SRA BOARD
25 April 2022

CLASSIFICATION – PUBLIC

This paper will be published

Financial penalties: post-consultation position

Reason for paper	This paper sets out our position and recommendations following the recent consultation on Financial Penalties.
Decisions(s)	The Board is asked to note the post-consultation analysis attached at annex 1, note the draft Equality Impact Assessment at annex 2 and to approve the recommendations at paragraphs 10, 31, 49, 60 and 78 and the next steps.
Previous Board and committee consideration	The Board most recently considered emerging themes following the consultation at a workshop meeting on 5 April 2022. Prior to the consultation, the Board discussed our approach to financial penalties at a workshop session in December 2020. The Board also considered a paper on the specific questions to test through consultation in September 2021.
Next steps	If the Board approves our recommendations, we will publish a consultation response during May and draw up a further short consultation for publication in the summer on the rules and guidance that put into effect our approach.

If you have any questions about this paper please contact: Juliet Oliver, Juliet.oliver@sra.org.uk

SRA BOARD
25 April 2022

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Solicitors Regulation Authority

Financial penalties: post-consultation position

Summary

1 This paper sets out the issues for the Board to consider following the recent consultation on the our Financial Penalties regime. It sets out recommendations and next steps.

Background

2 As Board members are aware, we undertook a public consultation in the period from November 2021 to February 2022 on our approach to the exercise of our powers to impose financial penalties on those we regulate. This included proposals to:

a. Seek an increase to the maximum fine we can issue internally for traditional firms and those working in them from £2,000 to £25,000. This was to reduce the cost, time, and stress for all involved in taking less serious cases to the SDT

b. Update our sanctions guidance to highlight behaviours that we consider unlikely to be suitable for a financial penalty such as sexual misconduct, discrimination, and harassment

c. Take into account the turnover of firms and the means of individuals when setting fines in all cases to ensure our fines are proportionate and act as a credible deterrent. We currently only do this systematically when setting fines for firms with a turnover of £2million or more. We also proposed increasing the maximum percentage of turnover that we can fine from 2.5% to 5%

d. Introduce a schedule of fixed penalties to enable lesser breaches relating to failure to comply with administrative requirements to be dealt with more efficiently and effectively.

3 We received a total of 39 responses to our consultation. There was a broad range of respondents including solicitors, law firms, and law societies, including organisations such as the Law Society (TLS), City of London Law Society (CLLS), Junior Lawyers Division (JLD), Solicitors Disciplinary Tribunal (SDT), Legal Services Consumer Panel (LSCP) and the Office for Professional Body Anti-Money Laundering Supervision (OPBAS).

4 We reference comments made by respondents that consented for us to do so throughout the paper. OPBAS were generally supportive of our proposed approach a number of constructive observations and suggestions. They have consented for us to publish their response in full but have asked that we do not extract selective lines to from their response. Therefore, we do not reference

their comments further in this document but have attached their full response at annex 4

5 We also commissioned a survey with 500 members of the public alongside a survey for solicitors, which attracted over 200 responses. We held two focus groups with the public, and one with consumer representative groups, as well as discussing our proposals at a range of external meetings and events.

6 A summary of consultation responses, surveys and public focus groups is attached at annex 1. A draft post-consultation Equality Impact Assessment is attached at annex 2.

Discussion

Principles

What did we propose?

7 In our consultation we proposed several principles that should govern our approach to the issues covered in the consultation. These were:

- Our aim is to ensure we have a robust fining framework that is transparent, proportionate, and effective in providing credible deterrence.
- We want a framework where all firms and individuals we regulate are treated consistently. Further, we are committed to achieving consistency in approach across all legal services regulators, to the extent appropriate and achievable.
- Our sanctions guidance should be focused on different types of behaviours. Certain types of behaviour should not normally attract a fine, where more serious sanctions or controls are required to ensure public confidence or protect against risk.
- We want to enhance our ability to make decisions in house on straightforward, and agreed, cases by increasing the threshold at which we can fine solicitors and traditional law firms.
- We want to work collaboratively with key stakeholders, including the Solicitors Disciplinary Tribunal (SDT), Legal Services Board (LSB), other legal regulators, and Ministry of Justice (MOJ) to develop a joint understanding and approach to financial penalties.

