

ILEX Professional Standards Limited
Fines Consultation Analysis of Responses

INTRODUCTION

IPS issued a consultation on its proposal for the approach it will take when fining CILEx members, authorised persons, entities and approved managers. It also consulted on proposals to increase the fining upper limits. The consultations opened on 10 February 2014 and closed on 22 April 2014.

SUMMARY OF RESPONSES

IPS published the consultation on its website. The consultations were also sent out to 14 stakeholder members and bodies, including consumer bodies.

The consultation received 2 responses, one from the Solicitors Regulatory Authority (SRA) and one from the Legal Services Consumer Panel (LSCP).

The responses were broadly supportive of the IPS approach to fines and the factors that will be taken into consideration when deciding on the fine to be levied. The individual responses are attached with commentary by IPS.

Q1. Do you agree that fines should be increased for individual CILEx members from up to £3,000 to up to £5,000? If not, state why.

RESPONSES:

Solicitors Regulatory Authority

We agree that the current levels of fines for the various categories referred to above should be increased to levels proposed by IPS. Setting an appropriate level for penalties is an important part of a regulator's enforcement strategy, and in particular to delivering a credible deterrence against conduct which poses a risk to clients and others. As matter of general principle, we recognise that an increase in IPS's fining powers would be consistent with the penalty principles set out by Professor B Macrory's in his 2006 report entitled 'Regulatory Justice: Making Sanctions Effective', which the SRA endorses.

Solicitors Regulatory Authority Additional comments

'The only substantive comment we have on this section is to query if the proposed increase in fines from £3,000 to £5,000 for individual CILEx members is sufficient to meet the objective of the consultation as set out in paragraph 8. The consultation states that the current amount has been found to have been inadequate as a deterrent but no further details are provided as to why this is or the types of misconduct that might attract a fine. In view of this we query if the proposed increase is sufficient in all the circumstances.'

Legal Services Consumer Panel

This category of individual CILEx members refers to those who are not authorised to provide reserved activities. This includes a range of situations including students, and members working under supervision on unreserved matters within solicitors firms.

The proposals would discriminate between reserved and unreserved activities. This could mean a CILEx member sanctioned in relation to a wills matter could be fined up to £5,000 but up to £50 million for a probate matter. This is hard to justify when looked at from a consumer detriment perspective. Further, as highlighted in the LSB's report, sanctions should eliminate any financial gain or benefit from non-compliance, and it should change the individual's behaviour and deter others. We do not consider that a maximum penalty of £5,000, which is only a very modest increase on the current level, would satisfy these good practice criteria.

There is also regulatory arbitrage since the SRA does not discriminate in this way and, depending on the outcome of its current consultation on fines, could penalise a solicitor £100,000 for the same offence. Moreover, the SRA

proposes to be able to fine this amount without reference to the Solicitors Disciplinary Tribunal (SDT), whereas the current IPS system means fines may only be imposed by a Tribunal. Inconsistency of powers and sanctions was a key feature of the LSB's review of the sanctioning and appeals regimes across the approved regulators – this IPS proposal would not help to simplify this situation.

Finally, we understand this category of membership includes individuals, such as students, who do not provide legal services to the public. This being the case, it is not clear why the regulatory arm of CILEx is responsible for sanctioning such persons. Indeed, the range of individuals within this class of membership may contribute to, what in our view, is an insufficient fine level for Chartered Legal Executives doing unreserved work within solicitors firms.

In our view:

- The fine amount should be the same for reserved and unreserved legal activities, i.e. £50 million (see below)
- IPS should only sanction individuals involved in delivering legal services
- IPS should be able to fine up to a certain amount without reference to a Disciplinary Tribunal

IPS RESPONSE Q1.

IPS carefully considered the comments made in both responses and agreed that raising the maximum limit to £100,000 to ensure consistency in sanctions in accordance with the Legal Service Boards recommendation for consistency amongst approved regulators. Consistency in this case will be achieved with the SRA proposal. It is noted that the LSCP proposed the fine should be increased to £50 million to achieve consistency with authorised persons. IPS has not opted for that position. In reaching its decision IPS took into account that this fining level is for those members who primarily work under the supervision of an authorised person.

