Responses to the SRA consultation: Proposal to increase the SRA's Internal Fining Powers issued on 20 November 2013

Introduction

1. The SRA has responsibility for investigating failures to meet regulatory standards and imposing fines upon regulated persons. The SRA's effective, consistent and proportionate use of its enforcement powers, including imposing fines, plays an important role in ensuring a credible deterrence against unacceptable behaviours. This in turn, furthers the regulatory objectives and professional principles in the Legal Services Act 2007 (LSA).

2. This report follows the SRA's consultation on the proposal to increase the current level of the SRA's fining powers for 'traditional' law firms from their current level of £2,000, and includes the SRA's responses to the substantive issues raised by the respondents.

3. The consultation paper explained our concerns with the current regime and set out our rationale for our proposals. The consultation contained 6 specific questions, and invited comment on a range of issues. The consultation closed on 7 February 2014. Relevant comments are summarised below.

Responses received

4. There were 37 responses to the consultation from a wide range of commentators, including an academic researcher and other regulators. A significant proportion of the responses came from the Law Society itself, various divisions of the Law Society or local law societies (including the City of London Law Society). We have also received in-depth responses from other key stakeholders such as the Solicitors Disciplinary Tribunal and the Legal Services Board which have drawn upon their experience and knowledge on regulatory matters. The most detailed responses received were from:

   - the Law Society;
   - the Solicitors Disciplinary Tribunal;
   - the Legal Services Board;
   - ILEX Professional Standards
   - the City of London Law Society;
   - the City of Westminster & Holborn Law Society;
   - Birmingham Law Society; and
   - Association of Personal Injury Lawyers.

5. The views of the Legal Services Consumer Panel were also specifically sought and the Panel have provided a response which is supportive of the proposals made.

6. We were pleased with the level of responses from solicitors practising in smaller firms and from sole practitioners.

7. A full list of the respondents appears at the end of this report.

Responses to Question 1

"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?

8. A number of key stakeholders, including the Legal Services Board (LSB), ILEX Professional Standards (IPS), the Legal Services Consumer Panel (LSCP) and the Association of Personal Injury Lawyers (APIL) agreed in broad terms with our analysis of the benefits that would flow from an increase in our in-house fining powers, including significant savings in efficiency and costs. They were also in general agreement with our concerns about regulatory arbitrage. The LSB, for example, pointed out that:-

> "*If the SRA had increased fining powers, it should lead to a substantial reduction in the time to reach a determination compared to referring the matter to the SDT to decide"*

and the LSCP felt 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".*

9. APIL considered that consumer and professional confidence was important in any regulatory controls and that it was *"imperative that there is a full and independent analysis of the SRA's current exercise of powers before any potential increase in fining powers goes ahead."* They further felt that fining by a percentage of turnover would achieve a higher degree of proportionality, consistency and fairness. They also refer to their wider concerns about the disparity between the different fining regimes for ABSs and traditional law firms. The LSCP similarly suggested that fines should take into account a range of factors, including the size of the business as opposed to the nature of the business.

10. Respondents, including the Law Society, a number of local law societies, the Solicitors Disciplinary Tribunal (SDT) and some law firms had concerns about the proposals. Set out below is a summary of the main substantive issues that were raised:

- The SDT raised a number of points that they say cast doubt on our assessment of the efficiency and likely costs savings to be made, pointing out, for example, that the length of time taken by the SDT to determine cases often depends on the level of cooperation by both parties. They referred to the fact that all but the most complex cases are targeted by the SDT to be heard within 6 months of issue and are therefore dealt with far more quickly than we stated in the consultation paper (an average of 10 months). In addition, the SDT commented that the consultation paper does not fully explore how long a comparable internal case would take to conclude, from the point of investigation to any final decision by the SRA. The SDT queried the SRA's statistical analysis of the fines imposed and questioned whether the Forensic Investigations /supervisor costs would be sought irrespective if matters are dealt with in-house, therefore reducing any cost benefits.