Key points raised

8 A majority of respondents with our approach supported the proposed principles. Transparency, consistency, fairness and certainty were cited by many stakeholders as being important elements to underpin our fining framework. Our approach of working collaboratively with other regulators was also specifically supported by the LSCP and a local law society.

9 Some respondents nuanced their responses by highlighting concerns about specific policy proposals sitting below the principles, which we set out in the consultation.

Our view

10 There was broad support for the principles. We address concerns about the specific proposals at the relevant points later in the paper. We do not consider that any of these concerns have a material impact on the appropriateness of the proposed Principles.

Recommendation: the Board is asked to adopt the principles to our approach to fining on which we consulted.

Seeking an increase to our internal fining powers

What did we propose?

11 We highlighted the inconsistency between our statutory fining powers for Alternative Business Structures (ABS) and traditional law firms. We are able to fine ABS firms up to £250 million and individuals within them up to £50 million. This contrasts starkly with our fining powers for traditional law firms and solicitors of up to £2,000 (with fines over this level being imposed by the Solicitors Disciplinary Tribunal (SDT)).

12 We set out the case for an increase from £2,000 to £25,000 in our consultation by way of an order of the Lord Chancellor under the Solicitors Act 1974; which would allow an increase in the level of fine we are able to impose, but without fundamentally changing the framework establishing the separate jurisdictions of the SRA and the SDT. More extensive changes to our fining powers would require an amendment to primary legislation.

13 The increase to £25,000 was proposed on the basis that this would enable us to offer quicker and more effective resolutions in a wider range of less serious matters. This would allow the SDT to focus on the most serious and complex cases, which would rightly be heard before their independent panels.

14 We noted that, from our experience, most fines under £25,000 are for less serious and straightforward cases. We also noted that over the past five years, most fines imposed up to £25,000 were imposed by way of Agreed Outcome. This means they are uncontested, with the facts, regulatory breaches and sanction agreed by the respondent. Currently, Agreed Outcomes (over our existing threshold of £2,000) have to be approved by the SDT. This means that there is little difference in the time these take to reach a conclusion compared to a contested hearing.

Key points raised

15 Most respondents agreed with our rationale and were in favour of an increase to our fining powers, with many respondents supporting an increase to £25,000. This included the LSCP and JLD and there was strong support from members of the public who responded to the online survey and within the consumer focus groups. Reasons included improving the deterrent effect of our fining framework, improving consumer confidence and reducing the time and cost it takes to conclude straightforward cases. Two respondents highlighted the impact a lengthy process can have on renewing professional indemnity insurance as insurers may be cautious of renewing a policy where disciplinary matters are outstanding.

16 A number of respondents to our consultation, along with members of the public who responded to our online survey, felt £25,000 was too low. The LSCP and members of the public were surprised by the disparity with ABS fining powers and saw no reason for this to be the case. A number of respondents also highlight the disparity with other regulators that have higher internal fining levels.

17 We did receive a small number of more cautious responses. Both the Law Society and SDT agreed with an increase but not the level proposed . The Law Society suggested an increase to between £5,000 and £7,500 for both traditional law firms and individuals, the SDT suggested an increase to £7,000 for individuals. (For firms, it suggested a maximum fine in line with our powers in relation to ABS.) Both respondents raised concern that our proposed increase may exceed the threshold for “less serious” cases intended by the Solicitors Act 1974, referencing the SDT’s indicative fining guidance for conduct assessed as “moderately serious” (£2,001 to £7,500). The SDT argued that the SRA should only fine matters that amount to “technical or administrative errors” rather than misconduct.

