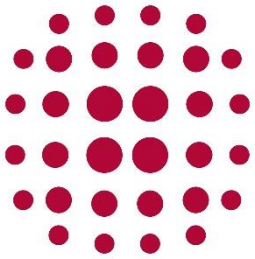

Solicitors Regulation Authority

Reporting concerns
Consultation responses

February 2019

List of respondents

29 responses were received in total, from these respondents.

Acuity Legal Limited
Association of Women Solicitors
Birmingham Law Society
City of London Law Society
John Cooke*
DAS Law
EY Riverview Law
Fox Williams
Stephen Hermer
The Law Society of England and Wales
Leicestershire Law Society
Linklaters
Manchester Law Society
Sarah Mumford*
Protect
Jennifer Woodyard*
Anonymous respondent 1
Anonymous respondent 2
Anonymous respondent 3
Anonymous respondent 4
Anonymous respondent 5
Anonymous respondent 6
Anonymous respondent 7
Anonymous respondent 8
Anonymous respondent 9
Anonymous respondent 10
Anonymous respondent who requested their response not be published 1
Anonymous respondent who requested their response not be published 2
Anonymous respondent who requested their response not be published 3

*Requested that their name, but not the text of their response, be published

Responses

These are the responses we received. Our questions are shown in bold. Where a respondent did not answer a question, the question is not shown.

Acuity Legal Limited

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No I think the requirement to report should be one where the COLP believes that a breach has occurred or that it is likely that a breach has (or will) occur rather than that one is capable of occurring. I don't think it is unreasonable for a COLP to undertake some preliminary investigation before making a report - in fact it is prudent to do so. The reasons for this are threefold:

1) If the requirement was simply to report anything that could result in a finding by the SRA that a breach has occurred this is likely to result in a significant increase in the number of reports made. Unless the SRA has additional resources available to it I don't see how it is to investigate all possible breaches and the inevitable delays in investigations and ultimately taking any disciplinary action would not be in the interests of the solicitors and firms involved nor in the public interest.
2) Given the potential severity of consequences for an individual or firm that is the subject of the report, any person making a report should not make a report lightly. I think it is appropriate for some investigation to be carried out first so the person reporting has a reasonable degree of confidence that there is a breach or is likely to be a breach before making a report.
3) I would want to avoid as far as possible the risk of the person who is subject of a report trying to bring a claim against the person making the report. That risk can be minimised by the person making the report taking some time to investigate the facts and matters first and only making a report if they conclude that a breach has or is likely to have occurred.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Where do you think the evidential threshold for reporting should lie?: Comments

I think option 3 is the correct test. It includes belief so if any person believes that a breach has occurred then it should be reported. However, belief alone is too

absolute. If the person reporting has investigated the circumstances and come to a conclusion that it is likely that a breach has occurred then they should report - they should not have to be 100% satisfied as that may make the process too onerous and is likely to drag out any preliminary investigation which may have an adverse impact on the SRA's ability to take preventative or early action.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

I don't think there should be an objective element. If the person believes that it is likely that a breach has occurred that should be sufficient to trigger an obligation to report. It is similar with the obligation to report under the money laundering regulations - it is enough to hold the belief. The person holding the belief should not have to interrogate themselves as to whether their belief is reasonable or not. Again, coming back to the potential risk of a claim being made against the person making the report, I think the risk of this would be increased if it had to be reasonable belief or have reasonable grounds to hold that belief. Ultimately that could be a disincentive to anyone making a report.

Do you have a preferred drafting option – and if so which option is it?

I would be happy with option 3

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

Give immunity from claims by the subject of a report against those making reports or the possibility of making anonymous reports.

Association of Women Solicitors

Essential for Success

SRA Consultation

Reporting Concerns

Response by Association of Women Solicitors, London

About Association of Women Solicitors, London

Association of Women Solicitors, London was founded in 1992 and its aims include representing, supporting and developing the interests of women solicitors. Membership is open to women solicitors and trainees and associate membership to other women lawyers including barristers, chartered legal executives and paralegals. For further information please visit our website www.awslondon.co.uk

RESPONSE

Question 1

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No. There should be an internal investigation before the facts are reported externally to the SRA.

Question 2

Where do you think the evidential threshold for reporting should lie?

a. **Belief (See option 1)**
b. **Likelihood (See option 3)**

c. **Any other options.** Balance of Probabilities following the internal investigation referred to above.

Question 3

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion?

If you have a view, please explain why. (See Options 2 and 4)

We do not consider that there should be an objective element. The decision maker should only report after an internal investigation.

Question 4

Do you have a preferred drafting option – and if so which option is it?

Option 4. A reasonable belief after an internal investigation.

Question 5

What else can the SRA do to help those we regulate to report matters in a way that allows us to act appropriately in the public interest?

Provide Guidance for decision makers on difficult matters such as,for example, allegations of sexual harassment and bullying and short, concise Guidance on what constitutes a "serious" breach, given what we have said in previous Responses about the need to encourage women to report such incidents. We would also have liked to see a full Equality Impact Assessment.

Association of Women Solicitors London

September 2018

Birmingham Law Society

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

Yes

Where do you think the evidential threshold for reporting should lie?

Belief (see option 1)

Where do you think the evidential threshold for reporting should lie?: Comments

Belief, but we prefer reasonable grounds to believe – please see comments at 3 and 4 below.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

We think it would assist decision makes because: Objectivity would give firms more confidence to report. That said, firms should be reminded of the types of things which need not be reported, e.g. internal/HR issues such as capability/competence; and be reminded that the reporting function should not be misused, e.g. where there is a dispute between employee and employer The evidential threshold being 'reasonable grounds to believe" would require those reporting to adopt a considered approach to the evidence i.e. are there reasonable grounds for believing that the evidence reveals serious misconduct? At the same time those reporting would not be required to determine the exact breaches of the Handbook that might arise, this being a task for the SRA.

Do you have a preferred drafting option – and if so which option is it?

Of the 4 options provided, Option 2 is our preferred option. However, the question of whether there has been a "serious breach of their regulatory arrangements" is for the SRA to decide. The SRA is the regulator and has responsibility for investigating the evidence and determining whether any breaches of the Handbook arise. It is not the responsibility of those reporting to determine which breaches are appropriate to any set of reported facts. We therefore prefer the wording used by the Bar Standards Board: "…reasonable grounds to believe there has been serious misconduct". The test introduces an element of objectivity which is to be welcomed – as per the comments at 3 above.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

We recommend that the SRA could more clearly explain what constitutes professional misconduct as opposed to employee failures (the latter being a matter for the firm), by providing examples of the types of issues which almost always should be reported. A list of more obvious examples would give firms confidence in reporting and save time. There will always be borderline cases but a list would make life easier for the profession. For example:

- Criminal convictions
- Anything involving dishonesty, e.g:
    - Theft of money from client account
    - Fiddling expenses
    - Forging/ backdating documents
    - Misrepresentations to clients (such as the state of play on their cases)
- Breach of client confidentiality
- Breach of undertakings
- Failure to comply with AML procedures.

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By email to: juliet.oliver@sra.org,uk

27th September 2018

Dear Sirs,

Response of the CLLS Professional Rules and Regulation Committee to the SRA Reporting Concerns Consultation (August 2018)

1. Introduction

The City of London Law Society ("**CLLS**") represents City lawyers through individual and corporate membership, including some of the largest international law firms in the world. The CLLS responds to a variety of consultations on issues of importance to its members through its specialist committees. This response has been prepared by the CLLS Professional Rules and Regulation Committee. For further information see the notes at the end of this letter.

The CLLS has read the SRA consultation paper on Reporting Concerns (the "**CP**") with interest. We set out our comments in two sections below – first our general comments on the proposals to change the reporting standard and secondly our specific points on the five questions and the drafting options which would introduce the changes. As our comments do not entirely correspond to the questions asked by the CP, we have not submitted our response via the online form.

2. General comments

2.1 In light of the proposal to introduce an earlier obligation to report matters to the SRA, how does the SRA expect the separate reporting obligations of the COLP and other solicitors at their firm to work?

The CP makes it clear that the firm's reporting obligations (which are entrusted to the COLP under the SRA draft Code of Conduct for Firms) sit side by side with solicitors' own reporting obligations set out in the draft Code of Conduct for Solicitors. Although the Code for Solicitors 'absolves' a solicitor from directly reporting to the SRA where they have reported internally to the COLP, this is only on the understanding that the COLP will onward report (Rule 7.10). This means that, in practice, the internal reporter will need to check as to the status of the report on an ongoing basis and be prepared to report directly if the COLP disagrees with the need to report and has elected not to send something to the SRA.

This creates a difficulty both for the solicitor and the firm and was a matter raised by the CLLS in its response to the consultation on Part 1 of the Code dated 14 September 2016. The CLLS suggested in paragraph 15 of that response that the SRA should, in line with the reporting obligations under the Proceeds of Crime Act 2002, add an obligation in the Code of Conduct for individuals to notify possible breaches to the COLP or COFA and, if they did so, any obligation to report directly to the SRA would be discharged.

Such an amendment to the Code is even more important now that the SRA is proposing to adopt an earlier approach to reporting, which will involve "independent judgment about what and when to report" (paragraph 25, CP). The change to the SRA's approach makes it inevitable that there will be instances when the COLP is, or becomes, aware of facts not know to the initial reporter (for example as a result of an internal investigation) that cause the COLP to hold a different point of view on the need to report.
Ensuring that notification of allegations to the COLP discharges an individual solicitor's obligations to report to the SRA will mean that there will not be duplication of reporting and that firms will be able to adopt a consistent and confident approach. It will also enable the COLP to have oversight of what is being reported and see that the SRA is not unnecessarily troubled by reports from individuals who do not hold relevant information available to the firm as a whole.

2.2 How does the SRA think that firms will balance their need to investigate for internal purposes with reporting - would the SRA expect a firm to ever report prior to conducting an internal investigation/verifying the facts?

It would appear from the CP that the SRA wants to move away from a reporting regime that is triggered only where it is evident that serious misconduct/serious breach has actually occurred to a position where there are grounds to think that such a breach may have occurred.[1]

Ostensibly, each of the four drafting options setting out the reporting standard suggest that any facts or allegations on which a report turns would need in some way to be verified and, therefore, for some level of internal investigation to first be carried out. In other words, the facts must be (to some greater or lesser degree) known and not simply alleged. In addition, the CP makes it clear at paragraphs 42 and 44 that it is in nobody's interest for reports to be made which are unmeritorious or frivolous.

However, the CP also suggests at paragraph 46, 51 and 52 that, where cases turn on personal accounts or memory, COLPs (and individual solicitors) should err on the side of reporting without trying to verify those accounts. The CP further suggests that, where the allegations are very serious, COLPs will need to err on the side of reporting at an even earlier stage. Paragraph 40 of the CP sets out clearly the advantages of early reporting for the SRA as being: "we can identify what concerns engage us, to decide how to investigate the issues most effectively."

Clearly these positions are somewhat inconsistent and it will be the role of the COLP to try to navigate the requirements appropriately. If, as the above suggests, the SRA wants in certain circumstances for COLPs to report without having verified the facts behind allegations or the firm having carried out or commenced an internal investigation, it is important that the SRA clarifies (within the body of the rules not just in guidance) in what form (and under what types of circumstances) this "urgent" reporting would be required.

[1] Please see further points on this issue at paragraph 2.5 below

Whilst the CLLS accepts that in certain extreme situations a "no-names basis" report to the SRA before any investigation has been finalised might be appropriate in order to reassure the SRA that the firm is taking appropriate steps, reporting allegations (even very serious ones) without prior investigation of facts carries substantial risks for firms and their COLPs personally (as highlighted further in paragraph 2.3 below). To assist COLPs or firms in reaching a decision and to ensure that reports can be made confidently (and be justified internally), the SRA must set out in the Handbook explicit directions about the circumstances and the fact pattern that would mandate early reporting.

