Solicitors Regulation Authority

# Financial Penalties

## Consultation response and final position

May 2022

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# Executive Summary

1. We are the largest regulator of legal services in England and Wales, covering around 90% of the regulated market. We oversee some 215,000 solicitors and around 9,800 law firms.

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

    - setting the 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.

3. The overwhelming majority of the solicitors and firms we regulate do a good job, providing high-quality legal services and meeting the high standards we set. However, when those standards are not met and things go wrong, we can and do investigate. We take action to make sure consumers are protected, standards are upheld, others are deterred from similar behaviours and confidence in the profession is maintained.

### Our current framework and the case for change

4. Our fining regime was introduced some ten years ago. We think it needs updating to address some key issues. Our aspiration is – where appropriate – to resolve cases more quickly. Potential benefits of this could include reduced costs and resources, while minimising stress for both those subject to a complaint and complainants. Our aim is also to improve public protection, consistency and provide a greater deterrent to reduce future risk of repeated behaviour.

5. The current framework puts tight legislative restrictions in place which means we can only fine traditional law firms, and the individuals who work in them, up to £2,000. This means that cases involving even low-level fines need to be referred to the Solicitors Disciplinary Tribunal (SDT), who have unlimited fining powers. They also have the power to suspend or strike off solicitors. We think it is appropriate that the most serious cases of misconduct should go to the SDT. However, the current situation means that cases that are less serious still regularly go to the SDT, taking longer to resolve, while further increasing costs.

6. This is in marked contrast to our fining powers in relation to Alternative Business Structures (ABS) where we can fine firms up to £250m and £50m for individuals. We have for some time wanted parity for solicitors and traditional firms with our fining powers for ABS. Such a change would require primary legislation. A more efficacious solution might be to obtain an order increasing the £2,000 figure under existing legislation. Therefore we consulted on a modest increase to £25,000 in order to get views on the appropriate threshold between cases decided by us and the SDT.

7. There are also other areas of our framework that could be improved. Currently fines for individuals do not take account of their means. The result is that the deterrent effect of fines may be limited, particularly in relation to wealthy individuals. For firms, turnover is considered in certain situations - those with annual domestic turnover of £2m or more. The current upper limit of 2.5% of turnover provides a limited deterrent and is

significantly lower than the potential fines in other regulated sectors (such as finance, utilities, and gambling).

8. We also want to send a clear message that we consider behaviours related to sexual misconduct, discrimination, and harassment to be serious in nature. And that the underlying attitude or behaviour displayed in such cases presents risk to the public and is incompatible with continued unrestricted rights to practise. Therefore we consider that these areas are unlikely in any but the most exceptional circumstances, to be suitable for a financial penalty. Instead they are likely to result in a restriction of practice, suspension or strike off, because of the ongoing risk to the public, and/or to maintain confidence in the legal system.

## Our consultation and responses

9. We have therefore consulted on a range of changes to our approach. To support the consultation, and to gather public views, we also commissioned a survey with the public (560 participants). This took place alongside a survey for solicitors which attracted more than 200 responses. We also held two focus groups with the public and one with consumer representative groups to test our proposals and gather views on a range of scenarios. We also discussing our proposals at a number of external meetings and events.

10. More than 7,500 people engaged with our consultation, including via face-to-face events, online or by submitting formal responses. We also ran a series of social media polls on key issues relating to the consultation, with specific questions targeting both the public and legal profession. These polls saw more than 3,500 having their say.

11. We received 39 formal consultation responses from a broad range of respondents, including solicitors, law firms, and law societies, representative groups, and the SDT. Alongside this report, we have also published an analysis of consultation responses and list of the consultation respondents who consented to their details to be published. The Office for Professional Body Anti-Money Laundering Supervision (OPBAS) have allowed us to publish their response in full and asked that we do not extract selective lines from their response. Therefore, we do not reference their comments in the summaries set out in this report.

