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***Lawyer Disciplinary Processes: An Empirical Study of Solicitors' Misconduct Cases in England and Wales in 2015***

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*The Legal Services Act 2007 effected major changes in the disciplinary system for solicitors in England Wales. Both the practice regulator, the Solicitors Regulation Authority, and a disciplinary body, the Solicitors Disciplinary Tribunal, were reconstituted as independent bodies and given new powers. Our concern is the impact of the Act on the disciplinary system for solicitors. Examination of this issue involves consideration of changes to regulatory institutions and the mechanics of practice regulation. Drawing on Foucault's notion of governmentality, empirical evidence drawn from disciplinary cases handled by the SDT and the SRA in 2015 is used to explore potentially different conceptions of discipline informing the work of the regulatory institutions. The conclusion considers the implications of our findings for the future of the professional disciplinary system.*

## 1. INTRODUCTION

The Legal Services Act 2007 (LSA) intended to precipitate a revolution in the regulation of legal services in England and Wales. The main purpose of the Act was to achieve deregulation and liberalisation of the legal services market. Its signal policy was to recognise organisations allowing non-lawyer investment and management. This created a legal services market regarded as 'one of the most liberalised in the world',<sup>1</sup> but also demonstrated an intention that large corporations rather than small firms of lawyers should provide mainstream legal services to ordinary consumers. The de-regulatory process was furthered by ending the regulatory role of professional bodies and completely reconfiguring the regulatory infrastructure. Various agencies created under the Act promoted a specific kind of regulation used in the financial services industry. It seeks to shift regulatory focus, from rules to risks, and uses management responsibility to affect business organisation, governance and strategy.<sup>2</sup> The LSA formed part of a wider process of public and private sector reform, designed to bring legal services within the ambit of the regulatory state<sup>3</sup> by establishing 'responsive regulation'; arrangements geared to symbiotic relationships between state regulation and private orderings.<sup>4</sup> This article explores what impact neoliberal regulatory methods had on lawyers' disciplinary systems, a key part of a professionalised legal services market.

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<sup>1</sup> C Binham 'UK Legal Services Act leads to creation of new business models' *Financial Times* 9 October 2014; available at <https://www.ft.com/content/8866e9ea-39f9-11e4-83c4-00144feabdc0> (accessed 20 March 2018).

<sup>2</sup> J Gray and J Hamilton *Implementing Financial Regulation: Theory and Practice* (Chichester: Wiley and Sons, 2006).

<sup>3</sup> M Moran 'The Rise of the Regulatory State in Britain' (2001) 54 *Parl Aff* 19.

<sup>4</sup> I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992).

The influence of regulation on individual behaviour is a theme of Foucault's work on the transition in criminal sanctions from physical punishment to confinement.<sup>5</sup> He observed that the introduction of the prison provided the opportunity to use novel technologies of surveillance.<sup>6</sup> He argued that the techniques of hierarchical observation, normalising judgment and their combination in assessment procedures, which he called 'the examination'<sup>7</sup> pervade social institutions aiming to affect individual subjectivity. Foucault's theory of governmentality proposes that the self-regulation of the subject using such techniques, aims to negate the need for external regulation. Their manifestation in both state regulation and attempts to instil self-government on the population<sup>8</sup> is particularly marked in initiatives across liberal and neoliberal economies. Institutions aim to normalise conduct conducive to enterprise, thereby affecting individual self-identity and subjectivity.<sup>9</sup> Foucault argued that three factors determine the character of systems of social discipline, the system's underlying purposes, its social institutions and the available technology of regulation,<sup>10</sup> is particularly relevant to the regulation of what was, until 2007, a professionalised legal services market.

The LSA effected fundamental change in the first two of Foucault's three factors, philosophy and institution. The philosophy was set out in the first section of the Act declaring, inter alia, the regulatory objectives of promoting competition and the consumer interest. The institutional changes made by the LSA were intended to reflect a de-regulatory agenda. The central thrust was abolition of the regulatory role of professional self-regulating organisations. A number of new regulatory institutions were therefore created. These included a Legal Ombudsman (LeO) to receive complaints against all regulated lawyers<sup>11</sup> and a government agency, the Legal Services Board (LSB), answerable to government for achieving the Act's regulatory objectives. The levers of changes to practice regulation were in the hands of new 'front line regulators' constituted independently of the professional bodies. A key mechanism of change was the LSB's oversight of and influence over these institutions. Those responsible for the three main areas of regulation for solicitors, the largest legal profession in England and Wales, were the Solicitors Regulation Authority (SRA) and the Solicitors Disciplinary Tribunal (SDT). The SDT was constituted as a professional institution in 1974 to hear misconduct allegations against individual practitioners. It changed little after the LSA, being relatively insulated from the LSB's influence. Its *raison d'être* is, however, potentially at odds with the rationale of the LSA and the regulatory direction taken by the SRA. This increasingly reflects a changing logic of regulation.

Freidson identified three regulatory logics and their complementary mechanisms: professionalism (collegial control of markets in a spirit of public service), perfect competition

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<sup>5</sup> M Foucault *Discipline and Punish: the Birth of the Prison* (trans. A Sheridan) (New York: Random House, 2nd edn, 1995).

<sup>6</sup> Exemplified by Jeremy Bentham's Panopticon, a prison in which inmates could be seen but did not know when they were being observed, J Bentham *Panopticon; or, The Inspection House* (Dodo Press, 2008).

<sup>7</sup> Foucault above n5, p 170.

<sup>8</sup> M Foucault *Security, Territory, Population: Lectures at the Collège de France 1977-1978* AI Davidson (ed) G Burchell (trs) (Basingstoke: Palgrave Macmillan, 2007) p 88.

<sup>9</sup> D Knights 'Governmentality and Financial Services: Welfare Crises and the Financially Self-Disciplined Subject' in G Morgan and D Knights (eds) *Regulation and Deregulation in European Financial Services* (London: Palgrave Macmillan, 1997), J Waring 'Adaptive regulation or governmentality: patient safety and the changing regulation of medicine' (2007) 29(2) *Sociology of Health and Illness* 163.

<sup>10</sup> Above n 5.

<sup>11</sup> LSA, Sch 4, Pt I. and see <http://www.legalombudsman.org.uk> (accessed 22 March 2018).

(a free market with minimal regulation) and corporate bureaucracy (maximising the advantages of effective management).<sup>12</sup> The SRA's regulatory strategy has gradually moved away from the policies of professionalism towards those promoting competition and corporate bureaucracy.<sup>13</sup> In terms of practice regulation, however, the forum for the 'modernisation' of legal services regulation is the modern law firm. The main focus has been on a process of ratcheting up the responsibility of law firms for regulation, exemplified by a rule book that addresses the employing organisation rather than the individual lawyer. This development was anticipated by strand of the legal ethics literature which advocated building the 'ethical infrastructure' of conventional law firms as a way of addressing lawyer misconduct.<sup>14</sup> The legal office is also viewed as a site of control of the individual in the organisational theory literature, where more subtle mechanisms of control are described.<sup>15</sup>

Brown and Lewis argue that processes of observation, normalisation and examination, processes identified by Foucault as features of modern disciplinary systems, are particularly effective in legal workplaces.<sup>16</sup> Routines such as time recording potentially define the identity of workers even in sectors, such as the professions, characterised by collegiality and relatively autonomous work places. Through the process of normalisation the individual accepts subjection to their work role and consequent limitations on their autonomy. In this approach to regulation '[d]isciplinary power is not, or not just sporadic and spectacular, but regular and monotonous... the mundane, everyday, repeated patterns of activity which characterize processes of (self) organizing'.<sup>17</sup> The ability of institutions to perform a disciplinary function by affecting the behaviour of the individual employee depends on their capacity to provide more effective surveillance and control of regulated populations. The legal services market in England and Wales comprises different spheres of solicitors' practice. A broad division between corporate and 'private plight' clients, recognised in the literature,<sup>18</sup> is the basis of very different firm structures. Sole practitioners and small firm tend to operate in the private plight sphere and their partners are over-represented in the SDT. This is a challenge to a system of regulation based on theories of governmentality.

This article explores the development of the regulatory system of solicitors following the LSA. Our account begins by exploring the evolution of the regulatory system following the Act. We argue that the shift in the SRA's regulatory strategy towards corporate bureaucracy presents different concepts of discipline in the post-LSA regulatory regime. The themes of regulation and governmentality are examined using empirical data on the role of the SRA as a practice regulator and prosecuting authority and that of the SDT as adjudicator. In conclusion we consider how the nature of risk associated with particular activities of the regulated population might determine tools of governance.<sup>19</sup> We also consider whether the SDT, in

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<sup>12</sup> E Freidson *Professionalism: The Third Logic* (Oxford: Blackwell Publishers, 2001).

<sup>13</sup> A Boon 'Cocktails of Logics - Reform of Legal Services Regulation in England and Wales' in A Boon (ed) *International Perspectives on the Regulation of Lawyers and Legal Services* (Oxford and Portland, Oregon: Hart Publishing, 2017) p 209.

<sup>14</sup> T Schneyer 'Professional Discipline for Law Firms?' (1991) 77 *Cornell L Rev* 1, E Chambliss and DB Wilkins 'Promoting Effective *Ethical Infrastructure* in Large *Law Firms*: A Call for Research and Reporting' (2002) 30 *Hofstra L Rev* 691, C Parker, A Evans, L Haller, S Le Mire and R Mortensen 'The ethical infrastructure of legal practice in larger law firms: values, policy and behaviour' (2008) 31(1) *UNSWLR* 158.

<sup>15</sup> AD Brown and MA Lewis 'Identities, Discipline and Routines' (2011) 32(7) *OS* 871.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, p 888.

<sup>18</sup> J Heinze and E Lauman *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation, 1982).

<sup>19</sup> Gray and Hamilton, above n 2, p 9.

some ways a surprising survivor of the LSA revolution, performs a necessary function. As a remnant of a professional regime representing the physical, public and ceremonial dimensions of discipline, it arguably sits uneasily in a system based on neoliberal theories of regulation.

## 2. METHODOLOGY

Our data derives from material published by the SRA and material provided to us on the overall disposition of investigated cases during 2015. We also read the full published summaries of all 105 cases heard by the SDT 2015,<sup>20</sup> yielding data on 132 solicitor respondents.<sup>21</sup> While such records provide ‘an underutilised window’ on lawyer misconduct,<sup>22</sup> their form, and hence their usefulness, can vary greatly.<sup>23</sup> Hence, gaps remain in different aspects of the study.<sup>24</sup> The Statistical Package for Social Scientists was used to analyse data from the transcripts. Each line of the database represented one SDT case against one respondent and contained variables such as, age, sex, the charges, mitigation and outcome of the hearing. Quantitative and qualitative data from the SDT records provide both an overview of the process and insight into how the tribunal approached cases.<sup>25</sup> In addition to these two main sources of data, we used web searches on the fate of the firms from which respondents before the SDT came<sup>26</sup> and other demographic data.<sup>27</sup>

## 3. THE POST-LSA REGULATORY SYSTEM

### (a) Regulatory framework

In 2007 the Law Society established the SRA as the independent regulator for solicitors, responsible for developing the system of practice regulation; in Foucault’s terms the ‘technology’ of discipline. As practice regulator the SRA is responsible for admissions (including educational requirements), the conduct framework and the prosecution of misconduct. The LSA specifically provided that the SRA must not allow the Law Society to influence its regulatory strategy, which must be geared to supporting the eight regulatory objectives of the LSA.<sup>28</sup> These include conventional objectives of the professional regulation of lawyers, such as supporting the rule of law and promoting and maintaining adherence to professional principles but made explicit the need to protect and promote the interests of

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<sup>20</sup> At time of writing the case transcripts referred to in this article were available at <http://www.solicitortribunal.org.uk/judgment-search-results#search> (accessed 16 October 2017).

<sup>21</sup> This includes cases initiated before but concluded during 2015 but excludes those begun in but concluded after 2015. Note that all percentages cited in our report are valid percentages, that is, they are calculated by excluding missing data.