2.3 How does the SRA propose to investigate early stage or urgent reports?

The CLLS accepts that, once a report has been made, the SRA will have questions for the COLP/firm in order to establish whether a breach has in fact occurred and to determine what regulatory action may need to be taken. However, in the case of early reporting of serious matters, where the firm has yet to carry out any (or a full) investigation, the suggestion, as set out paragraphs 37 to 41 and 52 to 54 of the CP that SRA might wish to lead the investigation and/or to request the firm to suspend its own activities is of concern to firms. In particular:

- How would the SRA propose to carry out such an investigation (would this be done by the SRA itself or would it be outsourced to one of its panel law firm?)
- How would the firm manage its own investigations and follow its own processes for addressing any employment or other legal obligations while, at the same time the SRA is conducting its own analysis/investigation?
- How would such an investigation be communicated to the firm's employees?
- How would the SRA ensure that its own investigation is conducted swiftly without undue delay?
- How does the SRA propose that a law firm should manage, from a practical perspective, early self-reporting where there may also be a need to report to other regulators?

Suppose, for example, that the report related to allegations of bullying by a partner in the firm. How is the firm to manage its duties to relevant employees and to deal with the interests of the partners and affected clients if it cannot conduct a rapid analysis of what has happened and reach a prompt disciplinary decision? It is not unusual given workloads (which one can only imagine will increase following the reporting reforms proposed in the CP) for the SRA to take in the region of 9-12 months to complete its deliberations on a reporting matter. During this time, does the firm need to continue to remunerate the partner who is alleged to have carried out the bullying? Should they be on a leave of absence? How could the firm manage that period of abeyance?

Further, there may be circumstances where the firm has a duty to report to another regulator, such as the ICO or any relevant overseas regulator where the thresholds for reporting a serious breach to that other regulator may not be the same as for the SRA. How does the SRA propose that firms manage these conflicting reporting obligations where at the same time the SRA are carrying out an investigation?

The CLLS does not accept that in most cases the SRA is best placed to promptly investigate and establish the facts where a firm has decided to report a very serious allegation at an early stage. In many cases the firm will be better placed to provide a detailed report with supporting evidence to the SRA. This will also enable the firm to manage it duties to employees, partners and other regulators in an appropriate manner. These types of investigations can be very sensitive and many different considerations (over and above those raised by the SRA Codes of Conduct) will need to be taken into account. In particular, where an "urgent" report has been made before the facts are fully understood, there will be concerns about whether the firm has breached duties to the subject of the report as a matter of data protection or employment law (and therefore be vulnerable to claims going forward – see further paragraph 2.4 below) or under the

terms of a partnership deed (which may lead to disruption or dissent at the partnership level).
If the SRA wants to encourage firms to report matters prior to investigating the facts, it should reassure them that firms that do so will not lose control of the investigation unless there are good reasons. The SRA should make it clear in what circumstances there might be "good reason", and that it would not be the norm for investigations regarding a well-run firm.

2.4 How will the SRA support the COLP with reporting?

Paragraph 55 of the CP states that the SRA would not "second guess" a "careful and rational judgement made on the basis of the facts reasonably available". Paragraph 56 also makes it clear that COLPs would not be criticised for not reporting where they acted with integrity and honesty in considering the matter. The CLLS welcomes these statements and the recognition of the difficult position in which COLPs will be placed by the new regime.

However, the suggestion in paragraph 23 of the CP, that credit will be given for early reporting is unhelpful as it creates an inference that it might be held against a firm were it to spend a long period coming to a considered view whether or not to report.

If, as the SRA wishes, COLPs are to "err on the side of early reporting", the SRA must also consider what support they could offer to those individuals who, believing the thresholds have been met, have reported early even where subsequent investigations point to the fact that no serious breach had in fact occurred. Although the CP discusses how claims brought by the subjects of reports in relation to defamation or confidentiality might be defended, it is little comfort for COLPs at the point they are deciding whether or not an early report needs to be made. It is easy to see that in those circumstances the COLPs in question may well be exposed to a degree of personal risk (up to and including the risk of losing their job and/or being sued by the subjects of the report). Allowing reporters to carry out investigations prior to reporting and having clear reporting thresholds set out in the Handbook as "standalone obligations" will help COLPs and others to report with some degree of confidence.

2.5 What is meant by "serious breach"?

The question of what kinds of issues constitute a "serious breach" which requires reporting is said in paragraph 13 of the CP to have been addressed in the SRA Enforcement Strategy. Although this document does discuss "factors to be taken into account" by the SRA when deciding on an appropriate outcome after the identification of possible misconduct, it falls short of offering any form of a definition.

The CLLS would like to better understand what the SRA means by serious breach and whether this, in effect, amounts to the same thing as serious misconduct/material breach as set out in the current Handbook. In particular, is the SRA planning to reduce still further the threshold for reporting, which originally was set at reporting those charged with offences involving dishonesty or which were otherwise serious (see 1999 rule book) but has now for many years been regarded by the profession as covering matters which are fact dependent and involve dishonesty, deception, serious criminal offences or situations analogous thereto[2]? If so, what is the policy objective behind the change and why does the SRA believe that the adjustment is merited?

We would also point out that the SRA rules as a whole set out another yardstick for measuring conduct in the form of the standards to be expected under the SRA Character and Suitability Test. How will the SRA ensure that there is no divergence

[2] See the 2007 Code of Conduct and the guidance on reporting serious misconduct in Chapter 20

between the types of behaviour that might be reportable under the Codes and those that are relevant for the purposes of the Suitably Test?

Finally in this regard, the Enforcement Strategy is said to be a "living document". Given the implications for firms and COLPs of the changes promulgated by the CP, it is not reasonable for the relevant thresholds to be capable of adjustment on the basis of policy considerations from time to time. To assist COLPs or firms to back their decisions, a definition of 'serious breach' should be included in the Handbook itself.

3. CLLS views on the questions posed in the paper and the drafting options

Question 1: Do you agree that a person should report facts and matter that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

As indicated below, in relation to our preferred reporting option, we feel that COLPs and firms should be reporting where a serious breach has either occurred or is likely to have occurred (rather than trying to establish whether or not this might result in a finding by the SRA). Ideally, COLPs and firms would be reporting where they are confident (having conducted an investigation) that a serious breach had occurred but we accept that there may be instances (for example where reaching a decision will depend on evidence that cannot be gathered by the firm) when the SRA ought rightly to be alerted to a matter before any conclusion as to wrong doing has been (or could have been) made.

Question 2: Where do you think the evidential threshold for reporting should lie? (a) Belief (see Option 1), (b) likelihood (see Option 3), (c) any other options (please specify)

As indicated below in relation to our preferred reporting option, we feel that the threshold should be couched in terms of belief that a serious breach is likely to have occurred.

Question 3: Do you think that an objective element – such as "reasonable belief" or "reasonable ground" would assist decision makers, or unnecessarily hamper their discretion. If you have a view please explain why (see options 2 and 4).

On balance the CLLS feel that an objective standard is in the better interests both of the firm and any subjects of the report as it will require the COLP (and the firm) to take a more balanced view as to whether the facts give rise to a belief which a "reasonable bystander" would conclude show that a serious breach is likely to have occurred. Introducing some level of objectivity into a standard based on the reporter's "belief" that certain facts occurred means that reporters will not be unduly rushed into having to make a report before being able to carry out some checks or investigations. Reports made against this standard are likely to be more helpful to the SRA as they would typically be made on the basis of more than one set of facts or evidence.

In addition, COLPs reporting on this basis should find it easier to justify, in the face of an internal challenge, why a report needed to be made by being able to point to the facts or evidence which gave rise to a "reasonable belief". Further, as discussed in paragraph 2.1 of this response, given that the draft Codes of Conduct do not envisage a "firm" response to reporting – but rather require individual solicitors to have parallel reporting obligations, the objective language in Option 4 would help avoid duplicate or contradictory reports as it encourages any would be reporters to seek counsel of others (and in particular the COLP) as to whether or not a reasonableness threshold had been met.

Question 4: Do you have a preferred drafting option – and if so which option is it?

The CLLS's view is that the formulations of Options 1 and 2 are not appropriate as they seem to go beyond establishing whether there had been serious breach of the Handbook requiring reporters to second guess whether or not this would result in a finding of such by the SRA.
Options 3 and 4 seem closer to establishing whether or not a serious breach has occurred on the basis of "likelihood" and are therefore preferred. For the reasons set out in our response to Question 3 the objective nature of Option 4 is preferred.

Question 5: What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest?

Please see our comments in this paper regarding the invidious position which COLPs find themselves and the support that the SRA could offer in this regard.

4. Concerns about the format of consultation

This CP goes further than merely providing clarification to an existing reporting standard – it introduces a new one. As this is a matter which affects all firms, the CLLS thinks that the timing of the consultation (over the school summer holidays) and the length of time for responses (well under the recommended 12 weeks) is suboptimal. In addition, those seeking to understand what the SRA means by a serious breach, and therefore when the regime would be triggered, are only able to consider a draft of the Enforcement Strategy. The fact that this critical document in not in final form, and presumably may well change, makes understanding the implications of the SRA's proposals and responding to this CP during the given period still harder. This is disappointing.

If you would find it helpful to discuss any of these comments then we would be happy to do so. Please contact me initially on +44 (0) +44 207 427 3033 or by email at **jonthan.kembery@freshfields.com** in the first instance.

Yours faithfully,

Jonathan Kembery
Chairman
Professional Rules and Regulation Committee
City of London Law Society

About the CLLS

The City of London Law Society (CLLS) represents approximately 17,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a wide range of consultations and comments on issues of importance to its members through its 18 specialist Committees. The CLLS is registered in the EU Transparency Register under the number 24418535037-82.

Details of the work of the CLLS Professional Rules and Regulation Committee can be found here:
http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=150&Itemid=469

DAS Law

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

Yes I agree that facts and matters that are capable of resulting in a finding should be reported. It is not the role of a Compliance Officer to make a final determination as to whether or not an act or omission amounts to a breach of the Code of Conduct. Indeed, it may be the case that at the time a report is made to the SRA an internal investigation is ongoing within the firm. At this stage there may be insufficient information to make a final determination as to whether or not a serious breach has occurred. If the threshold for reporting is at the point that the Compliance Officer makes a final determination that a breach has occurred this would prevent the SRA from taking early action (such as placing restrictions on an individual's practising certificate) to protect the public. The role of the Compliance Officer is to report facts and matters that they believe indicate a serious breach of the Code of Conduct taking into account all relevant information. Such an approach will ensure that the firm complies with its reporting obligations and enable the SRA to investigate as appropriate and take action (where appropriate) to ensure that the public are protected where solicitors conduct falls short of the required standard.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

I do not think that an objective element would hamper the discretion of a Compliance Officer as they would still have the discretion to report if a risk fell outside of this specific test. The addition of an objective element would enable compliance officers to challenge themselves as to whether a reasonable compliance officer in possession of the same facts as them would reach the same conclusion that the facts indicate a serious breach of a regulatory arrangement is likely to have occurred. They would also be able to contact the ethics helpline for assistance on whether something should be reported or not. However, the introduction of a 'reasonable belief' or 'reasonable grounds' test may create further uncertainty and interpretation issues. Practitioners may apply different tests of reasonableness depending on their area of practice. Should the SRA decide to adopt a test of 'reasonableness' then there should be a definition of 'reasonableness' such as that set out above. This would ensure greater consistency of reporting across firms.

Do you have a preferred drafting option – and if so which option is it?

Option 3 – You must promptly report to the SRA or another approved regulator, as appropriate, any facts of matters that you believe indicate a serious breach of their regulatory arrangements by any person regulated by them (including you) is likely to have occurred.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

Publish more information about reports made by firms and the SRA's response (anonymising as appropriate) in the form of case studies. This would enable compliance officers to consider similar reports made to the SRA Return to firms with updates on any open investigations. It is sometimes the case that the SRA makes a finding which is published on the website before being communicated to the firm. It would be more beneficial for firms to understand how investigations are progressing and specifically how the SRA has come to their decision.

EY Riverview Law

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

Prior to submitting a report, a firm should decide whether a breach has occurred and if so the extent of the breach. This is in line with ICO's GDPR approach. It is incumbent on all organisations to have a robust breach detection system and investigation process in place. Only if a serious breach has occurred should there be a report to the SRA. Otherwise there is a risk of inundating regulators with potential false positives. After thorough internal investigation of all evidence, if there is good reason to believe that a certain incident may raise serious concerns, even if it may not be certain that a breach has occurred, then this should be reported. If an incident may involve minor wrongdoing, but would not give rise to serious concerns then this should not be reported to the SRA, and should be dealt with internally by the appropriate means, in order to avoid the SRA being inundated with insignificant reports. Determining whether an incident may raise serious concerns involves using an element of judgement and depends on the circumstances of the incident. The SRA's Enforcement Strategy can also be used as guidance when ascertaining what may give rise to serious concerns. The case studies provided with the consultation are helpful too.