12. Below we set out the nature of feedback in detail on each of our proposals. In summary, the general themes of feedback were:

    - Support for the principles governing our approach
    - Strong public support for all our proposals, particularly for an increase to our fining powers, means testing, and surprise about the lack of parity with ABS fines
    - General support among other stakeholders for the increase to our fining powers. Some, including representative bodies and the SDT, felt we should seek a more modest increase (for example, to reflect inflation). Whereas other respondents felt that we should go further, including some other regulators
    - Respondents generally supported means tested fines for individuals and firms. However there were mixed views on whether raising the threshold for fining firms to 5 per cent of turnover was right. Some members of the profession and representatives felt this went too far, whereas others thought it did not go far enough

- There was a range of views on whether certain behaviours, such as sexual misconduct and discrimination, are not suitable for a financial penalty. While some respondents agreed, others cautioned against a blanket approach which could fetter our discretion.

## Summary of changes following consultation

13. We consulted on a range of changes. Following consultation, we have decided to make these changes. We will:

    - seek an increase to the maximum fine we can issue internally for traditional firms and those working in them from £2,000 to £25,000. This will reduce the cost, time, and stress for all involved, by reducing the number of less serious cases we refer to the SDT

    - consider the turnover of firms and the means of individuals when setting fines in all cases to make sure our fines are proportionate and act as a credible deterrent. For firms we will also increase the maximum percentage of turnover that we can fine from 2.5 per cent to 5 per cent

    - introduce fixed penalties for certain less serious breaches. This allows breaches for failure to comply with administrative requirements to be dealt with more efficiently and effectively. We will consult this summer on a schedule of fixed penalties and procedural rules to introduce these

    - update our sanctions guidance around behaviours such as sexual misconduct, discrimination and harassment to say they should attract sanctions of suspension or strike off. This would be because of an ongoing risk to the public, or a need to remove the solicitor to maintain confidence in the legal system. And that fines are unlikely to be suitable save in exceptional circumstances

14. We have set out more details below. Taken together our changes 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, cost-effective, and proportionate way.

## How we have responded to feedback

15. We are grateful to all those who took the time to respond and have taken into account the views of all respondents in reaching our post-consultation. This includes making a number of changes to our consultation position as a result.

16. A number or respondents asked us to consider whether turnover is the most appropriate metric to use when calculating firm fines. We considered carefully the questions and suggestions made. We also commissioned an economic consultancy to provide an independent assessment of the benefits and disbenefits of the different metrics for both firms and individuals. This assessment is published alongside this paper and has shaped our post consultation position.

17. We have considered the range of views set out in relation to behaviours unsuitable for a fine. We agree with the feedback that we cannot in guidance confine our discretion to impose a fine where the case requires this. We know that this will only occur in exceptional circumstances and will make this clear in our amended guidance.

18. We have also taken on board helpful additional suggestions made by some respondents and will further consider these. This includes whether we should, and if so how we might, systematically consider the impact on victims in all of our disciplinary cases.

### Next steps

19. We will work with the SDT as we develop our updated guidance on financial penalties, and the new rules that support the introduction of a fixed penalties scheme. We will share our emerging thinking with them as we develop and draft guidance and will seek views from them on this. We share the SDT's view that we should aim for consistency of approach between them and us. And we welcome their offer for further discussions to help make sure that we have consistent and streamlined processes and procedures.

20. As part of our work to consult on detailed rules, guidance, and criteria we will publish the process and rules for a fixed penalties scheme in summer 2022. We will also publish updated guidance. This will include the changes highlighted above in relation to behaviours unsuitable for a fine, and a new fining framework linked to turnover for firms and income for individuals.

21. We have already started to hold post-consultation discussions with the Ministry of Justice (MOJ) on an increase to our internal fining powers. We will continue those discussions over the coming months. We will set out any areas where we consider further changes may need to be made to our guidance following those discussions.

22. We will keep changes under review and make sure that our evaluation of changes informs our work around EDI and our enforcement processes and procedures.

## Principles governing our approach

23. Our consultation, which ran for 12 weeks (19 November 2021 - 11 February 2022, set out the principles that govern our approach as follows:

    - Our aim is to make sure 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 SDT, Legal Services Board, other legal regulators, and MOJ to develop a joint understanding and approach to financial penalties.

### Key points raised

24. A majority of respondents supported the proposed principles. Transparency, consistency, fairness and certainty were cited by many stakeholders as being important

elements to underpin our fining framework. Our approach of working collaboratively with other regulators was also specifically supported by the Legal Services Consumer Panel (LSCP). And the SDT also expressed a wish to work collaboratively with us in a number of areas. Where respondents highlighted concerns about specific consultation proposals in response to the principles question, we consider these below in the section that covers that specific policy proposal.

