Financial penalties: Consultation paper

November 2021

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About this consultation paper

We are seeking views on proposals in relation to our approach to financial penalties, with a view to resolving cases much more quickly, reducing cost, delay and stress for the profession as well as improving public protection, consistency and providing a deterrent to reduce future risk of repeated behaviour.

We have powers to impose a financial penalty when a regulated firm or individual does not meet the professional standards we expect of them.

The purpose of a financial penalty is to:

- remove any financial or other benefit arising from the conduct
- maintain professional standards
- uphold public confidence in the solicitors' profession and in legal services provided by authorised persons.

Through this consultation paper, we wish to explore:

- the principles that underpin our fining framework
- the types of behaviours that may or may not be suitable for a financial penalty
- the types of behaviours that may be suitable for a fixed penalty and the potential benefits of introducing fixed penalties
- the appropriate levels of fines to achieve a deterrent effect in order to maintain professional standards
- what level of fines should be imposed by us internally and what should be considered by the SDT.

We particularly welcome views from solicitors, firms we regulate, consumers and other regulators.

We are seeking views on our approach from **19 November 2021 to 11 February 2022**.

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How to respond

Online questionnaire

Our online consultation questionnaire is a convenient, flexible way to respond. You can save a partial response online and complete it later. You can download a copy of your response before you submit it.

Start your online response now.

Reasonable adjustment requests and questions

We offer reasonable adjustments. Read our policy to find out more.

Contact us - finingpowers@sra.org.uk if you need to respond to this consultation using a different format or if you have any questions about the consultation.

Publishing responses

We will publish and attribute your response unless you request otherwise.

Foreword

The overwhelming majority of the solicitors and firms we regulate do a good job, providing high-quality legal services to the public, and meeting the high professional standards we set.

However, when those standards are not met and things go wrong, we can investigate and take action to make sure that service users are protected, standards are upheld, others are deterred from similar behaviours and confidence in the profession is well placed.

We know that involvement in our enforcement processes can be very stressful, costly and time consuming for solicitors and firms, with many cases resulting in fines whether imposed by us or the Solicitors Disciplinary Tribunal (SDT), so we are consulting on proposals to reform our approach to financial penalties.

Our aspiration is to resolve cases much more quickly, potentially reducing the costs, delays, resource and stress for the profession as well as improving public protection, consistency and provide a deterrent to reduce future risk of repeated behaviour. We also want to be really clear about the types of misconduct where a financial penalty will not be appropriate.

This paper sets our proposals to:

- Increase the maximum fine the SRA can issue to £25,000
- Take into account the turnover or income of firms and individuals when setting fines
- Introduce a schedule of 'fixed penalties' of £800 or less for a first offence and up to £1500 for any subsequent offence, so that less serious concerns can be dealt with more easily for all concerned

Under our current framework, we are only able to fine traditional law firms and individuals up to £2000, which means that cases involving even low-level fines need to be referred to the SDT, incurring delays and further costs. Increasing this threshold would bring a range of benefits. As set out above, cases could be dealt with more quickly in a resource effective way, reducing the inevitable stress. It would also free up the SDT to progress the most serious cases, again cutting delays and stress for those involved.

We also propose to take into account the turnover of firms for all cases and the income of individuals when setting fines for individuals. This will ensure that our fines act as a credible deterrent and that they are fair and proportionate to the means of those concerned. This would, for example, allow different levels of fine to be issued to a low earning junior solicitor compared to a senior equity partner for similar offences.

Introducing "fixed penalties" for certain lower-level offences would provide greater transparency and consistency in how penalties are applied. This should make it easier to deal with straightforward issues in a timely and more streamlined manner. It should also provide solicitors with greater predictability around how cases are dealt with.

Alongside these proposals, we are reviewing our approach to some of the most serious kinds of misconduct, particularly sexual misconduct, discrimination and harassment, to ensure that our approach aligns with public expectations.

Our fining regime was introduced some ten years ago and we think it's time to update it. Taken together our proposals will provide a modern, robust framework that helps to uphold high professional standards and maintains public trust and confidence in the solicitor's profession in a timely and cost-effective and proportionate way.

Our fining powers

We are the largest regulator of legal services in England and Wales, covering around 90% of the regulated market and overseeing 212,000 solicitors and some 10,000 law firms.

We work to protect members of the public, and to support the rule of law and the administration of justice. We do this by:

- overseeing all education and training requirements necessary to practise as a solicitor
- licensing individuals and firms to practise
- setting the standards of the profession
- regulating and enforcing compliance against these standards

The purpose of our enforcement work is to protect consumers and the public interest, and to uphold the rule of law and the administration of justice. We set out our approach to enforcement in our Enforcement Strategy. We also publish information about our enforcement work in our Upholding Professional Standards reports.