Where do you think the evidential threshold for reporting should lie?: Comments

There is a real interest in setting the evidential threshold at a balanced point in order to give the SRA the power to regulate effectively in the public interest. On the one

hand, the threshold should be sufficiently high so that the matters that are being referred to the SRA do warrant regulatory investigation/action. On the other hand, the threshold should be sufficiently low so that matters can be reported at an early enough stage for the SRA to be able to investigate fully and take preventative actions. Based on the nature of the claims that require reporting, we think that the evidential threshold should be placed at a level that moves the matter from a mere suspicion to a grounded belief. There should be a subjective element because COLPs & COFAs that are tasked with reporting these allegations have a duty of acting with integrity and honesty, especially given the consequences of failing to report. As such, the SRA should be willing to empower such approved officers to exercise their discretion as to the stage at which a matter should be reported. However appropriate guidance should be provided by the SRA to ensure consistency of reporting. Therefore once adequate evidence has been gathered for the COLP/COFA to determine that more likely than not, a serious breach will occur then the matter should be immediately reported to the SRA.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

COLPs & COFAs have a duty to act with trust and integrity and they should be provided with the freedom to use their independent judgment when deciding what to report and when to do so. They should be given the discretion to make their own decisions on what needs to be reported to the SRA based on their analysis of the available evidence. We therefore favour a subjective element with the COLP/COFA having 'reasonable belief'.

Do you have a preferred drafting option – and if so which option is it?

We consider option 3 to be most appropriate i.e. 'You must promptly report to the SRA or another approved regulator, as appropriate, any facts of matters that you believe indicate a serious breach of their regulatory arrangements by any person regulated by them (including you) is likely to have occurred.'

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

In order to act appropriately in the public interest, the SRA needs to be informed about potential serious breaches in a timely manner. Currently, firms are encouraged to gather and investigate evidence and assess the seriousness of incidents before reporting to the SRA. Whilst this is a sensible approach and avoids the SRA being inundated with unnecessary reports, the SRA may also want to be notified of other less serious incidents to, for example, check that firms are making appropriate judgements as to the seriousness of an incident. This could be by way of an annual report to the SRA notifying all incidents based on an SRA template. That way the

SRA can ask for more information, if required to assess a firm's investigation and decision making process. Alternatively, technology could be used to log all incident (whether serious or not, but with more detail required for those incidents involving a serious breach). This reporting of all incidents would allow the SRA to gather data, spot trends, monitor consistency, provide further guidance on best practice and decide whether to take any further.

SOLICITORS' REGULATION AUTHORITY

REPORTING CONCERNS

RESPONSE TO CONSULTATION

September 2018

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SRA CONSULTATION: REPORTING CONCERNS

A response by Fox Williams LLP, Solicitors

1. INTRODUCTION

1.1 Fox Williams LLP ("**Fox Williams**") is a firm of solicitors established in 1989. The firm comprises of around 100 staff, including 70 solicitors.

1.2 We have particular expertise in the legal and regulatory issues facing law firms practising in the UK, and rank in Band 1 for Partnership and Partnership: Large International Structures in Chambers and Partners 2018, and Tier 1 for Partnership in the Legal 500.

1.3 We advise law firms of all types, including UK city and regional firms as well as overseas practices established in the UK. Solicitors at Fox Williams also have significant experience in other areas of professional and financial services regulation.

1.4 The Professional Services Group at Fox Williams has considered the questions posed by the SRA in its "Reporting Concerns" consultation document dated 2 August 2018 and provide a response below.

2. EXECUTIVE SUMMARY

2.1 Fox Williams' responses to the SRA's consultation questions are summarised in the following table.

No.	Question	Summary of response
1.	Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?	Whilst we agree that the standard of proof required should be less than certainty that a breach has occurred, we consider that facts merely being "capable of resulting in a finding" by the SRA is too low a threshold for reporting.
2.	Where do you think the evidential threshold for reporting should lie? a) Belief (see Option 1) b) Likelihood (see Option 3) c) Any other options	Our view is that the evidential threshold should be likelihood rather than belief. A test based on belief as to whether the SRA is capable of making a finding of a serious breach is too vague and demands a high level of insight into the regulatory regime as well as the SRA's investigation procedures. A consideration of whether a breach is likely to have occurred needs to be undertaken.
3.	Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why.	Our view is that the person considering making a report to the SRA should have reasonable grounds to hold his or her beliefs. This encourages internal investigation within the firm to an appropriate level and discourages reports based on mere suspicion.
4.	Do you have a preferred drafting option – and if so which option is it?	Option 4.
5.	What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?	The proposal to create separate Codes of Conduct for individuals and firms is a good opportunity to consider how best to encourage an efficient reporting line from individuals within regulated firms, to the firm's management, and then (where necessary) to the SRA.

2.2 Our preferred option of the four discussed in the consultation is **Option 4**. The reasons are, in summary:

2.2.1 it provides an appropriate division of labour between the SRA and the firm in investigating potential breaches by discouraging a firm from simply reporting raw factual data without investigation or analysis;

2.2.2 the requirement for reasonable grounds recognises that there may be differences in opinion between a firm's compliance officers and the SRA; and

2.2.3 it discourages unmeritorious or "knee-jerk" reports by individuals.

3. DISCUSSION

The SRA's objectives

3.1 In considering our response to the consultation we have taken into account the key objectives of the SRA, as we understand them from the consultation document, in seeking to ensure that the reporting threshold is correctly set. These objectives might be summarised as:

3.1.1 to ensure that potential issues of serious misconduct may be investigated quickly and effectively and remedied as soon as possible (see paragraph 8 of the consultation document);

3.1.2 to ensure that firms are clear on what should be reported to the SRA and when (paragraph 9) and what can be resolved internally (paragraph 10); and

3.1.3 to minimise frivolous or unmeritorious complaints, given the capacity of such complaints to take up time and resources (paragraph 42).

3.2 We would suggest that the SRA also seeks to place an appropriate burden on a firm's management to satisfy itself of the facts surrounding a potential breach, before considering whether the matter ought to be reported to the SRA. This not only ensures that unmeritorious allegations can be dealt with internally, but also facilitates the SRA's role: a thorough internal investigation and report would provide context to the facts alleged and the firm's business more generally, should reporting to the SRA be required, assisting the SRA's investigation and any subsequent enforcement action.

3.3 Additionally, the SRA should seek to ensure as far as possible that there is a robust and efficient reporting line between individuals and firms, and then from firms to the SRA where necessary, in order to:

3.3.1 avoid multiple reports to the SRA of the same set of facts;

3.3.2 discourage individuals within a firm seeking to use knowledge of facts as undue leverage by threatening to report those facts to the SRA on the basis of mere hearsay (we have encountered this in practice with respect to other regulatory issues); and

3.3.3 minimise the collateral damage to individuals' and firms' reputations caused by reports to the SRA, where such reports become public knowledge.

3.4 The objectives considered above are taken into account in our responses to the consultation questions in section 4 below.

Competing considerations

3.5 In the course of our discussions, a number of queries were raised in relation to other considerations which might present an obstacle to the prompt reporting of potential breaches. Such obstacles included:

3.5.1 **Proper process**

Where a firm is considering making a report to the SRA of facts which suggest an individual staff member has committed a serious regulatory breach, the reporting

process should, as a matter of fair process (often referred to as natural justice) accommodate the need to hear the staff member's own take on the events in question. This is particularly so given the potential for reputational damage to occur both inside and outside the firm once an individual's alleged conduct is referred to the regulator (though he or she may in fact have done nothing wrong). Moreover, where that individual is an employee, reporting concerns too quickly without sufficient investigation might give rise to employment law claims.

3.5.2 **Privilege**

Where a law firm is advising another SRA-regulated entity or individual on matters of potential misconduct, we recommend that there be an express derogation for the advising firm on the basis of legal privilege. This could be consistent with the approach to a disclosure on suspicion of money laundering. The derogation may need to go further than privileged information, and encompass all information which has come to the attention of the advising firm in the course of advising its client, whether privileged or not. A reporting obligation on an advising firm may result in the advising firm being required to carry out a process of investigation and analysis similar to that carried out by the principals involved in the potential breach. This should be avoided.

Expanding scope of conduct regulation

3.6 As a more general observation, the areas of conduct supervised by professional and financial services regulators have in recent years expanded beyond simply the competence with which the regulated firms and individuals provide their services. The regulators' purview now extends to all aspects of conduct befitting a solicitor or member of another profession. This trend acknowledges that trust in the professions is not only engendered by standards of competence but also by ensuring the profession is restricted to those with personal integrity.

3.7 The expansion of a regulator's remit means that it encompasses matters of personal conduct which do not directly affect the service provided to clients. It seems both the public and regulated firms and individuals have been slow to adapt to this. This is seen, for example, in the recent spike in reports to the SRA relating to sexual harassment. It must be right for this to be within the scope of the SRA's supervision: whilst sexual misconduct cannot be said to impact a solicitor's technical ability and may not impact the service provided to clients, acts of sexual misconduct will undoubtedly have the effect of undermining public trust in the profession.

3.8 The consequence of this recognition is that there is a clear overlap for a firm between employment law considerations and regulatory obligations. These are discussed in relation to proper process at paragraph 3.5.1 above.

3.9 It is therefore important that the mechanism by which concerns are to be reported to the SRA takes into account:

3.9.1 potentially conflicting employment rights; and

3.9.2 sufficient respect for a solicitor's private life: this is acknowledged in the draft Enforcement Strategy (at page 10), but no guidance is provided on how firms themselves should deal with private matters relating an individual that may affect public confidence in the profession.

Forthcoming Code changes

3.10 We note that the SRA is proposing to develop separate Codes of Conduct for individuals and firms in the course of its "looking to the future" reforms.

3.11 We further note the occasional difficulty which currently arises in the course of interpreting the Code of Conduct, which stems from the term "*you*" being applicable both to firms and regulated individuals. It might not always be appropriate to treat firms and individuals as interchangeable in terms of the obligations placed on them. We understand the SRA has identified this consideration as an occasional shortcoming of the current Code.

3.12 We would accordingly recommend that the SRA takes the opportunity to consider different reporting obligations for firms and for individuals, such that:

3.12.1 for regulated firms employing regulated individuals, the primary onus is on the firm to consider the facts which may constitute a serious breach, with the obligation on the individuals to report facts coming to their attention to the firm's COLP in the first instance;

3.12.2 where the alleged breach involves the COLP, individuals becoming aware of that breach should instead report to another member of the firm's management, failing which to the SRA; and

3.12.3 regulated individuals working in-house should report concerns directly to the SRA. In such cases it may be appropriate not to hold that individual to the same requirements to investigate the matters of which he or she has a suspicion: he or she may not have the ability or the resources to fully investigate the concerns, and so could be subject to a lower reporting threshold than "likelihood of breach" which we have recommended for law firms.

3.13 The above recommendation would create a clear reporting line where possible. Conversely, a universal obligation on all regulated individuals and firms to report to the SRA risks overburdening the SRA with reports on facts of which it is already aware. Moreover, we have encountered in the course of advising on matters involving other professions that individuals can unjustifiably use threats of reporting unmeritorious allegations as a means of achieving personal objectives such as promotions.

3.14 We therefore recommend that the SRA adopts in the Code of Conduct for individuals a high-level reporting procedure for concerns, similar to that which governs disclosures in the whistleblowing legislation in the Employment Rights Act 1996: the default position is that individuals should raise matters internally where possible.

Assessing potential breaches

3.15 Potential regulatory breaches may be characterised by reference to a number of factors, all of which are relevant to the seriousness of a breach, and accordingly to whether the breach requires the making of a report to the SRA. As the draft Enforcement Strategy acknowledges (at section 2.2), these factors include: (1) the intent and motivation of the individual causing the breach; (2) the harm and impact likely to occur; (3) the vulnerability of the persons affected; (4) risk of future harm; and (5) for private matters, the extent to which the breach discloses a risk to the safe delivery of legal services.

