Solicitors Regulation Authority

Financial Penalties Consultation responses

May 2022

These respondents asked us to publish their responses and their names:

Name	**Respondent Type**
Alina Mihaela Latagan	Other legal professional
Tim Bullimore	Member of the public
Barry Baines	Solicitor
Nami Honosutomo	Member of the public
Suzanna Eames	Law Society (Junior Lawyers Division)
Janet Abe	Birmingham Law Society
Ann Murphy	Liverpool Law Society
Karen Todner	Solicitor
Byron Jones	Cardiff and district Law Society
David Barton	Representative Group
City of London Law Society	CLLS
Sarah Chambers	CHAIR – Legal Service Consumer Panel
Melanie Knight	OPBAS*
Solicitors Disciplinary Tribunal	SDT
TheCityUK	TheCityUK
The Law Society	The Law Society

This document also includes responses from respondents who asked us to publish their responses anonymously.

***Office for Professional Body Anti-Money Laundering Supervision (OPBAS) requested that their response be published separately as an individual response, which can be found as an annex to this document.**

Financial penalties: Consultation paper

Response ID:36 Data

2. About you

1.
First name(s)

Alina Mihaela

2.
Last name

Iatagan

7.
In what personal capacity?

Other legal professional

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

Your principles are not enough, because your work depends a lot (too much!) on laws made in / by Parliament. More laws, more work for you- the money wheel- what this profession has become...Specifically immigration& criminal law- how much they seem to be related- almost anyone who's a ' foreigner' can be a criminal or has to go through way too many hoops& ' legal services'- mire money milking for the Home Office, it's never enough...

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

1. I don't know what tou mean by 'non-sexual harassment'.
2.You seem to diminish any responsibility- it's your responsibility (as an individual/person) how you behave. Maybe it should be dealt with in criminal courts, not the SDT, or both. Once a pig, always a pig. This only seems to happen to male lawyers, haven't heard of women harassing men.
There are MANY GREAT lawyers in the UK, and they're wonderful, but their personal lives are a mess& their colleagues suffer because of it. Financial penalty is NOT enough. What dies it take to learn to behave like a civilized person? That should give tou the answer for penalties.
This form hasn't been written by a lawyer- it's way too messy for such a bright mind. You put forms if harassement & discrimination together...
More on the next page

12.

3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Yes, not ONLY you mean.
Forcing your employees to make money on people's backs, conducting lengthy litigation for more money. That might have to do with how much lawyers are paid (I'm not sure on this one). Firms always seem to want more, and more.

13.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Such as?

14.
5) Do you have any comments on the proposed criteria and process?

These questions are too vague & general- you need to redo it.

15.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

Each case on its merits.

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16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

This money should go to people who were wronged, not 1 penny should stay with you. Those judging them should not be from the SRA, judging by past experience & very, very lengthy, useless Handbooks, you're not the nicest bunch.

17.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

I don't agree on any fixed penalties.
Some people could die because of that harassement/ bullying etc. What's your price for a life in percentages?

18.
9) Do you agree that we should take into account individual means when determining a financial penalty?

It depends on where you assign responsibility (individual, corporate = criminal, commercial...) You know, the usual. You should take into account the value of what you loose in YOUR profession- valuable people, who make a difference. Your previous standards, professional standards!

19.
10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

1.An 'individual ' will never match a corporation's means. Fixing it with money isn't just enough sometimes. A life destroyed can't be sometimes recovered.
That's where the imbalance is, everyone seems to think that money solves everything. It doesn't. JUSTICE does- and that means much , much more than money.
2. 10 million pounds can mean a lifetime of financial security for a person, and a peanut to the corporation. NO, justice repays debts in the same way- they should go through the same torment they inflicted on innocent people. Two wrongs don't make it right, but the lesson will never be learnt otherwise.
3.Oh, and let's not forget information asymmetry. It's not written down in Human Rights law- that's how the money wheel works, isn't it? This should change, and rapidly.

20.
11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to

the level of £25k?

I'm not sure that means. Who wrote this shit?!

21.
12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

Different groups?!
I think your understanding is wide enough, one hand helps the other... sadly.

Financial penalties: Consultation paper

Response ID:40 Data

2. About you

1.
First name(s)

tim

2.
Last name

bullimore

7.
In what personal capacity?

Member of the public

8.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

9.
1) Do you agree that these principles should govern our approach?

No. The SRA's approach is prescribed by sections 1 and 28 of the Legal Services Act 2007. Those sections lay down the regulatory objectives. The regulatory objectives are not referred to anywhere in the consultation paper. They may be reflected in the principles to which the SRA refers, but the consultation paper should have referred expressly to the regulatory objectives and explained how its proposals accord with those objectives.

10.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

No. It is not clear (i) why the SRA regards certain categories of behaviour as suited to financial penalties and other categories of behaviour as unsuited to financial penalties or (ii) how such a distinction is consistent with the regulatory objectives. Each case must be treated on its own facts and merits. The paper contains no clear definition of "sexual misconduct" or "non-sexual harassment". These offences could range from very minor incidents to incidents of the utmost seriousness. The papers does not recognise that.

Further, the paper contains no discussion of the Divisional Court's decision in SRA v Beckwith, in which the Court explained to the SRA that not every incident involving sexualised behaviour amounts to a disciplinary offence. The paper's failure to mention the Beckwith decision is troubling.

11.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

See answer to Q2 above. Every case must be treated on its own facts and merits. It is not correct to seek to force certain types of allegations into certain boxes. Apart from anything else, such an approach is liable to be challenged on the basis that it is unlawful as involving an over-rigid policy.

12.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

No. Indicative guidelines/brackets could be introduced for very minor disciplinary offences, but there should still be flexibility to reflect the particular aggravating/mitigating factors in each case.

13.

5) Do you have any comments on the proposed criteria and process?

See answer to Q4 above. Any approach of this kind would be suitable only for very minor offences in which no third party has suffered any loss.

14.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

Not more than £2,000 in any case. Any case which merits a penalty above that should be for the SDT to decide.

15. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

This assumes that the firm (not an individual solicitor) is the respondent or that the firm will pay the fine imposed upon an individual solicitor. The paper does not explain how the SRA decides whether to pursue the individual solicitor or the firm (or both).

It also appears to assume that turnover is the same as disposable profit, which is not correct.

16.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No, because there is no clear reason for adopting 5% rather than adopting any other percentage.

17.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes, where the respondent is an individual and the SRA is sure that the penalty will not be paid by his/her firm.

18.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

See above - who is actually going to pay the fine? The individual or his/her firm?

19.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

No.

20.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

It is impossible to assess any impacts without more information about (i) the sex/ethnicity of those upon whom fines are imposed and (ii) whether fines are actually paid. The consultation papers fails to address these points. A freedom of information request which I submitted to HM Treasury indicates that (i) a significant proportion of fines imposed by the SDT are never paid and (ii) there is no mechanism for the Treasury to report to the SRA/SDT on the (non-)payment of fines imposed by the SDT. Without more information about such matters, it is impossible to know whether fines are effective and what deterrent value they have. The case for increasing the SRA's fining powers is not adequately evidenced in the consultation paper and is thus not made out. See:

https://www.whatdotheyknow.com/request/sdt_fines#incoming-1942142

https://www.whatdotheyknow.com/request/fines_imposed_by_the_sdt_and_pay#outgoing-1253545

There is also a further question (which, again, the paper does not address) about the impact of the proposals upon the SDT. Any significant increase in the SRA's fining powers will reduce the amount of cases referred to the SDT. The sparse nature of the SRA's listings - and the high number of agreed outcomes - already suggests that the SDT does not have enough cases to fill its days or justify its budget. Part of the aim of increasing the SRA's fining powers appears to be to take/keep cases away from the SDT.

Financial penalties: Consultation paper

Response ID:44 Data

2. About you

1.
First name(s)

Barry

2.
Last name

Baines

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

n/a

10.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

11.
1) Do you agree that these principles should govern our approach?

Yes

12.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Yes

13.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Not at this stage

14.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Subject to further consultation

15.
5) Do you have any comments on the proposed criteria and process?

No

16.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

No

17. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes

18.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

Yes, there has to be a minimum level of penalty

19.
9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes

20.
10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

No

21.
11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes, the present fining powers are woefully inadequate, and the ability to levy higher fines may shorten investigations in that the defence may more willingly negotiate.

22.
12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

No

Financial penalties: Consultation paper

Response ID:63 Data

2. About you

1.
First name(s)

Nami

2.
Last name

Honosutomo

7.
In what personal capacity?

Member of the public

8.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

9.
1) Do you agree that these principles should govern our approach?

Yes

10.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Yes

11.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Lying (deliberately) to cover up mistakes in house

12.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes

13.
5) Do you have any comments on the proposed criteria and process?

14.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

15. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes

16.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

Yes

17.
9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes

18.
10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

19.
11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes

20.
12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

Financial penalties: Consultation paper

Response ID:85 Data

2. About you

1.
First name(s)

Suzanna

2.
Last name

Eames

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

The Junior Lawyers Division

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

Yes, the Junior Lawyers Division agrees the principles as set out in the consultation.

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

It is agreed that sexual misconduct, discrimination, and non-sexual harassment are not appropriate for financial penalties. Stronger measures are required to maintain public confidence in the legal system in light of the nature of the misconduct and its impact, and because of the potential risk to the public. It is also agreed that damage to the claimant should not be quantified by relation to a financial penalty, as this has the effect of putting a price on conduct which makes the victim feel as though this is 'their worth'. Trying to quantify this behaviour also has the negative impact that senior people in positions of power may be able to 'buy' their way of our allegations of this nature.

The general approach of more financial penalties for other offences (as a result of larger powers for the SRA) will mean that the SDT is freed up to appropriately and effectively handle these cases.

The consultation refers to 'a moment of madness' as a mitigating circumstance. This is not probably defined and there is a real concern that this will be used to excuse behaviour which should be penalised. Should this exception be included, there should be sufficient wording to demonstrate that this was only for truly exceptional circumstances. It should not just relate to a first incident.

12.

3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Serious cases of dishonesty may also demonstrate an underlying attitude which demonstrates a risk to the public and may be incompatible with continued unrestricted rights to practice.

13.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes, the Junior Lawyers Division agrees that the SRA should introduce fixed penalties for certain less serious breaches.

14.

5) Do you have any comments on the proposed criteria and process?

The illustrative examples which are set out in the consultation relate to lack of compliance and/or administrative failings. Those areas are going to be handled by the firm at an operational level so to target specific individuals appears to be inappropriate when the root cause of such non-compliance is likely to stem from the firm's process/practice rather than some individual failing. It is therefore not clear that fixed penalties for these breaches are appropriate against individuals unless they are sole practitioners.

15.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

N.A

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes, the financial penalty needs to be a notable deterrence. Looking at various comparables (such as the FCA, and looking at the GDPR context), the band levels must be much higher. £50,000 is clearly too low, considering the increasing revenues of law firms.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

5% seems reasonable. The JLD query whether this can be extended to international turnover rather than domestic turnover, given that the top firms often view their turnover globally. Again, the precedent referred to is the ICO/GDPR.

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes. The consultation rightfully notes the disparity in pay for trainees as one example, but of course there are many more examples of disparity which should be taken into account. Any fines for individuals should involve a consideration of the individual's personal financial circumstances. This will ensure that they still act as a credible deterrent for all solicitors, but while still being proportionate and fair.

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

Ideally, both gross income and net worth would be considered, as both are relevant to the level of fine which would be

appropriate.

In terms of the timing, gross income from the time of the misconduct appears to be appropriate.

The opportunity for individuals to apply for the financial penalty to be reduced if they are of low means should be maintained.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes. This would free up the SDT for more serious cases as detailed above, and reduce the length of time for an average case which can stretch years, effectively pausing the person's career for what could be considered 'straightforward' claims. This would also be likely to reduce the amount of fees which are incurred in defending claims, which often cannot be recouped even if the defendant is successful.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

While junior lawyers may be currently underrepresented (based off age categories, albeit 'junior' lawyers refers to those who are 5 PQE and below and therefore this is not a strict correlation), they are more affected by the current regime. This is because junior lawyers often do not have the financial resources with which to challenge SDT claims, and are often not covered by firm's insurance when faced with a claim. For this reason, the JLD welcomes the increase in powers for the SRA, and the measures suggested for financial measures to be means related.

In addition, it is often junior lawyers who are targeted when considering harassment (sexual and non-sexual), bullying and discrimination. The Junior Lawyers Division welcomes this stronger stance from the SDT and hope that this sends a clear message across the profession that these actions are not appropriate and will not be tolerated.

Financial penalties: Consultation paper

Response ID:98 Data

2. About you

1.
First name(s)

Janet

2.
Last name

Abe

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

Birmingham Law Society

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

By way of background, the £2000 fine limit is contained at Section 44D of the Solicitors Act 1974. It was introduced by the Legal Services Act 2007 and came into effect on 31 March 2009. It applies to individual solicitors and traditional law firms.
By contrast, the SRA has the power under the Legal Services Act 2007 to fine alternative business structures up to £250m and individuals working in them up to £50m.
The SRA first attempted to increase its fining powers in 2012 when it proposed an increase for individual solicitors and traditional law firms from £2000 to £250m. This was rejected by the Ministry of Justice.
The SRA tried again in 2014 when it suggested an increase to £10,000; £50,000 or £100,000. This attempt also petered out.
As to the response to Q1 above, the SRA lists five principles in support of its approach - as bullet points under the heading "Our approach" on page 9 of the consultation paper.
We agree the principles listed as bullet points 1; 2 and 5. These are very general and uncontroversial.
We do not accept the principle contained at bullet point 3 which states as follows:
Our sanctions guidance should be focused on different types of behaviours. Certain types of behaviour should not normally attract a fine, where more serious sanctions or controls are required to ensure public confidence or protect against risk.
Birmingham Law Society does not accept the premise that the SRA should be permitted to select certain types of misconduct as not being suitable for a financial penalty. The SDT and ultimately the Administrative Court should be given the freedom to judge each case on its facts without any pre-determined ruling by the SRA on what is and what is not "serious misconduct" and

thereby unsuitable for a financial penalty. That is a job for the SDT and/or the Administrative Court. We address this point more fully later in this response.
We are also not convinced by the principle at bullet point 4 which states as follows:
We want to enhance our ability to make decisions on straightforward, and agreed, cases by increasing the threshold at which we can fine solicitors and traditional law firms
The SRA already has the ability to impose fines of £2000 on "straightforward" and/or "agreed" cases. A fine of £25,000 would not be appropriate on a "straightforward" and/or "agreed" case. It would only be justified on a more serious case which is unlikely to be agreed. We expand this point more fully below.

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

We do not agree with this assertion.

We consider that each case should be judged individually and on its own facts. Whilst there will be cases that are unsuitable for a financial penalty, not all such cases will fall into this category. It is not for the SRA to prejudge whether these cases are more or less serious than other cases and to predict in advance the sanction that should be applied by the SDT. These are the most difficult cases to prosecute for a variety of reasons. Complainants are often reluctant to become involved. Evidentially, it is often the word of the complainant against the word of the solicitor. Often, other jurisdictions are better placed to determine these cases – such as Employment Tribunals and/or the criminal courts.

Also, in trying to set down rules for such cases the SRA needs to pay heed to the judgment in Ryan Beckwith v SRA [2020] EWHC 3231 (Admin). There is a tightrope between conduct in private and in professional life here which the SRA has understandably found difficult to navigate.

Under the heading of sexual misconduct, the impetus for the SRA's proposals for a separate sanction regime appears to have been derived from the media coverage of this topic rather than anything more considered or scientific. For a professional regulator to seek to tie the hands of the SDT in this way based upon press articles is disappointing to say the least. As Dame Victoria Sharp said in Beckwith v SRA "Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit."

As regards the SRA's reliance upon the approach taken by the disciplinary and regulatory arms of the Bar, the Bar Standards Board has (since the publication of the SRA consultation) been severely criticised by the Legal Services Board on the basis that it lacked capability, capacity and resources – see link
https://www.legalfutures.co.uk/latest-news/bar-standards-board-lacks-capability-capacity-and-resources
We are not convinced that the approach of the Bar to these matters should be relied upon by the SRA as justification for change.