IPS would like to clarify the membership breadth of CILEx in response to the LSCP comments and the community that IPS is delegated to regulate. Students may work in legal practices on work experience or a range of work. Students may also have had previous careers but who are now pursuing a career in law. During the course of employment during their studies their conduct may be called into questions and IPS has jurisdiction to consider any such allegations.

IPS would also draw the attention to our power to make determinations by consent. This is in response to the LSCP comment about IPS limitation to fine without reference to the disciplinary tribunal. Determinations by consent give IPS the power to fine without referral.

Q2. Do you agree that members who hold reserved or regulated legal activity rights can be fined up to £50 million? If not, state why.

RESPONSES:

Solicitors Regulatory Authority

Where we have not made a comment in response to specific questions, we remain neutral on issues/proposals discussed.

Legal Services Consumer Panel

A maximum fine of £50 million should be sufficient to eliminate any financial gain or benefit from non-compliance and influence the behaviour of the individual concerned and the regulated community as a whole. This amount would improve consistency across regulatory regimes since the fine limits for authorised persons working in ABS's regulated by the SRA and Council for Licensed Conveyancers (CLC) are also currently a maximum of £50 million.

However, while the SRA and LSB wish to see a £50 million fine limit for individual solicitors, the Ministry of Justice has so far not supported these plans. The situation for SRA and IPS authorised persons may thus be dramatically different in future. Unlike the SRA situation, the IPS proposals could be approved by the LSB without requiring any external confirmation. Should IPS decide to seek approval for its current set of proposals, clearly the LSB would have an acute dilemma. Our wish would be that the LSB approve a £50 million limit for IPS and continue its efforts to seek the same limit for individual solicitors. Otherwise this would lead to a lowest common denominator or race to the bottom situation that fails to put the interests of consumers first.

IPS RESPONSE Q2.

IPS supports these comments and will continue to work towards achieving consistency in fine limits, as proposed.

Q3. Do you agree that individuals who are an Approved Manager in a body regulated by IPS can be fined up to £50 million? If not, state why?

RESPONSES:

Solicitors Regulatory Authority

Where we have not made a comment in response to specific questions, we remain neutral on issues/proposals discussed.

Legal Services Consumer Panel

Yes, Approved Managers are in positions of responsibility and the fine level should reflect this. The same considerations apply as in the previous question

IPS RESPONSE Q3

IPS welcomes the support for this proposal.

Q4. Do you agree that entities who obtain Authorised Body status can be fined 0.5% of annual domestic turnover up to a maximum of 5% or up to a maximum of £250 million whichever is greater? If not, state why.

RESPONSES:

Solicitors Regulatory Authority

Determining penalties as a percentage of turnover of entities could, in our view, maximise the proportionality of fines to the means of entities in individual cases. In addition, as suggested in the consultation paper, it would also have the 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. The IPS's Disciplinary Tribunal would therefore need to take into account other factors in assessing financial means, including the entity's ability to pay, if this is necessary to achieve the overarching aims of the principles set out in the Legal Services Act 2007, and a consistent and fair method of assessing financial penalties.

Legal Services Consumer Panel

We agree that entities should be subject to a higher maximum fine than individuals due to the potentially higher gains that entities might obtain from non-compliant behaviour. This would also reinforce the importance of having effective systems and controls within entities to prevent consumer detriment and the role of senior leadership in taking responsibility for the behaviour of entities.

The consultation document does not offer a rationale for the proposed approach, although an upper limit of £250 million is consistent with the SRA and CLC limits for ABS/licensed bodies. While we support the proposal on consistency grounds, IPS is designing a sanctioning regime for a group of entities it does not yet authorise. There seems a risk that this will be out of kilter with the profile of its regulated community notwithstanding the proportionality factors it will take into account when setting fines. The risk for consumers here is that it has a chilling effect which discourages market entry, restricting innovation and choice.

