Solicitors Regulation Authority

Reporting concerns:

Our post-consultation position

January 2019

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Executive summary

1. Everyone has a right to expect that solicitors will behave in the right way and meet the high standards we set. If solicitors fall short, we step in to protect the public.

2. It is important that firms let us know about potential breaches of our rules promptly. We may have additional information and may need to use our powers to investigate the matter and/or to take steps to protect the public.

3. We also need others to alert us when things go wrong which may be the result of a breach of our rules by a solicitor or firm that we regulate. The public, clients and judiciary, for instance, all play a role and regularly report to us. And so do law firms.

4. Reporting behaviour that presents a risk to clients, the public or the wider public interest, goes to the core of the professional principles of trust and integrity. All solicitors and firms have a role in helping maintain trust in the profession.

Updated reporting obligation

5. We consulted on a range of options for a proposed new obligation for those we regulate to report concerns to us, to ensure that this is clear, consistently applied, and allows us to take early action to protect the public.

6. Our analysis of the consultation responses has led us to decide to update our reporting obligation as set out below. We will submit an application to the Legal Services Board for the updated drafting to replace the current reporting obligations for individuals and firms that we regulate as well as for compliance officers.

> 1. You must promptly report to the ***SRA***, or another ***approved regulator***, as appropriate, any facts or matters that you reasonably believe are capable of amounting to a serious breach of their ***regulatory arrangements*** by any ***person*** regulated by them (including you).
>
> 2. Notwithstanding, you must promptly inform the ***SRA*** of any facts or matters that you reasonably believe should be brought to its attention in order that it may investigate whether a serious breach of its ***regulatory arrangements*** has occurred or otherwise exercise its regulatory powers.
>
> 3. You must not subject any ***person*** making or proposing to make a report or proving or proposing to provide information based on a reasonably held belief under [cross reference to the relevant paragraphs of the Codes of Conduct] to detrimental treatment for doing so, irrespective of whether the ***SRA*** or another ***approved regulator*** subsequently

investigates or takes any action in relation to the facts or matters in question.

Introduction and background

Overview

7. The SRA sets the standards to be met by those we regulate, in order to protect the public interest: the users of legal services, the rule of law and administration of justice. The public and the profession have a right to expect that conduct or behaviour that falls below those standards will be met by robust and proportionate enforcement action. It is important that solicitors and firms let us know promptly about potential breaches of our rules.

8. We place an obligation on those we regulate to report wrongdoing either by themselves or others. They must use their judgment to consider what to report to us, and when, namely:

    - What, if proven, could give rise to regulatory action
    - What evidence or information is sufficient for them to report a matter
    - At what stage in any investigation process they should inform us.

9. This reporting obligation is critically important in a profession founded on trust and integrity, for the development of personal accountability, for shared values, and a culture of openness which allows for learning from mistakes.

10. It is also important to ensure effective regulation, enabling us to have timely receipt of potential risks and issues and to identify whether we need to take any action.

Our current reporting obligation

11. The current reporting obligation, set out in the SRA Code of Conduct 2011, is as follows:

    Outcome 10.3: you notify the SRA promptly of any material changes to relevant information about you including serious financial difficulty, action taken against you by another regulator and serious failure to comply with or achieve the Principles, rules, outcomes and other requirements of the Handbook.

    Outcome 10.4: you report to the SRA promptly serious misconduct by any person or firm authorised by the SRA, or any employee, manager or owner of any such firm (taking into account, where necessary, your duty of confidentiality to your client).

12. Following discussions with firms and individuals, it became clear that understanding of when this duty is triggered can differ. In particular, we identified that some consider that they should not report concerns to us until they have conclusively determined both the relevant facts and that these comprise serious misconduct. Others refer issues to us at an early stage. We wanted to make sure that there is greater understanding of the obligations, so all solicitors and firms have a clear and consistent view as to what we expect of them, and of what, and when, they should report.

Seriousness and the Enforcement Strategy

13. When revising our Codes of Conduct, we updated the current reporting obligation as follows:

    You ensure that a prompt report is made to the SRA, or another approved regulator, as appropriate, of any serious breach of their regulatory arrangements by any person regulated by them (including you) of which you are aware. If requested to do so by the SRA, you investigate whether there have been any serious breaches that should be reported to the SRA.[1]

14. This reflects a consistent use in our standards and regulations of the term: "serious breach" to describe conduct or behaviour which represents a concern to us, and in respect of which we may take regulatory action. The introduction to our new Codes of Conduct confirms:

    A serious failure to meet our standards or a serious breach of our regulatory requirements may result in our taking regulatory action against you. A failure or breach may be serious either in isolation or because it comprises a persistent or concerning pattern of behaviour.

