



The Council  
of the Inns  
of Court

# **Response to LSB Consultation document:**

## **“Upholding Professional Ethical Duties”**

### **Introduction**

1. The Council of the Inns of Court (COIC) thanks the Legal Services Board (LSB) for this opportunity to respond to the consultation paper on the draft statement of policy on upholding professional ethical duties (“the Paper”).
2. The four Inns of Court have appointed the Council of the Inns of Court (COIC) to submit a response on their behalf. A draft response was prepared by COIC and circulated to the Inns for consideration and comment by their relevant committees. This text therefore sets out the collective views of the Inns and their members.
3. COIC fully endorses the LSB’s view set out in the foreword to the Paper of the fundamental importance of professional ethics. We also agree that adherence to professional ethics cannot be taken for granted. All professions have a small number of members who damage the reputation of the profession as a whole and regulatory arrangements need to detect and deal with them. COIC also agrees that professional culture is important. The culture of the Bar reinforces its ethical code. Relationships between individual members of the Bar and their Inns, Circuits and Chambers all play a role in this with peer pressure, training and the setting and maintaining of standards. The Bar Council also plays a central role. It publishes detailed and comprehensive ethical guidance on its Ethics Hub website, which it reviews regularly to keep it up to date. It also provides an Ethics Helpline which is available for consultation by

practitioners whenever they experience ethical issues which, through experienced volunteers, is able to provide urgent ethical assistance when required.<sup>1</sup>

4. COIC supports the five outcomes identified in paragraph 39 of the Paper. We explain in our responses to the questions below, where we suggest that care is taken to ensure that appropriate emphasis is given to mechanisms for attaining the individual outcomes. In relation to Outcome 5, it is essential to keep a clear focus on the fact that the desired outcomes are the result of effective regulatory and training regimes and that it is the effectiveness of those regimes which should be measured. The other Outcomes will follow automatically if this is done.
5. As we explain in more detail below, we believe that the single most important step to take in ensuring effective adherence to professional ethics is to achieve proposed Outcome 3 by ensuring that practitioners are aware of and feel free to consult the support services available to them when they encounter ethical problems so that they know where to turn at moments of difficulty and know that it is right that they do so. This is of particular importance in the case of employed practitioners who may be placed under far greater pressure than those in self-employed practice.
6. COIC would like to emphasise that a great deal of effort already takes place within the structures of the Bar in training about, and reinforcing the importance of, professional ethics. The Inns, through the Inns of Court College of Advocacy, provide considerable detailed training materials to support pupils undertaking the BSB's mandatory Ethics assessment. The Inns provide support and practical training to students, pupils and practitioners, with particular emphasis on the overriding duty to the court, the importance of which is rightly identified in the Paper. Included in this is mandatory ethics training for new practitioners.
7. We therefore fully support the objectives described in the Paper. Whilst we do so, however, we would caution against seeking to impose additional regulatory burdens on the profession on the basis of extreme, isolated examples of failures to maintain ethical standards. Whilst such examples clearly exist, they are neither typical nor representative of the Bar as a profession. The Paper leaves the impression that the LSB may have wrongly inferred from such cases that there are widespread issues across the Bar.

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<sup>1</sup> The Bar's ethical helpline deals with more than 5000 calls a year, demonstrating that it is readily available when needed.

8. Finally, by way of introduction, we would point out that ethical issues which arise from specific areas of concern such as SLAPPs and NDAs identified in the Paper may not be appropriate targets for the general regulatory regime. Where there are specific areas of concern which give rise to particular problems, the better approach is a targeted response, which may require legislation. This has two clear advantages. First, it isolates and identifies the areas of concern and the problems to which they give rise, and second it allows a tailored response to be put in place which directly addresses those problems and concerns. We would suggest that a tailored individual response is likely to be both more effective and less burdensome than attempting to address such specific issues within the general regulatory regime.
9. With that introduction, we turn to the individual questions raised by the Paper.

