

A Question of Trust: summary of responses to the formal consultation

Introduction

- 1 On 30 September 2015 we issued a consultation document seeking views on a draft framework that set out the seriousness of breaches of the standards we set. The questions sought views on the factors we had used in identifying the gravity of different behaviour. The consultation closed on 31 January 2016. 34 responses were submitted, made up of 19 individuals and 15 organisations.
- 2 In addition to this formal consultation, we also carried out a large-scale campaign with members of the public and profession to understand their views on what should happen when solicitors get things wrong. We spoke to more than 5,000 people, with more than 2,000 responding to our online survey. Of those survey respondents who answered a question about their employment, responses were evenly split between solicitors and non-solicitors.
- 3 The campaign, including this formal consultation, has supported our current approach. It suggests we are taking the right issues seriously. Issues such as dishonesty, misuse of client money, or clear evidence of intent to do wrong are areas that matter to us, the public and the profession.
- 4 Respondents generally welcomed the fact we were consulting. They thought a move towards greater clarity around our decision-making approach and views on the behaviour of those we regulate would be beneficial.
- 5 There was general agreement with the consultation questions. Each question in the consultation saw the majority of respondents agree and in some cases there was overwhelming agreement. For example, the need to treat breaches that involve a vulnerable client more seriously, or that harm, intent and vulnerability are the right factors for us to be taking into account. Although more than half of respondents felt other factors should also be included.
- 6 As with our 'A Question of Trust' survey, some areas in our consultation were more likely to divide opinion. For example, whether we should consider events that occur in an individual's private life, such as use of racist language, that breach the professional principles. Or if an action has not resulted in harm, whether it should be treated as less serious than the same actions where harm has arisen.
- 7 A recurring theme in responses is that the format of the framework we consulted on was too rigid, and could be too simplistic. Questions were also asked about whether a rigid framework could lead to decisions made solely by reference to the levels in the framework, without taking into account all the facts of each individual case.
- 8 We have listened to all of the opinions received and have decided to use all the data gathered, and the thinking we have put into what constitutes serious behaviour, as an input into a wider review of our Enforcement Policy. The new Enforcement Policy, alongside our decision-making and other guidance, will together form a wider framework and consistent starting point for our decision-makers.

- 9 We intend to consult later this year on our new Enforcement Policy, alongside the second phase of our 'Looking to the future' proposals, which will include a review of the detail of the Disciplinary Procedure Rules.
- 10 This report provides a summary of responses to each consultation question, and of the other wider comments received, plus:
 - Information about respondents (Appendix 1)
 - The draft framework (Appendix 2)
 - How respondents voted (Appendix 3)

Answers to the consultation questions

Question 1: We have grouped the motivation or culpability of individuals or firms who fail to meet rules or obligations into three broad categories:

- **'No intent' describes acts or omissions which occur as a result of a mistake or accident or were otherwise unintended**
- **'Lack of knowledge or recklessness' describes acts or omissions where the person or firm should reasonably have known about and/or taken into account a rule or professional obligation, but did not do so. Acts or omissions are more serious if they are persistent or repeated**
- **'Intent' describes breaches where a person or firm deliberately or knowingly acts contrary to their professional or regulatory obligations. Acts or omissions are more serious if they are persistent or repeated.**

Question 1a: Are these three categories clear?

There was a fairly even split on this question, with slightly more respondents agreeing to this question. Although several who answered "yes" suggested changes to the terminology to improve clarity, for example changing 'reckless' to 'wilful', or 'intent' to 'deliberate'.

Question 1b: If these categories are not clear, how could they be improved?¹

- 11 The City of London Law Society (CLLS) agreed the terms were clear, but argued that it was not appropriate to treat lack of knowledge or recklessness in the same way for firms as for individuals, as every authorised firm can be expected to reasonably know about and/or take into account a relevant rule or professional obligation.
- 12 The main concern of those who answered "no" related to combining lack of knowledge and recklessness in a group. Several thought that by saying 'lack of knowledge or recklessness' the SRA was conflating the two concepts, and explained why they believed them to be different. There was also concern that 'lack of knowledge' was seen as a mitigating factor, as both individual solicitors and entities have a duty to know the regulations and rules that govern the area they are practising in.

¹ Some respondents provided comments after q1a, some after q1b and some commented after both. For this reason the comments relating to questions 1a and 1b have been considered together.

- 13 The Law Society thought many more categories should be used, identifying four that should precede deliberate dishonesty or other misconduct in terms of seriousness. They said:

"The category 'No intent' we take to mean accidental breaches of strict liability rules which would not normally attract any sanction. The next level we would categorise as 'inadequate understanding'. Here there is still 'no intent' but the failure to appreciate the significance of rules and guidance is culpable, but at a relatively low level.

"Next in ascending seriousness we would identify 'serious incompetence'; this could include negligence that is sufficiently serious to be regarded as misconduct.

"Close to this but different in character, in that incompetence or negligence may involve purely 'sins of omission' or failure to act, is the next category which involves some positive step, which we would describe as 'unacceptably poor judgement'."

- 14 One respondent thought that trying to define these elements was unnecessary as all the factors identified were on a spectrum of behaviour with each shading imperceptibly into the next. They went on to say that deciding on where lines should be drawn between each category was not necessarily helpful.
- 15 Several respondents were concerned about the definition of recklessness with some, including the Law Society, citing case law to provide definitions. Some also argued for including recklessness as a separate category, or including it in the more serious category of deliberate or intentional acts or omissions. In contrast some saw acting with lack of knowledge, rules or professional obligations, as themselves a form of recklessness.
- 16 Finally, several respondents questioned the reference to 'persistent or repeated acts' or 'omissions solely in relation to lack of knowledge' in our explanation of recklessness. Some made the point that persistent or repeated behaviour would always be an aggravating factor, whatever the intent. Another respondent suggested that repeated behaviour should not be included as part of the definitions for intent because this "confuses the issue of intent with the separate issue of harm caused which is a completely separate factor." Another said that "clearer examples of breaches in each category were needed".

