SRA BOARD

31 January 2023

CLASSIFICATION – CONFIDENTIAL

SRA consultation on Financial Penalties summary of responses

Executive summary

There were 13 respondents. These were from 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.

Overall, there was some significant support for our proposals, but respondents also provided suggestions for improvement and had concerns about some of the detail of what we had proposed.

This report presents the views of respondents to each question thematically, rather than a numerical analysis of responses which would create an overly simplistic picture.

Answers to questions

Questions 1-4 (safeguards in light of increase to maximum fine levels) – balance of responses and key themes

A number of respondents commented on positive impacts of using adjudication panels for band D cases, but several respondents questioned how the system would operate in practice and expressed concerns about the possibility of all lay adjudication panels. Several respondents sought greater clarity about how we would ensure efficiency was balanced with impartiality and that investigation and adjudication functions would be kept separate.

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.

There was broad support for our proposal, although some respondents expressed concern that the use of panels could be encroaching on the role of the Solicitors Disciplinary Tribunal (SDT). There were some concerns raised about whether it would lead to delays and additional costs.

Positive impacts

Several respondents commented on potential positive impacts of this proposal. The Legal Services Consumer Panel (LSCP) stated

> "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."

The Law Society stated:

> "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."

The Junior Lawyers Division (JLD) stated

> "The JLD agree… 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."

A law firm stated:

> "…we agree in principle that an adjudication panel, rather than an individual adjudicator, should determine these fines. We also welcome the requirement for reviews to be conducted by a different authorised decision maker."

The two members of the public who responded agreed. One of them stated:

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

Remit and effectiveness

Despite their support for the proposal, the LSCP had concerns about efficiency.

> "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." (LSCP)

A local Law Society felt that the SRA was encroaching on the remit of the SDT.

> "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…"

An individual solicitor stated:

> "No, I think they (Band D fines) should be decided by the Solicitors' Disciplinary Tribunal as this is the only truly independent body. It is not right for the SRA to be both 'prosecutor' and 'judge', and the proposals for 'independence' will in no way achieve true independence."

The other individual solicitor who responded stated

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

Guidance and processes

The Law Society thought that more guidance was needed.

> "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 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."

A local Law Society commented:

> "The SRA should ensure that its new rules and schedule of delegations promotes quality of decision-making in reasonable timescales."

A firm stated that they would like:

> "…further clarity from the SRA regarding the functional separation between the investigating case officer and the adjudication panel. We are concerned to ensure that the introduction of the adjudication panel does not precipitate further delays for respondents awaiting a decision and potential sanction."

They also went on to say:

> "We would… welcome the SRA's confirmation that all members of the adjudication panels will have the requisite experience and training… It is our view that the SRA will require an extensive pool of adjudicators from which to constitute panels so respondents receive efficient and timely decisions."

Composition of adjudication panels

The Law Society had concerns about the possibility of panels with only lay members.

> "…we consider that panels should always be made up of both legally qualified members and lay members… the public and the profession would have greater confidence where legally qualified individuals preside over such matters."

The Junior Lawyers Division (JLD), who also supported our proposal for adjudication panels, similarly said:

> "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."

The local Law Societies who responded had a similar view, although they varied in their views as to the exact composition of an adjudication panel.

> "In principle, we agree that an adjudication panel should decide the fines in Band D. However, our support for this proposal would depend upon the composition of the adjudication panel. We are firmly against an adjudication panel comprised entirely of lay adjudicators deciding fines of up to £25,000."

> "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."

> "…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."
>
> "We believe it important to ensure that any panel is comprised of a majority of legally qualified adjudicators, including the panel chair."

The two law firms who responded were also opposed to all-lay adjudication panels.

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.

There were a variety of different comments from respondents in respect of hearings, interviews and reviews. The JLD stated that they agreed:

> "…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."

Some individual respondents also agreed:

> "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." (solicitor)
>
> "Yes, the rules make sense." (member of the public)
>
> "Yes. The holding of hearings is vital for public protection." (member of the public)

But, many respondents, while not always disagreeing with the overall approach, had some significant concerns about how the proposals would be implemented, and wanted more information. The comments below set this out in more detail.

