POL00128970

Report to SRA of potential misconduct by ex-POL/RMG lawyers - Overview

Overview of position regarding notification to the SRA

1. Counsel has advised that the conduct of **Jarnail Singh, Rob Wilson,** and **Juliet McFarlane**, three senior lawyers in POL/RMG's criminal law team between 1999 and 2013 (collectively "the Three Lawyers") is capable of amounting to a serious breach of the SRA's regulatory arrangements, having regard to the nature and number of cases referred for appeal and the issues identified through a review of material in the PCDE and Project Brisbane.
2. Each SRA-regulated person has to make their own decision about whether they are obliged to report.
3. There is an obligation to report any potential misconduct "promptly", although the historic nature of the potential issues in this case, the ongoing PCDE exercise and the publicity to date are all factors that are likely to be relevant to the timing of any report.
4. Notification may be made to the SRA by any SRA-regulated lawyer connected to the case, including POL's inhouse legal team; those instructed by POL and/or lawyers representing the appellants.
5. P&P is of the view that notification is required and currently intends to make a report in advance of the directions hearing on 18 November 2020.
6. Whilst notification by P&P could trigger an investigation that might not otherwise take place, this seems unlikely given the independent obligations on any SRA-regulated lawyer to report and the publicity surrounding the case. In any event, it is not a factor that is material to whether or not P&P must make a report.
7. Consideration of issues relating to privilege are a relevant factor for regulated lawyers considering making a notification to the SRA.
8. P&P will not make any voluntary disclosure of information or material that is covered by LPP without POL's consent.
9. The information referred to in the draft letter of notification includes material that would attract LPP but which has been disclosed to the Appellants in the course of the PCDE. P&P can engage in discussions with the SRA in advance of making any written notification regarding the treatment of LPP material if POL consents to its disclosure (see final slide in this regard).
10. The SRA has powers to compel the provision of material, including material that attracts LPP. It is able to use that information in any investigation or proceedings but in appropriate circumstance will engage in discussions about how LPP material can be protected.
11. Any notification should be sufficiently detailed to apprise the SRA of the issues, but should encourage them to take into account the ongoing PCDE/CACD proceedings when determining their response.
12. There is no obligation on POL to report (as it is not a regulated entity).
13. However, in our view, there are benefits to referring to POL's awareness of the notification and its willingness to cooperate with any investigation by the SRA.

See Annexe 1 for more detail on SRA standards of conduct and reporting obligations
See Annexe 2 for more detail on SRA guidance and procedures on reporting and investigations
See Annexe 3 for more detail on protection of privileged material

It is recommended that POL consents to:

1. Being included in P&P's written notification to the SRA by P&P stating that:
    a. POL is aware of the notification that P&P is making to the SRA;
    b. POL's regulated lawyers, who might have their own obligation to report, individually are aware of the notification that P&P is making to the SRA;
    c. POL will cooperate with any investigation.
2. P&P engaging in discussions with the SRA on its behalf as to the disclosure of any LPP material, with a view to the provision of material being by agreement and with mechanisms in place to protect LPP.
3. The provision of limited LPP information to the SRA which has already been disclosed to the appellants in the PCDE.

POL00128970

Report to SRA of potential misconduct by ex-POL/RMG lawyers

Potential benefits/risks of P&P including POL in its notification (by indicating POL's awareness and willingness to cooperate)

