BIRMINGHAM LAW SOCIETY

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Response to SRA Consultation on Financial Penalties: Detail of New Approach

October 2022

Response of the Consultation Committee of the Birmingham Law Society to the SRA Consultation on Financial Penalties: Detail of New Approach

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. The response represents the collective view of the Consultation Committee whose members are specialist lawyers practising in all aspects of professional regulation and discipline.

Response

General comments

We welcome the SRA's acceptance that *"higher fining powers bring with them the need for greater accountability."*

We are however disappointed that some of the proposed improvements which are inextricably linked to the increased fining powers are not yet available for scrutiny.

In particular, we note that:-

1. The updated version of the SRA Schedule of Delegation will not be published until Autumn 2022.
2. The guidance on the decision-making processes to demonstrate the functional separation and independence of the adjudication function will not be published until Autumn 2022; and
3. The changes to be implemented following the consultation on the publication of regulatory decisions will not be published until early 2023

In the absence of this information, we nonetheless comment in more general terms

The SRA has stated that there will be explicit rules to clarify that *"all fines are imposed by functionally separate adjudicators".* However, as noted above, there is no detail as to how this critical objective can be achieved.

The SRA must ensure that there is a separation of powers when applying these much higher finer powers. The present position is that the SRA fuses together the investigation of the evidence, the prosecution of the allegations and the quasi-judicial adjudication function of reaching a decision on the evidence and sanction. The profession is unable to identify any separation by the SRA of these functions. With enhanced powers, the SRA must ensure that there is functional separation and independence of the adjudication function to avoid its standing and reputation within the profession falling even lower than it is presently.

In addition to the functional separation/independence issue, there is much in this paper that is of grave concern to the profession. It is not a paper which is confined to the financial penalties. There are proposals for extensions to the SRA powers of investigation which could lead to gross and obvious breaches of Article 6.

In the spirit of constructive feedback, the BLS would like to see the following changes implemented within the SRA investigation and decision-making process:

1. **The Investigation**

   The role of the SRA Investigation Officer ("IO") should be confined to investigating the complaint and collating the evidence. Some investigations will be undertaken on a desk-based investigation by the IO. Other investigations will be undertaken with the assistance of a Forensic Investigation Officer who may undertake an inspection at the offices of the law firm concerned. The IO or the FIO should, if necessary, interview any witnesses. The IO should not be permitted to draft the allegations nor propose a Recommendation for sanction to the Adjudicator.

2. **The Prosecution**

   The evidence as collated during the Investigation should then be considered by a more senior person within the SRA ideally within the Legal Department who should advise on the appropriate allegations to be brought forward for adjudication.

3. The Adjudication

This is the quasi-judicial process and must be undertaken with the utmost fairness in order to ensure a fair hearing and to comply with Article 6. As stated above, the Adjudicator should not be provided with a Recommendation for sanction by the Investigation Officer. Deciding upon an appropriate sanction is the job of the Adjudicator not the Investigation Officer or any other SRA employee. If this process were implemented it would at least give reassurance to the profession that the Adjudication process was independent and fair and that the Adjudicator did not just adopt whatever outcome had been recommended by the IO. The SRA must at least be seen to be making a separation between the roles of its full-time staff in investigating and formulating the allegations and the role of the adjudicator in determining sanction.

4. Publication on SRA website

In the interests of transparency, the SRA should also ensure that the names and profiles of the Adjudicators are published upon its website to ensure transparency. This process was always adopted in the past and seems to have been abandoned without explanation. It may be connected with the closure of SRA Board meetings to the public. Publishing the details of the background and experience of the Adjudicators would improve confidence in the adjudication process. The names and profiles of the members of the SDT are published as are details of the judiciary and members of other tribunals. We do not understand why the SRA does not follow this widespread and well-established practice.

5. Recruitment of Adjudicators

The recruitment process for Adjudicators should be reviewed to ensure that it is as transparent and independent as can be achieved in the circumstances. The roles should be advertised more widely via social media in order to reach the maximum number of quality candidates. Notice should be given well in advance of when the recruitment process is about to commence again to enable suitable candidates to begin thinking about applying. Further, the SRA

should introduce an independent person or persons to the recruitment process and/or interview panel to ensure fairness.

