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Upholding Professional Ethical Duties

Response to consultation paper on LSB's proposed statement of policy

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- **Research**: undertaking rigorous academic research to address the world's major corruption issues
- **Courses & Teaching**: training the next generation of anti-corruption professionals around the world from undergraduates to PhDs, with campus-based and online Masters courses and specialise short courses
- **Policy**: ensuring that our research informs evidence-based policy.

CSC's research activities are based around four themes:

- Corruption in politics
- Corruption in international business
- Corruption in sport
- Corruption in geographical context – with particular strengths in the UK, Germany & Eastern Europe, China and Africa.

Full details of the published and current research undertaken by our core faculty can be found in the detailed biographies of each faculty member at www.sussex.ac.uk/scsc

Important Note

Consultation submissions made by academic staff at the University of Sussex do not represent official university views or policy unless explicitly stated. This submission should therefore be taken to represent the view(s) of the author(s).

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1. Introduction

The Centre for the Study of Corruption (CSC) has undertaken research on the issue of professional ethics in relation to the legal profession, and more specifically on solicitors in England & Wales. This has examined the role played by legal professionals in relation to kleptocracy, state capture and grand corruption. One conclusion of the research is that there are general principles pertinent to legal ethics, and particularly to client and matter take-on, that can be extrapolated from this research to other areas.

Two specific CSC research projects have produced outputs that are relevant to this consultation:

1. 'Gatekeepers, Enablers or Technicians?' Conducted with Dr Tena Prelec, and funded by the FCDO's Governance & Integrity Anti-Corruption Evidence Programme, the results have been published as:

- CSC Working Paper - https://www.sussex.ac.uk/webteam/gateway/file.php?name=csc-wp-comments-analysis-jan-2025.pdf&site=405
- Spotlight on Corruption Policy Brief - https://www.spotlightcorruption.org/report/gatekeepers-enablers-or-technicians-the-contested-role-of-lawyers/

2. Background research for the IBE's Taskforce on Business Ethics and the Legal Profession, whose final report and background documentation can be found at: https://www.ibe.org.uk/legal-profession-taskforce.html

This submission is based substantially on CSC's research findings from these programmes.

2. Summary of Research Findings

The CSC research found that while it is correct to state that various City of London-based law firms have been identified in media reports and by civil society as having provided services to likely beneficiaries of grand corruption and kleptocracy, these are not the target client-base of most firms. The various examples of firms acting for these clients may therefore be characterised as being mostly by default rather than by design. The research found that whether described as gatekeeping or enabling, addressing this issue is not a question of anti-money laundering (AML) risk management: existing mechanisms to prevent 'dirty money' entering the UK, built on identifying risks or red flags which indicate a predicate crime linked to a client's wealth or source of funds, do not adequately address the proceeds of grand corruption and kleptocracy or the related situation of state capture.

The research found that there are persuasive grounds for which it can be argued that, in the absence of more stringent legislative or regulatory action, this legislative gap can be – and in many cases already is – filled by the choices made by lawyers and law firms themselves. Lawyers can and do make a choice as to whether they will or will not act for clients who are the beneficiaries of kleptocracy and grand corruption. This can be a risk-based choice, an ethical choice or a choice based on a certain understanding of what it means to be a legal professional.

However, the tools, training and structures examined as part of this research have been found to emphasise an approach to lawyering, sometimes described as the 'standard conception', centred on zealous advocacy for one's clients and a minimalist adherence to rules and standards.[1] This reinforces a conception of lawyering that does not encourage considered decision-making around ethical grey areas. This in turn is reflected in the default justifications from the legal profession in the debates surrounding the 'enabling' role of the profession, with common defences resting on the conception of the lawyer as impassive neutral technician, with little recognition that such a characterisation of the professional's role is contested in legal theory and often mis-applied. This is in tension with interpretations of the lawyer's role that prioritise the public interest and public trust and confidence in the profession, sometimes described as 'socially responsible lawyering'.[2]

The full conclusions of the research will be published in due course along with more detailed description of the methodology and detailed research results, but meanwhile the preliminary conclusions are:

[1] Vaughan, S., 2023. Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms. *Current Legal Problems*, *76*(1): 1-34.

[2] *Ibid.*

Enablers or gatekeepers?

- The term 'professional enabler' is considered provocative, and lawyers in particular found it to be objectionable. The reasons for this were diverse: some are concerned about the reputational aspects of such a label, others are concerned about the provision of enabling services but see it as a minority issue within the profession, and others are simply resistant to the notion that lawyers are acting inappropriately.
- Lawyers, however, are perceived by their critics to play a keystone role in the relationship between professional services and grand corruption.
- Many of the arguments and principles that have been used in defence of the legal profession are contested in legal theory (except in the circumstances of criminal defence, or where liberty or assets are at risk). It can be seen as a conceptual leap to apply notions such as 'access to justice' or 'right to representation' to straightforward commercial transactions.

Moral, ethical and regulatory elements of client and matter onboarding

- Lawyers rightly make choices about client take-on and retention based on their understanding of AML regulations; but for most such clients who are beneficiaries of kleptocracy or grand corruption, there is an absence of a predicate offence in the country of origin, and so they are not covered by existing AML laws or regulations. As a consequence, there are also ethical choices to be made, and law firms do have agency over such decisions – described by Vaughan (2023) as 'business decisions with (some) moral components.'
- Reducing the question solely to one of risk management has two consequences: first, it encourages firms to focus on their own reputational risk, without regard to wider questions such as risk to the profession's reputation as a whole, the risk to society or risk to the global rule of law (e.g., through providing services to kleptocrats who in other contexts are undermining the rule of law); secondly, it can remove the question of ethics – or the notion of doing the right thing – from decision-making.
- Based on the ethical content of legal education and the codes of conduct of major law firms, we conclude that professional education emphasises a conception of lawyering
  that does not incentivise or promote considered decision-making around ethical grey areas.
- While there is a legitimate debate over 'thin' versus 'thick' interpretations of the lawyer's role, there is little visibility or discussion within firms or the profession of the Solicitors Regulation Authority (SRA) guidance on the public interest, which might usefully be applied to this situation.

Structures and incentives

- There is a widespread perception that changes in the legal industry (broadly, the 'commercialisation' of law firms) have influenced the way (ethical) decision-making happens.
- Decision-making on such matters in large law firms is complex, particularly when they operate globally.
- No proposed solution to the issue of 'professional enablers' has yet gained widespread support within or outside the profession.
- There is a read-across to human rights and climate change. The principles that apply to client take-on with regard to kleptocracy and grand corruption have resonance in other ESG areas.

3. Response to consultation questions

- ***Need for regulation***. There is an open question as to whether the objectives of enhancing ethics in the legal profession are best advanced by profession-led change, regulation or legislation. Since culture change is a primary focus, profession-led change might be usually considered to be the most appropriate approach. However, the mood music from regulators makes a significant difference as to the appetite for and prioritisation given to progressing such changes.
    - **CSC therefore recommends** a) the LSB should be unambiguous in signalling to the profession and its regulators that ethical standards need to be improved and that there is an expectation this will happen b) if there is not demonstrable improvement within the profession, a regulatory and/or legislative solution, with appropriate sanctions, should be activated.
- ***Primacy of 'public interest'.*** The overall guidance is welcome in this regard, particularly in clarifying the important notion that where there is a conflict between client interest and the public interest that the public interest should prevail.
    - CSC is broadly supportive of the proposed definition of professional ethical duties, but ***recommends*** that: the concepts of the public interest and the duty to maintain public confidence in the profession should either be incorporated into the definition itself or be clearly emphasised in the accompanying notes and guidance.