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BIRMINGHAM LAW SOCIETY CONSULTATION COMMITTEE

RESPONSE TO SRA CONSULTATION PAPER

ON FINANCIAL PENALTIES

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This response has been prepared by the Consultation Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members from all branches of the legal profession and practising in all aspects of law. The response represents the collective views of the Consultation Committee whose members include specialists in professional regulation.

SRA Financial Penalties Consultation – Questions

Rationale for change

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

By way of background, the £2000 fine limit is contained at Section 44D of the Solicitors Act 1974. It was introduced by the Legal Services Act 2007 and came into effect on 31 March 2009. It applies to individual solicitors and traditional law firms.

By contrast, the SRA has the power under the Legal Services Act 2007 to fine alternative business structures up to £250m and individuals working in them up to £50m.

The SRA first attempted to increase its fining powers in 2012 when it proposed an increase for individual solicitors and traditional law firms from £2000 to £250m. This was rejected by the Ministry of Justice.

The SRA tried again in 2014 when it suggested an increase to £10,000; £50,000 or £100,000. This attempt also petered out.

As to the response to Q1 above, the SRA lists five principles in support of its approach - as bullet points under the heading “Our approach” on page 9 of the consultation paper.

We agree the principles listed as bullet points 1; 2 and 5. These are very general and uncontroversial.

We do not accept the principle contained at bullet point 3 which states as follows:

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.

Birmingham Law Society does not accept the premise that the SRA should be permitted to select certain types of misconduct as not being suitable for a financial penalty. The SDT and ultimately the Administrative Court should be given the freedom to judge each case on its facts without any pre-determined ruling by the SRA on what is and what is not "serious misconduct" and thereby unsuitable for a financial penalty. That is a job for the SDT and/or the Administrative Court. We address this point more fully later in this response.

We are also not convinced by the principle at bullet point 4 which states as follows:

We want to enhance our ability to make decisions on straightforward, and agreed, cases by increasing the threshold at which we can fine solicitors and traditional law firms

The SRA already has the ability to impose fines of £2000 on *"straightforward"* and/or *"agreed"* cases. A fine of £25,000 would not be appropriate on a *"straightforward"* and/or *"agreed"* case. It would only be justified on a more serious case which is unlikely to be agreed. We expand this point more fully below.

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

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?

We do not agree with this assertion.

We consider that each case should be judged individually and on its own facts. Whilst there will be cases that are unsuitable for a financial penalty, not all such cases will fall into this category. It is not for the SRA to prejudge whether these

cases are more or less serious than other cases and to predict in advance the sanction that should be applied by the SDT. These are the most difficult cases to prosecute for a variety of reasons. Complainants are often reluctant to become involved. Evidentially, it is often the word of the complainant against the word of the solicitor. Often, other jurisdictions are better placed to determine these cases – such as Employment Tribunals and/or the criminal courts.

Also, in trying to set down rules for such cases the SRA needs to pay heed to the judgment in *Ryan Beckwith v SRA [2020] EWHC 3231 (Admin)*. There is a tightrope between conduct in private and in professional life here which the SRA has understandably found difficult to navigate.

Under the heading of sexual misconduct, the impetus for the SRA's proposals for a separate sanction regime appears to have been derived from the media coverage of this topic rather than anything more considered or scientific. For a professional regulator to seek to tie the hands of the SDT in this way based upon press articles is disappointing to say the least. As Dame Victoria Sharp said in Beckwith v SRA *"Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit."*

As regards the SRA's reliance upon the approach taken by the disciplinary and regulatory arms of the Bar, the Bar Standards Board has (since the publication of the SRA consultation) been severely criticised by the Legal Services Board on the basis that it lacked capability, capacity and resources – see link

https://www.legalfutures.co.uk/latest-news/bar-standards-board-lacks-capability-capacity-and-resources

We are not convinced that the approach of the Bar to these matters should be relied upon by the SRA as justification for change.

Whilst we appreciate that this is a consultation seeking the views of stakeholders, the SRA as one of the most important professional regulators

should look to hard evidence as justification for change not what seems to be a knee jerk reaction to the media – see reference to “much debate in the media” (top of page 11). Debate in the media is not a substitute for a considered approach based on evidence.

Under the heading “Discrimination and non-sexual harassment”, the SRA claims that these cases are also unsuitable for a financial penalty. The usual jurisdiction for such cases is the Employment Tribunal and/or the civil courts. In both cases the remedy is a financial one. Why the SRA considers that financial penalties are unsuitable for discrimination and/or non-sexual harassment is not clear when it works well in other jurisdictions.

