INDEPENDENT COMPARATIVE CASE REVIEW

THE SOLICITORS REGULATION AUTHORITY

REPORT

by Professor Gus John

Gus John Consultancy Limited

February 2014

Acknowledgements

This review was possible because of the combined efforts of a team of Gus John Consultancy (GJC) associates, led by myself.

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I, of course, assume full responsibility for the contents of this report.

Professor Gus John

London

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1.0 Executive Summary

Background and Introduction to the Review

1.1 This review was commissioned by the Solicitors Regulation Authority (SRA) in 2012.

1.2 The SRA wished to conduct an independent, comprehensive case file review

> 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying potential improvements to such practices, policies and procedures to maximise fairness and consistency…'

1.3 This review followed reviews by Lord Ouseley (2008) and Pearn Kandola (2010), both of which looked at evidence of disproportionate regulatory outcomes for black and minority ethnic (BME) solicitors. The SRA was keen to establish whether such disproportionality as was found, was on account of the ethnicity of BME solicitors, or on account of the application of its own policies and procedures, the result of extraneous factors, or a combination of all those.

1.4 Gus John Consultancy Limited was commissioned to conduct the review in July 2012 and the terms of reference of the review were agreed in November 2012 (Appendix 1). The review began in earnest in the Spring of 2013, having selected a sample of 160 files of cases that had been concluded between 2009 and 2011. 80 of those files were of cases involving White solicitors, 40 of whom would have had their regulatory matter dealt with through internal adjudication by the SRA and the other 40 by the Solicitors Disciplinary Tribunal (SDT). This pattern was mirrored by the 80 files involving BME solicitors.

1.5 As the terms of reference stipulated, 'the reviewer (was) not carrying out a legal review of cases but …. identifying potential improvements to practices, policies and procedures to maximise fairness and consistency'.

1.6 The review was conducted in three parts:

i) a statistical analysis of ethnicity and gender by regulatory outcomes, drawing upon the SRA's published monitoring data (2009-2012),

ii) a comparative case file review to compare a sample of SRA files for SDT prosecutions in which the SDT published its findings or judgment in 2011 with a sample of files dealt with by way of internal SRA decision by adjudication in 2011,

iii) surveys, focus group sessions, and follow up interviews with solicitors who had been subject to regulatory action, regulatory solicitors who represent respondents in the SDT and members of other stakeholder groups.

1.7 November 2011, the SRA started rolling out Outcomes Focused Regulation (OFR). Chief Executive, Antony Townsend, said at the time:

> We will regulate fairly, proportionately, and firmly….Regulating in a new way, focusing upon risks and outcomes rather than compliance with detailed rules, has been a massive change for our organisation.'
>
> *OFR and beyond - The SRA's vision for regulating legal services in the 21st century*

1.8 OFR is predicated upon a qualitatively different relationship between the SRA and the regulated profession, with an emphasis on supervision, constructive engagement and supporting solicitors/firms in identifying and managing risk, among other things, so as to anticipate and avoid breaches. We felt it necessary, therefore, to explore the impact 'Outcomes Focused Regulation' and a greater proportion of in-house adjudication, might have on a key intended outcome of the review, i.e., to maximise fairness and consistency and eliminate potentially discriminatory practices.

1.9 In September 2013, an addendum was made to the terms of reference as follows:

(a) Examine how current cases are being processed and how recently concluded cases were dealt with under Outcomes Focused Regulation (OFR) in order to highlight the impact of 'improvements to SRA policies and processes and the extent to which the OFR approach to regulation is helping to eliminate disproportionality and maximise fairness and consistency'.

(b) Conduct two on-line surveys of external advocates and of respondents respectively, in relation to their experience of the regulatory process. A total of 160 respondents to be surveyed, who were not part of the main file review sample.

1.10 The SRA's **Strategy Paper: "Achieving the Right Outcomes"** (January 2010) set out the regulator's intention to move to OFR and its new approach to regulation as follows:

- The SRA is moving from being a rules-based regulator, primarily responding reactively to individual rule breaches, to an outcomes-focused, risk-based regulator.

- Our goal is to use our resources cost-effectively to maximise our delivery of the regulatory objectives set out in the Legal Services Act 2007, namely:

  (a) protecting and promoting the public interest,
  (b) supporting the constitutional principle of the rule of law,
  (c) improving access to justice,
  (d) protecting and promoting the interests of consumers,
  (e) promoting competition in the provision of services,
  (f) encouraging an independent, strong, diverse and effective legal profession,
  (g) increasing public understanding of the citizen's legal rights and duties,
  (h) promoting and maintaining adherence to the professional principles.

- Our approach includes:
  (a) ensuring that the requirements on firms are more focused on acting in a principled manner to deliver desired outcomes, rather than compliance with over detailed rules.

1.11 The difference between the SRA's approach to regulation in the period covered by the flies and cases in this review (2009-2011) and since the introduction of OFR in October 2011 is best summed up in the first bullet point above:

> ***The SRA is moving from being a rules-based regulator, primarily responding reactively to individual rule breaches, to an outcomes-focused, risk-based regulator.***

1.12 The SRA came into existence as an entity in its own right in January 2007 as a result of the Legal Services Act (LSA), having been the regulatory arm of the Law Society. As a regulator of the solicitors' profession, therefore, it works to deliver the regulatory objectives of the LSA. But, as a public body, it has another set of compliance requirements, i.e., compliance with the Public Sector Equality Duty (PSED) of the Equality Act 2010. How then does the SRA ensure that the regulatory objectives and its approach to delivering them are consonant with the requirements and spirit of the Equality Act 2010 and

the PSED compliance requirements? What are the implications of regulatory disproportionality as experienced by BME solicitors for both the regulatory objectives and the PSED?

1.13 In reviewing the way the SRA dealt with closed cases in order to identify 'potential improvements to practices, policies and procedures to maximise fairness and consistency', we were concerned to establish how those practices, policies and procedures reflected the SRA's approach to the regulatory objectives such that one did not negate the other(s), while having due regard to the requirements of the Equality Act 2010. In looking at the causes of BME disproportionality, therefore, we needed to explore the approach the SRA took to four inter-related regulatory objectives:

- protecting and promoting the public interest,
- improving access to justice,
- protecting and promoting the interests of consumers, and
- encouraging an independent, strong, diverse and effective legal profession.

Findings

1.14 The review found evidence of disproportionality at three stages of the regulatory process, namely: at the point at which a case is raised or a complaint is registered against a solicitor or a firm; in the process of investigating that complaint; and at the point at which an outcome is determined and a sanction imposed. Disproportionality in the number of cases raised is not necessarily as a result of SRA action. Cases could be raised or complaints registered by members of the public, other solicitors, through self-referrals, or by other external agents.

1.15 Our analysis of the SRA's monitoring data revealed that BME solicitors, given their percentage of the solicitor population overall, were disproportionately represented amongst those subject to investigation. Between 2009-2012 as an average, BME solicitors made up **13%** of the entire solicitor population, but during the same period they represented **25%** of the '**new conduct investigations**'. The percentage of new investigations involving BME solicitors was almost double what one would expect, while their White counterparts were underrepresented; representing **87%** of the solicitor population and accounting for **75%** of the new investigations.

1.16 What follows is a cross-section of our findings in respect of cases internally adjudicated by the SRA as well as those that were prosecuted in the SDT upon referral by the SRA.

1.17 Our analysis of the outcomes of the cases showed that BME solicitors and firms also comprised a higher percentage of those against whom action was taken and were also subjected to more severe sanctions than their White counterparts. In the case of interventions, where the SRA took control of a solicitor's legal practice or a firm, BME solicitors and firms were again over-represented. Whilst **25%** of the SRA's new investigations involved BME solicitors, they accounted for **29%** of interventions, during the period. Their White counterparts were under-represented in the same category, making up **75%** of the new investigations and **71%** of the interventions.

1.18 In the case of eventual referral to the SDT, BME cases made up **33%** of the cases referred, and accounted for **25%** of new cases**,** while White cases were proportionally underrepresented making up only **67%** of referrals in relation to **75**% of new cases. In instances where conditions were attached to practising certificates, BME cases accounted for **32%** in comparison to their **25%** share of newly opened cases**,** contrasted with cases involving White solicitors who accounted for **68%** in comparison to **75%** of new cases.

1.19 The figures indicate that not only was there a disproportionate number of BME solicitors under investigation by the SRA during the period 2009-2012, but also that the eventual outcome of the SRA's investigations ended with more severe sanctions being applied to BME respondents.

1.20 The group composed of White respondents featured more often in the lesser sanctions categories such as 'Finding and Warning' and 'Rebuke', in comparison to the BME sample. The largest difference in the sanctions passed between the two ethnic groups was in the 'Conditions on PC', which accounted for 20% in the BME compared to 7.5% in the White group. On the lower end of the scale BME respondents received more 'Cost Direction' orders with 12.5% compared to 5% in the White group.

1.21 We analysed 72 judgements passed by the SDT, 40 cases involving White respondents and 32 involving BME. The figures have been adjusted to level the sample size and are expressed in percentage form. 28% of BME cases ended in the suspension of the respondent compared with 17.5% in cases where the respondent was White.

1.22 Using the same data as the ethnicity comparison, but relating to gender, there is a clear concentration around Solicitors' Account Rules breaches, with the majority of cases in the female group, 52.6% and 43.1% in the male group, triggered by these offences. In relation to category 11, 'Fraud, Dishonesty and Money Laundering' (FDM), the female group outweighed the male group by 15.8% compared to 5.9%.

1.23 The outcome of cases that were prosecuted before the SDT for 'Fraud, Dishonesty and Money Laundering' breaches were weighted towards the

more severe end of the sanctions spectrum. 'Strike Off', a sanction reserved only for the SDT, was followed by 'Fine' in the frequency of sanction issued to both ethnic groups. In the 'Fine' category there was a disparity, with 50% of cases involving a White respondent ending in this sanction, compared to only 19% of BME cases. The majority of the remaining BME cases, 23.8%, fell into the 'Suspension of PC' category, with none of the White cases receiving this sanction.

1.24 Comparing the sanctions imposed in cases involving 'Solicitors' Account Rules' by ethnicity indicates a clear disparity. Cases involving a White respondent were more likely to end with a relatively minor sanction, i.e., a reprimand, with 47.8% ending in this way, against 21.2% in the BME group. Reprimands formed the majority of the sanctions given in the White group; this is more than twice as likely as the next most frequent sanction. By comparison, the most frequent sanction in the BME group was a fine, with 26.3%. This is quickly followed by suspension, which accounted for 21.1% of BME sanctions, nearly 5 times more frequent than suspensions occurring in the White group, which accounted for only 4.3% of cases.

Conclusions

1.25 The data analysed in this Report relating to SRA and SDT investigations and sanctions has highlighted disparities along ethnic lines in a number of key areas. However, it is important that these results are not immediately interpreted as evidence of discrimination or racism on an institutional level. A number of complex socio-economic and political factors must be considered as part of a comprehensive discussion of disproportionality. It is then possible to identify areas where the SRA can adjust its practices in order to take account of the nuances that might account for numerical disparities between ethnic groups and 'maximise fairness and consistency'.

1.26 In terms of the number of years a solicitor had been on the roll at the time of their investigation, clear differences were evident between the ethnic groups. For cases held by both the SRA and the SDT, White solicitors had been on the roll for more than twice as long as their BME counterparts. A possible explanation for this relates to the fact that, according to the data, the BME solicitors investigated had established sole practices with only 6 years post qualification experience (PQE), compared to 19 years PQE for White solicitors. Less experienced sole practitioners are more likely to fall foul of SRA regulation as they lack the resources to both ensure best practice is always followed and to insulate themselves against investigation. Therefore, the issue that arises is why BME solicitors are more likely to establish themselves on their own, with relatively little experience, in comparison to White solicitors.

1.27 Of more concern, is the fact that the data identified a procedural discrepancy in the sanctions given to BME and White solicitors. White solicitors were over represented in receiving lesser sanctions, such as rebukes, whereas 20% of BME solicitors compared to only 7.5% of White solicitors were disciplined with conditions placed on their practising certificates. Clearly, there is a link between the nature of the offence committed and the severity of the sanction issued. However, it is possible that certain practitioners may be more likely to commit certain breaches than others, depending upon their circumstances and the challenges they face in their practice. All of this relates to the question posed earlier: why are BME solicitors with less experience more likely to establish sole practices than Whites and what factors might disproportionately affect these more junior sole practitioners?

1.28 The data collected indicates that the most frequent offence triggering an investigation by either the SRA or SDT related to financial irregularities falling under either a breach of the Solicitors' Account Rules and Practising Regulations (SAR), or Fraud, Dishonesty and Money Laundering (FML). This was the case for investigations into both BME and White solicitors. FML breaches accounted for 60% of BME and 22% of White investigations. Significantly, the majority of these cases were the result of investigations initiated by the SRA themselves, rather than coming from public complaints, law enforcement agencies or other referrals. This would perhaps point to the fact that the SRA is particularly concerned with enforcing regulation concerning the financial practices of law firms; a focus that may disproportionately affect some firms more than others.

1.29 Given the factors mentioned above, a hypothetical example is useful in suggesting reasons why BME solicitors might be disproportionately affected by SRA regulation. It can be argued that BME individuals are less likely to come from backgrounds that enjoy the privileges of private schooling and, as a result, are underrepresented in Oxbridge or other first class higher education institutions. As such, they lack the advantages enjoyed by other demographics when it comes to progressing in an elite profession such as practising law. These advantages relate not only to the standard of education received, but also to the formation of a network of elite associates that might be useful in providing access to opportunities and resources later, and to a pronounced understanding of how to navigate elite systems so as to advance one's career. On the face of it, these factors, which are increasingly referred to as 'social and cultural capital', have more to do with barriers presented by class status and socio-economic background than ethnicity. However, they disproportionately restrict BME individuals who are less likely to come from backgrounds of privilege. A BME solicitor, lacking the benefits and social and cultural capital outlined above, may be directly or indirectly disadvantaged

when seeking training contracts and/or employment with established and well resourced law firms.

1.30 Frustrations and limitations in career opportunities may result in a BME individual working for smaller firms or deciding to advance their prospects by starting sole practices, relatively soon after qualifying. It is perhaps also the case that some BME solicitors, recognising the fundamental principle of providing access to legal representation, may choose to establish practices aimed at serving BME communities. The disciplines practised by these BME sole practitioners will therefore reflect the needs of the communities they serve and may demonstrate an emphasis on criminal, immigration, welfare rights, or residential conveyancing law, over corporate or commercial law. Due to the nature of client billing, specialising in certain disciplines may affect the financial standing and cash-flow situation of a law firm. In this Report, no data relating to the correlation between disciplines practised, breaches committed and sanctions given, was analysed.

1.31 Smaller, less established firms or inexperienced sole practitioners, particularly if affected by billing issues relating to discipline specialisation, lack the financial resources of larger firms that could act as a cushion against temporary cash flow problems, for example. They are, therefore, less able to manage their finances to ensure best practice is consistently adhered to. Given the aforementioned scrutiny of financial issues by the SRA, individuals at these firms are more likely to find themselves under investigation resulting in a sanction. If BME solicitors are disproportionately represented in the composition of these more vulnerable firms, then BME solicitors will be disproportionately investigated for financial irregularity. As these firms lack resources in the first place, they will be less able to structure solid and robust defences and may, therefore, be more susceptible to more severe sanctions, resulting in evidence of procedural disproportionality.

1.32 This is why we recommend later in this Report that the Law Society as the profession's representative body:

a) explore what positive action provisions can be made for BME solicitors and sole practitioners to enable them to deliver the best possible services to their communities within the challenging environments in which many of them operate, and

b) consider the extent of practical support that can be provided, including the provision of more extensive toolkits, or guidance on the challenges of setting up and running small firms, including:

guidance on the Regulations and requirements concerning setting up sole practices or small firms and on the capitalisation rules, to ensure that solicitors seeking to set up firms have sufficient knowledge and experience of the regulatory rules and that they are adequately capitalised to be able to cope with the financial pressures that small firms face.

1.33 An understanding of the nuances of socio-economic and wider societal and political factors that may increase the likelihood of junior BME solicitors establishing sole practices, and the vulnerability of these firms regarding financial matters, particularly considering the SRA's focus on monitoring this area, can help to build a picture of why BME solicitors may be disproportionately affected by key decisions made by the SRA. Rather than conclude that disparities across ethnicities must be evidence of institutionalised racial discrimination, or conversely and perversely, evidence of a greater propensity on the part of BME practitioners to commit breaches of a financial nature, nuanced and comprehensive investigation of wide ranging issues can provide a more useful resource with which targeted and considered modifications to regulatory practices can be made.

1.34 It is for all the above reasons that we stress in this Report, coincidentally reiterating some of the concerns raised by Lord Ouseley (2008), the need for Equality and Diversity competencies and an understanding of unconscious bias as part of the 'necessary skills and competencies to deliver the new (OFR) approach' to regulation.

1.35 If supervision and a regulatory culture of more positive engagement with firms as they improve their capacity to identify and manage risk, do not result in more tangible evidence of the application of these Equality and Diversity skills and competencies, then OFR is unlikely to have any impact upon regulatory disproportionality and the rate of referral of BME respondents to the SDT.

1.36 Regulation 'in the public interest' necessitates the SRA working with the solicitors' profession, rather than operating in a manner that sets up regulator and regulated as adversaries. It means also, connecting up the objectives of 'protecting and promoting the public interest' with 'improving access to justice' and 'encouraging an independent, strong, diverse and effective legal profession'.

1.37 Our review found, that while regulatory disproportionality is correlated with the ethnicity of BME solicitors, it is not caused by their ethnicity. The persistence of it, however, impacts upon all three of these core regulatory objectives. This is why the pre-OFR approach to regulation, focused as it was upon 'responding reactively to individual rule breaches' and on 'compliance with detailed rules' served to compound the racial disadvantage and 'ethnic

penalty' that BME solicitors, especially community based sole practitioners and those operating small firms, suffered.

1.38 The challenge for the SRA and the Law Society is to ensure that no 'one size fits all' approach is applied to the regulated profession that increasingly mirrors the socio-economic, ethnic, gender and cultural diversity of the communities whose interests the regulator seeks to promote and protect.

1.39 As we argue in the Report, BME solicitors in big city firms, or in 'magic circle' and international firms, do not face the same challenges as those on inner-city high streets. While we did not research this, anecdotal evidence suggests that they are not subject to regulatory disproportionality. However, the displacement of BME solicitors and their firms from the vulnerable communities that are served by those who face disproportionate regulatory outcomes has a direct impact upon those communities' 'access to justice' and upon the LSA's objective to 'encourage an independent, strong, diverse and effective legal profession'.

1.40 For all the above reasons, among the 45 recommendations in this Report for the SRA, the Law Society, the SDT and the Legal Services Board (LSB) are:

- On publication of this Report, there should be a tripartite discussion between the Law Society, the SRA, BME stakeholders in the Equality Implementation Group (EIG) and the wider network of BME practitioners, as to how to address the range of issues identified in the Report, as contributing to the vulnerability of BME sole practitioners and small firms and their exposure to regulatory action.

- The Law Society and the SRA should conduct a mapping exercise using surveys and focus groups in order to gain as comprehensive an understanding as possible of the many challenges facing solicitors and firms serving vulnerable communities, including the challenges in the legal services marketplace, such as criminal legal aid and alternative business structures.

- The SDT should monitor by ethnicity and gender, the outcomes for those solicitors who appear before it on regulatory charges, to see whether there is any disproportionality.

- The Legal Services Board and the Law Society should take steps to initiate a public debate about the SRA's approach to the regulatory objectives and the persistence of evidence of disproportionality in regulatory outcomes for BME solicitors.

Recommendations

The SRA

1. The SRA should declare its understanding of the regulatory objectives and of how it sees them in relation to one another. The SRA should demonstrate how it is delivering those objectives through regulation.

2. The SRA should conduct an equality impact assessment (EIA) of the impact of its regulatory practice upon the regulatory objectives, including 'protecting and promoting the public interest'.

3. Against the backcloth of that EIA, the SRA should engage a combination of stakeholders , the Equality Implementation Group (EIG), the Law Society, the SRA, the Legal Services Board (LSB), and the Equality and Human Rights Commission, in auditing its regulatory outcomes, having regard to the requirements of the Public Sector Equality Duty.

4. The SRA should make it its default position to demonstrate at all times the way in which 'the public interest' is impacted by the regulatory decisions it makes.

5. The 'public interest' definition should be reviewed to ensure that the impact of regulatory actions on particular communities (including communities from the protected characteristics) or locales is taken into account.

6. The SRA should examine the evidence of disproportionality presented in this data analysis and consider its implications for procedural disproportionality, decision making, its relationship with BME stakeholder organisations and with the Law Society as the solicitors' representative body.

7. The SRA and the Law Society should give greater thought to the underlying objectives and rationale of the regulatory process to ensure that the right balance is struck between the punitive, deterrent, declaratory, compensatory and restorative objectives of the sanctions and options for dealing with regulatory breaches.

8. In keeping with declared OFR objectives, the SRA and all those involved in regulatory procedures should adopt a more nuanced approach to enforcement and acknowledge that race related issues are

complex and can co-relate as much to class and socio-economic background as to ethnicity.

9. Staff development sessions should be organised to enable supervisors/caseworkers, team leaders and technical advisers, forensic investigators and adjudicators to study the results of this review and assess their training needs in the light of their decision making powers and especially the amount of discretion they have authority to exercise when taking regulatory action.

10. Specifically, the SRA should take steps to adopt a more considered approach to enforcing financial regulations that take into account the vulnerability of certain practices compared to others, and that recognises the disservice to the public interest, that results from closing firms that aim to provide access to legal representation for BME communities.

11. Supervision and engagement with sole practices/firms should be conducted against this background in order that early warning signals could be agreed between supervisors and practitioners and the latter could be advised as to the preventive actions they should take.

12. The SRA should undertake some further work on trying to identify cultural or religious practice or observances that may impact on the ability of solicitors to satisfy some of the current regulatory obligations and consequently, whether some of those rules need further consideration to see if they can be finessed.

13. The SRA should hold regular training sessions targeted at the profession as a whole, led by the investigative departments, to explain what they do, how the SRA's pursuit of the regulatory objectives intersects with its actions to meet the Public Sector Equality Duty and make clear the obligations on solicitors.

14. The relevant departments of the SRA that carry out regulatory investigations, should have regular liaison with representative practitioner groups and individual Black and minority ethnic (BME) and sole practitioners and small firm solicitors with regard to regulation and compliance with the Public Sector Equality Duty.

15. Since this review is probably the last such review that will examine SRA closed cases pre-Outcomes Focused Regulation (OFR), the SRA should publish monitoring data on the impact of OFR on BME disproportionality specifically, and on the regulation of sole practitioners and small firms generally.

16. The SRA should review its monitoring systems and databases and its approach to measuring issues of ethnicity, with a view to making improvements as necessary, especially in consistency and clarity. In doing so, it should examine for its usefulness, the Race and Diversity Audit Template devised by the ACPO and praised in the DIPPS report.

17. The SRA should review its Code for Referral to the Solicitors Disciplinary Tribunal (SDT) in the light of BME disproportionality and the objectives of OFR.

Discrimination

18. Complaints of racial discrimination against the SRA, whether internally or externally generated, should be reported to the EIG twice yearly.

19. The SRA should establish an independent body consisting of 3 people, one of whom would be a suitably qualified member of the SRA's Diversity & Inclusion team and two external to the SRA, with suitable terms of reference, to investigate individual complaints of racial discrimination and publish the results of their investigations.

Excessive Regulation?

20. The SRA should pay attention to what respondents are saying about 'over regulation' and the impact of the premature publication of regulatory action being taken against named individuals.

21. The SRA should monitor by ethnicity and gender, the impact of the application of its publication policy and should send that monitoring data to the SMT (the executive group), the Equality Diversity and Inclusion (EDI) Committee and the EIG. Specifically, the monitoring should tell how many BME solicitors facing regulatory action have had their matter published and been subsequently cleared of any breaches (by SRA internal adjudication, SDT, or the High Court), how long after publication they were cleared, and what has been the impact of publication upon their ability to practise, or upon their firm.

22. A more detailed piece of work should be carried out to find out the views and experiences of respondents who have been through the regulatory process. This should also include demographic details of respondents and the environment and context in which they practise. This more qualitative inquiry should be designed to highlight the challenges sole practitioners and heads of small firms face, the impact

of their services on improving access to justice and ways in which they feel the Law Society and the SRA could work with their sector of the profession and support solicitors' careers. It should also aim to identify and remedy inadequacies in the regulatory process and highlight any evidence of discriminatory practices or outcomes.

23. The SRA should examine its relationship with organisations that provided advice and assistance to solicitors, as a consequence of the SRA pointing them to such organisations, during the 2009-2012 period covered by this review, in order to assess the quality of the support provided, the way solicitors were dealt with and whether individuals in some of these organisations may have abused their position and exploited vulnerable solicitors.

Costs

24. The SRA should conduct an equality impact assessment on the cost of its regulatory proceedings and report on the cost determinations it makes, cost orders that are made by the SDT, the amounts the SRA actually recovers, the impact of meeting such costs on respondents, especially sole practitioners and partners in small firms and the total amounts that are outstanding and cannot be collected without leave of the SDT.

25. The SRA should conduct an exercise to estimate the cost implications of the reduction of cases referred to the SDT as a function of OFR, and of cost orders that might otherwise have been imposed on sole practitioners but for risk-based and outcomes-focused regulation.

Large and Small Firms

26. The SRA should monitor its regulation of large firms for any impact upon BME solicitors in such firms. As a baseline, the SRA should publish monitoring data on BME solicitors in 'magic circle', big city and international firms as compared to those in sole practice or in small firms.

27. The SRA should use the diversity monitoring data it collects from big city and 'magic circle' firms to assess the rate of entry and level of retention of BME solicitors to and in those firms. This data should include their policy in respect of the awarding of training contracts and their breakdown by ethnicity of the application of that policy.

Governance

28. The SRA Board should keep a focus upon and demonstrate its commitment to promote equality of opportunity and eliminate unlawful discrimination. It should ensure that the EDI Committee's terms of reference are clearly consistent with fulfilling the Public Sector Equality Duty and ensuring that the regulator has in place measures for tackling such structural, cultural, institutional and personal manifestations of discrimination that may exist or might arise within the organisation.

29. The SRA should set itself a target, with timescales, for achieving a better balance on the axis of ethnicity on its Board, Board Committees, and its team of Adjudicators, using appropriate positive action measures as necessary, including co-options and secondments.

30. In addition to ensuring that 'the overall SRA strategy and… vision and values (continue to) feature in the performance and development review of staff so that E&D can be translated into their day to day activities', the SRA should determine what constitutes 'Equality & Diversity competence' and ensure that this is rigorously tested in the selection and recruitment of Board members, senior managers and staff with line management and decision making responsibilities, including regulatory staff, and in the performance and development review of all staff.

Leadership and Management

31. The Chief Executive must be seen by SRA staff, the SRA Board, the profession and the public to provide visible and demonstrable leadership on equality, diversity, inclusion and shared values, particularly with respect to promoting equality and eliminating institutional and other forms of discrimination.

32. SMT and the Operational Delivery Group (ODG) should have a specific competency and objective around delivery of equality, diversity and inclusion and their performance in meeting that objective should form part of their performance appraisal.

33. The Director of Inclusion should be made a member of both the SMT and the ODG, to act as a strategic consultant on equality, diversity and inclusion and to help members of both those groups build their competence in leading and managing the equality, diversity and inclusion agenda. This would allow the Director of Inclusion, in turn, to help develop capacity within the teams that are led and managed by those SMT and ODG members.

34. The SRA should demonstrate a clear commitment to meeting the Public Sector Equality Duty. Promoting equality and combating discrimination in the spirit of the Equality Act 2010 should be reflected in the core strategic priorities and the strategic management of the organisation and how it functions as a regulator.

35. The SRA should audit its decision making framework and practices and ensure that equality, diversity and inclusion is included and the expertise of the Diversity & Inclusion team is called upon as necessary, even when managers anticipate challenges from that team.

36. The SRA should take further steps to change its culture and ethos and engage with the profession in a manner that enhances solicitors' willingness to engage and implement change, rather than seeing themselves in a potentially adversarial relationship with the regulator. In this regard, the profession should be able to see more tangible signs of the SRA being a change leader as far as promoting equality and combating discrimination is concerned.

37. The ODG should revisit the 'two day leadership development workshop' that was held for the Leadership Group in 2011, with a view to taking appropriate measures to build the Equality & Diversity competence levels of each member of the Group and monitor their application in the leadership and management functions members of the Group perform.

38. Staff should be encouraged and guided to take personal responsibility for combating personal and institutional discrimination.

39. The SRA should focus upon promoting equality and human rights and combating discrimination, rather than on promoting or valuing diversity, in order to assist individual members of staff to understand and take responsibility for how they could be implicated in perpetuating discrimination and exclusion and what they can do about it.

40. Given the profile of its staff, its leadership and senior management group and the equality and human rights issues it needs to address in the context of its regulatory functions, the SRA should take steps, as soon as is practicable, to ensure implementation of Ouseley 16 and Ouseley 18:

    16. The SRA should consider implementing its own HRD policies, practices and processes, incorporating equality and diversity, and independent of the Law Society's overall approaches.

18. The SRA should implement its equality and diversity policies on human resources effectively and not be constrained by the Law Society Group's approach in meeting its statutory, strategic and policy equality and diversity goals.

Partnership and Collaboration

41. In the light of the many matters that concern EIG representative groups and their members, and their relationship with the Law Society as their representative body, the SRA should enter into discussions with EIG members as to the most effective structural arrangements for securing their engagement with the SRA and its strategic management of the equality, diversity and inclusion agenda.

42. On publication of this Report, there should be a tripartite discussion between the Law Society, SRA, EIG and the wider network of BME practitioners as to how to address the range of issues identified in the Report as contributing to the vulnerability of BME sole practitioners and small firms and their exposure to regulatory action.

43. Specifically, EIG members and the bodies they represent should be facilitated to form part of a working group with a remit to examine regulatory disproportionality as it relates to the regulatory objectives and in particular: *regulation in 'the public interest', access to justice; the interests of consumers of legal services and encouraging an independent, strong, diverse and effective legal profession*. That working group should also include representatives of the Law Society, the SRA, the Legal Services Board, the Bar Standards Board and the Equality and Human Rights Commission.

SRA and the Law Society

44. The Law Society and the SRA as part of the Law Society Group, should promote and protect the public interest by working to ensure that solicitors' practices that serve vulnerable communities are supported in a manner commensurate with the market and societal challenges they face, so that those communities could access legal services locally and of a high standard.

45. The Law Society and the SRA should:

    i. Conduct a mapping exercise using surveys and focus groups in order to gain as comprehensive an understanding of the many challenges facing solicitors and firms serving vulnerable communities, including the challenges in the legal services

marketplace, such as criminal legal aid and alternative business structures,

ii. Jointly seek out legal insurance providers who can provide legal insurance at preferential rates for solicitors who are subject to regulatory proceedings,

iii. Give consideration to whether legal insurance can be provided as part of the practising certificate fees,

iv. Develop closer relationships with practitioner networks/forums and provide opportunities for them to contribute to the strategic policy development of the respective organisations and especially their agenda to combat unlawful and institutional discrimination,

v. Work with the EIG and the networks they represent to examine the most effective ways of addressing with BME solicitors most susceptible to regulatory action the matters raised in the above analysis and in this report more generally, and

vi. Provide closer scrutiny of persons applying to set up law firms, in order to ensure that the solicitors concerned are not just properly capitalised, but they have the necessary experience to run a law firm and fully understand the onerous regulatory requirements they would need to satisfy.

The Law Society

46. The Law Society should:

- Consider what its own response should be to the structural and operational issues identified as having a bearing upon the nature and incidence of cases raised that involve BME sole practitioners and small firms.
- Consider providing modular training for sole practitioners and heads of small firms on:
    - Management,
    - Leadership,
    - Recruitment,
    - Due diligence,
    - Practice management, and
    - Financial probity.

- Explore what positive action provisions can be made for BME solicitors and sole practitioners to enable them to deliver the best possible services to their communities within the challenging environments in which many of them operate.

- Consider the extent of practical support that can be provided, including the provision of more extensive toolkits, or guidance on the challenges of setting up and running small firms. This should include guidance on the Regulations and requirements concerning setting up sole practices or small firms and the capitalisation rules, to ensure that solicitors seeking to set up firms have sufficient knowledge and experience of the regulatory rules and that they are adequately capitalised to be able to cope with the financial pressures that small firms face.

The Law Society and the Legal Services Board

47. The Legal Services Board and the Law Society should take steps to initiate a public debate about the SRA's approach to the regulatory objectives and the persistence of evidence of disproportionality in regulatory outcomes for BME solicitors.

SRA and the Solicitors Disciplinary Tribunal

48. The SRA and the SDT should make it clearer in their publications and on their respective websites that they are separate entities from each other.

The Solicitors Disciplinary Tribunal

49. The SDT should monitor by ethnicity and gender, the outcomes for those solicitors who appear before it on regulatory charges to see whether there is any disproportionality.

50. The SDT should ensure that its panel of members include an ethnically diverse range of individuals.

2.0 Background and Introduction to the Review

2.1 This review was commissioned by the Solicitors Regulation Authority (SRA) in 2012. The SRA wished to conduct an independent, comprehensive case file review

> 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying potential improvements to such practices, policies and procedures to maximise fairness and consistency…'

2.2 The Solicitors Regulation Authority was established as an independent regulator in 2007, an authority formed from its predecessor, the Law Society Regulation Board that had come into being as a result of the reorganisation of the Law Society in 2006 and the separation of its three main functions: representation, regulation and complaints into separate directorates. External evaluation of the Law Society's performance in promoting equal opportunity and tackling unlawful discrimination in the three years prior to 2007, as well as the Law Society's own research, had revealed disproportionality in the number of Black and Ethnic Minority solicitors who were the subject of complaints or of regulatory action by the Law Society. BME solicitor networks continued to express concern about the persistence of monitoring data and anecdotal evidence which pointed to disproportionality and its impact on the career and livelihood of BME solicitors.

2.3 One major concern that external evaluation reports highlighted, therefore, was the likelihood that the adverse impact of regulatory and other operational practices upon BME solicitors would persist if strategic solutions were not found before the SRA became engrossed in putting in place an organisational infrastructure and establishing itself as an entity in its own right, albeit a part of the Law Society Group. That concern was justified in that while there existed evidence of some progress in promoting equality and diversity in the regulatory function, that progress was incremental and not commensurate with the challenges and risks BME solicitors were facing across the profession; nor did it appear to be having a positive impact upon disproportionality in regulatory activity and resulting sanctions as experienced by BME solicitors.

2.4 Such, then, was the context in which the new SRA was seeking to configure itself as a regulator and fashion a relationship with the profession and with the other partners in the Law Society Group.

2.5 In Lord Ouseley's 2008 report of his *'Independent review into disproportionate regulatory outcomes for black and minority ethnic solicitors'*, he notes:

> 'Following representations about allegations of discriminatory treatment, a Working Party was established in 2007 by the Solicitors Regulation Authority (SRA), under the leadership of Anesta Weekes QC, to investigate the apparent disproportionality of regulatory and conduct investigations and activities on BME solicitors…….In March 2008, Lord Herman Ouseley was appointed by the SRA, with the support of the Working Party, to conduct the independent review . Its aim was to:
>
> *consider all relevant aspects of the SRA's regulatory policies, practices and its decision-making process and provide a report with findings and recommendations'*.

2.6 Lord Ouseley reported his findings to the SRA in July 2008 and made 40 recommendations encompassing:

- Organisational Culture and Leadership
- Equality and Diversity
- Support and Guidance
- Monitoring and Evaluation and
- Operational Issues.

(Ouseley Report July 2008 , p. 62-65)

2.7 The SRA made an 'initial response' as part of the report in which, among other things, it accepted

> 'the review finding that progress in embedding equality and diversity has been slow and that we must address issues of discretion and possible prejudice which may result in disproportionate outcomes for BME practitioners, as part of our programme of ensuring that we have the best organisation to deliver regulation in the public interest'.

2.8 The SRA response also set out the immediate actions the regulator would take 'under each of the key areas for action identified by Lord Ouseley'. Those areas included:

- Leadership
- Engagement
- Impact Assessment
- Training and Development of Staff on E&D
- Data Collection, Monitoring and Analysis
- Complaint Investigation

- Recruitment and
- Scrutiny and Quality Assurance.

2.9 The report contained a number of appendices, including views and additional recommendations 'of the BME stakeholder groups who were represented on the SRA Working Party looking at the impact of SRA decisions on BME solicitors' (Ouseley, p.89). The report was seen by practically all the stakeholder groups as a vindication of anecdotal evidence gathered over time from their members. Most called for a moratorium on regulatory action against BME solicitors and an independent review of former regulatory decisions in the light of Lord Ouseley's findings and recommendations.

2.10 Following Lord Ouseley's report, the SRA produced an action plan for implementing his recommendations. That action plan was updated in due course to include steps the SRA would take to meet the requirements of the Equality Act 2010.

2.11 Lord Ouseley was retained by the SRA to monitor its performance in promoting equality, diversity and inclusion in the light of his report. The Working Party that had oversight of the Ouseley review segued into the Equality Implementation Group (variously called the External Implementation Group) in order to assist the SRA in implementing the action plan and to receive reports from the SRA at regular intervals on its progress in this regard. The Equality Implementation Group (EIG) is chaired by Lord Ouseley.

2.12 In March 2009, the SRA published its first Equality and Diversity Strategy as a framework for promoting equality and diversity and ensuring fairness in the work it does as a regulator and an employer.

2.13 In June 2009, Lord Ouseley reported to the EIG on his *'Interim Review of Equality, Diversity and Inclusion Policy Implementation by the Solicitors Regulation Authority'*, with 'a specific focus on matters of leadership, culture change, access to information and communications…, and a scrutiny of discrimination complaints…'. That report signalled that future review reports would include, among other things, an 'assessment of how disproportionality is being tackled as a consequence of the equality, diversity and inclusion initiatives'. It also acknowledged the various steps the SRA had taken to focus the organisation on progressing equality and diversity since the 2008 review.

2.14 One of the measures the SRA took in 2009, in response to Ouseley 2008, was to commission follow-up research into the reason(s) for disproportionality in its regulatory activities with a particular focus on disproportionate outcomes for BME solicitors. It commissioned Pearn Kandola to conduct follow-up research 'to understand why this level of disproportionality was occurring and

what can be learnt from other organisations that have tackled similar disproportionality issues'. Pearn Kandola submitted an initial interim report, *Disproportionality in Regulation* in December 2009.

2.15 In July 2010, Pearn Kandola reported to the SRA on their 'comprehensive investigation into the factors that contribute towards a solicitor having a case raised against them, as well as whether the outcomes vary by ethnicity for the way in which the case is resolved'.
(*Commissioned research into issues of disproportionality*, Pearn Kandola, July 2010)

2.16 We shall return to this report time and again in the sections that follow. By way of background to this review, however, it is helpful to note at this stage that Pearn Kandola concluded from their study that:

> 'A disproportionately high number of cases are raised against BME solicitors. These cases are being raised by members of the public, members of the profession, partners such as the Legal Complaints Service (LCS), and a small number are made by other bodies, such as the police. This means that before the SRA puts any of its processes in place, it is dealing with a disproportionate case load….
>
> It is important that solicitors are made aware that the SRA have a disproportionate number of cases raised against BME solicitors. Currently, some forms of reporting suggest that the disproportionality experienced by BME solicitors is purely due to the SRA; the results of this research indicate that this clearly is not the case'.

2.17 Crucially, Pearn Kandola concluded:

> 'However, a clear finding of this research has been that a solicitor's ethnicity in itself does not predict whether they are more likely to have a case raised against them. In essence, whilst BME solicitors have a disproportionate number of cases raised against them, it is not their ethnicity that directly contributes to this. Instead, other factors, such as the number of years a solicitor has been practising and the number of PCs (practising certificates) they have held are more likely to predict whether a case is raised. We know, for example, that solicitors who work in BME-owned firms are more likely to have cases raised against them, that BME solicitors are more likely to work in BME-owned firms, and that BME-owned firms are more likely to have fewer partners (i.e. they are more likely to be smaller firms). In addition, this research has also highlighted that those with fewer number of years practising when their first case is raised are more likely to have a case raised against

them; BME solicitors are also more likely to have fewer years practising. These factors, therefore, are indirectly associated with the disproportionality experienced by BME solicitors'.

2.18 Pearn Kandola made 16 recommendations, many of which had to do with the need for the SRA to review the decision-making processes that govern regulatory activity once an event has been reported/recorded and a case is raised.

2.19 In December 2011, the SRA reported on the progress it was making in implementing the action plan it had devised in response to the Pearn Kandola recommendations, having regard to the fact that it was implementing those recommendations simultaneously as the organisation was adapting to outcomes focused regulation and alternative business structures.
SRA: *Implementing the Pearn Kandola recommendations* (December 2011)

2.20 Between October 2010 and February 2012, the SRA conducted six disproportionality audits directly related to as many of the recommendations in the Pearn Kandola report. The audits also examined progress in implementing the Ouseley recommendations that were mirrored by the findings and recommendations of Pearn Kandola.

2.21 In 2013, the SRA produced a comprehensive internal report that reviewed the actions it had taken to implement each of the Lord Ouseley's 40 recommendations. We comment upon that progress report in some detail below.

2.22 Against the background of his 2008 report, his chairing of the EIG and reports to the EIG of the auditing conducted by the SRA and on its implementation of its action plan, Lord Ouseley was alerted by a number of BME practitioners and practitioner networks to allegations of discrimination in regulatory processes. Those discrimination claims centred around the SRA's treatment of BME solicitors as compared to White solicitors in response to regulatory breaches.

2.23 On 26 January 2012, for example, the Society of Black Lawyers issued a press release with the banner headline:

> Lawyer accuses Solicitors Regulation Authority of 'racial profiling'

2.24 The press release stated:

> 'A growing number of ethnic minority solicitors are bringing race discrimination claims against the Solicitors Regulation Authority (SRA),

> the body created by the Law Society to regulate solicitors and law firms. Many point to the inconsistencies in the decision making process within the SRA in relation to ethnic minority solicitors, when compared with decisions made against white solicitors'.

2.25 The press release cites the case of one Joyce Agim as being:

> …the latest ethnic minority solicitor who believes that institutional racism at the SRA has led to a white solicitor receiving a reprimand from the SRA, even though the Authority found that the solicitor in question had committed clear breaches of the Solicitors Accounting Rules and anti-money laundering rules. Mrs Agim claims that ethnic minority solicitors have been struck off for far lesser charges and she is now suing the regulatory body for discrimination. The SRA are seeking, not only to have Mrs Agim's claim struck out at a hearing on Thursday 26 January 2012 at the Central London County Court, but also to prevent Mrs Agim from using the SRA's forensic investigation report into the conduct of the white solicitor as evidence in her case against them….. Mrs Agim and others believe that despite these reports (internal and Lord Ouseley's of 2008) and efforts within the SRA to implement Lord Ouseley's recommendations, the Authority continues to engage in practices and decision making which amount to 'racial profiling'.

2.26 This press statement has implications for what was to transpire with respect to the comparative case review, as we shall see later in this report.

3.0 Terms of Reference for the Review

3.1 Against the above background, the SRA decided to commission a review of case files

> 'to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying potential improvements to such practices, policies and procedures to maximise fairness and consistency…'

3.2 The SRA elaborated upon its objectives in commissioning the review as follows:

> 'The SRA remains concerned about the issue of disproportionality, and has over the past three years taken steps to address disproportionality by commissioning research to improve our understanding, carried out audits across its key regulatory process and implemented development programmes for its staff on decision making. These are important steps towards us making sure that our regulatory processes and their application by our staff is fair and unbiased. We have shared the findings of this work with the EIG and published a great deal of material.
>
> Addressing disproportionality and demonstrating that the SRA is a proportionate and outcome focused regulator is key to achieving our strategic objectives. We see the comparative case review as providing further insight into this issue and its causes (which may well be changing over time – an example being the financial pressures in the national economy). We also see the review contributing to our transformation programme as we continue to embed outcomes focused regulation in the public interest. This means that although the review needs to be focused, the context of our strategic objectives needs to be borne in mind. The SRA believes the Comparative Case Review can contribute to these objectives, providing insights of general relevance leading to further improvements in practices and operations.'

3.3 The SRA pointed to three strategic policy objectives and nine equality and diversity objectives in its 2012 strategic plan. Among the nine equality and diversity objectives were:

- Continuing to closely monitor the disproportionate outcomes for BME solicitors and firms and seeking where possible to reduce that disproportionality (Objective 6)
- Encouraging a diverse profession (Objective 9).

3.4 The Gus John Consultancy was appointed in July 2012 to conduct the review and was provided with draft terms of reference on which the SRA was consulting with members of the EIG. There was protracted discussion of those draft terms and especially around one issue which for members of the EIG was central to the very purpose of the review, i.e., whether some 14 regulated cases in which discrimination on the part of the SRA had been alleged in the course of the regulatory process would be reviewed in their own right. The SRA elaborated upon its view of the purpose of the review and informed the EIG that it:

> *'does not believe that it would be helpful or acceptable for the review to become an unconventional process in which the formal investigation, prosecution and adjudication of individual cases is informally repeated… . It does not believe that it would be appropriate to re-open cases, go behind the findings of courts or tribunals or create any form of parallel process for cases which are yet unresolved. The SRA does not have anything to hide…'.*

3.5 The SRA took the view that since some of those 14 cases were still live, it would not be appropriate for them to be reviewed. In relation to the rest, since it was not part of the remit of the review to go behind the decision of the tribunal or court and conduct a review of any one case that might result in a different outcome, it was not appropriate for the review to extend to those 14 cases.

3.6 Eventually, a decision was taken that the review would begin by examining two cases in which discrimination had been alleged and about which there was particular concern in order to identify issues that might help to inform the approach to the main review, including the methodology most appropriate to the terms of reference.

3.7 It was suggested during discussion of the terms of reference that the SRA should put out a call for evidence in order to allow solicitors who wish to contact the review team to do so and provide information about their experience of regulation. The SRA responded as follows:

> 'The SRA is concerned that this may create an open ended call on its resources to rebut allegations from solicitors who despite the conclusion of regulatory processes are reluctant to accept their own misconduct. There is no evidential basis to justify the cost of such a review, and the SRA could not justify such a cost to those who fund it. Such a mechanism would take the selection of cases and information away from the reviewer and be less likely to produce a significant, objective and meaningful sample as a basis for recommendation.'

3.8 The terms of reference were finally agreed in November 2012. In September 2013, an addendum was made to the terms of reference as follows:

- Examine how current cases are being processed and how recently concluded cases were dealt with under Outcomes Focused Regulation (OFR) in order to highlight the impact of '***improvements to SRA policies and processes'*** and the extent to which the OFR approach to regulation is helping to eliminate disproportionality and ***maximise fairness and consistency'.***

- Conduct two on-line surveys of external advocates and of respondents respectively, in relation to their experience of the regulatory process. A total of 160 Respondents to be surveyed, who were not part of the main file review sample.

3.9 The terms of reference are set out in the Appendix to this Report.

4.0 Methodology and Research Issues

Methodology

4.1 1st Stage review of two cases where the SRA is alleged to have discriminated during the regulatory process:

- Examination of background documents provided by the SRA,
- Interviews with the Respondent in each case,
- Examination of files provided by the Respondent, and
- Interviews with SRA regulatory staff, as necessary.

4.2 Pilot review of 20 files to examine the way files are organised and the nature and quality of file content:

- Interviews with SRA regulatory and file management staff, as necessary, and
- Identification of issues pertinent to the selection of the file review sample.

4.3 Work with SRA file management staff to select sample of 160 files as indicated in the terms of reference.

4.4 Construction of a file review and data capture instrument, with variables to reflect the data indicated by the terms of reference.

4.5 Review of 160 case files in 4 sets as outlined in the terms of reference.

4.6 Advocates survey.

4.7 Respondents survey.

4.8 Focus group discussions with respondents and with regulated solicitors and lawyers representing them in the SDT.

4.9 Interviews with relevant SRA management and staff:

- Regulatory practice pre-OFR,
- Regulatory practice through OFR,
- Equality, Diversity & Inclusion, and
- Complaints.

4.10 Tracking the implementation of the Ouseley and Pearn Kandola recommendations.

4.11 Interviews with other relevant persons representing other agencies:

- The Law Society,
- The Solicitors Assistance Scheme,
- BME practitioner networks,
- Members of the Equality Implementation Group,
- Other regulators,
- Regulatory Advocates,
- Representatives of City law firms, and
- Academics researching disproportionality in regulatory practice by other regulators.

4.12 Statistical analysis.

4.13 Qualitative analysis.

Research Issues

4.14 The review activities necessary to deliver the required outcomes as indicated in the terms of reference were as follows:

a) Working with the SRA to choose (as randomly as possible):
   - 40 Solicitors Disciplinary Tribunal (TRI) files involving BME respondents
   - 40 TRI files not involving BME respondents
   - 40 files that went to Adjudication involving BME respondents
   - 40 files that went to Adjudication not involving BME respondents.

b) Working with the SRA to identify a proportion of cases in which discrimination has been alleged.

c) Examination of those files and comparative cross referencing.

d) Possible follow-up interviews with:
   - SRA staff
   - Solicitors in the cases being reviewed.

Sampling and File Selection

4.15 As noted in the introduction to this report, the trigger for this review was concern about regulatory processes, practices and outcomes as experienced by BME solicitors over time and the need to explore, through a thorough examination of case files, whether there was evidence pointing to the reasons

for the disproportionality that had been identified by both the Ouseley and Pearn Kandola reviews. The review was therefore meant to establish:

a) whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others, and
b) if there is disparity, what accounts for it.

4.16 In this sense, bearing in mind the work already done by Lord Ouseley, by Pearn Kandola and the SRA's own follow-up audits more or less continuously between 2008 and the commissioning of this review in 2012, the review set out to explore the range of factors that might account for regulatory disproportionality, statistical and procedural. Are BME solicitors more likely than their White counterparts to generate or be the subject of 'events' or complaints that might constitute regulatory breaches? Might that be as a result of their location as practitioners, the size of their firms, the nature of their practice, the length of their experience before setting up in practice, or other factors? And, once the SRA, in discharging its regulatory function takes necessary steps in response to a complaint, does the application of its policies and procedures, or/and its internal practices lead to disproportionate outcomes for BME solicitors?

4.17 But, since this is a 'comparative case review' and effectively a 'file' review that does not allow scope for focused interviews with each respondent to which the file relates, there is an obvious further question:

- Are case files organised in such a manner as to allow a reader of those files to capture data about respondents and their profile, or about regulatory staff, their profile, decision making, use of discretion, etc., in order to establish the possible reason for decisions or outcomes that affect BME practitioners disproportionately?

4.18 The methodological challenges this posed, therefore, included:

a) establishing precisely what data was available and how that was recorded and stored so that sensible decisions could be made about sample sizes in respect of the variables identified in the terms of reference, and

b) accessing the sum total of cases involving solicitors (rather than legal executives or paralegals) that went to the SDT in 2009, 2010 and 2011, in order to conduct a statistical analysis of the ethnic and gender breakdown of the solicitors involved, the nature of the event that triggered the raising of a case/logging of an 'event'

regarding a solicitor and the recorded outcome of regulatory action in response to that event.

4.19 As far as the SDT is concerned, this was meant to assist us in determining the number of BME solicitors as compared to White who were subject to the tariff of outcomes listed in the terms of reference for breaches or professional failings that were identical to those of their White counterparts. The tariff is:

a. Strike off,
b. Suspension,
c. Fine,
d. Reprimand,
e. Respondent ordered (only) to pay SRA costs,
f. No order, and
g. All allegations dismissed.

4.20 If those numbers were not large in any one year, it might not be sensible or possible even, to try and pick a 'random' sample from among them.

4.21 If the number of events that are common to both White and Black solicitors is small, a direct comparison may not be possible, although other factors might be at play (use of discretion; quality of decision making; comparative robustness of the regulator's manner of dealing with relatively minor incidents where no public interest issues were evident; extent to which solicitors felt constrained and distrustful about cooperating with the regulator; attempts on the part of the SRA to get them to engage and cooperate; how early they sought legal advice or representation; solicitor's/firm's regulatory history, if any, etc.).

4.22 For this reason, in addition to comparing outcomes for BME solicitors and for their White counterparts in regulatory matters of a similar nature, the research needed to be mindful of the nuances that could help to illuminate 'disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others'. One variable, for example, might be the extent and nature of the SRA's engagement with intervening solicitors and/or with the SDT post-referral, through to the latter's publication of its findings and judgment. In this case, a close examination of file content and any recordings of exchanges between the regulator and the respondent would be necessary. Such an examination should reveal any evidence of disproportionality of response in cases involving White solicitors as well as BME, or White male solicitors as compared to female, etc.

4.23 Our capacity as researchers to do the above would therefore depend hugely on the nature of file entries and the extent to which the reasons for particular decisions or courses of action are actually recorded, as distinct from needing

to be inferred. In view of the fact that caseworkers exercise a degree of discretion in their decision-making when dealing with events, it was reassuring to find on an initial examination of files that, where necessary, supervisors and adjudicators had required caseworkers to be more transparent about the basis of their decisions and would endorse files to indicate that the recommended outcome did not match the evidence on which it was based.

4.24 These were some of the issues we identified in respect of Phase One of the research, i.e., the statistical analysis.

4.25 The above also had implications for Phase Two, the comparative case file review. The review was meant: 'to compare a sample of SRA files for SDT prosecutions (TRI reference) in which the SDT published its findings or judgment in 2011 with a sample of files dealt with by way of internal decision at Adjudication in 2011.

Agreed sample – random within following criteria:

- 40 TRI files involving BME respondents,
- 40 TRI files not involving BME respondents,
- 40 files that went to Adjudication involving BME respondents, and
- 40 files that went to Adjudication not involving BME respondents'.

4.26 The 80 files (TRI and Adjudication) involving BME respondents could relate to solicitors belonging to the ethnic categories that fall under the generic term 'Black and Ethnic Minority'. Individuals determine whether or not they belong to this generic group by virtue of the identity they ascribe to themselves. But when they are classified as BME, or White, it is still possible for the purposes of file sampling to know the representation of specific ethnic groups within the generic BME category. An additional difficulty is that 'ethnic minority' is invariably taken to mean 'non-White'. White, in the popular imagination, is not seen as an ethnic group. Consequently and for the purposes of this review, although White solicitors constitute the ethnic minority in the areas in which they practice, this is not how they would describe their ethnicity.

4.27 Random' selection of files involving BME respondents might yield files which relate to male or female individuals in one if the following categories: Black Caribbean solicitors; Black African solicitors; Black British solicitors (Caribbean/British parentage); Black British solicitors (African/British parentage); Pakistani solicitors; Bangladeshi solicitors; Indian solicitors; Turkish solicitors; Iranian solicitors … the list goes on. Some would have qualified outside England and Wales, others not.

4.28 The 80 files (TRI and Adjudication) involving White solicitors are most likely to relate to male or female individuals in one if the following categories: White

English, White Scottish, White Welsh or White European (French, German, etc.). Some would have qualified outside England and Wales, others not.

4.29 While a random selection of files involving BME solicitors might give one a mere handful of solicitors in each of the possible categories listed above, there might well be concerns involving Black Caribbean and African solicitors more than others, or Black Caribbean and African males more than females. Respondents with distinctly African names, for example, might trigger responses from case workers or other regulatory staff that are different from the less distinguishable and more European sounding African Caribbean names, especially if the Respondent already has a regulatory history with the SRA. Since, some 20% of solicitors registered for practice have not self-identified their ethnicity, it may be difficult to select 80 files at random (Tribunal and Adjudication) unless one first aggregates the total number of files in each BME category and then identify the percentage of the overall BME file population they represent. Given the fact that the overall number of BME files in any one year that goes to adjudication or is referred to the SDT is small, this seems to be the only way one can tell whether random sampling will give a sufficient number of files to be statistically relevant and to make for meaningful comparisons.

4.30 In Phase Two of the review, therefore, we examined the files and on the basis of available evidence in the files we endeavoured to assess the SRA's decision making processes from the time an event was reported and recorded/a case was raised, to the decision to go for internal adjudication or referral to the SDT, noting the outcome of either process, focusing also on the SRA's processes/policies and the quality assurance procedures it used to inform and monitor this decision making.

4.31 We also looked at any issues that may have been raised at any stage during the process by the respondent/firm and how these were dealt with by the SRA. This means that in relation to all cases in the sample we looked at issues of fairness, transparency and consistency in dealing with solicitors in the sample, irrespective of their profile. However, information on these matters was not consistently available in the files and this is one of the reasons for our decision to conduct a survey of respondents.

4.32 Another important aspect of the review, which was also very dependent on file quality and file management, especially in the light of 4.5 and 4.6 above, was the availability of evidence of how SRA personnel explain their decisions and judgements, so that one is able to see how a decision was made and have a clear explanation of the evidential tests used. This is necessary for one's ability to assess whether unconscious bias is at work, or whether stereotypical judgements are being made. This is particularly relevant with regard to

referrals to the SDT via the adjudication process. It is especially important in respect of the SRA's application of the 'public interest' test.

4.33 We decided that one way of 'testing' the fairness, transparency and consistency of the SRA's application of its policies, processes and evidential tests would be to take all those with an SDT outcome published in 2011 and compare that group to those who were not referred for the same or similar events, by ethnicity. The same is true for those who were taken through adjudication and those who were not.

4.34 For all of the above reasons, the sampling process needed to be robust in order to provide us, hopefully, with a sample that would yield the sort of information to enable us to make some evidence based assessments.

4.35 Given the 'BME' conundrum outlined above and the need to ensure the sample is relevant to the objectives of the review, we felt it would be sensible if the cases being considered were chosen from small firms (sole practitioner to 4 partners or less), as it would appear that they have the highest representation among solicitors/firms that are investigated by the SRA.

