

Corporate Lawyers and the Public Interest

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Corporate Lawyers and the Public Interest

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What is the public interest in legal services? Is this public interest multiple and, if so, what does it mean in the context of the corporate and finance work of large law firms?

I am currently in the middle of a three year project, funded by the Economic and Social Research Council, titled *The Limits of Lawyers*.¹ Here, I am looking at lots of different things that each concern the role, function and proper place of large firm corporate and finance lawyers in society. One aspect of this goes to ‘the public interest’.

In the paper which follows, I comment on how ‘the public interest’ has been used thus far in legal services regulation, and on what ‘the public interest’ might mean in the context of the work of corporate and finance lawyers working in large law firms. I also draw on the 43 interviews I have conducted to date for *The Limits of Lawyers* to show how those in practice understand and problematize the concept.

I want to make three broad arguments. First, ‘the public interest’ is used in legal services regulation without any underpinning guidance. Such devalues its importance and has the potential to make the concept mean both everything and nothing. I accept here that the ‘public interest’ is complex and contested and that the production of guidance on this term by the Solicitors Regulation Authority (SRA) may well be challenging to accomplish. My second argument is that the lack of clarity and guidance on the ‘public interest’ is concerning as, as a concept, the ‘public interest’ has the potential to remind corporate and finance lawyers that their professional status means that they are something more than mere service providers, and have an important role to play in society. Finally, my third argument is that corporate and finance lawyers in practice struggle to articulate what ‘the public interest’ means in the context of the work that they do. I would suggest that this is a product of both a lack of clarity on the regulatory side and a lack of reflexivity on the part of those lawyers about what they are doing, why they are doing it and the impacts their work can have.

This is, in effect, an op-ed piece which will be developed into a more robust paper during study leave in the Spring of 2016. As such, I very much welcome comments on it.

Legal Services Regulation and ‘The Public Interest’

Legal Services Legislation and ‘The Public Interest’

The “public interest” is a term common to much legislation. It appears in more than 1,000 pieces of English law across a wide variety of fields.² In the context of the legal profession, s1(1)(a) of the Legal Services Act 2007 (LSA) sets out that one of the regulatory objectives (which the regulators of legal services in England & Wales need to comply with) is “(a) protecting and promoting the public interest”. The “public interest” appears a further 8 times in the LSA, though the Act does not define what “public interest” might mean. As we will come to see, this lack of definition is a recurrent theme.

¹ See: <https://limitsoflawyers.wordpress.com/>

² Search of legislation.gov.uk conducted on 15 June for term “public interest” using Advanced Search function.

The LSB and the 'Public Interest'

The Legal Services Board (LSB), the parent regulator of legal services in England & Wales, has published a paper on what it understands the meaning of the LSA regulatory objectives to be. The six paragraphs on the "public interest" are worth setting out in full:³

"The public interest includes our collective stake as citizens in the rule of law and in society achieving the appropriate balance of rights and responsibilities. It is not static, but will always be based upon deserved public confidence in the legal system. That is because the legal system is key to the resolution of disputes, the proper maintenance of legal relationships and process - the rule of law, and indeed to democracy itself. Without public confidence, these structures would be rendered redundant.

The duty is to protect and promote - to actively place the public interest higher than sectional interests of particular consumer or professional interests.

The LSB considers that the public interest is best served through a properly regulated legal services market compatible with the regulatory objectives contributing to properly maintaining confidence in the legal system. But that alone does not guarantee the public interest. In meeting the regulatory objectives, the LSB and approved regulators will face tensions between different objectives that allow for different courses of action.

We also consider that a commitment to transparency is particularly important in relation to promoting the public interest. We will operate in that way, setting out in consultation documents how our proposals help to deliver the regulatory objectives and we expect approved regulators to do the same.

The principle of separation of regulation and representation within the approved regulators is key to this objective. Technical compliance with the rules is an important foundation but nothing less than achieving and being able to demonstrate outcomes from them will increase public confidence and satisfy the public interest as secured by this objective.

We intend that, over time, public and consumer confidence in the legal sector will rise, whether as measured by looking at complaints handling, faith in lawyers, or trust in regulation. The Legal Services Consumer Panel will be important in holding the regulatory framework to account for the consumer interest."

