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Lawyers ethics: a call for action

This post summarises proposals made to address problems of honesty and integrity in commercial and public life in the wake of the Post Office Scandal in the third Hamlyn Lecture 2024.

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You can watch the third Hamlyn Lecture 2024 here for a fuller explanation.

Those proposals encompass, but are not confined to, professional regulation of lawyers. They go wider. Corporate governance approaches and the courts, for example, are part of the ethics ecosystem affecting commercial and public life.

Cover-up culture, of which the Post Office Scandal is one example, suggests broad, system-wide features that require concerted action including but beyond lawyers.

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The proposals are driven, in particular, by an analysis of the Post Office Scandal and intended as one answer to the question: what should be done as a result of the Scandal?

These recommendations are by no means a comprehensive answer to that question; for example, questions of computer evidence, private prosecution, are not covered, to name but two of many possibilities.

These recommendations are an answer focused particularly on integrity in the use of law and lawyers.

The problems are also wider and deeper than the extraordinary series of Post Office cases. There are many other examples of serious problems: in cases handled for Banks and Oligarchs; the threats to national security posed by professional enabling; alleged SLAPPs: NDAs, corruption and hacking cases are particularly interesting exanples.

In the last few days, the law-washing of the Saudi regime by a leading law firm, and the role of the Attorney General in proroguing Parliament under Boris Johnson have garnered attention for reasons which might suggest problematic lawyering.

The three central problems addressed in this analysis are:

- excessive aggression in legal work – suggesting things are legal that are likely not legal, including misleading and abusive handling of legal matters;
- mutually irresponsible management of legal decisions between lawyers and clients– often aided by lawyers; and,
- the abuse of confidentiality and legal professional privilege.

The central recommendations is for:

- an independent commission, not dissimilar to the Clementi Review of legal services which led to the Legal Services Act 2007.
- Its central agenda should be how to improve honesty, integrity and effectiveness in the use of law.
- It would need to be independent of, but also working with, government, the professions, the courts and regulators.

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- Given problems in accountancy it may need to encompass professional advisers beyond law.
- The Commission would need to be strongly led with a mandate to address a programme of reform, not just one big bang.

A more detailed agenda and aims for such reform is set out below. These are suggestions; some are particularly strongly advocated, others less so. A more detailed explanation of the thinking is given in the outline of the original lecture.

In the interests of brevity, the document you are reading does not seek to advocate for each of these reforms here, but all bear serious consideration:

- We need more capable, better resourced, and more respected regulators able to fairly but robustly enforce their rule book against powerful players.
- This may mean a single regulator and a single disciplinary tribunal are needed.

On education and training:

- UK law schools and firms should embrace and encourage undergraduate education in lawyers and ethics.
- Regulators should be more open and actively promote day to day debate and education in professional ethics.
- The regulators could support an independent centre of research and education to drive educational infrastructure, debate, and insight.
- More robust enforcement and openness about investigations might also drive an appetite for preventative training.

On the courts:

- A critical assessment of how judicial practice impacts litigation ethics should be carried out.
- Ways of engaging and constructively challenging judges on how their work influences behaviour and ethics in litigation and advocacy should be encouraged, whilst respecting their independence.

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- Resourcing and support for our highly capable judges to effectively manage cases, especially those with difficult parties and lawyers, is needed.
- Regulators and judges need to engage in a *concerted*, ongoing, *visible* collaboration on cultural problems in litigation.

Changing corporate governance rules (and analogues):

- A particular focus of reform should be on building and strengthening accountability systems for legal risk in organisations and the professions.
- This likely requires changes to rules and guidance in relation to corporate governance as well as the professions.
- In broad terms, accountability systems suggest the proportionate benefits of ensuring named individuals are responsible for managing and taking legal risk decisions and that they can be held accountable for them.
- Legal risk management generally in organisations, and specific legal projects, such as significant litigation, may need to be addressed.
- In financial services, this role should be mandated under the Senior Managers and Certification Regime.
- Corporate governance guidance should encourage good practice in legal risk management, ensuring and supporting the ultimate responsibility of legal risk leadership.
- Board Effectiveness Reviews should actively consider legal risk management.
- Such guidance should cover appropriate lines of management and communication between the business and its legal advisers. As should lawyers' contracts (inside and outside the organisation).

Professional regulation and guidance for lawyers should aim to mirror these requirements:[1]

- Regulators should look to strengthen leadership and responsibility in legal teams through supervision requirements.
- The power of regulators to regulate in-house lawyers and support their independence more broadly needs consideration to ensure regulatory gaps are

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closed.