3.16 When possible breaches are considered internally within a firm, the strength of the evidence will also need to be evaluated. It is suggested that, given the SRA's objectives discussed at paragraph 3.1 and the multiplicity of factors which need to be considered internally before reporting, it is difficult to interpret a reporting obligation which is linked to "serious breaches" when the regulation breached may be a high-level principle rather than a prohibited act. Outcomes-based regulation does not lend itself to an easy means of considering seriousness, whereas detailed and prescriptive rules governing a solicitor's conduct can more simply be categorised.

3.17 Whilst we appreciate prescriptive rules are not a feature of the current Code of Conduct (and will be even less so following the present reforms), we believe the profession would benefit from a greater degree of clarity as to which kinds of breach will almost always be serious, or usually serious, or rarely serious. We are nevertheless aware that the seriousness of the breach is outside of the scope of the consultation, and is dealt with to some extent in the draft Enforcement Strategy circulated with a previous consultation.

3.18 Given the difficulty in carrying out the multi-factor assessment described above, we recommend that:

3.18.1 a greater onus is placed on management, rather than individuals, to consider whether the reporting test is met;

3.18.2 the decision-maker within a firm is given sufficient leeway when considering when a matter warrants a report to the SRA, recognising that he or she may not always come to the same view as the SRA on the subject, provided that reasonable enquiries have been made; and

3.18.3 the SRA recognises that prompt reporting cannot always be achieved given a requirement for a firm to make reasonable enquiries, which in some instances may involve a lengthy investigation.

Other means of achieving objectives

3.19 A number of solicitors at Fox Williams attended a recent talk by two senior SRA staff members given to the Association of Partnership Practitioners. During that talk it was noted that there had recently been a fundamental change in the dynamic between City law firms and the SRA. Particularly, it was noted that there was a significantly more open culture which facilitated the prompt and full disclosure of concerns to the SRA.

3.20 For example, a magic circle firm was able to personally contact staff at the SRA on the same day as a concern arose, with the matter being discussed in person at the firm's offices the next day.

3.21 This anecdote highlights the fact that the wording of the reporting obligation discussed in this consultation is only one lever by which the SRA can seek to optimise the reporting process and ensure that important matters are brought to its attention. This objective should also be achieved by a change in culture, towards a more open and personal degree of supervision and collaboration between firms and the SRA. This is already becoming apparent.

3.22 We recommend that the SRA considers in parallel other ways of encouraging a culture of openness between firms and the regulator, whilst recognising that firms should have some responsibility to investigate internally before reporting to the SRA.

4. RESPONSES TO CONSULTATION QUESTIONS

1. *Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?*

We agree in principle that a regulated firm or individual should not be required to determine whether there has been an actual breach, as it would essentially be pre-empting a decision of the SRA: the SRA is the arbiter of whether or not a breach has occurred.

Facts and matters known to a firm should be reported to the SRA in cases where that firm or individual despite the firm being less than certain that a breach has actually occurred. However, we do not consider that the "capable of" wording in Options 1 and 2 has sufficient clarity to allow firms to draw the line between matters which are unlikely to be considered a serious breach by the SRA (which we suggest should not trigger the reporting requirement) and those which are sufficiently likely. We prefer the language of Option 4, where the reporting obligation is trigger by facts which "indicate" that a serious breach "is likely to have occurred". We consider that the term "likely" should import the civil standard of proof, i.e. the balance of probabilities (or, in other words, more likely than not), a concept with which lawyers will be familiar.

We would additionally recommend an exception for public domain information which is reasonably considered to have already come to the SRA's attention (similar to that in the Rule rC68(1) of the BSB Code). This could help filter out unnecessary reports to the SRA.

2. *Where do you think the evidential threshold for reporting should lie? (a) Belief (see Option 1) (b) Likelihood (see Option 3) (c) Any other options?*

Our preferred threshold is (b), likelihood.

This requirement places the onus on a firm's management, and particularly the COLP and COFA, to investigate and satisfy themselves of the facts of a possible breach to the civil standard of "more likely than not". As discussed above, this is clearer and more familiar to lawyers than the "believe are capable of resulting in a finding of a serious breach" test suggested in Option 3.

This might help filter unnecessary reports, and any subsequent assessment by the SRA will benefit from the knowledge the management has about the firm's business and the context which the report has provided.

This test should strike a reasonable division of labour between the firm and the SRA in investigating the matter. Whilst the firm shouldn't be required to do everything that the SRA would do before taking enforcement action, it must also do more than simply convey raw factual data to the SRA featuring a mere suspicion of wrongdoing without further investigation and analysis. The SRA's resources may otherwise be stretched too far.

3. *Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why.*

We approve of a requirement for a reasonable belief (i.e. an objective test) to be held by the person reporting the potential breach, because:

- it gives an appropriate margin of leeway for a diligent compliance officer to come to a different view than the SRA might have done (the former having a better grasp of the firm's business), and decline to report having considered the position and investigated to the extent necessary and come to a determination within the range of reasonable outcomes;
- a subjective test might encourage a degree of wilful blindness to potential breaches within the firm's management; and
- a subjective test based on belief may provide an incentive for individuals to threaten overzealous and vexatious reports to the SRA for internal political reasons, whereas an objective test would encourage individuals to escalate matters within the firm for further investigation.

Additionally, the requirement for a reasonable belief encourages investigation of suspicions by a firm's compliance officers or other management staff.

4. *Do you have a preferred drafting option – and if so which option is it?*

Our preferred drafting option is Option 4, for the reasons given above.

5. *What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?*

It would be useful for there to be guidance as to the meaning of "promptly" when used in the reporting obligation. In particular, there should be some recognition of circumstances which would justify a degree of further investigation before reporting to the SRA. For matters involving allegations of misconduct against an individual, in the interests of fairness that individual should be given an opportunity to make representations about the allegations to the person investigating, before the matter is progressed further.

It would also be beneficial to get clarification on the reporting obligations of solicitors receiving information in the course of advising on matters involving law firms, to the extent this is not covered by legal privilege.

Fox Williams LLP
27 September 2018

Stephen Hermer

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

I do not think it should be the responsibility of an individual solicitor to decide whether a serious breach has occurred. This is a regulatory judgement and one for the SRA to make. Equally I do not think that a reporting obligation should arise merely because the facts and matters are capable of resulting in a finding of serious breach by the SRA. It is notable that even in the case of example 3 in the consultation paper, the COLP checked the files before reporting, and this seems to me to have been appropriate in that case. Similarly, paragraph 45 of the consultation paper refers not only to an allegation but also to the information or evidence supporting the allegation. I don't mean to suggest that an investigation will always be required, or that if one is required, it needs to conclude that a serious breach has occurred before a reporting obligation arises. I think though that it will rarely serve the interests of the public or the firm in question for the COLP to be taking an uninformed decision and that in many cases, some form of evidence gathering process will be needed, and occasionally perhaps legal advice might need to be obtained, before a reporting obligation ought properly to arise.

Where do you think the evidential threshold for reporting should lie?: Comments

I don't think belief and likelihood are necessarily opposing factors. In many cases they will be interlinked and difficult or impossible to separate. To my mind the right question, once a COLP becomes aware of a matter, is how much more if anything he or she needs to do in order to decide whether or not to report. Unnecessary reporting would be a burden to the SRA and an even greater burden to the individual whose conduct is reported. In my view, the COLP should have reasonable grounds for believing a serious breach has occurred before a reporting obligation arises, and he or she should be entitled to take steps to work out whether such grounds exist or not. I think therefore that a reporting obligation should arise once the COLP becomes aware of "facts or matters that he or she believes, on reasonable grounds, indicate a serious breach…".

Do you think that an objective element – such as “reasonable belief” or “reasonable grounds” would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

I do think an objective element would help. See the answer to question 2.

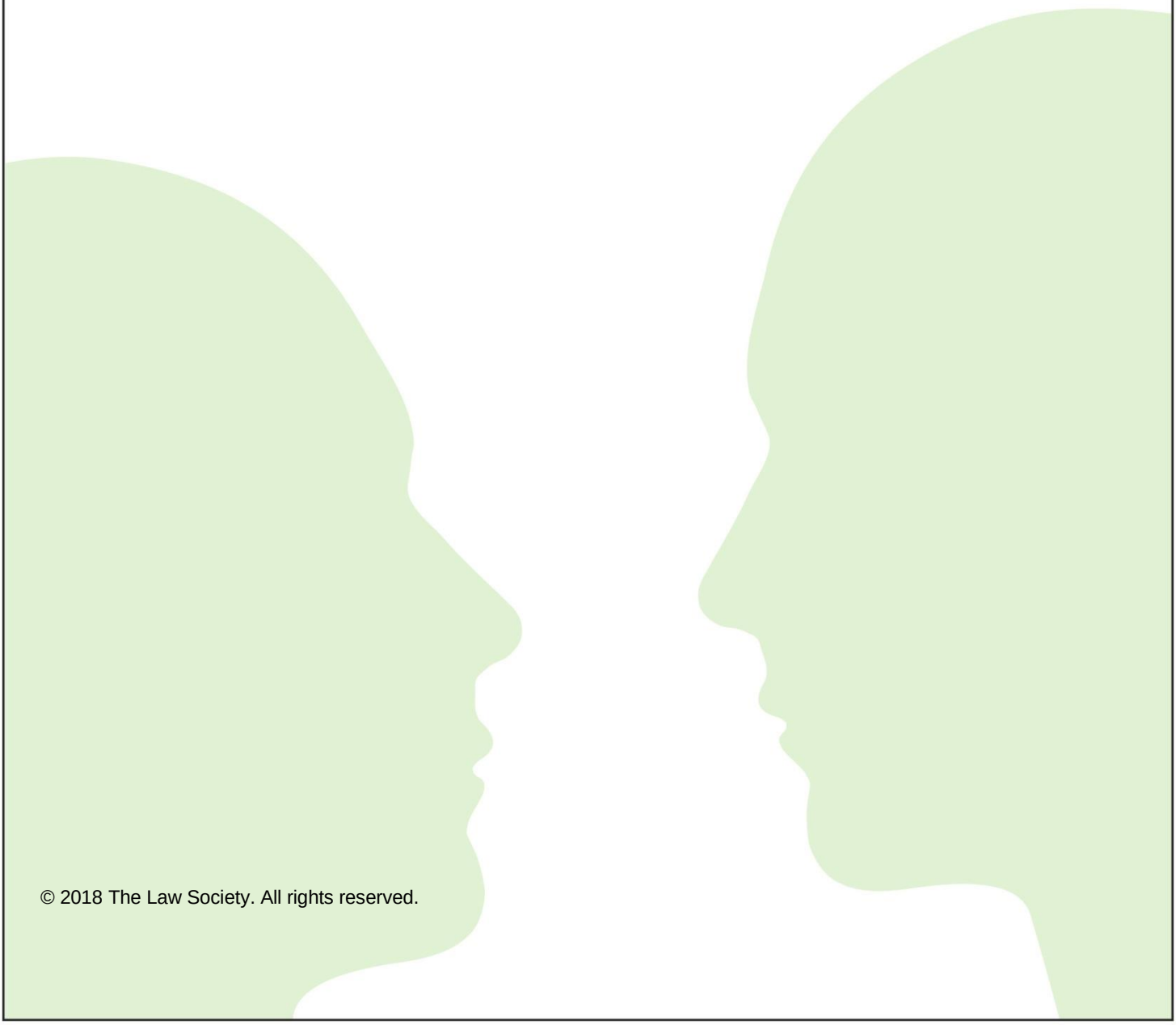
Do you have a preferred drafting option – and if so which option is it?

Suggested drafting is in the answer to question 2.

The SRA's consultation on Reporting Concerns

Law Society Response

October 2018



Introduction

1. The Law Society is supportive of the principle underlying the consultation, that it is important that reporting obligations for serious misconduct are at all times clear to the solicitors' profession. We believe that this is also in the interests of consumers and, more generally, the public, as it plays an important role in the smooth administration of justice, and in maintaining public trust in the profession.

2. If there is greater clarity on the process for reporting, it follows that serious cases are more likely to be reported promptly, leading to early resolution of issues. This is clearly the optimum situation.