15. We do not consider it desirable to define the term "serious breach" in the Codes, as we are concerned that any attempt to crystallise this in an exhaustive way in a rule, will risk proving inflexible and becoming outdated. However, the wording itself clearly seeks to express that a mere breach is not in and of itself reportable: it must be "serious".

16. Our updated Enforcement Strategy explains in more detail our views about the factors which make a breach serious, and, provide clarity about how, and when, we will (or will not) enforce breaches. Together with the new Codes of Conduct, we believe the revised Enforcement Strategy provides the transparency and assurance that solicitors and firms have been asking for regarding the question of ***what*** to report, by reference to key principles which can be applied to concerns relating to any type of conduct or behaviour that may arise in practice.

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[1] Code of Conduct for Firms – Co-operation and information requirements (3.9) SRA Code of Conduct for Solicitors, RELs and RFLs (7.7)

17. A final version of the Enforcement Strategy will [shortly] be published on our website, providing the public and profession with a lead in time of a number of months before the introduction of any new reporting obligation. This will be supported by a number of topic guides elaborating on specific types of conduct and behaviour, and we are developing further guidance, including case studies, to help compliance officers and others when they are considering making a report to us. We want to do all we can to ensure that the obligations we place on those we regulate are transparent, predictable, and operate effectively to protect the public.

When to report - our updated reporting obligation

18. However, the newly drafted obligation does not clarify the question of ***when*** to report a matter, and what evidence or information is sufficient in order to do so.

19. We asked a number of specific questions in the consultation, as well as setting out four potential draft options. We sought views on the following:

    - Do you agree that a person should report facts of matters that are capable of resulting in a finding by the SRA, rather than decide whether a breach has occurred?
    - Where do you think the evidential threshold for reporting should lie?
    - Do you think that an objective element – such as “reasonable belief” or “reasonable grounds” would assist decision makers, or unnecessarily hamper their discretion?
    - Do you have a preferred drafting option from among our suggestions? stakeholders were also welcome to submit their own drafting suggestions
    - 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

20. The suggested drafting options we proposed were as follows:

    Option 1

    You must promptly report to the SRA or another approved regulator, as appropriate, any facts of matters that you believe are capable of resulting in a finding of a serious breach of their regulatory arrangements by any person regulated by them (including you).

    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).

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.

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.

21. We received 29 responses from a variety of stakeholders including firms, individuals, local law societies, representative bodies, the public interest body Protect[2] and a risk management firm. We thank all those who responded for your contribution to this important issue.

22. The responses demonstrated a range of views which helped us to think through the issues. A summary of the responses to the consultation are set out at paragraphs 39 to 85 below. We have considered these very carefully. As a result, we have decided to introduce the following updated reporting obligation.

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

5. Notwithstanding, you must promptly inform the ***SRA*** of any facts or matters that you reasonably believe should be brought to its attention in order that it may investigate whether a serious breach of its ***regulatory arrangements*** has occurred or otherwise exercise its regulatory powers.

6. You must not subject any ***person*** making or proposing to make a report or proving or proposing to provide information based on a reasonably held belief

[2] Leading experts in whistleblowing.

> under [cross reference to the relevant paragraphs of the Codes of Conduct] to detrimental treatment for doing so, irrespective of whether the ***SRA*** or another ***approved regulator*** subsequently investigates or takes an action in relation to the facts or matters in question.

23. This reflects the fact that it is important for us, as the regulator, to receive information at an early stage where this may result in us taking regulatory action. We do not want to receive reports or allegations that are unmeritorious or frivolous – that is not in anyone's interest. We do want to receive reports where it is possible that a serious breach of our standards or regulations has occurred and where we may wish to take regulatory action.

24. We agree with one respondent "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." We consider that the decision whether matters comprise a serious breach on which action should be taken, is ultimately for us – as an independent public interest regulator. Therefore we require reporting of facts or matters which could comprise a serious breach, rather than allegations identifying specific and conclusively determined breaches.

25. This does not in our view lead to "over" reporting because it is our job to investigate those concerns that are capable, if proven, of amounting to a serious breach of our requirements. Early reporting is important because it allows us to do so; and although a firm itself, having identified a breach may be best placed to gather evidence, this will not always be the case – for example where this sits in another firm or with a client.