4.36 During discussions in 2012 about the terms of reference for the review, the view was often expressed by practitioner networks that the SRA does not 'go after' the larger firms. Their perception was that small firms and sole practitioners were much more likely to be subjected to regulatory action than large firms, especially 'magic circle' and other 'big city firms'. We thought it would be informative to discover how many large firms have been taken through adjudication or been referred to the SDT and with what outcomes. Of obvious importance here, too, would be the ethnicity and gender of the solicitors acted against in these firms and the events that triggered SRA action. If that number is small, we would want to examine a high percentage of them in order to establish whether there is consistency in the way the SRA deals with them as firms, as compared with the way it deals with small firms, or consistency in its treatment of Black as opposed to White solicitors in those larger firms.

4.37 This did not form part of the terms of reference specifically, and resources did not allow us to pursue this line of inquiry. However, we did speak with representatives of three large city firms to gain an understanding of how they functioned and how they viewed or engaged with the work of the SRA. We discuss their perspectives below.

4.38 Having regard to the sampling challenges outlined above, in order to gain a sense of files and their organisation and content, we felt it would make sense to conduct a pilot review of 10 BME and 10 White files according to the criteria set out in the terms of reference. This, we hoped, would enable us to better

determine the most suitable review process and whether the files were capable of enabling us to extract the level of dependable information we needed for meaningful analysis.

4.39 The 160 files in the review sample were those 'in which the SDT published its findings or judgment in 2011, plus a sample of files dealt with by way of internal SRA decision at Adjudication in 2011'.

4.40 In November 2011, the SRA started rolling out Outcomes Focused Regulation (OFR). Chief Executive, Antony Townsend, said at the time:

> 'We will regulate fairly, proportionately, and firmly….Regulating in a new way, focusing upon risks and outcomes rather than compliance with detailed rules, has been a massive change for our organisation'.
>
> *OFR and beyond - The SRA's vision for regulating legal services in the 21st century*

4.41 OFR is predicated upon a qualitatively different relationship between the SRA and the regulated profession, with an emphasis on supervision, constructive engagement and supporting solicitors/firms in identifying and managing risk, among other things, so as to anticipate and avoid breaches. We felt it necessary, therefore, to explore the impact 'Outcomes Focused Regulation' and a greater proportion of in-house adjudication might have on a key intended outcome i.e., to maximise fairness and consistency and eliminate potentially discriminatory practices.

4.42 We argued, successfully, for an amendment to the terms of reference and for slightly more time to engage with SRA staff who are involved in implementing OFR in order to assess the difference OFR would have made to cases in our sample and the impact it is having on the volume of cases raised, referrals to the Adjudicator and from the SRA to the SDT. This is the subject of a later section of this report.

4.43 We decided it would be helpful to canvass the views of external advocates who act on behalf of the SRA in the regulatory process in order to elicit their views on disproportionality and on the way regulation works. Survey forms were sent by the SRA on behalf of the review to **10** advocates and responses were received from **7**. An analysis of those responses is given below.

4.44 Given the findings of both Lord Ouseley and Pearn Kandola with respect to the regulatory process and the issue of disproportionality, plus the fact that this review was principally a file examination exercise, we decided that data captured from the files in the sample should be augmented by the personal

narrative of respondents about their engagement with the regulator. Consequently, we decided to survey a further 160 respondents, not by reviewing their files, but by asking them to answer a number of questions specifically relating to their experience of the regulatory process. For data protection reasons, this survey was administered by the SRA on behalf of the review. Regrettably, however, the survey was sent out in hard copy rather than electronically, thus resulting in a lower percentage of responses than we anticipated. This is especially unfortunate because we believe that there would have been much advantage in being able to access the views of a larger number of solicitors who had been through the regulatory processes.

File Quality

4.45 A major impediment in this review, both with regard to the length of time it has taken to complete the fieldwork, the availability of relevant data to try and answer the research questions, not to mention the cost of the exercise, has been the quality of the files. Some files were poorly organised, with no logical or consistent structure, thus making it necessary to burrow extensively in order to find core bits of information. This situation was compounded where there had been an intervention in respect of multiple respondents within a single firm in relation to very complex matters, often in cases where each respondent was allegedly responsible for a range of breaches.

4.46 External evaluation reports for the Law Society (Ouseley: 2004; John: 2005), highlighted the need for reliable monitoring data and for impact assessments, especially with regard to complaints by and against BME solicitors and the impact of regulatory activities upon sole practitioners and heads of small firms particularly. Additionally, reviews conducted since by Lord Ouseley and Pearn Kandola with a focus on disproportionality have underscored the need for basic profiling data, e.g.:

- What is the ethnicity of the solicitor?
- At what age did a person qualify?
- Where did they qualify?
- What is their practice specialism?
- At what age and in what year did they register on the Roll?
- How many practising certificates have they held?
- Have those ever been suspended or had conditions attached to them?
- How soon after qualification did they start trading as a sole practitioner?
- How long have they been in practice?
- If a partner, what length of experience have they had as a partner?

- What is their CPD record?
- Do they have any regulatory history?

4.47 As a general observation, the quality of the files kept by the SRA is poor. Though voluminous in most cases, the files we examined were not organised in any logical or sensible manner. Much of the data related to actions taken by the SRA in the regulatory process and counter-actions/responses by respondents. But that tells you little more than what the regulator did in response to an event and how respondents reacted. The triggering event is not placed in context; a context that should include baseline information about the respondent(s), the firm, the environment in which the firm operates, etc. Even something as fundamental as whether or not the respondent has a regulatory history and the nature of the event that gave rise to prior regulatory action and what the outcome of that action was, could not always be accessed in the same order in the files.

4.48 The data indicated above may be relevant to some cases rather than others and it would not be appropriate or desirable to include it for each respondent in every file. However, the file should indicate where this data is stored and available in composite form, so that caseworkers no less than researchers can access it as necessary. Similarly, a basic chronology of events and a summary of the most recent regulatory activities should be readily available, but was missing in many of the files. Having reviewed the files in our sample, it was necessary to ask the SRA to provide, additionally, the profiling data in 4.34, so as to enable us to complete the dataset on individual respondents and conduct multivariate analysis according to the terms of reference.

4.49 This has a bearing, also, on the way the SRA conducts monitoring and impact assessment, having regard to the range of variables that might cluster together to constitute 'risk' for certain practitioners, or make them more susceptible to regulatory action and/or in need of support with risk management.

4.50 Crucially, caseworkers/supervisors should be required to state clearly on the face of the file their reasons for the decisions they make and for the discretion they exercise in each case. While a triggering event, complaint or episode causing a case to be raised might be identical as between two solicitors, of whatever ethnicity, the context and mitigating circumstances involving one solicitor might give rise to a regulatory response that is vastly different from those of the other. On the face of it, the absence of a like-for-like decision might appear discriminatory or at best idiosyncratic. The reasons for SRA action, or for the apparent lack of consistency in regulatory action in respect of similar events are not always clear on reviewing files. Fuller and better recording of reasons could make for more transparency and would help

ensure that unconscious bias and stereotypical beliefs and attitudes are not informing the decision making process.

5.0 Regulatory Practice Before and after OFR

5.1 The SRA's **Strategy Paper: "Achieving the Right Outcomes"** (January 2010) set out the regulator's intention to move to OFR and 'sought initial views of consumer groups, the profession and all those with an interest in legal services'. The SRA reported that 'the overwhelming majority of those who responded were in favour of our move to OFR. The benefits of the approach were seen to include:

- "This is the best way of putting the client's interest foremost in the minds of those who practise law."
- "It represents a move away from the current box ticking micro regulatory approach."
- "It avoids unnecessary rules, improves the effectiveness of the regulator for more proportionate supervision"'.

5.2 The strategy paper set out the SRA's new approach to regulation as follows:

- ***The SRA is moving from being a rules-based regulator, primarily responding reactively to individual rule breaches, to an outcomes-focused, risk-based regulator.***

- By 6 October 2011 we expect to have achieved important first milestones, including introduction of a new outcomes-focused Code of Conduct as part of a new Handbook of all of our regulatory requirements; using an explicit risk-based and outcomes-focused approach to our authorisation, supervision and enforcement activities; and licensing our first ABSs.

- ***This transformation will involve: changing the way the SRA delivers its regulatory objectives; changing the relationship the profession and the providers of legal services have with the SRA; further development of SRA staff to ensure we have the necessary skills and competencies to deliver the new approach.***

- Our goal is to use our resources cost-effectively to maximise our delivery of the regulatory objectives set out in the Legal Services Act 2007, namely:

  (a) ***protecting and promoting the public interest,***
  (b) supporting the constitutional principle of the rule of law,
  (c) ***improving access to justice, protecting and promoting th***e interests of consumers,
  (d) promoting competition in the provision of services,

(e) ***encouraging an independent, strong, diverse and effective legal profession,***

(f) ***increasing public understanding of the citizen's legal rights and duties,***

(g) ***promoting and maintaining adherence to the professional principles.***

- Our approach includes:

(b) ***ensuring that the requirements on firms are more focused on acting in a principled manner to deliver desired outcomes, rather than compliance with over detailed rules.***

We will do this by lifting the binding regulatory requirements ("rules") to the level of principles, stating the clear outcomes to be achieved where possible;

(c) a sophisticated desk-based research and analysis capacity to assess potential risks to the regulatory outcomes and support the delivery of targeted proactive regulatory action;

(d) an approach to authorisation that is risk and evidence based, making sure that legal services are delivered by principled and competent firms and individuals;

(e) ***an approach to supervision which encourages firms and individuals to be open and honest in their dealings with us, that helps and encourages them to tackle the risks themselves wherever possible, allowing us to concentrate on those who can't, or won't put things right;***

(f) ***an approach to enforcement that is effective, fair, proportionate and creates a credible deterrent;***

(g) the delivery of consistent regulatory protection across the profession to ensure that no entity or individual delivering legal services is at an unnecessary comparative disadvantage as a result of our regulation;

(h) ***concentrating our resources on dealing with those firms who pose a serious risk to our regulatory objectives, such as protecting and promoting the interests of consumers. This means we will make decisions not to address matters we judge to be of low***

risk and impact, and will accept the risk that entails; and

(i) delivering better value for money. Concentrating our resources on the greatest areas of risk, will make us more cost effective'.

(All highlights are those of the author)

5.3 The difference between the SRA's approach to regulation in the period covered by the flies and cases in this review (2009-2011) and since the introduction of OFR in October 2011 is best summed up in the first of the highlighted extracts above:

> ***The SRA is moving from being a rules-based regulator, primarily responding reactively to individual rule breaches, to an outcomes-focused, risk-based regulator*.**

5.4 Promoting and maintaining adherence to the professional principles and acting in a principled manner to deliver desired outcomes, rather than compliance with over detailed rules is at the heart of the contract between the regulated profession and the SRA under OFR.

5.5 So, how were events dealt with or cases raised and followed through the SRA decision making process prior to the introduction of OFR? As noted above, the SRA receives referrals, complaints and notification of events from a wide range of external sources in addition to its own internal referrals.

5.6 The Regulatory Investigation Unit used to deal with the more straightforward regulatory investigations and regulatory applications.

5.7 The Conduct Assessment and Investigation Unit dealt with most conduct investigations, usually driven by complaints or events.

5.8 The Investigative Casework Team (ICT) used to deal with complex or sensitive or high profile matters, as well as urgent interventions into solicitors and firms. They also dealt with multi-pronged investigations, i.e. multiple matters where there were several different strands to be considered.

OFR and Supervision

5.9 The SRA sees supervision as a key component of the OFR process. Supervision, it says,

...is the risk-based oversight of the entire regulated community. The aim of our supervisory activity will be to continue to help firms improve standards, reduce risk for consumers and enhance the reputation of legal services providers. One focus will be on the quality assurance of the firm's own risk management systems and assessing whether or not firms are delivering the principles and achieving the right outcomes, rather than the detailed processes for delivering outcomes. Where warranted through risk assessment we will undertake more intensive analysis of particular activities including a firm's approach to exercising judgement on how to deliver particular principles and outcomes. Firms will also be assessed on whether their systems produce good outcomes: simply having a system will not be sufficient.

Our prime point of contact with a firm will be through a nominated individual.

Supervision will be tailored, taking into account such factors as:

- the risk posed by the firm,
- size of the firm, and
- the firm's approach to risk management.

We will also take account of:

- positive engagement with the SRA,
- compliance history, and
- the firm's ability and willingness to put things right.

The Process of SRA Internal Determination and Adjudication

5.10 The First Instance Decisions (FID) may be made by the operational unit staff or by a single adjudicator or in some instances by an adjudication panel. Adjudicators are required to make decisions on matters referred to them by the operational units. All requests for an internal review or appeal are dealt with either by a single adjudicator or an adjudication panel.

5.11 Adjudicators are part of the internal decision-making structure and exercise certain regulatory powers on the SRA's behalf. They are not part of the executive of the SRA and there is functional separation between adjudicators and staff who are involved in the investigation of cases. Adjudicators take no part in the investigative process and do not engage with allocated case officer(s) who carry out the investigation.

5.11 All adjudicators are either employed on a full-time basis or are appointed for fixed periods of time. There are separate administrative arrangements for adjudicators and all communications take place via the adjudication administration team. The team are not involved in dealing with applications or conducting investigations. The adjudication function is responsible for allocating and scheduling all cases to adjudicators and adjudication panels.

5.12 The original decision-maker will not be involved in the consideration and/or determination of any subsequent appeal. The standard of proof required is on a balance of probabilities, except where the normal principles of law require a higher standard.

5.13 Decisions are made in accordance with the Schedule of Delegations in operation at the time of the decision being made. Written reasons are provided for all decisions within 5 working days of the case being allocated to a single decision-maker or within 10 working days from the date of a panel meeting in the case of an adjudication panel. All decisions are signed and dated by the decision-maker or Chair of the adjudication panel. The decision is sent to the case officer who will disclose it within 5 days of receipt. The case officer confirms whether any statutory rights of appeal exist and, where applicable, any relevant time limits.

Appeals and Reviews

5.14 There are occasions where the applicant, regulated individual or entity affected by the decision may wish to request an internal review of, or to appeal, the FID. There are some decisions that are not considered on appeal and that will be stated in those decisions. Examples include a decision to intervene into a practice or to publish a decision.

5.15 In most cases, the appellant is required, under the rules and regulations, to first exhaust the internal appeal route before exercising any external right to appeal that may be available. Some decisions can be automatically appealed to an external body, such as to the High Court or the SDT. Other decisions may be amenable to judicial review.

5.16 The general approach is to consider an appeal against decisions that are made as final and determinative of rights or professional standing. The applicable rules or regulations in the SRA Handbook refer to both a request for a "review" and also an "appeal" of a FID.

5.17 Depending upon the type of decision made and who has made it, an appeal may be heard by either a single adjudicator or by an adjudication panel. The Schedule of Delegations identifies who can make a particular decision. In certain circumstances, appeals from decisions made by operational unit staff may be referred directly to an adjudication panel; for example, where lay input is desirable in a particular case.

5.18 On appeal, the adjudicator or adjudication panel considers the case afresh and may make any decision within its powers. This means that the adjudicator(s) will consider all the evidence again and may reach a decision that is the same or is different from the First Instance Decision, which could include a more severe outcome.

Reconsideration

5.19 To ensure public protection is not compromised and that those dealing with the SRA are not subjected to incorrect decisions, it is important that any errors are corrected promptly and transparently. The ability of regulators to reconsider decisions is an important aspect of public law. The SRA operates a Reconsideration Policy for this purpose.

5.20 A decision whether to direct a reconsideration or not is made solely at the discretion of the SRA's authorised officers. The Schedule of Delegations contains details of who is authorised to reconsider a decision. The Reconsideration Policy sets out the eight grounds upon which a request to reconsider a decision may be made. These are, that the person making the original decision:

- Was not provided with material evidence that was available to the SRA,
- Was materially misled by the regulated person or any other person,
- Failed to take proper account of the material facts or evidence,
- Took into account immaterial facts or evidence,
- Made a material error of law,
- Made a decision which was otherwise irrational or procedurally unfair,
- Made a decision which was 'ultra vires' (beyond their powers), or
- Failed to give sufficient reasons.

http://www.sra.org.uk/sra/how-we-work/decision-making/schedule-of-delegations.page

5.21 The authorised officer decides whether the decision should be reconsidered and if so, may direct further investigations are undertaken and who should deal with the case afresh. The authorised officer does not substitute the original decision with what they think to be the 'correct' decision. It is possible that the decision-maker looking at the matter afresh will reach the same conclusion as the previous decision-maker. This is perfectly proper as long as the decision has been made following the correct process and taking into account the appropriate evidence.

5.22 Where disputes have been determined by a decision-maker and the relevant person does not agree with the outcome, the proper route for challenge is by way of an appeal. Administrative errors or mistakes in any decision, or errors

arising in a document from an accidental slip or omission may be corrected by the decision-maker without the need for a formal reconsideration.

The Operation of the Adjudication Panel

5.23 The adjudication panel will comprise of:

(i) a Chair, and
(ii) at least 1 other member.

5.24 The adjudication panel is quorate with 2 members. The adjudication panel includes a combination of legally qualified and lay members. There will be at least one lay member on each panel. The adjudication panel follows the procedures described in the procedure document, and subject to these, will conduct itself in a manner that the Chair considers suitable to enable a fair and expeditious determination of the case being considered.

5.25 Each member of the adjudication panel may vote on the matter under consideration. If a panel consists of 3 members, a majority decision will be reached. The Chair will have a vote as a panel member and will have the casting vote in the event of a tie.

5.26 The panel of 26 adjudicators includes 16 legally qualified adjudicators and 10 lay adjudicators. 12 adjudicators are male and 14 are female; 15 are white, five are BME, and the ethnicity of six is unknown.

5.27 Adjudicators make decisions such as:

- whether or not to reprimand a solicitor,
- whether or not to prosecute a solicitor before the SDT, and
- whether or not to intervene (close down) a firm.

5.28 They also take decisions on admitting students and foreign-qualified lawyers to the Roll of solicitors. In complex cases, a panel of three adjudicators is involved in making the decision.

Analysis of the SRA regulatory process

5.29 The important point to note here, the SRA emphasises, is that even if it could be shown that it was taking a discriminatory approach to its decisions regarding commencing and pursuing disciplinary charges against BME solicitors in the SDT, the adjudication of those matters is a separate and independent process undertaken by the SDT. This, however, does not imply that the SRA does not need to exercise due care and apply transparent and consistent criteria when deciding to refer a respondent to the SDT.

5.30 The SRA's referral decisions are clearly important in any consideration of regulatory disproportionality. If the SRA feels justified in prosecuting respondents in the SDT, it clearly has an expectation that the SDT would endorse its reasons for bringing the case. Moreover, many respondents find themselves unable to afford legal representation, whereas the SRA has experienced advocates presenting its case against the respondent and invariably asks the SDT to award costs against the respondent. One of the complaints we heard repeatedly during the review was the absence of 'parity of arms' when BME solicitors are taken to the SDT. Another charge made was that the SRA engaged expensive advocates to put its case in matters that did not warrant that level of advocacy.

The Function of the SDT

Allegations of disproportionality in sanctions imposed by the SDT

5.31 There have been accusations that the SRA has disproportionately made regulatory findings against BME solicitors and imposed more severe sanctions on BME solicitors than on their White counterparts. However, it must be pointed out that the SRA are not the body that imposes sanctions following a disciplinary finding by the SDT.

5.32 The terms of reference of this review do not encompass investigating the SDT and whether it treats BME solicitors more harshly than White solicitors. However, we want to address this point about differential sentencing outcomes as it is an important charge that has been made against the SRA regarding the fairness or otherwise of the regulatory process.

5.33 Consideration must be given to the SRA's regulatory process to examine whether the SRA is discriminating against BME solicitors in how it carries out those functions. The SRA's procedures for internal resolution of certain disciplinary matters and the decisions of the Adjudicators are decisions that the SRA could potentially be criticised for if there are any issues of disproportionality, as the internal route and the Adjudicators are not formally independent of the SRA.

5.34 However, the SDT is the statutory tribunal charged with responsibility for adjudicating on applications and complaints made under the provisions of the Solicitors Act 1974 (as amended) ("the Act"). The Act bestows on the SDT the function of protecting the public from harm, maintaining public confidence in the profession and preserving the reputation of the solicitors' profession for honesty, probity, trustworthiness, independence and integrity.

5.35 The SDT has adopted broad guidance (which can be found at http://www.solicitorstribunal.org.uk/content/documents/17.10.13.pdf), the aim of which is to ensure that the SDT panels in determining the sanctions for regulatory matters first of all establish the seriousness of the misconduct and,

from that, proceed to determine a fair and proportionate sanction to be imposed.

5.36 The case of **Bolton v The Law Society [1994] 1 WLR 512** is often cited by the SDT as it provides important guidance and sets out the fundamental principle and purposes of the imposition of sanctions by the SDT:

> *"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal."*
>
> *"... a penalty may be visited on a solicitor ... in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ..."*
>
> *"… to be sure that the offender does not have the opportunity to repeat the offence; and"*
>
> *"… 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 … a member of the public … is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."*
>
> (***Sir Thomas Bingham, then Master of the Rolls)***

Scope of the SDT's Sanction-making Powers in Respect of Solicitors

5.37 The SDT's jurisdiction and powers on an application are set out in Section 47 of the Act and include:

- the imposition of a reprimand,
- the imposition of a financial penalty payable to HM Treasury,
- suspension from practice indefinitely or for a specified period, and
- striking off the Roll of Solicitors.

5.38 The SDT is not restricted as to the number or combination of sanctions which it may impose in any particular case. Other orders which the Tribunal can make in respect of solicitors or former solicitors include:

- making no order,

- imposing restrictions on the way in which a solicitor can practise, and
- termination of a period of suspension.

Scope of the SDT's Sanction-making Powers in Respect of Solicitors' Employees

5.39 By Section 43 of the Act, the SDT has a limited jurisdiction to deal with misconduct by those who are not admitted but are employed or remunerated by solicitors. The powers which the SDT may exercise in respect of such individuals are:

- to make no order, or
- to make an order prohibiting, save with the prior consent of the regulator, any solicitor from employing the person to whom the order relates.

Applying OFR Retrospectively

5.40 In September 2013, the terms of reference for the review were extended to include:

- Examine how current cases are being processed and how recently concluded cases were dealt with under Outcomes Focused Regulation (OFR) in order to highlight the impact of '***improvements to SRA policies and processes'*** and the extent to which the OFR approach to regulation is helping to eliminate disproportionality and ***maximise fairness and consistency'.***

5.41 Two methods were adopted in order to achieve this. One was to have supervisors take us through the OFR method of processing cases from the moment they are raised until there is an outcome, and identify the interactions with respondents and their firms and with relevant other internal structures and individuals. The other was to compare the processes and outcomes of certain disciplinary scenarios that were dealt with pre-OFR with how they would be dealt with post the introduction of OFR.

5.42 For the latter exercise, we produced 10 scenarios, drawn from our sample of case files and dating back to pre-October 2011 and the introduction of OFR, and asked the supervisors to take us through them using current OFR policies and procedures, noting how those differed from those that were applied pre-OFR and whether (and if so how) the outcomes would have been different under OFR.

5.43 The scenarios included 6 Tribunal and 4 Adjudication cases involving the following:

- Solicitors Account Rules,
- Complaint referred from the Legal Complaints Service: quality of service breaches,
- Internal referral - Client account issues; unpaid disbursements,
- Client referral - Abandoned firm,
- Small firm - failure to deliver two years' accountants' reports,
- Failure to carry out clients' instructions and to reply to client correspondence,
- Undeclared conflict of interest; failure to advise client to seek independent advice in a matter in which the respondent was to be a beneficiary, and
- Intervention in firm for failure to provide books for a forensic investigator; permitting unauthorised persons to operate bank accounts alone; fraudulent property transactions.

5.44 This enabled us to gain experience of how regulation is conducted under OFR and especially the function of processes such as:

- firm-based risk identification and management,
- enhanced supervision,
- building trust between the SRA and practitioners and their firms,
- encouraging practitioners to make early contact and seek help from the SRA in managing risks and events, and
- negotiating responses to breaches and time to take corrective measures in respect of more minor breaches and those with no public interest implications.

5.45 The exercises above assisted us in identifying processes and arrangements which had the potential to impact upon fairness, consistency and proportionality, or not as the case may be. We were, therefore, able to explore in some depth how the following issues were being addressed and their impact upon regulatory outcomes monitored:

i) the role of supervisors (pre-OFR caseworkers) in processing cases once they are raised,

ii) the role of the Team Leader (Supervision) and of Technical Advisers,

iii) the decision making powers of those and the levels at which decisions could be taken without having those decisions signed off by a more senior manager,

iv) the amount of discretion various levels of staff could exercise and the layers of scrutiny/quality assurance that such exercise of discretion would be put through,

v) checks and balances for assessing and ensuring the quality of decision making and of the supervision solicitors and their firms receive,

vi) measures for eliminating bias and idiosyncratic or capricious conduct,

vii) training of supervisors and especially training in the use of discretion; making quality decisions; training for supervision; training in cultural competence; issues of discrimination, prejudice, bias and the role that stereotypes play in the latter,

viii) measures for monitoring the difference OFR is making and its impact upon the quality of the interface between solicitors/firms and the SRA; application of the Risk Framework and the new supervision model, and whether solicitors are identifying and managing risk more competently and in a more timely fashion on account of SRA guidance/support,

ix) the extent to which number of investigations, interventions, adjudications and referrals to the SDT have been impacted by the application of OFR, and

x) tailored supervision, guidance and support for practitioners recently established as sole practitioners or heads or partners in small firms.

Conclusions

5.46 The claim that the SRA may be responsible for any disproportionate sanctions imposed on BME solicitors by the SDT is not supported when one takes into account the separation of the functions of the SRA and the SDT. The SDT is the body that adjudicates on the disciplinary charges prosecuted by the SRA and is independent of it.

5.47 The more relevant question is whether or not there is disparity in the SRA's prosecution of cases at the SDT, or whether its decision making with respect to the prosecution of cases involving BME respondents is consistent with that for White respondents. The SRA's 2012 equality impact assessment of its Code for Referral to the Solicitors Disciplinary Tribunal (published 3 September 2012) stated:

> 'Another public interest factor favouring prosecution is the defendant's regulatory history. ***We recognise that there is disproportionate***

representation of male solicitors, and BME solicitors in some of our regulatory outcomes which is a consideration when taking into account regulatory history. However, we consider it is legitimate in protecting the interest of the public to consider previous regulatory history. As this is only one of a number of factors in favour of prosecution, we are of the view that it is a proportionate approach to take'. (paragraph 25) - [Our emphasis].

5.48 This approach raises a number of questions:

- What criteria are used for judging the weight of that history, its relevance to the regulatory process under way and the risk it poses to 'the interest of the public'?
- How far back does the history that is taken into account date from?
- How serious does the breach need to have been before the regulatory history begins to count?
- Does it matter how the respondent has conducted their affairs since the most recent regulatory activity?
- How serious does the current matter need to be before the weight of any regulatory history is added to it?
- What 'consideration' is the SRA giving to its recognition that 'there is disproportionate representation of male solicitors, and BME solicitors in some of (its) regulatory outcomes', or, having recognised it, is the SRA simply choosing to dismiss it?
- At what point does the weight attached to regulatory history push a respondent over the threshold for deciding whether, for example, a Regulatory Settlement Agreement is desirable, or whether the matter should be prosecuted in the SDT?

5.49 The SRA goes on to say:

> 'Each case is considered on its merits and in accordance with the SRA's principles of decision making which are designed to ensure, among other things, that all decisions are fair, transparent and proportionate'.
>
> (paragraph 26)

5.50 There are clearly situations in which it would be sensible and indeed responsible to take regulatory history into account when deciding whether or not to prosecute, but just invoking 'the public interest' can never be a sufficient reason for doing so. One of the criticisms we heard frequently during this

review was that the SRA quotes 'the public interest' at every turn without feeling the need to demonstrate how the interest of the public is served or hampered, actually or potentially, by what it does or might fail to do.

5.51 We believe that unless the SRA adopts a much more nuanced approach to referral to the SDT, it will simply be compounding the BME disproportionality that it recognises and is seeking to eliminate.

5.52 The analysis of our sample of SDT files shows that there is disproportionality in terms of the sanctions the SDT has imposed upon BME respondents as compared to White respondents for the same category of breach. Our data analysis also shows that respondents who had no previous conditions attached to their practising certificate were more likely to receive less severe sanctions as outcomes of the SRA adjudication process, i.e., on the lower end of the scale: from 'no action' to 'rebuke'. Those who already had conditions placed on their practising certificate were more likely to have further conditions placed, or to be referred to the SDT.

5.53 This in our view should give the SRA pause for thought in respect of the rate at which it is referring BME respondents to the SDT. While we acknowledge that we reviewed only a limited number of files and that there was a vast range of differing factual circumstances within each of those files, we invite the SRA to review its referral practices within the context of its OFR objectives and its move:

> 'from being a rules-based regulator, primarily responding reactively to individual rule breaches, to an outcomes-focused, risk-based regulator'

5.54 Unlike the SRA, the SDT does not collect and monitor this data and it is something that the SRA should recommend that they do. The SRA prosecutes respondents in the SDT that it deems to have committed serious breaches. No consideration of disparity and disproportionality by ethnicity or gender could be complete, therefore, unless one examines both the rate of referral to the SDT and the SDT's own determination of those cases, including the sanctions it imposes. The SRA holds information on the outcome of each case that goes before the SDT and can therefore assist the SDT in putting a system in place for gathering and monitoring its decisions by ethnicity and gender.

5.55 In terms of both historical cases and cases that are not closed (for example, those where a SDT decision is being appealed), further research could be undertaken to examine data on all cases over the last 10 years up to 2013. With the benefit of the data available to the SRA, a standard tariff could be developed and used to benchmark any particular case to assess whether there has been any disproportionality.

5.56 The SRA's vision statement, OFR and beyond, makes the point that:

> ‘Regulating in a new way, focusing upon risks and outcomes rather than compliance with detailed rules, has been a massive change for our organisation… Through recruitment and re-training we have been putting the right people in the right jobs… The introduction of supervisors and relationship managers to improve the quality of regulation, and promote constructive engagement with those we regulate, has been widely welcomed’
>
> (p.6)

5.57 We were greatly assisted in understanding and interrogating the OFR process by a wonderful group of staff who were enthusiastic about OFR and saw themselves as change agents, not least in terms of improving the reputation the SRA has amongst the regulated community. Those supervisors who took us through the cases and scenarios had not been with the organisation prior to the introduction of OFR and were on a spectrum from mild surprise to total bemusement in their reactions to the way cases, such as those in our research sample, had been dealt with pre-OFR.

5.58 The SRA’s pre-OFR focus on ‘compliance with detailed rules’ and its insistence on seeing the breach of every rule as having implications for ‘the public interest’ and, therefore, punishable as a deterrent to both the rule breaker and any other practitioner who might be minded to do likewise, was thrown into sharp relief by that comparative exercise.

5.59 While we welcomed the sharpness of the supervisors with whom we worked and their commitment to supporting practitioners to provide high quality services to the public and run successful businesses, consonant with the principles to which they all commit, we were concerned that the SRA’s transition to OFR could too easily be a case of ‘new wine into old bottles’.

5.60 How a regulator regulates is reflective of their interpretation and understanding of their regulatory objectives, in other words the means by which they achieve the ends. If the SRA’s interpretation of and approach to meeting the regulatory objectives post-OFR remain the same as they were pre-OFR, then it is likely that, overall, regulatory outcomes will change little.

5.61 It is for this reason that we believe fundamental issues such as the fuzziness around the concept of ‘regulating in the public interest’ and the lack of evidence of a policy and operational linking of five interactive objectives urgently need to be addressed. Those five objectives are:

- protecting and promoting the public interest,
- improving access to justice,
- protecting and promoting the interests of consumers,

- encouraging an independent, strong, diverse and effective legal profession, and
- promoting and maintaining adherence to the professional principles.

5.62 These clearly have implications for the personal and professional conduct of each solicitor who is regulated by the SRA. But they also impact differently upon solicitors and their firms, depending upon a range of variables: social class; wealth; educational background; ethnicity; gender; sexuality; social and cultural capital; training; location of practice; size of firm; ownership of firm; etc. Some of those factors combine to render some solicitors more likely to be discriminated against and denied opportunity than others; more likely to exercise choice than others; more likely to be commercially successful than others; more likely to have demands, professional, social and political, made upon them than others.

5.63 Such, then, is the diversity of the profession, a diversity that necessitates: a commitment to promoting equity; to not assuming that 'the market' will deal automatically with issues of inequality and a lack of social mobility; an understanding of the operational constraints that some practitioners face as they seek to 'improve access to justice' for the vulnerable communities they serve and to 'increase public understanding of the citizen's legal rights and duties'.

5.64 Whatever amount of training in diversity awareness, cultural sensitivity, cultural competence, decision making, etc., supervisors operating OFR might receive, or might have had prior to joining the SRA, unless there is clarity and firm leadership in respect of how the organisation understands and seeks to pursue its regulatory objectives, having full regard to the diversity of the profession, OFR operational methodology is likely to give rise to the same disproportionate outcomes as before.

5.65 Much of the SRA's literature on OFR is about the organisation's general direction of travel and the processes and arrangements by which it would achieve its OFR objectives. The high level objectives for 'Moving forward – 2013 and beyond' include:

- To deliver risk-based outcomes-focused regulation and achieve positive outcomes for consumers in the public interest and do so in a way that is justifiable to all our stakeholders, and
- To develop our regulatory arrangements and tools to meet the objectives and the principles of better regulation and to anticipate changes in the legal environment

  OFR and beyond (p12).

5.66 Neither those ‘high level’ objectives nor the regulatory processes for meeting them will, by themselves, deal with the issue of regulatory disproportionality as far as outcomes for BME solicitors are concerned. (ref. the discussion about ‘regulatory history’ above). Whatever monitoring of the implementation of OFR the SRA may be doing, we believe there is need for a wider public debate about the SRA’s approach to the regulatory objectives and the persistence of evidence of disproportionality in regulatory outcomes for BME solicitors. The Legal Services Board (LSB) and the Law Society not only have a role in that debate, they should take steps to initiate it.

Recommendations

- The SRA should declare its understanding of the regulatory objectives and of how it sees them in relation to one another. The SRA should demonstrate how it is delivering those objectives through regulation.
- The Legal Services Board and the Law Society should take steps to initiate a public debate about the SRA’s approach to the regulatory objectives and the persistence of evidence of disproportionality in regulatory outcomes for BME solicitors.
- Since this review is probably the last such review that will examine SRA closed cases pre-Outcomes Focused Regulation (OFR), the SRA should publish monitoring data on the impact of OFR on BME disproportionality specifically, and on the regulation of sole practitioners and small firms generally.
- The SRA and the SDT should make it clearer in their publications and on their respective websites that they are separate entities from each other.
- The SRA should review its Code for Referral to the Solicitors Disciplinary Tribunal (SDT) in the light of BME disproportionality and the objectives of OFR.
- The SRA should make it its default position to demonstrate at all times the way in which ‘the public interest’ is impacted by the regulatory decisions it makes.
- The SDT should monitor by ethnicity and gender, the outcomes for those solicitors who appear before it on regulatory charges to see whether there is any disproportionality.
- The SDT should ensure that its panel of members include an ethnically diverse range of individuals.

6.0 Findings

6.1 Comparing, by statistical analysis of ethnicity and gender, SDT outcomes based on:

a. Strike off
b. Suspension
c. Fine
d. Reprimand
e. Respondent ordered (only) to pay SRA costs
f. No order
g. All allegations dismissed.

Analysis of SRA's Diversity and Monitoring Statistics

6.2. The 'Diversity and Monitoring' statistics that have been published by the SRA from 2009 through to 2012 have shown that BME solicitors were proportionally overrepresented in comparison to White solicitors regarding investigations by the SRA. As we noted above, the SRA received reports from Lord Ouseley and Pearn Kandola which not only raised concerns about disproportionality but recommended that the SRA reviews its decision making as part of the regulatory process and engages in monitoring and impact assessment with regard to the process and outcomes of regulation for different ethnicities.

6.3 The SRA conducted its own audits following the Pearn Kandola report; its monitoring data showed that BME solicitors and firms were overrepresented in its investigations. Looking at the relative frequency of new SRA investigations in comparison to the solicitor population at large, it became clear that BME solicitors, given their percentage of the solicitor population overall, were disproportionately represented amongst those subject to investigation. Between 2009-2012 as an average, BME solicitors and firms made up **13%** of the entire solicitors population, but during the same period they represented **25%** of the '**new conduct investigations**'. The percentage of new investigations involving BME solicitors was almost double what one would expect, while their White counterparts were underrepresented; representing **87%** of the solicitor population and accounting for **75%** of the new investigations.

6.4 Further to this, an analysis of the outcomes of the cases showed that BME solicitors and firms also comprised a higher percentage of those against whom action was taken and were also subjected to more severe sanctions than their White counterparts. In the case of interventions, where the SRA took control of a solicitor's legal practice or a firm, BME solicitors and firms

were again over-represented. Whilst **25%** of the SRA's investigations involved BME solicitors, they accounted for **29%** of interventions, during the period. Their White counterparts were under-represented in the same category, making up **75%** of the new investigations and **71%** of the interventions.

6.5 In the case of eventual referral to the SDT, BME cases made up **33%** of the cases referred, and accounted for **25%** of new cases, while White cases were proportionally underrepresented making up only **67%** of referrals in relation to **75**% of new cases. In instances where conditions were attached to practising certificates, BME cases accounted for **32%** in comparison to their **27%** share of newly opened cases**,** contrasted with cases involving White solicitors who accounted for **68%** in comparison to **75%** of new cases.

6.6 The figures indicate that not only was there a disproportionate number of BME solicitors under investigation by the SRA during the period 2009-2012, but also that the eventual outcome of the SRA's investigations ended with more severe sanctions being applied to BME respondents.

6.7 The Pearn Kandola 2010 report to the SRA on their 'comprehensive investigation into the factors that contribute towards a solicitor having a case raised against them, as well as whether the outcomes vary by ethnicity for the way in which the case is resolved' indicated that:

> 'A disproportionately high number of cases are raised against BME solicitors. These cases are being raised by members of the public, members of the profession, partners such as the Legal Complaints Service (LCS), and a small number are made by other bodies, such as the police. *This means that before the SRA puts any of its processes in place, it is dealing with a disproportionate case load'.* (My emphasis)

6.8 Pearn Kandola recommended, among other things, that the SRA 'review its decision-making processes that govern regulatory activity once an event has been reported/recorded and a case is raised'.

6.9 Pearn Kandola found that disproportionality was correlated to ethnicity (in this case BME), but was not caused by ethnicity:

> 'In essence, whilst BME solicitors have a disproportionate number of cases raised against them, it is not their ethnicity that directly contributes to this'.

6.10 Part of the task of this review, therefore, is to look in greater depth at the context (spatial, financial, societal, managerial) in which BME practitioners mostly operate, and the relationship between that context and the risk and vulnerability associated with their practice as solicitors. However, while this

might help explain disproportionality in terms of complaints made to and recorded by the SRA, it does not by itself explain the disproportionality in outcomes arising from the regulatory process. That is why Pearn Kandola recommended that the SRA 'review its decision-making processes that govern regulatory activity once an event has been reported/recorded and a case is raised'. In addition to examining the factors that might contribute to complaints and cases being raised, this review focused on how the SRA processed cases and imposed sanctions on BME solicitors and their White counterparts for the same category of regulatory breaches.

SRA Data 2009

	Solicitor Population	New Conduct Investigations	Interventions	Referrals to SDT	PC Conditions
BME	12%	19%	19%	34%	32%
White	88%	81%	81%	66%	68%

SRA Data 2010

	Solicitor Population	New Conduct Investigations	Interventions	Referrals to SDT	PC Conditions
BME	12%	27%	38%	31%	29%
White	88%	73%	62%	69%	71%

SRA Data 2011

	Solicitor Population	New Conduct Investigations	Interventions	Referrals to SDT	PC Conditions
BME	14%	27%	30%	35%	34%
White	86%	73%	70%	65%	66%

SRA Data 2012

	Solicitor Population	New Conduct Investigations	Interventions	Referrals to SDT	PC Conditions
BME	14%	27%	28%	32%	31%
White	86%	73%	72%	68%	69%

SRA Data 4 year average

	Solicitor Population	New Conduct Investigations	Interventions	Referrals to SDT	PC Conditions
BME	13%	25%	29%	33%	32%
White	87%	75%	71%	67%	68%

Issues in Statistical Methodology

6.11 The hope was that a statistical model could be employed in order to explore the hypothesis that there existed other factors that could help to better explain the perceived racial disproportionality that is observable in the SRA's own statistics. Ultimately, the statistical analysis was intended to help answer the question of whether the disproportionate number of investigations involving BME respondents conducted by the SRA and the severity of sanctions were on account of institutional or individual bias based on race/ethnicity within the organisation, or whether this disparity was the result of structural issues and the position of many BME solicitors and firms, indicating that this group constituted an 'at risk' group, with regard to exposure to investigation and sanction by the SRA.

6.12 The initial variables that were identified as requiring analysis were:

a) How many BME and White solicitors had practising certificates (PCs),
b) The number of years they had had PCs,
c) How many BME and how many White solicitors had PCs with conditions attached,
d) How many BME solicitors were subject to any form of regulatory action,
e) How many White solicitors were subject to any form of regulatory action,

f) Whether those BME and White solicitors subject to regulatory action were sole practitioners,
g) The size of the firms to which they belonged otherwise,
h) Whether they worked for local authorities, other public bodies or commercial firms,
i) The number of BME and correspondingly of White solicitors who were subject to regulatory action in the period 2009- 20012 as a result of complaints by clients or other members of the public,
j) The number who were subject to regulatory action as a result of SRA monitoring/forensic investigation, and
k) The number who were subject to regulatory action as a result of self-reporting to the SRA.

6.13 As noted above, the data recorded in the files did not provide all the information necessary in order to test the interaction of these variables. It was necessary, therefore, for the SRA to gather the additional data for each respondent in the sample, so that adequate statistical analysis could be undertaken.

6.14 The issues detailed above had an impact upon the amount of time needed for the file review and for data analysis, especially given the fact that a large percentage of the files were of an enormous size.

Statistical Analysis

Solicitor Demographic Information

SRA Adjudicated: Years on Roll

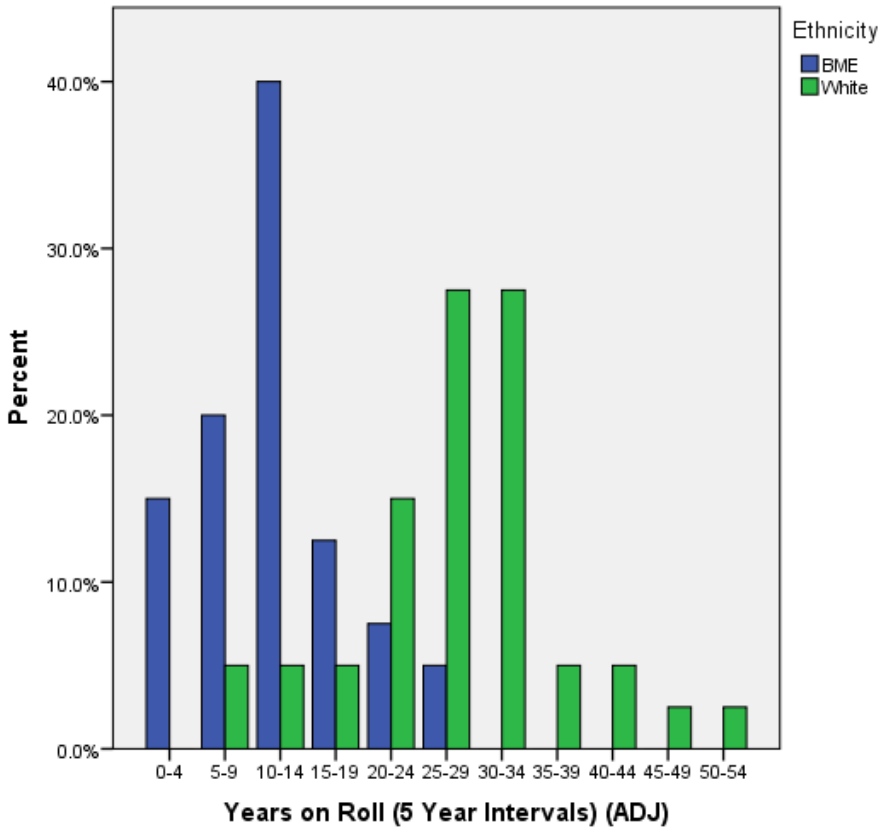
6.15 Within the SRA Adjudicated sample population, the difference between the number of years on the Roll in the BME and White group is clear. The average number of years in the BME group is 12, whilst for White solicitors it is 28. The range from minimum to maximum years on the Roll within the BME population was 24, significantly smaller than the 44 year range in the White group; the variance of the population was also lower in the BME group with a standard deviation of 6 compared to 9 in the White group. The BME group also displays a negative distribution and the White group a normal distribution. This data indicates that BME solicitors appear to have been on the roll for a shorter period of time than their White counterparts, at the time of investigation.

		Years on Roll at Close of Investigation (ADJ)					
		Average	Standard Deviation	Median	Mode	Minimum	Maximum
Ethnicity	BME	12	6	11	11	4	28
	White	28	9	29	31	7	51

SRA Adjudicated: Years on Roll compared by Ethnicity (Count)

		Years on Roll (5 Year Intervals) (ADJ)											
		0-4	5-9	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-54	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Ethnicity	BME	15.0%	20.0%	40.0%	12.5%	7.5%	5.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
	White	0.0%	5.0%	5.0%	5.0%	15.0%	27.5%	27.5%	5.0%	5.0%	2.5%	2.5%	100.0%

SRA Adjudicated: Years on Roll compared by Ethnicity (5 Year Intervals, %)



SRA Adjudicated: Years on Roll compared by Ethnicity (5 Year Intervals, %)

SDT: Years on Roll

6.16 In the population sample relating to SDT cases, the years on the Roll data displayed the same difference between the BME and White solicitors as found in the SRA Adjudicated data. The BME group's mean average was half that of the White, with 10 years compared to 22 respectively, and both groups in the SDT population were on mean average, lower than those whose

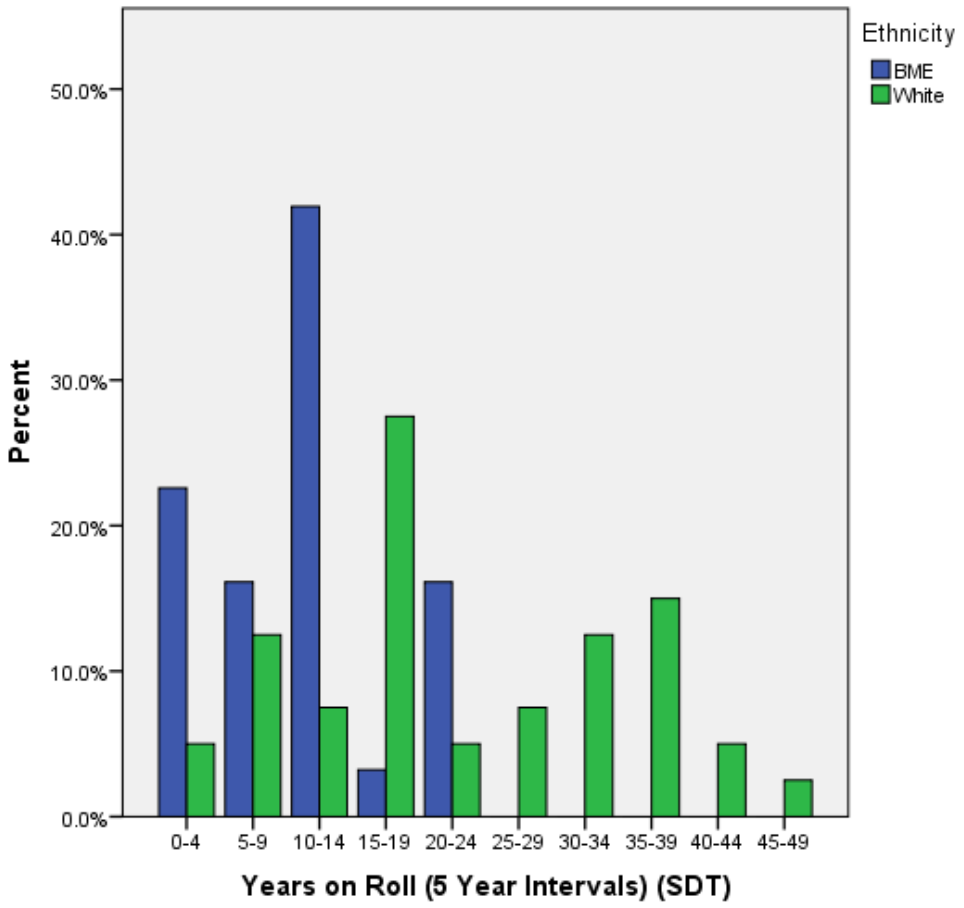
sanctions were imposed by the SRA Adjudication panel. Again, the range in the BME population was lower, with 21 compared to 43 in the White group, the standard deviation being 7 and 22 respectively.

		Years on Roll at Close of Investigation (SDT)					
		Mean	Standard Deviation	Median	Mode	Minimum	Maximum
Ethnicity	BME	10	7	10	10	0	23
	White	22	12	19	5	2	45

SDT: Years on Roll Compared By Ethnicity (Count)

		Years on Roll (5 Year Intervals) (SDT)										
		0-4	5-9	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	Total
		%	%	%	%	%	%	%	%	%	%	%
Ethnicity	BME	22.6%	16.1%	41.9%	3.2%	16.1%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
	White	5.0%	12.5%	7.5%	27.5%	5.0%	7.5%	12.5%	15.0%	5.0%	2.5%	100.0%

SDT: Years on Roll Compared By Ethnicity (5 Year Intervals, %)



SDT: Years on Roll Compared By Ethnicity (5 Year Intervals, %)

SRA Adjudicated: Years from Qualification to Sole Practitioner

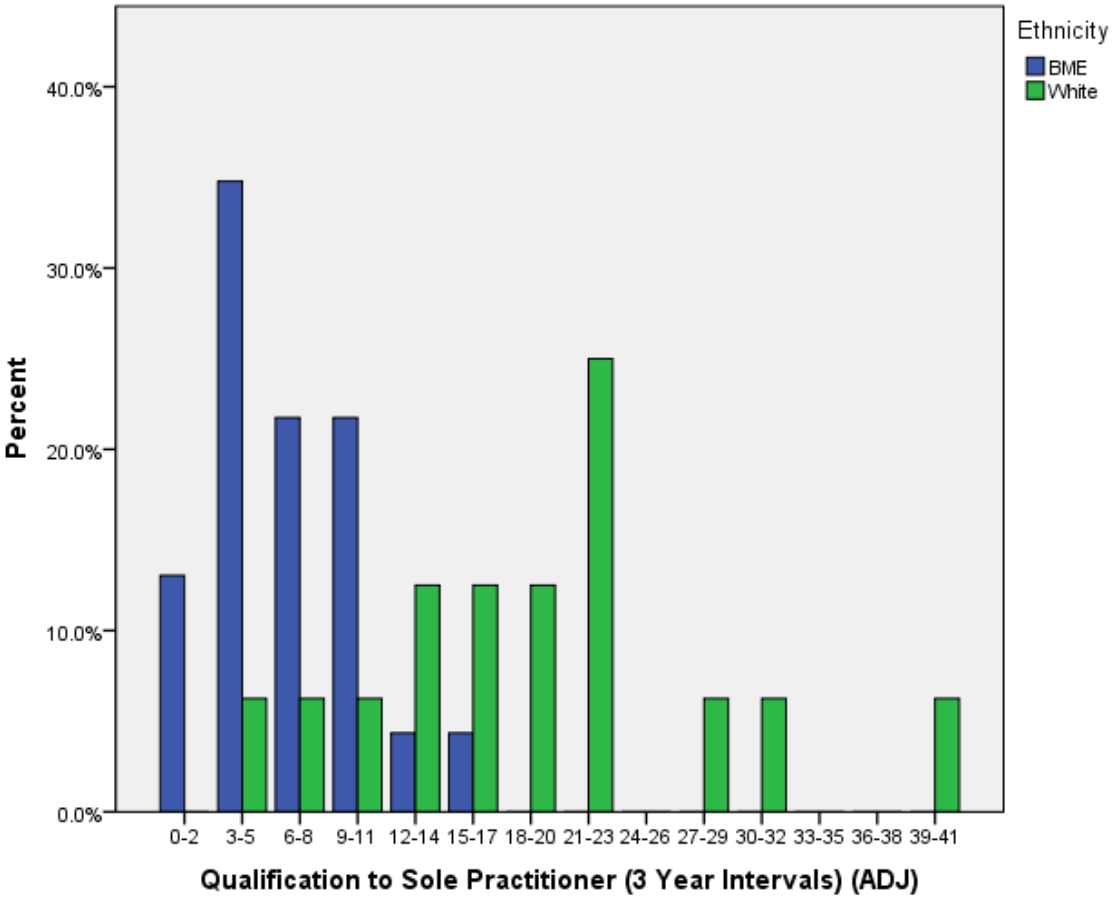
6.17 Within the sample population of SRA Adjudicated cases, the period from qualification to acting as a sole practitioner also highlighted a difference between the two groups, BME and White. In the BME group, and where the information was available, there were 23 cases involving sole practitioners compared to 16 in the White group. The average and median value in the BME group was 6 and 19 in the White group. The range in the BME group was half that in the White group with 17 and 34 years respectively and a standard deviation of 4 and 9. The graph and tables show a trend indicating the period between BME practitioners qualifying and practising as sole practitioners as being far shorter than in the White group. In other words, BME solicitors appear to be less experienced than their White colleagues at the point of establishing themselves as sole practitioners.

		Qualification to Sole Practitioner (ADJ)					
		Mean	Standard Deviation	Median	Mode	Minimum	Maximum
Ethnicity	BME	6	4	6	3	0	17
	White	19	9	19	21	5	39

SRA Adjudicated: Years from Qualification to Sole Practitioner compared by Ethnicity (Years)

		Qualification to Sole Practitioner (3 Year Intervals) (ADJ)													
		0-2	3-5	6-8	9-11	12-14	15-17	18-20	21-23	24-26	27-29	30-32	33-35	36-38	39-41	Total
		%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
Ethnicity	BME	13.0%	34.8%	21.7%	21.7%	4.3%	4.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
		0.0%	6.3%	6.3%	6.3%	12.5%	12.5%	12.5%	25.0%	0.0%	6.3%	6.3%	0.0%	0.0%	6.3%	100.0%

SRA Adjudicated: Years from Qualification to Sole Practitioner compared by Ethnicity in (3 Year Intervals, %)



SRA Adjudicated: Years from Qualification to Sole Practitioner compared by Ethnicity in 3 Year Intervals (%)

SDT: Years on Roll to Sole Practitioner

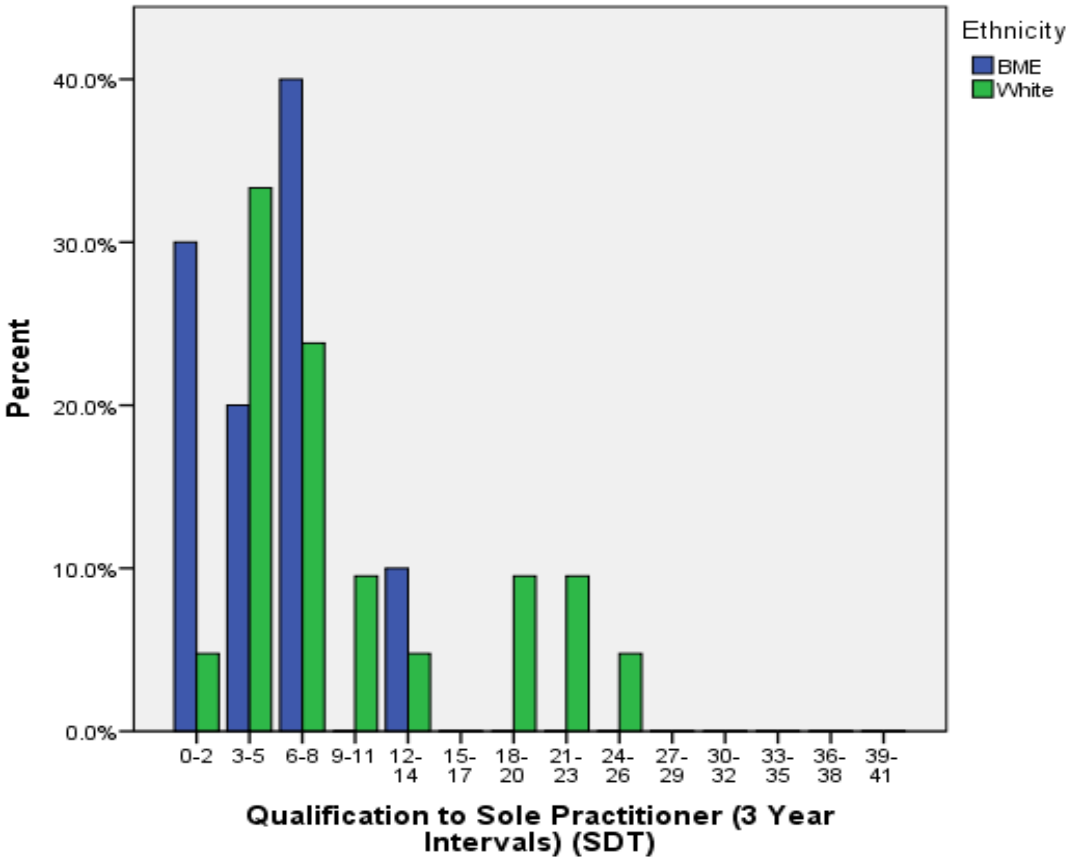
6.18 Within the SDT sample, where the information was available, there were 21 cases involving sole practitioners from the White group and 10 in the BME group. Once again, the mean average for the BME group was lower than the White; 6 and 10 years respectively. Both groups' distribution was at the lower end of the scale and in the 0-2 years period, there was a noticeable spike in the BME group, 30%, compared with the same category from the SRA Adjudicated sample (13%), and in comparison to the SDT White group (4.8%). The BME group was again more concentrated with a lower range of 21 in comparison to 43 years in the White group, with the standard deviation being 4 and 7 years respectively. Across both groups, BME and White, the SDT population had a shorter period between qualification and practising as sole practitioners, than the SRA Adjudicated sample group.

