LEGAL SERVICES CONSUMER PANEL

Consultation response

SRA: Increasing the SRA's internal fining powers

Overview

1. **We support the SRA's original proposal to introduce commensurate fining powers for traditional law firms and ABS. We now recommend a maximum fine of £100,000 for traditional law firms as an interim measure.**
2. **The nature of the business structure should not be the determining principle behind the design of a sanctioning regime. Rather monetary penalties should be determined consistent with a published enforcement policy which takes into account a range of factors including size of business and the impact of misconduct on victims. Consumers lose out if competition suffers due to the problems of regulatory arbitrage and inconsistency of treatment of different types of firm for the same offence.**
3. **Increasing the maximum fine amount would mean the SRA needed to take fewer cases to the SDT – this would lead to time and cost savings for consumers as well as the regulated person involved.**
4. **The ability of regulators to impose fines subject to appeal to an independent body is common across the economy. There are a series of safeguards to ensure due process, in particular the published Financial Penalty Criteria.**
5. **Good regulatory practice is that penalties available to regulators should exceed the potential gains of non-compliance and be capable of acting as a deterrent. The potentially large gains from dishonest conduct justify a high maximum fine. We anticipate this would be used only in exceptional cases and it would not act as a benchmark to determine all fines.**
6. **The SRA should explore the use of fines as part of Regulatory Settlement Agreements. The amount should be uncapped – the voluntary nature of such agreements and option of an SDT case would guard against abuse of power. Transparency over agreements would reassure consumers that this is not used as an easy option by the SRA and they should not be seen as a substitute for voluntary compensation for victims.**
7. **Equality issues should be viewed in terms of impact on consumers as well as on regulated persons. An effective sanctioning regime benefits those consumers who are most vulnerable to exploitation.**

The proposals

8. The Solicitors Regulation Authority (SRA) is consulting on proposals to increase its fining powers for traditional law firms from the current level of £2,000 to a new limit of:
   - £10,000
   - £50,000
   - £100,000
   - A different limit
9. The SRA also proposes powers to agree (rather than impose) fines of a more significant amount with the regulated person concerned under its existing Regulatory Settlements Agreement policy.
10. The SRA had previously consulted in 2010 on the proposal that it should have the same level of fining powers for traditional law firms as for ABS - £250m for firms and £50m for individuals. However, the Ministry of Justice concluded this would require changes to primary legislation. The Ministry has indicated that a more modest increase to the SRA's fining powers is possible without going down this route. The SRA remains of the view that its original proposal would deliver the best outcome, but is consulting on revised proposals in order to obtain the benefits of change more quickly.

The Panel's response

11. The Panel did not respond to the SRA's 2010 consultation. We wish to place on record our support for its original proposal to introduce commensurate fining powers for traditional law firms and ABS. It is disappointing that this proposal was frustrated for largely technical reasons and further that this impasse has still yet to reach a resolution four years later.
12. In order to move forward, the Panel is proposing that the new limit should be £100,000. Given the long delays to date it is important that the SRA and Ministry of Justice work quickly to implement the agreed solution. This should be viewed as an interim measure and work should progress in parallel to deliver the SRA's original proposal.

Q1. Do you agree with our analysis of the benefits that would flow from an increase in our in-house fining powers around the areas of efficiency and proportionality, consistency and fairness and regulatory arbitrage?

13. We agree with the benefits discussed in the consultation paper.
14. The SRA's own data supports its claim that there are traditional law firms with large turnover and ABS firms with small turnover. The nature of the business structure should not be the determining principle behind the design of a sanctioning regime. Rather monetary penalties should be determined consistent with a published enforcement policy which takes into account a range of factors including size of business. This ensures that the penalty is proportionate and has the desired behavioural effects on the individual or entity while taking account of the impact of the misconduct on victims.
15. The current situation means that the SRA must prosecute relatively low level cases before the Solicitors Disciplinary Tribunal (SDT). Indeed, financial considerations and the risks associated with the higher burden of proof used by the SDT may mean the SRA decides not to bring some cases that would otherwise attract fines. Enabling the SRA to impose financial penalties at a

higher amount would be proportionate to the offence and also reduce pressure on the SDT, enabling it to focus its expertise on the most serious cases. In this context we note that 55% of applications to the SDT over 2012-13 were determined within six months – well below the target of 70%.[1]

16. The SRA has demonstrated that internal fines would resolve cases more swiftly and cheaply for those lawyers involved than the SDT route. Importantly, these benefits would also apply to consumers – enabling faster resolution for victims and allowing them to move on with their lives, and reducing the cost of the regulatory system for consumers as a whole. Consumers also lose out if competition suffers due to the problems of regulatory arbitrage and inconsistency of treatment of different types of firm for the same offence. This is outlined persuasively in the consultation paper and serves to reinforce public confidence in the regulatory framework.

