LAWYERS ARE RESPONSIBLE

COUNSEL'S OPINION ON THE RIGHT OF CONSCIENTIOUS OBJECTION AT WORK

EXECUTIVE SUMMARY

1. The Counsel's Opinion in respect of 'Lawyers Are Responsible' covers three potential scenarios for lawyers working in the climate and ecological emergency:

    a. Refusing work connected with fossil fuel extraction in certain circumstances ('**conscientious objection activities**');

    b. Blowing the whistle in respect of their employers, clients or third parties in certain circumstances ('**whistleblowing activities**');

    c. Exercising their democratic right to peaceful protest outside of their workplace, including where this leads to criminal sanctions ('**protest activities**').

(A) CONSCIENTIOUS OBJECTION ACTIVITIES

What is a Climate-Related Protected Belief?

2. 'Conscientious objection' refers to the refusal of an individual working in the legal sector to carry out certain types of work, on account of their genuinely held belief in the climate crisis and its consequences (*para 2*).

3. A belief in the climate crisis and the moral duty to avoid catastrophic climate change is protected under Article 9 of the European Convention on Human Rights ('**ECHR**') and/or as a '*religious or philosophical belief*' under Section 10 of the Equality Act 2010 ('**EqA 2010'**). This was established in the case of Grainger plc and ors v Nicholson [2010] ICR 360 (*paras 3 – 11*).

4. The belief has to satisfy the criteria for protection in Grainger. These are that the belief: (i) is genuinely held; (ii) is not simply an opinion or viewpoint based on the present state of information available; (iii) concerns a weighty and substantial aspect of human life

and behaviour; (iv) attains a certain level of cogency, seriousness, cohesion and importance; and (v) is worthy of respect in a democratic society, is not incompatible with human dignity, and is not in conflict with the fundamental rights of others. The first, second and fourth criteria are the most important in these circumstances. For a '**climate-related protected belief'**, it is necessary to ensure the individual's beliefs go beyond a mere opinion and have the necessary cogency and coherence to be protected. The fact the individual is prepared to refuse certain work connected with fossil fuel extraction will, in many cases, be clear and persuasive evidence of the extent to which they live their life according to their belief (*paras 12 – 16*).

What Protections are there for Conscientious Objection Activities?

5. For those who have a climate-related protected belief, there are four specific provisions of the EqA 2010 that afford protection in this context for conscientious objection activities: (i) direct discrimination (s 13); (ii) indirect discrimination (s 19); (iii) harassment (s 26); and (iv) victimisation (s 27) (*para 18 – 19*).

6. For a claim in **direct discrimination** by someone who carries out conscientious objection activities to succeed, it needs to be shown that less favourable treatment from their employer or Chambers was <u>because of</u> the climate-related protected belief, comparing the treatment of an individual who refuses the fossil fuel work with the treatment of a hypothetical or real comparator without the belief whose circumstances are materially similar, including a refusal to carry out similar work for non-climate related reasons. This involves an inquiry into the employer's subjective reasons for acting as it did (*paras 20 - 22*). This is likely to depend in part on the working practices of the organisation e.g. how much flexibility are associates given to reject work, and have there been any other cases? (*para 59*).

7. An employer may be able to rely on the distinction between the underlying belief and an inappropriate manifestation of the same belief, so there is no direct discrimination or contravention of Art 9 ECHR. However, they can only do so where the action they have taken in response to the conscientious objection activities is a proportionate means of achieving a legitimate aim – meaning that the *proportionality* of the employer's action is relevant to whether there has been direct discrimination (*paras 23 – 24 with case examples at para 25*). For example, if an individual were disciplined for refusing to carry out work for clients and expressing the refusal in a way in which the employer could reasonably object (e.g. posting a public statement on social media) then it is more likely that a Tribunal or Court would conclude that the employer was able to distinguish between the belief and manifestation (*paras 58 – 60)*.

8. In **indirect discrimination**, a provision, criterion or practice ('**PCP**') is applied neutrally, but puts people with a climate-related protected belief at a particular disadvantage when they carry out conscientious objection activities (e.g. a policy requiring all solicitors to work on all cases, including for fossil fuel clients, failing which they are liable to disciplinary action). The employer or Chambers has to show the PCP is a proportionate means of achieving a legitimate aim; operational needs of a business are a relevant legitimate aim but do not automatically mean the discrimination is justified - there will be an assessment of proportionality by the tribunal. The employer will need to evidence

that the operational need is so pressing that it outweighs any discriminatory impact (*paras 26 – 34*). The proportionality assessment will be fact-sensitive, but the size of the company and the extent to which fossil fuel companies form a core part of its practice may be significant (*paras 61 - 62)*.