**Question 1: Do you agree with our proposed definition of *professional ethical duties*?**

10. Subject to one comment, our answer is yes. We would suggest that the structure of the definition is reviewed with care. A barrister's primary and overriding ethical duty is to the court and the interests of justice (not to their clients). That duty is reinforced by the duty to act with integrity and independence.<sup>2</sup> All other duties are subject to the primary obligation. It is not clear that the proposed definition fully reflects the overriding importance of this primary obligation. We would suggest the duty to the court and interests of justice be given greater emphasis rather than being relegated to a potential point of conflict with the duty to the client. To achieve this, we would suggest that the duties be recast as follows:

*Authorised persons have a duty to act with honesty, independence and integrity in the interests of justice; to the court to comply with that duty; to maintain proper standards of work; to act in the best interests of their clients<sup>3</sup>; and to keep the affairs of their clients confidential. They must ensure that the duty to act in the best interests of their client does not override their duty to the court, or their duty to act with honesty, independence and integrity where these come into conflict.*

11. We have endeavoured to recraft the definition so as to give appropriate prominence to

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<sup>2</sup> This is specifically noted in the Paper at paragraph 50 first bullet.

<sup>3</sup> When considering this duty it should be noted that it is for the client to determine what is in their best interests and that barristers are required to carry out a client's instructions even where the barrister has advised that to do so may be foolish or expose the client to criticism provided that the proposed course is lawful and not otherwise in breach of the barristers' overriding ethical duties.

the overriding duty which should apply to all branches of the legal profession whilst ensuring that it also accurately reflects the particular position of the Bar.

**Question 2: Do you agree with our proposal to set general outcomes?**

12. COIC agrees with the proposal to set general outcomes. Outcomes, however, are not themselves the actions, guidance, processes and mechanisms by which the outcomes are achieved. Nor are the outcomes appropriate metrics for measuring progress. It is uncontroversial that the regulator should aim for good outcomes. COIC anticipates that it will be the identification of mechanisms and metrics which will pose greater challenges.
13. It is also important to keep in mind the need to avoid an excessive regulatory burden on the professions and that the steps taken must be proportionate.

**Question 3: Do you agree that these proposed outcomes address the harms and unethical behaviours presented in the evidence? Are there any further outcomes we should consider?**

14. As will be apparent from the introductory remarks above and our response to question 2, we do not agree that the proposed outcomes address the specific harms and unethical behaviours presented in the evidence. Nor do we agree that outcomes are an appropriate way of doing so. A good ‘outcome’ cannot address harm; rather, it is the mechanism for attaining that outcome which must address the harm. Good outcomes and harms are alternative end results. Consequently, we do not consider that there are further outcomes which should be considered.
15. In our view, a better approach is to look at the identified harms and unethical behaviours and to consider whether any additional regulatory or training activity is required to address them. If the conclusion is that it is, then the activity should be addressed to the particular harm or behaviour. Again, as explained in our introductory remarks, specific areas of concern should be addressed by specific legislation or procedural rules directed to them rather than seeking to deal with them by otherwise unnecessary general regulation which may have unpredictable and unintended consequences.
16. For example, SLAPPs in relation to economic crimes are already the subject of specific

legislation.<sup>4</sup> We consider this to be a better approach. The particular problems which are considered to be posed by SLAPPs and NDAs should be addressed by specific legislation rather than by the imposition of broad ethical obligations on practitioners. It is not an individual lawyer's job to act as judge and jury when asked by a client to undertake a lawful course of action requested by the client. A lawyer should in principle be free to act on a client's instructions on the basis that the underlying facts are true. That must be so unless it is apparent that the facts asserted by the client cannot be true. A lawyer should not be required to assume his or her client is dishonest. Imposition of an ethical obligation which would<sup>5</sup> in practice have that effect would be wrong in principle.