- In terms of regulatory arbitrage, the SDT felt that our concern was not underpinned by any actual evidence, and pointed out (correctly) that that no fines

have to date been imposed by the SRA on the Alternative Business Structures (ABSs) we regulate. In their view, there was no means, therefore, to assess if our proposals would deliver consistency and fairness in decision making.

- The SDT's main concern was that in their view we would be acting as investigator, prosecutor and judge and jury when imposing more significant fines on traditional law firms. They relied on the fact that the SDT's role is independent of the SRA, and said that this acts as a guarantee of impartiality, transparency and fairness. They referred to both parties having the opportunity to make written and oral submissions to the SDT and commented, by way of example, that it is established by case law that the SDT must take the means of the solicitor into account when deciding the level of any fine. They argue that "*such important safeguards will be lost if the SRA applies what appears likely to become a sliding scale of pre-determined fines rather than judging each case independently, impartially and transparently on its own merits*". They concluded by suggesting a number of ways in which we could seek to reduce our own costs to lessen the regulatory burden but doubted that, in any event, the issue of costs should be an overriding factor.

- The City of London Law Society and a number of smaller law firms expressed similar views on the actual impact of regulatory arbitrage.

- The Law Society said it does not "*believe that this is the right time*" for our fining powers to be increased, confirming that they share the LSB's concerns about the *"functioning of the enforcement team within the SRA*". The Society accepted that there were costs associated with bringing cases before the SDT for both the SRA and regulated persons but said that there was no clear evidence of how many cases included in the consultation would have been resolved in-house. The Law Society therefore felt that the likely benefits of the proposal were limited, as over 20% of cases in which fines were imposed by the SDT in 2012 was less than £2,000. They also noted "*that fines of over £10,000 are rare and thus it is questionable that increasing the SRA's fining power beyond £10,000 would provide any substantive efficiency gains*".

11. Some law society groups were, however, supportive of the principle and in particular the City of London Law Society expressed its view that:-

"*There is no doubt that a two tier system whereby disciplinary matters involving an ABS are handled differently from those involving traditional law firms is inequitable. We also agree that a moderate increase in the fining powers of the SRA to £10,000 which allows the regulator to deal with the majority of less serious matters is appropriate"*

SRA response:

12. We are encouraged that a number of key stakeholders were broadly supportive of our proposals to increase internal fining powers for 'traditional' law firms. It was recognised by many respondents that even a conservative increase in our internal fining powers would result in cases being dealt with more efficiently enabling a faster resolution for all concerned, and therefore reducing the overall cost burden on the regulatory system.

13. We are conscious that some respondents are concerned that there is currently insufficient evidence to make a measured assessment on whether matters can be

heard more efficiently in house, thereby deriving tangible cost savings. We note the SDT's comment that all parties should look to minimise the costs of proceedings. We agree with this: keeping costs under regular review and as low as is consistent with ensuring proper public protection must be, and is, one of our primary objectives. We have been working closely with the SDT and other defendant representative groups to ensure that the process and procedures followed at the SDT are as efficient as possible for all parties. We will continue to work to improve these with a view to reducing costs wherever possible, by for example, using standard directions where appropriate.

14. We note the SDT's aim to deal with most cases within 6 months of issue. However, as the LSB's response to the consultation points out, "*in 2012/2013 on average only 55% of SDT cases were determined (by substantive hearing or otherwise) within 6 months of proceedings being issued*". In addition to both the respondents' and the SRA's costs, there is also the costs of running the SDT that is not recoverable. In our view these need to be taken into account in looking at overall cost savings. We note that the SDT indicated that the "*average cost per court (which may hear multiple cases) in 2012 and 2013 was £7,386 including every overhead incurred for running the Tribunal*". We assume that is the SDT's daily rate. A reduction in fining cases being dealt with by the SDT should result in cost savings for not only the SRA and the respondent (should they chose not to appeal), but also for the SDT, all of which costs are passed on by practising fees, and ultimately to the consumer. We agree with the SDT that costs should not be the only driver for the increase we have suggested but we do consider that it is an important factor.

