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31 January 2023

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This paper will be published

Financial Penalties: implementation of new arrangements

Reason for paper	This paper provides the Board with our recommended final positions on the implementation of new arrangements for financial penalties, following our second consultation. It asks the Board to make rules where these are required to implement these positions.
Decisions(s)	The Board is asked to: a) agree that we amend our rules to implement the proposed enhancements to our decision making procedures on which we consulted, save that we make express provision for adjudicators or panels to interview respondents only (paragraph 18) b) agree that we take forward a pilot on personal impact statements in relation to sexual misconduct, discrimination and harassment (paragraph 33) c) agree that we implement our proposed updated fining frameworks for firms and individuals (paragraph 53) d) agree that when we impose fines for individuals and firms which take into account their income, we publish the level of the fine and how this has been calculated, unless we decide to withhold publication because the impact on the respondent would be disproportionate (paragraph 57) e) approve the implementation of the fixed financial penalty regime (paragraph 60) f) make the SRA Financial Penalties and Adjudication (Amendment) Regulations 2023 (at annex 1) which will implement the changes recommended at a) and e) through amendments to the SRA Regulatory and Disciplinary Procedure Rules, the SRA Application, Notice, Review and Appeal Rules and the Glossary.
Previous Board and committee consideration	The Board discussed our approach to financial penalties at a workshop session in December 2020. In September 2021, the Board agreed the proposals for consultation which was published in November 2021.

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	Emerging themes from consultation responses were considered at a workshop on 5 April 2022 and, on 25 April 2022, the Board approved the recommendations. In July 2022, at a workshop, the Board considered details of extra steps we intended to take in light of the increase to our internal fining powers of up to £25,000 for traditional law firms. A second consultation on the detail of our approach launched in August 2022 and closed on 14 November 2022.
Next steps	Subject to Board approval, we will apply to the Legal Services Board (LSB) for approval of the amendments to our rules. We also plan to begin training staff in operational units with a view to implementing the recommendations in Spring 2023.

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

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Solicitors Regulation Authority

Financial Penalties: implementation of new arrangements

Summary

1 This paper sets out recommendations for next steps following our second consultation on financial penalties, which set our proposals for the detail of our new approach.

Background

2 Following our first consultation, we announced decisions to make significant changes to our financial penalties framework. Our second consultation set out the detail of how we intended to take those changes forward. As part of the consultation we published updated draft fining guidance and proposed rule changes.

3 The consultation closed on 14 November 2022. There were 13 respondents: the Legal Services Consumer Panel; the Law Society; the Junior Lawyers Division; four local law societies; two law firms; two individual solicitors; and two members of the public. A summary of responses is at annex 2.

4 We also engaged directly with key stakeholders during the consultation period, including the Law Society, and the Legal Services Consumer Panel.

Safeguards in light of increase to maximum fine levels

5 With effect from 20 July 2022, the government increased our fining powers from £2,000 to up to £25,000 for 'traditional' firms and the solicitors who work in them.

6 We recognised that with the increased fining powers, we needed to provide assurance about the transparency and robustness of our processes. Alongside our consultation, we published a statement setting out the detailed procedures and safeguards we already have in place together with further enhancements we planned to make. Some involved changes to our rules, which were included within this consultation.

7 Many of our proposals were uncontroversial and received broad support from respondents. These were:

- all fines to be imposed (unless agreed) by functionally separate adjudicators
- most serious fines (Band D) to be imposed by adjudication panels only
- all reviews should be dealt with by a different authorised decision maker to the one who made the original decision.
- that we should have the discretion to revoke a referral we had made to the SDT that had not yet been certified.

8 We also suggested, in setting the context of our proposals, that on rare occasions adjudication panels may consist of all lay members. We received

strong opposition about this from the profession. We accept that having a solicitor member is important for the profession to have confidence in the process and can confirm that as a matter of practice we will always require that there will be a legally qualified panel member.

Hearings

9 We currently have the ability to hold hearings, but we have not previously used this power. Our consultation made clear that in most cases where a hearing is required it will be most appropriate for the case to be referred to the Solicitors Disciplinary Tribunal (SDT). However, there are instances where a hearing is necessary and we are not able to refer a case to the SDT, for example, where the respondent firm is a licensed body (also known as an Alternative Business Structure or ABS). We proposed that we amend our rules to make the circumstances in which we would hold a hearing clear – limiting this to cases where we are not able to refer a case to the SDT and:

- there are material disputes of fact which cannot be determined without a hearing in which the parties are cross-examined, or
- there is an exceptional public interest in matters being ventilated in public.