SRA response

- 17 We agree with a number of the comments about the clarity of the terminology and will review terms taking on board suggestions such as the use of 'deliberate'. We also accept that repeated or persistent acts or omissions should be considered as an aggravating factor in all cases, not just those which relate to lack of knowledge or recklessness. We do not think, however, that the only concern relating to repeated behaviour is the harm caused by the acts or omissions. It also goes to the intent of the perpetrator – was it a one-off aberration or part of a wider pattern of behaviour?
- 18 Questions about recklessness are considered below under 2a.

Question 2a²: Should 'lack of knowledge' be considered separately from 'recklessness'?

- 19 The majority of respondents thought 'lack of knowledge' should be considered separately from 'recklessness' because these categories covered very different levels of culpability. 'Lack of knowledge' might arise where a solicitor was unaware of a rule or obligation that did not normally affect their practice; where they were newly qualified and had not had relevant training; or where it was reasonable to rely on the knowledge of a third party. 'Recklessness' was seen as more serious because it involved lack of regard for the consequences of actions which a solicitor knew, or should have known, were in breach of rules or morally wrong.
- 20 The London Criminal Courts Solicitors' Association and some individual respondents said that 'lack of knowledge' should be dropped as all solicitors are under a duty to abide by the core professional principles and to implement them, so a failure to do so should be regarded as intrinsically reckless.
- 21 The Law Society said that as the meaning of 'recklessness' is settled in law and adopted by the Solicitors Disciplinary Tribunal (SDT) it would be unhelpful if for the SRA to adopt a different definition and it would be inappropriate to combine 'recklessness' with any other category of failing including in particular 'lack of knowledge'.
- 22 Only the Law Centres Network argued for dropping 'recklessness'. They argued that 'recklessness' could not easily be distinguished from intent. Judgements about whether an action was 'intended' or 'reckless' were likely to be subjective and subject to widely different interpretations.

SRA response

- 23 The key issue here is whether acting without knowledge amounts to 'recklessness' - where the solicitor or entity should reasonably be expected to have known about the issue, whether it is an area of law or rules or professional obligations and/or has chosen not to check their understanding.
- 24 On balance we think that a distinction can be drawn between an offence that results from a 'lack of knowledge' of a rule or obligation which the solicitor should reasonably should have known or found out, and on the other hand, those offences where a solicitor acts knowing that there is a risk of breaching rules or obligations, or causing harm. We think that both are relevant factors for our decision-makers.

Question 2b: If 'lack of knowledge' should be considered separately from 'recklessness', which is the more serious?

- 25 The vast majority of respondents saw 'recklessness' as more serious than 'lack of knowledge', although two responses again said that 'lack of knowledge' should be seen as a form of recklessness and a further respondent suggested that while the two overlapped, where lack of knowledge was excusable, the action would not be reckless.

² The online questionnaire did not offer an opportunity to comment on questions 2a and 2b, whereas the paper forms included space for comments on both questions, as well as offering an opportunity for further comment in question 3. Some on-line responses to q3 have been included in the findings for questions 2a and b.

- 26 One respondent said that recklessness was more serious because it showed an element of intent, while another suggested the same but because it had the implication of 'knowing perfectly well but doing it anyway'. However, this respondent noted there were many cases where the lack of motive was of little significance because it was overshadowed by the consequences to the client or to the public.

SRA response

- 27 The responses mostly served to reinforce the comments made to the previous questions. They continue to demonstrate a wide range of views, from the Law Society's opinion that 'lack of knowledge' and 'recklessness' are wholly different to the view that they are closely connected or even synonymous.
- 28 As before, we take the view that cases may arise where a 'lack of knowledge' does not amount to 'recklessness', and it is therefore appropriate to use both categories. While it may be serious for someone not to know about an issue or a rule when they should have, it is always serious if someone is reckless as to the consequences of their behaviour. We consider that recklessness demonstrates a mindset whereas lack of knowledge can arise from a number of different circumstances.

Question 3: Do you have any further comments on 'intent'?

- 29 The issues raised here reinforce the different views about 'recklessness' and 'lack of knowledge' that have been expressed in responses to questions 1 and 2. Additional points raised included concerns about being able to identify a solicitor's intent. As one respondent said "like the truth, intent is rarely pure and never simple". One respondent was concerned that the majority of cases would fall between the categories of 'no-intent' and 'intent', meaning that most offences would be categorised as arising from 'lack of knowledge' or 'recklessness'.

SRA response

- 30 Questions 1-3 provided useful suggestions to improve the clarity of the categories within 'intent'.
- 31 The main issue of debate concerned whether 'lack of knowledge' and 'recklessness' belonged together in a category between 'mistakes' and 'deliberate' misconduct, to indicate that was culpability greater than an error or mistake. There were good arguments for retaining 'recklessness' only; and for including 'recklessness' with the 'deliberate' category. Overall we might revise the categories as follows:
- 'Mistakes and accidents' describe acts or omissions where there is no intent to cause harm or to breach rules or professional principles and which occur as a result of a mistake, an accident or from 'lack of knowledge' which the solicitor could not reasonably be expected to have acquired.
 - Actionable 'lack of knowledge' describes acts or omissions where the person [or firm] should reasonably have known about and taken into account a rule or professional obligation, but did not do so.

- 'Recklessness' arises where a person has a disregard for the consequences of their actions and whether or not these result in a breach.
- 'Deliberate' describes breaches where a person or firm knowingly and intentionally acts contrary to a rule or their professional obligations.

Question 4: Do you think criminal convictions (excluding minor motor offences), should be treated as matters of concern whether or not they relate to the regulated person's professional work?