<sup>22</sup> RL Abel *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (New York: OUP, 2008) p 53.

<sup>23</sup> See, for example the use of case studies by Abel, *ibid*, and RL Abel *Lawyers on Trial: Understanding Ethical Misconduct* (Oxford: OUP, 2010) and a special issue of *Legal Ethics* (2012) 15(2).

<sup>24</sup> We were unable, for example, to reliably identify the ethnicity of respondents or to explore the reasoning behind SRA decisions not to refer cases to the SDT.

<sup>25</sup> But not rich analysis of grievance committee decision-making, advocated by NL Piquero, MS Meitl, EM Brank, JL Woolard, L Lanza-Kaduce and AR Piquero ‘Exploring Lawyer Misconduct: An Examination of the Self-Regulation Process’ (2016) 37 *Deviant Behav* 573, 582.

<sup>26</sup> These included the Law Society’s ‘Find a Solicitor’ database; available at <http://solicitors.lawsociety.org.uk>, (accessed 20 October 2017).

<sup>27</sup> Including, *The Law Society Trends in the Solicitors’ Profession Annual Statistics Report 2015* (London: The Law Society, 2016).

<sup>28</sup> LSA s.1(1) and see also s.1(3).

consumers and competition in the provision of services. Otherwise, regulators were required to promote regulatory activity that was transparent, accountable, proportionate, consistent and targeted only at cases in which action was needed.<sup>29</sup>

The SDT was originally established under the Solicitors Act 1974 'at the [Law] Society's request and in the public interest'.<sup>30</sup> It was introduced at the same time as the Law Society acquired power to make disciplinary rules and investigate their breach,<sup>31</sup> make account rules<sup>32</sup> and intervene in solicitors' practices.<sup>33</sup> The Act arguably marked the height of an age in which the ideology of professionalism prevailed. Even twenty years later Sir Thomas Bingham MR, canvassing reasons for striking a solicitor from the roll in *Bolton v The Law Society*,<sup>34</sup> identified 'the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth'.<sup>35</sup> The role of the SDT did not change following the LSA. Its power to strike respondents from the roll of solicitors, arguably the essential professional power,<sup>36</sup> was traditionally exercised when it was necessary to protect the integrity of the professional body. Inevitably, such exclusion often came long after harm had been suffered by consumers or others. The philosophy of regulation represented by such tribunals therefore appears to be at odds with the consumer orientated objectives of the LSA and with the broader interest of the state in 'markets which are fair, efficient, orderly and clean'.<sup>37</sup>

The LSA enhanced the powers of both the SDT and the SRA, but in a way that made them potential competitors for jurisdiction. The Act removed a restriction on the upper limit of fine the SDT could impose<sup>38</sup> but gave the SRA new powers to issue written rebukes and impose fines of up to £2,000 on individual practitioners. These new powers of sanction, albeit minor, potentially deflected cases from the SDT. This may have been relatively unproblematic had the LSA not also given the SRA rights to fine new entities created by the LSA, Alternative Business Structures (ABS), up to £250 million and individuals working in them up to £50 million. The discrepancy in the power to fine solicitor practitioners and entities and their employees appeared illogical, spurring the SRA to seek to extend its power to fine solicitors on the grounds of consistency.<sup>39</sup> If it were to be successful the SDT would effectively be left with striking off and suspension as its exclusive powers. The incremental extension of the SRA's powers therefore poses an existential threat to the SDT.

#### (b) Regulatory policy

The SRA promised a regulatory regime placing public and consumer interests at its heart.<sup>40</sup> It would overhaul regulatory practice and forge a new relationship with regulated parties, adopt

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<sup>29</sup> LSA s. 28(3).

<sup>30</sup> PA Leach, 'The New Look in Disciplinary Enforcement in England' (1975) 61 ABAJ 212.

<sup>31</sup> Solicitors Act 1974 s.30.

<sup>32</sup> Ibid s.32.

<sup>33</sup> Ibid s.35.

<sup>34</sup> [1994] 2 All E.R. 486.

<sup>35</sup> Ibid, 492e.

<sup>36</sup> M Jacob 'The strikethrough: an approach to regulatory writing and professional discipline' (2017) 37(1) Legal Stud 137

<sup>37</sup> A Tosh *The Regulators Experience* (Speech to World Trade Organisation symposium on cross border supply of services, Geneva, April 2005).

<sup>38</sup> Sch 16, s 49(d) amending Solicitors Act 1974 s 47(2)(c).

<sup>39</sup> The SRA wished for commensurate powers requiring a change to the primary legislation, see SRA *Consultation Paper: Proposal to increase the SRA's internal fining power* 2013; available at <http://www.sra.org.uk/sra/consultations/internal-fining-powers.page#download> (accessed 17 October 2017).

<sup>40</sup> SRA Handbook 2011 (as amended): Introduction, para 3.

risk-based strategies, a more proactive and preventative approach and ‘focus resources on problem firms’.<sup>41</sup> A significant step in the evolution of the new regime, publication of a new regulatory rulebook, occurred in 2011. The SRA Handbook retained six core duties in the previous code and added a further four primarily focused on running legal businesses. It presented these as ten mandatory principles defining ‘the fundamental ethical and professional standards that we expect of all firms (including owners who may not be lawyers) and individuals when providing legal services’.<sup>42</sup> As part of the Handbook, a new code of conduct reframed the rules in the previous code as ‘Outcomes’ to be achieved and ‘Indicative Behaviours’, examples of how they might be. The format represented a radical departure from the Solicitors Code of Conduct 2007, which was based on more conventional rules. This introduced some ambiguity in the behaviour expected of professionals since, in theory, there were various possible ways of achieving Outcomes.

The SRA Handbook resulted from several pressures. Prior to the LSA the Law Society had asked consultants to advise on regulation; both advocated a form of ‘principles based regulation’, the system used to regulate the financial industry.<sup>43</sup> Further, the oversight regulator, the LSB, specified that licensing authorities for ABS companies potentially owned and run by non-lawyers, should also use that system. The Law Society had reservations about the SRA proposal to use the system as a framework for regulating ABS *and* individual solicitors. It argued that under rule-based systems:

‘...solicitors are able to rely without hesitation upon uniformity of practice across the profession where it comes to issues such as conflict, confidentiality and undertakings. This enables routine commercial transactions to proceed smoothly and economically. This requires a set of quickly and easily enforceable obligations that sanction any failure to adhere to professional obligations... [T]he proposed rules as they currently stand contain a myriad of reporting requirements. We are concerned that this will mean that the SRA will be overwhelmed with reports under the various different rules as solicitors either misinterpret the requirements or take a risk averse approach to reporting.’<sup>44</sup>

Despite these reservations the SRA went ahead. Thus, traditional solicitors’ firms, even sole practitioners, were required to appoint a Head of Legal Practice and a Head of Finance,<sup>45</sup> compliance posts required by the LSA for ABS.

The SRA’s system imposed significant new responsibilities on firms for regulating the conduct of the solicitors they employed. One of the ten principles was that ‘[you] comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner’.<sup>46</sup> A new chapter, ‘You and Your Regulator’, appeared in the Handbook’s Code of Conduct.<sup>47</sup> This included sub-rules from the previous

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<sup>41</sup> See e.g. SRA *The Architecture of Change – Part 2* (2010) para 16; available at [www.sra.org.uk/documents/sra/consultations/handbook/october-consultation-paper.doc](http://www.sra.org.uk/documents/sra/consultations/handbook/october-consultation-paper.doc) (accessed 4 May 2018).

<sup>42</sup> Above n 40, para 3 (a).

<sup>43</sup> Lord Hunt of Wirral *The Hunt Review of the Regulation of Legal Services* (London: Law Society, 2009) and N Smedley *Review of the Regulation of Corporate Legal Work* (London: Law Society, 2009), although Smedley proposed it for corporate firms only.

<sup>44</sup> The Law Society *The Architecture of Change Part 2—consultation on the new SRA Handbook Law Society response* (London: Law Society, January 2011) p.4.

<sup>45</sup> LSA s.91.

<sup>46</sup> SRA Handbook. above n 40, Principle 7.

<sup>47</sup> SRA Code of Conduct 2011, Chapter 10.

code<sup>48</sup> requiring regulated parties to notify the SRA promptly of serious financial difficulty or failure to comply with or achieve the principles and other requirements of the Handbook<sup>49</sup> and to inform the SRA of serious misconduct.<sup>50</sup>

The subtle shift in regulatory method could be seen as a move from the regulatory logic of professionalism towards corporate bureaucracy. This, theoretically at least, offers regulators a range of different disciplinary technologies aimed at increasing employee commitment, motivation, performance and behaviour.<sup>51</sup> Within firms the possibilities include conventional methods such as hierarchical management and surveillance, but might also include incentives.<sup>52</sup> These techniques can be seen as part of a process ‘responsibilisation’, an aspect of governmentality whereby regulated populations are encouraged to rationally choose new ways of conducting themselves.<sup>53</sup> External regulation increasingly assumes and builds on the responsibility of the regulated population. We see examples of this in requirements that entrants assess their own suitability to enter the profession, assess and confirm their own training needs and form their own continuing professional development programme.<sup>54</sup>

The changes outlined could be interpreted as a refinement of professional methodology, but proposals for education and training of solicitors suggest a decisive change in regulatory strategy. Professionalism uses an intensive and common initial phase of education and training to both select suitable individuals and socialise them into a collegial social group.<sup>55</sup> Individual discipline largely depends on personal self-regulation, group identification and peer pressure. Formal discipline, as represented by the SDT, is directed at irredeemable failures of the socialisation process. The SRA is adopting policies that incrementally move away from the collegial strategies of professionalism. Perhaps the most fundamental of these is the proposal that prospective solicitors need only pass a Solicitors Qualifying Examination (SQE). One of the espoused advantages of removing requirements to take prescribed undergraduate and vocational courses<sup>56</sup> is that future solicitors will begin their careers, not in traditional law firms, having taken law degrees, but in corporate employment or as beneficiaries of corporate patronage, having an undergraduate degree *or equivalent* experience.<sup>57</sup> This continues a development already seen in the form of bespoke, firm

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<sup>48</sup> Ibid R.20.03 and R.20.04.

<sup>49</sup> SRA Code of Conduct 2011, O(10.3).

<sup>50</sup> Ibid, O(10.4).

<sup>51</sup> J Collier and R Esteban ‘Corporate social responsibility and employee commitment’ (2007) 16(1) Business Ethics 19.

<sup>52</sup> For example, Axiom, promotes itself as being a global leading alternative legal services provider, at the forefront of a new era of legal services. It rewards employees with a form of equity, stock awards, for demonstrating ‘good client facing skills’ and ‘corporate citizenship’, doing away with partners and billing targets, see <https://www.axiomlaw.com> (accessed 23 March 2018). See also Binham, above n 1.

<sup>53</sup> T Lemke ‘Foucault, Governmentality, and Critique’ (2010) 14(3) Rethinking Marxism 49.

<sup>54</sup> SRA *Annual Review 2015/16* (London and Birmingham: SRA, 2016); available at <http://www.sra.org.uk/sra/how-we-work/reports/annual-review/annual-review-2015-16.page> (accessed 20 October 2017).

<sup>55</sup> MS Larson *The Rise of Professionalism: A Sociological Analysis* (Berkeley CA: University of California Press, 1977) and Freidson, above n 12.

<sup>56</sup> SRA *A New Route to Qualification: The Solicitors Qualifying Examination* (2017); available at <https://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page#download> (accessed 4 May 2018)

<sup>57</sup> The SQE will ‘validate different routes to qualification, including ‘earn as you learn’ pathways such as apprenticeships’, see news release ‘SRA announces new solicitors assessment to guarantee high standards’ 25 April 2017; available at <https://www.sra.org.uk/sra/news/press/sqe-ensure-high-consistent-standards.page> (accessed 17 March 2018).

sponsored vocational courses.<sup>58</sup> It potentially replaces the professional ideal of a common educational experience with induction into the culture of a specific organisation.