1. **Potential benefits:**
    a. POL does not make an independent notification in circumstances where it has no obligation to do so, thereby mitigating the risk that POL is criticized for notifying inappropriately;
    b. However, POL is able to potentially derive some credit from its involvement in the notification, particularly from demonstrating its willingness to cooperate with any investigation as set out below;
    c. Cooperating in appropriate regulatory oversight of the conduct of prosecution lawyers would demonstrate that POL is confronting and investigating possible errors relating to historic prosecutions and putting them right (consistent with its overall governance/cultural/comms strategy);
    d. A level of engagement with the SRA is likely to enable POL to have greater influence over the timing and scope of any investigation, including the volume and nature of material sought and the SRA's agreement to mechanisms to protect LPP;
    e. Cooperation may be reflected in any findings by the SRA so that even if individual solicitors are criticized, comments about POL may be more favourable;
    f. The Three Lawyers are named in POL's Respondent's Notices in the CACD. POL may be asked in due course if it has reported any potential misconduct. Whilst there is no obligation to report, a failure to do so may be viewed negatively by the public/media. This approach enables POL to say that it is aware that any potential misconduct has been reported and has confirmed that it will cooperate with any investigation.
2. **Potential risks:**
    a. A concession of misconduct or bad faith may have implications for civil liability. P&P will mitigate this risk by making it clear that the report does not amount to any concession (and by reference to the test of "capable of amounting to serious breach", which properly reflects the basis for the report);
    b. There are cost implications of cooperating with an investigation. However, such costs are likely to be incurred if an investigation is commenced by the SRA regardless of whether POL makes a notification or not. Costs may be higher if POL does not cooperate;

Other relevant issues

1. There is a risk that POL (or RMG) could be subject to criticism by the SRA, for example, for failing to exercise appropriate oversight or training.
2. However, only one of the Three Lawyers was ever employed directly by POL. He is no longer an employee.
3. Further, as set out above, POL's ability to mitigate this risk is likely to be greater if it acknowledges the notification and confirms its willingness to cooperate.
4. HSF has indicated that they are content for P&P to acknowledge in their letter to the SRA that HSF is aware that notification is being made;
5. We do not advise individual lawyers in POL's in-house team who may have independent obligations to report but they can also be included in the notification by reference to their awareness of it, if they so wish.

POL00128970

Report to SRA of potential misconduct by ex-POL/RMG lawyers

Summary of conduct capable of amounting to serious breach

1. The fact that 47 of 61 of the applicants to the CCRC have been referred for appeal on the grounds of potential abuse of process, and the fact that POL only intends to oppose 3 of those 47 cases is of itself indicative that there was an issue with how criminal cases were being conducted by POL/RMG during the relevant period and that the conduct of some lawyers involved in those investigations/prosecutions may have fallen below the requisite standard.

2. Counsel has advised that material identified in the course of the PCDE and Brisbane identifies potential misconduct that (whether by individual instance or cumulatively) is capable of amounting to a serious breach. In particular:
    a. Inadequate investigation, including a failure to pursue all reasonable lines of inquiry whether they pointed towards or away from the guilt of the defendant and to establish that an actual financial loss had occurred in theft cases;
    b. Material non-disclosure, in particular about the reliability of Horizon, in breach of CPIA duties;
    c. Inadequate, negligent or improper decision-making in relation to charging offences and determining whether to drop charges or accept lesser/partial ones, for example:
        i. Misunderstanding or misapplying the Full Code Test;
        ii. Misunderstanding or misapplying the burden of proof by requiring defendants to prove that they were not responsible for the loss suggested by Horizon rather than by proving that there was a loss and that the SPM must have been responsible for it;
        iii. Attaching improper weight in decision making to the financial/commercial interests of POL, particularly in terms of using criminal prosecution as a means of recovering losses and/or bringing charges as a means of pressuring SPMs to make good losses that they were not necessarily liable for (with charges dropped once payment had been made);
        iv. Failure, in false accounting cases, to have any regard to the cause of the underlying shortfall that was being covered up by the SPM;
        v. Adding theft charges in circumstances where the elements of the offence were not made out and/or potentially with a view to pressuring defendants to plead guilty to lesser charges (in particular, false accounting);
        vi. Making the acceptance of pleas conditional on the defendant not making any explicit criticism of the Horizon system.

