Non-Departmental Public Bodies Lawyers Conference

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The Seven Principles of Public Life

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Good morning and thank you very much for inviting me to address this exciting and important conference today. I congratulate, if you will permit me to do so, your organisers for having convened such a stimulating array of sessions each of which goes to the heart of the occupations and preoccupations of lawyers in public service.

I propose briefly to examine a few specific implications for public service lawyers of the seven *Nolan Principles* – honesty and integrity; openness and accountability; objectivity and selflessness; and leadership – the shared ethical foundations that are the common denominator of all those in the public service of the United Kingdom.

The *Nolan Principles* have been articulated in their present form for only around 25 years: but they have their origin, of course, in well-understood shared values that precede the Nolan Committee by many decades. Indeed, in one form or another, as an expression of the values without which a public service cannot expect to command the trust of the public which it serves, they are more or less timeless, even though they may have been honoured more in the breach than in the observance at some times in the somewhat pendular swing of the efficacy

and efficiency of the public service in this country, with the era of the Circumlocution Office made so graphically notorious by Dickens in Little Dorrit, and the less enlightening performances of the Internal Navigation Office in Trollope's The Three Clerks, serving as poignant and enduring examples of how not to behave.

Like many of you, I suspect, I have long asked myself what is the difference between honesty and integrity? Put a slightly different way, what, if anything, does the concept of integrity add to the fundamental and obvious requirement of honesty? And I think the second way of putting the question provides a key to the answer, in a way that resonates particularly strongly with those of us whose present occupation, like you, or whose background, like me, is in the legal professions. Ever since the jurors' oath required to be qualified to add a focus on "the whole truth" it has been apparent to all that objective accuracy itself, or the avoidance of a statement that is simply a literal untruth, is in itself insufficient to found a relationship of trust and a reputation for over-arching honesty. As lawyers we know very well that a full and fair picture of the truth of a situation requires much more than avoiding objective inaccuracy.

For me it is this concept of fullness that gives life and meaning to the requirement of integrity. The word itself derives from looking at an integrated or holistic picture of legal service, and presenting a consistency and coherence of values in everything that we do.

To offer a practical illustration, and one which perhaps takes us back towards the field of legislative application and interpretation, a lawyer whose concern is confined to avoiding dishonesty concentrates on what we might call the letter of the law and advises her or his clients in a manner that is designed to prevent a technical infraction; a lawyer who wishes to become a trusted advisor in a classical sense at the heart of an institution's performance looks to advise from a more holistic perspective of what we might once have called the spirit of the

law and are more likely nowadays to describe as a purposive construction of the rules and regulations appertaining to a regulated sector.

If I may say so, I have detected over the decades a largely unspoken but distinct shift in the attitudes of public sector lawyers in this respect.

When I began in public service many years ago there was a clear understanding that an important part of our role was to consider the wider perspective of legality, extending beyond technical compliance with the laws directly applicable to the department or other body that we served. And our colleagues did not just accept this: they welcomed it and valued it.

The clearest example I would give in this respect is that of human rights. In the same way that long before the Human Rights Act 1998, and even long before the European Convention on Human Rights, our courts developed and applied a series of presumptions and rules designed to encode protection for fundamental rights into the application of legislation and the law, in that same way legal advisers to the public service saw ourselves and were seen by others as having a role in preserving and articulating fundamental ethical principles in relation to the business of government; so as a Parliamentary Counsel, for example, it was sufficient for me to express to Law Officers, as I did more than once, that a particular legislative proposal was to be deprecated on general grounds of being contrary to good legislative practice or fundamental constitutional principle or convention for my advice to be accepted, and conveyed to and respected by Cabinet.

During my time in government I witnessed the development of a corporate client-service mentality more modelled on the private sector, and by the end of my time as Parliamentary Counsel it was being openly insisted upon by senior lawyers within government.

In the same way that the challenge for politicians of integrity adds to the specific requirement of honesty the duty to present a consistent coherent attitude to all the professional activities, the notion of integrity for public service lawyers extends the rigour, fairness, impartiality and even sensitivity that we demand of ourselves in the provision of legal services, to the wider aspects of our relationship with our clients.

I come now to openness which is, of course, in many ways the most quintessential *Nolan* principle in relation to the behaviour of politicians, but at first sight the least relevant to lawyers in public service; at the least, it is an attribute which lawyers cannot follow in the same way as politicians, since it is the duty of confidentiality rather than any duty of openness that most clearly characterises the fundamental relationship between a legal advisor and their client or employer. I suggest, however, that the reality is that openness applies in its best and most effective form in precisely the same way to us as public service lawyers as it does to politicians.