9. **Victimisation** will occur where an individual is subjected to detrimental treatment where they have done a protected act – raised a complaint or grievance of discrimination on the grounds of the climate-related protected belief. It is unlikely that the act of refusing to perform work would in and of itself constitute a protected act (it would have to be a separate act, such as a complaint of discrimination suffered as a result of having carried out conscientious objection activities) (*paras 63 – 65*). The detrimental treatment must be <u>because of</u> the protected act, requiring a subjective inquiry into the employer's reasons for doing so – this is a fact-sensitive exercise. There will be no victimisation where the real reason for the treatment is not the fact an individual has done the protected act but some other reason, such as giving a television interview criticising the firm and repeating the complaint *(paras 35 – 41).*

10. **Harassment** will occur where an individual is subjected to unwanted conduct (e.g. abuse, mimicry or pranks that create an intimidating and hostile environment for them) and this must be <u>related to</u> the climate-related protected belief *(paras 42 – 47)*. An individual's conscientious objection activities may provoke unwanted conduct from their colleagues, such as mocking comments and memes about their environmental beliefs (*para 66 – 67*).

11. Where an individual has a climate-related protected belief and has carried out conscientious objection activities (such as refusing to work on a fossil fuel project, or a project which will otherwise contribute to the climate and ecological emergency), several criteria need to be met for a successful claim to an Employment Tribunal or Court. The analysis involves assessing: (1) whether their climate-related protected belief meets the threshold criteria under <u>Grainger</u>; (2) whether the manifestation of that belief in the form of their conscientious objection activities is an 'appropriate' or 'inappropriate' manifestation; (3) whether there is a sufficiently close and direct nexus between the act they have carried out and the climate-related protected belief *(paras 53 – 57)*. The climate-related and ecological impact of some projects will be clearer than others – the more directly identifiable the impact on the climate crisis, the more likely it is that a refusal to carry out the work will attract protections under ECHR/EqA 2010 (*paras 75 – 76*).

12. It may even be possible to bring a claim where a lawyer is required to perform activities in a manner which is inconsistent with the law firm's own commitments – e.g. where the firm has a position on air travel and the lawyer is sanctioned for refusing to travel by air (*para 77 – 79)*.

13. It is possible, at least in theory, for claims in respect of a climate-related protected belief to be brought by employees and partners of a law firm (or other employed lawyers) as well as pupils and barristers (*paras 68-73)*. For public sector employees, duties of political impartiality (such as under the Civil Service Code) will be weighed in the balance when assessing proportionality (*para 94 – 98)*.

Regulatory Action arising from Conscientious Objection Activities

14. In terms of any additional regulatory risks: for barristers, conscientious objection activities may lead to a breach of the 'cab rank rule'. Notably, the cab rank rule is qualified by some exceptions, in particular Rule 21.10 which states that a barrister must refuse instructions where there is *'a real prospect that* [they] *are not going to be able to maintain* [their] *independence'*. This means that an individual who refuses instructions on account of their climate-related beliefs may be able to argue that the strength of their conviction is such there is a real prospect they would be unable to maintain their independence in acting for that client. However, *'independence'* in this context may mean independence from external pressures (rather than moral convictions). No guidance has been issued by the Bar Council or Bar Standards Board to date, nor has it been properly tested in the context of disciplinary action. No action has been taken against the barrister signatories of the LAR Declaration of Conscience. Any regulatory action would need to be justified as an interference with Article 9 rights. The severity of the sanction imposed will determine the question of whether the action is necessary and proportionate. In practice, barristers are likely to arrange their self-employed practice so no breach occurs, or is apparent (*paras 100 - 109)*.

15. For solicitors, any regulatory action taken against them would also need to be justified as an interference with Article 9 ECHR. However, it is unlikely that the Solicitors Regulation Authority (**SRA**) would choose to take any such action, given that the Law Society has recently published guidance on '*The impact of climate change on solicitors'* (2023) which has addressed client choice and made clear that solicitors may legitimately place weight on climate-related concerns when deciding whether to accept/advise a client. It is possible that the manner in which an individual refuses the work (e.g. public criticisms on social media) may be distinguished from the actual refusal and may be done in such a way to undermine public trust and confidence in the profession. In these circumstances, the SRA would have to show that any disciplinary sanction was proportionate and necessary (*paras 110 – 115*).

(B) WHISTLEBLOWING ACTIVITIES

16. Whistleblowing is a term used colloquially to refer to situations where individuals may disclose information concerning certain types of wrongdoing.

17. There are statutory protections under the Employment Rights Act 1996 ('**ERA**') for whistleblowers in certain circumstances, the following being the most relevant in the context of climate-related beliefs: (i) a right not to be subjected to any detriment on the grounds of making a 'protected disclosure' (s 47B ERA); and (ii) a right not to be unfairly dismissed, with the dismissal being deemed automatically unfair where the main reason is that the claimant made a protected disclosure (s 103A ERA) (*paras 116 – 117*). As an important side-note, these protections will only apply to 'workers' and so in practice will apply to solicitors and potentially partners in organisations and law firms, but not to self-employed barristers (*paras 118 – 123*).