(c) Disciplinary tribunal references and alternative disposals

In terms of practice regulation, references to the SDT are the tip of a much larger framework. Unlike many lawyer discipline systems,<sup>59</sup> the solicitors system does not deal with consumer complaints, which are the province of the LeO. Nevertheless, in 2015/16 the SRA received around 11,000 reports about solicitors and businesses it regulates.<sup>60</sup> Approximately 9.6% (1,079) of these were referred to LeO,<sup>61</sup> but the remainder were assessed in order to decide whether or not there should be further investigation, usually by examination of the practice files and accounts, by the SRA's Forensic Investigation Unit (FIU).<sup>62</sup>

Although the Law Society had used a power to impose conditions on practising certificates as a way of dealing with some cases of misconduct, the new powers to rebuke or fine extended its options. From 2007 the SRA also made more extensive use of regulatory settlement agreements (RSAs) under which solicitors could even agree to being struck off, denying them their livelihood. In 2015 restrictions were imposed on practising certificates in 24 cases.<sup>63</sup> Additionally, the SRA upheld 286 allegations resulting in 140 letters of advice, 26 warnings, 43 rebukes or reprimands and 16 fines.<sup>64</sup> A further 199 allegations were referred to the SRA's legal directorate with the intention that disciplinary proceedings should be issued. The fact that these referrals resulted in only 105 cases is explained by the fact that some were rescinded, or led to a RSA, or that multiple investigations led to just one hearing.<sup>65</sup>

The SRA claims to draw upon a wide range of sources in identifying risks to regulatory outcomes, 'including reports we receive, intelligence-gathering while supervising firms, contacting consumers directly and monitoring markets and the economy'.<sup>66</sup> The majority of reports the SRA received for the year November 2015 to October 2016, came from members of the public and, at 56.2% (n. 6,337), was almost double that received from the profession (23.1%, n. 2,602).<sup>67</sup> The SRA's internal sources made up 11.6% (n. 1,304) of referrals, half of that received from the profession.<sup>68</sup> The balance (c.10%) comprised reports from

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<sup>58</sup> See, for example, Legal Week *City LPC: The Elite Mould* 25 Oct 2004; available at <http://www.legalweek.com/sites/legalweek/2004/10/25/city-lpc-the-elite-mould/?slreturn=20180404061330> and Law Society Gazette *Controversial City LPC consortium splits as firms opt for different providers* 25 March 2004; available at <https://www.lawgazette.co.uk/news/controversial-city-lpc-consortium-splits-as-firms-opt-for-different-providers/41684.article> (accessed 4 May 2018).

<sup>59</sup> LC Levin, 'Building a Better Lawyer Discipline System: The Queensland Experience' (2006) 9 *Legal Ethics* 187.

<sup>60</sup> SRA *Annual Review 2015/16*, above n 54, p 30.

<sup>61</sup> *Ibid*, 33.

<sup>62</sup> The Unit carries out the SRA's investigatory function, see <http://www.sra.org.uk/sra/equality-diversity/impact-assessments/forensic-investigation.page> (accessed 16 October 2017).

<sup>63</sup> Freedom of Information Request SRA/0188.

<sup>64</sup> Freedom of Information Request SRA/0174.

<sup>65</sup> *Ibid*.

<sup>66</sup> SRA *SRA Regulatory Risk Framework* (SRA, 2014) p 3; available at <http://www.sra.org.uk/risk/risk-framework.page> (accessed 23 March 2018).

<sup>67</sup> According to the SRA *Annual Review 2015/16*, above n 54, p 31 the SRA receives around 11,000 reports per annum from the profession, e.g., compliance officers or solicitors, the public, the police and the courts. We contacted the SRA and asked for a detailed breakdown of the reporting figures, which they provided via email on 12<sup>th</sup> April 2018.

<sup>68</sup> SRA email, *ibid*. The remaining sources of reports to the SRA came from anonymous sources (1.7%), government departments (1.4%), the police (0.9%), insurers (0.5%), banks (0.4%), other regulators (0.3%), courts (0.2%), the press (0.1%), trainees (0.1%) and students (0.1%).

institutions, the main provider being the LeO (3.4% of the overall total). The record of SDT cases indicate four main ways in which respondents came to attention. First, in 35 of the 105 cases prosecution followed investigatory audits of accounts and files by FIU. It was not always clear what prompted these investigations, but they could have resulted from solicitors' failure to comply with regulatory requirements such as providing information or filing accounts. Second, in 31 cases the matter was referred by the firm or by the party guilty of misconduct. Third, in 17 cases the matter was reported by clients (for example, mortgage lenders) insurers, opponents, other solicitors or the Legal Ombudsman (LeO). Finally, there were 15 cases involving criminal convictions where the SRA may have been alerted by news reports or judicial referral.

Auditing and self/firm reporting could provide evidence of the success of the SRA's regulatory strategy, such as the 35 cases (33%) where prosecution followed investigatory audits of accounts and files by FIU. While in most cases it was unclear what triggered the audits, they could be prompted by failure to comply with new information requirements.<sup>69</sup> These were introduced to enable the SRA to assess risks, identify failure to meet the outcomes<sup>70</sup> and deal with instability or financial failure, fraud and dishonesty.<sup>71</sup> A clearer example of success is the 31 (29.5%) cases in which misconduct was reported by the firm, or their reporting accountants,<sup>72</sup> or by the guilty party. These are arguably evidence of the success of the introduction of compliance posts and reporting requirements.

#### (d) Prosecution

Although consumers can bring cases to the SDT they cannot obtain compensation. This, combined with the difficulty of bringing a case, is probably why nearly all cases are prosecuted and presented by the SRA. In 2015/16 over 5,500<sup>73</sup> cases sent for investigation by the SRA's Risk Centre Assessment Team<sup>74</sup> resulted in only 129 referrals by the SRA to the SDT.<sup>75</sup> Referring only 2.3% of investigated cases might manifest excessive concern about the risk of losing.<sup>76</sup> In 2015 the SRA succeeded in all but two of the cases it prosecuted before the SDT<sup>77</sup> and in criminal matters moderate levels of dismissal are taken as signifying that appropriate risks are taken.<sup>78</sup> A second explanation of the large gap between reports and cases, and the general long term decline in the caseload of the SDT,<sup>79</sup> is that the SRA made appropriate use of its disciplinary powers to make alternative disposals.

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<sup>69</sup> See, for example, *Malcolm Ronald Hannaford* (11085-2012).

<sup>70</sup> *SRA Architecture of change*, above n 41, para 157.

<sup>71</sup> *Ibid*, para 158.

<sup>72</sup> The firm's reporting accountants reported in four cases, see, for example, *William John Owen* (11068/2012) and *Jeremy Simon Barker & Michelle Jane Newton* (11327-2015).

<sup>73</sup> *SRA Annual Review 2015/16*, above n 54, p 33.

<sup>74</sup> See <http://www.sra.org.uk/risk/reports-assessment-method.page> (accessed 16 October 2017).

<sup>75</sup> *SRA Annual Review 2015/16*, above n 54, p 17.

<sup>76</sup> M Lonakan 'Self-regulation in the Canadian securities industry: Funnel in, funnel out, or funnel away?' (2105) 43 *IJLCJ* 456.

<sup>77</sup> In the first the charges were not made out (*Ademuyiwa Olusesan Ogunnowo* (11317/2015) and in the second the tribunal complained that the prosecution had not matched the evidence to the charges against multiple respondents, *Heer Manak Solicitors, Kulwant Singh Manak, Robin Heer, Balbir Singh Dahil, Pritpal Chahal, Rajbinder Kaur Dhillon* (11165-2013).

<sup>78</sup> A Ashworth 'Ethics and Criminal Justice' in R Cranston (ed) *Legal Ethics and Professional Responsibility* (Oxford: Oxford University Press, 1995).

<sup>79</sup> The *SRA Annual Review 2015/16*, above n 54, p 37 notes that the 129 SDT referrals in 2015/16 were a 34% increase in cases referred in the previous two years (2014/15 saw 96 referrals and 2013/14 saw 97) but that this increase was a result of a full case review rather than being reflective of a spike in concerns for this year.

#### e) Misconduct

In 2015, 66 of the 105 cases (62.9%) presented to the SDT involved financial impropriety. These cases could be broadly divided into cases where the solicitor acted against the client's interests and cases where the solicitor was implicated, deliberately or not, in a client fraud. Of the 25 cases involving fraud in our sample, 19 involved solicitor fraud on clients. Actions against the best interests of clients may also involve a breach of the Solicitors' Accounts Rules (SAR). Of the 66 cases of financial impropriety, 40 (60.6%) were simply breaches of the SAR. This preponderance of cases is probably because SAR offences were generally strict liability and the easiest to prove using accounting records. The SAR required that all client money was held in a separate client account until it could be legitimately transferred to the solicitor's office account on delivery of a bill.<sup>80</sup>

Using client money to pay office expenses or to fund another client's matter, a practice known in bookkeeping as 'teeming and lading', occurred in several cases, generally when firms suffered cash flow problems.<sup>81</sup> Such conduct showed reckless disregard of the risk of losing the client's money if, eventually, the firm collapsed. Accordingly, withdrawal from client account for any purpose other than payment of a delivered bill or to return it to a client, was treated as a serious breach. Nevertheless, the SRA dealt with some breaches of the SAR in which there was no dishonesty under a RSA rather than by reference to the SDT.<sup>82</sup>

There were only six cases in which the respondent was implicated in their client's fraud. In four of these they acted knowingly, but in a further two they were ignorant of their clients' intentions. These relatively small numbers fail to highlight significant concern regarding active solicitor involvement in money laundering. In one notorious case a sole practitioner was caught in the Financial Conduct Authority's Operation Cotton, which examined the activities of land banking companies.<sup>83</sup> Other examples occurred when solicitors apparently allowed their client account to be used as a bank, that is, without there being an underlying transaction. In such cases there may be a suspicion of money laundering but no clear proof of illegal activity.<sup>84</sup> Although the SDT identified this issue in 2002<sup>85</sup> the code of conduct only specifically addressed it 2011.<sup>86</sup>

Another relatively large category of case indirectly involved firms unable to secure professional indemnity insurance (PII). This followed from the SRA's 2011 decision to close the Assigned Risks Pool, the safety net for solicitors' firms unable to obtain client liability insurance on the open market.<sup>87</sup> Eight of the 105 cases, involving 13 respondents, concerned

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<sup>80</sup> SRA Solicitor Account Rules, 13 and 17; see

<http://www.sra.org.uk/solicitors/handbook/accountsrules/part4/content.page> (accessed 17 October 2017).

<sup>81</sup> See for example *Selcuk Karatas* (11258/2014), *Richard Arnold Wilkes* (11281-2014) and *Gerard Christopher Mann and Katherine Jane Bradford* (11251-2014).

<sup>82</sup> *Beeley, Nancy Kan-Hai* (Agreement 2nd November 2016) (deficit of nearly £50,000 on client account remedied after a month – respondent rebuked and fined £2,000).

<sup>83</sup> *Dale Robert Walker* (11254-2014), see further the FCA 'Eight convicted for roles in unauthorised collective investment scheme' 1 June 2015; available at <http://www.fca.org.uk/news/press-releases/eight-convicted-role-unauthorised-collective-investment-scheme> (accessed 16 October 2017).

<sup>84</sup> See, for example, *Mark Stanley Agombar* (111092-2012), fined £15,000 and *Daniel Gidon Zysblat* (11222-2014), suspended for two years.

<sup>85</sup> *Michael William Robert Wood & Alan Burdett* (8669-2002).

<sup>86</sup> SRA Code of Conduct 2011, Rule 15, note (ix) and see SRA Account Rules r.14.5.