		Qualification to Sole Practitioner (SDT)					
		Mean	Standard Deviation	Median	Mode	Minimum	Maximum
Ethnicity	BME	6	4	6	3	1	14
	White	10	7	6	3	1	25

SDT: Years from Qualification to Sole Practitioner (Years)

		Qualification to Sole Practitioner (3 Year Intervals) (SDT)														
		0-2	3-5	6-8	9-11	12-14	15-17	18-20	21-23	24-26	27-29	30-32	33-35	36-38	39-41	Total
		%	%	%	%	%	%	%	%	%	%	%	%	%	%	%
Ethnicity	BME	30.0%	20.0%	40.0%	0.0%	10.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
	White	4.8%	33.3%	23.8%	9.5%	4.8%	0.0%	9.5%	9.5%	4.8%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%

SDT: Years from Qualification to Sole Practitioner (3 Year Intervals) (%)



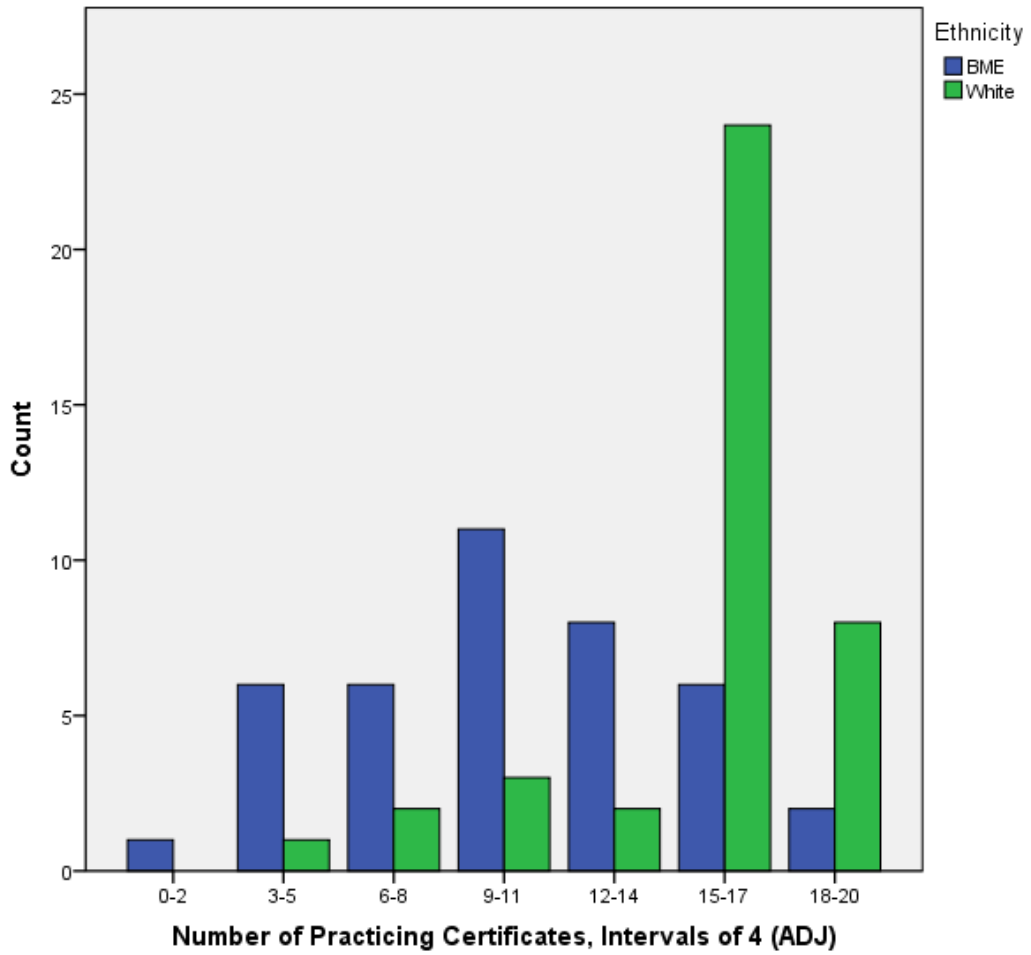
SDT: Years from Qualification to Sole Practitioner 3 Year Intervals (%)

SRA Adjudicated: Number of Practising Certificates (PCs)

6.19 When looking at the sample groups in comparison to the number of PCs held, there was a clear disparity between the two. The mean average for BME was 11 compared to 15 for White. Although the difference is not as pronounced as in the years on the Roll, or the period from qualification to sole practitioner, there is still a clear trend demonstrating that White solicitors held a greater number of PCs at the time of their case being adjudicated by the SRA, compared to BME solicitors.

		Number of Practicing Certificates (ADJ)					
		Average	Standard Deviation	Median	Mode	Minimum	Maximum
Ethnicity	BME	11	4	11	10	3	18
	White	15	4	17	17	3	18

SRA Adjudicated: Number of Practising Certificates (Count)



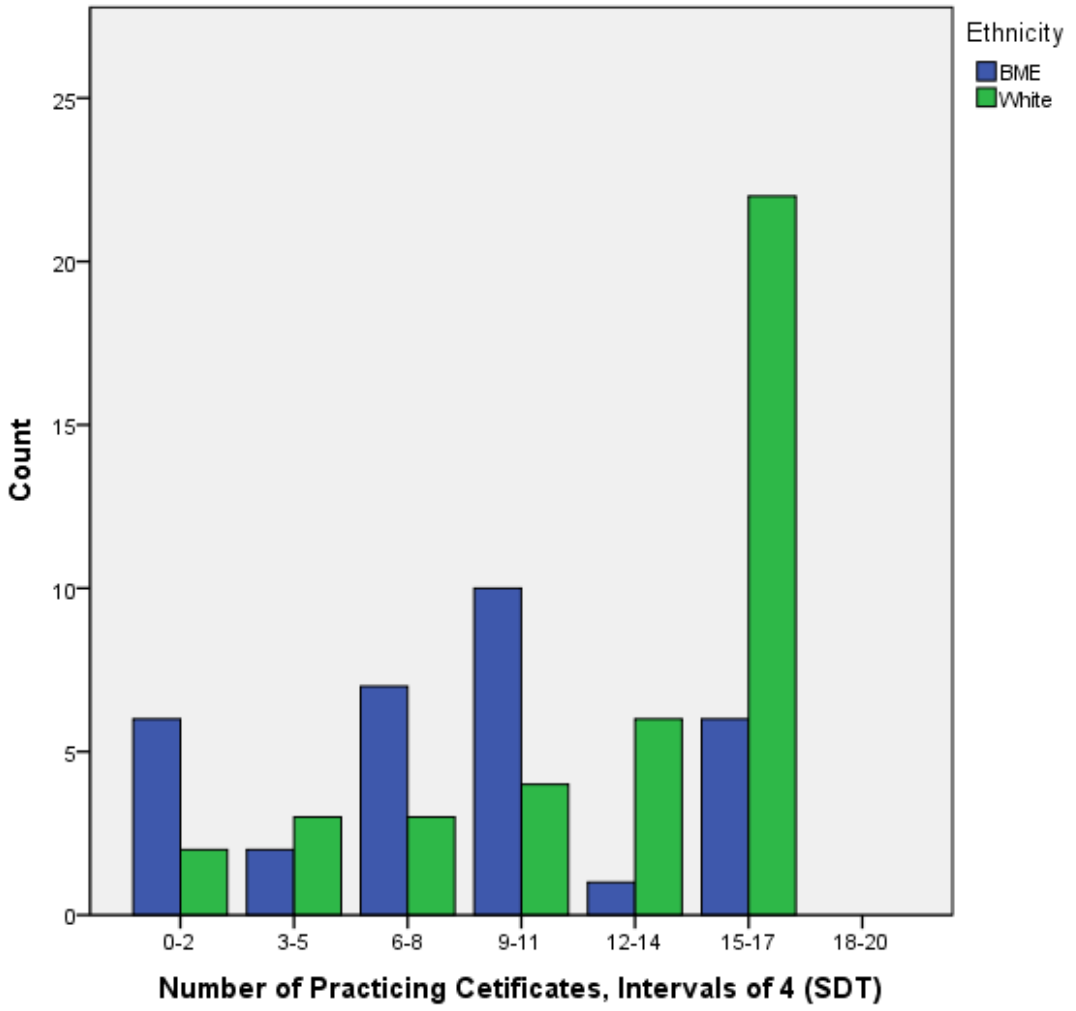
SRA Adjudicated: Number of Practising Certificates Intervals of 4 (Count)

SDT: Number of Practising Certificates

6.20 The SDT sample also showed a difference between BME and White solicitors with the mean average of 8 and 13 for the BME and White groups respectively. The BME group had a normal distribution with the highest frequency of cases having 9-11 practising certificates. The White group was highly concentrated at the top end of the scale, i.e., within the 15-17 group. Again, across both the BME and White groups, cases that ended in front of the SDT featured a fewer number of practising certificates on average.

		Number of Practicing Certificates (SDT)					
		Mean	Standard Deviation	Median	Mode	Minimum	Maximum
Ethnicity	BME	8	5	9	9	0	17
	White	13	5	15	17	0	17

SDT Number of Practicing Certificates (Count)



SDT Number of Practising Certificates, Intervals of 4 (Count)

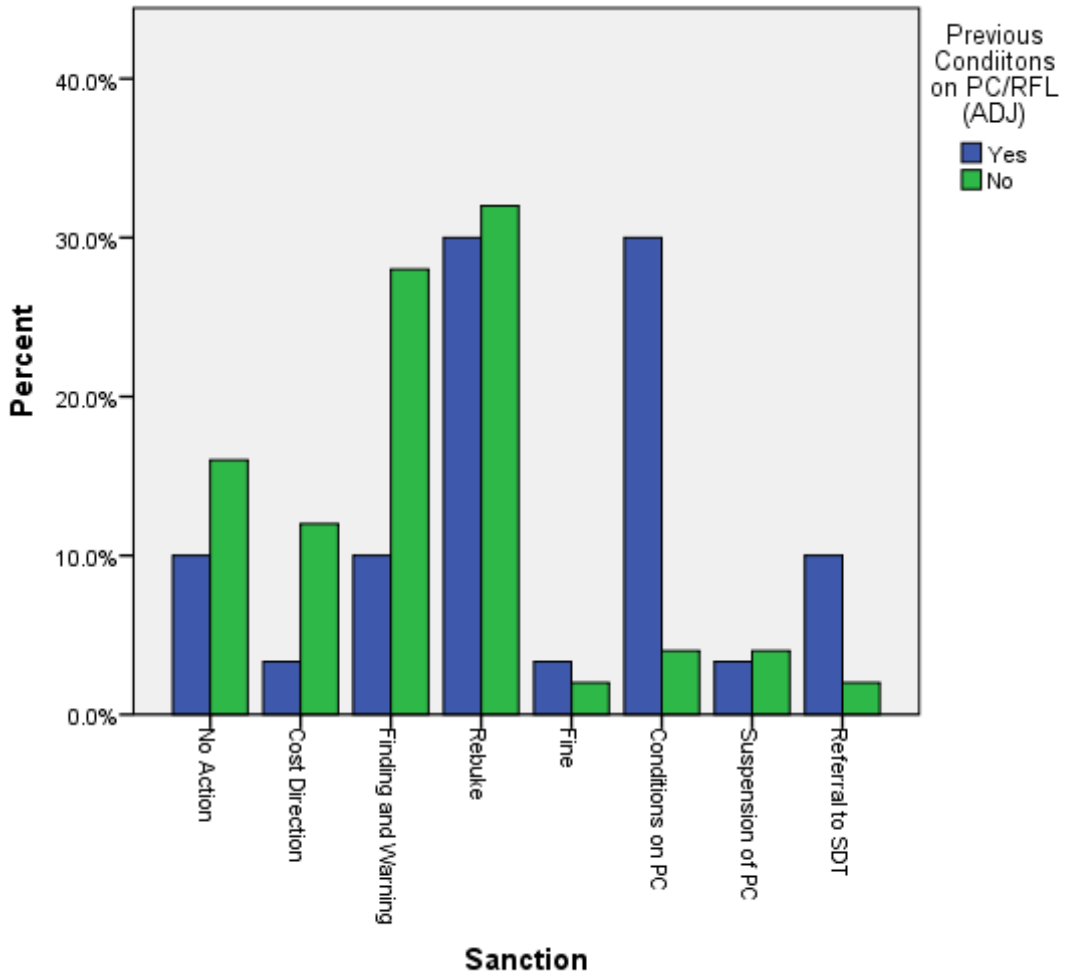
SRA Adjudicated: Previous Conditions on Practising Certificate (PC) or Registered Foreign Lawyer (RFL)

6.21 Of those cases that were SRA Adjudicated, 30 had previous conditions placed on their PCs or were in the RFL category. 19 of these cases were in the BME group and 11 from the White. Of the 50 that had no previous conditions placed upon their practising certificate, 21 were from the BME group and 29 from the White group.

6.22 The sanctions issued through SRA Adjudication, and relating to cases where previous conditions had been placed on the practising certificate, are shown in percentage form in the graph and table below. Those who had no previous conditions were more likely to receive less severe sanctions on the lower end of the scale; from 'no action' to 'rebuke'. Those who already had conditions placed on their PC were more likely to have further conditions placed, or to be referred to the SDT.

		Previous Conditions on PC/RFL (ADJ)					
		Yes		No		Total	
		Count	Row N %	Count	Row N %	Count	Row N %
Ethnicity	BME	19	47.5%	21	52.5%	40	100.0%
	White	11	27.5%	29	72.5%	40	100.0%
	Total	30	37.5%	50	62.5%	80	100.0%

SRA Adjudicated: Previous Conditions on Practising Certificate or Registered Foreign Lawyer (Count and %)



		No Action	Cost Direction	Finding and Warning	Rebuke	Fine	Conditions on PC	Suspension of PC	Referral to SDT	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Previous Conditions on PC/RFL (ADJ)	Yes	10.0%	3.3%	10.0%	30.0%	3.3%	30.0%	3.3%	10.0%	100.0%
	No	16.0%	12.0%	28.0%	32.0%	2.0%	4.0%	4.0%	2.0%	100.0%

SRA Adjudicated: Previous Conditions on Practising Certificate or Registered Foreign Lawyer (%)

SDT: Previous Conditions on Practising Certificate or Registered Foreign Lawyer

6.23 In the SDT sample there was not such a clear trend in the sanctions applied, when compared to the SRA Adjudicated equivalent. Those with previous conditions on their practising certificates received more fines in comparison to those who had not, with 44.7% compared to 32.4%. The only other significant difference was in the 'strike off' category where those with no previous conditions had a higher percentage, 32.4% compared to 26.3% with previous conditions.

		Previous Conditions on PC/RFL (SDT)					
		Yes		No		Total	
		Count	Row N %	Count	Row N %	Count	Row N %
Ethnicity	BME	18	56.3%	14	43.8%	32	100.0%
	White	20	50.0%	20	50.0%	40	100.0%
	Total	38	52.8%	34	47.2%	72	100.0%

SDT: Previous Conditions on Practising Certificate or Registered Foreign Lawyer (Count and %)

		Sanction							
		Dismissed	No Order	Cost Direction	Rebuke	Fine	Suspension of PC	Strike Off	Other
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Previous Conditions on PC/RFL (SDT)	Yes	0.0%	2.6%	0.0%	2.6%	44.7%	21.1%	26.3%	2.6%
	No	0.0%	2.9%	0.0%	5.9%	32.4%	23.5%	32.4%	2.9%

SDT: Previous Conditions on Practising Certificate or Registered Foreign Lawyer (%)

SRA Adjudicated: Sanctions Based on Ethnicity

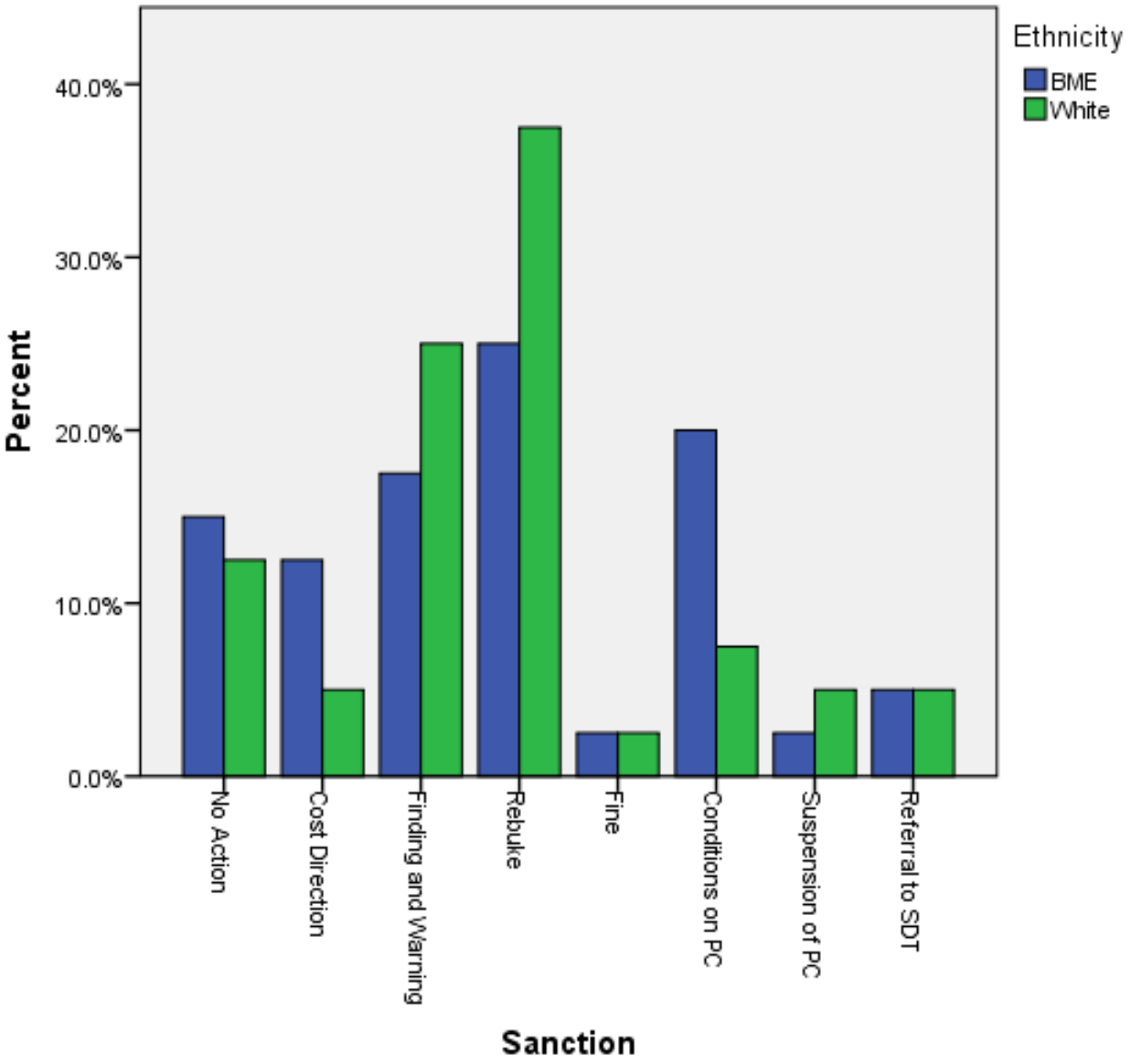
6.24 The percentage breakdown of the sanctions issued by the SRA Adjudication panel in relation to ethnicity indicates some clear disparities. The group composed of White respondents featured more often in the lesser sanctions categories such as 'Finding and Warning' and 'Rebuke', in comparison to the BME sample. The largest difference in the sanctions passed between the two ethnic groups was in the 'Conditions on PC', which accounted for 20% in the BME, compared to 7.5% in the White group. On the lower end of the scale BME respondents received more 'Cost Direction' orders with 12.5% compared to 5% in the White group.

		Sanction								
		No Action	Cost Direction	Finding and Warning	Rebuke	Fine	Conditions on PC	Suspension of PC	Referral to SDT	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	6	5	7	10	1	8	1	2	40
	White	5	2	10	15	1	3	2	2	40

SRA Adjudicated: Sanctions compared by Ethnicity (Count)

		Sanction								
		No Action	Cost Direction	Finding and Warning	Rebuke	Fine	Conditions on PC	Suspension of PC	Referral to SDT	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Ethnicity	BME	15.0%	12.5%	17.5%	25.0%	2.5%	20.0%	2.5%	5.0%	100.0%
	White	12.5%	5.0%	25.0%	37.5%	2.5%	7.5%	5.0%	5.0%	100.0%

SRA Adjudicated: Sanctions compared by Ethnicity (%)



SRA Adjudicated: Sanctions compared by Ethnicity (%)

SDT: Sanctions Based on Ethnicity

6.25 The table and graph below are based on 72 judgements passed by the SDT, 40 cases involving White respondents and 32 involving BME. The figures have been adjusted to level the sample size and are expressed in percentage form. 28% of BME cases ended in the suspension of the respondent compared with 17.5% in cases where the respondent was White. There was also a small disparity in the number of BME cases that were concluded with 'no order', in comparison to the White group, although this accounted for only 2 cases out of the 32 (6.5%).

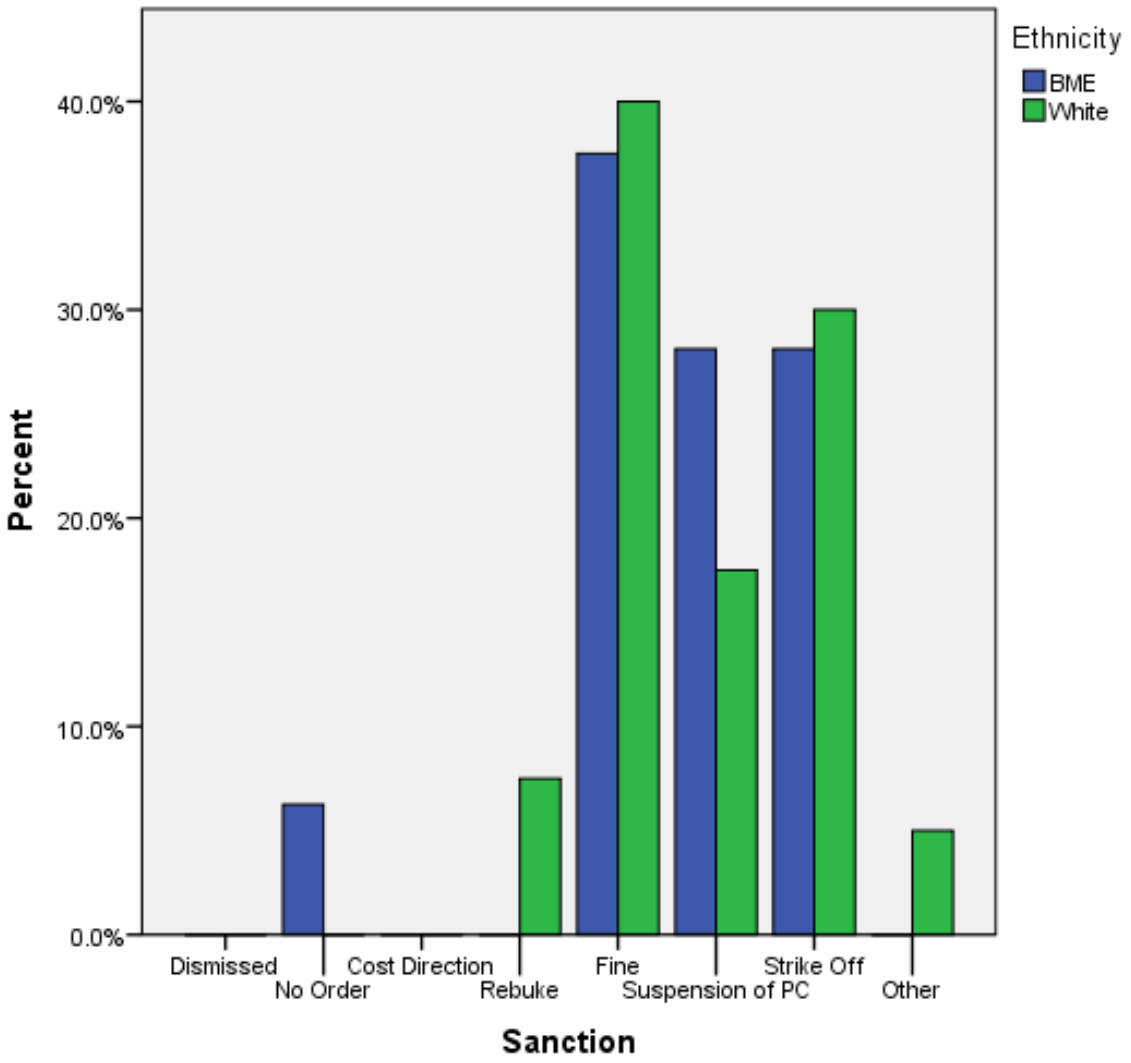
		Sanction								
		Dismissed	No Order	Cost Direction	Rebuke	Fine	Suspension of PC	Strike Off	Other	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	0	2	0	0	12	9	9	0	32
	White	0	0	0	3	16	7	12	2	40

SDT: Sanctions compared by Ethnicity (Count)

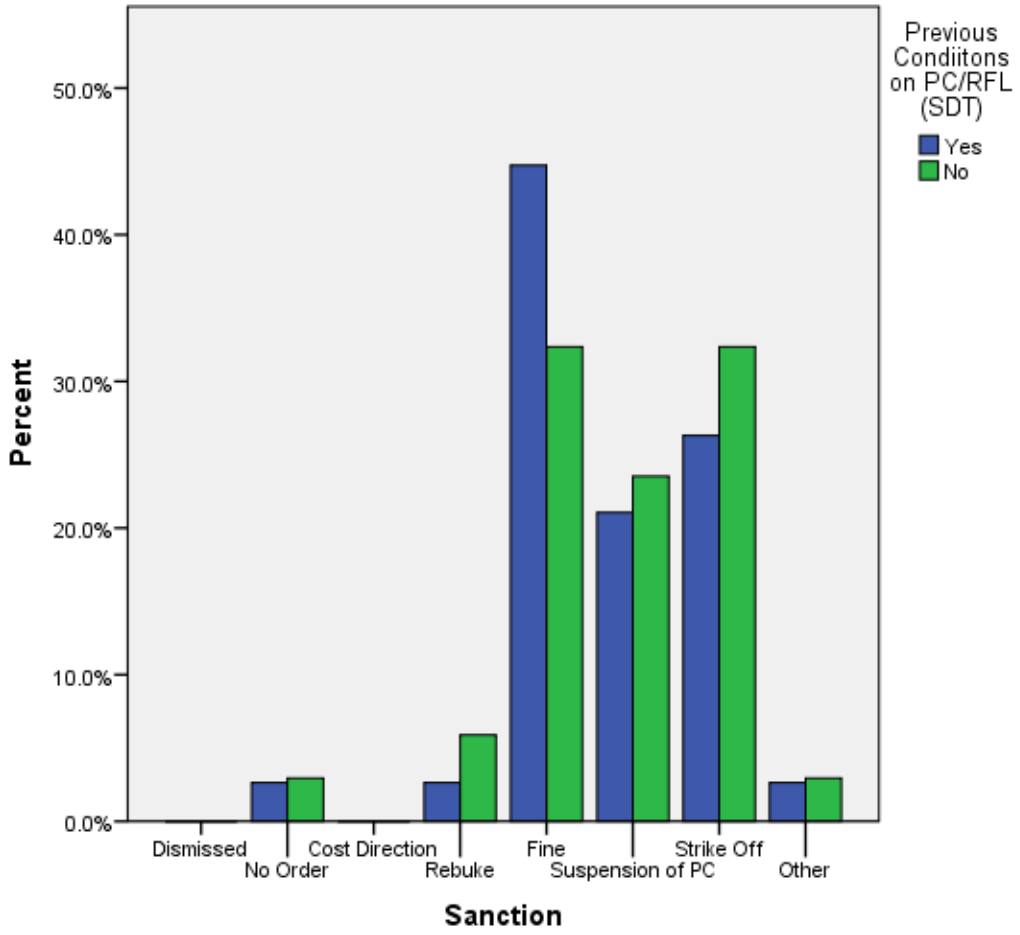
SDT Sanctions Table %

		Sanction							
		Dismissed	No Order	Cost Direction	Rebuke	Fine	Suspension of PC	Strike Off	Other
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Ethnicity	BME	0.0%	6.3%	0.0%	0.0%	37.5%	28.1%	28.1%	0.0%
	White	0.0%	0.0%	0.0%	7.5%	40.0%	17.5%	30.0%	5.0%

SDT: Sanctions compared by Ethnicity (%)



SDT: Sanctions compared by Ethnicity (%)



SDT: Previous Conditions on Practising Certificate or Registered Foreign Lawyer (%)

Comparative Data Scatter Graphs

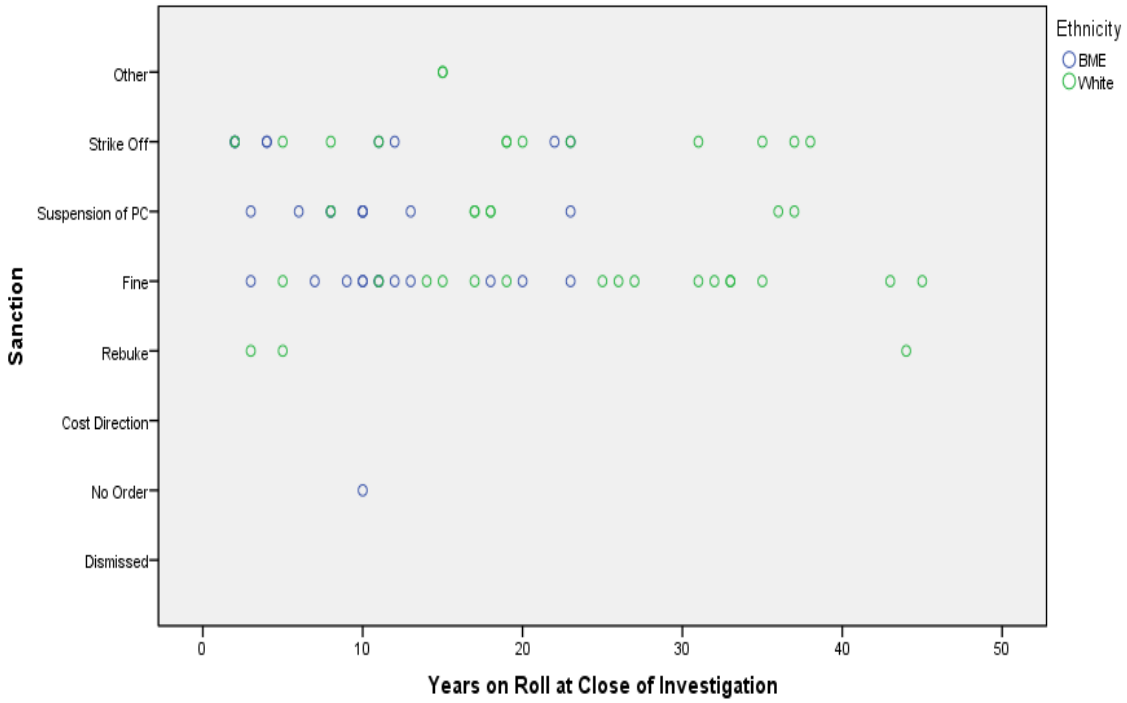
SRA Adjudicated: Years on Roll and Sanctions Compared

6.26 Comparing the years on the Roll to the eventual sanctions issued through SRA Adjudication indicates no clear correlation, nor does it suggest that there was a direct causal relationship between the two factors.

Scatter Graph Comparing Years on Roll to Sanctions Passed for SRA Adjudicated Matters

SDT: Years on the Roll and Sanctions Compared

6.27 Again, comparing the years on the Roll to the eventual sanctions passed by the SDT shows that there was no discernible relationship between the two factors.



Scatter Graph Comparing Years on Role to Sanctions Passed for SDT Panel

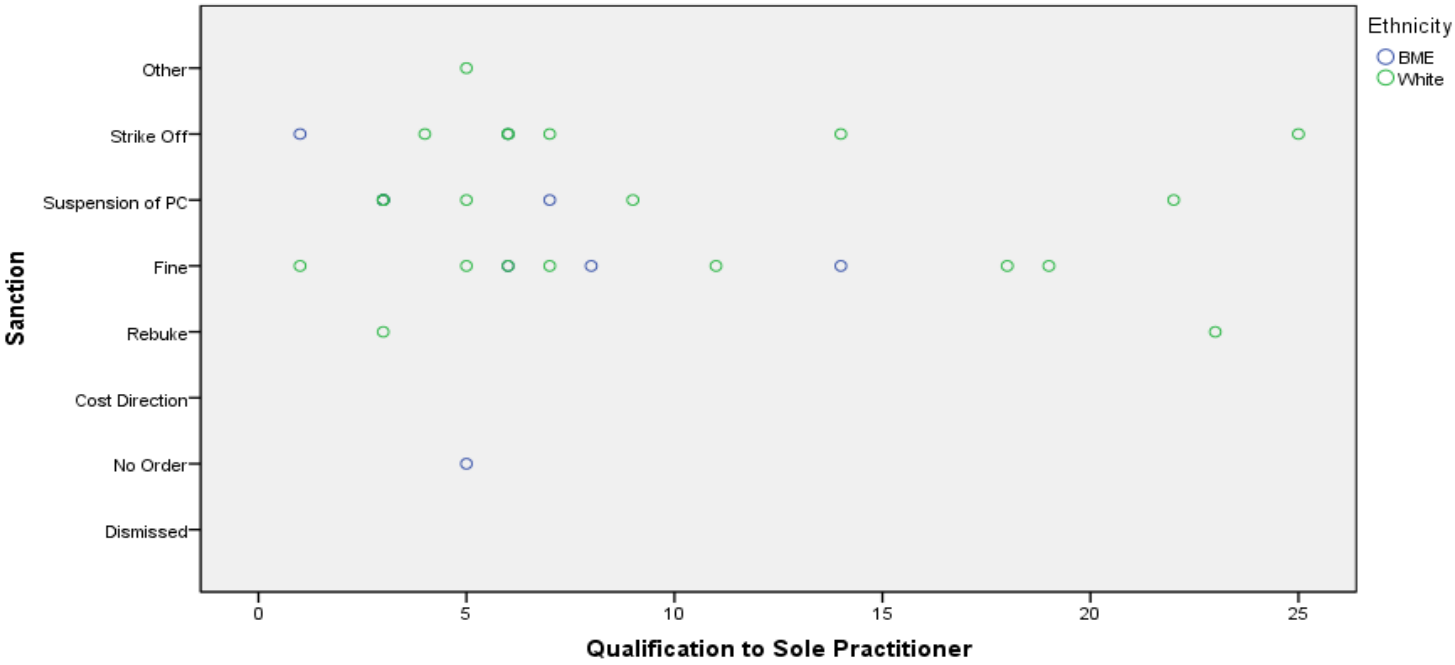
SRA Adjudicated: Years from Qualification to Sole Practitioner and Sanctions Compared

6.28 Looking at the period between qualification and operating as a sole practitioner , this did not correlate with the sanctions given by the SRA Adjudication panel.

Scatter Graph Comparing Years from Qualification to Sole Practitioner and Sanctions Passed by SRA Adjudication Panel

SDT: Years from Qualification to Sole Practitioner and Sanctions Compared

6.29 Looking at the period between qualification and setting up as a sole practitioner, there was no correlation with the sanctions given by the SDT.



Scatter Graph Comparing Years from Qualification to Sole Practitioner and Sanctions Passed by the SDT Panel

Comparative Analysis of the SRA Physical Dataset

6.30 A second set of data was gathered from the SRA's own physical files. The data capture process was limited by the sheer size of the files and by the inconsistent and incomplete data recorded within. This dataset did however produce certain variables that were not available in the original dataset provided by the SRA and which are of relevance to the terms of reference for this Report.

Trigger for Investigation

6.31 One variable that was included in the dataset related to the instigation of the investigations. Below are listed the different sources of complaints:

1. Public,
2. Internal SRA Section,
3. Legal Complaints Service,
4. Law Enforcement Services,

5. Internal Referrals,
6. Self-Referrals, and
7. Other Referrals.

6.32 In contrast to the previous data analysis section, no distinction has been made between the SRA Adjudicated cases and those presided over by the SDT, relating to the trigger of investigation. This is because a key objective was to observe if there were any statistical indications relating to BME solicitors receiving a disproportionate number of complaints from one source. As the trigger of investigation precedes any regulatory action from either body, it was unnecessary to divide the sample cases between the SRA and SDT.

Trigger for Investigation Compared by Ethnicity

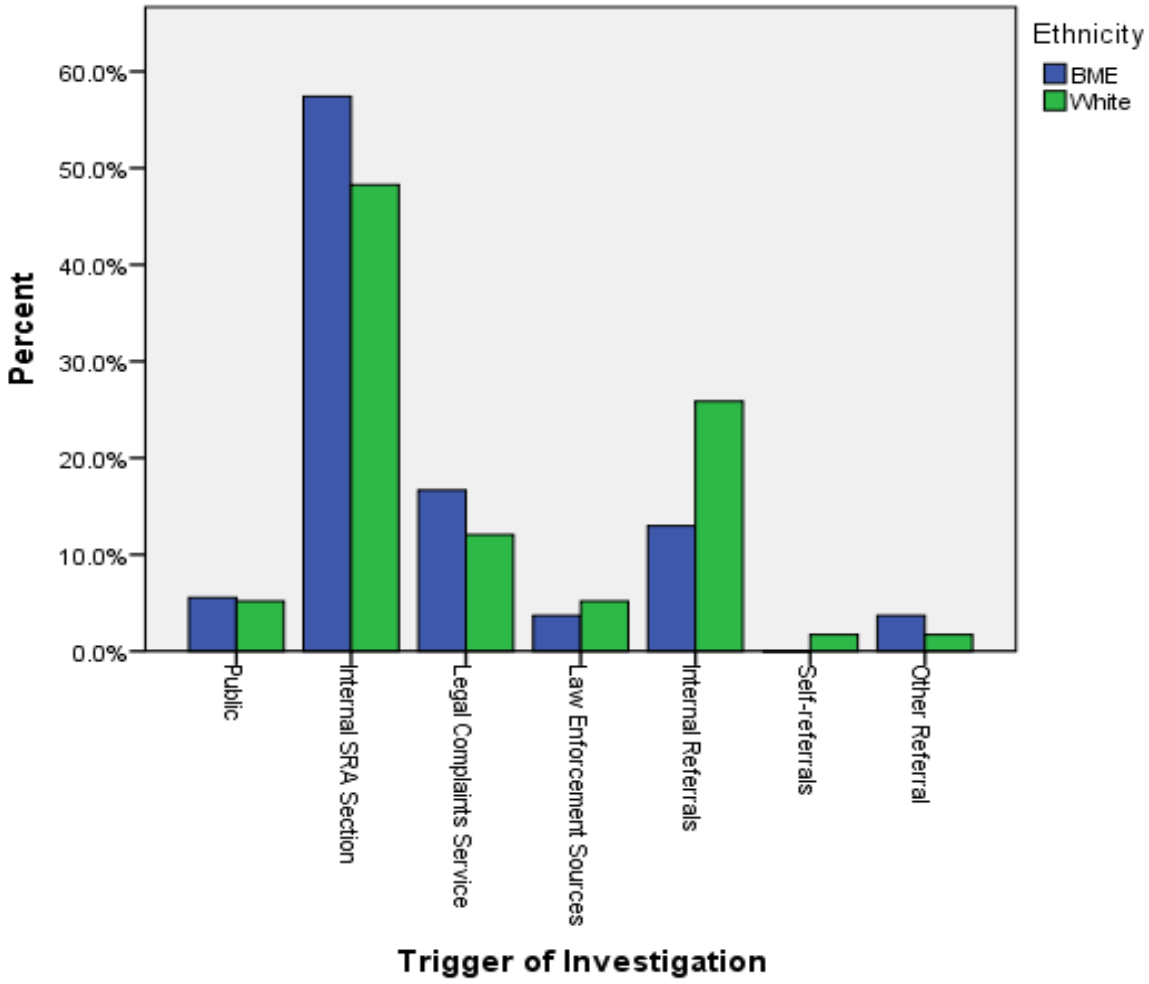
6.33 Relating to the categories above, the majority of complaints or events that led to the investigation of respondents in both ethnic groups came through the 'Internal SRA Section'. In these instances, BME respondents came under scrutiny more frequently than their White counterparts, with 57.4% of investigations being triggered through this route, compared to 48.3% in the White group. A further disparity was observed in these statistics, as 25.9% of White solicitor investigations were triggered by 'Internal Referrals' with only 13% of BME solicitor investigations triggered the same way.

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	3	31	9	2	7	0	2	54
	White	3	28	7	3	15	1	1	58

Trigger of Investigation Compared by Ethnicity (Count)

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		%	%	%	%	%	%	%	%
Ethnicity	BME	5.6%	57.4%	16.7%	3.7%	13.0%	0.0%	3.7%	100.0%
	White	5.2%	48.3%	12.1%	5.2%	25.9%	1.7%	1.7%	100.0%

Trigger of Investigation Compared by Ethnicity (%)



Trigger of Investigation Compared by Ethnicity (%)

Trigger of Investigation Compared by Gender

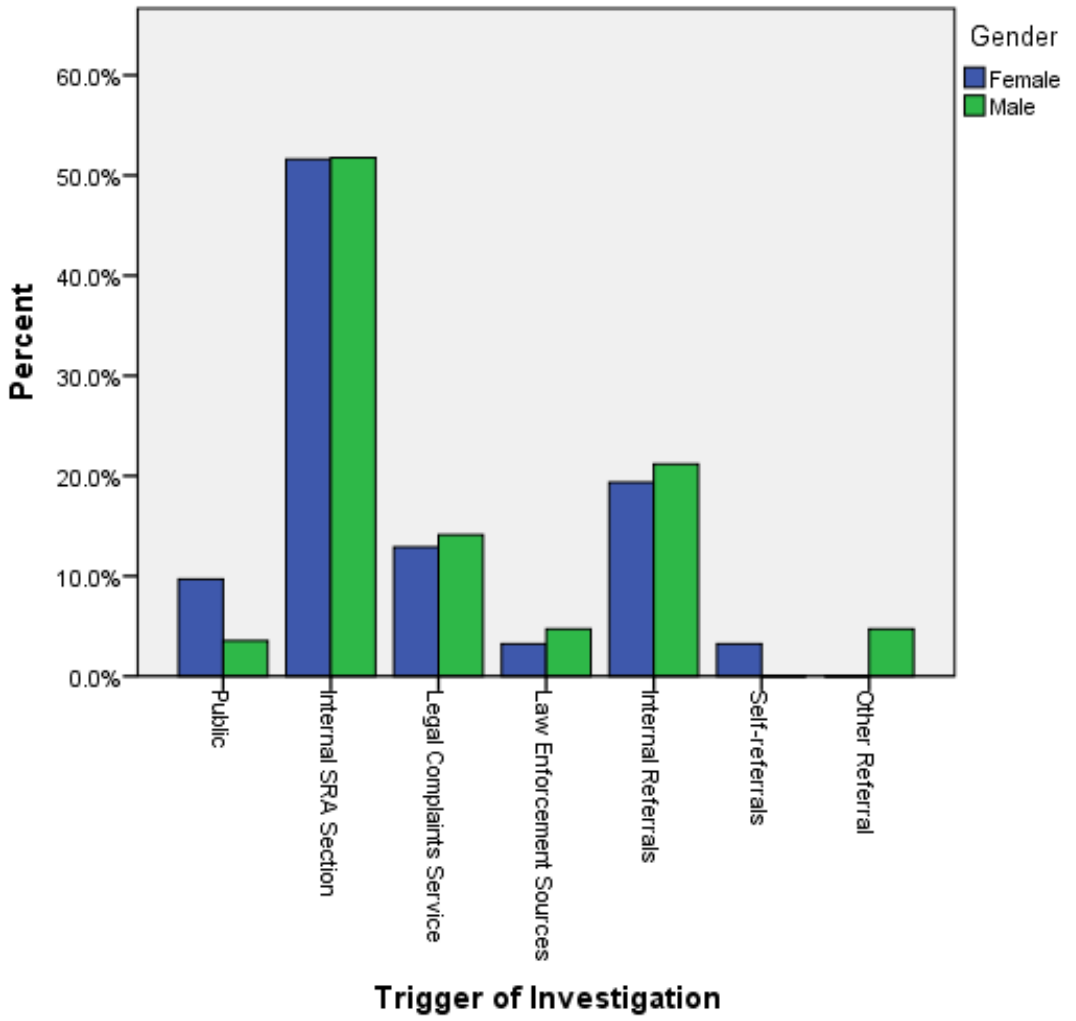
6.34 When reviewing the trigger of investigation data, there are some observable disparities between the gender groups. The female sample size, however, is small with 31 cases compared to 85 in the male group, and is therefore more sensitive to random variation. Female respondents received a higher frequency of complaints from the public, with 9.7% of complaints coming from this source compared to 3.5% for the male group.

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		Count	Count	Count	Count	Count	Count	Count	Count
Gender	Female	3	16	4	1	6	1	0	31
	Male	3	44	12	4	18	0	4	85

Trigger of Investigation Compared by Gender (Count)

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		%	%	%	%	%	%	%	%
Gender	Female	9.7%	51.6%	12.9%	3.2%	19.4%	3.2%	0.0%	100.0%
	Male	3.5%	51.8%	14.1%	4.7%	21.2%	0.0%	4.7%	100.0%

Trigger of Investigation Compared by Gender (%)



Trigger of Investigation Compared by Gender (%)

Events Leading to Regulatory Action

6.35 The SRA physical data contained variables relating to the 'events that led to regulatory action'. This categorisation is used by the SRA in the processes of bringing cases against respondents. For the purposes of the report, this category has been used to illustrate the type and severity of the event that led the SRA to investigate the respondent. In this instance, we can compare the nature of the offence investigated by the SRA, with cases brought to the SDT. From this data we can observe any discernible patterns between both ethnic

and gender groups, and identify any discrepancies between the nature of cases brought before the two bodies, the SRA and SDT. The categories are listed below:

1. Abandonment of Solicitors' Practice,
2. Contravention of Restrictions on Practice,
3. Applications Regarding Restrictions on Practice,
4. Breaches of Undertaking(s) Given to Regulator,
5. Breaches of Solicitors' Code of Practice and Other Regulations,
6. Failure to Comply with Guidelines for Practising,
7. Professional Competence,
8. Conflict of Interest,
9. Conduct Cases,
10. Cost, Fees and Referrals of Clients,
11. Fraud/Dishonesty/Money Laundering, and
12. Solicitors' Account Rules and Practising Regulations.

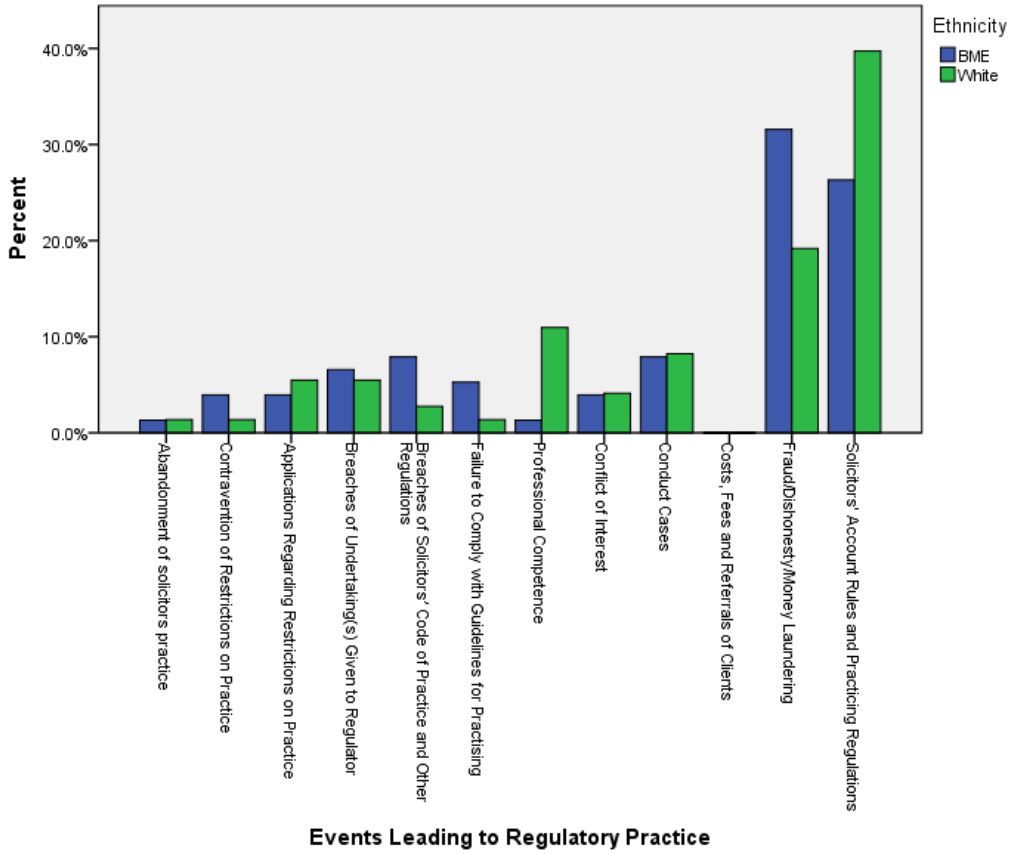
Events Leading to Regulatory Action Compared by Ethnicity (SRA Adjudicated)

		Events Leading to Investigation (ADJ)												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	1	2	2	2	1	1	2	0	6	0	3	11	31
	White	0	0	2	1	1	0	3	2	3	0	4	19	35

Events Leading to Investigation Compared by Ethnicity (SRA Adjudicated) (Count)

		Events Leading to Investigation (ADJ)												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		%	%	%	%	%	%	%	%	%	%	%	%	%
Ethnicity	BME	3.2%	6.5%	6.5%	6.5%	3.2%	3.2%	6.5%	0.0%	19.4%	0.0%	9.7%	35.5%	100.0%
	White	0.0%	0.0%	5.7%	2.9%	2.9%	0.0%	8.6%	5.7%	8.6%	0.0%	11.4%	54.3%	100.0%

Events Leading to Regulatory Action Compared by Ethnicity (SRA Adjudicated) (%)



Events Leading to Regulatory Action Compared by Ethnicity (SRA Adjudicated) (%)

6.36 Within the case files that related to the SRA Adjudication process, there was a clear concentration of cases involving category 12, Solicitors' Account Rules and Practising Regulations (SAR), representing the most common charge in both the BME and White group. In the White group it made up the majority of cases with 54.3%, while the BME group was more varied, with 35.5% relating to SAR and the rest spread across the other fields. Category 9, 'Conduct Cases', made up 19.4% of BME investigations compared to half that in the White group, 8.6%.

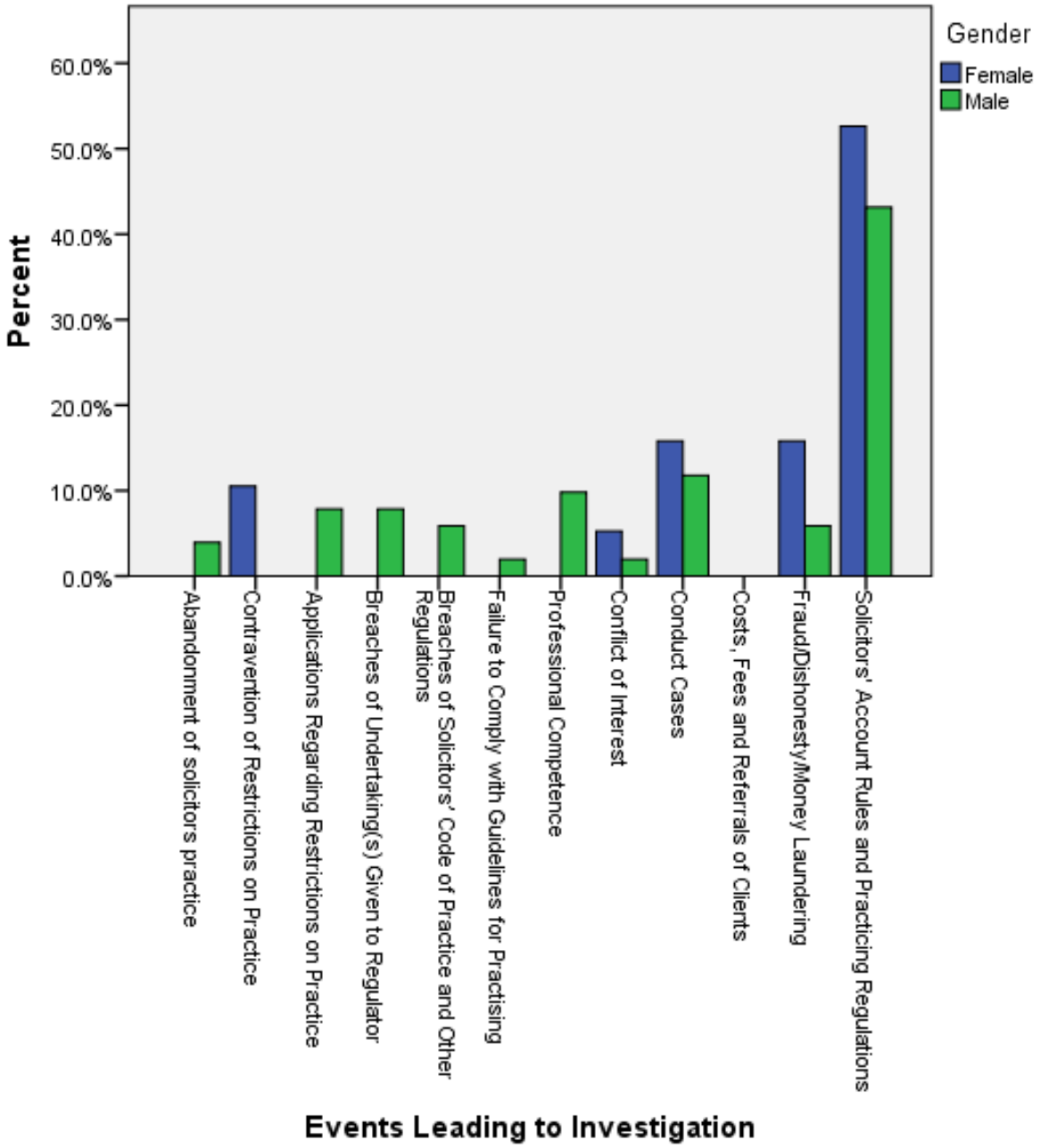
Events Leading to Regulatory Action Compared by Gender (SRA Adjudicated)

		Events Leading to Regulatory Action												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count
Gender	Female	0	2	0	0	0	0	0	1	3	0	3	10	19
	Male	2	0	4	4	3	1	5	1	6	0	3	22	51

Events Leading to Regulatory Compared by Gender (SRA Adjudicated) (Count)

		Events Leading to Regulatory Action												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		%	%	%	%	%	%	%	%	%	%	%	%	%
Gender	Female	0.0%	10.5%	0.0%	0.0%	0.0%	0.0%	0.0%	5.3%	15.8%	0.0%	15.8%	52.6%	100.0%
	Male	3.9%	0.0%	7.8%	7.8%	5.9%	2.0%	9.8%	2.0%	11.8%	0.0%	5.9%	43.1%	100.0%

Events Leading to Regulatory Compared by Gender (SRA Adjudicated) (%)



Events Leading to Regulatory Action Compared by Gender (SRA Adjudicated) (%)

6.37 Using the same data as the ethnicity comparison above, but relating to gender, there is once again a clear concentration around category 12, SAR breaches, with the majority of cases in the female group, 52.6% and 43.1% in the male group, triggered by these offences. In relation to category 11,

'Fraud, Dishonesty and Money Laundering' (FDM), the female group outweighed the male group by 15.8% compared to 5.9%. The female group had no cases that fell into categories 3, 4, 5, 6, 7 or 10, but it should be noted that this could be due to the small size of the female sample, 19 cases compared to 51 in the male group.