15. We note the SDT's points about our own process and the time taken to reach any internal decisions using our current level of fining powers. Once the matter has been investigated, most decisions are made by adjudication within the 28 days time frame set by the relevant key performance measures. At present, we do not seek to recover our costs of an onsite investigation where a fine within our current limit is imposed by adjudication (as opposed to where we agree to the imposition of a sanction by a Regulatory Settlement Agreement). Where sanctions are imposed by adjudication, we apply the SRA (Costs of Investigations) Regulations 2011. These give effect to section 44C of the Solicitors Act 1974 which enables us to make regulations prescribing our charges. Generally we only seek to recover on adjudication costs in 3 bands, up to a maximum of £1,350, although we can charge an additional rate of £75 an hour after the first 16 hours of any investigation. As the consultation paper sets out, we are currently looking to review these costs. This is in line with the SRA Board's general approach that those who have been found to have breached our rules should pay the costs of the investigation that led to the sanction being imposed.

16. The time taken to resolve matters at the SDT can clearly be stressful for the regulated person involved. A lengthy period between referral to the SDT and judgment can also adversely affect that person's ability to obtain, for example, indemnity insurance. We also agree with the view of the LSCP that an increase in our fining powers should "*reduce pressure on SDT, enabling it to focus its expertise on most serious cases*". It is often these cases where public protection is most urgently required by the deterrence provided by a suspension or strike off.

17. We note the points made by some respondents doubting our assessment of the risk of regulatory arbitrage. We accept that we are not aware of any direct evidence of the risk actually crystallising to date although the issue has been raised with us in conferences and workshops. However, we do believe that the risk does exist and it is unlikely that a person setting up a firm is going to disclose their anticipation of a fine being a factor in their business planning. Our view is supported by the LSB which, as

the overarching regulator is in a good position to assess such risks. We note that in its response the LSB has referred to the undesirability of the following position:-

"It is thus possible for a firm's decision on whether or not to apply for an ABS licence to be influenced by the perceived harshness of one regulatory regime as opposed to another, rather than being driven by proper commercial incentives."

Responses to Question 2

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

18. We received a significant number of comments on this particular question which asked about the perceived risks of an increase in our fining powers. Concerns were expressed under the following three broad themes:

- Independence of the disciplinary decision-maker: concerns have been raised about whether the SRA can objectively make a fair and impartial disciplinary decision in respect of investigations which it has both instigated and led. Many respondents have referred to concerns that a lack of transparency of decision making by the SRA, and the important principle of natural justice (Article 6, right to a fair hearing) being compromised may lead to disproportionate sanctions, which have never been properly examined, and ultimately a number of appeals. This inevitably, in their view, would impact heavily on the issue of costs;

- The competence of Adjudicators to deal with complex matters: the SDT in particular felt that their extensive experience of dealing with cases by judicially trained members is important. They questioned the expertise and experience of Adjudicators plus queried their recruitment process. This concern was similarly echoed by a number of respondents, especially those from the profession.

- The applicable standard of proof: a small number of the respondents raised the issue that, for consistency, the SRA should adopt the same standard of proof applied by the SDT in its decision making, namely the criminal standard.

19. A number of key stakeholders, including the LSB and LCSP noted, however, that the ability of regulators to impose fines subject to an appeal to an independent body is common in many other sectors across the economy.

SRA response:

20. The difficulty with the argument about independence is that we have parallel powers to fine up to £250m in relation to licensed bodies. Article 6 rights are protected by statutory appeal to the SDT. We have made thousands of regulatory decisions which are appealable to or challengeable in the High Court or to the Master of the Rolls over many years.