10 We also proposed to amend our rules to enable all adjudicators, not just adjudication panels, to decide there should be a hearing.

11 There was some support for our proposal, including from the Junior Lawyers Division and the City of London Law Society. Some respondents wanted assurance that respondents could request a hearing. Many respondents raised concerns that it was not appropriate for the SRA to hold a hearing, urging us to refer all appropriate cases to the SDT.

Our view

12 Given our inability to refer some cases to the SDT, we consider that we need to retain the ability to hold hearings (in private or public). This is especially so in light of our high fining powers in relation to Alternative Business Structures (£250m) and those that work within them (£50m). These cases are likely to be extremely rare (there has not been one to date).

13 Our post consultation response and decision-making guidance will emphasise the limited circumstances in which we will hold a hearing. We also plan to publish guidance which sets out the procedures for a hearing, including that we will consider requests from respondents against the criteria above, and covering matters such as notice periods and special measures that may be appropriate to enable vulnerable witnesses to make representations.

14 All of our existing adjudicators and panel members received training on hearings in December 2021 and we have an on-going training programme with topics covered including: the role of panels; fairness in hearings; questioning; witness management; skills required of panelists; and relevant case law. All

new adjudicators and panel members will have initial training as part of their induction covering the above topics.

Interviews

15 Adjudicators and panels are currently able to interview the person (the respondent) subject to the decision. We consulted on a proposal to include express provision in our rules for adjudicators to interview respondents. We also proposed that adjudicators and panels should also be able to interview a witness to events.

16 There was mixed feedback from respondents on this proposal. This included some very strong objections on two grounds:

- a view that the interview is part of the investigation process, so should not be conducted by an adjudicator at the decision-making stage
- it is unfair to the respondent to not be present at an interview of a witness.

Our view

17 We consider the facility for adjudicators to interview respondents to be essential to a process that delivers robust, quality decisions. This has a different purpose to the evidence gathering that takes place at the investigation stage. It is not to seek new evidence but to test credibility of a respondent's evidence in order to reach a decision. The High Court has held that there are circumstances where fairness requires us to hear orally from a respondent. This includes when a significant explanation is advanced which needs to be heard orally in order to fairly determine its credibility (*Yussouf v SRA [2018] EWHC 211 (Admin)*). Further, the respondent sometimes requests to speak to the adjudicator or panel.

18 In relation to interviewing witnesses, we consider that fairness can be safeguarded if the respondent is given details of what the witness has said and an opportunity to respond. However, we recognise the strength of feeling against adjudicators also being able to interview witnesses In the absence of a respondent and suggest that in the rare circumstances in which this need may arise. It would be appropriate instead for us to refer the case to the SDT for a hearing, or hold a hearing ourselves where we are unable to make such a referral.

Recommendation: the Board is asked to:

(a) agree that we amend our rules to implement the proposed enhancements to our decision making procedures on which we consulted, save that we make express provision for adjudicators or panels to interview respondents only.

Suggestions put forward by consultation respondents

19 We asked respondents for suggestions on other measures that may provide additional assurance about our processes. One of the most common suggestions was that we should reinstate a previous practice of publishing biographical information about our adjudicators on our website. And a related suggestion was that we publish details of the training given to adjudicators.

20 Some respondents raised concerns that adjudicators have access to a respondent's previous regulatory history, believing that this may unduly influence the decisions that adjudicators make about the case.

Our view

21 We do not consider that publishing the names and biographies of individual adjudicators is necessary to provide assurance about our decision-making. However, we agree that more information on recruitment and selection and on our adjudicator training programme would provide assurance that all adjudicators have the required knowledge and skills to carry out the role, and propose to publish this additional information accordingly.

22 Adjudicators are provided with information about regulatory history in order that they are able to take into account patterns of behaviour and history of offending which are relevant to their decision on sanction. The information is part of the case bundle and is disclosed to the respondent so they can make representations. It would not be practical or efficient to separate out the representations process and/or information available in respect of findings of fact/misconduct.

23 Our adjudicators are professionally trained, including around the appropriate considerations at each stage of the decision-making process. It is well recognised in caselaw that professional decision-makers are able to apply their minds in this way and not be unduly influenced by material of this nature.

