



## **The Legal Services Board Consultation: Upholding Professional Ethical Duties (the 'Consultation')**

### **Response of the UCL Centre for Ethics & Law**

1. The UCL Centre for Ethics & Law ('**CEL**') is a research centre based at UCL's Faculty of Laws. The Centre brings together leading academics, practitioners and policy makers to support research at the intersection of ethics and law. Our work aims to support the development of regulatory frameworks, organisational policies and individual practices that drive sustainable benefits for people, business and society.
2. The CEL's research adopts an interdisciplinary approach and applies across a range of sectors, from corporate law and governance to emerging technologies and professional ethics. The Centre's work on legal professional ethics includes the Independent Review of Legal Services Regulation, led by Honorary Professor Stephen Mayson, with our members leading numerous important initiatives on legal professional ethics. These include The Post Office Project (Professor Richard Moorhead and Dr Karen Nokes) and the IBE Taskforce on Business Ethics and the Legal Profession (Lauren Branston, Sam Eastwood, Honorary Professor Stephen Mayson and Honorary Professor of Practice Jeff Twentyman).
3. Underpinning the CEL's work is the belief that ethical rules, appropriately applied and implemented well, are fundamental to a just and successful society. At a time when the rule of law is facing unprecedented attack, the need to uphold its principles, and to maintain the UK's commitment to, and reputation for, upholding its principles, is of pressing importance. Central to this imperative is protecting public trust in the profession, a key component of which is the maintenance of professional ethical duties. Against this, the CEL fully supports the LSB's objectives in proposing the statutory statement of policy ('**Statutory Statement**'), as well as the Consultation's premise that strengthening professional ethics is crucial for upholding the proper administration of justice and the rule of law. Our comments below should be read in light of this support.
4. The CEL welcomes the opportunity to respond to the Consultation. We provide both our general perspective on the issues raised as well as specific responses to the Consultation questions.

### **General themes**

5. Five key themes emerge from our response to the Consultation. These themes reflect the overarching observation that to achieve the Consultation's objectives, genuine, pervasive and sustained behavioural change is needed and much of our response considers how the Statutory Statement can, or should, achieve that outcome. In making this observation, we are mindful of

protecting against the risk that regulation can sometimes create a false sense of action. Namely, that technical compliance<sup>1</sup> with espoused rules can be seen by some as sufficient in discharging their responsibilities, without necessarily achieving the intended behavioural change.<sup>2</sup> In these cases, intervention can act to set a low ceiling of compliance, rather than a high floor. Many of our comments aim to reduce this risk.

6. **Behavioural change in a complex environment.** Threats to professional ethics emerge in complex institutional and social environments<sup>3</sup> and at multiple levels of the broader legal system (individual, firm and client). These threats intersect with individual, organisational and sector/industry norms; personal and professional incentives, pressures and identities; education and training; and individual variance in ethical awareness, orientation, personal resilience and courage. Characterised by decision uncertainty, ethical challenges often involve competing interests and present themselves in dynamic situations and an environment of urgency. This complexity makes meaningful behavioural change challenging, often requiring intrinsic, identity-based change that can be difficult to achieve by regulation alone. As such, any regulatory intervention needs to be carefully structured to promote and support an environment in which sustainable change can occur. This includes considerations of environments that enable psychological safety, individual autonomy and responsibility, professional identity, and cultural change, together with the systems and processes that facilitate this (for example speak up mechanisms and incentive structures that recognise and reward ethical conduct). One important aspect of this environment is ensuring the salience of a firm's commitment to the professional ethical duties as part of their recruitment and onboarding processes. In this regard, culture and leadership will be critical. We do not underestimate the difficulty of this task, and insights can be drawn from other sectors (such as the medical profession), and other jurisdictions,<sup>4</sup> which have also had to address these challenges.
7. **Role identity.** One critical component of behavioural change, which has been threatened by recent scandals, is the role and identity of lawyers within society. As mentioned, role identity is central to the intrinsic motivation needed to uphold professional ethical duties, particularly given the difficult circumstances in which ethical dilemmas arise.<sup>5</sup> Clarity of role identity, widely communicated, also acts as a powerful determinant of the expectations of third parties engaging with, or instructing, members of the legal profession. Whilst these third parties are outside of the LSB's regulatory perimeter, the Statutory Statement can operate to underscore the importance, and absolute nature, of the professional ethical duties. In this way, 'bright line'

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<sup>1</sup> That is, compliance with the letter of the law, sometimes in defeat of its spirit. See: D. McBarnet, 'After Enron Will "Whiter Than White Collar Crime" Still Wash?' (2006) 46(6) *British Journal of Criminology* 1091.

<sup>2</sup> J. K. Robbenolt and J. R. Sternlight, 'Behavioral legal ethics' (2013) 45 *Arizona State Law Journal* 1107. For a broader discussion on the behavioural change (individual and organisational) see: D. Langevoort, 'Behavioral Ethics, Behavioral Compliance,' in J. Arlen (ed.) *Research Handbook on Corporate Crime and Financial Misdealing* (2018 Edward Elgar Publishing), 263.

<sup>3</sup> The decision environment facing legal professionals is increasingly complex, due to the transformation of professional fields via corporatisation, marketisation and globalisation (for example see J. R. Faulconbridge and D. Muzio, 'Legal Education, Globalization and Cultures of Professional Practice,' (2009) 21 *Georgetown Journal of Legal Ethics* 1335; D. Muzio, D. M. Brock and R. R. Suddaby, 'Professions and institutional change: Towards an Institutionalist Sociology of the Professions,' (2013) 50(5) *Journal of Management Studies* 699.

<sup>4</sup> See our comments on the Norwegian Bar Association in paragraphs 50 and 51.

<sup>5</sup> H. Tajfel and J. Turner, 'An integrative theory of intergroup conflict,' in W. Austin and S. Worchel (eds), *The Social Psychology of Intergroup Relations*, 33-47 (1979 Monterey, CA: Brooks-Cole); S. Stryker, *Symbolic Interactionism: A Social Structural Version* (1980 Benjamin/Cummings Publishing Co).

or specific rules whilst serving to constrain, also serve to protect members of the profession, providing defined boundaries for lawyers as to what is considered appropriate conduct.<sup>6</sup>

8. **Transparency.** Reporting on adherence to the professional ethical duties will be essential for reflexive engagement, monitoring and enforcement, normative change<sup>7</sup> and sharing of best practice. Any such reporting requirements find their legitimacy in the understanding of the legal profession as a public one and the corresponding professional privilege that individual authorisation grants.<sup>8</sup> That said, this necessarily raises the question of what reporting is required, including the standard of reporting that is expected and the metrics that will be used. We know from other contexts, such as the Corporate Governance Code, that the quality of reporting can be varied. Consideration is therefore needed as to the role of regulators in making transparency a priority, whilst supporting high quality reporting through guidance and oversight. In turn, this requires due recognition of the regulatory resources that this will require and consideration as to how these will be realised.
9. **Education and training.** We agree with the Consultation that education and training are fundamental to strengthening professional ethical duties. This not only drives awareness, identity and norms but increases ethical resilience by creating the expectation and psychological safety that upholding the duties (including through speak up processes) will be met with support (if it is then met with support). We further agree with the Consultation that this education and training should be met at the point of qualification and throughout an individual's career. Whilst outside of the remit of the LSB, we would be remiss not to observe that there is also an important need for legal ethics to be an integrated part of undergraduate education.<sup>9</sup>
10. **Overriding duty.** Navigating the potentially conflicting professional ethical duties is challenging. This can be exacerbated by the misperceived primacy of the duty to act in the best interests of the client, particularly as this duty can be reinforced by the immediacy of commercial pressures and dimensions of client power.<sup>10</sup> Given this, and a need for the normative, behavioural and identity changes set out above, there is a place for the LSB to consider including an overriding duty as part of the Statutory Statement. Much like the overriding objective acts as a normative ordering mechanism for civil procedure,<sup>11</sup> an overriding duty will help to perform the same role for lawyers (and those interacting with them), offering an unambiguous and unequivocal statement of the legal profession's overarching obligation in the event a conflict of duties arises. We appreciate that the draft Statutory Statement makes clear that the duty to act in the best interests of a client does not override other professional duties, which is an important clarification. However, it still leaves scope for individual interpretation and, therefore, misinterpretation. An

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<sup>6</sup> L. Mulder, J. Jordan and F. Rink, 'The Effect of Specific and General Rules on Ethical Decisions,' (2015) 126 *Organizational Behaviour and Human Decision Processes* 115.