Our ability to impose financial penalties when required is central to maintaining professional standards and public confidence in the profession. The process for fining varies depending on the type of entity. We are responsible for regulating:

- 'traditional' law firms, which are generally owned and managed by solicitors or other regulated lawyers
- alternative business structures (ABSs), a type of law firm the ownership and management of which involves non-lawyers or non-legal businesses.

We have powers to fine traditional law firms, and those involved in such firms, up to £2,000 only. We also have the power to impose similar fines on all individual solicitors, regardless of what type of entity or employer they work for.

If we consider that a greater fine (or other more serious sanction such as the striking off or suspension of a solicitor) is appropriate then we would need to make a referral to the Solicitors Disciplinary Tribunal (SDT) to achieve such an outcome. The SDT has unlimited fining powers.

By contrast, the Legal Services Act 2007 (LSA) permits the SRA to exercise all disciplinary powers in respect of ABSs and managers and employees of ABSs itself.

We can (among other things):

- fine a manager or an employee of an ABS up to £50 million
- fine the ABS itself up to £250 million.

There is a right to appeal to the SDT for all fining decisions we make with respect to traditional law firms and ABS. All fines are paid to the Treasury regardless of whether the fine was imposed by us or by the SDT.

Our Regulatory and Disciplinary Rules set out when a fine should be imposed. Rule 4 sets out that a decision-maker may impose a fine where it is appropriate to:

- remove any financial or other benefit arising from the conduct
- maintain professional standards
- uphold public confidence in the solicitors' profession and in legal services provided by authorised persons.

Alongside the rules we have fining guidance which is designed to assist decision-makers in arriving at the appropriate financial penalty.

This guidance applies once we decide that a financial penalty is the appropriate outcome. The conduct needs to be sufficiently serious to warrant this approach rather than a warning or rebuke but is not appropriate where the conduct poses an ongoing risk to clients or the public. In such circumstances, an alternative outcome which is able to control or restrict the firm or individual’s practice or behaviour, such as conditions, suspension or strike off, will be required.

The guidance applies to all financial penalties imposed on individuals and firms internally and, for solicitors and traditional law firms, also serves the purpose of guiding our consideration about when we might need to refer a matter to the SDT.

In our fining guidance, we set out a three-step process to identify the level of the fine. The first step is to determine the basic penalty taking into account the seriousness of the conduct (based on a score calculated by assessing the nature and the impact of the conduct) – this determines the penalty bracket. The second step is to adjust the penalty to account for mitigating factors and the third to ensure that the financial or other benefit as a result of the conduct is removed.

Rationale for change

We think that it is time to review and reform our current fining framework, in order to provide a more robust and up to date approach that delivers greater consistency and a more effective deterrent effect, while being more cost effective and efficient.

As set out in the foreword, our aspiration is to resolve cases much more quickly, potentially reducing the costs, delays, resource and stress burden for the profession as well as improving public protection.

Our legislation results in inconsistency, based on the business model that the firm has chosen to adopt. For recognised bodies, the majority of those that we regulate, we have to refer the case to the SDT to impose relatively low-level fines. This creates added cost, delay, and stress for those involved.

We have previously consulted on a modest increase of our internal fining powers for traditional law firms. We consider it is now time to revive this discussion to ensure that we are able to handle inhouse the majority of less complex and serious cases, reducing cost, time and stress for solicitors going through our enforcement processes.

Further, there have been significant changes to the environment since our fining guidance was introduced, in 2013. In 2019, we introduced our new Standards and Regulations, and accompanying Enforcement Strategy. We made some minor changes to our existing fining guidance, however we did not carry out a substantive review at that time.

We are also conscious that societal views about what an appropriate sanction might be are likely to have changed significantly in over eight years. In that time, we have seen a change in the nature of the cases we handle, with a greater number of cases relating to ethical behaviour outside of the solicitor/client relationship, including sexual harassment cases and offensive and discriminatory communications. Therefore, we now need to undertake a more fundamental review to ensure the guidance remains appropriate and up to date.

In addition, in recent years other regulators have shifted their approach to financial penalties as an effective deterrent, issuing much larger (and headline grabbing) fines. For example, since consulting in 2017, the Gambling Commission began to issue fines of over £1m for the first time. During 2018/19 it issued fines totalling nearly £20m. Solicitors and law firms that we regulate are not fined at this level, despite the high wealth and turnover of many of the individuals and firms that we regulate.

