Financial penalties: detail of new approach

Consultation responses

February 2023

Consultation responses

These respondents, listed in the order in which they responded to the consultation, asked us to name them and publish their responses. The text of their responses follows the list of names.

Liverpool Law Society

Mr Man Mohan

City of London Law Society

Legal Services Consumer Panel

The Law Society

Junior Lawyers Division

Consultation: Financial penalties - detail of new approach

Response ID:30 Data

2. About you

1.
First name(s)

Ann

2.
Last name

Murphy

3.
Please enter your SRA ID (if applicable)

6.
I am responding..

on behalf of an organisation

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. Question 1

10.
1) Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

A. We agree, for the reasons set out in the consultation paper, that fines at band D level, (the most severe level), should be determined by an adjudication panel. In particular, with fines of the magnitude now proposed in this banding and the adjudicator having the power to reduce the fine level by up to 40%, we recognise the need for independence and vigour. However, we also consider that at least one member of the panel should be legally qualified. In cases of such severity, we consider that it is important to have the input of a practitioner, who has lived and breathed practice.

4. Question 2

11.
2) Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews?? Please provide comments to explain your reasons.

A. We believe that the profession would welcome clarification about the circumstances in which the SRA will consider holding hearings or conducting interviews. This will assist to make the process more transparent.

Whilst the consultation makes clear that determination following a hearing and the conducting of interviews is not standard in every case and will be the exception rather than the norm, we are concerned about how the additional work created by the hearings/interviews will be resourced.

On the issue of conducting interviews with third parties the consultation does not address the compellability of that third party to attend any subsequent hearing. We assume that the individual will not be compellable and thus it is our view that in circumstances where a hearing is contemplated at the same time the note of interview is supplied to the solicitor he or she should be informed if the third party has been asked to attend the hearing and their response.

5. Question 3

12.
3) Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

A. Yes. The existing requirement is unnecessary.

6. Question 4

13.
4) Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

A. See above.

7. Question 5

14.
5) Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

A. Yes. We particularly welcomed the example of circumstances when a fine or rebuke might be considered as this provides the reader with an understanding of the likely approach to be taken.

8. Question 6

15.
6) Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment and take these into account when considering the appropriate sanction?

A. Whilst we agree with the proposed approach to pilot personal impact statements in specific types of cases we have some concerns about introducing their use as a matter of course even in the types of cases currently contemplated as it is not clear

what weight might be attached to the statements. We say that conscious that the forum is a regulatory tribunal not a court and the standard of proof is the civil not the criminal standard.

9. Question 7

16.
7) Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

A. We consider that the determination of the fine based on annual domestic turnover as opposed to profit could lead to unfairness. We also take issue with the percentage penalty ranges applicable in each penalty band. Beyond commenting that the start and end point of each bracket is higher than the current fining table, as it is believed that the existing fining bands are out of kilter, no explanation is offered for the chosen percentage ranges in each band. Whilst we accept that the percentages should increase from band A to band D to reflect the seriousness of the misconduct the choice of the figures set out in the table appears completely arbitrary.

It is our view that the maximum percentage- i.e. for what is termed in the table as Basic Penalty Scale D5 should be 3% and the preceding penalty scales should be fixed at levels starting above 0% for Basic Penalty Scale A1.

10. Question 8

17.
8) Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

A. No. Basing the fine on gross income is unfair. Further, it is immediately apparent from the table set out in the consultation paper showing the comparison between the current fining levels for each band and the fines that would be imposed using the income-based calculation that the level of fines once into band C become increasingly disproportionate, with the suggestion that D4 fining would be between 113 percent and 161 percent of gross income. No justification is offered in the consultation paper for those percentage figures. We are simply told that the proposal is aimed at ensuring there is a credible deterrent.

11. Question 9

18.
9) Do you have any further comments on our approach to fining individuals?

A. We do not agree with the proposal to publish the level of fine and the percentage of income as this will readily reveal the individual's gross income. We also do not accept that the publication is permissible under GDPR as being necessary to the exercise of the SRA's function and in the public interest. Weighing the competing interest in the balance, it is our view that the balance falls in favour of the individual solicitor's privacy

12. Question 10

19.
10) Do you have any comments on our proposed approach to fixed financial penalties?

A. We are largely in agreement with the proposed fixed penalty process. We agree with the level of the stage one fixed penalty at £750 and are pleased to see that there is a right of review and appeal in respect of both level 1 and level 2 fixed penalties. We do not agree that a level 2 penalty should be issued if after three years from the initial penalty the firm is found to be non-compliant for the same reason. In our view, this period is too lengthy and should be shortened to 18 months. Non-compliance

for the same breach in a period exceeding 18 months from the issuance of the initial penalty should be treated as a new breach attracting a level 1 penalty.

13. Question 11

20.
11) 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. No.

Consultation: Financial penalties - detail of new approach

Response ID:35 Data

2. About you

1.
First name(s)

Mr Man

2.
Last name

Mohan

3.
Please enter your SRA ID (if applicable)

6.
I am responding..

in a personal capacity

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. Question 1

9.
1) Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

Yes
Fine is essential for public protection

4. Question 2

10.
2) Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews?? Please provide comments to explain your reasons.

Yes
The holding of hearings is vital for public protection

5. Question 3

11.
3) Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

No,
Revoking referral under mines transparency

6. Question 4

12.
4) Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

Please contact me in person

7. Question 5

13.
5) Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

I have an open mind on this

8. Question 6

14.
6) Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment and take these into account when considering the appropriate sanction?

Yes, this'll be an important safeguard

9. Question 7

15.
7) Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

The percentage should be higher at around 10%

10. Question 8

16.
8) Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

Possibly

11. Question 9

17.

9) Do you have any further comments on our approach to fining individuals?

Yes . I have a paper to submit but there's no opportunity to up load it

12. Question 10

18.

10) Do you have any comments on our proposed approach to fixed financial penalties?

Yes. I wish someone to contact me

13. Question 11

19.

11) 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. Please contact me

Consultation: Financial penalties - detail of new approach

Response ID:38 Data

2. About you

1.
First name(s)

Clare

2.
Last name

Wilson

3.
Please enter your SRA ID (if applicable)

144422

6.
I am responding..

on behalf of an organisation

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

City of London Law Society - CLLS

9.
How should we publish your response?

Please select an option below.

Publish the response with my/our name

3. Question 1

10.
1) Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

Those imposing fines should obviously be functionally separate from those investigating misconduct. We also welcome the proposal that an explicit rule be introduced to require reviews to be dealt with by a different authorised decision maker. It is fundamentally inappropriate for a review to be considered by the original decision-maker.

However, we disagree with the SRA's proposals which appear to envisage extended use of adjudication panels for Band D fines.

The SRA's rationale for increasing the amount of the fines it is able to impose for individuals and traditional law firms was grounded in the previous £2,000 limit needing some inflationary form of adjustment. In the previous consultation, the SRA was express that increasing its fining powers to £25,000 was not about extending its remit into matters that are more suitable for the SDT. For example, it said: "Certain cases, for example those that are very serious or involve linked allegations of a more serious nature would be better heard by the SDT".

Yet fines in band D are, by their nature, for the most serious misconduct. It is not for the SRA to encroach on the proper role of the SDT when it comes to decision-making on serious misconduct. The suggestion that adjudication panels may take matters where there has been "significant loss" or a "significant impact" begs the question as to why the SRA would not be referring such matters to the SDT. The SRA appears to be creating a parallel system without providing analysis of how its proposal may benefit the public or the profession, adding complexity to the current system without demonstrating a compelling rationale for change. It risks inconsistencies in how serious misconduct is decided and promotes a shadow regime that does not have the safeguards of the established SDT process. It thereby increases the scope for unfairness and raises serious questions of natural justice.

A further consideration is whether the proposal for greater use of adjudication panels might increase already lengthy delays in resolving matters at the SRA. The SRA should ensure that its new rules and schedule of delegations promotes quality of decision-making in reasonable timescales.

The possibility of a panel of only lay members does not, in any event, seem appropriate for the kinds of matters the SRA is suggesting may go to panels.

4. Question 2

11.
2) Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews?? Please provide comments to explain your reasons.

We agree with the proposal that SRA hearings should be limited to the situation where a hearing is necessary and the SRA is unable to make a referral to the SDT. As the SRA acknowledges, the SDT has an established role and infrastructure as a body set up for hearings, which the SRA does not have.

As regards the proposal to widen the people who may be interviewed by adjudicators, more information is needed. As a general proposition, we would observe that adjudicators should usually be considering the evidence presented to them, not themselves collecting evidence. Care is needed so as not to blur the investigation function with the adjudication function, ensuring fair separation and impartiality. There must be appropriate rigour and safeguards around this proposal, for it to be implemented fairly and transparently vis-à-vis the person subject to the decision, so that they have a proper opportunity to make representations and if appropriate put forward additional evidence of their own. It risks considerable unfairness if interviews are held with witnesses, with their accounts effectively unchallenged. This is not necessarily mitigated by the mere provision of a transcript to the subject of the investigation after the event, if they do not have the occasion to question the witness and test what they are saying. This is important in any event, but all the more critical in a regulatory system where delays are commonplace, and conduct is being examined often years after the event with the risk of memories being stale or other witnesses no longer being available.

5. Question 3

12.
3) Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

We do not oppose this so long as it does not work in any way that could be unfair to a respondent.

6. Question 4

13.

4) Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

We would like to see greater efficiencies in the SRA's decision-making, reducing the time taken to reach decisions that are fair and proportionate to the conduct in issue. We would like to see greater transparency to the profession around how the SRA operates its decision-making in practice; the quality and training of its people; and adherence to published KPIs. We suggest greater investment in training particularly on the appropriate collection and interrogation of evidence and the rules of natural justice.

