is more proportionate, and is likely to be more effective and future-proof than the alternative, since it would be capable of capturing new forms of poor conduct that may arise in future.

<u>The proposed five outcomes</u>

16. We are proposing that regulators pursue five outcomes to support authorised persons to understand and uphold their *professional ethical duties*. Each outcome is underpinned by expectations as set out in the proposed policy statement (Annex A). The five outcomes are as follows - **Regulators must:**

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

17. The responses from the regulators to our information gathering exercise broadly showed that authorised persons are expected to learn the basics of professional ethics (e.g. Codes of Conduct & Guidance) as part of their vocational learning and qualification. One regulator has recently introduced a mandatory, one-hour per annum, CPD requirement on ethics. Beyond this there is limited bespoke education and training - both at the point of qualification and throughout a legal professional's career - to help them specifically identify and understand how to apply their professional ethical duties.

18. Some members of the PERL Reference Group noted that the examples of poor conduct that had been identified in our evidence were in large part symptomatic of the pre-qualification education and training, and the Codes of Conduct of the regulators. The Codes were considered too prescriptive without teaching aspiring lawyers about the overarching role they play in society and how to prioritise different duties in practice.

Outcome 2: adapt their rules, regulations, guidance and other resources as they consider appropriate to ensure that *professional ethical duties* are the core foundation for the way authorised persons behave and act throughout their careers:

19. The literature review identified the need for regulators to broaden their expectations of what professional ethical conduct and upholding the rule of law means in practice e.g. independence, honesty, integrity and recognising obligations to the client, alongside duties to the court, and to the administration of justice. It concluded that solely serving client interests is too narrow in the context of legal services and legal services regulation. The review outlined that regulators could do more to help lawyers, and particularly those working in-house, to balance serving client interests against maintaining independence.

20. While regulators have ethical frameworks through Codes of Conduct, principles, and guidance, the evidence we have exemplifying poor ethical conduct indicates regulators' expectations around *professional ethical duties* are often either not properly understood or are disregarded altogether.

21. There remains a gap in regulators' proactive identification and addressing of ethical challenges, in part because the Act's inclusion of ethical concepts is across different statutory provisions. Our evidence indicates that a distinct, targeted and cohesive approach to ethics would ensure that those elements of professional ethical duties that are focused on protecting public interest are not overlooked in serving client interest alone.

22. We believe there are useful opportunities for collaboration between regulators on this outcome, including those overseeing other sectors and we encourage regulators within and beyond the sector to learn from each other's approaches and coordinate in areas of common interest to ensure *professional ethical duties* are maintained.

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

23. The significant roles workplace culture and leadership play in influencing and enabling ethical conduct have been consistently apparent across our evidence. In addition, Professors Moorhead and Vaughan have highlighted that firm and community culture speak to; the ethical climate of the workplace, the role of supervisors, responses to and perceived handling of misconduct, peer group behaviour and influences, client and stakeholder influences, and perceptions of attitudes. Our stakeholder engagement, including through the PERL Reference Group, highlighted the significance of emulating the norms authorised persons see, particularly through leadership and culture.

24. Our gap analysis has found that codes of conduct and guidance are mostly focused on professional responsibilities, rather than the environments in which authorised persons work. While we can see the beginning of some changes to this, for example the SRA's guidance on in-house lawyers which raised awareness about toxic work cultures and mental health and wellbeing, there

appear to be no established practices that take account of the intersection of professional ethics, working environments and wellbeing.

25. We recognise that cultural and leadership change requires a collective effort across the sector beyond regulation, though our regulators are uniquely placed to enable and support authorised persons to act ethically and have powers to steer a shift in culture. They can offer guidance and resources to enable their regulated communities to maintain their *professional ethical duties*, set expectations on reporting unethical behaviour, establish a line of accountability and speak up when necessary. We also know accountability regimes can reduce problematic risk taking by authorised persons. Moorhead and Vaughn noted the example of the *Senior Managers Regime* in the UK across the financial services sector, which puts the responsibility of consequential decision-making on senior leaders to set a clear line of accountability, address the inequalities of power between senior and junior decision-makers and reduce risk.

