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# Response to SRA Consultation on Financial Penalties: further developing our framework

**September 2024**

**Response of the Professional Regulation Committee of the Birmingham Law Society to the SRA Consultation on Financial Penalties: further developing our framework**

This response has been prepared by the Professional Regulation Committee of the Birmingham Law Society. The Society is the largest local law society with some 9,000 members. The response represents the collective view of the Professional Regulation Committee whose members are specialist lawyers practising in all aspects of professional regulation and compliance for the legal profession.

**Response**

We are aware that the Law Society is responding in detail and at length to this consultation. Birmingham Law Society supports and endorses the concerns expressed by the Law Society in its opposition to the SRA's proposals.

Of particular relevance to Birmingham Law Society are the following concerns on matters of principle:-

1. **Lack of data/empirical evidence/lack of impact assessment**

As per its usual practice (most recent example the Consumer Protection Review), the SRA has not collected data before embarking upon this consultation. The consultation paper is peppered with references to increased fining bands and minimum fines being a "credible deterrent" and being "in the public interest" but there is nothing to support these laudable phrases. As to "credible deterrent", the vast majority (over 90%) of individuals and firms upon whom a sanction is imposed either by the SRA or the SDT have always been "first-time offenders". The reliance therefore by the SRA upon increased powers being a credible deterrent does not bear close scrutiny. Most firms and individuals are determined to comply with the rules. It is damage to reputation

and the stress and anxiety associated with SRA investigations that are sufficient deterrents not higher fines.

The SRA current fining bands were introduced on 30 May 2023. On 28 June 2024, the SRA published the consultation paper with which we are now concerned. So, after 11 months the SRA has decided that, without supporting data, minimum fines should be introduced.

In addition, the SRA has failed to consider the impact of higher fines upon small firms, legal aid firms, sole practitioners and those from Black, Asian or minority ethnic groups. Would higher fining levels signal the end of smaller firms and individuals who are prepared to work in the lower paid but vital sections of the legal services market? These are important considerations for the SRA.

Three regulatory objectives imposed by Section 1 of the Legal Services Act 2007 apply here to the SRA as follows:-

> *( c ) improving access to justice;*
> *(d) protecting and promoting the interests of consumers; and*
> *(f) encouraging an independent, strong, diverse and effective legal profession;*

The impact upon smaller firms often referred to as High Street firms which provide an invaluable service to consumers should not be ignored by the SRA. Is it really in the public interest to press ahead without considering the impact upon smaller firms? Will these changes result in higher fees for consumers? Every change has an adverse consequence for someone and should not be made without hard evidence to support the change.

## 2. Use of gross income figures for calculation of fines

The use of gross turnover for firms and gross income for individuals for the calculation of financial penalties is wholly unfair. Gross in this context means

before the deduction of corporation tax and of income tax. It bears no relation whatsoever to the financial position of the firm or of the individual concerned. By way of example, an individual with an income of £150,000 would pay almost £50,000 in income tax, bringing net income down to £100,000, so a deduction of one third.

On the existing fining bands, a fine based upon gross income of £150,000 would be as follows:-

Band A at 3% = £4500
Band B at 11% = £16500
Band C at 49 % = £73500
Band D at 97% = £145,500
Proposed Band E ranges from 113% to 145%
Proposed Band F over 145%

From the above example, one can see that a fine at Band C would extinguish almost all of an individual's income and at Band D would exceed the individual's annual income. Even fines at Band A and Band B are hefty sums. The proposed increased fining Bands E and F are even larger and could not be paid from income. The pretence therefore that there is a link between the amount of the fine and the individual's income is artificial as the fine could only be paid from capital or a loan and the SRA does not seek information about capital before determining the level of fine.

All of these percentage fines would be imposed upon gross income without consideration of tax and regular outgoings for support of family and home.
From the above figures one can predict the draconian effect upon a solicitor who falls within any of these fining bands – a financial catastrophe might be an appropriate description.

Whilst it can be argued that expenses for firms and outgoings for individuals are mostly a matter of personal choice and therefore differ widely, tax is paid

more or less at the same levels by all. It is a universal and inevitable deduction. For that reason, the SRA should discontinue this unfair practice of using gross income or gross turnover for the basis of its calculations. The SRA's calculations should be based upon net income. It would at least be fairer and have some link with the actual amount of income received by firms or individuals as opposed to the current regime.

### 3. Lack of independence in decision making process

It is said that the SRA acts as investigator, prosecutor and judge within the same organisation. It has fused these three functions which can offend the rules of natural justice. The two principles are the rule against bias and the right to a fair hearing. It follows that if there is bias or a conflict of interest there cannot be a fair hearing.