Whilst we appreciate that this is a consultation seeking the views of stakeholders, the SRA as one of the most important professional regulators should look to hard evidence as justification for change not what seems to be a knee jerk reaction to the media – see reference to "much debate in the media" (top of page 11). Debate in the media is not a substitute for a considered approach based on evidence.

Under the heading "Discrimination and non-sexual harassment", the SRA claims that these cases are also unsuitable for a financial penalty. The usual jurisdiction for such cases is the Employment Tribunal and/or the civil courts. In both cases the remedy is a financial one. Why the SRA considers that financial penalties are unsuitable for discrimination and/or non-sexual harassment is not clear when it works well in other jurisdictions.

In summary, a financial penalty is just one of the various sanctions available to the SDT. Nothing more nothing less. The SRA should not be permitted to fetter the discretion of the SDT which is a wholly independent judicial tribunal. In addition, the penalty for these cases does not need to be linked to the breach in the way proposed by the SRA. A regulator does not need to apply a "a financial quantity to the harm caused".

12.

3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

No

13.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

We agree that this could be a sensible proposition but before proceeding further, the SRA should collate historic data on the types of these cases and the financial penalties applied – for example the number of cases in the last 5 years for breach of failure to submit accountants' reports and the amount of the fines applied. If, as we suspect there are very few of these type of cases then the SRA may wish to reconsider its approach and decide whether it is worth introducing a new system for very few cases.

Subject to the above, the SRA should then prepare a list of the breaches to which fixed penalties should be applied. The list should be confined to minor administrative breaches. Under no circumstances should fixed term penalties be applied to breach of the SRA Principles and/or to any of the rules contained in the Codes of Conduct which are not prescriptive and are subject to interpretation/subjectivity and are therefore inappropriate for fixed penalties.

A further discrete consultation could then take place before fixed penalties are introduced.

14.

5) Do you have any comments on the proposed criteria and process?

No

15.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

We agree with the proposals on the level of fine. The key criterion is the list of breaches suitable for a fixed penalty. If that is fair and confined to rules-based minor administrative breaches the profession is likely to accept the imposition of fixed penalties.

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

We find this section of the consultation to be rather muddled. The proposals to introduce turnover based assessment could only apply whilst the maximum fining limit remains at £2000 to Alternative Business Structures ("ABSs"). This is not made clear in this part of the paper. It would be a total waste of time and energy to even attempt to allocate a proportion of a £2000 fine to turnover as things presently stand.

The SRA states that the present fining framework does not deliver "credible deterrence" and that fines at the top end of the market appear disproportionately low. Very few large firms appear before the SDT and of those that do significant fines are imposed by the SDT (for example £250,000 for White & Case in 2017).

In seeking to justify these proposals, the SRA refers to the top 100 law firms and their revenue of between £30m and £2.1bn and also to comparisons with other regulators for example the Financial Conduct Authority fining Goldman Sachs £97m. The financial success or otherwise of the top 100 law firms at £30m to £2.1bn is almost irrelevant because they represent such a tiny proportion of the firms which appear before the SDT. The majority of firms which appear before the SDT are small firms of 4 partners or less of which there are over 8,000. Also, even these large firms would only be affected under the present regime if they were also ABSs.

Before proceeding further, we would suggest that the SRA provides evidence on the number of ABSs regulated by the SRA and which would likely to be affected by these proposals. The number of ABSs which remotely resemble Goldman Sachs is tiny. Most are small businesses who have taken the opportunity to add non solicitors to the business.

Further, we are wholly against the proposed link between turnover and financial penalty. The turnover of a firm usually bears no relation to the amount of profit. It is only profit which would be relevant to this type of financial assessment.

We also consider that the proposals are unnecessarily complicated, more akin to actuarial tables than sentencing guidelines.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial

penalties across the different levels of seriousness at 5%?

No

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

We do not understand why this is included as a new proposal. We agree that individual means should be taken into account when determining a financial penalty but this is a factor which is already taken into account currently. It is not a change. The SRA's present system is to send to persons or firms subject to an investigation a 3-page statement of financial means questionnaire when the SRA recommends a financial penalty via the adjudication process. The SRA suggests that the statement of means is completed and returned so that the financial means can be taken into account.

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

No specific comment except that the SRA should beware of basing current fines on past income for the previous completed year. Often individuals and firms are subjected to financial ruin as a result of an SRA's investigation and so previous financial information is of no relevance to the current state of affairs. Individuals are usually dismissed and cannot secure employment until the SRA investigation is completed. The SRA has provided in this consultation a figure of 458 days for completion of the most straightforward investigation (and most will be much longer) so this time lapse needs to be considered. Similarly, the SRA has referred to the fine being based upon the income related to the employment in which the misconduct occurred in the first place. We disagree with this proposal. The fine should be judged upon the financial position of the individual when the fine is applied not at some earlier imaginary point in time.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

We are concerned that the consultation paper sets out a very misleading impression of the justification for the increase in fining powers. We remain unconvinced by the SRA's arguments even more so than in 2014.
Since similar proposals were rejected in 2014, there have been certain changes to the regulatory landscape which are relevant to the SRA being allowed internal fining powers up to £25,000 and which include:
1. The SRA Principles & Codes of Conduct 2019 are shorter and not rules based. Many breaches are based upon the SRA's subjective interpretation of what is and what is not professional misconduct. As a result, very few cases are "straightforward". There is argument to be made on both sides. The risk here is that firms will accept the SRA's view of the case and submit to a fine merely on the basis of cost not on the basis of any arguments or mitigation that they might justifiably have; and

2. The profession has lost trust in the SRA and its enforcement team Examples of high-profile failures include Leigh Day; Ryan Beckwith; Ellen and Ahmud.

3. Concerns have been expressed in the media about the competence of the SRA's enforcement team – for example - see the Law Society Gazette article - Can the SRA be trusted with extra powers? https://www.lawgazette.co.uk/commentary-and-opinion/can-the-sra-be-trusted-with-extra-powers/5110954.article

4. The SRA now relies upon a single law firm for independent legal advice.
Whilst we can see an argument for a modest increase in its internal fining powers to say £10,000 purely and simply on the basis of inflation (the £2000 fining limit having been put in place on 31 March 2009 by the Legal Services Act 2007) the arguments relied upon by the SRA in its consultation for an increase to £25,000 are weak if not misleading.
The SRA seeks to justify an increase by relying upon unsound comparisons. It states that the average length of time for a case to be concluded before the SDT in 2020 was 960 days – over two and a half years.. It then states that the average length of time for cases concluded by the SRA internally with a fine in 2021 was 458 days.
The SDT itself will no doubt challenge the impression which the SRA seeks to give i.e., that the SDT is a time-consuming

process and causes delay. In truth, once proceedings are issued in the SDT by the SRA, they are concluded within an average of 6 months.

The SRA itself is responsible for the time taken to issue proceedings in the SDT. Of the figure of 960 days or two and a half years the SRA on average bears responsibility for the first two years. Once the proceedings are issued, the case is subject to strict time limits and moves fairly quickly within the SDT. It is the SRA that is generally responsible for delay not the SDT.

Further, the SRA's description of Agreed Outcomes suggests that firms agree readily to whatever is suggested by the SRA as to admitted allegations and fines and that this could be achieved without referral to the SDT. Nothing could be further from reality. In many cases, the specific allegations and the financial penalty are hotly contested and negotiated between the SRA and firms under investigation before an Agreed Outcome is submitted to the SDT. Within this process, the SRA is curtailed by the thought of having to justify its position to the SDT. This process provides a strict control on the SRA in only presenting to the SDT the allegations and sanctions which it considers will be approved by the independent tribunal. Without this check and balance there is a risk that allegations will be admitted and fines agreed which would not be approved by the SDT.

We regard an increase from £2000 to £25,000 to be too much of an increase in one move bearing in mind the issues mentioned above. A more nuanced move would be preferred – for example to £10,000.

At risk of duplication, the subjective nature of the current Principles and Codes of Conduct needs to be borne in mind. The majority of investigations are brought on the basis of breaches of Principles not on the basis of the breach of prescriptive rules. With a few exceptions such as dishonesty, every other alleged breach of the Principles is subject to disagreement on the part of the person under investigation. Unless the case is determined by the SDT and/or the Administrative Court there is no independent arbiter of what is and what is not misconduct. The SDT is trusted because it is comprised of practising solicitors who are independent of the SRA and have knowledge of the profession. Neither of those attributes can necessarily be found within the SRA.

Further, the SRA has not included any detail in the consultation paper as to who will be responsible for adjudicating if its proposed fining powers are increased to £25,000. The current system is that a complaint is made to the SRA. It is then investigated by an SRA investigation officer who is a full-time employee of the SRA. That same Investigation Officer prepares a Notice and supporting papers recommending a financial penalty. The Notice and the evidence with comments from the person or firm under investigation are then submitted to an SRA Adjudicator.

The SRA Adjudicator is an employee of the SRA. Some of these are full time some are part time. There was a time when the names and qualifications were set out transparently on the SRA website. This is no longer the case. There is therefore a lack of openness and transparency about the process which is unhelpful to the SRA maintaining the trust of the profession.

The investigation and then the quasi-judicial adjudication process would under these proposals be undertaken by employees of the SRA. As this Society stated in 2014, the SRA would be acting as investigator, prosecutor, judge and jury in its own interest in imposing these more significant fines. One of the most important principles of natural justice is that no-one is judge in his own cause – Nemo judex in causa sua – or no person can judge a case in which they have an interest. This is a principle which appears to be unimportant to the SRA.

We would be hard pushed to describe the process as independent and impartial. Whilst the fines remain at £2000, the harm that the SRA and its Adjudicators can inflict is limited but should the fining powers be increased to £25,000 then it is a massive jump and one which would be unwelcome to the profession and would further damage its relationship with the profession. An incremental increase to £10,000 would be a preferable option. Data could then be collected for consultation before any attempt is made to increase to a higher level in the future.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

We are aware that the SRA holds research data that demonstrates that black and ethnic minority lawyers are disproportionately represented within the SRA regulatory and disciplinary investigations and outcomes. If the SRA's fining powers were increased to £25,000, we anticipate that such a step would in turn have a disproportionate effect on those groups of solicitors.

Financial penalties: Consultation paper

Response ID:110 Data

2. About you

1.
First name(s)

Ann

2.
Last name

Murphy

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

Liverpool Law Society

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

Yes. However, an additional principle should be the need to provide certainty as the likely penalty that could be imposed.

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

LLS does not agree with this statement. LLS is concerned about the proposed approach, given that the range of offences falling within these categories of conduct will vary enormously in terms of the nature of the offending conduct and its severity. Not all cases will justify the threat to the individual's livelihood occasioned by imposing conditions on a practising certificate/suspension/striking off. LLS considers that there ought to remain a residual discretion to impose a financial penalty in these circumstances.

LLS notes the SRA's view that a rebuke may be more appropriate than a financial penalty where the incident was totally out of character or a one-off "moment of madness". Further, that the SRA's view is underpinned by the reasoning that a financial quantity cannot be applied to the harm caused. Given that any fine would be punitive rather than compensatory, LLS does not accept that this point militates against retaining some residual discretion to fine solicitors in these circumstances.

LLS is also concerned about the ability to impose proportion sanctions if fining is removed as a possible sanction in this category of cases. The Investigating Officer would be faced with stark alternatives- a warning or rebuke or suspension or striking off.

12.

3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

LLS considers that any offence involving dishonesty is not suitable for a financial penalty but understand that reflects the current position in any event. Also, misappropriation of client money falling short of dishonesty, as any breach of the absolute obligation to safeguard client money, is extremely serious.

13.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes.

14.

5) Do you have any comments on the proposed criteria and process?

LLS notes that the process includes an opportunity for the relevant person to remedy the breach. LLS considers it important that any timescale given is realistic, in view of the specific corrective action required. Clearly, this will vary on a case by case basis, so LLS would not be in favour of a fixed period of, say, seven days, in all cases.

LLS notes that "..there would be a right to request a review of the issuing of the fixed penalty and the level of the fine imposed..". LLS would like to understand more about the procedure that will be adopted for such reviews and what timescales the SRA will commit to in that regard.

15.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

Given that the fixed penalty regime would not include allowance for financial means, LLS consider that a more appropriate level of fine for a first offence would be £300.

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

LLS is not opposed to this in principle but it is unconvinced that sufficient research has been done to support the figures suggested.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

LLS does not agree with this proposal for the following reasons:

LLS is unconvinced that some of the regulators listed in Annex 1 of the consultation are suitable comparators, when considering whether a maximum penalty of 5% of turnover ought to be applied to law firms. The type of companies regulated by the Water Services Regulation Authority and the Gas and Electric Markets Authority might well have very different overheads and profit margins to the traditional law firm. More context ought to have been given about the types of breaches that have attracted fines of 3.5% of turnover (in the case of OFWAT), especially given that failures of energy/water companies have the potential to cause personal injury and death,

The SRA's proposal appears to be driven by the need for credible deterrence and bolstering public confidence in the regulatory regime. However, the consultation paper does not consider the running costs and/or profit margins of the traditional law firm in arriving at this figure. LLS considers this an integral part of determining what a 'credible deterrent' looks like.

LLS considers that much more research is needed as to how the proposed fining structure could affect the provision of legal services and the likelihood of it leading to disorderly/distressed firm closures etc.

LLS notes that, if the SRA decides to proceed with its proposal, it would review its Indicative Finance Guidance to ensure that its approach is clearly set out. LLS considers that draft guidance ought to have been annexed to the consultation paper, to assist respondents in understanding exactly what is proposed.

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes.

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

For administrative ease and to reduce delay, LLS considers that net income from the previous tax year is a good starting point. However, the process ought to allow solicitors to submit a statement of means to contend for a lower penalty than would be the norm. This should enable people who are of low means because of child support payments etc to have that taken into account.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

N/A

Financial penalties: Consultation paper

Response ID:116 Data

2. About you

1.
First name(s)

karen

2.
Last name

todner

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

Karen Todner Limited

10.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

11.
1) Do you agree that these principles should govern our approach?

You should not have any inhouse decision making powers. All decision making should be exercised by independent decision makers who are not employed at the SRA and are not involved in the investigation process - see evidence given at the SDT of Stephen Rowe, Head of legal and enforcement at the SRA, on the 16th November 2021

12.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

I don't think you should prosecute any sexual misconduct outside the work place. Financial penalties may be adequate.

13.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

No all cases should be considered on the facts and on the merits and no decision should be made by the SRA employees involved in the same investigations.

14.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

No all cases should be considered on facts and merits

15.

5) Do you have any comments on the proposed criteria and process?

Fines should not be attributed according to means and should not be imposed by the SRA. Until the SRA has a fair adjudication process in place they should not be allowed to impose any penalties upon firms or individuals.

16.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

No

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17. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

No the SRA re already ridiculously heavy handed with the profession. They should not be allowed to financially cripple firms when they are not transparent or fair in their own processes.

18.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No I don't think turnover should be a factor

19.

9) Do you agree that we should take into account individual means when determining a financial penalty?

No

20.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

No the SRA are intrusive enough as it is without having to disclose income to them

---

21.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

No the processes at the SRA are at present unlawful and demonstrate bias. Until the functions of investigation and decision making are entirely separate, the SRA should not have any powers at all!

22.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

Yes you need to overhaul your own processes to ensure fairness, independence and transparency, until you do so you cannot function properly as a Regulator.

Financial penalties: Consultation paper

Response ID:122 Data

2. About you

1.
First name(s)

Byron

2.
Last name

Jones

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

Cardiff and District Law Society

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

We agree that the fining framework should be transparent, proportionate and effective. We support the introduction of fixed penalties as we consider they will help meet these goals. Our main concern is on the proportionality of turnover based fines, having regard to the financial viability of law firms and the problems with limiting access to justice if firms are forced out of the market.
We do not think that law firms can be equated with many other commercial organisations in this regard, as often a fine is the only effective penalty for other commercial organisations, whereas the SRA is able to discipline the individual solicitors within a law firm, including seeking an order for suspension or striking off. Those sanctions also have a material effect on a solicitor's finances. As those other sanctions act as effective deterrents to solicitors running law firms, there is arguably not the need for turnover based fines of the magnitude proposed by the SRA.
Subject to provisos, we support the proposal to raise the level of fine which the SRA can impose without needing to take a case to the Solicitors Disciplinary Tribunal. We welcome the greater tailoring of fines in line with the means of individuals. However, we have significant concerns about fine inflation should the SRA's fining limits be increased. We also agree that fines are not necessarily appropriate sanctions in cases of sexual misconduct, discrimination and harassment, but do not think that fines should be precluded in these cases.

