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Dear Sirs

***Re: Response of the CLLS Professional Rules and Regulation Committee to the SRA "co-operation agreements" consultation dated 31 October 2012***

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The City of London Law Society ("CLLS") represents approximately 15,000 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 variety of consultations on issues of importance to its members through its specialist committees. This response to your 31 October 2012 consultation paper "Co-operation agreements" has been prepared by the CLLS Professional Rules and Regulation Committee (see list of members attached).

**Executive Summary** Co-operation agreements comprise just one category of whistleblowing matter - c.f. whistleblowing in cases where a potential witness has not committed any breaches or misconduct. As such, cases in which co-operation agreements might be used are likely to form only a small sub-set of matters which a firm will be required to report to the SRA each year. In this context, the CLLS would welcome a more comprehensive policy and guidance from the SRA generally on the reporting (including internal reporting) of breaches and misconduct by law firm participants.

Only within this context and subject to the following provisos and amendments, does the CLLS support the draft policy:

1. The policy should be constructively aligned with and should not contradict or undermine the recently introduced recording and reporting requirements under the new COLP / COFA regime;

2. For this reason, the default procedure for a potential witness seeking to co-operate with the SRA should initially be to report the matter(s) of concern to the COLP / COFA in their firm;

3. The COLP / COFA would then be obliged to report promptly to the SRA any such matters reported to them which constituted serious misconduct and serious or other material compliance failures – where a COLP/COFA makes such a report to the SRA based on a report from a potential witness, it should fulfil any individual obligation of the potential witness to report a matter to the SRA themselves;

4. It must be for the potential witness and the COLP/COFA to decide individually whether matters of concern amount to issues which they are respectively obliged to report to the SRA[1]. However, a COLP/COFA would not be obliged to agree with the potential witness' view of whether and/or why matters of concern should be reported to the SRA[2];

5. If a potential witness reported a matter of concern to a COLP / COFA, which was then reported on to the SRA by the COLP/COFA, the potential witness should expect the same degree of leniency from the SRA as they could have expected if they had made materially the same report directly;

6. There should be alternative reporting provisions in the draft policy for circumstances in which: (a) the matter of concern involves the COLP / COFA; or (b) the COLP / COFA decides not to report the matter on to the SRA. In case (a) there should be a provision for a potential witness to report to another member of the firm's senior management, e.g. the senior or managing partner. Alternatively, in both cases (a) and (b), a potential witness could report a matter of concern directly to the SRA;

7. There should be clearer guidance both in the draft policy and from the SRA generally about reporting requirements - in particular, the SRA should use internally consistent terms to describe the types of matter to be reported.

The main grounds for our provisos and amendments are that:

(a) Our proposed procedure follows the well-established precedent of reporting to a Nominated Officer under the Proceeds of Crime Act 2002;

(b) The positions and authority of COLP / COFA will be undermined, particularly in larger recognised bodies, if the SRA themselves appear not to support the use of internal COLP / COFA reporting structures so shortly after the new regime has become effective;

[1] There may be circumstances in which the COLP/COFA decides that they are unable / it is inappropriate to share with the potential witness the thinking behind their decision to report or not. The potential witness may be in the same position vis-à-vis the COLP/COFA.

[2] There may be circumstances in which the COLP/COFA decides that a matter of concern need not be reported to the SRA. In such circumstances, a COLP/COFA would inform a potential witness that they would not be reporting a matter (but not necessarily why) and confirm that the potential witness is free to make a report to the SRA themselves, subject to reminding them of any other relevant rights and duties, e.g. confidentiality and privilege.