<sup>7</sup> P. J. DiMaggio and W. W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147.

<sup>8</sup> S. Mayson, 'Legal Services Regulation, the Meaning of 'the Public Interest, Second Supplementary Report of the Independent Review of Legal Services Regulation' (September 2024), iv. Available < [https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr\\_second\\_supplementary\\_report.pdf](https://www.ucl.ac.uk/ethics-law/sites/ethics-law/files/irlsr_second_supplementary_report.pdf) > (accessed 27 May 2025)

<sup>9</sup> There is a wealth of scholarship that advances the benefit of ethics education within the undergraduate curriculum. For example: J. Ching, G. Ferris and J. Jarman, 'To Act is to be Committed, and to be Committed is to be in Danger,' (2022) 25(1-2) *Legal Ethics* 44, discuss the vulnerability of the young lawyer in an ethical crisis and suggest that a comprehensive ethics education may assist in countering the sense of vulnerability that young lawyers may find themselves experiencing when entering legal practice.

<sup>10</sup> R. Dinovitzer, H. Gunz and S. Gunz, 'Origins, Applications, and Developments' in L. Empson, D. Muzio, J. Broschak, and B. Hinings (eds.) *The Oxford Handbook of Professional Service Firms* (2015 OUP), 113.

<sup>11</sup> Rule 1.1. Civil Procedure Rules.

overriding duty will provide clear guidance as to how any conflicts between the professional ethical duties must, ultimately, be resolved whilst providing an equally unequivocal statement of the robustness of the duties (and their priority) to those engaging and employing the profession.

11. We are at a juncture where there is widespread support for reinforcing professional ethical duties to reduce the risk of further lawyering failures such as the Post Office scandal, inappropriate use of NDAs and SLAPPs. To achieve this, we need similarly widespread normative change, which reflects a common understanding of the role of a lawyer, and the legal profession, in civil society. Experience from other significant normative changes, such as public attitudes to smoking, suggest that this requires changing understandings of the harm that failure to reform will result in<sup>12</sup> and utilising the expressive function of law to signal a new, or accepted, normative position.<sup>13</sup> The LSB, through the Statutory Statement and corresponding communication, education and guidance activities, is well placed to drive these changes. Against these general observations, we are pleased to set out our responses to the specific Consultation questions below.

#### **Q1. Do you agree with our proposed definition of professional ethical duties?**

12. The professional ethical duties are based on those set out in the Legal Services Act 2007 (the 'Act'). This raises the potential question of the extent to which the Statutory Statement adds to the existing landscape, or risks introducing additional regulatory overlay, without material reform. However, given the systemic risks that the current threats to professional ethics present, we consider it appropriate for an oversight regulator to make a clear and unequivocal statement of the expected norms of the profession,<sup>14</sup> which is a necessary first step in achieving meaningful behavioural change. It is our view that this imperative is sufficiently important to mitigate any criticism in this regard. Moreover, and subject to the comments that follow, by basing the professional ethical duties on those in the Act the LSB can perform this normative signalling role, whilst reducing the risk of introducing uncertainty that a new, or materially different, set of duties may bring.
13. It is important that the Statutory Statement makes clear what the line of integrity/ethics that needs to be achieved is. This needs to be an unequivocal, bright line test that is readily understandable and accessible to all. For example, whilst not a direct extract from the Hippocratic Oath, the abbreviated concept of 'do no harm' is a powerful statement of principle understood by medics and patients alike. The importance of this clarity of principle lies in its behavioural impact. If members fall below the line they are met with personal, organisational and systemic risk as well as potential sanction and public shame. If their behaviour is above the line, they are open to growth, innovation and constructive challenge. Being clear as to the ethical standards expected of members of the legal profession is likely to support the creation and maintenance of working environments of psychological safety, the ability to build ethical expertise and learn from potential issues<sup>15</sup> and move from a culture of blame to openness and curiosity.
14. Given the importance of such a bright line test, and notwithstanding our general support for the proposed content of the professional ethical duties, we do wonder whether there is clarity as to

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<sup>12</sup> C. R. Sunstein, 'Social Norms and Social Roles' (1996) 96(4) *Columbia Law Review* 903.

<sup>13</sup> C. R. Sunstein, 'On the Expressive Function of Law,' (1996) 144 *University of Pennsylvania Law Review* 2021.

<sup>14</sup> As a 'norm entrepreneur' to use Cass Sunstein's taxonomy (Sunstein, n12).

<sup>15</sup> On the role of experience in ethical decision making at work see: E. Dane and S. Sonenshein, 'An Ethical Expertise Perspective,' (2015) 5(1) *Organizational Psychology Review* 74.

the standard (or duty) that will be applied when resolving conflict between the duties? The Statutory Statement makes a much-needed clarification that the duty to clients does not override an authorised person's other duties. However, this still leaves authorised persons with the discretion on how to manage a conflict and any scope for individual determination retains the risk that commercial pressures will prevail in resolving disputes. As such, we believe there is potential for the Statutory Statement to introduce an overriding duty that acts as a normative ordering function<sup>16</sup> in the event of conflict between the professional ethical duties. We would anticipate that this is grounded in the public interest in the administration of justice (which incorporates the rule of law and public confidence in the profession),<sup>17</sup> providing both a mechanism for authorised persons to resolve conflicts and a clear statement to third parties (who may have an interest in how any such conflict is resolved) as to the lack of discretion that their advisors have in determining which way to act.

15. The definition of professional ethical duties does not incorporate fully, but does overlap with, other elements of professional ethics. For example, certain of the SRA principles and obligations regarding client money, which whilst not mentioned explicitly in s 1 of the Act are an important part of professional ethics. The Statutory Statement offers the opportunity to consider the extent to which a broader approach to professional ethics is desirable.
16. We note too that the outcomes focus on 'authorised persons' with a corresponding obligation in paragraph 17 of the draft Statutory Statement for regulators to 'take account' of 'regulated persons' when pursuing the five outcomes. We wonder whether there is scope to consider whether the Statutory Statement should expressly refer to the different approaches that may be needed for each type of person and whether applied to an individual or entity. Further, does the reference to regulated persons give sufficient recognition to those individuals who may not be authorised persons but can have significant influence on the environment in which the professional ethical duties arise?

## **Q2. Do you agree with our proposal to set general outcomes?**

17. The structure of the Statutory Statement, setting out outcomes and expectations, provides important flexibility for frontline regulators to comply in the way that is most appropriate for their members. However, whilst this approach is appropriate (a detailed set of rules alone will likely be ineffective), such flexibility necessarily comes at the expense of specificity. This raises the question of how regulators can structure their own requirements to facilitate meaningful behavioural change, whilst providing specific, actionable, support to their members.<sup>18</sup>
18. We have seen this challenge (namely, flexibility at the cost of specificity) elsewhere, for example with the use of 'failure to prevent' offences.<sup>19</sup> The breadth of these regulatory obligations, coupled with high sanctions, have shown early effectiveness in motivating organisational engagement.<sup>20</sup> However, these broad requirements do risk uncertainty and we have also seen

<sup>16</sup> C. O'Reilly and J. A. Chatman, 'Culture as Social Control: Corporations, Cults and Commitment' in B. M. Staw and L. L. Cummings (eds) *Research in Organizational Behavior: an Annual Series of Analytical Essays and Critical Reviews* Volume 18 (1996, JAI Press Inc), 157.

<sup>17</sup> See: Mayson (n 8). The introduction of an overriding duty would then inform (in part) the education, training and resources produced pursuant to the outcomes.

<sup>18</sup> This imperative informs our comments below regarding each outcome and the corresponding expectations.

<sup>19</sup> See: s 7 Bribery Act 2010 and s 199, Economic Crime and Corporate Transparency Act 2023.