- 32 The majority of respondents agreed that all convictions were a matter of concern as they raised questions about a solicitor's integrity and judgement. Others took the view that while all convictions were of concern, the range of possible offences, some of which might be quite minor, meant that sanctions against the regulated person should not necessarily result.
- 33 Several respondents, including the Law Society, called for greater clarity about how the SRA defined convictions, (where minor motoring offences would be excluded) and how offences settled by fixed penalty notices would be treated. One respondent argued that fixed penalty notices should not be treated in the same way as convictions and cautions, as they did not require an admission of guilt. The Law Society suggested that cautions also raised concerns, but added the caveat that all convictions and cautions should be considered within the specific circumstances in which the conviction arose.
- 34 A minority of respondents thought that the SRA should only intervene where there was a connection between the offence and the solicitor's work, although several argued that any offences relating to dishonesty raised concerns. Some respondents did not think that the SRA should become involved in matters connected with a solicitor's private life. Other respondents felt there could be instances where the SRA should become involved. The CLLS said:

"The test should not turn on whether an offence occurs in the individual's private life as opposed to their professional work..... In our view all these cases should be tested by considering the extent of the 'harm' to the individual's, his or her firm's and the profession's reputation likely to be caused by the conviction."

SRA response

- 35 We accept the view of the majority of respondents that convictions relating to dishonesty should usually be treated as more serious than, for example, convictions for misuse of drugs or drink driving, because they may be more likely to be replicated in professional practice. Action taken for these kinds of offences would likely result in a less severe outcome than the action we take for convictions relating to dishonesty.
- 36 However, other offences may also raise questions about a solicitor's judgement or integrity. There was little consideration of the range of offences that can arise, for example, sexual offences (including convictions for child pornography) or offences involving violence which, while unconnected to professional practice and not directly involving dishonesty, could significantly damage public confidence in the profession.

- 37 For that reason we propose to continue to treat all convictions as matters of concern whether or not they are connected with professional practice, while also accepting that there is a spectrum of seriousness for these matters.

Question 5: Do you think that in considering complaints or making other decisions the SRA should include events that occur in an individual's private life, outside professional practice, that breach the professional principles?

- 38 The majority of respondents answered yes to this question, although individual respondents were evenly divided on the issue.
- 39 The Law Society strongly supported considering complaints relating to individuals' private lives. They argued that treating such events as irrelevant would "risk the public's trust in professionals to hold certain characteristics such as honesty and integrity as fundamental."
- 40 However, most of those who responded "yes" qualified their answer suggesting a 'case by case' approach, or that cases should be considered in circumstances where a solicitor's behaviour could impinge on, or read across to their professional practice. One respondent commented that this was appropriate only where a criminal offence had been committed.
- 41 Some respondents expressed concerns about enabling minor disputes, for example with neighbours, to become subject of complaints, where there was no reasonable prospect of the solicitor's actions affecting their professional practice or damaging the reputation of the profession. One organisation suggested that a policy should be drafted "to ensure that the decision as to whether to investigate such a complaint is only taken where it is proportionate and necessary to do so which should be judged by the seriousness of the events concerned."
- 42 Two of the respondents who answered "no" were strongly opposed to solicitors having any professional accountability for their actions outside their professional practice. Others were concerned that most matters which arose in a professional's private life would not affect their practice, and to investigate them would be a poor use of the SRA's resources and of limited value. It was suggested that many matters could be dealt with more effectively within the solicitor's firm or place of work.
- 43 Opinion was divided on the question whether publicly expressed views which were, for example, racist should be investigated or result in sanctions. Some argued strongly against any restrictions on the expression of opinion, whether or not it indicated the solicitor held sexist, racist or other views that could undermine clients' confidence in the solicitor, or the public's confidence in the profession. Others took the view that public confidence in the profession should be preserved, even if this included some restriction on the expression of views.

SRA response

- 44 A large majority of those who responded agreed that there were some circumstances in which a solicitor's behaviour outside their professional practice should be investigated by the SRA, although some regarded these as exceptional cases.

- 45 We agree that matters related to integrity or honesty should be investigated whether or not they occur in professional practice. We will look at complaints or events and decide whether or not they are of a nature which has the potential to damage public confidence in the profession. We will also consider behaviour which, despite being in a personal capacity, indicates a risk to the carrying out of a professional activity (eg. financial impropriety).

Question 6: Do you think breaches of clients' rights to privacy, dignity and non-discriminatory treatment should be treated as causing harm in themselves, even where there is no financial impact on the client?

- 46 There was clear support for treating breaches of clients' rights as 'harm' from both organisations and individuals. Some respondents suggested that impact and harm should be considered together while others were concerned that a client's account of the impact on them should be treated with caution. Some argued that no financial penalties should be awarded if clients had not incurred financial loss; and that care should be taken not to 'double count' offences.
- 47 The Law Society did not think that privacy, dignity and right to non-discriminatory treatment should be considered together, and defined each term.
- 48 Most of the respondents who answered "no" thought it was a matter of degree. For example, Devon and Somerset Law Society said:
- "Breaches of clients' rights to privacy, dignity and non-discriminatory treatment could (not should) be treated as causing harm in themselves. Again, it is a matter of fact and degree in each case."
- 49 One other respondent agreed in principle, but was concerned about the 'nebulous' nature of the factors identified, which it was felt would be difficult to include in a framework about sanctions.

SRA response

- 50 Overall there was support for the proposition that breaches of clients' rights should be considered as causing harm – or matters of concern - even where there is no financial or other quantifiable loss to the client. Such breaches should therefore be included in the framework. The impact of the action and the intent should be assessed, alongside the particular circumstances of the case, to determine the seriousness of the behaviour.

Question 7: Do you think actions that have not resulted in harm, but have the potential to do so, should be treated as less serious than the same actions where harm has arisen?