(c) With direct reporting to the SRA, we have serious concerns that COLPs and COFAs will not come to have sight of matters which potential witnesses report directly to the SRA and in connection with which they / their firm have concurrent obligations to other authorities, regulators, clients and third parties, as well as meaning they may not be placed to act swiftly to preserve relevant evidence of wrongdoing;

(d) Direct reporting to the SRA by potential witnesses may involve both mis-reporting and over-reporting to the SRA; and

(e) The best interests of clients will not be met if, as part of a direct report to the SRA, a potential witness discloses information which is privileged, or confidential to a client or which includes their personal data – those outcomes are less likely to occur if a report is made indirectly to the SRA via a COLP / COFA, who are experienced in calling and managing privilege and confidentiality issues

We set out our grounds in more detail below, in the responses to the specific consultation questions.

## Answers to the consultation questions

1. **Question 1 - Do you feel that the SRA should develop a policy on reaching agreements with co-operating witnesses?**

Only in the context of producing a comprehensive policy and clearer guidance on general reporting obligations (including internal reporting) of which the co-operation agreement policy would form part. More particularly, the CLLS is concerned that while:

(a) Rule 8.5 (c) (ii) and (e) (iii) of the SRA Authorisation Rules 2011 sets out the COLP's and COFA's obligations to report to the SRA; and

(b) Outcomes (10.3) and (10.4) set out the obligations on regulated individuals to report to the SRA serious financial difficulty; action taken against them by another regulator; serious failures to comply with the requirements of the Handbook; and serious misconduct by any authorised person or employee, manager or owner of a firm,

there is no regulatory requirement on individuals within a firm to make reports to the COLP and COFA about the same issues. As we explain in more detail in our answer to Question 3 below, this potentially causes adverse consequences both for the firms and for the individuals concerned.

The CLLS recognises that, when used in appropriate circumstances (e.g. where the public interest of securing information outweighs other ethical concerns), immunity and leniency schemes can operate to the mutual benefit of the public, the regulators which operate them and to the relevant regulated community.

It is clear from paragraph 8 of the consultation paper that, at present, in the context of the current legal services market, the SRA only anticipates that its proposed co-operation policy will be helpful in a handful of serious cases each year. The corollary of this observation is that, in the vast majority of cases in which serious failures or misconduct must be disclosed to the SRA, co-operation agreements will not be relevant and there is no reason why failure and misconduct reporting should not be managed via a firm's COLP or COFA.

If the proposed co-operation policy is not set in the context of a more comprehensive statement about reporting obligations generally (including internal reporting), the CLLS is concerned that the focus on direct self-reporting to the SRA, without mentioning the need to involve the COLP/COFA in a relevant firm will undermine the intended purpose of Rule 8.5 of the Authorisation Rules and, as a consequence, may have adverse consequences in many more than a handful of cases. We deal with this issue in more detail in our answer to Question 3 below.

2. **Question 2 - Do you agree that there could be significant benefits in implementing a co-operation agreements policy? Do you feel that there are any objectives which have not been included in the policy which should be?**

The CLLS recognises and agrees that:

(a) in appropriate cases the potential impact of early discovery of serious regulatory issues in terms of protecting the public interest and increasing SRA efficiency in any one case could be significant; and

(b) a policy clarifying how the SRA deals with the regulatory position of a co-operating witness could increase the likelihood of reports about serious wrongdoing and misconduct being made.

However, in the majority of such cases, none of the above beneficial outcomes is lost by the potential witness channelling his/her report via the firm's COLP/ COFA. The CLLS is concerned that in its present form the proposed policy is not clear or transparent enough and could result in an increase in the number of inappropriate or immaterial issues being reported to the SRA with a resulting waste of investigating resource and reduction in SRA efficiency.