Q2. Do you have any other views about the issues or risks that might flow from an increase in our in-house fining powers?

17. The role of fixed and variable monetary penalties was a key part of the Macrory report[2] on effective sanctioning regimes, which underpins current understanding of best practice in this area. This set out how regulators should be able to impose fines subject to appeal to an independent body. The report recognised that fines contribute to a more flexible sanctioning regime by providing an intermediate step between informal measures and last resort action.

18. Some stakeholders have raised concerns about 'due process', in particular about whether the SRA can objectively make fair and impartial disciplinary decisions in respect of investigations which it has both instigated and led. However, it is normal practice for regulators to both investigate a breach of the rules and impose a penalty. Should the SRA's proposals be unlawful, then so would those sanctioning regimes operated by many other major regulators, including other legal services regulators.

19. The consultation document describes the various safeguards which the SRA has introduced to ensure procedural fairness. These include internal separation of its investigation and adjudication functions, its published decision-making framework, the right of appeal to an Adjudication Panel with independent governance, and the right to refer the matter to the SDT for review on appeal. Further, since fines are paid to Government the SRA has no self-interest in issuing such penalties.

20. The Panel has reviewed the SRA's Financial Penalty Criteria, which were established following public consultation. This document sets out very clearly the SRA's three-step fining process including the various bands of penalty that apply to different offences and the aggravating and mitigating factors that are used to help it determine the precise amount of the fine. A high level of transparency is an important safeguard for lawyers and consumers alike. The SRA should be as transparent about how individual fines are reached as it is transparent about its overall fines policy.

Q3. We are keen to hear the views of our stakeholders on possible increases of (a) up to £10,000 (b) up to £50,000 (d) up to £100,000 (d) do you have views on any other potential increase bands?

21. The Panel recommends the maximum level of fine should be set at £100,000 as an interim measure. This represents the best available option available to the SRA for the time being.

22. Good regulatory practice, as set out by the Macrory Review, is that penalties available to regulators should exceed the potential gains of non-compliance and be capable of acting as a deterrent. The potentially large gains from dishonest conduct that law firms might achieve and high consumer detriment suggests a high maximum fine amount.

23. Such a sum would only be used rarely and would not be the benchmark against which all fines are determined – this is the purpose of the Financial Penalty Criteria. This document requires the SRA to impose an appropriate penalty in any individual case having regard to all of the circumstances and in particular in order to achieve the objectives of the Criteria.

24. The sanctioning regime for ABS involves a fivefold difference in maximum fines for individuals and entities. However, given the highest fine amount envisaged under the current proposals is £100,000, the Panel would not support a different approach for individuals and entities in respect of traditional law firms. Given the potential high turnover for firms and remuneration for individual senior managers, this amount could be less than the potential gains that individuals could achieve as a result of their misconduct and be an insufficient deterrent.

Q4. Do you agree that we should explore increasing our ability to agree higher fines with those we regulate? Do you have any views on whether this figure should be capped to say, £1m or should be unlimited?

25. A fine agreed as part of a Regulatory Settlement Agreement (RSA) should not be viewed as a substitute for compensation to victims, but as a complement to this. To the extent that an RSA is reached more quickly than an internal fine or SDT prosecution, such flexibility would benefit victims.

26. We consider the figure should be unlimited. The key factor is that RSAs are entered into voluntarily by the person concerned. Regulated persons would retain the right to face prosecution before the SDT if an RSA could not be agreed and this should safeguard against any abuse of power. Indeed, the concern from a consumer perspective is that the SRA uses RSAs as the 'easier option' and the regulated person is insufficiently penalised. However, as we emphasised in responding to the SRA's consultation on co-operation agreements[3], transparency of decision-making here will be vital to maintaining public confidence.

Q5. Do you have any other views or comments on this consultation that you think we should consider?

27. This consultation has highlighted wider issues relating to disciplinary and appeals processes across the approved regulators, for example inconsistency of approach, strength of penalties and efficiency of the procedures. These issues should be explored further as part of the LSB's planned review of this major area of regulatory practice.

Q6. Do you consider that an increase in our fining powers is likely to have a negative impact upon a specific section of the legal service market and in particular a specific equality strand?

28. Equality issues should be considered from the perspective of consumers as well as that of lawyers. Those consumers who are least able to protect their own interests due to lack of knowledge about the law or other reasons are most likely to be exploited. An effective sanctioning regime therefore contributes to reducing vulnerability and this factor should be balanced against any negative impacts on parts of the profession.

February 2014

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1 Solicitors Disciplinary Tribunal, Annual Report 2012-13.

2 Professor Richard Macrory, Regulatory Justice: Making Sanctions Effective, Final Report, November 2006.

3 Legal Services Consumer Panel, SRA consultation on co-operation agreements, January 2013.