In summary, a financial penalty is just one of the various sanctions available to the SDT. Nothing more nothing less. The SRA should not be permitted to fetter the discretion of the SDT which is a wholly independent judicial tribunal. In addition, the penalty for these cases does not need to be linked to the breach in the way proposed by the SRA. A regulator does not need to apply a *“a financial quantity to the harm caused”.*

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

No

Fixed penalties

***Q*4 Do you agree that we should introduce fixed penalties for certain, less serious, breaches?**

We agree that this could be a sensible proposition but before proceeding further, the SRA should collate historic data on the types of these cases and the financial penalties applied – for example the number of cases in the last 5 years for breach of failure to submit accountants’ reports and the amount of

the fines applied. If, as we suspect there are very few of these type of cases then the SRA may wish to reconsider its approach and decide whether it is worth introducing a new system for very few cases.

Subject to the above, the SRA should then prepare a list of the breaches to which fixed penalties should be applied. The list should be confined to minor administrative breaches. Under no circumstances should fixed term penalties be applied to breach of the SRA Principles and/or to any of the rules contained in the Codes of Conduct which are not prescriptive and are subject to interpretation/subjectivity and are therefore inappropriate for fixed penalties.

A further discrete consultation could then take place before fixed penalties are introduced.

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

No

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

We agree with the proposals on the level of fine. The key criterion is the list of breaches suitable for a fixed penalty. If that is fair and confined to rules-based minor administrative breaches the profession is likely to accept the imposition of fixed penalties.

Financial penalties as credible deterrence

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

We find this section of the consultation to be rather muddled. The proposals to introduce turnover based assessment could only apply whilst the maximum fining limit remains at £2000 to Alternative Business Structures (“ABSs”). This is not made clear in this part of the paper. It would be a total waste of time and energy to even attempt to allocate a proportion of a £2000 fine to turnover as things presently stand.

The SRA states that the present fining framework does not deliver *"credible deterrence"* and that fines at the top end of the market appear disproportionately low. Very few large firms appear before the SDT and of those that do significant fines are imposed by the SDT (for example £250,000 for White & Case in 2017).

In seeking to justify these proposals, the SRA refers to the top 100 law firms and their revenue of between £30m and £2.1bn and also to comparisons with other regulators for example the Financial Conduct Authority fining Goldman Sachs £97m. The financial success or otherwise of the top 100 law firms at £30m to £2.1bn is almost irrelevant because they represent such a tiny proportion of the firms which appear before the SDT. The majority of firms which appear before the SDT are small firms of 4 partners or less of which there are over 8,000. Also, even these large firms would only be affected under the present regime if they were also ABSs.

Before proceeding further, we would suggest that the SRA provides evidence on the number of ABSs regulated by the SRA and which would likely to be affected by these proposals. The number of ABSs which remotely resemble Goldman Sachs is tiny. Most are small businesses who have taken the opportunity to add non solicitors to the business.

Further, we are wholly against the proposed link between turnover and financial penalty. The turnover of a firm usually bears no relation to the amount of profit. It is only profit which would be relevant to this type of financial assessment.

We also consider that the proposals are unnecessarily complicated, more akin to actuarial tables than sentencing guidelines.

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%?

No

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

We do not understand why this is included as a new proposal. We agree that individual means should be taken into account when determining a financial penalty but this is a factor which is already taken into account currently. It is not a change. The SRA's present system is to send to persons or firms subject to an investigation a 3-page statement of financial means questionnaire when the SRA recommends a financial penalty via the adjudication process. The SRA suggests that the statement of means is completed and returned so that the financial means can be taken into account.

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?

No specific comment except that the SRA should beware of basing current fines on past income for the previous completed year. Often individuals and firms are subjected to financial ruin as a result of an SRA's investigation and so previous financial information is of no relevance to the current state of affairs. Individuals are usually dismissed and cannot secure employment until the SRA investigation is completed. The SRA has provided in this consultation a figure of 458 days for completion of the most straightforward investigation (and most will be much longer) so this time lapse needs to be considered. Similarly, the SRA has referred to the fine being based upon the income related to the employment in which the misconduct occurred in the first place. We disagree with this proposal. The fine should be judged upon the financial position of the individual when the fine is applied not at some earlier imaginary point in time.

Increasing the threshold for our internal fining powers

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?

We are concerned that the consultation paper sets out a very misleading impression of the justification for the increase in fining powers. We remain unconvinced by the SRA's arguments even more so than in 2014.

Since similar proposals were rejected in 2014, there have been certain changes to the regulatory landscape which are relevant to the SRA being allowed internal fining powers up to £25,000 and which include:

1. The SRA Principles & Codes of Conduct 2019 are shorter and not rules based. Many breaches are based upon the SRA's subjective interpretation of what is and what is not professional misconduct. As a result, very few cases are "straightforward". There is argument to be made on both sides. The risk here is that firms will accept the SRA's view of the case and submit to a fine merely on the basis of cost not on the basis of any arguments or mitigation that they might justifiably have; and

2. The profession has lost trust in the SRA and its enforcement team Examples of high-profile failures include Leigh Day; Ryan Beckwith; Ellen and Ahmud.