18. A 'protected disclosure' is (i) a disclosure of information; (ii) by a person who must reasonably believe it to be in the public interest; (iii) the person making the disclosure must reasonably believe that it falls within the six defined categories of wrongdoing; and (iv) it must be via six prescribed methods (*para 124*). It is likely, in circumstances where climate-related matters arise, for a disclosure to be in the public interest (*e.g. para 151)*; the fact that it may also concern a personal interest (such as the individual's own beliefs) does not necessarily preclude an individual having the reasonable belief that a matter is in the public interest and other factors will come into play such as the nature of the wrongdoing disclosed and identity of the alleged wrongdoer *(para 127)*.

19. The six defined categories of wrongdoing under s 43B ERA include:
    (i) that a criminal offence has been committed, is being committed or is likely to be committed;
    (ii) that a person has failed, is failing or is likely to fail to comply with a legal obligation;
    (iii) that a miscarriage of justice has occurred, is occurring or is likely to occur;
    (iv) that the health or safety of any individual has been, is being, or is likely to be endangered;
    (v) that the environment has been, is being or is likely to be endangered; and
    (vi) the information showing any of these matters has been, is being or is likely to be deliberately concealed.

20. The first, second, fourth and fifth category are flagged as the most important in the climate-related context *(para 128 - 129*). There is no minimum threshold of harm to the environment or to health and safety; there is also no temporal threshold, meaning that it is not necessary to prove that there is 'imminent' danger to health and safety or the environment (*para 129(vi)*). Harm to a local environment and harm to the global environment may both be encompassed (including by endangerment of the environment as a whole, through the medium to long-term effects of carbon emissions). However, the greater the specificity with which an individual can identify the environmental harm alleged, the more likely it is that a Tribunal will be satisfied that the individual engaged in whistleblowing activities reasonably believed the information disclosed tended to show the environment was endangered (*para 156(i)*). Similarly, information tending to show the health and safety of the population at large being endangered and at a point in the future may be part of a protected disclosure under this category of wrongdoing, although the greater the precision, the more likely it is a Tribunal will consider the individual's belief was reasonable that it fell within that category of wrongdoing (*para 156(ii)*).

21. There are certain types of disclosures which are excluded from the statutory scheme; most relevant to this situation is where legal professional privilege can be claimed in respect of the information (s 43B(4)). However, LPP will not apply to prevent protection where the legal adviser's advice would be sought to further a crime, fraud or similar – which can include an environmental crime (the '*iniquity exception*'). The conduct must be unlawful and not merely unethical *(para 137*). The iniquity exception will arise only where the advice is being sought for fraudulent / dishonest purposes, not where the client is simply seeking advice about its potential liabilities. So, for example, if a legal professional were asked to advise an organisation on how to conceal an environmental

crime, the protection of legal professional privilege would not apply to that communication (*para 138*).

22. There are several worked scenarios in the Counsel's Opinion, illustrating the application of the law to whistleblowing activities (*paras 139 - 186*).

(C) PROTEST ACTIVITIES

23. The attendance of lawyers at climate protests can attract human rights protections under the ECHR, in particular Article 8 (*right to respect for private and family life*), Article 9 (as above), Article 10 (*freedom of expression*) and Article 11(*freedom of assembly*) as well as under s 10 EqA 2010 *(paras 188 – 199)*.

24. The level of legal protection available to individuals disciplined by their employer for attending a peaceful protest will depend if they have a protected climate-related belief and whether their attendance at a protest was a manifestation of that belief. If so, then they will have legal protections under the EqA 2010 for any disciplinary or other action taken against them. The proportionality of any sanction or other interference by their employer will be considered as part of any discrimination claims (*paras 200 – 202*).

25. Disciplining an employee for the mere act of attending a peaceful climate-related protest is unlikely to constitute a justified interference with their rights (*para 202 (iii))*.

26. Where an employee attends a climate-related protest resulting in the imposition of a criminal sanction, the position is more nuanced. The need to uphold public trust and confidence in the legal profession and the risk of harm to an employer's reputation are likely to constitute legitimate aims. The question of whether disciplinary action is necessary and proportionate in pursuit of those aims will depend on matters such as the gravity of the offence of which the individual has been convicted; the extent to which it caused or risked harm to the public; and the extent to which it involved damage to property (*para 202 (iv)*). For public sector employees subject to the Civil Service Code, the heightened expectation of their independence and impartiality will be a significant factor weighed in the balance of any proportionality assessment when deciding on a disciplinary sanction (*para 204)*.

27. For solicitors, the publication by the SRA of guidance on *"Convictions arising from matters of principle or social conscience"* (1 Sept 2022) has highlighted their regulatory approach will also involve balancing of 'mitigating' and 'aggravating' factors of the conviction. Therefore, the SRA appears to be taking an approach to the proportionality assessment on investigating and sanctioning the individual that is compliant with individual's human rights under the ECHR for engaging in protest activities as a result of their climate-related beliefs (*para 49*). To date, the BSB do not appear to have published guidance specifically addressing this point.

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