Hearings

Some respondents misunderstood our position to hold hearings only for cases that cannot be referred to the SDT. Others had specific concerns. The LSCP stated that:

> "…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."

The Law Society stated that there was need for more information and guidance on how adjudicators will decide on whether to hold a hearing:

> "…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… 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?"

A local Law Society stated:

> "We think the SRA could be much clearer within the Rules and/or guidance in relation to how the adjudicator's wide discretion is to be used in deciding whether:
>
> - a hearing is required
> - in public or in private
> - it is in the interests of justice to hold a hearing.
>
> The proposed amendments also appear to be silent about whether the respondent has any right to request a hearing."

And the Law Society commented:

> "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."

One local Law Society disagreed with the SRA holding hearings.

> "If a hearing is required, it is an almost automatic admission that the case is unsuitable for adjudication and that proceedings should be issued in the SDT."

A firm stated:

> "If a case is complex or serious enough that a hearing is required, a referral to the SDT would likely be more appropriate in the interests of fairness… We would welcome further clarification from the SRA on how this proposal will further the interests of fairness and justice and its proposed methodology for determining which cases will fall within its jurisdiction for hearings."

Interviews

Some respondents made general comments about interviews being part of the investigation, meaning it is not appropriate for an adjudicator to conduct an interview.

The City of London Law Society stated:

"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."

Conversely, the JLD were supportive, stating:

"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"

However, in general, responses focused on our proposal that adjudicators be able to interview witnesses to events, with some being strongly opposed.

The LSCP stated:

> "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."

They went on to say:

> "It may be acceptable for investigators to interview witnesses without the respondent solicitor… being present, but it does not appear fair to have a decision-maker do so."

The Law Society expressed concerns about whether decision-makers interviewing witnesses encroached on the role of investigators:

> "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."

This concern was echoed by local Law Societies:

> "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."
>
> "We think the SRA's proposals in relation to interviews have gone too far. To give adjudicators sole discretion about inviting people such as witnesses to be interviewed by them is in our view unfair. If the SRA accepts that there needs to be greater accountability and transparency as a result of their increased fining powers, how can it be right or fair that a sole adjudicator is able to decide (without there being any clear criteria set out on which to base a decision to exercise such discretion), to act as an investigator and prosecutor…?"

The LSCP also noted that:

> "…in expanding its decision-making powers, the SRA must be conscientious in keeping its investigation and decision-making roles separate."

Reviews

The Law Society had concerns about reviews being conducted by a colleague of the original decision maker:

> "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."

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

Most respondents agreed with this proposal. The Law Society stated:

> "Yes, we support the proposals around revoking a referral to the SDT prior to the matter being certified by the Tribunal… 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."

The JLD also agreed with the proposal, and a local Law Society stated:

> "This makes sense to save time, costs and result in quicker decisions."

An individual solicitor stated:

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

Others were concerned about unfairness to the respondent or the impact on transparency. Some local Law Societies stated:

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

> "…we agree with the proposals but only in circumstances where the respondent has requested that the referral to the SDT should be revoked…There may be cases where the respondent wishes the case to be referred to the SDT in order to obtain a fair hearing. We acknowledge that these cases would be unusual but nonetheless should be taken into consideration in drafting the rules."

A firm made a similar point.

> "We support this proposed rule change in circumstances in which a respondent requests the SRA to reconsider its decision to refer to the SDT… However, in circumstances in which the SRA revokes a referral to the SDT at its own initiative, the respondent should still be notified and given the opportunity to make representations, in case the respondent does in fact want the case to be referred to the SDT (for example, pursuant to that person's right to a fair trial under Article 6 of the European Convention on Human Rights)."

A member of the public stated:

> "Revoking referral undermines transparency."

The LSCP stated that:

> "[affected consumers of legal services] 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… 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."

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 LSCP stated:

> "The LSB's MTCOG Regulatory Information Service Working Group is currently considering how lawyers' regulatory information… 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."

A member of the public also stated that they would like to see more information about decisions on financial penalties.

The Law Society reiterated that more information was needed about how the system would work, and repeated its concerns about separation of powers.