In addition, we have ongoing concerns as to the way in which the SRA runs its enforcement function, which too often falls short of properly taking into account solicitor mental health and wellbeing. The SRA states in its Guidance (SRA investigations: Health issues and medical evidence) "that the regulatory process can be a stressful and anxious time for those who we are investigating. This may be exacerbated for those who are particularly vulnerable because of poor physical or mental health. Sometimes the regulatory process itself can exacerbate or trigger health issues". We would encourage the SRA to show greater leadership in this area, by performing its role in a way that does not cause unnecessary stress. Most practitioners take the SRA's processes very seriously, even where they are themselves confident that they have acted in a proper way. The SRA should not underestimate the impact they have when they are questioning someone's conduct, and it is incumbent on the SRA to keep the process fair and proportionate to allegations under consideration. The delays and uncertainty can significantly adversely affect wellbeing, as can the months without substantive progress that are too often a feature of the process. Apart from undermining the SRA's efforts to be more transparent, this can leave practitioners with matters hanging over them sometimes for years: years on from the alleged conduct.

7. Question 5

14.

5) Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

We support initiatives aimed at removing unacceptable behaviours from the profession, but remain concerned about how the SRA plans to use its regulatory role in this area. The SRA's updated Guidance on Acting with Integrity (September 2022) suggests that, notwithstanding the Court's judgment in Beckwith v SRA [2020] EWHC 3231 (Admin), the SRA plans to take a wider approach than the case law may indicate.

Our principal concern remains that the updated Enforcement Strategy lacks flexibility and is too restrictive of the SRA's decision-making discretion in circumstances where there is such a broad range of conduct that could be categorised as sexual misconduct, discrimination or harassment, and such a vast array of circumstances. The SRA refers to "exceptional circumstances" where suspension or strike off may not be appropriate as including cases where the complaint has arisen due to inappropriate or insensitive behaviour, but the SRA is satisfied there is no ongoing risk, such as where an incident is one-off or there has been a remark that is misjudged but not ill-motivated. We suggest that the SRA's view of such circumstances as "exceptional" is not in line with reality. We recommend that if the SRA continues with this exceptionality test it should do so on a trial basis, monitoring both cases it has had as well as future cases. It is not logical that one-off misjudged/inappropriate/insensitive but not ill-motivated behaviour in this category should be rarer than deliberate, targeted sexual misconduct, discrimination or harassment.

It is not clear from the updated Enforcement Strategy or the consultation paper how the SRA intends to define and differentiate between sexual misconduct, discrimination and harassment cases. Moreover, it is not clear how the SRA's approach ties in with the obligation in 7.7 of the Code of Conduct on solicitors to report to the SRA "any facts or matters that you reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them (including you)",

for example whether the SRA would expect the regulatory reporting of "misjudged but not ill-motivated" behaviour where the incident has been successfully handled within a firm according to established procedures. An inference from the updated Enforcement Strategy could be that the SRA would expect reporting, but this would not be in line with authority, which makes it clear that all professional people are human and from time to time make slips: such slips not necessarily amounting to professional misconduct (see eg SRA v Day [2018] EWHC 2726 (Admin)). We suggest that the SRA should make it clear that for behaviours in this category, as with other types of conduct, the reporting requirement is where the conduct would be regarded as serious and reprehensible by competent and responsible solicitors, and there is a reasonable degree of culpability.

Such clarity would also help to mitigate against the potential chilling effect of the SRA's approach on victims of such behaviour. If the SRA's reporting threshold is set too low, and/or it applies too much of an exceptionality test to sexual misconduct, discrimination or harassment, it may find that this stifles the legitimate interactions which in practice help to resolve such issues when they occur at the one-off/inadvertent end of the spectrum. Victims may hesitate from raising concerns within their firm, against the prospect of those concerns being escalated to the SRA. Those responsible may be more hesitant to take proper responsibility and apologise, lest that be taken as an admission to be escalated. There may also be an adverse impact on well-intentioned discussions and training aimed at promoting awareness, for example of micro-aggressions and language, which are not always obvious and intuitive to people.

8. Question 6

15.
6) Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment and take these into account when considering the appropriate sanction?

Yes, so long as the respondent is given a fair opportunity to respond and the SRA gives appropriate weight to such statements in decision-making. The SRA will of course need to achieve a fair balance between respondents and complainants. We suggest the SRA develops guidance for the role of personal impact statements in enforcement decisions.

In this regard, we welcome the SRA's statement in the consultation suggesting that what it has in mind is personal impact statements being taken into account by the authorised decision-maker only when considering the appropriate sanction. The safeguards that the SRA should consider for suitable guidance include ensuring that such statements are not available to the decision-maker before the decision has been made as to whether there has been professional misconduct. The SRA should reflect on how it proposes to manage the role of personal impact statements in influencing the appropriate sanction. By their nature, personal impact statements are very personal and will be subjective based on the complainant's experience and what the conduct has meant for them, which may be different for different people depending on their characteristics and circumstances. If the SRA is going to have personal impact statements, it needs to develop guidance for decision-makers that ensures that sanctions remain objectively fair and proportionate to the conduct at issue.

9. Question 7

16.
7) Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

The scheme for calculating fines is simplistic and provides too little scope for discretion to ensure that the outcome is fair and proportionate. This is especially important insofar as the SRA is taking a means-based approach to fines, rather than an approach where outcomes are first and foremost driven by the conduct at issue (and then adjusted if necessary to take account of means).

The SRA must factor in that at any level fines can have a much wider impact than simply the amount of the fine: there are reputational consequences that may be disproportionate to the seriousness of the misconduct.

In circumstances where the SRA appears to be reducing its discretion in setting the level of a fine, it is even more important for the integrity of its decision-making that it keeps an appropriate level of flexibility when it comes to mitigation. The consultation states that as is currently the case, once the basic penalty has been identified, an adjudicator may apply a discount to take into account an early admission of the misconduct, whether the harm was remedied and whether the respondent co-operated with the SRA's investigation. These discounts can be a maximum of 40% in total. We suggest that this 40% maximum should itself be capable of applying flexibly such that in an appropriate case, a greater than 40% discount may be applied.

10. Question 8

17.
8) Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

At the outset, it is not logical that breaches of a similar nature would be dealt with by the SRA (lower earners) or the SDT (higher earners). Such an approach risks inconsistency in decision-making and potential injustice. The approach could lead to great discrepancies between the penalties for equivalent conduct. The scheme is too simplistic and provides too little scope for discretion to ensure that outcomes are fair and proportionate.

We note that unlike for firms where the SRA has explained that it engaged an independent economic consultancy to advise us on the best metric to use for calculating means, no such work appears to have been done for individuals. We suggest that the SRA should commission equivalent analysis in relation to individuals.

We have several serious concerns about the SRA's proposal and suggest it requires further consideration of suitable safeguards. For example, it is not clear why the SRA has chosen gross income as that inflates the size of any fine relative to the actual take-home income of an individual. Contrary to the suggestion in the consultation, gross income is not "a good indicator of the affordability of a fine and the ability of the individual to pay". The affordability of a fine for any given individual will depend on their own circumstances, such as caring responsibilities, routine household outgoings, other means of financial support and the like. Whilst we accept that there is a deterrent element to fines, it cannot rationally be part of the purpose that a person and potentially their household might be put in serious financial difficulty.

We are concerned that the SRA will no longer routinely invite an individual to submit a statement of means. We recognise the SRA has said that individuals can still provide evidence of their current income where there "may have been a significant change in income since the latest available P60 or tax return", but this sets the test at the wrong place and makes it too much of an afterthought.

We note the approach of other regulators, for example the FCA when it comes to fining individuals. The FCA's Decision Procedure and Penalties Manual (DEPP, https://www.handbook.fca.org.uk/handbook/DEPP/) states repeatedly how the FCA will consider all the relevant circumstances of the case when deciding whether to impose a penalty or issue a public censure, whether or not the particular factors are expressly listed. DEPP 6.4 sets out considerations relevant to whether a financial penalty or public censure is appropriate, including: if a person has profited or avoided a loss from a breach, they should not be permitted to benefit from that breach; seeking to achieve a consistent approach (see final paragraph below); and the impact on the person concerned. DEPP 6.5 sets out factors going to determining the appropriate level of a financial penalty. For individuals, although this is in part an income-based approach, the "relevant income" is defined as coming from the employment connected to the breach and the period of the breach, up to 40% of the relevant income. Its rules around serious financial hardship focus on net annual income and looking at all relevant circumstances, recognising that penalties may affect people differently and its approach needs to ensure that any fine is proportionate to the breach.

The Association of Chartered Certified Accountants (ACCA) in its Guidance on Disciplinary Sanctions (https://www.accaglobal.com/gb/en/about-us/regulation/disciplinary-and-regulatory-hearings.html) recognises how an individual's means should be a relevant consideration in calculating the appropriate level of fine, but it also expressly states: "the amount of a fine should not be so punitive as to characterise the proceedings as 'criminal' rather than a determination of civil rights and obligations". It has a maximum level of £50,000, and the Guidance is clear that before fixing the amount of fine, the Disciplinary

Committee should invite the member to address it on affordability.

The Financial Reporting Council (FRC) in its Sanctions Policy relating to its enforcement jurisdiction over statutory auditors (https://www.frc.org.uk/about-the-frc/procedures-and-policies/enforcement-procedures/supporting-documents,-policies-and-guidance) has as a starting consideration whether deterrence can be achieved by publication of a public statement alone. It is also express that a fine needs to be proportionate to the breach at issue and all the circumstances of the case. For statutory auditors, the FRC will "normally take into consideration" their "financial resources and annual income and the effect of a financial penalty on that Statutory Auditor and [their] future employment".

