

SRA response

Claims Management Regulator Regulatory Enforcement - Financial Penalties, Ministry of Justice consultation

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Download consultation paper: Ministry of Justice consultation on Claims Management Regulator Regulatory Enforcement - Financial Penalties [https://consult.justice.gov.uk/digital-communications/claims-management-regulation/supporting_documents/cmrfinesconsultationfebrmar2014.pdf]

This response is submitted on behalf of the Solicitors Regulation Authority, the independent regulatory body of the Law Society for England and Wales. We regulate solicitors, the firms in which they operate and all those working within the firms. We regulate in the public interest.

The main focus of our action is protection of the consumer as well as the wider public interest in ensuring that, by complying with the law and regulatory requirements, confidence in those who deliver legal services is maintained.

As part of this role, the SRA has responsibility for investigating failures to meet the regulatory standards set out in our Handbook. The SRA's effective, consistent and proportionate use of its enforcement powers, including imposing fines, plays a vital role in ensuring a credible deterrence against unacceptable behaviours and furthers the regulatory objectives and professional principles in the Legal Services Act 2007 (LSA).

We consider that a broad range of flexible and proportionate sanctions that can be applied in cases of regulatory non-compliance at an earlier stage improve outcomes for society as a whole, and we support the CMR's proposals to expand their Regulatory Enforcement Toolkit to include a financial penalty component (the "Scheme"). With the recent programme of work, which has included the need to monitor entities involved in the claiming of mis-sold payment protection insurance and the ban on referral fees in personal injury cases, we consider it appropriate for the CMR to review and amend its regulations.

In developing our approach to using fines as an enforcement power we are aware of a variety of approaches to guidelines and guidance on fining levels in other regimes. There are some common factors which appear in the majority of regimes which have a framework for determining financial penalties. These include:

- a set of overarching principles for the calculation of fines;



- a method for calculating a 'basic' sum or 'starting point' for a fine, which takes account of the impact and nature of the authorised person's actions;
- a method for adjusting that figure to take account of other relevant factors such as aggravating circumstances, mitigating circumstances and the desire to remove any benefit attained by the authorised person as a result of the conduct.

We consider that the Scheme sets out a number of relevant factors to be taken into account in deciding the appropriate response to a regulatory breach. The Scheme pays close regard to the findings of the Macrory report¹ [note 1]. Achieving consistency in the levying of penalties is important in the context of ensuring effective deterrence and consistent consumer protection. We believe that the basic penalty bands proposed by the CMR are at levels that are likely to:

- deter repetition of the conduct by regulated persons;
- be proportionate to the risks posed by, the nature and the seriousness of the conduct; and
- be proportionate to the means of the authorised person which the CMR regulates.

We note that the CMR's Scheme adopts a relatively broad and flexible approach to determining financial penalties rather than distinguishing between different types of offences and misconduct. However, one of the major challenges in introducing criteria of this kind (when deciding what level of fine to impose) is how to correctly balance the desire to maximise consistency with the desire to retain an appropriate level of flexibility. Flexibility is important given the wide variety of factual scenarios the CMR is likely to encounter.

As proposed in the Scheme, determining penalties as a percentage of turnover of entities could maximise the proportionality of fines to the means of entities in individual cases. This, in turn (as suggested in the consultation paper), would also have the associated impact of deterring misconduct more widely.

We however recognise that turnover of entities will not always be the most reliable indicator of an entity's financial means. We understand that the Scheme takes into account other factors in assessing financial means, including the entity's ability to pay, if this is necessary to achieve a consistent and fair method of assessing financial penalties.

In our view, regulators should have sufficient financial powers to be able to eliminate any financial gain or benefit, as far as reasonably practicable, which would otherwise arise from the conduct in question. This would be to restore the consequential harm caused to the individual consumer and

more widely in the public interest. We welcome the approach that the CMR has taken at paragraph 40 of the consultation paper where it is envisaged that the Scheme will take this into account.

We consider that the proposals will provide a consistent and transparent approach to levying financial penalties achieving a fair and proportionate fining regime.

Financial penalties provide a flexible method of deterring misconduct by those who are directed to pay them but also to others who may be considering similar conduct. In our view, therefore, the Scheme that is put forward by the CMR provides for a robust framework for determining fines, which ensures that the level of fines will both be consistent, proportionate and that the interests of the public are protected.

See more information and guidance on the SRA's approach to financial penalties [<https://www.sra.org.uk/solicitors/guidance/financial-penalties/>] .

The SRA and the MoJ's Claims Management Regulation Unit share a common objective which is to protect consumers from harm and protect and promote the public interest. We look forward to continuing to work with the CMR on common proposals to achieve these objectives.

Notes

1. Professor Macrory's recommendations included that "A sanction should:
 1. Aim to change the behaviour of the offender;
 2. Aim to eliminate any financial gain or benefit from non-compliance;
 3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
 4. Be proportionate to the nature of the offence and the harm caused;
 5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
 6. Aim to deter future non-compliance