> "…we remain concerned that there needs to be a clearer functional separation of the roles of investigators and adjudicators. 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."

The Law Society's comments in this respect were echoed by local Law Societies and law firms. A law firm also stated:

> "It is also essential that the SRA ensures the process is fair and proportionate to the alleged misconduct; lengthy delays in the enforcement process stretching for years can adversely impact individuals' health, mental health and financial circumstances."

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

Overall balance of responses

Generally, a number of respondents including the LSCP agreed that there was clarity on the types of behaviours that are unsuitable for a financial penalty. Other stakeholders reiterated their points made with respect to the principle of whether sexual misconduct, discrimination or harassment should be suitable for a financial penalty, which we had already confirmed our position on, further to our first consultation.

The LSCP felt that the updated Enforcement Strategy provides further clarity, and went on to state:

> "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"… 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."

One local Law Society agreed, saying:

> "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."

The Law Society stated:

> "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."

They also agreed in terms of the use of fines for firms.

> "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."

The JLD, and a local Law Society, agreed – the latter stated:

> "From a firm's perspective, we agree 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 with the potential for a referral to the SDT in the more serious cases."

But the Law Society and other respondents expressed reservations in respect of:

- behaviours unsuitable for a fine
- exceptional circumstances
- reporting requirements.

Behaviours unsuitable for a fine

A number of law societies and firms made comments on the breadth of behaviours that are included in sexual misconduct, discrimination and harassment and there were some comments to say that we should not rule out financial penalties.

Exceptional circumstances

The Law Society stated that the scope of "exceptional circumstances" needed to be clarified, and that cases suitable for the SDT could include ones where a financial penalty is appropriate.

> "…discrimination, non-sexual harassment and sexual misconduct cover a very wide spectrum of behaviours which may arise in a wide range of circumstances… 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."

> "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."

The JLD said that they expected "exceptional circumstances" to be rarely used:

> "…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."

But, a local Law Society argued that the way that "exceptional circumstances" could be used did not reflect reality.

> "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."

Reporting requirements

A local Law Society said more clarity was needed on how this would affect reporting requirements. They asked:

> "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."

They went on to state:

> "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."

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?

There was support with respect to our proposal to pilot personal impact statements, but also some concerns about how it would work in practise.

The LSCP supported the proposed pilot.

> "…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."

They also went on to say:

> "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."

The JLD also supported the pilot.

> "[We] 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."

One local Law Society was broadly supportive, but was keen to see guidance that would help ensure a fair balance between the complainant and the respondent.

> "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… 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."

Two other local Law Societies expressed some concerns about the status of personal impact statements.

> "Whilst we agree with the proposed approach to pilot personal impact statements in specific types of cases we have some concerns… 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."

> "…the proposals are unclear as to how they might be used in the investigation/decision process and we think there might be some unintended consequences leading to unfairness eg if a witness bears a grudge /is vexatious etc and the impact statement cannot be challenged. The SRA should already take into account the impact on the victim through its current investigation process so it isn't clear what benefit these additional proposals will bring to the existing process."

Another local Law Society was opposed to the pilot.

> "The SRA and the SDT and the higher courts focus in professional regulation cases upon evidence not emotion. We do not consider that it will add anything to the case as the SRA will already be in receipt of the most important key facts to enable it to make a decision. In addition, we object to the proposal to undertake a pilot study in order to further the research of the SRA. The SRA cannot experiment with the careers of individual solicitors in this way."

The Law Society was also opposed to the pilot.

> "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… 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."

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?

Balance of responses and key themes

The Legal Services Consumer Panel, the Junior Lawyers Division and an individual solicitor and a member of the public thought that the approach was overall correct.

A number of respondents reiterated points made with respect to our first consultation around whether turnover was an appropriate metric or on the level of the increased turnover threshold, which we already have confirmed positions on.

Respondents' views clustered into four key themes which were:

- public confidence, transparency, equality and diversity
- impacts on firms and the legal services market

- the deterrent effect of our proposals
- flexibility, fairness and clarity.

Public confidence, transparency, equality and diversity

The LSCP thought that the proposals would have a positive effect in respect of public confidence in a more transparent process.

> "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."