We suggest that the SRA should at least cap its proposed basic penalties at an appropriate percentage of net income reflective of its function to achieve proportionate penalties for professional misconduct, taking all relevant circumstances into account. It should also be in line with the SDT's approach to financial penalties, in particular: that they should reflect the seriousness of and be proportionate to the misconduct, where a reprimand is not sufficient but strike off/suspension is not justified – with fine bands being indicative, "broad starting points" only. It is noteworthy that the SRA's proposed table has (potentially, depending on income) results for some individuals which would put their level of fine at the more "minor" (A/B) end for the SRA, but at the very serious or significantly serious end for the SDT (Level 4/5).

Regarding mitigation, we otherwise offer the same comments as for Question 7 above about firms and how flexibility is needed around the 40% maximum discount.

11. Question 9

18.
9) Do you have any further comments on our approach to fining individuals?

See Question 8.

12. Question 10

19.
10) Do you have any comments on our proposed approach to fixed financial penalties?

Our principal submission is to remind the SRA that financial penalties at any level should only be imposed where it is satisfied that there has been professional misconduct. As is well-established, a rule breach is not necessarily professional misconduct and it is important that the SRA does not overreach in this regard.

The SRA proposes that a firm may "request a review of the fixed penalty only on the grounds that it was compliant within the specified time or that it did not receive our initial letter through no fault of its own. This would not apply if for example a firm had not updated its contact details or checked its email/spam folders". We suggest the SRA should be open-minded on the "no fault of its own" ground as there may be circumstances where it would be unfair – for example a combination of absences which lead to an inadvertent delay in a letter coming to the appropriate person's attention in a firm.

13. Question 11

20.
11) 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?

This response is submitted on behalf of the City of London Law Society ("CLLS"). 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.

Policy Team
Solicitors Regulation Authority
125 Old Broad Street
London EC2N 1AR

Sent by email only to Chris.Handford@sra.org.uk

14 November 2022

Dear Policy Team,

Re: Consultation on Financial Penalties – Details of New Approach

The Legal Services Consumer Panel (Panel) welcomes the opportunity to comment on the Solicitors Regulation Authority's (SRA's) consultation on the details of the new approach to financial penalties.

We appreciate the SRA's pledge to work with other regulators, where possible, to align its financial penalties scheme to theirs. As we stated in our response to the first consultation on financial penalties, the Panel welcomes a sector-wide approach that would strengthen standards for all lawyers and consequently the public's confidence in legal services.

Given that the reason for expanding the SRA's fining powers was to save costs and time in processing disciplinary issues involving fines, these aims need to be front of mind when creating additional decision-making capabilities within the SRA. Duplicating processes that already exist at the Solicitors Disciplinary Tribunal (SDT) should be approached carefully. Both disciplinary streams should be consistent, even more so where a difference in income drives the difference in venue. Overall, disciplinary systems need to be fair and transparent in order to instill public confidence. We will endeavour to answer the consultation questions below.

Question 1: Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

The Panel understands why you wish to use adjudication panels, rather than a single adjudicator, to decide band D fines given that the level of these will be potentially considerably higher than now, and agrees that the use of Panels in serious cases is often appropriate. There is, however, a possibility that this change could increase the cost and time to administer these financial penalties. As one of the main objectives for increasing the SRA's fining capability was to reduce the cost and time necessary to decide cases that would otherwise be before the SDT, it is important to consider carefully how you propose to use Panels in a way which will not add materially to the cost and time taken to take a decision internally.

Question 2: Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews? Please provide comments to explain your reasons.

If the SRA is amending its procedures to enable it to hold more hearings (even if they are rare), it raises the issue of potentially increased duplication of duties between the SRA and SDT. This might mean that additional resources are needed, and efficiencies are lost. It might be useful to have a discussion with the SDT about how to find systemic efficiencies through holding additional hearings at the SRA level.

With regard to changing how interviews are done, though it may be useful to streamline a decision-making system, it is important to maintain a transparent and procedurally fair process that is viewed as just and credible by all actors. This is the only way that all stakeholders will buy into the process, thereby boosting public confidence.

It may be acceptable for investigators to interview witnesses without the respondent solicitor (and representative) being present, but it does not appear fair to have a decision-maker do so. Respondent solicitors must be able to answer the case against them, including challenging all the evidence placed before the decision maker (which encompasses any information provided by viewing a witness give an account). Therefore, in expanding its decision-making powers, the SRA must be conscientious in keeping its investigation and decision-making roles separate. The one exception to this general view is where a witness is very uncomfortable or indeed unwilling to provide evidence in front of the respondent, in which case alternative methods may have to be explored.

Question 3: Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

Generally, the Panel feels that where there is a consumer affected by the conduct of a solicitor or firm being considered by the SRA, they ought to be notified of the outcome of the investigation and/or case.

Beyond this, we wish to reiterate our caution that streamlining a decision-making process cannot compromise the transparency and procedural fairness of an adjudication system. Accordingly, most people would expect parties to a proceeding to have the opportunity to respond to any new information, whether it is evidence or a legal opinion. It will always be useful to consider who the interested parties are in each disciplinary proceeding.

Of course, if the only new information received originated from the respondent solicitor, it does not make sense to seek further submissions. Nevertheless, it should be made clear in the reconsideration request procedures for respondent solicitors, that a decision to reconsider a referral to the SDT could be taken based solely on the evidence and submissions provided with the request for reconsideration.

Question 4: Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

It would be helpful to publish all SRA decisions on financial penalties in some form. As we stated in our response to the SRA's consultation on the publication of regulatory decisions, it is important to consider how this information could be best used and digested in a meaningful way by consumers. The LSB's MTCOG Regulatory Information Service Working Group is currently considering how lawyers' regulatory information (such as qualifications or sanctions) can be made available to users of legal services via a common regulator database or third party digital comparison tools. It would be useful to think about how to

make financial penalty information accessible at the same time as rehauling the financial penalties system.

The Panel would also like to note that while it is useful to make available to the public (as well as other stakeholders) all documents about how the SRA dispenses financial penalties, it is important to try to make them easy to navigate. It should be clear how different documents fit together and what issues each document addresses. Information should be conveyed in a manner that reduces the risk of information overload.

Question 5: Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

Yes, the Enforcement Strategy provides further clarity. Specifically, the Panel appreciates the mention of taking seriously allegations of abuse of trust, taking unfair advantage of clients (or others) and misusing client money that was added to the "Factors which affect our view of seriousness". It is important to have this information up front, even though these situations are examined in more detail later in the document. The primary emphasis on seriousness has to start with behaviour that would affect clients significantly before turning to specific factors concerning the solicitor or firm in question. This helps readers remember the primary purpose for the SRA taking enforcement actions – to protect the public.

We also note that the financial penalty table is missing the row containing the purpose, factors for and factors against headings (which is required to understand the table).

Question 6: Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment and take these into account when considering the appropriate sanction?

Yes, the Panel agrees with this approach. It may also be worth having a discussion with the SDT to pilot them in that forum as well. The Panel believes that employing personal impact statements in sexual misconduct, discrimination and harassment cases could help change the offending solicitor's understanding of the situation which would in turn contribute to more positive behaviours and workplace culture.

Detailed monitoring and evaluation plans should be developed as soon as possible to capture the short term and long term effects of employing these statements. We appreciate that any effect on reporting sexual misconduct, discrimination or harassment will be monitored. Where applicable, consumer views should also be collected, in addition to the views of respondents and decision-makers. It may be worth considering when this information should be collected as views may develop after parties have had a chance to digest the experience.

If there are no negative effects to including personal impact statements as part of the process, the Panel would like to see them employed, where applicable, in all disciplinary cases considered by the SRA.

Question 7: Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

Question 8: Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

Question 9: Do you have any further comments on our approach to fining individuals?

The Panel is pleased to see concrete methods for calculating penalties with the fining charts. Specifically setting out how to calculate fines, considering case specific factors, within each band (for each level of misconduct) and for various levels of personal income and firm turnover makes the decision-making less subjective. Introducing more objectivity to financial penalties fosters both transparency and public confidence.

One area, however, that is of concern is that the different fining powers of the SRA and SDT means that higher earning individuals will be referred to the SDT where the SRA lacks the ability to apply the fine mandated by its fining charts. In fact, it is not clear that the SDT will use the same fining charts when determining the specific amount of a penalty. It is also not clear if there are any meaningful differences in the procedures (including how involved a respondent's representative can be) and decision-making principles used when a respondent's case is decided within the SRA system rather than by the SDT. Therefore, beyond the issues surrounding duplication of process, it could be argued that there are two different disciplinary justice systems for the same infractions and a solicitor's income determines where one ends up. Such a proposition appears unfair on its face and might undermine public confidence. It would have been useful to have an estimated proportion of cases that may be handled in each venue as a result of the new guidelines tying income and firm turnover to the financial penalty.

We do appreciate that the SRA is communicating with the SDT to try to clearly demarcate when cases will be referred to the SDT, but there are larger issues at stake here which may require further collaboration. Solutions should be considered so that disciplinary action is applied uniformly, whether offending parties work in a traditional law firm or an alternative business structure and regardless of their income or firm turnover. Inconsistencies between types of solicitors must be resolved before a common approach to different types of lawyers can be pursued.

Monitoring and evaluation will be very important to ensure that taking income and firm turnover into account when assigning financial penalties is having the desired effects. It would also be interesting to see if the methods of calculating financial penalties are being applied in a consistent manner and adequately taking relevant considerations into account.