11.

2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Whilst we agree that there are obviously cases that are not suitable for a financial penalty, we feel it would be wrong to indicate that a particular type of case is not suitable for a financial penalty. It is our view that each case should be dealt with on a case by case basis rather than a "one size fits all" penalty being imposed.

There are many factors which can affect a sanction being imposed and the categories of case where it is suggested that they would not be suitable for a financial penalty to be imposed are themselves extremely broad and can encompass both very serious and less serious types of misconduct. By way of example, each of the categories described can bring about criminal prosecution or sanction which would tend to suggest more serious misconduct but that in itself is not necessarily accurate. The imposition of sanctions for misconduct is a detailed and considered task and includes considerable analysis by many of the parties involved. We feel it would be wrong to tie the hands of the relevant decision makers (whether within the SRA or SDT) to preclude the imposition of a financial penalty from their deliberations. It is noted with regret that the case examples described within the consultation do not accurately reflect the detailed factors that may well have been considered when imposing certain penalties.

It seems to us that there is no requirement to make specific guidance that certain types of behaviour are not suitable for financial penalty. If the misconduct involved an offence of sexual assault or serious discrimination, it would in all likelihood never be considered for a financial penalty and would likely be referred to the SDT for consideration of a more severe sanction. It is noted that there would be other cases that would fall within the definitions set out which could be considered for a "less severe penalty". For example, the solicitor who following the breakdown of their marriage sends flowers and unwanted messages to their former spouse. They have potentially harassed their former spouse. It would be erroneous to indicate that the solicitor in question should be given a more severe penalty (especially where other factors may well be present such as mental health issues or otherwise).

Also, the SRA's consultation paper focusses on fines for individuals for certain behaviours, but the SRA can fine regulated firms as well as individuals. There may be instances where a firm bears responsibility for the culture, environment and working conditions within which the individual's behaviour has occurred, and a fine may be the only option to discipline the firm.

Lastly, excluding fines and imposing minimum penalties in cases of sexual misconduct may have unintended consequences and cause harm to victims. If the matter has to be dealt with by way of suspension or strike off, it will have to be dealt with in the Tribunal, causing maximum publicity. It could also lead to more denials and contested hearings.

12.

3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Given the reasons set out above, we would not agree that there are other types of conduct which are not suitable for a financial penalty. We would reiterate that each case should be determined on its own particular facts having regard to all the relevant issues.

13.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes. We think there are benefits from introducing fixed penalties for less serious breaches. Fixed penalties will mean quicker determination of matters and should reduce the costs of dealing with the matter, for both the solicitor and the regulator. The proposal aids transparency, in that it will be clearer what sort of penalty will be imposed for certain breaches.

14.

5) Do you have any comments on the proposed criteria and process?

We welcome a process whereby a solicitor is given time to rectify a basic administrative error before any fixed penalty is imposed. We would hope that any timescales set for rectifying errors take account of the very busy professional lives of most solicitors.

15.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

We are concerned about the suggested level of first time fixed penalty. Whilst a fine of £800 may be seen as affordable by

senior members of the profession, it is a substantial (and potentially unaffordable) amount for someone more junior. We should like to see some allowance for this in any fixed penalty framework. Having said that, if a solicitor is given a reasonable time to rectify an error, and if a fine is not imposed if an error is rectified, this point becomes less of an issue.

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes, we agree with the proposal to base the maximum fine on a firm's turnover but have some concerns with this method of calculating fines on firms. Specifically, this method does not take into account the profitability of a firm, and we are of the view that the SRA should set guidance for its decision makers to enable profitability and other relevant factors to be taken into account in setting the level of fee. In the experience of one of our members in representing ABS's, the SRA seem to apply the percentage of turnover regardless of consideration of profit and affordability.

The policy of taking into account the last recorded turnover can also lead to unfairness. One of our members had an instance recently where a client firm's turnover in the previous year was much higher than the current year due to an anomaly. Despite evidence from the firm's accountant to support this, the drop in turnover was not recognised by the SRA's decision makers in setting the fine.

Accordingly, although we do not disagree with the premise of using turnover as a starting point, we consider that other factors should be taken into consideration, such as profitability and affordability of any fine. (It is noteworthy that one of the SRA's concerns with retaining post six year run off cover in the Solicitors Indemnity Fund was that the modest levy on firms and/or solicitors would be passed on to clients in the form of higher fees. Any firm having a very large fine may well pass the cost of that fine onto their clients through the setting of higher fees.)

Lastly, one rationale for the existing fines based on turnover of larger firms is that such a fine is seen as an effective deterrent for such a firm. However, small firms already have an effective deterrent through the threat of suspension or striking off. There is thus less (or perhaps no) need for another deterrent, in the form of large turnover based fines for small firms.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No, we do not agree, because the turnover of a firm may not reflect its profitability. Five percent of a firm's turnover will represent a much greater proportion of its profits for the year. Taking 5% of a firm's turnover may seriously erode a firm's profits to the point that it will be forced out of business. This is likely to impact small firms in particular, perhaps exacerbating advice deserts and affecting access to justice.

Even with larger firms, the existence of the deterrents of suspension and striking off (of the solicitors within them) mean that increased penalties for the firms are not necessary.

We do not think that the SRA has made a sufficiently strong case, therefore, for increasing the percentage maximum from the current limit of 2.5%.

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes. We think this would be a proportionate approach.

19.

10) Do you have any comments on the proposed features for assessing an individual’s means? What other features do you think we should consider, if any?

There are many factors affecting a person's ability to meet a financial penalty, not just their income from the employment. A person's outgoings also need to be considered, such as mortgage or rental payments. Any assessment of a person's resources should take into account their income, expenses, assets and liabilities. In most cases it would be reasonable to base income figures on the previous tax year but there should be allowance for exceptions.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes, but with provisos.

We agree that increasing the level of fee that the SRA may impose to £25,000 will have benefits, through reducing the length of time to determine a disciplinary matter, by reducing the likely costs for a firm/solicitor and the regulator, and by reducing the stress caused to a solicitor whilst waiting for a matter to be determined.

The first proviso is that we are concerned that raising the limit to £25,000 will have the effect of inflating fines generally, and that fines approaching £25,000 will become the new norm, replacing fines that previously would have been no more than £2,000. We therefore support the raising of the limit in the interests of speed, and reducing costs and stress for those involved, but not for the purpose of enabling the SRA to significantly uprate its fines across the board.

The second proviso is that although it will be open to solicitors to appeal to the SDT against the SRA's decision to apply a penalty, who would bear the costs of that appeal? Will costs follow the event so that a solicitor will not pay the costs if successful in the appeal? Currently, it is difficult to obtain a costs order against the SRA even if a solicitor is successful at the SDT.

We also think that there is merit in introducing an automatic right for the case to be heard before the Tribunal, particularly for proposed fines in excess of a certain figure – perhaps £10k. The process for fining within their current powers is that the SRA can do so without reference to the SDT. If the solicitor denies the misconduct, the SRA can deal with in-house by way of adjudication (which is dealt with on the papers). If the solicitor is unhappy, they can ask for the matter to be dealt with by an SRA adjudication panel. Unlike the SDT, there is no right to appear in person and or have representation before an adjudication panel. Unless the SRA are proposing changing this, it is our view that there should be a right to elect for hearing to be before SDT, including a rehearing of the facts.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

A majority of firms in the Cardiff and District area, and in Wales generally, are small or medium sized. Changes which impact adversely on small to medium firms will therefore impact disproportionately on the legal services market in Wales. Increased fines for all firms based on turnover (rather than profit) have the potential to drive small and medium firms out of business, thereby exacerbating issues of advice deserts and potentially limiting access to justice.

Financial penalties: Consultation paper

Response ID:135 Data

2. About you

1.
First name(s)

David

2.
Last name

Barton

7.
On behalf of what type of organisation?

Representative group

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

I have had the benefit of seeing and considering the Answers given by The Law Society for which I am grateful. Such answers and supporting analysis are adopted here for this question and those which follow.

The notion of dealing with certain behaviours as asked by SRA is simply unnecessary. The regulatory process is able to assess how to deal with the wide range of behaviours seen by SRA and the SDT and separating certain of them out does not improve on this.

The Law Society's reasoned approach is adopted and repeated.

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

No, this is not agreed. This is prescriptive and tends towards a one size fits all approach. Of course such conduct is serious, but it can also be very complex. A nuanced approach is required when dealing with allegations of conduct which may be life changing.

For some low level conduct it is broadly unobjectionable for SRA to be prosecutor judge and jury. For life changing circumstances the opposite is the case.

12.

3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

The answer to this follows the answer to question 2. It is wrong in principle to categorise conduct in this way and assessment can be properly left to SDT and the Administrative Court as "experts".

13.

4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

No, again this is simply prescriptive. It isn't understood what constitutes such a breach and how it is assessed. Breaches involve a huge range of behaviours from the intentional to the unintentional and a wide range of reasons. A fixed penalty regime would cast these aside.

Fixed penalties work for low level "offending" in certain circumstances - certain strict liability road traffic offences, car parking and littering. This is not suitable for a regulatory regime.

It would encourage box ticking and swift "justice".

The Law Society response is adopted.

14.

5) Do you have any comments on the proposed criteria and process?

The answer to 4 determines this as a "no"

15.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

No, as this follows previous answers.

---

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

No that is not supported for the reasons articulated by The Law Society.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No, given the answer to question 7.

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes, this should be done. It is routinely done in courts across the country and is well understood.

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

No. The SRA has a system in place that appears to be sufficiently inquisitive and should be retained.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

No. This is too high. Over recent years SRA has attracted adverse publicity for some significant errors and there needs to be confidence in its assessment and adjudication procedures.

This level of fine is suitable for "very serious" misconduct as defined in the SDT Guidance Note on Sanction.

SDT is independent. It hears evidence from live witnesses and assesses it. SRA does not do that and they will be paper based adjudications. This creates a serious and unacceptable risk of injustice.

It is a fact that many allegations go before SDT and are not proved even to the civil standard and it demonstrates that SRA "gets it wrong". An increased fine regime will likely increase the number of offences which might otherwise not be proved.

We would support an increase to a level of £5000 maximum. This will capture conduct that is at the bottom end of the scale leaving everything else to the existing regime. SRA comments it is forced to refer to SDT if it thinks alleged misconduct warrants a penalty of more than a £2000 fine and that this slows the process. This is misconceived. The real source of delay is the slow investigation process. Once in the SDT cases move swiftly and Agreed Outcomes can be quickly achieved.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

The Law Society has answered this very helpfully and is adopted. we support the Law Society submissions save one point. The fine limit should not exceed £5,000.

SRA consultation: Financial Penalties

[*Response to be submitted via online form*]

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Professional Rules and Regulation Committee.

1. **Do you agree that these principles should govern our approach?**

First and foremost, the SRA's approach to financial penalties must sit within the parameters of its statutory functions. The SRA's approach should be compatible with the regulatory objectives and should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed (sections 1 and 28, Legal Services Act 2007).

We agree that a robust fining framework is one which fits the above qualities and is effective in providing credible deterrence. As will be set out in our response, we are concerned that the SRA's proposed approach gives insufficient weight to the deterrent effect that any sanction at all may have on a solicitor or law firm.

As regards consistency, we would emphasise that, in line with well-established case law, the SRA must nevertheless ensure that it reaches decisions that are rationally based on relevant considerations pertinent to each individual case. The SRA must not through its approach fetter itself from properly exercising its discretion in individual cases, and its approach should not be so rigid as to exclude consideration of the proportionality of any penalty in particular circumstances. With such legal principles in mind, we do not agree, for example, that any changes to the SRA's sanctions guidance should pre-determine the appropriate kind of penalty for any given behaviour.

We note from our discussions with The Law Society about this consultation and the questions generally that CLLS and The Law Society are in similar positions as regards the SRA's proposals.

2. **Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?**

No. Certainly, there will be instances where the appropriate sanction may well be suspension or strike off, which would be a matter for the SDT. However, each case should be considered properly on its own facts. It does not seem logical for the SRA to limit its internal options to a rebuke: all potential sanctions should remain available, given the vast array of behaviours, fact patterns and circumstances that might fall within this category.

The SRA does not appear to have fully considered the potential impact on complainants, if it were to restrict its options in this way. A consequence of the SRA's proposal would be that all such cases beyond a rebuke would need to go to the SDT. Nonetheless it would be open to the SDT to impose a fine under its sanctions guidance. The SRA should not underestimate the potential impact on the willingness of some complainants to report misconduct, if a public hearing before the SDT is regarded as inevitable, even with anonymity.

Further, it is difficult to see the advantage of a referral to the SDT where, in a case which does not require suspension or strike off, the SDT’s powers will be similar to those of the SRA.

3. Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

No. See our response to Question 2 above. Obviously, cases of egregious conduct (eg dishonesty) require a more severe sanction (ie strike off or suspension) than just a fine.

4. Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

No. The SRA has not provided sufficient information about the proposed scheme, for example how fixed penalties would be set and what savings would be achieved in terms of time or cost. It is unclear how such a regime would deliver a *"swift and streamlined process"*.

The purposes of sanctions in this jurisdiction are well established (see *Bolton v The Law Society* [1994] 1 WLR 512). They are primarily to maintain public confidence and to act as a deterrent. The SRA has not articulated how a fixed penalty regime would meet these objectives. The rationale appears to be based on the administrative convenience of the SRA. However, such an approach risks the SRA imposing a penalty without adequately considering whether the sanction meets the public interest and the underlying facts.

We consider that the SRA should continue to decide the appropriate sanction for each case individually, rather than pre-determine that a fine is appropriate, or the level of fine. The SRA must take into account that the impact of any sanction on a firm or solicitor goes beyond the fact of any fine, however small the amount. For example, many clients in their procurement or firm selection processes ask whether a firm has incurred any regulatory fine. In such a context it is not the amount of the fine that matters, but the fact that a fine of any kind has been imposed.

In the event that a fixed penalty regime were introduced, we agree that the relevant person should first be informed of what action is required to remedy the breach and the timescale for doing so. That timescale should be fair in the context of the action required, and applied consistently. The SRA should maintain flexibility where appropriate around the timescale to avoid the situation where, for example, a deadline is missed due to circumstances outside of a firm's control such as technical issues. A fixed penalty regime should not be used where a rebuke would be a more appropriate sanction.

The SRA should ensure that any fixed penalty regime features certainty around which actions fall within it. We suggest that such actions should be limited to those that are more summary in nature and capable of objective determination, such as not displaying required information on a website (where no harm is caused).

As a matter of principle, any fixed penalty regime should not dilute regulatory oversight, as there may be a heightened risk that where penalties are fixed to individual actions without an investigatory process, larger and more serious misconduct may be picked up more slowly or go unchecked. It is noteworthy that many of the SRA's and SDT's decisions feature cumulative instances of what in isolation might be regarded as minor misconduct, which when taken together illustrate deeper systemic problems.

5. Do you have any comments on the proposed criteria and process?

Please see response to Question 4.

6. Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

Please see response to Question 4.

7. Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

No. It is understood that the SRA is not in fact proposing to seek a change in its powers in respect of traditional law firms to be equivalent to its powers under the Legal Services Act 2007 regarding ABSs. However, we offer certain observations regarding the SRA's comments on turnover, in particular:

- It is concerning how the SRA has referred to "headline grabbing" fines without a more thorough analysis of what makes for an appropriate sanction in the context of the legal profession. Focussing on turnover ignores material relevant considerations which the SRA in the proper exercise of its functions must take into account such as the specific facts of the case, the extent to which any profit can be attributed to the conduct, and the degree to which direct harm is localised.
- The SRA has not articulated any case for increasing the turnover percentages in its current guidance. There is no evidence that the current levels are inadequate to achieve their purpose. The SRA's only justification seems to be that it wants greater publicity and/or to be like other regulators.
- The SRA refers to a turnover based approach leading to fines being *"targeted, proportionate to the firm concerned"* but this is the wrong test. Any sanction or penalty must be proportionate to the conduct concerned taking account of the individual circumstances of each given case. Annex 2 to the Consultation demonstrates how the SRA's proposal could lead to vastly different and irrational results for the same conduct.
- The SRA seeks to make analogies with other regulators but does not appear to have considered how the different types of regulators it refers to are relevant to the legal profession. Many of the comparative regulators regulate a market and their powers reflect that. Even the financial sector regulators are regulating entities of a very different nature such as banks and accountancy firms where systemic failures can have impacts on a huge scale directly affecting millions of people or causing widespread harm – such as where a widely used financial product is mis-sold, or a flawed statutory audit is associated with a collapse of a large company, or indeed a sector crisis generating significant liabilities for the taxpayer occurs. Although public trust and confidence in the solicitors' profession and in legal services is core, as reflected in the SRA's Principles, the potential damage to public trust and confidence arising from professional misconduct in the legal sector is not analogous to where there is quantifiable, tangible and very costly harm.
- The SRA refers to the "wealth" of firms but does not appear to have analysed important issues inherent in a turnover based approach, including the business model of a law firm and principles of financial management applicable to law firms. For example:
    - → Turnover is not a reliable indicator of the financial position of a firm, in terms of how much cash or debt a firm has. In any event it is not a measure of profit. Culpability, likelihood of harm and harm itself should be properly reflected in any fine. In certain cases, this may bring in indicators of financial means, as appropriate to the case at hand: for example, the amount of revenue generated by the firm or the part of the firm involved in the breach may be relevant factors, particularly where a firm has benefited financially from the misconduct. A profit based fine or a test that was the lower of a percentage of revenue or cash may help to minimise the risk of liquidity issues, which would be more compatible with the regulatory objectives as a whole including encouraging a strong and effective legal profession.

→ The legal profession is heavily regulated. The SRA must take into account the full cost of regulation and cost of compliance.

→ Any destabilising impact that a fine based on turnover may have on a firm is a relevant consideration, bearing in mind that the impact of any penalty is amplified by how law firms tend to operate on a full distribution model, where profits, after overheads are paid (including employee salaries), are divided up among the partners each financial year.

→ Given the time lag between the conduct at issue and any penalty, it is highly likely that a penalty would need to be expensed and cash found at a time when partner composition has changed, when the original partner group (ie the partners who were with the business in the year the issue for which the fine is being levied arose) have received 100% of profits in cash in relation to that year, and so in fact the impact of the fine falls on a different group of individuals, some of whom may not have been partners at the time. This is different from the case of a corporate, where there is more insulation from the impact of fines, in the sense that only a minority of prior year profits would likely have been paid to owners, and hence a majority of profits remain in the business as retained earnings and cash.

The SRA's approach in any event should be consistent with the SDT, not least because matters above the SRA's fining threshold would still need to be referred to the SDT. This would ensure a greater level of consistency between ABSs and recognised bodies in respect of whom the SDT has unlimited powers to fine. The SDT's approach as set out in its Guidance Note on Sanctions is that fines should be fixed at a level which reflects the seriousness of and is proportionate to the misconduct. The SDT recognises that *"the means available to an individual or a firm"* is a factor that may be considered, which is a more flexible and appropriate test than the SRA's proposed turnover approach, as it allows for proper consideration of the size and financial resources of a firm and the effect of a fine on that firm's business. The SDT's Guidance highlights how, when considering means, it is also relevant to take into account the total financial detriment which is suffered, including any costs order, and any adverse financial impact of the decision itself.

8. Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

Please see response to Question 7.

9. Do you agree that we should take into account individual means when determining a financial penalty?

An individual's means may be relevant to the amount of any penalty, where a penalty is considered appropriate, but in all cases the penalty must remain rationally linked to the conduct at issue. The SRA already has its guidance which provides for the ability to reduce the financial penalty if the person is of low means. The case law in this area makes clear that the starting point is to set a fine that is linked to the conduct and then to consider a reduction based on means. See *D'Souza v The Law Society* [2009] EWHC 2193 (Admin) and *Tinkler v Solicitors Regulation Authority* [2012] EWHC 3645 (Admin). This is the fair and logical approach. The SRA's proposal seems to be that it will increase a fine based on means. That would lead to an inconsistent and arbitrary outcome where there is no link to the seriousness of the underlying conduct. Insofar as an individual's income may be relevant, this should only be earnings from legal work.

10. Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

The SRA should not be prescriptive as to the features that it should take into account in any given case as each needs to be considered on its own facts. However, such features may include aggravating or mitigating factors such as:

- the experience of the individual and, where relevant, how the person was supervised
- any previous disciplinary record
- any loss to clients or, the absence of any loss and any steps taken to minimise loss
- whether there has been any personal financial gain
- what remedial action was taken and how quickly
- whether the matter was self-reported
- any relevant health or personal issues at the time of the misconduct
- co-operation with the SRA
- consistent with the SDT's approach: the total financial detriment that the individual has experienced, including any costs order and any adverse financial impact of the decision itself
- any other relevant mitigating or aggravating factors

11. Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

We consider it right that serious disciplinary matters go before the SDT, not least given the SDT's wider range of powers including non-financial penalties where appropriate. The SRA's proposal would take its powers into the fine bands that the SDT currently applies to moderately (£2,001-£7,500) to more and very (£7,501-£50,000) serious cases.

That said, we are minded to agree that some form of increase to the SRA's internal fining powers is appropriate, subject to the requirements of section 44D of the Solicitors Act 1974. However:

- The SRA should be satisfied that any increase would not adversely affect the independent scrutiny of serious misconduct and the integrity of the SDT process.
- The SRA should consider the impact that increased powers may have on its workload and resources, bearing in mind that as the SRA has identified, matters are already taking a long time to address, at an average of 458 days end to end (before any SDT process) – which suggests that some cases take much longer. In the legal profession, where ethical conduct is core to reputation and the provision of services, such delays intensify the stress which comes with any regulatory process. We consider that any application to the Ministry of Justice for an increase in fining powers should be supported by a clear plan as to how the SRA will improve its processes and decision making to reflect the additional powers.
- Increased powers increase the importance of the SRA following a robust, transparent and fair internal adjudication process, and having its guidance more aligned with that of the SDT.
- The SRA should consider what internal safeguards may be appropriate to minimise the risks that any higher level fining power may have the effect of weakening scrutiny at SDT level of serious misconduct, or that inconsistency is aggravated in the disciplinary process depending on how an outcome is negotiated with a firm or individual. Stakeholder and consumer confidence may be adversely affected in the event that independent adjudication is reduced. The SRA may wish to consider whether some form of internal review process

at the election of the firm/solicitor may be appropriate for higher level fines, or regulatory settlement agreements that seek to agree higher level fines.

12. Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

No. However, it is important for the SRA to keep in mind that the majority of solicitors hold themselves to high standards. Reputation is integral to any legal professional and the SRA should not underestimate the impact of publicity as a lasting deterrent, irrespective of the amount of any fine that may be appropriate in any given case.

Policy Department
Solicitors Regulation Authority
The Cube, 199 Wharfside Street
Birmingham B1 1RN

Sent by email only to Amanda.Fox@sra.org.uk and Tim.Pearce@sra.org.uk

11 February 2022

Dear Policy Team,

Consultation: Financial Penalties

The Legal Services Consumer Panel (Panel) welcomes the opportunity to respond to the Solicitor Regulation Authority's (SRA's) consultation on financial penalties. We further welcome this review of the SRA's fining powers and have endeavoured to answer the consultation questions below.

Q1 Do you agree that these principles should govern our approach?

The Panel broadly agrees with the principles set out to govern the review of the SRA's fining powers. On ensuring a transparent fining framework, the Panel would encourage the SRA to ensure that the fining framework (and any fines issued under it) are transparent and accessible to consumers in particular. This would add to its ability to be an effective deterrent.

We are also supportive of a fining framework that treats all firms and individuals regulated by the SRA in the same way and would encourage all legal services regulators to work towards a consistent approach. Similarly, the Panel would welcome a sector-wide understanding and approach to financial penalties in order to strengthen enforcement of ethical conduct and standards for all lawyers. In fact, this type of collaborative approach is necessary if the SRA is to succeed in ensuring more serious sanctions for behaviour that negatively affects the public's confidence in the profession or increases the risk of harm. Committing to taking stark transgressions seriously is important to reaffirm the public's trust in solicitors and all lawyers.

Finally, the Panel agrees that increasing the maximum fines for solicitors and traditional law firms will allow for increased efficiencies in the enforcement mechanism handled jointly by the SRA and the Solicitors Disciplinary Tribunal (SDT). The only thing that may be missing from the enunciated principles in this review is pulling through the idea expressed more fully in the SRA Enforcement Strategy that the SRA's fining powers are to be used to ensure a trustworthy profession and to protect the consumer.

Q2 Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Generally, the Panel agrees that serious misconduct such as sexual harassment, discrimination or non-sexual harassment is not suitable for financial penalties. It is crucial that all solicitors are aware that this type of behaviour (and what constitutes it) is not tolerable in the profession. Such awareness should be promoted through multiple avenues that may include education at admission to the profession, measuring ongoing competence as well as strong penalties to support deterrence. This type of behaviour has the potential not only to affect colleagues in the workplace, but also how clients are treated and whether they are adequately served, and therefore goes to the heart of whether a solicitor is fit to practise. While low level behaviour in these categories may not warrant a suspension or being struck off, a rebuke that stays on the offender's record for a definite period of time may be more likely than financial penalties to communicate the seriousness of the matter, and make perpetrators aware that repeated violations may bring much more serious consequences.

It is important to remember that legal services consumers often become vulnerable due to the legal problem that causes them to seek a solicitor's services in the first place. In this situation, they are relying on a solicitor's advice in connection to an important issue that affects their lives but which they cannot deal with on their own, thereby introducing a power imbalance. For these reasons, protecting legal services consumers from this type of exploitative behaviour is especially pressing.

Q3 Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

The Panel believes that where a solicitor takes advantage of a vulnerable client, the behaviour moves beyond dishonesty to predatory behaviour that should not be solely addressed with financial penalties. Similarly, the correspondence discussed in case study 2 shows a level of cruelty that if present in client dealings, even where discrimination cannot be proven, is a very serious infraction of the public's expectations of a solicitor. Such behaviour toward a client, even absent the discrimination finding, should not solely be addressed with financial penalties, though we would not want to rule this out, especially where an order of restitution is appropriate.

Q4 Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

The Panel agrees with the plan to introduce fixed penalties for specific and less serious breaches of SRA rules. We believe that if solicitors and firms are given the opportunity to correct their actions prior to being fined, this course of action will promote compliance. We are pleased to see that transparency rules around price and quality will form part of this regime to further encourage all firms to be compliant with these guidelines that aim to provide consumers with very basic information about the solicitors they may be considering hiring. The closer the SRA can get to 100% compliance, the more effective this information will be to prospective consumers.

Q5 Do you have any comments on the proposed criteria and process?

The Panel agrees with the SRA's approach, especially providing a clear timeline for the solicitor or firm to correct its failings because the ultimate goal is to have the firm comply with SRA rules. We are also happy that cases that involve specific clients will not be subjected to this fixed fine approach because those are the cases that will demand more attention and investigation by the SRA.

Many of the types of rules discussed would directly benefit consumers by bolstering competence through encouraging professional development compliance, transparency with regards to price and quality indicators and even encouraging cooperation with the SRA's requests or investigations so it can efficiently ensure standards are maintained. Therefore, fixed penalties will put timely and proportionate teeth behind the SRA's rules so that solicitors and firms are aware of the clear and immediate consequences to their failure to comply. Not

having to commit staff resources to determining case-specific fines will be more efficient, and strengthen the SRA's ability to ensure high standards with fewer resources.

Q6 Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

The Panel feels the SRA is best placed to determine the appropriate value for each offence but would stress the need to ensure that they are not simply seen as a cost of doing business.

Q7 Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

The Panel generally agrees with the turnover based assessment of fines that regulators in other sectors have used to reign in undesirable conduct. It aligns with the Panel's thinking that penalties need to be more than a cost of doing business so that more than dealing with the one individual or firm involved, these penalties serve as a strong deterrent for the whole sector. As the regulator responsible for the majority of the reserved legal services sector, the Panel is pleased to see the SRA taking a stronger approach in this regard.

Q8 Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

The Panel is pleased to see a substantial increase in the maximum proportion of turnover as a measure of fines in the SRA's proposed changes to its penalty framework. However, when compared with other regulators, this maximum percentage is still low. Therefore, the Panel would encourage the SRA to consider increasing this percentage further. In any event, appropriate monitoring and evaluation must be put in place to determine whether the policy change has the desired deterrent effect, or whether the SRA needs to employ an even higher maximum proportion of turnover in fining the most serious transgressions.

Q9 Do you agree that we should take into account individual means when determining a financial penalty?

Again, generally the Panel does agree that an individual's means should be considered when determining a financial penalty. Like taking a firm's turnover into account, it will also ensure that where appropriate, fines can be levied that are large enough to provide a deterrent against continued misconduct for that particular individual and larger fines will also provide a strong deterrent for others. However, care needs to be taken to ensure that individuals of low means (or low traceable earnings) do not feel that they can get away with behaviour that should attract a meaningful financial penalty.

We also agree that assessing an individual's income as well as net worth is important. Income alone may not accurately reflect an individual's ability to pay a fine (or their likelihood to be deterred by standardised fines).

Q10 Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

No.

Q11 Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

The Panel agrees that the SRA should seek an increase in its internal fining powers for traditional law firms and solicitors to a level of £25k, which is still very low compared to its fining powers for Alternative Business Structures. We believe this increase will have the effect of

speeding up the average time to resolve penalty cases. This means that penalties must be paid closer to the time of commission or discovery which improves their ability to act as a deterrent. In addition, and in our view, more importantly, it means that consumers may be made aware of these penalties in a more timely fashion, which is always better than information provided long after the event. In turn, by allowing the SDT to focus on the most serious cases that require their expertise and hearing capability, their ability to handle cases in a more timely fashion will also improve. Of course, the Panel would like to see a clear monitoring and evaluation plan attached to this policy change to ensure that this is the case, and also to observe any other unintended effects.

Q12: Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

No.

The Panel appreciates the opportunity to provide input from the vantage point of legal services consumers. We hope you find these comments helpful. Please contact Heidi Evelyn, Consumer Panel Associate (Heidi.Evelyn@legalservicesconsumerpanel.org.uk), with any enquiries.

Yours sincerely,

Sarah Chambers
Chair
Legal Services Consumer Panel

Solicitors Regulation Authority (SRA) Financial Penalties: Consultation Paper

Introduction

The Solicitors Disciplinary Tribunal ("the Tribunal") should not make public statements (even in the context of consultation) which might give rise to a complaint at a future date from those appearing before it of predetermination and/or apparent bias. As this consultation relates to sanctions imposed upon solicitors, where misconduct has been established, it has a direct impact upon the work of the Tribunal and a response is appropriate.

Question 1: Do you agree that these principles should govern our approach?

1.1 The SRA's stated aim is to ensure it has a robust fining framework that is transparent, proportionate, and effective in providing credible deterrence where all firms and individuals it regulates are treated consistently. The consultation states that the SRA's sanctions guidance should be focused on different types of behaviours; that certain types of behaviour should not normally attract a fine, where more serious sanctions or controls are required to ensure public confidence or to protect against risk. The SRA seeks to enhance its ability to issue sanctions "in-house" on what it suggests are straightforward, or agreed, cases by increasing the maximum threshold at which it can fine solicitors and traditional law firms.

1.2 The Legal Services Act 2007 ['LSA'] gave the SRA low level fining (£2000) and sanctioning powers whilst leaving the Tribunal with higher penalties and fining powers to be exercised within the bounds of its judicial discretion. This important principle remains as valid today as it did when Parliament enacted the LSA in 2007. The SRA's proposals are not limited to increasing fines in line with inflation but go significantly beyond that.

1.3 The Tribunal considers that an individual, traditional law firm or an alternative business structure (ABS) alleged to have committed a serious rule breach should not judged by the same body which has set the rules, investigated the alleged offence and initiated the prosecution. There remains the need for a meaningful separation of powers to enable the profession and public to be satisfied that breaches of professional conduct will be scrutinised with objective rigour and which maintains trust and confidence in the profession.

1.4 Whilst recognising that cost effectiveness should always be aimed for in the context of regulatory proceedings, it is the Tribunal's view that cost alone (and/or cost reduction) should not be a driving determinative factor when considered against the importance of the administration of fairness and justice to members of the profession facing allegations brought by their regulator. Such an approach may be seen as placing the rights of the accused individual behind the interests of the regulator. The Tribunal would suggest that other ways of reducing costs should be considered and is willing to assist in exploring creative solutions with the SRA and other stakeholders.