<sup>87</sup> The ARP was abolished in October 2013. See, SRA Indemnity Insurance Rules 2012 as amended by the SRA Indemnity Insurance Rules 2013; available at <http://www.sra.org.uk/solicitors/handbook/indemnityins/content.page> and R Collins 'Why the SRA Replaced

solicitors charged with PII connected offences: making false insurance declarations,<sup>88</sup> failing to obtain insurance, failing to notify the SRA of the firm entering into an extended indemnity period or failing to close their businesses within the specified cessation period.<sup>89</sup>

The balance of the SDT's 2015 caseload comprised cases in which respondents were convicted of criminal offences prior to the SDT hearing. These cases involved a disparate range of offences, but one category seemed reasonably clear: misleading others about mistakes. Cases included those against partners who had concealed mistakes from clients by, for example, faking emails to the court having failed to list a case,<sup>90</sup> or misled them about the stage their case had reached.<sup>91</sup> In similar cases involving associate solicitors, failure to register a charge,<sup>92</sup> missed court deadlines<sup>93</sup> or forged letters and medical reports,<sup>94</sup> the respondents also concealed mistakes from their firm. Another small category of case involved solicitors conspiring to assist illegal immigration<sup>95</sup> and misleading the court in litigation proceedings.<sup>96</sup>

It has been seen that the misconduct considered by the SDT in 2015 largely involved financial impropriety, from fraud to inadequate book-keeping, which may or may not involve dishonesty. A smaller category of cases potentially involved other kinds of dishonesty such as misleading clients or the courts. Finally, a residue involved a breach of the requirement for professional indemnity insurance, which may or may not involve dishonesty. In considering whether these kinds of cases are due to regulatory failings, and if so the nature of such failings, it is helpful to consider the offender profile.

#### (f) Respondent profiles

The profile of respondents appearing before the SDT in 2015 supports some generalisations regarding risk factors. Graph 1, depicting the age of the 132 respondents before the SDT, suggests that the likelihood of appearance before the SDT peaks in middle age. It is important to note that this impression can be misleading for two reasons. The first is that offences can occur many years before misconduct is discovered. In 34 cases, over a quarter of the whole, the date of the first act of misconduct recorded in the transcript, what we have called the first infraction date (FID), occurred within the first ten years of practice and in a further 31 cases within 11 to 20 years PQE. The second reason concerns late admission. The current mean age for first admission to the Roll is 29.5<sup>97</sup> but large numbers of respondents were admitted late: 21 (17.5%) when they were aged between 30 and 39, 14 (11.7%) when they were between 40 and 49 and three (2.5%) when they were 50 or over.

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the Assigned Risks Pool' LSG 21 July 2011; available at <http://www.lawgazette.co.uk/analysis/why-the-sra-replaced-the-assigned-risks-pool/61455.article> (accessed 16 October 2017).

<sup>88</sup> *Christakis Pittordou* (11316-2014), failure to disclose investigation by SRA in application for PII.

<sup>89</sup> See, for example, *David Alan Eager* (111300-2014), *Ian Robert Gannicott* (11308-2014), *Justin Philip Huntly Nelson* (11304-2014) and *Rebecca Sabena Asghar, Mohammed Ekramulhoque Mazumder & Mohammed Mazibur Rahman* (11333/2015).

<sup>90</sup> *Matthew Albert Timmis* (11193-2013), fined £10,000.

<sup>91</sup> For example, *Duncan John Dollimore* (11303-2014) and *Mark Christopher Ungood Davies* (11345-2015).

<sup>92</sup> *Eve Clare Carlile* (11247-2014).

<sup>93</sup> *Duncan Hugh Ranton* (11263-2014).

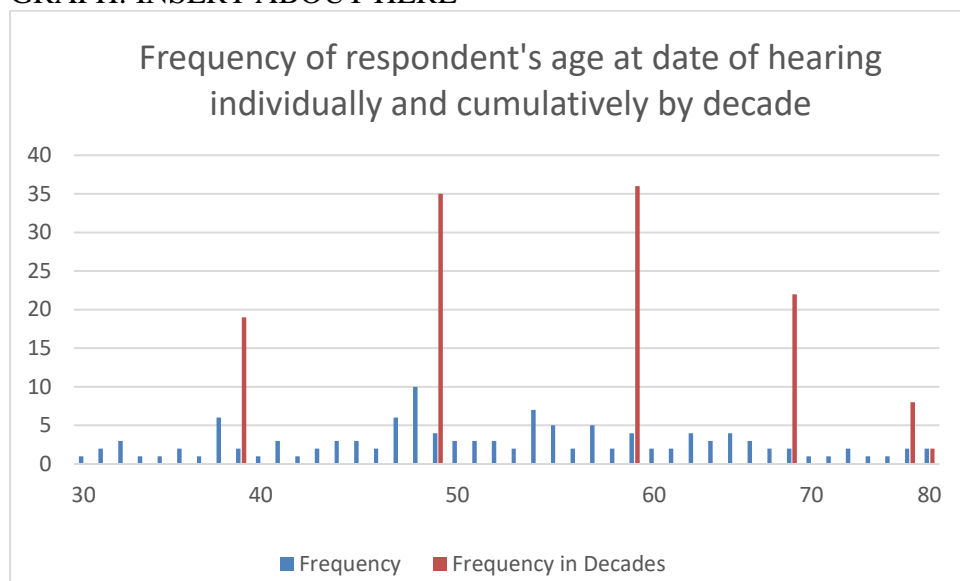
<sup>94</sup> *Claire Louise Tunstall* (11289-2014).

<sup>95</sup> See, for example, *Chika Emmanuel Ike-Michael* (11233-2014), struck off, *Nazakat Ali* (11275/2014), struck off and *Syed Tanweer Akhtar & Benny Thomas* (11262-2014), *Akhtar* was reprimanded and *Thomas* was struck off.

<sup>96</sup> See for example, *William John Gregory Osmond* (11355/2015) and *Paul Geoffrey Dean Smith* (11358/2015).

<sup>97</sup> The Law Society, above n 27, p 46.

GRAPH: INSERT ABOUT HERE



In the majority of cases we were able to identify the practices that respondents came from.<sup>98</sup> The largest organisation at which a respondent worked consisted of 60 partners,<sup>99</sup> but this was exceptional. Over 70% of SDT cases were against respondents from sole or small practices, those with four partners or fewer. Table 1 appears to support the contention that principals, sole practitioners and partners, are disproportionately engaged in misconduct compared to their number in the general population of solicitors. In 2015 partners or their equivalent<sup>100</sup> comprised 43% (n.57) of respondents but only 31.5% of the total population of practising solicitors, and sole practitioners 23.5% of SDT respondents (n.31) but only 4.6% of the population of practising solicitors. These data suggest a negative association between the size of firm in which respondents were employed and appearance before the SDT.

TABLE 1: INSERT ABOUT HERE (Table 1: Respondents’ employment status compared with number with that status in the general population)<sup>101</sup>

	General Population		SDT	
Sole Practitioners	n.4,157	4.6%	n.31	23.5%
2—4 Partners	n.8,885	9.8%	n.40	30.3%
5—10 Partners	n.4,951	5.4%	n.7	5.3%

<sup>98</sup> We identified 32 sole practices and 44 partnerships, leaving 29 firms unaccounted for. Sole practitioners were identifiable from SDT records and other partnership data. We also gleaned data from the firm’s website, the Law Society’s “find a firm” database; available at <http://solicitors.lawsociety.org.uk> and the SRAs “Law Firm Search”; available at <http://www.sra.org.uk/consumers/using-solicitor/law-firm-search.page> (accessed 20 October 2017). These sources provide details of the situation in 2015, rather than the time at which the offences occurred.

<sup>99</sup> Based in the London office of Fieldfisher LLP. It was a partner at the London office who was brought before the tribunal, see *Bartholomew Michael John Harte* (11329-2015).

<sup>100</sup> Respondents use various new terminology, such as ‘director’ or ‘equity member’.

<sup>101</sup> The Law Society, above n 27, p 29, Table 4.3.

11—25 Partners	n.3,531	3.9%	n.6	4.5%
26—80 Partners	n.4,102	4.5%	n.4	3%
80+ Partners	n.7,225	7.9%		
Associates/Assistants	n.43,203	47.4%	n.36	27.3%
Others	n.15,008	16.4%	n.8	6.1%
Total	91,062	100%	132	100%

In 19 cases of the 105 cases in our sample, more than one member of staff was involved in alleged misconduct: one case involved six co-respondents from the same firm,<sup>102</sup> one involved five (one of which was a recognised body), three involved three and 14 cases involved two. In two of these cases employers were held responsible for failing to ensure staff complied with the code of conduct.<sup>103</sup> A follow-up search of firms established that nearly 62% (n.58) of the 105 firms associated with respondents in 2015 became defunct.<sup>104</sup> The cause of this high figure may be that appearance before the SDT was either a symptom of practice breakdown or a result of key personnel being struck off.

An explanation of why disciplined lawyers come from small firms is that they are targeted by regulators and do not respond adequately.<sup>105</sup> While there is limited evidence of bias against small units, reviews by or for the SRA lend credence to this hypothesis. In 2008 an independent review found probable institutional racism in the selection of black and minority ethnic (BAME) solicitors for disciplinary prosecutions.<sup>106</sup> In 2014, the John report suggested non-discriminatory reasons why BAME solicitors were more likely to appear in disciplinary cases.<sup>107</sup> Whereas, on average, white solicitors set up on their own after 19 years of practice, BAME solicitors, motivated by frustration, lack of career opportunities or a desire to serve their community, went solo six years after qualification.<sup>108</sup> The report suggested that these kinds of sole practices were more likely to be monitored by the SRA<sup>109</sup> and not to have the resources to “ensure best practice and insulate themselves against litigation”.<sup>110</sup> Moreover, the lack of experience of the principals meant that, once challenged, they were more likely to come into conflict with the SRA. John found disproportionate treatment of BAME solicitors at three stages of the regulatory process. They were more likely to have cases raised or complaints registered against them, to be investigated, and be severely sanctioned (on which

<sup>102</sup> Three partners, two assistant solicitors and their firm, *Heer Manak Solicitors et al*, above n 80.

<sup>103</sup> *Joe Ezaz, Darren James Dale & Richard Spector* (11151-2013) and *Alexander Henry Bevan & Guy Robin Hollebon* (11236/2014).

<sup>104</sup> The percentages quoted here are valid percentages based on a total population of 94 firms. Firm information was missing in 11 cases.

<sup>105</sup> LC Levin ‘The Ethical World of Solo and Small Firm Practitioners’ (2004) 41 Hous LR 309.

<sup>106</sup> Lord Ouseley found institutional racism highly probable, see *Independent Review into Disproportionate Regulatory Outcomes for Black and Minority Ethnic Solicitors* (London: SRA, 2008); available at <http://www.sra.org.uk/documents/SRA/equality-diversity/ouseley-report.pdf> (accessed 20 October 2017).

<sup>107</sup> G John *Independent Comparative Case Review: The Solicitors Regulation Authority* (London: Gus John Consultancy Limited, 2014); available at <http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page> (accessed 20 October 2017).

<sup>108</sup> *Ibid*, p 13, para 1.30.

<sup>109</sup> *Ibid*, p 14, para 1.33.

<sup>110</sup> *Ibid*, p 11, para 1.26.

see below), when compared to white solicitors.<sup>111</sup> The report warned against jumping to conclusions of institutional racism, citing complex ‘socio-economic and political factors’ as contributors to disproportionality.<sup>112</sup>

One aspect of these findings, an absence of resources to ensure best practice and insulate against litigation, apply to many solo and small firm lawyers. However, it might be argued that these factors only call into question selection for prosecution decisions where dishonesty is not involved. Lack of resources may be relevant in some types of SDT case, for example, those where there is ‘borrowing’ from client account to pay office expenses or failure to obtain professional indemnity insurance. As we have seen, some of these cases, particularly, use of client money, can be labelled dishonest when motivation is difficult to determine.