We are mindful of the benefits of having consistency between regulators, particularly the legal regulators. We will engage with the Solicitors Disciplinary Tribunal (SDT) as well as other legal service regulators to discuss our proposed approach during the consultation period. We have also reviewed the recent consultations and draft guidance produced by the Bar Tribunals and Adjudication Service (BTAS) as part of their Sanctions Guidance Review. In our discussions with the SDT, we will explore how best to achieve consistency in outcomes for firms that we regulate and any methods for doing so, such as further alignment

in our respective sanctions guidance. Should we decide to proceed with proposals to increase our internal fining powers, this change would need to be made by the Ministry of Justice through secondary legislation, and we will be discussing the issues with them as part of this consultation.

Our approach

The following principles govern our approach to the issues covered in this consultation paper:

- 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.

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

What types of behaviours may or may not be suitable for a financial penalty?

We consider that our sanctions guidance could be more focused on different types of behaviours and more explicit in highlighting those that might be most appropriate for financial penalties and those that are unlikely to be.

Our Enforcement Strategy and the annexed Sanctions and Controls table explains how we use our enforcement powers, when there are concerns about a failure to meet our standards. This includes the factors that we take into account in deciding the seriousness of a breach, aggregating and mitigating factors, and how we decide what an appropriate sanction or control might be.

Our approach is to consider the available sanctions in turn, starting with the least restrictive or serious, in order to achieve an appropriate and proportionate response to address the issues in the case.

As stated above, financial penalties are used to sanction a firm or individual for a serious breach in cases where the conduct is sufficiently serious to warrant this approach rather than a warning or rebuke; but where alternative measures such as conditions, suspension or strike off are not required in order to protect the public from ongoing risk, or to maintain public confidence in light of the nature of the misconduct and its impact.

It may be particularly appropriate to use financial penalties in relation to misconduct relating to financial gain or loss. This is because financial gain and financial loss arising from the misconduct can be quantified. Further, these penalties are appropriate for cases relating to deficient systems and controls or by taking shortcuts that result in poor compliance and/or deficient services.

Conversely, we consider that there are types of misconduct that will not ordinarily be suitable for a financial penalty. This is because the underlying attitude or behaviour displayed presents risk to the public and is incompatible with continued unrestricted rights to practise, or the level of harm cannot be financially quantified and it may be inappropriate to do so. 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.

Case law guides our approach to sanctions for dishonesty and suggests that this should lead to strike off, save in exceptional circumstances[1]. Our Enforcement Strategy and annexed Sanctions and Controls table also specifically highlights that dishonesty / lack of integrity, abuse of trust or exploitation of vulnerability and misconduct of a criminal offence will all mitigate towards suspension or strike off rather than financial penalty.

Sexual misconduct

We want to particularly seek views on whether sexual misconduct should be considered unsuitable for a financial penalty. Our provisional view is that it should.

This is an area that has increased in profile in recent years. We saw a significant increase in the number of reports arising from the #Metoo movement. The numbers have reduced from that high point but we still have over 100 pending cases.

Many of the sexual misconduct cases that we have referred to the SDT in the past few years have received financial penalties. This includes the highest fine issued in 2020 for a serious allegation of sexual misconduct of £55,000. By contrast, a solicitor who inappropriately touched a paralegal on several occasions in front of colleagues and clients was fined £10,000.

[1] For example: *Bolton v law Society [1994] 1 WLR 512;* and more recently *SRA v James, SRA v MacGregor, SRA v Naylor [2018] EWHC 3058 (Admin)*

These findings have resulted in much debate, including in the media, often questioning whether any sanction short of restrictions on practice for behaviour of this nature can meet public expectations.

Case study 1

Sexual harassment

Whilst in practice as a solicitor and a senior partner at the firm, the solicitor acted in a manner that was not appropriate towards a junior female employee of the firm. Whilst at a wine bar, he touched and kissed her in an intimate way on several occasions in circumstances in which the solicitor should have known that such conduct was not wanted or invited.

The solicitor was fined £10,000 by the Solicitors Disciplinary Tribunal.

The Bar Tribunals & Adjudication Service (BTAS) is currently reviewing its sanctions guidance. In its first consultation that concluded earlier this year, BTAS proposed that its sanctions guidance should be amended so that misconduct of a sexual nature would no longer be eligible for a financial penalty but rather would range from a suspension of least 12 months up to disbarment. This was, they stated, following recent examples of BTAS panels having issued fines for sexual misconduct which it described as having received "widespread and almost unanimous condemnation of the leniency fines represent in addressing such conduct". This included a male barrister who sexually assaulted a junior barrister at a Christmas party (which included making sexual comments and inappropriate touching), who received a reprimand and a fine of £6,000. BTAS also noted that suspension or strike off were the norm for regulators and tribunals outside the legal profession.

Following consultation, BTAS has stated that it will take forward this proposal and are currently consulting on detailed sanctions guidance which includes the approach proposed. BTAS noted that 69% of respondents to the first consultation agreed with this approach, with a minority expressing concern that this threshold was too high. It was stressed that, in such cases, imposing a fine may make the person who was targeted by the misconduct feel that a price is being put on their self-worth.