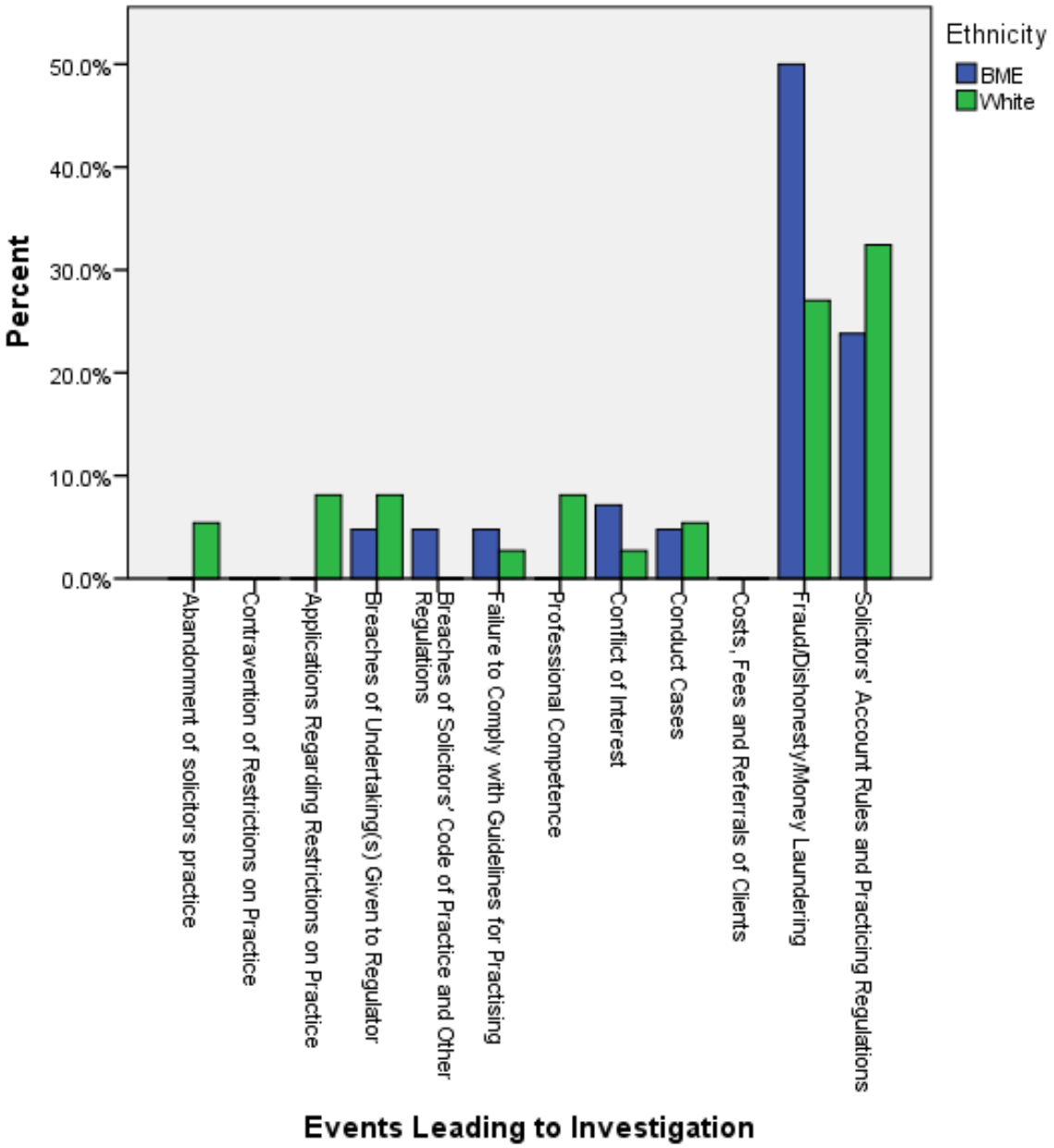
Events Leading to Regulatory Action Compared by Ethnicity (SDT)

		Events Leading to Regulatory Action												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	0	0	0	2	2	2	0	3	2	0	21	10	42
	White	2	0	3	3	0	1	3	1	2	0	10	12	37

Events Leading to Regulatory Action Compared by Ethnicity (SDT) (Count)

		Events Leading to Regulatory Action												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		%	%	%	%	%	%	%	%	%	%	%	%	%
Ethnicity	BME	0.0%	0.0%	0.0%	4.8%	4.8%	4.8%	0.0%	7.1%	4.8%	0.0%	50.0%	23.8%	100.0%
	White	5.4%	0.0%	8.1%	8.1%	0.0%	2.7%	8.1%	2.7%	5.4%	0.0%	27.0%	32.4%	100.0%

Events Leading to Regulatory Action Compared by Ethnicity (SDT) (%)



Events Leading to Regulatory Action Compared by Ethnicity (SDT) (%)

6.38 Within the cases investigated by the SDT, there is a clear concentration of cases within category 11, 'Fraud, Dishonesty and Money Laundering' (FDM). This one category constitutes exactly 50% of the BME cases and 27% of the White cases. The second area of concentration was category 12, 'Solicitors' Account Rules' (SAR), which inversely made up 32.4% of White and 23.8% of BME cases.

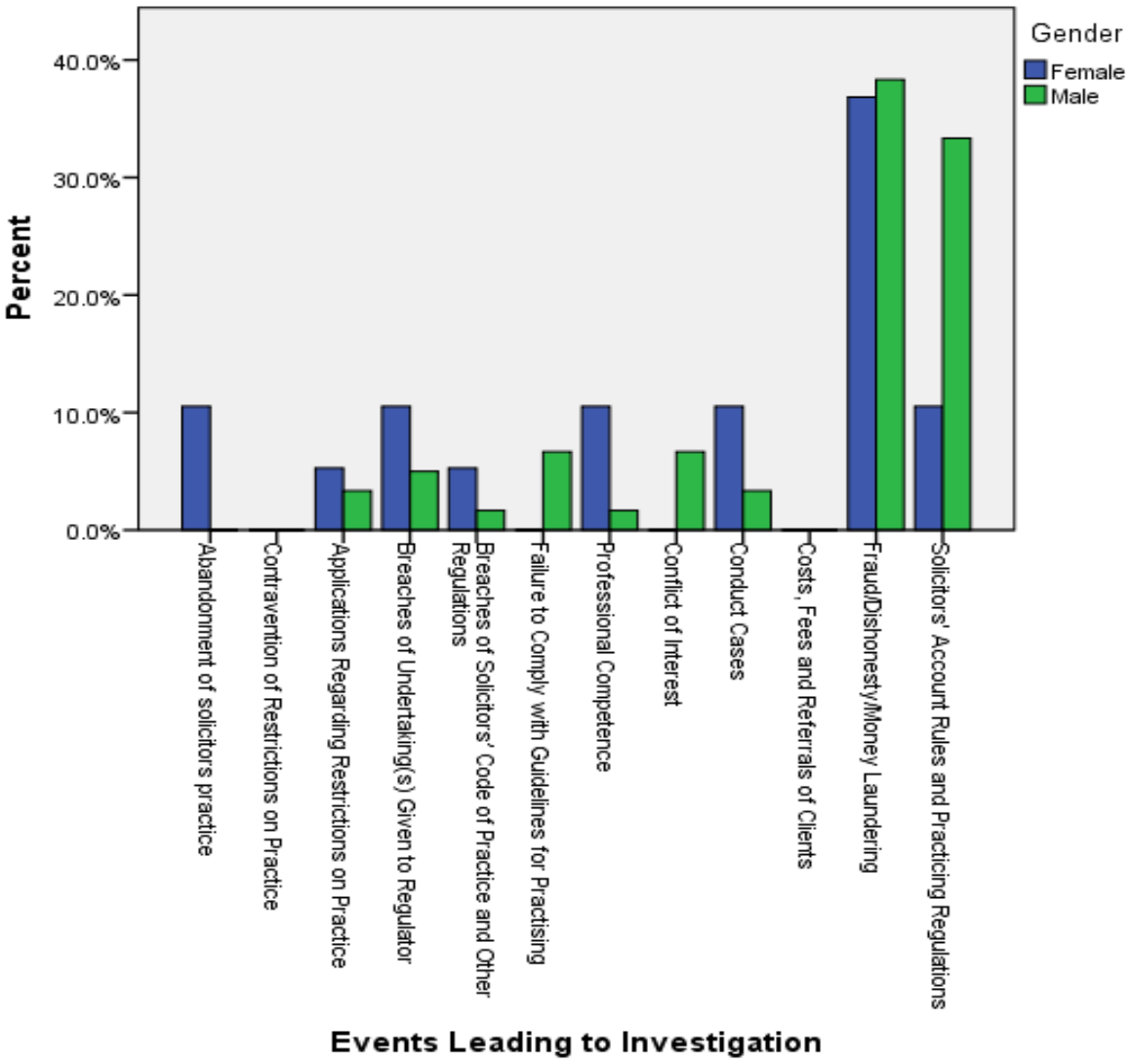
Events Leading to Regulatory Action Compared by Gender (SDT)

		Events Leading to Regulatory Action												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count	Count
Gender	Female	2	0	1	2	1	0	2	0	2	0	7	2	19
	Male	0	0	2	3	1	4	1	4	2	0	23	20	60

Events Leading to Investigation Compared by Gender (SDT) (Count)

		Events Leading to Regulatory Action												
		1	2	3	4	5	6	7	8	9	10	11	12	Total
		%	%	%	%	%	%	%	%	%	%	%	%	%
Gender	Female	10.5%	0.0%	5.3%	10.5%	5.3%	0.0%	10.5%	0.0%	10.5%	0.0%	36.8%	10.5%	100.0%
	Male	0.0%	0.0%	3.3%	5.0%	1.7%	6.7%	1.7%	6.7%	3.3%	0.0%	38.3%	33.3%	100.0%

Events Leading to Investigation Compared by Gender (SDT) (%)



Events Leading to Regulatory Action Compared by Gender (SDT) (%)

6.39 Relating to the events leading to regulatory action by the SDT, there is a clear concentration in the gender data, around category 11 (FDM). This accounts for 38.3% of male and 36.8% of female cases. The second most frequent offence for the male group is category 12 (SAR) accounting for 33.3% of male cases. SAR is also the category that shows the clearest disparity between the two gender groups, with a 10.5% difference between male and female cases. The rest of the sample is spread between the remaining categories, with female cases recording 10.5% in categories 1, 4, 7, 9, 12. It should once again be noted that this feature may be accounted for by the very small female sample size, with only 19 female cases compared to 60 in the male group.

SRA Adjudicated and SDT Sanctions Compared

6.40 Within SRA Adjudicated cases, there was a clear concentration of cases that involved category 12, 'Solicitors' Account Rules' (SAR) with 45.8% of cases relating to this charge. For cases prosecuted in the SDT, there was a concentration of cases relating to category 11, 'Fraud, Dishonesty and Money Laundering' (FDM), constituting 38.3% of cases brought in the SDT. Isolating these cases and observing whether there was any disparity in the way each of the regulatory bodies applied their sanctions, will be helpful in answering the terms of reference of this Report. It should be noted that even though an attempt was made to set the charge categories as a constant (e.g. SAR and FDM etc), in order to test if the regulatory bodies were consistent in their dealings between the ethnic/gender groups, there are many nuances in the seriousness of the breach within each charge category. In addition, events that preceded or followed the alleged offence may have affected the decision of the regulatory body, such as if the respondent had appeared before one if not both of the bodies previously and the level of co-operation that the respondent demonstrated in the course of the investigation.

SRA Adjudicated: Solicitors' Account Rules (SAR) Sanctions Compared by Ethnicity

6.41 The sample size within the SRA Adjudicated group for SAR breaches was small with only 16 White and 10 BME cases. As a result, confidence in the conclusions that can be drawn is low. For both of the ethnic groups the most likely outcome at this stage of regulatory action was a 'reprimand', representing 56.3% of outcomes in the White and 40% of outcomes in the BME group. This category also had the third largest gap between the two groups, 16.3%. BME cases received 'no order' decisions more frequently than cases involving White solicitors, with 30% compared to 6.3%. These figures could have been the result of appeals being upheld. The largest disparity between the two ethnic groups occurred in 'referral to SDT' which represented 18.8% of the adjudication decisions in the White cases with no

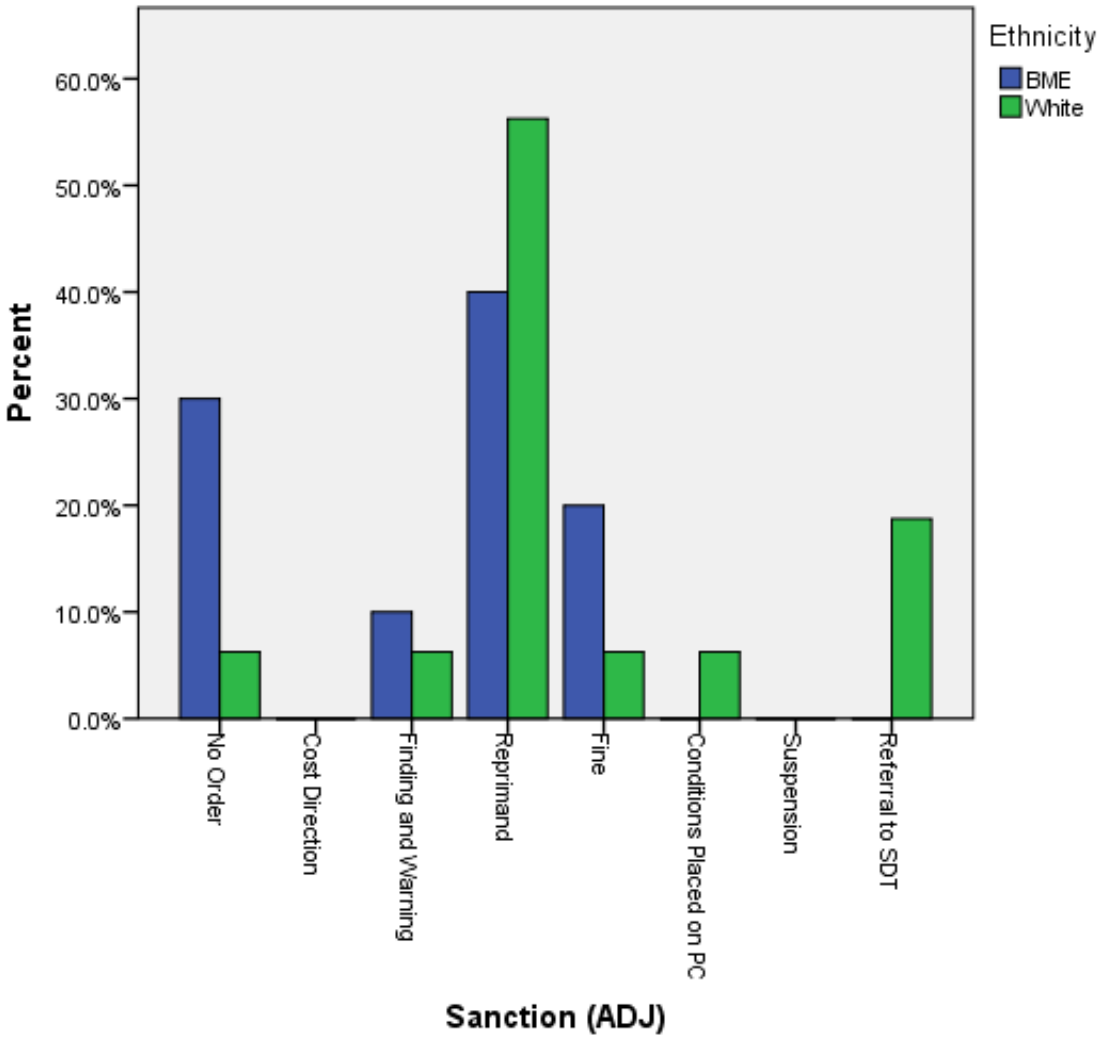
such referral being made in BME cases. This however may be a result of the small sample size relating to SAR breaches.

		Sanction (SRA Adjudicated)								
		No Order	Cost Direction	Finding and Warning	Reprimand	Fine	Conditions Placed on PC	Suspension	Referral to SDT	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	3	0	1	4	2	0	0	0	10
	White	1	0	1	9	1	1	0	3	16

'Solicitors' Account Rules' Sanctions Compared by Ethnicity (Count) (SRA Adjudicated)

		Sanction (SRA Adjudicated)								
		No Order	Cost Direction	Finding and Warning	Reprimand	Fine	Conditions Placed on PC	Suspension	Referral to SDT	Total
		%	%	%	%	%	%	%	%	%
Ethnicity	BME	30.0%	0.0%	10.0%	40.0%	20.0%	0.0%	0.0%	0.0%	100.0%
	White	6.3%	0.0%	6.3%	56.3%	6.3%	6.3%	0.0%	18.8%	100.0%

'Solicitors' Account Rules' Sanctions Compared by Ethnicity (%) (SRA Adjudicated)



"Solicitors' Account Rules" Sanctions Compared by Ethnicity (%) (SRA Adjudicated)

SRA Adjudicated: "Solicitors' Account Rules" Sanctions Compared by Gender

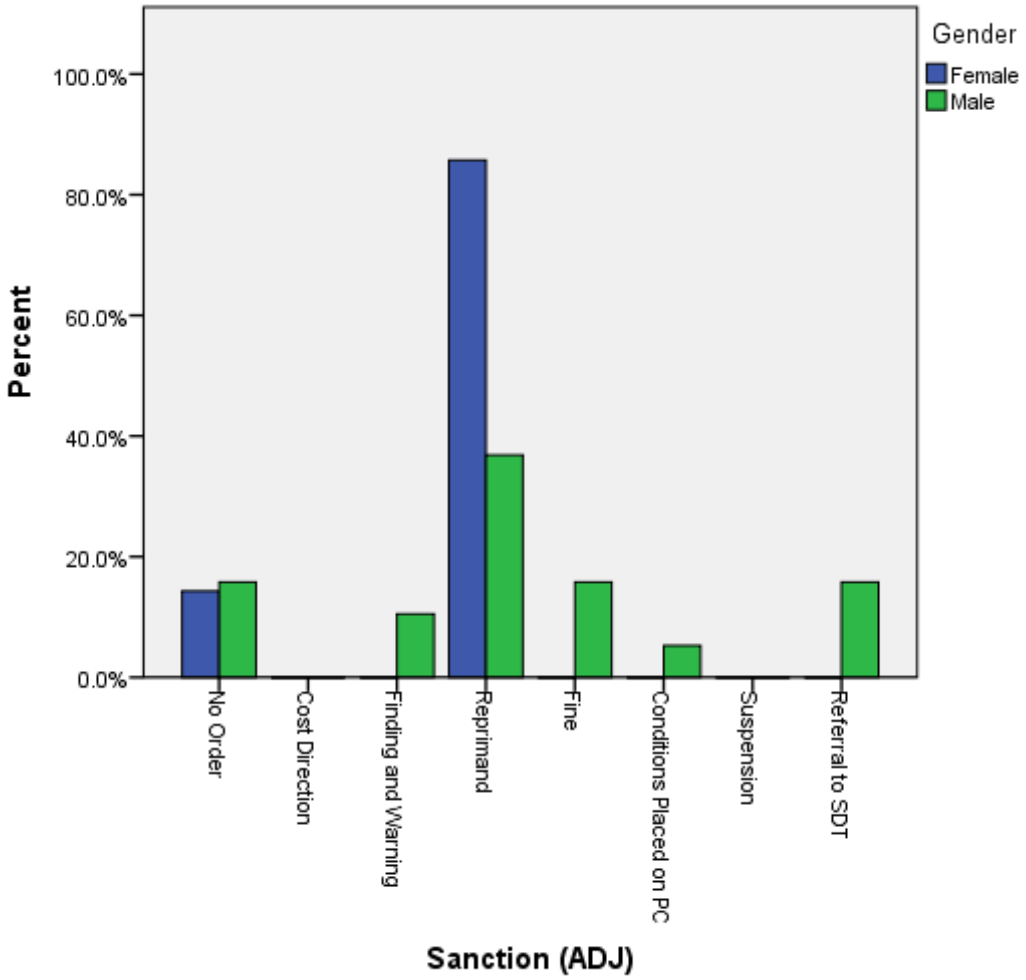
6.42 The sample size comparing the outcomes of SAR breaches in relation to gender was also very small, with only 19 cases in the male group and 7 in the female group. The most frequent sanction for both gender groups in the SAR category was a 'reprimand', representing 85.7% of female and 36.8% of male cases. The female group was heavily concentrated in the reprimand category, whereas male cases were spread more evenly across the sanctions, but again, this could be due to the very small female sample.

		Sanction (ADJ)								
		No Order	Cost Direction	Finding and Warning	Reprimand	Fine	Conditions Placed on PC	Suspension	Referral to SDT	Total
		Count	Count	Count	Count	Count	Count	Count	Count	Count
Gender	Female	1	0	0	6	0	0	0	0	7
	Male	3	0	2	7	3	1	0	3	19

"Solicitors' Account Rules" Sanctions Compared by Gender (Count) (SRA Adjudicated)

		Sanction (ADJ)								
		No Order	Cost Direction	Finding and Warning	Reprimand	Fine	Conditions Placed on PC	Suspension	Referral to SDT	Total
		%	%	%	%	%	%	%	%	%
Gender	Female	14.3%	0.0%	0.0%	85.7%	0.0%	0.0%	0.0%	0.0%	100.0%
	Male	15.8%	0.0%	10.5%	36.8%	15.8%	5.3%	0.0%	15.8%	100.0%

"Solicitors' Account Rules" Sanctions Compared by Gender (%) (SRA Adjudicated)



"Solicitors' Account Rules" Sanctions Compared by Gender (%) (SRA Adjudicated)

SRA Adjudicated: Legal Representation within SAR Cases Compared by Ethnicity

6.43 The data also provided information relating to the number of solicitors who had legal representation in hearings concerned with breaches of the SAR based on ethnicity and gender.

		Legal Representation (SRA Adjudicated)					
		Yes		No		Total	
		Count	%	Count	%	Count	%
Ethnicity	BME	2	18.2%	9	81.8%	11	100.0%
	White	1	7.1%	13	92.9%	14	100.0%

"Solicitors' Account Rules" Legal Representation by Ethnicity (%) (SRA Adjudicated)

6.44 In the majority of cases, respondents from both ethnic groups were not represented at the adjudication hearing by a legal professional. In percentage terms, BME solicitors were represented in 18.2% of cases in comparison to the White group at 7.1%. Once again, the sample size is small and thus sensitive to error.

SRA Adjudicated: Legal Representation within SAR Cases Compared by Gender

		Legal Representation (SRA Adjudicated)					
		Yes		No		Total	
		Count	%	Count	%	Count	%
Gender	Female	1	12.5%	7	87.5%	8	100.0%
	Male	2	11.8%	15	88.2%	17	100.0%

'Solicitors' Account Rules' Legal Representation by Gender (%) (SRA Adjudicated)

6.45 No disparity can be observed in the trends between gender groups who were legally represented in regulatory action relating to SAR.

SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Ethnicity

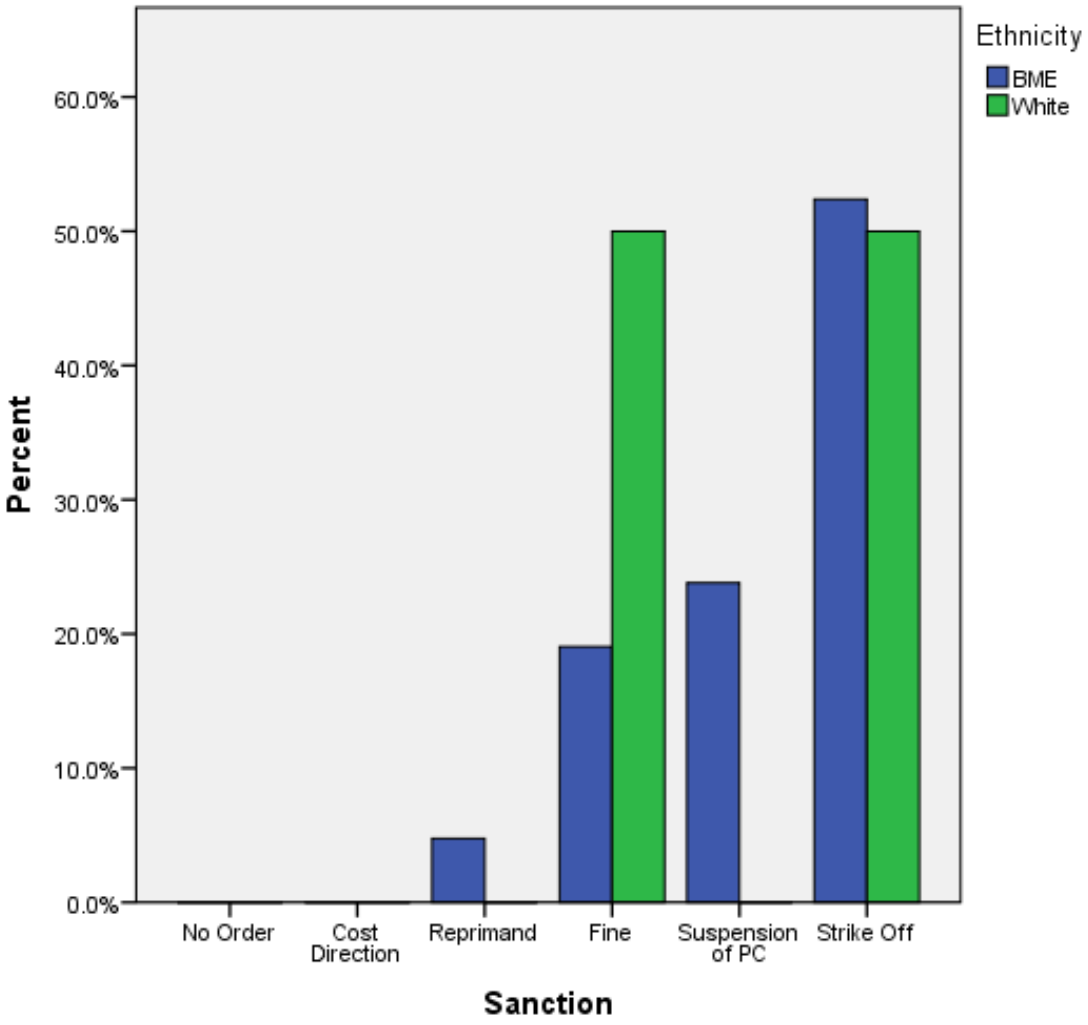
6.46 The outcome of cases that were investigated by the SDT for 'Fraud, Dishonesty and Money Laundering' breaches were weighted towards the more severe end of the sanctions spectrum. 'Strike Off', a sanction reserved only for the SDT, was followed by 'Fine' in the frequency of sanction issued to both ethnic groups. In the 'Fine' category there was a disparity, with 50% of cases involving a White respondent ending in this sanction, compared to only 19% of BME cases. The majority of the remaining BME cases, 23.8%, fell into the 'Suspension of PC' category, with none of the White cases receiving this sanction. Again, the sample size was very small, with only 21 BME and 10 White cases, which renders the results very sensitive to random variation.

		Sanction						
		No Order	Cost Direction	Reprimand	Fine	Suspension of PC	Strike Off	Total
		Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	0	0	1	4	5	11	21
	White	0	0	0	5	0	5	10

SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Ethnicity (Count)

		Sanction						
		No Order	Cost Direction	Reprimand	Fine	Suspension of PC	Strike Off	Total
		%	%	%	%	%	%	%
Ethnicity	BME	0.0%	0.0%	4.8%	19.0%	23.8%	52.4%	100.0%
	White	0.0%	0.0%	0.0%	50.0%	0.0%	50.0%	100.0%

SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Ethnicity (%)



SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Ethnicity (%)

SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Gender

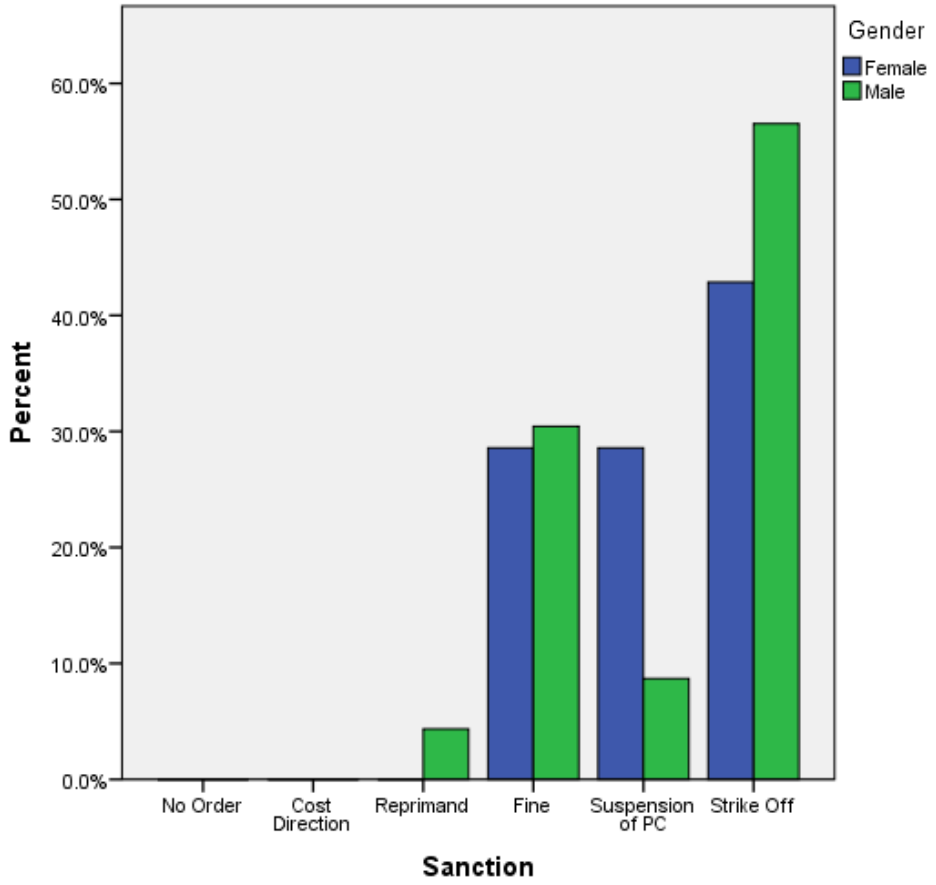
6.47 Comparing the same data but along gender lines, the largest disparity occurs in the 'Suspension of PC' category, with 28.6% of cases involving a female respondent compared to 8.7% in the male category, subjected to this sanction. Males received a 'Strike Off' more often than females, 56.5% compared to 42.9% respectively. Again, the sample size for this category was small with 23 in the male group and only 7 in the female.

		Sanction						
		No Order	Cost Direction	Reprimand	Fine	Suspension of PC	Strike Off	Total
		Count	Count	Count	Count	Count	Count	Count
Gender	Female	0	0	0	2	2	3	7
	Male	0	0	1	7	2	13	23

SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Gender (Count)

		Sanction						
		No Order	Cost Direction	Reprimand	Fine	Suspension of PC	Strike Off	Total
		%	%	%	%	%	%	%
Gender	Female	0.0%	0.0%	0.0%	28.6%	28.6%	42.9%	100.0%
	Male	0.0%	0.0%	4.3%	30.4%	8.7%	56.5%	100.0%

SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Gender (%)



SDT: 'Fraud, Dishonesty and Money Laundering' Sanctions Compared by Gender (%)

SDT: Legal Representation within FDM Cases Compared by Ethnicity

		Legal Representation (SDT)					
		Yes		No		Total	
		Count	%	Count	%	Count	%
Ethnicity	BME	8	40.0%	12	60.0%	20	100.0%
	White	6	60.0%	4	40.0%	10	100.0%

SDT: 'Fraud, Dishonesty and Money Laundering' Legal Representation Compared by Ethnicity (Count and %)

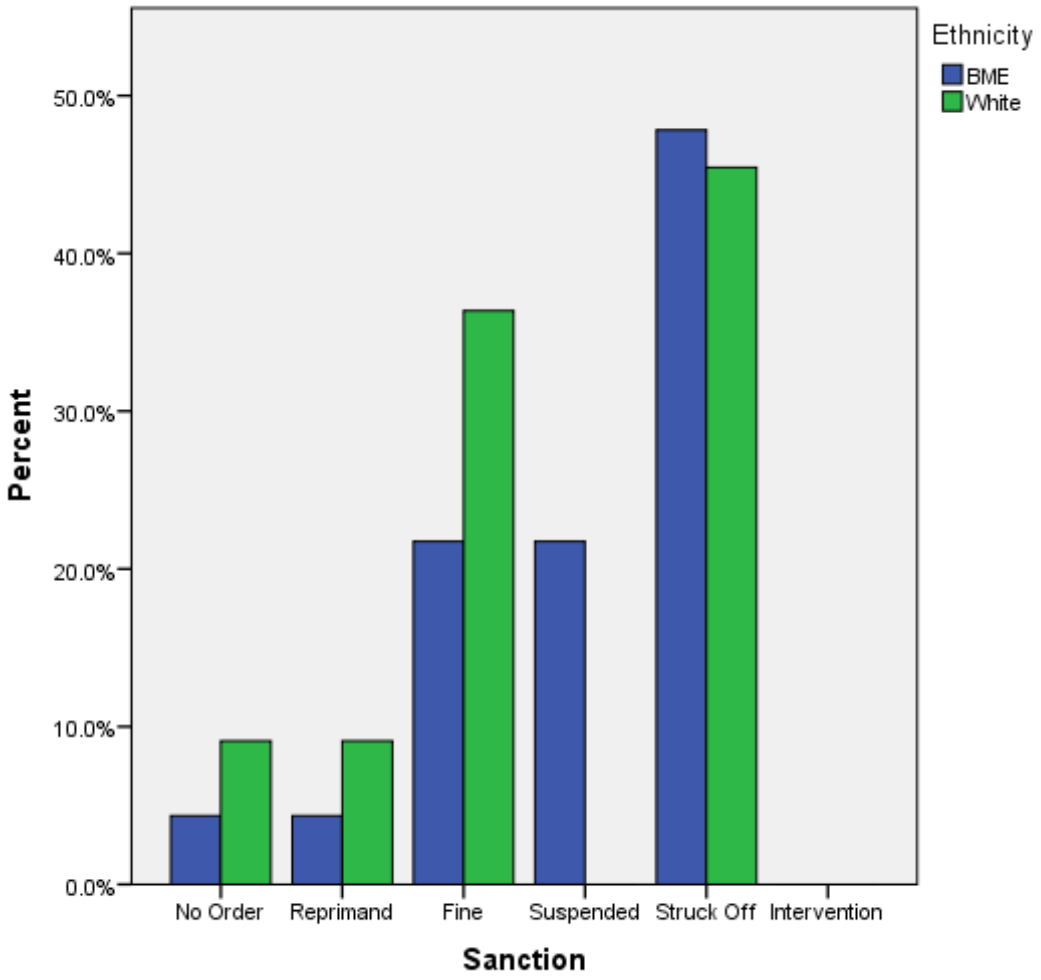
6.48 Within the sample, 60% of White solicitors had secured legal representation ahead of appearing before the SDT, compared to 40% of BME solicitors.

SDT: Legal Representation within FDM Cases Compared By Gender

		Legal Representation (SDT)					
		Yes		No		Total	
		Count	%	Count	%	Count	%
Gender	Female	3	42.9%	4	57.1%	7	100.0%
	Male	10	45.5%	12	54.5%	22	100.0%

SDT: 'Fraud, Dishonesty and Money Laundering' Legal Representation Compared by Gender (Count and %)

6.49 Observing the data relating to legal representations across the gender divide for SDT investigations into FDM, there is no clear disparity between males and females.



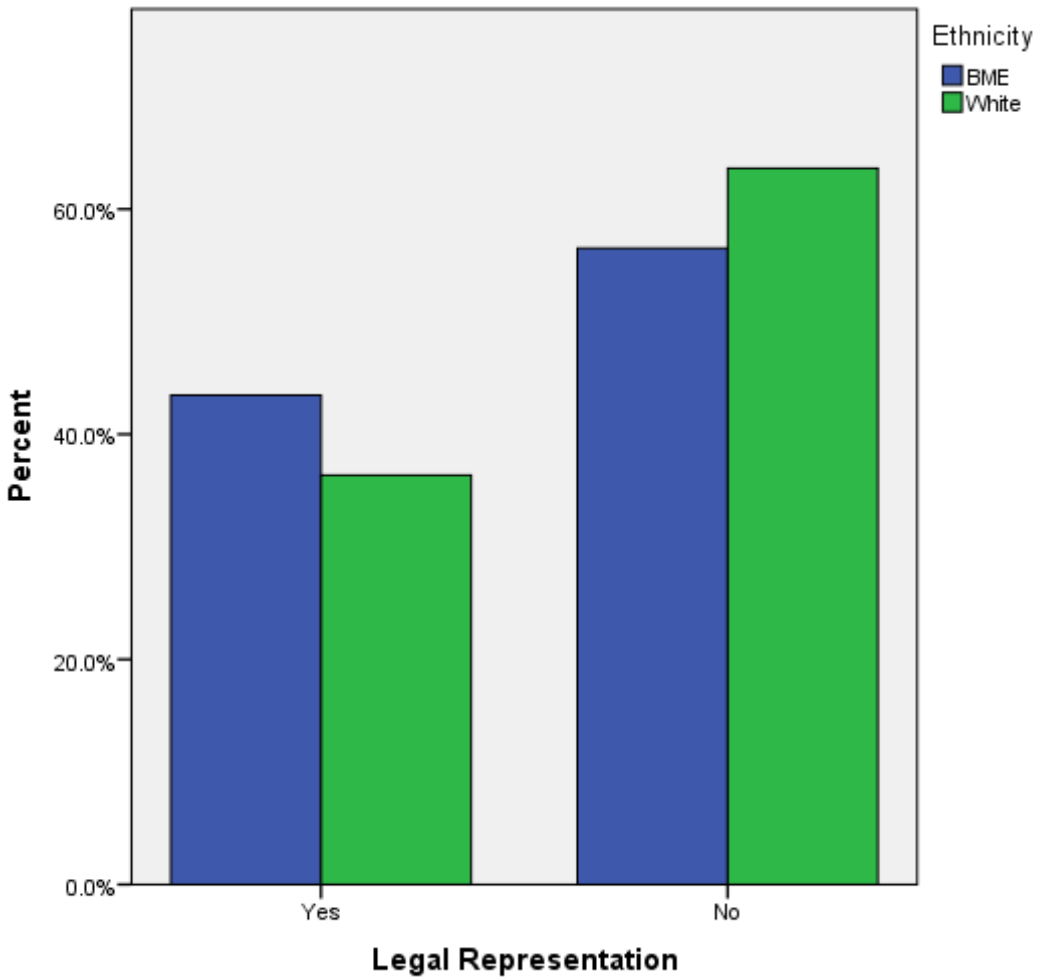
'Fraud/Dishonesty/Money Laundering' and Sanction Compared by Ethnicity (%)

Legal Representation within Fraud/Dishonesty/Money Laundering Cases (FML)

6.50 Within the FML cases there was no clear difference between the two ethnic groups in terms of the number of respondents who had legal representation for their case. The majority in both groups were not represented.

		Legal Representation					
		Yes		No		Total	
		Count	Row N %	Count	Row N %	Count	Row N %
Ethnicity	BME	10	43.5%	13	56.5%	23	100.0%
	White	4	36.4%	7	63.6%	11	100.0%

'Fraud/Dishonesty/Money Laundering' Group, Legal Representation by Ethnicity (Count and %)



'Fraud/Dishonesty/Money Laundering' Group, Legal Representation by Ethnicity (%)

6.51 Regarding the correlation between legal representation and the eventual sanctions issued, there was a disparity towards the lower end of the scale for respondents who were not represented. 'Suspension' and 'Strike Off' were equal as between those who were legally represented and those who were not. There is a spike for fines being imposed upon those who had legal representation, with 38.5% compared to 17.6% for those who had none. In the categories of 'No Order' and 'Reprimand' no such sanctions were imposed for those who had representation, with those without legal representation accounting for 11.8% in both categories.

6.52 The higher instances of both fines and of solicitors being struck off, in the case of those respondents with legal representation, may be an indicator of the correlation between weight of evidence and legal representation. In other words, respondents who felt that their defence case was weak may be more inclined to seek legal representation rather than manage their own defence.

6.53 Examination of case files indicates that a number of factors emerging during a hearing may account for the higher sanction, rather than indicating a causal link between legal representation and sanctions. For example:

- the weak nature of a respondent's defence,
- failure to accept that their conduct constituted a breach of the rules, or to acknowledge the seriousness of the breach and the actual or potential detriment suffered by clients,
- contemptible conduct during the hearing, and
- evidence of persistent failure to comply with the SRA's requests for information.

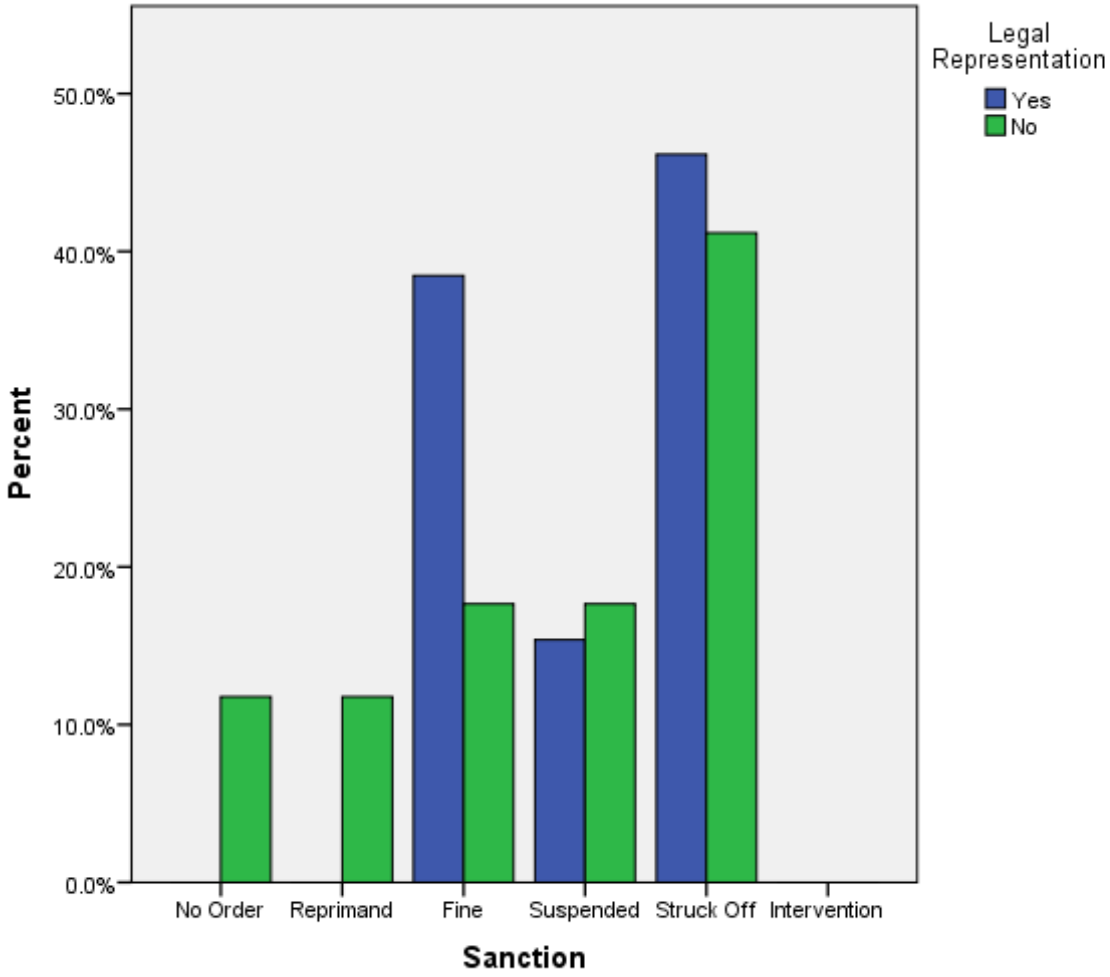
6.54 In one case (2010), the SDT stated:

> 'The matter which gave the Tribunal concern in this case was the respondent's failure to accept that she should not have acted as she did in relation to the Solicitors' Accounts Rules. The respondent had not recognised throughout the hearing that she had breached any of the Rules and indeed, she had made reference to breaches of the Accounts Rules being trivial. She had not accepted that compliance with the Solicitors' Account Rules was a strict liability matter and given her inability to recognise her failings, the Tribunal was not convinced the respondent appreciated the importance of complying with the Solicitors' Account Rules. Client funds were sacrosanct and the rules were in place to protect those funds…. The respondent's failure to appreciate that it was not appropriate to act in the way that she had led

the Tribunal to believe the respondent was a risk to the public at the moment….'.

		Sanction													
		No Order		Reprimand		Fine		Suspended		Struck Off		Intervention		Total	
		Count	%	Count	%	Count	%	Count	%	Count	%	Count	%	Count	%
Legal Representation	Yes	0	0.0%	0	0.0%	5	38.5%	2	15.4%	6	46.2%	0	0.0%	13	100.0%
	No	2	11.8%	2	11.8%	3	17.6%	3	17.6%	7	41.2%	0	0.0%	17	100.0%

'Fraud/Dishonesty/Money Laundering' Group, Sanctions compared by Legal Representation (%)



'Fraud/Dishonesty/Money Laundering' Group, Sanctions compared by Legal Representation (%)

'Fraud/Dishonesty/Money Laundering': Trigger of Investigation Compared by Ethnicity

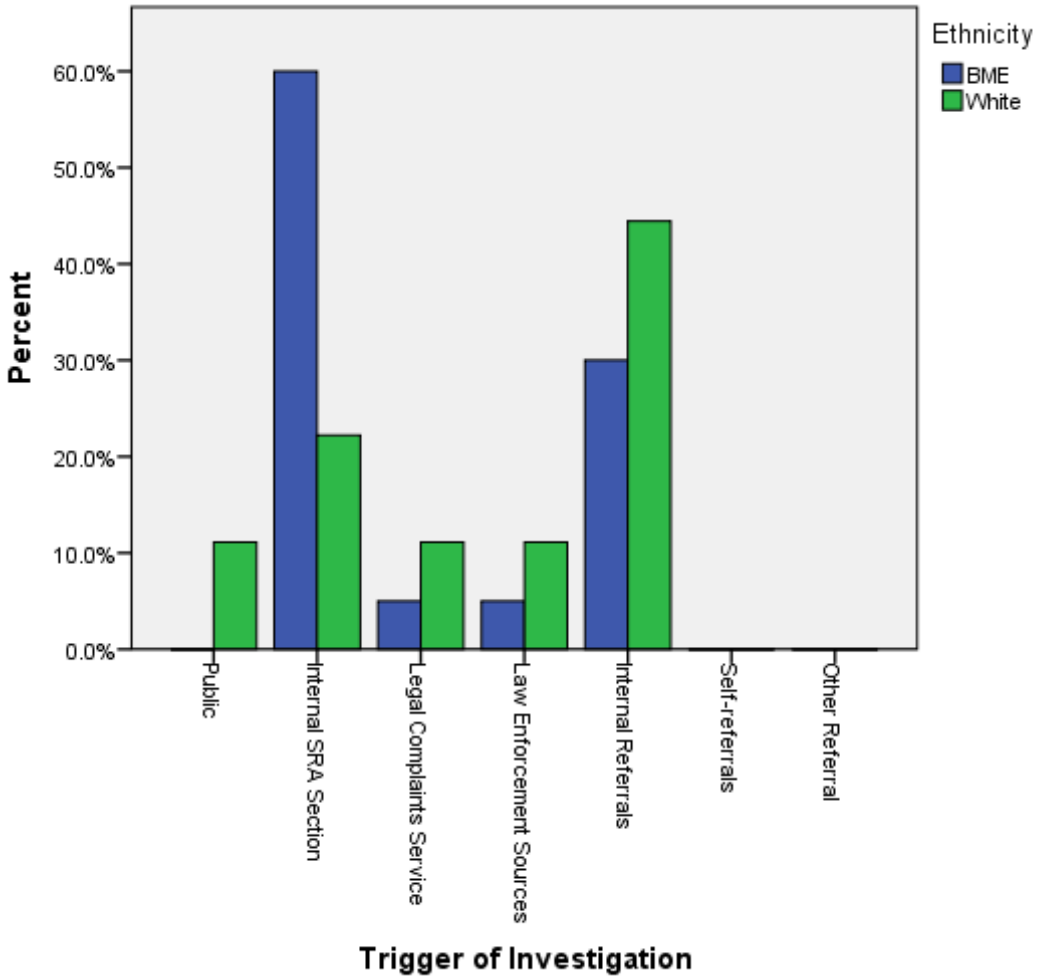
6.55 Comparing the trigger of investigation within the FML group by ethnicity shows that BME investigations were almost 3 times more likely to be triggered by an internal SRA investigation than those in the White group, with 60% compared to 22.2% respectively. The White group was higher for every other trigger, most notably in the 'Internal Referrals' category with, 44.4% compared to 30% in the BME group.

		Trigger of Investigation						
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral
		Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	0	12	1	1	6	0	0
	White	1	2	1	1	4	0	0

'Fraud/Dishonesty/Money Laundering' Group, Trigger of Investigation Compared by Ethnicity (Count)

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Ethnicity	BME	0.0%	60.0%	5.0%	5.0%	30.0%	0.0%	0.0%	100.0%
	White	11.1%	22.2%	11.1%	11.1%	44.4%	0.0%	0.0%	100.0%

'Fraud/Dishonesty/Money Laundering' Group, Trigger of Investigation Compared by Ethnicity (%)



'Fraud/Dishonesty/Money Laundering' Group, Trigger of Investigation Compared by Ethnicity (%)

Solicitors' Account Rules (SAR): Sanctions Compared by Ethnicity

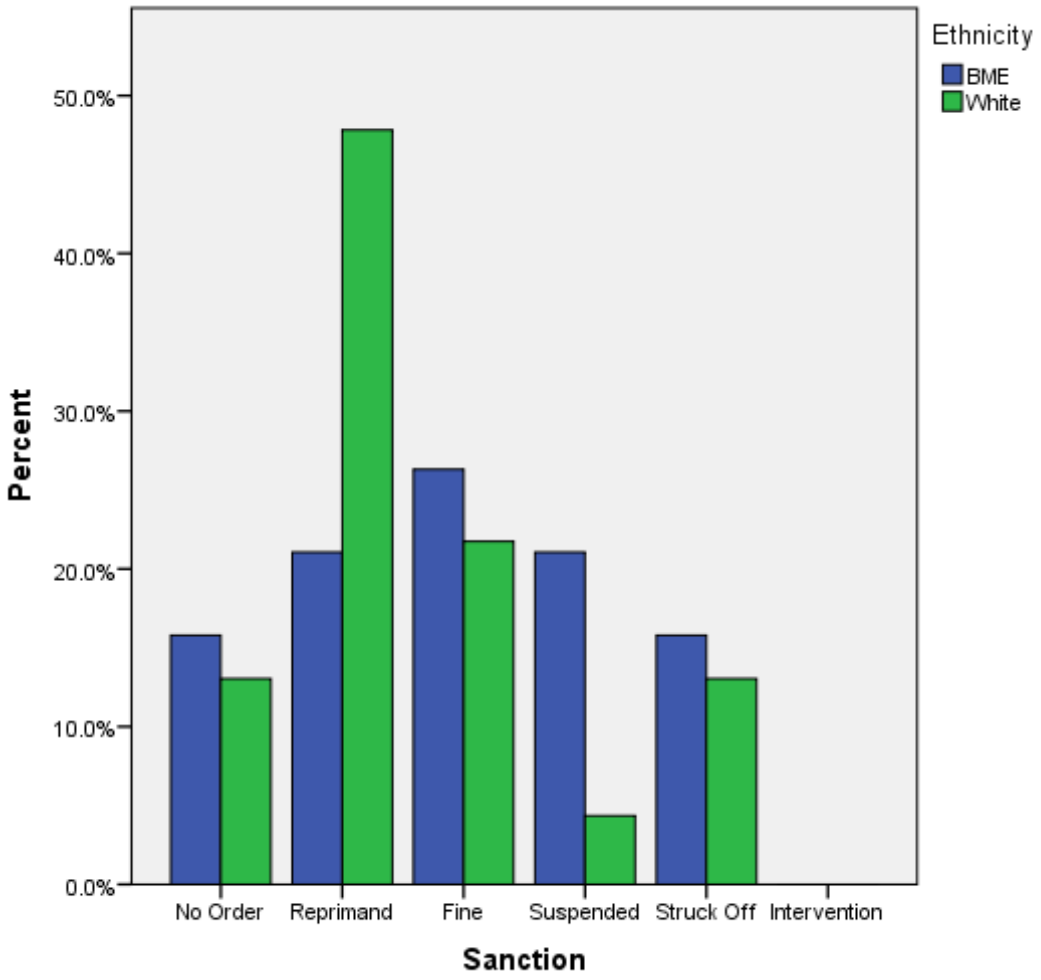
6.56 Comparing the sanctions given in SAR cases involving by ethnicity indicates a clear disparity in the sanctions given. Cases involving a White respondent were more likely to end with the relatively minor sanction, i.e., a reprimand, with 47.8% ending in this way, against 21.2% in the BME group. Reprimands formed the majority of the sanctions given in the White group; this is more than twice as likely as the next most frequent sanction. By comparison, the most frequent sanction in the BME group was a fine, with 26.3%. This is quickly followed by suspension, which accounted for 21.1% of BME sanctions, nearly 5 times more frequent than suspensions occurring in the White group, where it accounted for only 4.3% of cases.

		Sanction						
		No Order	Reprimand	Fine	Suspended	Struck Off	Intervention	Total
		Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	3	4	5	4	3	0	19
	White	3	11	5	1	3	0	23

"Solicitors' Account Rules" Sanctions Compared by Ethnicity (Count)

		Sanction						
		No Order	Reprimand	Fine	Suspended	Struck Off	Intervention	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Ethnicity	BME	15.8%	21.1%	26.3%	21.1%	15.8%	0.0%	100.0%
	White	13.0%	47.8%	21.7%	4.3%	13.0%	0.0%	100.0%

"Solicitors' Accounts Rules" Sanctions Compared by Ethnicity (%)

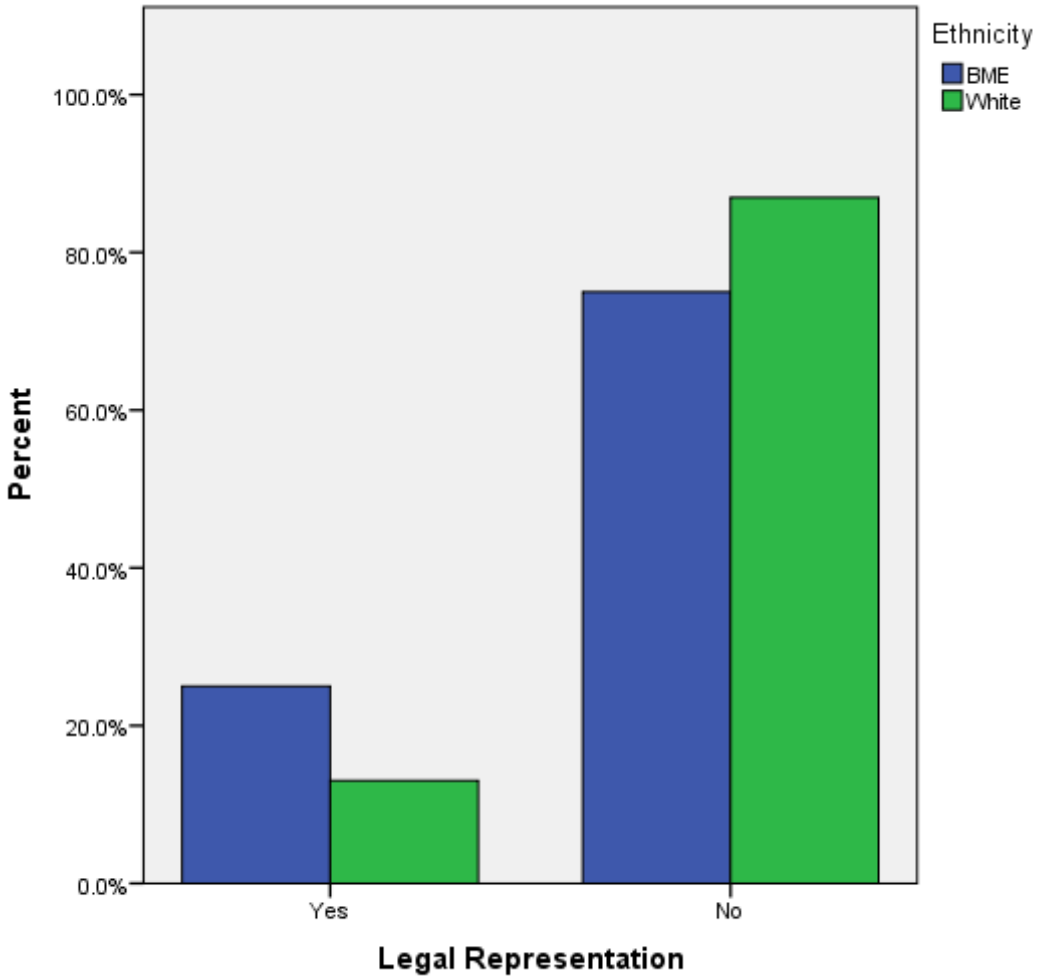


Solicitors' Account Rules (SAR): Legal Representation

6.57 Looking at those who had legal representation in the SAR group, again there is not a clear difference between the two ethnic groups. The BME group had a higher percentage of those who were represented, with 25% compared to 13%. But the majority in both of the ethnic groups did not have representation, with 75% for BME and 87% for the White group having no representation.