In future work, I am going to unpick these paragraphs in more depth, but for now four quick points can be made. First, the idea that the public interest is "not static" must be right. Second, I would disagree with the LSB and suggest that the "public interest" may well sometimes required certain sectional interests to be placed higher than other sectional interests: so, for example, regulatory action might be taken to protect consumer interests at the expense of professional interests. Third, there is some circular logic in the LSB suggesting that it, "considers that the public interest is best served through a properly regulated legal services market compatible with the regulatory objectives", as such translates (in part at least) to "the public interest is best serviced through a properly regulated legal services market which, among other matters, protects and promotes the public interest." Fourth, it is not entirely clear from where the repeated theme of "confidence" derives. Certainly, it is not a part of the LSA.

³ http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

The SRA and the 'Public Interest'

The SRA Handbook was approved by the Legal Services Board in June 2011. It has undergone various iterations and changes in the last four years. The 14th version of the Handbook was published on 30 April 2015.⁴ The term “public interest” appears 127 times in the latest version of the Handbook which, when downloaded in its entirety as a pdf, is 431 pages (or 194,517 words) long. By way of contrast, the original print version of the Legal Services Act 2007 is only 400 pages long (158,116 words).⁵ Despite it being used so frequently, the “public interest” is not a term in the SRA Handbook Glossary.⁶

Para 5 of the Handbook, titled ‘Additional Information’, sets out that the SRA is, “confident that the contents of this Handbook, coupled with our modern, outcomes-focused, risk based approach to authorisation, supervision and effective enforcement will: (1) benefit the public interest.” This is quite a claim. The SRA is “confident” that its approach “will benefit the public interest”. This statement goes beyond what is required in the Legal Services Act 2007 and it is not clear why the LSA language (of “protecting” and “promoting” the public interest) was not used instead of a direct guarantee of “benefit”. As set out at the start of this paper, one of the things I am interested in is the extent to which the “public interest” is multiple. Certainly, the SRA seems to think it is, and also to think that the “public interest” can come in gradations. Compare and contrast, on this, the following two statements from the Handbook:

Para 1 (as part of ‘Contents’): “Consumer interests and the general public interest are the key justifications for any regulatory scheme. Users of legal services are, therefore, the focus of the Solicitors Regulation Authority's (SRA's) regulatory framework.”

Para 7, ‘Additional Information’ – “These regulatory objectives can only be achieved if we and our regulated community work together in a spirit of mutual trust for the benefit of clients and the ultimate public interest.”

The SRA then is of the view (even if such was not an intended outcome) that there is both a “general public interest” and an “ultimate public interest”. I am not entirely sure what the difference is here.

The prime use of the “public interest” is seen in relation to the Principles section of the Handbook. The Handbook lists 10 Principles which apply to all solicitors and regulated entities. Interestingly, the “public interest” does not form part of these Principles. The reason for this is not clear. Indeed, one might have thought that Principles which directly reflected the LSA regulatory objectives would allow the SRA to be confident that it was itself compliant with its statutory obligations. As such, a Principle 1 which read “protect and promote the public interest” might have been a useful starting point. Instead, the Principles begin with obligations to uphold the rule of law (the second of the LSA's regulatory objectives). In any event, where the “public interest” does come into play is in relation to the notes attached to the Principles. Here, Para 2.2 states that:

“Where two or more Principles come into conflict, the Principle which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.”

This is a powerful piece of guidance. Despite this, there is no guidance in the SRA Handbook on what the “public interest” might mean. The term is used, but not defined, in the Handbook Glossary. It is

⁴ <http://www.sra.org.uk/solicitors/handbook/welcome.page>

⁵ http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf

⁶ <http://www.sra.org.uk/solicitors/handbook/glossary/content.page>

seen 127 times throughout the Handbook. A search for the “public interest” on the SRA’s website returns almost 600 hits, but I was unable to find anything which set out the views of the regulator on what the term might mean.⁷ I would suggest that the lack of any guidance has the potential for the “public interest” to mean both everything and nothing at the same time. I would also suggest that the fact that the “public interest” is tucked away, under but not a part of the Principles, devalues its potential. Finally, I would suggest that my data (discussed below) suggests that the SRA should seriously revisit the question of how it uses the “public interest” in its regulation. My hypothesis is that the idea of the “public interest” has a potentially powerful role to play in reminding solicitors, and other regulated lawyers, about the special, privileged place they hold in society as professionals.

Problematizing ‘the Public Interest’

This middle chunk of the paper is largely missing. Here, I want to problematize what the “public interest” does/could/should mean for and in legal services. Next Spring, I have a period of study leave which I am devoting solely to this matter. It is, I think, a somewhat daunting task: a search of Westlaw for legal materials (articles, cases etc) that contain the “public interest” brought back 56,700 results.