18 Other concerns raised by consultation respondents included:

i. the fairness of the SRA investigating potential breaches and determining the outcome without independent scrutiny

ii. that the SDT’s regime offers greater confidence due to its independence, greater transparency through public hearings and clearly defined processes, and detailed published judgments.

iii. impact of disciplinary action in relation to Black, Asian and minority ethnic solicitors who are over represented in our disciplinary processed

iv. firms and individuals agreeing fines or not appealing a fine to avoid substantial costs incurred at the SDT even if they dispute the allegations.

v. whether higher internal fining powers would guarantee faster timescales

Our view

19 We note the widespread support for an increase to our fining powers and the view that our current £2,000 limit is anomalous. This is the case when compared to the position of other legal regulators as well as many regulators outside of the legal sector.

20 Further, our powers under the Solicitors Act 1974 are not limited to technical or administrative errors; these expressly apply where there has been either a failure to comply with a regulatory requirement (which failure has to be serious in order to result in regulatory action, following our Enforcement Strategy) or "professional misconduct" (section 44D(1)(b)).

21 We recognise that the SDT's indicative fining guidance currently lists fines above £7,500 as being "more" than moderately serious, and those over £15,000 (and up to £50,000) as being "very serious".

22 However, notwithstanding, our assessment is that cases resulting in fines under £25,000 have tended to be straightforward, less serious matters which would not generally warrant the increased time, cost and stress involved in a hearing before the SDT. Fines represent about a quarter to a third of outcomes at the SDT and around 75% of fines across the Board are £25,000 or less. As stated above, whilst the largest fines above £25,000 are generally imposed following a full hearing, the majority of fines up to that level are concluded by Agreed Outcome.

23 Of course the appropriate fine in any given circumstances will depend on the facts - and, if agreed (as proposed below) the means of a firm or individual, which would require the flexibility afforded by a higher upper threshold in order to impose relatively modest fines for wealthier firms and individuals. We would of course retain the discretion to refer a case to the SDT for a full hearing in cases where we judge this to be more appropriate. This may be for example, because there are connected considerations that are more serious, there are complex legal arguments, the facts are disputed and require to be resolved at a hearing, or where public confidence requires this. We propose working with the SDT to develop a shared understanding of what represents a serious case, and our referral criteria.

24 We note the comments regarding confidence in the independence, transparency and efficiency of our internal procedures. It is of course

commonplace for regulatory bodies to make rules, investigate potential breaches and determine outcomes; often without a public hearing. Our approach of internal decision makers making decisions without a public hearing is shared by a number of other regulators[1].

25 Our processes safeguard the independence of decision-makers by ensuring a clear separation between those who investigate and those who adjudicate on cases. Our regulatory decisions (which include amongst other matters, fines for ABS, imposing conditions on practising certificates and barring orders for non-solicitors) are all made by 'authorised decision makers' under a published schedule of delegation. Fines are imposed by Adjudicators, who are not involved in the investigation of a case and make objective and impartial decisions based on the evidence which has been disclosed to the relevant person and their representations in response. We employ legally qualified adjudicators who mainly make single adjudicator decisions. We also have a pool of panel adjudicators consisting of lay and legally qualified individuals who may sit on two or three-member adjudication panels.

26 We make all decisions in a fair, transparent, and proportionate way.[2] Ensuring that we make fair, consistent, and proportionate decisions is key to our role in protecting the consumers of legal services and supporting the operation of the rule of law. We publish a significant amount of information relating to our criteria, processes, as well as the decisions that we make.

27 However, we think it is important that we evolve our processes and consider what more we can do to increase transparency and confidence. In particular, we will shortly be consulting on the publication of regulatory decisions, to ensure that this information is accessible, clear, transparent and consistent. We also continue to pay close attention to the efficiency and effectiveness of our disciplinary proceedings as part of our continuous improvement work, which remains a key strand of our draft Business Plan for 2022/23.

28 An updated Equality Impact Assessment can be found at annex 2. We have identified a potential positive impact from this proposal in terms of reduced costs, delays and stress for those currently subject to fines being issued between £2000 and £25,000. We have commissioned analysis from an economic consultancy (reference later in this paper), and this highlights that changes to our fining processes should not unfairly impact on any particular category of person. However, should our fining threshold be increased, we would monitor and evaluate the impacts of any new approach on different groups including those from Black, Asian and minority ethnic backgrounds.