### Our view and post consultation position

25. There was broad support for the principles and we are confident that these are the correct principles for our approach. We do not consider that the concerns raised by some respondents on specific consultation proposals, on balance, impact on the appropriateness of the proposed principles as a whole.

## Behaviours unsuitable for a financial penalty

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

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

28. We said that we considered 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 highly unlikely to be. We also asked respondents whether there were any other behaviours that they considered unsuitable for a financial penalty.

### Key points raised

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

30. The Junior Lawyers Division (JLD) agreed with our position that these behaviours are not suitable for a financial penalty. They strongly questioned whether there should be any exceptions made. They urged us that, where possible, there should be sufficient wording to demonstrate that this was only for truly exceptional circumstances and not, for example, used for a first misconduct incident.

31. The LSCP agreed that serious misconduct such as sexual harassment, discrimination and non-sexual harassment is not suitable for financial penalties. When we met with them, they suggested that we should further consider undertaking ‘victim impact assessments’, which should then inform the sanction.

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

include education at admission to the profession, measuring ongoing competence as well as strong penalties to support deterrence.

33. A local law society highlighted that there may be instances where a firm bears responsibility for the culture and environment within which the individual's behaviour has occurred. Here a fine may be the only option to discipline the firm.

34. The SDT viewed all such allegations as being by their nature inherently serious and a cause of concern to the public and trust in the profession. Their view was that all such cases should be referred to the SDT by default.

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

36. In the online surveys, we tested the views of the public and solicitors about the sanctions that they considered to be most appropriate for different types of misconduct. Suspension/strike off was selected by a majority of public respondents if a solicitor has a proven allegation of sexual harassment or made discriminatory comments about colleagues. Solicitors were less likely to select these options, or to feel that any action should be taken in some situations.

37. In our focus groups, public and consumer representatives considered a range of misconduct across a spectrum of seriousness. There was a strong view that sexual misconduct was unsuitable for a financial penalty wherever the behaviour occurred. Views were strongest in relation to workplace misconduct, views varied more where the sexual misconduct occurred outside of work.

38. Views were also mixed in respect of making racist comments. These were almost equally divided between those who thought this was unsuitable for a financial penalty, and those that thought it might be (depending on the circumstances).

39. When asked to consider bullying, most of the focus group participants thought that a rebuke/warning or less would be the most appropriate outcome. This scenario also generated interesting discussion around education as an important tool to deter individuals from behaving in this way in future.

40. In relation to making offensive comments on social media, responses were mixed. Most felt that it should attract a greater sanction than a financial penalty, but some felt that either a financial penalty or warning/rebuke may be appropriate. One respondent noted that it was more serious as the remarks were made in a public way.

41. Consultation respondents in the main did not think that there were other behaviours unsuitable for a financial penalty. Those who did suggested issues where an underlying attitude or behaviour may present an ongoing risk such as dishonesty. (This attracts a presumption of strike off, as set out in case law.) However, other matters put forward included data protection breaches and loss of client money.

## Our view and post consultation position

42. We remain of the view that where an individual is found to have committed sexual misconduct, harassment and discrimination, they are unlikely to be suitable for a financial penalty. Typically, those which would attract a regulatory sanction are serious

in nature and raise attitudinal issues that present a risk to others. This suggests that restriction on practice is required to protect others, and to maintain public confidence in the profession. We consider that our guidance should make this position clear.

43. We agree with the feedback that we cannot confine our discretion to impose fines, as well rebukes, where a case requires this in exceptional circumstances. This could be where a respondent displays inappropriate or insensitive behaviour without an improper attitude or motivation which would suggest ongoing risk or a high level of seriousness.

44. We will therefore amend our guidance to highlight that sexual misconduct, discrimination and non-sexual harassment will generally be met by sanctions that restrict practice. Our guidance will make it very clear that it should be exceptional that behaviour of this type will not lead to restrictions on practice. We will develop a set of criteria to identify when this narrow exception may be appropriate. We will discuss our updated guidance with the SDT as we develop it.

45. We also recognise that the position for firms will be different, and a financial penalty is likely to be an appropriate sanction for where poor systems or controls allowed this type of behaviour to occur or persist. Our guidance will also reflect this.