- 51 Responses to this question were evenly divided overall, with slightly more respondents agreeing. Individuals were more likely to say "yes" than organisations. Respondents who responded "yes" generally thought that harm was a significant factor in assessing seriousness, and where harm had not arisen, for any reason, this should be taken into account. One respondent qualified this by saying that there was an exception where the

harm was clearly intended. Two took the view that attempts to put matters right, or prevent harm occurring should be taken into account.

- 52 One respondent thought that the issue should be considered in a more nuanced way; creating a risk of harm should be considered separately from the harm occurring. However, in relation to compliance, he argued that the creation of the risk of a compliance breach should be treated as a breach, irrespective of the outcome.
- 53 One respondent suggested that where lack of harm reduced the seriousness of an action, solicitors would have an incentive to put matters right before they were found out. Another argued that only intent should be considered.
- 54 Several respondents suggested different models for considering harm or potential harm. One suggested that harm should be considered when deciding on a sanction, but not in considering the seriousness of an offence. Two respondents suggested that the issue that should be considered is the extent to which harm should have been anticipated. From these, a non-solicitor legal professional said:

"...the assessment of harm should be at the point where the solicitor engaged in the relevant activity."

- 55 Two respondents thought that actual and potential harm should be treated in the same way, except in cases where the harm was very predictable and highly likely to occur. One suggested that in some cases it might not always be appropriate to treat the two situations in the same way, depending on the facts of each case, so the framework should say that offences 'can' be treated less seriously if no harm has arisen.

SRA response

- 56 There is little support for the view that harm arising from breaches of the principles should not be considered at all in deciding on the seriousness of conduct. However, there is no consensus about how 'potential' harm should be treated. The most practical option may be to take into account harm that could reasonably have been anticipated, considering both the likelihood of it occurring and its seriousness, and assessed at the point the offence was committed.
- 57 Considering potential harm allows us to focus on risky behaviour. Harm may not materialise from an action, but this may be pure luck. Alternatively, a lack of harm could be because of the actions of the individual or firm, and so may be relevant. Further, if serious harm does arise this could increase the seriousness of the action and potentially introduce the issue of public confidence in the profession.

Question 8: Do you think actions that have not resulted in harm because they were identified early (eg by regulatory action), but had the potential to do so, should be treated as less serious than the same actions where detection only happened after harm had arisen?

- 58 Responses to this question mostly repeated the responses to question 7. The Association of Mental Health Lawyers suggested that: "It should be an aggravating factor that the harm was only avoided as a result of regulatory action and the potential level of harm taken into account but it shouldn't be treated as the same where harm has occurred."

59 One respondent suggested that if there was an attempt to conceal an action it should be treated as seriously as if harm had arisen. Another argued that if the intervention occurs at a sufficiently early point, some allowance should be able to be made for the possibility that the person would not in fact have continued with their actions. The SRA should take this into account if it is satisfied that such a possibility is realistic and not merely asserted with the benefit of hindsight.

SRA response

60 We agree with the respondents that intervention by us should not materially affect the outcome of cases, and there is no need to consider cases where harm is averted by the intervention of the regulator as separate category cases. As described in response to question seven, we will consider potential harm as a possible indicator of risky behaviour.

Question 9: Do you think that when we make decisions we should consider the impact of an individual's conduct on clients or other parties, as well as the nature and scale of the offence?

61 There was overwhelming support for considering the impact of an individual's conduct on clients and other parties. However, some respondents suggested impact was not always relevant, for example in cases involving dishonesty, or where harm/impact was not foreseeable. Others argued that whether impact should be considered or not would depend on the particular facts and circumstances of the case, and no blanket rule could apply. A number of responses also noted the difficulty of measuring impact, particularly in relation to non-financial harm, where the impact would be subjective.

62 One respondent was concerned about considering impact on third parties because, while solicitors have clear duties to their clients, their duties (if any) to third parties depends significantly on who the third party is and the nature of the relationship between them. The Law Society shared this concern and added that the impact on third parties should be considered separately from the impact on clients.

63 One respondent argued that impact should be considered whether or not the individual had known about the impact or likely impact of the actions. Another suggested that impact should be treated as secondary to other factors such as intent.

SRA response

64 Impact is clearly an important factor in some cases and there is general support for taking impact into account in considering cases. However, impact is not relevant to all cases nor can it easily be measured.

Question 10: Should we view breaches as more serious where they involve vulnerable clients?

65 There was strong support for this proposition from both organisations and individuals. A small number of respondents agreed with the proposition without further qualification,

arguing that a higher level duty of care was needed where a client was vulnerable. For example, the Association of Mental Health Lawyers said: "that there should be a higher burden on those representing vulnerable individuals to act with all due diligence, integrity and honesty."

- 66 Most respondents agreed that cases should be treated more seriously if the solicitor knew or should have known about the vulnerability of the client and/or that this was relevant - either because their vulnerability made it possible (or easier) to mislead or defraud them, or because the impact on them would be greater because of their vulnerability.
- 67 Three respondents also commented on the need to have a clear definition of vulnerability, with one organisation suggesting that almost all clients seeking some kinds of legal advice or services could be regarded as vulnerable.
- 68 A minority of respondents felt the vulnerability of the client was irrelevant; the seriousness of an offence or breach should not be affected by this. Other respondents saw it as a possible exacerbating factor in relation to sanction, but not a matter to be taken into account in assessing the seriousness of the offence.
- 69 Some respondents were also concerned about the definition of 'vulnerable', with the Law Society suggesting "a narrow definition". One respondent added that many people disguised their vulnerability (eg low levels of literacy), so it was not always possible for solicitors to identify vulnerable clients.
- 70 The Law Society also noted that the vulnerability of the solicitor may be relevant when considering mitigating circumstances.