26. We have powers to compel the production of documents and information from a regulated individual or firm or a third party, even where privileged. We can take statements and test evidence at oral hearings where matters turn on one person's word against another**.** Further, we can also take urgent action to protect the public where appropriate, through a range of regulatory powers – including the withdrawal of approvals, the application of practising conditions, and (in the most serious cases of all) using our intervention powers to close a firm.

27. Early engagement with the SRA also allows us to make sure that we can understand any patterns or trends using information we already hold. Sometimes we will want to gather information regarding particular types of risk to consumers, to understand patterns and trends (eg cybercrime), even where this may raise no concerns about the conduct or behaviour of regulated individuals or firms.

28. This is not to suggest that firms shouldn't investigate matters nor that compliance officers shouldn't exercise their judgment in deciding whether a potential breach has occurred – indeed we want to encourage firms to resolve and remedy issues locally where they can. However, we are keen for firms to engage with us at an early stage

in their internal investigative process and to keep us updated on progress and outcomes. In these circumstances, we are likely to be happy for the firm to conclude their investigation and to provide us with a copy of their report and findings. However, we may, on occasion wish to investigate a matter (or an aspect of a matter) ourselves – for example because our focus is different, or because we need to gather evidence from elsewhere.

29. We agree with a number of respondents who have highlighted that these matters should be for the professional judgment of the decision maker. And that this should combine a subjective element (what they believe) with an objective element – as supported by the majority of respondents - (that this belief was reasonable bearing in mind the circumstances, information and evidence available to the decision-maker). This serves to avoid the reporting of mere allegations or suspicions, and provides a balance on the spectrum between this on the one hand, and fully investigated findings on the other. We believe this also provides support for appropriate reflection, investigation and professional judgment.

30. We do not consider it appropriate to seek to define reasonableness – nor that this requires a wide knowledge of previous cases – but, as stated above, will develop case studies to demonstrate how this is applied in a range of circumstances, noting the support for the provision of more guidance in the responses received.

31. We note that there was some support for the suggestion that this belief should be that serious breach had “likely”, or “probably”, occurred. However, on balance we do not consider it appropriate to set the threshold for reporting higher than the threshold we apply when deciding to open an investigation (which, as stated above, is that the concerns, if proven, are capable of amounting to a serious breach). In effect, this wording would mean that we would not get notice of matters from firms that, if they came from another route, we would investigate.

32. We are concerned at the suggestion that internal pressures and influences can place compliance officers in a difficult position and that as a result early reporting can be a real concern to them. We want firms to give compliance officers support in discharging their duties and in exercising their judgment about what and when to report. Sometimes a report may be made to us that does not necessarily result in regulatory action once we have investigated further, for good reason. This does not necessarily mean that it was wrong to report to us.

33. We want compliance officers to have confidence about making a report to us at any stage in their internal investigation. We have therefore included an additional provision in our updated rule which makes crystal clear that firms or individuals must not subject any person making, or proposing to make, a report (or to provide information) to detrimental treatment for doing so. This is irrespective of whether we, or any other regulator subsequently investigates or takes any action. Victimisation of individuals for properly reporting concerns undermines the very basis of the

regulatory regime and the outcomes we are trying to achieve. Our new rule sets that out explicitly for the first time.

34. We are considering carefully the suggestions for other areas where further help or support may be provided, and note the comments about the need for greater ease of reporting, including on an anonymous or confidential basis. Those we regulate currently have access to support and advice via our ethics helpline, and we provide guidance and a confidential red alert helpline to those who wish to seek confidential or anonymous advice and assistance. We will always discuss with those who contact us any needs or concerns they may have about involvement in our process, as well as provide regular updates about how we are handling their concerns.

35. However, we have plans to update our guidance to provide greater support to whistleblowing and raise awareness of their rights in particular in respect to the reporting of information that may be subject to confidentiality obligations (for example from non-disclosure agreements) and privilege, as well as the ongoing support we provide for witnesses and others involved in our disciplinary procedures.

36. We will also consider, as we update our online digital tools, developing our reporting forms. We are also in the process of introducing an annual report on how we exercise our disciplinary functions and will consider how we might use this to provide statistics and examples to demonstrate our approach to reporting thresholds.

Next steps

37. We will submit an application to the Legal Services Board for the updated drafting to replace the current reporting obligations for individuals and firms that we regulate[3] as well as for compliance officers[4]. We currently expect the new SRA Standards and Regulations to come into force in Spring/Summer 2019.

38. In the meantime, we would invite firms to contribute material to us in confidence that will help us to build a range of case studies which, whilst anonymised, might help other individuals, firms and compliance managers. We can develop case studies based on hypothetical cases – and/or based on what we have seen in practice. However, case studies relating to matters that have not – for whatever reason – been referred to the SRA will help to build a richer and more comprehensive picture in this area.