We appreciate that the monitoring and evaluation team will have members with different areas of expertise, but the focus seems to be concentrated on looking at which solicitors are being fined. Arguably, given that the primary purpose of financial penalties should be to deter sub-standard conduct, the most important impact that needs to be monitored is the impact on solicitor's conduct in general, and the consequent impact on the consumer. Such impacts may include how a specific client felt about the disciplinary system, changes in the likelihood to report, as well as any ramifications for larger groups of consumers. Attention should be paid to developing these monitoring and evaluation plans as soon as possible.

Question 10: Do you have any comments on our proposed approach to fixed financial penalties?

The Panel is pleased to see that fixed financial penalties are being used to ensure compliance with the SRA's transparency requirements and other administrative infractions. We feel that the provision of a specified amount of time to comply prior to the fixed fine being introduced, followed by a refusal to accept any excuses other than evidence that the notice was not received, would promote compliance. The closer the SRA can get to 100% compliance with quality and price transparency, the more effective this information will be to prospective consumers in choosing a legal service. We are also in agreement that a repeated infraction should incur a higher fixed penalty (eg. £750 for the first instance and £1500 for the second).

We are also pleased that the SRA has built discretion into the system so that higher fines may be imposed or an investigation initiated where it becomes apparent that systemic issues related to the administrative failures are present within the firm.

Question 11: 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 Panel would like to see the SRA also consider how consumers with protected characteristics are affected by new proposals. For example, the 2022 Tracker Survey shows that ethnic minority consumers are more likely to shop around for legal services (54% compared with 40% of white British consumers) and would therefore benefit more from transparency data being available from legal services providers.

It would also be very useful to see which clients are being affected by substandard solicitor behaviour. If there is previous data of this nature, it may be useful to compare it to such data under the new system over the long term, but it would be useful to collect this information even if it was not available previously. It is important to remember that changing the financial penalty system not only affects solicitors, but also consumers, especially as consumer protection is the substantial reason for the system existing in the first place.

Should you have any questions pertaining to this discussion paper response, please contact Heidi Evelyn, Consumer Panel Associate at Heidi.Evelyn@legalservicesconsumerpanel.org.uk, with any enquiries.

Yours sincerely,

Sarah Chambers
Chair
Legal Services Consumer Panel

Law Society response:

SRA Financial Penalties: detail of new approach

Consultation

November 2022

Introduction

1. The Law Society is responding to this consultation[1] 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 responded to the Solicitors Regulation Authority's (SRA) first Financial Penalties consultation in February 2022[2].

3. The SRA's internal fining powers, in relation to traditional law firms and solicitors and others working there, increased from £2,000 to £25,000 from 20 July 2022.

4. The SRA is now further consulting on detailed plans to implement the decisions outlined in the SRA's Final Position Report[3] made following that consultation, including:

    - proposals for panels, instead of single adjudicators, deciding the most serious category of fines
    - guidance to clarify behaviours that are unsuitable for a fine
    - taking the means of respondents (both firms and individuals) into account when setting a fine and proposed updated fining bands
    - raising the maximum fine it will impose on a firm to 5% of turnover
    - the detailed proposals with regards to the introduction of a fixed penalties scheme for a limited number of low-level breaches of its rules.

5. The paper poses several questions, and we provide our views below.

Q1 Do you agree with our proposed rule that fines in Band D will be decided by adjudication panels? Please provide comments to explain your reasons.

6. In principle we support the proposal that adjudication panels, instead of sole adjudicators, should consider matters which fall into the SRA's most serious category of fines (Band D). However, we consider that panels should always be made up of both legally qualified members and lay members. We also believe that legally qualified members with experience in practice should be the majority and always chair the panels. Lay members play a valuable part in such processes; however, such conduct matters should not be dealt with by a panel of entirely lay individuals (even on rare occasions as the SRA suggests). Given that similar instances would have previously been referred to the Solicitors Disciplinary Tribunal (SDT), the public and the profession would have greater confidence where legally qualified individuals preside over such matters.

7. The consultation is silent about the constitution of such panels or the number of people who will normally preside on such panels, although the proposed amendments to Rule 8.4 SRA Regulatory and Disciplinary Procedure Rules (RDPR)[4] indicate chairing arrangements where the adjudication panel consists of at least two members. For transparency reasons there also need to be clear rules or guidance to cover issues that might arise, for instance how matters would be dealt with in circumstances where a

[1] Financial penalties: detail of new approach and Statement
[2] Law Society Response to SRA Financial Penalties Consultation Feb 2022
[3] SRA Financial Penalties Final Position Report
[4] SRA Consultation Annex 1 RDPR

panel member's involvement raises doubts about their impartiality or where a panel member cannot deal with a matter due to a conflict of interest.

Q2 Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews? Please provide comments to explain your reasons.

Hearings

8. The SRA is proposing to amend its rules[5] to give adjudicators sole discretion to decide whether there should be a full hearing before a panel either to be held in public or private[6]. Whilst the SRA anticipates that this will be rare in practice and that in most cases it will make a referral to the SDT, it would be helpful to understand on what basis, how and in what circumstances an adjudicator will exercise their discretion under this provision, particularly in relation to traditional law firms or individuals.

9. It proposes that public hearings would only be held in circumstances where an adjudicator decides that it is in the interests of justice to do so. However, the rules, as proposed, give the adjudicator wide discretion but do not set out any criteria on how such a discretion would be exercised. Clarity about these matters is needed to ensure transparency, proportionality, and consistency.

10. The paper is also unclear about whether a respondent and/or their representative would be able to attend and/or make any representations to an adjudicator or indeed whether a respondent would have the right to ask for a hearing themselves. It is in the interests of justice and fairness to provide all parties with the same opportunity to comment before any decision is made, including about whether to hold a hearing in private or public. A respondent may have representations to make, for example on a sensitive medical issue, which may make a public hearing inappropriate.

11. It is unclear how and where public hearings would take place. For example, does the SRA envisage that they would take place in person, or in some hybrid form and in what location? If hearings are planned to be held virtually how does the SRA plan on ensuring the parties have the relevant capability to participate?

Interviews

12. We have serious concerns about the proposals that adjudicators have the sole discretion over inviting people to be interviewed[7], such as witnesses. As stated in the previous section, the proposed rules give an adjudicator wide discretion but do not provide the criteria under which such discretion would be exercised. This is important again for the purposes of transparency, fairness, and consistency of decisions.

13. The proposals provide that an adjudicator would be able to interview a third-party witness to test their evidence and credibility and/or clarify the impact of the events in question on them. This means that the adjudicators /panels are not actually acting in their capacity as decision makers, but instead acting as investigators in clarifying evidence and then acting as prosecutors testing the prosecution case and evidence and potentially rehearsing the witness.

[5] SRA Consultation Annex 1

[6] Proposed Rule 8.6c SRA Regulatory and Disciplinary Procedure Rules (RDPR)

[7] Proposed Rule 8.6 (a) & (b) SRA Regulatory and Disciplinary Procedure Rules (RDPR)

14. It is the role of investigators to gather evidence, including any evidence regarding the impact of events on any victim or witness. All evidence should be presented to adjudicators or panels, as decision makers, to decide on whether there has been misconduct, or whether the matter should be dismissed based on the evidence presented. It is not an adjudicator's job to investigate or test the prosecution case prior to a decision being considered.

15. Additionally, the SRA proposes that the respondent or their representative would not be present at such inquisition but would be sent a copy of the 'evidence' obtained from the witness and be given an opportunity to make representations. This is not the same as being present or putting a respondent's case in cross examination to a witness. The proposed process appears contrary to the interests of justice. There must be 'equality of arms' – meaning a fair balance between the opportunities given to both parties. What the SRA proposes is not a transparent process and may lead to unfair outcomes.

Reviews

16. The SRA proposes introducing an explicit rule to require reviews to be dealt with by a different adjudicator or panel to the one that made the original decision (proposed Rule 4.5 SRA Application, Notice, Review and Appeal Rules (ANRAR)). We are pleased that the SRA acknowledges the need to address this issue; however, in our view the process does not go far enough. Whilst the SRA has clarified the grounds on which a decision may be reviewed, it is still unclear how it will prevent the likelihood of bias affecting a decision to review. We remain concerned that authorised decision makers in their capacity of reviewers of the decisions of adjudicators may not be impartial when reviewing cases of colleagues, either through conscious or unconscious bias. We consider that a panel, consisting of individuals independent of the SRA, which could review such matters at arm's length. would be appropriate. We would also suggest that a respondent should be entitled to adduce further evidence at any review.

17. Further clarity is also needed regarding the proposed amendments to the ANRAR at Annex 2[8]. For instance, Rule 4.1 ANRAR states '*A review will usually be determined by an authorised decision maker on consideration of written evidence alone*.' However, the proposed amendments then contradict this by providing that an adjudicator will have a discretion to invite and interview the relevant person or witnesses, similar to the amendments proposed to the RDPR. We have similar concerns to those outlined above that the proposed rules give the adjudicator wide discretion but do not provide the basis on which to exercise such discretion to ensure transparency, fairness, and consistency of decision making. We consider it contrary to interests of justice, that the relevant person will only be sent a copy of the evidence and invited to make written representations but will not be permitted to attend in person.

18. Regarding the proposed Amendments to the Schedule of Delegation (Annex 2) we make the following observations: -

    - Row 39A – with regard to the content please see our comments below at paragraphs 77-80.
    - Row 39A – the information in the last column is unclear.