Question 1

Do you agree with our proposed rule that fines in band D will be decided by adjudication panels? Please provide comments to explain your reasons.

In principle, we agree that an adjudication panel should decide the fines in Band D. However, our support for this proposal would depend upon the composition of the adjudication panel. We are firmly against an adjudication panel comprised entirely of lay adjudicators deciding fines of up to £25,000. Lay adjudicators would not necessarily have the expertise nor the experience to do so and would not appreciate the context of the allegations occurring within a regulated solicitor's practice, or any applicable legal issues. Also, lay adjudicators would not have the support and confidence of the profession in such circumstances.

We recommend that there should be a panel of three persons and that this should be composed of two professional adjudicators and one lay adjudicator. One of the professional adjudicators should act as Chair to the panel. This arrangement would replicate exactly the composition of SDT panels – which as we know works extremely well.

Question 2

Do you agree with our proposals to change our rules to clarify the circumstances in which we will consider holding hearings or conducting interviews? Please provide comments to explain your reasons.

No – we do not support these proposals.

Hearings - the proposal for the holding of hearings entirely in the discretion of the adjudicator is unfair. If a hearing is required, it is an almost automatic admission that the case is unsuitable for adjudication and that proceedings should be issued in the SDT.

If the SRA is insistent upon continuing with this change, then the rules need to provide as follows:

- The respondent should be entitled to agree to a hearing; or
- The respondent should be entitled to refuse a hearing; or
- The respondent should be entitled to request that the SRA issue proceedings in the SDT.

Otherwise, a unilateral decision by the Adjudicator to hold a hearing without taking into account the wishes of the respondent represents an own interest conflict of legendary proportions. The SRA would be responsible for investigating and prosecuting the case before an SRA Adjudicator who had unilaterally decided upon a hearing. We anticipate that such an unfair procedure would not find favour with the SDT and the Administrative Court and that decisions made in that way would be challenged on appeal.

Interviews – we find the proposal for the Adjudicators to interview parties and witnesses to be even more troubling than the previous suggestion regarding the holding of hearings.

We have already explained above in our general comments that we view the adjudication process as a quasi-judicial process. Under no circumstances should an adjudicator be permitted to interview witnesses. That is the task of the investigation function within the SRA not the quasi-judicial process.

Question 3

Do you agree with our proposals around revoking referrals to the SDT?

Yes – we agree with the proposals but only in circumstances where the respondent has requested that the referral to the SDT should be revoked.

Where the SRA has decided to revoke the referral then the present system should be retained i.e., a Notice should be served and the respondent invited to give submissions. There may be cases where the respondent wishes the case to be referred to the SDT in order to obtain a fair hearing. We acknowledge that these cases would be unusual but nonetheless should be taken into consideration in drafting the rules.

Question 4

Are there any other specific measures that you would like to see us take to provide further assurance as to the transparency and robustness of our decision making?

Please see our general comments above regarding the independence and transparency of the adjudication process.

The SRA should publish its policy about how a solicitor's antecedents are considered in the context of decision making. Such antecedents should not be available to an Adjudicator, or Panel before a decision has been made on whether there has been a breach of the rules.

Furthermore, any complaints (noting that above 80% of reported complaints are not referred for investigation by the SRA) should not be provided to the Adjudicator or Panel, because of their ability to create a false impression as to whether a solicitor may have breached the rules.

If it is proposed to put antecedents before the Adjudicator/Panel, then the solicitor should have opportunity to make prior representations to have them excluded or, at the very least, comment on them and to request that they are excluded from consideration.

Such matters were subject of a detailed Law Society Policy to ensure a robust and fair process, but now cannot be found on the SRA's website.

In creating a functionally separate Adjudication team, would the SRA agree that such positions should not be available to those related to SRA employees working in other teams and that there is a physical separation of work location?