[3] Paragraph 7.7 of the SRA Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.9 of the SRA Code of Conduct for Firms
[4] Paragraph 9.1(d) and 9.2(b) of the SRA Code of Conduct for Firms

Annex One: Analysis of stakeholder responses

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

39. Views ranged in response to this question. Several respondents raised concerns about reporting facts or matters that are capable of resulting in a finding by the SRA, with some saying that it risked over-reporting; for example, one respondent said:

    "'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."

40. One respondent, who was also concerned about over-reporting, also added that a more flexible approach to reporting was needed:

    "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."

41. However, the principal issue raised by several respondents was around the role of firms' staff and compliance officers. For example, one respondent said:

    "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."

42. Some respondents took the view that part of compliance officers' role is to exercise judgment about potential breaches, and that reporting facts or matters that are capable of resulting in a finding by the SRA will negatively impact their role. For example, one respondent said:

    "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."

43. Another respondent stated:

    "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."

44. However, one respondent interpreted the question in a different way:

"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."

45. Another respondent felt that the compliance officer role is not currently functioning effectively:

"We have encountered cases where partners have tried to stop compliance officers from reporting serious misconduct… We are also aware of COLPs trying to shun their regulatory responsibilities by passing the defined role… to third parties or more junior members of staff."

46. Another respondent answered this question in terms of objectivity and subjectivity and compliance officers' level of experience:

"A mixed test, combining a subjective element (the person actually believed) and an objective element (that there was reasonable grounds based on the evidence to form the view that a breach has occurred) is likely to produce the most consistency… an experienced COLP or senior partner may have a different interpretation of [reporting facts of matters that are capable of resulting in a finding by the SRA] than a person with less exposure to the SRA Code of Conduct…"

47. The City of London Law Society recognised the tension between having sufficient evidence to report and the need for prompt action.

"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?

48. We gave these options to stakeholders

- Belief

- Likelihood
- Any other options – we asked respondents to specify their preference.

49. In response to this question, respondents recognised the need to achieve the right balance. One respondent summed up the issue:

    “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.”

50. Some respondents felt that belief was sufficient. Some did not comment further, but one who did comment said:

    “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.”

51. Some of the respondents who favoured a belief threshold added a comment to say that “belief” should be on reasonable grounds. Those respondents said:

    “We think that the evidential threshold should be placed at a level that moves the matter from a mere suspicion to a grounded belief.”

    “Belief, but we prefer reasonable grounds to believe.”

    “The threshold should be couched in terms of belief that a serious breach is likely to have occurred.”

52. Another respondent gave a different variation on this approach.

    “Belief that a serious breach has probably occurred.”

53. Others took the view that a threshold of likelihood, rather than belief, would help give objectivity, and would reflect compliance officers’ role and function. Those who added comments on this said:

    “Belief on its own is a subjective test whilst the addition of likelihood provides greater clarity.”

    “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.”

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?

54. Again, views were mixed, but many respondents favoured an objective element. A typical comment from respondents was:

    "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."

55. One respondent argued that an objective element would help the decision-making process, but also raised the need for guidance from the SRA.

    "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… should the SRA decide to adopt a test of 'reasonableness' then there should be a definition of 'reasonableness'."

56. Another respondent set out their reasoning as follows:

57. "[A requirement for a reasonable belief] gives an appropriate margin of leeway for a diligent compliance officer to come to a different view than the SRA might have done; 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 [reports], whereas an objective test would encourage individuals to escalate matters within the firm for further investigation."

58. Other respondents did not think that an objective element would be helpful. Those who commented on this stated:

59. "This would not help unless the decision maker had a wide knowledge of previous cases and likely outcomes, which in most cases is unlikely."

60. "I believe it would unnecessarily hamper discretion."

Question 4: do you have a preferred drafting option from among our suggestions?

61. We gave stakeholders four suggested drafting options, as follows. There were a variety of views and arguments advanced by respondents for each of these options.

Option 1: you must promptly report to the SRA or another approved regulator, as appropriate, any facts or matters that you believe are capable of resulting in a

finding of a serious breach of their regulatory arrangements by any person regulated by them (including you).

62. A few respondents supported this, but only one commented, saying that discretion to report should be unhindered. However, the respondent did also mention that over-reporting needed to be avoided.

Option 2: you must promptly report to the SRA or another approved regulator, as appropriate, any facts or 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).

63. Again, some respondents who supported this did not provide additional comments. One respondent supporting this option who did comment added that the inclusion of "reasonable" grounds for belief would help prevent over-reporting:

    "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."