19. The Schedule of Delegation, in a format which is more accessible for an external audience, which the consultation states would be published in autumn 2022 has not been provided by the SRA and we are therefore unable to comment.

[8] SRA Consultation Annex 2 ANRAR

Q3 Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

20. Yes, we support the proposals around revoking a referral to the SDT prior to the matter being certified by the Tribunal. This appears particularly sensible where a respondent has made such a request to the SRA. We agree that the current rules are unnecessarily burdensome to both parties. We therefore agree with the proposal to remove the requirement for notification and representations from the SRA's rules which should result in quicker decisions with corresponding saving in resources and associated costs.

Q4 Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

21. Bearing in mind the points we highlighted in response to questions 1 and 2 above, we remain concerned that there needs to be a clearer functional separation of the roles of investigators and adjudicators.

22. To maintain the confidence of the profession and the public, adjudicators need to be completely independent. We would like greater clarity on how the SRA will ensure that there will be a functional separation between investigators and adjudicators. For example, adjudicators, as employees of the SRA, have access to SRA records and accordingly can retrieve the antecedents of any solicitors prior to considering a matter. Viewing such matters prior to deciding has the potential to cause prejudice and prevent a fair determination. This might be addressed by, for example, restricting the information adjudicators can access about a solicitor's antecedents.

23. Greater biographical information about both legal and lay adjudicators would also assist transparency. For example, adjudicators' names could be displayed on the SRA website with information about their experience.

24. It would be helpful to understand what internal reporting processes are in place should an adjudicator or panel conclude that any disciplinary action has been improperly or unreasonably brought, such as was found by the SDT in relation to Jamil Ahmud[9]. The SRA was criticised for displaying a 'lack of diligence and transparency' in that case.

25. Our members are also concerned about how the SRA will ensure consistency of outcomes between different panels and between panel decisions and those matters subject to agreed outcomes dealt with by the SRA internally.

26. The SRA's previous consultation paper provided little information regarding how the proposals would result in quicker outcomes. Have any formal assessments been conducted by the SRA which demonstrate that what is being proposed will improve matters? Can those assessments be shared with us? We would like to be reassured that improved speed will not come at the price of less fair outcomes.

27. We would be interested in seeing current Key Performance Indicators (KPI) and whether and how these will be amended going forward. We would also be interested in what costs assessments the SRA has undertaken to support the assertion that that the new process will save costs. We would be interested in seeing the results. Equally,

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

members are concerned to know when will the SRA conduct a post-implementation review and when will the results be shared with stakeholders?

28. The consultation paper states that the SRA is going to update its Guidance on its decision-making processes and procedures in autumn 2022. At the time of our response, we have not seen this.

29. We understand that the SRA has been working with the SDT to develop a shared understanding of what represents a serious case, what constitutes appropriate levels of fining and what the SRA's criteria will be for referring matters to the SDT. For example, will all cases involving dishonesty and lack of integrity be automatically transferred to the Tribunal?

30. As the issues in the above two paragraphs appear not to have been fully considered by the SRA or shared to date, we believe that this consultation may be slightly premature. We would contend that we do not have all the relevant information needed to fully respond.

Q5 Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

31. It is unequivocally right that sexual misconduct, discrimination, and all forms of harassment within the profession should be treated with the utmost seriousness to uphold the public trust and confidence in the profession. The profession is totally committed to the elimination of discrimination and harassment and promoting a modern, diverse and inclusive profession.

32. The proposed amendments to the Enforcement Strategy[10] indicate that a financial penalty will be an unsuitable sanction for individuals concerning sexual misconduct, discrimination, and non-sexual harassment, save for in exceptional circumstances. The consultation paper indicates that the SRA could consider imposing a rebuke but that it would be extremely rare. It would help our members' understanding if the SRA could clarify what it considers '*exceptional circumstances'* and provide specific examples of the type of cases that would not require a referral to the SDT.

33. The Enforcement Strategy also indicates that most cases would be referred to the SDT and implies that the Tribunal will impose a suspension or strike a solicitor off the Roll in all cases. As stated in our consultation response of February 2022[11] a suspension or striking off may well be the most appropriate sanction in many cases. However, discrimination, non-sexual harassment and sexual misconduct cover a very wide spectrum of behaviours which may arise in a wide range of circumstances, and it is right that the individual circumstances of each case should be considered when deciding an appropriate penalty. The Enforcement Strategy should make it clearer that cases referred to the SDT could be subject to any available sanction to the Tribunal that it deems appropriate in the circumstances, including financial penalties to ensure that a fair and proportionate outcome is achieved in each case.

[10] SRA Consultation Annex 3

[11] Law Society Response to SRA Financial Penalties Consultation Feb 2022

34. Having said this, the SRA will still need to have regard to established case law where individuals are concerned, particularly where it relates to private life as well as Article 8 of the European Convention on Human Rights (ECHR)[12].

35. We agree that the position with regards to firms is different and that a financial penalty is most likely to be the appropriate sanction where there are poor systems or controls, which allow such types of behaviour to occur or persist. We agree that it is important that firms develop a culture where these types of behaviour are not tolerated and that where there are serious failings at a leadership level, the SRA should consider a referral to the SDT.

36. We would welcome clarity on how the SRA will monitor the impact of these proposals and whether the data will be shared on an ongoing basis to understand any adverse impacts and/or developments.

Q6 Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment and take these into account when considering the appropriate sanction?

37. The SRA wishes to pilot the introduction of personal impact statements (PIS) in relation to cases of sexual misconduct, discrimination, and harassment. It says that the pilot aims to explore these matters in a consistent way, standardising the processes.

38. We do not agree with this proposal. PIS are most commonly used in criminal cases, and it is not clear how these will be used in the investigation and decision process. Nor has the SRA explained adequately how it has determined that no particular groups will be adversely affected by their use.

39. It is not clear to us why the pilot is needed or whether its potential repercussions have been properly considered. The SRA currently obtains information about the impact on victims as part of its investigation process which is already taken into account by decision makers. The SRA has not demonstrated the case for making changes to the existing process or outlined what improvement would be brought about by standardising the process.

40. There are considerable risks involved in imposing sanctions based on a PIS, which cannot be challenged, and that the introduction of such a process may bring about inequity.[13] This needs careful consideration by the SRA.

41. There is no indication about the timeframes for the pilot nor of the advantages of piloting such a process. The consultation is silent about what might happen where an alleged victim does not want to sign a PIS or whether a PIS will be shared with the respondent or how or what outcome criteria will be used to determine the pilot's success or failure. Furthermore, if respondents whose cases fall within any pilot period appeal decisions on the grounds of perceived unfairness, this may undermine confidence in the entire process. For the above reasons we are not in favour of the pilot.

[12] Fouracre v Solicitors Regulation Authority Ltd 2021
[13] Bolton v The Law Society [1993] EWCA Civ 32

Q7 Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms.

42. We believe that using the annual turnover of firms from SRA authorised activities is neither a fair nor a reliable indicator of profitability and does not always demonstrate ready availability of cash. As outlined in our earlier response[14], this is likely to unfairly impact on sole practitioners, small firms and legal aid practices, which make up a high proportion of SRA regulated firms, employing a large proportion of Black, Asian and minority ethnic solicitors, and frequently serving the most vulnerable clients.

43. The SRA's Statement[15] on financial penalties confirms that '*The overwhelming majority of solicitors do a good job and meet the high standards we all expect*.' This supports the point we made in our response in February 2022[16], which was that solicitors, as one of the most highly regulated professions, generally comply with their regulatory obligations. Furthermore, the SRA's own expert commissioned report[17] demonstrates that historically the SRA rarely imposes fines on firms. Over the last five years the maximum number of firms fined in any given year was five in 2017, with no firms being fined in 2019. Again, the SDT, with its ability to impose unlimited fines only fined one regulated body in 2020 and 7 in 2021[18]. 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.

44. Furthermore, the SRA has not supplied any evidence to justify the need to increase its powers to such a level. For example, had the SRA considered that fines being imposed by the SDT were too low, it would surely have lodged appeals against the level of those fines, but we are not aware that this has happened.

45. Bearing in mind the above points, we consider that an increase in fines of up to 5% is both excessive and unjustified as we believe it will provide no additional deterrent. We maintain that concern for reputation is the prime motivator of good behaviour, and that this will operate regardless of the level of any potential fine and the proposed increase is consequently unwarranted.

46. The consultation paper states that the SRA's new framework will take into account the annual domestic turnover of all firms (meaning the turnover of a firm in England & Wales from SRA authorised activities) when considering what level of fine to impose. However, the proposed Guidance[19] on the approach to financial penalties (Annex 4) states that the regulator could choose global turnover or average turnover (but does not explain what the latter means or how it would be calculated). Once the SRA has established the turnover figure it chooses to use, the Guidance indicates that it will then apply a fine in accordance with the fining table. We believe that this section of the Guidance does little to improve transparency in the SRA's decision making process and is a cause of uncertainly and confusion.

47. The SRA's own expert commissioned report[20] does provide more information on using global and average turnover but concludes that, '*Notwithstanding the above examples,*

[14] Law Society Response to SRA Financial Penalties Consultation Feb 2022
[15] SRA Statement on financial penalties 22 August 2022
[16] Law Society Response to SRA Financial Penalties Consultation Feb 2022
[17] Economic Insight – Financial Penalties Report
[18] Annex A to Law Society Response – February 2022
[19] Guidance: The SRA's approach to financial penalties Annex 4
[20] Economic Insight – Financial Penalties Report

there are no practical reasons to deviate from the current annual domestic turnover approach. It continues: '*Moreover the SRA currently collects firms' turnover in relation to England and Wales, and thus there are both 'in principle' and in practice' reasons to favour this metric'.* We therefore cannot understand why the SRA's guidance appears to disregard its own expert's recommendation.