24 The Board is asked to note that we will publish additional information on our website on the recruitment and training of our adjudicators and that adjudicators will continue to have access to a respondent's regulatory history.

Updated financial penalties guidance

Behaviours unsuitable for a fine

25 We consulted on an updated Enforcement Strategy, setting out the position reached following the initial consultation that where an individual is found to have committed sexual misconduct, harassment, or discrimination, a financial penalty is highly unlikely to be an appropriate sanction.

26 We set out that the position is different for firms – where poor systems and controls allow such behaviours to occur or persist. In these cases, a financial penalty may be appropriate.

27 Many respondents were supportive of our proposal. Some respondents however suggested that the range of such behaviours is very broad and should be considered on a case by case basis.

Our view

28 As with all guidance, it is designed to assist decision makers and provide clarity to those subject to our decisions and other stakeholders. However, it cannot fetter the discretion of our decision makers, who will consider each case on its own facts. The guidance makes clear that in any case in which a sanction will be imposed for misconduct in relation to sexual misconduct, harassment, or discrimination – circumstances in which the case will have already crossed a significant threshold of seriousness and will typically raise attitudinal issues that present a risk to others – a fine will, save in exceptional circumstances, be insufficient to protect the public. We have included within the guidance examples of exceptional circumstances.

29 The Board is asked to note that we will implement the updated Enforcement Strategy that was published as part of this consultation.

Personal Impact Statements

30 We consulted on a proposal to pilot the use of personal impact statements in cases relating to sexual misconduct, discrimination and harassment, following a suggestion put forward by the Legal Services Consumer Panel. These cases tend to have in common that the personal impact is at the core of the harm caused by the conduct and therefore at the core of the seriousness of the conduct itself.

31 Most respondents were broadly supportive, but some were concerned of a risk of abuse of the process, or of unfairness to the respondent (for example if the statement were not shared with them/disclosed to them).

Our view

32 We already gather information regarding the impact of misconduct on any identified victim(s) as part of our investigation. The proposal is to use a template to gather this evidence in a more structured and consistent way, to draw out key information. The information will continue to be disclosed to the respondent in the usual way and they can make representations on it.

33 We consider that there are grounds for taking forward a pilot as proposed.

Recommendation: the Board is asked to:

(b) agree that we take forward a pilot on personal impact statements in relation to sexual misconduct, discrimination and harassment.

Taking means into account when setting a fine

Fines for firms

34 Following our first consultation, the Board decided that the maximum amount we would usually fine firms should rise from 2.5% to 5% of annual domestic turnover.

35 This second consultation sought views on how we proposed to update our fining bands to bring these changes into effect.

36 The majority of respondents raised concerns, but many focused on the decisions previously made rather than our proposed fining bands.

37 There were some specific concerns about the detailed proposals:

- that the framework does not allow enough discretion to tailor a penalty in the specific circumstances (although others suggested the framework gave too much discretion)
- that fining bands for the least serious misconduct would lead to disproportionately high fines for bigger firms
- the draft guidance provides that we may take into account other income e.g. global or average income rather than annual domestic turnover without sufficient specificity.

Our view

38 We consider that the proposed approach provides appropriate certainty and transparency whilst maintaining discretion. Each case will be considered on its own facts and the guidance cannot fetter the discretion of adjudicators to issue fines up to the limits allowed by legislation, but it provides a clear framework for how decision makers will apply their discretion.

39 As a result of the changes to our fining bands, we anticipated that many firms would face higher penalties, as we believe our fining bands had become out of step with what is required in order to provide a credible deterrent effect. We were also concerned that our fines were often much lower than those of other regulators. The largest firms we regulate will face higher fines for misconduct that falls into the least serious band for offences that are suitable for a fine (Band A). We consider this to be proportionate to the size and scale of their operations and therefore necessary to provide a credible deterrent effect and to uphold public confidence in the profession.

40 We have not to date had a case in which an adjudicator has used an alternative to annual domestic turnover as the basis for determining a fine. However, it is in our view important that this discretion exists for those rare circumstances where it is clear that basing the fine on domestic turnover would not provide a credible deterrent or uphold public confidence. For example, whilst generally the turnover (and by proxy, the scale and impact) of the regulated business within England and Wales represents an appropriate metric, it may be the case that a large global firm that has significant market impact reports a de minimis in England and Wales. In finalising our guidance, we have clarified this. The investigation officer would identify the appropriate metric and recommend to the adjudicator that this is the metric used, together with reasons. This would be disclosed to the respondent as part of the case bundle and they would be able to make representations.