SRA response

- 71 There is a strong majority in favour of regarding offences as more serious when they involve vulnerable clients. However, the comments made it clear that this applied only where it had relevance to the particular offence. The vulnerability of the client was not usually regarded as a matter of concern of itself.
- 72 We therefore propose to consider a client's vulnerability as a possible aggravating factor following an initial assessment of the seriousness of behaviour. This would apply where the vulnerability had been an enabling factor for the offence, or had resulted in increased impact on the client.

Question 11: Should we distinguish between levels of vulnerability resulting from lack of legal knowledge or experience of legal services, and vulnerability arising from personal circumstances, including mental or physical ill-health or disability?

- 73 The majority of respondents supported making a distinction between vulnerability arising from lack of legal knowledge, and vulnerability arising from personal circumstances. Many respondents argued that the imbalance in knowledge and power between a professional and a client is intrinsic to professional practice - professional regulation (in addition to consumer

and legal protections) exists to reflect this, and there is no need to regard the majority of clients as 'vulnerable'.

- 74 Two respondents suggested the vulnerability of clients would fall within a continuum from simple lack of legal knowledge to profound learning disability, and that it was not possible to draw a clear line between the two groups identified in the question. Each case should be considered on its own merits.
- 75 Those who responded "no" to this question offered both practical and in principle reasons for their views. Several respondents supported the view that the two categories overlapped and making such distinctions would be impossible. Further complexities arose because people may be vulnerable in some situations but not in others, and to try to rank different degrees of vulnerability would involve further detailed definitions.
- 76 Some respondents saw this as a matter of principle, arguing that it is simply wrong to take advantage of anyone in any circumstances, whether they are considered to be vulnerable or not.
- 77 There was broad acceptance that all, save the most sophisticated, users of legal services were vulnerable because of their lack of knowledge. This led some to see the need to identify a separate category of the clients whose personal circumstances added to their vulnerability, and those who thought a single category should be used, but accepting that vulnerability would be on a spectrum.

SRA response

- 78 Taking into account the conclusion from the previous question, we think that the vulnerability of the client should be taken into account only where it has direct relevance to the offence. The nature of this vulnerability will automatically be identified and considered as part of the assessment of aggravating and mitigating factors - whether it arose from a lack of legal knowledge, or other situational factors on the one hand and permanent characteristics such as a disability on the other.

Question 12a: Are harm, intent and vulnerability the right factors for us to be taking into account?

- 79 A majority of respondents agreed that the issues identified were the right ones. Four respondents said that other factors that should also be taken into account, for example, compounding the behaviour by ignoring a client's complaints or concealing the complaints from the complaints partner.
- 80 Two also raised concerns about including 'vulnerability' of the client at this level - one saying that the vulnerability must be clear to the adviser. The CLLS said that: "if an individual's conduct harms a vulnerable client then this inevitably makes the conduct more harmful overall, and that only intent and harm need be considered."
- 81 One response suggested an order of priority - 1. intent; 2. vulnerability; 3. harm. Another was concerned that many breaches could be regarded as 'harmless' and if the SRA were to

make disciplinary action dependent on harm, breaches might become more widespread and harder to challenge, which would undermine the public perception of the profession overall.

- 82 The Junior Lawyers Division of the Law Society was concerned about harm being a factor, because of the element of luck as to whether harm actually arose from an action. The Law Society agreed that intent and harm should be taken into account, following the SDT sanctions guidance in relation to harm. They saw vulnerability as one of many possible aggravating factors that should be taken into account on a case by case basis. One respondent was concerned that the proposed factors differed from the SDT Sanctions Guidance. Two respondents thought other factors, including contrition, should be taken into account.
- 83 Overall there was agreement that harm, intent and vulnerability should be taken into account although concerns were raised about both harm and intent by a small number of respondents. Many respondents argued that other factors should also be considered.

SRA response

- 84 This question was designed to explore the role of harm, intent and vulnerability in assessing seriousness, but was not intended to suggest that this was an exhaustive list. Nothing in the responses suggests that intent and harm should be discarded from consideration. Having considered the consultation responses on vulnerability, we believe that this should also be regarded as an aggravating factor.

Question 12b: Are there any other factors you consider should be included?

- 85 Most respondents thought that other factors should be considered. They proposed a wide range of factors, some have been included in the list below:
- Honesty
 - Repetition of offence
 - The firm's previous record of SRA disciplinary action and findings of the Legal Ombudsman
 - The attitude of the solicitor; self-reporting; remedying poor standards; contrition; immediate recognition; admission; restitution; concealing the complaint from the complaints partner
 - Ignoring a client's complaints
 - Vulnerability of solicitor
 - Commercial pressure/other pressures on solicitor
 - The conduct of the client
 - Financial matters
 - The availability of guidance relating to the particular breach
 - Aggression

- Accuracy
- Experience of the regulated person
- Failure to comply with the code of conduct with regard to client care.

86 The Association of Women Solicitors made the wider point that: "breaches involving vulnerable staff however such as paralegals and trainee and junior solicitors the majority of whom are female should be regarded as serious. Bullying, for example and non compliance with the Law Society's own guidance on Equal Pay and Flexible Working should be taken very seriously."

SRA response

87 Some of these factors - for example the vulnerability of the solicitor - may fall under 'personal mitigation'. If intent affects seriousness, this may in turn be affected by the solicitors personal circumstances. However, there is a difference between the factors which affect the seriousness of the events, and those (personal) which might affect the likely sanction.

88 Other of these factors relate to aspects of harm or could be seen as offences in themselves (for example, ignoring a client's complaint). We agree that honesty is of paramount importance for solicitors.

Question 13: We have focused on the professional principles set out in the Legal Services Act 2007. Do you think that we have covered the right issues and given clear examples?