A matter of particular concern is the internally inconsistent phrases used in connection with reporting obligations both within the consultation paper and in the SRA Handbook itself – see the confusingly diverse range of phrases used in Annex 1 attached

3. **Question 3 - Do you agree with our views as to the main risks and challenges posed by such an approach? Are there other issues which you feel should be considered?**

With regard to risks and challenges, the CLLS's primary concerns with the proposed policy are that:

(a) it is not set in the context of a more comprehensive statement about reporting obligations generally (including internal reporting) and, as a consequence, the proposed focus on direct self-reporting to the SRA may have adverse consequences (see further below);

(b) it is likely to encourage false or inappropriate reporting in some circumstances, for example as a tactic deployed by disgruntled employees in employment disputes with a firm (see paragraph 15 (c) of the consultation paper concerning the reliability of evidence);

(c) no account is apparently taken of the requirements of and interactions with other agencies (e.g. police, Serious Organised Crime Agency, and insurers) which may also have concurrent jurisdiction over / an interest in a matter in addition to the SRA; and

(d) no account is apparently taken of the matters identified in the SRA's previously published guidance to Rule 20.06 of the Solicitors' Code of Conduct 20071 which drew attention to risks and issues to consider when deciding whether to make a direct report to the SRA about serious misconduct or serious financial difficulty.

**Potential adverse consequences** – the direct self-reporting of matters to the SRA which an individual suspects amount to serious misconduct or serious breaches of Handbook requirements carries with it a number of possible pitfalls for the individual and for the firm concerned. For example, such self-reporting might lead to the unintended commission of criminal offences, breaches of regulatory requirements or result in civil liability.

More particularly, we are concerned that in its current form the proposed policy could: lead to individuals overlooking money laundering reporting requirements; encourage false or inappropriate reporting; result in the unintentional dissemination

[1] see paragraphs 33 to 39 of the June 2009 edition

of privileged information or the disclosure of confidential information without a client's consent; and possibly lead to firms failing to meet their obligations to insurers with potentially serious financial consequences. We believe that incidences of this nature are more likely to be avoided or reduced if the initial expectation is that (except in unusual circumstances) all matters which potentially involve serious breaches or misconduct are to be reported to a firm's COLP or COFA (see further below in connection with paragraph 15(g) of the consultation paper).

**Paragraph 15(d)** - as the case of ***R v Dougall*** illustrates, there can be a number of difficult questions to consider when weighing the balance between various public interest issues and the use of leniency in dealing with wrongdoers. For this reason, we believe that decisions under the proposed policy should be reserved to the most senior decision makers within the SRA. This does not currently appear to be the case in relation to regulatory settlement agreements[2].

**Paragraph 15(g)** of the consultation paper refers to the consistent maintenance of compliance. In the CLLS' view, this ought to mean that, except in unusual circumstances, any matter involving serious breaches or serious misconduct in a firm about which an individual has concerns should be reported in the first instance to the COLP or COFA. The COLP or COFA are likely to be in the best position of any individual within a firm to decide whether a report is of a kind which requires prompt escalation to the SRA or the involvement of other parties or agencies. The COLP and COFA are also likely to be in a better position to identify issues of privilege, confidentiality and data protection and to take steps to safeguard such information and to act to protect the available evidence (possibly e.g. via a prompt suspension of the alleged wrongdoer and the subject of the direct report, who may otherwise be placed to destroy self incriminating evidence). Of course, if a COLP or COFA were themselves objects of suspicion or they decline to escalate a matter reported to them (see our comments above at paragraphs 4 and 6 of the Executive Summary), we accept that alternative approaches would be required. However, for the reasons already stated in relation to potential adverse consequences, we consider that the first alternative to reporting concerns to the COLP or COFA should be for an individual to make a report to a firm's managing or senior partner. Where that alternative is exhausted or the individuals concerned are objects of suspicion, the matter should be the subject of a direct report to the SRA.