The reality is that a great deal of what politicians do also requires to be kept confidential in a variety of ways, to a variety of extents and for a variety of reasons. The Freedom of Information Act is sometimes facetiously described as an Act to determine the parameters of government secrecy, and there is of course something in that: in my own office as Commissioner for Standards, I was faced at the outset with the anomaly that while I am both required, and very much want, to set an effective example within Parliament of commitment to transparency, at the same time a large part of the efficacy of my role depends on people who write to me in a range of contexts being able to be satisfied that I will not disclose to anyone else information that they have given me or, in some cases, even their identity and the fact that they have contacted me.

We resolve this conundrum by being as transparent as possible in relation to process. A member of the public is not entitled to know precisely why I decided

to investigate, or not to investigate, a particular Member of Parliament in response to their complaint. But they are entitled to know, and my website publicises as widely as possible, the process by which I come to decisions of that kind in as granular detail as possible, together with the criteria that I apply in forming the judgements that determine those decisions.

To give you a practical example, when I took up office at the beginning of last year I started publishing a series of Advice Notes that are directed at Members of Parliament, helping them to understand how I apply particular provisions of the Code of Conduct and the Guide to the Rules: and I published those advice notes so that there is full transparency for the public as a whole in relation to how those Advice Notes reflect and influence the discretionary decisions that I make in connection with investigations.

It is that kind of transparency that I believe that we as public service lawyers can and should embrace. If I may say so, legal and non-legal public servants do sometimes become slightly obsessed with secrecy as a product of the duty of confidentiality to one's client, and it can lead one to spend insufficient time and energy asking oneself how creative can we be in offering full transparency to the public – who at the end of the day are our ultimate clients or employers – about the processes we apply in performing our functions and the substantive criteria to which we have regard in making our decisions or in recommending to others decisions that they make.

As public service lawyers, I believe that we are not free from the reputational problems that affect the public service in general and the political class in particular. I have said publicly on a number of occasions since my appointment that I believe the present level of trust between the public and politicians is dangerously low; and I believe that the same applies to the relationship between the public and the different organisations that comprise the picture of the broader amorphous public service.

As lawyers, we all intuitively understand that trust is not a luxury with which politicians can dispense if they wish, but a fundamental underpinning of the rule of law. Rule of law in a liberal democracy depends on government by consent: and consent, in that context at least, itself depends on trust. I may not like the outcome of a particular election, or a particular decision made by a public official or regulator: but I consent to be bound by the result because I trust the process by which it has been reached. And it is therefore fundamental to that trust that every regulator and other public body concerns embraces the principle of transparency with enthusiasm and creativity and leaves me as a member of the public in no doubt that no stone has been left unturned in the endeavour of demonstrating to me the basis on which their decisions are made.

Transparency goes, of course, beyond merely making documents and information available: it is about accessibility in a very real sense. I have had the pleasure of working with a number of the bodies represented here today in preparing regulatory documents in a form which makes them genuinely and helpfully accessible both to the regulated sector and to all those who may seek to engage with it. Again, I see this not as a voluntary or luxury process, but as a fundamental part of the application of the *Nolan* principle of transparency in the context of the legal relationship between regulators and other official public authorities and the entire public body that represents for this purpose their ultimate clients.

When it comes to the *Nolan* principle of accountability, of course, its application to lawyers in public service is much more intuitive. The essence of the law, and of equality before the law, is that we are accountable for everything that we do, again to a range of bodies and in a range of ways. I am old enough to remember when the pamphlet *The Judge Over Your Shoulder* was still a relatively new and innovative resource. And although it seems almost impossible to imagine this, for those of you who live in a perpetual atmosphere of consciousness of judicial

review of practically everything that you do, and of practically every decision to which you contribute, the processes and procedures of administrative law are of surprisingly recent origin. It is a rather salutary question to ask ourselves, if judicial review is so central to the principal of legality and the rule of law, how come it was in a sense unknown until the middle of the 20th century? And the equally salutary answer to this illuminating question is that in public service terms, accountability has to keep pace with the penetration of regulation. It is no coincidence that administrative law in essence came into being not after the First World War, when emergency regulations were largely relaxed, but after the Second World War, following which the regulatory penetrative ambitions of government appeared if anything to increase as time went by. Micro-management of public life as a legitimate objective of government ineluctably required the supervision of the court to develop into the kind of regulatory landscape that we now know in the form of judicial review. Put another way, accountability and proportionality go together: the more we leave the public alone, the less they require the judges to act as umpire between us; and the deeper we descend into micro-managing their lives, the more they both need and desire a rigorous form of accountability.