Another factor that may be relevant in solo and small firm transgression is opportunity.<sup>113</sup> Junior lawyers and women are, it is said, under-represented because of structural position rather than propensity.<sup>114</sup> An important dimension is lack of oversight, a theory that explains the persistence of the generalisation that older males from small firms<sup>115</sup> or solo practices<sup>116</sup> are the subjects of lawyer discipline. On this view, offending is promoted by the nature of solo and small practice: lawyers with control of office finances, clients with whom lawyers have no continuing relationship and little incentive to serve diligently,<sup>117</sup> low pay, low levels of finance, inadequate staffing and sporadic supervision. These conditions provide motive, opportunity and classic conditions for white collar crime.<sup>118</sup> Health and dependency problems, often linked to depression or stress,<sup>119</sup> may also play a part. These are factors which lack of adequate workplace support probably exacerbate.<sup>120</sup>

The fact that a large population of active practitioners continues to produce relatively few disciplinary cases is consistent with earlier studies.<sup>121</sup> Indeed, our data suggests a long term reduction in SDT cases since the change of regulator. The fact that only a third of potential

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<sup>111</sup> Ibid, p 9, para 1.14. The Ouseley report, above n 106 and Pearn Kandola, *Solicitors’ Regulation Authority Commissioned Research into issues of disproportionality* 2010; available at <http://www.sra.org.uk/sra/equality-diversity/reports/research-disproportionality.page> (accessed 26 April 2018).

<sup>112</sup> John, above n 110, p 11, para 1.25.

<sup>113</sup> JW Coleman ‘Competition and Motivation to White-Collar Crime’ in N Shover and JP Wright *Crimes of Privilege: Readings in White Collar Crime* (NY, Oxford: OUP, 2001) 341.

<sup>114</sup> Abel above n 22, p 41, and see T Sklar, Y Taouk, D Studdert, M Spittal, R Paterson and M Bismark ‘Characteristics of Lawyers Who are Subject to Complaints and Misconduct Findings’ (20 January 2018); available at <http://dx.doi.org/10.2139/ssrn.2988411> (accessed 15 February 2018).

<sup>115</sup> HW Arthurs ‘Why Canadian Law Schools Do Not Teach Legal Ethics’, in K Economides (ed) *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998), L Haller ‘Solicitors’ Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis’ (2001) 13 Bond LR 1, F Bartlett ‘Professional Discipline Against Female Lawyers in Queensland: A Gendered Analysis’ (2008) 17 GLR 301 and Piquero *et al*, above n 25.

<sup>116</sup> See review of the literature in Abel, above n 22, ch 1, pp 54-56 and particularly, JE Carlin *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (New Brunswick: Rutgers University Press, 1962). M Davies ‘The regulation of solicitors and the role of the solicitors Disciplinary Tribunal’ (1998) 14 PN 143, found that over 50% of SDT respondents were sole practitioners but Piquero *et al* (ibid, p 575) suggest that the evidence from other jurisdictions is equivocal.

<sup>117</sup> Abel, above n 22, p 52.

<sup>118</sup> Ibid, pp 28-52.

<sup>119</sup> See further J Moore, D Buckingham and K Diesfield ‘Disciplinary Tribunal Cases Involving New Zealand Lawyers with Mental or Physical Impairment (2015) 22:5 Psychiatry, Psychology and Law 649.

<sup>120</sup> Indeed, LawCare, established as SolCare in 1997, focuses on helping with addiction, mental health and well-being issues; see <http://www.lawcare.org.uk/about-us> (accessed 16 October 2017).

<sup>121</sup> M Davies ‘The Regulatory Crisis in the Solicitors Profession’ (2003) 6:2 Legal Ethics 185, p 216.

misconduct cases reached the SDT may, however, be misleading. The evidence suggests that the many matters not referred to the SDT are now being processed and dealt with by alternative disposals rather than simply abandoned. Despite this, the high success rate at the SDT, similar to that of SROs, may suggest that the SRA is over-cautious in making prosecution decisions. This is a particular concern given the risk that those SDT cases in which solicitors were involved in client fraud could be the tip of a much larger iceberg.

The possibility of undetected fraud could lead to unexpected and large claims on the Compensation Fund maintained for victims of solicitors' fraud.<sup>122</sup> It could also lead to costly interventions by the SRA. In 2013 the SRA had to intervene in 47 practices.<sup>123</sup> Because there was no other source of funding the cost of intervention, around £17 million, fell on the Compensation Fund.<sup>124</sup> Since 2013 there has been a downward trend in the number of SRA interventions and thus savings to the compensation fund. So, in 2015/16 the authority intervened in 37 practices<sup>125</sup> with a cost to the compensation fund of £10.3m.<sup>126</sup> This may justify a more intensive focus on some parts of the market.<sup>127</sup> Our data suggests that size of firm is most consistently linked with misconduct cases before the SDT.<sup>128</sup> It is not known whether detection and investigation strategies in relation to small units are adequate or sufficiently proactive. At present, it appears that the only regulatory strategies that might target such problems are increased monitoring and increased information requirements on firms. Details are difficult to find and it may be that the techniques may not detect well organised fraudsters. Despite the apparent success of the reporting requirements we found little evidence in the transcripts of new or improved monitoring by the SRA.

Our assessment of the SRA's broad regulatory strategy suggests that it is ill-suited to the most salient problems of regulation. It is geared to organisations with significant infrastructure, not to the solo and small practices comprising the majority of organisations in which solicitors' work. One solution would therefore be to require a minimum size of practice, but this could severely restrict access to legal services, particularly in areas of low population density. Because of the difficulty of making private practice conform to its regulatory model, the SRA must also rely on the disciplinary apparatus inherited from the Law Society. This system, based on monitoring and investigation, was geared to the use of specific professional rules of conduct. The abandonment of a conventional rule book causes difficulty in both prosecuting cases and in adjudicating on cases brought to the SDT.

#### 4. ADJUDICATION

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<sup>122</sup> See *Hannaford*, above n 69, which resulted in a £700, 000 claim on the Compensation Fund.

<sup>123</sup> See page 3 of the SRA Regulatory Outcomes Reports for March (12 interventions), June (7 interventions), September (16 interventions) and December (12 interventions) 2013; available at <http://www.sra.org.uk/sra/how-we-work/reports.page> (accessed 5 April 2018).

<sup>124</sup> Two interventions are estimated to cost £1.8 million because of the size of the firms involved (SRA 'SRA seeks solution to increased interventions' costs' 10 May 2013; available at <https://www.richardnelsonllp.co.uk/sra-seeks-solution-to-increased-interventions-costs> (accessed 18 March 2018). For the cost of compensation fund pay outs to claimants, see page 3 of the SRA Regulatory Outcomes Reports for March (£3.45 million), June (£5.69 million), September (£2.72 million) and December (£5.15 million) 2013; available at <http://www.sra.org.uk/sra/how-we-work/reports.page> (accessed 5 April 2018).

<sup>125</sup> SRA *Annual Review 2015/16*, above n 54, p 39.

<sup>126</sup> *Ibid*, p 41.

<sup>127</sup> See Sklar, *et al*, above n 114, who suggested that complaints data should be used as an active part of regulatory strategy.

<sup>128</sup> Conclusions regarding propensity for misconduct assume the adequacy of detection measures and consistency of prosecution decisions.

### (a) Jurisdiction

While the LSA ended the connection between the Law Society and the SDT, it did not change the disciplinary process itself or the structure and role of the tribunal. The advice of a preliminary report that the professions' systems worked reasonably well and could be left to operate broadly as they were<sup>129</sup> was heeded. The SDT therefore continues to be comprised of solicitors with at least ten years' experience and lay members appointed by a senior judge, the Master of the Rolls.<sup>130</sup> Panels of three members hear charges against solicitors, recognised bodies, registered European lawyers or registered foreign lawyers. Also employers can be joined in applications against non-solicitor employees. Nearly all the cases the tribunal hears are against solicitors.<sup>131</sup> The LSA required that the SDT be reconstituted as a company limited by guarantee, independent of, but funded by, The Law Society.<sup>132</sup> It was also relatively free from control by the oversight regulator, the LSB; its only power in relation to the SDT was to approve rule changes proposed by the tribunal<sup>133</sup> or to make orders enabling the tribunal to carry out its role more effectively or efficiently.<sup>134</sup> It could give directions only where the tribunal failed to perform its functions to an adequate standard, or at all.<sup>135</sup>

### (b) Charges

The SDT's decisions refer to charges formulated by the SRA. These are based on breaches of rules current at the time that offences are committed. Therefore, respondents potentially face different charges covering different periods of regulation.<sup>136</sup> Practice prior to the creation of the SRA Code of Conduct 2011 was to charge respondents with a breach of one of six core duties in the preamble to the Solicitors Practice Rules 1990, or the Solicitors Code of Conduct 2007, and with breaches of detailed rules in the code. After adoption of the 2011 Code, and the shift from rules to outcomes, specific charges were only laid where there were breaches of the Solicitors Accounts Rules (SARs) or, for offences predating 2011, the old code of conduct. Where no rules applied, respondents were charged with a breach of the SRA Principles.<sup>137</sup> As seen in Table 1, the most frequent charges based on the Principles were reducing public trust in the profession and failing to act with integrity. The least used charge was failure to run a practice so as to encourage equality and diversity.

INSERT TABLE 2 ABOUT HERE

Table 2: Allegations of Breach of SRA Principles in 2015

Rank	Principle No.	Principle Name	Number of Times Breach of Principle Alleged	Number of Times Breach of Principle Alleged (%)
1 <sup>st</sup>	6	Maintaining Public Trust	83	23.8

<sup>129</sup> Sir David Clementi, *Review of the Regulatory Framework for legal Services in England and Wales: Final Report* (2004) p 8, para 18.

<sup>130</sup> Solicitors Act 1974, s 46.

<sup>131</sup> In 2015, 132 respondents were solicitors, three were paralegals, two trainees, two firms and one legal was an executive. Therefore, non-solicitors made up approximately 6% of the total population.

<sup>132</sup> See LSA Schedule 16 Part 1, s.48, introducing s. 46A to the Solicitors Act 1974, and Solicitors Disciplinary Tribunal Administration Limited (SDTA Ltd) *Solicitors Disciplinary Tribunal Annual Report 2011-2012*, p 10; available at <http://www.solicitortribunal.org.uk/about-us/annual-reports> (accessed 20 October 2017).

<sup>133</sup> LSA s 178.

<sup>134</sup> *Ibid*, s 180.

<sup>135</sup> *Ibid*, s 179.

<sup>136</sup> *Hannaford*, above n 69.

<sup>137</sup> SRA Code of Conduct 2011; available at <http://www.sra.org.uk/solicitors/handbook/code/content.page> (accessed 17 October 2017).

2 <sup>nd</sup>	2	Integrity	75	21.5
3 <sup>rd</sup>	4	Acting in Client's Interests	40	11.5
4 <sup>th</sup>	10	Client Money & Assets	34	9.7
5 <sup>th</sup>	7	Legal & Regulatory Obligations	32	9.2
6 <sup>th</sup>	5	Standards of service	27	7.7
7 <sup>th</sup>	8	Effective Business Governance, Finance & Management	23	6.6
8 <sup>th</sup>	1	Rule of Law & Admin of Justice	22	6.3
9 <sup>th</sup>	3	Independence	11	3.2
10 <sup>th</sup>	9	Equality & Diversity	2	0.6
		Totals	349	100%

One of the difficulties with using Principles as a basis for misconduct charges is that despite their generality, they sometimes do not appear to cover specific misconduct. This problem is marked where respondents incur criminal convictions for offences having nothing to do with practice. In one case a respondent convicted of falsely nominating another driver for a speeding offence was charged with failing to uphold the rule of law and proper administration of justice (principle 1).<sup>138</sup>

The difficulty in framing charges may have been caused because of a decision to omit a flexible 'catch all' charge from the Principles. This function was previously served by a duty to preserve the good repute of the legal profession. This was the core of the Bingham dictum in *Bolton* and one of five fundamental principles attached to the Solicitors Practice Rules 1990. The Solicitors Code of Conduct 2007 adopted a reformulated principle; that solicitors should not behave in a way 'likely to diminish the trust the public places in you or the profession', the phraseology adopted in the SRA Principles 2011. Diminishing trust is less apposite than preserving reputation in cases where solicitors have been convicted of offences. Thus, charges of acting without integrity or failing to maintain public trust are not suitable in many cases involving convictions. Cases of drunken driving,<sup>139</sup> making false claims for refunds on train tickets for train delays and cancellations<sup>140</sup> and making indecent photographs of children<sup>141</sup> are only a few examples of cases in which undermining public trust did not seem to accurately cover specific conduct.