Based on the experience of our member firms which have made reports of serious misconduct to the SRA in recent years, we also have concerns about how the SRA would handle self-reports made by individuals in a firm. Our concerns relate both to the time the SRA has taken to make substantive responses to reports of serious misconduct (in the past this has often taken a number of weeks without any explanation being given to the "reporter" of what was happening in the meantime) and also to the nature and means of further communication with a reporting individual. As regards the first point, any significant delays by the SRA in responding to a direct self-report which was unknown to the COLP or COFA in a firm (or in contacting the COLP or COFA to alert them to the situation) would potentially exacerbate each of the adverse consequences identified above. To illustrate the second point, a secretary in one of our member firms received a call from a SOCA employee in response to a suspicious activity report by the firm's Nominated Officer. The SOCA employee left a message with the secretary to pass to the Nominated Officer. The message clearly identified the highly sensitive subject matter of the report and had potential to lead to the commission of a tipping-off offence. With such

[2] We note that under item 69 of the SRA's Schedule of Delegations (4 July 2012), Technical Advisers and the Operations Manager are authorised to make regulatory settlement agreements in addition to Executive Directors and Heads of Legal and Enforcement and Legal Policy and Advice.

examples in mind, we consider there are risks that reporting "witnesses" may be unintentionally identified within their firms unless appropriate safeguards are adopted by both the SRA and an individual self-reporter. Once more, this risk is less likely to crystallise if reports are handled by COLPs and COFAs.

4. **Question 4 - Do you feel that the steps proposed to minimise the risks posed by such an approach are sufficient and appropriate? Are there any other safeguards which you feel should be included, such as excluding very serious conduct from the scope of the policy?**

**Paragraph 18 of the consultation paper –** it is not clear enough when co-operation agreements should be used. For example, the consultation paper variously refers to *"very serious wrongdoing"* (paragraph 3); *"serious misconduct"* (paragraph 4); *"any wrongdoing"* (paragraph 7) and the interchange of key phrases is repeated in the draft policy itself – paragraph 2 refers to *"serious misconduct", "wrongdoing"* and *"serious regulatory difficulty"*. We envisage that, without a clearer and more consistent definition of the type of behaviour on which the policy is intended to bite, there is likely to be confusion and the possibility of over-reporting and mis-reporting (see our previous answer to Question2 above and Annex 1 below).

As stated above in relation to Question 3, the draft policy should refer to the need to make an initial report to the firm's COLP / COFA, other than in circumstances which involve suspected wrong-doing (of requisite seriousness – see above) on the part of the COLP/COFA.

Given the potential we see for false reporting (see our response to Question 3 above), we suggest that a general statement is made in a preamble or early section of the draft policy about the consequence of misleading the SRA in addition to the statement currently made in paragraph 12.

**Paragraph 19 of the consultation paper –** we agree that certain conduct should be excluded from the scope of the policy and note that other provisions of the consultation paper / draft policy already appear to give effect to this proposal – e.g. failure to act in good faith and to provide full and frank disclosure; misleading the SRA; failure to return benefits received as a result of misconduct. Given the very wide scope and number of actions / omissions which would fall within the definition, we believe that it is unlikely to be helpful to use *"alleged criminal behaviour"* as the basis for excluding a potential witness from the scope of the policy. For instance, this definition would appear to cover a range of activity from the most serious offences involving manslaughter or serious bodily harm through to the most minor, such as using a television without a TV licence.

Taking account of these issues, we would welcome an express statement that alleged criminal behaviour involving dishonesty as well as by anyone who could be seen to be the "driving force" behind the misconduct in question is likely to exclude a witness from the scope of the policy.

5. **Question 5 - Do you agree with the content of the draft policy and the proposed process for dealing with such matters? Do you feel that this could be improved in any particular way?**

**General** - we suggest that:

(a) a wider policy is written to cover reporting obligations in general (including internal reporting) and not just in relating to cases in which potential witnesses may require protection (see our answer to Question 1 above); and

(b) to avoid inconsistencies and potential misunderstandings, a choice is made about the appropriate words and phrases to use in the draft policy as between "serious misconduct", "wrongdoing" and "serious regulatory difficulty".

**About this policy** – we suggest a general reference is made in this section to the consequences of intentional misuse of the policy.