3. Concerns have been expressed in the media about the competence of the SRA's enforcement team – for example - see the Law Society Gazette article - Can the SRA be trusted with extra powers? https://www.lawgazette.co.uk/commentary-and-opinion/can-the-sra-be-trusted-with-extra-powers/5110954.article

4. The SRA now relies upon a single law firm for independent legal advice.

Whilst we can see an argument for a modest increase in its internal fining powers to say £10,000 purely and simply on the basis of inflation (the £2000 fining limit having been put in place on 31 March 2009 by the Legal Services Act 2007) the arguments relied upon by the SRA in its consultation for an increase to £25,000 are weak if not misleading.

The SRA seeks to justify an increase by relying upon unsound comparisons. It states that the average length of time for a case to be concluded before the

SDT in 2020 was 960 days – over two and a half years.. It then states that the average length of time for cases concluded by the SRA internally with a fine in 2021 was 458 days.

The SDT itself will no doubt challenge the impression which the SRA seeks to give i.e., that the SDT is a time-consuming process and causes delay. In truth, once proceedings are issued in the SDT by the SRA, they are concluded within an average of 6 months.

The SRA itself is responsible for the time taken to issue proceedings in the SDT. Of the figure of 960 days or two and a half years the SRA on average bears responsibility for the first two years. Once the proceedings are issued, the case is subject to strict time limits and moves fairly quickly within the SDT. It is the SRA that is generally responsible for delay not the SDT.

Further, the SRA's description of Agreed Outcomes suggests that firms agree readily to whatever is suggested by the SRA as to admitted allegations and fines and that this could be achieved without referral to the SDT. Nothing could be further from reality. In many cases, the specific allegations and the financial penalty are hotly contested and negotiated between the SRA and firms under investigation before an Agreed Outcome is submitted to the SDT. Within this process, the SRA is curtailed by the thought of having to justify its position to the SDT. This process provides a strict control on the SRA in only presenting to the SDT the allegations and sanctions which it considers will be approved by the independent tribunal. Without this check and balance there is a risk that allegations will be admitted and fines agreed which would not be approved by the SDT.

We regard an increase from £2000 to £25,000 to be too much of an increase in one move bearing in mind the issues mentioned above. A more nuanced move would be preferred – for example to £10,000.

At risk of duplication, the subjective nature of the current Principles and Codes of Conduct needs to be borne in mind. The majority of investigations are brought on the basis of breaches of Principles not on the basis of the breach of

prescriptive rules. With a few exceptions such as dishonesty, every other alleged breach of the Principles is subject to disagreement on the part of the person under investigation. Unless the case is determined by the SDT and/or the Administrative Court there is no independent arbiter of what is and what is not misconduct. The SDT is trusted because it is comprised of practising solicitors who are independent of the SRA and have knowledge of the profession. Neither of those attributes can necessarily be found within the SRA.

Further, the SRA has not included any detail in the consultation paper as to who will be responsible for adjudicating if its proposed fining powers are increased to £25,000. The current system is that a complaint is made to the SRA. It is then investigated by an SRA investigation officer who is a full-time employee of the SRA. That same Investigation Officer prepares a Notice and supporting papers recommending a financial penalty. The Notice and the evidence with comments from the person or firm under investigation are then submitted to an SRA Adjudicator.

The SRA Adjudicator is an employee of the SRA. Some of these are full time some are part time. There was a time when the names and qualifications were set out transparently on the SRA website. This is no longer the case. There is therefore a lack of openness and transparency about the process which is unhelpful to the SRA maintaining the trust of the profession.

The investigation and then the quasi-judicial adjudication process would under these proposals be undertaken by employees of the SRA. As this Society stated in 2014, the SRA would be acting as investigator, prosecutor, judge and jury in its own interest in imposing these more significant fines. One of the most important principles of natural justice is that no-one is judge in his own cause – Nemo judex in causa sua – or no person can judge a case in which they have an interest. This is a principle which appears to be unimportant to the SRA.

We would be hard pushed to describe the process as independent and impartial. Whilst the fines remain at £2000, the harm that the SRA and its Adjudicators can inflict is limited but should the fining powers be increased to £25,000 then it is a massive jump and one which would be unwelcome to the

profession and would further damage its relationship with the profession. An incremental increase to £10,000 would be a preferable option. Data could then be collected for consultation before any attempt is made to increase to a higher level in the future.

Equality Impacts

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?

We are aware that the SRA holds research data that demonstrates that black and ethnic minority lawyers are disproportionately represented within the SRA regulatory and disciplinary investigations and outcomes. If the SRA's fining powers were increased to £25,000, we anticipate that such a step would in turn have a disproportionate effect on those groups of solicitors.