<sup>20</sup> Although the impact of enforcement strategies on ongoing engagement should be noted.

regulatory guidance being offered to help inform compliance and address common concerns.<sup>21</sup> Such guidance is not without its own challenges,<sup>22</sup> and care would be needed not to undermine the reflexive intention of any regulatory action. However, the experiences in other domains may offer instructive support as to how frontline regulators can best support the wide range of regulated entities that will need to comply with any regulatory requirements arising from the Statutory Statement.

19. One final, general, consideration on the outcomes is whether these (or any ensuing regulatory requirements) should be proscriptive or prescriptive. Research has suggested that proscriptive rules are generally characterised as strict and seen as mandatory and duty-based, with prescriptive rules seen as more abstract and discretionary.<sup>23</sup> We see, for example, that fiduciary duties of directors are proscriptive, with the no-conflict duties strictly applied on the basis that it is human nature (and, in the case of the professional duties, cognitive biases), not morality, that the duties need to respond to.<sup>24</sup> The outcomes and expectations are prescriptive, which is understandable given the context. However, frontline regulators may wish to consider this dichotomy when meeting expectations e.g. when setting regulatory arrangements pursuant to outcome two.

**Q3. Do you agree these proposed outcomes address the harms and unethical behaviours presented in the evidence? Are there any further outcomes we should consider?**

20. One outcome that may be required centres on self-regulation and individual responsibility. We have seen a move towards organisations centralising the consideration of ethical issues and consequential decision making. This centralised support is useful and allows for shared understanding and knowledge. However, research shows that this deferral of decision-making responsibility can also lead to a corresponding outsourcing of ethical responsibility, with individuals simply becoming task-focussed at the expense of broader, more holistic, considerations.<sup>25</sup> The legal profession is predicated on individual authorisation and a question arises as to whether the objectives the Consultation is seeking to achieve require a model of individual responsibility plus central support. That is, we do not advocate for an entirely individualistic model (which would carry undesirable and unintended consequences). Rather, one that offers the benefit of collective wisdom combined with some individual responsibility. This could manifest in several ways, from individual reporting on, training in, and compliance with, professional ethical duties to annual declarations that any concerns with professional ethical duties have been properly escalated and, where relevant, reported. In this way, discussions of personal accountability are not myopically focussed on enforcement actions for breach (which could act as a deterrent to open communication), but as a mechanism for driving genuine

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<sup>21</sup> See: Ministry of Justice, 'Guidance on Procedures that Relevant Organisations can put into Place to Prevent Relevant Persons Associated with them from Bribing (s 9 of the Bribery Act 2010),' (March 2011); and Home Office, 'Economic Crime and Corporate Transparency Act 2023: Guidance to Organisations on the Offence of Failure to Prevent Fraud,' (November 2024).

<sup>22</sup> See: C. Krishnan, Executive Director of Transparency International: 'The Bribery Act ... is one of the best anti-bribery laws in the world. But the Guidance will achieve exactly the opposite of what is claimed for it. Parts of it read more like a guide on how to evade the Act, than how to develop company procedures that will uphold it.' Available <<https://www.transparency.org/en/press/20110330-guidance-weakens-bribery-act>> accessed 20 May 2025.

<sup>23</sup> R. Janoff-Bulman, S. Sheikh, and S. Hepp, 'Proscriptive Versus Prescriptive Morality: Two Faces of Moral Regulation.' (2009) 96(3) *Journal of Personality and Social Psychology* 521.

<sup>24</sup> *Bray v Ford* [1896] AC 44.

<sup>25</sup> For a broader discussion of this point see: A. Donovan, *Reconceptualising Corporate Compliance, Responsibility, Freedom and the Law* (2021 Hart).

engagement, supporting learning and behavioural change.<sup>26</sup> We examine this concept further, and the important balance between individual and collective responsibility, when discussing outcome two.

21. We should also note that whilst the Statutory Statement is, rightly, grounded in managing risk, mitigating harms and preventing wrongful conduct, this is not the only outcome of strengthening the professional ethical duties. There is considerable benefit (to individuals, firms and society), in enhancing adherence to the duties. This includes attracting and retaining high quality talent in the profession, whilst further strengthening the global standing of the UK legal sector, which in turn creates more sustainable long term opportunities for UK legal services providers.

**Q4. Do you agree that the proposed general outcomes should be met by regulators through a set of specific expectations?**

22. It is important that regulators support the diversity of their members by not only stating the issues that need to be prevented but also providing insight into what is needed to prevent them. Most professionals are doing, or want to do, the right thing. However, the complexity of the challenge, the pressures that authorised persons are under and the potential resource constraints that many are experiencing, can make this difficult to achieve. The Consultation and outcomes do well to identify what is missing. For example, the lack of understanding of what upholding the duties means and a lack of empowerment in many environments. However, there is also a place to provide insight into what is needed, specifically, to address this. We note that this is what the expectations are designed to do, and we agree with the approach of setting a broad outcome together with more detailed expectations. We see this approach used elsewhere (such as the Corporate Governance Code) to help manage the balance between the need for flexibility as well as the support that is given through more granular requirements.
23. One consideration is the extent to which the expectations make clear the nature and extent of action that is required from frontline regulators. For example, in providing 'guidance' how granular should this be? Are regulators to offer specific insight or toolkits on, for example, how to support ethical decision-making frameworks, what feedback, incentives and appraisals would look like in this context, what infrastructure is needed, and what effective leadership, education, training and speak up processes might be required (and how they are structured)? That is, practical support, insight and guidance beyond a general requirement to introduce an 'ethical culture' and what this, broadly, might look like (tone from the top etc).<sup>27</sup> Further, what obligations are the regulators under to directly provide the support themselves e.g. through training programmes? Our comments here reflect the fact that many authorised persons (which occupy a broad spectrum from global firms to sole practitioners) will benefit from this type of detailed

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<sup>26</sup> Similar observations were made by the Committee on Standards in Public Life, 'Recognising and Responding to Early Warning Signs in Public Bodies,' (March 2025), 10. Available at [https://assets.publishing.service.gov.uk/media/67dadc79a87d546feeda0290/CSPL\\_Early\\_Warning\\_Signs\\_report\\_Final\\_WEB.pdf](https://assets.publishing.service.gov.uk/media/67dadc79a87d546feeda0290/CSPL_Early_Warning_Signs_report_Final_WEB.pdf) accessed 20 May 2025.

<sup>27</sup> There is also the need for organisations to assess culture at all levels given that the view that leaders may have can look different from those employees at other levels of the organisation, see L. K. Treviño, G. R. Weaver and M. E. Brown, 'It's lovely at the top: Hierarchical Levels, Identities, and Perceptions of Organizational Ethics,' 18(2) *Business Ethics Quarterly* 233.

support in taking action towards the ethical standards that are expected of them and that, in the most part, they themselves will likely want to achieve.

24. Aligned with considerations of the action that each regulator is expected to provide, is whether the Statutory Statement is clear on what success looks like for each outcome. There is value in recognising that the markers of success for a Consultation such as this can be counter intuitive, and we need to create a regulatory environment that allows for this. For example, that the signs of an ethical culture might be an initial *increase* in reports of ethical violations. By clearly defining success, regulators are also better positioned to understand how to effectively meet the expectations for each outcome, where appropriate points of intervention might exist and how to set appropriate reporting metrics for their members.

**Q5. 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?**

25. We do agree with this approach. This encourages reflexive engagement with the needs of members, the outcomes of which can be shared as part of the regulator's obligation to provide support to those who it regulates. In addition, this provides the opportunity for objective and transparent decision making, which further instils trust in the profession.

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

**Q6. Do you agree with the proposed outcome 1?**

**Q7. Do you agree with the specific expectations proposed under outcome 1?**

26. Developing individual, and collective, ethical awareness, resilience and courage underpins successful implementation of the professional ethical duties. This requires a strong sense of professional identity, grounded in the public nature of the profession and the social licence with which it operates.<sup>28</sup> Developing this sense of professional identity starts with an individual's legal education and necessitates continued reinforcement, particularly when the pressures of modern practice can present conflicting demands, norms and incentives.
27. Introducing legal professional ethics at an early stage of a person's legal education not only increases the salience of these duties but also creates a shared understanding, identity and common language. In turn, this shared identity is a powerful mechanism for creating a broader culture of ethics and a common goal - both of which contribute to a sense of agency and safety should the need to raise an ethical concern arise. Research consistently shows social identity as a powerful determinant of behaviour, with individual actions quickly aligning to group norms (a phenomenon that can, of course, both work towards achieving the Consultation objectives and against it).<sup>29</sup>

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<sup>28</sup> Mayson (n 8).