The rule against bias is known " Nemo judex in causa sua" or "No one is judge in their own cause". Some would say that the SRA invariably acts as judge in its own cause. Whilst the ultimate decision maker in the higher fining bands (D,E & F) will be an Adjudication Panel, the recommendations as to sanction are drafted by SRA Investigation Officers. The Adjudication Panel (& for the lower fining bands Adjudicators) are not left to their own professional judgment to determine an appropriate sanction commensurate with the facts of the case. They are channelled by the SRA Investigation Officers to a decision which sits within the SRA guidance and its fining bands.

The SRA Investigation Officers are responsible for investigating the facts of the case, they also determine which allegations are appropriate and make a recommendation for sanction. Their role is therefore as investigator and prosecutor and to some extent as judge because of the recommended sanction. Often the Investigation Officer will prepare the case for adjudication before receiving any representations from the firm or individual under investigation. The firm or individual will be asked to provide financial evidence on gross turnover or gross income before a decision has been taken on

whether or not the allegation is made out. This financial evidence will be used by the Investigation Officer to prepare a recommendation as to sanction.

It is correct that the firm or individual under investigation is asked to comment upon the evidence, allegation, and proposed sanction at this late stage and that all of this is then put before the Adjudicator. However, those under investigation feel that the Investigation Officer has prejudged the case, that it is too late to change anything and that it is presented to the Adjudicator as a fait accompli.

When one subjects this process to close scrutiny, one can see the potential for unfairness and bias. It is said in the consultation paper that the Investigation Officers have to attend *"a higher fining surgery where staff carefully consider the rationale for the fine. All meetings of the group must have several senior members of staff present, including an investigation manager, a head of department, a knowledge & development manager, and a legal or senior legal advisor".*

A new safeguard which is proposed in the consultation is that for any recommendations for a financial penalty in either Band E or F these have to be approved by one of the following SRA employees:

- Director of Legal and Enforcement
- Deputy Executive Director Investigations and Enforcement
- Deputy General Counsel
- General Counsel.

All of the above where SRA employees check the work of other SRA employees means that the SRA "is marking its own homework." There is no independent element to this process. We hasten to add that we make no criticism of individual SRA employees.

The current SRA guidance on financial penalties states that "This guidance is intended to provide a practical guide for *our decision makers* to assist them in arriving at an appropriate financial penalty for individuals and firms we regulate" (our emphasis).

If it is intended that the Adjudicators should use the guidance to make decisions as to sanction then the SRA Investigation Officers should not be permitted to make recommendations as to sanction. Otherwise, there is a sense (and sometimes this sense may be justified) that the Adjudicators are merely rubber stamping the recommendations as to sanction.

In the Solicitors Disciplinary Tribunal, those prosecuting on behalf of the SRA are not required or encouraged to make recommendations as to sanction so the same procedure should apply consistently to the SRA with these internal regulatory decisions. Prosecutors in other jurisdictions do not recommend appropriate sanctions. It is a matter for those with a judicial or quasi-judicial function to determine an appropriate sanction not be spoon fed by those prosecuting the case.

The solution would be for the SRA Investigation Officers to be forbidden from making any recommendations as to sanction. They should be required to present the facts to the Adjudicator who will then consider an appropriate sanction. In that way, there is a separation between the investigation/prosecution function and the quasi-judicial decision on sanction.

Further, there should be a two-stage process introduced. The Adjudicator should consider first whether or not the allegations in question are proved on the evidence. If they are, then the firm or individual under investigation should be asked to provide mitigation and information about sanction and financial information. A two-stage process would fairness and appropriate sanctions.

Further, for those firms or individuals where allegations have not yet been proved they should not be asked to provide confidential information about their

financial circumstances before allegations have been proved. It is an invasion of privacy and could be regarded as a breach of Article 8 ECHR for individuals.

When the SRA's internal powers were limited to a rebuke or a fine not exceeding £2000, the potential for injustice caused by a lack of independence existed but its impact was much less. With unlimited fining powers for economic crime comes much greater responsibility. The SRA must review its decision-making process and ensure at least some semblance of separation of powers and more independent decision making.

## 4. The ability to appeal an SRA decision

The SRA states that '*There is a right of appeal to the SDT for all fining decisions we make"* This is correct as far as it goes but it is potentially misleading. It suggests that dissatisfied respondents will always have the SDT to fall back on for an appeal. However, it is not that straightforward.

The grounds of appeal to the SDT are seriously constrained. The SDT only carries out a review of the case and will not rehear the original case, i.e. it will not embark on an exercise of finding the relevant facts afresh, or hear witness evidence,.

The cost of bringing such an appeal is high and that, coupled with the risk of an adverse costs order against the respondent, acts as a deterrent even to those who feel they have been treated unfairly. If the SRA is to make decisions of such significance and gravity concerning economic crime, there should be far more emphasis on proper due process, fairness, transparency, and accountability. These are absent in the proposals presented.