46. Finally, we considered the other behaviours that respondents suggested may not usually be suitable for a financial penalty. Some respondents put forward suggestions such as data protection breaches and loss of client money. These types of cases involve a spectrum of seriousness. The most serious may not be suitable for a financial penalty and may require sanctions that restrict practice. But there are likely to be other cases where a financial penalty is an appropriate sanction. This is particularly so when the misconduct has resulted in financial loss or gain which may be quantified by way of financial penalty. Dishonesty, which was also raised, attracts a presumption of strike off under existing caselaw. As above, we will make it clear in our guidance the issues which indicate that a financial may or may not be suitable.

## Fixed penalties

47. We consulted on introducing fixed penalties for lower-level breaches of our rules, for example non-compliance with administrative requirements or failure to respond to our requests. We said that a fixed penalty would be an automatic financial penalty that would be issued upon proof of the offence. The firm or individual would be given the opportunity to put matters right before the fine is issued. There would also be a right to have the decision to issue the fixed penalty reviewed.

48. We set out our view that 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 the fine. This would give firms certainty about the sort of outcome they may see, reducing unnecessary stress and anxiety.

### Key points raised

49. The majority of respondents were supportive and thought fixed penalties would result in quicker resolutions and aid transparency around the penalty applicable to different breaches. However, several respondents suggested that fixed penalties should also be means tested to make sure that they act as credible deterrent and are fair and proportionate. Several respondents also indicated that their support would depend on how the fixed penalty process worked in practice.

50. There was also significant support for our proposals in the public and profession surveys, including strong consensus on the kinds of behaviours that should attract fixed penalties.

51. When asked to determine what the fine should be for a first offence, the profession tended to opt for lower-level fines of up to £200 (69 per cent of respondents). For the public, the highest proportion (39 per cent) choose fines of between £201 and £499 for the same behaviours. A small number of consultation respondents thought that £800 was a high fine for an individual for a first offence. The LSCP stressed the need to make sure that fines are at a level that they are not simply seen as a cost of doing business.

52. In the public focus groups, there was general support for our proposal to introduce a schedule of fixed penalties for less serious breaches of our rules. One participant was worried that fixed penalties might lead to individuals taking on responsibility for firm failures.

53. Amongst the minority who disagreed with fixed penalties, respondents stated that they did not consider them suitable for regulatory matters that often have aggravating and mitigating factors. Some of the profession were concerned that this was a money making exercise, and others that we would begin to start fining in new areas, starting a fining 'industry'.

### Our view and post consultation position

54. We will proceed to take forward the development of a fixed penalties scheme and consult on the process and the rules that govern our approach this summer.

    Some consultation respondents and attendees at events raised concerns that our changes, including fixed penalties and increased fining powers, would be a means for us to raise revenue. However, the proceeds of all financial penalties go to HM Treasury rather than to us. Nor will the use of fixed penalties in itself change the threshold for taking action. Rather, this change will allow us to streamline our approach to misconduct that is currently suitable for a low-level fine. It also means we can fostering greater transparency around possible disciplinary outcomes for failure to cooperate with us as a regulator and more administrative breaches.

    We identified within the consultation our recent experience of monitoring compliance with certain AML requirements and our transparency rules (where firms must publish certain information). This has led to a series of low level fines. These kind of matters are capable of objective determination and attracting standardised penalties.

55. We plan to limit the scheme to firms to begin with and to a small number of specified areas. This will allow us to evaluate the operation of the scheme before deciding whether to extend this further. We will include full details in our consultation in the summer.

56. We will undertake more work to develop the appropriate fine levels for first breaches. We have suggested this would be £800 maximum and subsequent breaches up to a maximum of £1,500. We will also develop scheme rules. These will include the processes, as well as covering circumstances such as when multiple breaches indicate poor systems or controls within the firm or matters that warrant an investigation.

## Deciding the level of fines

57. In our consultation, we proposed a new framework for setting fine levels that considers the size and financial position of firms and individuals at all times.

58. At present, for firms with an annual domestic turnover of £2m or more we can determine the fine as a percentage of that turnover. This is intended to make sure that firms deemed to be of 'greater means' receive a fine likely to deter repeated misconduct and is proportionate to its means. It is relevant both to our decisions to fine an ABS or traditional law firm where we consider a fine is appropriate, and whether to refer the case to the SDT where it exceed our fining power.