Discrimination and non-sexual harassment

We also want to seek views on whether discrimination and non-sexual harassment should similarly be considered unsuitable for a financial penalty. As with sexual harassment, and for many of the same reasons, our view is that it should.

There are a wide range of behaviours that are covered by this category and cases involving various levels of seriousness heard at the SDT, some of which have involved the imposition

of a financial penalty, as set out in the case study below. Others have resulted in different outcomes such as suspension. This includes a case where a partner who tweeted derogatory comments about Islam, Judaism and Catholicism was suspended from practice for 18 months and ordered to pay £11,000 in costs.

Case study 2

Discrimination

A senior partner at a law firm had been in dispute with his former friend and colleague for some time. In response to a complaint from his friend about how he was being treated by the firm, the partner emailed him saying he should 'seek help', adding as a Catholic, he should 'know better than to spread such hatredness [sic] especially during Christmas'. The email was copied to two colleagues. In later emails, he said he was a 'very bitter old man', suggested he had 'lost his marbles' and was 'probably going senile'. He went on to say 'The fact of the matter is that you were long past your sell by date, and we should have got rid of you years ago. The only reason I kept you on was loyalty but I should have realised you were just a parasite'.

An employment tribunal found in favour of the former friend on four acts of discrimination, harassment and victimisation, ordering the solicitor and firm to pay £18,509 compensation for injury to feelings, and referred the case to the SRA. At the SDT, the solicitor admitted two allegations, including that he directly discriminated against an individual on the grounds of religion and/or age, and perpetrated unlawful acts of harassment and victimisation in breach of solicitor rules. He apologised unreservedly for what he had done.

The tribunal accepted his apology was genuine, found that there was clear potential for harm to the profession (as found by the employment tribunal), and fined him £2,000 with £16,000 costs.

Discrimination and non-sexual harassment was another area about which BTAS consulted on amending its sanctions guidance so that the minimum sanction would start at 12 months up to disbarment. They said that "while sanctions for sexual misconduct have attracted widespread public attention, issues of discrimination and harassment are equally as serious. Research indicates that bullying and harassment at the Bar is a significant problem. This range is intended to send a clear signal that such behaviour will not be tolerated within the profession and will result in serious, career changing, sanctions".

In our view, cases in which findings have been made of discrimination or harassment would ordinarily require a sanction of suspension or strike off given the issues these raise about the individual's attitude and the risk they present to colleagues in the workplace, clients and others. The objective of preserving public confidence would also mitigate towards these outcomes. This is also an area where financial quantification of harm is problematic. Therefore, they are unlikely to be suitable to be dealt with by financial penalty. We propose

that we amend our sanctions guidance to make this explicit in the same way as proposed for sexual misconduct.

We do appreciate that there will be cases with mitigating circumstances where the incident was totally out of character, a one-off “moment of madness”. And so, on occasion this, along with other considerations around seriousness, may mitigate to suspension or strike off being disproportionate in all the circumstances. In this scenario, we consider that a rebuke may be a more appropriate than a financial penalty, given that a financial quantity cannot be applied to the harm caused.

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

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

Fixed penalties

We are considering 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. 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.

We do not currently issue fixed penalties. We decide the appropriate sanction for each case individually, following the process set out in our Rules and Indicative Sanctions guidance. And once it is decided a fine is the appropriate sanction, we follow the three-step process set out in our Indicative Fining Guidance to decide the level of fine.

We are aware that several other regulators use fixed penalties for certain types of breaches. These commonly involve breaches that may be considered administrative failures or failure to provide information upon request. We provide some case studies in the boxes below.

Case studies 3 and 4

Royal Institute of Chartered Surveyors

“A fixed penalty is an administrative fine and/or caution issued by RICS when a Regulated Member fails to provide RICs with information that have requested.

A Regulated Member is an RICS professional or regulated firm.

Examples of requested information could include a firm or valuer submitting their annual return record, updating CPD records or payment of regulatory fees.

The Regulated Member should pay the fixed penalty by the date specified in the notice and ensure that they comply with the relevant rule that brought about the fixed penalty. Any fixed penalty issued and not rescinded will remain on a Regulated Member's record for a defined period."

The Taxation Disciplinary Board

"Under the Taxation Disciplinary Scheme Regulations 2008, there is provision for the Board's Reviewer to apply a fixed penalty in circumstances where there has been a breach of the participants' administrative requirements, rules or procedures…

The following are examples of the kind of complaint that may be regarded as an administrative failure: (a) Failure to submit a record of CPD (continuing professional development) when requested by a participant; (b) Failure to undertake or complete the required amount of CPD hours; (c) Failure to carry or renew professional indemnity insurance (PII) for a short period; (d) Minor infringement of the rules governing the designation of firms as Chartered Tax Advisers; (e) Failure to have in place all the administrative procedures required to ensure Anti-money Laundering Compliance; (f) Failure to notify the participant that disciplinary proceedings have been initiated or completed by another professional body to which the member belongs."

