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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
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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