Quite by chance, I came across (via Twitter) a paper by Maria Lee (Professor of Law at UCL) on the “public interest” and the law of nuisance.⁸ It is a brilliantly good piece of scholarship and has made me think lots about how the “public interest” in legal services could be framed. Lee argues, and I would agree, that there is, “the difficulty (even impossibility) of defining public or collective interests in the abstract, or of distinguishing public from private, collective from individual, in any neutral or universal way.”⁹ As such, the search for a neat definition of the “public interest” may be elusive. Despite this, I would suggest that some form of extrapolation would be useful. This is because, as Lee acknowledges, there are and will be substantive decisions to be made that relate to, on invoke, the notion of the “public interest” and, as Lee writes, the site of resolution of these decisions will lie outside the judiciary:

“...insisting on any single abstract understanding or definition of the public interest is unlikely to be very helpful, at least in tort. But the courts continue to refer to and to consider the public interest in their judgments. Perhaps the answer to the conundrum might be found in a case-by-case analysis of the substantive content of the public interest. But, whilst what is in the public interest is ultimately a substantive matter, I doubt that the courts generally have the capacity to assess diverse and competing claims of public interest in substantive terms: most would agree that a public sewerage system is a good thing, for example, but precisely how effective it needs to be, who should pay, and how much, raises competing, equally plausible public interest claims and high economic stakes.”¹⁰

‘The Public Interest’: Views from Practice

As part of my ESRC project, I have interviewed 43 corporate and finance lawyers from large law firms in England & Wales during the course of 2015. These interviews covered a wide range of ground, including the notion of the “public interest” in legal services regulation. Depending on the interview, I asked my interviewees about the extent to which there was a “public interest” in their work and/or

⁷ Search performed on 15 June for “public interest” returned “about 580 results”. See:

<http://www.sra.org.uk/SearchResult.aspx?id=72&searchtext=%22public+interest%22>

⁸ M Lee, ‘The Public Interest in Private Nuisance’ (2015) Cambridge Law Journal 1

⁹ *ibid* 3

¹⁰ *ibid*, 19

the extent to which they knew of, or accepted, the “public interest” as part of SRA regulation of their work. My interviewees split into four groups:

- The first group saw no connection between their work and the ‘public interest’.
- The second group saw (ish) a connection between their work and the “public interest” but felt the “public interest” wasn’t their job/responsibility
- The third group could see a connection (and this connection manifested in a number of different ways)
- The final group equated the ‘public interest’ with their own private ethics. I am still puzzling this one over.

The ‘No Connection’ Group

Around a quarter of the interviewees were clear that their work had no connection, at all, with any notion of the “public interest”. In the interview with one of the corporate partners (CP8), the exchange went as follows:

- I “Do you think there is much about the public interest in the sort of work you do?”
- R Not, no, I’d struggle to know what even the public interest means. I mean isn’t that a very subjective term?
- I Well there’s no guidance on it.
- R It sounds like a cop out.”

There was a sense, at least for corporate associate CA7, that the role of the lawyer was to effect the wishes of the client and nothing more: “We haven’t got time to be asking all those questions about the public interest... you just do the deal.” It was clear that, for some interviewees, the “public interest” was, or could, only be engaged in relation to certain types of work.

“I don’t think I’ve ever been involved in a transaction where that has been a real issue. I haven’t been involved in armaments. I don’t get involved in the garment business, so slave labour. I’m not involved in constitutional law.” CP4

My gut reaction is that this must be wrong and that there is, in whatever form, some “public interest” in all of the work that all lawyers do. What form that “public interest” might take is explored below.

The ‘Above My Pay Grade’ Group

For a small handful of my interviewees, they could see that their work might engage “public interest” issues but they were equally clear that such questions were not for them to decide on or engage with.

“I suppose yeah, but I personally haven’t had any instances. I don’t know whether that would be something that they’d deal with higher up, but I haven’t personally.” CA2

“No, I have never seen those issues arise and I’d struggle to think of situations where they might arise...I think we rarely see those issues arise in terms of when it gets to the stage of they’re in a transaction and we’re working on the legal side of things, I think they’ve been dealt with prior to that, within their own organisations, and then if it ever got to it, at the highest level within ours. I think there are so many stages that are taken before you get to the stage.” CA5

These comments go, I would suggest, to much wider questions about the role and function of corporate and finance lawyers and (more generally) to the role of lawyers in society. In the book that will come from my ESRC project, I will explore these issues in some depth. To précis, what I think I can see in my research is a series of potential tensions between the closeness and distance in the relationships that lawyers have with their clients. The idea that the “public interest” is for someone else to decide on speaks to part of this distancing.