We consider that there may benefit in adopting a fixed penalty approach in certain circumstances. As above, this could speed up the process, reduce the burden and cost for all involved, bring certainty and reduce stress and create a clear and timely link between the conduct and fine. Our recent proactive compliance monitoring work in relation to anti-money laundering regulations and our Transparency Rules has provided us with insight about how this approach might work in practice, as set out in the case study below.

Case study 5

Over the past year or so we have been undertaken proactive monitoring of compliance with certain aspects of anti-money laundering (AML) regulations and compliance with certain requirements to publish consumer facing information on firm websites under our transparency rules. This has led to low level fines for non-compliance and/ or lack of cooperation with the review with the monitoring exercise.

To date we have imposed 21 fines of £800 for failures to respond to our AML risk assessment declaration exercise. We have also issued ten fines for failing to publish information required by our transparency rules. Six of these attracted our maximum financial penalty of £2000. The other fines we imposed ranged between £750 and £1200.

The fines issued were not all of the same level, as we took into account different factors and aggravating and mitigating factors, in line with our existing indicative fining guidance. This was largely dependent on the level of information that was omitted and the extent to which the respondent co-operated with the monitoring exercise and investigation. This granulation could be standardised within fixed penalties, to offer a streamlined procedure.

We consider that fixed penalties may be most appropriate for types of breaches:

- relating to non-compliance or lack of compliance with a regulator or ombudsman
- relating to requirements that may be considered administrative in nature and particularly where there has been a failure to undertake a specific activity required in either our rules or as a result of a standalone request.
- where the act or omission in question is not specific to a client or individual who has suffered harm or risk of harm as a result (as opposed to the requirement being for the benefit of clients more).

Illustrative examples of actions that might fall into the above categories might include:

- failure to submit accountants reports when meeting the criteria for being required to do so
- breach of authorisation requirements such as updating records when there is a change of role holder
- not complying with requirements to display certain information on a website (such as our digital logo or price information in line with our transparency rules)
- failure to produce records on request of the training that you have undertaken to keep up to date with your knowledge and skills
- failing to meet specific information requests or self-declarations, made under our statutory powers.

The process that we propose following would be:

- identify non-compliance that meets the criteria for a fixed penalty
- inform the relevant person of what action is required to remedy the breach and the timescale for doing so
- if there is no response, or the required remedial action is not completed satisfactorily to the required deadline, issue the relevant penalty.

Level of fine

We propose that fixed penalties will be at the lower end of the spectrum and will usually attract a lower fine of £800 or less for a first offence and up to £1,500 for any subsequent offence.

The fixed penalty regime would:

- assume that the fine is payable and would not make a request for financial means
- not have any weighting, for example in relation to turnover or any income measure (if this is introduced within our financial penalties regime more broadly)
- not include discounts.

There would be a right to request a review of the issuing of the fixed penalty and the level of fine imposed.

If there is ongoing non-compliance on the same or similar issue, or this non-compliance is part of a pattern of non-compliance across a range of requirements, the matter will be escalated with view to issuing a more severe and targeted sanction.

Should we decide to take forward this proposal we would revise our procedural rules accordingly, along with our Indicative Fining Guidance. We would then liaise with the Legal Services Board to obtain approval for the changes.

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

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

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

Financial penalties as credible deterrence

We consider that our existing fining framework and the approach that it engenders does not deliver credible deterrence and that fines at the top end appear disproportionately low given the seriousness of the issues that are being considered.

This is also bearing in mind the size and scale of the legal market; in which the top 100 firms reported revenue of between £30m and £2.1bn in 2020 and handle legal work which contributes £60bn to the UK economy. And with reports of profits per equity partner exceeding £2m for the first time this year, and of newly qualified solicitor salaries potentially exceeding £100k.

Comparisons with other regulators contribute to perceptions around what a robust fining regime looks like – the FCA's highest fines include £97m for Goldman Sachs for risk management failures, which included a failure to address allegations of bribery. Whilst the context, the respondent and the conduct in question, will of course differ case by case, in practice we, and the SDT, rarely fine over £60,000 (and our highest ABS fines to date have been £144k and £500k respectively).

As detailed below, our framework allows us, for larger ABS firms, to fine up to 2.5% of turnover: Where percentage turnover is used in other regulatory regimes, the approach varies but this includes up to 4% (Information Commissioners Office) and 10% (OFWAT - the Water Services Regulation Authority). A table with some illustrative examples of other regulators can be found at annex 1.