1.5 The SRA argues that its proposals would also reduce delay. The Tribunal assumes that the delay the SRA is referring to is the time that is taken between a decision to refer a matter to the Tribunal and the SRA sending the proceedings to the Tribunal for issue. In 2020 the Tribunal first listed 96% of cases for substantive hearing within six months of issue and determined 70% of cases within six months of proceedings being issued.[1] The data for 2021 indicates that the Tribunal first listed 99% of cases for substantive hearing within six months of issue and determined over 80% of cases within six months of proceedings being issued. Currently the Tribunal is first listing new matters in approximately 16 weeks. The data indicates that if delay is a determinative factor, then it is not the Tribunal which contributes to it as the bulk of delay occurs before the Tribunal is seized of the matter.

1.6 An increase in the SRA's fining powers increases the risk of a miscarriage of justice. In 2020 there were 68 substantive hearings before the Tribunal. In eight of these cases allegations were found not proved for all respondents and in a further case some allegations were found proved only for some respondents. In another two cases allegations were withdrawn[2]. The Tribunal considers that these figures evidence the critical importance of having allegations of professional misconduct tested by an independent and impartial body.

1.7 The Tribunal's substantive decision making engages representatives of the public in a manner in which the Regulator does not. The involvement of the Tribunal enhances public engagement, trust and confidence in the profession. Each substantive decision made by the Tribunal is made by a panel of three. Two of the panel are solicitor members and the third member is a lay member who represents the views of the public. The Tribunal is not divorced from the community it serves and it is made up of an evolving and increasingly diverse cross-section of the profession and the public.

[1] 2020 Annual Report (solicitorstribunal.org.uk) page 28

[2] 2020 Annual Report (solicitorstribunal.org.uk) page 32

1.8 An increase in the fining powers of the SRA may erode transparency. The majority of Tribunal hearings are in public. The press and public may attend to view the proceedings at the Tribunal's offices or remotely and a detailed written Judgment would be produced by the Tribunal. In all cases, absent a carefully considered application for non-publication by one or other of the parties, the Judgment is published in keeping with the principle of open justice. Once published on the Tribunal's website the judgment is available to the press, profession, and the public without charge. The Tribunal's reasoned judgment may also be subject to critical analysis by Judges of the Administrative Court by way of appeal and in this way decisions taken by the Tribunal are open to further scrutiny . In contrast, SRA internal decisions are made without public or press scrutiny. Although the SRA publishes its decision notices in relation to most internal sanctions its decisions are far shorter than a Tribunal Judgment and do not contain comparable explanation and detail. In the event the SRA receives the greater fining powers it seeks the attendant diminution in the transparency of decision making and detailed reasoning would be in neither the public nor the profession's interest. Tribunal judgments also frequently relate to an important area of law with a direct impact upon the profession, the wider public and the development of regulatory jurisprudence.

1.9 The Tribunal (for reasons explained in this response) does not support the proposed increase in the SRA's internal fining powers and nor does it consider that the SRA should determine the range of sanctions available on matters that are before the Tribunal. In summary, it is the Tribunal's position that:

a) any allegation of professional misconduct (or an accumulation of administrative/technical errors that amount to something more than minor infringement) should be referred to the Tribunal for full consideration;

b) the SRA should be able to handle internally matters which amount to technical or administrative errors;

c) in such cases where the SRA is handling a matter internally it may levy a fine of:

(i) up to £7,000 upon an individual;

(ii) a maximum fine for traditional law firms consistent with the SRA's sanctioning powers over an ABS. There is no apparent reason why the inconsistency in the SRA's fining powers for an ABS or a traditional law firm should be maintained.

1.10 For DTprothe avoidance of doubt, the Tribunal does not consider dishonesty to ever be an appropriate matter for internal sanction by the SRA.

1.11 The Tribunal's proposal of increasing the maximum size of a fine for an individual to £7,000 recognises inflationary increases since the introduction of fines by the LSA 2007 and importantly brings the SRA's approach into line with a Level 2 fine of the Tribunal's Indicative Fine Bands for individuals whose conduct is assessed as 'moderately serious' (Level 2 fines are in the range of £2,001-£7,500). Conduct which is, or could be considered, as falling into the 'more serious' range starting at £7, 501 should be matters for the Tribunal.

1.12 Why does the Tribunal take this position?

The dangers of increasing the fining powers of the regulator substantially are twofold, potentially affecting both ends of the profession. The Tribunal considers there is a significant risk that those with limited resources (such as sole practitioners) may feel compelled to agree to a fine simply to avoid proceedings before the Tribunal, even if they dispute the allegations. At the other end of the financial spectrum there is a risk that a much more profitable law firm (operating either nationally or internationally) or an affluent individual (such as a partner in a large firm) may seek to agree a fine directly imposed by the SRA simply to avoid the scrutiny of public proceedings before the Tribunal. The Tribunal does not consider that any form of '*plea bargaining'* in the solicitors' profession is appropriate given the importance of safeguarding the public's trust and confidence in the profession as a whole. Most importantly it is, in the Tribunal's view, wholly inappropriate for there to be any possible perception that wrongdoing in the profession is being "swept under the carpet" by a swift privately agreed financial levy rather than to be subject to transparent public scrutiny.

1.13 The Tribunal asks whether there has been any impact study conducted by the SRA as to how the changes proposed would affect individuals from different backgrounds? If so, then the Tribunal considers that this should be published as part of the consultation process and if not, the Tribunal would suggest that this exercise should be undertaken.

1.14 Hearings at the Tribunal test the evidence and scrutinise the allegations on a case- by-case basis with each case having its own particular facts and circumstances. If the SRA and proposed respondent wish to agree a financial penalty, then there already exists a due process where they may submit an Agreed Outcome with the Rule 12 application for the Tribunal's consideration at an early stage. If granted by the Tribunal, this would result in a published Judgment available for public scrutiny. This process also leaves

open the option for the Tribunal to reject the application if it considers that the proposed financial penalty is not commensurate with the level of the wrong-doing and/or the Respondent's means. This is something the Tribunal has done. The Tribunal does not simply "rubber-stamp" such agreements and considers whether the proposed sanction is appropriate given the admitted misconduct. Whilst such matters are not subject to the same scrutiny as those that are heard at a substantive hearing the Tribunal's consideration of sanction is an important safeguard both for the individual/firm concerned and for the reputation of the profession as a whole and the protection of the public.

1.15 It is also notable that comparatively few appeals against Tribunal sanction have been successful, whether initiated by the SRA or by respondents. In 2021 18 appeals were lodged against the Tribunal's decisions. Of these appeals:

- 14 were made by respondent(s).
- 0 were made by the SRA.
- 1 was made by an applicant who had applied to be restored to the Roll
- 3 were made by lay applicants in relation to the decision not to certify their application as showing a case to answer.

Of the 4 appeals heard in 2021 to date the position is:

- 1 appeal by a respondent against the Tribunal's findings, sanction and costs was dismissed.
- 1 appeal by a respondent against the Tribunal's findings and costs was dismissed.
- 1 appeal by a respondent against the Tribunal's sanction and costs was dismissed.
- 1 appeal by a respondent was dismissed by consent.

Question 2: Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

2.1 Cases involving allegations of sexual misconduct, discrimination and/or non-sexual harassment are, by their nature, inherently serious and a cause for concern to the public who place their trust in members of the profession and to all those working within the profession itself. By default, such cases should come before the Tribunal in order for the Tribunal to carefully scrutinise the evidence before it and to determine where each case lies on the spectrum of seriousness and, if proved to the requisite standard, to impose a commensurate sanction.

Question 3: Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

3.1 Please see the response to question 2 above.

Question 4: Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

4.1 It is the Tribunal's understanding that the proposal to introduce fixed penalties relates to matters that would not be referred to the Tribunal. The imposition of sanction for such matters is for the SRA to determine and it would not be appropriate for the Tribunal to comment on the proposal to introduce fixed penalties for certain matters disposed of internally by the SRA.

Question 5: Do you have any comments on the proposed criteria and process?

5.1 Please see the response to question 4 above.

Question 6: Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

6.1 Please see the response to question 4 above.

Question 7: Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

7.1 For matters that the SRA sanctions internally, the Tribunal considers that the approach the SRA takes when calculating the level of financial penalty is a matter for the SRA.

7.2 However, for matters that the SRA refers to the Tribunal it is for the Tribunal to determine the appropriate sanction. If the Tribunal decides to impose a financial penalty on a firm the Tribunal, in determining the appropriate fine, will take into account (1) whether the seriousness of the misconduct, and giving effect to the purpose of the sanction, puts the case at or near the top, middle or bottom of the relevant fining category; (2) the level of fines imposed by other disciplinary tribunals or the High Court in analogous cases; (3) the size or standing of the firm in question; and (4) the means available to a firm. In considering means the Tribunal will consider the total financial detriment which has been suffered, including any costs order, and any adverse financial impact of the decision itself.

7.3 Any fine imposed by the Tribunal will be proportionate to the wrongdoing and be sufficient to meet the primary objectives of sanctions, including being a punitive deterrent for the firm, and a meaningful deterrent for the profession. The Tribunal will also take into consideration the size and financial resources of the firm and the effect of a fine on its business. This assessment of resources will include considering the amount of revenue generated by the firm; the level of profitability per partner or registered individual and market share; the loss to clients if any; and any income generated by the misconduct.

7.4 The Tribunal is unlikely to base its assessment of resources on turnover alone as it recognises that there will be a difference between the amount of turnover and profitability. However, the Tribunal recognises that there should be consistency of approach between the Tribunal and the SRA and this is a matter upon which the Tribunal itself could consult with its stakeholders to assess whether its approach in this area could be further strengthened. In addition, the Tribunal would welcome an opportunity to discuss with the SRA what better/more detailed information could and should be provided in cases such that it is able to determine any financial sanction based on information which is as complete and up to date as possible.

Question 8: Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

8.1 This, again, is something for the SRA to consider when it deals with matters internally and the Tribunal's response is essentially the same as its response to question 7 above.

Question 9: Do you agree that we should take into account individual means when determining a financial penalty?

9.1 It is a matter for the SRA to decide whether to consider individual means when determining a financial penalty imposed by them. It is a matter for the Tribunal to decide whether to consider individual means when determining a financial penalty imposed by the Tribunal.

9.2 The Tribunal approach to fines is set out at paragraphs 26 to 30 of its current Guidance Note on Sanctions (9th Edition December 2021). Respondents before the Tribunal can provide evidence in relation to their means. If evidence is submitted in accordance with Rule 43(5) of the Solicitors (Disciplinary Proceedings) Rules 2019 the Tribunal will take this information into account when determining a financial penalty. The Tribunal

notes that it would welcome being provided with as much financial information as possible so that individual means can be validly assessed.

Question 10: Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

10.1 Please see the response to question 9 above.

Question 11: Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

11.1 For all the reasons set out, the Tribunal does not agree that the SRA should seek an increase in its internal fining powers across the board for traditional law firms and solicitors to the level of £25,000. However, the Tribunal wishes to work collaboratively with the SRA to ensure both consistency of approach and that those cases involving technical regulatory breaches, short of misconduct not requiring the Tribunal's oversight, are subject to a penalty in keeping with the profession as it stands in 2022 and for some years ahead.

11.2 Recognising the passage of time since the introduction of fining powers, along with the increased value of the legal profession, as said above, the Tribunal would support a proposal that the SRA should have at its disposal a fine range up to £7,000 for individual solicitors and increased fining powers in keeping with those powers it has with respect to an ABS.

11.3 There is no limit to the level of fine that the Tribunal can impose on an individual or on a firm. The Tribunal has five indicative fining bands for individuals:

Fine Band	Overall Assessment of Seriousness of Conduct	Fine Range
Level 1	**Lowest level for conduct assessed as sufficiently serious to justify a fine (rather than a reprimand)**	**£0-£2,000**
Level 2	**Conduct assessed as moderately serious**	**£2,001-£7,500**
Level 3	**Conduct assessed as more serious**	**£7,501-£15,000**
Level 4	**Conduct assessed as very serious**	**£15,001-£50,000**

Level 5	**Conduct assessed as significantly serious but not so serious as to result in an order for suspension or strike off**	**£50,001 – unlimited**

11.4 The proposed figure of £25,000 would fall within the Tribunal's level 4 indicative band. This is for conduct assessed as very serious. This level of fine is not appropriate for the type of technical breaches that the SRA should deal with using its internal powers.

11.5 Annex 3 of the SRA Consultation document sets out an analysis of SDT fines between 2014 and 2021. The following information may be of interest:

Year	Cases concluded in year	Number of Fines	Total Amount of Fines
2017	**136**	**55**	**£1,548,501**
2018	**168**	**46**	**£1,179,115.45**
2019	**144**	**50**	**£719,253**
2020	**129**	**38**	**£515,505**
2021	**114**	**35**	**£445,602**

Year	Number of Level 1 Fines	Number of Level 2 Fines	Number of Level 3 Fines	Number of Level 4 Fines	Number of Level 5 Fines
2019	**2**	**10**	**20**	**18**	**0**
2020	**4**	**5**	**17**	**10**	**2**
2021	**1**	**7**	**21**	**6**	**0**

2020

	Fine imposed following a substantive hearing	Respondent Type: Individual	Respondent Type: Recognised Body	Fine imposed by way of Agreed Outcome	Respondent Type: Individual	Respondent Type: Recognised Body
Level 1	4	4	0	0	0	0
Level 2	1	1	0	4	4	0
Level 3	5	5	0	12	11	1

Level 4	3	3	0	7	7	0
Level 5	2	2	0	0	0	0

2021

	Fine imposed following a substantive hearing	**Respondent Type: Individual**	**Respondent Type: Recognised Body**	**Fine imposed by way of Agreed Outcome**	**Respondent Type: Individual**	**Respondent Type: Recognised Body**
Level 1	1	1	0	0	0	0
Level 2	2	2	0	5	5	0
Level 3	5	5	0	16	11	5
Level 4	4	3	1	2	1	1
Level 5	0	0	0	0	0	0

11.6 The data above demonstrates that the most common fine imposed by the Tribunal falls into the indicative band level 3 category. This is fining band is for conduct assessed as more serious and ranges from £7,501-£15,000. It should be noted that the Tribunal's starting point for a financial penalty in any individual case may have been a higher financial penalty but that the level of fine may have been reduced to the individual's means.

11.7 If the SRA's internal fining powers were increased to £25,000 this would mean that a total of 55 matters which received a level 1 to 3 fine would not have come to the Tribunal and would therefore have avoided independent scrutiny.

Question 12: Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

12.1 The Tribunal does not have any information that would assist the SRA in relation to the impact of its proposals on different groups of solicitors but would re-iterate the concerns expressed above about the possible impact of these proposals. The Tribunal does seek to collect data regarding diversity of those referred to the Tribunal (but this is provided on a voluntary basis only) which it would be happy to share with the SRA if this would be helpful.

12.2 Whilst the SRA and Tribunal are independent of each other the Tribunal has appreciated the opportunity to engage in constructive dialogue in relation to the consultation to enable it to seek some clarification of specific points which has assisted the Tribunal in formulating its response. The Tribunal would welcome the opportunity to continue this dialogue to ensure that there is consistency in the approach to sanctioning for the two respective bodies.

Response provided on behalf of the Policy Committee of the Solicitors Disciplinary Tribunal
9 February 2022

TheCityUK

Solicitors Regulation Authority
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Submitted via email to: finingpowers@sra.org.uk

11 February 2022

Dear Sir/Madam,

Solicitors Regulation Authority - Financial penalties: Consultation paper

I write in response to the Solicitors Regulation Authority (SRA) consultation on financial penalties.

Our comments focus on the importance of an evidence-based approach to policy reform and the need for impartiality, transparency and fairness in the adjudication of alleged breaches of the rules and regulations applicable to solicitors and their firms.

TheCityUK represents UK-based financial and related professional services (FRPS) – an industry that contributes nearly 10% of the UK's total economic output and employs over 2.3 million people, with two-thirds of these jobs outside London. It is the UK's largest tax payer and biggest exporting industry, and generates a trade surplus greater than all other UK net exporting industries combined.