[1] This includes for example – the Gambling Commission and Information Commissioner's Office

[2] www.sra.org.uk/solicitors/guidance/make-decisions-criteria-apply

29 There is no doubt that having higher internal fining powers would lead to a number of cases being concluded more quickly. Our current process provides that, if we consider regulatory action is warranted at the end of an investigation, we prepare a notice setting out the allegations and recommended action (or, in a case in which the matters are resolved by agreement, the relevant document settling the agreed matters).

30 If matters are handled internally, then once representations are received the case is decided by an Adjudicator, as set out above. Alternatively it is at this stage that the case is referred to the SDT: The additional steps that the SRA needs to take to prosecute a matter before the SDT add significant time. These steps are of course entirely appropriate in matters which require resolution before the SDT. However, we consider that this proposal will bring benefits through enabling a faster resolution in more straightforward cases.

31 We also note the calls by some respondents to be more ambitious in seeking parity with our ABS fining powers. Consistency in our fining powers for traditional law firms and ABS has been our long-term, publicly stated policy objective. We consider that there is no principled nor rational explanation why there are differences in our fining framework for ABS as compared to traditional firms. However, this would be a matter for primary legislation and subject to separate discussion. In the meantime, however, we propose that we pursue discussions with the Ministry of Justice to seek an increase of our internal fining powers for solicitors and traditional law firms to £25,000 by way of an order of the Lord Chancellor under the Solicitors Act 1974.

Recommendation: the Board is asked to agree that we proceed with discussions with the Ministry of Justice about a potential increase to our internal fining powers to £25,000 for both individual solicitors and traditional firms

Certain behaviours (un)suitable for a financial penalty

Our proposal

32 In our consultation, we set out our preliminary views on particular types of conduct that were or were not suitable for a financial penalty. We proposed that certain behaviours such as sexual misconduct, discrimination and non-sexual harassment are unlikely to be suitable for a financial penalty.

33 This is because the underlying attitude or behaviour displayed presents risk to the public and is incompatible with continued unrestricted rights to practise. The seriousness of the offence may also mean that it is necessary to suspend or remove the individual from the profession to maintain confidence in the legal system. Further, it may be difficult, or indeed inappropriate, to quantify the level of harm in financial terms. Fining may lead to victims feeling a price is being imposed on their self-worth. Therefore, in such cases, depending on the facts

and the level of seriousness, we proposed that a rebuke, suspension or strike-off may be more appropriate.

Key points raised

34 This proposal prompted a mixed response. Some respondents recognised the serious nature of these types of misconduct and the potential impacts on colleagues and clients and therefore agreed that these behaviours would not be suitable for a financial penalty.

35 The main concern raised by respondents about our proposal was that we should not fetter our discretion to consider our full range of sanctions, nor seek to fetter the discretion of the SDT. Many respondents pointed out the very wide spectrum of behaviours covered by discrimination, non-sexual harassment and sexual misconduct and urged against a one size fits all approach. There was also a concern raised about the potential impact on victims from the greater (unwanted) publicity and contested hearing that a referral to the SDT could bring.

36 One respondent suggested that financial penalties are routinely issued by, and work well within, other jurisdictions such Employment Tribunals.

37 The LSCP agreed that 'serious misconduct such as sexual harassment, discrimination and non-sexual harassment is not suitable for financial penalties.' When we met with the Panel to discuss our proposed approach, they suggested that we should further consider undertaking "victim impact assessments", which should then inform the sanction.

38 Cardiff and District Law Society highlighted that there may be instances where a firm bears responsibility for the culture, environment and working conditions within which the individual's behaviour has occurred and a fine may be the only option to discipline the firm.'

39 In the online surveys, we tested the views of members of the public and solicitors about the sanctions that they considered to be most appropriate. The survey respondents were shown a range of different types of misconduct and asked to allocate a suitable penalty. These showed that suspension/strike off was selected by a majority of public respondents if a solicitor has a proven allegation of sexual harassment or made discriminatory comments about colleagues in the workplace. When presented with the same nuanced examples, solicitors were less likely to select these options.