<sup>29</sup> See: Tajfel (n 5). In addition, social identity theory can amplify the effect of social norms. See C. Moore and F. Gino, 'Ethically Adrift: How Others Pull our Moral Compass from True North, and how we can Fix it' (2013) 33 *Research in Organizational Behavior* 53.



28. One important aspect of education and training is ethical awareness. Ethical concerns rarely start, or present themselves, as a single, clearly identifiable issue. Instead, they often reflect a cumulation of smaller incidents and behaviours that coalesce over time with powerful behavioural implications. High profile scandals in the business world such as Boeing, Volkswagen, Enron and many others demonstrate that when ethical degradation occurs slowly, unethical behaviour is more likely to be accepted.<sup>30</sup> The pernicious nature of these smaller incidents can be seen in how they operate to change the baseline of ethical conduct for an individual and, ultimately, an organisation. As each incident requires rationalisation (and over rationalisation)<sup>31</sup> the baseline of what is 'acceptable' or 'ethical' changes, legitimising previously unethical conduct. This can then extend to organisational, and even sector, level change due to processes such as institutionalisation, rationalisation and socialisation.<sup>32</sup> In addition, as people look to the conduct of others to determine their own behaviour, organisational and sector level change can occur both consciously and implicitly.<sup>33</sup> Once a decision has been made, this can create a sense of commitment to it and conservatism against deviation (that 'there's no going back').<sup>34</sup> It is more difficult having started down a path of action to later raise concerns. Instead, it is important to enable the identification of potential issues at the earliest possible time before any steps are taken (no matter how small), as it is at this point that concerns are more likely to be raised and, if raised, interventions are likely to be more effective at stopping escalation.
29. The need for education and training to support ethical awareness, as well as resilience to exercise personal agency and the courage to speak up, requires tailored education and training. Training helps to highlight the real-life situations in which ethical challenges can arise, which may differ according to practice area, firm size and whether in-house or in private practice (to name but a few variables), rather than anchoring training solely in abstract rules and potentially unrealistic scenarios. Education needs to extend beyond the mere identification of applicable rules to how consideration and reflection of expected standards and rules play out in the type of challenging and fast paced environments that law firms present. We consider that there is considerable merit in such training harnessing disciplinary insights to incorporate business and behavioural ethics.<sup>35</sup> Again, this requires resources (both financial and the time to create, and engage with, training) and there is an important role for regulators to play that can be reflected in the expectations set out for regulatees and authorised persons. For example, by mandating effective training, guidance as to what 'effective' training means and an obligation for entities to provide sufficient support and space for employees to engage with training. Regulators are also uniquely placed to share the range of real-life case studies that arise, together with a detailed analysis of these looking at where changes in behaviour, training and processes (as the case may be) could have made a difference. In doing so, these case studies enable authorised persons to learn from the experience of others, increasing the likelihood of individuals recognising similar risks and ethical issues in their own work.

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<sup>30</sup> F. Gino and M.H. Bazerman, 'When misconduct goes unnoticed: The acceptability of gradual erosion in others' unethical behaviour' 45 *Journal of Experimental Psychology* 45, 708.

<sup>31</sup> Over rationalisation is required to manage an individual's cognitive dissonance as 'perfect' rationalisation is not possible. On this see: M. Wenzel, 'Motivation or Rationalisation? Causal Relations between Ethics, Norms and Tax Compliance,' (2005) 26 *Journal of Economic Psychology* 491; S. C. Zyglidopoulos, P. J. Fleming and S. Rothenberg, 'Rationalization, Overcompensation and the Escalation of Corruption in Organizations,' (2009) 84 *Journal of Business Ethics* 65; discussed in chapter four of Donovan (n 25).

<sup>32</sup> B. E. Ashforth and V. Anand, 'The Normalization of Corruption in Organizations' (2003) 25 *Research in Organizational Behavior* 1.

<sup>33</sup> DiMaggio (n 7).

<sup>34</sup> See also: A Bandura (1977) *Social Learning Theory* (1977 New York: General Learning Press).

<sup>35</sup> See: Robbenolt and Sternlight (n 2); R. Atkinson, 'Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together' (2004) 29 *Journal of Corporation Law* 469.

30. Regulators can also play an important role in communicating the role and responsibilities of lawyers - not only to those that they regulate, but to the third parties who engage them. Lawyers have different responsibilities to other professionals, such as directors, and this is a key component of the value that they provide to their clients. To support lawyers in implementing their ethical duties, it is important that clients understand this value, and share a common language as to the benefits, and boundaries, of legal advice and the professional duties by which lawyers are bound. Regulators can contribute to this broader education through the resources that they make publicly available, the public statements that they make and the conversations that they have with other representative bodies.
31. On the prioritisation of duties, see our earlier comments as to the role of an overriding duty to provide definitive guidance in the event duties are found to be in conflict.
32. The creation of a common professional identity and language starts, whether intentionally or otherwise, with an individual's undergraduate education. A person's undergraduate education will serve a norm setting function, which if done in the right way will give confidence to an individual to uphold those norms when entering the profession (secure in the understanding that they will be supported by others when doing so). In the UK, standalone undergraduate modules on professional ethics do exist but are not routinely available in all law schools.<sup>36</sup> The Faculty of Laws at UCL, offers a final year module 'Lawyers, Ethics and Organisations' convened by Dr Karen Nokes.<sup>37</sup> The module critically examines how lawyers practice in a range of organisational and institutional contexts using interdisciplinary insights drawn from law, sociology, organisation and management theory and psychology, to examine the psychological, social, and economic forces that influence lawyers' ethical judgments in their daily practice. This module equips students with an understanding of what applied practice is like. It starts to develop an awareness, and understanding, of how to navigate tensions and challenges in the context in which ethical dilemmas arise. Doing so allows students the opportunity to understand the distorting impact that pressure (in many forms) can have, giving students the skills and tools to navigate this. In this way, undergraduate education can provide a foundational understanding of applied professional/legal ethics that moves away from simply knowledge of abstract rules, towards something more holistic.
33. Clinical legal education and placements also play an important role in undergraduate ethical knowledge, awareness and skills training. Giving students an experiential learning opportunity helps them to realise the challenge of ethical awareness and the need to be alert to potential risks and what these might look like. The CEL is currently developing a clinical-based programme to support students in recognising when a question of professional ethics may arise in a transactional setting, highlighting how these might not always be immediately apparent. The value of this type of experience is significant, giving students an opportunity to start to internalise the importance, and potential opacity, of ethical risks prior to engaging with real client work. This type of clinical programme demonstrates the benefit of collaboration between academia, practice and policy – drawing on the expertise of all branches of the profession to provide robust education and training that helps to strengthen the ethical understanding of future members.

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<sup>36</sup> We have not undertaken an exhaustive search. Exceptions we identified where details of modules on professional/legal ethics were publicly available included the Universities of Birmingham, Exeter, Kent, Sussex, Westminster and York.

<sup>37</sup> The module in previous years has been co-convened with Professor Steven Vaughan, now Dean at Monash Law School.

