By email only

6 February 2014

LEGAL SERVICES BOARD

The Chief Executive's Office
Legal Services Board
3rd Floor
One Kemble Street
London WC2B 4AN

T 020 7271 0043
F 020 7271 0051

www.legalservicesboard.org.uk

Dear Sir/Madam,

FINAL response to SRA on proposal to increase amount of financial penalty for non-ABS

The LSB welcomes the opportunity to respond to the SRA's consultation paper on increasing its financial penalty powers for non-ABS firms (the level for ABS firms having already been set by Statutory Instrument[1]). We will shortly be publishing an assessment of the regulatory arrangements across all legal services regulators that sets out the problems and complexity in the current framework.

Our position was set out in response to the MoJ's request for views on this issue which we published in April 2012[2] (see Annex A). We consider that, of the maxima put forward by the SRA, the level of £100,000 is most consistent with the principles of better regulation, in particular the Macrory principles that sanctions should:

- Aim to change the behaviour of the offender;
- Aim to eliminate any financial gain or benefit from non-compliance;
- Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- Be proportionate to the nature of the offence and the harm caused;
- Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- Aim to deter future non-compliance

However, we would encourage the SRA and the MoJ to consider raising the maximum to a higher amount in order to ensure that it acts as a sufficient deterrent for the largest non-ABS firms. The deterrent effect must be sufficient to influence the behaviour of individuals and to punish systemic failings at an entity level. The annual turnover in 2013 for Allen and Overy was £1.189bn;[3] profits of £356m were available for division among partners. In 2012/13, Clifford Chance's global revenue was £1.271bn, with profits per equity partner of £1m.[4] Against such large numbers, we would

[1] SI 2011 No 1659
[2] http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/sra_non_abs_penalties_to_moj.pdf
[3] http://www.allenovery.com/SiteCollectionDocuments/AR2013/Annual%20Report%20and%20Financial%20Statements.pdf
[4] http://www.thelawyer.com/firms-and-the-bar/law-firms-international/clifford-chance-revenue-drops-25-per-cent-as-pep-slips-to-1m/3006986.article

question whether a maximum penalty of £100k is consistent with the Macrory principles. The fact that the SRA's figures show that, to 30 July 2013, the SDT only imposed one penalty over £20k and that the total associated costs orders were higher than the total penalties imposed by the SDT only adds to our concern that the current regulatory arrangements do not appear to be appropriately targeted or proportionate and seem unlikely to be a sufficient deterrent to Code breaches.

In addition, we would make the following points:

1. Our "Blueprint for reforming legal services regulation"[5] set out the case for simplification of the sanctions and appeals processes across legal services regulators. We consider that economies of scale and greater consistency of decisions could be achieved through rationalisation of the current sanctions and appeals arrangements. We consider that the First Tier Tribunal should be the single body for all appeals against regulatory decisions. We also consider that there should be a consistent approach across legal regulators, tribunal and appeal bodies that uses the civil standard of proof for all enforcement decisions/appeals. This would reduce cost, improve consistency, better protect the public and reduce the risks of regulatory arbitrage. A significant increase in the maximum penalty that the SRA could impose would have the important benefit of ensuring that the civil standard of proof is used in most cases where a penalty is imposed. This would ensure consistency for cases that the SRA investigates. We do not consider that the current position, where the SDT uses the criminal standard for penalties of £2001 upwards, is proportionate since it requires the SDT to be sure that a breach has occurred rather than considering it more likely than not that there has been a breach.

2. The SRA has made clear (in its comments after the Court of Appeal's finding that the SDT had been unduly lenient[6]) that it "do[es] not believe that substantial fining powers are a substitute for strike off when the risk to the public is substantial".[7] Under the current system, the ability to strike off rests only with the SDT. It is our understanding, therefore, that the SRA would continue to pursue the most serious cases at the SDT. However, it is essential that the SRA has the power to impose significant financial penalties for other breaches of regulatory requirements;

3. Through our work on improving the standards of the regulators, we will continue to focus on the cost and effectiveness of the SRA's (and other regulators') enforcement processes. This includes the time it takes to investigate alleged breaches of regulatory arrangements and the transparency of those processes. However, it is important to note that a significant period of time elapses between a case being referred to the SDT by the SRA and the actual hearing. The SDT's own statistics show that in 2012/13 on average only 55% of cases were determined

---

5 http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reforming_legal_services_regulation_final_09092013.pdf

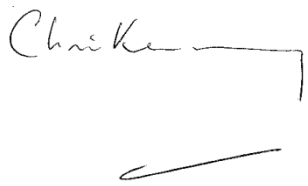
6 http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sra-v-dennison-judgment-03042012.pdf

7 http://www.sra.org.uk/sra/news/court-appeal-confirmation.page

(by substantive hearing or otherwise) within 6 months of proceedings being issued.[8] If the SRA had increased penalty 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.

4. Regulatory settlement agreements are similar to the concept of Enforceable Undertakings that were proposed in the Macrory Report.[9] They were proposed on the basis, amongst other things, that they can provide a quicker and more cost-effective mechanism for resolution of regulatory non-compliance than court proceedings. The SRA has told the LSB that even if it has agreed a regulatory settlement agreement with an entity or individual, case law means that, if the terms of the settlement differ from the type of sanction that the SRA has a statutory power to impose, then the SDT has to consider whether the terms of the settlement are acceptable. The LSB considers that this creates unwelcome regulatory uncertainty and is an unnecessary additional layer of bureaucracy in the enforcement process; if the SRA and those subject to the investigation are in agreement with the settlement, then there should be no need for it to have to be considered by the SDT. We therefore support in principle the need for the SRA to be able to settle investigations on whatever terms the parties agree without the need to refer them to the SDT. However, it seems unlikely that the Order-making power in section 44D of the Solicitors Act 1974 is an appropriate way for this to be implemented and we would be happy to discuss how to take this specific issue forward.

Yours faithfully



Chris Kenny
Chief Executive

E chris.kenny@legalservicesboard.org.uk

[8] http://www.solicitorstribunal.org.uk/Content/documents/Annual%20Report%202012-2013%20Revised.pdf p29
[9] http://www.berr.gov.uk/files/file44593.pdf paragraphs 4.17 – 4.31