40 The LSCP also emphasised the importance of education and ongoing competence so that all members of the profession are aware of what behaviours are not tolerable. They suggested that such awareness should be promoted through multiple avenues that may include education at admission to

the profession, measuring ongoing competence as well as strong penalties to support deterrence.

41 We also asked respondents to tell us if they felt there were other behaviours that were unsuitable for a financial penalty. The majority did not think that there were, but those who did suggested issues where an underlying attitude or behaviour may present an ongoing risk to the public such as dishonesty (which attracts a presumption of strike off, as set out in case law). However, other matters put forward include data protection breaches and loss of client money.

Our views

42 We remain of the view that the majority of cases in which an individual is found to have committed sexual misconduct, harassment and discrimination are unlikely to be suitable for a financial penalty. Most of the cases that we see which would attract a regulatory sanction are serious in nature and also include an attitudinal aspect that would ordinarily suggest that restriction on practice is required to protect others, and to maintain public confidence in the profession. We consider that our guidance should make this general position clear.

43 We recognise that Employment Tribunals issue financial penalties for similar behaviours. However, the role of the Employment Tribunal is expressly to provide (chiefly, financial) redress for a claimant. This is very different to the purpose of the SRA;s regulatory sanctions. In particular, the Employment Tribunal does not need to consider the ongoing risk the individual may pose, nor have considerations of upholding public confidence in the regulated legal sector.

44 We agree that we cannot in guidance fetter our discretion to impose fines, as well as non-financial sanctions such as a rebuke, where a case requires this. This is likely to be in cases where the respondent may have displayed inappropriate behaviour or acted insensitively but does not appear to have behaved in a way that indicates a concerning or improper attitude or motivation.

45 We also recognise that firm misconduct is distinct from individual misconduct, and a financial penalty is likely to be an appropriate sanction for firms where poor systems or controls allowed this type of behaviour to occur or persist.

46 We therefore recommend amending our guidance to highlight that sexual misconduct, discrimination and non-sexual harassment will generally be met by sanctions that restrict practice. We will also develop case studies that cover the circumstances where this may not be the case, and will publish these alongside our updated guidance.

47 The LSCP emphasised the role of education as a preventative tool. We agree that this is important. We will consider how we might incorporate further education and training alongside sanctions when we think it might be required.

And we note that we do already take into account remedial action as a mitigating factor in our Enforcement Strategy and have the ability to require education and training as a condition. We will also give further as to whether we should and if so, how we might systematically consider the impact on victims in all of our disciplinary cases, and we will give this further consideration.

48 Finally, we considered the behaviours that respondents suggested may not usually be suitable for a financial penalty. Some respondents put forward suggestions such as data protection breaches and loss of client money. These types of cases involve a spectrum of seriousness. The most serious cases may not be suitable for a financial penalty and may require sanctions that restrict practice, but there are likely to be other cases where a financial penalty is an appropriate sanction. This is particularly so when the misconduct has resulted in financial loss which may be quantified by way of financial penalty.

49 We will ensure that our draft guidance makes it clear that issues which indicates an underlying attitude or behaviour that may present an ongoing risk to the public will usually be unsuitable for a financial penalty and that dishonesty attracts a presumption of strike off and would therefore be referred to the SDT. However, we consider that the other matters could be suitable for a financial penalty.

Recommendation: the Board is asked to agree that we update our guidance to make clear that sexual misconduct, harassment and non-sexual misconduct will ordinarily result in restriction in practice and provide case studies of examples where this may not be the case.

Fixed penalties

Our proposal

50 We proposed introducing fixed penalties for lower-level breaches of our rules, for example non-compliance with our more administrative requirements or failure to respond to our requests. A fixed penalty is an automatic financial penalty that would be issued upon proof of the offence; subject to a right of review. Such penalties would potentially allow for a swift and streamlined process, leading to reduced administrative burden and cost for all involved, and creating a clear and timely link between the conduct and fine. They would also give firms certainty about the sort of outcome they may see, reducing unnecessary stress and anxiety. At present we decide the appropriate sanction for each case individually.

Key points raised

51 The majority of respondents were supportive and indicated that they thought fixed penalties would result in quicker resolutions and aid transparency around the penalty applicable to different types of breach.