The ‘Some Connection’ Group

Most interviewees could, when pushed, see a connection between their work and the “public interest”. This connection took a variety of forms for different interviewees. Some were very conscious of the potential impacts their work had in a post financial crisis world:

“I think massively so. You know, again the credit crisis and the fallout from that has seen particularly what the banks do called into question over the years. But obviously as corporate advisors, corporate lawyers we have played a part in the way in which all of that has come about. So I think, I think we have to recognise and be open and honest about the fact that you know perhaps there might be some culpability there should we – I don’t know any answer to this but should, you know, should we be putting our hands up and saying, well yeah, actually we had a role in assisting Barclays with that particular scheme or structure or whatever it was and obviously it hasn’t worked and it’s had a dramatic effect on the economy and therefore the public at large. And it is a very difficult question with many facets to it and I don’t know the answer to that.” CP5

Others spoke of wider stakeholders that lawyers had to keep in mind, perhaps informed by their public corporate work and the obligations their public clients had under (for example) the Takeover Code:

“I suppose if you were working on a large public transaction... perhaps with an employer that employs, you know, a large amount of people in – you know, the stakeholders include a large section of the public or something like that, I suppose then – but then it would be difficult to balance that with your duty to the client if, say, the best thing in the interests of the client would be to perhaps, you know, for example cut a load of jobs or something like that. Then, I mean, I’d find it difficult to know whether... I’d have to check my rules to see where the line lies with that.” CA11

“I guess so. You could look at it from a transactional point of view. What is the impact of a deal whether it be on customers, stakeholders, that kind of thing? Yes, that is always going to have a knock-on effect on that kind of thing. If you’ve got individual shareholders, if they’ve sold their business, probably for their benefit, they’re going to make a hell of a lot of money out of it, that kind of thing.” CT2

A number of interviewees discussed the “public interest” in their work by reference to the efficient functioning of markets and/or the need for clients to receive accurate and appropriate legal advice:

“I suppose in a more general maybe ideological sense I’d be very comfortable... what I do is ultimately in the furtherance of the public good that it is good that buyers and sellers in a market should be advised and they should get the best advice possible is a very similar analogy to what happens in the criminal field, but I can’t really think of many instances where that kind of materialises and becomes an issue that I actually factor in directly to the work that I do” CA13.

“I guess I must confess I could not have told you that provision of the solicitor’s handbook off the top of my head. In terms of the public interest, it’s an interesting question actually. The

public interest is fundamentally that professionals dealing with the law uphold the law. And although obviously we're not law enforcement officers or barristers, we don't stand up in court, the way that we conduct ourselves has to reflect those sorts of principles. But at the same time, I don't know if you can say it's in the public interest to have an open and fair, it's not really the economy, but the work that we do facilitates industry and business in the UK. So it's quite a vague point, I guess, but it's also in the public interest that we do a good job that people want to come to the UK to do business. And that in doing the kind of transactional law we do, it's in the public interest that we do that right and we do it well." FA2

Some took this a little further and suggested that lawyers might, in effect, act as a check on clients, such that there was a "public interest" in clients not engaging in work which was illegal or immoral:

"Yeah, I mean – that's a really big question. I mean it's – obviously it's in the public interest to ensure that I think, you know, business is done fairly, honestly and that people are not engaging in activities for example that might be criminal. And that, there's a whole range there from Human Rights, National Security that are also impacted by even the businesses that we represent." CA12

Where Next?

As set out in the introduction, this paper is a short op-ed. Over the next year, I need to do two main things. The first is to spend significant time analysing, in depth, what my interviewees told me (and gathering, as far as is possible, additional participants willing to be interviewed). The second is some hard thinking on what the "public interest" might be or might mean in the context of legal services. Like my third group of interviewees, I can see that there might be multiple aspects; some market based and some based in professionalism or wider notions of ethics. But the question is a hard one and, I think, not easily answered. For now, I think this final quote sums up, better than I could for myself at the moment, the potential complexities in the work ahead:

"Yeah, it's a tough question actually, because I guess phrases like 'public interest', they always ... Well first of all without guidance it's so vague almost to the point of not meaning a great deal but because of the sort of work we do, because it's very much private sector business and doesn't seem on the face of it to have much to do with the welfare of the public or national security or anything like that, it's not something that generally ever is in the forefront of my mind in terms of when I think about the ethics of what we do. But, if pushed, I suppose the public interest would mean that we would need to ensure that our conduct as lawyers when working on these deals and the conduct of our clients and the consequences of the deals that we're working on shouldn't in any way ... It's hard actually because we're dealing ... Let me think about that. Can we return to that question?" FA5