Our current banding levels

Our guidance sets out four penalty bands against which a basic penalty is assessed (based on the nature and the impact of the conduct) which can then be adjusted to remove financial benefit, or to apply a discount to account for mitigating factors.

The penalty brackets are as follows:

a. £500-£1000 for conduct on the lower end
b. £1001-£5000 or if the regulated person is a firm of greater means (ie with a domestic turnover of £2 million or more) up to 0.5% turnover
c. £5001-£25000 or if the regulated person is a firm of greater means up to 1.3% of domestic turnover
d. £25000-£50000 or if the regulated person is a firm of greater means up to 2.5% of turnover

There is also a general provision that in setting the level of fine, the decision maker should consider achieving a credible deterrent – penalties should be of such an amount that they are capable of deterring future misconduct by the person directed to pay and by others who may be engaged in similar conduct. No defined metrics are provided to frame this consideration.

Firms that are not of "greater means"

Our approach applies fixed bands to firms with a domestic turnover of less than £2 million.

It is difficult to see how a maximum fine of £50,000 can be appropriate to provide a credible deterrent, and an outcome that is sufficiently robust to protect consumer confidence. For example, a firm with an annual turnover of £1.5 million could receive no more than a maximum fine of £50,000 for having, for example, failed to carry out client due diligence and allowed their client account to be used as a banking facility, which resulted in them facilitating money laundering over a prolonged period of time.

Furthermore, we consider that the low levels for the first two bands and starting level of £5,000 for the third band disincentivises fining at the higher levels within each band.

Taking into account a firm's means

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.

However, this approach appears arbitrary. For example, a firm whose annual domestic turnover is £1.9 million and commits an identical breach as a firm with a turnover of £2 million would face a different framework for calculating the fine, potentially leading to disparity of outcome.

For other firms (and for individuals) the fining guidance explicitly 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.

A different approach

Our provisional view is that it may be more rational and transparent to develop a new fining framework that takes into account the size and financial position of the firm at all times. Save for exceptions, which may be dealt with for example through the fixed fining regime described above, we consider this should be done through applying a percentage of annual domestic turnover threshold to all firms. The measure is considered a sound way to assess means, uses data that we hold and are experienced in utilising for this purpose.

This new approach would ensure that our fines are targeted, proportionate to the firm concerned and act as a credible deterrence in all cases, potentially increasing confidence in the regulatory regime. It would also address concerns that our current approach deters fines at the upper levels.

We consider that we should raise the maximum percentage of the annual domestic turnover of firms that we charge up to 5%. This appears to be with the normal range of many other regulators and is more likely to give flexibility to provide a credible deterrent and provide sanctions at a level more likely to instil public confidence, particularly for the more serious misconduct that might attract a financial penalty. For example, this would provide us with the flexibility to fine an ABS firm with an annual domestic turnover of £2 million up to £100,000 for misconduct in the most serious Band D category. For a firm with an annual domestic turnover of £200million we would have the flexibility to fine up to £10 million on the same basis.

We set out at annex 2 an illustrative example of how the financial penalties might look across the existing four bands if we took into account a firm’s turnover in all cases without a minimum level of fine and without any further graduation based on level of seriousness within the four bands. For illustrative purposes we have provided details of different of options of maximum percentage point that we could apply between 1% and 5%.
Should we decide to proceed with this proposal, we would review and amend our Indicative Fining Guidance to ensure that our approach is clearly set out. We would then liaise with the Legal Services Board to obtain any necessary approvals for the changes.

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

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

Taking into account an individual's means

Our provisional view is that any new regime should also take into account the means of individuals, in a consistent and robust way. As set out above, we have vastly different fining powers for solicitors and traditional law firms (up to £2000) as compared to ABS firms and individuals working within them (up to £250million and £50million respectively.)

We do not currently take into account the means of the individual in a consistent way. For example, a trainee in a small regional legal aid firm could receive the same the fine as an associate in a large city firm despite there being a very significant disparity in income and therefore impact. Taking into account the means of the individual would ensure that our fines are proportionate, are fair and act as a credible deterrent. The fine should be calculated so it has a more equal impact on individuals with different financial circumstances.

A number of regulators take this approach. For example, the Prudential Regulation Authority take into account the individual's gross annual income from the employment connected with the breach. The Sentencing Council takes into account an individual's financial circumstances, including assets in a broader sense.

Unlike with annual domestic turnover for firms, we do not already hold data against which we are able to determine individual means. We would welcome views on the potential features below:

- the fine should be based on income related to the employment in which the misconduct occurred in the first instance or, where this is not considered appropriate, the individual's net worth
- we consider that for administrative ease, we should consider income or net worth from the previous completed tax year
- we maintain the existing position in our guidance which provides for the ability to reduce the financial penalty if the person is of low means

Should we decide to proceed with this proposal, we would review and amend our indicative fining guidance to ensure that our approach is clearly set out. We would then liaise with the Legal Services Board to obtain any necessary approvals for the changes.