		Legal Representation					
		Yes		No		Total	
		Count	Row N %	Count	Row N %	Count	Row N %
Ethnicity	BME	5	25.0%	15	75.0%	20	100.0%
	White	3	13.0%	20	87.0%	23	100.0%

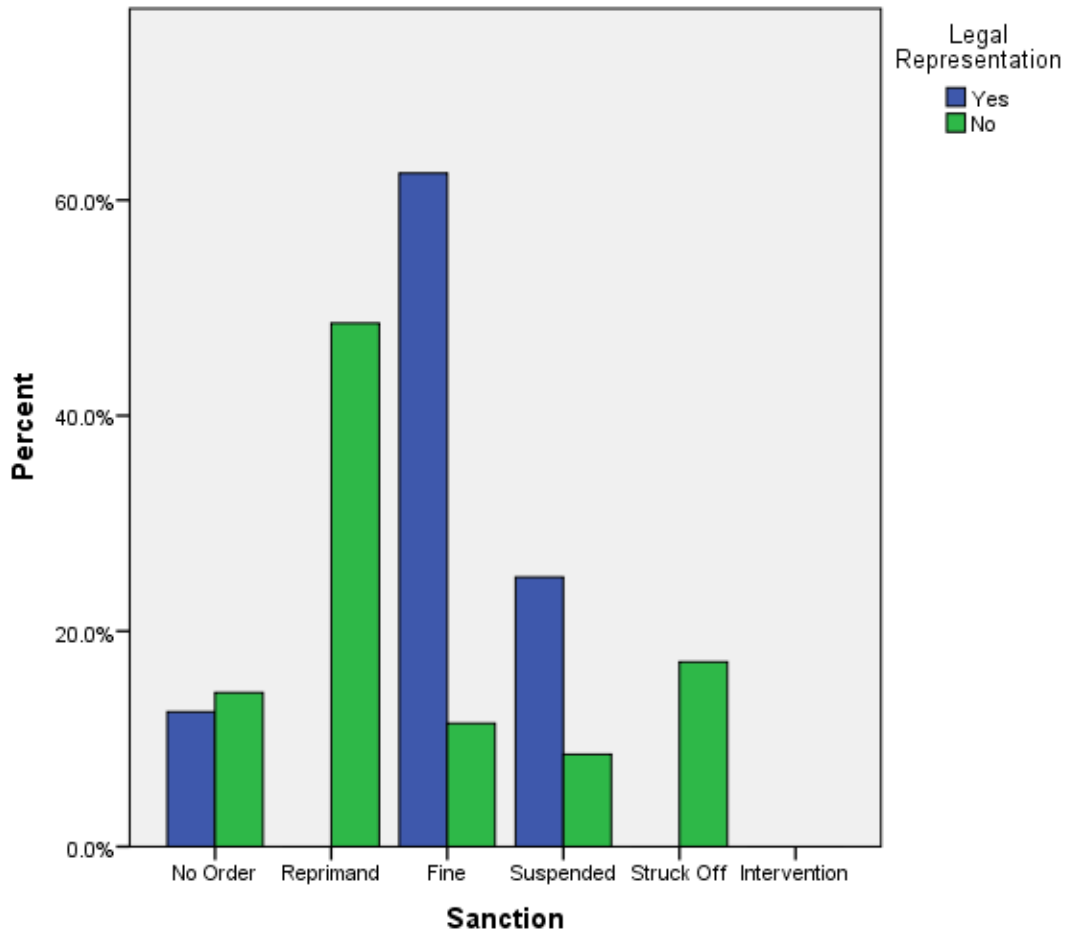
Legal Representation within "Solicitors' Account Rules" by Ethnicity (Count and %)



Legal Representation within "Solicitors' Account Rules" by Ethnicity (%)

		Sanction						
		No Order	Reprimand	Fine	Suspended	Struck Off	Intervention	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Legal Representation	Yes	12.5%	0.0%	62.5%	25.0%	0.0%	0.0%	100.0%
	No	14.3%	48.6%	11.4%	8.6%	17.1%	0.0%	100.0%

"Solicitors' Account Rules" Sanctions Compared by Legal Representation (%)



"Solicitors' Account Rules" Sanctions Compared by Legal Representation (%)

Solicitors' Account Rules (SAR): Trigger for Investigation Compared by Ethnicity

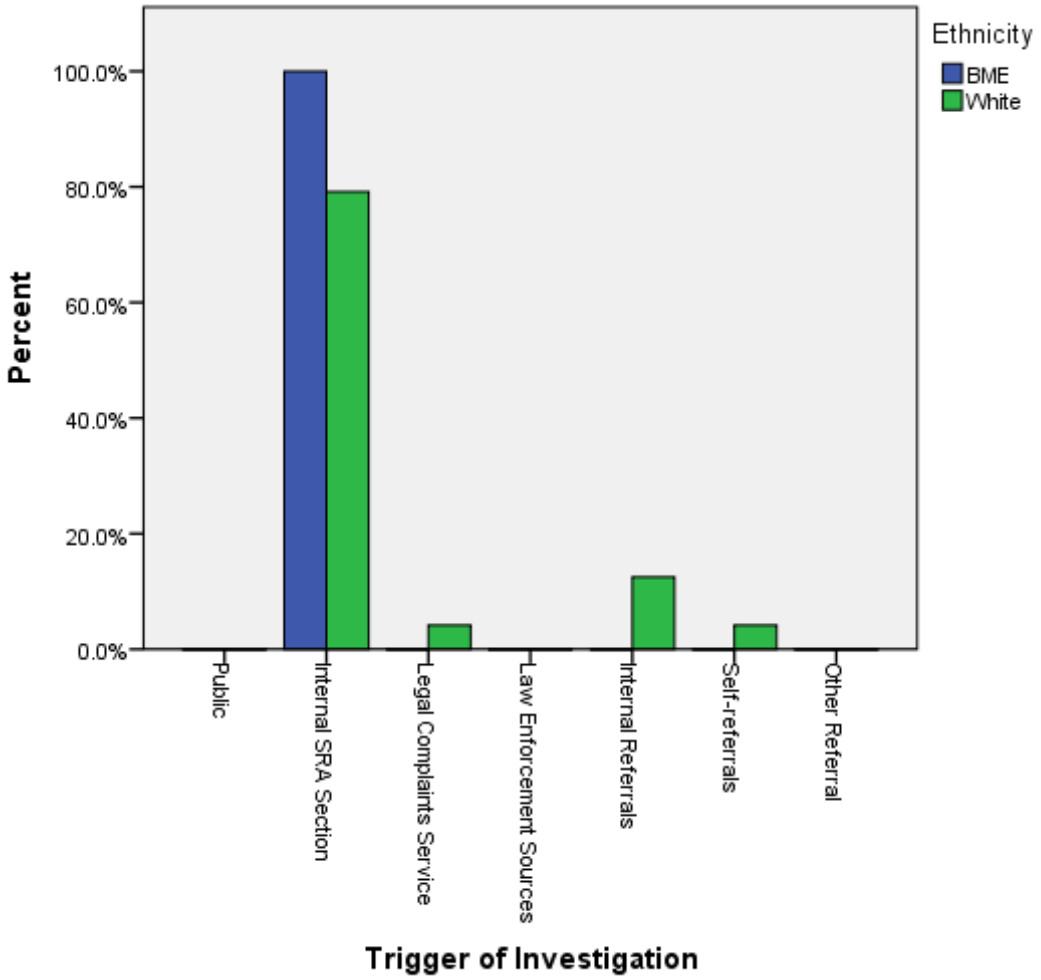
6.58 Looking at the data on the triggers of an investigation in the SAR category, there appears to be a clear ethnic disparity. The BME group had 100% of their cases triggered through the internal SRA section, and this also formed the vast majority of White cases, 79.2%. However, the sample size for the entire group was only 33, with 24 of those being from the White group and only 9 from the BME group, which could explain the perceived disparity between them.

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		Count	Count	Count	Count	Count	Count	Count	Count
Ethnicity	BME	0	9	0	0	0	0	0	9
	White	0	19	1	0	3	1	0	24

"Solicitors' Account Rules" Group, Trigger of Investigation Compared by Ethnicity (Count)

		Trigger of Investigation							
		Public	Internal SRA Section	Legal Complaints Service	Law Enforcement Sources	Internal Referrals	Self-referrals	Other Referral	Total
		Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %	Row N %
Ethnicity	BME	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
	White	0.0%	79.2%	4.2%	0.0%	12.5%	4.2%	0.0%	100.0%

"Solicitors' Account Rules" Group, Trigger of Investigation Compared by Ethnicity (%)



"Solicitors' Account Rules" Group, Trigger of Investigation Compared by Ethnicity (%)

Conclusion of Comparative Analysis

6.59 The data analysed in this Report relating to SRA and SDT investigations and sanctions has highlighted disparities along ethnic lines in a number of key areas. However, it is important that these results are not immediately interpreted as evidence of discrimination or racism on an institutional level. A number of complex socio-economic and political factors must be considered as part of a comprehensive discussion of disproportionality. It is then possible to identify areas where the SRA can adjust its practices in order to take account of the nuances that might account for numerical disparities between ethnic groups.

6.60 In terms of the number of years a solicitor had been on the Roll at the time of their investigation, clear differences were evident between the ethnic groups. For cases held by both the SRA and the SDT, White solicitors had been on the Roll for more than twice as long as their BME counterparts. A possible explanation for this relates to the fact that, according to the data, the BME solicitors investigated had established sole practices with only 6 years post qualification experience (PQE), compared to 19 years PQE for White solicitors. Less experienced sole practitioners are more likely to fall foul of SRA regulation, as they lack the resources to both ensure best practice is always followed, and to insulate themselves against investigation. Therefore, the issue that arises is why BME solicitors are more likely to establish themselves on their own, with relatively little experience, in comparison to White solicitors.

6.61 Of more concern, is the fact that the data identified a procedural discrepancy in the sanctions given to BME and White solicitors. White solicitors were over represented in receiving lesser sanctions, such as rebukes, whereas 20% of BME solicitors compared to only 7.5% of White solicitors were disciplined with conditions placed on their practising certificates. Clearly, there is a link between the nature of the offence committed and the severity of the sanction issued. However, it is possible that certain practitioners may be more likely to commit certain breaches than others, depending upon their circumstances and the challenges they face in their practice. All of this relates to the question posed earlier: why are BME solicitors with less experience more likely to establish sole practices than Whites and what factors might disproportionately affect these more junior sole practitioners?

6.62 The data collected indicates that the most frequent offence triggering an investigation by either the SRA or SDT related to financial irregularities falling under either a breach of the Solicitors Account Rules and Practising Regulations (SAR), or Fraud, Dishonesty and Money Laundering (FML). This was the case for investigations into both BME and White solicitors. FML

breaches accounted for 60% of BME and 22% of White investigations. Significantly, the majority of these cases were the result of investigations initiated by the SRA themselves, rather than coming from public complaints, law enforcement agencies or other referrals. This would perhaps point to the fact that the SRA is particularly concerned with enforcing regulation concerning the financial practices of law firms; a focus that may disproportionately affect some firms more than others.

6.63 Given the factors mentioned above, a hypothetical example is useful in suggesting reasons why BME solicitors might be disproportionately affected by SRA regulation. It can be argued that BME individuals are less likely to come from backgrounds that enjoy the privileges of private schooling and, as a result, are underrepresented in Oxbridge or other first class higher education institutions. As such, they lack the advantages enjoyed by other demographics when it comes to progressing in an elite profession such as practising law. These advantages relate not only to the standard of education received, but also to the formation of a network of elite associates that might be useful in providing access to opportunities and resources later, and to a pronounced understanding of how to navigate elite systems so as advance one's career. On the face of it, these factors, which are increasingly referred to as 'social and cultural capital', have more to do with barriers presented by class status and socio-economic background than ethnicity. However, they disproportionately restrict BME individuals who are less likely to come from backgrounds of privilege. A BME solicitor, lacking the benefits and social and cultural capital outlined above, may be directly or indirectly disadvantaged when seeking training contracts and/or employment with established and well resourced law firms.

6.64 Frustrations and limitations in career opportunities may result in a BME individual working for smaller firms or deciding to advance their prospects by starting sole practices, relatively soon after qualifying. It is perhaps also the case that some BME solicitors, recognising the fundamental principle of providing access to legal representation, may choose to establish practices aimed at serving BME communities. The disciplines practised by these BME sole practitioners will therefore reflect the needs of those BME communities they serve and may demonstrate an emphasis on criminal, immigration, welfare rights, or residential conveyancing law, over corporate or commercial law. Due to the nature of client billing, specialising in certain disciplines may affect the financial standing and cash-flow situation of a law firm. In this Report, no data relating to the correlation between disciplines practised, breaches committed and sanctions given, was analysed.

6.65 Smaller, less established firms or inexperienced sole practitioners, particularly if affected by billing issues relating to discipline specialisation, lack the financial resources of larger firms that could act as a cushion against

temporary cash flow problems, for example. They are, therefore, less able to manage their finances to ensure best practice is consistently adhered to. Given the aforementioned scrutiny of financial issues by the SRA, individuals at these firms are more likely to find themselves under investigation resulting in a sanction. If BME solicitors are disproportionately represented in the composition of these more vulnerable firms, then BME solicitors will be disproportionately investigated for financial irregularity. As these firms lack resources in the first place, they will be less able to structure solid and robust defences and may, therefore, be more susceptible to more severe sanctions, resulting in evidence of procedural disproportionality.

6.66 This is why we recommend later in this Report that the Law Society as the profession's representative body:

a) explore what positive action provisions can be made for BME solicitors and sole practitioners to enable them to deliver the best possible services to their communities within the challenging environments in which many of them operate,

b) consider the extent of practical support that can be provided, including the provision of more extensive toolkits, or guidance on the challenges of setting up and running small firms, including:

- ***guidance on the Regulations and requirements concerning setting up sole practices or small firms and on the capitalisation rules, to ensure that solicitors seeking to set up firms have sufficient knowledge and experience of the regulatory rules and that they are adequately capitalised to be able to cope with the financial pressures that small firms face***.

6.67 An understanding of the nuances of socio-economic and wider societal and political factors that may increase the likelihood of junior BME solicitors establishing sole practices, and the vulnerability of these firms regarding financial matters, particularly considering the SRA's focus on monitoring this area, can help to build a picture of why BME solicitors may be disproportionately affected by key decisions made by the SRA. Rather than conclude that disparities across ethnicities must be evidence of institutionalised racial discrimination, or conversely and perversely, evidence of a greater propensity on the part of BME practitioners to commit breaches of a financial nature, nuanced and comprehensive investigation of these wide ranging issues can provide a more useful resource with which targeted and considered modifications to regulatory practices can be made.

6.68 As we noted at the beginning of Chapter 5, the SRA's **Strategy Paper: "Achieving the Right Outcomes"** (January 2010) set out the SRA's new approach to regulation as follows:

> **'The SRA is moving from being a rules-based regulator, primarily responding reactively to individual rule breaches, to an outcomes-focused, risk-based regulator …**
>
> **This transformation will involve: changing the way the SRA delivers its regulatory objectives; changing the relationship the profession and the providers of legal services have with the SRA; further development of SRA staff to ensure we have the necessary skills and competencies to deliver the new approach'.**

6.69 It is for all the above reasons that we stress in this report, coincidentally reiterating some of the concerns raised by Lord Ouseley (2008), the need for Equality and Diversity competencies and an understanding of unconscious bias as part of the '***necessary skills and competencies to deliver the new approach'.***

6.70 If supervision and a regulatory culture of more positive engagement with firms as they improve their capacity to identify and manage risk do not result in more tangible evidence of the application of those skills and competencies, then OFR is unlikely to have any impact upon regulatory disproportionality and the rate of referral of BME respondents to the SDT.

Recommendations

- The SRA should examine the evidence of disproportionality presented in this data analysis and consider its implications for procedural disproportionality, decision making, its relationship with BME stakeholder organisations and with the Law Society as the solicitors' representative body.

- The Law Society should consider what its own response should be to the structural and operational issues identified as having a bearing upon the nature and incidence of cases raised that involve BME sole practitioners and small firms.

- In keeping with declared OFR objectives, the SRA and all those involved in regulatory procedures should adopt a more nuanced approach to enforcement and acknowledge that race related issues are complex and can co-relate as much to class and socio-economic background as to ethnicity.

- The SRA and Law Society should both work with the EIG and the networks they represent to examine the most effective ways of

addressing with BME solicitors most susceptible to regulatory action the matters raised in the above analysis and in this report more generally.

- Staff development sessions should be organised to enable supervisors/caseworkers, team leaders and technical advisers, forensic investigators and adjudicators to study the results of this review and assess their training needs in the light of their decision making powers and especially the amount of discretion they have authority to exercise when taking regulatory action.

- Specifically, the SRA should take steps to adopt a more considered approach to enforcing financial regulations that take into account the vulnerability of certain practices compared to others, and that recognises the disservice to the public interest, that results from closing firms that aim to provide access to legal representation for BME communities.

- Supervision and engagement with sole practices/firms should be conducted against this background in order that early warning signals could be agreed between supervisors and practitioners and the latter could be advised as to the preventive actions they should take.

7.0 Report on Regulatory Cases where Respondents have Alleged Discrimination

Introduction

7.1 A list of fourteen cases was provided to the Review Team where allegations of discrimination were made at some stage during the regulatory process, or following the conclusion of the regulatory proceedings.

7.2 At the point at which stakeholders were negotiating changes to the draft terms of reference, it was agreed that we would review two of those cases as recommended by Lord Ouseley in order to establish whether there were issues that could inform the methodology for the review. It was felt that those two cases raised questions about the regulatory process and particularly the relationship between the regulator and respondents which could usefully be examined in order to get a feel for the concerns that BME respondents had about the SRA's approach to regulation. Both cases were still live, although regulatory activity had been stayed in one of them.

7.3 I reviewed those two cases by examining documents provided by the SRA and files kept by the respondents. Interviews were held with each of the respondents over a period of two full days in each case.

7.4 The purpose of the review of both of those and of a further six cases, a summary of which is given below, was not to go behind the decision that was made by the SDT or the Courts in each case and establish whether on the basis of our examination of the files the decision was correct, but to understand the context in which the allegation of discrimination arose and the actions and/or events during the regulatory process that led respondents to claim discrimination, rightly or wrongly. We examined the discrimination cases in order to identify any matters that would assist us in understanding the processes and issues thrown up by regulation in these cases and which might also assist us in reviewing the other cases involving BME respondents in which no discrimination was alleged.

7.5 It was agreed by the SRA and the practitioner forums represented on the External Implementation Group (EIG) that we could review a proportion of those cases that were closed in terms of the regulatory processes and where the allegations of discrimination had been heard, whatever the outcome. We were therefore provided with 6 cases that have been anonymised and described as involving solicitors A to F. The documentation in these six cases was voluminous. In one case, for example, the bundles of documents filled 3 bankers' boxes.

7.6 Although we had the competence to review each case and form a judgment based on the evidence available in the files – as to whether, on the balance of probability, discrimination had occurred, it was not our function to substitute our judgment for that recorded in the files. Instead, we focused on examining in detail what took place during the regulatory process, the interaction between the Regulator and the person subject to the regulatory action, and on providing an account of the proceedings in the court and Employment Tribunal that followed. A table summarising this is set out later in this section of the report.

7.7 We produced a template for the file review to help us locate the data we needed and to facilitate analysis of that data. The parameters we agreed for reviewing the cases were:

a) That discrimination was alleged to have occurred in the SRA's dealings with the respondent in the course of the regulatory process

b) That the SRA engaged with the respondent in the first instance as a consequence of some event(s) that triggered SRA response

c) That such response was legitimate in the first place and in keeping with the SRA's exercise of its regulatory duties, or that the SRA's decision to initiate regulatory action was in itself considered by the respondent to be discriminatory

d) That the alleged discrimination was on account of the racial origin of the respondent

Summary of Cases where Discrimination was Alleged

7.8. The following table contains short summaries of the cases where discrimination was alleged. Some of these cases were voluminous and, therefore, these summaries are not intended to cover every stage of the regulatory or legal processes but are intended to provide an overview of what the claims were and the outcome in each case.

Solicitor A

Background

- Solicitor A was the subject of two separate sets of disciplinary proceedings. These included: disciplinary charges relating to failing to comply with an undertaking; retaining files belonging to their former firm; holding themselves out to be and acting as a solicitor prior to admission; misleading the Asylum and

Immigration Tribunal and failing to deal promptly with correspondence from the Law Society. Solicitor A was struck off the Roll.

- Solicitor A was made bankrupt on account of failing to pay the costs of legal actions that he had brought against their former employer.

The SDT and judicial review proceedings

- The disciplinary issues were set for hearing but Solicitor A sought an adjournment and a series of disclosure orders, attendance of witnesses etc., which were refused by the SDT. Solicitor A informed the SDT that they intended to challenge these refusals by judicial review.
- Solicitor A applied for judicial review the day before the case was listed to be heard by the SDT.
- Permission to apply for judicial review was refused.
- The application for judicial review was renewed; however, Solicitor A agreed with the Law Society and the SRA that the claim should be withdrawn and an order to that effect was made by consent.
- Solicitor A sought an adjournment of the SDT hearing pending the outcome of discrimination proceedings that he had brought in the County Court and was informed that the application for an adjournment would be dealt with at the SDT.
- Solicitor A sent to the SDT a copy of freshly issued proceedings, notifying the SDT of his non-attendance that day on account of ill health and the need to see a doctor, but failed to provide a medical certificate. At the hearing the SDT refused the application for an adjournment and heard the matter in A's absence. The SDT found the charges proven against Solicitor A and imposed a 'Strike Off' sanction.
- Solicitor A had the option to appeal the SDT's decision but decided to bring separate proceedings. Solicitor A made a further application for judicial review. Permission to apply for judicial review was refused.
- Solicitor A renewed his application for permission to apply for judicial review. He also then lodged an appeal against the decision of the SDT.
- The High Court directed that the appeal should be considered together with the renewed application for permission.
- The High Court dismissed an application by Solicitor A for a stay of the Order of the SDT.
- Solicitors acting for Solicitor A wrote to the SRA seeking an adjournment of the hearing on the grounds that they had recently been instructed by Solicitor A and needed time to obtain instructions. An oral application for an adjournment was made.
- The application for permission to apply for judicial review was dismissed on the ground that it did not add to the substantive appeal against the SDT decision. However, directions were given for amended grounds of appeal to be filed and served by Solicitor A, and an order for costs in the sum of £2,500 was made against A.

- No amended grounds of appeal were filed and served and the matter went back to court where the judge made an 'Unless Order', stipulating that the outstanding orders of the court had to be complied with by a specified date.
- Solicitor A applied for an extension of time to serve the amended grounds which was granted and A was ordered to serve the amended grounds by a specified date, with additional orders made. The SRA agreed that there should be a reconsideration of the SDT hearing and an order to that effect was made by consent with Solicitor A. The SDT contended that whilst the grounds of appeal were misconceived they were conscious that as Solicitor A had not attended the hearing of the SDT and had not given evidence, and consequently had not been able to cross examine witnesses, the court may have some sympathy for the appellant. This was even though Solicitor A had not acted properly in terms of seeking an adjournment and by adducing medical evidence to support the request for an adjournment.
- Solicitor A sent a letter to the SDT where he made allegations of discrimination.
- The application to the High Court was struck out.
- The SRA received notice of a judicial review application from Solicitor A regarding his complaint about their alleged failure to prosecute an individual. Solicitor A had unsuccessfully made the same application twice previously, which had both been rejected by the High Court.
- Solicitor A served an Appellant's Notice to appeal the decision the SDT made not to grant a rehearing of the substantive disciplinary when A was originally struck off the Roll. The High Court appears to have closed the matter on account of a Civil Restraint Order and due to A's inactivity in pursuing the matter.

Discrimination proceedings

- The first set of disciplinary proceedings that were brought against Solicitor A were the result of a complaint made by A's first principal. Solicitor A made a counter complaint against that principal.
- Solicitor A first raised the issue of discrimination claiming that the SRA's refusal to investigate the person who was the subject of A's complaint was due to Solicitor A's colour.
- Solicitor A brought two discrimination cases against the SRA. The claims were protracted but were eventually struck out by the court and the Employment Tribunal, with costs awarded against Solicitor A.
- The court decision showed that Solicitor A's conduct was of concern at some stages of the proceedings. The judicial review proceedings which commenced included reference to the SRA discriminating against Solicitor A in the regulatory proceedings as compared to how it dealt with A's comparator, i.e., the former principal at Solicitor A's previous firm.

Negligence claim

Solicitor A issued a negligence claim against the SRA that was struck out by the court due to A's failure to comply with the orders of the court.

Civil restraint and contempt proceedings

- After a civil restraint order was imposed on Solicitor A, the terms of which were breached, separate contempt proceedings were brought against A which were eventually the subject of an admission by him. These contempt proceedings were for the unauthorised disclosure of confidential documentation provided by the SRA to Solicitor A, by way of disclosure in A's discrimination proceedings.
- The confidential information disclosed comprised an investigation report on a former colleague of Solicitor A whom the latter cited as a comparator in the Employment Tribunal proceedings. Even though the documentation had nothing to do with other solicitors and the actions against them, the documentation was used by four other solicitors in bringing discrimination proceedings of their own against the SRA.
- Referring to the disclosure of the documentation by Solicitor A, the judge remarked that: "It is clear that the documents were supplied in order to stimulate further spurious, poorly-founded litigation against the [SRA] based on the false suggestion, at least insofar as that documentation was relevant of racial discrimination. There is a particular wickedness in accusing any group of individuals of race discrimination, because of the severe impact it may have and because such an accusation tends to feed future accusations of the same kind. A further wickedness of production of such material for wrongful purposes is that it may tend to undermine or cheapen genuine claims of race discrimination, when they arise, in the eyes of the public".
- Solicitor A, through counsel, admitted contempt of court in the disclosure of the documentation and was sentenced to six months imprisonment, suspended for 2 years.

Assessment

As the above demonstrates, the allegations of discrimination were rejected by the court. The solicitor concerned appears to have been vexatious and willing to pursue complaints and bring legal proceedings without much by way of evidence to support them.

Solicitor B

Background

- Disciplinary proceedings were brought against solicitor B for failure to deliver accountants' reports for two years and a failure to deal with the SRA in an open, prompt and co-operative manner.
- A hearing was fixed and Solicitor B lodged a judicial review application.

- Solicitor B did not attend the SDT hearing, stating that this was on account of having to keep medical appointments. Solicitor B was notified of their right to seek an adjournment of the SDT hearing but failed to make an application for an adjournment.
- The matter was heard by the SDT which found against B and ordered an indefinite suspension from practice, as well as making an order for costs.
- Solicitor B did not appeal against the SDT finding.
- The application for permission to apply for judicial review was refused on paper.
- An oral hearing, at which an application to renew the application for permission was to be determined, was held in Solicitor B's absence because they failed to attend.
- Permission to apply for judicial review was refused. The judge stated in the ruling: "The Claimant asserts that the Defendant was and is racist generally and was so in the Claimant's own case. This court is concerned in this Claimant's case that the assertion the Claimant makes is inconsistent with the contemporaneous material justifying referral of a case to the SDT. The Claimant makes general assertion but has not identified any individual, evidence or circumstance that the Defendant was so motivated in his case".

Discrimination allegations

- The allegation that the SRA was discriminatory in bringing the regulatory proceedings against Solicitor B was raised in the judicial review proceedings and had not been raised previously with the SRA.
- In Solicitor B's skeleton argument for the oral hearing, the principal issues were stated as: 'The Solicitors Regulation Authority which are very much in the habit of fabricating **"**trumped up**"** allegations against black solicitors has done the same thing to the Claimant'.
- And, in the conclusion to the skeleton argument, B stated: "In conclusion, it is submitted that the Defendants' behaviour towards the Claimant is part of a campaign of hounding and harassment in their racist attitude towards black solicitors. The Claimant has referred to a Report by Lord Herman Ouseley concerning the racist behaviour of the Defendants to black solicitors…'

Assessment

- Solicitor B failed to appear at the SDT hearing to challenge the disciplinary charges, claiming to have been unable to attend due to medical issues, but did not provide any evidence to support this and did not request an adjournment.
- Solicitor B's decision to commence judicial review proceedings to challenge the disciplinary proceedings appeared to have been misconceived.
- The disciplinary proceedings appear to have been justified in that this respondent had not delivered their accounts.
- The allegations of discrimination were vague and did not appear to have been supported by any evidence. Solicitor B's claim seems to have been founded on

hearsay and relied largely on the report of Lord Ouseley as evidence of racial discrimination.

Solicitor C

Background

Solicitor C was a sole practitioner. Their accountant produced qualified accounts due to concerns about some inappropriate transfers from the client account. On inspection by the SRA there were also further concerns about breaches of the Solicitors' Accounts Rules and some improper property transactions. A decision was made by the SRA to intervene in the practice of Solicitor C. A decision to commence disciplinary proceedings was made that same month.

Proceedings

- Solicitor C applied to court for an order that the SRA withdraw the intervention. Solicitor C did not give evidence during these proceedings because of concerns about being asked about matters in the pending disciplinary proceedings, but their spouse presented the case on their behalf.
- Solicitor C obtained an interim injunction to prevent the SRA from distributing the practice files following the decision to intervene. There is reference to a previous injunction application where Solicitor C gave certain undertakings that were not complied with. The injunction was then discharged with costs awarded against C.
- Solicitor C made an application for permission to appeal to the Court of Appeal which was dismissed as "being totally without merit and the applicant may not request the decision to be reconsidered at an oral hearing". The judgement in the Court of Appeal referred to the decision of the judge in the High Court stating that he 'sets out in careful detail the many serious objections raised by the [SRA] to …C's conduct of their practice, and gives full reasons why those objections were justified. He considered also the criticisms of the [SRA's] investigator and of the Society's procedure, and was satisfied that those criticisms were unfounded. The grounds and skeleton really do not engage with any of that detail. I am not minded to extend further indulgence in respect of these failures, bearing in mind that the applicant is a solicitor'.
- Solicitor C had their practising certificate suspended for one year.
- The High Court refused an application to stay the SDT proceedings.
- Solicitor C appealed the SDT decision to the High Court.
- The High Court dismissed the claim by Solicitor C and ordered costs on an indemnity basis.
- No allegations of discrimination were made in the regulatory proceedings.

- Solicitor C's application for judicial review was struck out by the Administrative Court for failing to comply with the orders to lodge proper grounds and a bundle of documents.
- There is reference in the file to other proceedings brought by Solicitor C.

Assessment

- The allegations of discrimination appear to have been unmeritorious.
- The disciplinary proceedings against Solicitor C appear to have been warranted by the facts.
- Solicitor C was unable to find any basis to support the allegations of discrimination. The court took a dim view of the allegations having been made.

Solicitor D

Background

- Solicitor D was the subject of an intervention into their practice following concerns raised by a third party charity about misappropriation of funds. An investigation uncovered other issues including overcharging, breaches of the Solicitors' Accounts Rules, possible property irregularities and financial irregularities.
- Leave was granted to the respondent.
- The SRA successfully appealed to the Court of Appeal.
- Solicitor D petitioned the House of Lords for permission to appeal.
- The House of Lords refused permission to appeal.
- Solicitor D made an application to the European Court of Human Rights for breaches of Article 6.
- An application for committal for contempt was made by Solicitor D against the SRA that was described as being without merit by the court and the court advised that Solicitor D was at risk of a civil restraint order.
- Solicitor D was struck off.
- Solicitor D commenced further judicial review proceedings.
- Solicitor D's application to stay their own application for permission to apply for judicial review was heard by the High Court, which rejected the application and ordered Solicitor C to lodge and serve proceedings and gave directions as to the hearing.
- The Court of Appeal turned down an appeal against the refusal of permission to apply for judicial review. The judge stated: "This is a completely hopeless application in circumstances in which it is plain that [the Applicant] had completely failed to particularise [their] case ……. [the Applicant's] 64 page

skeleton argument presents no ground whatsoever for challenging the judge's decision. The application is without merit".

Disciplinary proceedings

Complaint by a charity led to investigations that uncovered other issues of concern, accounting irregularities, overcharging, transferring a large amount of money from client account for Solicitor D's own purpose, failing to comply with SDT orders to compensate clients for failings in the professional services provided, and possible fraud.

Civil Restraint proceedings

Two separate proceedings were brought against Solicitor D by the SRA.

Discrimination claim

The first reference to discrimination appears in an application that Solicitor D made in response to the SRA's application for a Civil Restraint Order. The application by Solicitor D was a 22-page document in which a large number of unsupported allegations against the SRA and 13 individuals were made.

Assessment

- The disciplinary proceedings that were brought by the SRA appear to have been warranted.
- The various allegations of discrimination appeared to be unmeritorious.
- Solicitor D apparently acted vexatiously in pursuing spurious allegations and legal proceedings.
- Solicitor D was made subject to a Civil Restraint Order and prevented from bringing further proceedings.

Solicitor E

Background

E, who was a student, made an application for student enrolment which was refused after it became apparent that the applicant had not disclosed having had a caution for a drugs offence. There was also some concern about some driving convictions.

Regulatory process

- E requested a review of the decision, which was considered by a Review Panel. The Panel interviewed E, who was unable to provide satisfactory explanations for the failure to declare the caution and the convictions.
- After the meeting, E requested permission to submit some mitigating evidence to explain some circumstances that had arisen on the day of the interview, which was refused by the Chair of the Panel on the grounds that it was an inappropriate request. The Panel upheld the previous decision to refuse the enrolment. E made a complaint to the SRA about the process, which is clarified in an email to an SRA staff member where E amplifies the complaint and says: "Although I do not have any cogent evidence to support my allegation of racial discrimination, I feel that a comparative study of a number of decisions taken by the SRA would reveal that no person of white, English/Welsh ethnicity has been so harshly treated and rejected student enrolment in the same way on the same or similar kind of grounds. It is to be noted various investigation reports (especially Lord Ouseley's report, August 2008) found compelling evidence of widespread practice of discrimination by the SRA, mainly targeting people Black and Asian ethnicity [sic]. I should mention that in my intended appeal to the High Court, on the advice of my lawyers, I intend to include racial discrimination as one of the grounds of appeal, in addition to the substantive grounds of irrationality and illegality".
- E requested a further review and it was referred to the Chief Adjudicator who directed that the decision of March should be quashed and a newly constituted Review Panel invited to reconsider the application 'de novo'.
- The Chief Adjudicator's decision was sent to E who responded arguing that the decision that the matter should be dealt with 'de novo' was unacceptable and would be made the subject of a judicial review.
- E provided a statement and submissions for consideration by the newly constituted Review Panel.
- The Adjudication Panel met and refused E's application for enrolment.

Legal challenge

E appealed to the High Court. The matter was heard at the High Court and dismissed. The High Court awarded costs against E of £5,922.

Assessment

The allegations of discrimination were not made until late in the proceedings and appeared to be based only on the findings in the Ouseley Report of 2008.

Solicitor F

Background

- Solicitor F was listed on the SRA's database as being a partner in a law firm with

another Solicitor J. The firm in question was the subject of an intervention. An Adjudicator resolved to commence disciplinary proceedings against Solicitor F concerning the alleged failure to properly supervise the firm. Solicitor F had moved abroad and the SRA had difficulties contacting Solicitor F. The SRA published a notice in a local newspaper in the country where Solicitor F was resident, giving details of the intended proceedings.

- From the information available to the SRA it appeared that Solicitor F had failed to supervise Solicitor J. On becoming aware of the notice in the newspaper Solicitor F contacted the SRA and was able to provide information that showed that the allegations were not correct. Solicitor F had not been a partner in the firm and had not failed in respect of the duties alleged by the SRA.
- The SRA carried out further investigations and was able to confirm that solicitor F had not in fact been a partner in the firm. There were various indications that Solicitor J had changed the name of the firm and had falsely printed letter headed paper showing that both Solicitor J and Solicitor F were partners in the firm. The SRA reconsidered the disciplinary allegations and decided to terminate the proceedings against Solicitor F.

Assessment

- The regulatory proceedings that were commenced against Solicitor F and Solicitor J appear to have been warranted based on the information that the SRA officers had at the time. That information had been falsely provided by Solicitor J. Once Solicitor F was able to adduce evidence to counter the information held by the SRA that indicated committal of the breaches alleged, the SRA withdrew the allegations against him.
- It appeared that the actions alleged against Solicitor F had been committed by J.
- There was no allegation of discrimination that was made by Solicitor F, nor was there any evidence pointing to a motive or intention on the part of the SRA to discriminate against Solicitor F. The allegations of discrimination had been made by Solicitor J, not Solicitor F.
- Solicitor F appears to have accepted the SRA's explanation for what took place and why he was thought to have been a partner in the firm.

Conclusion

7.9 Whilst we are not judges and it was not our business to conclusively determine one way or another whether discrimination had occurred in these cases, we have substantial experience of dealing with discrimination cases and could form reasonably accurate judgements, on the balance of

probability, as to whether there appeared to be discriminatory treatment based on the evidence in the files. However we recognise that our judgment is based on our file reviews, as we did not interview the solicitors concerned or any witnesses.

7.10 A major concern we have is that, of the cases we reviewed, the solicitors in question made allegations of discrimination that did not appear to be supported by any specific evidence (as opposed to making reference to generalised background concerns or allegations). We also noticed that one of those solicitors, Solicitor A, purported to rely on documentation that was obtained from the SRA without authority. It is not clear how that document corroborated the allegations of discrimination that they had made, or how helpful the document was to the solicitor concerned as the circumstances of the solicitors appeared to be different. The solicitor provided the document to other solicitors in the belief that it would assist them with their own allegations of discrimination against the SRA, even though it was improperly disclosed.

7.11 One of those solicitors who sought to rely upon the document obtained from the SRA was Joyce Agim. She was the subject of the Society of Black Lawyers' press release which we quoted in the introduction to this report and who brought an action against the SRA for discrimination in the Central London County Court, having been struck off by the SDT at the end of a regulatory intervention in May 2011. Solicitor A admitted being in contempt for 'the unauthorised disclosure of confidential documentation' that was provided by the SRA by way of disclosure in Solicitor A's own discrimination proceedings. Solicitor A was sentenced to six months imprisonment, suspended for two years.

7.12 Agim had herself admitted six charges (from conflict of interest to money laundering) and was found guilty of dishonesty by the SDT in May 2011. The evidence available suggests, therefore, that the regulatory action taken against Mrs Agim was warranted.

7.13 Given the extent of the discrimination BME solicitors suffer in the workplace, it is difficult to see the justification for mobilising in support of a practitioner who chooses in those particular circumstances to bring what appear to be vexatious allegations against a regulator. Since BME practitioner forums see it as their business, no less than that of the SRA, to promote and preserve professional standards and insist upon an operational environmental in which their members and all lawyers may feel safe and have their rights respected, one wonders what the representative networks see as their role in this context? Racism is corrosive and racial discrimination in the workplace very difficult to prove. BME networks have a key role to play not only in combating unlawful discrimination, but in ensuring that genuine and meritorious claims of racial discrimination are not trivialised, or brushed aside, on account of the conduct of those who irresponsibly and nonchalantly bring such claims.

7.14 Having examined those cases and given the level of concern expressed by the BME solicitors networks prior to this review about what the cases signified, potentially, in terms of the SRA's treatment of BME solicitors in discharging its regulatory function, there is little doubt that knowledge that these allegations of discrimination had been made helped to accentuate BME solicitors' concerns not only about disproportionality in the SRA's regulation of BME solicitors and their firms, but also about the likelihood that such disproportionality might be due to racial discrimination.

7.15 The SRA was clearly concerned about having such cases scrutinised. As an organisation striving towards fairness and transparency in the way it conducts its business, however, the SRA should want to sweep the corners and look under the cupboards to ensure that there are no covert practices or institutional cultures that support discrimination and exclusion. If it is found that there is discrimination or institutionalised racial bias, the organisation should surely want to know about it so that it could be eliminated. If, contrariwise, no evidence of racial discrimination or of institutional practices that support racism is found, then the organisation should want to ensure that processes and practices are subject to the closest scrutiny to ensure not only that people do not become complacent, but that everything is done to proactively build a culture of equity, fairness and justice. Peace, after all, is not the absence of conflict, racial or otherwise, but the presence of equity, fairness and justice, especially where unequal power relations abound, as is the case in the relationship between the SRA and those it regulates.

7.16 It is our judgment that there was no evidence to support a claim of racial discrimination in any of the cases we examined. Even though it appears that the events or/and persons cited as comparators turned out in each case not to qualify as such, we record our concerns about how the SRA went about its regulatory functions during the period covering these cases, which was prior to the adoption of Outcome Focused Regulation. This is a matter we deal with at greater length elsewhere in this report.

Recommendations

- Complaints of racial discrimination against the SRA, whether internally or externally generated, should be reported to the EIG twice yearly
- The SRA should establish an independent body consisting of 3 people, one of whom would be a suitably qualified member of the SRA's Diversity & Inclusion team and two external to the SRA, with suitable terms of reference, to investigate individual complaints of racial discrimination and publish the results of their investigations.

8.0 Findings from the Surveys

Survey of Respondents

The survey and background

8.1 Given the fact that we had no scope to interview the respondents whose files we reviewed, we thought it would be helpful to canvass the views of additional people who had been subjected to regulatory action and find out how they experienced the process.

8.2 We asked the following questions:

1. Have you had any experience of SRA regulatory action?

    - Yes
    - No
    - I know people who have been through the process
    - I have represented people who have been subject to the process
    - Other - please specify

2. Was the regulatory matter deal with by:

    - An Adjudicator
    - Informally
    - The Solicitors Disciplinary Tribunal
    - Other - please specify

3. What was the outcome of the regulatory action?

    - No action taken
    - Strike off
    - Suspension
    - Fine
    - Reprimand
    - Rebuke
    - Respondent ordered to pay SRA costs
    - All allegations dismissed
    - No Order
    - Conditions attached to Practising Certificate
    - Other - please specify

4. Were you able to present your arguments properly during the regulatory process?

    - I was not given the opportunity to present my case
    - I decided not to participate in the regulatory process
    - I chose not to present any evidence to challenge the regulatory process
    - I was able to present my case properly
    - Other - please specify

5. How many partners does/did the firm in question have?

    - Sole practitioner
    - to 10 partners
    - 11 to 30 partners
    - 31 to 50 partners
    - 51 or more partners
    - Other - please specify

6. Do you believe it is necessary for respondents to have legal representation when defending regulatory matters?

    - It is essential for all regulatory matters
    - It may make a difference depending on the regulatory issues involved
    - It does not make a difference to the outcome
    - I don’t know
    - Other - please specify

7. Having regard to the Solicitor’s Code of Conduct, do you think the regulatory action that was taken was justified and proportionate?

    - Yes, it was justified and proportionate
    - I am not certain
    - No, it was not justified and not proportionate
    - Other - please specify

8. Did you receive advice or assistance on regulatory matters from any of the following organisations/sources?

    - The Law Society
    - Practitioner Groups
    - Solicitor’s Assistance Scheme
    - Law Care
    - Specialist representative groups

- Other - please specify

9. Do you think there should be a Cost Order regime during the regulatory process?

   - Yes, there should be a Cost Order regime
   - I don't know
   - There should be limited Cost Orders for the most serious regulatory findings
   - No, there should not be any Cost Orders at all

10. Do you have any suggestions as to how the regulatory process could have been dealt with differently?

The responses

8.3 The survey was meant to target 160 respondents, 80 BME and 80 White, who had been subjected to regulatory action. The survey was designed to be an electronic survey hosted on Survey Monkey, but it was mistakenly sent out in hard copy by the SRA. We also had problems with the SRA's pre-paid postal licence on the return envelope respondents had been sent to return the completed survey. The Freepost licence number on the envelopes that the completed forms were to be returned in had expired which meant that many of the completed surveys may have been left in the Royal Mail sorting office in the area in which they were posted. We received only 28 completed responses that were sent to the SRA's London office, but which the Royal Mail held back for payment of the postal charges and administration costs before they could be delivered to the SRA or collected from the central London Sorting Office. These difficulties clearly affected the response rate.

8.4 Of the 28 completed responses, 26 respondents outlined the direct experience they had had of SRA regulatory action. 13 people had been subject to adjudication, 2 were dealt with informally and 21 at the SDT. The numbers of completed questionnaires constituted just over 15% of the surveys that were sent out and are therefore too few to have any statistical significance, or to allow for any meaningful analysis or reliable conclusions. Nevertheless, for what it tells us, the data is set out below.

Statistical charts

Chart 1 - Experience of SRA regulatory action

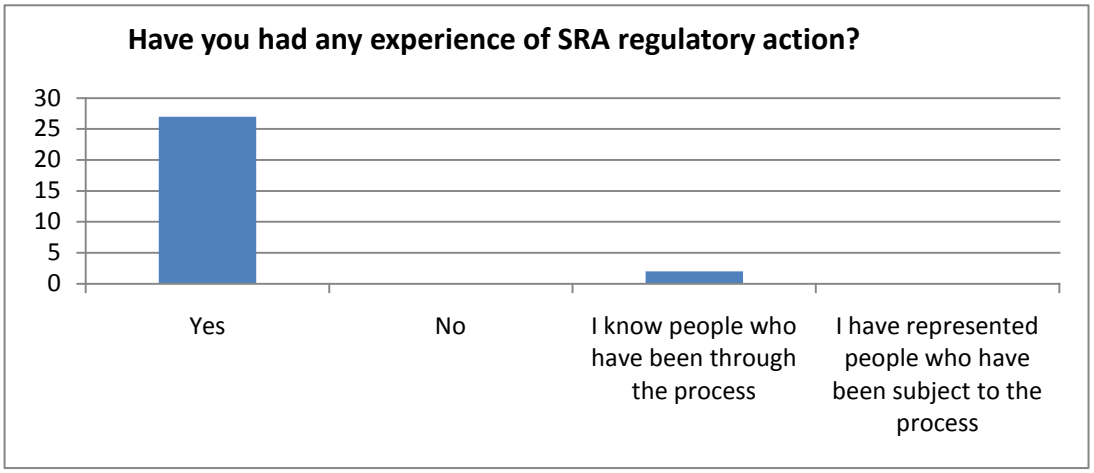


Chart 2 - the regulatory route

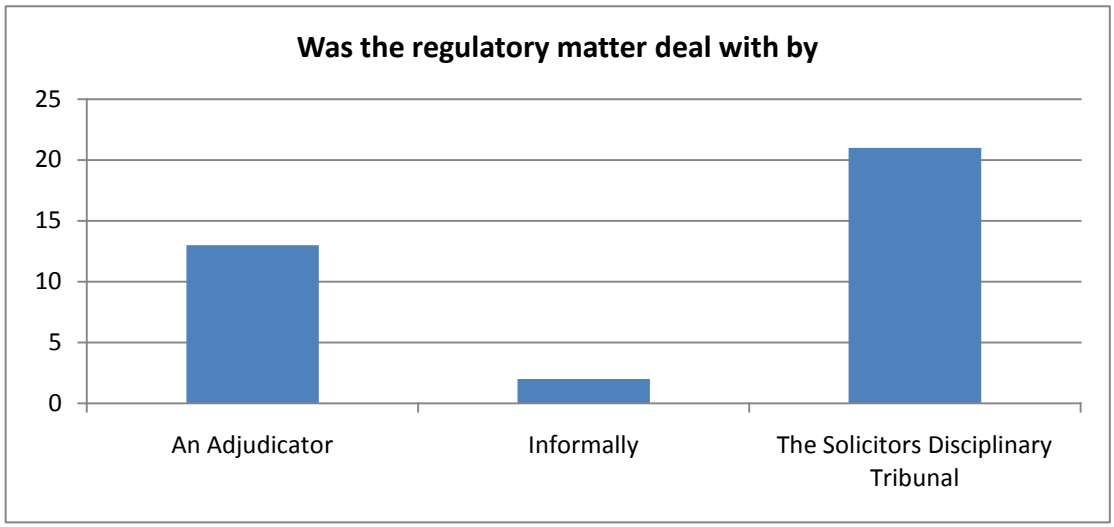


Chart 3 - the regulatory outcome

8.5 In respect of the outcome of the regulatory action: 5 people stated that no action was taken; 3 were struck off; 2 people were suspended; 2 were fined; 4 people were reprimanded; 5 were rebuked; 7 were ordered to pay SRA costs and in 3 cases all allegations were dismissed.

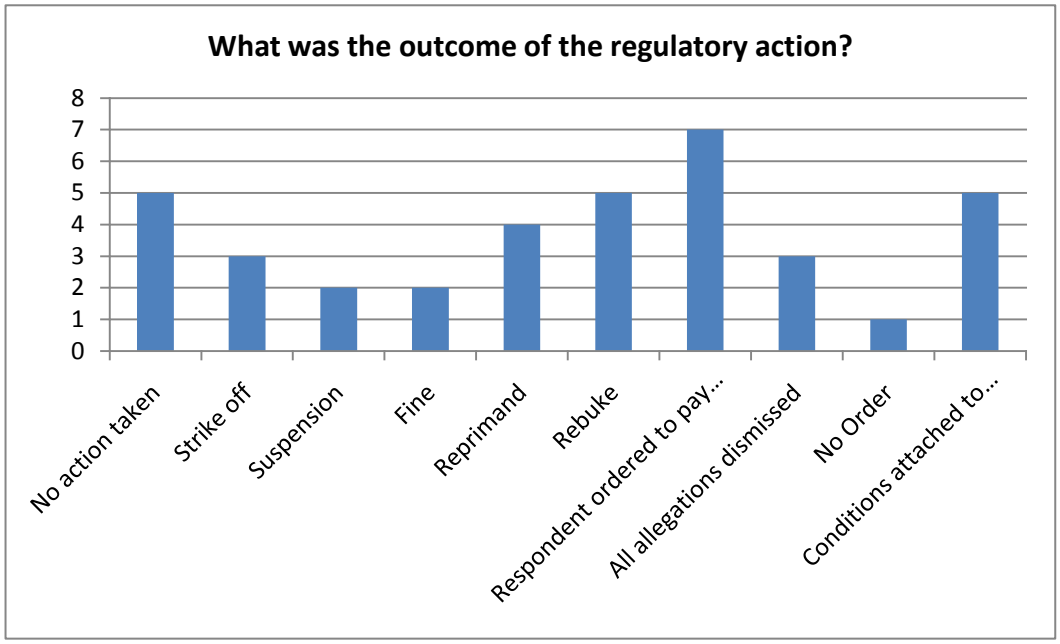


Chart 4 - Ability to Present Arguments During the Regulatory Process

8.6 When asked if people were able to present their cases properly, 23 respondents replied that they were able to present their cases properly. 2 people reported that they were not able to present their cases properly. 1 person chose not to present any evidence to challenge the regulatory action.

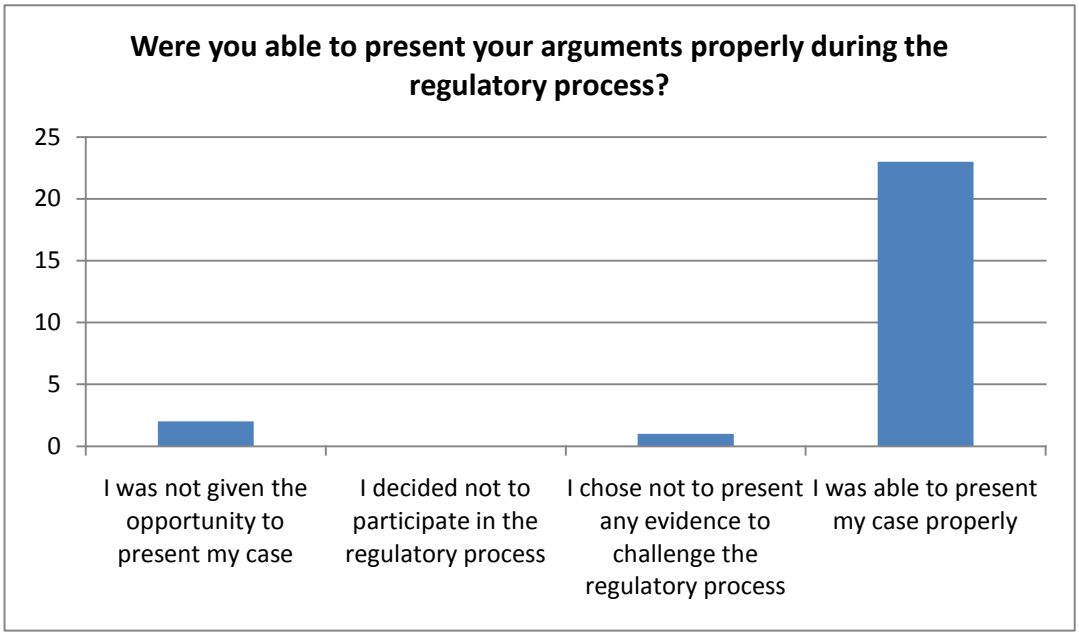


Chart 5 - Size of Firm

8.7 The size of the firms varied. 8 respondents were sole practitioners. 17 were in 2 -10 partner firms; 1 was in an 11 to 30 partner firm and one person was in a 31 to 50 partner firm.

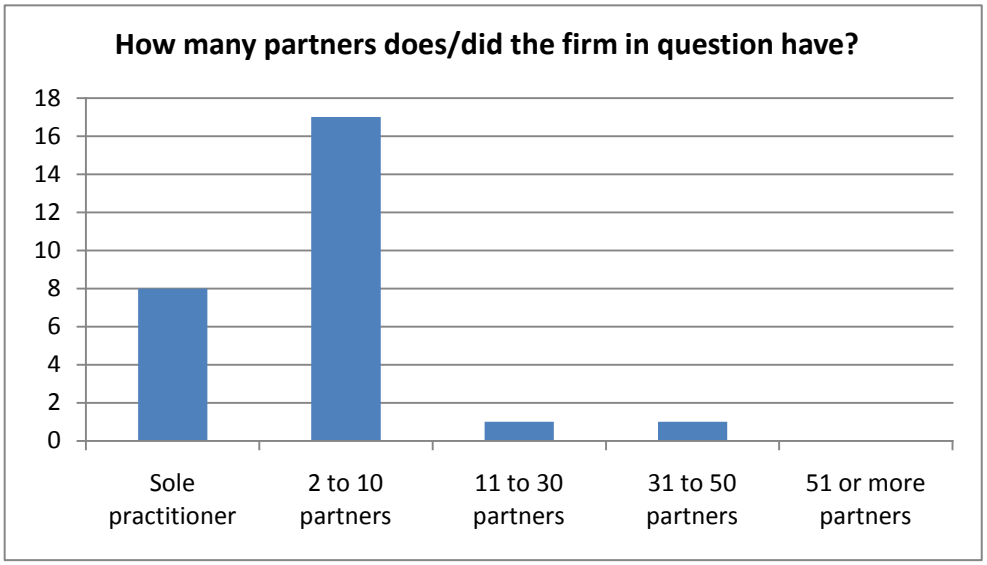


Chart 6 - The Necessity for Legal Representation

8.8 In response to the question on whether legal representation is necessary 13 people thought that it is essential. 11 people thought it might make a difference depending on the regulatory issues involved. 2 people thought that it would not make a difference.

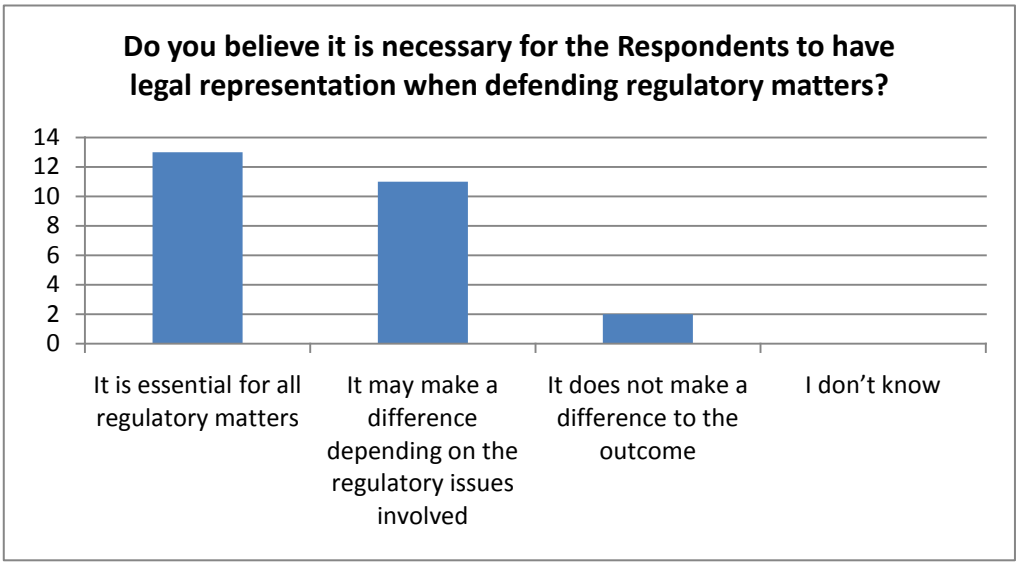


Chart 7 - Whether the Regulatory Action was Justified and Proportionate

8.9 In answer to the question about whether the regulatory action was justified and proportionate, 9 people thought it was proportionate, 5 were not certain and 14 thought it was not proportionate.

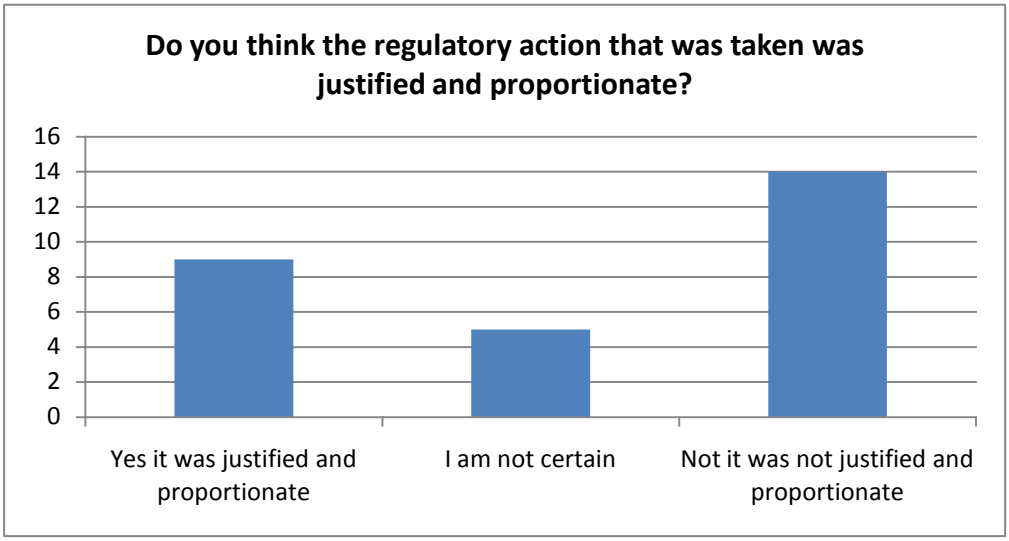


Chart 8 - Sources of Legal Advice

8.10 When asked about obtaining advice and assistance, most people said they had not obtained any advice and assistance. Only 1 person paid privately to be represented and 1 person sought advice from the Law Society.