17. The difficulties of dealing with SLAPPs (and equally NDAs) by enforcement of ethical obligations are highlighted by the recent actions of the SRA. Proceedings have been brought against two solicitors in relation to SLAPPs, Ashley Hurst and Christopher Hutchings. The allegations were found partly proved by the SDT in the first case and the second is pending. The facts of the cases illustrate how difficult it can be to draw the boundary between conduct which is acceptable and that which is not. The former case concerned conduct on the part of the client which was allegedly tax evasion and concerned correspondence sent to the well-known tax campaigner, Dan Neidle. The second case is understood to concern allegations about statements made during a telephone call which are said to have constituted an improper threat of litigation and an overstatement of the strength of the client's claim in relation to a proceeding for contempt of court. The fact that the SRA's allegations in the first case have only partly succeeded before the SDT indicates how finely balanced the judgment may be as to whether or not a lawyer's actions are proper. We do not yet have the SDT's reasoned judgment in the first case and there is as yet no outcome to the second. These judgments are likely to provide significant guidance on the approach to enforcement of ethical obligations and we would caution against amendments to the professions' rules and regulations until the effect of the judgments has been fully considered. Precipitate action in such a sensitive area is likely to do more harm than good.

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<sup>4</sup> Sections 194 and 195 of the Economic Crime and Corporate Transparency Act 2023 set out a definition of a SLAPP claims and a legislative framework for making specific procedural rules to govern such claims. Amendments to the CPR to enable a court to strike out a SLAPP claim unless the claimant shows that it is more likely than not that it would succeed at trial and to deny the claimant an award of costs in a SLAPP action are in SI 2025/106. Those rules will come into force once the statutory provisions come into force.

<sup>5</sup> Or might, see the following paragraph.

18. In the particular case of the Bar, it is essential to factor in the cab rank rule, which the LSB appears to have overlooked (see e.g. the ‘Client association and disassociation’ bullet point on p15 of the Paper). A barrister is not entitled to decline to act for a client simply because the client appears to be disreputable or to seek to promote actions with which the barrister disagrees. That remains the case however often the barrister has acted for a particular client. Whilst there may be circumstances in which the lawyer should question the client’s account of the facts, they are not common even if the position may look very different after a full enquiry. Barristers are acutely aware of the need to ensure that the client takes a realistic view of the outcome of any dispute based on the instructions given. Where, despite such advice, a client instructs a barrister to pursue a lawful course of conduct, the barrister must be free to do so irrespective of the barrister’s view of the wisdom of such a course. That freedom is essential to the barrister’s ability to provide proper representation in accordance with the law. It is also an important aspect of access to justice. The right of practical and effective access to a court is a key aspect of the right to a fair trial under Article 6 of the European Convention on Human Rights. Professional obligations which in practice constrain an individual’s ability to access representation by restricting a barrister’s ability to pursue a lawful case or argument may therefore infringe Article 6 ECHR.

**Question 4: Do you agree that the proposed outcomes should be met by regulators through a set of specific expectations?**

19. We repeat our answers to questions 2 and 3. What matters in addressing harms is the specific actions, rules and guidance which are put in place to do so. Outcomes cannot address harm. They follow as a result of the actions taken to address harm.

**Question 5: 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?**

20. The answer to this question is clearly yes. What matters is the quality of the evidence. Regulators should be required to gather high quality evidence and to evaluate it before seeking to act. Specifically, the BSB should actively obtain evidence about the Bar and from this evidence develop specific expectations to meet the LSB’s outcomes.
21. The nature of the Bar and its activities means that practitioners’ actions are already subject to considerable public and judicial scrutiny through court and other

proceedings. In relation to the Bar, therefore, it is likely that less onerous ethical regulation is required than of other parts of the legal profession.

### **Question 6: Do you agree with the proposed outcome 1?**

22. COIC agrees with the principle underlying outcome 1, namely that there needs to be reinforcement of ethical understanding throughout a professional's career. We would remind the LSB, however, that the nature of a barrister's work is that it is already subject to both judicial and public scrutiny, the effect of which is necessarily to provide a clear reminder of the ethical obligations applicable. Shortcomings are likely to be rapidly exposed to critical review without further action. The level of recourse to the Bar's ethical helpline<sup>6</sup> indicates that barristers are generally aware of their obligations, the need to ensure that they comply with them and to take appropriate advice when they are unsure how to respond. It also supports our view that ethical obligations are generally well understood by members of the Bar and that the existing teaching and support is effective.
23. The structure of the self-employed Bar also provides extensive opportunities for ethical support as and when issues arise. Discussions with colleagues and consultations with senior leaders in Chambers and on Circuits are readily available. Our experience is that these resources are frequently used when individual practitioners consider that they are faced with ethical problems to which they do not immediately have a solution. This does not suggest that significant changes need to be made.
24. Nevertheless, we recognise that it would be sensible to consider whether there are ways in which continuing ethical education through a barrister's career could be refined. In this context it is essential to appreciate that the ethical problems faced by barristers in different areas of practice vary widely. Thus, barristers in criminal practice face different problems and dilemmas from those advising and acting for large commercial organisations in civil disputes or those working in family law. It follows that any ethical training needs to be tailored to different practice areas. The organisations best placed to ensure that this is done appropriately are the Inns and the specialist Bar associations, all of whom have greater expertise in these areas than the regulator. The regulator should work together with the Inns in considering whether ethical training needs to be made available beyond that which the Inns already provide and, if so, what and how to