48. In our view the fining framework proposed is too complicated[21] and the SRA should consider a simpler model. The determination of the basic penalty by taking into account the seriousness of a breach, placing it into the appropriate penalty bracket and arriving at a specific basic penalty before considering any aggravating and mitigating factors and removal of any financial benefit is a complicated process highly dependent on a number of subjective decisions. This complicated process must be negotiated before applying an appropriate fining band. We are apprehensive that this could lead to significant and unfair variations in outcomes despite similarities in facts/breaches.

49. Additionally, the proposed bands indicate that fines against firms using a turnover based assessment may lead to much higher fines. What considerations have been given to the introduction of this increase during a national cost of living crisis and at a time when many firms (particularly those most likely to be impacted by this proposal) are still facing the financial impact of the Covid 19 pandemic?

50. The SRA seeks to adopt as comparators other regulators such as Ofcom, the Water Services Regulation Authority (Ofwat) and the Financial Conduct Authority (FCA). However, we reiterate that these are not fair comparisons 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.

51. There is an enormous difference between large publicly owned enterprises such as those exemplified, and privately owned practices funded by the individual partners. The SRA's own expert commissioned report states '… *that almost 60% of firms regulated by the SRA had an annual turnover of up to £500,000 in 2020-21*[22].'

52. Furthermore, unlike in the majority of legal practices, the income of the employees and managers in the comparator organisations are not directly affected by a fine imposed on the entity. They receive their salaries come what may, whereas in the case of traditional legal practices, there are no external investors or shareholders, and the income of the managers is derived from the profit made. A realistic consequence of the approach proposed by the SRA is the failure of the practice. The proposal takes no account of the fluctuations in income or the effect of rising operating costs. This is far from being a *one size fits all* situation. Additionally, the viability of a practice may well be adversely affected for years by a single penalty.

53. Furthermore, 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 levels of income/profitability. Most practices are small and do not currently share the detail of their finances outside the equity partnership, because to do so would cause instability both within and outside the business. Indeed, there could be an adverse competitive impact on a firm following the identification of commercially sensitive information about its financial position as well as those of the principals and individuals within them.

[21] SRA Consultation Annex 4

[22] Economic Insight – Financial Penalties Report

Q8 Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

54. The SRA proposes that the basic penalty level for individuals will be set as a percentage of an individual's gross income and suggests that this is a more proportionate indicator of the affordability of a fine. We do not agree that this is the best metric for affordability of a fine.

55. While this may be the simplest model for the SRA to administer, we contend that it would fail to reflect an individuals' real economic circumstances and therefore their actual ability to pay a fine imposed by the regulator. The metric being proposed is likely to result in inequitable outcomes. Gross income is a poor proxy for the ability to pay as it fails to take into account deductions such as national insurance and tax over which an individual has no control but has to pay.

56. Furthermore, any regulated person is likely to have financial responsibilities including mortgage or rental payments and other essential costs and unavoidable expenses which ought, in the interests of proportionality, to be reflected when considering the level of fine to be imposed. A failure to consider essential living expenses or the size and circumstances of the regulated person's family, for example paying for the care costs of a disabled family member, could adversely affect the regulated person's family and therefore should be taken into account.

57. The SRA's post-consultation report provides that *'There was near universal support amongst consultation respondents and other stakeholders for our proposals to consider an individual's means when setting a financial penalty. This included support from the LSCP, TLS, JLD as well as local law societies. The common reasons were that this would help us to make sure that the fine in an individual case would both provide a credible deterrent and be proportionate and fair'* [23].

58. Given the general consensus that considering the means of an individual is the fairest way to assess the level of fine to impose, we are concerned that the SRA is departing from the consensus and moving to an inferior metric. We firmly believe that it would be unfair for the SRA not to make any inquiry about an individual's means and thereby the real affordability to pay any fine imposed by the SRA[24].

59. We are concerned that the SRA's proposal for calculating fines could lead to unjust outcomes. For example, the SDT expects a respondent to adduce evidence of means to assist with calculating the amount of any fine[25]. The Bar Standards and Adjudication Service (BSAS) take a similar approach[26]. We support and contend that taking into account an individual's means is the most proportionate and fair metric to use.

60. We reiterate what we say above regarding concerns about the fining tables for individuals as firms (see paragraph 48 above) and that the method of calculating which band a matter potentially falls into is complex and subjective. This could lead to variations in outcomes where there are similar facts. We urge the SRA to consider a simpler model.

[23] SRA Financial Penalties Final Position Report

[24] Merrick v The Law Society (2007) **WL 4610398 (2007)**

[25] SDT Guidance Note on Sanctions 9th Edition December 2021

[26] The Bar Standards and Adjudication Service Sanctions Guidance Version 6 Jan 2022

61. The SRA needs to address concerns about the disparity in bringing a greater number of investigations (acknowledged by the SRA[27]) and disciplinary action against Black, Asian and minority ethnic solicitors.[28] The SRA should bear this disparity in mind when considering financial penalties, given the evidence that this cohort of solicitors is exposed to a greater risk of financial instability. We would like to know what assessments the SRA has carried out in this regard.

62. The right of appeal to the SDT is not an adequate safeguard. Many 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 entails challenging the regulator. Legal costs are also an important consideration for a solicitor facing regulatory action by the SRA, as there is a high likelihood that they will bear their own legal costs even if successful[29]. 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, cannot normally claim costs for a prosecution.

63. As discussed, we are strongly opposed to the SRA basing fines on gross income. However, if the SRA is still minded to do so, provisions must be made for individual respondents subject to fines to be able to submit a statement of their income and outgoings. The statement would be used by an adjudicator to modify the set fine and make proportional reductions to ensure that fines really are appropriate, proportionate, affordable and fair.

64. If the SRA were to implement such a system, it could produce a standard form, detailing the evidence that individuals facing a fine would have to provide before an application for a reduction would be considered. Then the onus would be for the respondent to decide whether they have the ability to pay the fine, or whether the level of fine needed to be reviewed.

65. By specifying the necessary evidence, and the form in which it should be submitted, the SRA could streamline the process, making it more efficient to ensure that the fines imposed are appropriate, given the totality of an individuals' financial obligations.

66. This approach would also place the responsibility on individuals who believe a fine would be onerous to supply evidence in mitigation, rather than requiring the SRA to carry out investigations into the finances of every individual, before a fine could be imposed. This would minimise the costs to the SRA, while providing assurance to the profession that they would not be subject to unmanageable and unfair fines.

67. It is highly unlikely that our members would abuse such a system, but if the SRA did make provisions for reviews of this kind, we would support the SRA in the imposition of higher penalties for any individual who is found to have submitted false information in an attempt to reduce a fine, or where appropriate separate disciplinary action.

68. A fairer alternative to that of using gross income as the calculating metric is to use actual income as a metric. If the SRA is obtaining information about the income from an

[27] SRA | Researchers appointed to examine overrepresentation in solicitor reports and enforcement | Solicitors Regulation Authority
[28] https://www.lawgazette.co.uk/news/huge-disparity-in-bame-solicitors-taken-to-tribunal-sra-figures-show/5106786.article
[29] Cleared lawyer must pay £534,000 defence costs, SDT rules | News | Law Gazette

individual's P60 or tax return, then it will already have the individual's actual income, i.e. after deductions of tax and national insurance.

69. Given what we say above, our firm preference is for a system of fines similar to that used by the SDT. However, a possible compromise would be provisions for revising fines based on actual income, following an application by the individual and the fair consideration of their individual circumstances. We would argue that this could represent a fairer workable concession and the best gauge for the affordability of a fine.

Q9 Do you have any further comments on our approach to fining individuals?

70. The SRA acknowledges that by publishing its regulatory decisions it is possible to ascertain the income of the individual subject to the decision, which is personal data protected by the General Data Protection Regulation (GDPR).

71. We do not agree with the proposal to publish the percentage of income a fine represents of a person's income as it entails use of that individual's sensitive data and is disproportionately intrusive. It would be much better to publish the SRA's fining table and set out the general factors that may have been applied (without specifying the amount) to reduce the risk to individual privacy.

72. Furthermore, our members consider that there is a risk that people looking at an individual's income may draw an uninformed conclusion about the compensation of, for instance, a managing partner who is an MLRO, COLP etc. without understanding the amount of responsibility, working hours and the assumption of risk by that individual. Comparisons with the financial services sector about disclosure are flawed due to the difference in the size, nature and profitability of the practices, as well as their levels of expected profitability and the role of profit on staff within those entities as discussed in paragraph 52 above.

Q10 Do you have any comments on our proposed approach to fixed financial penalties?

73. The SRA is introducing a fixed penalties scheme for specified breaches of its rules, such as for non-compliance with administrative requirements or failure to respond to SRA requests. It says that the scheme will result in quicker resolutions and aid transparency around the penalty applicable to different types of more minor breach.

74. The scheme will start off with a small number of breaches initially relating to firms only. The paper identifies a finite number of breaches for inclusion in the scheme with a view to extending these in the future. The proposed scheme provides that following a warning to remedy a breach, a fixed penalty of £750 will be imposed by the SRA and £1500 for a subsequent breach of the same category within 3 years of the date of the first penalty, or a continuation of the first breach after the SRA has directed payment of a penalty for that breach.