52 However, several respondents suggested that the fixed penalties should also be means tested to make sure that they act as credible deterrent and are fair and proportionate. One respondent argued the proposed fine should be set at a lower level for individuals and there should be some graduation for different sized firms.

53 Several respondents indicated that their support would depend on how the fixed penalty process worked in practice. TLS stated that they could not comment without a complete list of all the breaches that would be covered and how we have disposed of them in the past.

54 Amongst the minority who disagreed with the principle of fixed penalties, respondents stated that they did not consider fixed penalties suitable for regulatory matters that often have aggravating and mitigating factors at play. In consultation events, some members of the profession were concerned that this was a money making exercise, and others were concerned that we would begin to start fining in new areas, starting a fining “industry”.

55 The LSCP felt the SRA is best placed to determine the appropriate value for each offence but stressed the need to ensure that they fines are not simply seen as a cost of doing business.

Our view

56 Given the broad support we have received for this proposal, we propose to proceed to take forward the development of a fixed penalties scheme and to consult on the process and the rules that govern our approach this summer.

57 Fixed penalties cannot be a means for the SRA to generate more revenue. The proceeds of all financial penalties go to HM Treasury rather than to the SRA. Nor will the use of fixed penalties in itself change the threshold for taking action. This proposal is about streamlining our approach to misconduct that is suitable for a low-level fine where we would take action now, and fostering greater transparency around possible disciplinary outcomes.

58 We identified within the consultation criteria for the limited types of cases where we consider that it is possible to fairly run a fixed fine process with standardised penalties. This drew on our recent experience of running proactive monitoring of compliance with certain AML requirements and our Transparency Rules, which provide that firms must publish certain information on their websites. This has led to a series of low level fines for non-cooperation

with requests for a self-declaration of whether or not a firm has undertaken AML risk assessments and failure to publish the required Transparency Rules information and co-operate with requests to put this right.

59 We propose to limit the scheme to firms to begin with and to a small number of specified areas. This will allow us to embed learning and improve our processes ahead of wider implementation. We will include full details in our consultation in the summer.

60 We will undertake more work to develop the appropriate fine levels for first breaches (which we have suggested would be to a maximum of £800) and subsequent breaches (to a maximum of £1,500) as well as developing scheme rules. This will include the processes to follow, as well as covering circumstances such as when multiple breaches indicate poor systems or controls within the firm or matters that warrant an investigation, for example where there is a failure to cooperate or respond in a number of different areas.

Recommendation: The Board is asked to agree that we proceed to develop a fixed penalty regime and produce detailed criteria for further consultation.

Deciding the level of fines

Our proposal

61 We proposed developing a new framework for setting levels of fine that takes into account the size and financial position of firms and individuals at all times.

62 At present, for firms with an annual domestic turnover of £2 million or more we can determine the fine as a percentage of that turnover. This is intended to ensure that firms that are deemed to be of “greater means” receive a fine of a level that is likely to deter the repetition of the misconduct by that firm and is proportionate to its means. For other firms (and for individuals) the fining guidance provides for means to be taken into account when considering the person’s ability to pay, by reducing the penalty if they are of low means (undefined), but makes no other explicit provision.

63 We also proposed that we should raise the maximum percentage of the annual domestic turnover of firms that we charge up to 5%. This is within the normal range of many other regulators and we considered would be more likely to give us the flexibility required to impose (or identify, for imposition by the SDT) a sanction that provides a credible deterrent and promotes public confidence, particularly for the more serious allegations and the larger firms.

Key points raised

64 There was near universal support for our proposals to take into account 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 given

were that this would help us to ensure that the fine in an individual case would both provide a credible deterrent and be proportionate and fair. A majority of respondents also supported our proposal to take into account the means of the firm in all cases.

65 However, a number of stakeholders highlighted concerns about using turnover and/or made alternative suggestions. TLS stated that it did not consider that turnover is 'a reliable indicator of profitability and does not always equate to the ready availability of cash. This may be especially true of firms reliant upon legal aid work for example.' A local law society said that "focusing on turnover ignores material relevant considerations…such as the specific facts of the case, the extent to which any profit can be attributed to the conduct, and the degree to which direct harm is localised". An individual working in compliance argued that "firms last reported turnover may not be reflective of the financial position at the time of the disciplinary proceedings. It is the latter that should be taken into account."