UK legal services make a vital contribution to the FRPS ecosystem and the wider economy. The sector generates 1.5% of UK gross value added (GVA) and employs over 365,000 people across the country, two-thirds of whom are based outside London. The UK's status as host to the most international legal sector in the world is underlined by its substantial trade surplus, worth nearly £5.6bn in 2020, almost double its value a decade ago.

The FRPS industry ecosystem is a core driver of the UK economy and a national asset. TheCityUK works to maintain and enhance our industry's international competitiveness, economic contribution and enabling role in supporting the creation of jobs and growth in the UK.

TheCityUK advocates for an effective and strategic partnership between government, regulators and industry to ensure a holistic approach through which potential reforms are considered in the context of wider UK competitiveness. Maintaining UK competitiveness by creating an open, stable and welcoming business environment, encompassing immigration, domestic skills development, sustainability, regulation and the tax system all underpinned by the rule of law, will be key to the country's future success.

TheCityUK Legal Services Group is comprised of member organisations, including law firms, in-house counsel and representative bodies and has considered the issues raised within this consultation.

We hope the views of TheCityUK will be helpful in assessing the issues discussed within the consultation and would be pleased to provide further insight.

James Palmer
Chair, Legal Services Group
TheCityUK

TheCityUK

TheCityUK response to the Solicitors Regulation Authority (SRA) - Financial penalties: Consultation paper

1. TheCityUK's Legal Services Group welcomes the opportunity to respond to the SRA's financial penalties consultation paper ("the consultation paper"). We would be happy to provide further detail on any of the issues raised in this response.

2. The central focus of TheCityUK Legal Services Group is on maintaining and building the competitiveness of the UK's legal services sector and the UK's position as a world-leading destination for dispute resolution. The Group has a unique role in representing the legal interests of the financial and related professional services (FRPS) industry. A strong, competitive, and well-regulated legal services sector is essential for sustainable growth of the UK economy.

3. TheCityUK's response is predominantly focussed on the importance of an evidence-based approach to policy reform and the need for impartiality, transparency and fairness in the adjudication of alleged breaches of the rules and regulations applicable to solicitors and their firms.

4. We note that the SRA has consulted on this matter previously, the most recent exercise being the "Proposal to increase the SRA's Internal Fining Powers" consultation issued on 20 November 2013.

5. TheCityUK supports a measured and evidence-based approach to policy reform and we do not consider the case for reform set out by the SRA in this consultation to be strong. Further, we would note that many of the fundamental concerns raised by key stakeholders (in particular the Solicitors Disciplinary Tribunal) in responses to previous consultations on this matter remain valid, and thus prevent us from supporting the proposal for the SRA to increase the maximum fine it can issue to £25,000.

6. We do not feel that the SRA's rationale for the need for these increased powers is adequately substantiated by evidence of any systemic problem of breaches of the rules and regulations applicable to solicitors and their firms going unpunished, nor any need for (or request by) the Solicitors Disciplinary Tribunal (SDT) to have capacity freed up to focus on the most serious and complex cases.

7. TheCityUK considers the comparisons with regulatory regimes without individual accountability for every individual advising clients that are cited in the consultation document as evidence of the need for change, to not be appropriate. A great strength of the system for solicitors is individual accountability, not just institutional or leadership. A system reliant on institutional or leadership accountability only, is fundamentally different. We acknowledge that the SRA does have powers amongst others to disqualify non-authorised persons in ABS firms, which creates an aspect of individual accountability for all roles in an ABS. However, a vital distinguishing point is that a solicitor in receipt of a sanction will likely find this to be career- limiting (or ending) for them in terms of continuing to work as a solicitor. This is less likely to be as career-limiting for a non-solicitor in receipt of such a sanction.

8. Concerns around the need for continued independence of the disciplinary decision-maker are as valid today as they were when they were raised by the SDT and others when the SRA has sought increased fining powers in the past, and are fundamental to our opposition to the current proposals.

9. The Solicitors Disciplinary Tribunal's (SDT) members are appointed by The Master of the Rolls and drawn from a wide range of backgrounds to reflect the make-up of the profession and, as far as possible, the public. Crucially, the SDT is independent of the Law Society and the SRA which, we believe, acts as a guarantee of impartiality, transparency and fairness.

10. These proposals also need to be looked at in the context of the SRA's focus on culture. We agree that culture is important, but there is currently a perception amongst many firms that the SRA does not have a sufficient understanding of culture issues and has taken too simplistic a view to it. Law firm challenges can in some cases wrongly be perceived as retrograde, when in fact they reflect far deeper experience of the multiple layers of culture / bias and other challenges. The survey issued in connection with the penalties consultation reinforces our concerns. The questions are far too simplistic, ignoring context, and the answers to such questions will not provide meaningful evidence: they reflect a clear lack of understanding of the issues, which we would be happy to expand constructively on and help improve.

11. Our members have also raised concerns about whether the SRA has, or would be easily able to attain, the required competence of adjudicators in-house to deal with more complex matters. The SDT has extensive experience of dealing with cases by judicially trained members and has a reputation for expertise and competence.

12. If government feels that the inconsistency cited by the SRA between its fining powers for ABS firms and traditional firms requires addressing, the extension of the remit of the SDT to be the default disciplinary body for serious matters for ABS firms (as it is for traditional law firms) would be TheCityUK's preference.

13. Further, if following this consultation exercise the SRA remains determined to again request from government an increase in its fining powers, we would consider a more modest increase to be more appropriate than the £25,000 maximum sought in this consultation paper. A more modest increase would enable the regulator to deal with the majority of less serious matters while continuing to leave more complicated matters for the better-equipped and independent SDT to adjudicate.

TheCityUK
February 2022

Law Society response:

SRA Financial Penalties Consultation

February 2022

Introduction

1. The Law Society is responding to the consultation in its representative capacity as the independent professional body for solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.
2. The Law Society welcomes the opportunity to respond to the Solicitors Regulation Authority's (SRA) Financial Penalties consultation.[1]
3. The SRA is consulting on proposed reforms to its approach to financial penalties concerning traditional law firms and individuals. The consultation seeks to explore five key issues: -

    - the principles that underpin its fining framework;
    - which types of misconduct may not be suitable for a financial penalty;
    - which misconduct may be suitable for a fixed penalty and the potential benefits of introducing a fixed penalty regime;
    - the appropriate level of fine to achieve a deterrent effect in order to maintain professional standards and how this may be calculated; and
    - what threshold limit of fines the SRA should be allowed to impose internally before referral to the Solicitors Disciplinary Tribunal (SDT). It is suggesting that its internal fining limit should be increased from £2000 to £25,000

4. The consultation further provides that all fines imposed by the SRA would be capable of being appealed to the Solicitors Disciplinary Tribunal (SDT) and that any fines levied by the SRA would still be paid to the Treasury.
5. The consultation paper poses several questions and we have provided our response to these below.

Q1 Do you agree that these principles should govern our approach?

6. The principles outlined concerning the SRA's approach are broadly supported. From a principles' perspective, any fining framework should be fair, transparent, proportionate, consistent and be a deterrent to firms or individuals from committing breaches under the SRA Codes of Conduct[2].
7. We do not agree, however, that the SRA's sanctions guidance should be focused on different types of behaviours, such as sexual misconduct or discrimination, or that limits should be placed on the sanctions to be imposed in respect of certain types of misconduct, such as, the availability or not, of financial penalties.
8. From our perspective it is not within the regulator's remit to constrain the sanctions applicable in advance of the consideration of all the evidence, including any mitigating or aggravating factors, thereby effectively tying the hands of the Tribunal and the Administrative Court. It is in the public interest and the interests of justice for an independent tribunal to hear all the evidence and decide which penalties to apply, having considered the circumstances of each case.

[1] SRA Financial Penalties Consultation

[2] SRA Code of Conduct for Firms and Code of Conduct for Solicitors, RELs and RFLs

Q2 Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

9. The consultation seeks views on whether issues such as sexual harassment, discrimination and non-sexual harassment might be better dealt with by way of suspension or striking off only. We do not agree that there should be any restriction or fettering of available sanctions of a tribunal or court as this will ensure that fair and proportionate outcomes will continue to be achieved.

10. It is right that discrimination and harassment within the profession should be treated with the utmost seriousness. We are deeply committed to eliminating discrimination and harassment and promoting a modern, diverse and inclusive profession.

11. Discrimination, non-sexual harassment and sexual misconduct covers a very wide spectrum of behaviours and can arise in a wide range of circumstances and it is right that the individual circumstances of each case should be considered in making a decision about an appropriate penalty. In our view, these very different regimes, types of behaviour and contexts demand that decision-makers should have the flexibility to look across the full range of possible penalties in deciding how to proceed

12. This 'one size fits all approach' will undermine confidence in the SRA and has the potential to lead to numerous challenges of the SRA, if it is not addressed. We would also argue that more flexibility to deal with such serious and sensitive matters would better address the underlying issues. For example, we know that there is some evidence that people are more hesitant to raise and address such behaviours if there is a blanket response to them, and that some victims of discrimination and harassment would like to pursue an approach based on restorative justice.

13. The SRA's proposals should allow consideration of the specific facts of each case in determining the most appropriate penalty. For example, whilst all instances of discrimination, sexual misconduct or non-sexual harassment are unacceptable and may have a serious impact on those affected, the surrounding circumstances, intention, or lack of intention of the person responsible for the breach may mean that some breaches merit a greater penalty than others. The SRA's proposals would severely limit the scope for taking those circumstances into account and may mean that all breaches are treated similarly. This may mean that inappropriate penalties are given for some of the breaches concerned. For example, the case of an individual who makes offensive remarks in a private Facebook group, such as the case of Jain[3], is very different to a case of someone who makes offensive comments openly on Facebook, for example in the case of Mahmood[4]. In the Jain case, the SRA rebuked the solicitor and fined him the maximum amount possible. Whereas in the particular circumstances of the Mahmood case, imposing a suspension and a £25,000 fine was wholly appropriate. However, under the proposal put forward by the SRA both would be suspended or struck off.

14. By suggesting that all sexual misconduct, discrimination and non-sexual harassment cases should only be dealt with by suspension or striking off, thereby excluding the availability of a financial penalty, the SRA is effectively tying the hands of the Tribunal from the outset. If suspension or striking off are the only sanctions available, there are likely to be cases, just under the threshold, which would result in no sanction being

[3] Sanctions for solicitor who posted offensive comments on Facebook - Legal Futures

[4] Solicitor sanctioned for anti-Semitic Facebook comments - Legal Futures

imposed at all. However, if the fining power is still available then this sanction could still be imposed in such cases.

15. A suspension or striking off may well be the most appropriate sanction in many cases. However, introducing rigid rules would unfairly fetter a tribunal or court's discretion and powers in cases where a suspension or striking off may well be an inappropriate outcome.

16. If financial penalties are available to the Tribunal as a possible sanction (as they currently are), but the Tribunal decides that a financial penalty is not appropriate in a particular case, it can choose to disregard it. The SDT has considerable flexibility in the penalties it can impose. The SDT's Guidance Note on Sanctions states at paragraph 2 that '*The Tribunal is not restricted as to the number or combination of sanctions which it may impose'*.[5] Accordingly the SDT is able to discharge its duties fairly, proportionately and in the public interest.

17. Furthermore, some types of behaviour identified above, can be addressed under other, more appropriate, jurisdictions. This might be at an employment tribunal, civil court, or criminal courts where matters can be considered in detail by specialist tribunals. In certain situations, it may be considered that a sanction, possibly against a firm (or its owners), may be more appropriate in some circumstances, rather than pursuing an individual. For example, if the firm has adopted a particular culture, condoned poor behaviour or encouraged it (such as requiring continual long working hours or not supervising newly qualified solicitors), the organisation / owners should be investigated, in the first instance.

18. In our view, the first two case study summaries presented in the consultation fail to include sufficient information. They do not, for instance, mention any mitigating circumstances which would have been considered by the decision-making tribunal when deciding on the sanction and the level of fine imposed.

19. It would be helpful to see data on the numbers of such matters that are reported to the SRA and how many are referred to the SDT. If the SRA is of the view that the SDT is under-sentencing, it would be helpful to understand how many of those cases have been appealed by the SRA.

Q3 Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

20. Please see our response to the above question. Outcomes should not be fixed according to broad categories of conduct. Each case should be considered on its individual facts and the outcome based on the facts and any mitigating or aggravating factors.

***Q*4 Do you agree that we should introduce fixed penalties for certain, less serious, breaches?**

21. The consultation suggests setting up a fixed penalty regime for lower-level breaches of the SRA rules or non-compliance with its more administrative requirements or failure to respond to requests. We do not consider there is a sufficient evidential basis to justify the need for a new fixed penalty regime.

22. The vast majority of solicitors and firms comply with their regulatory requirements. Therefore, without specific data about the numbers of such matters handled by the SRA or the range of fines imposed, it is difficult to place this proposal in its proper context.

[5] SDT Guidance Note on Sanctions (9th Edition) December 2021

23. Case study 3 cites the Royal Institution of Chartered Surveyors (RICS) as a regulator which uses fixed penalties for certain types of regulatory breaches. The current Sanctions Policy: Guidance to RICS Disciplinary, Registration and Appeal Panel Rules[6] outlines the RICS processes. The fixed penalty regime applies to both firms and members. It is relatively narrow in scope and covers breaches of continuing professional development (CPD) rules, failure to provide information and payment of fees. Due to the low-level types of breaches covered by this process, the sanctions that may be imposed reflect this and appear fair and proportionate. So, for example, for CPD breaches, following an initial warning to remedy a breach, if no action is taken for a first breach the sanction is a caution registered against the name of the firm or member. A second breach within 10 years of receipt of the caution will be followed by a modest fine (£150-£250). A third breach within 10 years of receipt of a caution will lead to a referral to a Single Member or Disciplinary Panel with a presumption of expulsion.

24. Case study 5 in the consultation paper is of very limited assistance and simply states that *'To date we have imposed 21 fines of £800 for failures to respond to our AML risk assessment declaration exercise*.' It goes on to say that it has issued ten fines for failing to publish information required by the Transparency Rules, six attracting the maximum fine of £2000 and the other four fines ranged between £750 and £1200. Without any information about when the period of monitoring commenced, the length of monitoring, what the breaches entailed, the reasons for the different levels of fines, the nature, size and type of firms or any other circumstances, it is difficult to comment on the level of fines imposed. The fact that the SRA itself decided to impose a range of fines appears to contradict the supposed benefits of fixed penalties.

25. In contrast to the modest fines applied by RICS, the level of fines suggested by the SRA for the proposed scheme range from £800, for a first offence, up to £1,500, for subsequent offences. These appear high, given that they are intended to sanction low-level or administrative breaches. Accordingly, we can only assume that the fines indicated in the above paragraph are not low-level breaches to attract the level of fines imposed.

26. The consultation does not provide any information or data about the potential cost of setting up and administering such a scheme or any costs savings. Indeed, the costs may be prohibitive dependent on the number of matters that would fall within the scheme; the costs of reviews and appeals; how the SRA proposes to deal with the enforcement of payments (or whether payments will be enforceable by the Treasury) and whether any resource savings will be made against its current operations. Setting up such a scheme may be a considerable administrative exercise and the financial burden would fall on the profession. We would urge the SRA to carefully consider the viability of the proposed scheme, particularly in the prevailing economic conditions, when many of our members are feeling the financial impacts of the pandemic.

27. We believe that the SRA's current approach to such breaches, as set out in its Rules and Indicative Sanctions guidance, is both fair and proportionate. We therefore see no necessity to introduce an alternative regime.

Q5 Do you have any comments on the proposed criteria and process?

28. Please see our response to question 4 above.

[6] Sanctions Policy: Guidance to RICS Disciplinary, Registration and Appeal Panel Rules

Q6 Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

29. Please see our response to question 4 above. Without any data and an exhaustive list of the proposed breaches covered by such a scheme, as well as information about how the SRA has dealt with such matters in the past, we are unable to comment.

Q7 Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

30. No, we would not support the introduction of a turnover based assessment for firms for the following reasons:

- The SRA is partly basing justification for this proposal on it being a more effective deterrent than the prevailing model. Solicitors endeavour to operate and conduct themselves to the high professional standards set by the SRA. Indeed, solicitors are one of the most highly regulated of all professions. Each firm is obliged to have many safeguards in place including compliance officers and money laundering reporting officers, in order to minimise dishonesty, the loss of client funds or other misconduct. A model based exclusively on turnover will not necessarily incentivise better compliance. Instead, we believe that concern for reputation is the prime motivator of good behaviour, and that this will operate regardless of the level of any potential fine. We therefore see no good reason as to why a turnover based model is preferable to the existing model.