3. We are therefore seeking to assist the SRA to find a common-sense approach that recognises the imperative to report matters when appropriate, but deters over-reporting and is proportionate to the level of misconduct. The system should be suitable for the entire profession, from sole practitioners to larger firms. The system will need to be applied in relation to the Code for Firms and the Code for solicitors, when introduced. We have made suggestions to improve the test for reporting and we believe option 4 could be adapted to give greater clarity.

4. In this introductory section we have summarised why we believe options 3 and 4 are appropriate. Then we go on to set out the Society's views on some points that need be clarified in order for the test to be clearly understood and consistently applied.

   Threshold

5. The evidential threshold set out in options 3 and 4 are that you should report if you believe a serious breach is likely to have occurred. We believe that this is an appropriate evidential threshold, and preferable to believing that a breach is capable of having occurred. If either option 1 or 2 was chosen, both of which contain a lower threshold, then it would result in the SRA being inundated with reports which a proper investigation by the firm could have concluded were without merit. This would be inefficient both from the SRA's perspective and the firm's perspective, as well as creating unnecessary stress and being potentially unfair to any individual involved in any allegation of breach.

6. The other reason that we marginally favour option 4 is that while the decision to report is very much for the individual solicitor, the word "reasonably" helps to indicate that there must always be an obligation to act within parameters that would be regarded as objectively justifiable. Option 3 does not include the word "reasonable", although it could be argued that its inclusion is not necessary as solicitors still have to comply with the SRA Principles, such as acting with honesty and integrity.

7. The degree to which the test will be a success will depend on the SRA providing clear and accessible guidance which explains how the test will work in practice, alongside a proportionate and consistent enforcement approach. The test will need to work for all types of rule breach and misconduct and will need to apply

to self-employed and employed persons in relation to the Code applicable to Firms and the Code for Solicitors. It is important to bear in mind that the test will need to be capable of being applied in new work environments if the 'Looking to the Future' changes are approved.

Clear, consistent and accessible guidance

8. Alongside whichever test is chosen, the SRA should publish clear guidance to help practitioners apply the test confidently and consistently. It is vital that all guidance documents which touch on the reporting test take a consistent approach. If the SRA selects options 3 or 4, then it will be important to go back and check any publications in the past which might have included a different test. For example, the SRA's warning notice on non-disclosure agreements[1], published in March 2018, talks about reporting "suspected misconduct". This language would need to be updated to clarify that the time to report is when the facts indicate a serious breach is "likely to have occurred".

9. This guidance should be sure to cover topics which we will go on to discuss in more detail here, including:

    a) clear definitions of terms like "serious breach";
    b) a clear explanation of a proportionate enforcement approach;
    c) examples of when in the process a report should be made;
    d) information on how an SRA investigation works in practice.

Clear definitions

10. Clear definitions are essential. The options for reporting as set out in the consultation are linked to the idea of a "serious breach" having occurred. However, no definition is available for that term, and those seeking to understand what is meant by it are only able to consider a draft of the SRA's enforcement strategy. This arguably makes the task of deciding which of the SRA options to adopt more difficult, since what in fact amounts to a serious breach may change.[2] It is important that the SRA can provide a clear definition of the term "serious breach" that is relevant to all situations in which it must be applied. We would add that in terms of the current test of "material breach", this is a test with which practitioners are now familiar. We would suggest that it would be useful to incorporate guidance currently contained in the notes to rule 8.5 of the Authorisation Rules within the new definition of "serious breach".

A proportionate enforcement approach

11. We firmly agree with paragraphs 55 and 56 of the SRA's consultation document, which notes that the SRA would not allege failure to report simply because the SRA would have applied its judgement differently. To do so would be unfair on solicitors who are making finely balanced judgements in good faith.

12. The SRA should only allege failure to report when there is evidence that the decision-maker has not acted with integrity or honesty, or if the decision not to report was manifestly outside the boundaries of reasonableness, given the

[1] http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-(NDAs)--Warning-notice.page
[2] The SRA's enforcement strategy is proposed as a living document

facts actually known at the time. This enforcement approach would give compliance officers the incentive to make the best possible decisions on the facts available to them, rather than referring everything to the SRA to avoid facing allegations against themselves.

When should a report to the SRA be made?

13. One topic that the guidance should cover is when a report should be submitted to the SRA. This will vary depending on the facts of the case. On the assumption that option 3 or 4 is selected, it will be rare for a compliance officer to be satisfied that a serious breach is likely to have occurred, without the firm undertaking some form of investigation. Indeed, it is both efficient and fair to all parties for the firm to carry out investigations prior to making a report to the SRA. At the point when it becomes clear that a serious breach is likely to have occurred, the reporting obligation kicks in. This will often be at the end of an investigation.

14. There will be occasions when it would not be necessary or appropriate to wait until the end of an investigation to make a report to the SRA. One example for individuals (rather than firms) is reporting your own breaches, which can be done promptly. Another example would be when facts emerge which would trigger a report to another body (e.g. the police or another regulator). But these clear-cut cases are likely to be the exception rather than the rule, and in general we believe it is appropriate for firms to carry out the initial investigation themselves. Thorough investigation by firms is likely to result in fewer unfounded allegations being reported and would ultimately lessen the cost of regulation.

15. It is also important for guidance to address whether it is sufficient for a solicitor within a firm to report a likely serious breach to their compliance officer. We would argue that it is right for a solicitor to be discharged of their responsibility to report within a regulated firm once they have reported to their compliance officer. It is then for the compliance officer to ensure that the potential breach is investigated and, if the reporting obligation is triggered, to make that report to the SRA. It would be unreasonable to expect any individual solicitor to monitor how the compliance officer and firm deal with the outcome of any investigation and be under a continuing duty to report if the incident gives rise in their view to a serious breach. It would be helpful if the guidance could clarify this point. As a precedent for the above, we refer to the money laundering legislation which has a similar provision releasing the reporting party from any further obligations once a report has been made to the Money Laundering Reporting Officer.

16. Notwithstanding this, an individual solicitor will not be constrained from making a report to the SRA (in line with the requirements of the particular reporting option that is chosen) if they have concerns. Selecting option 4 would require that there is a reasonable basis for those concerns.

How will an SRA investigation work in practice?

17. The consultation paper states that, where an early report has been made, the SRA may *"ask or agree with the firm that it should suspend its own investigation whilst the SRA's investigation is underway".* It would be helpful to have more

clarity about how exactly the SRA intends to run these investigations, and how firms can continue to discharge their legal responsibilities to clients and others and manage their own internal concerns (which might centre around, for example, communicating the fact of the investigation to employees, considering whether personnel who are under investigation should be allowed to continue working whilst the investigation proceeds, etc.). It would also be useful to hear the SRA's views as to how firms should deal with different authorities (i.e. the police, the Information Commissioner's Office (ICO)) that may be carrying out their own investigations alongside the SRA. The preferred position would of course be for firms to be able to carry out their own investigations, sharing information as needed with the relevant authorities, without having to cede control to them.

Approach taken by other professions and legal jurisdictions

18. The SRA's intention to be clear and transparent regarding the obligations to report serious breaches is in line with the way this issue is handled both by other professions within the UK and by legal regulators in other jurisdictions.

19. We have conducted initial research into how the following regulators and other legal jurisdictions deal with the issue of reporting concerns when a serious breach of regulations has taken place:

    - The Bar Standards Board (BSB)
    - General Medical Council (GMC)
    - General Dental Council (GDC)
    - Institute of Chartered Accountants for England and Wales (ICAEW)
    - Royal Institute of Chartered Surveyors (RICS)
    - American Bar Association
    - Law Society of Ontario
    - Law Society of Ireland
    - Law Council of Australia
    - New Zealand Law Society

20. The above all include specific provisions regarding making reports of misconduct. The most obviously useful material is located within the BSB's guidance to barristers. For example, in its guidance to the profession, the BSB provides a list of examples of serious misconduct, many of which are also likely to be relevant to our consideration of this issue.

21. The BSB's Code of Conduct also creates an obligation on all barristers not to victimise anyone for making in good faith a report of serious misconduct. This means that barristers must not treat any individual less favourably because they have made such a report to the BSB.

22. The Law Society takes the view that it is a worthwhile exercise to make a study of how other professions and jurisdictions approach this difficult issue, and that there are examples which the SRA would do well to follow. Other regulatory approaches are set out in the annex at the end of this consultation response.

23. We would recommend including a provision which would deter victimisation of those who report misconduct, similar to that used by the BSB (see our response to question 5, below).

24. We would also argue that the guidance which the SRA offers in relation to this issue will be critical; in our view there is a clear need for comprehensive examples as to what constitutes serious misconduct. The Law Society would be happy to facilitate a workshop with practitioners which the SRA could attend in order to develop these examples.

25. We would also recommend that the SRA makes it clear if you are in doubt as to whether or not particular behaviour amounts to serious misconduct, whether advice can be obtained from the SRA's ethics line.

1) Do you agree that a person should report facts and matter that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

26. No, we do not agree with this. As explained in our introductory section, we support options 3 and 4, which apply the test of whether it is likely that a serious breach has occurred. We believe that a lower threshold such as "capable of resulting in a finding" would result in the SRA being inundated with reports which a proper investigation by the firm could have concluded were without merit. This would be inefficient both from the SRA's perspective and the firm's perspective, as well as potentially stressful and unfair to an individual who is suspected of the serious breach. It is far more efficient and fairer for firms to carry out their own investigation and only report to the SRA when it becomes clear that a serious breach is <u>likely</u> to have occurred.

27. Another objection to the "capable of resulting in a finding" test, is that it requires firms to second-guess the approach of the SRA. Firms are unlikely to be able to know what the regulator would do in any given situation for a number of reasons.

28. Firstly, the SRA will conduct its own investigation, often using statutory powers under the Solicitors Act 1974. Firms will not have the same statutory powers to obtain information, for example to require another solicitor's file to be produced.[3] The SRA may also have information disclosed to it by another party which the firm is not aware of, for example, by a client, a third party, or other regulator, or law enforcement agency. A regulated firm is not in the same position as a legal regulator and cannot make a fully informed decision as to whether the SRA would make a positive finding, or not.

29. Secondly, even if the view of the firm was that the SRA would make a finding of a breach, the firm would also have to consider whether the SRA would regard the conduct as a *"serious breach"*. Although the SRA enforcement strategy gives some indication of how seriously they treat cases, the firm is not in the same position as the SRA when deciding whether there is breach. A firm will not be aware of a substantial proportion of SRA decisions and so will be unsighted on what the regulator decided in similar cases. Many SRA decisions

[3] Section 44B Solicitors Act 1974

are published, but others are not and are treated in confidence. For example, decisions to take no further action, decisions to make a finding and give a warning and decisions to issue a letter of advice. Firms, therefore, cannot be expected to form a complete picture of whether the SRA would take action, or not, in any given situation.

30. Thirdly, the SRA employs a sophisticated risk assessment model to inform its decisions to decide whether to investigate reports.[4] It will be impossible for smaller firms to replicate this risk assessment methodology, in reporting cases where the SRA would assess the risk in the same way. To give an example of the complexity of risk assessment, the SRA has 180 *"event categorisations"*. While it would be desirable that reports are only made when action would be taken, the SRA's sophisticated assessment approach cannot be replicated by most law firms.

2) Where do you think the evidential threshold for reporting should lie?

31. One of the key considerations for developing regulatory rules is that they are proportionate.[5] The threshold, in our view, should be based on probability. If it is more likely than not that there has been a serious breach, it should be reported. An evidential threshold that is too low will lead to over-reporting with insignificant issues masking real concerns that should be prioritised for action. Creating a regime that results in many minor reports being submitted to the SRA, would create an unnecessary burden on firms and on the regulator. Regulatory costs are in turn passed on to practitioners, in the cost of their practising certificate fees. For these reasons, there should not be a low evidential threshold, such as "suspicion."

32. Whatever threshold is set, the problem of conflicting evidence remains. In cases relating to personal behaviour, where there could be conflicting witness evidence, it is the role of solicitors to evaluate that evidence and make a decision about reporting, based on their own professional judgement. Whenever solicitors are making these decisions, it would be good practice to make a contemporaneous note as to why a particular decision about reporting was made, and this is something that could be explained in SRA guidance.

3) Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

33. Option 4 requires the application of a subjective judgement based on the available evidence. We support the use of the word "reasonably" to qualify this. It is critical that the word "reasonably" does not result in the SRA second-guessing a decision not to report, which was made in good-faith by a solicitor. It would be inappropriate for the SRA to find a solicitor had failed to meet his or her reporting obligation unless the solicitor has not acted with integrity or honesty, or if the decision not to report was manifestly outside the boundaries

[4] Incoming reports – risk assessment methodology (last updated 20 October 2014) https://www.sra.org.uk/risk/reports-assessment-method.page
[5] Section 3(3), Legal Services Act 2007

of reasonableness, given the facts known at the time. We make this point in paragraphs 11 and 12.

34. We strongly recommend the SRA provides guidance which offers practical situations as examples. For example, the SRA could produce guidance illustrating (non-exhaustive but common) examples of matters that should trigger a referral. There would of course be many potential scenarios, but setting out a list of examples (e.g. using an NDA to suppress awareness of sexual harassment of one employee by another which results in a discrimination claim against a regulated firm) will illustrate the principles compliance officers should follow.

4) Do you have a preferred drafting option – and if so which option is it?

35. Options 3 and 4 are the preferred drafting options for the reasons outlined in paragraphs 5-7. Providing it is accompanied by clear guidance and a proportionate enforcement approach, Option 4 should be the most efficient and fairest of the options to all parties concerned:

Option 4

You must promptly report to the ***SRA*** or another ***approved regulator***, as appropriate, any facts of matters that you reasonably believe indicate a serious breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you) is likely to have occurred.

5) What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

<u>Examples of misconduct that must be reported</u>

36. As set out in our introduction, the SRA could more clearly set out what constitutes a serious breach for solicitors and unadmitted persons, as opposed to employee failures (the latter being a matter for the firm), by providing examples of the types of issues which almost always should be reported. A list of more obvious examples will give firms confidence in reporting and save time, instead of each time having to consider the latest edition of the SRA's enforcement strategy. For example:

- criminal convictions;
- dishonesty, such as theft of money from client account, forging or backdating documents and deliberate misrepresentations to clients on the progress on their cases;
- failure to have any anti-money laundering procedures when required.

<u>Reporting conduct that occurs outside of practice</u>

37. The Law Society takes the view that the SRA needs to make it absolutely clear how far the obligation extends to report matters that take place outside of practice. The New Zealand Law Society example may be helpful in this regard, which states that the obligation to report applies whether the lawyer

experienced the conduct, or became aware of what took place as a supervisor, employer, colleague or bystander.

38. We understand that the proposed SRA Code for Solicitors will only apply in relation to the solicitor's practice, as confirmed by its introduction. This reflects the current situation under the existing Code of Conduct, as Chapter 10 containing the reporting provisions does not apply outside the course of practice.[6] However, solicitors have appeared before the Solicitors Disciplinary Tribunal because they have failed to report matters to the SRA, relating to their conduct outside of practice. These cases appear mostly to relate to criminal offences. We note that similar provisions to report in the proposed Code for Solicitors exist in the current handbook, when a solicitor is charged or convicted of a criminal offence.

39. Solicitors need clear guidance as to the circumstances in which conduct outside of practice which falls short of criminal conviction should be reported and when. If the SRA relied on the general SRA Principles to say that such matters must be reported, this would not be satisfactory and would leave solicitors in an unclear position.

<u>One clear test for reporting</u>

40. The SRA should have one clear test for reporting a serious breach. In the consultation, it says that *". . . where there is room for doubt, we would expect the person to err on the side of reporting."*[7] This creates a second test for reporting and it is not clear how it relates to the first test. This could encourage solicitors to over-report minor issues, if they feel that the evidential threshold has increased to require reports when there is "room for doubt" as to whether the threshold has been met. Reporting should be based on a single test, setting out the appropriate evidential threshold and showing how it is to be applied in differing types of situation to the various types of breach that can occur.

<u>Protection for those making reports</u>

41. We referred to other regulators' reporting regimes in our introduction, in particular the BSB's guidance on not victimising someone for making a report. We consider that those who face the difficult decision to make a report to the SRA should have the confidence that action will not be taken against them, when they have made a report in good faith.

42. The current wording in Chapter 10 of the SRA Code of Conduct 2011, indicative behaviour 10.12 is *"Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the Principles: . . .unless you can properly allege malice, issuing defamation proceedings in respect of a complaint to the SRA."* One concern is that if a compliance officer reports matters that turn out not to involve any proved misconduct, they will face legal action from the solicitor or employee they reported. We note that in the proposed SRA Code for Solicitors, recently submitted to the Legal Services Board, this indicative behaviour has not been retained. We suggest keeping this provision, and possibly expanding its remit

[6] See the application provisions in Chapter 13, SRA Code of Conduct 2011
[7] Paragraph 51, Page 12

to cover other types of legal claim. In addition, the reference to "complaint" should be replaced with the word "report", as firms are not making a complaint as such, but rather reporting to their regulator, as required by the Code.

43. Previous editions of the Code contained similar provisions and these should be re-instated, *"You must not victimise a person for reporting your conduct to the Solicitors Regulation Authority . . ."*[8]

Parallel reporting regimes

44. The SRA should have regard to other reporting regimes that compliance officers will have to consider. For example, under data protection legislation, firms must report data breaches to the ICO. The ICO has produced extensive guidance for organisations on its reporting regime.

45. The SRA could take the opportunity to learn from other reporting regimes and specify the type of information it requires to be included in the firm's report to them. The National Crime Agency, we understand from the SRA's own guidance, analysed the quality of Suspicious Activity Reports.[9] The profession would welcome feedback from the SRA about the quality of reports that it assesses. While the SRA has a non-mandatory form for making reports, it could explore using a standard proforma, if this would increase efficiency in assessing and decision making.

When solicitors need help

46. Practitioners will from time to time need advice about their conduct. Solicitors should be confident that when they need advice themselves they can discuss the facts openly with their adviser, in the knowledge that the advice will be protected by a solicitor's duty of confidentiality and legal professional privilege.[10]

47. In previous editions of the Code of Conduct, this was made clear, but such clarity is not found in the current version. Although the advice may still be protected, it is important to give acknowledgement of this in order for solicitors to be encouraged to seek advice, without being under the misapprehension that the solicitor will have to report them. In previous editions of the Code, reference was made to independent and confidential support services, such as the Solicitors' Assistance Scheme and Lawcare[11] and these should be signposted, along with the SRA and Law Society helplines. This will assist both those solicitors who are faced with difficult decisions about when to make a report and practitioners who are being made the subject of a disclosure to the regulator.

[8] See Rule 20.07, Solicitors' Code of Conduct 2007
[9] Warning notice Money laundering and terrorist financing - suspicious activity reports 8 December 2014 http://www.sra.org.uk/aml-sar/
[10] The Law Society of Ontario expressly protects client privilege. See also guidance from the Law Society of Ireland.
[11] See the guidance to Rule 20.06, Solicitors' Code of Conduct 2007

Annex – other regulatory approaches

Regulator	Approach
General Dental Council	Provides guidance as to circumstances when a member would prefer to speak to someone confidentially without disclosing their identity, noting the identity of a complainant is often necessary for an investigation.
General Medical Council	Published guidance about when doctors will wish to consider making their concerns public if they have raised these concerns within the organisation in which they work, or with the appropriate external body, and have good reason to believe that patients are still at risk of harm.
American Bar Association	Imposes an obligation for lawyers to inform the appropriate authority if a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office.
The New Zealand Law Society	An obligation for a lawyer to report applies whether the lawyer experienced the conduct or became aware of what took place as a supervisor, employer, colleague or bystander.
The Law Society of Ontario	Guidance expressly protects client privilege.

SRA Consultation

Reporting Concerns

Response by Leicestershire Law Society

About Leicestershire Law Society

Leicestershire law Society was founded in 1860 as an organisation for local solicitors. Its current objects include representing the interests of its members locally and nationally. More information can be found at www.leicestershirelawsociety.org.uk.

RESPONSE

Question 1

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No. There should be an internal investigation before the facts are reported externally to the SRA.

Question 2

Where do you think the evidential threshold for reporting should lie?

a. **Belief (See option 1)**
b. **Likelihood (See option 3)**

c. **Any other options.** Balance of Probabilities following the internal investigation referred to above.

Question 3

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion?

If you have a view, please explain why. (See Options 2 and 4)

We do not consider that there should be an objective element. The decision maker should only report after an internal investigation.

Question 4

Do you have a preferred drafting option – and if so which option is it?

Option 4. A reasonable belief after an internal investigation.

Question 5

What else can the SRA do to help those we regulate to report matters in a way that allows us to act appropriately in the public interest?

Provide Guidance for decision makers on difficult matters such as ,for example, mutual allegations of bullying and short, concise Guidance on what constitutes a "serious" breach. The link to your Enforcement Strategy referred to at paras 13 and 23 is difficult to find and the coverage too long.

Leicestershire Law Society
Non contentious business sub committee
September 2018

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27 September 2018

Dear Sirs

Response to the SRA Consultation: Reporting concerns – August 2018

1 Introduction

1.1 This letter contains Linklaters' response to the SRA consultation: "Reporting concerns", which was published on 2 August 2018. It reflects, and in large part endorses, the responses provided by the City of London Law Society ("CLLS"), including the CLLS's general comments on the proposals.

1.2 In responding to this consultation, we have reiterated some of the CLLS's general observations and set out our preferred drafting option. We have also taken into account the impact and the relevance of the proposals both to our own firm and to the legal profession as a whole.

1.3 This response is structured in two parts: some general observations in Part One and our response to one of the consultation questions is set out in Part Two.

Part One – general observations

2 General observations

2.1 Separate reporting obligations of the COLP and other solicitors at their firm

We understand that the firm's reporting obligations in the Code of Conduct for Firms sit alongside, an individual solicitor's reporting obligations, which are set out in a separate Code of Conduct for Solicitors.

Rule 7.10 in the Code of Conduct for Solicitors states that an individual solicitors' obligation to submit a report to the SRA will be satisfied if they have reported the information to the firm's COLP or COFA on the understanding that they will make a report to the SRA. The inclusion of the words "on the understanding that they will do so" effectively means that, in practice, an individual may not be discharged from their obligation to report a serious breach to the SRA where their COLP or COFA decides not to submit a report to the SRA.

As currently drafted, we think that rule 7.10 will create practical difficulties for individual solicitors. This is because, once an individual makes a report to their COLP or COFA, they will have to proactively, and at regular intervals, check in with their COLP or COFA to find out what their decision is in relation to whether the firm will be submitting a report to the SRA. This would be excessively burdensome for an individual solicitor to have to manage and deal with and, even more so, if the individual was unsure about making the report to their COLP or COFA in the first place.

In addition, where a COLP or COFA has justifiably determined that there is no need to submit a report to the SRA, but is not able to explain the reasons behind its decision to the solicitor who reported the breach (e.g. because the COLP or COFA is privy to highly sensitive and confidential information that the reporting solicitor is not, and should not be made, aware of), this will put the individual solicitor in a difficult position when determining whether or not he/she has satisfied the SRA's reporting requirements. This is aside from the difficult position that an individual solicitor would be putting themselves in if, they submit a report to the SRA despite knowing from the COFA or COLP that the firm is not going to be reporting the alleged serious breach to the SRA. What are the SRA's views on this and how does the SRA propose that individual solicitors should manage such difficulties?

In line with the CLLS's views on this point, our preference is that rule 7.10 is amended so that once an early report in relation to a serious breach has been made by an individual solicitor to a COLP or a COFA this satisfies an individual's reporting obligation in full.

2.2 Reconciling the early reporting requirement with reporting obligations that a firm may owe to other regulators, and the difficulties that may arise for a firm where the SRA has taken control over the conduct of an investigation into a serious breach

If an early report regarding a serious breach is submitted by a firm to the SRA and such a report is made at a point in time when another regulator to whom the firm may need to submit a report is not aware of it (e.g. because the relevant reporting threshold for that other regulator has not been met), how does the SRA propose that firms manage any conflicting reporting obligations; either in terms of the need to report (and when to do so) and/or in terms of any conflicting instructions that a firm may receive from other regulators in relation to how an investigation into a serious breach should be conducted.

Further, how does the SRA propose that firms manage the difficulties that may arise, both practically speaking and in relation to a firm being able to comply with any reporting or cooperation obligations that it may owe to other regulators, where the SRA has taken control of the investigation and therefore the firm may not, itself, have access to, or be privy to, all of the information relating to an alleged serious breach?