34. Of course, not everyone who studies for a law degree wants to go on to practice law.<sup>38</sup> However, the great value that an undergraduate degree in law offers is the ability to think critically, to identify and engage with complex questions and to recognise broader questions of ethics and justice – characteristics that are of value to whatever future careers our graduates pursue.<sup>39</sup>
35. Beyond the academic stage of a person's education, we agree that authorised persons must have the right knowledge and skills of the professional ethical duties at the point of qualification and throughout their career. In addition, supporting the professional ethical duties requires not only knowledge and skills but also the right attitude and motivations. For example, what does it mean to be a professional? What does it mean to have integrity? How can a person navigate difficult conversations and power imbalances? At what point does 'creative compliance'<sup>40</sup> or 'lawful but awful'<sup>41</sup> behaviour constitute a breach of professional standards and duties? This type of education and skills training is essential to develop ethical awareness, personal robustness and the aptitude to raise concerns in a dynamic and high-pressured environment.
36. In line with earlier observations, some aspects of ethical training need to be tailored to an individual's practice. However, certain skills and attitudes will be required by all authorised persons and there is scope here for regulators to take the lead on developing expectations and training resources. The expectations in outcome one could therefore make clear the role that a regulator has in providing education and training itself, as well as setting the standards for authorised persons to meet.
37. It is a policy question as to whether mandatory annual ethics training should be required. This would support individuals in recognising and reporting ethical risk, whilst signalling the central importance of professional ethics to the profession and others. It does however raise questions of resource and structure. For example, whether this should be offered by external partners and form a CPD requirement or be offered internally, allowing for a tailored programme. Both approaches carry broader considerations – external training risks a 'tick box' approach to training whilst an internal programme, whilst tailored, risks inconsistency in terms of depth and quality. Regardless of the approach adopted, this type of training requires the incorporation of 'learning loops' to allow for the application of what has been considered in training to be applied when people return to their 'day jobs.' Receiving feedback and the sharing of their experiences is an important element in the development of ethical expertise.<sup>42</sup>
38. The complexity of ensuring spirited (as opposed to creative) compliance with professional ethical duties means that effective education and skills training requires an interdisciplinary approach. Given this, we agree with the expectation that regulators should share best practice amongst themselves. However, we would strengthen this and suggest that there is value in the development of a Legal Ethics and Responsibility Network ('**LEARN**') that brings together regulators, practitioners and academics from across disciplines to develop and share best practice, training resources, toolkits and case studies developed through evidence-based

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<sup>38</sup> And not everyone who practices law studies law as an undergraduate. Any changes to the requirements, or expectations, of undergraduate education should also be conveyed to those offering alternative paths to qualification e.g. the PGDL.

<sup>39</sup> See: R Atkinson (n 35). For this reason, there is also a great benefit in embedding ethics within undergraduate modules.

<sup>40</sup> McBarnet (n 1).

<sup>41</sup> N. Passas, 'Lawful But Awful: "Legal Corporate Crimes"' (2005) 34 *The Journal of Socio-Economics* 771.

<sup>42</sup> For example, see: Dane and Sonenshein (n 15).

approaches. LEARN could create a collaborative hub of resources for its respective members, help to lead policy discussions and act as a convening power and focal point for open conversations on emerging risks and best practice. This network, and its outputs, would be integral to outcomes one and two and their associated expectations.

39. The creation of a central ethics hub, whether via the LEARN proposal or otherwise, would help to increase user experience when accessing support at a time of stress. This hub could include relevant warning notices, decisions, guidance, case studies and toolkits, as well as the potential model documents referred to in this response. The hub would also benefit from sharing other relevant avenues of support, such as mental health support for lawyers and regulator helplines.

**Outcome two: regulators have a framework of rules, regulations, guidance and other resources which make clear that *professional ethical duties* are integral to the way authorised persons are expected to behave and act throughout their careers.**

**Q8. Do you agree with the proposed outcome 2?**

**Q9. Do you agree with the specific expectations proposed under outcome 2?**

40. Regulators need to have a framework of rules that encourage the behavioural change needed to achieve the objectives of the Statutory Statement. This includes rules that require action from authorised entities relating to governance, systems and processes (including internal reporting lines and speak up mechanisms), external reporting, incentives and responsibility. We know from other sectors (such as tax and corporate governance reporting) that the risk of creative compliance is high and regulators need to structure their requirements and guidance in a way that mitigates this risk.
41. There are three approaches to consider in achieving this. First, broad outcome-based objectives backed by stringent sanctions (see for example Bribery Act 2010). Secondly, detailed and specific procedural requirements that in and of themselves will drive behavioural change (see for example the systems and controls requirements of the FCA Handbook). Finally, and this can be integrated with the two previous mechanisms, the allocation of individual liability (or responsibility) that ensures an individual has robust authority and strong motivation to ensure appropriate systems and controls are put in place (see for example the Senior Managers Regime or Sarbanes-Oxley financial statement requirements).
42. The imposition of individual liability can be controversial and raises several important questions about the appropriate allocation of responsibility. This is particularly the case when organisational factors, outside of an individual's control, can have a powerful impact on individual decision making. Whilst this is a larger policy question, we note that a lack of personal responsibility can risk 'moral outsourcing',<sup>43</sup> with individuals (genuinely) believing that others within the firm are responsible for determining the ethics of a particular decision. It might be that regulators determine that some level of individual responsibility to recognise and report potential risks is important for meaningful change, noting that there is wide scope for what this responsibility might look like. For example, this could be reflected in an annual confirmation that

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<sup>43</sup> Donovan (n 25), chapter 7.

all potential breaches of the professional ethical duties have been reported in line with internal processes. Again, this is where we see the importance of broader cultural norms and reforms. For such reporting to work, there is a prerequisite that individuals need the psychological safety that any report will be received seriously, without negative repercussions and investigated appropriately. In addition, it is important to be clear that any individual responsibility must sit alongside organisational responsibility. Significant care needs to be taken to ensure that any personal responsibility regime does not operate to undermine organisational responsibility to create an ethical and responsible culture.

43. Other sectors have seen success with discrete individual liability regimes, such as the Senior Managers' and Certified Persons Regime ('**SMCR**') in the financial services sector.<sup>44</sup> When thinking of individual accountability regimes such as this, it is prudent to reflect on the fact that the UK model of regulation relies, *inter alia*, on firms having a good governance system overseen by senior management. It requires these individuals to interpret the regulations by applying their discretion and exercising judgement. Their judgement is mediated by systems of internal controls, which seek to achieve the regulatory objectives to satisfy both the letter and the spirit of the regulations. This system of 'meta-regulation' has as its objective the connection of private internal justice with the public justice of accountability. It requires that those working in the business, including senior management, internalise compliance with the regulations and are responsible, where appropriate for failures to do so. As can be seen with the SMCR this can be successfully operated without using heavy-handed enforcement action. It ensures responsibility remains where it belongs with the senior management of each and every individual firm.
44. The imposition of personal liability ensures responsibility not just for individual decision making but to investigate and address any systemic contributions to poor ethical decision making. These systemic factors can be wide ranging and include recruitment, induction and onboarding, training and development, appraisals and incentives (amongst others). Notwithstanding the potential benefits of a senior managers regime, this can be met with significant resistance and the parameters of any such responsibility (and corresponding liability) would need to be carefully considered. As mentioned elsewhere, care would also need to be taken that the appointment of an individual responsible for ethical risk management does not trigger the psychological outsourcing of responsibility (mentioned above) by other individuals with the firm. Regulators who consider any such appointment, perhaps in firms over a certain size, can learn from the banking sector as to best practices for implementing a similar regime and the challenges that can emerge, including the impact of any individual appointment on culture and behavioural change.<sup>45</sup>
45. Regulatory frameworks will need to set out appropriate record keeping obligations in respect of decisions that are relevant to the professional ethics duties (this overlaps with outcome four and we also refer you to our comments against that outcome). For both reporting and enforcement purposes, organisations will need to be able to evidence their risk assessments, complaints regime, speak up processes and the steps taken when ethical challenges arise. Regulators will need to consider what obligations it is proportionate to request of their members in this regard e.g. contemporaneous notes of relevant decisions. This also helps to preserve institutional memory, support internal audits and post-event reviews.

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<sup>44</sup> E. Hickman and A. Brener, 'The Senior Managers and Certification Regime in UK Practice and Global Context,' (2025) *Journal of Banking Regulation*.

<sup>45</sup> See: Hickman and Brener (n 44).