21. Decisions to fine are made by our adjudication function, which is functionally separate from our investigative units. Adjudicators work to a well defined and published decision making framework, underpinned by a transparent decision-making criteria. All decisions to fine also carry an internal right of appeal from the decision-maker - in the case of fines - by an Adjudicator to an Adjudication Panel, comprising SRA internal adjudicators and external adjudicators, both legally qualified and lay.

22. Most decisions to rebuke or fine are made on written evidence. Resolving cases on paper is often more efficient and cost-effective than requiring attendance at a hearing (in London). In our view, for the type of conduct that will generally attract a fine, this is wholly appropriate. We do not accept that such cases are necessarily complex as the SDT submits. In addition and more importantly, regulated persons would in all cases retain the ability to appeal against any fines imposed to the SDT for review.

23. We agree with the comments made about transparency. We apply our publication policy to all decisions to fine and/or issue a written rebuke and where we decide that it is in the public interest to publish the decision, we do so transparently on our website under a fully searchable function. This section of our website is the second most visited section of our website.

24. We note concerns expressed by some that disproportionate penalties might be imposed – expressed mainly around concerns that we would not take into account the respondent's means when assessing the level of any fines. For the avoidance of any doubt, fines are paid to HM Treasury and we are required under our own rules to have regard to the respondents' means when imposing a fine so that the fine is "*proportionate to the means of the person directed to pay it*". In all cases in which we currently exercise our limited fining powers, we specifically seek evidence of means before the matter is referred for adjudication. The LSCP have recognised this in their response: "*The ability of regulators to impose fines subject to an 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*".

25. A number of respondents, including the SDT, questioned the competency of the internal decision makers, namely the Adjudicators. The Adjudicators perform an important public function at the SRA and are appointed following a rigorous and competitive recruitment process, attracting a wide range of suitably qualified and experienced candidates. All Adjudicators are recruited on the basis of their competency, skills and experience. The current cohort of full time Adjudicators are all experienced in the field of professional regulation.

26. Adjudicators make formal regulatory decisions on a wide range of powers contained in legislation, such as the Solicitors Act 1974, LSA and the SRA Handbook, and consequently have a much wider and deeper regulatory knowledge than the SDT. These decisions are risk-based, and in accordance with published policy and criteria. All of the Adjudicators have a proven ability to determine issues objectively applying independent and balanced judgement. The adjudicators' experience and qualifications are published transparently on our website at http://www.sra.org.uk/sra/how-we-work/decision-making/adjudicators-panel.page#full-adjudicators. All have diverse backgrounds and some of the part time Adjudicators perform the role of adjudicator or mediator or sit on tribunals for other bodies and regulators. The part time Adjudicators underwent a comprehensive 4 day initial induction programme. They are all subject to an appraisal and quality assurance system and learning and development is identified to enable continuous improvement. The whole function meets three times a year with additional workshops and joint training opportunities with other decision makers. It is also of note that adjudicators working for the SRA have successfully applied for decision making roles in other organisations, tribunals and public bodies because of the significant skills and experience gained whilst working at the SRA.

27. As mentioned by a number of key stakeholders, it is common for other comparable regulators to exercise significant fining powers in house, such as the Financial Conduct Authority. Other approved regulators under the LSA such as the Bar

Standards Board and the Council of Licensed Conveyancers also have significantly higher internal fining powers than we are able to use. As the LSB said in its response "It *is normal practice for regulators in many other areas of the economy to both investigate an alleged breach of rules and, in a quasi-judicial capacity, impose a penalty/sanction on bodies that they regulate".*

28. Some of the responses refer to the difference in the standard of proof that is applied by the SDT, which appears to consider itself bound by case law to apply the criminal standard to disciplinary decisions. Our rules set out in detail how we exercise our powers to fine in house (for both traditional law firms of up to £2,000 and ABSs of up to £250m) – the SRA Disciplinary Procedure Rules 2011. The rules provide that the applicable standard of proof is the civil standard (Rule 7.7). The Rules were approved by the LSB after significant debate and public consultation. We agree with the LSB's conclusion as set out in its recently published review of sanctions and appeals[1], that:-