64. Another respondent commented to say that they felt Option 2 achieved the right measure of objectivity.

    "[Option 2] 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."

65. Another respondent, while preferring Option 2, suggested modified wording.

    "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."

Option 3: you must promptly report to the SRA or another approved regulator, as appropriate, any facts or 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.

66. Some respondents supported Option 3, but only one provided any additional comments. They stated:

    "I am torn between Options 3 and 4. However as we don't have a proper definition of serious misconduct (because the Enforcement Strategy is still in draft) it seems to me that it is impossible to have a settled view."

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.

67. Several respondents supported this option, and put forward a number of arguments to support it. Some argued that the responsibility of making a reasonable judgment is a natural part of the profession's role.

    "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."

68. Some argued it would improve consistency and assist the evaluation process:

    "This would assist the decision maker, because it makes reporting threshold clearer and less likely to result in varying degrees of interpretation by different firms."

    "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."

69. The City of London Law Society stated:

    "[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…. 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."

70. The Law Society also favoured Option 4, while calling for supporting guidance:

    "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. 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.

71. One respondent did not favour any of the options. They stated:

"The different reporting thresholds in the various options are too low. Our preference is to have something similar to the Bar Standards Board – 'reasonable grounds to believe that there has been serious misconduct'."

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?

72. A number of respondents made suggestions. Respondents who favoured Options 1 and 2 made points about supporting early reporting:

    "Make it easier to report anonymously."

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

    "Open a dialogue based on an assumption that the self-reporter will cooperate - if they have self-reported, that must be the most likely position… Appoint more regulatory managers so that firms have someone to discuss matters with."

    "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… This would provide reassurance from the horse's mouth that [the reporter was] engaging appropriately with their role."

73. A supporter of Option 2 made this suggestion:

    "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.

74. Respondents who supported Option 3 mostly made suggestions for more support from the SRA

    "Offering an advice service for informal enquiries around potential reports would assist."

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

“Publish more information about reports made by firms and the SRA's response (anonymising as appropriate) in the form of case studies… Return to firms with updates on any open investigations…It would be more beneficial for firms to understand how investigations are progressing and specifically how the SRA has come to their decision.”

75. One respondent who supported Option 4 stated:

“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.”

76. Another supporter of Option 4 in Question 4 stated:

” 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...”

77. Another supporter of Option 4 made these suggestions for supporting guidance

"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."

78. A law firm, which supported Option 4, suggested:

“[The SRA should have] separate reporting obligations of the COLP and other solicitors at their firm… 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… As currently drafted, we think that rule 7.10 will create practical difficulties for individual solicitors… 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.”

79. As well as raising the same concern as the law firm about rule 7.10, the City of London Law Society's response included an extended discussion of the difficulties facing COLPs. They concluded:

    "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."

80. The Law Society raised this concern:

    "The SRA needs to make it absolutely clear how far the obligation extends to report matters that take place outside of practice... We understand that the proposed SRA Code for Solicitors will only apply in relation to the solicitor's practice... 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."

81. Protect (formerly Public Concern at Work) stated

    "We believe more can be done by the SRA to educate and inform both lawyers and their clients about whistleblowing rights when the whistle-blower is looking to escalate their public interest concerns once a settlement agreement has been agreed to end tribunal action, even if a non-disclosure agreement is part of that agreement. The Public Interest Disclosure Act provides a defence in the event of an employer attempting to enforce a non-disclosure agreement against a whistle-blower who is looking to escalate their public interest concerns to a regulator…"

Other themes raised by respondents

82. Some other themes emerged through the responses to the questions given by respondents. One theme related to the definition of serious breach – for example, the City of London Law Society stated:

    "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."

83. The Association of Women Solicitors stated:

    "[The SRA should] 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."

84. The theme of defining “serious breach” connected to another theme – the SRA’s Enforcement Strategy. The City of London Law Society stated:

    “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.”

85. Another respondent stated:

    "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... The approach of the SRA and the Enforcement Strategy must be seen to be proportionate and reasonable."

List of respondents to the consultation

Acuity Legal Limited
Association of Women Solicitors
Birmingham Law Society
City of London Law Society
DAS Law
EY Riverview Law
Fox Williams
Jennifer Woodyard*
John Cooke*
Leicestershire Law Society
Linklaters
Manchester Law Society
Protect
Sarah Mumford*
Stephen Hermer
The Law Society of England and Wales
12 further respondents requested anonymity: - 9 law firms - 2 individual respondents - 1 risk management organisation

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