The Law Society, however, identified what they saw as potential negative impacts in terms of equality and diversity.

> "…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."

Impacts on firms and the legal services market

A firm pointed out a possible unintended consequence of the proposals.

> "… a large ABS firm like ourselves… could be fined £200,000 (0.2%) for an A1 Band fine (the most minor of breaches… Even with the maximum discount of 40%, a fine of £80,000 would be disproportionately high… Might this lead to more ABSs in such a scenario appealing the internal sanction to the SDT?"

The Law Society felt that any changes should give more consideration to the current state of the legal services market, as well as changes in firms' incomes and running. They stated that our proposals are made:

> "during a national cost of living crisis and at a time when many firms… are still facing the financial impact of the Covid 19 pandemic? … The proposal takes no account of the fluctuations in income or the effect of rising operating costs."

Deterrence

The JLD felt that the proposals could have a deterrent effect, but should be based on international 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."

The Law Society and a local Law Society thought that other factors were the key deterrent.

> "…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…"

> "A responsible firm's risk management regime is not based on the risk of being fined. Whilst it is one factor, the processes put in place will be there because it is the right thing to do to protect clients, employees and the firm as a whole."

Flexibility, fairness and clarity

Three local Law Societies felt that the basis of the fine level could lead to unfairness.

> "The scheme for calculating fines is simplistic and provides too little scope for discretion to ensure that the outcome is fair and proportionate."

> "The table formula is mechanistic and complex and gives no room for the exercise of any discretion."

> "…the determination of the fine based on annual domestic turnover as opposed to profit could lead to unfairness."

The Law Society felt that our proposed guidance lacked transparency.

> "…the proposed Guidance… 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)… 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."

Respondents' suggestions

A number of respondents had suggestions regarding our model of fines for firms. A local Law Society stated:

> "…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."

Another stated:

> "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."

The LSCP had suggestions regarding monitoring.

> "Monitoring and evaluation… to ensure that taking income and firm turnover into account when assigning financial penalties is having the desired effects… to see if the methods of calculating financial penalties are being applied in a consistent manner… the most important impact that needs to be monitored is the impact on solicitors' 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."

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

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

Balance of responses and key themes

Most of the responses to these questions emphasised very similar themes. Most respondents felt that the use of gross income as a metric could lead to unfairness, and many of them put forward arguments that individual circumstances should be taken into account when determining the level of a fine. However, the LCSP was broadly in favour of the approach, while highlighting an issue of consistency between the SRA and the SDT.

Respondents raised points in respect of these themes:

- objectivity and consistency
- fairness and individual privacy

Some made suggestions for improvement, which were all broadly similar.

Objectivity and consistency

The LSCP said that fines based on "various levels of personal income" would increase objectivity, transparency and public confidence.

However, they went on to note that:

> "…the different fining powers of the SRA and SDT means that higher earning individuals will be referred to the SDT… 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."

A local Law Society made the same point, stating

> "Such an approach risks inconsistency in decision-making and potential injustice."

Fairness and individual privacy

A member of the public stated that the SRA should take a holistic approach based not just on income but on other factors such as savings. A number of other respondents made

similar points, some focused on net rather than gross income, others on other factors including impact on dependents.

> "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." (law firm)

> "Fining on a gross income basis risks impacting unreasonably on family/relatives/others who may be wholly dependent upon the income of that individual solicitor." (local Law Society)

> "…a substantial gross income does not necessarily translate into a high net income with the corresponding ability to meet a high fine." (local Law Society)

> "In principle, some link to ability to pay seems fair. However… How about looking at the overall wealth of the person as well as their income?" (individual solicitor)

> "Fines can only be proportionate and fair if they are appropriate to the nature of the breach, impact and the means of the individuals concerned are properly taken into account. The impact of fining will be different in each case and dependent upon that individual's personal circumstances." (law firm)

A local Law Society also stated that the higher bands are disproportionate, and said

> "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."

An individual solicitor also noted that an individual who incurs an SRA fine may also be affected by a "change of employment circumstances".