While professional repute is no longer a principle, the courts continue to maintain Lord Bingham's assertion in *Bolton* that maintaining the reputation of the solicitors' profession is *raison d'être* of professional discipline.<sup>142</sup> The SDT also frequently refers to the reputation of the profession.<sup>143</sup> In one decision it was considered the decisive factor.<sup>144</sup> Problems in matching the Principles to specific misconduct were not limited to cases involving convictions. In a case in which a solicitor had purchased an elderly client's house at less than market value, the SRA dropped a charge of lack of integrity before the hearing.<sup>145</sup> The

<sup>138</sup> *Mohammed Imran* (11246-2014).

<sup>139</sup> *Harte*, above n 102 and *Gail Evans* (11285-2014).

<sup>140</sup> *Nancy Josephine Lee* (11362-2015).

<sup>141</sup> *Hugh Alexander Jackson* (11340-2015).

<sup>142</sup> Above, n 34 and see *Richard John Tinkler v SRA and Others* [2012] EWHC 3645 (Admin) [43].

<sup>143</sup> *Ali*, n 95 above, *Imran*, n 138 above and *Mann & Bradford*, above n 81.

<sup>144</sup> *Jackson*, above n 141.

<sup>145</sup> *Nigel Guy De Laval Harvie* (11257-2014).

prosecution was only saved because the alleged offence had occurred when earlier rules, stating that a solicitor must not take unfair advantage for himself or a third party, applied.<sup>146</sup>

Considerable difficulty has been caused by the absence of a Principle demanding honesty, the dishonesty of a respondent being the most significant conclusion the SDT reaches. Respondents accused of dishonesty are therefore charged with a breach of the Principle requiring integrity. The SDT has applied a judicial definition that states ‘... a person lacks integrity if he/she acts in a way which, although falling short of dishonesty, lacks moral soundness, rectitude and steady adherence to an ethical code’.<sup>147</sup> Before 2011, the SRA’s practice was to attach an allegation of dishonesty or recklessness to specific charges. Post 2011 the practice was to charge potentially dishonest respondents with lack of integrity while alleging dishonesty in relation to specific factual allegations, for example, dishonest use of client money.<sup>148</sup> Such allegations were accompanied by the observation that it was not necessary to establish dishonesty to prove lack of integrity. In dishonesty cases the SDT applied the two stage test set out by the House of Lords in *Twinsectra v Yardley*.<sup>149</sup> This involved asking whether conduct was dishonest according to the ordinary standards of reasonable and honest people and, if so, whether the respondent should have realised that his conduct was dishonest by those standards. Respondents cleared of dishonesty could still be found guilty of lack of integrity, which is generally treated as having only an objective element.<sup>150</sup> This potentially caused confusion because a finding of lack of integrity without dishonesty is regarded as a lesser offence.

In 2017 the proposition that solicitors might display lack of integrity without being dishonest was doubted in an appeal to the Administrative court.<sup>151</sup> Mostyn J stated that lack of integrity inevitably involved dishonesty and argued that the SRA should not be able to ‘side-step the requirement of proving the subjective element of dishonesty in any case by the simple expedient of charging the same facts as want of integrity’.<sup>152</sup> The Divisional Court’s decision temporarily threw into doubt a distinction recognised since *Bolton* where a solicitor who had been reckless with client money was found not to have been dishonest. Perhaps fortunately, another Divisional Court, led by Sir Brian Leveson, confirmed that lack of integrity is indeed a lesser standard than dishonesty and simply a failure to reach the high standards demanded of a solicitor.<sup>153</sup>

The simple expedient of adding a requirement for honesty to the list of principles would not answer a deeper question: does charging solicitors with breaches of very broad principles satisfy their human right to a fair trial? The most obvious requirement of a fair trial that current practice could offend is ‘to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him’.<sup>154</sup> This wording does not explicitly require that charges be made clear, but it is arguable that, unlike

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<sup>146</sup> The Law Society *Guide to the Professional Conduct of Solicitors 1999* (London: The Law Society, 1999).

<sup>147</sup> *Hoodless and Blackwell v. Financial Services Authority* [2003] UKFSM FSM007, cited in *Michael John Baker* (11268-2014), [21.8].

<sup>148</sup> See, for example, *Mann & Bradford*, above n 81.

<sup>149</sup> [2002] UKHL 2002 12, per Lord Hutton [27].

<sup>150</sup> *Kirschner v General Dental Council* [2015] EWHC 1377 (Admin).

<sup>151</sup> *Malins v Solicitors Regulation Authority* [2017] EWHC 835 (Admin).

<sup>152</sup> *Ibid*, [29].

<sup>153</sup> *Williams v Solicitors Regulation Authority* [2017] EWHC 2005 (Admin). See also, B Hubble and H Evans ‘Is there a difference between dishonesty and lack of integrity?’ *Solicitors Journal* 22 May 2017 and the combined appeals, *Wingate and Evans v SRA; SRA v Malins* [2018] EWCA Civ 366.

<sup>154</sup> European Convention on Human Rights Article 6.3.

in criminal trials, solicitors may often have little idea of the specific offence they have committed. The current situation arguably over relies on the SDT knowing misconduct when it sees it.

#### (c) Proof

One of the difficulties created by the SRA's new sanctions is the articulation of the two disciplinary systems. In relation to the standard of proof for misconduct, for example, the SRA applies the civil standard of proof, the balance of probabilities, when deciding whether to rebuke or fine. The SDT uses the higher, criminal standard, beyond a reasonable doubt, in considering new cases and when reviewing SRA decisions on appeal. The fact that respondents can have a higher standard applied to the facts of their case encourages appeals and increases their chances of reversing an SRA decision. Historic support from the courts for the SDT's use of the criminal standard<sup>155</sup> has ebbed away following an SRA campaign for the SDT to use the civil standard in appeals and in disciplinary proceedings. This drew official approval,<sup>156</sup> then government support.<sup>157</sup> Finally, an influential bench in the High Court endorsed use of the civil standard across the board.<sup>158</sup> No doubt as a result of this pressure, and in the light of a similar proposal by the Bar, the SDT has undertaken to consider the standard of proof in a forthcoming consultation on its rules.<sup>159</sup>

#### (d) Intention

One reason for the SDT's insistence on the criminal standard of proof is that much of its caseload comprises dishonesty cases. Guidance from the courts suggests that a tribunal faced with a solicitor of 'anything less than complete integrity, probity and trustworthiness... [should] almost invariably, no matter how strong the mitigation... [result in an] order that the solicitor be struck off'.<sup>160</sup> Possibly because of the severity of the sanction a previous study of the SDT's approach to dishonesty found that the SDT '...demonstrate[d] a practice of

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<sup>155</sup> *Re A Solicitor* [1993] QB 69 and *Campbell v Hamlet* [2005] UKPC 19.

<sup>156</sup> Insurance Fraud Taskforce: Final Report (January 2016); available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494105/PU18\\_17\\_Insurance\\_Fraud\\_Taskforce.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU18_17_Insurance_Fraud_Taskforce.pdf) (accessed 27 February 2017), Independent Review of Claims Management Regulation (March 2016) para. 9.7; available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/508160/PU19\\_18\\_claims\\_management\\_regulation\\_review\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/508160/PU19_18_claims_management_regulation_review_final.pdf) (accessed 17 October 2017).

<sup>157</sup> J Hyde 'SRA wants lower standard of proof for tribunal prosecutions' LSG 20 January 2016; available at <https://www.lawgazette.co.uk/law/sra-wants-lower-standard-of-proof-for-tribunal-prosecutions/5053131.article> (accessed 16 October 2017).

<sup>158</sup> See, *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin) an appeal concerning a non-solicitor immigration advisor reinstated by the SDT after the SRA banned him from working for a regulated firm. Leggatt J and Sir Brian Leveson, the President of the Queen's Bench Division, declared that the SDT should apply the civil standard when hearing appeals against SRA decisions, and possibly across the board. See also J Hyde 'Re-think SDT Standard of Proof—Leveson' LSG 11 November 2016; available at <https://www.lawgazette.co.uk/law/rethink-sdt-standard-of-proof--leveson/5058766.article> (accessed 17 October 2017) and Legal Futures 'High Court: Time to consider lowering burden of proof in the Solicitors Disciplinary Tribunal' 11 November 2016; available at <https://www.legalfutures.co.uk/latest-news/high-court-time-consider-lowering-burden-proof-solicitors-disciplinary-tribunal> (accessed 20 October 2017)

<sup>159</sup> See Solicitors Disciplinary Tribunal, *Solicitors Disciplinary Tribunal Response to Bar Standards Board Consultation—Review of the Standard of Proof Applied in Professional Misconduct Proceedings* (Solicitors Disciplinary Tribunal, July 2017); available at <http://www.solicitortribunal.org.uk/sites/default/files-sdt/SDT%20Response%20-%20BSB%20Consultation%2020.07.17.pdf> (accessed 17 October 2017).

<sup>160</sup> *Per* Sir Thomas Bingham MR in *Bolton*, above n 34, pp 518a-519b.

negotiating reality in which the dishonesty rule is circumvented by applying a different label'.<sup>161</sup>

Our sample contained several cases in which the SDT might have found dishonesty but did not. In one of these the tribunal doubted the respondent's evidence but refused to make a finding of dishonesty because dishonesty was not alleged in the charges.<sup>162</sup> In another, a respondent who had transferred money from client account to office account, knowing that this would leave a shortfall, was found to have been reckless but not dishonest.<sup>163</sup> In yet another case, the dishonesty of a respondent who had persuaded someone to accept his speeding points was excused because it was 'of short duration'.<sup>164</sup> In a case where a respondent created a false email trail to conceal a failure to list a case for hearing, the SDT accepted that he thought he was recreating emails that had existed.<sup>165</sup> Applying the subjective limb of the *Twinsectra* formula it found that he had not realised that ordinary people would regard this behaviour as dishonest. The SDT also accepted medical evidence negating dishonest intent.<sup>166</sup> In one such case it accepted a regulatory settlement proposed by the SRA because medical evidence called into question whether there was 'dishonesty to the level of proof required'.<sup>167</sup>

In cases involving women the SDT's generous interpretation of behaviour suggests the possibility of chivalry bias; in this context a failure to treat women the same as men in relation to similar offences.<sup>168</sup> One woman charged with a dishonest accounts rule breaches was found not to be dishonest, or lacking integrity, but guilty of 'sloppiness and misunderstandings'.<sup>169</sup> In another case a respondent had got behind in a number of personal injury files. She made false time recordings, forged letters and medical reports and made 'interim payment' and supplemented damages out of other clients' funds to prevent complaints.<sup>170</sup> The SDT found that the SRA had not established beyond reasonable doubt that her conduct was dishonest, being convinced by her "...truly compelling and exceptional mitigation [it concluded that she] ...had not been thinking rationally at the time and had not given any thought at all to the question of dishonesty. She had simply been trying to keep her head above water in extremely difficult circumstances."<sup>171</sup> In a case in which a woman respondent failed to warn a mortgage lender client of possible mortgage fraud the transcript noted that the 'tribunal had the benefit of hearing R give lengthy oral evidence clearly under considerable stress'.<sup>172</sup>

Although lack of integrity could be seen as a lesser charge, findings of lack of integrity were not lightly made. In one case the SDT decided respondents involved in numerous deliberate breaches were only 'reckless to the point of lacking integrity' because they believed that

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<sup>161</sup> P Case 'Doctoring Confidence and Soliciting Trust: Models of Professional Discipline in Law and Medicine' (2013) 29 *Journal of Professional Negligence* 87.