66 In relation to individuals, several respondents agreed that net income from the previous tax year was a good starting point whereas others urged us to take into account the income associated with the breach, and to consider whether the financial circumstances of the individual had changed for the worse.

67 In relation to increasing the maximum fine for firms from 2.5 percent to 5 per cent, the LSCP and OPBAS supported an uplift but cautioned that a maximum of 5 per cent was insufficient. Whereas most respondents from, or representing, the profession opposed an uplift. Reasons included:

i. that the comparison with other regulators was not like for like

ii. we do not currently fine to the maximum 2.5%.

68 Liverpool Law Society stated that "the consultation paper does not consider the running costs and/or profit margins of the traditional law firm in arriving at this figure" and a law firm argued that the change could lead to higher costs for Directors and Officers /Management Liability insurance, which could end up being passed on to clients.

Our view

69 We consider there is good support – and grounds - for continuing with the proposal for moving towards a means-based model in relation to individuals and all firms.

70 We recognise the legitimate questions and suggestions about the appropriate metrics to use. We have therefore commissioned an economic consultancy, to give us an independent assessment of the benefits and disbenefits of the

different metrics. A summary of their report is included at annex 3, we will publish a summary of the key points in our consultation outcome report.

71 Having considered the various options, including those put forward during consultation, the Consultancy recommended that for firms, the annual domestic turnover from SRA authorised activities in the last year prior to the misconduct occurring best reflects a firm's ability to afford the financial penalty. For individuals, they recommended that an individual's income related to the employment in which the misconduct occurred should be used – and that this should relate to the tax year prior to the one in which the misconduct occurred.

72 The report highlighted that this is consistent with the approach taken by many other regulators. The report states that alternative metrics, such as profit for firms and net worth for individuals, are not likely to better correlate with means than turnover or income. This is because profit can be affected by the way a firm accounts for its costs, the remuneration model it adopts and other financial decisions that may be entirely unrelated to its ability otherwise to pay a fine or the financial viability of its business. Similarly, net worth for individuals can be impacted by how an individual's assets are valued.

73 Further, for these other options there are additional variables to consider, which would require significant levels of information from those being fined and administrative work by the SRA to consider. For example, for individuals, this might include personal details, house ownership information, credit commitments. The Consultancy highlighted that this may create difficulties in practice and scope for inconsistencies in measurement and appraisal of wealth. It is more likely that individual judgements would need to be used in determining the figures to be used, with a resulting impact on certainty and transparency.

74 We do accept that the firm's last reported turnover may not always be reflective of their financial position at the time of the disciplinary proceedings. This also applies to individual income – e.g. where employment circumstances have changed. For this reason, we consider that there is benefit in maintaining the process whereby firms and individuals can make representations to us regarding their ability to pay. Further, and alternatively, it may be appropriate in certain circumstances for us to give individuals more time to pay rather than reduce the level of the fine.

75 The consultancy also considered the impact of raising the maximum level of annual domestic turnover that may be fined from 2.5% to 5% on different types of firms. Their report concluded that this increase does have the potential to increase the deterrent effect of the fine if firms consider that there is a real risk of being fined at the maximum level. They conclude that there is no reason to expect that this route would affect the viability of firms in general or disproportionality impact smaller firms more or less than larger firms.

76 The real question is whether the level of fine at 5% would compromise the viability of any given firm when a fine of 2.5% would not. They highlight that this is only likely to be the case if a firm's profit margin is more than 2.5% but lower than 5%, it cannot access reserves or finance to pay, cannot make cost savings to pay and cannot spread the fine. This is unlikely to be a common scenario and can be mitigated by us maintaining the discretion to reduce a fine based on ability to pay or allow payment over a longer period.