Finally, respondents should be entitled to request that a case is referred to the SDT ab initio in order that it can be considered by an independent tribunal as opposed to dealt with in-house by the SRA. We cannot see any provision under the rules either current or proposed which enables such an election to be made by a respondent. There is a right of appeal to the SDT against a decision of a single Adjudicator or an Adjudication Panel but such an appeal is limited to a review of the evidence not a rehearing. The SDT would not therefore embark upon an exercise of finding the relevant facts afresh. It is considered contrary to a respondent's Article 6 rights for there to be no provision allowing a respondent to elect for the case to be referred ab initio to the SDT.

Question 5

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

We are firmly against the SRA's insistence upon singling out cases of sexual misconduct etc. as being more serious than any other cases and therefore being inappropriate for a financial penalty. The SRA is pre-judging the sanction before it has considered the facts of the case and the mitigation which seems to us to be the height of unfairness. Each case should be determined upon the evidence and an appropriate sanction imposed based upon the facts of each individual case. Cases should not be dealt with upon the basis of political and media opinion.

Further, the SRA should not be attempting to fetter the hands of the SDT in deciding what is a fair and equitable sanction for particular types of behaviour.

More specifically, we do not consider that it is possible to provide any clarity as there are so many factual variations between cases that it is impossible to cover every eventuality in the guidance. All sanctions should be on the table and available to the decision-makers. The imposition of the sanction should be considered on a case-by-case basis as with all other cases.

The principle that a sexual misconduct case will always be more serious than, say, a breach of client confidentiality or an own interest conflict is unjustified and a hazardous position for the SRA to adopt.

It is also noted that the SRA appears to be extending the automatic suspension or strike off (regardless of the other factors in the Enforcement Strategy) to cases of discrimination. Discriminatory remarks have often been met with a fine by the SDT, or other legal regulators, but more serious cases have resulted in a suspension.

Whilst sexual harassment and discrimination should be addressed robustly by the regulator, and should not be dealt with leniently, we believe a just approach would be that the sanction should reflect the particular facts of the case. It would be easy to say that all money laundering breaches should result in a suspension of strike off, or failing to properly protect clients' money, but the sanction is best left to the expert members of the SDT hearing the case.

Question 6

Do you agree with our proposal to pilot personal impact statements in cases relating to sexual misconduct, discrimination, and harassment and take these into account when considering the appropriate sanction?

No – we do not support this proposal.

The present system is that the SRA gathers evidence i.e., the hard facts from the complainant and uses this as the basis of the investigation.

This current proposal suggests that, in addition, to the statement of evidence from the complainant the SRA seeks a personal impact statement – such a statement would not be evidence per se. It would be just as the name suggests a statement of personal circumstances. It could contain vitriol and venom. It could be completely untrue. It would not under the proposal be disclosed to the respondent. It could not therefore be challenged. It is a proposal of the utmost unfairness to the respondent. The SRA and the SDT and the higher courts focus in professional regulation cases upon evidence not emotion. We do not consider that it will add anything to the case as the SRA will already be in receipt of the most important key facts to enable it to make a decision.

So, we would object to this suggestion as being both unnecessary and unfair.

In addition, we object to the proposal to undertake a pilot study in order to further the research of the SRA. The SRA cannot experiment with the careers of individual

solicitors in this way. If the sanction imposed upon a solicitor during the pilot study was adversely affected by the personal impact statement and could not be challenged because of the secrecy surrounding it then the sanction would need to be appealed to the SDT and to the Administrative Court. This would constitute an unfair burden on the solicitor concerned.

Also, if the pilot study were limited to sexual misconduct cases which appear under the latest proposals to be destined for the SDT, then the SDT itself would need to decide whether it was prepared to accept these personal impact statements. It would not be a decision for the SRA.

This proposal is perhaps the most concerning of all the proposals in this consultation and should be rejected ab initio by the SRA.

Question 7

Do you agree that our proposed model of fines for firms is effective in applying our decision to take into account the turnover of a firm across our fines and to increase fines up to 5 per cent of turnover for all firm?

No – we do not support this proposal.