Individual income

41 Following the first consultation, the Board decided that we should develop our fining approach for individuals so that the level of fine imposed is informed by the income of the individual.

42 In the second consultation, we set of the detail of our proposed approach: Once the misconduct has been placed within a penalty band based on seriousness (taking into account aggravating and mitigating factors), the basic penalty would be calculated as a percentage of the individual's gross income from the previous tax year. We said this would help us to achieve our aims of ensuring that the fine serves as a credible deterrent and upholds public confidence through fines that are proportionate to the income of the individual.

43 Our proposed framework maintained a discretion to discount the basic penalty by up to 40% for cooperation with the investigation and remedying the breach. And if there has been a significant change in income since the latest available P60 or tax return, individuals can provide alternative evidence of their current income.

44 Many respondents raised concerns about our proposals. A key objection was that gross income is not the same as having available money to pay a fine and so is not a measure of affordability or impact on the individual at the time that the fine is issued. Suggested alternatives included using net income or disposable income.

45 Some respondents also raised concerns about the high percentage of gross salary that our proposed fining bands go up to for the most serious breaches (over 150%), suggesting that we should voluntarily cap fines at a lower level.

46 Consistency with the SDT was also raised by a number of respondents, with some fearing two disciplinary justice systems depending on wealth. As fines would be based on income, some cases would exceed our permitted internal fining level based on income if all other circumstances were the same. The

concern is then that SDT fines will be lower than our own, meaning those of greater income may be fined lower amounts.

Our view

47 Our proposal to build consideration of income into our fining framework is not based on affordability for the individual; rather it is about providing a meaningful deterrent effect and providing confidence to the public that solicitors doing wrong are fined at a level that is commensurate to their position and financial standing. However, we have reviewed our proposed approach considering the potential impacts raised in consultation responses.

48 Economic Insight provided advice previously that income was the best measure to use in our fine setting processes to deliver proportionate and fair outcomes. This informed the Board's decision following the first consultation. In light of responses to the second consultation, they have specifically considered whether net or disposable income would be a fairer metrics than gross income. Their view is that gross income is the fairest metric to use. Their view was that net income would not be a better measure since while higher and additional rate taxpayers pay a higher proportion of their gross income in tax, they may pay a smaller proportion in non-discretionary expenditure, such as utility bills. They considered that using disposable income (or taking account of savings) would lead to inconsistencies. In particular, they pointed to the challenges of determining what is necessary and what is discretionary spending.

49 We also asked Economic Insight to consider whether our proposed bands have been set too high or too low at the top end. Their view is that there is no evidence to suggest that this is the case. This takes into account that the proposed new framework will result in a) in the majority of cases the percentage of fine for the average earning solicitor staying roughly the same b) an uplift for higher earning solicitors c) a reduction for solicitors of lower than average income. Although Economic Insight highlight that the Financial Conduct Authority (FCA) cap fines for individuals at 40% of gross income, they also give examples of the fining bands of other organisations, including the SDT, the Council of Licensed Conveyancers and Bar Tribunal and Adjudication Services which, as a percentage of gross income, are broadly in line with or higher than the bands we have proposed. Economic Insight's full report is at annex 3.

50 In our response to consultation and relevant guidance, we will clarify that any respondent may provide a statement of means as evidence of whether the level of fine based on gross income from the previous year's tax year is affordable. This would not impact the rationale for our fine setting, nor the base level set, but in exceptional circumstances, may inform either the final fine or, more likely, the basis on which it is paid (eg length of time given).

51 There may be occasions when an individual refuses to provide us with information about their salary. To address this, in our consultation we explained that this refusal would mean that the misconduct would be moved to the next

highest band of seriousness in our published fining table and that we would assign the individual a default salary based on salary bandings that we would develop. We explained that the default salaries would be at the top end of the range of salary brackets we obtained, in order to incentivise disclosure to us.

52 We have now developed these default salary bands. The bands take into account the individual's seniority within the firm, their geographical location and whether they are in private practice or in the public sector. They are devised based on information from the most recent available salary datasets (2021) of four different recruitment companies (Saccoman, Hay, ENL, and Robert Walter) that focus on different segments of the legal services market. The bands can be found in annex 4 and will be published.

