TO REPORT OR NOT TO REPORT PART 2

In the October 2018 edition of the Bulletin, I considered the consultation paper "Reporting concerns" upon which the SRA was consulting with the profession and other interested bodies writes Jayne Willetts, Solictor Advocate at Jayne Willetts & Co Solicitors.

The Legal Services Board has now approved the SRA's application to amend the reporting obligations in the new Codes of Conduct for individuals and firms – due to come into effect on 25 November 2019.

These new reporting duties are not identical to the proposals contained in the consultation paper which is a source of some concern to the Law Society and other consultees. They are also not identical to the provisions contained in the Standards & Regulations which currently appear on the SRA website.

They are contained within the SRA Regulatory Arrangements (Reporting Concerns) Amendment Rules 2019 which are in the process of being approved by the SRA Board.

This new regime introduces three provisions which will apply to all individuals and firms regulated by the SRA – guidance is promised for later this year. I have given each of the provisions a nick name for the purposes of recollection only.

1. UNIVERSAL CHARTER

Rule 7.7 (Individuals) Rule 3.9 (Firms) Rule 9 (COLPs & COFAs)

You report promptly 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).

This provision is the first port of call for self-reports or reports about your firm. It creates a multi-stage process for reporting. The test combines a subjective element (what the person making a report believes) with an objective element (the belief was reasonable bearing in mind the circumstances, information and evidence available to the decision-maker). The SRA has declined to provide a definition of what amounts to a "serious breach" and has directed the profession to its Enforcement Strategy which includes a list of the nine factors for assessing "seriousness". The Enforcement Strategy has been drafted in-house by the SRA and has never been subject to consultation. COLPs & COFAs will need to read the Enforcement Strategy in conjunction with the Codes before they start reporting under these new regulations. Some concerns will be obvious and warrant a report. Others will require careful investigation and consideration and/or professional advice before reporting.

2. SNITCHERS' CHARTER

Rule 7.8 (Individuals) Rule 3.10 (Firms) Rule 9 (COLPs & COFAs)

Notwithstanding Rule 7.7 above, you inform the SRA promptly of any facts 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.

Just to make it even more complicated – the SRA has introduced a second duty to report any facts which the SRA should investigate and with a much lower threshold for reporting. It is intended to cover the scenario where a firm has not gained (or is not able to gain) sufficient knowledge of the facts to satisfy itself whether the matter is capable of reporting.

The SRA can then use its wider regulatory powers to investigate in situations where a firm cannot – for example where the evidence sits within another firm or is in the possession of a client. The SRA could use its statutory powers to compel the production of evidence.

This is a very disturbing provision. As it stands it would enable firms to make reports about other firms without clear evidence of wrongdoing, for example in hostile litigation. It also appears to be an alternative to the overarching duty at 1 above. If so, it would enable firms to report under this provision without conducting an internal enquiry which could result in injustice in the case of an employee or partner.

To add to the concern, I cannot see any chance of the SRA sanctioning an informant for making a mischievous or unjustified report, so let us hope that we have some clear guidance before this provision takes effect.

3. WHISTLEBLOWERS' CHARTER

Rule 7.9 (Individuals) Rule 3.12 (Firms)

You do not subject any person to detrimental treatment for making or proposing to make a report or providing or proposing to provide information based on a reasonably held belief under Rule 7.7 or 7.8 above irrespective of whether the SRA or another approved regulator subsequently investigates or takes any action in relation to the facts or matters in question

This is a new obligation aimed at protecting whistleblowers who report their employers to the SRA. It could be seen as the successor to the more general provision at current Outcome 10.7, which forbids the profession from preventing anyone including employees and clients from providing information to the SRA.

This whistleblowers provision follows in the wake of the decision in SRA v Vita, Platt & Emily Scott SDT 11696-2017. Ms Scott fabricated documents, whilst a trainee solicitor. She did so under duress and was too frightened to report to the SRA but when she moved firms, the COLP at her new firm advised her to report to the SRA. She was referred to the SDT and was then promptly struck off.

The objective of this new provision is to enable others in similar circumstances to report misconduct to the SRA without fear of reprisal. The alternative scenario is that this could backfire and result in unfounded reports to the regulator by discontented employees.

The obligation to report concerns to the SRA needs to be clearly understood by the profession and not enmeshed in a web of complexity. Why is this so important? Anyone who has ever been investigated by the SRA, however unjustified the allegations, can attest to the delays, anxiety and costs of the enquiry process. Reporting or being the subject of a report to the SRA is not for the faint-hearted. We can only hope that the promised guidance will shed light on this important topic.

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