

**Solicitors Regulation Authority
Proposal to increase the SRA's internal fining powers**



A response by the Association of Personal Injury Lawyers

February 2014

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer

APIL

3 Alder Court, Rennie Hogg Road

Nottingham NG2 1RX

Tel: 0115 958 0585; Fax: 0115 958 0885 E-mail: mail@apil.org.uk

Introduction

APIL welcomes the opportunity to respond to the Solicitors Regulation Authority (SRA)'s consultation on internal fining powers. We have consistently argued that the regulatory regime should be the same across the board for the delivery of the same services. We agree that steps should be taken to address the disparity between the SRA's fining powers concerning traditional firms and Alternative Business Structures (ABS'), and we believe that the correct approach is to link the fine to a percentage of annual turn-over.

This approach would achieve consistency and fairness for both ABS' and traditional firms. Fines that are proportionate to turnover would ensure fairness, as they would not just be a "drop in the ocean" for any large corporate organisation (regardless of whether it was an ABS or a traditional firm) – and at the same time would not be unduly harsh to medium and smaller sized firms (again, regardless of whether it was an ABS or traditional firm). APIL also agrees with the proposal that if firms wish to pay a higher fine to avoid the Solicitors Disciplinary Tribunal (SDT), then this should be permitted, subject to agreement between the SRA and the firm in question.

The need for scrutiny

Before allowing the SRA any increased fining powers there needs to be independent scrutiny of its existing powers, distribution of resources and its current approach to fining and broader powers. It is essential that there is consumer and professional confidence in any regulatory control.

In addition, the level of fines permitted needs very careful, objective and external analysis for a number of reasons. Firstly, there is a huge gulf between the fining regimes for ABS and solicitors firms at present, and to simply adopt the higher level fines without proper analysis could lead to solicitors firms facing disproportionate penalties. Further, a justification for the proposed introduction of increased fines is to avoid the costs and time involved in taking a case before the SDT. The SDT currently acts as an independent safeguard in issuing larger fines. If this safeguard is removed and the SRA is allowed to issue larger fines, then careful analysis must take place to ensure that misuse is avoided.

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

It is 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. This need is far greater than any possible improvement in efficiency.

If this analysis is carried out and the proposals are implemented, we agree that there are potential savings in terms of time and money to be gained, as there would be no need to involve the SDT in many cases. We do, however, believe that linking fines to a percentage of turn-over would achieve proportionality, consistency and fairness to a higher degree than if the SRA were simply allowed to issue greater fines for traditional firms. For example, even if the SRA's powers were increased to the proposed amount in this consultation document, this would still not achieve equality across the board, and there could still be issues with regulatory arbitrage. Similarly, if the SRA's fining powers for traditional firms were increased

to the same maximum level as for ABS', there would still be a potential for unfairness as firms could be exposed to disproportionate fines. The most effective way to ensure fairness, proportionality and consistency would be to introduce a proportionate fining system, which would apply equally to both ABS' and traditional firms.

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

To ensure full confidence in an increase in the SRA's fining powers, there should be a full and independent analysis into the SRA's exercise of existing powers. If it is decided that an increase should take place, steps must be taken to ensure independence in decision making. The need for substantial safeguards would be incredibly important, as cases would no longer be subject to the scrutiny of the SDT.

We are concerned that the steps taken by the SRA to ensure independence in decision making, as detailed in the consultation document, do not go far enough, and there should be further safeguards to ensure independence regarding fining powers. The higher the fine, the more senior the investigator or decision maker involved should be. These decision makers should be independent, and there should always be the ability to challenge and review the decision.

APIL believes that the points raised in relation to ABS' requiring higher penalties (paragraph 32 of the consultation document) are valid; however our suggestion to link fines with a proportion of turnover will ensure that all firms engaging in misconduct or breaching regulatory requirements, be they traditional or ABS, are fined appropriately. As pointed out in the consultation document, a number of traditional firms in England and Wales have global turnovers in excess of one million pounds, whilst many ABS' resemble small traditional firms in their turnover and structure. It would be far more just and effective to set fines according to turnover as opposed to the corporate nature of the firm in question.

Q3 We are keen to hear the views of our stakeholders on possible increases of:

Up to £10,000;

Up to £50,000;

Up to £100,000; or

Do you have views on any other potential increase bands?

Subject to our concerns above being addressed in the first instance, we believe that the fine should be a percentage of the annual turnover of the firm, as this would ensure proportionality, consistency and fairness. Fines will be effective, without being unnecessarily overbearing, and will ensure a level playing field across the whole of the legal sector.

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

The issues of concern summarised in our introduction must be addressed before there is any increase in the power to fine. Subject to this important caveat, we support the suggestion that the SRA should explore increasing its ability to agree higher fines so that it can agree the level of fine with a firm on a case by case basis. Working in this way will not in

our view lead to misuse, because if the firm does not agree to the fine, then the SRA will refer the matter to the SDT. This will be more efficient than the current process because even if there is agreement within the current regime, it is still necessary to go before the SDT, adding unnecessary cost and delay.

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

We are concerned that the current proposals in the paper do not produce fairness. As addressed in the consultation document, there is a misconception that all ABS' are large multi-million pound operations, yet this is not necessarily the case. Simply because you are registered as an ABS, meaning that there is a non-lawyer as an owner or manager within the company, does not necessarily mean that you are a large company with a turnover to match. The ABS structure simply provides a different model on which to build a business. The proposals in the paper risk producing an uneven playing field which would be unjust. Increasing fines to an arbitrary level of between £10,000 and £100,000 may still be an insignificant amount to larger traditional firms. Similarly, it is unfair that small ABS' could be open to largely disproportionate fines. The best way to ensure consistency and fairness would be to set fines as a percentage of turn-over across the board.

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

Increased fixed fines or brackets of fines that are not linked to turnover are likely to impact on small high street firms, or firms in rural communities. Whilst there is a need to standardise fines, which could either mean a reduction in fines for ABS's or an increase in fines for the largest traditional firms; smaller firms will feel the effects of a large fine much more keenly. If the fines are disproportionate, this could have devastating consequences for these small to medium sized firms, and for those communities which rely on them. This will therefore impact on access to justice, particularly in rural communities and other areas where smaller firms thrive. It is important that fines are proportionate so as to ensure that the impact is both effective and not unnecessarily overbearing.

- Ends -

Association of Personal Injury Lawyers

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
T: 0115 958 0585 W: www.apil.org.uk E: mail@apil.org.uk