- Making the provision of *legally privileged* advice a reserved matter requiring a practising certificate should be considered.
- There may be a case for firmer regulation of litigation as a reserved matter and of disclosure in particular (separate disclosure officers in civil litigation and, documented responsibility and sign-off around privilege, disclosure, and redaction, might improve disclosure).
- Disclosure problems could be made subject to a failure to prevent obligation, including responsibility for properly managing legal privilege.

Lawyers' Codes of Conduct, guidance etc.:

- Consideration could be given to changing the thresholds around what constitutes properly arguable points in cases before the courts and, more particularly, when advising clients away from courts and litigation.
- On the latter, regulators (and courts) could do more to emphasise and strengthen obligations to be independent and objective in the provision of advice and assistance to clients.
- Professional codes and guidance would benefit from a clearer, more lucid imperative to focus on independence, integrity and honesty to overcome the tendency of sections of the professions to overweight client interests when handling their work, leading to misconduct.
- Better scaffolding of such decisions, though guidance for instance, should be provided. Regulators draw attention to all the consequential liability risks on lawyers when dealing with the question of what 'potentially lawful' things a lawyer should nonetheless decline doing (as per the *Simms* case dicta that the SRA has begun to emphasise).
- Scrupulousness, complete honesty, and particular care not to mislead, as well as the responsibility of purpose, and consideration of foreseeable consequences, should feature prominently in any professional code.
- Fearlessness and the *presumption* that lawyers can harm third parties for their clients should be removed from the codes and guidance. Harm cannot always be

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avoided, but being required to consider, and if proportionate, mitigate or alleviate such harm, might reduce some of the unnecessary excess.

- The claim that lawyers do law but not morality should be challenged in the code and guidance. It can be done without suggesting morality should generally trump legal rights. Wise advisers need all their cognitive faculties to do a good job: their advice and actions require breadth of vision and moral sensitivity not just narrow logic.

Guidance needs to be developed and improved on topics such as:

- understanding, defining and supporting independence (as a behaviour not just a label);
- lawyers reporting up within organisations they work for or are instructed by;
- lawyers reporting out (lawyers as whistleblowers – where statutory rules may need revisiting);
- on the abuse of privilege; and,
- on the drafting of unreasonable contracts.

The Bar, in particular, needs to revise its Code of Conduct. Indeed, lawyers should be subject to a single, unified code of conduct.

Additional mechanisms short of investigation, but more effective than CPD, compulsory or otherwise, can be found for encouraging accountability and self-development in the professions:

- Ethical practice should be a routine and proactive part of competence review for all lawyers in firms and chambers.
- A mechanism by which individuals, teams, or their firms/chambers could undergo non-disciplinary investigation and analysis, to encourage lesson learning and remediation, not punishment, could be developed (cf. FCA skilled person reports). If the regulators do not have this power, perhaps they ought to be given it.
- The COLP (Compliance Officer in Legal Practice – compliance leads in solicitors firms) needs review and improvement to make the role and its incumbents more

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effective.

- A mechanism, perhaps similar to, when well-run, Board Effectiveness Reviews in the corporate world, could be developed through a mixture of voluntary approaches and targeted compulsion (for higher-risk firms or practice areas).
- The aim would be to develop in lawyers and their teams/organisations substantial and meaningful engagement with ethics and ethical leadership.

Legal professional privilege

- Regulators (and the courts) need to grasp the nettle of abuse of legal professional privilege.
- There should be a full, independent review of the law on privilege.

A final word on the need for whole system reform

I have suggested a strongly led Commission because the problems that need to be addressed are central to the conduct of lawyers, but also bigger than that. Other related issues that are germane are wide, they include - as examples - whistleblowing, the regulation of non-disclosure agreements, and the definition of abusive litigation, as well as inter-professional competition for advisory work and other services.

It is a more hefty agenda than the one I have sketched out here, but I call on the Government to take it seriously and take a lead on integrity in public *and* commercial life.

It is central to the health of our society and the rule of law, which is too often abused rather than supported by legal aggression.

Discussion about this post

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Write a comment...

Dougie 4 Nov 14

Meanwhile, the BSB is ignoring this herd of elephants and trying to change its rules to make barristers diversity advocates.

LIKE (1) REPLY SHARE

Simon Wadsworth Nov 14 *Edited*

It appears to me as a non-lawyer, one of the most striking failures during the Post Office litigation was the failure to ensure [ordinary] witnesses of fact that became expert witnesses, were properly briefed as to their role and duties within the justice system. This also needs to be addressed in the review, for the litigators and the judiciary.

LIKE REPLY SHARE

1 more comment...