Law firms – #metoo?

Peter Scott and Polly Rodway consider your regulatory obligations in the face of bullying and harassment allegations

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It is clear from the work we do with law firms, that currently one of the most discussed issues for those who are charged with managing risk and compliance in their firms relates to how to deal with and report to the Solicitors Regulation Authority what is now, in the #metoo era, almost universally referred to as 'inappropriate behaviour'. This can cover a multitude of 'sins'.

While inappropriate behaviour at work (we focus specifically on 'bullying and harassment' in this article) is not a new concept, the reality is that, as a result of the #metoo movement, we are seeing more and more individuals (particularly women) raising allegations of their own experiences of bullying and harassment – both recent and historic. As a result, these types of allegations are currently at the forefront of issues facing law firms.

SRA focus

The SRA in its enforcement strategy, published in February 2019 under the heading *Private Life*, states that its key role relates to an individual or a firm's legal practice. But it goes on to say: "However our Principles set out the core ethical values we require of all those we regulate and apply at all times and in all contexts." Given that, it is understandable, and indeed advisable, that law firms are taking allegations of bullying and harassment very seriously. They are turning their attention to ensuring that they have effective and full-scope internal policies and protocols on what is and is not 'good behaviour' (encompassing not only bullying and harassment but extending to alcohol consumption out of the office); how they will handle complaints of bullying and harassment; and establishing conduct committees to police such behaviour.

However, despite every effort within law firms to promote 'good behaviour' on the part of individuals working in their firms, there will inevitably still be instances of people behaving badly and inappropriately in all kinds of ways towards colleagues. This raises questions in relation to these matters for law firms which we address in this article:

- What does 'bullying and harassment' mean?
- How should a law firm employer deal with such allegations?
- What are the SRA regulatory responsibilities of individual solicitors, law firms, their owners and employees in relation to reporting to the SRA such behaviour under the SRA's Standards and Regulations, which came into force on 25 November 2019?

Bullying and harassment

Behaviour constituting bullying and harassment encapsulates a wide manner of (mis)conduct and can be hard to define.

Under the terms of the Equality Act 2010 (EqA), harassment means "unwanted conduct which has the purpose or effect of either violating [the complainant's] dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them".

Importantly, however, harassment for these purposes must relate to a protected characteristic as identified in the EqA, currently: age, disability, gender reassignment, marriage or civil partnership status, race, religion or belief, sex and sexual orientation. It is important to note, however, that the test for determining if something 'relates to' a protected characteristic for these purposes is broad. Indeed, an individual can be harassed on grounds of a protected characteristic, irrespective of whether they possess that characteristic themselves, if the unwanted conduct creates an intimidating, hostile environment for them. For example, a man can complain of harassment on grounds of sex as a result of derogatory comments about women and vice versa. Additionally, individuals can complain of their harassment because of a perceived protected characteristic (obvious examples include disability/ sexual orientation), or because of their association with someone with a protected characteristic.

In any event, outside of the EqA, the term harassment is widely understood and interpreted as extending beyond that which relate to protected characteristics, and most harassment and bullying policies provide as such.

The EqA also defines sexual harassment, which occurs where: "A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading or offensive environment for B."

Bullying is harder to identify, and there is no legal definition upon which to rely. The Advisory, Conciliation and Arbitration Service (ACAS) characterises bullying as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient (ACAS *Guide on Bullying and Harassment at work*), and this is often relied upon by employers as a starting point for their own policies on bullying.

Preparing for complaints of bullying and harassment

Policies

The first step to being able to respond effectively to allegations of bullying and harassment is to ensure that an appropriate suite of policies is in place. Naturally, this would include having a specific policy on bullying and harassment. Given the difficulties in defining behaviours that are deemed to fall within its scope, policies should be clear to list a wide range of both overt and covert behaviours which could amount to bullying and harassment. A policy also needs to contain a process for handling complaints of bullying and harassment, and should flag to employees that allegations may be reported to the SRA and that, in turn, the SRA may refer the matter to the Solicitors Disciplinary Tribunal and/or the police.

Other important policies to have in place are grievance, disciplinary and whistleblowing policies and a Code of Conduct setting out the basic standards and behaviours expected from people working at the firm. The whistleblowing policy should clarify that the employee is entitled to blow the whistle about the wrongdoing directly to the SRA if they so wish.

These policies can, and should, be benchmarked against current best practice guidance, including for example, the ACAS guidance on sexual harassment, the Law Society guidance on workplace harassment and the SRA guidance on Equality, Diversity and Inclusion (which emphasises the need for firms to have a policy statement regarding harassment).