**Recognition of mitigating factors –** we recommend that a warning or notice is given in the draft policy that mitigating factors which might have an impact on a regulatory decision by the SRA do not necessarily have the same effect in connection with the penalty / sanction decisions which lie with another court or another agency[3].

**Paragraph 8 of the draft policy** – as drafted, purpose of this paragraph is unclear. The second sentence and reference to Outcomes (10.3) and (10.4) appear to pull in opposite directions. We suggest that a better measure for applying substantial mitigation would be the likelihood that the behaviour of concern would not have been discovered (or substantive evidence of it would not have been obtained) without the disclosure (which will typically occur via a first stage report to the COLP/COFA)

6. **Question 6 - Do you envisage any particular section of the public or a group of stakeholders being placed at a disadvantage by the policy or the implementation of the policy? If so, do you feel that there are any steps or adjustments which can be reasonably be taken to minimise any impact?**

Without the changes recommended above, we consider that there are potential risks to and disadvantages for clients, the potential witnesses intending to enter into co-operation agreements, firms, other investigating agencies and insurers – see our answers to Question 1 – 3 above. The recommendations we make above take account of the potential risks and disadvantages we have identified.

Yours sincerely,

Alasdair Douglas
Chair , CLLS

[3] See the reference made to the Court of Appeal's comments in the judgment in ***R v Dougall*** [2010] in footnote 5 to the consultation paper.

**ANNEX 1**

| **Consultation Paper Paragraph No** | **Relevant phrases used in the Consultation Paper** |
|---|---|
| Para 2 | Witness to and reports of misconduct |
| Para 4 | Serious wrongdoing; wrongdoing and serious misconduct |
| Para 5 | Investigate and prosecute serious misconduct; aware of wrongdoing; serious regulatory difficulty; stop wrongdoing |
| Para 6 | Deter wrongdoing |
| Para 7 | Wrongdoing |
| Para 8 | A handful of serious cases; involved in some wrongdoing; serious regulatory issues |
| Para 11 | Very serious wrongdoing |
| Para 15(e) and (f) | Misconduct; involved in wrongdoing |
| Para 16 | Report serious misconduct |
| Para 20 | Parties involved in wrongdoing |
| Para 24 | Report serious misconduct |
| Annex 1, Para 1 | Witnesses in serious cases |
| Annex 1, Para 2 | Prosecute serious misconduct; aware of wrongdoing; investigations into serious misconduct; involved in serious misconduct; stop wrongdoing |
| Annex 1, Para 3 | Involve very serious wrongdoing; proving the wrongdoing |
| Annex 1, Para 5 | Can decide not to pursue misconduct |
| Annex 1, Para 6 | Mitigates misconduct; involved in wrongdoing; in respect of their own wrongdoing |
| Annex 1, Para 7 | (a) the alleged wrongdoing; (c) investigation of serious misconduct; (d) alleged wrongdoing; (f) wrongdoing arising from misconduct |
| Annex 1, Para 8 | Serious failure to comply; serious misconduct |
| Annex 1, Para 12 | Alleged wrongdoing; involvement in wrongdoing; original wrongdoing or consequential misconduct |
| Annex 1, Para 13 | Involvement in the wrongdoing |

| | |
|---|---|
| Annex 1, Para 15 | Full admission of any wrongdoing. |
| | |

| **SRA Handbook reference** | **Relevant phrases used in the SRA Handbook 2011** |
|---|---|
| O(10.3) | Notify …promptly…serious financial difficulty; serious failure to comply… |
| O(10.4) | Report…promptly, serious misconduct |
| Rule 8.5(c) (i) and (e)(ii) SRA Authorisation Rules 2011 | Record any failure to comply |
| Rule 8.5(c) (ii) and (e)(iii) SRA Authorisation Rules 2011 | As soon as reasonably practicable, report to the SRA any failure so to comply |

**THE CITY OF LONDON LAW SOCIETY**
**PROFESSIONAL RULES AND REGULATION COMMITTEE**

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