Part Two – responses to the consultation questions

3 Linklaters views on the drafting options posed in the SRA's consultation paper

3.1 Question 4: Do you have a preferred drafting option – and if so which option is it?

We strongly oppose drafting Options 1 and 2 which we think are unworkable.

Whilst we consider that Option 3 may provide a COLP with flexibility and personal protection, our preferred drafting option is Option 4 because we think it is better suited to what is in the firm's best interests.

We also believe that Option 4 will provide a more helpful framework to support a COLP's position when facing internal challenges from others who, before a disciplinary process has been completed, might have an initial reaction that opposes the COLP's view.

Yours faithfully

For and on behalf of
Linklaters LLP

RESPONSE TO SRA REPORTING CONCERNS CONSULTATION ON BEHALF OF MANCHESTER LAW SOCIETY

This response is submitted on behalf of Manchester Law Society ("MLS") Members in response to the SRA Consultation: Reporting concerns. By way of background, MLS has a membership of over 3,000 solicitors and firms. It is one of the joint five local Law Societies along with Birmingham, Bristol, Liverpool and Leeds. MLS has an active COLP and COFA Forum which meets regularly and this consultation has been discussed within that Forum.

The questions posed by the SRA in response to the consultation are set out below.

1 **Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?**

Whilst we agree with the principle that matters capable of resulting in a finding should be reported, we want to avoid a situation that would effectively require reporters to second guess the result of any disciplinary action at a very early stage. As is set out below, to help address this concern we would welcome the introduction of an objective element to the reporting obligation. In addition, we would welcome further guidance to assist decision makers when making practical judgments and when deciding at what stage in the process to report a potential serious breach. We are concerned that within the new Codes, there is no guidance similar to the present guidance (xi) to Rule 8, which could lead to uncertainty and potential conflict.

A further concern which we would like to see addressed is whether a report could subsequently be construed by the SRA as an admission that the reporter considered that a serious breach had occurred. We consider that confirmation that the fact of a report would not be used as evidence of a breach would encourage prompt reporting of potentially serious misconduct.

2 **Where do you think the evidential threshold for reporting should lie?**

a **Belief (see option 1)**

We are not in favour of this option which we consider to be too subjective and likely to lead to inconsistent reporting. There would also be an element of the reporter having to second guess what the SRA's response would be in relation to a report.

b Likelihood (see option 3)

We are not in favour of this option which we consider to be too subjective and likely to lead to inconsistent reporting.

c any other options (please specify)

We would favour option 4, as amended, deleting the words 'is likely to occur'. Please see response to 4 below.

3 **Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers or unnecessarily hamper their discretion? If you have a view, please explain why. (See options 2 and 4).**

We consider that the addition of an objective element would assist decision makers because it would allow for some evaluation of the evidence and a reasoned decision to be made. An entirely subjective reporting obligation based on one person's belief could require a report at a very early stage based on little or no evidence simply because the belief is present. The introduction of an objective element would hopefully result in more considered reporting. We note that the other well-known regulators such as the Bar Standards Board favour the use of an objective element.

4 **Do you have a preferred drafting option – and if so which option is it?**

As is outlined above, the introduction of an objective element is favoured. Option 4 is our preferred option but with an amendment in order to delete the words "*is likely to occur*". Our preferred wording would therefore read as follows:

"you must promptly report to the SRA or another approved regulator, as appropriate, any facts of matters that you reasonably believe indicate a serious breach of their regulatory arrangements by any person regulated by them (including you)" .

5 **What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest? Against this obligation?**

We welcome the SRA's stated desire to work openly and collaboratively with firms regarding what evidence or information is sufficient for them to report a matter. We consider that transparency and consistency in the SRA's approach to reports is the key to an effective and efficient reporting regime and would like the profession to have access to more guidance and examples of what reports should be made as well as analysis of reports received and outcomes. At present the decision making process by the SRA is exclusively internal with very little transparency and has the potential to be inconsistent. Where no disciplinary action is taken following a report, feedback is not provided by the SRA. This leaves the reporter unsure as to whether the report was made correctly. Feedback in relation to reports made would be of significant assistance for reporters when determining whether to make future reports and would promote a culture of openness which would assist the profession in learning from mistakes resulting in greater protection for the public. Increased transparency would enable firms to manage risk more effectively by adopting relevant controls which would also assist in protecting the public.

Protect

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

We welcome the opportunity to respond to this consultation. By way of background Protect (formerly known as Public Concern at Work) is the UK's leading authority on whistleblowing. We have 25 years' experience in providing advice to whistleblowers, we operate a free legal advice service that takes 2500 cases a year. These experiences feed into our other activities whether that's campaigning for better legal protection for whistleblowers, or our work with organisations advising them on creating effective whistleblowing arrangements and training managers.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest? Against this obligation? We believe more can be done by the SRA to educate and inform both lawyers and their clients about whistleblowing rights when the whistleblower is looking to escalate their public interest concerns once a settlement agreement has been agreed to end tribunal action, even if an NDA is part of that agreement.

The Public Interest Disclosure Act (PIDA) provides a defence in the event of an employer attempting to enforce an NDA against a whistleblower who is looking to escalate their public interest concerns to a regulator, the police, an MP, media etc. This defence was put in place to prevent an employer using such agreements to prevent the exposure of wrongdoing in exchange for a settlement of an employment claim, or where there is a confidentiality clause in a contract of employment. The experience of whistleblowers from our Advice Line shows the importance of this part of the act, most whistleblowers raise their concerns internally and the most common response from the employer is that their concerns have been ignored. 43J should give whistleblowers the confidence to escalate their concerns even when they have signed a settlement agreement whether it has an NDA or not. Research has shown that this is often not the case due to a perception of whistleblowers negotiating a settlement agreement an NDA within the agreement will prevent them from escalating the concerns even when analysis of the actual agreement signed does not indicate this.

Research from the NAO identified the following issues as contributing to people believing they were gagged;

1) the events leading up to the signing of the agreement, including the culture of the workplace and the attitude towards whistleblowing
2) the wording of the agreement itself was often opaque
3) despite getting legal advice (a prerequisite of accepting the agreement) it was generally not made clear to individuals that the confidentiality clauses would not prevent them blowing the whistle on a public interest concern.

To underline the second conclusion from the NAO research, below is an extract of the confidentiality agreement used in their report. The report found that none of the agreements looked at for the report breached PIDA, but in our judgement this extract could be an attempt to flout section 43J:

> "The Employee agrees not to publicise any of [their] whistleblowing complaints by communicating them to third parties (including the press) but without prejudice to [their] right to report any allegations of criminal offences to the Police or other official bodies who are responsible for their investigation or prosecution and in consideration thereof the Employer agrees to make a payment of £500 (less tax and National Insurance contributions) to the Employee."

At the very least the opaque wording of the agreement shows why this individual believed they were gagged and underlines why clearer wording of s.43J and legal advice on this point is needed. Protect suggests the SRA create template for settlement agreements that covers fully explains the rights whistleblowers have under s.c. 43J, combined with new guidance on the issue. This will have a double effect:

1) NDAs will be used in a more appropriate manner
2) Those signing NDAs will be more likely to come forward to the SRA to report breaches they may otherwise feel gagged from reporting.

This policy response has used by other regulators such as the Financial Conduct Authority (FCA) who require firms they regulate to have a set wording that makes it very clear that any settlement agreement will not stop an individual from raising whistleblowing concerns with them as a regulator. We would suggest adopting the following wording:

> "For the avoidance of doubt, nothing shall preclude [the employee's name] from making a "protected disclosure" within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures about topics previously disclosed to another recipient."

In addition, if the public have an idea of what to expect from an NDA (by seeing a generic template), they will be better informed of what to expect. Then if their employer asks them to sign a document which differs widely from the standard format, they will know this is unusual. This information could be accessed via ACAS and CABs, as these are the first organisations people usually turn to when they need support with private legal matters. It would also be useful if there was some guidance for employees issued by the SRA, perhaps in terms of "what your NDA really means" to explain the limitations of these agreements to the public. This is key due to the low levels of awareness among the general public to whistleblowing rights, YouGov surveys research we have conducted has shown that only 38% of UK workers are aware there is a law that protects whistleblowers.

The only way we can really combat this perception that whistleblowing is not possible once a settlement agreement has been agreed is to better educate the legal community and to increase awareness among the public of their legal rights in this area.

The following responses were received from respondents who requested that their names should not be published.

Anonymous respondent 1

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

Yes

Where do you think the evidential threshold for reporting should lie?

Belief (see option 1)

Where do you think the evidential threshold for reporting should lie?: Comments

Organisations are conflicted out of investigating themselves or their staff. They should be able to call on a regulatory body to conduct an independent review.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

I believe it would unnecessarily hamper discretion.

Do you have a preferred drafting option – and if so which option is it?

Option 1

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

Support organisations in early decision making on reporting in a confidential manner.

Anonymous respondent 2

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

We consider that as a firm we are clear in our obligations around internally assessing and reporting such matters. Under the "risk-based approach" we take a cautious approach to such matters and would report where there was (or where there was the possibility of) a serious breach. However "reporting facts and matters that are capable of resulting in a finding" could lead to administrative gridlock, as some firms could report everything in order not to risk a breach of the rules.

Where do you think the evidential threshold for reporting should lie?

Belief (see option 1)

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

Option 2's "reasonable grounds" seems preferable as it would allow firms space for judgment, assessment and decision making so that irrelevant matters are not reported unnecessarily.

Do you have a preferred drafting option – and if so which option is it?

Option 2

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

Rather than amend the Code of Conduct, the SRA might consider dealing with this through guidance and publicity as to expectations and perhaps give examples as to the types of situation that should be reported.

Anonymous respondent 3

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

I do not. I consider that it is better that compliance officers first assess whether a potential breach has occurred. They are at local level and they have immediate access to the relevant players, documents and facts to allow them to quickly assemble a thorough investigation and form a view on whether there has been a

potential breach. This should not necessarily interfere with the requirement for prompt reports as one of the assessment criteria for approval as a compliance officer is capacity to do the job. The insertion of the word potential is deliberate. I consider that because of the far-reaching implications of any finding for the firm or individual concerned that the ultimate arbitrator has to be the SRA.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Where do you think the evidential threshold for reporting should lie?: Comments

Compliance officers are capable of forming a view as to whether there is likely to have been a breach. If they are not, then they ought not to be in the role.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

I do consider that this would assist. Allegations of a potential breaches often cross my desk couched in very emotive language. If I were to be influenced by that language and the one-sided version of events before me at that stage I could very quickly form a 'belief' that someone had done something wrong and make a report accordingly. However with a balanced investigation and proper enquiry into the facts, often something turns out to be nothing and I cannot reasonable believe or have no reasonable grounds to consider that a breach has occurred. More often than not, the issue is client care and not misconduct. Consumers will not be served well by issues that should be before the LeO coming before the SRA first.

Do you have a preferred drafting option – and if so which option is it?

Option 2

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

The reporting process is not enjoyable from a technology point of view. If the reporting process could replicate this consultation process in terms of ease of use, it could build in filters to ensure that unnecessary reports do not reach the SRA but yet the reporter still receives satisfaction and has an audit trail in the form of a downloadable PDF or reference number or something to show that they have attempted to discharge their duty but did not meet the criteria for a report. This would provide reassurance from the horse's mouth that they were engaging appropriately with their role.

Anonymous respondent 4

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

We believe that facts and matter of a potential breach should be reported to the SRA. However, in addition, it should also be for firms to decide whether they reasonably believe that a serious breach has occurred. Based on the evidence/facts that a Compliance Officer has, they should be in a position to make a decision as to whether they reasonably believe a serious breach has occurred and if so, to report this to the SRA.

Where do you think the evidential threshold for reporting should lie?: Comments

Option 2

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

We believe that an objective element is needed and would assist decision makers rather than hampering their discretion. Adding an objective element means that those making a decision whether or not to report, are not merely relying on their own opinions and feelings but instead, taking into consideration facts and evidence to determine whether the breach is serious in nature. We believe that adding a reasonableness test would reduce instances of over reporting and add weight behind a decision to report which is thought to be serious in nature.

Do you have a preferred drafting option – and if so which option is it?