26. Members of our PERL Reference Group expressed the need for governance structures, with clear reporting lines, particularly for those in-house. The SRA has guidance to share with employers to help develop an understanding of an in-house solicitor's professional obligations. ICAEW has a technical help sheet on ethics for chartered accountants in business environments and CLSB issued a Guidance Note for Unregulated Employers of Costs Lawyers advising employers against impeding compliance with professional obligations. Aside from these examples of guidance for employers, our understanding is that no accountability regimes expressly concerned with professional ethics currently exist.

Outcome 4: identify and use appropriate tools to monitor the conduct of authorised persons, and where necessary take action to address non-compliance with *professional ethical duties:*

27. The Literature Review recommended that regulators continually develop the evidence base on risks posed by legal professional misconduct and adapt rules, guidance, and their operational strategies for promoting the rule of law. It also stressed the importance of understanding the challenges at various levels, including the behaviour of individual authorised persons and their relationship to their organisations (whether it's a law firm, chambers, or an in-house environment). Responses to our information request show that there is no specific focus through monitoring, compliance or enforcement on professional ethics. The PERL Reference Group also raised the importance of learning from real-life cases, data collection and analysis to inform regulatory approaches.

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

28. Regulators should have processes in place to evaluate the impact of the measures they undertake to meet outcomes 1-4 to make sure that they remain relevant and fit for purpose. We know from our historical policy development that for policy interventions to achieve their intended objectives, regulators must be able to evolve their approach, informed by live issues and emerging risks.

29. One example of an emerging issue is the intersection between technology and ethical considerations. The increasing uptake of technologies such as Artificial Intelligence (AI) across the legal sector has the potential to significantly improve the quality and accessibility of legal services but there are also ethical considerations. For example, the use of AI in service provision may exacerbate and/or amplify existing poor ethical conduct by authorised persons. Regulators should exploit their horizon scanning capabilities to support their understanding of emerging challenges to *professional ethical duties*, as well as their ability to proactively address these issues to mitigate risk.

<u>Draft statement of policy and consultation</u>

30. We consider that a statement of policy will provide an effective, proportionate and targeted regulatory tool to ensure that regulators embed expectations on upholding professional ethical conduct in their regulatory arrangements and have assurance that professional ethical conduct is upheld by those they regulate.

31. Given the diversity of the market and the need for regulators to be able to develop targeted and proportionate risk based approaches, we have ensured the policy statement is outcome-focused and sufficiently flexible, to allow regulators to develop approaches that are fit for purpose for their regulated communities, while ensuring a minimum standard of professional ethical conduct requirements (e.g. through a set of expectations under each outcome) across the sector.

Long-term change in workplace and leadership culture

32. The Board has also asked us to consider our role in driving lasting change in how the legal sector engages with professional ethical duties, which will extend beyond our proposed policy expectations for regulators. As oversight regulator, we are uniquely positioned to bring stakeholders together and maintain momentum on professional ethics reform in the sector, including long-term change in workplace and leadership culture.

33. We are drafting a longer term PERL engagement strategy plan covering the consultation period and beyond, which will include, for example: utilising our PERL Reference Group as ‘change makers’; active participation in high profile events (including panels at the LSB annual conference); contributions to public discourse; convening cross sector regulator engagement; regular monitoring and discussions with regulators; and capitalising on opportunities to advocate for cultural change and share emerging best practices.

34. We will use our horizon scanning capability to help identify emerging issues, track progress and best practice within and beyond the sector. We will measure longer term changes through our proposed outcomes 4 and 5 and incorporate our expectations and measurements into the regulatory performance framework.

Next steps

35. Subject to Board member’s comments, and to final drafting changes approved by the Chief Executive, we will consult on Annexes A and B for 12 weeks. This will be supported by a communications and engagement plan.

Risks and mitigations	
Financial:	N/A
Legal:	The proposals to define professional legal ethics and how regulators should implement it incurs with it increased legal risks. The legal team was engaged throughout the process of developing the proposals for consultation, advising on risks and mitigations.
Communications and engagement:	We expect there will be views for and against our proposals. We will engage with stakeholders during the consultation and seek to establish consensus. We are also developing a detailed engagement strategy to run alongside the consultation and beyond.
Equality and diversity:	We have set out our equality impact assessment in Annex B
Resource:	N/A
Environmental:	N/A

Annexes
Annex A – Draft statement of policy on upholding professional ethical duties
Annex B – Draft consultation paper on the statement of policy

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
Annexes A, B	s.22 – Future publication	Date of publication