## 5. Responses to specific questions in consultation paper

*Q1: Do you agree that we should update our guidance on financial penalties to include two new fining bands - bands E and F?*

No – we do not agree. There should be a separate framework for economic crime otherwise there will be a temptation for Investigation Officers to increase fines for non-economic crime related conduct.

*Q2: Do you agree that our proposed approach will provide a credible deterrent against the most serious breaches of our rules?*

No – see comments above on first time offenders (paragraph 1) and the fact that damage to reputation and stress and anxiety are more relevant deterrents.

*Q3: Do you agree that the new nature and impact scores provide greater clarity as to how we determine the appropriate penalty within the bands?*

No – the nature and impact scores are all based upon subjective decisions made by the SRA Investigation Officers without any independent or external oversight. See comments above on our view that SRA Investigation Officers should be forbidden from making recommendations as to sanction. The determination of sanctions should be left to the quasi-judicial function i.e. the Adjudicators.

*Q4: Are there any further steps you think we could take to provide clarity on how we determine the appropriate penalty band when imposing financial penalties?*

These nature and impact scores are fiendishly complicated and have the look and feel of actuarial tables. One would not start from here so it is difficult to suggest an improvement other than starting again. Fair and appropriate sanctions cannot be confined to formulaic process.

*Q5: Do you agree that we should take into account aggravating and mitigating factors at one stage, when setting an appropriate fine, and therefore remove the standalone discounting process?*

This might work if the decision on sanction was left entirely to the Adjudicators but the main objective is for all the relevant factors to be taken into consideration by the decision maker before imposing a penalty. Again, this is in danger of becoming far too complicated and formulaic.

*Q6: Do you agree with the list of aggravating and mitigating factors that we have set out above?*

Yes – but these are not the only factors. Each case depends on its facts so there will be additional aggravating factors and additional mitigating factors that will need to be considered. There should not be a restricted list. It offends the principles of natural justice.

*Q7: Do you agree that cooperating with our investigation and remedying harm caused by a breach of our rules are not mitigating factors?*

No – these are definitely mitigating factors.

*Q8: Do you agree with our proposal to introduce minimum fine levels in each penalty band in our fining guidance?*

No – we vehemently oppose the introduction of minimum fines – especially at the levels proposed – which are at eye watering levels.

We repeat our concerns about the lack of independence in the decision-making process – see section 3 above. The SRA is trying to short circuit any consideration of the facts of the case. Fines at these levels may be appropriate for some cases for others not. The Adjudicators should consider each case on its facts, whether a financial penalty is appropriate and ensure that the penalty is fair, proportionate and reasonable. Otherwise, we will be left with enormous minimum fines being imposed as a result of recommendation by SRA Investigation Officers – who fulfil the roles of investigator, prosecutor and judge.

*Q9: Do you agree with the proposed levels of minimum fine?*

No – see response to question 8 above.

*Q10: Do you think providing illustrative examples such as this will be a helpful addition to our guidance on financial penalties?*

Possibly but each case should be determined on its facts

*Q11: In identifying the appropriate metric on which to base a fine, are there any key considerations we should take into account, for example regarding the corporate structure of the firm?*

The SRA should not stray into trying to use global turnover in its calculations. There is no advantage to its regulatory role. The turnover should be net and should be related to the legal services undertaken within England & Wales which is the jurisdiction that is covered by the SRA. Any attempt to do otherwise would we anticipate be met by a strong legal challenge from global firms which the SRA would be unwise to encourage.

*Q12: Do you agree with our proposal to clarify our position by stating in our guidance that all financial penalties will be the sum of the indicative fine and the amount of any financial gain obtained from the misconduct?*

No – the SRA will have already taken into account the "harm" caused by the misconduct in its complicated tables. This would be a duplication. Also trying to define "financial gain" is not a simple task and is best avoided.

*Q13: Do you agree with our proposal that we should not impose a financial penalty following a conviction for driving with excess alcohol?*

We agree with the proposal not to impose a financial penalty following a single conviction for driving with excess alcohol. It was historically always the case that the regulator took no action other than noting the file for one conviction but did investigate/take action on subsequent convictions.

We do not agree with the proposal that drink drive convictions with "aggravating factors" should be referred automatically to the SDT. Such a rule would be unfair and not take into consideration the facts of the case. Some cases will be suitable for a financial penalty imposed by the SRA. Some will not. There is no regulatory reason to single out drink drive convictions for special consideration. All cases must be considered on their facts.

*Q14: Are there any additional potential impacts, either positive or negative, of our proposals on any group of solicitors with protected characteristics?*

Please see our comments at section 1 above regarding small firms and others who will be adversely affected.

*Q15: Do you think providing illustrative examples such as these will be helpful additions to our guidance on financial penalties?*

This seems to be a repeat of question 10 above.

**Birmingham Law Society Professional Regulation Committee**

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