"Therefore:

- *We consider that the standard of proof should be consistent across the legal services sector. A consistent standard will avoid the risk of individuals with malign intent "forum shopping" for a regulator in which poor conduct is harder to prove. It will also maintain confidence across the sector as individuals will be treated consistently for the similar allegations of misconduct.*

- *The consistent standard of proof should be the civil standard rather than the criminal standard. We consider that use of the civil standard will minimise the risk to consumers of regulated persons who probably have seriously breached conduct rules continuing to practise".*

Responses to Question 3

"We are keen to hear the views of our stakeholders on possible increases of:

(a) up to £10,000;

(b) up to £50,000;

(c) up to £100,000; or

(d) do you have views on any other potential increase bands?"

29. We received broad support from respondents for an increase in our fining powers. The responses were, however, quite polarised, with some suggesting no or a modest increase of up to £10,000 (option (a)) to some suggesting an increase in our powers of up to £100,000 (option (c)) and beyond.

30. A significant proportion of respondents, including the City of London Law Society and the Manchester Law Society felt an increase of our fining powers of up to £10,000 was an equitable balance between the saving of costs and the maintenance of an independent and fair disciplinary process. Many respondents felt that an increase of

[1] (see http://www.legalservicesboard.org.uk/Projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals)

up to £10,000 still represented a significant penalty, and noted that it would encompass a large proportion of the fines that are currently imposed by the SDT. The Manchester Law Society summarised their view as follows "*any fine must be of sufficient weight to ensure that the firm won't re-offend. The classic example is the referral fee ban which could result in £2,000 fine currently - very affordable for firms wishing to flout the rules as the security of work would still be guaranteed and cost effective by simply paying the file and carrying on."*

31. Some respondents, including the LSB and the LSCP, felt that the maximum level of fine should be set at a level of £100,000, which would be consistent with the better regulation principles, act as a sufficient deterrent for large 'traditional' firms and lead to fewer cases before the SDT. This, in turn, they considered would, in their view, result in time and cost savings for both consumers and regulated persons. The LSB again made the point that we should aim to raise "*the maximum to a higher amount in order to ensure that it acts as a sufficient deterrent for the largest non-ABS firms".*

32. A very small number of respondents suggested for an increase of fining powers of up to £50,000, confirming that such a figure would have, in their view, a deterrent effect.

33. The Law Society's position was somewhat ambiguous in that they replied to this question as follows: "*fines above £10,000 are rare at the SDT and thus we are unclear as to why the SRA would seek fining powers above this level*" but we assume that their position on any increase is as set out in their opening remarks in that they do not believe that this is the right time for our fining powers to be increased (at all). In their 2012 response to our initial policy paper setting out our case for an increase to a commensurate level, that is up to £250 million, we note that they said :-

" The Law Society recognises that section 44D enables the Lord Chancellor to change the maximum fine. We certainly do not argue that it should be fixed for all time – indeed the Law Society favoured a slightly higher figure at the time of the Legal Services Act. But in the Society's view it is important that the principle behind the provision should be maintained – namely that it is a limited power, appropriate to less serious matters, rather than being sufficient to enable very serious regulatory breaches to be dealt with in house"

34. The strongest opposition to an increase of our power came from the SDT. They felt that the SRA's business case for an increase in our fines was fundamentally flawed from the outset. The SDT referred to the MoJ's suggestion of a conservative increase, which they said even at a 25% uplift would, in their opinion, only result in an increase of £2,500. Some firms said that they did not favour any increase mainly because as one firm expressed the issue "*Increase would have detrimental effect on sole practitioners and smaller firms*".

35. A number of commentators referred to the need to base fines upon the percentage turnover of the firm to ensure consistency, fairness and proportionality.