75. This consultation has now provided greater clarity on the types of matters which are to be covered by the fixed penalty scheme and we consider that the level of penalties being proposed to be on the high side bearing in mind that they cover low level breaches. The SRA's Final Position Report[30] states that 39% of public respondents thought that fines should be between £201-£499 and 69% of respondents from the profession thought it should be at the lower end of the scale indicated above.

[30] SRA Financial Penalties Final Position Report

Accordingly, we consider that a fixed penalty of between £250-500 for a first breach and £750-£1000 for a subsequent breach is a fairer and more proportionate level for the administrative type offences covered by the scheme.

76. The proposed scheme makes no provision for time limits for making payment and we would suggest that the SRA consider perhaps offering a discount for early payment which might encourage prompt payment.

77. The paper indicates that the SRA proposes to charge costs of £150 in relation to all fixed-penalty decisions. Most fixed penalty schemes do not impose costs as there is no investigation process. The procedure reflects a lack of action by a respondent firm. Even if costs are imposed, they appear to be high and punitive, and we suggest that a lower level of costs should be considered. The paper indicates that fixed costs will be charged but the proposed Rule 11.4 RDPR does not state that a 'fixed' charge for costs will be applied and does not indicate whether this is inclusive of VAT or not. Furthermore, Rule 11.4 RDPR suggests that a decision maker may exercise discretion as to whether a charge will be applicable as it states that 'an authorised decision maker may require a person …to pay a charge'. Clarity on when a decision maker can exercise their discretion would be helpful.

78. Regarding Rule 11.1 b) RDPR we consider giving the relevant person not less than seven days to produce evidence of compliance to be short and would suggest a more proportionate alternative of not less than 14 days.

79. The paper provides that any fixed penalties may be reviewed on request. The scheme should make clear provisions for what decisions a reviewer may take – for instance confirming, modifying, or revoking a penalty – and there should be provisions for the return of the penalty, and reimbursement of any costs paid, in the event that a penalty is revoked on review. There is no provision in the draft rules for time frames within which a person may be able to seek a review, so can this be done at any time?

80. There is no indication in the paper about whether any fixed penalty decisions will be published on the SRA website or elsewhere, and this should be clarified.

81. The SRA says that it will, in the future, consider including breaches by individuals. It would be helpful if the SRA would indicate their thinking around this.

Q11 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?

82. Whilst the consultation acknowledges the impact on gender, ethnicity and age groups – with the greatest impact on male professionals from a Black, Asian and minority ethnic background, and those over 45 years old – there is no mention of the potential impact on LGBT+, disabled, and/or carers who may similarly be affected by the proposed changes.

83. It is noted that the omission of these other groups may be due to a lack of meaningful data on their involvement in the SRA's enforcement process. This should not result in their being overlooked when other statistics show that they make up a substantial proportion of the profession, with some being vulnerable to this enforcement process due to their protected characteristics. A gap analysis for all protected characteristics listed in the Equality Act (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) should be carried out.

84. It does not appear that the SRA has taken into account the likely adverse effect of the cost of living on those members of the profession who serve the high street and individuals particularly those offering publicly funded services to the most vulnerable. Additionally, most firms planning their future will have anticipated that there will be a downturn in payment and instructions as clients experience financial restrictions. It is already evident that attempts by clients to avoid or reduce payment for costs are increasing and more clients will just not be able to afford to instruct solicitors as was the experience in the last recession. This is just one way in which it can be seen that previous years' performance does not guarantee replication of profit in future years.

85. Has there been consideration of the existence of mental health issues in the profession, whether these might make individuals more likely to be subjected to such sanctions, and/or consideration regarding the impact on mental health should sanctions be applied to a person? If so, what were the outcomes and who was consulted?

86. It would be of assistance if the SRA could provide any contextual data behind the diversity breakdown of individuals who are sanctioned each year, to allow for proactive steps to be taken to support these groups, and prevent reoccurrence of sanctions within the same groups, which could be due to the same/similar factors.

87. Likewise, it would be helpful to know how the SRA proposes to address the impact on other groups potentially affected such as clients, members of the public seeking legal aid assistance, etc on the proposals being put forward, bearing in mind what we have said above.

88. With regards to updating the Reasonable Adjustments policy, will this be done in consultation with disability consultants and/or disabled solicitors for feedback?

89. The SRA believes that the collective impact of the actions it is taking and the proposals in the consultation paper *'will make [its] internal decision making more transparent and will benefit all groups'.* We would welcome seeing the evidence behind this assertion.

Conclusion

90. In principle we support the proposal that adjudication panels, instead of sole adjudicators, should consider matters which fall into the SRA's most serious category of fines (Band D). We consider that panels should be made up of both legally qualified members and lay members, but that legally qualified members should be the majority and chair the panels.

91. We do not agree that annual turnover is the most reliable indicator of profitability. However, if the SRA is still inclined to use this metric, then we consider the proposal to increase fines up to 5% of turnover is both excessive and unjustified for the reasons outlined above and do not believe it will provide any additional deterrent. We believe that concern for reputation is the prime motivator of good behaviour, and the proposed increase is therefore unnecessary.

92. There are inconsistencies in the consultation documentation about how the SRA will calculate turnover, either on an annual domestic turnover or global turnover basis. We believe that it should be based on domestic turnover in all cases. We also believe that the fining framework is too complicated, and the SRA should consider simplifying it.

93. The SRA proposes that the basic penalty level for individuals will be set as a percentage of an individual's gross income. We do not agree that this is the appropriate indicator to base the affordability of a fine. While this may be the simplest model for the SRA to administer, it would fail to reflect an individual's real economic circumstances. Instead, an individual's means should be considered in terms of their actual income and outgoings in order to determine what they can afford to pay.

94. We would also make the point that additional money generated by increasing fines will not benefit the profession as it will be retained by the Treasury. If the money were to be retained by the regulator, which is currently funded through solicitors' practising certificates, the additional income could be reinvested to improve the SRA's operations or on further supporting the profession through guidance or training events, but this is not the case. It is also unclear how any fines imposed will be enforced and by whom. We would welcome more clarity.

95. We do not agree with the proposal to publish the percentage of income a fine represents of a person's income as it entails use of that individual's sensitive data and is disproportionately intrusive. We also do not agree to the piloting of the use of personal impact statements for cases involving sexual misconduct, discrimination or any form of harassment.

96. We have made some practical suggestions in relation to the proposed fixed financial penalties scheme, and the amounts proposed for fines appear to be high bearing in mind they relate to low level breaches.

97. We have outlined above that we remain concerned about the functional separation between investigators and adjudicators and that the safeguards proposed by the SRA do not go far enough. We also have serious concerns about the wide discretion afforded to adjudicators to decide whether to have hearings and interview witnesses. We question whether the SRA has fully considered and appreciates the possible adverse impacts of its proposals in relation to certain sections of the profession.

Junior Lawyers Division response

1. The Junior Lawyers Division ("JLD") is an independent representative body formerly affiliated with The Law Society. Membership of the JLD is free and automatic, for those within its membership group including Legal Practice Course ("LPC") students, LPC graduates, trainee solicitors, solicitor apprentices and solicitors up to, and including, five years qualified (referred to as the Membership).
2. The JLD welcomes the opportunity to respond to the Solicitors Regulation Authority's consultation on financial penalties and makes this response in relation to the matters that concern the Membership. It will not make reference in particular to Question 4 and Question 9.
3. The JLD agrees in that the principles for any reforms are in the interest of, not being limited to, resolving cases quicker and more effectively than before resulting in reduced costs, fewer delays and less stress for those members whom are subject to the procedures.
4. Following the increased maximum fining powers which the SRA have from 20 July 2022, rising from £2,000 to £25,000, the JLD have slight concerns on the following:
    a. How this may disproportionately affect the junior lawyers covered under the Membership given their financial ability to challenge decisions;
        i. The JLD hope that the definition of salary is determined and reserve comment on this point. Whilst it referenced that the basic penalty level of an individuals gross income it is suggested that the gross income and net income of an individual are evaluated before issuing the appropriate fine.
5. The JLD agree to Question 1 that adjudication panels will decide fines in band D. This is on the understanding that it would help to free up the Solicitors Disciplinary Tribunal (SDT) to prosecute accordingly. Cases falling into Band D involves conduct which is more serious in nature and the introduction of an adjudication panel will allow for a quicker resolution. It is unclear why the adjudication panel may consist of all lay members, and it is suggested that the panel should always include at least one legally qualified individual.

6. The JLD agree to Question 2 that the amendment to the rules should be implemented when considering whether to hold a hearing or conduct an interview. This seems entirely sensible to allow for these powers to extend to adjudicators. As is mentioned in the consultation paper, In the majority of cases where it is considered that a public hearing should be held, a referral to the SDT will be made.
7. The JLD agree that Question 3 is a sensible solution where a referral is to be revoked to the SDT.
8. Question 4 is not responded to.
9. Under question 5, the JLD appreciates why there is a category of 'exceptional circumstances' where an individual may receive a fine because there is no ongoing risk. It is expected that this will be a very narrow category to ensure that sexual misconduct, discrimination and non-sexual harassment are dealt with the appropriate seriousness. The JLD agrees that the position for firms should be different.
10. The JLD do agree firmly in response to Question 6 in the consultation that the SRA's pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment are taken into account when considering the appropriate sanction. It is echoed that strong measures are needed in order to maintain public confidence that cannot effectively be attributed to a financial price or cost.
11. The JLD also partially agrees with Question 7 that proposed model of fines for firms is effective in and takes into account the turnover of a firm up to 5% of turnover. The suggested percentage acts as a notable deterrent however, as raised in the previous consultation it is suggested that be extended to international turnover rather than domestic turnover. This is due to many international firms view their turnover globally.
12. Question 8 is agreed by the JLD and we believe the percentage bands allow the SRA to take into account the income of individuals across all fines. Reverting to point 4 a I in this response,

provided that each case is assessed on a case by case basis and all factors being considered as to an individual's income and dependents.