59. For other firms (and for individuals), the fining guidance does not make explicit provision to take into account means when calculating the level of fine. But it does provide for means to be considered when looking their ability to pay - reducing the penalty if they are of low means (which is undefined).

60. We also proposed that we should raise the maximum percentage of the annual domestic turnover of firms that a fine can be levied, from 2.5 per cent to 5 per cent. This is within the normal range of many other regulators. This would give us the flexibility required to impose (or identify, for imposition by the SDT) a sanction that provides a more credible deterrent and better promotes public confidence. This is particularly true for the more serious allegations and the larger firms.

61. We also set out a provisional view in our consultation that any new regime should also take into account the means of individuals, in a consistent and robust way. Taking into account the means of the individual would make sure 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.

62. We noted that, unlike with firm turnover, we do not already hold data which would enable us to determine individual means. We sought views from stakeholders (through the consultation and through focus group discussions and the two surveys) on a potential criteria as follows:

    - Fine 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
    - Income or net worth from the previous completed tax year used as basis for fine for administrative ease
    - Maintenance of the existing position in our guidance which provides for the ability to reduce the financial penalty if the person is of low means.

## Key points raised

### Turnover

63. A majority of respondents supported our proposal to take into account the means of the firm in all cases. Most respondents who agreed did not go on to make any further comments.

64. However, a number of stakeholders highlighted concerns about using turnover and/or made alternative suggestions. The Law Society (TLS) stated that it did not consider that turnover is 'a reliable indicator of profitability and does not always equate to the ready availability of cash. This may be especially true of firms reliant upon legal aid work for example.'

65. A local law society said that 'focusing on turnover ignores material relevant considerations…such as the specific facts of the case, the extent to which any profit can be attributed to the conduct, and the degree to which direct harm is localised.' An

individual working in compliance argued that 'firms last reported turnover may not be reflective of the financial position at the time of the disciplinary proceedings. It is the latter that should be taken into account.'

66. Most respondents from, or representing, the profession opposed an uplift. Reasons included:

    - that the comparison with other regulators was not like for like
    - we do not currently fine to the maximum 2.5 per cent.

67. A local law society noted that 'the consultation paper does not consider the running costs and/or profit margins of the traditional law firm in arriving at this figure'. And a law firm argued that the change could lead to higher costs for Directors and Officers /Management Liability insurance, which could end up being passed on to clients.

68. In both surveys, there was a similar level of agreement with our proposals to consider the turnover of the firm – with just over two thirds agreeing in each sample.

69. Those disagreeing that turnover should be considered when setting fines felt fines should be the same for everyone: 'that the fine should fit the crime'. A minority suggested profit would be a more suitable measure.

70. Views between the public and the profession on the increase to a maximum of 5 per cent differed. Two thirds of the profession felt that this is too high, whereas only 5 per cent of the public thought this (with some suggesting a figure of up to 10 per cent).

71. The LSCP welcomed the increase – but noted that, compared to other regulators, the maximum percentage is still low. They encouraged us to consider increasing this percentage further, and to monitor and evaluate whether the increase to 5 per cent has the desired deterrent effect. OPBAS also set out their views on the maximum turnover, which can be seen in their published response.

**Individual means**

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

73. In both survey, views were more closely aligned regarding the proposal to consider the means of an individual than was the case with firm turnover. Around three quarters of respondents overall agreed with this proposal.

74. As with firm turnover, respondents disagreeing with this proposal felt punishments should be the same for everyone. And that doing something wrong should have the same consequences irrespective of income.

75. In the focus groups, there was unanimous support for our proposals to take into account the means of individuals when setting fines. Although one participant stated that they felt it would be unfair if a financial penalty led to bankruptcy.

76. Several respondents agreed that net income from the previous tax year was a good starting point. Others urged us to look at income and consider whether the individual's financial circumstances had changed for the worse by the time the fine is issued.

## Our view and post consultation position

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

78. We recognised the need to carefully consider the questions and suggestions made by respondents in relation to the appropriate metrics to use. We commissioned an economic consultancy to provide an independent assessment of the benefits and disbenefits of the different metrics and have used this to develop our position post-consultation. The assessment also looked at how a higher maximum figure might impact different firms depending on different potential metrics. This is published alongside this paper.