IPS RESPONSE Q4.

IPS has noted the comments and provided additional explanatory notes within the fines policy to highlight the importance of assessing the proportionality factors when deciding on whether a Relevant Persons has the ability to pay the fine.

The rationale for the proposed approach to fines comes from the link to alternative business structures and to maintain consistency with other regulators.

IPS would draw attention to the start of the consultation which states that this policy is in preparation for when IPS will begin regulating entities.

In relation to comments about discouraging innovation and choice, IPS does not consider increasing fining powers will have this affect. The aim of fining is to have in place a suitable level of consumer protection when things go wrong. IPS believes that in the same way that the risk of civil or criminal action does not discourage innovation and choice neither will increasing fining.

Q5. Do you agree with our general proposal on the level of fine? If not, state why.

RESPONSES:

Solicitors Regulatory Authority

The IPS proposal 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 big 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 IPS's Disciplinary Tribunal are likely to encounter.

In our view, the IPS criteria for determining fines should also take into account, as far as reasonably practicable, the removal of any benefit or gain which would otherwise arise from the conduct in question. This was one of the focal points of Professor Macrory's work on better regulation principles and is also reflected in the recent LSB's paper on sanction and appeals (March 2014) in which they stated that:-

“We consider that;

The legal regulators should have sufficient financial penalty powers to be able to eliminate any financial gain or benefit from non-compliance and, where possible, restore the harm caused to individual consumers and/or the public

interest.”

Legal Services Consumer Panel

We have nothing to add to our comments in response to earlier questions. However, while this consultation focuses on the level of fine, we hope that IPS will look again at its overall sanctioning and appeals regime in light of the LSB’s report. In particular, its inability to impose any fine without recourse to the Disciplinary Tribunal risks acting as a disincentive to punish lesser offences which though low in value might have serious consequences for individual consumers. Consistent failure to address effectively what may be perceived as minor offences could over time damage consumers’ trust in legal executives and their reputation.

IPS RESPONSE Q5.

IPS has taken the comments into consideration and has included 'removal of benefit and gain' as a factor to take into consideration when deciding on the level of fine.

Q6. Do you agree with the proposed Seriousness Factors? If not state why.

RESPONSES:

Legal Services Consumer Panel

We support the proposed factors, which correctly focus on the outcome or harm caused. In considering this, IPS should consider the impact of non-compliance on both individual consumers and consumers collectively. A small group of consumers who are severely affected should be treated as seriously as a large group of consumers who each suffer a small amount of harm but where the total illicit gains are high. Dealing effectively with both types of detriment are important to maintaining consumer perceptions of fairness and trust in legal executives and in their regulation.

IPS RESPONSE Q6.

The responses by the SRA to questions 5, 6, 7, and 8 appear as one under question 5.

IPS has taken into consideration the comments and has included this example in the policy to demonstrate how different circumstances may warrant the same level of fine.

Q7. Do you agree with the adjustment factors that will be taken into account when considering the level of fine? If not, state why.

RESPONSES:

Legal Services Consumer Panel

We are pleased that impact on vulnerable consumers is an aggravating factor. This should be based on the definition of a vulnerable consumer in the British Standard on Inclusive Service Provision (BS18477). Both the LSB and the Panel have written to the regulators about the benefits of using BS18477. During 2014/15, the Panel will produce a clear and simple guide to help the regulators apply the learning from the standard in a legal services context.

We support the inclusion of attempting to rectify the wrong caused as a mitigating factor, although clearly a successful attempt to repair the damage should have greater weight than an unsuccessful one. IPS might also consider introducing an SRA-style regulatory settlements process whereby an individual or entity would voluntarily offer to compensate consumers following a breach of the rules which causes financial loss.

IPS RESPONSE Q7.