77 We note the questions raised about the potential impact a raised maximum level of turnover that may be fined might have on Directors and Officers /Management Liability insurance. The report from the Consultancy highlights that in principle could lead to an increase in premium but they do not have industry information to understand whether that would be the case in practice. They also emphasise that there are a number of factors that might influence the impact of any rise including around the prevalence and magnitude of this costs compared to other operating costs. We do not consider that potential impact in itself would be reason not to proceed with the proposal to achieve the benefits outlined. However, we have had informal discussions with one broker who suggested that the nature of insurers' risk models mean that such a rise would unlikely impact on premiums.

78 The Consultancy also emphasise that 5% is in line with, or lower, than maximum fines of other regulators – including some legal regulators, having looked at an expanded list of regulators they considered relevant.

Recommendation: the Board is asked to agree that we proceed with the proposal to introduce means related fines for all individuals and firms, should raise the maximum percentage of the annual domestic turnover of firms that we may fine up to 5% on the basis that we consulted on.

Next steps

79 If the Board approves our recommendations, we will publish a consultation response during May and draw up a further short consultation in the summer on the rules and guidance that govern our approach. We will also engage with the SDT with a view to trying to reach a shared understanding of seriousness, appropriate fining levels, referral criteria and creating efficiency in the end to end process. The SDT indicated in their response that it would welcome further engagement with us.

SRA BOARD
25 April 2022

CLASSIFICATION – PUBLIC

Supporting information

Links to the Corporate Strategy and/or Business Plan

80 This project is of direct relevance to objective 1 of the 2021-22 business plan: setting and maintaining high standards for the professional and ourselves. A robust framework for financial penalties is a vital tool for enforcing compliance with those standards.

How the issues support the regulatory objectives and best regulatory practice

81 There are two regulatory objectives that this work directly contributes towards. These include the protection of the public interest and promoting and maintaining adherence (by authorised persons) to the professional principles. A robust fining framework contributes directly to both of these aims. It is important that the public has confidence in the legal profession and by ensuring that our fining framework is effective at providing a credible deterrence this should ensure that regulated persons adhere to the professional standards set out in our Standards and Regulations.

Public/Consumer impact

82 Our approach to sanctions and a decision whether to impose a financial penalty is vital to uphold public confidence in the profession and protect the public from potential harm.

83 We are reviewing our approach to financial penalties in part to ensure that it aligns with public expectations on appropriate sanctions. Our review also ensures that our fining framework is up to date and accessible to consumers.

What engagement approach has been used to inform the work and what further communication and engagement is needed

84 Alongside our public consultation, we commissioned a survey with 500 members of the public alongside a survey for solicitors, which attracted over 200 responses. We held two focus groups with the public, and one with consumer representative groups, as well as discussing our proposals at a range of external meetings and events.

85 We will issue a second consultation on the detail of our proposals this summer which will include further engagement with stakeholders, the public and the profession.

What equality and diversity considerations relate to this issue?

86 We committed to undertake further EDI assessment of any of the proposals being taken forward for consultation. An updated EIA is included at annex 2

87 We have now analysed a further year's worth of EDI data (2020-2021) and combined that with the dataset that we pulled together for the assessment. We have now analysed trends across financial penalties since 2015. The additional data supports the conclusions we reached in our initial assessment, which is that men over 45 are more likely to receive a fine at the SDT. Those over 65 make up 5% of the population but receive 31% of all fines. The data also confirmed the overrepresentation of Asian and Asian British solicitors when compared against the general population. We had identified potential positive impacts on these groups should we be granted an increase in our internal fining powers, since this group would directly benefit from reduced time, cost and delay associated with a financial penalty at the SDT.

How the work will be evaluated

88 Our second consultation on the detail of our proposals will also include our evaluation plan. We will take an iterative approach to implementation for some of our proposals such as that of fixed penalties, starting with a discreet number of practice areas, embedding learning before deciding whether to roll out to other areas.

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Annexes

Annex 1	**Financial penalties consultation analysis**
Annex 2	**Equality Impact Assessment**
Annex 3	**Summary of the economic consultancy advice**
Annex 4	**OPBAS response**

NB: the annexes to this paper will be published as part of the consultation response in May 2022.