89 Respondents were evenly divided in their views on this question. Of those who disagreed, a primary concern was that the professional principles were not widely known, whereas the Code of Conduct was (relatively speaking) better known within the profession. Two respondents raised the question of why the principles had been used in favour of the Code of Conduct.

90 Several respondents asked for more examples to be provided and for more detail to be included in the framework or supporting materials.

91 One response from a member of the public asked about the treatment of solicitors who were sick, and suggested that the SRA consider introducing new procedures to protect the public and support solicitors with long-term physical or mental health problems.

SRA response

92 We are currently reviewing the Code of Conduct and have recently consulted on new versions for individual solicitors and for firms that we authorise. These set standards that incorporate the professional principles and enforcement action could follow any breaches of those standards, subject of course to the specific facts, circumstances and our enforcement policy.

General Comments

93 The Law Society, the CLLS and the Law Centres Network, as well as one individual solicitor in private practice, made comments about the project as a whole, or made comments on issues not raised in the consultation.

- The framework includes matters that are for the SDT to determine. Their 'Guidance Note on Sanctions' sets out factors - culpability, harm, mitigating and aggravating factors - that are used to determine seriousness of behaviour. The Law Society was also concerned about the SRA appearing to try to influence decisions.

The framework—in the form of a table—was the wrong approach because:

- The issues to be covered are too complex to be dealt with in a table, and as a result omits important factors such as whether behaviour was a 'one-off' or 'repeated'.
 - It might encourage a 'tick box' mentality, rather than a careful consideration of the particular circumstances of each case on its own merits.
 - It could mean more junior staff were allowed to make decisions
- There is not enough focus on regulatory principles, particularly, supporting the constitutional principles of the rule of law; and increasing public understanding of their legal rights and duties. (Law Society only).
 - The framework focuses on individuals' behaviour but it is not clear how it could be applied to firms or entities. In particular, questions about 'lack of knowledge' and 'intent' apply differently to firms. The CLLS provided examples of cases arising in corporate environments.
 - The consequences of using the framework are unclear - for example, will Compliance Officers feel obliged to refer to the SRA any instance of conduct that fall within levels 2-6 of the framework, because it is probable that the SRA would want to take action on such behaviour? At present the Compliance Officers' obligation is to report 'material failure', while individuals and firms have an obligation to report 'serious misconduct' or serious failures to comply with the Principles, rules, outcomes and other requirements of the Handbook.
 - The framework does not treat a number of issues seriously enough - list provided (Law Society).
 - It should be supported by a wide range of example cases showing how the framework should be applied.

94 The Sole Practitioners' Group (SPG) expressed concerns about the purpose of the project and the way professional and public views were being gathered. They criticised, in particular, the lack of a publicly available methodology for deciding where meetings were held, who they were open to, and how the survey was promoted.

95 The SPG also questioned the purpose of 'A Question of Trust' suggesting it may be a forerunner to a campaign to separate the SRA from the Law Society. Finally, the SPG questioned the involvement of the public, arguing that judicial decisions are not reflections of public opinion, but based on principles.

SRA response

- 96 We have listened to all of the opinions received about the structure of the framework. We have decided to use all the data gathered during this work, and the thinking we have put into what constitutes serious behaviour, as an input into a wider review of our Enforcement Policy. The new Enforcement Policy, alongside our decision-making and other guidance, will together form a wider framework and consistent starting point for our decision-makers. We intend to consult later this year on our new Enforcement Policy alongside the second phase of our 'Looking to the Future' proposals, which will include a review of the detail of the Disciplinary Procedure Rules.
- 97 Our November 2015 Policy Statement addresses our role as a public interest regulator, and what we think regulating in the public interest means. Gathering views from members of the public to inform our work is a key part of this role. We will continue to engage with the public and consumers on all areas of our work.

Appendix 1

Information about respondents

98 34 responses were submitted, and a further 4 responses were partially completed on line (one answered all the questions). These respondents did not formally submit their responses, so have not been included in statistical data. Their comments have been considered and noted in the analysis where they make an additional point. The submitted responses were made by:

Individuals			
	Solicitors in private practice	8	
	Members of the public	2	
	Trainee solicitors	1	
	Retired solicitors	1	
	Other legal professionals	3	
	Did not say	4	
	Total		19
Organisations			
	Representative Groups	7	
	The Law Society/ TLS Boards or Committees	2	
	Local Law Societies	5	
	Law firms	1	
	Total		15
Total			34

Organisations that responded:

- Association of Women Solicitors London
- Burgess Salmon LLP
- Devon and Somerset Law Society
- Fraud Advisory Panel
- Hampshire Law Society

- Junior Law Division, Law Society
- Law Centres Network
- Leicester Law Society
- Liverpool Law Society
- London Criminal Courts Solicitors' Association
- Mental Health Lawyers Association
- Sole Practitioners Group
- Solicitors Association of Higher Court Advocates
- The City of London Law Society
- The Law Society

Demographic data about individual respondents

There were 20 individual respondents.

Sex

Male	12
Female	7
Preferred not to say	1

Disability

No	17
Preferred not to say	3

Age

16-24	1
25-34	3
35-44	3
45-54	3
55-64	6
65 and older	1
Preferred not say	3

Ethnicity

White British	9
Other White	4
Asian/Asian British	1
Mixed	1
Preferred not to say	5

Appendix 2

Draft framework

Principle 1a - Independence

Level	Rule of law and proper administration of justice	Independent advice	Conflicts of Interest
Level 1 (no action)			
Level 2 ('engagement')			
Level 3 (warning/rebuke)		Enabling an unregulated entity to control a regulated firm	
Level 4 (low level sanction)	Entering into a business partnership or other arrangement with a person with a criminal conviction relating to financial or other dishonesty.	Giving advice when compromised by knowledge of case from another source Acceding to client pressure in interpreting the law, or providing advice on appropriate action	Conflict of interest between clients where no harm arises to either client.
Level 5 (large fine/suspension)	Not acting on knowledge of criminal behaviour Entering into a business partnership or other arrangement with a person with a criminal conviction relating to financial or other dishonesty. resulting in money laundering or other offences		Conflict of interest between clients where one client is disadvantaged. Conflict of interest between client and solicitor
Level 6 (strike off)	Engaging in or enabling bribery or corruption	Using client account to offer a personal banking facility to clients	Conflict of interest between client and solicitor where solicitor has financial or other interest in the outcome.