Training

Paragraph 4.3 of the SRA Code of Conduct for Firms ('Code for Firms') requires that firms ensure their partners / owners and employees keep the understanding of their legal, ethical and regulatory obligations up to date. Firms should therefore ensure that everyone receives training on what behaviours constitute bullying, harassment and sexual harassment.

Not only can training help prevent bullying and harassment, but it can also form an important part of a firm's defence to a claim against it of vicarious liability for a colleague's harassment (which could be serious sexual harassment) of an employee.

What do you do if an allegation is made?

The first port of call should be the firm's harassment and bullying policy, which should be applied. In the case of minor incidents, the matter may be able to be resolved informally. Otherwise a formal process should be initiated, which will include the allegations being put in writing, and a formal investigation being conducted.

The alleged victim may be reluctant to pursue a formal route. However, the firm may have to do this notwithstanding the alleged victim's preferences because of:

(1) its duty of care to other employees who may be at risk; and

(2) its duty to report breaches to the SRA.

Careful thought needs to be given as to the individual who conducts the investigation. Given the issue of imbalance of power often prevalent in these types of cases, it must be someone sufficiently senior and, of course, someone independent from the issues. If a complaint is made against

a very senior member of the firm, then consideration should be given to engaging an independent investigator.

The investigation itself needs to be conducted promptly and taking care to ensure that the appropriate level of investigation is conducted, bearing in mind the seriousness of the allegations in question. The purpose of the investigation is, of course, to establish whether the misconduct occurred, and the standard to be applied is on a balance of probabilities, i.e. not beyond all reasonable doubt. This will almost certainly involve reviewing documentary evidence, which might include text messages, emails, WhatsApp messages and CCTV footage, as well as interviewing others which can bring with it serious concerns as regards confidentiality and reputational damage.

Careful thought needs to be given throughout any investigation or subsequent process to consider appropriate safeguards for all parties involved, including considering whether the alleged victim and perpetrator can continue to work together; whether the alleged perpetrator should be suspended; and whether managers understand the need to treat both the alleged victim and perpetrator fairly and not to victimise them as a result of the allegations made.

There is a real challenge for firms in balancing their duties of care to both the purported victim and perpetrator and, of course, other employees. Firms must recognise both the seriousness of the allegations made and the implications that this type of incident can have on the mental health and wellbeing of victims, as well as the fact that serious allegations of misconduct against a purported (but at this stage unproven) perpetrator may irreparably damage an individual's professional reputation and their future ability to work in the profession.

If a complaint is reported to the police, or criminal proceedings are pursued, this does not prevent the firm from investigating the complaint as an employment matter. Firms are not required to await the outcome of the criminal process before investigating and/or taking disciplinary action. However, where an employment investigation precedes a criminal investigation there is a risk that it could have a negative effect on the criminal case. For that reason, it would be prudent to obtain specialist criminal law advice before proceeding with an investigation.

Firms should also note that the SRA has a Memorandum of Understanding with the Association of Chief Police Officers of England and Wales under which the parties agree to disclose information to the other, so that alleged criminality, misconduct, breach of the SRA Principles or other failures are properly investigated and decided upon. Therefore, if the matter has been reported to the police, they may notify the SRA before the firm chooses to do so and vice versa – if the firm reports to the SRA and the matter has not been reported to the police then the SRA may do so. The firm should advise the alleged victim of this possibility.

Another issue the firm may need to grapple with is whether to proceed with the investigation if the alleged perpetrator resigns. In the *Russell McVeagh* case in New Zealand, involving five summer interns who alleged that they were harassed by

a partner and senior associate at a firm, the firm came under heavy criticism for not continuing with the investigation in these circumstances. Most recently, the Equality and Human Rights Commission has produced best practice (non-statutory) guidance on the use of non-disclosure agreements (NDAs) in discrimination cases. Within that guidance they recommend that investigations proceed even where the alleged perpetrator leaves the organisation.

Reporting to the SRA

The firm and individuals within the firm will also need to consider their regulatory obligations and specifically at which point should the SRA be notified of allegations made.

Paragraph 7.7 of the Code of Conduct for Solicitors, Registered European Lawyers and Registered Foreign Lawyers ('Code for Solicitors') requires that they 'report promptly to the SRA or another approved regulator as appropriate any facts or matters that they reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them'.

However, paragraph 7.8 of the code also requires solicitors, 'notwithstanding paragraph 7.7, to inform the SRA promptly of any facts or matters that they 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.'