IPS has already spent time considering whether the British Standard on Inclusive Service Provision (BS18477) definition of 'vulnerable consumer' should be adopted and it was decided that the Investigation, Disciplinary and Appeals rules and the CILEx Code of Conduct provide sufficient definition to cover vulnerable consumers.

The regulatory settlement is available already and is called determination by consent in IPS rules.

Q8 Do you agree with the proportionality factors that will be taken into account when considering the level of fine? If not, state why.

RESPONSES:

Legal Services Consumer Panel

Yes.

IPS RESPONSE Q8.

IPS welcomes the support in this regard.

Q9. Do you agree that at present there is no detrimental impact on

equality and diversity? If you consider there to be some, what are they?

RESPONSES:

Solicitors Regulatory Authority

We believe that the proposals will not have a negative impact in terms of equality and diversity. The proposals will provide a consistent and transparent approach to levying financial penalties achieving a fair and proportionate fining regime.

Legal Services Consumer Panel

Yes.

IPS RESPONSE Q9.

IPS appreciates the comments provided. It will keep under review the impact on members from an equality and diversity point of view.

Q10 Do you have any other comments on our Fines Policy? If so, please state what they are.

RESPONSES:

Solicitors Regulatory Authority

The IPS has responsibility for investigating failures to meet regulatory standards and imposing fines upon regulated persons (individuals and entities). The proposals put forward by the IPS in the consultation paper sets out a strong case to increase their internal fines for regulated persons, and in our view, provides for a robust framework for determining fines, which ensures that the level of fines will both be consistent and proportionate.

We consider that the proposals should also increase the deterrent value of the financial penalties.

The seriousness of the conduct, the aggravating factors, the mitigating factors and the means of the regulated person who has benefited from the conduct will all need to be considered. We agree that the benefit of encouraging the Disciplinary Tribunal to do this as part of a step-by-step approach is the transparency of the process and the opportunity to maximise consistency in the imposition of penalties.

Legal Services Consumer Panel

(IPS has included these comments here as appropriate to question 10. They were part of the opening overview by the LSCP)

The Panel welcomes this consultation on the IPS's powers to fine members in breach of regulations. We see this as an opportunity to make sanctions more consistent with other legal service providers to ensure that consumers of chartered legal executives' services perceive them as regulated effectively and therefore safe to use.

The Panel agrees with the proposed fine amounts of £50 million for CILEx Practitioners and Authorised Managers, and a maximum fine of £250 million for Authorised Bodies. In our view, these should be sufficient to eliminate any financial gain or benefit from non-compliance, and it should change the individual's behaviour and deter others.

We do not support an increase in fine for CILEx members from £3,000 to £5,000. Discriminating between reserved and unreserved activities in this way is hard to justify when looked at from a consumer detriment perspective. Such an upper limit potentially could be less than the illicit gains from this activity and fail to influence the behaviour of the individual concerned or deter others. The limit for reserved and unreserved legal activities should be the same.

Inconsistent sanctioning and appeal regimes across the approved regulators was a key finding of the LSB's recent survey of current practice. Should the IPS proposals go ahead, it would remain the case that SRA and IPS authorised individuals and entities could be fined differently for the same offence.

Overall we support the approach to the 'determining factors', in particular the focus on consumer outcomes. It will be important for IPS to apply this in the context of each case, for example by treating severe detriment for a small number of people as seriously as a small detriment for a large number of people.

This consultation exercise should give cause for IPS to look again at its overall sanctioning and appeals regime in light of the LSB's report. In particular, its inability to impose any fine without recourse to the Disciplinary Tribunal risks acting as a disincentive to punish for lesser offences.

IPS RESPONSE Q10.

IPS welcomes the overall support for the fines proposals and the determining factors.

IPS has taken into consideration the upper limit fine for CILEx individuals and agrees that the limit should be increased.

IPS has the power to enter into consent agreements that allow decisions to be made without full disciplinary tribunal hearings.

IPS notes the comments made about the potential for disparity between reserved and unreserved activity. The change in the upper limit for members will support the work towards consistency.