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<sup>6</sup> See fn 1 above.

deliver it.

25. Finally, under this question, we draw attention to the fact that the training of employed barristers is likely to require a different approach from those in self-employed practice. We note that the Paper contains a number of references to lawyers working “in-house” which suggests that the LSB recognises the different pressures on them. We return to the differences between the two areas of work under outcome 3 below where this distinction is most acutely present.

**Question 7: Do you agree with the specific expectations proposed under outcome 1?**

26. Subject to the comments made in response to question 6, we agree with the expectations set out in paragraph 48 of the Paper under outcome 1. It is imperative that those expectations are approached with the differing requirements of individual practice areas and environments fully in mind.

**Question 8: Do you agree with the proposed outcome 2?**

27. In relation to the Bar, it is our firm view that outcome 2 has already been effectively achieved by the BSB, which has a comprehensive framework of rules and guidance which make it clear that professional ethical duties are integral to the way that members of the Bar should act. Members of the Bar are aware that their professional ethical duties are an integral part of their actions and behaviours. Our proposed revision to the statement of professional ethical duties reflects what barristers already know and apply in practice. We agree with outcome 2 but we do not consider that the BSB needs to take further action to ensure it is met.

**Question 9: Do you agree with the specific expectations proposed under outcome 2?**

28. We repeat our response to question 8. It is our firm view that the Bar and its regulator already meet these expectations.

**Question 10: Do you agree with the proposed outcome 3?**

29. As will be clear from what we have said above, we fully endorse outcome 3. Workplace culture and environment are critical to this. As we have noted, the structure of the self-employed Bar provides many opportunities for practitioners to consult colleagues and obtain support for difficult ethical decisions. We believe that it is important that the



Bar Council, Inns, Circuits and Chambers continue to promote those opportunities.

30. The role of regulation is accordingly less important in empowerment and support of practitioners than it may be in other areas of the legal profession. Whilst we agree that the regulator should ensure that it obtains evidence of the way in which the structures of the Bar are supporting practitioners in making appropriate ethical decisions, we do not consider that there is a need for additional, potentially onerous, regulatory processes or requirements to ensure that that support is available. It may be that guidance derived from the evidence would be of assistance to the professional structures but we suggest that this is something which the regulator and the profession should be left to address without the need for further action by the LSB.

**Question 11: Do you agree with the specific expectations proposed under outcome 3?**

31. We repeat our response to question 10.
32. There is one area in which we would suggest that further action may be appropriate. Employed barristers do not necessarily have the same access to the support networks available to self-employed practitioners and may find themselves under greater pressure from their employer: whilst a self-employed practitioner always has the option of refusing to carry out a client's instructions on the basis that they are improper, the employed barrister may face overwhelming pressure to do so. An employed barrister does not have the ultimate sanction available of simply returning a set of instructions.
33. We would therefore suggest that if action is to be taken to achieve the expectations under outcome 3, it is focused on the role and position of the employed Bar and provides for structures and resources to enable employed barristers to feel that they may safely and effectively challenge their employer if and when ethical issues arise. In relation to setting Expectation VI we encourage the LSB to consider whether regulators' resources also need to be provided to third parties rather than just employers.

**Question 12: Do you agree with the proposed outcome 4?**

34. We support outcome 4, but we foresee that challenges will arise when the BSB determines which monitoring and supervision processes are "appropriate". It should not be necessary for additional extensive monitoring and supervision to be imposed with its consequent cost and time burden on the profession. We comment further below in

response to question 21 on the impact of any proposals which may follow from the proposed statement of policy. The considerations we raise there apply particularly to outcome 4.