The code goes on to say (at paragraph 7.12) that 'any obligation under this section or otherwise to notify, or provide information to, the SRA will be satisfied if information is provided to the firm's COLP or COFA, as and where appropriate on the understanding that they will do so'. This puts the onus fairly and squarely on the COLP in particular and brings into sharp focus the responsibilities of carrying out that role.

The Code for Firms (at paragraphs 3.9 and 3.10) repeats these reporting requirements for firms.

In addition, paragraph 7.5 of the Code for Solicitors and paragraph 3.11 of the Code for Firms provide that 'they do not attempt to prevent anyone from providing information to the SRA or any body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest'.

Firms should also abide by the SRA's Warning Notice (and the Law Society's Practice Note) on the use of NDAs in settlement agreements.

COLP's reporting obligations

Paragraph 9.1 (d) of the Code for Firms requires the compliance officer for legal practice (COLP) to ensure that a prompt report is made to the SRA of any facts or matters that the COLP reasonably believes are capable of amounting to a serious breach of the terms and conditions of the firm's authorisation, or the SRA's regulatory arrangements which apply to the firm, its partners / other owners or employees.

And paragraph 9.1 (e) (tracking paragraph 7.8 referred to above) requires the COLP, notwithstanding 9.1 (d), to ensure that the SRA is informed promptly of any facts or matters that the COLP reasonably believes 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.

If a firm's investigation upholds the allegations then the firm should take disciplinary action against the perpetrator, up to and including dismissal for gross misconduct for the most serious offences (or other action if a third party e.g. terminating a retainer). If it has not already done so, the firm should report to the SRA.

When to report to the SRA?

At what point should the firm / COLP report concerns to the SRA?

The above reporting obligations are likely to raise difficult decisions for a firm and its COLP in relation to the timing of reporting to the SRA. They will have to balance their regulatory obligations against the duty of care to the individuals concerned who are likely to be vulnerable, potentially suffering from ill-health, and concerned for their careers.

Until the new SRA Standards and Regulations came into effect on 25 November 2019, it was likely that a firm's and its COLP's decision would have been to ascertain all relevant facts before reporting the matter to the SRA, which would have been in line with what is regarded as good employment law practice.

Even today, were it not for paragraph 7.8 of the Code for Solicitors and paragraphs 3.10 and 9.1(e) of the Code for Firms, the likelihood is that a firm and the COLP would wish to first ascertain all relevant facts by carrying out an investigation (internally or externally) before reporting. However, will paragraphs 7.8 , 3.10 and 9.1(e) above fundamentally change the approach by law firms as to how they deal with such matters so that a preliminary report should now be made to the SRA before all relevant facts are ascertained, or only subsequently? In particular, each of these provisions refers to the SRA carrying out its own investigation, which would seem to suggest that the SRA does not want firms to do so themselves in such circumstances.

Firms and COLPs are now more likely to consider, to protect themselves, that they must take a safety-first approach and prematurely report every incident involving allegations of bullying and harassment, even if the facts have not yet been established. While that approach may protect them from SRA disciplinary action being taken against them, doing so may be at odds with what is regarded as good employment law practice and may not necessarily be fair to the alleged victim or perpetrator.

It will be sensible in these circumstances before deciding how to proceed, to first obtain specialist regulatory and employment law advice and, for this purpose a COLP should have in place an agreement with the firm enabling the COLP to take independent legal advice at the expense of the firm in relation to how the COLP's duties are to be performed.

Paragraphs 7.8, 3.10 and 9.1(e) referred to above would seem to have introduced a lack of clarity to the reporting of allegations of bullying and harassment where hitherto good employment law practice has been to 'first ascertain all the relevant facts'. Consequently, the interests of both alleged victims and perpetrators may not now be best served if firms and COLPs feel they must now prematurely report to the SRA matters which are still only allegations and unproven.

It is suggested that there is now an urgent need for clarity and guidance from the SRA on this.

Finally, a firm should ensure that however it deals with reporting, it reviews where things went wrong and what steps may need to be taken to prevent such conduct recurring. In the *Russell McVeagh* case, the review made wide-ranging recommendations for change including: training for HR; changing HR reporting lines; ensuring investigations go ahead even if the alleged perpetrator walks away; recognising when independent advice / independent investigator is needed; limiting use of alcohol at social events; new policies and improved policies; making sure policies are followed; diversity training for all employees; and devising a 10 year "culture change" plan.