Key potential issues capable of amounting to serious breach

3. Examples of this type of conduct occur in many of the CACD cases, but arguably the most serious potential issues identified to date are:
    d. the material non-disclosure of the RPM in Misra and subsequent cases, once the Three Lawyers' were aware of its potential to impact prosecution cases; and
    e. Making the acceptance of pleas conditional on Horizon not being criticised.

POL00128970

Annex 1 – Reporting obligations and standard of conduct

Reporting obligations of SRA regulated persons

1. Paras 7.7 and 7.8 of the SRA 2019 Code of Conduct ("CoC") provides that individuals regulated by the SRA are required to report **promptly conduct by any SRA-regulated person which is *capable* of amounting to a serious breach** of the SRA's regulatory arrangements or, alternatively, conduct which should be brought to the SRA's attention.
2. The reporting obligation is wide and subjective and can apply at an early stage of an internal review. As it applies to all SRA-regulated persons, this includes solicitors and other SRA regulated individuals within POL Legal, P&P and HSF.
3. Paras 3.9 and 3.10 of the SRA Code of Conduct for Firms places the **same reporting obligation on firms that are authorised by the SRA** to provide legal services. **POL is not regulated by the SRA and so has no obligation to report.**
4. There is evidence, at this stage of the review, that the Three Lawyers potentially engaged in conduct capable of meeting the SRA's reporting criteria (as above).
5. There is no evidence at present to suggest that a report should be made in relation to other lawyers involved in the historic prosecution cases.

Legal and professional obligations of the Three Lawyers

1. The CoC has been amended three times since 2000 (in 2007, 2011 and 2019) but the following fundamental principles have always required solicitors to act:
   a. in a way that upholds the rule of law and proper administration of justice;
   b. in a way that upholds public trust and confidence in solicitors;
   c. with integrity;
   d. with independence;
   e. with competence, skill and due diligence.
2. Senior lawyers are generally accountable for those they supervise/manage.
1. As lawyers with conduct of criminal prosecutions, the Three Lawyers should have ensured that POL complied with the legal duties imposed on prosecutors and relevant best practice, including:
   a. Legal obligations under the Criminal Procedure and Investigations Act 1996 ("**CPIA**") (as amended by section 32 Criminal Justice Act 2003), including, a duty to disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused (the underlined part being added and in force from 4 April 2005);
   b. The Code for Crown Prosecutors, including provisions relating to "Accepting Guilty Pleas".

POL00128970
POL00128970

Annexe 2 – SRA guidance and procedures on reporting and investigations

SRA Guidance on "serious breach"

1. The SRA deliberately does not define the term "serious breach" in the CoC.
2. The SRA's enforcement strategy provides some guidance on what constitutes a "serious breach". Key points relevant here include:
    a. Allegations of trust, dishonesty, lack of integrity or criminal behaviour would be serious breaches;
    b. Multiple issues relating to errors of law or professional judgement are much more likely to be serious than isolated incidents;
    c. Issues will be viewed more seriously where a firm or individual knowingly acts outside their competence or fails to take reasonable steps to update their knowledge and skills or those of their employees;
    d. A deliberate or reckless disregard for professional obligations is viewed more seriously.
3. Other issues likely to be relevant to whether a breach is serious include:
    a. The impact of harm (or risk of harm) upon any victim – e.g. an act resulting in an unfair conviction and consequent sentence;
    b. More senior lawyers (especially those with management or supervisory roles) are expected to demonstrate higher levels of insight, knowledge and judgement.

Making a report to the SRA

1. The report should be made directly to the SRA. There is a form on their website but in the more complex context of this case, we intend to submit a letter setting out in fuller detail the background and context, especially in light of the ongoing criminal appeals.
2. Reports should set out concerns clearly; identify the individuals responsible and attach any evidence in support.
3. The SRA will acknowledge reports within 30-40 working days.
4. The SRA is particularly concerned about behaviour relating to financial wrongdoing or dishonesty.