**Question 13: Do you agree with the specific expectations proposed under outcome 4?**

35. We repeat our response to question 12. From what we have said it will be apparent that we do not consider that there are significant gaps in compliance by the Bar with its professional ethical duties and there is accordingly no ground for additional expensive data gathering unless and until specific gaps are identified.

**Question 14: Do you agree with the proposed outcome 5?**

**Question 15: Do you agree with the specific expectations proposed under outcome 5?**

36. We take these questions together as they are simply different facets of the same question. It is imperative that the regulator has in place appropriate means to measure the effect of their activities. We strongly support an approach which directly measures the impact of any regulatory activity; this will be more meaningful than trying to determine whether an outcome has been achieved. As we have noted above, putting in place the appropriate mechanisms to ensure compliance with ethical duties and measuring the effectiveness of those mechanisms will result in the desired outcome.
37. The regulator should engage with the profession to ensure that any evaluation methods and indicators are appropriate.

**Question 16: Do you agree with our proposed timelines for implementation?**

**Question 17: Is there any reason why a regulator would not be able to meet the statement of policy outcomes with the timeframes proposed? Please explain your reasons.**

38. We take these questions together. This response relates solely to the BSB. As we have indicated, we consider that the BSB is currently addressing ethical issues in a proportionate and effective manner. Relatively little change in the way it does so is required to achieve the LSB's proposed outcomes. Consequently, we agree with proposed implementation timelines and do not consider that there are any reasons why the BSB should not be able to meet them.

**Question 18: Have you identified any equality impacts, we haven't considered which, in your view, may arise from the proposed statement of policy?**

**Question 19: Do you have any evidence relating to the potential impact of our proposals on specific groups with certain protected characteristics, any and associated mitigating measures that you think we should consider?**

**Question 20: 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?**

39. Again, we address these questions together. COIC takes the view that the proposed statement of policy is at too high a level of generality taken by itself to have any equality impact. However, when actions are proposed to achieve the outcomes sought by the statement of policy, their potential equality impact will need to be assessed case by case.

**Question 21: Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and benefits?**

40. There continues to be a crisis in the recruitment and retention of barristers at the publicly funded Bar. Although the direct impact on barristers of the Covid pandemic has now receded, and there have been some improvements in fee rates in some aspects of criminal work, together with a steady flow of work (indeed, excessively so), earnings remain under significant pressure in public-funded work. While recruitment and retention may be stabilising, the supply of barristers to do this work continues to be under pressure. This is the continuing result of years of cuts and failures to keep pace with inflation and is against a backdrop of significant inflation over the last three years. We again ask the LSB to bear in mind that any increase in the burden and cost of regulation would in these circumstances be likely to achieve the opposite of its intended effect by driving more barristers out of this area of work.
41. In other areas of practice, if the economic situation leads to less work for self-employed barristers, then that too will put pressure on individual barristers' incomes and on their personal and family lives.
42. Areas of potential activity should be subject to a *rigorous* assessment of the need for regulatory activity, based on the principles of good regulation. Increasing the BSB's resources by placing a further financial burden on the profession should not be seen as any quick-fix to any ethical issues. There is a limit to the burden that can and should

properly be placed on the profession in the light of the ongoing situation that we have described.

43. In this context, the role played by the Bar itself in promoting the regulatory objectives, including the key objectives of protecting and promoting the public interest, supporting the constitutional principle of the rule of law, improving access to justice, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining barristers' adherence to the professional principles is critical.
44. In all of these areas, the LSB should also be looking always to coordinate any activity with the profession and its institutions in a cooperative and mutually supportive way and to allow the profession to take its own steps where those are more likely to achieve lasting change. It should also bear in mind that lasting, embedded change takes both effort and time, and depends to a large extent on the support and efforts of the profession and its institutions.

**Question 22: Do you have any further comments?**

45. COIC would welcome the opportunity to engage with the LSB to discuss any of the points raised in this response, and any related matters.

**The Council of the Inns of Court**

**May 2025**