SRA response:

36. We are encouraged that the majority of respondents were in favour of an increase in our fining powers, and also conscious of the wide range of opinion on the level of increase, and its associated benefits.

37. A significant proportion of the responses we have received have chosen option (a), namely for an increase in our fines up to £10,000. We believe that even a conservative increase in the level from the current £2,000 limit to £10,000 would

have a positive impact upon our ability to improve the speed and efficiency of the imposition of financial penalties as well as substantially reducing the costs borne by both parties. It is further evident that any such increase would also impact the number of cases dealt with by the SDT at first instance. In our view an increase in our fining powers would be consistent with good regulatory practice and in particular the penalty principles set out by Professor B Macrory in his 2006 report entitled 'Regulatory Justice: Making Sanctions Effective'.

38. We welcome the comments from both the LSB and LSCP, and agree that an increase of our fining powers of up to £100,000 would improve efficiency and consistency. As we set out in the paper we remain of the view that "*While we firmly remain of the view that our having commensurate fining powers would be the best outcome, we are interested in seeking stakeholder views on more conservative changes, the benefits of which could hopefully be obtained much more quickly*".

39. Taking into account all of the comments received, we remain of the view that an increase in our fining powers would result in cases being dealt with more quickly and with less cost. It is also worth noting that in the more serious disciplinary matters involving a regulated person where a significant fine is likely to be imposed, we will take a considered approach on whether it is appropriate for the matter to be prosecuted before the SDT in any event, where a greater range of sanctions are available, such as suspension.

40. We believe that setting a penalty, which is appropriate and reflective of the misconduct in question is an important part of our enforcement strategy, and in particular to delivering a credible deterrence against conduct which poses a risk to clients and the public as a whole.

41. Having carefully reviewed the responses received to the consultation, and having again recently discussed with the MoJ their views about the amount they might consider appropriate to recommend to the Lord Chancellor under the mechanism provided by s 44D(10), we consider that it would be appropriate for us now to submit a business case to the MoJ seeking an increase in our current fining powers for traditional law firms from the current level of £2,000 to £10,000. We have given due consideration and weight to the majority of the respondents' views about the level of any increase. This view is best summarised by the response from the City of London Law Society: "A *moderate increase in the fining powers to £10,000 is appropriate and represents an equitable balance between the saving of costs and the maintenance of an independent, fair disciplinary process*".

42. We have also taken into account the MoJ's considered views as expressed to us that the s 44D(10) mechanism may not be appropriate for significant increases and that for commensurate or significantly increased fining powers we should be seeking to use the mechanism provided for in section 69 of the LSA to effect the necessary change to primary legislation. In light of all of these factors we consider that seeking an increase from £2,000 to £10,000 is the right approach.

43. We, of course, appreciate that the MoJ will need to consider the strength of the evidence we will provide to them in our support of our business case when considering the recommendation to the Lord Chancellor. We are aware that they or the Lord Chancellor may not agree with our view of the increase that we have proposed.

44. In the longer term, we propose that we work with the LSB and the MoJ to bring about more extensive changes to our enforcement powers, in particular, with the aim of our

achieving commensurate fining powers, consistent with the other Approved Regulators, using the mechanism provided for in s69 of the LSA. We firmly believe that our having commensurate fining powers is the correct position and endorse the conclusions reached by the LSB in their recently published report on Sanctions and Appeals that:-

- *The legal regulators should have sufficient financial penalty powers to be able to eliminate any financial gain or benefit from non-compliance and, where possible, restore the harm caused to individual consumers and/or the public interest.*
- *It should not be possible for firms to game the system by choosing a legal regulator without sufficient sanctioning powers…*
- *The legal regulators should have a consistent approach to the way they apply sanctions, i.e. a similar sanction for a similar offence regardless of regulator*.