SRA investigations

1. Desk based investigation (common) v on-site investigation (unusual – generally only cases in authorized firms where urgent need to take action/preserve documents).
2. Paras 7.3 and 7.4 of the CoC imposes duties on SRA regulated individuals to cooperate with the SRA and provide full and accurate explanations, information and documents in response to any request or requirement. The same duty is imposed on an authorized firm (through paras 3.2 and 3.3 of the CoC for Firms);
3. The SRA has wide-ranging powers to compel the provision of documents, information and explanations from regulated individuals and firms and to seek High Court Orders in the same terms against third parties.
4. The SRA is able to obtain and review material that is confidential and/or subject to LPP (see next slide for more information on LPP).
5. Information should be given to the SRA in an organized way, with a view to saving time and cost.
6. The SRA can pay the reasonable costs of responding to a notice for information/documents, but only usually does so in exceptional circumstances.
7. It is a criminal offence for anyone who knows or suspects that an investigation into professional misconduct is happening/likely to happen to falsify, conceal or destroy a document they know or believe to be relevant.

POL00128970

Annex 3 – protection of privileged material

SRA investigations and the provision of privileged material

1. If the SRA initiates an investigation, it will often require the production of further information and documents.
2. Such production can be made on a voluntary basis or by way of compulsion.
3. The SRA can compel the provision of privileged material for its regulatory purposes subject to satisfying the necessity and/or materiality of the material sought.
4. Once information has been provided, the SRA will maintain its confidentiality and use it only for its regulatory purposes. However, the SRA has a power to disclose or publish any information arising from its investigation.
5. Whether disclosed voluntarily or under compulsion, privileged material may lose its privileged status.
6. P&P will not voluntarily disclose information or material attracting privilege without POL's consent.
7. If the Three Lawyers request copies of documents that are privileged and confidential to POL (to the extent that they do not already have them in their possession) POL would be entitled to refuse to provide them, on the basis that either they were not and/or they are no longer employees.
8. If the Three Lawyers still have any material that is subject to POL's privilege or confidential to POL in their possession now, then depending on the terms of their employment contracts, that is likely to amount to a breach of those contracts. POL would therefore in principle be entitled to refuse to consent to their reliance on that material.
9. If POL declined to cooperate and insisted on the SRA using its compulsory powers, there is a risk that:
    a. Any disclosure ordered would be wider in scope and fewer restrictions would be placed on its use; and
    b. Although the validity or scope of any compulsory order or notice issued by the SRA could be challenged, this would have to be done in Court which might result in the distraction or additional risk of the publicity associated with a contested hearing about disclosure.

Limiting waiver of privilege and use of privileged documents

1. It is possible for privilege to be maintained over such documents or for any waiver of privilege to be limited to its use in the regulatory proceedings.
2. The SRA's guidance on investigation and evidence gathering sets out that if it is necessary for the SRA to refer to privileged material in a case that is being dealt with in public, part of the hearing can be in private and the clients' identity can be protected by using initials instead of names.
3. POL could cooperate with the SRA in relation to providing information (thereby deriving the full benefit of cooperation) whilst requiring an agreed High Court Order compelling provision of such material to the SRA on terms which preserve agreed limitations on the use that can be made of that material (thereby preserving LPP for all purposes other than regulatory proceedings).
4. HSF has experience of the SRA agreeing to the privileged material being disclosed by consent subject to the type of conditions set out below:
    a. That, in the view of the party concerned, it is necessary to have regard to the privileged material in order to enable them to make or respond to the complaint;
    b. That the information and documents are provided to the SRA only, and for use only in connection with investigation into the complaint; and
    c. That if and to the extent that the SRA considers it necessary to disclose any privileged material to any third party or to make use of them otherwise than for the purposes of the investigation, it will notify POL to enable it to make any representations that it considers appropriate at that time.
5. Much, if not all, of the material that is likely to be provided to/sought by the SRA has been or will be disclosed in the context of the PCDE, although collateral use restrictions apply. If it is referred to in open Court, LPP will be considered to have been waived in any event.