13. Question 9 is not responded to.
14. Further to Question 10, the JLD agree with a fixed penalties scheme for specific breaches of rules. The JLD will respond further should fixed penalties be introduced which relate to our members (rather than firms).
15. Further to Question 11, it is hoped that this new approach will result in further protection for junior lawyers who suffer from harassment and discrimination in the workplace. The JLD welcomes the SRA's commitment to monitoring fines for adverse effects, such as lower reports as a result. It is also hoped that the more streamlined process will benefit junior lawyers who struggle to find funds for legal representation, and that outcomes will be swifter (as delay can be detrimental, even when an outcome is ultimately positive).

The following responses were submitted by respondents who asked us to publish their responses but not their names.

Consultation: Financial penalties - detail of new approach

Response ID:7 Data

3. Question 1

9.
1) Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

Agreed - the greater the fine, the greater number of people should be included in the decision-making process.

4. Question 2

10.
2) Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews?? Please provide comments to explain your reasons.

Yes, the rules make sense.

5. Question 3

11.
3) Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

Yes

6. Question 4

12.
4) Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

If details / minutes of the decision-making process can be provided, that would be useful.

7. Question 5

13.
5) Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

To some degree. The SRA needs to recognize that such behaviors vary enormously in scope - something very minor could be technically considered harassment, equally a pattern of very egregious behavior could fall into the same category. The SRA needs to ensure that it differentiates between either end of the spectrum.

8. Question 6

14.
6) Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct,

discrimination and harassment and take these into account when considering the appropriate sanction?

Yes, no issues with that approach.

9. Question 7

15.
7) Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

To some degree. The SRA needs to take holistic approach - turnover might be skewed for a particular year, or profitability may be very high (but with a lower turnover). Placing all the emphasis on 1 factor might lead to adverse consequences so a nuanced approach needs to be adopted.

10. Question 8

16.
8) Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

To some degree. Again, the SRA should take a holistic, case specific approach. For instance, at one end of the spectrum, a person who has been an equity partner for 20 years in a city law firm, has amassed wealth of £10 million, but in recent years has had a modest income, their income might be £50k. On the other end of the spectrum, a young lawyer working very long hours in a city law firm could be earning £300k, but they have only worked for a few years and have savings of £25k. It does not seem right to base the decision purely on income bands here - as the young lawyer would be fined more than the senior partner (despite one having wealth of £10 million and the other £25k savings). It is vital to take a fulsome approach and allow flexibility into the system to ensure a fair outcome.

11. Question 9

17.
9) Do you have any further comments on our approach to fining individuals?

Generally, take a case-specific approach to understand the individual circumstances and allow flexibility. Income and employment status can change significantly over a couple of year, so looking at the whole picture would be a fair approach.

12. Question 10

18.
10) Do you have any comments on our proposed approach to fixed financial penalties?

I agree - makes sense.

13. Question 11

19.
11) 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?

If I were the SRA, I would consider the impact of imposing the same fine on a younger solicitor (may have student debt, limited

assets, limited savings) vs an older solicitors (no debt, lots of assets, lots of savings). The fine is also likely to get publicity and therefore could significantly impact the career prospects (and wages) of that younger solicitor. The older solicitor may be established and the fine may have limited affect on their employment situation. I would urge the SRA to consider the side effects of the fine, and the potential for significantly adverse consequences to younger people in the profession.

Consultation: Financial penalties - detail of new approach

Response ID:32 Data

3. Question 1

11.
1) Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

Given the increase in fining power, I would suggested that band C should also be decided by a panel.

4. Question 2

12.
2) Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews?? Please provide comments to explain your reasons.

Yes. In general, I would add that increased used of hearings / interviews for decision-making is a good idea. Often words on paper don't really highlight the nuance of an issue.

5. Question 3

13.
3) Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

Yes, makes sense. The SRA needs to exercise greater discretion and proportionality in cases.

6. Question 4

14.
4) Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

N/A

7. Question 5

15.
5) Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

There is a serious issue of proportionality here in respect of the type of behavior. For instance, sexual misconduct could range from a crude joke to a serious criminal charge. Clearly, the SRA needs to exercise common sense and discretion so that the outcome reflects the severity and range of behavior within these categories. To some degree, the recent SRA guidance on sexual misconduct spells this out - e.g. a couple of people who just happen to be work collegeagues flirting in a bar vs a training principal being inappropriate to a trainee in an office. There is a world of difference between these behaviors so any sanction should reflect this scale of behavior. To that end, I think fines could be a useful tool so that the outcome isn't pre-judged.

8. Question 6

16.

6) Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination and harassment and take these into account when considering the appropriate sanction?

Possibly. However, what if a person complaining has an axe to grind? People can lie and exaggerate all the time. How are the SRA going to recognize these instances which will crop up from time to time?

9. Question 7

17.

7) Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

I actually think, in relation to fines for individuals, that 5% of turnover is relatively low. You are proposing to be able to fine an individual up to 160% of their gross income (which would likely lead to economic ruin for that person) yet only fine firms 5% of their turnover. If a firm is fined 5%, chances are it will be able to keep on operating. If an individual is fined 100% of gross income, given the negative publicity that will accompany that, chances are their career and finances will be in tatters.

10. Question 8

18.

8) Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

In principal, some link to ability to pay seems fair. However, the current proposal looks dangerous and arbitrary for a number of reasons:

(i) Income is a very crude measure of ability to pay. For instance, someone who has been a senior equity partner in city and has amassed a wealth of £5 million, but who now does a small amount of consultancy work on £50k a year, they would be charged based on the £50k. Vice versa, a very junior solicitor in the city (say 3PQE) who is working incredibly hard and earning £150k - who has student debt, no money in the bank, no family support - they would be fined 3x the amount of the very senior and wealthy person for the same misconduct. This does not seem fair at all, especially as the point of the income banding is fairness. How about looking at the overall wealth of the person as well as their income?

(ii) The SRA needs to be super aware of the change of employment circumstances that it will likely encounter. If someone is in the regulatory system, chances are somthing has gone wrong. Chances are that their employment situation may have altered drastically and therefore any assessment of income needs to be alert to a significant fall in income.

(iii) The SRA could consider looking at net income, given the tax rate of 45% for income over £150k. In effect, if you fine a individual on £200k 100% of their income, that in effect equates to 2 years of net income. As such, a category D fine is now starting to look significantly worse that a suspension. i thought that a suspension is supposed to be worse that a fine?

(iv) Could the SRA note that fines should continue to be at the discretion of the SDT so that a fair and proportionate outcome is reached. If you are hiking fines this significantly and applying to a very diverse professional with significant disparity in circumstances, you will likely produce some very arbitrary and unfair outcomes.

11. Question 9

19.

9) Do you have any further comments on our approach to fining individuals?

As previously noted:

(i) consider the wealth of person (not just the income) to make it fair. Multimillionaire former equity partner vs junior solicitor with limited assets. The latter could be fined more.
(ii) consider net (not gross) income given the UK tax system (eg 45% tax on over £150k makes the fining band unfair for high earners)
(iii) ensure that current income is taken into account given the likely change of employment circumstances
(iv) ensure that the SRA / SDT has discretion and flexibility to look at the case in the round, not just apply a basic formula that could result in very unfair / arbitrary outcomes.

12. Question 10

20.
10) Do you have any comments on our proposed approach to fixed financial penalties?

Seems fair.

13. Question 11

21.
11) 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?

Junior solicitors could be significantly disadvantaged by the system (they have less assets, more debt, less ability to pay) so that needs to be taken into account on financial penalties. For someone who is 25 - having to pay £20k is likely more significant than for someone who is 60 and had £1million in assets.

Consultation: Financial penalties - detail of new approach

Response ID:44 Data

3. Question 1

11.
1) Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

It is appropriate that a panel should adjudicate matters. The panel should have a majority of members chosen from the solicitors' profession.

4. Question 2

12.
2) Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews?? Please provide comments to explain your reasons.

The proposal are opaque and require better development and clarification. A right to a hearing and to address one's accusers lies at the heart of a due process.

5. Question 3

13.
3) Do you agree with our proposals around revoking referrals to the SDT? Please provide comments to explain your reasons.

Neither support or oppose.

6. Question 4

14.
4) Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

The requirement for the provisions of reasons for any decisions is necessary.

7. Question 5

15.
5) Does the updated Enforcement Strategy provide clarity as to the outcomes for firms and individuals for these types of behaviour?

No, it remains opaque.

8. Question 6

16.
6) Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct,

discrimination and harassment and take these into account when considering the appropriate sanction?

No, the SRA should be slow to engage in an area where there are adequate public remedies. Due process would require the maker of such statements to be available to be examined on the content of such statements.

9. Question 7

17.
7) Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines for up to 5% of turnover for all firms?

No. Such approach does not reflect the moral turpitude of any act and exposes individuals working in large firms to disproportionate sanction.

10. Question 8

18.
8) Do you agree that the percentage bands successfully enable us to take into account the income of individuals across all of our fines?

No. The proposal is ill considered.

11. Question 9

19.
9) Do you have any further comments on our approach to fining individuals?

12. Question 10

20.
10) Do you have any comments on our proposed approach to fixed financial penalties?

13. Question 11

21.
11) 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 following respondents asked us to name them, but not to publish their responses.

Birmingham Law Society

Manchester Law Society

Weightmans LLP

One respondent asked that we do not name them and do not publish their response.