<sup>162</sup> *SRA v Harvie*, above n 145.

<sup>163</sup> *Baker*, above n 147, £88,000 deficit in client account, no dishonesty, suspended for one year with conditions on return to practice.

<sup>164</sup> *Imran*, n 138 above, two year suspension.

<sup>165</sup> *Matthew Albert Timmis* (11193-2013).

<sup>166</sup> *Theresa Ann O'Hare* (11299-2014), where the respondent suffered from mental health issues.

<sup>167</sup> *Carlile*, above n 92.

<sup>168</sup> P. W. Hatamyar & K. M. Simmons 'Are Women More Ethical Lawyers? An Empirical Study' (2004) 31 *Florida State University Law Rev* 785, p. 827.

<sup>169</sup> *O'Hare*, above n 166 [67.2].

<sup>170</sup> *Tunstall*, above n 94 [37].

<sup>171</sup> *Ibid*, [27.30].

<sup>172</sup> *Afshan Ejaz Nawaz* (11294/2014), [65.57].

monies withdrawn from client account were covered by monies due.<sup>173</sup> In another, a family lawyer, dabbling in a purchase for a conveyancing client, failed to alert the mortgage lender for whom he was also acting of a risk of mortgage fraud.<sup>174</sup> The SDT felt that he was a grossly incompetent conveyancer and did not have sufficient awareness of practice in the area for the conduct to lack integrity. The misconduct predated the SRA Principles 2011 and this was another case where the respondent was found guilty of breaches of the relevant code, the Solicitors Code of Conduct 2007.

Appeals by the SRA to the High Court perhaps suggest that it does not accept the SDT's standards. A decision of the SDT not to strike a dishonest solicitor from the Roll was reversed by the Court of Appeal with the admonition that striking off should follow all but minor findings of dishonesty.<sup>175</sup> In two recent cases involving alleged dishonest use of client money the SRA obtained rulings from the High Court quashing some or all of SDT decisions favourable to respondents.<sup>176</sup> Of the 105 cases in 2015, seven were subject to appeal, four by the respondents and three by the SRA. All of the respondents' appeals were dismissed<sup>177</sup> whereas the SRA succeeded in one of its appeals,<sup>178</sup> had another dismissed<sup>179</sup> and partially succeeded in the third.<sup>180</sup>

#### (e) Sanctions

The SDT tended not to impose multiple sanctions. Thus, while one respondent received a fine and a prohibition order,<sup>181</sup> as shown in Table 6, the total number of sanctions imposed matched the number of respondents. As the Table also shows, striking off and suspension accounted for nearly 55% of SDT actions.

Table 3: INSERT TABLE 3 ABOUT HERE (SDT Cases 2015 Total Sanctions—footnote 182 to be inserted after the title of the table <sup>182</sup>)

Table 3: SDT Cases 2015 Total Sanctions

Sanctions	Number	%
Struck Off	56	39.4
Suspension (Indefinite)	3	2.1
Suspension (Fixed Period)	12	8.5

<sup>173</sup> *Barker & Newton*, above n. 72 [51.1]. Respondents suspended for two years and six months respectively.

<sup>174</sup> *Ross Onotasa Moniro* (11295-2014).

<sup>175</sup> *SRA v Anthony Lawrence Clarke Dennison* [2012] EWCA Civ 421.

<sup>176</sup> *SRA v Heer Manak (1) and Dhillon (2)* (2016) EWHC 1914 (Admin) and *SRA v Wingate and Evans* [2016] EWHC 3455 (Admin).

<sup>177</sup> *Ogunniyi v Solicitors Regulation Authority* [2016] EWHC 3516 (Admin), *Gurpinar v Solicitors Regulation Authority* [2016] EWHC 1549 (Admin), *Barnett v Solicitors Regulation Authority* [2016] EWHC 116 (Admin) and 11293/2014 *Yunus Agboola Alatise* (Case Unreported).

<sup>178</sup> *SRA v Heer Manak and Dhillon*, above n 176.

<sup>179</sup> *R (On the Application of Solicitors Regulation Authority) v Imran* [2015] EWHC 2572 (Admin.)

<sup>180</sup> *SRA v Wingate and Evans*, n 176 above. The respondents went on to appeal to the Court of Appeal to reinstate the SDT's acquittal, see combined appeals *Wingate and Evans v SRA*; *SRA v Malins* [2018] EWCA Civ 366. Wingate's appeal to reinstate the SDT's acquittal was dismissed but Evans' appeal was allowed.

<sup>181</sup> *Moniro*, above n 174, both sanctions were counted. Whereas *Robert Andrew Schofield* was involved in two cases (11292-2014 and 11322/2015), the sanction for each was striking off, so the sanction was recorded only once.

<sup>182</sup> There are some discrepancies between some of the figures in this table and the sanctions data listed in the SDTs Annual Report 2015. For example, due to an omission the report lists 10 restrictions on practice, however, there were 12, SDT response to query 2<sup>nd</sup> March 2017.

Fine	33	23.2
Reprimand	8	5.6
Prohibition Order	1	0.7
Revocation of s.43 Order—refused	1	0.7
s.43 Clerk Order	2	1.4
(Application for) Restoration to the Role Refused	3	2.1
(Application for) Restoration to the Role Granted	1	0.7
(Application for) Determination of Indefinite Suspension (refused)	1	0.7
Conditions Imposed on Practice Cert	12	8.5
Application for Removal of Condition on PC (granted)	1	0.7
Application for Rehearing (refused)	1	0.7
No Order, Costs Only Order or Case Dismissed	7	4.9
TOTAL	142	100

In the sample considered the most likely circumstances for striking off occurred when solicitors were found to have dishonestly used client funds, particularly substantial sums.<sup>183</sup> A few respondents found to lack integrity were struck off without a finding of dishonesty.<sup>184</sup> In one of these a solicitor involved in miss-applying investment funds was found to have been “duped” by a client,<sup>185</sup> and may not have appreciated that she was facilitating a fraud, but was nevertheless struck off.<sup>186</sup> Deliberately ‘borrowing’ client money, even without a finding of dishonesty, also led to striking off.<sup>187</sup> In general, however, a finding that a solicitor lacked integrity but was not dishonest led to a lesser sanction.

The second group most likely to be struck off were those convicted by courts of serious criminal offences. In one of the most serious examples a respondent had ferried messages from suspected drug dealers under arrest and a suspect still at large.<sup>188</sup> He was convicted at Crown Court on three counts of possession of cocaine and attempting to pervert the course of justice. Another respondent was struck off for dishonesty convictions acquired before embarking on a legal career; claiming refunds on five train tickets for which a court had fined her £711.11.<sup>189</sup> Another had not had a practising certificate since 2009, but was struck off following conviction of drunk driving and other offences, including claiming false expenses from the Law Society.<sup>190</sup>

The conclusion that striking off was the most serious sanction was not true in all cases. The removal of the cap on the SDT’s fining powers made a fine the most appropriate sanction in some circumstances. This was demonstrated in *Harvie*.<sup>191</sup> Since the respondent had retired from practice, striking off or suspension was potentially a less significant sanction than the

<sup>183</sup> For example, *Mann & Bradford*, above n 81, *Adrian Patrick Shaun Dann* (11213-2014), *Karatas*, n 81 above, *Owen*, above n 72, *Wilkes*, above n 81, *Jonathan Charles Lewis* (11244-2014) and *Peter Ellis Taylor* (11274-2014) were all struck off.

<sup>184</sup> *Andrew Donald Varley* (10763-2011).

<sup>185</sup> See *Pascale Edith Marie-Anne Wood-Atkins* (11270/2014) [169].

<sup>186</sup> *Wood-Atkins*, *ibid*, struck off. Two factors appear to have influenced this result. The first was that her actions contravened the SRA’s warning card on Fraudulent Financial Arrangements, which stated that involvement in dubious financial schemes could lead to disciplinary action, see generally *SRA Warning Notices*; available at <http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices.page> (accessed 16 October 2017). The second was that she had deducted large sums in costs from client monies.

<sup>187</sup> *Lewis*, above n 183 and *Mann & Bradford*, above n 81.

<sup>188</sup> *Basharat Ali Ditta* (11060-2012).

<sup>189</sup> *Lee*, above n 140.

<sup>190</sup> *Frances Louise Brough* (11148-2013).

<sup>191</sup> Above n. 145.

£305,000 fine imposed; the difference between the respondent's outlay and the probate value of the deceased client's house he had purchased. Additionally, the order to pay £37,016 costs ensured he was substantially out of pocket. At the other end of the scale a solicitor who called another solicitor 'a complete plonker' was reprimanded and ordered to pay costs of £2,600.<sup>192</sup> This was only slightly more than the SRA's maximum fine, but the SDT declared the proceedings justified because of other factors.<sup>193</sup> This decision reflected the fact that respondents who admitted all or some of the charges against them and demonstrated what the SDT called 'genuine insight',<sup>194</sup> a recognition of failings combined with remorse, were likely to benefit from a more positive interpretation of conduct *and* less onerous sanctions.

Banning solicitors from practice contributed 55% of the SDT's disposals and fines a further 25%. The maximum fine imposed was £305,000 and the minimum £500. Fines to a total value £521,500, were imposed in 33 cases; an average of nearly £16,000 per case. Costs orders were invariably made against respondents. Although the SRA could be ordered to pay costs it was protected by the tribunal's propensity to recognise a public interest in encouraging prosecution. The total value of costs awarded over the period was £1,742,530, imposed against 115 respondents; an average per case of £15,152. These figures suggest that further increasing the SRA's power to fine, even to £20,000, would reduce the SDT's caseload without a significant loss in terms of solicitors' rights. Indeed, many would be saved from paying costs almost as severe as the average fine. The cases of failure to obtain PII are good example of this. Most of the cases resulted from impecuniosity and in only two were the respondent's failures part of a larger and more serious allegation.<sup>195</sup> In these cases one respondent was struck off and the other was suspended and fined.<sup>196</sup> In the PII cases where no dishonesty was involved, respondents were fined (five cases), reprimanded (two cases) or suspended (two cases). In some of these cases the SDT expressed doubt about the decision to refer the case to it.<sup>197</sup>

It is not possible to provide any definitive statistical analysis on the SDT's treatment of BAME respondents in our 2015 sample.<sup>198</sup> However, the John Report,<sup>199</sup> found significant differences in the imposition of sanctions on BAME solicitors compared to their white counterparts. This was demonstrated most starkly in relation to sanctions imposed for breaches of the Solicitors' Account Rules (SAR). Here, white solicitors (47.8%) were more likely to be reprimanded than BAME solicitors (21.2%).<sup>200</sup> The most frequent sanction against BAME for SAR breaches was a fine (26.3%).<sup>201</sup> Where a solicitor was suspended for breach of account rules, that solicitor was almost five times more likely to be of BAME origin (21%) than white (4%).<sup>202</sup> Overall, the greatest variation in the use of sanctions generally was in relation to the imposition of conditions on practice certificates, at 20% for

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<sup>192</sup> *Richard Gregory Barca* (11313-2014).

<sup>193</sup> There were allegations of possibly racist comments, *ibid*, [41].

<sup>194</sup> *Harvie*, above n 145, [45].

<sup>195</sup> *Richard Anthony Barnett & Anthony Augustine Swift* (11249-2014), involving improper use of litigation funding and *Kanwar Bhan & Monika Narad* (11320-2014) where the main focus was a potential conveyancing fraud.

<sup>196</sup> *Barnett* and *Bhan*, *ibid*, were struck off, while *Swift*, *ibid*, was suspended and *Narad*, *ibid*, was fined.

<sup>197</sup> See, for example, *Reginald Walter Hemmings* (11283/2014), [40].

<sup>198</sup> As sensitive personal data, the Tribunal's reports rarely contain this information. Indeed, ethnic origin could only be gleaned in one case (South Asian, *Nazakat Ali*, above n 95). Moreover, the Law Society's "Find a Solicitor" database does not record such details

<sup>199</sup> Above, n 107.