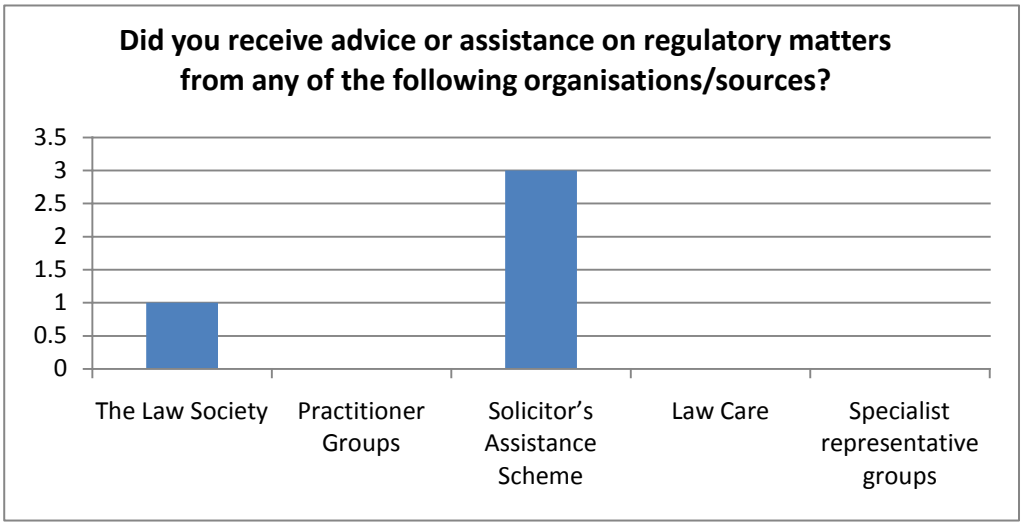
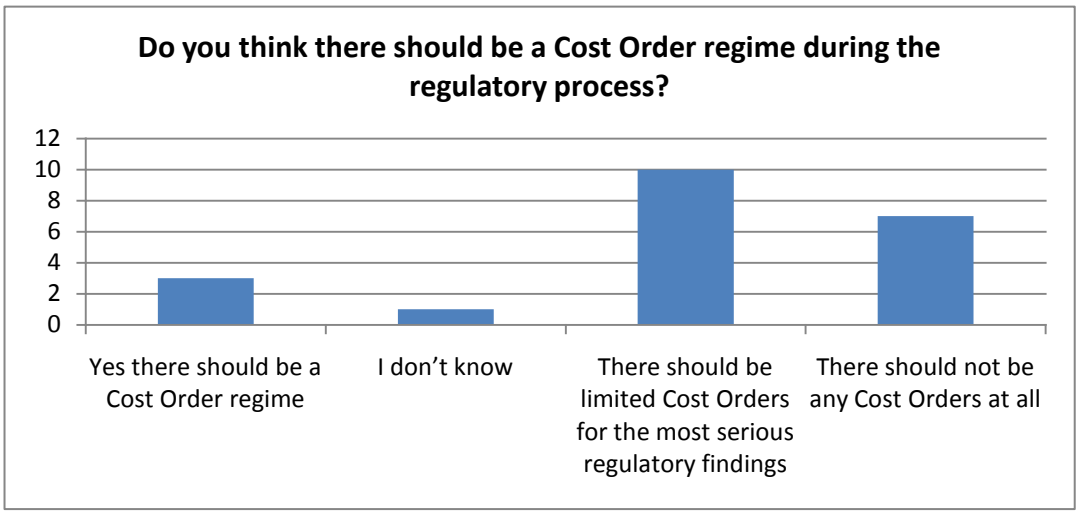


Chart 9 - Whether there Should be a Cost Order Regime

8.11 As to whether respondents thought there should be a Cost Order regime, 3 people thought there should be, 10 thought there should be limited Cost

Orders for the most serious regulatory findings, 7 thought there should no Cost Orders at all and 1 did not know.



Some qualitative replies to the survey

Though not a representative sample, the testimonies shared by these respondents are instructive and are reinforced by what was shared in the focus group discussions we held in an effort to supplement these responses as a consequence of the low rate of response.

Whilst the regulatory action was just and proportionate, I believe that in my case the investigator was presumptuous and misconceived. He even made allegations of dishonesty in a trivial manner. The sanction did not appear to have been properly thought through as it did not include any consideration of its effect on my future professional standing. I do not see the benefit to the public of publicising the breach when it was not a serious breach. I therefore consider the SRA may have been unnecessarily disproportionate in terms of the outcome.

The SRA have referred to me in a publication in the Law Society Gazette – the publication was inaccurate and referred to me as having been involved in certain activities – a complete falsehood. The SRA appears to lack control and accountability.

I complained from the outset as to the way my matter was being dealt with, but there was nobody that could/would listen and investigate my complaint about the way the SRA was dealing with my case. There needs to be a separate body just for this purpose, i.e., to ensure the SRA are conducting themselves properly and any complaint against them is investigated.

It is wrong that the names of those subject to regulatory process are publicised before the tribunal date. The internet means that clients could have this information before the case is decided. There should be emphasis on helping solicitors in times of financial difficulty. The SRA concentrates on disciplining them and are perceived as confrontational. If not the SRA, then the Law Society should take on this role.

I would rather not say much for obvious reasons. To give you an example, I have referred a few matters to the SRA. My recorded delivery letters were not replied to for 4/5 months despite the client alleging fraud and the matter being reported to the police. I firmly believe small firms are discriminated against as the larger firms are simply too powerful. I also firmly believe that non-white firms are targeted by the SRA.

My experience was positive and constructive.

The matter was dealt with by the SRA in little short of a Jack-booted way; interspersed with periods or months when I heard nothing (appalling). There would have much to recommend some form of mediation in discussion of where things "went off the rails" technically.

Nobody assisted me. The Law Society are useless, the only other recourse is to privately pay for legal advice. This is always too expensive to contemplate and you end up without support and having to deal with matters alone and within tight deadlines.

In my case, despite the lack of support the matter was dealt with fairly both by case workers and Adjudicators. Again in my case Cost Orders were largely proportionate, but recent decisions of the SDT indicate rising levels of costs which appear very heavy handed, although one must concede that appearances before the SDT are always usually serious.

The process is heavily weighed against a small practice with scant resources to pay for representation against the well resourced lawyer team paid for by the SRA and ultimately reimbursed by way of the massive cost orders sought and ordered.

The whole process is very long and therefore you are in a position where you are unsure about your future career for a long time, which is very stressful. Even now, fairly long after the hearing I feel that the stigma attached to being subject to

proceedings affects my job prospects, even though it was a minor breach and only a minor sanction was made.

The SRA had visited the firm and discussed the issues in question with no concern whatever until the action. I had to accept the reprimand as I couldn't afford to defend the position further, or risk a punitive costs order. There should have been an informal process to discuss the issues rather than a process designed solely to pursue action and defend the behaviour of the SRA's own staff.

The Code of Conduct applies to solicitors when they are acting as a trusted advisor and representing the legal profession. Any action/activity outside of this set of criteria is not regulated by the Code of Conduct and should not be the subject of SRA investigations. It is hoped that the regulatory process will not be used against another solicitor as it was against me. Regulatory action should only be taken when there has been an actual breach of the Code of Conduct, not otherwise.

Caseworkers should have been more helpful and actually respond to issues raised in correspondence, instead it was ignored. The issues relating to intervention need to be reviewed as it appeared to be no more than a process to extract costs from me and served no other useful purpose. A cost order was imposed even though a 'no order' was made. This is unfair and unjust.

I should never have been subject to the investigation. I was the only BME lawyer in the firm, and all the other white partners were not taken to the Tribunal – not even the equity partners.

Don't get me started. The SRA is not fit for purpose and that is evidenced by the witch hunt I am party to at the moment.

Conclusions

8.12 The number of respondents to the survey is too small to have any statistical significance. However, certain patterns of responses are interesting. The majority of respondents, in total 23, thought the process permitted them to present their arguments. The respondents were mainly from sole practitioner firms, or 2 to 10 partner firms. Most respondents thought that legal representation was either essential or it made a difference. 14 people thought the proceedings were not justified or proportionate, compared to the 9 people

who thought it was justified and proportionate. Very few people sought advice from the listed sources but 3 people from the sample sought advice from the Solicitors' Assistance Scheme (SAS). [Described in greater detail below, the SAS is a panel of lawyers that offer advice and guidance to solicitors, especially when regulatory action is involved. They can be instructed to offer representation like any other solicitor]. On the question of costs, 10 people thought there should be limited Cost Orders and 7 thought there should be none.

Recommendations

- The SRA should pay attention to what respondents are saying about 'over regulation' and the impact of the premature publication of regulatory action being taken against named individuals
- A more detailed piece of work should be carried out to find out the views and experiences of respondents who have been through the regulatory process. This should also include demographic details of respondents and the environment and context in which they practice. We believe that this more qualitative inquiry will highlight the practice challenges sole practitioners and heads of small firms face, the impact of their services on improving access to justice and ways in which they feel the Law Society and the SRA could work with their sector of the profession and support solicitors' careers. It would also help to identify and remedy inadequacies in the regulatory process and highlight any evidence of discriminatory practices or outcomes.

Survey of SRA Advocates

The purpose of the surveys

8.13 We decided that we wanted to seek the views and perceptions of advocates in relation to their experiences of carrying out regulatory work on behalf of the SRA. We specifically wanted to find out what they thought of the process, whether they had experience of dealing with cases involving discrimination and their views on the cost regime.

The survey questions

8.14 We produced a short survey involving the following six questions:

1. How long have you or your firm acted for the SRA in regulatory matters?
   - 1 to 3 years
   - 4 to 6 years
   - 7 or more years

2. How well do you think the regulatory process works?
   - Extremely well
   - Very well
   - Moderately well
   - Slightly well
   - Not well at all

3. Did you act for the SRA in any matter where the respondent(s) claimed the action being taken against them was discriminatory in any way? If so, please specify what action you took to deal with it:
   - I dealt with a case where the respondent alleged that action being taken against them was discriminatory
   - I have not dealt with any cases where the respondent has alleged that the action being taken against them was discriminatory
   - Other - (please specify)

4. What are your views on the impact on respondents of the Costs Order regime?
   - The impact on respondents is very fair considering the necessary costs of pursuing matters
   - The impact on respondents is somewhat fair considering the necessary costs of pursuing matters
   - The impact on respondents is fair considering the necessary costs of pursuing matters
   - The impact on respondents is somewhat unfair considering the necessary costs of pursuing matters
   - The impact on respondents is very unfair considering the necessary costs of pursuing matters

5. Do you have any suggestions as to how the SRA's regulatory process can be improved?

6. Do you have any suggestions as to how the Cost Order regime can be improved?

Survey responses

8.15 The survey was sent to 10 advocates who carry out regulatory work for the SRA. There were no stipulations as to ethnicity or gender. We received 9 completed responses.

Question 1

8.16 Regarding the length of time the advocates or their firms have acted for the SRA, 1 person had acted for between 4 to 6 years and all of the other 8 advocates for 7 or more years.

Question 2

8.17 On how well the advocates think the regulatory process works, 1 advocate thought it worked extremely well. 5 advocates thought that it worked very well and three people thought it worked moderately well.

Question 3

8.18 5 of the advocates had dealt with cases involving allegations of discrimination. of those cases was an intervention. 4 advocates had not dealt with any such cases.

8.19 Comments received were:

On the SRA's instructions and with the assistance of a colleague in the Employment Team we completed an Equality Act Questionnaire. All the allegations of discrimination by the SRA were dealt with by submissions to the SDT, which was happy to conclude that it did not find them proven even if they were relevant to the proceedings before it.

The issues were dealt with internally by the SRA. The matter was subsequently stayed on health grounds.

An issue was raised by a respondent that the SRA was institutionally racist. I explained to the Tribunal the steps undertaken by the SRA in relation to diversity which demonstrated that the allegation was unfounded. The Tribunal made no finding on the point and this was upheld on appeal.

Yes. It has been raised a few times over the years. I have dealt with it by focussing the parties on the actual issues and misconduct. In none of my cases has it been pursued with real determination.

I have not dealt with any disciplinary cases where discrimination claims have been made. However, in relation to a number of interventions, most recently the practice of [Anonymous] Solicitors, numerous allegations of discrimination have been raised against the SRA. In each case I have worked hard with the SRA to ensure that the allegations are properly understood, seeking clarification where necessary, investigated and appropriately responded to. By way of example, in relation to the allegations by [Anonymous], I worked with the intervention officer and [SRA officer] to accommodate [Anonymous'] request for a meeting to discuss his various issues. However, he then never responded to the proposed dates and the meeting never happened.

Question 4

8.20 2 advocates thought that the impact of the Cost Order regime was very fair. 7 people thought that it was fair considering the necessary costs of pursuing the matter.

Question 5

8.21 Suggestions received on how the regulatory process can be improved ranged from:

Not with regard to issues of potential allegations of discrimination as I have not been involved in a case where such an allegation has been made but I am aware of the extensive commitment made by the SRA to ensure that their processes are transparent and fair.

I consider the processes in place now to be relatively quick and robust.

Our involvement in the SRA's regulatory process is ordinarily after decisions have been taken to refer matters to the SDT. In our experience, SRA decision making at that stage and subsequently is robust, transparent and fair. In particular, we have observed the care and rigour with which decisions are taken in respect of important areas such as whether or not to allege dishonesty, whether to enter into discussions concerning Regulatory Settlement Agreements, and the terms of such agreements. We have also observed a particular and consistent focus on addressing, in all

regulatory decision-making, the risks to the public which have been identified during the course of the investigations.

Question 6

8.22 Views were sought on suggestions as to how the Costs Order regime process could be improved. The suggestions were:

It is important to be pragmatic and proportionate.

I consider that the regime has developed appropriately and the Tribunal has sufficient jurisdiction to ensure that Costs Orders are fair and proportionate.

The SRA's approach to the costs recovery jurisdiction of the SDT is robust and consistent. We have observed that the SDT itself is not always entirely consistent or transparent in its approach to making costs orders, and in particular reasons are not always given for "discounting" of costs orders, or for decisions to make costs orders "not to be enforced without leave of the Tribunal."

The Tribunal should encourage and conduct a proper inquiry into respondents' means before making 'not to be enforced without leave' costs orders.

Liaison between the SRA and the SDT (probably by the Users' Group) to understand the rationale behind the SDT's 'not to be enforced without leave' decisions ...

Findings

8.23 The advocates are all very experienced regulatory lawyers who have mainly acted for the SRA for 7 or more years. Most advocates think that the process works very well, or at least moderately well.

8.24 7 out of the 9 advocates thought that the Cost Order regime process was fair. 5 of the advocates have dealt with a case where allegations of discrimination were raised.

8.25 The numbers involved do not lend themselves to much meaningful analysis statistically speaking, or reliable conclusion. Nevertheless, the narratives of

those advocates suggest that the SRA could have a more in-depth discussion, not only on the issue of cost, but also in relation to its in-house adjudication processes and the impact of OFR on the rate of referrals to the SDT.

Recommendations

- The SRA should conduct an equality impact assessment on the cost of its regulatory proceedings and report on the cost determinations it makes, cost orders that are made by the SDT, the amounts the SRA actually recovers, the impact of meeting such costs on respondents especially sole practitioners and partners in small firms, and the total amounts that are outstanding and cannot be collected without leave of the SDT.
- The SRA should conduct an exercise to estimate the cost implications of the reduction of cases referred to the SDT as a function of OFR and of cost orders that might otherwise have been imposed on sole practitioners but for risk-based and outcomes-focused regulation

9.0 Regulatory Disproportionality, and Regulation ‘in the Public Interest’

‘Access to Justice' and ‘the Interests of Consumers of Legal Services’

9.1 In view of the difficulties we encountered with the Respondents’ Survey and the low response rate we achieved as a consequence, we conducted individual and focus group interviews with further groups of respondents and with advocates each of whom, unlike those in the Advocates’ Survey who prosecuted on behalf of the SRA, had had some considerable experience of acting in defence of respondents in the SDT.

9.2 Based upon the results of the two surveys and discussions with BME practitioner networks and regulated solicitors, we were keen to canvass views in relation to the following issues that had been identified:

a) The Legal Services Act 2007 itself and the way it defines ‘the public interest’.

b) Regulatory objectives and whether they are sufficiently nuanced, given the grossly uneven /unequal context within which different sections of the solicitors' profession operate.

c) Whether, in the light of what is known empirically through detailed research and examination of regulatory outcomes, the regulatory objectives themselves need to be revisited, or

d) Is it, as some argue, simply a case of over-regulation on the part of the SRA? If so, is that over-regulation across the piece or is it more obvious in the case of BME solicitors? If the latter, is that attributable to where BME solicitors are situated within the profession and the context in which they are practising, or did they have evidence of institutional and personal manifestations of racism and discrimination?

e) If it is a case of ‘over-regulation’, does that conflict with regulating ‘in the public interest’ and ensuring access to justice for vulnerable client groups/sectors of the population?

f) The Law Society, as the body representing solicitors and whose ‘keep’ is funded by them, could be said to have a duty of care to all of them. The SRA is its regulatory arm. If, therefore, the regulator sees itself as

having a statutory duty to protect only the interests of the public, and if regulatory outcomes are causing detriment disproportionately to any section of the profession, should that not become the business of the Law Society?

g) Where is the evidence that the Law Society is engaging with the issue of regulatory disproportionality?

h) The cost of regulation, from the moment an event is recorded by/registered with the SRA, to the point at which costs and fines are levied by the SDT, or by the SRA itself, is prohibitive in a large number of cases, albeit the SDT often attaches a condition making it necessary for the SRA to come back and get their authorisation before pursuing the respondent for costs. We have been told that the SRA pursues certain respondents relentlessly, especially if the regulatory process is adversarial, rather than seeking alternative ways of resolving the matter(s), for example through Regulatory Settlement Agreements or through mediation. This often results in massive costs, that in some cases, become the subject of yet more litigation (on account of bankruptcy proceedings, property repossessions, and the like). Respondents argue that this, too, impacts upon the Law Society, but that the Law Society does not appear to be able to influence the SRA's 'ferret-style' approach to regulation.

i) It is argued, by BME respondents especially, that the above are all matters which, ideally, the Law Society should be working jointly with the BME practitioner networks to address (Society of Asian Lawyers, Black Solicitors Network, Society of Black Lawyers, etc). However, those practitioner networks do not appear to have any role in the strategic operation of the Law Society; whatever strategic engagement they may have had seems to be waning in the face of Law Society marketing, and targeting individual solicitors to buy the services (on-line or otherwise) that it provides. It is felt that this is likely to push the networks' concerns about regulatory disproportionality further to the margins. The charge, in other words, is that rather than the Law Society seeing the issue as reflecting the way BME solicitors disproportionately experience regulation and addressing the factors, other than their ethnicity, that might be affecting them *as a group,* the Law Society is offering them individualised solutions as potential consumers of its services.

j) The jury is still out as to whether, given what might well be the root causes of the disproportionality that has been identified for the last decade, at least, Outcomes Focused Regulation would address the

over-regulation issue and the specific circumstances of BME sole practitioners and small firms. This is seen as a critical question since the latter are disproportionately represented in SRA investigations and interventions.

k) Publishing the regulatory action taken against respondents and issues of fairness and what one partner described as 'unwarranted detriment to the careers and livelihoods of the innocent or careless in the name of *deterrence'*. It is argued that 'Protecting the interests of consumers of legal services' has become 'a blanket justification' for over-regulation and treating the regulated community as people who have ceased to matter.

l) The implications of the persistence of regulatory disproportionality as experienced by BME practitioners for the regulatory objective 'to encourage an independent, strong, diverse and effective legal profession.'

m) Regulation Costs and arguments for and against 'a cost neutral regime'. It has been argued, for example, that the SRA would conduct itself differently if there were a cost-neutral regime and costs were levied only against those respondents who were found guilty of dishonesty, fraud and/or money laundering?

n) Any other issues to do with regulatory disproportionality.

9.3 At the heart of those discussions is the legal context of the SRA's regulatory function. ***The Legal Services Act 2007*** (LSA) lists the regulatory objectives as follows:

(a) protecting and promoting the public interest,

(b) supporting the constitutional principle of the rule of law,

(c) improving access to justice,

(d) protecting and promoting the interests of consumers,

(e) promoting competition in the provision of legal services,

(f) encouraging an independent, strong, diverse and effective legal profession,

(g) increasing public understanding of the citizen's legal rights and duties, and

(h) promoting and maintaining adherence to the professional principles.

9.4 The “professional principles” are:

(a) that authorised persons should act with independence and integrity,

(b) that authorised persons should maintain proper standards of work,

(c) that authorised persons should act in the best interests of their clients,

(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and

(e) that the affairs of clients should be kept confidential.

[http://www.legislation.gov.uk/ukpga/2007/29/notes/contents]

9.5 The SRA has regard to the Better Regulation principles, although they neither form part of, nor are required by the Legal Services Act. The SRA defines them as:

‘the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed’.
[http://www.bis.gov.uk/policies/bre/policy/five-principles-of-good-regulation]

9.6 For its part, the SRA states:

‘Essentially, those making decisions in individual cases should always have the regulatory objectives and better regulation principles in mind…..Protecting and serving the public interest is ultimately at the heart of our decision making and the Principles define the fundamental ethical and professional standards we expect of all firms and individuals providing legal services. Where we need to take action, our approach to enforcement is proportionate, outcomes focused and risk based, as set out in our enforcement strategy’
[www.//sra/strategy/sub-strategies/sra/enforcement-strategy.page]

9.7 In consideration of the issues outlined in a) to n) above, a wide range of views were shared, by regulated practitioners, partners in their firms and lawyers who had represented respondents in SDT hearings.

9.8 On the question of the LSA and 'the public interest', it was felt that both providers and users of legal services had a clear understanding of what 'in the public interest' meant, not least because of its widespread use by the media and the Crown Prosecution Service. One respondent put it like this:

> 'The problem is not with the LSA but with the SRA. Everything it does is *in the public interest*, however disproportionate. One of the reasons people are reluctant to tell the SRA about even a relatively minor breach is that we have too many examples of them using a sledge hammer to crack a nut. You tell them about something that could readily be sorted out and it's like an invitation for them to come and turn you inside out. And yet, when you eventually report it, or worse yet if they find out before you tell them, you get done for being in breach and failing to report it'.

9.9 There was general agreement in the group about this, with other people claiming to have had similar experiences and putting it all down to what they saw as 'a lack of accountability on the part of the SRA, because they do not have to prove to anybody what they see as the 'risk' posed to the public by such a breach'. Elaborating on this theme, one solicitor noted:

> "There is certainly an argument that the regulatory objectives are over-complicated, but another factor is that regulation by the SRA focuses on "public interest" to the apparent exclusion of all other objectives. There is little or no visible focus by the SRA on "encouraging an independent, strong, diverse and effective profession" or "improving access to justice" for example. This is in contrast to the Bar. The Bar Standards Board rightly considers that a strong independent Bar is essential in the public interest – it is a bulwark against injustice, oppression and unfairness, but this is equally true of the solicitors' profession. There is a "pro-profession" element in the regulatory objectives which is not seen in the SRA's approach to regulation.
>
> Everything that the SRA does tends to be justified on the basis that it is acting "in the public interest" and this is the standard response to any challenge of any controversial decision. The difficulty is that what is said to be in the public interest is defined for these purposes to be, simply, what the SRA says it is."

9.10 Regarding the view that there is too much regulatory action on the part of the SRA, one BME respondent acknowledged the point Pearn Kandola made, i.e., that a large number of events or complaints do not originate with the SRA but come from the public. Her view, however, was that the SRA's response to those did not always take into account the context in which the practitioner

was operating, especially as so many complaints involved sole practitioners. She had been the subject of regulatory action for a relatively minor breach, but her experience was that there was an almost automatic presumption of guilt on the part of the SRA. 'To err is human…, but solicitors are not allowed to be human, even when there is no harm or detriment to clients'.

9.11 One partner (who had never been subject to regulatory action) argued that if the SRA accepts there is disproportionality and that those 'in the frame' were mainly BME sole practitioners and small firms, it should have adopted a 'different attitude towards supporting such solicitors long before OFR kicked in'. Instead, as he saw it, the SRA's approach was more about punishment than protecting the interests of consumers.

9.12 Commenting on disproportionality and the over-representation of BME sole practitioners and small firms in regulatory proceedings, one respondent noted:

> "There is a widespread belief that over-regulation is endemic. The organisation seems to be committed to finding new things to regulate and new ways to regulate. But that should affect everyone."

9.13 Some respondents in the focus groups felt that the SRA appeared to want to work with firms to manage risk and reduce the number of investigations and interventions by adopting OFR, but that the culture and fear of the old, pre-OFR regime was still very much present. The requirement to have compliance officers - compliance officer for legal practice (COLPs) and compliance officer for finance and administration (COFAs) - who had an obligation to report immediately any 'material' breach, was created by rules made by the SRA in 2011, but the date from which COLPs and COFAs were appointed, and from which date those duties became effective, was 1 January 2013. There was considerable discussion in the focus group about the interpretation of what constitutes a 'material' breach.

9.14 One lawyer noted:

> "The true reason [for the development of an industry around the word 'material'] is that solicitors are collectively fearful that however hard they try to get it right, the SRA will later say that they were wrong, and will react disproportionately. There is no trust, in either direction, between regulator and regulated. Regrettably, though there are those within the SRA motivated to change the culture, this has not occurred and cultural change must now be seen, almost certainly, to be unachievable."

9.15 A solicitor with considerable experience of defending in front of the SDT had this to say:

> "Perhaps my greatest concern is that the SRA – rather than regulating unequivocally and exclusively in the public interest – is in truth regulating in the interests of the SRA, and the reputation of the SRA. Of course public considerations are in play but perhaps they are not the most important factor. Decisions which are otherwise inexplicable become logical if they were made by reference to the question "Would the SRA look better if…" or "Would we look bad if we don't…". There is no doubt that staff do think in this way because they occasionally maintain it as the basis for recommendations and decisions, so that we know the culture is there, even if it were to be denied as a policy. This is a recent example: "*I consider that there is a risk to the public's confidence in the reputation of the profession as well as the perception of the SRA as the regulator in the event that controls of Mr X's practising arrangements are not put in place. The imposition of the recommended conditions enables the SRA to have such control and at the same time protects both the reputation of the profession and maintains confidence in the SRA.*" (narrator's underlining). This reasoning was disavowed by the decision-making committee because I criticised it!
>
> In my view the problem lies not in the regulatory objectives, which could be simplified but are not fundamentally flawed, but in the SRA's approach to regulation, which is based on mistrust for the profession it regulates, and a belief that it always knows best."

9.16 Some participants in the focus group commented upon the conflict they detected in the SRA's 'regulation in the public interest' on the one hand, and 'improving access to justice' on the other. There was general agreement with the view that if there is over-regulation of sole practitioners or/and small firms in areas where they provide access to legal services for some of the most vulnerable consumers of legal services, and if that over-regulation shuts down practices for breaches which do not patently put the public at risk but could be down to weak management, for example, it is difficult to see how that squares with improving access to justice.

9.17 In response, one solicitor who had been to an OFR workshop run by the SRA suggested that since the SRA expected supervision and firms' own risk identification and management to result in less regulatory action against sole practitioners and small firms, it is effectively conceding that it could have found a different way of working with them all along. It should therefore audit all its decisions in the period that our review covers (2009-2012) up to the present, and take remedial action in respect of all but the most serious cases, e.g., Solicitors' Account Rules, mortgage and other fraud, dishonesty and money laundering.

9.18 A regulatory advocate added:

> "The SRA rarely if at all acknowledges, as far as I can tell, the vitally important role that BME solicitors can provide within their own ethnic communities, and without which vulnerable members of those communities would be much disadvantaged. It should be considering the statutory objectives of improving access to justice and encouraging a diverse legal profession, but these do not seem to attract much attention."

9.19 A BME respondent who had had conditions attached to his practising certificate and was now 'clean again' as he put it, noted that his concern was that the rest of the profession and the public at large might form the view as a result of regulatory disproportionality, that BME lawyers are all either crooked or incompetent. As far as he was concerned, despite its various commissioned studies and reviews and its own monitoring reports, the SRA was not doing enough to publicise the reasons why so many BME solicitors were 'trapped' in single offices or with one or two colleagues and fighting to make ends meet:

> 'I am sure the impression people looking in have is that black people are naturally incompetent and untrustworthy and the public has to be protected from us, rather than the fact that some of us operate in areas where solicitors with more money and more choice just won't dream of setting up a practice'. And contrary to popular belief, we are not making a lot of money. Many of us are struggling, but we keep going because we believe that the communities we serve need our services. The Legal Aid situation makes things much worse and I strongly believe that many of us would struggle to survive'.

9.20 Regarding the factors that might account for BME disproportionality, one advocate drew upon his experience of representing respondents in the SDT and suggested:

> "There has to be something which is driving the embarrassingly large number of BME solicitors appearing before the Tribunal. I have given considerable thought to this, because I have not, with rare exceptions, encountered overt racism or other discrimination. My latest thinking is a development of my hypothesis on credibility; that is, a variation in the preparedness of the SRA to accept what it is told; to be persuaded, depending on the source. In addition to the fact that BME solicitors are more likely to be in small firms, is language a factor? If English is not the first language, and English speech patterns are not ingrained, is an explanation more readily dismissed by caseworkers already inclined to suspicion? I appreciate that this is an incomplete theory; it is insulting

to suggest that BME solicitors have, *per se*, less ability to persuade in the English language, but there are certainly some BME solicitors for whom this is a factor".

9.21 On the question of the cost of regulatory action, the issue of over-regulation cropped up again, as did the disadvantage sole practitioners and small firms were felt to suffer on account of a lack of 'parity of arms'. Respondents expressed the view that 'the price of justice' for many BME sole practitioners or heads of small firms was simply too high and therefore the SRA 'had got away with ruining people's careers and life chances over the years', for no other reason than that people could not pay to challenge the SRA and save their reputation and their practice. Things had got worse recently, it was claimed, on account of the removal of Professional Indemnity Insurance cover for 'any investigation, inquiry or disciplinary proceeding' during or after the period of insurance.

9.22 In its paper *Disciplinary Action by the SRA: An Overview* (September 2012), under the heading 'Representation of respondents (and insurance), the SRA states:

> 'There are various misunderstandings about the relevance of insurance to defending proceedings at the SDT. Solicitors may buy such cover (if it is available). Until recently (2010), insurers who provide indemnity insurance to solicitors were required to include cover for defence costs in the policy. That was not however freestanding cover: it applied when the disciplinary action was related to a claim on the insurance….. The removal of this was on the basis that there is no public protection basis for interfering with the market by requiring such provision in commercial insurance. The paper to the SRA Board meeting (18 June 2010) included: 'As there is no issue of public protection involved, clause 1.2(c) has been amended to remove the obligation on insurers to provide cover for defence costs for disciplinary matters. Insurers can continue to offer defence costs cover for disciplinary matters at their discretion by way of an endorsement to firms' policies'.

9.23 Commenting upon the fact that in spite of 'that significant change', the SRA could still go on spending at will to prosecute cases and 'protect the public', one advocate noted:

> "The SRA is notorious for spending wildly disproportionate sums in legal costs to protect its reputation and to 'win at all costs'. It is almost impossible to secure after the event legal expenses insurance against adverse costs risks when seeking to litigate against the SRA, by appeal or judicial review. Insurers believe that the SRA does not make

decisions on any predictable rational or commercial basis; it is therefore unpredictable as well as being unconstrained in spending on legal costs, and cases are in consequence uninsurable through uncertainty.

"In-house investigation costs claimed at very high levels (tens of thousands of pounds) without any clear justification for the basis of calculation and unscrutinised; enormous amounts of time claimed by some panel solicitors for routine work; a preparedness by the SDT to assess costs on a summary basis so that these two issues are not tested; the costs of any interlocutory applications (for example for greater clarity in the SRA's case) are normally ordered to be "in the application" – ie: they will follow the eventual result. As the SRA nearly always gets its costs, the solicitor will have to pay his/her own costs and the SRA's costs of the interim application, even if he/she gained something by it. So you can have a poorly presented and reasoned application, seek clarification, obtain an order from the Tribunal that the clarification be provided, and you will end up paying all the costs, including the extra costs of the SRA in doing what it should have done in the first place. As a result, experienced defence advocates generally do not bother to make applications of this kind and do their best to 'muddle through'; wherever there is a serious contest, particularly if counsel is for the defence, the SRA immediately also instructs counsel or leading counsel (regardless of whether the weight or complexity of the case requires this)."

9.24 In interview, one very experienced solicitor who specialises in defending in the SDT added:

> "The SRA is not truly accountable for the money it spends on individual cases. Not surprisingly, in the interests of the wider profession on whom the cost would otherwise fall, the Tribunal is generally inclined to ensure that the costs fall on the individual, if at all possible, rather than the profession, in terms of the costs orders it makes. But no-one knows how much is actually recovered – the way that the SRA reports publicly on financial matters makes it impossible to align legal expenditure with costs recovery".

9.25 With regard to the suggestion that that the SRA would conduct itself differently if there were a cost-neutral regime and costs were levied only against those respondents who were found guilty of dishonesty, fraud and/or money laundering', opinion was widely divided. Most respondents agreed that it was 'grossly unfair and punitive' for the SRA to be able to pursue solicitors for a string of minor breaches that had nothing to do with the Solicitors' Account Rules and did not present any risk to the public, and claim costs against respondents who were already strapped for cash and were therefore

representing themselves. One respondent argued that it was as well that the SDT, even when it awarded costs in favour of the SRA, often added the rider that the SRA should come back and get their permission to go after respondents for those costs.

9.26 A number of respondents felt that the SRA would adopt a different approach to regulation if they had to justify their decision to pursue solicitors for particular breaches and incur costs in the way that they do, especially the cost of engaging prosecuting advocates.

9.27 One solicitor argued that a 'cost-neutral regime' was 'unworkable':

> It is inconsistent with the Law Society's (reasonable) desire that the innocent profession at large should not have to pay for the costs of prosecuting the guilty. That is obviously also going to be the view of any in the profession who has not had to cope with the SRA. The issue here, in my opinion, is not the principle of the guilty or mostly guilty paying the costs attributable to their defaults, but that a combination of the endorsement of that general policy by the Law Society and the Tribunal, and the profligacy of the SRA, and the lack of controls, results in a deeply unhealthy regime which rewards, rather than penalises, disproportionate and over-aggressive prosecution.
>
> A classic example is the practice in relation to allegations of dishonesty. On the case-law, if dishonesty is to be asserted it has to be specifically alleged. Some panel solicitors are highly responsible about when to allege it. Others are not. There is nothing worse for a professional practitioner than to be accused of dishonesty, in his/her view without justification. It can destroy lives. Very many cases in the Tribunal proceed on the basis of a dispute on the sole issue of dishonesty, the facts being admitted, but not the asserted interpretation of them. Solicitors acquitted of dishonesty but convicted on the basis of the undisputed facts, where the case would otherwise have cost a fraction, will generally be ordered to pay all the costs, even if the discrete allegation failed and the solicitor is to that extent vindicated. He/she will probably have decided that the last penny must be spent to preserve reputation in the face of that allegation. He/she will be left paying his/her own costs as well. The SRA will say "it was reasonable, in the public interest, to air the issue and let the Tribunal decide". Of course, the panel solicitor quick to allege dishonesty is likely to be paid a lot more too, with no risk or penalty. Rather, the contrary if anything. Aggressive prosecutors will naturally be more popular with a prosecuting department than those who advise that allegations should

not be made or would fail (when your instructing officer has formulated them).

For completeness, let me add that there are of course many cases of disputed dishonesty resolved against the solicitor.

9.28 The issue of publication of regulatory action against respondents was also hotly debated in focus groups and discussed in interviews. There was general agreement that lawyers themselves were well served by that practice, particularly when conducting due diligence prior to making appointments or acting on the recommendation of others. As one head of a small firm put it: 'if there are crooks and charlatans out there, we need to know that just as much as the public. It saves us putting the public at risk by appointing people who should not be practising, or who have had regulatory action properly taken against them for serious breaches'.

9.29 What exercised most respondents was the impact of publication upon solicitors whose matters were dropped at adjudication or dismissed by the SDT or by the High Court on appeal. While there was acknowledgement of the fact that regulatory matters could take a long time to reach a final outcome, especially if the matter goes to appeal, and that 'one doesn't want people losing themselves in the woodwork and repeating their dishonest or unprofessional conduct in your firm while they await an outcome', it was widely agreed that the system as it is at present, does a grave injustice to those who are named and then are cleared of wrongdoing.

9.30 Commenting on discussions in the focus groups and the issues they raised, a defending lawyer said in interview:

> 'I am convinced that decisions to publicise rebukes, fines, PC conditions and decisions to prosecute are driven by "regulation in the interests of the SRA" rather than public interest. It is a question of "look what a good job we are doing" rather than being necessary. However, I have been banging my head on this wall endlessly, and no challenge has yet been successful. The SRA has an enviable record in the courts, because the courts allow regulators a wide margin of appreciation and on the other side there is always a solicitor who has done something wrong, even if not much.
>
> I have used, I think, every argument possible, including the terms of section 28(3) of LSA, and the need in making every regulatory decision to consider whether it is "necessary" – that is: vital; something you cannot do without, as well as proportionate. SRA relies on "transparent" in the same subsection but misreads the statute in my view;

transparency is concerned with process – how the regulator does its job, and not with making public every decision it makes. The Law Society has done international research on this and from recollection no-one else does it like this.

Does the public need to know that a solicitor has been slightly inefficient in his management of accounts without any actual loss or prejudice to anyone and has been told he must go on a course? The SRA would say yes, even if this meant that the publicity seriously damaged his firm and had unforeseen results. They would say “tough” that does not make the decision wrong. There is a genuine public interest, for example in contrast, in knowing that a solicitor has been sanctioned by the Tribunal and as a result cannot practise as a sole practitioner, in case he tries.

We have also pointed out that publicity is unpredictable in its results – if you have an unusual name Google will find the decision instantly and it will be at the top of page 1. If you have a common name it may be on page 50. I have tried to link the necessity of PC conditions to publicity. If it is not necessary to limit the way a solicitor may practise (in the public interest) why is it in the public interest to publicise something which is not regarded to be serious enough to warrant that? Should not publicity be “necessary” only where it is necessary to exercise controls? All to no avail…

The SRA would undoubtedly refer to the absence of challenge or the lack of success of challenges to all the many decisions it has made of this kind – but without knowing what the consequences have been, long term. I have been urging the SRA for years to audit the consequences of their decisions. They say they do but not in the way that I mean – that a condition that a solicitor may only work as an employee for example (when he or she had no desire to do anything else) in fact means that no firm will employ them.

In a recent case (December 2013) publicity given to the allegations at a time when they were not proved caused the firm in question to be removed from lenders’ panels; as a result the business went downhill. They were not able to afford their quotation for professional indemnity insurance in September, and were forced to close. The SRA nevertheless pressed on with an appeal for the purposes of raising the level of fines imposed by the Tribunal against five partners. The Tribunal had found that there was some fault, but that it was far less serious than the SRA had alleged.

> The appeal was successful in part, in that the fines were increased from £5,000 to £35,000 in total, although the case has been remitted for rehearing by the Tribunal as there needs to be a means enquiry now that the solicitors may be unemployed. There was no order as to the costs of the appeal. £50,000 of the profession's money has been spent, so far, "in the public interest" to increase revenue to the Treasury by £30,000 (subject to a further possible reduction reflecting the ability of the solicitors to pay).
>
> However, perhaps the most important point does not emerge from the judgment, but from the SRA's written submissions. Their case was that the appropriate level of fine was £50,000 on the partnership; £50,000 on the sole equity partner, and £25,000 each of four salaried partners; total £200,000, and why there should be a double whammy for the sole equity partner (because the proposed fine on the firm was obviously a fine on him) remains unclear. The Tribunal had declined to impose a penalty on "the firm" at all. The High Court plainly thought that although the Tribunal set the fines at too low a figure, the SRA's alternatives were completely inappropriate.
>
> This is at a time when the SRA is seeking increased powers to impose fines itself. This does not suggest that, if they obtained them, they would use them wisely and proportionately.

9.31 A member of a practitioner forum told a focus group:

> There have been issues with the SRA and its publishing policy for years. They don't seem to accept the need for them to audit the impact of that upon solicitors' capacity not only to get PII (professional indemnity insurance), but to continue trading at all. Where it is published that the practitioner is subject to regulatory action, long before the matter is heard and anything is proven, that sounds the death knell for the individual, irrespective of the eventual outcome. The SRA is adamant that it must do so 'in the public interest'.

9.32 Another respondent pointed out that the current publishing policy had a direct bearing on disproportionality and the LSA's regulatory objectives. His argument was that if the SRA accepts that disproportionality in investigations and interventions affects BME sole practitioners and heads of small firms, it has a duty 'in the public interest' to find out how many such practitioners have had their careers and their lives ruined by its publicity when in fact they are free to practice without any conditions:

> The SRA does not tell the profession or the public how many people whose matters they publish eventually end up cleared of the regulatory matters. We need to know how many of them are BME and how

publishing the fact that they were subject to investigation affected their careers and their lives generally. What message is it sending out to all those BME young people who are joining the profession, if that is how their careers are likely to end? How does that unquestioned practice encourage diversity in the profession?

9.33 A member of a practitioner forum gave the example of a solicitor who is qualified to practise both in this jurisdiction and in Jamaica and who in fact does most of her work in Jamaica. The SRA is said to have published that her practice was the subject of an intervention and in respect of a regulatory matter here 'which is anything but clear cut, and on the face of it looks like another case of bullish over-regulation and an automatic presumption of guilt'. This is alleged to have caused the complete collapse of her practice in Kingston and a stain on her reputation, not just as a lawyer but as a highly regarded and upstanding member of the community there.

9.34 There was unanimous support in one focus group for the view that although solicitors and barristers operate in a competitive legal services market, the entire profession should concern itself with the serious issues of regulatory disproportionality and its impact upon BME solicitors. It was argued that apart from the matter of access to justice, the knowledge that BME solicitors not only have difficulty gaining training contracts, but once in practice are being intervened disproportionately, must be a massive disincentive to those doing legal education and training and wishing to pursue a career as a solicitor.

Conclusions

9.35 These focus group sessions and interviews conducted on the question of regulatory disproportionality and the SRA's interpretation of the regulatory objectives provided us with a useful set of narratives from a range of solicitors. Among them were those who had been subject to regulatory action, solicitors who defend in the SDT and/or provide advice to respondents facing regulatory action and solicitors who had an interest in sole practitioners and small firms and their increasing vulnerability in the legal services marketplace.

9.36 Three key issues raised in those sessions are worthy of careful consideration by the SRA. One is the perception that in pursuing certain regulatory objectives, foremost among which is 'regulating in the public interest', the SRA is operating in a manner contrary to other objectives. This is a matter, which we believe the SRA should address by conducting an equality impact assessment of the impact of its regulatory practice upon the regulatory objectives, including 'protecting and promoting the public interest'. We believe that 'protecting and promoting the public interest' is not limited to defending

those interests from practitioners who are unprofessional, negligent, incompetent or fraudulent, or generally disregarding of the Code of Conduct for the profession, or the Solicitors' Account Rules. It also means, in an open but challenging and competitive legal services market, working with those solicitors' practices that serve vulnerable communities, to help ensure that those communities could access legal services locally and of a high standard. In this respect, the Law Society itself and the SRA as part of the Law Society Group have a responsibility to promote and protect the public interest by working to ensure that those practices are supported in a manner commensurate with the market and societal challenges they face.

9.37 The second and related issue is that of 'parity of arms'. The SRA is clearly able to engage and deploy lawyers to prosecute solicitors in the SDT. There is a belief among those solicitors facing regulatory action and those defending them, from whom we heard, that quite often the SRA's use of such lawyers is disproportionate and unwarranted; that on account of reasons to do with the withdrawal or refusal of insurance cover, respondents are often unable to afford legal representation, but that even in relatively minor cases the SRA fields expensive lawyers to go up against them. OFR will hopefully reduce year on year, the number of respondents the SRA refers to the SDT, but given our findings that BME solicitors are disproportionately referred to the SDT, we believe (as we have argued elsewhere) that the SRA should review its code of referral to the SDT and, with the Law Society, it should consider adopting measures to assist practitioners to access legal representation.

9.38 As indicated in our findings above of 72 judgements passed by the SDT, 40 cases involving White respondents and 32 involving BME…...28% of BME cases ended in ***the suspension of the respondent*** compared with 17.5% in cases where the respondent was White. Given that BME disproportionality exists both in relation to regulatory action and to sanctions, BME access to appropriate legal representation becomes paramount.

9.39 In the case of suspension as an outcome, this is what relevant case law states:

> *Law Society v Salisbury* built on the seminal decision of Sir Thomas Bingham in *Bolton v Law Society* [1994] 1 WLR 512. It would require a strong case, said Sir Thomas Bingham MR, to interfere with a sentence imposed by a professional disciplinary committee. That body was best placed for weighing the seriousness of professional misconduct. The factors, which weighed in mitigation before a criminal court were not to have the same weight before a disciplinary body because the most fundamental object was maintaining the standards of the profession

rather than punishing the offender. Members of the public were ordinarily entitled to expect that a solicitor would be a person whose trustworthiness was not, and never had been, seriously in question. A profession's most valuable asset was its collective reputation and the confidence it inspired. The essential issue is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus ***it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member.*** Membership of a profession brings many benefits, but that is a part of the price." (our emphasis)

[http://regulatorylaw.co.uk/Appeals_from_the_SDT.html]

9.40 Arguably, the consequences of being unable to re-establish a practice when the period of suspension is past, are not just for the individual solicitor and their family, but for the community they serve. Promoting the public interest and the collective reputation of the profession in such cases could have an impact upon the public's access to justice, especially in cases where the solicitors concerned have good reason(s) to contest the decision of the SDT but are unable to do so on account of not being able to afford legal representation.

9.41 The third key issue, also related to the other two, is that of publishing. Ouseley, Pearn Kandola and now this Report all provide evidence to the SRA of disproportionality both in the number of BME respondents against whom cases are raised and in regulatory outcomes. In our view, the arguments presented by solicitors in the focus group and follow-up interview sessions warrant the SRA's careful consideration. The SRA should monitor by ethnicity and gender the impact of the application of its publication policy and should send that monitoring data to the SMT, the Equality Diversity and Inclusion (EDI) Committee and the Equality Implementation Group (EIG). Specifically, the monitoring should tell how many BME solicitors facing regulatory action have had their matter published and been subsequently cleared of any breaches (by SRA internal adjudication, SDT, or High Court); how long after publication they were cleared and what has been the impact upon their ability to practise, or upon their firm.

Recommendations

- The SRA should conduct an equality impact assessment (EIA) of the impact of its regulatory practice upon the regulatory objectives, including 'protecting and promoting the public interest'.

- Against the backcloth of that EIA, the SRA should engage a combination of stakeholders , the Equality Implementation Group (EIG), the Law Society, the SRA, the Legal Services Board (LSB), and the Equality and Human Rights Commission, in auditing its regulatory outcomes, having regard to the requirements of the Public Sector Equality Duty.

- The Law Society and the SRA as part of the Law Society Group should promote and protect the public interest by working to ensure that solicitors' practices that serve vulnerable communities are supported in a manner commensurate with the market and societal challenges they face, so that those communities could access legal services locally and of a high standard.

- The SRA should monitor by ethnicity and gender the impact of the application of its publication policy and should send that monitoring data to the SMT (the executive group), the Equality, Diversity and Inclusion Committee and the EIG. Specifically, the monitoring should tell how many BME solicitors facing regulatory action have had their matter published and been subsequently cleared, of any breaches (by SRA internal adjudication, SDT, or High Court); how long after publication they were cleared and what has been the impact upon their ability to practise, or upon their firm.

10.0 SRA - Regulatory Approaches to Big and Small Firms

10.1. The vast majority of the solicitors who are subject to regulatory action are sole practitioners and the vast majority of solicitors' firms that are intervened are small firms with less than ten and often no more than four partners. BME solicitors are over-represented in both categories, hence the correlation between ethnicity and regulatory action. In discussions about the remit of this review, the view was often expressed by practitioner networks that the SRA does not 'go after' the larger firms, especially 'magic circle' and other 'big city firms'.

10.2. Asked to comment upon the relationship big firms have with the SRA, representatives of magic circle and big city firms told us:

- There can be no doubt that large firms and small firms are dealt with differently, in a way which causes great resentment. There is a very strong perception that the SRA will go after the easy targets and that they are wary of taking on the larger firms. On the other hand, it is undoubtedly the case that large firms and small firms present different regulatory issues, so different treatment is to some extent to be expected.

- The SRA 'Handbook' – its suite of regulations – is structured on a 'one size fits all' basis, which is slightly surreal. Of course some elements are relevant to all solicitors and to all regulated professions. Regulatory requirements vary only slightly as between professions, and fundamental principles tend to be common to all; typically integrity, professional competence, and engendering trust in and maintaining the reputation of the profession. But when it comes to the detail, and importantly to enforcing the rules, high street practices have practically nothing in common with the city and international firms. In truth, to the city firms, the SRA is largely irrelevant save for being an occasional annoyance. Left to our own devices we would police ourselves. In any event, we are effectively policed by our clients, without the need for any outside agency. And we need to police ourselves for the sake of our own reputations.

- As far as BME representation is concerned, the diversity initiatives taken by the Law Society and by BME practitioner networks themselves have thrown up some fantastic examples of good practice. Some big firms are really leading the way and raising the

bar for the rest of us. What I would say, though, is that even if our ethnic profile is not as representative of solicitors in the profession, other than us white British, the BME practitioners we have, all enjoy the protection our infrastructure affords to everybody in the firm. So, BME solicitors are no more exposed than anyone else. They also have access to colleagues in a range of departments and all levels of seniority to whom they could go to share issues, raise concerns or do joint problem solving. If you were to research the number of BME solicitors in big city or magic circle firms who get intervened or investigated by the SRA, I am sure you would find that their number, relative to the overall number of non-regulated BME solicitors across those firms, would be proportionate as compared with the number of White solicitors who are intervened or investigated.

- The question you pose about BME representation in big city and international firms in the context or regulatory disproportionality is interesting. I agree with the view that BME solicitors have greater protection in large firms than as sole practitioners and heads of small firms. As to why there are not more of them in large firms, I suppose that has to do with a whole range of factors: education and training, access to training contracts, firms' recruitment practices, etc. But, these are not regulatory issues; they are what some people refer to as 'front end' issues which many firms don't get exercised about because they have such a pool of high performers to choose from. In terms of Equality and Diversity, I suspect that most firms would argue that the challenge is to ensure there are more high performing BME people in the pool from which they select. That is a schooling and legal education and training issue. Firms will recruit on merit, relative to their needs and the services they provide to the market.

- The perception that the SRA adopts a 'light touch' approach to regulation when it comes to large firms, international or otherwise, is not entirely accurate. When the SRA has cause to investigate a large firm it is really a big deal and more often than not the publicity alone impacts upon that firm's position in the market, never mind the regulatory outcomes. Structurally, however, high street practices are much more exposed. Some large firms are really corporations with a massive infrastructure and divisions of responsibility of the kind that most high street practices simply cannot afford and would not need. Defaulting on regulatory compliance requirements, whether that is to do with accounts, or diversity monitoring, or client care would indicate a measure of negligence that the firm would deal with it long before it became an

> issue for the SRA. It is for those reasons that most magic circle and big city firms are hardly conscious of the SRA, unless we receive consultation documents or our views are being sought on particular issues. We certainly do not find ourselves looking over our shoulders in case the SRA decides to do a monitoring visit, or to send in a forensic investigator.

10.3 We spoke with SRA Relationship Managers about their experiences of the SRA's relationship with small and large firms. One of those officers reported that they had accompanied others on a visit to one of the magic circle firms and they were surprised to see the differences in how the SRA related to those firms, compared to how it deals with small firms. The person pointed out that the SRA showed great deference to the magic circle firm in question and the senior partner concerned. For example, it had been difficult to fix up a date to meet with the relevant person and it was evident that the person was not prepared to be flexible about the date. Nevertheless, the SRA was very accommodating even though the senior partner was not being particularly helpful.

10.4 The Relationship Manager felt that when the meeting eventually took place it was clear that the SRA officers and the people from the magic circle firm were not in a meeting of equals. The senior partner turned up to the meeting with the Head of Human Resources (HR) and said that he would not be able to remain in the meeting as he had some urgent business to attend to. He promptly left the room and the meeting proceeded with the Head of HR alone. After a period of less than an hour and even though a dialogue was taking place about the issues under consideration, the Head of HR abruptly stated that they could not spare any more time and the meeting had to come to an end.

10.5 The observation the Relationship Manager made, was that the SRA would not have been so deferential and would not have permitted this from a small firm. The regulator would have been more vocal in expressing their disappointment had it been a solicitor in a small firm who was acting in that way. When asked as to whether this situation was prior to OFR, the Relationship Manager stated that OFR did not change the fact that the SRA was to some extent intimidated by the very large firms that were well connected and powerful.

10.6 One regulatory lawyer who has acted both for small and large firms told us:

> 'My hypothesis is that at an instinctive level the SRA is more ready to believe what they are told by a large firm than by a small firm or an individual. When dealing with individuals and small firms it is my impression that the SRA 'defaults' to disbelief and suspicion, whereas factual accounts and representations are more likely to be accepted at face value when made by a large firm. I have a current example of a

large firm reporting an individual partner, who argues that he is being made a scapegoat and that this is a deliberate diversionary tactic on the part of the firm, to distract the SRA from looking into the firm's own problems. The SRA pursued the allegations made by the firm against the partner with vigour, though the investigations were ultimately abandoned. Counter-allegations by the individual that relatively minor faults which he admitted actually represented, as he had lately discovered, an endemic practice across the firm, which was potentially much more serious because they appeared therefore to be deliberate firm's policies rather than an individual's mistakes, were ignored and not even investigated'.

10.7 Another solicitor told the focus group:

> There is something else that affects small firms and not large ones. Before 2010, a minor fault would be acknowledged and dealt with by a rebuke or reprimand, which was a private matter. The complainant, if any, would know of it, and it was discloseable if one applied for judicial office (when it was likely to be ignored), but otherwise it had no adverse consequences. The right-thinking members of the profession learnt that they had made a mistake and were suitably chastened; the others tore it up and forgot it. Now however rebukes are published on the SRA website, as are decisions to prosecute, even if the matter remains fully contested. Further, commercial pressures and competition in the profession are more acute; there has been a proliferation of accreditation schemes. The Professional Indemnity Insurance market for small firms is very tough.

10.8 We asked the focus group to comment upon the following issue which was very apparent to us as we reviewed the files. Despite the fact that sole practitioners and small firms were very susceptible to regulatory action, there appeared to be a lack of trust between practitioners and the SRA, to the extent that solicitors were reluctant to be proactive and report difficulties to the SRA, let alone breaches, minor or more serious.

10.9 One solicitor stated:

> There is a lot of distrust in the profession and fear of the SRA, and there are two stages to that. The first stage is fear that the SRA will react intolerantly and disproportionately. The fear is that if you let them in the door for one thing, however minor, you risk them going through the whole house, in a manner of speaking. The second stage is fear that anything the SRA might do, even if it is at the low end of the scale, such as a rebuke, could well have consequences for the business far beyond what the SRA might envisage, or care about if they did envisage it. There is a real risk of increased PII premium, loss of lender

panel status, loss of accreditation including CQS – and, to the extent that this does not happen, solicitors fear it might. One of the consequences of this is that young members of the profession with a minor black mark may find themselves unemployable and their career prospects could be ruined just as they are starting out in the profession. This does not affect large firms at all. They do not need membership of accredited schemes or kite marks to attract and retain their clients.

10.10 Another solicitor added:

> An additional small firm issue is the stress of dealing with any SRA enquiry or investigation. Demands can be oppressive and deadlines short. Because of the lack of trust and the perception of the SRA as a heavy-handed regulator (constantly reinforced by the SRA's own rhetoric; there is rarely a public announcement of any kind without a reference to "robust enforcement action"), it is hugely stressful just to receive a letter. It is difficult to do oneself justice without expensive assistance. If responses are rushed, contain mistakes, miss the point, are incomplete or are poorly presented, they may make things worse or be perceived to be lacking in credibility.

10.11 A solicitor who had been intervened noted:

> This is accentuated by the fact that solicitors experience the SRA as having a presumption of guilt as its starting point. The solicitor therefore has to prove s/he is not guilty as charged, even when the event is the result of a simple oversight that could readily be rectified. When you are a sole operator or in charge of a very small team and you're concerned about the bills, such requirements are an added burden. Some people are reluctant to ask for more time to meet the SRA's demands out of fear that that might be interpreted as evidence of a complete lack of systems, or even worse as evidence that you are trying to cover up something. None of us here is against upholding standards and safeguarding the reputation of the profession, but I am talking about matters which have absolutely no client impact and would be of no interest to the public whatsoever.

10.12 Given what they shared, we sought respondents' views about the changes they expected under OFR and were told:

- Risk management is all good and well, but we would be back to square one if the only approach to this is to deal with individual practices. Sole practitioners and small firms have got a number of things in common, by their very nature, and those are the things

that make us vulnerable to regulatory action. Many of us are trying to cope in an increasingly difficult legal market and that defines our operational context. Helping me to identify and manage my risks is good, but I want to see the SRA showing a greater appreciation of the systemic issues that constrain solicitors like us. It is not enough for the SRA to pay lip service in acknowledgment of these issues. If it acknowledges them, it should show how that is influencing the way it regulates this vulnerable sector of the profession, rather than talking about 'robust enforcement' every minute. I believe there is a fundamental difference between regulating the profession and regulation against the profession. Our experience is principally of the SRA regulating against the profession.

- The OFR approach to supervision should help to break down the fear we talked about before and improve the relationship between practitioners and the SRA. The approach should be geared not only to minimising risk and avoid breaches, but to assisting practices to give a higher standard of service to clients and operate more successfully as businesses. That would be evidence of the regulator working with the profession to deliver the regulatory objectives.

Conclusions

10.13. The respondents in our sample and those who were involved in the review overall were from sole practices or small firms, barring 1 who was in an 11 to 30 partner firm and another in a 31 to 50 partner firm. It was not part of our remit to discover how many large firms were taken through adjudication or had been referred to the SDT and with what outcomes, in the period covered by this study. We therefore, did not gather data on, for example, the number of big city, international or magic circle firms that had been taken through the regulatory process in that period, the ethnicity and gender of the solicitors acted against in these firms, or the events that triggered SRA action. The SRA confirmed what we were told, i.e., that the number of large firms investigated or intervened in any one year is small and such intervention invariably involves complex matters requiring teams of investigators. It would have needed additional terms of reference and matching resources for an exercise that would have enabled this review to establish whether there is consistency in the way the SRA deals with magic circle and big city firms as compared with the way it deals with small firms, or consistency in its treatment of BME respondents as opposed to White in those larger firms.