The basis of taking turnover into account in assessing financial penalties in order to increase the deterrent effect of fines is flawed. The vast majority of breaches of the rules are inadvertent not deliberate. The vast majority of those disciplined by the SRA or the SDT have no previous sanctions and only ever trouble the SRA once. Therefore, the SRA's link to the deterrent effect of higher fines is unsound. It is not borne out by the evidence.

In addition, comparisons with Ofcom; Ofwat and Financial Conduct Authority in order to justify these changes are misplaced. Those regulated by these quangos are a very different type of organisation to the variety of businesses and individuals regulated by the SRA. In addition, the focus of these regulators such as Ofwat is upon deterring companies from making a profit via a breach of the rules. A profit made by an SRA regulated firm or individual via a breach of the rules is a very rare occurrence indeed.

We regard the proposal to set a fine based upon turnover as unfair. The level of fine should be commensurate with the level of seriousness of the breach. Again, each

case should be considered on an individual basis. It should not be affected by how successful or unsuccessful the firm might be financially. A fine imposed upon a successful firm might under these proposals be too high for the seriousness of the breach. Similarly, the level of fine imposed upon an unsuccessful firm might be too low for the seriousness of the breach. The SRA should not try to pre-judge and fetter the decision-making process in this way.

Question 8

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

No – we do not support this proposal.

We repeat the comments made in response to question 7 i.e., fines should be decided on a case-by-case basis and not pre-judged in advance.

The SRA states that:

Under the new table, for the highest earning solicitors, fines would be higher than at present where they would be decreased for lower earners for the same offence. We think this is the right approach."

We cannot support this "Robin Hood" principle.

Even if the offence were the "same" which is never the case, an individual should not be subject to a higher fine just because he or she has a high salary. Each fine should be appropriate for each offence and not be pre-judged. Affordability is a completely different test to the level of appropriate financial penalty.

The SRA has also stated that the basic penalty will be based upon a percentage of an individual's **gross** income. An individual's gross income bears no relation to the affordability of fines. We disagree entirely with the SRA statement in this paper that income is a good indicator of the ability of the individual to pay. We all know that a substantial gross income does not necessarily translate into a high net income with the corresponding ability to meet a high fine.

In addition, we note that the SRA is intending to abandon the current practice of individuals providing a statement of means to the SRA in order to assist in determining affordability. We anticipate that this change would lead to even further unfairness.

The proposal for publication of the percentage of income is concerning and one which we strongly object to on the basis of individual privacy. The SRA seeks to justify the publication on the basis of public interest without any regard for individual privacy. We predict that such publication could be challenged as being in breach of Article 8.

Question 9

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

The income of individuals has been approached in the SRA consultation paper as if every individual is employed and paid according to schedule E – in which case it is simple to assess the gross income of that individual. A wage slip or a P60 provides straightforward evidence of gross income. However, in our experience, there are very few individuals who fall into this category of employees.

The majority of individuals are self-employed owners of their own firms. They are paid according to the success or otherwise of their firms. They may not be aware of the actual income from their firms or businesses until months after the end of their financial year. They may be taking drawings from their firm during the financial year, but it may not bear any relation to the actual profit from the firm. The SRA needs to take this into consideration in formulating its proposals.

Question 10

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

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

Question 11

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

We are concerned for the undefended.

Those who cannot afford independent specialist legal advice are at a considerable disadvantage when dealing with the SRA. They are intimidated by the SRA and often admit allegations or agree fines when it is inappropriate to do so. Such allegations have been drafted by Investigation Officers without legal training and even more concerning is that these Investigation Officers under the present arrangements are entitled to make recommendations as to sanction.

The disadvantage of being undefended will increase significantly with the increased fining powers. The SRA must act fairly in its dealings with those in such a category. It must not take advantage of the undefended. We welcome the proposal that fines in regulatory settlement agreements above £2k should be approved at a more senior level but this exercise must not be a box ticking exercise. Those senior members of the SRA must undertake a proper consideration of the allegations and the evidence not just the fine before approving the RSA

Birmingham Law Society Consultation Committee

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