<sup>200</sup> *Ibid*, p106 [656].

<sup>201</sup> *Ibid*.

<sup>202</sup> *Ibid*.

BAME and 7.5% for whites.<sup>203</sup> The report called for the SDT to monitor its outcomes by respondents' ethnicity and gender<sup>204</sup> but the outcome has not been reported.

## 5. CONCLUSION

The LSA began a phase of deregulation in the legal services market which has not yet concluded. One of its most dramatic impacts was to end professional self-regulation. The result has been a gradual erosion of other indicators of professionalism. The SRA will shortly implement plans to allow solicitors to work in unregulated entities, subject to a code of conduct but not necessarily offering other protections of professionalism.<sup>205</sup> In response the Law Society asks whether solicitors will use this opportunity to set themselves up as unregulated providers because of the benefits of operating without regulation.<sup>206</sup> One implication is that solicitors struck from the roll will reappear as owners or workers in a burgeoning alternative legal sector. The LSB has declared that the deregulatory steps facilitated by the Act will soon reach the limits of the current legislative framework, calling for 'more fundamental revision.'<sup>207</sup> It claims that the incremental impact of deregulatory initiatives represents a huge shift away from old ways of working towards a better regulated system that is focused on managing risks and delivering better outcomes for all consumers.<sup>208</sup>

In a deregulated legal services sector, it would make perfect sense to place more responsibility for the conduct of lawyers on their employers. Data from the regulatory system throw some light on whether such a shift in direction might be successful. The decreased number of cases reaching the SDT could be evidence of a decline in serious misconduct or that the SRA is operating a so-called 'regulatory funnel', like professional SROs, and filtering out the cases before they reach disciplinary hearings.<sup>209</sup> Both of these notions are countered by the large number of alternative disposals. Many of these presumably involve less serious cases which may not previously have involved a disciplinary sanction. The fact that they now do, can be claimed as evidence of the additional reach of the new system. Proportionality in handling these cases could be claimed as evidence of more effective regulation; reinforcing governmentality by heightening the sense of surveillance. Similarly, we speculate that the large proportion of the cases that appear to result from self and firm referrals (31 of the 105 cases or 30%) may be due to the new compliance posts and reporting regulations in the SRA Handbook.<sup>210</sup> This may be claimed as a benefit of a new culture of

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<sup>203</sup> Ibid, p10 [120].

<sup>204</sup> John, above n 107, p15.

<sup>205</sup> M Farman 'Key law watchdog slashes rulebook and pushes for more market liberalisation' Legal Business 14 June 2017; available at <https://www.legalbusiness.co.uk/blogs/key-law-watchdog-slashes-rulebook-and-pushes-for-more-market-liberalisation> (accessed 22 March 2018). In the meantime, the latest version of the SRA Handbook, Version 19 (released October 2017); available at <http://www.sra.org.uk/handbook>, aims to "drive high professional standards, remove unnecessary bureaucracy and free up solicitors to work in new markets"; see <http://www.sra.org.uk/sra/news/press/handbook-decision-2017.page> (accessed 4 April 2018).

<sup>206</sup> The Law Society *The Future of Legal Services* (London: The Law Society, 2016) 16; available at <http://www.lawsociety.org.uk/news/documents/future-of-legal-services-pdf> (accessed 20 March 2018).

<sup>207</sup> The Legal Services Regulators *Annex A: Progress on deregulation and market liberalisation in legal services*, A report for Ministers on deregulation from the *legal services regulators of England and Wales* (June 2015) 3; available at [http://www.legalservicesboard.org.uk/what\\_we\\_do/pdf/20150720\\_Report\\_On\\_Progress\\_On\\_Deregulation\\_And\\_Market\\_Liberalisation.pdf](http://www.legalservicesboard.org.uk/what_we_do/pdf/20150720_Report_On_Progress_On_Deregulation_And_Market_Liberalisation.pdf) (accessed 4 March 2011).

<sup>208</sup> Ibid, 4.

<sup>209</sup> Lonakan, above n 76.

<sup>210</sup> These may not be the only such cases since many of the alternative disposals may also have been initiated in this way.

managerial responsibility and management of the self. This can also be seen as evidence of an element of governmentality; what Foucault called ‘the conduct of conduct’.<sup>211</sup>

Our data also highlights the limits of governmentality achieved through the logic of corporate bureaucracy, which relies on organisational structure to control behaviour. In 2015, over 4,000 sole practices and 8,885, 2-4 partner firms employed over 30% of all practitioners.<sup>212</sup> Around 80% of respondents before the SDT in that period were from such firms. When they were from larger firms, more than one member of the firm was often involved in misconduct. Regulation dependent on organisational structure is constrained in dealing with this reality. There is not much point insisting on a compliance officer for conduct if that person is the one involved in wrongdoing. One obvious solution, prescribing a larger minimum size of firm, would ensure a chance of establishing ethical infrastructure. Another, preventing small units operating in areas handling large sums of client money, would minimise risk. Both of these may exacerbate a problem of access to legal services<sup>213</sup> impeding the regulatory objectives of promoting competition and the consumer interest. They could also be detrimental to diversity in the legal profession as it is predominantly BAME solicitors who populate small firms.<sup>214</sup> The alternative being urged by government and their regulators is further deregulation. The evidence points to a contrary conclusion; there is arguably a need for the SRA to increase its use of random audits as a means of improving risk identification, controlling lawyer misconduct and closing down firms who fail to comply with the rules.<sup>215</sup> Random audits may also have a ‘ripple effect’ on lawyer compliance behaviour.<sup>216</sup>

The final step in the decline of the ideology of professionalism in legal services regulation would involve eliminating the SDT. This is the predictable consequence of the growth in the numbers of solicitors. In the decade before *Bolton v The Law Society*, in which Bingham MR expressed reverence for the reputation of the profession, the number of practising solicitors in England and Wales grew by a little over 28%, from 45,732 to 63,628.<sup>217</sup> In 2015, there were over 133,000 practitioners, nearly 80% working in 9,403 solicitors’ firms.<sup>218</sup> The difficult task of regulating such a large group across so many sites is compounded by the diversity of the modes, styles and sizes of solicitors’ practices. The preparation and presentation of cases to the SDT compound the resource problems in confronting these difficulties.

The shrinking number of cases the SDT handles, and the fact that around 70% of the sums paid by respondents comprised costs and only 30% fines, raises the issue of whether it offers a proportional response to the problem of solicitor misconduct. If the SDT did not exist,

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<sup>211</sup> LH Martin, H Gutman and PH Hutton *Technologies of the Self: A Seminar with Michel Foucault* (Amhurst: University of Massachusetts Press, 1988).

<sup>212</sup> The Law Society, above n 27, Table 4.3.

<sup>213</sup> This issue was identified by the SRA as the first of seven risks to the legal services sector, *SRA Annual Review*, above n 54.

<sup>214</sup> See, John, above n.107.

<sup>215</sup> For example, the SRA recently reviewed 50 firms (ranging from high street to City), as a means of testing the sectors compliance with its new more rigorous money laundering rules, finding two-thirds of these firms lacking. In six of the firms the SRA found serious concerns meriting ongoing disciplinary processes; see <https://www.sra.org.uk/sra/how-we-work/reports/preventing-money-laundering-financing-terrorism.page> (accessed 23 March 2018).

<sup>216</sup> For example, over the last three years the SRA have closed down eight firms over money laundering concerns, 14 firms closed of their own volition after the SRA raised concerns, see Barney Thompson ‘UK law firms disciplined over money laundering’, *Financial Times*, 2 March 2018; available at <https://www.ft.com/content/c919dbf8-1d4b-11e8-aaca-4574d7dabfb6> (accessed 23 March 2018).

<sup>217</sup> D Dixon *Entry to the Solicitors’ Profession: 1980-2011* (London, Law Society, 2012) 2.

<sup>218</sup> The Law Society, above n 27, p 2 and 21.

however, there would still need to be a system for excluding solicitors guilty of serious misconduct. One solution would be for the SRA to deal with low level misconduct, leaving dishonesty offences to be tried by the courts.<sup>219</sup> An arguably more efficient system would enable the SRA to take all disciplinary actions, including striking off, subject to the protection of an appeals system. Such a step was recently recommended in a Treasury report alongside a recommendation that the criminal standard of proof be abandoned.<sup>220</sup>

There are several counter arguments to further de-regulation. Rule of law and fair trial principles support the use of independent tribunals in hearing cases against lawyers. The risk of increasing the level of state involvement in the practice and discipline aspects of regulation was illustrated recently by a high-profile prosecution of members of a leading human rights firm presenting compensation claims arising from alleged abuse by armed forces in Iraq.<sup>221</sup> The respondents were acquitted amid claims that the decision to prosecute was influenced by government pressure.<sup>222</sup> As a result, the SRA plans to publish an enforcement policy clarifying when and why it brings proceedings.<sup>223</sup> This may not have followed had it been the sole arbiter of misconduct. Another consideration is that the SDT may be better able to deal effectively with financial misconduct than courts. This is because the strict requirements of the SAR impose a higher standard than might be enforced using criminal law.<sup>224</sup> A final consideration is that the tribunal process publicly exposes possible failings in practice regulation. These may not come to light where the regulator is the sole judge of misconduct.

One option that will undoubtedly be considered in the next wave of legal services reform is creation of a single tribunal to hear misconduct cases against all regulated lawyers. Such a body could be established independently but given a remit clarifying the regulatory standards and methods to be promoted.<sup>225</sup> This would be an opportunity to explore a different procedural basis for hearings, including replacing the current adversarial format with an inquisitorial approach.<sup>226</sup> It should enable re-examination of the central priorities of discipline, whether consumer interests, professional reputation or public trust.<sup>227</sup> It is also possible that the next review will lead to further steps towards competition as the dominant logic of regulation.<sup>228</sup> In that case, the Act will be seen to have actually served a hidden purpose; to act as a bridge to the de-professionalisation of the legal services market.

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<sup>219</sup> Lonakan, above n 76.

<sup>220</sup> Because it “means that those who are dishonest on the balance of probabilities (the civil standard of proof) can continue to practise”, Insurance Fraud Taskforce, above n 159, p 44. See also, N Rose ‘Bid for higher SRA fining powers and lower burden of proof “on government agenda”’ *Legal Futures* 10 August 2017; available at <https://www.legalfutures.co.uk/latest-news/bid-higher-sra-fining-powers-lower-burden-proof-government-agenda> (accessed 16 October 2017).

<sup>221</sup> *SRA v Martin Jeremy Day, Sapna Malik, Anna Jennifer Crowther, and Leigh Day* (11502-2016) and see O Bowcott ‘Law firm Leigh Day cleared over Iraq murder compensation claims’ *The Guardian* 9 June 2017 <https://www.theguardian.com/law/2017/jun/09/law-firm-leigh-day-cleared-over-iraq-compensation-claims> (accessed 20 October 2017).

<sup>222</sup> M Hogg ‘Leigh Day highlights the SRA’s inconsistent approach to enforcement’ *Solicitors Journal* 7 August 2017.

<sup>223</sup> See for example, J Hyde ‘SRA ready with new enforcement plan for errant solicitors’ *LSG* 30 March 2017

<sup>224</sup> DJ Middleton ‘The legal and Regulatory Response to Solicitors Involved in Serious Fraud’ (2005) 45 *Brit J Criminol* 810.

<sup>225</sup> Levin, n 59 above.

<sup>226</sup> S McLean ‘Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers Paradigm’ (2009) 28 *UQLJ* 225.

<sup>227</sup> See, for example, FC Zacharius ‘The Purposes of Lawyer Discipline’ (2003-4) 45 *Wm. & Mary L Rev* 675.

<sup>228</sup> For example, by requiring legal services providers to give more information on quality and price and by providing platforms for consumer feedback, see Competition and Market Authority *Legal Services Market Study: Final Report* (London: CMA, 2016); available at