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

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

Increasing the threshold for our internal fining powers

As previously set out, under our current framework, if we think a fine of more than £2000 ought to be imposed on a traditional firm or an individual in such a firm we have to refer the matter to the SDT. This adds considerable time, stress and cost for the individual concerned.

The average length of time for a case to be concluded before the SDT in 2020 (from receipt of a complaint in the SRA to date of the SDT order) is around 960 days – over two and a half years. There is little difference in the length of time whether it proceeds to a contested hearing or is resolved by way of an agreed outcome. (This is the mechanism by which, following referral of a case to the Tribunal, the SRA and a respondent come to an agreement as to which allegations are admitted and any corresponding sanction. The SDT must approve the outcome.)

By contrast, looking at the 62 cases that we have concluded with a fine internally this year, the average length of time is 458 days end to end. Further, the average cost to an individual solicitor of a case being heard at the SDT was £8500 in 2020 as compared to £1350 if the case was handled by us in house.

We recognise that in many cases there is a good reason why the matter should proceed to a hearing before the SDT. However, for less serious matters resulting in relatively low fines, we believe that we could offer quicker and more effective resolutions if we had greater scope to deal with these inhouse. We should stress that it remains our position that the most serious and complex cases should be heard at the SDT.

We have carried out a review of the cases resulting in a financial penalty at the SDT over the past five years. This analysis is available at annex 3. Having considered this, our provisional view is that we should seek an increase of our internal fining powers from £2,000 to £25,000.

We consulted on increasing our internal fining powers in 2013, providing analysis showing that approximately 87% of fines issued by the SDT in 2012 were under £10,000. For all years since 2014 at least half of all fines by number were of £10,000 or less and at least 75% of all fines by number were of £20,000 or less.

What is particularly striking is the increase in the number of agreed outcomes. When we previously consulted in 2013, very few financial penalties were imposed in this way. However, over the past five years the majority of fines imposed up to £25,000 were imposed by agreed outcome. This suggests that it may be appropriate for us to handle these fines under our internal powers and therefore without the need for the SDT to approve the outcome. These fines are not contested and the sanction has been agreed with the firm. Having these cases proceed before the SDT adds unnecessary cost and delay for those involved. It would also free up the SDT to focus on the most serious and complex cases.

There are a number of factors that influence the appropriateness of whether a particular case should be handled by us or by the SDT. The cases in the bracket up £25, 000 involve a

spectrum of complexity and of seriousness. Certain cases, for example those that are very serious or involve linked allegations of a more serious nature would be better heard by the SDT, along with those which we would submit should attract a different sanction (such as sexual misconduct cases).

However, the majority of cases in the bracket up to £25,000 would not, we suggest, fall within the very serious or complex categories. By contrast, cases beyond £25,000 do not tend to attract agreed outcomes and the allegations tend to be more serious in nature.

There would remain a statutory right for any fine that we impose to be appealed to the SDT.

During the consultation we wish to work closely with the SDT with the aim of developing a shared understanding on the types of issues that are suitable for us to fine inhouse as compared to those that ought to be considered by the SDT.

Should we decide to proceed with this proposal, we will put a business case to the Ministry of Justice setting out the rationale for our proposal, to seek a change to the level of fines we are able to impose via an order under section 44 (D) of the Solicitors Act 1974. More extensive changes to our fining powers and/or those of the SDT would require primary legislation via an order under section 69 of the Legal Services Act 2007.

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

Equality impacts

We include an initial equality impact assessment at annex 4, using the Legal Services Board template, and will undertake a further assessment of any of the proposals we consider taking forward within this consultation paper. We will also engage with groups who we have identified may be more greatly affected by our proposals through the consultation period. This will help us build our detailed understanding of the equality impacts of all our proposals.

The diversity profile of individuals in our enforcement work

We are using the diversity data we collect directly from solicitors to inform our equality impact assessment of these proposals. The data which we used as a baseline for monitoring the profile of individuals in our enforcement work, shows the following breakdown for the profession as a whole:

- There are slightly more women than men in the profession overall, 52% compared to 48%.
- The overall population of Black, Asian and minority ethnic solicitors in the profession is 18%, made up of 12% Asian, 3% Black, 2% Mixed and 2% Other ethnic groups.
- The age breakdown shows that the majority of solicitors are between 35 and 54 years (33% in the 35 to 44 group and 24% in the 45 to 54 group) with 24% aged 34 and under, and 19% aged 55 and over.