46. In making recommendations for appropriate internal systems and controls, care should be taken to avoid the creation of siloed thinking within an organisation, which can undermine culture and increase the risk of abuse, due in part to moral outsourcing and a failure to see the 'bigger picture.' For example, the insular approach reported to be taken by the Wells Fargo in-house legal team, and their concern with damage to the bank's reputation, was identified as a potential contributor to the scandal.<sup>46</sup> The in-house teams provided legal advice throughout the period of concern, but the investigation found that '[t]here continued to be a lack of recognition within the Law Department (as in other parts of Wells Fargo) about the significance of the number of sales integrity terminations, and the potential reputational consequences.'<sup>47</sup> When considering litigation, costs, rather than the broader ethical consequences, seemed to be a driving factor: '[c]onfident those costs would be relatively modest, the Law Department did not appreciate that sales integrity issues reflected a systemic breakdown in Wells Fargo's culture and values and an ongoing failure to correct the widespread breaches of trust in the misuse of customers' personal data and financial information.'<sup>48</sup>
47. A broader policy question exists as to the extent of proactive and preventative support regulators should provide when meeting their obligations under outcome two (in contrast to support when the duties are challenged pursuant to outcome three). Are regulators under a positive obligation to help reduce the risk of breach, which could manifest in several ways ranging from telephone helplines to potential sandboxes? Alternatively, does the outcome simply require regulators to support authorised persons to implement appropriate governance mechanisms to reduce the risk of breach)? The systemic and individual harm caused by ethical breaches supports interventions that maximise prevention, not simply cure, but these do raise questions of regulatory resource and responsibility.
48. When looking at preventative models, designed to ensure ethics are integrated into authorised persons' practice, the experience of in-house counsel can also be instructive. Whilst in-house counsel can face different challenges to those in private practice, it should also be noted that in-house environments can sometimes offer more developed systems of support, including speak up processes. Thus, when producing guidance materials, some examples of the in-house experience can offer valuable insights into both the ways in which conflicts can manifest but also how best to identify, and manage, this risk. In particular, on how to build resilience and support structures (both formal and informal) to help individuals assert their agency and exercise their duty of independence. We note that not all in-house environments are accommodating to the exercising of professional independence, although some are, and there is a wealth of scholarship which details the challenges that in-house lawyers have in this regard.<sup>49</sup> What is critical is that wherever a lawyer works, the situational impact of their workplace is one that fully supports the proper implementation of, and adherence to, the professional ethical duties.

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<sup>46</sup> Independent Directors of the Board of Wells Fargo, 'Sales Practices Investigation Report', April 2017, 72 onwards (**Wells Fargo Report**). For example: "notwithstanding the growing awareness of the reputational risk associated with [widespread staff] terminations, and the fact that many of these incidents involved unauthorized products or accounts, the perception persisted in the Law Department that sales integrity issues involved 'gaming' the [retail bank's] incentive programs and not conduct affecting customers," [75]. Available at <<https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2018/01/WF-Board-Report.pdf>> accessed 20 May 2025.

<sup>47</sup> Ibid, 78.

<sup>48</sup> Ibid.

<sup>49</sup> D. C. Langevoort, 'Getting (too) comfortable: in-house lawyers, enterprise risk, and the financial crisis' (2012) 2 *Wisconsin Law Review* 495; and R. Moorhead, S. Vaughan and C. Godinho *In-house Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (2018 Bloomsbury Publishing).

49. Other sectors and disciplines can also be instructive when developing resources to support and empower compliance. There is much to be learned from organisational psychology and behavioural science as to how to change culture, increase psychological safety and structure incentives to avoid unintended and adverse consequences. From the corporate world, board effectiveness reviews, internal audits and risk assessments can be used to identify risks before a breach occurs. The experience from some large corporate organisations, who have run ethics and behavioural programmes for several decades, provide important opportunities for learning - showing that leadership, culture, training and education, monitoring and oversight, as well as relationships with regulations are all key. Again, an interdisciplinary network would help to identify where the legal profession can learn from others.
50. Within the legal profession, lessons can be learned from jurisdictions and firms that have demonstrated progress in effectively embedding legal ethics. In this regard, Norway can serve as an exemplar. In common with other jurisdictions, the Norwegian Bar Association's Code of Conduct states in rule 1.1 that the purpose of the code is 'to ensure that professional activities as a lawyer are conducted in accordance with the ethical principles that form the basis for the lawyer's work.'<sup>50</sup> The code also includes a training obligation to 'maintain and strengthen the professional and ethical standard of the body of lawyers.'<sup>51</sup> However, what is particularly helpful is that, in addition to the code of conduct, the Norwegian Bar Association has issued 'Practical Guidance for Lawyers and Law Firms on Business and Human Rights' (the '**Norwegian Guidance**').<sup>52</sup> Notwithstanding the focus on human rights, the Norwegian Guidance offers useful insight into how regulators can support firms in supporting compliance with broader ethical duties.
51. The Norwegian Guidance's focus on detailed, practical, support (including separate guidance for in-house counsel) and the recognition of the value of individual responsibility is particularly relevant for the Consultation. Of note is that the guidance not only requires that the firm's human rights policy is supported at the highest level within the firm but also that an individual partner be appointed as responsible for compliance with the relevant policy. Alternatively, and if applicable, this responsibility can be specifically integrated within the firm's governance structure e.g. by vesting responsibility in the firm's ethics committee.<sup>53</sup> There is also an emphasis on 'active work'<sup>54</sup> with internal communications and training to ensure that everyone within the firm (not just fee-earners) are familiar with the relevant policy. Detailed guidance is offered as to what should be included in a human rights policy and the Bar Association itself has created a model policy, with the clear instruction that this should be a starting point that must be tailored to the needs of each individual firm.<sup>55</sup> The guidance both mandates, and provides guidance on, risk assessments and due diligence (including when accepting new clients or instructions) for firm's to understand their own risks. This includes providing draft text that firms can include in their client acceptance letters,<sup>56</sup> and an obligation for firms to develop a plan for managing the risk of adverse human rights impacts.<sup>57</sup> Firms are required to report on how they work with human

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<sup>50</sup> Available at <https://www.advokatforeningen.no/en/lawyer-ethics/code-of-conduct-for-norwegian-lawyers2/> (accessed 27 May 2025).

<sup>51</sup> Rule 5.6.

<sup>52</sup> The '**Norwegian Guidance**,' Available

[https://www.advokatforeningen.no/contentassets/9704b9addeef40f8acc26ea77c2444ff/businessandhumanrights.p](https://www.advokatforeningen.no/contentassets/9704b9addeef40f8acc26ea77c2444ff/businessandhumanrights.pdf)  
[df](https://www.advokatforeningen.no/contentassets/9704b9addeef40f8acc26ea77c2444ff/businessandhumanrights.pdf) (accessed 27 May 2025).

<sup>53</sup> Norwegian Guidance (n 52), paragraph 2.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Norwegian Guidance (n 52), 19.

<sup>57</sup> Norwegian Guidance (n 52), paragraph 6.

rights with this requirement explicitly recognising that any such report will be general so as to maintain the firm's duty of confidentiality.<sup>58</sup>

52. The law firm Wiersholm provides a particularly instructive example of how these obligations, including those under the Norwegian Transparency Act and the voluntary commitments made as members of the UN Global Compact, can be implemented. Details can be found in Wiersholm's 'ESG and Sustainability Report, UN Global Company: Communication on Progress.'<sup>59</sup> Several aspects from the report address matters raised in both the Consultation and this response. These include the appointment of the firm's own ethics committee, which acts as a 'sparring partner whenever dilemmas arise in ongoing matters,'<sup>60</sup> together with dilemma training, which is offered as part of the firm's introductory programme, alongside ongoing professional seminars as well as regular supplementary training.<sup>61</sup> The report emphasises that ethics is 'the backbone of our law firm'<sup>62</sup> and the firm sets out ethical guidelines that are 'fully implemented' into the firm's business, with a recognition that 'ethics is an essential part of our profession.'<sup>63</sup> Onboarding programmes are tailor-made, with new employees attending dedicated training events so that they become 'familiar with the firm's values, culture and way of working.'<sup>64</sup> Ensuring that the firm's commitment to ethics is made clear at the onboarding, and we would suggest recruitment, stage is critical to increasing the salience of an organisation's commitment to professional ethics. These training events also include discussions about 'ethical issues [and] role understanding.'<sup>65</sup> The firm has an annual skills development day,<sup>66</sup> which gives employees agency over their own development by allowing them to choose from a menu of options.<sup>67</sup>
53. The Norwegian model provides insights into the ways in which ethics can permeate the firm culture. There is a clear and unwavering commitment throughout the report that ethics is a firm priority and that employees are expected to act with the highest ethical standards. These aspirational statements are then supported through tailored, face to face, training, with the firm providing the time and space to engage with detailed onboarding training in ethics that is reinforced by supplementary training and an annual skills day. Practical support is offered to assist with ethical issues that may arise both through dilemma training and the availability of an ethics committee to support dilemmas that arise. The language used here is also instructive. Challenges are framed as 'dilemmas' to be curious about and resolve, reflecting the inherently difficult nature of ethical issues. This immediately helps to reframe how potential challenges are perceived – moving from a culture of blame to curiosity.