79. In brief, for firms, it recommended that the annual domestic turnover from SRA-authorised activities in the last year prior to the misconduct best reflects their ability to afford the penalty.

80. For individuals, they recommended that an individual's income related to the employment in which the misconduct occurred should be used. And that this should relate to the tax year prior to the one in which the misconduct occurred.

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

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

83. We do accept that the firm's last reported turnover may not always be reflective of their financial position at the time of the disciplinary proceedings. This also applies to individual income as their employment circumstances may have changed. For this reason, we consider that there is benefit in maintaining the process whereby firms and individuals can make representations to us regarding their ability to pay. This will allow us in appropriate circumstances to alter the level of fine or to give individuals more time to pay.

84. We also asked the economic consultancy to consider the impact of raising the maximum level of annual domestic turnover that may be fined from 2.5% to 5% on different types of firms.

85. Their report concluded that this increase does have the potential to increase the deterrent effect of the fine if firms consider that there is a real risk of being fined at the maximum level. They concluded that there is no reason to expect that this route would affect the viability of firms in general or disproportionately impact smaller firms more or less than larger firms. The consultancy considered that it was unlikely that a fine at the

level of 5 per cent would compromise the viability of any given firm. And that this could be mitigated by us maintaining the discretion to reduce a fine based on ability to pay or allow payment over a longer period.

86. They also confirmed that 5 per cent is in line with, or lower, than the maximum fines of other regulators, including some legal regulators.

    We therefore consider that the level of 5 per cent is a sensible and proportionate level at which to cap our maximum turnover fine at this stage. However, we note the views of some respondents that we should seek a higher percentage, and conversely, those who think it should be lower. We will monitor and evaluate the operation of our bands in practice and remain open to making further changes in the future if we think this is necessary.

87. We note the questions raised about the potential impact of potential fines up to a raised maximum level of turnover might have on Directors and Officers /Management Liability insurance. The report from the economic consultancy highlights that in principle this could lead to an increase in premium but they cannot confirm whether that would be the case in practice. They emphasise that different factors might influence the impact of any rise in premium We do not consider that potential impact in itself would be reason not to proceed with the proposal, given the benefits outlined.

88. Based on the above, we will proceed with the position set out in our consultation and update our published fining guidance accordingly.

## Increasing the threshold for our internal fining powers

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

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

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

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

### Key points raised

93. Most respondents agreed with our rationale and were in favour of an increase to our fining powers, with many respondents supporting an increase to £25,000. This included

the LSCP and JLD and there was strong support from members of the public who responded to the online survey and within focus groups. Reasons included improving the deterrent effect of our fining framework, improving consumer confidence, and reducing the time and cost it takes to conclude straightforward cases. Two respondents highlighted the impact a lengthy process can have on renewing professional indemnity insurance as insurers may be cautious of renewing a policy where disciplinary matters are outstanding.

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

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

96. Other concerns raised by consultation respondents included:

    - the fairness of the SRA investigating potential breaches and determining the outcome without independent scrutiny
    - that the SDT's regime offers greater confidence due to its independence, greater transparency through public hearings and clearly defined processes, and detailed published judgments
    - impact of disciplinary action in relation to Black, Asian and minority ethnic solicitors who are overrepresented in our disciplinary processed
    - firms and individuals agreeing fines or not appealing a fine to avoid substantial costs incurred at the SDT even if they dispute the allegations
    - whether higher internal fining powers would guarantee faster timescales.

97. A local law society noted that that the profession would need to be confident that we would take a reasonable approach in negotiations. And highlighted the importance of applying updated fining guidance to 'ensure a reasonable and consistent approach is achieved.'

98. In the public and profession surveys, there was also support for an increase to our fining powers. This was particularly marked amongst respondents to the public survey. Within the focus groups (including the consumer group focus group) support was also high. Focus group respondents were particularly surprised at the disparity in our fining powers for traditional law firms and ABS, with some commenting that in their view, they felt this undermined our effectiveness as a regulator.

## Our view and post consultation position

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

100. We recognise that the SDT's indicative fining guidance currently lists fines above £7,500 as being 'more' than moderately serious, and those over £15,000 (and up to £50,000) as being 'very serious'. However, our assessment is that cases resulting in fines under £25,000 have tended to be straightforward, less serious matters which would not generally warrant the increased time, cost and stress involved in a hearing before the SDT.