- We strongly believe that the ability to continue to practise and the reputation of the firm are of paramount importance for the vast majority of solicitor-owned firms, rather than commercial gain derived from breaching regulatory rules by a tiny minority of 'bad apples'.

- Also, we note further justification for this proposal is an alignment with other regulators such as the Water Services Regulation Authority (Ofwat), the Financial Conduct Authority (FCA) and the Gambling Commission. The consultation provides that these regulators have started '*issuing much larger (and headline grabbing) fines*.' The consultation notes that '*since consulting in 2017, the Gambling Commission began to issue fines of over £1m for the first time. During 2018/19 it issued fines totalling nearly £20m.'* However, this is not a fair comparison, given the nature of the industries, numbers of entities regulated, types of breaches, impact on the public and the resources available to the comparator regulators. For example, Ofwat is a non-ministerial government department and is the regulator for the water and sewerage sectors in England and Wales. It is responsible for making sure that its regulated companies provide consumers with a good quality and efficient service at a fair price. Over 50 million households and non-households receive water, sanitation and drainage services from the 32 regional companies, many operating as monopolies, regulated by Ofwat. The revenue of these companies is vastly different when compared to most domestic law firms in England and Wales. For example, for the financial year 2021, Thames Water reported revenue of £2.1billion and United Utilities reported revenue of £1.8 billion.[7] If contaminated water is supplied by even one company it can have a devasting impact on millions of consumers. This is not comparable to legal

[7] UK: water & sewer utilities revenue 2021 | Statista

services, where the effect of default is generally limited to a relatively small group of clients or those involved in a single set of instructions. The FCA regulates around 51,000 financial services businesses whereas the SRA regulates around 10,100 businesses of a considerably more diverse nature. Accordingly, increasing the threshold for fines, to keep up with other regulatory bodies is not a good reason for change.

- Furthermore, turnover is not necessarily a reliable indicator of profitability and does not always equate to the ready availability of cash. This may be especially true of firms reliant upon legal aid work, for example.

- We believe that the SRA's existing framework and approach already provides a credible deterrent as those matters deemed to be above the SRA's internal fining powers (currently £2,000) are referred to the SDT which has unlimited fining powers. The table (Figure 1) at Annex A[8] shows the numbers and levels of fines imposed or sanctioned by the SDT in 2020 and 2021. The figures show that only a very low number of fines were imposed by the SDT against recognised bodies (RBs) in both years, with less than 3% and 20% of the total number of fines in each respective year. Also, despite the availability of powers to fine over £50,000 (level 5) the SDT was not required to use them in the last three years. With such low numbers of fines against firms and a very tiny percentage of all SRA regulated businesses, we see little justification for the introduction of a new turnover-based assessment for firms.

- We are not persuaded that the SRA being able to use higher internal powers to fine Alternative Business Structures (ABS) justifies any alignment to traditional law firms. In the absence of any good evidence that higher fining powers are likely to be effective (as judged by the cases referred to in the Annex A), it is hard to see what real purpose the proposed change would currently serve.

- We also believe that the SDT, as an independent Tribunal, serves a public interest role in that it is under a duty to objectively consider the facts and circumstances of each case before imposing sanctions. No evidence has been provided that the level of fines it has thus far levied are inappropriate or an ineffective deterrent.

- Should the SRA proceed with this proposal, it would be important to consider the potential implications on some PII or other insurance policies which could see premiums rise due to possible increased regulatory fines.

- We are also not clear about whether the SRA is attempting to extend its internal powers to the maximum fine indicated in Annex 2 of the consultation paper, or whether a matter above its fining threshold would still be referred to the SDT. If it is the latter, then the SDT already has unlimited powers to fine so we cannot see the need for this.

31. For the reasons given above it is highly unlikely that the proposed change in the SRA's approach will have the deterrent impact it hopes for. Indeed, it may turn out to be contrary to the public interest as the proposed turnover based model of assessment could increase firms' overheads, which costs would most likely be passed to consumers of legal services.

[8] Information provided by the SDT

Q8 Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

32. Please see our response to question 7 above.

Q9 Do you agree that we should take into account individual means when determining a financial penalty?

33. We are somewhat concerned by the suggestion that the SRA do not currently consider the means of an individual in any consistent way. It is standard practice in many courts and tribunals to consider an individual's means before imposing a financial penalty. We believe that caps should be set on financial penalties but also that an individual's means should be considered when determining a financial penalty, especially when the person is applying for a reduction due to his or her means.

Q10 Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

34. We broadly support the proposal that any fine should be based on income related to the employment in which the misconduct occurred if the individual remains in the same position, but that other sources of capital or income from other sources such as investments, wealth or income from other work should not be considered. However, if the individual's circumstances / means have changed for the worse, for example, they have lost their job, then this method of assessment cannot be equitable. We agree that it would be fair to consider income from a previous completed tax year unless there were extenuating circumstances brought to the SRA's attention for basing it on a different year.
35. We agree that the SRA's existing policy, which allows the SRA to reduce the financial penalty if the person is of low means, should remain.
36. We also believe that the SRA should consider taking into account: -

    - what remedial action was taken and how quickly
    - how the person was supervised
    - whether there was any personal financial gain
    - any relevant health or personal issues at the time of the misconduct and
    - any other relevant mitigating or aggravating factors both at the time of the misconduct and at the time of fining.

37. We believe that all matters covered in our response to this question ought to be considered by the SRA to ensure that there is proportionality within the fining mechanism, leading to more just outcomes.

Q11 Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

38. The SRA is proposing an increase to the maximum level of fines it can impose internally from £2,000 to £25,000. It says that under the current regime even low-level fining

matters need to be referred to the SDT. By raising the threshold and dealing with more matters internally, it suggests that delays will be avoided, and substantial costs will be saved. It is accepted that there are costs associated with cases being referred to the SDT both for the SRA and the respondent, who will also have the stress of prolonged disciplinary proceedings. The SRA's threshold for internal fines has not changed since 2009.

39. We accept that an appropriate increase to the threshold is reasonable and would assist the regulator in making decisions in a greater number of straight forward cases, which is likely to speed up the process, save costs as well as reduce the stress on all parties.

40. However, we do not consider a rise to a new limit of £25,000, an increase of 1150% (12.5 times its current level) is appropriate for a number of reasons. Concerns have been expressed about the SRA's decision-making and investigation processes generally but also more particularly disciplinary action in relation to Black, Asian and minority ethnic solicitors[9] as well as the substantial costs that are regularly incurred, usually payable by a respondent, and which have been the subject of recent criticism both by the SDT and the High Court. For example, in December 2021, the SDT found that the SRA had brought disciplinary proceedings improperly and unreasonably against Jamil Ahmud[10], and criticised the SRA for displaying a 'lack of diligence and transparency'.

41. The recent case of Beckwith is an example of where the High Court raised serious concerns about the level of costs incurred by the prosecution (£343,957) in a relatively straightforward case.[11] In that case, the SDT reduced the costs payable by the respondent to £200,000. However, on appeal, the High Court quashed both the fine and the costs order and indicated that it had considerable sympathy with the respondent. The Court went on to comment '*Regulators pursue disciplinary proceedings in the public interest; the costs they incur should reflect that responsibility. This is no more than one aspect of an imperative that applies to all regulators – they must exercise their regulatory powers proportionately. Since the SRA will not in the ordinary course, be required to pay costs when regulatory proceedings are successfully defended… it must conduct its cases with proper regard to the need to permit persons who face regulatory complaints to defend themselves without excessive cost. This is part of any regulator's responsibilities in the public interest*.' Examples of where the SRA's claims for costs have been reduced substantially include those of Julian Critchlow[12], in September 2020, when the SDT awarded £8,000 costs for the prosecution instead of the £22,500 applied for and the case of Peter Collins Maku-Kemi[13] last year, where the SDT reduced the SRA's claimed costs of £42,600 to £15,000.

42. The profession has concerns about the threshold being increased substantially and wish to see greater transparency and accountability from the SRA concerning its internal disciplinary and enforcement processes. This is particularly important in the light of the SRA's practice of preferring multiple charges in respect of the same conduct, several of which are often not proved at the SDT. It is questionable, given our concerns about the lack of transparency and independence of the internal disciplinary process, whether that would remain the case if the SRA were to adjudicate in such cases in place of the SDT.

43. A further risk that needs consideration is that arguably, given the options of a contested hearing before the SDT and a relatively cheaper option of a compromise through an in-

[9] https://www.lawgazette.co.uk/news/huge-disparity-in-bame-solicitors-taken-to-tribunal-sra-figures-show/5106786.article

[10] https://www.solicitorstribunal.org.uk/sites/default/files-sdt/11955.2019.Ahmud__4.pdf

[11] https://www.lawgazette.co.uk/news/court-blasts-sra-for-alarming-costs-bill-in-beckwith-case/5106593.article

[12] SRA on rack over costs again as scrutiny builds | News | Law Gazette

[13] https://www.solicitorstribunal.org.uk/sites/default/files-sdt/12118.2020.Maku-Kemi.pdf

house adjudication by the SRA, some firms may take a commercial view and choose to opt for the latter, rather than risk the matter being taken to the Tribunal, even if there is a reasonable defence to put forward. That option would become more attractive should the SRA's fining powers be substantially increased. This would not necessarily serve the best interests of justice.

44. The profession is very diverse: from large multinational firms to sole practitioners operating in a landscape covering all areas of contentious and non-contentious business. A large commercial law firm is likely to be in a much stronger position to negotiate and/or argue its case and resist any pressure to accept a higher fine. In contrast a small firm, in similar circumstances, would be far less likely to be able to represent itself adequately without seeking independent legal advice, which would undoubtedly be costly. Small firms would have difficulty in affording representation and advice and may find themselves under an unacceptable level of pressure to accept a 'deal'.

45. This also raises important concerns of confidence where the SRA is investigator, prosecutor and judge. Whilst it is acknowledged that there is an internal separation between these functions, the profession remain concerned about the reality of the segregation and the independence of those carrying out those functions within the SRA. It can be argued that there is nothing new here as the SRA has been exercising this power for some time. The difference is that the proposed increase to the threshold would potentially encompass many more serious and significant cases which currently go before the SDT to scrutinise. It would be of concern, if that level of scrutiny were no longer to be available for those types of cases because the SDT was no longer involved.

46. The right of appeal to the SDT is not an adequate safeguard. Many firms and individuals faced with an adverse decision from the SRA would find the prospect of an appeal (and the associated costs of appealing) daunting, as it would in effect be challenging the regulator. There is also the issue of costs. The impact of a costs order in favour of SRA cannot be underestimated, as seen above. Currently a solicitor facing an SRA investigation has to be aware of the high likelihood that they will bear their own legal costs even if successful[14]. If the respondent is unsuccessful, they will pay the regulator's costs as well as their own. In contrast to the SRA's position regarding costs, the General Medical Council, the regulatory body for doctors, normally cannot claim costs for a prosecution.

47. The independence of the SDT from both the regulator and the profession, as well as its objectivity, clearly defined processes and transparency means that solicitors generally have more confidence in the SDT's decision-making processes.

48. In a similar vein, the SDT's decisions provide greater transparency and consistency than the SRA's adjudication decisions. Whilst the SRA's decisions are published on its website[15], they do not provide the same level of detail in terms of the facts of the case, the arguments raised by both the SRA and respondents or adequate reporting of mitigating circumstances as would be in the case of an SDT published judgment which allows these decisions to be relied on as precedents. The lack of transparency about SRA decision making, together with the concerns about the need for scrutiny of how its internal processes operate in practice, give rise to questions about whether there is an adequate level of confidence in the SRA to exercise the increased powers it seeks, in a manner that would guarantee that members of the profession would be dealt with fairly.

49. An inflationary rise to the current maximum fine level of £2,000 from 2009 would result in a modest increase only to £3,011 (based on the Retail Price Index) and £2,743.53

[14] Cleared lawyer must pay £534,000 defence costs, SDT rules | News | Law Gazette

[15] SRA Recent Decisions

(based on the Consumer Price Index). It is, therefore, accepted that the inflationary rise would not achieve the benefits indicated by the SRA.

50. Fines above £15,000 are relatively rare at the SDT and thus we are unclear as to why the SRA would seek fining powers well above that level, given that the stated purpose of the fines is to address less serious infractions that attract lower-level fines.

51. It is asserted that the SRA proposals would save time and costs. However, we have no information to enable us to assess this claim. The SDT has indicated that it lists substantive hearings within 12 weeks of the issue of proceedings (but can be varied by application by the SRA or the respondent or by agreement by the parties) but it is not evident how quickly the SRA will conclude matters in-house were its fining powers to increase.

52. An increase in fining powers might seem attractive to divert cases away from the SDT and thereby save costs. However, we are not convinced that the SRA has comprehensively considered the full implications of all its proposals. The SRA has not provided any information to persuade us how it proposes to speed up its processes without unfairness to respondents. For example, the SDT's Annual Report 2020[16] states that it takes the SRA between 6.3 weeks and 163.1 weeks to refer a case to the SDT with approximately 57% of cases taking between 20-25 weeks to be referred to the SDT after the SRA's decision to refer. This suggests that delays stem from the SRA. If a number of these matters are to be dealt with internally by its adjudicators, the SRA must acknowledge that processes will need to change. It will have to demonstrate clearly how it will guarantee timeliness, fairness, transparency and proportionality. It will also need to address in detail its proposals for appeals.

53. Bearing in mind what we say, we accept that a modest increase may be appropriate to the SRA's maximum fining power. The SDT's Annual Report 2019[17] (see Figure 2 Annex A) provides information about the number of fines imposed and within what band levels. It can be seen that the majority of fines fell within level 3 and above, equating to 76% of all fines above £7,500.

54. Again, the SDT's Annual Report 2020[18] (see Figure 3 Annex A) shows that the majority of its fines (29 out of 38) were above £7,500, equating to 76% of all fines. The majority of fines (17) fell into level 3, which is between £7,500 and £15,000. In view of these figures, it suggests that the SRA's internal fining limit should sit somewhere between £5,000 and £7,500.

55. Some members of the profession might prefer to resolve straight forward matters or those potentially resolvable by a financial penalty with the SRA which are above the SRA's fining threshold via a regulatory settlement agreement (RSA). However, as outlined there are concerns that firms or individuals may feel under pressure to agree to an RSA. There need to be some safeguards to ensure that an RSA is not being entered into for the wrong reasons and/or to avoid confronting the SRA in an adversarial environment, notwithstanding the fact that this might deliver a fairer outcome. For that reason, we would suggest that any such RSA must be ratified by the SDT.

56. Under the current SDT rules, proceedings would need to be issued together with statements for the Tribunal to be able to ratify such agreement. It is accepted that this would be costly and time consuming. We would therefore suggest that the SRA and SDT consider whether a fast-track process could be developed and agreed for such matters

[16] SDT 2020 Annual Report (p27)
[17] SDT 2019 Annual Report (p44)
[18] SDT 2020 Annual Report (p39)

to be referred to the SDT with less formality. The SDT rules would need to be amended accordingly.

57. We therefore remain of the view that serious disciplinary matters should be prosecuted before the SDT, whether they are dealt with by financial penalties or non-financial penalties.

Q12 Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

58. It is vital that any proposed regulatory reforms are robustly assessed for their impact on equality, taking account of their effect on different segments of practitioners and firms, and their clients. The profession is highly diverse in terms of the size of firms (from large international firms to sole practitioners), the type of work undertaken and income /profitability. Sole practitioners and small firms make up a high proportion of firms, with a large proportion of Black, Asian and minority ethnic solicitors working in those firms, and frequently serving the most vulnerable clients. Often regulatory costs are more difficult for smaller firms to absorb because they do not have the compliance resources of the larger firms. The proposals in this consultation could impact different sectors of the regulated population in quite different ways. Our response has already touched on some of these.

- The proposal to calculate fines against firms using a turnover based assessment could lead to much higher fines. This may lead to increased insurance costs. This may cause premiums to inflate across the whole profession. Self-evidently an increase in overheads could lead to further financial stress for legal businesses. At a time when access to justice is a real issue, the SRA must take care that the introduction of further regulatory burdens does not lead to unintended negative consequences, particularly for consumers of legal services.