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<sup>58</sup> Norwegian Guidance (n 52), paragraph 9.

<sup>59</sup> The '**Wiersholm Report**' available at

<[https://wiersholm.no/content/uploads/2025/01/Wiersholm\\_UN-Global-Compact\\_Report-2022.pdf](https://wiersholm.no/content/uploads/2025/01/Wiersholm_UN-Global-Compact_Report-2022.pdf)>

<sup>60</sup> Wiersholm Report (n 59), 10.

<sup>61</sup> Ibid.

<sup>62</sup> Wiersholm Report (n 59), 11.

<sup>63</sup> Ibid.

<sup>64</sup> Wiersholm Report (n 59), 18.

<sup>65</sup> Ibid.

<sup>66</sup> Wiersholm Report (n 59), 23.

<sup>67</sup> Wiersholm Report (n 59), 18.



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

**Q10. Do you agree with the proposed outcome 3?**

**Q11. Do you agree with the specific expectations proposed under outcome 3?**

54. The outcome suggests that regulators have an active role in ensuring that authorised persons are 'supported' and 'empowered' to uphold their professional ethical duties. We agree with this approach. As discussed throughout our response, developing ethical awareness, resilience and robustness is difficult, and ethical failures often arise where there has been a failure to 'identify and share emerging risks.'<sup>68</sup> Regulators are uniquely positioned to both identify and communicate common risks (see our discussion on reporting and transparency against outcome four) and share practical insights, toolkits and resources to help members comply with their ethical duties.
55. We agree with the Consultation that environmental context (including culture and leadership) is of critical importance in supporting individuals to meet their professional ethical duties and this cannot be overstated. Situational, rather than dispositional, factors are often instrumental when looking at employee behaviour – both the decision to act in breach of the duties and when deciding whether to report any concerns.<sup>69</sup> Even the best speak up process will be ineffective unless they operate within an environment of psychological safety and organisational trust, one where a person does not fear recriminations in the event they make a report.<sup>70</sup> Clear leadership, tone from the top and a strong ethical culture are essential; without them a rules based system will likely be ineffective.
56. Regulators can have significant influence on environmental factors (amongst others) by setting regulatory expectations, collecting and analysing sector data to identify risk (see our comments in outcome four on reporting) and sharing best practice, case studies and training. Whilst there is a need to structure any guidance carefully,<sup>71</sup> as has been seen in other domains (e.g. the Bribery Act 2010) regulators will need to play a key role in providing guidance on adherence with the duties.<sup>72</sup> Any resources need to be detailed and provide actionable, practical, insights that help people to identify risks, encourage ethical awareness and build ethical resilience.
57. Regulatory guidance should emphasise the importance of tailoring internal processes and training, following risk assessments and due diligence, whilst recognising the fact that risks are often not immediately obvious. Learning from other jurisdictions, consideration should be given

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<sup>68</sup> A theme recognised in the review by the Committee on Standards in Public Life (n 26).

<sup>69</sup> We recognise that unethical outcomes can be a result of the interaction of individual and situational factors, see for example: L. Treviño, 'Ethical Decision Making in Organisations: A Person-Situation Interactionist Model,' (1986) 11(3) *Academy of Management Review* 601. Further, situational factors can be a dominant force in 'good people doing bad things,' see: J. J. Kish-Gephart, D. A. Harrison and L. K. Treviño, 'Bad Apples, Bad Cases, and Bad Barrels: Meta-analytic Evidence about Sources of Unethical Decisions at Work,' (2010) 95(1) *Journal of Applied Psychology* 1; L. K. Treviño, N. A. Den Nieuwenboer, and J. J. Kish-Gephart, '(Un)ethical Behavior in Organizations,' (2014) 65(1) *Annual Review of Psychology* 635.

<sup>70</sup> N. L. Trapp, 'Staff Attitudes to Talking Openly About Ethical Dilemmas: The Role of Business Ethics Conceptions and Trust,' (2011) 103 *Journal of Business Ethics* 543.

<sup>71</sup> See paragraph 18.

<sup>72</sup> MOJ Guidance (n 21).

to model policies, with a clear mandate that these should not be adopted without amendment but represent a starting point for consideration. Case studies should be specific and identify the factors that gave rise to the risk, highlight missed opportunities for intervention and explain where decisions could have been made differently, as well as detailing the processes, skills and knowledge that were needed to avoid the eventual breach. Guidance on how, and when, to have the difficult conversations that any such ethical dilemma will require is also crucial.

58. This sharing of best practices, and lessons learned from failures, underscores the public nature of the profession.<sup>73</sup> For the profession to commit to its obligation to prevent ethical breaches, and enhance public trust, it needs to engage in sector wide learning that in turn requires a changed attitude to reporting potential breaches. Regulators need to lead the narrative change that reframes reporting concerns as an active way of upholding the professional ethical duties, providing an opportunity to learn from potential risks and strengthen trust in the sector. This also requires a new understanding of what success looks like and the counter-intuitive metrics that this might engage. As detailed earlier, an ethical culture may actually see an initial increase in reports being made and this change in perspective will need to be supported by regulator behaviour and communication.
59. Against this, regulators should carefully consider the reporting requirements that they introduce pursuant to the Statutory Statement. Questions should encourage members to engage reflexively with the reporting process, whilst also communicating what is expected from an ethical culture. For example, asking members to report on how they encourage reporting of ethical concerns, details of the formal reports made and how they have been responded to, what processes they have implemented to create an environment of trust – one where reports will be taken seriously and lessons learned by, and communicated across, the organisation. How firms support employees in identifying and navigating ethical concerns and any client communications in this regard are also important to understand. Questions may also explore how the firm ensures sufficient information is given to the leadership team, including any risk function, to ensure they have requisite oversight to identify ethical risks. What approach does the firm take to updating their risk assessments e.g. periodic reviews and any factors that will trigger an updated assessment?
60. The expectations explicitly refer to self-reporting, or speak up requirements and we agree that this is an important aspect of any regulatory framework promoting the professional ethical duties. Here, the legal profession can learn from others, such as the medical profession, that share similar characteristics with it e.g. those that are highly regulated, operate in complex and high-pressured environments, have vulnerable members (such as trainees), and that can have a sense of professional collegiality/loyalty amongst members that may serve to constrain an individual's perceived ability to report concerns. In this regard, the findings of Sir Robert Francis' 'Freedom to Speak Up Review' (the '**Francis Review**,')<sup>74</sup> which sets out conditions to support NHS staff to speak up, is instructive. Of note, is the Francis Review's recognition of how organisational leadership was unaware of the problems and pressures that were clear to frontline staff and the concerns that many respondents raised about speaking up, such that only 72% of respondents felt confident to do so. Staff concerns focussed on the fear of repercussions for speaking up, as well as the perceived futility in doing so.<sup>75</sup>

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<sup>73</sup> See for example: Committee on Standards in Public Life (n 26), 5.

<sup>74</sup> Available: <http://freedomtospeakup.org.uk/the-report/> (accessed 27 May 2025).

<sup>75</sup> Francis Review (n 74), 9.