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

102. Of course the appropriate fine in any given circumstances will depend on the facts and taking into the account the means of a firm or individual (as set out in paras 57 to 62 above). This would require the flexibility afforded by a higher upper threshold in order to impose relatively modest fines for wealthier firms or individuals.

103. We would of course retain the discretion to refer a case to the SDT for a full hearing in cases where we judge this to be more appropriate. This may be, for example, because:

- there are connected considerations that are more serious
- there are complex legal arguments
- the facts are disputed and require to be resolved at a hearing
- public confidence requires this.

We propose working with the SDT to develop a shared understanding of what represents a serious case, and our referral criteria.

104. We note the comments regarding confidence in the independence, transparency, and efficiency of our internal procedures, and have considered these carefully.

105. Our processes safeguard the independence of decision-makers by ensuring a separation between those who investigate and those who adjudicate on cases. Our regulatory decisions include, amongst other matters, imposing fines, imposing conditions on practising certificates and disqualification or control orders for non-solicitors. These are all made by 'authorised decision makers' under a published schedule of delegation. The infographic below sets out the decision making framework.

Solicitors Regulation Authority

# Journey of a report, investigation and sanction decision

Report is made and assessed

Does it meet threshold to be investigated?

✗ No

✓ Yes

Investigation

No further action

? Is there clear evidence of misconduct?

✗ No

✓ Yes

What is the appropriate sanction?

Sanctions guidance

Enforcement Strategy

Least serious — Most serious

| Concluded by the SRA | Adjudication | Refer to Solicitors Disciplinary Tribunal (SDT) |
|---|---|---|
| | An independent panel of solicitors | |
| Letters of advice or warning | Fine of up to £2,000 | Fines over £2,000 |
| Regulatory Settlement Agreements (RSAs) | Rebukes and controls on practice of individuals | Controls on the practice of individuals |
| | Intervention into firm | Suspend or strike off a regulated person |

? How can these decisions be appealed?

| | | |
|---|---|---|
| SRA internal review | SRA internal review | Appeal to the High Court |
| | Appeal to the SDT | |
| | Appeal to the High Court (Decision to intervene) | |

106. Fines are imposed by Adjudicators, who are not involved in the investigation of a case and who make objective and impartial decisions based on the evidence which has been disclosed to the relevant person. We employ legally qualified adjudicators who mainly make single adjudicator decisions. We also have a pool of panel adjudicators consisting of lay and legally qualified individuals who may sit on two or three-member adjudication panels.

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

108. However, we think it is important that we evolve our processes and consider what more we can do to increase transparency and confidence. In particular, we are currently consulting on the publication of regulatory decisions, to make sure that information about the decisions we make is accessible, clear, transparent, and consistent. This asks for views about how different audiences might use the information that we publish and the level of detail that they want.

109. We also continue to pay close attention to the efficiency and effectiveness of our disciplinary proceedings as part of our continuous improvement work, which remains a key strand of our draft Business Plan for 2022/23.

110. An updated Equality Impact Assessment has been published alongside this report. We have identified a potential positive impact from this proposal by reducing costs, delays, and stress for those subject to fines of between £2,000 and £25,000. We also commissioned analysis from an economic consultancy, and this highlighted that changes to our fining processes should not unfairly impact on any particular category of person.

111. However, should our fining threshold be increased, we would monitor and evaluate the impacts of any new approach on different groups. These include older solicitors, men, and those from Black, Asian and minority ethnic backgrounds, who continue to be over-represented in our enforcement processes overall. This ongoing over-representation sits outside the scope of this particular project, but we have an ongoing programme of work and research to address this.

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

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

114. We also note the calls by some respondents to be more ambitious in seeking parity with our ABS fining powers. Consistency in our fining powers for traditional law firms and ABS has been our long-term, publicly stated policy objective. We consider that there is no principled nor rational explanation why there are differences in our fining framework

for ABS as compared to traditional firms. However, this would be a matter for primary legislation and subject to separate discussion.

115. In the meantime, however, we will pursue discussions with the Ministry of Justice to seek an increase of our internal fining powers for solicitors and traditional law firms to £25,000 by way of an order of the Lord Chancellor under the Solicitors Act 1974.