10.14. The testimonies we report above of solicitors from large firms as well as from sole practitioner/small firms suggest that both groups of practitioners agree that the relationship between the SRA and large firms and the nature and level of the regulator's engagement with them is significantly different from that with sole practitioners and small firms.

10.15. We did not organise focus group sessions specifically for BME solicitors in large firms to test whether, what partners in those firms told us about the level of support available to BME solicitors and the protection afforded by the infrastructural arrangements in those firms, accord with their experience. What we can say, however, is that there is a view that when one is considering the issue of regulatory disproportionality as related to ethnicity, BME solicitors in large firms could virtually be left out of the discussion as that is not a group that is vulnerable to regulatory action. Not only are such firms seldom subjected to investigation or intervention, BME solicitors would not be as exposed as individual practitioners, in the way that their counterparts in sole practice or in small firms are. In addition to which, is the fact that there is not a concentration of BME solicitors in large firms.

10.16. Given the nuances of size, infrastructure, the protection that organic systems and access to support and guidance provides, on-the-job continuous professional development, access to training and mentoring, all issues which distinguish BME practitioners in large firms from those operating as sole practitioners and in small firms, the SRA should monitor its regulation of large firms for any impact upon BME practitioners in such firms. As a baseline, the SRA should publish monitoring data on BME solicitors in magic circle, big city and international firms.

10.17. The SRA should use the diversity monitoring data from big city and magic circle firms to assess the rate of entry and level of retention of BME solicitors to and in those firms.

Recommendations

- The SRA should monitor its regulation of large firms for any impact upon BME solicitors in such firms. As a baseline, the SRA should publish monitoring data on BME solicitors in 'magic circle', big city and international firms as compared to those in sole practice or in small firms

- The SRA should use the diversity monitoring data it collects from big city and magic circle firms to assess the rate of entry and level of retention of BME solicitors to and in those firms. This data should

include their policy in respect of the awarding of training contracts and their breakdown by ethnicity of the applicants of that policy.

11.0 The Law Society, the SRA and Regulatory Disproportionality

> 'I don't see why black or coloured lawyers should get any preferential treatment. They are in the same situation as everyone else - if you don't like it go and start your own firm'.
>
> - Anonymous (on-line comment on the 2013 Diversity League Table)
>
> http://www.lawgazette.co.uk/5038711.article

11.1 In December 2004, Sir David Clementi published his *Review of the Regulatory Framework for Legal Services in England and Wales*

> One of the report's main conclusions was that the governance arrangements the Law Society and the Bar Council had in place then, were "inappropriate for the regulatory tasks they face". Consequently, Clementi recommended that the regulatory and representative functions of front-line regulatory bodies should be split. The Legal Services Act of 2007 established the SRA as the independent regulatory arm of the Law Society, thus replacing the Regulation Directorate that had discharged the Law Society's regulatory function. The key division within that directorate was Investigation and Enforcement (I&E).

11.2 In 2005, an external evaluation of the Law Society's implementation of its equality and diversity policy and strategy reported as follows:

> 'The Law Society has made considerable progress in mainstreaming Equality and Diversity through its activities across the organisation and in promoting E&D across the solicitors' profession. 85% of its activities have been completed to time, with the rest expected to be delivered on target.
>
> 'The Society has in place excellent 'Guidelines for Identifying and Assessing Equality and Diversity Implications'. Its internal monitoring and assessment processes have been strengthened by the availability of more extensive baseline data than was the case previously, as highlighted in Lord Ouseley's report.
>
> 'The progress made by The Society in the last 18 months is reflected in the assessment of the activities that have been undertaken across the organisation. Equality and Diversity principles are clearly becoming

embedded and the outward facing parts of the organisation are more alert to the E&D implications of their remit and their practice'.

11.3 Dealing with the Law Society's regulatory function, the report noted:

'The Law Society recently commissioned an independent consultant to conduct an initial race impact analysis of the monitoring data collected by Investigation and Enforcement (I&E). It was concerned about the results of its own analysis of that data which revealed that Black and Ethnic Minority practitioners are disproportionately represented in I&E intervention decisions.

The consultant has recommended, among other things:

- Equality & Diversity learning and development for staff within I&E, and
- Comparative research into the experiences of BME practitioners subject to I&E interventions compared to that of white practitioners.

The Regulation Directorate is to be commended for commissioning this research and demonstrating its commitment to promoting equality and diversity.

11.4 The evaluation report recommended that:

In considering the consultant's recommendations and the further work that might be undertaken, I&E should seek to establish:

- Commonalities in the factors giving rise to I&E interventions involving BME practitioners,
- The profile and history of the legal practices in which they operate,
- The number of BME practitioners subject to intervention decisions who are from legal practices that they own and control or that are owned and controlled by other BME practitioners,
- The number of Registered Foreign Lawyers subject to I&E intervention decisions relative to their overall numbers in legal practice,
- Whether there are Professional Ethics issues that arise recurrently in cases involving BME practitioners and the context in which they arise,
- Support and professional guidance mechanisms available to them and the use made of them,
- The extent to which similar or near identical precipitating factors involving white practitioners would trigger I&E intervention,

- Comparative assessment of the manner and style of investigation I&E conducts with BME practitioners and with White,
- The level of cultural competence and E&D awareness of staff within I&E, and
- Whether the level of over-representation and the analysis of factors triggering I&E intervention evidence point to the need for specific guidance for BME practitioners and other groups operating in similar contexts.

11.5 The report further recommended that:

- Decisions with respect to an Equality and Diversity competence framework and how that sits with Legal Education and Training, Staff Appraisal and Performance Monitoring, (should be) arrived at before the debate regarding mandatory E & D training gains momentum.

- An E&D competency framework for managers and HR staff (should) be developed that could identify the criteria such staff should satisfy as evidence of professional competence to manage a diverse workforce.

Source: Equality and Diversity Policy and Strategy Interim External Evaluation Report (2005) - Professor Gus John

11.6 Even before it came into being as a separate entity in January 2007, therefore, the regulatory arm of the Law Society was generating concerns about the number of BME practitioners who were the subject of investigation and intervention decisions. Given the portfolio of responsibilities managers in the Regulation Directorate and across the Law Society were discharging and their potential impact not only upon a diverse workforce, but in the case of Intervention and Enforcement, upon the profession generally, the report highlighted the importance of 'professional competence to manage a diverse workforce'.

11.7 The SRA regulates solicitors, other authorised professionals and the firms they work in throughout England and Wales. Despite the fact that the matters

highlighted earlier in this Report were the subject of growing concern to the Law Society as early as 2004, on becoming a free-standing regulator in 2007, the SRA seemed to send out one emphatic message, i.e.:

> *The SRA regulates firms and individuals in the public interest. This means setting the minimum professional standards that solicitors should adhere to so their clients - as consumers - get the service they expect. When these standards are not met, professional sanctions are imposed to act as a deterrent*.

11.8 Neither the Law Society, the solicitors' profession it represents, or its BME practitioners in particular were told how, in concrete terms, those concerns were being reflected in the manner in which the SRA was pursuing the regulatory objectives and meeting the requirements of the Race Relations (Amendment) Act 2000.

11.9 By its own admission, as we have seen, between 2007 and the introduction of OFR in 2011, the SRA proceeded to apply a rules-based, tick-box approach to regulation, in the manner of a blunt instrument that had little regard for the operational challenges faced by sole practitioners and small firms, that made them vulnerable to regulatory investigation and intervention. The factors listed above constituted unfinished business for the Law Society's regulatory arm. Yet, they do not appear to have been factored into the SRA's strategic priorities in 2007 as an entity recently independent of the Law Society.

11.10 Practitioner networks, including BME continued to raise those matters with the Law Society not least through their membership of its Diversity Forum and its Equality & Diversity Committee. But, while the Law Society worked with those stakeholder forums to implement and refine its E&D strategy and address their concerns, it appears to have had little influence on how the SRA chose to address issues of regulatory disproportionality and its approach to regulating vulnerable sections of the profession.

11.11 In due course the SRA commissioned studies, as we have seen, in order to establish whether there is evidence of disproportionality and what its causes might be.

11.12 For its part, the Law Society continued its engagement with members of practitioner forums/networks and to register their concerns about regulation and what they identified as:

- over-regulation and the SRA's 'public interest' justification for its response to events, even when the matter has no impact upon consumers,
- the Solicitors' Assistance Scheme; the service it provides to the regulated community; the nature of its relationship with the SRA; the SRA's referrals of respondents exclusively to the SAS even though the latter states on its website that *'The Solicitors' Assistance Scheme is independent of the Law Society and the Solicitors Regulation Authority';* the experience of BME solicitors that on referral to the SAS, cases tend to end up with a particular firm, and
- BME disproportionality and the impact of regulatory outcomes upon BME solicitors.

11.13 The Law Society told this review that it shares the above concerns. It believes that the impact of regulation upon sole practitioners and small firms in the context of the challenges and risks they face need to be closely examined, not least in relation to the SRA's approach to the regulatory objectives. Any correlation between BME disproportionality and over-regulation should be considered for its impact on 'access to justice' for the often vulnerable client groups who look to BME solicitors for legal services.

11.14 The Law Society has perhaps expressed its concerns most clearly in its response to the SRA's consultation on its proposals for increasing its fining powers under OFR. The Law Society published its response which included the following:

The Law Society does not believe that this is the right time for the Solicitors Regulation Authority's (SRA's) fining powers to be increased. We share the Legal Services Board's concerns about the functioning of the enforcement team within the SRA. There continues to be a lack of transparency about the operation of the enforcement team which makes it impossible for the Law Society to support any increase in the powers available to it.

11.15 In response to the SRA's consultation question:

Do you have any other views about the issues or risks that might flow from an increase in our in-house fining powers?

The Law Society stated: 'Given the concerns regarding the work of the enforcement team and, in particular, the transparency and consistency of decision making there are clear risks that solicitors will face disproportionate sanctions. We are also concerned that the SRA's approach to calculating fines is substantially different to that of the Tribunals. This inconsistency is likely to lead to a high level of appeals to the Tribunal and negate some of the cost savings claimed by the SRA'.

11.16 And in answer to the question:

Do you consider that an increase in our fining powers is likely to have a negative impact upon a specific section of the legal service market and in particular a specific equality strand?

The Law Society stated: 'The SRA's information indicates that BME solicitors are disproportionately represented in its enforcement action statistics. Therefore we are surprised that no further analysis of the effect of these changes on BME solicitors has been undertaken'.

http://www.lawsociety.org.uk/representation/policy-discussion/proposal-to-increase-the-sra-s-internal-fining-powers/

11.17 This reasoning mirrors our concern above, about using regulatory history as a factor in determining whether or how to prosecute cases, especially as:

'Our data analysis… shows that Respondents who had no previous conditions attached to their practising certificate were more likely to receive less severe sanctions as outcomes of the SRA adjudication process, i.e., on the lower end of the scale: from 'no action' to 'rebuke'. Those who already had conditions placed on their PC were more likely to have further conditions placed or to be referred to the SDT'.

11.18 If the SRA is able to impose larger fines (beyond the current limit of £2,000) and can do so as an alternative to prosecuting a case in the SDT, and if previous regulatory history is a criterion for determining the level of fine, then all of those solicitors whose regulatory history arose from the application of *'the rules-based, tick-box approach to regulation'* and the resultant imposition of sanctions as deterrents, are likely to be doubly disadvantaged.

11.19 Having regard to all the systemic and contextual factors associated with disproportionality in the number of events reported and investigated in BME practices, the Law Society as the body representing the profession in all its diversity, has been considering the implications of such disproportionality for the regulatory objectives. As far as we can tell, its focus has been twofold:

- Working with practitioner groups to explore issues around regulatory disproportionality, examine the measures that would help solicitors identify and manage risk and enhance their competence at regulatory compliance and
- Providing services, courses and CPD programmes that solicitors could access to improve their skills in the management and delivery of legal services.

11.20 In addition to planned sessions for members of practitioner groups and liaison meetings with practitioner forums (e.g. sole practitioner groups, small firms forum, BME practitioner networks, and the new Ethnic Minority Lawyers Division), the Law Society provides a range of services and courses which it is seeking to get more BME sole practitioners and small firms to access for example:

- Risk and Compliance Service,
- Risk Consultancy Service,
- Law Management,
- 'Connect to Law',
- Small Firms Service,
- Practice Advice Service,
- Law Society Consulting,
- CPD Centre & Course Directory,
- On-Line Courses, and
- Webinars.

Conclusions

11.21 Without gainsaying the benefits sole practitioners and heads of small firms could derive from those services and courses, our review of files suggests that

the Law Society should pay close attention to the wide range of practice challenges, as well as challenges in the legal services marketplace that render BME solicitors vulnerable to events being triggered, cases raised or complaints lodged. The anonymous comment quoted at the top of this chapter is typical of those who believe that BME lawyers are pleading for special treatment and should set themselves apart if they cannot accept what everyone else in the mainstream takes in their stride.

11.22 There is an even greater danger in all this, however. Whether it be BME over-representation in unemployment statistics, school underachievement, 'Stop & Search' or regulatory disproportionality, there is a tendency for some people to establish a causal, essentialist link between racial origin and the particular disadvantage that those sections of the BME population suffer.

11.23 As the representative body for the solicitors' profession, the Law Society must ensure that every effort is made to provide the available evidence to the profession and to the society that BME disproportionality has to do with the origins of risk, the incidence of breaches and how the SRA chooses to regulate, rather than the 'natural or genetic propensity' of BME solicitors to be incompetent, to break rules, act fraudulently or not cooperate with regulatory authorities.

11.24 It is clearly not enough for the SRA to satisfy itself that BME disproportionality is not caused by practices that amount to racial discrimination, or by the operation of discriminatory policies. As we observed elsewhere in this report, the impact of regulatory disproportionality on 'access to justice' for those vulnerable communities served by many BME sole practitioners and small firms, and on the objective to 'encourage an independent, strong, diverse and effective legal profession' is such that the SRA and the Law Society must be seen to work with BME solicitors to eliminate this disproportionality.

11.25 The best quality assurance, inspection or regulatory bodies are ones which both inspect or regulate and advise as to measures to eliminate weaknesses, push up standards and enhance performance 'in the public interest' and for the integrity and reputation of the service, profession or entity. This calls for collaboration between the Law Society and the SRA to devise and implement strategies for eliminating disproportionality.

Recommendations

- The Law Society should:
  - Consider providing modular training for sole practitioners and heads of small firms on:
    - Management,
    - Leadership,
    - Recruitment,
    - Due diligence,
    - Practice management, and
    - Financial probity.

  - Explore what positive action provisions can be made for BME solicitors and sole practitioners to enable them to deliver the best possible services to their communities within the challenging environments in which many of them operate.

  - Consider the extent of practical support that can be provided, including the provision of more extensive toolkits, or guidance on the challenges of setting up and running small firms. This should include guidance on the Regulations and requirements concerning setting up sole practice or small firms and the capitalisation rules, to ensure that solicitors seeking to set up firms have sufficient knowledge and experience of the regulatory rules and that they are adequately capitalised to be able to cope with the financial pressures that small firms face.

- The Law Society and the SRA should:

  - Conduct a mapping exercise using surveys and focus groups in order to gain as comprehensive an understanding of the many challenges facing solicitors and firms serving vulnerable communities, including the challenges in the legal services marketplace, such as criminal legal aid and alternative business structures,

  - Jointly seek out legal insurance providers who can provide legal insurance at preferential rates for solicitors who are subject to regulatory proceedings,

  - Give consideration to whether legal insurance can be provided as part of the practising certificate fees,

- Develop closer relationships with practitioner networks/forums and provide opportunities for them to contribute to the strategic policy development of the respective organisations and especially their agenda to combat unlawful and institutional discrimination, and

- Provide closer scrutiny of persons applying to set up law firms, in order to ensure that the solicitors concerned are not just properly capitalised, but they have the necessary experience to run a law firm and fully understand the onerous regulatory requirements they would need to satisfy.

➢

➢ The relevant departments of the SRA that carry out regulatory investigations should have regular liaison with the representative groups and individual BME and sole practitioners and small firm solicitors.

➢ The SRA should hold regular training sessions targeted at the profession as a whole, led by the investigative departments, to explain what they do, how the SRA's pursuit of the regulatory objectives intersects with its actions to meet the Public Sector Equality Duty and make clear the obligations on solicitors.

➢ The SRA should examine its relationship with organisations that provided advice and assistance to solicitors, as a consequence of the SRA pointing them to such organisations, during the 2009-2012 period covered by this review, in order to assess the quality of the support provided, the way solicitors were dealt with and whether individuals in some of these organisations may have abused their position and exploited vulnerable solicitors.

➢ The SRA and the Law Society should give greater thought to the underlying objectives and rationale of the regulatory process to ensure that the right balance is struck between the punitive, deterrent, declaratory, compensatory and restorative objectives of the sanctions and options for dealing with regulatory breaches.

➢ The ‘public interest’ definition should be reviewed to ensure that the impact of regulatory actions on particular communities (including communities from the protected characteristics) or locales is taken into account.

- The SRA should undertake some further work on trying to identify cultural or religious practice or observances that may impact on the ability of solicitors to satisfy some of the current regulatory obligations and consequently whether some of those rules need further consideration to see if they can be finessed.

12.0 Respondents' Access to Legal Advice and Representation

The Solicitors Assistance Scheme

12.1 The terms of reference required that this review examine "The impact of respondents being represented or not, including whether and if so at what stage they accessed legal advice as to their position; make recommendations as to how to encourage such advice to be accessed and from where".

12.2 The review of the case files in our sample has revealed that in the period covered by the closed cases we examined (i.e., up to 2011), once a complaint was received by the SRA and a case raised, especially if a serious breach was alleged, the SRA would 'draw the respondent's attention' to the Solicitors Assistance Scheme (SAS) to seek advice and/or discuss their need for representation. In relatively few cases, respondents were also pointed to LawCare, but it would appear that the majority were provided with information about the SAS over the phone or in writing. In a number of cases we examined, what happened once respondents contacted the SAS, became a matter of such controversy, that we consider it to be within the terms of reference of this review, to examine what the SAS is and how it operates.

12.3 In its paper *Disciplinary Action by the SRA: An Overview* (September 2012), the SRA states:

> 'It is a truism that lawyers acting in civil or criminal proceedings consider those proceedings generally to proceed more effectively if their opponents are represented by lawyers rather than acting in person. Those who bring SDT proceedings for the SRA have the same view. Solicitors are often represented at the SDT although the SRA has not seen any statistics as to frequency.
>
> In the absence of a defence fund, the SRA draws solicitors' attention to the Solicitors Assistance Scheme, which was historically administered by the Law Society but is now separate. The SAS comprises many highly experienced practitioners although there is, no doubt, a range of expertise. Its work in terms of client/solicitor interface is of course not generally visible to the SRA because of legal professional privilege'. (page 3)

12.4 Further, the SRA ends its guidance note: '***If we are investigating you'…*** with advice on 'Where to find help':

You can seek independent advice at any time during the investigation. If you are a solicitor, the Solicitors Assistance Scheme has a list of members who offer advice and representation to solicitors who are being investigated.

12.5 In the light of the file review and recurring issues we encountered such as: respondents' access to legal advice and support, the relationship with the SRA once some form of regulatory action commences, the withdrawal of support/cover by professional indemnity and other insurers and other related issues, we determined that we would seek an interview with someone from the SAS to assist us in gaining a better understanding of these matters and about the way their scheme relates to the SRA as a regulator. It appeared from the file review that, consistent with the advice in the foregoing paragraph, solicitors who were the subject of complaints were invariably recommended to contact the SAS rather than other sources of advice.

12.6 We were very fortunate to receive an offer from a senior manager of the SAS to assist us once we were able to brief her on the remit and scope of our review. We are grateful to the SAS for the wealth of information it provided to aid our understanding of the origins of the scheme and how it operates.

12.7 The SAS is run by a board of solicitors and panel membership is voluntary, so a solicitor is admitted to the SAS panel by submitting a written application. They are asked to fill in a questionnaire and to sign an undertaking that they have the experience they claim to have, that they are appropriately covered by indemnity insurance and that they will give people who come, or are referred to them under the Solicitor's Assistance Scheme, an hour's free advice in every case, whether that be by telephone, in person or through email or correspondence.

12.8 When they get admitted to the panel, they get added to a rota and the Scheme is run on a strict rota system. The SAS therefore has a complete list of panel members, with lists of where they are in the country and their relative expertise. When an enquiry comes in, or solicitors are referred to the Scheme, the current administrator, who is also a volunteer, would deal with it in the first instance. There used to be a full time administrator, but the Scheme can no longer afford it, so consequently, oversight of the Scheme is largely in the hands of the senior manager who runs the rota.

12.9 The SAS described the process of responding to inquirers:

> 'If SAS gets an email or telephone call, it could be any one or number of events, or it could just say I need some help. SAS would inquire as to what is the general area of the caller's problem and whether they want a solicitor who is near them, or would prefer to have someone out of their area. SAS would then send them two names and tell them to

contact the solicitor directly, informing them they had been referred by the SAS and they are then entitled to the hour's free advice from that solicitor. Effectively, what SAS does is give names of experts who are experienced in advising solicitors in that particular area'.

12.10 Most of the SAS expertise is focused on disciplinary matters. The scheme has a breadth of expertise as follows: disciplinary, compliance, and specific intervention and practising certificate expertise, but it also covers things like employment, partnership dispute, more general practice management matters, and discrimination. Discrimination generally falls under the employment head, because it tends to be this area that generates the most discrimination claims. The person phoning is given the next two names on the list and it continues down the rota in that order.

12.11 When the solicitor gives the first free hour, if during that period they discover that, what the practitioner seeking advice needs, might be delivered more appropriately by someone else, they discuss this with the caller at that stage. It is the caller's choice who they go to. If the solicitor is not happy with the names they have been given, they are advised that they can come back and will be given other names.

> 'The people they are sent to are all practising solicitors and are all bound by the same obligations. They are all experienced in dealing with regulatory matters and having an hour's free advice out of your day as a solicitor, if it is something you should not be dealing with, it is going to take you longer. It is a great deal easier to say actually you would be better off with somebody whose specific area this is. The SAS' reasoning is that there is absolutely no commercial point in a solicitor taking on a prospective client in an area that is not within their expertise'.

12.12 The SAS sees itself as 'a valuable resource because [its] service is comparable to legal aid if you don't know where to go':

> 'The SRA is coming at you and it can appear that they are bullying you as they have got all of the power and you have nothing and have never had to deal with that before. It can be a very daunting experience, not always but sometimes, and the stress people go through is absolutely immense. It's incredible and just knowing that they have got somewhere to turn, someone they can pick up the phone to who can say: yes, there is someone who can help.
>
> 'That does help and I think it is very positive that the SRA sends out the details of the SAS'.

12.13 The SAS has about 48 panel members on its rota at any one time and they are distributed geographically. The majority are in London, as the city with the

biggest population; there is a Midlands based group; a Manchester based group and others further North; there are a couple in Wales. In addition, London based panel members will go further afield as necessary.

12.14 The SAS regards the regulatory area as being very much about 'the balance of power' and sees that balance as being tilted sharply on the side of the SRA. As the SAS sees it, *'it is power that is open to abuse, if not to tyranny and it can feel like that to the person under investigation'*.

12.15 The SAS states that on the question of the timeliness with which solicitors seek advice when the SRA comes knocking, and whether or not they adopt a co-operative or adversarial approach to the regulator, for the most part they help people make choices that best suit the situation they are in. For the most part, once a solicitor has taken advice for their free hour, they will come to a better understanding of their situation and realise the benefit of advice and representation and will engage one of the SAS panel members to act for them.

12.16 This assumes they can afford it, but that is a matter for negotiation through the process. It is the SAS's experience, however, that those who do have representation, tend to find the process slightly less painful and they come out with a better result. Those who do not engage at all or those that engage in the wrong way, with excessive belligerence or alternatively complete submission, do potential harm to their case.

> 'We have had people who have had been interviewed by the SRA and the interviews that the regulator does can be quite aggressive. A few years ago the SRA would say to people "do you accept that this is a breach of Rule whatever it is" and we would complain about that a lot because they are asking people to make admissions early on at a recorded interview. No notice had been given of the questions that were likely to be asked and no access to the files is granted. Now where that has happened with us, someone from the SAS has been present at the interview, or we represent clients as well through my firm. Where I have been to a forensic investigation interview, we have specifically agreed with the SRA in advance that they will stop the tape, leave the room and allow me to consult with clients about questions so that we can take instructions. They have backed down on some of their demands for admissions because we can intervene and say "it is not appropriate for you to seek admissions, we do not have the full findings. If you ask that question in writing we will be able to consider it with the benefits of the full facts. An admission now isn't worth it". The thing is once an admission has been made at an early stage it's then harder and harder for a solicitor to back away from it. They feel under a great deal of pressure, especially when the SRA keeps insisting: "don't you accept that that's a breach". But, I think it's changing. I think

it is changing for the better and moving away from those sorts of practices.

But, there is still the danger of too much submission too early on, because you find people who have made submissions and said "yes, I am sorry" and turn their hands up, but actually when you analyse the position a bit more closely they may have admitted to the wrong thing or they may have made more admissions than they should, just because they are made to feel like criminals. The complaint that we consistently get is that we lawyers treat criminals better than we treat solicitors under investigation and obviously, commercially and based on common sense, the counter argument to that is that as a solicitor you should have a reasonable working knowledge of the law and practice. It shouldn't be as easy to intimidate you as it is to intimidate somebody uninformed, but sadly it often is and we are talking about stressed out busy practitioners. The SRA come in and they often want everything at very short notice and the solicitor is totally out of his depth, panicking completely and being told he has breached. He panics and says I am terribly sorry, I didn't mean to, without necessarily carrying out that analysis. When the SRA consulted on the new rule book and in particular when they consulted... as you know they had the right to demand that you be interviewed, I remember through our local Law Society when we responded to that we said that it was necessary that solicitors had the right to be represented and I think the right to be represented is crucially important. I mean more so now than ever. The SRA got its new powers. Since it started publishing decisions, since the economic crisis, lenders have been tightening up, indemnity insurers have been tightening up so getting it wrong at that early stage, even if it is only something minor, it can still potentially throw away your whole career because of other commercial pressures. The SRA is not necessarily concerned about that, because their approach is, if you have done something wrong then they are entitled to investigate, they are entitled to punish you for it. It is for the solicitor to understand what the consequences of what they are saying might be, and whether it is actually more appropriate to negotiate or to fight their corner a bit harder, depending on what they are accused of doing'.

12.17 As for the question of the stage at which a solicitor is advised by the SAS advocate, what will need to be done, and what it is likely to cost, the SAS procedure is that:

'they should be told during or shortly after that first hour. They will be told the likely cost of instructing that solicitor immediately the clock starts running and before they have incurred any costs. I know for a fact that although the SAS says it's an hour free, that is often a bit

flexible and stretched to an hour and a half, possibly a bit more time. We are all human and have sympathy with the people who are coming to us saying, we are in desperate need. On occasion there have been members of the SAS who have taken on cases on a 'pro bono' basis, but that is a matter for negotiation. It is not part of the SAS scheme. The SAS is supposed to be like an emergency band aid service to point you in the right direction, patch you up and get you moving so that you are not totally without sound advice, if not representation'.

12.18 In the experience of the SAS, solicitors who seek advice as soon as possible after they become aware of the commencement of regulatory action are more likely to have their issues dealt with appropriately. Even if the respondent does not go on to request legal representation from the SAS, advice as to how to engage with the SRA about their case could be crucial. It is necessary from time to time to steer respondents away from adopting a confrontational attitude towards the SRA and taking an adversarial approach to the simplest of issues. Similarly, it is necessary to defend respondents against aggressive and intimidating conduct by the SRA.

12.19 On the question of quality assurance and monitoring the professional conduct of SAS panel solicitors, the SAS sees that as part of the quality assurance work that would be done by the firms to which panel members belong. They have not had complaints about the conduct of their panel members and would expect any alleged breaches for which solicitors are responsible, including complaints about professional conduct, to be reported to the SRA in the usual manner because the solicitors on their panel are themselves regulated by the SRA.

Other Sources of Advice

12.20 LawCare describes itself as:

> '…an advisory and support service designed to help lawyers, their immediate families and their staff to deal with issues such as stress, depression, addiction, eating disorders and related emotional difficulties. We offer the opportunity to discuss such problems, which are interfering with, or have the potential to interfere with work performance and/or family life and to seek help in resolving them in their early stages. The service is free and entirely confidential'.
>
> While LawCare advise solicitors about dealing with the stress of being regulated, they invariably recommend that respondents seek some form of legal representation and make sure their matters are dealt with competently. Solicitors cannot look to them for representation in regulatory matters.

12.21 Some respondents who were denied funding by their insurers for legal representation under Professional Indemnity cover chose to represent themselves, or paid for legal representation from sources other than the SAS.

Conclusions

12.22 The SAS sees itself as ‘a valuable resource because it is comparable to legal aid if you don't know where to go’. This is an interesting observation that is open to challenge. A number of respondents told us during the review that on being recommended or advised by the SRA to contact the SAS, they were indeed of the impression that the Scheme operated as a ‘solicitors’ law centre’ where, given their financially compromised situation and frightened state, they would receive free legal advice and at least ‘pro bono’ representation. It is only on being assigned a lawyer whom the SAS considered to have the regulatory expertise they needed, that they learnt that they were expected to engage the services of a solicitor on the terms they would have expected if they had walked into a firm on the high street.

12.23 The SAS is in fact a referral service that has enjoyed the benefit of having its services advertised by the SRA for many years. While it has a body of solicitors who specialise in regulation, it does not as a policy, or as part of its ‘raison d’etre’, offer special or preferential rates to respondents.

12.24 A constant criticism of the SRA that we heard during the review was from solicitors facing regulatory action who had followed the SRA’s advice and contacted the SAS, only to find:

a) they were being referred to the same ‘top notch’ regulatory expert,

b) that the solicitor in question was quoting ‘eye watering’ sums as down-payments for immediate representation because of the seriousness of their situation, and

c) that the solicitor concerned belonged to a separate firm of solicitors and was not a member of SAS staff.

12.25 Every one of those respondents claimed that they instructed the solicitor in question because of the SRA’s ‘recommendation’ and because they did not know they could approach other regulatory lawyers. What is more, they assumed that because the SRA had referred them to, or encouraged them to contact the SAS, they were going to the CAB of the solicitors’ profession and would at least be given preferential rates and could expect a ‘pro bono’ service if they were facing complete financial meltdown.

12.26 We are of the view that such criticism of the SRA is fair, for nowhere in the SRA's references to the SAS in the literature that we have seen, did it make it clear:

a) that the SAS is a referral service that points solicitors to members of a panel who operate in their own individual firms like any other solicitors,

b) that while some of those solicitors have expertise in regulatory matters, those being referred should be aware that after an hour of free advice, they would need to make financial arrangements if they go on to instruct the solicitors recommended by the SAS, and

c) that despite the referral to, or at least being pointed to, the SAS, respondents are free to consult/engage any other solicitor.

12.27 In the course of the review, we were given anecdotal accounts of encounters certain respondents had had with SAS solicitors in which issues of fees and services had arisen. While most of those respondents dealt with those issues without further recourse to the SRA, they formed the view nevertheless that they were a 'readymade market' for the SAS and that the SRA which had pointed them in the direction of the SAS in the first place, did not see it as its business to monitor the quality or effectiveness of the service they were receiving from the SAS.

12.28 On this latter point, the SRA's stated position is that SAS solicitors are:

> 'subject to the same rules and regulations as any other(s) in the profession. Any client or consumer who feels they have cause to complain to the SRA about the professional conduct or quality of service of any SAS solicitor is free to do so. The SRA has no more connection with the SAS than it does with any other legal services provider, save for the fact that it informs solicitors facing investigation of their existence as a possible source of advice or/and representation on regulatory matters'.
>
> (Verbal submission to the Review Team, November 2013).

12.29 At the beginning of this chapter, we quoted from the SRA's guidance note on *Disciplinary Action by the SRA,* in which they state:

> In the absence of a defence fund, the SRA draws solicitors' attention to the Solicitors Assistance Scheme, which was historically administered by the Law Society but is now separate. The SAS comprises many highly experienced practitioners although there is, no doubt, a range of expertise. Its work in terms of client/solicitor interface is of course not

generally visible to the SRA because of legal professional privilege'. (our emphasis)

12.30 The SRA is here reassuring respondents, at least by inference, that they can expect the SAS to be able to provide them with a service from 'highly experienced practitioners'. Once they follow the SRA's lead and engage the services of the SAS, they morph into 'the public', become a client of the SAS, and a consumer of their legal services. Those within the SAS who provide/sell those legal services have a duty to protect the respondents' interests and uphold the standards of the solicitors' profession. Those respondents find themselves in the position of needing the SAS' services for allegedly failing to do the latter in their own role as providers of legal services, pre-event and pre-referral to the SAS.

12.31 Presumably, the SRA recommends solicitors facing regulatory action to the SAS, because it believes that justice is better served if they can prepare themselves for a tribunal hearing competently and preferably with the benefit of legal representation. However, in the files we examined, it referred them only to the SAS, which in turn, appeared to recommend one firm in particular.

12.32 We received further anecdotal evidence of claims that SAS solicitors had 'special access' to the SRA, the inference being that they would therefore be able to gain intelligence about the regulatory process. Be that as it may, the SRA would underscore its independence from the SAS, if it made available to solicitors facing regulatory action, contact details of a range of other regulatory solicitors on an equal footing, making it clear that the SAS was not being recommended in any sort of priority order.

12.33 This review consulted with the BME practitioners networks represented on the EIG, on the issue of legal advice and representation in regulatory cases involving BME solicitors/firms. The issue of disproportionality, both in the number of BME solicitors who face regulatory action and the sanctions that are imposed upon them, has implications for practitioner networks and specialist support organisations no less than for the Law Society and the SRA, not least in respect of the strategic relationship between the networks and the Law Society as the body representing the profession and the SRA as its regulatory arm. Should representative groups, for example, extend their role to provide legal advice and representation to their membership on regulatory issues? Should they provide training and assistance to their members on practice issues, and mentoring of solicitors and firms to ensure that their members are better able to satisfy the regulatory obligations and can compete in an increasingly difficult and competitive legal market place? Should a consortium of BME firms with experience of regulatory law, or who could develop expertise in legal representation in regulatory cases, constitute

a panel similar to that of the SAS and offer advice and paid representation to network members and other BME practitioners, as well as to the profession more generally?

12.34 The networks were universally sceptical about extending their remit to encompass those developments. In summary, their argument is that the Law Society is the representative body for the entire solicitors' profession and if it has a concern about disproportionate treatment suffered by any one section of the profession, it should consider strategic ways of responding to that, rather than seeing it as something those members of the profession should fix themselves. Moreover, running the networks in addition to their regular workload and the other initiatives individual members of the networks are engaged with, is already so demanding that people can hardly be expected to take on the tasks suggested above, especially as the networks operate without funding from any source, barring that which comes from their own members.

12.35 As far as the SAS is concerned, practitioner networks represented on the EIG questioned the SRA's continuing practice of drawing respondents' attention to the SAS only, as a possible source of support and advice above. This led the SRA in May 2013 to alter its advice on 'Support' for solicitors facing regulatory action. Paragraph 17 of the letter the SRA sends to solicitors/firms notifying them of its intention to move to a formal investigation now states:

> 'Please note there are various sources of advice and support, which can be found by going to the following link on our website: www.sra.org.uk/support'

12.36 This link takes one to the 'Support' section of the SRA's website under which are listed 10 'sources of support and contact details', the SAS appearing in ninth place on that list.

12.37 The issue of representation for solicitors facing regulatory action featured highly in the files we reviewed. Legal representation is perhaps the most immediate 'access to justice' issue for respondents. The files reveal that the insurance waters get very murky once solicitors become the subject of regulatory action. At a time when solicitors in the files we reviewed, were feeling especially vulnerable, they appeared, from what we have seen, to have followed the SRA's steer and made contact with the SAS. Once that ball started to roll, for some respondents it resulted in some very unintended consequences.

12.38 Over the years, the SAS has clearly been a conduit through which work flows into the firms or practices represented on its panel in the manner described in

above. It is counter-intuitive for the SRA to suggest that if respondents are unhappy with the standard of service they receive from solicitors on the SAS's panel, they should complain to it in the normal manner. If one is facing regulatory action and the regulator points you to a service through which you might arrange legal representation, one would not readily be inclined to go and complain against that service to the very regulator who is taking action against you and who 'drew your attention' to them in the first place.

12.39 It is our view from reviewing the files, that a number of respondents became disillusioned with the service they were receiving from firms represented on the SAS panel and felt that their problems were compounded as a result of their engagement with the SAS.

12.40 We commend the SRA for heeding the EIG's concerns about the above matters and for making available to solicitors facing regulatory action, contact details of a range of other regulatory solicitors, on an equal footing with the SAS, making it clear by inference that the SAS was not being recommended in any sort of priority order.

Recommendations

- The SRA should examine its relationship with organisations that provided advice and assistance to solicitors, as a consequence of the SRA pointing them to such organisations, during the 2009-2012 period covered by this review, in order to assess the quality of the support provided, the way solicitors were dealt with and whether individuals in some of these organisations may have abused their position and exploited vulnerable solicitors.

- The SRA and the Law Society should jointly seek out legal insurance providers who can provide legal insurance at preferential rates for solicitors who are subject to regulatory proceedings.

- The SRA and the Law Society should jointly give consideration to whether legal insurance can be provided as part of the practising certificate fees.

13.0 Implementing Ouseley

13.1 As noted above, in March 2008, Lord Herman Ouseley was appointed by the SRA to conduct an independent review with the remit to:

> *'…consider all relevant aspects of the SRA's regulatory policies, practices and its decision-making process and provide a report with findings and recommendations'*.

13.2 Ouseley made 40 recommendations. In 2013, the SRA audited its progress in implementing those recommendations. Many of those recommendations have relevance for the way the SRA tackles regulatory disproportionality and the findings of this review. Since the summer of 2012, we have had a large measure of exposure to the SRA, its policies, personnel and organisational culture. In this chapter, we examine the progress the SRA has made in implementing Ouseley and adapting its policies and procedures in line with its commitment to promoting equality, diversity and inclusion and discharging the Public Sector Equality Duty. We do this with a view to identifying potential improvements the SRA might yet make to such practices, policies and procedures to maximise fairness and consistency and eliminate unlawful discrimination on account of the protected characteristics.

13.3 There is no doubt that the SRA has made great strides since Lord Ouseley's report, but the architecture for promoting equality, diversity and inclusion and discharging the Public Sector Equality Duty is still not right, and the culture of the organisation does not yet reflect the SRA's commitment to equal opportunity, diversity and inclusion.

13.4 We review below the SRA's progress by first presenting the specific Ouseley recommendation under consideration, then the SRA's actions in response and finally our comments and recommendation(s).

Ouseley Recommendation 1

A comprehensive action plan, incorporating the actions set out in paragraph 12.9.6 together with the recommendations set out below to be adopted and implemented, led by the Chief Executive and with specified programmes, targets, outcomes, timescales and monitoring and evaluation arrangements

SRA Progress

13.5 In April 2009, the SRA published an Equality and Diversity (E&D) action plan for 2009/2011 to accompany the first E&D strategy and a report on progress up to the end of 2010 was published in February 2011. An Equality Framework was published in July 2011 and replaced the E&D strategy and action plan. The Framework explained how the SRA intended to meet the requirements of the new Equality Act. Reports against its progress on equality and diversity were published both for 2011 and 2012.

13.6 In 2009, an E&D Board Group was established to oversee the progression of the E&D action plan. This group was chaired by the SRA Board Chair with membership comprising of lay and solicitor members. It meets quarterly. It reports directly to the SRA Board and also meets twice a year with the internal Diversity Working Group to discuss equality and diversity issues and the progress being made against the new Framework. In 2012, the E&D Board Group reviewed its terms of reference and became the Diversity and Inclusion Committee of the SRA Board. The membership comprises of two lay and one solicitor member, all being SRA Board members.

Comment

13.7 SRA actions since 2008 had a focus on Equality or Equality & Diversity, including an E&D action plan and strategy. In 2012, however, the E&D Board Group took a retrogressive step and reconstituted itself the Diversity and Inclusion Committee. We have not been able to establish what the impetus for that change was. Our discussions with the Diversity and Inclusion team suggest that they did not have a part in the review of the terms of reference that triggered the name change. While its status as a committee of the SRA Board is to be welcomed, we considered that the focus away from Equality to Diversity and Inclusion is regrettable, especially given the SRA's Equality Framework and its 9 core equality objectives.

13.8 Having regard to the change programme the SRA has been pursuing since 2010, and the external drivers for change in the legal services market that have a direct bearing on the regulated profession, and the need to subject those changes to equality impact assessment, we felt that the SRA should not by changing the name of that crucial committee signal that it has shifted its focus from promoting equality and eliminating unlawful discrimination to valuing diversity and promoting inclusion. The former two goals are important if real equality is to be achieved for BME solicitors and are reflected in the Public Sector Equality Duty to which the SRA is subject. Neither valuing diversity nor promoting inclusion has any basis in law, except by inference as

possible outcomes of measures to promote equality and combat unlawful discrimination.

13.9 Another reason for our concern about the message the name change might send to the organisation and to the regulated community was that up to 2010, the E&D Board Group was chaired by the SRA Board Chair, despite not being a formal committee of the Board. The Group was very active and engaged in providing important oversight and governance of the E&D agenda. The commissioning of Pearn Kandola, progress in implementing the E&D strategy and in improving engagement with internal teams and with practitioner groups was all done under its watchful eye. During 2011 and 2012, however, it was difficult to pin point, let alone assess, what the Group's oversight entailed or how it was being led. It seemed to regain focus and bring some structure to its oversight of the E&D agenda only in 2013 when it became a formal committee of the Board under the leadership of its current Chair. What this demonstrates in our view is that the effectiveness of the committee and its relevance to the organisation, depends upon the leadership and commitment of the Chair and the level of understanding, knowledge and competence both Chair and members bring and how engaged they are.

13.10 At a progress review meeting in November 2013, we discussed this matter of the focus on equality and combating discrimination, with the Diversity and Inclusion Committee in the context of the Committee's function to oversee the SRA's progress in implementing the Equality Framework on behalf of the Board. We therefore welcome the fact, that at its last meeting the committee took a decision to call itself the Equality, Diversity and Inclusion (EDI) Committee.

Our Recommendation

- That the SRA Board itself keep a focus upon and demonstrate its commitment to promote equality of opportunity and eliminate unlawful discrimination. It should ensure that the EDI Committee's terms of reference are clearly consistent with fulfilling the Public Sector Equality Duty and ensuring that the regulator has in place measures for tackling such structural, cultural, institutional and personal manifestations of discrimination that may exist or might arise within the organisation.

Ouseley Recommendation 2

The future composition of the SRA Board to reflect ethnic diversity (12.9.7)

SRA Progress

13.11 A number of positive action proposals were introduced to try and improve the diversity of the SRA Board, Committees and workforce and there has been some improvement in the SRA's diversity profile overall. The SRA acknowledges, however, that this diversity is not reflected at all levels in the organisation and that there are still gaps for some equality groups. In 2011, it updated the diversity monitoring data that it held for the SRA Board, its Committees and its panel of Adjudicators and started publishing the ethnicity and gender breakdown for each of these groups.

13.12 At the end of 2012, the Board consisted of 15 members; seven solicitors (including the Chair) and eight lay people. The gender breakdown is ten male and five female members; the ethnicity breakdown is 13 White and two BME members. Of the eleven committee members who are not on the Board, six are male and five are female; ten are white, and one member is BME. Of the panel of 26 Adjudicators who make decisions about regulatory matters, 16 are legally qualified and ten are lay. 12 Adjudicators are male and 14 are female; 15 adjudicators are White, five are BME and the ethnicity of six is unknown. Of the eleven committee members who are not on the Board, six are male and five are female; ten are White, and one member is BME.

Comment

13.13 While in respect of both SRA Board committees and Adjudicators, the gender balance is improving, the same is far from true in respect of ethnicity. The SRA has declared its commitment to 'operating fairly towards all individuals and groups regardless of their ethnic origin, race, colour, gender, religion, disability, sexual orientation, or age'. Given the increasing diversity of the regulated profession and the fact that, as in too many other areas of institutional life in the society, over-representation and disproportionality for BME people are typically to be found at the negative end of the spectrum, the SRA should set itself the task of making its decision making bodies more diverse and representative of the solicitors' profession as well as of 'consumers' in the legal services market.

Our Recommendation

- The SRA should set itself a target, with timescales, for achieving a better balance on the axis of ethnicity on its Board, Board Committees, and its team of Adjudicators, using appropriate positive action measures as necessary, including co-options and secondments.

Ouseley Recommendation 3

The SRA should affirm that equality and diversity competence is an essential and integral aspect of it being a credible and capable regulator

Progress

13.14 E&D has continued to be a key priority for the SRA. This was affirmed through the development of an E&D strategy in 2008 and through the subsequent development of an Equality Framework for 2011/12. E&D forms a key aspect of the SRA strategy overall and of its vision and values could be assessed. Research was commissioned in 2009 to further understand the reasons for disproportionality in the SRA's regulatory activity. The research findings were published in 2010 along with an action plan for implementation of the recommendations....Also, in 2010, the SRA reviewed how it was meeting its duty to provide reasonable adjustments and it published its ' Reasonable Adjustments' policy. In 2012, the SRA published its Gender Reassignment policy statement to set out how it recognises and respects the rights of those who have undergone or are undergoing gender reassignment.

Comment

13.15 The SRA is to be commended for taking these initiatives, especially given where the organisation was prior to Lord Ouseley's review in 2008.

13.16 Under the heading: 'Promoting equality in the profession', the Equality Framework states:

> One of our regulatory objectives is to "encourage an independent, strong, diverse and effective legal profession." One of the ways that we can encourage diversity as the regulator, is by setting standards for equality and diversity in the profession. (para.29)
>
> Principle 9 of the SRA Handbook requires solicitors to "run [their] business or carry out [their] role in the business in a way that encourages equality of opportunity and respect for diversity" and chapter 2 of the Handbook sets out the expected outcomes for equality and diversity in the profession. (para.30)

13.17 We understand 'equality and diversity competence' to mean the ability of decision makers, managers of all grades, case workers, supervisors, technical advisers, team leaders and adjudicators who are all part of the regulatory process to show evidence of having the knowledge, understanding, skills, attitudes and behaviours that are consistent with promoting equality, eliminating all forms of unlawful discrimination, exercising sound judgement and acting fairly, consistently and without bias. The executive group has a

special responsibility to show leadership in this respect and ensure that recruitment policies and practices, staff development, staff appraisal and performance management schemes are routinely focused on developing and expanding equality and diversity competence and that the culture and ethos of the organisation reflects this. For this reason, the equality, diversity and inclusion commitment of the organisation must be seen to lie at its core and to permeate the business: strategic priorities, strategic management and the entirety of its functions as an employer and a regulator, including its engagement with stakeholders.

13.18 For the above two paragraphs in the Equality Framework to be credible, the solicitors' profession needs to see evidence of the SRA conforming to its own standards for equality and diversity, both as an employer and as a regulator. This means ensuring that equal employment practices must be seen to be adhered to in recruitment to and progression/promotion within the organisation at all levels, including senior management. Practices such as engaging temporary staff or consultants and then, either creating posts for them or confirming them in senior posts seamlessly, without existing internal staff being given the opportunity to apply for those positions are evidently contrary to equal employment opportunity practice. What is more, morale is dented, divisions arise among staff and questions are raised about the organisation's credibility and the seriousness of its commitment to equal opportunity and to eliminating institutional discrimination. Principle 9 of the SRA handbook and the regulator's role in ensuring that solicitors run their business in a way that "encourages equality of opportunity and respect for diversity" must surely presuppose that the SRA's own policies and practices are consistent with those goals and standards.

13.19 In the five-plus years since Lord Ouseley's recommendations, the SRA has not made the progress that might have been expected, particularly in relation to the diversity of its workforce. This calls into question the Human Resources and Development (HRD) function as well as the E&D competence of the Senior Management Team (SMT) and the SRA Board which oversees their management performance.

13.20 The Equality Framework states:

> We recognise that strong leadership will be critical in delivering our outcomes for equality and diversity and, as such, strategic accountability for equality and diversity rests with the SRA's Board, the chief executive and the senior management team and supported by senior managers on the SRA's leadership group who are firmly committed to this area of work.

13.21 How then does the SRA ensure that the 'strategic accountability' is discharged by the chief executive, the SMT and senior managers on the SRA's

Leadership Group. Until it was restructured in 2011, the SMT included the Director of Inclusion who is Head of Inclusion, and acts as an internal consultant to the SRA on the strategic management of the equality, diversity and inclusion agenda across all its functions. The restructure created an Executive Team, the membership of which is all White and includes one woman, and a Leadership Group comprised of Directors, two of whom were BME.

13.22 In 2013, the SMT disbanded the Leadership Group and created the Operational Delivery Group (ODG). Whereas the Leadership Group had two BME members, the ODG now comprises the Directors of Supervision, Risk, Enforcement, Client Protection and Authorisation, all of whom are White. Neither the Director of Inclusion, nor the other BME director sits on this group. The ODG was created in order to maximise operational effectiveness and joint working across the organisation, but is understandably performing a more strategic function in support of the SMT.

13.23 In the light of our observations above and the Equality Framework quoted above, the following questions arise:

i) How are members of SMT and of the ODG held to account for their leadership of the Equality, Diversity and Inclusion agenda across their entire portfolio of responsibilities?

ii) Given the apparent downgrading of equality, diversity and inclusion in the organisation's structure and given the Ouseley findings and recommendations, how does the SRA ensure that equality, diversity and inclusion is central to the leadership and management of the organisation, including its pursuance of its regulatory objectives? Are senior leaders and managers required to provide tangible evidence of how they are leading and managing the equality, diversity and inclusion agenda? Is this designated as a core objective against which performance is assessed as part of the performance appraisal/staff review process?

iii) What is considered to be the role of the Director of Inclusion and the D&I team in the above?

13.24 The D&I team proactively seeks to engage with all parts of the organisation in an effort to ensure that equality, diversity and inclusion becomes embedded within the culture of the SRA. They face outwards, interfacing with stakeholders, including practitioner groups; internally they investigate complaints, provide training on various subjects and provide support and guidance with regard to ensuring that decision making is more transparent and that, for example, clear reasons are given for investigations. There appears to be a lack of clarity across the organisation, however, about what

the Director of Inclusion and the D&I team can and cannot do, what they can call upon leaders and managers to provide by way of evidence of embedding equality, diversity and inclusion. This apparent confusion is accentuated by the way in which the HRD function is discharged within the organisation. We comment upon this apparent confusion and the HRD function when we consider Lord Ouseley's Recommendation 16 below.

13.25 Although the SRA has made some strides since Lord Ouseley reported in 2008, it acknowledges that it has to do much more to integrate the compliance requirements of the Public Sector Equality Duty with its regulatory objectives and embed equality, diversity and inclusion across the organisation. The advent of a new Chief Executive and the rolling out of OFR provide an excellent opportunity to do this more coherently, drawing upon the findings of this and previous reviews. We believe that the SRA will make more rapid and sustained progress if:

i. SMT and ODG members had a specific competency and objective around delivery of equality, diversity and inclusion, and

ii. The Director of Inclusion were to be included as a member of both groups, to act as a strategic consultant on equality, diversity and inclusion and to help members of both those groups build their competence in leading and managing the equality, diversity and inclusion agenda. This would allow the Inclusion Director, in turn, to help develop capacity within the teams that are led and managed by those SMT and ODG members.

Our Recommendation

- In addition to ensuring that 'the overall SRA strategy and… vision and values (continue to) feature in the performance and development review of staff so that E&D can be translated into their day to day activities', the SRA should determine what constitutes 'Equality & Diversity competence' and ensure that this is rigorously tested in the selection and recruitment of Board members, senior managers and staff with line management and decision making responsibilities, including regulatory staff and in the performance and development review of all staff.

- SMT and the Operational Delivery Group (ODG) members should have a specific competency and objective around delivery of equality, diversity and inclusion and their performance in meeting that objective should form part of their performance appraisal.

- The Director of Inclusion should be made a member of both the SMT and the ODG, to act as a strategic consultant on equality, diversity and

inclusion and to help members of both those groups build their competence in leading and managing the equality, diversity and inclusion agenda. This would allow the Director of Inclusion, in turn, to help develop capacity within the teams that are led and managed by those SMT and ODG members.

Ouseley Recommendation 4

The SRA should develop visible and demonstrable leadership on equality, diversity and shared values at Board, Chief Executive and senior management levels.

Progress

13.26 The internal Diversity Working Group was chaired by the CEO during 2009 and 2010. The responsibility for chairing these meetings is now shared by all members of the SMT. This group is responsible for championing E&D across the business and monitoring progress against the Equality Framework. The SRA's 'Inclusion Champions' were launched in 2012 to promote equality across the organisation. They have since worked closely with the Transformation Champions to embed equality into the transformation agenda, playing a vital role in the SRA's move to the single site in Birmingham city centre and engaging with staff. All Board and Committee members receive E&D training at the start of their appointments and are required to understand the impact of equality on decision making. All Board papers are now required to identify E&D implications and in 2011 training was rolled out to all decision makers on managing unconscious bias.

Comment

13.27 The Chief Executive must be seen by SRA staff, the SRA Board, the profession and the public to provide visible and demonstrable leadership on equality, diversity and shared values. The comment in the foregoing section also applies.

Our Recommendation

- The Chief Executive must be seen by SRA staff, the SRA Board, the profession and the public to provide visible and demonstrable leadership on equality, diversity inclusion and shared values.

Ouseley Recommendation 5

An organisational culture and ethos should be created that respects and promotes equality and diversity and ensures that these principles are central to all of the SRA's functions. In this respect the SRA should establish an effectively resourced and authoritative equality and diversity Unit to provide expert internal and independent equality and diversity input to all levels of the organisation and to be part of the senior management team (12.9.11)

Progress

13.28 A D&I team has been established, which is comprised of two managers, two officers and a co-ordinator. They are led by the Director of Inclusion, who reports to the CEO and is a member of the Leadership Group. It is the role of the team to set the strategic equality objectives and actions for the SRA and support the business to embed equality and diversity in all its functions. Key work areas of the unit have included:-

- Oversight of the SRA's strategic equality work,
- Monitoring the impact of the SRA's work on equality and human rights by providing guidance for staff,
- quality assurance for published equality impact assessments (EIAs) and overseeing the EIA schedule,
- Providing advice and guidance to staff on equality issues, such as reasonable adjustments for disabled people,
- Developing relationships with equality groups in the profession and supporting engagement events, and
- Providing training to staff on equality issues.

13.29 In 2012, the team developed and implemented an internal benchmarking tool to ensure all areas are delivering against the SRA's Equality Framework.

Comment

13.30 It is debatable whether, despite having in place a Director of Inclusion, the D&I team constitutes 'an effectively resourced and authoritative equality and diversity unit to provide expert internal and independent equality and diversity input to all levels of the organisation'. Building a culture of equity and complying with the Public Sector Equality Duty is not the same as promoting diversity and inclusion (though the latter may assist in the former, there is not a necessary coincidence between them). Institutional discrimination and in particular institutional racism is known to persist within organisations that boast a proud record of promoting diversity and inclusion, with all the statistics to prove their diversity and inclusion credentials.

13.31 Having 'oversight of the SRA's strategic equality work' and ' monitoring the impact of…(its) work on equality and human rights by providing guidance for staff, quality assurance for published equality impact assessments (EIAs) and overseeing the EIA schedule', plus the other listed headline tasks the D&I team performs, have had and continue to have, an impact upon the organisation and its knowledge and understanding of equality issues. Regulatory staff speak highly of the team's work in this respect, especially with regard to the focus and training they have arranged on unconscious bias. We would suggest the work of an 'effectively resourced and authoritative equality and diversity Unit', as recommended by Lord Ouseley, is to have oversight not only of 'the SRA's strategic equality work', but to ensure that equality and human rights sit at the core of the organisation's strategic priorities and operations and inform all of its functions, whether or not those are considered to have implications for equality. As such, the SRA should examine whether and how D&I (and for D&I read 'promoting equality and combating discrimination') permeates its strategic management and regulatory functions and the decisions that are made at 'all levels of the organisation'. Hence, the recommendations in the previous section.

Our Recommendation

- The SRA should demonstrate a clear commitment to meeting the Public Sector Equality Duty. Promoting equality and combating discrimination in the spirit of the Equality Act 2010 should be reflected in the core strategic priorities and the strategic management of the organisation and how it functions as a regulator.
- The SRA should audit its decision making framework and practices and ensure that equality, diversity and inclusion is included and the expertise of the Diversity & Inclusion team is called upon as necessary, even when managers anticipate challenges from that team.

Ouseley Recommendation 7

The SRA should investigate how its culture and ethos can impact upon solicitors' willingness to engage and implement change accordingly to achieve the necessary outcomes.

Progress

13.32 Since Ouseley, the SRA has adopted a more proactive approach to engagement with the profession, which has resulted in improved relationships. The External Implementation Group (EIG), chaired by Lord Ouseley, has been key to building more effective relationships with BME practitioners. The SRA has also seen improved engagement with key equality groups such as the

Black Solicitors Network, the Society of Asian Lawyers, the Lawyers with Disabilities Division and the Association of Women Solicitors. The SRA's approach to regulation changed in 2011, with the introduction of a new SRA Handbook and the beginning of its move toward OFR. This ushered in a new way of working with the profession, and a new approach to the SRA's main functions of Authorisation, Supervision and Enforcement. A number of roadshows were held across the country in 2011 to explain the SRA's new regulatory approach and to listen to the views of those it regulates. A series of more focused engagement work with small firms, sole practitioners and BME practitioner groups took place in 2012 to help support them through the transition to OFR. A number of webinars have also been delivered on specific topics of relevance to the profession.