In addition, we collect diversity data from law firms, indicating that there are differences in the diversity breakdown of firms by size. Our firm diversity data tool indicates in broad terms, compared to the overall solicitors' population:

- Men are overrepresented in small firms compared to the overall population, but women are overrepresented in mid-sized and larger firms, although at less senior levels.
- Solicitors from Black and Asian groups are overrepresented in small firms and underrepresented in mid-sized and larger firms.
- Solicitors aged 45 and over are overrepresented in small firms and underrepresented in larger firms.

Compared to the profile of the profession as a whole, we know, from our annual work to monitor the diversity of those involved in our enforcement processes that there is a continued overrepresentation of men as well as solicitors from Black, Asian and minority ethnic backgrounds in complaints made to us and the cases taken forward for investigation. This is set out in our 'Upholding Professional Standards' reports for 2018/19 and 2019/20. This reflects patterns in other professions and regulated communities.

The key findings for these groups for the period 2019/20 shows:

- There is an overrepresentation of men throughout our enforcement process, and the overall breakdown at each stage is largely comparable with the 2018/19 data. Men are overrepresented in reports raised with us and this overrepresentation increases at each stage of our enforcement process. In 2019/20 men made up 48% of the practising population, 65% of reports raised with us and 75% of cases taken forward for investigation. Of the individuals whose cases were concluded with a finding and a sanction in 2019/20, 73% of the cases concluded internally were men and 80% of those concluded at the SDT were men.

- The Black, Asian and minority ethnic group, as a whole, made up 18% of the practising population and 26% of individuals reported to us in 2019/20. Asian and Black individuals make up 12% and 3% of the practising population, respectively, yet are overrepresented when looking at the number of reports made to us, at 18% and 4%. The proportion of Black, Asian and minority ethnic individuals increases from 26% to 35% of those whose cases were taken forward for investigation. Of the individuals whose cases were concluded with a finding and a sanction, 29% of the cases concluded internally and 28% of those concluded at the SDT involved Black, Asian and minority ethnic individuals.

- There is an underrepresentation of people in the younger age categories (44 and under) named on reports to the SRA and the opposite is true for those in the older age categories (55 and over) who are overrepresented when compared with the practising population. The 45 to 54 age group is largely proportionate with the practising population. There is little difference for any of the age groups, when looking at cases involving individuals taken forward for investigation. With some exceptions the picture is similar for those sanctioned internally by the SRA and by the SDT.

We are looking in more detail at the diversity breakdown of those who have received fines, to identify the potential impact on different groups of the various proposals within this consultation. The data identified in our Upholding Professional Standards reports does not help when considered alone because the numbers are too small to apply the statistical methodology necessary to understand whether the differences we saw were meaningful or a chance variation.

The data we have for the other protected characteristics is not sufficient to enable us to determine whether there is likely to be any adverse or positive impact, namely disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, religion or belief, or sexual orientation.

With this background in mind, our provisional findings in relation to the equality impact of the four key proposals that we are making are set out below**.**

Behaviours suitable for financial penalties

Our proposals to amend our sanctions guidance to make it clear that sexual misconduct and discrimination or harassment is unsuitable for a financial penalty should have a positive impact on equality, diversity and inclusion. Taking a robust stance on these issues should ensure our penalties act as a credible deterrent and potentially drive up levels of reporting thereby having a positive impact on all groups who may be subject to such conduct.

Fixed penalties

Our proposals to introduce fixed penalties for certain types of less serious non-compliance could have positive impacts that would be felt by all groups by providing certainty and streamlining the process of investigation with the associated reduction in costs and anxiety. In case study five, we illustrated our approach to proactive monitoring of compliance in relation to our AML regulations and our requirements to publish consumer facing information. Many non-compliant firms are smaller firms where we know there is a higher proportion of Black, Asian and minority ethnic solicitors, solicitors aged 45 and over and men. We will be looking at the potential benefits and disadvantages of fixed penalties in more detail as the consultation progresses.

The level of fines - a credible deterrence

As set out above, our proposal to take into account the turnover of firms and means of the individual may be a fairer approach for everyone and help to mitigate against the current position where the ability to pay is not a factor. We will be looking further at the level of fines imposed on individuals and on firms to helps us identify if there is any potential positive or negative impact of this proposal.

Increasing the threshold for our internal fining powers

Our proposal to deal with a larger proportion of less serious cases (up to a 25k fine) inhouse should result in positive impacts for all groups. This should reduce the time, cost and stress involved in taking forward cases to the SDT. As Black, Asian and minority ethnic solicitors,

men and solicitors aged 55 and over are overrepresented in our enforcement processes, they may particularly benefit.

We will be engaging with the profession and exploring any potential impacts on these groups as the consultation progresses.

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