Principle 1b - Integrity

	Honesty in all dealings with clients, colleagues and employers.	Fairness and non-discrimination	Compliance with the law	Public confidence in the profession
Level 1 (no action)			Parking/driving offences resulting in fixed penalty notices	Conduct in private life (not public)
Level 2 ('engagement')	Errors in billing client			
Level 3 (warning/rebuke)	Accounting mistake – wrong funds in client account No or inadequate interest paid	Discrimination against client or colleague in groups protected by Equality Act Bullying junior staff	Cautions and penalty notices except those relating to dishonesty	Personal conduct with lack of honesty/integrity or disregard for the welfare of others which is made public
Level 4 (low level sanction)	Failure to redeem mortgage or pay stamp duty land tax Misleading/dishonest marketing or advertising Misleading client for personal benefit	Use of language in public that is offensive to groups protected by Equality Act Use of discriminatory language to client/colleague Tribunal finding of sexual harassment or similar	Cautions and penalty notices relating to dishonesty	Publishing material which shows lack of honesty/integrity or serious disregard for the welfare of others
Level 5 (large fine/suspension)	Lying or omitting information on (non-legal) documents Client funds used to meet other obligations - repaid Misleading SRA a lender, HMRC, or any other party	Discrimination against client or colleague in groups protected by Equality Act	Convictions other than those relating to dishonesty	Dishonesty or fraud while serving in a position of trust outside professional practice
Level 6 (strike off)	Misuse of client funds		Convictions resulting in imprisonment or a suspended sentence	
			Convictions involving fraud, bribery, dishonesty or	

			which are motivated by discrimination	
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Principle 2: Proper standards of work

Level	Competence in all aspect of work	Dealing with complaints	Co-operating with the SRA and other regulators and complying with rules and requirements.
Level 1 (no action)			
Level 2 (engagement)	Fail to supervise or manage staff. Failure to manage case-load Inadequate document management system or record keeping	No complaints systems or procedure	Practising without a current practising certificate. Failure to maintain indemnity insurance
Level 3 (warning/rebuke)	Significant delays in progressing cases		failure to provide SRA with required information
Level 4 (low level fine)	Incompetent advice leading to financial loss to client Working outside limits of knowledge Breach of undertaking	Misleading clients in response to complaints Failing to respond to complaints from clients	Failure to comply with accounts rules
Level 5 (large fine/suspension)	Firm is financially unstable	Obstructing investigation of complaint to SRA, or other regulator	Providing false or misleading information to regulator
Level 6 (strike off)			

Principle 3: Acting in the best interests of clients

Level	Acting in the best interests of each client	Acting with clients' consent and in accordance with their instructions	Communication and actions take into account clients' needs and circumstances
Level 1 (no action)			
Level 2 (engagement)			Being polite and considerate of clients' needs Communication in a way clients can understand
Level 3 (warning/ rebuke)	Failure to raise concerns about standards of practice	Putting undue pressure on clients to take particular action	Keeping clients informed of progress of case
			Providing adequate information about fees
Level 4 (low level fine)	Using professional contact with clients to develop personal relationships (including with vulnerable clients) Exploiting vulnerability, accepting cases with no merit	Not following clients' instructions	Directing obscene/offensive language to clients
Level 5 (large fine/ suspension)	Deliberate over charging client	Lying to/misleading clients	
Level 6 (strike off)	Financial dishonesty involving vulnerable client		

Principle 4: Acting with independence before any court

Level	Honesty in all dealings with the court, litigants and other participants	Compliance with court rules and procedures	Abuse of court processes
Level 1 (no action)			
Level 2 (engagement)			
Level 3			Bringing cases without legal

(warning/ rebuke)			merit
Level 4 (low level fine)		Failing to comply with rules (eg disclosure rules)	Failing to consider the duty to the court when following a client's wish to pursue aggressive or speculative litigation
Level 5 (large fine/ suspension)	Knowingly allow misleading/false information to be presented to court Present dishonest evidence/lie to the court	Contempt of court	Bringing cases with the primary purpose of incurring unmanageable costs for client's commercial rival Using the threat of litigation to obtain settlement on cases that have no real merit. Encouraging or enabling clients to incur costs disproportionate to the value of the case.
Level 6 (strike off)			

Principle 5: Confidentiality

Level	Protection of information from improper disclosure or use when it is stored, used or transmitted.	Disclosure of confidential information about clients.
Level 1 (no action)		
Level 2 (engagement)	Failure to dispose of information securely (eg from computer hard drive before disposal of computer)	Accidental disclosure (eg wrongly addressed email)
		Loss through error (eg leaving briefcase in taxi)
Level 3 (warning/ rebuke)	Inadequate or outdated security system	
Level 4 (low level fine)	Disposal of confidential records in ordinary waste/public place	Papers used/left where accessible to others
	Inadequate or outdated security system resulting in cyber-crime or serious security breach	
Level 5 (large fine/ suspension)		Disclosure of client data to third party

Level 6 (strike off)		Disclosure of client data to third party resulting in harm to client.
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Appendix 3

How respondents voted

Question 1

99 We have grouped the motivation or culpability of individuals or firms who fail to meet rules or obligations into three broad categories

- 'No intent' describes acts or omissions which occur as a result of a mistake or accident or were otherwise unintended
- 'Lack of knowledge or recklessness' describes acts or omissions where the person or firm should reasonably have known about and/or taken into account a rule or professional obligation, but did not do so. Acts or omissions are more serious if they are persistent or repeated
- 'Intent' describes breaches where a person or firm deliberately knowingly acts contrary to their professional or regulatory obligations. Acts or omissions are more serious if they are persistent or repeated.