Responses to Questions 4

"**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, £1 million or should be unlimited? "**

45. We have received a mixed response to this issue.

46. A number of respondents, including the LSB and LSCP were in broad support for increasing our ability to agree higher fines with firms and individuals. The LSB and the Manchester Law Society supported the principle that we should be able to settle investigations on whatever terms the parties agree without the need to refer them to the SDT. The LSCP, in particular, suggested that the figure of any fines imposed by agreement should be unlimited, although in contrast a small minority of respondents felt a cap of £1million was excessive and should be restricted to the region of £50,000, with more significant penalties being imposed by the SDT.

47. Some respondents, including the Law Society, a number of local law societies and the SDT raised concerns around the following issues:

    - In order to avoid the delay and costs of appearing before the SDT, there may be a greater tendency for firms and individuals to be pressurised into agreeing a fine with the SRA even though the level of the fine may be considered disproportionate. One of the respondents felt that there was a risk that the temptation for us to agree fines might override the public interest, particularly for future consumers of legal services who may be exposed to an increase risk of harm from those who have agreed to accept a high fine (rather than being removed from practice);

    - A number of small firms were concerned with the bargaining power of high street practices, the so called 'equality of arms' approach in disciplinary matters. Their concerns revolved around the fact that the SRA had significantly greater resources to investigate and prosecute matters. Under such circumstances such firms felt that the SDT would provide a safety net for smaller unrepresented solicitors and firms. Interestingly, the LSCP felt that the voluntary nature of Regulatory Settlement Agreements and the option that matters can still proceed to the SDT, if agreement is not reached, would provide the necessary safeguards against the possibility of an abuse of power. One commentator suggested that

there should be safeguards to ensure that any agreement was freely arrived at by the solicitor concerned.

- A number of respondents pointed out that the transparency of the decision making in such situations will be vital to maintain public confidence.

SRA response:

48. Regulatory Settlement Agreements (RSAs) are used between the SRA and a regulated person to settle an investigation; either in part or in full, although the latter are much more common. Our published policy on RSAs make it clear that such agreements are not commercial settlements but an agreed regulatory outcome in the public interest, which is accepted by the firm or individual concerned. There is no compulsion on the SRA to negotiate or enter into an agreement, or indeed the firm or individual in question. All discussions are conducted on a "without prejudice" basis so that if the proposals are not accepted and the matter does not proceed, the fact of the "without prejudice" discussions are not referred to the decision maker. Only senior members of staff in the SRA currently have the power to authorise a RSA to ensure that the outcome proposed is the correct one in the public interest. When assessing this, we apply our published decision making criteria about the applicable level of sanctions or regulatory controls required (if any).

49. A significant number of requests to enter into RSAs come from solicitors or their representatives especially when they recognise that there have been misconduct that requires a disciplinary outcome or where there are public interest factors such as significant ill health issues. In our view we do not feel that there is any pressure on the regulated person to enter into an RSA, if they are not prepared to accept that things have gone wrong (which is prerequisite of any agreement). The option to decline to enter into a RSA and have the matter referred to adjudication or to the SDT will always remain open.

50. We wholly agree with the comments made around the importance of transparency in our decision making around RSAs. The vast majority of RSAs we have entered into have been made public on our website, in accordance with our publication policy. They are all published in full and generally remain on our website for a period of 3 years. Up to 31 December 2013, we have entered into 130 RSAs and 123 of these (or 95%) have been published in full on our website.

51. If a regulated person wants to accept a penalty which exceeds the current statutory limit, and we consider, having applied our published criteria, that this is the most appropriate outcome, we believe that the matter should not have to be referred to the SDT for "approval" with its inevitable attendant delays and cost implications.

52. Any increase in our fining powers that we are able to achieve, using the mechanism under s44D(10), should also help us to achieve, by agreement, more proportionate and swifter outcomes in the public interest. In the longer term, we intend to explore with the MoJ and the LSB using other mechanisms that might be available (such as s69) to achieve a more significant increase in our ability to impose higher fines with the agreement of the regulated person.