Accountability and transparency are closely linked as *Nolan* principles, and in the case of the public service legal sector the connection is particularly apparent. As esteemed colleagues present today know a great deal better than I do, relatively few judicial reviews are won on grounds of substance, while a relatively large proportion are won on grounds of process. Clear audit trails setting out in accordance with the transparency we discussed before the precise processes that are to be followed, and the precise way in which they have been followed in particular cases, are the best preparation for the accountability that takes place through auditing or various institutional kinds, or through challenges by way of judicial review or otherwise.

About the *Nolan* principle of objectivity I will say very little, partly because I have touched on it already in the form of the impartiality which is a component of integrity for lawyers, and partly because it is so fundamental to our comprehension of the role of an effective lawyer that it requires no reiteration to ourselves. But I will permit myself just one observation, if I may, harking back to the point I made about an apparent change in the understanding of integrity between public service lawyers and their public service clients.

Objectivity is at the very core not merely of the ethics of a lawyer, but of her or his value to their client. As the old adage put it, a lawyer who advises himself has a fool for a client. As someone who after 35 years as a legal advisor in one form or another became a decision-maker, I was genuinely surprised by how quickly I came to feel genuinely incompetent to advise myself about matters in relation to which I had been advising my predecessor a few months before. One is conscious of a lack of objectivity that renders one effectively useless in articulating the kind of balance and painting the kind of overarching landscape that is at the heart not nearly of the propriety of a lawyer but of their value to their client.

As to selflessness, if the immediate application of objectivity to our daily lives as lawyers is obvious, the application of selflessness may be more subtle or, indeed, actively counter-intuitive. Certainly, the image of lawyers in general is not that of selflessness personified. In terms of the public sector, however, I believe that we do have a very clear understanding of how selflessness relates to our constitutional position and purpose. Part of our role in relation to the maintenance, or in some cases the necessary rebuilding, of trust as a component of the rule of law in the way that I explained a moment ago, depends on colleagues, our institutional clients, and our ultimate consumers, the public, appreciating that we sense a value in what we do which goes well beyond our personal enrichment or professional advancement.

The ethos of the legal public service has always been one of professionals who are constantly inspired and energised by the consciousness of being tiny but individually effective cogs in an enormously complex and interconnecting mechanism that together forms the entirety of the constitution. There is not one of us here who implements or administers rules or regulations of a granular and technical kind who is not conscious that we do that under the authority very often of powers delegated to ministers or other officeholders, but always subject to the overarching authority and oversight of Parliament, in the form of one or more enabling Acts of Parliament or in some other way.

Even as quasi-legislation becomes an ever more potent and penetrating force of micro-influence, although not of micro-regulation, those of us who create and oversee the impact of guidance are always conscious that quasi-legislative documents depend either on the authority of Parliament in the form of a hierarchy of enabling provisions or on the judicial branch of the rule of law in the form of common law principles, in the application of which properly constituted and consulted quasi-legislation provides effective evidence of best practice and can be key to answering questions of reasonableness.

Finally, leadership. Although you may wish to discount this somewhat as a prejudiced and self-interested viewpoint from a lawyer turned office-holder, I invite your attention not to my own career but to the careers of so many other public service lawyers with whom you will be familiar, who have at some point or another transformed their career into that of someone with direct responsibilities for the regulatory or other overarching organisation for which they work; or in other cases have departed the law altogether at some point in their career in favour of leadership roles. And without wishing in any sense to seem to be encouraging anyone to depart from their present positions, I do think it is important that as a profession we as public service lawyers are seen as a natural source of future leaders in a wide variety of roles. Put simply, I believe that by our effective demonstration of the essential way in which the

Nolan principles found our performance as lawyers, we by the same token demonstrate that we are capable of supporting the public service overall in other capacities to which those qualities and ethical drivers are equally important.

I thank you for the kind patience with which you have listened to my exposition of the relevance of the *Nolan* principles, which it is my role to oversee in relation to Members of the House of Commons, to my alter ego and previous life as a lawyer. I will now be very happy to answer any questions that you may have in relation to my standards role; or in relation to matters legislative, this being the year in which I have just handed in the manuscript for the thirteenth edition of *Craies on Legislation*. I am at your service to discuss any matter that occurs to you and I thank you again for your kind attention.