Question 1a: Are these three categories clear?

n=31	Yes	No	Did not answer	Total
Individual ³	12 (39%) ⁴	7 (22%)	0	19
Organisations	5 (16%)	7 (22%)	3	15
Total	17 (55%)	14 (45%)	3	34

Question 2: Should 'lack of knowledge' be considered separately from 'recklessness'?

n=30	Yes	No	Did not answer	Total
Individual	13 (43%)	6 (20%)	0	19
Organisations	7 (23%)	4 (13%)	4	15
Total	20 (66%)	10 (33%)	4	34

³ Because of the small numbers of responses statistics for each question group together responses from individuals and from organisations. Where relevant the views of the two members of the public who responded have been noted in the 'findings' section.

⁴ Percentages relate to the number of responses 'yes' or 'no' to each question. Where respondents did not answer 'yes' or 'no', but provided comments, this has been noted in the 'findings' section.

Question 2b: If 'lack of knowledge' should be considered separately from 'recklessness', which is the more serious?

n=22	Lack of Knowledge	Recklessness	Did not answer	Total
Individual	2 (9%)	16 (73%)	1	19
Organisations	0	4 (18%)	11	15
Total	2 (9%)	20 (91%)	12	34

Question 4: Do you think criminal convictions (excluding minor motor offences), should be treated as matters of concern whether or not they relate to the regulated person's professional work?

n=28	Yes	No	Did not answer	Total
Individual	11 (39%)	8 (28%)	0	19
Organisations	9 (32%)	0	6	15
Total	20 (71%)	8 (28%)	6	34

Question 5: Do you think that in considering complaints or making other decisions the SRA should include events that occur in an individual's private life, outside professional practice, that breach the professional principles?

N=29	Yes	No	Did not answer	Total
Individual	10 (34%)	9 (31%)	0	19
Organisations	9 (31%)	1 (3%)	5	15
Total	19 (65%)	10 (34%)	5	34

Question 6: Do you think breaches of clients' rights to rights to privacy, dignity and non-discriminatory treatment should be treated as causing harm in themselves, even where there is no financial impact on the client?

N=30	Yes	No	Did not answer	Total
Individual	12 (40%)	6 (20%)	1	19
Organisations	10 (33%)	2 (17%)	3	15
Total	22 (73%)	8 (27%)	4 (11%)	34

Question 6: Do you think breaches of clients' rights to rights to privacy, dignity and non-discriminatory treatment should be treated as causing harm in themselves, even where there is no financial impact on the client?

N=30	Yes	No	Did not answer	Total
Individual	12 (40%)	6 (20%)	1	19
Organisations	10 (33%)	2 (17%)	3	15
Total	22 (73%)	8 (27%)	4 (11%)	34

Question 7: Do you think actions that have not resulted in harm, but have the potential to do so, should be treated as less serious than the same actions where harm has arisen?

n=30	Yes	No	Did not answer	Total
Individual	11 (23%)	7 (23%)	1	19 (56%)
Organisations	5 (17%)	7 (23%)	3	15
Total	17 (54%)	14 (46%)	4(11%)	34

Question 8: Do you think actions that have not resulted in harm because they were identified early (eg by regulatory action), but had the potential to do so, should be treated as less serious than the same actions where detection only happened after harm had arisen?

n=30	Yes	No	Did not answer	Total
Individual	11 (37%)	7 (23%)	1	19
Organisations	7 (23%)	5 (17%)	3	15
Total	18 (60%)	12 (40%)	4	34

Question 9: Do you think that when we make decisions we should consider the impact of an individual's conduct on clients or other parties, as well as the nature and scale of the offence?

N=28	Yes	No	Did not answer	Total
Individual	17 (61%)	0	2	19
Organisations	10 (36%)	1 (3%)	4	15
Total	27 (97%)	1 (3%)	6	34

Question 10: Should we view breaches as more serious where they involve vulnerable clients?

N=31	Yes	No	Did not answer	Total
Individual	16 (52%)	2 (6%)	0	19
Organisations	10 (32%)	3 (10%)	3	15
Total	26 (84%)	5 (16%)	3	34

Question 11: Should we distinguish between levels of vulnerability resulting from:

- **lack of legal knowledge or experience of legal services, and**
- **vulnerability arising from personal circumstances, including mental or physical ill-health or disability?**

N=31	Yes	No	Did not answer	Total
Individual	12 (39%)	7 (22%)	0	19
Organisations	7 (22%)	5 (16%)	3	15
Total	19 (61%)	12 (39%)	3	34

Question 12a: Are harm, intent and vulnerability the right factors for us to be taking into account?

N=29	Yes	No	Did not answer	Total
Individual	17 (59%)	1 (3%)	1	19
Organisations	7 (24%)	4 (14%)	4	15
Total	24 (83%)	5 (17%)	5	34

Question 12b: Are there any other factors you consider should be included?

N=28	Yes	No	Did not answer	Total
Individual	11 (39%)	6 (21%)	2	19
Organisations	7 (25%)	4 (14%)	4	15
Total	18 (64%)	10 (36%)	6	34

Question 13: We have focused on the professional principles set out in the Legal Services Act 2007. Do you think that we have covered the right issues and given clear examples?

N=27	Yes	No	Did not answer	Total
Individual	8 (30%)	10 (37%)	1	19
Organisations	6 (22%)	3 (11%)	6	15
Total	14 (52%)	13 (48%)	7	34