53 We acknowledge the importance of ensuring, as far as possible, a consistent approach between us and the SDT and we will continue to engage with them about this.

Recommendation: the Board is asked to:

(c) agree that we implement our proposed updated fining frameworks for firms and individuals

Publication

54 We explained that when we impose fines for individuals which take into account their income, we would publish the level of the fine and how this has been calculated. We recognised that this would make it possible to calculate the income of the individual subject to the decision, which is personal data protected by the General Data Protection Regulation (GDPR). We plan to publish similar information in relation to firms that would make it possible to calculate the firm's turnover.

55 Many respondents strongly objected to this. Objections were largely based around assertions that it is unfair to publish information that allows income (or turnover) to be ascertained and that this may be a breach of GDPR and / or Article 8 of the Human Rights Act.

Our view

56 We consider that our proposed approach is proportionate given the public interest benefits of being transparent, both about the sanction imposed and the reasons for that sanction being appropriate, including our view on the seriousness of the misconduct and how this is affected by any aggravating and mitigating factors. This is essential in order that our fining decisions are able to serve their purpose in maintaining standards and upholding public confidence. We accept that there is a risk that we are legally challenged when we do publish information that could lead to an individual's income level being identified but we have sought legal advice and are satisfied that our proposed approach is GDPR and Human Rights Act compliant.

57 It is important that (as is now the case) we are able to withhold publication of this information if the respondent is able to demonstrate that it would be disproportionate, for example causing real prejudice, harm or the destruction of their business. We will make sure that this is clarified in our guidance on withholding publication. We will also consider any objections to the publication of personal data under GDPR provisions on a case by case basis, in the usual way.

Recommendation: the Board is asked to:

(d) agree that when we impose fines for individuals and firms which take into account their income, we publish the level of the fine and how this has been calculated, unless we decide to withhold publication because the impact on the respondent would be disproportionate.

Fixed penalties

58 Following our first consultation, we confirmed that we would take steps to introduce a fixed penalties scheme for specified breaches of our rules, for example non-compliance with our more administrative requirements or failure to respond to our requests. These breaches would be limited to firm breaches to begin with, and the scheme would be monitored and evaluated before any further breaches were added (including consideration of any individual breaches).

59 There was broad support for the introduction of fixed financial penalties for the breaches proposed in the consultation. There was some isolated push back on specific points, for example, the amount of the penalty, the amount of the fixed costs and the grounds for review.

Our view

60 No clear rationale was put forward by respondents to support their opposition to parts of our consultation proposals. Therefore, given the broad support for the fixed penalty proposals and that we are implementing this for a limited number of specifies breaches for firms only, our view is that we should proceed as proposed, with a commitment to monitor and evaluate.

Recommendation: the Board is asked to:

(e) approve the implementation of the fixed financial penalty regime

Next steps

61 Subject to Board approval, we will:

- submit an application to the LSB in relation to rule changes
- publish our post consultation response

- publish amended guidance (Enforcement Strategy, Approach to fining, Decision making, Hearings procedures, Schedule of Delegation)
- commence staff training.

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Supporting information

Links to the Corporate Strategy and/or Business Plan and impact on strategic and mid-tier risks

62 This project is of relevance to objective 1 of the Corporate Strategy. A robust framework for financial penalties is a vital tool for enforcing our standards.

How the issues support the regulatory objectives and best regulatory practice

63 A robust fining framework contributes directly to our objectives to protect the public interest and promote and maintain adherence to the professional principles.

Public/Consumer impact

64 Having the right fining framework in place is vital to uphold public confidence in the profession and protect the public from potential harm.

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

65 We have formally consulted twice, as well as conducting a survey with 500 members of the public and over 200 solicitors. We have held focus groups and engaged directly with key stakeholders.

66 Further engagement is being planned in advance of the implementation of the fixed penalties scheme.

Equality and diversity considerations relate to this issue

67 The overrepresentation of black and minority ethnic solicitors in our enforcement processes is relevant here.

How the work will be evaluated

68 We will put in place a formal evaluation of our reforms. including how we have used our increased fining powers and new fining bands and how our fixed penalty regime is working.

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Annexes

Annex 1	**SRA Financial Penalties and Adjudication (Amendment) Regulations 2023**
Annex 2	**Summary of responses to the consultation**
Annex 3	**Economic Insight report**
Annex 4	**Default salary bands**