Responses to Question 5

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

53. The majority of respondents made no further substantive comments. A few respondents reflected on their earlier comments, and made the following additional observations:

- The LSB commented that "It *seems anomalous that the Legal Ombudsman's maximum is currently 1500% greater than the regulator's* [SRA's]*, with the result that it can make larger awards to an individual consumer for poor service than the SRA can impose to deter and punish misconduct*".

- One of the local law societies felt that the regulatory enforcement strategy is still in its infancy stage, and it would be better to monitor the existing system for a few more years before introducing further changes.

SRA response:

54. We welcome the range of views and comments generally we have received from respondents on our proposals to increase our internal fining powers.

55. Overall, we agree with the conclusion of the LSCP that "*This consultation has highlighted wider issues relating to the disciplinary and appeals process 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"*. We have made clear our support for the desired outcomes the LSB has indentified in their recently published paper on Sanctions and Appeals and we will work with them, in so far as we can, to progress these aims. In our view, the current regime is unsatisfactory and unbalanced.

56. We do not agree with the view that ABSs should be subject to higher penalties. A number of 'traditional' law firms in England and Wales have global turnovers in excess of one billion pounds. In contrast, many ABSs that we have licensed are of comparatively low means, more closely resembling 'traditional' small firms. In any event, our rules and criteria make it clear that we will take into account the entity's (and individuals') means when looking at the size of any penalty to be imposed. We also can and do agree to payment of any fines by instalments if the financial evidence to support such a request is provided.

Responses to Question 6

"Do you consider 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?"

57. A majority of respondents, including a number of key stakeholders were concerned that a significant increase in our fining powers would have a disproportionate effect on small firms, which are made up of a large number of BME solicitors. The Law Society pointed out that, in general, BME solicitors are disproportionately represented in the SRA's enforcement statistics. A number of respondents, however, suggested

that risks to small firms may be mitigated by a more conservative increase (of up to £10,000) with appropriate safeguards. APIL has consistently felt that an increase in fines that are not specifically linked to turnover will impact small high street practices or firms based in rural communities.

58. A few respondents commented that a significant increase in our fining powers would act as a deterrent, and therefore may result in less complaints being made and improved efficiency.

SRA response:

59. We do not anticipate that an increase in our fining powers will have a negative impact upon any section of the legal service market though we accept that there is currently limited information available to us to make a full and detailed assessment on this specific issue. We are conscious of the concerns raised by some of the respondents in terms of the impact on BME solicitors. We are currently working on how we can take forward recommendations made in the Independent Comparative Case Review recently prepared by Professor Gus John, published in March 2014.

60. We have already conducted and published an Equality Impact Assessment into the impact of our fining powers but due to the low amount that we can fine, the evidence gathered to date has inevitably been limited. We are conducting similar impact assessments into two related areas: the application of our publication policy and RSAs. Our business case to the MoJ requesting an increase will need to be supported by an impact assessment. We will also look to conduct a more in-depth equality impact assessment on the impact and effect of any increase in our fining powers once further evidence is to hand in this respect.

List of respondents

- The Law Society
- Solicitors Disciplinary Tribunal
- ILEX Professional Standards
- The Association of Personal Injury Lawyers
- Legal Services Board
- Legal Services Consumer Panel
- The City of London Law Society
- Solicitors Sole Practitioners Group
- Liverpool Law Society
- City of Westminster & Holborn Law Society
- Birmingham Law Society
- Leicestershire Law Socity
- Newcastle upon Tyne Law Society
- Manchester Law Society
- Tunbridge Wells, Tonbridge & District Law Society
- Wards Solicitors
- Harland & Co. Solicitors
- Alternative Family Law
- Steeles Law Solicitors Limited
- Sahota Solicitors

- Martin T Smith Solicitors
- T H R Crawley Solicitors
- Geoffrey Simcox, a locum/consultant
- Marina Nehme, senior lecturer, University of Western Sydney

There were 11 anonymous responses.