61. Regulators are well-positioned to support effective speak up mechanisms by sharing best practices, what firms should consider when implementing any such processes and potential pitfalls. This includes guidance on the timeliness of responding to reports, who should conduct any required investigation (having regard to expertise and independence), how the findings of any investigations are shared (both with the person making the original complaint and the wider team if necessary), the difference between anonymous and confidential reports (and the considerations that arise with each), training in making and responding to reports, and offering informal support to those unsure of whether to make a formal report.
62. Regulators should also make clear that effective speak up programmes must be embedded in a wider culture which enables a sense of psychological safety. That simply issuing a policy, and process, for speaking up without broader organisational commitment will be insufficient. Rather, what is needed is a clear message from firm leadership, which is embedded throughout the organisation by consistent internal communications, training, and appraisals (amongst others), that high ethical conduct is expected from, and valued by, all members of the firm. Such an approach would need to make clear to employees what 'unethical' conduct includes (for example, so-called 'lawful but awful' behaviour or 'creative compliance') and that any observed instances or reports will be dealt with quickly, confidentially (where appropriately), proportionately, and seriously. Organisations will need to communicate identified risks, the harm that these risks present and how the firm will or has responded to such risks. Part of an effective speak up culture is addressing the resistance that some may face in reporting the conduct of colleagues, with whom they feel a professional and social allegiance. Again, the legal sector can learn from others when looking to develop effective speak up cultures, including the medical<sup>76</sup> and general business communities.<sup>77</sup>
63. Internal reporting obligations are, of course, essential. However, these must be carefully structured to avoid any unintended consequences including the risk of a chilling effect on people seeking legal advice regarding their position (both in-house and from private practitioners). Communications concerning the professional ethical duties will be critical in guarding against this risk, namely a concern that duties of confidence may be breached with the outcome that professional advice is not sought. This observation should not soften our comments elsewhere on the need for reporting and escalation. Rather, they serve to underscore the importance of legal privilege in ensuring people are able to seek legal advice, including when difficult questions arise, and that a commitment to professional ethical duties needs to be considered in light of the critical role that privilege performs. When looking at the professional ethical duties from a broader systems perspective, we can and must develop a system that is robust (anti-fragile, rather than fragile), meeting the needs of multiple stakeholders and strengthening trust in the system itself.
64. Regulators can also include blueprints within the toolkits they offer to members. In addition to client acceptance and policy blueprints, this could include example processes for postmortem reviews. This will both normalise and support firms to learn from any identified risks or breaches. Learning from mistakes is a fundamental element of preventing future breaches. However, in line with earlier observations, this requires a shift in culture from one of individual blame and

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<sup>76</sup> Francis Review (n 74).

<sup>77</sup> The Institute of Business Ethics Speak Up Toolkit available < <https://www.ibe.org.uk/advisoryservices-and-toolkits/the-ibe-speak-up-toolkit.html> > (accessed 27 May 2025).

defensiveness to one of curiosity that adopts a systems first focus.<sup>78</sup> That does not mean an absence of consequences or individual responsibility. Rather, it means a culture where a genuine commitment to identifying and learning from the root cause of a problem, with a view to avoiding repeat failures, is paramount. This requires openness and candour,<sup>79</sup> for which organisational psychological safety and trust are prerequisites. Regulators can also play an important part in supporting this transition - how they communicate, report and discuss professional ethical duties.

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

**Q12. Do you agree with the proposed outcome 4?**

**Q13. Do you agree with the specific expectations proposed under outcome 4?**

65. Supervision and monitoring, underpinned by an effective and efficient reporting process, will be integral to achieving the objectives of the Statutory Statement. Reporting provides respondents an opportunity to engage reflexively with the issues to be disclosed, provides regulators with data to identify emerging risks, share best practice and take enforcement action where necessary. Disclosure also provides transparency to stakeholders, including clients and the wider public, increasing engagement with, and ideally trust in, the profession. Supervision and audit by regulatory bodies is also a critical requirement. Whilst reporting is a valuable regulatory tool, there are two inherent issues with sole or heavy reliance upon it. First, firms and individuals will be self-reporting, which raises issues of the potential for reporting that either explicitly or implicitly reports in a way that provides a rosier picture than is actually the case.<sup>80</sup> Secondly, reported data collected on an annual basis (for example) is lag data and relates to events that have already arisen. Proactive supervision and monitoring thus has a range of attendant advantages and can assist in feeding into risk profiling across the sector.<sup>81</sup>

66. Outcome four does raise several questions in terms of what to monitor (metrics), how to monitor and what action to take as a result.<sup>82</sup> Action could involve enforcement action where appropriate (adopting a spectrum of responses) as well as the wider communication of emerging risks and updating support through guidance and toolkits pursuant to outcome two. It is also perhaps helpful to clarify the extent to which outcome four changes regulators' current obligations or whether outcome four is reinforcing powers that regulators already possess.

67. Aligned with our comments against outcome three, reporting by, or surveying of, authorised persons play a central role in meeting the objectives of the Statutory Statement. Survey and

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<sup>78</sup> See the Committee on Standards in Public Life (n 26). Similar observations were also made in the Francis Review (n 74).

<sup>79</sup> See the proposed 'Hillsborough Law,' introducing a statutory duty of candour for public bodies.

<sup>80</sup> A range of research recognises that self-reporting can be susceptible to a range of social response biases linked to conforming to social norms and the need to appear compliant. This can be heightened where the topic being reported on involves decision making in morally or politically sensitive situations. Such biases are often implicit and not open to conscious awareness so the scope for them to be ameliorated is limited.

<sup>81</sup> J. Black and R. Baldwin, 'Really Responsive Risk-based Regulation,' (2010) 32(2) *Law and Policy* 32(2), 18.

<sup>82</sup> For more on measuring culture see: A Brener, *Strategies for Compliance* (Routledge, 2021) 168-170.

reporting data can be used for benchmarking across the sector whilst allowing regulators to work with data analysts to identify emerging risks and best practices. This can then be shared across the sector to improve overall performance. Over time, this survey data can help build a picture of progress and provides an evidence base from which to build further reform.

68. From an individual firm perspective, increased transparency contributes to behavioural change in two key ways. First, the process of reporting demands reflexive engagement with the metrics surveyed. In turn, this increased awareness helps to inform and instigate change where needed. Secondly, in benchmarking behaviours this will drive a competitive interest in being seen to perform well against the sector, further driving change in the desired direction.

**Outcome five: regulators regularly evaluate the impact of their measures to pursue outcomes 1 to 4 above and make changes, if required, to ensure that they remain fit for purpose.**

**Q14. Do you agree with the proposed outcome 5?**

**Q15. Do you agree with the specific expectations proposed under outcome 5?**

69. Evaluating and, where necessary, amending regulatory action pursuant to the outcomes will be vital. Ethical duties arise in dynamic situations, with increasing complexity arising from geo-political and technological developments, including the use of AI in legal practice and the implications that this has for client confidentiality, professional integrity and modern practice.<sup>83</sup> Evaluation allows regulators to be proactive, whilst responding to situational demands that will inevitably change from time to time.
70. The activities taken pursuant to outcome four, namely data collection and analysis, will be critical to meeting outcome five and there is an opportunity for engagement with data analysts to identify themes in complaints, the outcome of reviews and any regulatory reports.
71. This periodic evaluation is also an important pillar in maintaining public trust in the profession. Namely, by demonstrating how the profession is aware of, responsive to and in some cases proactive in addressing emerging risks.

**Implementation and monitoring**

**Q16 – Q21**

72. The only comment we have on implementation and monitoring is whether implementation could be quicker than anticipated. Given that the context of the Consultation has meant that professional ethics have been a consideration for regulators, firms and individuals for some while

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<sup>83</sup> G. P. Hodgkinson, S. Gulati, K. Nokes, A. D. James and S. Kununka, 'Attitudes toward law tech adoption: Findings from a survey of solicitors in England and Wales' (2023, London: The Law Society). Available at <<https://www.lawsociety.org.uk/topics/research/read-our-new-report-on-attitudes-towards-lawtech-adoption>> accessed 20 May 2025; R. Susskind and R. E. Susskind, *Tomorrow's lawyers: An Introduction to your Future* (2023 Oxford University Press).

now, and that many of the outcomes reflect existing duties and obligations, it may be that implementation can be achieved earlier than the proposed 18 months for outcomes one to three.

**Q.22 Do you have any further comments?**

73. We do not have any further comments but would be happy to elaborate upon any of the response above, should this be of assistance.

**UCL Centre for Ethics & Law**

**May 2025**

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