We believe the SRA should adopt option 2 – 'You must promptly report to the SRA or another approved regulator, as appropriate, any facts of matters that you have reasonable grounds to believe are capable of amounting to serious breach of their regulatory arrangements by any person regulated by them (including you).' As noted in Q3, this is because this test contains an objective element rather than a mere subjective element – 'reasonable grounds to believe' and therefore does not just rely on an individual's own feelings or opinions, but instead encompasses facts and evidence which should be used at the time of assessment, to determine whether the breach is serious in nature. We do not believe that the likelihood test is appropriate. As noted in the discussion above, this test is usually applied at the end of an investigation once all evidence has been obtained. This may deter firms from reporting at an early stage, due to the fact that they do not have all the evidence

required. Whilst in some cases early reporting may not be appropriate, this does not extend to all cases. In some circumstances, not reporting early may be detrimental to the public interest, especially if the SRA are not able to put in place early protective action as they were not made aware of the issue.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

If the reasonableness test is applied, the SRA should consider defining the threshold for reasonableness in order to provide clarity to firms, compliance officers and solicitors, otherwise the industry will be no clearer on their duty to report. The SRA could report on a monthly or quarterly basis anonymised examples of reports made to them and in turn whether these were considered to have been appropriate matters for reporting and or reported at the correct stage. This would help firms to calibrate and assist in a more consistent approach to reporting and in turn help the SRA to act appropriately in the public interest.

Anonymous respondent 5

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

Hamper their discretion. Self regulation is surely aimed at transferring the responsibility, cost and time involved in initial investigation and assessment to Solicitors.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

Offering an advice service for informal enquiries around potential reports would assist. The professional ethics helpline is often of little help.

Anonymous respondent 6

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach as occurred?

We are not convinced that a person should report facts that are capable of resulting in a finding. There are many circumstances which are capable of resulting in a finding but, as argued in the consultation, each set of circumstances turns on its own facts. The spectrum from being capable of resulting in a finding to deciding a breach has occurred is significant. Our concern is that this wide approach will result in mass reporting. In our view, this question is at odds with the subsequent questions which refine the evidential threshold. We agree with the SRA that mere suggestion or suspicion is too low a threshold and would result in over reporting of matters that are not capable of proof. The guidance provided by the ICAEW is helpful in our view particularly the last sentence of the 2nd paragraph. The challenge is that it is relatively easy to identify either end of the spectrum, however it is much harder to decide to report something which is in the middle of the spectrum and where the nuances of the particular situation make the decision more difficult. We do not agree that a person should report facts and matters that are capable of resulting a finding by the SRA as we believe that that is too wide and will result in mass reporting.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Where do you think the evidential threshold for reporting should lie?: Comments

In our view, individuals and firms must take responsibility for considering the information available before making a report. We do not believe that the evidential threshold should be belief on its own as we think it is too low a threshold. We prefer Option 3 as the introduction of likelihood adds greater certainty which is welcome. We do not think it hampers a person's flexibility to exercise their judgment. The decision to report will not be made lightly nor will it be made without careful consideration of all of the issues. However, belief on its own is a subjective test whilst the addition of likelihood provides greater clarity. The points made in paragraph 49 are helpful. Whilst it is acknowledged that this is generally applied at the end of an investigation, we think that is helpful.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

Our view is that the introduction of an objective element is helpful. We believe that it would assist decision makers and would not hamper their discretion. The COLP is

likely to discuss the issues with for example the COFA or Director of Quality and Risk, although ultimately the decision to report will rest with the COLP or the COFA.

Do you have a preferred drafting option – and if so which option is it?

Of the 2 options, there is little between them. Reasonable belief is probably marginally better but equally reasonable grounds would be helpful. It will always be a judgement call as to whether you reasonably believe or whether there are reasonable grounds. The reasonable grounds test is slightly harder as one person may view a situation as reasonable grounds but another person does not.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

The more information available to the profession about how the SRA propose to deal with the range of matters referred to them would be helpful. It is particularly important that the profession have confidence in the SRA taking a proportionate approach as set out in the consultation, particularly the comments at paragraph 55 and 56. We are concerned that there may have been a move towards investigating every matter reported regardless of whether the firm has given a sensible explanation as set out in examples 2 and 3. It is critical that those investigating have the relevant skills, expertise and understanding to assess whether a report should be investigated or whether the firm has already taken appropriate action. The challenges faced by the profession are immense and the majority of solicitors work hard to provide the best service to their clients despite significant pressures, whether from clients or personal difficulties. The approach of the SRA and the Enforcement Strategy must be seen to be proportionate and reasonable.

Anonymous respondent 7

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No. We think the requirement to report to the SRA should only arise where the COLP believes a breach has occurred or it is likely that a breach has (or will) occur rather than a breach is capable of occurring. We believe it is essential for a COLP to undertake a preliminary investigation before making a report. This will avoid the SRA seeing an increase in the number of reports that would not have been made if an investigation had been undertaken and instead the SRA's resources can be focused on matters they need to investigate. As reporting a potential serious breach to the SRA could result in severe consequences for the subject of the report, including ultimately losing the right to practice as a solicitor, some investigation needs to be undertaken first before putting the individual through what could be perceived as

avoidable personal stress. If a decision is reached that a breach has occurred, this quite rightly must be reported to the SRA.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Where do you think the evidential threshold for reporting should lie?: Comments

We believe this should be Option 3. It is not for a COLP to definitively decide if a serious breach has occurred. Instead, it is for the COLP to reach a decision after preliminary investigation that if a serious breach is likely to have occurred, it should be reported to the SRA.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

We do not think there should be an objective element in the decision making process. As a COLP, if you believe a serious breach is likely to have occurred, you are obligated to report it to the SRA. We see this as the regulatory duty and it should not be extended to a COLP needing to question themselves as to whether their belief is reasonable or not.

Do you have a preferred drafting option – and if so which option is it?

We would be happy with Option 3.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

Give immunity from claims by the subject of a report against those making reports or the possibility of making anonymous reports.

Anonymous respondent 8

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No, in the same way that the SARS reporting for AML is inundating the regulator, you would have too many reports, and the onus of firms and individuals would be too high.

Where do you think the evidential threshold for reporting should lie?: Comments

When, following initial investigation, the evidence points to a reasonable belief that a breach has occurred.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

I agree with the need for an objective element, Solicitors are well used to making value judgements and assessing evidence. Reporting is a serious matter and in my view should not be done unless there is a reasonable belief or reasonable grounds for considering that a breach could have occurred.

Do you have a preferred drafting option – and if so which option is it?

Option 4.

Anonymous respondent 9

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

Yes, but this assumes that the COLP/COFA understands or is interested in what this involves in the first place. We are concerned that many partners and compliance officers do not take their responsibilities for compliance seriously, including understanding what equates to material/non-material breaches or serious misconduct. We have encountered cases where partners have tried to stop compliance officers from reporting serious misconduct for fear of the commercial/regulatory consequences, and have then made life difficult for them or removed them from their roles when they have fulfilled their obligations by report to the SRA. We are also aware of COLPs trying to shun their regulatory responsibilities by passing the defined role (not just assistance and support) to third parties or more junior members of staff, which seems to indicate a lack of senior engagement with compliance generally. In our view, until such time as there is a thematic review of the overall COLP/COFA regime, including whether compliance officers are actually suitable for their roles and other partners do in fact support them, there will remain a problem in the reporting of breaches and serious misconduct.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

We believe that 'reasonable belief' is the appropriate element to use as this is more likely to be understood by most compliance officers; but this again assumes that compliance officers have a good understanding of their roles and responsibilities, especially in relation to breach and misconduct assessment and reporting.

Do you have a preferred drafting option – and if so which option is it?

Option 4

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

As outlined above, there is an assumption that partners and compliance officers operate in line with the Authorisation Rules (appropriate for role, support from partners, freedom to report, etc.), but in reality many don't and therefore breaches and serious misconduct go, and will continue to go, unreported. Only if firms realise that the SRA is regularly monitoring what they are doing will things change. We are aware of many examples where firms find serious misconduct, but rather than get involved in reporting to regulators and taking disciplinary proceedings, just allow the individuals to leave; all this does is move the problem on to another unsuspecting firm and its clients. Many firms don't take up references, and those that do only get factual information (position, start/end date, salary), which would not include reasons for leaving. In our view law firms should:

- Not be able to let employees suspected of serious misconduct leave the firm without following its formal disciplinary process
- Report suspected/proved serious misconduct to the SRA
- Be required to provide and obtain employment references in the same way as FCA regulated businesses, so that firms are able to carry our due diligence and make appropriate hiring decisions.

Anonymous respondent 10

Do you agree that a person should report facts and matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?

No. We believe that the proposed lower reporting threshold would most probably result in the SRA receiving a very large number of reports of matters from firms which result in unnecessary time and resources being spent by the SRA and would not necessarily assist the SRA in improving the quality or effectiveness of regulation. We

consider that it is entirely appropriate for a firm first to take steps internally to establish whether the facts and matters actually indicate that a serious breach of the SRA's rules has occurred and, if so, to report it to the SRA. In our experience, effective internal investigations on learning of potential misconduct within the firm have the benefits of:

- eliminating internally and at an early stage any question of potential breach without wasting the SRA's time and resources;
- identifying and properly addressing (for instance through supervision and education) instances of breach which fall short of being serious (as required by O(10.3), again without wasting the SRA's time and resources;
- enabling the firm to present a clearer picture of the potential misconduct to the SRA at that stage, including any relevant evidence, context and explanations from any individuals involved, thereby assisting the SRA's own investigations into the matter.

The SRA must be able to trust COLPs and COFAs to carry out proper initial investigations into potential misconduct and only to refer on to the SRA those with a reasonable evidential basis and that meet the criteria of seriousness. To change the threshold test as now suggested has the impact of reducing the roles of the COLP and COFA to mere conduits for issues of potential misconduct – no matter how trivial – between the firm and the SRA and is likely to leave the SRA with an unmanageable workload and reduce the potential for effective regulation to be achieved.

Where do you think the evidential threshold for reporting should lie?

Likelihood (see option 3)

Where do you think the evidential threshold for reporting should lie?: Comments

For the reasons set out in Q1, we consider that it is more appropriate that those facts and matters indicate a serious breach, rather than that they are capable of resulting in a finding by the SRA of a serious breach.

Do you think that an objective element – such as "reasonable belief" or "reasonable grounds" would assist decision makers, or unnecessarily hamper their discretion. If you have a view, please explain why. (See options 2 and 4)

We believe the inclusion of an objective element is likely to assist rather than hinder the decision maker. It is easy to imagine situations in which a decision maker may respond hastily to what appears to be a prima facie case of serious breach by reporting without proper reflection or investigation, for example, for fear of otherwise falling foul of their own reporting requirements; or where a decision maker, driven by personal antipathy towards the individual in question, is pre-disposed to reporting the person at the first suggestion of any potential breach, however minor. The inclusion of an objective element has the effect of building in a step which requires the

decision maker to focus their mind on the matter at hand and to judge the situation without favour or bias and to proceed accordingly. We therefore believe that including such a test is likely to result in better quality reporting to the SRA, assisting the SRA in regulating effectively. Moreover, one would expect a regulator, acting in accordance with its statutory duties, to apply such a test if looking at such potential misconduct itself. As set out in our response to Q1, an important part of the role of COLPs and COFAs within firms is to act as a first check on disciplinary matters before taking appropriate action in a given case, including reporting potentially serious breach to the SRA. So far as possible, these trusted individuals should be trusted to carry out those particular duties in accordance with those requirements.

Do you have a preferred drafting option – and if so which option is it?

Option 4: You must promptly report to the SRA or another approved regulator, as appropriate, any facts of matters that you reasonably believe indicate a serious breach of their regulatory arrangements by any person regulated by them (including you) is likely to have occurred.

What else can the SRA do to help those we regulate report matters in a way that allows us to act appropriately in the public interest against this obligation?

The (re-) introduction of Relationship Managers, who talk to law firms and develop knowledge of their particular legal services, whilst also having a responsibility to consider potential risks and review those risks with law firms, would assist a COLP or COFA in their objective considerations and the SRA to act appropriately in the public interest.

These respondents asked that their names be published, but not their responses.

- John Cooke
- Sarah Mumford
- Jennifer Woodyard.

Three respondents asked that neither their names or their responses be published.