The Law Society, and a local law Society expressed concern about our proposal to publish the percentage of income and the level of fine:

> "Publishing a decision by setting out the percentage of income a fine represents will also mean that an individual's income can be ascertained which would be personal sensitive data protected by GDPR." (local Law Society)

Respondents' suggestions

A number of respondents suggested that we should:

- introduce completion of a Statement of Means as part of the process for all fines
- use net income as the metric for the starting point for a fine
- consider discounting more than the 40% maximum for mitigation on a case by case basis
- move to a simplified banding system (similar to that of the SDT, with fines providing a starting point)

- consider capping the upper level for a fine (to eg 40% of income in the period of the breach)
- avoid a two-tier approach to fining between the SRA and the SDT (which the current proposal could introduce).

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

Overall balance of responses

Some respondents were supportive, while some did not specifically say that they supported or did not support the approach, but had comments on the level of fines and potential for discretion.

The LPSC supported our approach, stating that they were:

> "…pleased to see that fixed financial penalties are being used to ensure compliance with the SRA's transparency requirements and other administrative infractions."

They went on to say:

> "We feel that the provision of a specified amount of time to comply prior to the fixed fine being introduced… would promote compliance… We are also in agreement that a repeated infraction should incur a higher fixed penalty… We are also pleased that the SRA has built discretion into the system…"

The JLD agreed with the introduction of fixed penalties for firms, while stating that they would comment at a later stage if we considered introducing fixed penalties for individuals.

A local Law Society was also overall supportive of our approach, stating:

> "We are largely in agreement with the proposed fixed penalty process. We agree with the level of the stage one fixed penalty at Â£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."

An individual solicitor stated that they thought the approach "seems fair" and firm stated that they agreed with the approach in principle, but they went on to say:

> However we would welcome further clarification from the SRA on how it proposes to treat any operational or systems errors under this scheme that result in a pattern of non-compliance; a fixed penalty per instance of minor compliance failures arising out of an operational/ process deficiency could lead to a disproportionate result for a firm due to the volume rather than the seriousness of the error."

They also stated that they would welcome consideration of bringing in fixed penalties for individuals:

> "to ensure minor breaches are proportionate and dealt with in an expedited manner to avoid unnecessary costs and delays for both the SRA and the individual."

But, a local Law Society stated:

> "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 Law Society made a number of points:

> "…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 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… Clarity on when a decision maker can exercise their discretion would be helpful."

A local Law Society and a firm also stated that they thought the fixed penalty rates were high. Another local Law Society commented:

> "The SRA appears to be reserving to itself the power to order costs on top of the fixed financial penalty. This defeats the objective of a fixed penalty. It is either a fixed penalty or it is not. In the interests of simplicity and fairness there should be single figure applicable as a fixed penalty."

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?

There were a lower number of responses to this question, and no clear themes in the responses. The main substantive comments are set out below.

Respondents' comments

The LSCP stated that they would:

> "…like to see the SRA also consider how consumers with protected characteristics are affected by new proposals… ethnic minority consumers are more likely to shop around for legal services... and would therefore benefit more from transparency data... It would also be very useful to see which clients are being affected by substandard solicitor behaviour."

The Law Society stated:

> "…there is no mention of the potential impact on LGBT+, disabled, and/or carers... the omission of these other groups may be due to a lack of meaningful data... this should not result in their being overlooked… A gap analysis for all protected characteristics... should be carried out."

They also stated that legal services for consumers in some sectors will be impacted by the current economic situation.

> "…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… 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."

They also mentioned the need for our approach to consider mental health issues in the solicitors' profession.

JLD stated:

> "…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)."

But an individual solicitor stated:

> "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."

And a member of the public made a similar point:

> "[the SRA should 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 potential for significantly adverse consequences to younger people in the profession."

A local Law Society stated:

> "Those who cannot afford independent specialist legal advice are at a considerable disadvantage when dealing with the SRA. The disadvantage of being undefended will increase significantly with the increased fining powers."

A law firm stated that they could not speculate on impacts, but they felt that:

> "…all solicitors and firms would likely benefit from more guidance and support around the SRA's expectations and approach to enforcement. The SRA needs to also take into account the fact that smaller firms and low paid individuals are less likely to have the resource and confidence to challenge the decisions made."