- The proposals on extending the SRA's internal fining powers to £25,000 would make serious inroads into the role of the SDT. The SRA would in effect be assuming, in part, a jurisdiction parallel to that of the SDT without the safeguards, independence and objectively guaranteed by an independent tribunal. The disciplinary system must retain the confidence of the regulated population; we are concerned that this proposal has the potential to undermine that confidence.

- Again, an extension to the SRA's internal fining powers could see a large commercial law firm potentially being in a much stronger position to negotiate and resist any pressure to accept a higher fine. In contrast, a small firm in similar circumstances would be far less likely to be able to represent itself adequately without seeking independent legal advice. Small firms would have difficulty in affording representation and advice and may find themselves under an unacceptable level of pressure to accept a 'deal'. This is particularly likely to influence the behaviour of those members of the profession who are most vulnerable, such as those from minority ethnic-owned firms. Concerns have already been raised about the SRA's decision-making and enforcement action in connection with Black, Asian and minority ethnic solicitors and these proposals could have a compounding effect.[19]

[19] https://www.lawgazette.co.uk/news/huge-disparity-in-bame-solicitors-taken-to-tribunal-sra-figures-show/5106786.article

Financial penalties: Consultation paper

Response ID:6 Data

2. About you

9.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

Yes.

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Yes.

12.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Yes. Data protection breaches should be considered also. They can have serious impact on members of the public. In my experience some solicitors do not grasp the seriousness of their responsibilities in relation to client data.

13.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes.

14.
5) Do you have any comments on the proposed criteria and process?

I am concerned that while other aspects of the SRA's proposal carefully consider the question of the means of the individual to pay, this aspect does not. £800 is a huge amount to a solicitor in a legal aid firm at the beginning of their career - it could easily represent half or more of a month's salary. By contrast, an equity partner earning many thousands of pounds a month will not feel the same impact. There is diminishing impact the further up the earning scale you go, which seems very unfair to me.

15.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

No, but I do think in relation to individuals, there should be some mechanism to link the fixed penalty to income level - e.g. by reference to salary.

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes, absolutely. Traditional firms and ABSs should be treated the same way by their regulator in relation to financial penalties.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No. 5% is twice the current maximum fine for ABSs - it seems too far a jump at once. Setting the maximum percentage lower will still mean the SRA can apply significant penalties, but it will be more widely accepted by the profession.

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes, absolutely.

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

Assessing based on the previous financial year seems reasonable on the face of it, but the SRA should think about cases where that would cause significant financial hardship - e.g. where an individual no longer has employment due to their conduct, but did have employment in the previous financial year. It is not so much about consideration of the individual whose conduct has incurred the penalty, but of those who may depend on them. In general, the interests of the individual's dependants should be taken into consideration. The SRA should also consider taking into account the financial impact on the individual where other regulators have applied or may apply penalties.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes. The case for this is very reasonable.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

No.

Financial penalties: Consultation paper

Response ID:11 Data

2. About you

9.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

No. I agree with the principles shown at bullet points 1 and 2. At 3 it should not be the case that the appropriate sanction is limited. The range of sanctions must include the ability to impose a financial penalty irrespective of the conduct in question. At bullet point 4 there needs to be a further justification for why the SRA wants to enhance its ability to make decisions in-house. That must also be accompanied by greater transparency on the right to appeal to the SDT.

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

No. The SRA should have the ability to impose a financial sanction in such cases if that is deemed the appropriate sanction for the conduct in question.

12.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Any finding of misconduct must have available to it the appropriate sanction, whether that is a financial penalty or other sanction.

13.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

No. The penalty that is imposed must be dependent on the misconduct involved and the facts of each individual case.

14.
5) Do you have any comments on the proposed criteria and process?

The process is not sufficiently robust. Where a respondent is given a timeframe in which to respond and fails to do so the SRA should contact to tell the respondent that since he/she has failed to respond in the timeframe a penalty will be imposed at a set date unless the respondent is able to demonstrate a valid reason for not responding or lodging an appeal.

15.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

I do not consider fixed penalties an appropriate measure. If fixed penalties are introduced then the maximum penalty must not exceed £2,000.

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of

financial penalty?

No. The financial penalty should be assessed in accordance with the seriousness of the conduct that gives rise to the penalty. Any penalty imposed by the SRA should be consistent with the approach adopted by the SDT. Furthermore a firms last reported turnover may not be reflective of the financial position at the time of the disciplinary proceedings. It is the latter that should be taken into account.

17.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No. The financial penalty should be assessed in accordance with the seriousness of the conduct that gives rise to the penalty. Any penalty imposed by the SRA should be consistent with the approach adopted by the SDT. Furthermore a firms last reported turnover may not be reflective of the financial position at the time of the disciplinary proceedings. It is the latter that should be taken into account.

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes. This is consistent with the approach taken by the SDT.

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

The approach taken by the SRA must be consistent with that taken by the SDT.

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

No. The fining powers of the SRA should be in line with those available on summary conviction in the Magistrates' Courts and no greater.

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

Financial penalties: Consultation paper

Response ID:31 Data

2. About you

10.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

11.
1) Do you agree that these principles should govern our approach?

Yes

12.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Yes. A more credible deterrent is needed urgently.

13.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

No

14.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes.

15.
5) Do you have any comments on the proposed criteria and process?

'Failure to have in place all the administrative procedures required to
ensure Anti-Money laundering Compliance' is too vague and undermines fairness because it is not an objective test.

16.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

£2000 for firms is too low to act as a deterrent.

17. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes.

18.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

No. 6%.

19.

9) Do you agree that we should take into account individual means when determining a financial penalty?

No.
A Proportion of firm's turnover is better.

20.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

Assessing an individual's means creates privacy concerns. SRA should not have any right to to see information from individual's tax returns nor information on assets unrelated to employment.

21.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes. £50000 would be more realistic and sustainable than £25000.

22.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

I strongly support support suspension as a soliictor for a minimum of 12 months or striking off , rather than financial penalty, for proven sexual misconduct or discrimination so as to act as a credible deterrent. The impact of this proposal would be to help end violence and discrimination against women and girls and help end inequality.

Financial penalties: Consultation paper

Response ID:42 Data

2. About you

10.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

11.
1) Do you agree that these principles should govern our approach?

I do not agree with all the principles

12.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

No .

I do not agree that there are never cases where a financial penalty would be out of the question .

I do recall the difficulties SRA and SDT encountered when the offence of employing or remuneration a struck off solicitor carried an obligatory strike or suspension . The straightjacket of sentencing gave rise to strange decision of a day's suspension for each partner but spread out to allow a frim to continue . Obligatory sentencing can give rise to injustice and lack of proper flexibility of penalty to meet the actual conduct.

13.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

For the reasons above I do not think that any type of conduct are such that they can never be dealt with by a financial penalty albeit that some , including dishonesty , are most unlikely to be suitable for a fine . There should be guidance but there are always exceptions on the specific facts of each case .

14.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

I have no problems with fixed penalties for matters that attract no misconduct against the solicitor eg oversight rather than culpable behaviour. There have to be narrow areas where this is allowed and those areas should not be extended by mission creep .

15.
5) Do you have any comments on the proposed criteria and process?

Please see comments above ..

I do not agree with an increase in the power of SRA to impose higher fines. However, I do see merit in higher fining where SRA and the solicitor/firm agree to a financial penalty higher than the current limits. If agreement is reached, that agreed resolution is

unobjectionable. If it is not reached , the case should proceed as it would now .

I have concerns as to whether the public interest is adequately protected and would be prefer some external input in any higher financial penalty . This could be achieved by any such agreement to be approved by a member of SDT to ensure the publice interest is properly reflected in the outcome

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16.

6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

See above with general views on fixed penalties. They can surely only be relevant in a rather small area of caseload . How many cases in the last year would SRA say they could have been used ?

It should not be seen as simply a method of reducing SRA work. Matters that fall within this category could be a sign of more serious problems in a firm that will not be discovered in a fast track system . SRA would be creating a risk factor for itself if it deals with cases by fast track and misses underlying problems in the firm which are only discovered later when things have progressed perhaps to intervention

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17. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

No .

Whereas poverty can be a relevant factor , profitability should not unless related to the misconduct . In addition , turnover does not always mean profitability.

18.

8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

See comments above .

Profits may be relevant : turnover may be a misleading rather than a helpful factor .

19.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes .

Low income and lack of assets are relevant factors to reduce a financial penalty

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20.

10) Do you have any comments on the proposed features for assessing an individual’s means? What other features do you think we should consider, if any?

There should not be an obligation to provide a statement of means . If a solicitor wants to "plead poverty", the burden properly shifts to the solicitor to validate his/her assertions.

21.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

No .

I think that there is a lack of trust within the profession as to SRA's ability to make correct decisions in its investigations and disciplinary processes. That lack of trust needs to be remedied before extension of powers should be considered.

22.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

It will have limited impact on well resourced firms . It will have a disproportionate impact on smaller and less well financed firms. The costs of defending cases as SDT is very high and even if successful a small firm would be considerably out of pocket . The impact might be to accept a high fine simply as a pragmatic solution.

Financial penalties: Consultation paper

Response ID:68 Data

2. About you

9.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

Broadly speaking yes

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

No, I think these behaviours at less serious levels could all reasonably fall to be dealt with by way of financial penalty. The SRA appears to be escalating the seriousness of selected offences unnecessarily.

12.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

Theft or reckless loss of client money

13.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes

14.
5) Do you have any comments on the proposed criteria and process?

There is a danger of insufficient levels of challenge by internal adjudicators and decision makers

15.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

Important to link the fine to income/turnover/ability to pay at higher and lower end

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes

17.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

Yes

18.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes critically important that we don't bankrupt individuals or firms employing people for breaches which would not otherwise get people struck off or firms intervened

19.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

20.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

I have no problem with it being higher for firms with high turnover - it has to be high enough to act as a deterrent

21.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

Solicitors are employers - impact on staff as innocent employees has to be a consideration

Financial penalties: Consultation paper

Response ID:72 Data

2. About you

10.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

11.
1) Do you agree that these principles should govern our approach?

Yes, absolutely.

12.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Yes, a financial penalty ought not to be suitable for these matters.

13.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

No

14.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

Yes

15.
5) Do you have any comments on the proposed criteria and process?

No

16.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

Not really but the income of the individual ought to be taken into account

17. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

Yes

18.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

Yes

19.

9) Do you agree that we should take into account individual means when determining a financial penalty?

Yes, absolutely

20.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

No

21.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Yes

22.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

No, sorry!

Financial penalties: Consultation paper

Response ID:120 Data

2. About you

8.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

9.
1) Do you agree that these principles should govern our approach?

YES

10.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

YES

11.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

BEING FOUND GUILTY OF ONE OF A RANGE OF CRIMINAL OFFENCES (TO BE DECIDED BY THE SRA)

12.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

YES - AS LONG AS THEY ARE LARGE ENOUGH TO ACT AS A DETERRENT AND A PUNISHMENT FOR THE WRONGDOING

13.
5) Do you have any comments on the proposed criteria and process?

SEE 4) & 6)

14.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

MUST BE LARGE ENOUGH TO ACT AS A DETERRENT AND CLEAR PUNISHMENT FOR THE WRONGDOING.

15. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

YES

16.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

YES

17.

9) Do you agree that we should take into account individual means when determining a financial penalty?

YES

18.

10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

IT IS IMPERATIVE THAT AN EMPLOYER DOES NOT PAY ANY FINE OR COSTS ON BEHALF OF AN INDIVIDUAL SOLICITOR, WHERE THE EMPLOYER DID NOT AUTHORISE THE MISCONDUCT, AND IS NOT THE SUBJECT OF THE CASE.

OTHERWISE, EMPLOYERS MAY WELL PAY THE FINES/COSTS INSTEAD OF THE INDIVIDUAL SOLICITOR WHO ACTUALLY CAUSED THE MISCONDUCT.

THAT WOULD RELIEVE THE ACCUSED OF ANY PERSONAL FINANCIAL PENALTY AND BE OF NO DETERRENT AT ALL. CONSEQUENTLY, THERE WOULD BE NO INCENTIVE TO MODIFY THIS/HER BEHAVIOUR.

I BELIEVE THIS WOULD OCCUR IN MANY CASES, BOTH BY LAW FIRMS AND LARGE EMPLOYERS (lOCAL AUTHORITIES, PUBLIC BODIES, PLCs).

THERE NEEDS TO BE A STIPULATION IN THE RULES THAT ANY FINE/COSTS MUST BE PAID OUT OF THE INDIVIDUAL SOLICITOR'S OWN POCKET (SUBJECT TO THE INDIVIDUAL'S MEANS),
AND THAT THERE IS AN SRA INVESTIGATION AND LARGE FIXED PENALTY (BASED ON TURNOVER), FOR ANY EMPLOYER WHO BREACHES THE RULE, TO ACT AS A STRONG DISINCENTIVE.

THE MOST EFFECTIVE WAY OF STOPPING THIS IN ITS TRACKS IS TO STIPULATE IN THE RULES THAT THE SENIOR DIRECTORS/PARTNERS ARE PERSONALLY LIABLE FOR PAYING THAT PENALTY!

19.

11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

YES

20.

12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?

Financial penalties: Consultation paper

Response ID:132 Data

2. About you

9.
How should we publish your response?

Please select an option below.

Publish the response anonymously

3. Consultation questions

10.
1) Do you agree that these principles should govern our approach?

Yes

11.
2) Do you agree that the behaviours demonstrated in cases relating to sexual misconduct, discrimination and non-sexual harassment are not suitable for a financial penalty?

Yes. This is a common sense approach.

A concern is that the SDT will be able to make very harsh decisions which can, effectively, lead to an individual being forced out of the profession. Those sitting in judgment at the SDT will apparently apply as a burden of proof the 'civil' test of an issue being beyond reasonable doubt rather than the higher bar of an issue being beyond reasonable doubt.

12.
3) Are there any other types of conduct that you consider are or are not suitable for a financial penalty?

conduct issues where the repercussions can lead to an individual having to cease practising.

13.
4) Do you agree that we should introduce fixed penalties for certain, less serious, breaches?

The SRA is trying to impose penalties on a sliding scale between £800 and £1500 for administrative breaches. It seems that £1500 would be a significant cost to a number of practitioners - especially where multiple breaches were - perhaps inadvertently - made.

There is also concern that the integrity of certain practitioners might be called into question if, for example, they have no financial problems and find it easier to settle fines than to demonstrate compliance.

14.
5) Do you have any comments on the proposed criteria and process?

As above. Further, it is clearly beneficial if the time involved in bringing cases to a conclusion can be reached.
The level of the fine is concerning - a fine of £25,000 could potentially be catastrophic for a small firm.

There is also significant concern that the SRA might be seen as assuming the power to judge and punish solicitors unilaterally. Further, there seems no clarification as to precisely who at the SRA is responsible for making decisions and how well placed they are to do so.

There is also a possibility that some practitioners might be reluctant to report breaches due to being worried over facing an automatic fine. This might raise the possibility of the integrity of certain practitioners being impaired.

15.
6) Do you have any comments on what an appropriate value for fixed penalties might be in different circumstances?

It has to be proportionate and equitable.

16. 7) Do you agree that we should introduce a turnover based assessment for all firms when calculating the level of financial penalty?

It seems to be positive that the SRA is now suggesting that, as a result of considerable disparity in the level of income of various firms within the profession, fines should be proportionate and take into account the firm's turnover and the individuals' circumstances. It does, nevertheless, appear to be the case that the criteria for determining the financial wherewithal of individuals and practices need to be more carefully set out.

17.
8) Do you agree that we should set the maximum proportion of turnover we can take into account when applying financial penalties across the different levels of seriousness at 5%?

See answer to 7 above.

18.
9) Do you agree that we should take into account individual means when determining a financial penalty?

yes.

19.
10) Do you have any comments on the proposed features for assessing an individual's means? What other features do you think we should consider, if any?

Only in the sense that the details of the fines would be in the public domain. There might therefore be a risk of individuals' financial circumstances being (to some extent at least) being in the public domain.

20.
11) Do you agree that we should seek an increase to our internal fining powers for traditional law firms and solicitors to the level of £25k?

Please refer to answer to 5 above.

21.
12) Do you have any information that will help us to build our understanding in relation to the impacts of our proposals on different groups of solicitors?