Comment

13.33 We have received very positive feedback in the course of this review with regard to the 'series of more focused engagement work with small firms, sole practitioners and BME practitioner groups which took place in 2012 to help support them through the transition to OFR'. The SRA should seek to build upon that, having regard to the structural and practice issues that confront small firms, sole practitioners and BME practitioner groups and add to their risk and vulnerability to regulatory action. The new approach to Authorisation, Supervision and Enforcement and the work of compliance officers for legal practice (COLPs) and compliance officers for finance and administration (COFAs) might not necessarily lead firms and solicitors to develop and sustain a more positive engagement with the SRA. The SRA should take further steps to change its culture and ethos and engage with the profession, irrespective of the size and location of firms, in a manner that enhances solicitors' willingness to engage and implement change. This is especially pertinent to big city and 'magic circle' firms, some of which have been leading by example in promoting equality, diversity and social mobility. In this regard, the profession should be able to see more tangible signs of the SRA being a change leader as far as promoting equality and combating discrimination is concerned.

Our Recommendation

- The SRA should take further steps to change its culture and ethos and engage with the profession in a manner that enhances solicitors' willingness to engage and implement change, rather than seeing themselves in a potentially adversarial relationship with the regulator. In this regard, the profession should be able to see more tangible signs of the SRA being a change leader as far as promoting equality and combating discrimination is concerned.

Ouseley Recommendation 8

Equality and diversity should be embedded into all aspects of the SRA's change programme, business planning processes and risk management and this requires stronger leadership at policy level than exists at present. (12.8.1)

Progress

13.34 The D&I team worked with colleagues across the organisation to ensure that E&D was considered as part of the change programme. A new Leadership Group was established in 2011 which includes the SMT, directors and senior managers. In 2011, the Leadership Group attended a two day leadership development workshop to help them review progress and learn about how they could work differently to provide the organisation with clear direction and instil behaviours needed to deliver the SRA's new Vision and Values. The group also attended the unconscious bias training session and completed the e-learning programme on the Equality Act alongside all employees.

13.35 An internal benchmarking exercise has been launched to ensure E&D are embedded in the day to day work of units and two key performance indicators have been set to ensure compliance with this exercise.

Comment

13.36 In addition to the initiatives taken in respect of this recommendation, having regard to the comment above in relation to the SRA's progress in implementing Ouseley's Recommendation 3, the Leadership Group should revisit the 2011 'two day leadership development workshop to help them review progress and learn about how they could work differently to provide the organisation with clear direction and instil behaviours needed to deliver our Vision and Values'. This review session should focus upon assessing the equality and diversity competence of each member of the Group, with a view to taking appropriate measures to build those competence levels and monitor their application in the leadership and management functions members of the Group perform. At a time when the organisation is welcoming a new Chief Executive, who will no doubt be leading this change agenda with the active support of the Director of Inclusion as an internal consultant, the SRA should make every effort to prioritise this work.

Our Recommendation

- The ODG Group should revisit the 'two day leadership development workshop that was held in 2011**,** with a view to taking appropriate measures to build the Equality & Diversity competence levels of each member of the Group and monitor their application in the leadership and management functions members of the Group perform.

Ouseley Recommendation 10

Equality and diversity should be incorporated into the SRA's competence framework, with appropriate targets and objectives, linked to reward to ensure that the senior management team and line managers are equality and diversity competent.

Progress

13.37 A behaviour competency framework has been developed for all staff, which includes a range of diversity behaviours that the SRA expects from staff in carrying out their roles.

13.38 Inclusion, fairness and diversity have been built into the SRA's Vision & Values to help staff understand the kind of organisation it wants to be and what it expects from them as employees. To support this, the SRA has published a *Standards Charter* to outline what people can expect when dealing with the SRA. A series of workshops were also delivered in 2012 to help embed the organisation's Vision & Values and translate these into everyday activities. An extensive training programme took place in 2011 to help equip staff for the new way of working and a wide range of specialist E&D training was provided to supplement this. A compulsory e-learning module on the Equality Act was delivered as part of this process, with an additional module for all managers.

Comment

13.39 Please see comments and recommendations in respect of Ouseley 3, 4, 5 and 8 above.

Ouseley Recommendation 13

A training needs analysis should be completed and comprehensive programme of equality and diversity training rolled out, including cultural awareness and equality impact assessment and to ensure effectiveness in helping to tackle racial bias or prejudice. This should include all staff,

Adjudicators and others who work from home. It should also include training on the Human Rights Act and the SRA's responsibilities as a public body.

Progress

13.40 The SRA carried out a training needs analysis in 2009. A range of training and developmental interventions have since been developed to equip staff with the necessary knowledge, skills and competencies with regard to E&D.

13.41 Since 2009, the D&I team has provided a range of training and diversity events to staff which have included workshops on equality impact assessments, making reasonable adjustments, the handling of discrimination complaints, and the SRA's obligations under the Equality Act. A compulsory online training programme on the Equality Act was rolled out in 2011 which had an additional module for managers to complete. Specific training was provided to Supervision staff ahead of their visits to firms in 2012, as part of the thematic review of E&D within firms. E-learning programmes on reasonable adjustments and gender reassignment were launched in 2013.

13.42 All of the SRA's Board and Committee members receive E&D training at the start of their appointments and understand the impact of E&D on decision making.

13.43 Formal training for decision makers was introduced in 2011 which includes a half day session on managing unconscious bias. Specialist legal training on human rights and public law was also commissioned that year. A series of workshops on bullying, harassment and other unreasonable behaviour were also delivered in 2011 & 2012, in response to the concerns raised by staff in the annual staff survey.

13.44 An annual diversity week was established from 2007 to 2010, which delivered a range of activities and events for staff and stakeholders, providing an opportunity to raise awareness and understanding of E&D issues. In 2011, the SRA ran a series of smaller events throughout the year, including an event for International Women's Day, a talk from MIND about mental health awareness and a quiz for Black History month. Within 2012, the SRA held a Disability Awareness Day and arranged a talk from the Gender Identity Research & Education Society, following the release of its Gender Reassignment policy statement.

Comment

13.45 The SRA's progress in implementing this recommendation is a further indication of the strides the SRA has made. Again, we would urge that the

initiatives and activities outlined above are couched in the frame of promoting equality and human rights and combating discrimination, rather than building diversity awareness. Cultural competence, cultural awareness and the growth in cultural sensitivity are essential to avoiding bias, avoiding conduct, judgements and decision making based upon stereotypes and, as such, taking personal responsibility for combating personal and institutional discrimination. A focus on promoting equality and human rights and combating discrimination, rather than on promoting or valuing diversity, assists individual members of staff to understand and take responsibility for how they could be implicated in perpetuating discrimination and exclusion and what they can do about it.

Our Recommendation

- Staff should be encouraged and guided to take personal responsibility for combating personal and institutional discrimination.
- The SRA should focus upon promoting equality and human rights and combating discrimination, rather than on promoting or valuing diversity, in order to assist individual members of staff to understand and take responsibility for how they could be implicated in perpetuating discrimination and exclusion and what they can do about it.

Ouseley Recommendation 16

The SRA should consider implementing its own HRD policies, practices and processes, incorporating equality and diversity, and independent of the Law Society's overall approaches.

Progress

13.46 Human Resources Development (HRD) has remained a shared service function of the Law Society group, although it continues to have responsibility for advising the SRA on recruitment, development and retention of staff and works closely with the SRA to ensure that it attracts the widest pool of talent. An Employee Forum has been developed for the SRA, which has a HRD and E&D representative at each meeting. Changes have been made to the SRA's family flexible policies, benefits policies and a broader flexible working policy has been introduced to make them more inclusive.

Ouseley Recommendation 18

The SRA should implement its equality and diversity policies on human resources effectively and not be constrained by the Law Society's Group approach in meeting its statutory, strategic and policy equality and diversity goals. (6.7)

Progress

13.47 In addition to the above, the HRD function has supported the SRA in delivering the following:

- A people management development programme focussed on ensuring that the SRA's managers have the right skills and competencies to manage people. The development programme was mandatory for all managers in the organisation and included a two day programme on fair recruitment, workshops on handling grievances and performance management.
- A Leadership Programme for the SRA's directors and senior managers to equip them with the skills to coach staff.
- An Employee Forum for SRA staff to improve the quality of employee engagement.
- Joining Stonewall's Diversity Champions network.
- Applying for two external benchmarks in 2012: Race for Opportunity (RfO) and the Stonewall Workplace Equality Index. RfO awarded the SRA a silver banding and they have improved their performance from last year with Stonewall.

Comment on Progress vis-à-vis Ouseley 16 & 18

13.48 We endorse Lord Ouseley's recommendations in respect of HRD and present them formally, again, as arising from this review, having already presented them formerly in a verbal presentation of the findings and recommendations of this review.

13.49 The current arrangement is unnecessarily disjointed, especially as HRD could be pursuing Law Society objectives and priorities that are not in sync with the strategy, work plan or staff development focus of the SRA, with or without consultation with the D& I team.

13.50 In the light of the recommendations we have examined thus far, and the progress in implementing them that the SRA reports, it seems illogical, incoherent and antithetical to the holistic approach to the organisational change the SRA is seeking to adopt, for it to have a D&I team that is structurally unable to shape and steer an in-house HRD strategic agenda.

13.51 The D&I team currently does the many critical things the SRA is able to report upon by way of progress in implementing Ouseley. It discharges the key function of ensuring that the Equality, Diversity and Inclusion commitment of the organisation is seen to lie at its core and to thread through its strategic priorities, strategic management and the entirety of its functions as a regulator. It cannot be expected to do that, while at the same time being

dependent upon a HRD function that is not integral to and taking its cue from the SRA's own strategic approach and the developmental needs of the organisation. What, for example, is the correspondence between 'advising the SRA on recruitment, development and retention of staff and (working) closely with the SRA to ensure that it attracts the widest pool of talent', on the one hand, and the SRA's efforts to ensure that those whom it recruits, develops and retains have the 'equality and diversity' competence and commitment to its Vision and Values that it is seeking to engender among its existing staff, on the other hand? What is the correspondence between the HRD function and the training, development and monitoring of regulatory staff who make critical decisions using varying levels of discretion day by day, decisions that could have a bearing on regulatory disproportionality, if not justice?

13.52 If HRD under the current arrangement sees itself, or is seen by the Law Society and by staff within the SRA, as fulfilling core HR functions, the question arises as to where those functions sit in relation to the integrative, mainstreaming and permeating approach of the D&I team. Our view is that HRD should not be making decisions as to what is required in respect of the people and culture of the SRA. The SRA has a Director of Inclusion who has both an internal and external responsibility for equality, diversity and inclusion and manages a team that works in accordance with the priorities and objectives set by the SRA. It is they who should be setting the HRD requirements and commissioning HRD or other appropriate providers to deliver those requirements via service level agreements or otherwise.

13.53 HRD is group-wide facility serving the Law Society Group and seems to be focused on having a group wide approach. While remaining part of the Law Society Group, the SRA is a different and separate organisation and regulates a diverse profession in the public interest. It is also a public body under the Equality Act 2010, and as such has to comply with the Public Sector Equality Duties. It is also a public body under the Human Rights Act. The Law Society is a membership body that represents the interests of its members.

Our Recommendation

- Given the profile of its staff and leadership and senior management group and the equality and human rights issues it needs to address in the context of its regulatory function, the SRA should take steps to ensure implementation of Ouseley 16 and 18 as soon as is practicable.

Ouseley Recommendation 21

A comprehensive programme of consultation and engagement with BME solicitors and representative groups should be implemented to understand

their concerns and expectations and how best to target SRA (and Law Society) support resources.

Progress

13.54 The SRA's E&D strategy and subsequent Equality Framework were both developed in consultation with a range of stakeholders including BME and other equality groups. In 2012, the SRA carried out some research to evaluate the impact of its new OFR approach on the profession and as a result of these concerns, looked in particular at the findings in relation to BME firms. In 2011, they published their first Consumer Affairs strategy which included an action plan setting out their approach towards providing more engagement opportunities for people using legal services, and towards creating a new wave of information and support for members of the public. Their website has been re-launched to provide more accessible guidance for consumers, including making leaflets available in different languages and adding video clips as guides for consumers about key stages of the legal services process.

Comment

13.55 As stated earlier in this report, the EIG has played a major role in working in partnership with the SRA in its response to Ouseley 2008 and Pearn Kandola 2010, in the establishment of this review and in supporting its work. The EIG maintains not only a keen interest in studying the report of the findings and recommendations of the review, but in working with the SRA to ensure that they are acted upon. In the light of the many matters that concern EIG representative groups and their members, and their relationship with the Law Society as their representative body, the SRA should enter into discussions with EIG members as to the most effective structural arrangements for securing their engagement with the organisation and its strategic management of the equality, diversity and inclusion agenda. On publication of this Report, there should be a tripartite discussion between the Law Society, the SRA, EIG and the wider network of BME practitioners as to how to address the range of issues identified in the report as contributing to the vulnerability of BME sole practitioners and small firms and their susceptibility to regulatory action.

13.56 Specifically, EIG members and the bodies they represent should be facilitated to form part of a working group with a remit to examine regulatory disproportionality as it relates to regulatory objectives and in particular: Regulation in 'the public interest', access to justice, the interests of consumers of legal services, and encouraging an independent, strong, diverse and effective legal profession. That working group should also include

representatives of the Law Society, the SRA, the Legal Services Board, the Bar Standards Board and the Equality and Human Rights Commission.

Our Recommendations

- In the light of the many matters that concern EIG representative groups and their members, and their relationship with the Law Society as their representative body, the SRA should enter into discussions with EIG members as to the most effective structural arrangements for securing their engagement with the organisation and its strategic management of the equality, diversity and inclusion agenda.

- On publication of this Report, there should be a tripartite discussion between the Law Society, SRA, EIG and the wider network of BME practitioners as to how to address the range of issues identified in the Report as contributing to the vulnerability of BME sole practitioners and small firms and their exposure to regulatory action.

- Specifically, EIG members and the bodies they represent should be facilitated to form part of a working group with a remit to examine regulatory disproportionality as it relates to regulatory objectives and in particular: regulation in 'the public interest', access to justice, the interests of consumers of legal services, and encouraging an independent, strong, diverse and effective legal profession. That working group should also include representatives of the Law Society, the SRA, the Legal Services Board, the Bar Standards Board and the Equality and Human Rights Commission.

14.0 A Comparative Analysis of Approaches to the Issue of Ethnic Disproportionality in Professional and Regulatory Bodies

14.1 By comparing the objectives behind the commissioning of reports into ethnic disproportionality by different bodies, and by examining the scope and methodologies employed in compiling these reports, we can frame the approach of the SRA in the context of a wider, societal understanding of the issue of disproportionality. Furthermore, a useful comparison with other bodies may result in observations of good practice and the issuance of recommendations that can be used to furnish the SRA with a more nuanced understanding of the various complexities surrounding the issue of disproportionality. The key advantage of a thorough comparison with other public professional institutions, regardless of any regulatory constitution, is that it highlights the capability of large and diverse institutions (such as the Police Service), with a mandate to operate in the 'public interest', to navigate the potential pitfalls attached to race issues and disproportionality.

14.2 We consider that the SRA should examine its current approach to enforcing regulations to take account of the contextual issues relevant to the scope of this review, in order to improve the situation for BME solicitors and thereby reduce the instances where punitive sanctions are considered necessary. At a time when the SRA is implementing Outcomes Focused Regulation (OFR) and seeking to regulate in a new way, focusing upon risks and outcomes rather than on compliance with detailed rules, it is important that the regulator develops a more nuanced understanding of the context, structural, institutional, cultural, as well as the legal market context, within which BME solicitors, male and female, operate and how that helps to frame the risks they face as BME practitioners and as newly qualified solicitors joining the profession.

14.3 We examine below the approach to complaints about professional standards and conduct issues that three bodies with a regulatory function adopt, namely the Bar Standards Board, the General Medical Council and the Police Service.

Bar Standards Board (BSB)

Report on Diversity of Barristers Subject to Complaints, 2013. Inclusive Employers.

14.4 In 2012, the BSB commissioned the consultants, Inclusive Employers, to undertake an independent review of their complaints system relating to issues of gender, disability and ethnicity. The report by Inclusive Employers

constitutes an analysis of the diversity, determined by gender and ethnicity, of barristers who were the subject of complaints raised both internally and externally, between 2007 and 2011. At 56 pages long, and covering diversity issues relating to gender as well as ethnicity, the BSB report does not have the same level of focus as this SRA commissioned report on regulatory disproportionality in relation to ethnicity. Nevertheless, solicitors and barristers in the UK are both governed by the Legal Services Act 2007 and the respective regulatory bodies, the SRA and the BSB, are both scrutinised by the Legal Services Board. These shared elements allow for a useful comparison of the understanding of, and approach to tackling ethnic disproportionality issues by the two regulators and, in particular, their differing interpretations of the notion of a regulatory body acting in the 'public interest'. For the purposes of this comparison, the context, methodology and treatment of issues relating to ethnicity and the conclusions drawn in the BSB Report, will be analysed.

BSB Regulatory Framework

14.5 Altering the complaints procedures analysed in the BSB report, the Legal Services Act 2007 gave jurisdiction relating to externally raised complaints, those issuing from clients, to the Legal Ombudsman. This transferred the handling of all complaints between October 2010 and March 2011, reducing the role of the BSB to only considering issues relating to professional misconduct for complaints opened in 2011.

14.6 The BSB oversees the Professional Conduct Department (PCD) whose Professional Conduct Committee (PCC) is tasked with investigating all complaints levelled at barristers and assisting the PCD in enforcing the barristers' Code of Conduct. Upon receipt of a complaint, a decision is made as to whether the Code of Conduct is deemed to have been breached and, if this is found to be the case, the PCC, or senior managers within the PCD, will refer the complaint for disciplinary action. At this point, it is the responsibility of the BSB to pursue action against the barrister, acting as the prosecution in a case that is heard before an independent panel, convened by the Council of the Inns of Court.

14.7 External complaints, made by clients, members of the public, solicitors, judges or other professional organisations, are all registered, regardless of whether evidence relating to a breach of the Code of Conduct is revealed. By contrast, internal complaints are raised by the BSB in relation to a breach of the Code and usually relate to breaches of the practising requirements, failure to comply with panel or tribunal decisions, failures to pay non-disciplinary fines and failures to respond to BSB communication. Owing to the administrative nature of the majority of these matters, the scope for applying value judgements in relation to potential breaches of the Code of Conduct is limited.

BSB Report Commissioning Background

14.8 The commissioning of the independent review of the complaints and disciplinary systems of the BSB followed the findings of a PCD review in 2010, itself a response to findings of numerical disparities in the 2007-2008 Diversity Report. The 2007-2008 Diversity Report had noted that male barristers were three times more likely to receive complaints than their female colleagues, which was disproportionate to the gender composition of the Bar. In addition, and of direct relevance to the scope of this Report, the 2007-2008 Diversity Report undertaken by the BSB, concluded that those members practising at the Bar from BME backgrounds were overly represented in relation to internally raised complaints. The 2010 internal PCD review corroborated that BME practitioners outside of London, and those acting as sole practitioners, were disproportionately more likely to have complaints raised against them for failures to comply with continuing professional development requirements. Neither the 2007-2008 Diversity Report, nor the 2010 PCD review posited any reasons for the numerical disparity, although the latter recommended that the BSB Education and Training Department investigated the issue in more detail.

14.9 The 2009-2010 Diversity Report noted that a disparity still existed in the number of BME practitioners who were subject to internally raised complaints, compared to the overall ethnic composition of the Bar. This numerical disproportionality featured alongside a procedural disproportionality as the complaints against BME barristers were found to be more likely to be upheld than those made against their White counterparts. This report also noted that the issue of disparity relating to BME sole practitioners, was no longer apparent and, as a result, it was noted that trends occurring in one single year were insufficient to map broader, and potentially systematic, patterns of disproportionality.

14.10 The Bar Council's Research Team carried out a review of all of the complaints data from 2007-2011 and reached a number of conclusions that highlighted a numerical disparity relating to BME practitioners. With regards to the outcome of externally raised complaints, BME barristers were more likely to be referred for disciplinary action and more likely to have this referral upheld than their White counterparts. Additionally, BME practitioners were over-represented in the internal complaints process, with no evidence to account for this factor other than ethnicity. The review recommended that an independent and external equality expert should be commissioned to investigate the possibility of discrimination in the BSB complaints process in light of the disparities presented in the data.

Scope of Report

14.11 Inclusive Employers were commissioned by the BSB to undertake qualitative research into the possibility of systematic bias in the complaints system relating to issues of practitioner ethnicity and gender. The scope of the report included:

- further analysis of the complaints data for the period 2007-2011,
- evaluation of the existing complaints system relating to the raising, referral and outcomes of complaint cases,
- conducting of up to 100 case file reviews to investigate the possibility of bias,
- holding interviews with office holders and key staff, and
- consulting stakeholder groups and specialist interest groups.

14.12 Inclusive Employers compared the ethnic and gender profiles of barristers who were the subject of complaints with the overall composition of the Bar and introduced variables to ascertain whether different types of complaint, the BSB decisions, and the disciplinary outcomes, indicated any particular bias. A thorough analysis of the 2007-2011 BSB complaints dataset took place, using descriptive statistics, bivariate analysis and significance tests to determine examples of a statistically significant relationship.

External Complaints Results

14.13 The numerical data relating to externally raised complaints demonstrated no evidence of disproportionality on the grounds of ethnicity, with BME barristers accounting for 10.9% of complaints, which was in line with the ethnic composition of the Bar, with BME barristers accounting for 10.2% of total members. When further variables were explored, it was found that BME barristers were disproportionately affected by multiple complaints, complaints relating to discreditable conduct and were more likely to have complaints referred for disciplinary action and subsequently upheld. There were higher instances of White barristers as compared to BME barristers receiving complaints on the basis of misleading the court and White practitioners were also more likely to have complaints against them dismissed. A more substantial issue related to practitioners who had qualified abroad, who were shown to be more likely to have complaints levelled against them.

Bar Standards Board Report Conclusion

14.14 Whilst the BSB commissioned report provides a thorough analysis of the data gathered on diversity issues over a five year period, and identified evidence of numerical disproportionality and disparity on ethnic and other lines, it fell short of examining any managerial, structural and contextual issues, or investigating possible causal links, that might shed light on the factors that resulted in the statistical disproportionality. There is no evidence of the report

having investigated the possible societal factors relating to issues of ethnicity. On the issue of practitioners who had qualified abroad, Inclusive Employers suggested, in the vaguest sense, that this might be related to differences in presentation. No evidence was provided for this assertion. The quantitative analysis of the data from 2007-2011 is fairly thorough. However, the report ultimately fails to meet its own commissioning terms of reference as no qualitative investigation seems to have been undertaken and the report does not extend understanding of the issue of ethnic disproportionality much beyond the parameters of the preceding data analysis undertaken by the Bar Council's Research Team. Furthermore, the report does not present a critique of the current BSB complaints system, and therefore fails to suggest possible improvements, as one would have expected given the terms of reference.

14.15 There are important differences in the function of the BSB and the SRA, reflecting the differing structures of their respective professions. Although barristers operate individually in court, they are part of a Chambers and as such are surrounded by resources and an infrastructure that can insulate them as individuals from certain complaints. Barristers are therefore less vulnerable to complaints regarding issues such as financial irregularities and the BSB operates in a more limited regulatory refrain than the SRA, restricting itself to matters of personal misconduct in breach of the Code. Despite this, both regulatory bodies have a commitment to regulating in a manner that holds the 'public interest' as paramount. This term can be interpreted in different ways and, given the reduced scope of the BSB when compared to the SRA, the BSB frames its regulatory capacity around a pro-profession rather than a punitive mindset, seeking to reinforce the independence and diversity of the profession and seeing this objective in itself as defining action in the 'public interest'. The 2013 Inclusive Employers report would have benefitted from looking at definitions of the 'public interest', particularly relating to the diversity of the profession, when critiquing the current BSB complaints handling and disciplinary systems.

14.16 In a final recommendation that acknowledges the fact that the report does not present a nuanced understanding of the contextual complexities of ethnic disproportionality issues, or an examination of how the complaints system understands ethnic disproportionality, Inclusive Employers suggest that the BSB commission a further study:

> The reason for these disproportionalities is not known. In order to examine the possibility of discrimination in the complaints system it is advisable that an external equality expert is commissioned to investigate the complaints handling process. (p52)

General Medical Council (GMC)

Place of medical qualification and outcomes of UK General Medical Council "fitness to practise" process, 2011. Professor Charlotte Humphrey, Shaista Hickman, Professor Martin C Gulliford.

14.17 The General Medical Council (GMC), which registers all doctors practising medicine in the UK, has the regulatory function of ensuring that all doctors follow the proper standards of medical practice, and the GMC also enforces disciplinary action on doctors whose fitness to practice has been called into question. Complaints, expressions of concern and general questions relating to a doctor's competence are investigated and processed using the GMC's Fitness to Practice procedures and the GMC has as its firm priority a commitment to protecting public health. Additionally, as a public authority, defined by the Equality Act 2010, the GMC is bound by the Public Sector Equality Duty and therefore has a commitment to eliminate discrimination, harassment and victimisation. Certain parallels can be drawn between the GMC's focus on protecting public health and the SRA's commitment to enforcing regulation in the 'public interest'.

Commissioning Background

14.18 Concerns regarding the possibility of disproportionality relating to the number of BME doctors and those who received their qualifications from abroad have existed in the medical profession since the early 1990s. These concerns led to the commissioning of a Policy Studies Institute investigation into the GMC's complaints handling systems, which concluded that there was no statistical disparity in the number of non-UK qualified doctors subject to complaint, in relation to the overall population of doctors in the UK. This report did however identify procedural differences in the treatment of UK qualified and non-UK qualified doctors by the GMC. This related to the number of non-UK qualified doctors who received 'high impact' outcomes following complaints or concerns raised regarding their fitness to practice. In terms of the GMC's fitness to practice procedures, these 'high impact' outcomes include a recommendation to move to the next stage of the disciplinary process or the pursuit of legal or professional sanctions.

14.19 A retrospective cohort study was commissioned by the GMC to investigate issues of fairness and discrimination in the regulatory processes relating to medical professionals, with a particular focus on the treatment of foreign trained doctors. The report assessed the correlation between a doctor's country of medical qualification and the likelihood of receiving 'high impact' outcomes in the complaints process handled by the GMC, but fell short of directly investigating wider issues of potential discrimination in the health service.

Methodology

14.20 The study took the form of a secondary analysis of complaints about individual doctors received by the GMC between 2006 and 2008. 7526 complaints were investigated, employing variables related to the doctor: gender, place of qualification, years since primary medical qualification, practice speciality and a composite variable combining ethnicity (if stated) and country of qualification. In addition, variables relating to the nature of the complaint were also included such as the provenance, presentation and content of the enquiry.

14.21 Demographic and professional data is held by the GMC for all doctors on the medical register and is regularly monitored through auditing processes and exception reporting methods to identify any anomalies. For the purposes of the 2011 report, GMC staff ensured that all of the data relating to cases under review by the authors was anonymous and presented this information in Excel spreadsheets. Multinomial logistic regression models were then used by the authors of the report to analyse the influence of the variables listed above on the outcomes of decisions taken by GMC in the first three stages of the Fitness to Practice assessment process - the initial triage of complaints, the subsequent Investigation and the final Adjudication.

GMC Data Analysis Results

14.22 Having looked at the provenance of complaints from 2006-2008, the report concluded that there was no evidence of numerical disparity to suggest that non-UK qualified solicitors were more likely than their White colleagues to receive complaints resulting in GMC investigation. 60% of enquires related to UK qualified doctors, 10% were regarding those who had trained in the European Economic Area, and the remaining 30% concerned doctors who had qualified outside of this area, which was in line with the proportional composition of all doctors registered with the GMC. In addition, there was no over-representation of complaints against UK qualified doctors who identified themselves as BME, and there was also no association in this category between ethnicity and the severity of outcome following the GMC Fitness to Practice process.

14.23 The report did conclude that the data evidenced a procedural disproportionality, showing that those doctors who qualified outside of the UK were over-represented in the later stages of the GMC Fitness to Practice process. As a result of this, non-UK qualified doctors were more likely to receive the more punitive ‘high impact’ outcomes following GMC adjudication of complaints against them. The report offered two possible explanations for the procedural disparity. Firstly, there may exist real differences between the

competencies and fitness to practice of doctors who have trained in the UK and those who have qualified abroad. This is slightly problematic as in this instance one would expect the percentage of complaints against doctors who were qualified outside of the UK to be higher than the percentage of this group represented on the GMC medical register. Secondly, the report suggests that the GMC processes may discriminate against certain groups of doctors. Connected with this point, and related to the issues of individual BME solicitor resources explored elsewhere in this report, the authors posit that in the Fitness to Practice process, non-UK qualified doctors may be less well placed than their White counterparts, in terms of fewer resources, connections and an absence of confidence and external support, and therefore, less able to mount a convincing defence of their actions, thus resulting in higher and disproportionate instances of non-UK qualified doctors receiving 'high impact' outcomes.

14.24 The authors of the report are very careful to warn against drawing firm conclusions regarding ethnic discrimination due to the incompleteness of the available data.

Limitations in the Available Data

14.25 There were a number of limitations in the quality of data and the scope of the GMC's investigation, which prevented thorough conclusions regarding the total association of ethnicity and regulatory action from being drawn. The issue of ethnicity was conflated with overseas qualification and the authors themselves warned of an existing tendency in analysing issues of ethnic discrimination to equate all foreign born or trained doctors with ethnic minority status. Furthermore, a more nuanced study may have been able to investigate differences existing between various ethnic groups, Black, Asian, dual heritage, etc, that were concealed under the blanket category of 'non-UK qualified'. Relating to UK trained doctors, the available data was incomplete with an absence of ethnic status being provided for all of the doctors on the GMC register, thus limiting the value of a quantitative data analysis. An analysis of a complete dataset might have resulted in the emergence of different patterns of disparity and disproportionality.

14.26 The scope of the report was also hindered by limitations, preventing the necessary investigations into the wider contextual and societal factors that may be influencing instances of discriminatory treatment for BME doctors. Whilst the authors of the report suggested that a lack of resources might account for non-UK qualified doctors receiving a disproportionate number of 'high impact' outcomes, an investigation into the structure and effectiveness of stakeholder organisations was not included in the terms of reference. In addition, institutional factors such as the rate of promotion for BME and non-UK trained doctors, and the proportion of this category employed in senior

roles, were not included in the terms of reference. Both of these issues have been identified in the other reports we analyse in this section as having an impact on the ability of BME professionals to represent and defend themselves against regulatory action. Lastly, by restricting the GMC report to a limited numerical analysis, there is a risk of ignoring other aspects of racial discrimination, not resulting in the commencement of a formal complaint and Fitness to Practice investigation, that may affect the performance and experiences of BME doctors. The authors of the 2011 report suggest that these issues would be illuminated by the commissioning of a specific qualitative report into the experiences of BME doctors, featuring close consultations with those doctors and with other relevant stakeholders.

The Police Service

Disproportionality in Police Professional Standards (DIPPS) Report 2012. Graham Smith, Harry Hagger Johnson, Chris Roberts, (University of Manchester).

An Overview of the DIPPS report

14.27 This report consisted of an investigation into internally raised misconduct proceedings in Greater Manchester Police, with additional statistical analyses of both West Midlands Police and British Transport Police data, as well as statistical analyses of counter-corruption intelligence data in these three services. The DIPPS report and the report commissioned by the SRA share the common theme of attempting to analyse instances of disproportional disciplinary or regulatory action from the relevant bodies. When drawing comparisons between the scope of investigations of the two reports, it is important to note that the police enquiry focused on internally raised misconduct proceedings rather than including instances where investigations and proceedings were the result of complaints from the general public.

14.28 The DIPPS report was born out of discussions between the Greater Manchester Police Professional Standards Branch and the University of Manchester, and was subsequently commissioned in March 2011 by Greater Manchester Police, Greater Manchester Police Authority, West Midlands Police, British Transport Police, West Mercia Police (subsequently withdrawn from the project), the Home Office, Association of Chief Police Officers, National Policing Improvement Agency and the Independent Police Complaints Commission.

DIPPS Methodology and Definitions

14.29 The quality of data presented to the authors of the DIPPS report allowed for a sophisticated analysis including the use of advanced inferential statistical methods that resulted in a range of statistical regression models being constructed to investigate race as a predictor of internal misconduct proceedings. A logistical regression model was used to estimate the odds ratio (OR), adjusting for age, gender, rank and ethnicity, in relation to officers who had been investigated for misconduct offences. In addition, the authors were able to use the triangulation of documentary and qualitative research evidence to comment on the correlation between race and procedural treatment. In particular, and of relevance to this SRA commissioned report, the authors were able to analyse this qualitative evidence within the context of procedural justice, to posit on the degree to which a blanket enforcement of regulation, without an understanding of external factors, reflects fairness, consistency and an efficient allocation of resources.

14.30 The methodology employed by the authors of the DIPPS report shares certain similarities with that which we employed in conducting this review into ethnic disproportionality, in that both reports differentiate between 'numerical disproportionality' and 'procedural disproportionality'.

- Numerical disproportionality - descriptive statistical methods were used to identify instances of a disproportional representation of various ethnic groups within internally raised misconduct proceedings. Inferential methods were then used to analyse the statistical significance of the findings.
- Procedural disproportionality - qualitative research methods were used to identify instances of disproportional treatment across various ethnic groups, as a result of internally raised misconduct proceedings.

14.31 The significance of this definition is that complex socio-political factors may well account for a numerical disproportionality in the instances of internally raised misconduct proceedings, quite unconnected to issues of racial or other discrimination on an individual or institutionalised basis. An example of factors that are perceived to contribute to a higher proportion of BME personnel facing misconduct hearings, whilst not necessarily directly reflecting a racist element, is the under-representation of BME officers in senior ranks. In this regard there are direct parallels with the scope of the SRA commissioned report as the number of senior BME solicitors in 'magic circle' and city firms, who would themselves have a vested interest in ensuring that the issue of ethnic disproportionality was properly analysed, remains small. In this instance, the combined influence of this small group of senior BME solicitors is relatively ineffectual in addressing the larger issues of disproportionality within the profession, in much the same way that a lack of

senior BME police officers limits the perceived power of this group to effect change in relation to ethnic disproportionality within the police force.

14.32 The DIPPS study found that 25 BME officers were investigated over a 4 yr period and 3 allegations were substantiated. Similarly, relatively few White officers were investigated and allegations substantiated over the same period. The researchers concluded that professional standards were 'in paralysis' as a result of failure to address allegations of racism dating back at least to 2003. On examining Investigating Officer reports, they found that there are different types of internal investigation. Whereas the largest type commenced for White officers involved statutory investigations (eg road traffic collisions), the largest type for BME officers involved allegations of misconduct made by supervisors or colleagues. Thus, they were able to confirm the tendency of supervisors to refer BME officers to professional standards. The 'fear factor', i.e., supervisors' fear of having allegations of racism brought against them, as grounds for treating BME officers formally, whereas White officers are dealt with informally is arguably a covert form of racism.

14.33 Furthermore, it can be observed that by resorting to formal punitive and disciplinary measures, rather than attempting other, less formal approaches to solving misconduct issues involving BME officers, managers are ignoring an opportunity to engage with the issues of ethnic disproportionality and are therefore maintaining a 'status quo' that has engendered a frustration and lack of trust regarding the attitudes and practices of the police service, both among BME police officers and the public. This lack of trust could in turn be responsible for the under-representation of BME officers in senior ranks and links closely to a key theme of this SRA report regarding the impact of regulatory and management practices. Without a sufficient and evidenced understanding of the correlation between BME solicitors and regulation, the actions of the SRA may have a knock-on effect, limiting the career progression of BME solicitors at best, and at worst, the success in achieving one of the Legal Services Act's regulatory objectives: 'encouraging an independent, strong, diverse and effective legal profession'. This in turn could affect the number of senior BME solicitors within 'high end' solicitors firms, as mentioned previously, and will therefore maintain the cycle of numerical and procedural disproportionality affecting this population in the solicitors profession. .

14.34 The authors of the DIPPS report were mindful of the role of management and supervision practices in perpetuating a cycle of disproportional responses in proceedings associated with BME officers. This report into disproportionality within the SRA highlights time and again, the importance of understanding the nuances, context and contributory factors that may result in numerical disproportationality regarding regulation and BME solicitors. By acknowledging these factors, the SRA will be able to implement a more

measured response to regulatory breaches and therefore better serve the profession by engendering greater public confidence. The recently completed Legal Education and Training Review (LETR) examined among other issues the role of LETR in promoting Equality, Diversity and Social Mobility in the legal profession, mindful of the regulatory objectives of the Legal Services Act. The DIPPS report assists in understanding the correlation between the regulatory objectives (in which the SRA's 'regulation in the public interest' is framed), legal education and training and regulatory disproportionality as it affects BME solicitors.

14.35 The DIPPS report employed quantitative and qualitative research methods in order to establish a consistent methodological framework to apply to the human resources and professional standards statistics, relating to three police services over four years. The material analysed encompassed: investigating officer reports, internal reports, minutes from meetings, training materials and interviews with former and current personnel. In terms of an investigation into procedural disproportionality, case files involving 377 Greater Manchester Police personnel were reviewed and scrutinised, requiring a significant investment of time.

14.36 The scope and complexity of the DIPPS report, as evidenced by the years covered, the range of material gathered and the difficulty inherent in correlating evidence across three different police forces, speaks to the fact that all of the commissioning bodies recognised the importance of tackling ethnic disproportionality and were committed to contributing to and making possible a thorough report on the issue.

DIPPS Report Commissioning Context

14.37 The commissioning of the DIPPS report in March 2011 came just over a decade after the Stephen Lawrence Inquiry Report, which branded the Metropolitan Police Service institutionally racist. As a result of the findings of structural and deep-seated racist attitudes and procedures within the police force, a number of key operations, initiatives and research exercises were conducted and reports produced, all designed to add to the understanding of the issue of racism in society generally and within the police service specifically. The public reaction to the Stephen Lawrence Inquiry Report and the media scrutiny of the police service nationwide, resulted in a firm commitment from the relevant bodies to find solutions. The Greater Manchester Police launched Operation Catalyst in 1999 in direct response to the SLI and spent 21 months scoping and investigating their own operation, using the recommendations of the Stephen Lawrence Inquiry Report as a framework. The Home Office also commissioned a study in response to the Stephen Lawrence Inquiry Report, the 'Career Progression of Ethnic Minority Police Officers', which pointed to institutional racism as a factor in the

disparity between the careers of BME and white officers in terms of recruitment, retention and promotion and also concluded that the rate of dismissal for BME officers was two to three times higher than for their White colleagues. The significance of studies into the retention and promotion of BME staff and officers should be stressed as it confirms the need to be concerned about both numerical and procedural disproportionality and to develop measures for tackling it.

14.38 Furthermore, the 1999 publication 'Race Equality - The Home Secretary's Employment Targets' (in which Jack Straw maintained a personal interest), identified the correlation between retaining BME staff and building a critical mass of BME staff, not hindered in their career progression, able to reverse the practices of institutionalised racism from within. Issues relating to a lack of trust and confidence in the police service on the part of both the public and BME officers, formed a key theme of the Chief Inspector of Constabulary's 2003 'Diversity Matters' report, and warned of "incalculable damage" on recruitment and retention rates as a result of this lack of trust. Both 'Diversity Matters' and the findings of the 1999 Home Office report, contain direct parallels with the observations mentioned earlier in this report concerning the damaging impact of a shortfall in senior BME solicitors and the danger that the SRA could, through the nature of its regulatory practices, help in maintaining this deficit.

14.39 Of particular significance to the remit of this SRA report are the comments made as part of the 2001 Virdi Inquiry, which investigated the findings of an Employment Tribunal that had concluded that the procedure applied to a BME officer, Sgt Gurpal Virdi, differed to those applied to a White officer for the same offence. In other words, the Employment Tribunal had ruled that there had been procedural disproportionality on racial grounds and the Virdi Inquiry was critical of enforcement of the Police Conduct Regulations stating, "The Regulations when complied with **mechanistically** and **without common sense** can lead to disadvantage for minority groups" (Virdi Report, 2001, pp76-77, quoted in DIPPS, 2012, p17, emphasis added).

14.40 In 2003, a very public disagreement occurred between the Black and Asian Police Association and Greater Manchester Police Complaints and Discipline Branch over accusations of discriminatory treatment, countered by accusations of leniency from the relevant bodies. Further attention was given to the issue of race as a result of the BBC's documentary 'The Secret Policeman', and the criticism of the Metropolitan Police Service's investigation of the head of the National Black Police Association, Superintendent Ali Dizaei, both also in 2003. In response to the public criticism, the Greater Manchester Police reopened Operation Catalyst under the leadership of the head of the Black and Asian Police Association, and launched a Police Complaints Authority supervised investigation, Operation Haddon. The

Association of Chief Police Officers also developed a 'Race and Diversity Audit Template' whist the Commission for Racial Equality announced they would conduct a statutory investigation into the police services of England and Wales.

14.41 Between 2004 and 2007 there were 12 separate reports into the issue of race based disproportionality in misconduct proceedings within the police service, concluding that the greatest concern arose from internally raised conduct matters rather than public complaints. Following on from the damning criticism of the SLI and evidence of institutional racism, one of these reports, the 2004 Morris Report recommended that the Metropolitan Police Service took:

> urgent steps to eliminate discriminatory management practice which has led to a disproportionate number of investigations of black and minority ethnic officers.
>
> (Morris Report, 2004, paragraph 5.76, quoted in DIPPS, 2011, p20).

14.42 The Taylor Review of 2005 was tasked with reviewing the recommendations of the Commission for Racial Equality and the Morris Report and again stressed the importance of maintaining standards of procedural justice, with the need to practice the disposal of conduct matters in a manner that would enjoy public confidence. In 2009, the Home Affairs Committee noted that despite progress in the ten years since the Stephen Lawrence Inquiry report, the police service had failed to meet its target of employing 7% of its force from ethnic minorities, the career progression of BME officers was still hindered, and these officers were still disproportionately affected by disciplinary procedures. In March 2010 the Government responded to the Home Affairs Committee report, stressing the need to improve transparent monitoring procedures.

14.43 It is important to have a sense of the commissioning context of the DIPPS report and to appreciate the level of scrutiny and public attention that the police service received following the Stephen Lawrence Inquiry report. The number of reports and internal investigations commissioned by various police forces are indicative of a serious commitment to a robust and thorough investigation of race related issues and a determination to improve practices within the police service. The resources dedicated to solving race issues, often focussing on disproportionality within the police service, have been significant, allowing for solid recommendations to be made following the appropriate analysis of detailed data sets. The influential 2005 Lowe Report, for example, had a full 30-month research window. In addition, the findings of major reports have been used to devise frameworks and modalities for implementing the various recommendations.

14.44 In contrast to the time, resources and critical attention focussed on solving issues of racial disproportionality within the police service, other professional standards departments and regulatory bodies have avoided the spotlight. Despite the recommendations of the 2005 Nicholson Review, the 2008 Ouseley Report and the 2010 Braithwaite report into equality, diversity and disporportionality, the legal profession and the SRA have not had their practices scrutinised publicly, to the same extent as the police service.

14.45 The need for the SRA to continue to address its own parallel issues of disproportionality is real and it is one the regulator acknowledges. However, that acknowledgment must translate into an ongoing commitment at the highest level, both in terms of leadership and the allocation of resources, and concrete measures to review the regulatory process and work with the BME population in the regulated community to tackle the causes of both numerical and procedural disproportionality. The impact of ethnic disproportionality upon BME solicitors, their careers, their families and the communities they serve is simply not sustainable. What is more, it raises serious 'public interest' and 'access to justice' issues which the SRA does not factor into its understanding of 'regulation in the public interest'.

14.46 This is made all the more obvious when we juxtapose the efforts of the police service over the past decade, despite the complexity of synchronising different police forces and gathering data across different managerial practices and cultures, with the approach of the SRA towards the findings and recommendations of the reports it commissions and its relationship with the Law Society as the body representing the regulated community. One needs to see evidence of both the SRA and the Law Society working jointly to tackle the issue of disproportionality and in a manner that does not compromise the independence or statutory operation of either. The overwhelming and continuous public and media scrutiny of race issues in the police service, compared to a relative lack of interest in the structure and regulatory systems of the legal profession, may account for this comparative lack of public attention paid to issues of ethnic disproportionality and its implications for access to justice of some of the most vulnerable communities in the country.

14.47 The importance of striving towards a judiciary that functions in line with social norms and values and is itself regulated with the same discretion, nuance and common sense that the public expects of law-makers when interpreting and applying our national laws, leads us in this report to recommend considerable changes to the SRAs engagement with the issues of race and ethnic disproportionality.

Framework of DIPPS Report

14.48 The DIPPS Report was framed around the following seven questions:

1. What are the operating procedures of the Greater Manchester Police Force Professional Standards Branch?
2. What is the statistical evidence concerning BME officer involvement in various stages of internally raised misconduct proceedings and covert investigations in comparison to other ethnic groups?
3. What perceptions are there of the development of concern with disproportionality in misconduct proceedings in the Greater Manchester Police?
4. What are the experiences of BME officers who have been involved in Greater Manchester Police internally raised misconduct proceedings?
5. What perceptions are there of disproportionality in internally raised misconduct proceedings in the Greater Manchester Police at present?
6. What perceptions are there of disproportionality in covert investigations in Greater Manchester Police?
7. What perceptions are there of the effectiveness of Greater Manchester Police initiatives to address concerns with disproportionality in internally raised misconduct proceedings?

14.49 The simplicity of this framework prevented the inherent complexity of the subject matter and the difficulty of assembling the relevant data across different police bodies, from distracting from the focus of the report. In addition, the framework employed in the DIPPS report followed a logical progression in terms of chronology. This SRA report suffered from difficulties in confirming the Terms of Reference and scope of the analytical review and, as a result, a coherent framework was only devised after certain aspects of the research had already started. In January 2013, less than ten months before the SRA report was due to be submitted, the scope of the project in relation to the data sets and also the qualitative aspect of the research, were yet to be finalised. Taking into account the severe delays involved in gathering all the relevant data needed to satisfy the terms of reference, an insufficient timeframe was agreed for the submission of the report. That said, the SRA sought to be as flexible as the situation demanded and key members of staff facilitated the research even as the goalposts shifted from time to time.

Perceptions of Key Stakeholders

14.50 The authors of the DIPPS report conducted thirty-four interviews with personnel from the Greater Manchester Police force and relevant staff associations, resulting in over fifty hours of interview data, framed around a semi-structured thematic coding framework. Of particular interest was the background to the establishment of the Black and Asian Police Association

(BAPA), which was formed in response to the Stephen Lawrence Inquiry Report in 1999. Hostility to the formation of BME officer associations in the 1990s continued even after the formation of the BAPA, with a pattern of counter-allegations and misconduct proceedings facing BME officers who attempted to raise behavioural complaints regarding the attitudes of their White colleagues. Progress was made following the BBC's 'Secret Policeman' documentary in October 2003 and during interviews with two officers from the Association of Chief Police Officers (ACPO), credit was given to the role of BAPA and other BME staff associations, in ensuring that issues of disproportionality were taken seriously.

14.51 The scarcity of senior BME officers, a concern raised elsewhere in this report, was also raised by the ACPO interviewees, one commenting that in the Metropolitan Police Service, there was not a single senior black officer who had not been investigated or put through misconduct proceedings (DIPPS report, 2011, p60). Eleven members from the Professional Standards Branch, responsible for investigating and regulating misconduct procedures, were interviewed and their support for BAPA and initiatives seeking to address disproportionality varied greatly. Praise was given, both by current members of the Professional Standards Branch, and those who had served after 2007, to the role of stakeholders such as BAPA and the Muslim Police Association in working as constructive and critical partners in improving practices relating to race within the police force. The Greater Manchester Police Authority also supported the actions of BME staff organisations, drawing particular attention to the roles of these stakeholders in addressing the deficit in numbers of BME officers in senior ranks.

14.52 With regard to the perception of stakeholders concerning procedural disproportionality, all eight of the BME officers interviewed had been subject to internally raised misconduct proceedings and believed that their ethnicity was a factor in their treatment. Significantly, the four officers who conceded that their behaviour warranted some disciplinary action believed that the matter could have been resolved informally, without referral to the Professional Standards Branch. The authors of the report were able to triangulate the qualitative research to verify some of the claims of disproportionality expressed in these eight interviews. The emotional strain, reputational damage and stigma attached to the process of being under investigation were common themes arising from the interviews.

14.53 With regards to this SRA report, while it does not form part of the terms of reference, the role of relevant stakeholder organisations regarding the issue of ethnic disproportionality and how the SRA and the Law Society deal with it is explored. BME practitioner networks, such as the Muslim Lawyer Association, Black Solicitors Network, Society of Black Lawyers and the British Nigerian Law Forum must be encouraged by the Law Society and the

SRA as critical partners in addressing disproportionality concerns, in the same way that the Greater Manchester Police Authority praised the role of BAPA. The response of BME stakeholder organisations to the 2008 Ouseley Report indicates a serious lack of faith in the ability of the SRA to forge an effective partnership and address the concerns of their members.

DIPPS Report Conclusion

14.54 The DIPPS report concluded that evidence of disproportionality on racial grounds in internally raised misconduct proceedings were, "symptomatic of flawed approaches to dealing with difference" (DIPPS report, 2011, p101). The DIPPS report therefore went further than simply classifying the issue as a professional standards problem, linking it to failings in management in all areas.

14.55 Owing to the obvious synergy between the DIPPS report and this SRA report, certain lessons can be learnt in order to set out a more effective framework for analysing and tackling the issue of disproportionality within the legal profession and to offer solutions to the current problems. We make some recommendations at the end of this chapter.

Conclusions

14.56 The overall objective of this report, and the long-term value of comparing this review with other research on the subject of race and disproportionality, is to furnish the SRA with a more nuanced understanding of racial issues within the legal profession, the wider legal marketplace and within the space occupied by BME legal practitioners in the community. Hopefully, this review will help to deepen the SRA's understanding and encourage the regulator to review its approach to regulation once issues arise that are not intrinsically connected to the ethnicity of BME practitioners themselves but relate more directly to their structural location in the society and in the profession.

14.57 This transformed mindset will hopefully enable the SRA to realign its practices in order to improve the relationship between the regulator and the profession, work with the profession in all its diversity and, where necessary, adjust its regulatory systems and procedures, thus reducing the frequency of punitive and disciplinary actions and tackling ethnic disproportionality in a tangible and meaningful way.

14.58 There is another and on the face of it perhaps not so obvious parallel between the issues the DIPPS report addresses and this review. The assumption is made, and quite often articulated with deep resentment and hostility, that BME professional networks and associations such as the Black and Asian Police Association (BAPA), the Muslim Police Association, the National Black

Police Association and their counterparts, e.g., the Muslim Lawyers Association, Black Solicitors Network, Society of Black Lawyers, British Nigerian Law Forum, etc., are groups of staff who come together at the exclusion of their White counterparts to lobby for their own interests and make the organisations to which they belong 'bend' to their preferences and demands. It is not generally conceded that those practitioners have a passionate commitment to upholding the highest standards within their profession and dealing with whatever policies, procedures or conduct work against that. They do so not only for their own protection and in expression of their own high professional standards, but because they are committed to public service of the highest standard. Hence their active commitment to eradicating institutional, personal and other forms of racism and other forms of exclusion and oppression and whatever barriers there are to access, retention and progression of themselves and others within their profession.

14.59 It should not be assumed, therefore, that by demanding that the police service or the SRA, BSB, etc, tackle the evidence of ethnic disproportionality, they are against professional standards, against protecting 'the public interest', or in favour of giving 'carte blanche' to their fellow professionals, Black or White, to engage in all forms of malfeasance and abuse of power, privilege and authority, to the detriment of the public and the collective reputation of the profession.

14.60 We flag this up because we expect that there are those both within and external to the SRA who would take issue with the general orientation of this report and argue, without justification, that the likes of the EIG and us as the authors of this Report will want the SRA to abandon its 'punishment and deterrent' function as a regulator and compromise both 'the interests of the public' and the reputation of the profession. Our position is that punishment and deterrence are not the antithesis of fairness, natural justice, proportionality and transparency. On the contrary, the former stand a far greater chance of being effective when the latter is uncompromisingly present. I expect that this is also the position of the BME stakeholder networks that make up the EIG in the SRA and that the DIPPS report acknowledges in an analogous context.

Recommendations

- The SRA should review its monitoring systems and databases and its approach to measuring issues of ethnicity, with a view to making improvements as necessary, especially in consistency and clarity. In doing so, it should examine, for its usefulness, the Race and Diversity Audit Template devised by the ACPO and praised in the DIPPS report.

- The SRA should conduct an equality impact assessment (EIA) of the impact of its regulatory practice upon the regulatory objectives, including ‘protecting and promoting the public interest’.

- Against the backcloth of that EIA, the SRA should engage a combination of stakeholders, the Equality Implementation Group (EIG), the Law Society, the SRA, the Legal Services Board (LSB), and the Equality and Human Rights Commission, in auditing its regulatory outcomes, having regard to the requirements of the Public Sector Equality Duty.

APPENDIX

Appendix

Solicitors Regulation Authority

16 November 2012

Independent Comparative Case Review

Terms of Reference
(subject to formal contract)

To carry out a comparative file review to identify whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying potential improvements to such practices, policies and procedures to maximise fairness and consistency, by:

1. Comparing outcomes at the SDT depending upon the ethnicity and gender of respondents by statistical analysis of ethnicity and gender by outcomes based on:

   a. Strike off
   b. Suspension
   c. Fine
   d. Reprimand
   e. Respondent ordered (only) to pay SRA costs
   f. No order
   g. All allegations dismissed

   Sample – SDT cases concluded 2009-2011. SRA to provide management information of SDT outcomes broken down by ethnicity and gender with anonymous referencing by which case sampling described below can be carried out.

2. Carrying out a comparative case file review to compare a sample of SRA files for SDT prosecutions (TRI reference) in which the SDT published its findings or judgment in 2011 with a sample of files dealt with by way of internal decision at Adjudication in 2011 to review:

a. Application of criteria to refer to SDT

b. Whether matters appear to have been dealt with consistently and at the right level in terms of seriousness

c. Whether matters appear to have been dealt with fairly in comparative terms

d. The impact of respondents being represented or not, including whether and if so at what stage they accessed legal advice as to their position; make recommendations as to how to encourage such advice to be accessed and from where

e. The impact of respondents engaging with the process – attending the SDT hearing; making cogent submissions in adjudicated cases

f. The impact of costs orders, taking into account factors such as:

   i. the costs ordered by the SDT or SRA adjudicator in the sample of cases;
   ii. whether those costs have been paid in individual cases;
   iii. the overall proportion of costs actually paid;
   iv. the impact of respondents' behaviours such as early admissions or failure to make admissions

g. Quality:

   i. reasoning in reports prepared for either route;
   ii. reasoning in Adjudication decisions.

Agreed sample – random within following criteria (and see Notes below):

- 40 TRI files involving BME respondent
- 40 TRI files not involving BME respondent
- 40 files that went to Adjudication involving BME respondent
- 40 files that went to Adjudication not involving BME respondent.

3. Considering whether, in the light of the reviews in 1 and 2 above, there are implications for the costs regime and the relationship between the SRA and the SDT.

Notes:

Although the samples should be random so far as possible it may make the comparison more meaningful if the SDT outcome is the same or similar, eg strike off/suspension/fine and a similar approach is adopted for internal adjudications (eg rebukes), acknowledging that cases are decided on their own facts and penalties are often heavily influenced by case or respondent-specific mitigating factors.

The reviewer has contacted and met with two solicitors subject to SRA action, as nominated by Lord Ouseley. This step was recommended by Lord Ouseley after he had met with five solicitors concerned about their treatment by the SRA, and was accepted by the SRA as it was felt that their experiences would help provide some useful context to the independent reviewer of the issues being raised. Lord Ouseley had informed the individuals that the purpose of the meeting was for them to talk to Professor Gus John about their experience of the SRA and how they felt they had been treated by the SRA. Lord Ouseley also made it clear to the individuals that the purpose of the meeting with the independent reviewer (Professor Gus John) was not to review their case or affect the outcome.

The reviewer may review a proportion of the 14 cases where racial discrimination has been alleged in order to analyse the cases chosen to the extent reasonably necessary to fulfil the terms of reference (noting that he has already reviewed 2 of the cases as identified by Lord Ouseley).

As far as any live cases amongst those in which racial discrimination is alleged are concerned, the reviewer has agreed that it is not the purpose of the review to 'seek to go behind or undermine the findings of a court or tribunal'. The reviewer will conduct any review of a case in the same manner that he approached the 2 cases already reviewed and in keeping with the principal purpose of this review, i.e., to establish whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying potential improvements to such practices, policies and procedures to maximise fairness and consistency. Cases in which there is continuing substantive regulatory or legal action (such as proceedings against the SRA or substantive appeals) will not be included. However, if the continuing issues are not substantive (such as the amount of costs to be ordered or paid; or an application for permission to appeal), the case is within the group of cases which the reviewer may consider.

In view of possible continuing legal proceedings (such as appeals or satellite litigation) the review, including any reports, will not attribute any of its content to a specific or identifiable case or individual. Nor will the review seek to go behind or undermine the findings of a court or tribunal. The reviewer is not carrying out a legal review of cases but as noted above is identifying potential improvements to practices, policies and procedures to maximise fairness and consistency. The reviewer has the benefit of legal expertise in his organisation but may seek advice from a regulatory lawyer (who does not generally act for or against the SRA) if reasonably necessary. The reviewer may seek clarification from respondents if reasonably necessary to fulfil the terms of reference.

All material must be treated with the strictest confidentiality. SRA prosecution files will often contain material which is confidential to clients and subject to their legal professional privilege. To ensure frankness by staff and constructive learning, outputs will not be attributable to identifiable cases or persons. Clients' and the SRA's legal professional privilege must be respected at all times.

The SRA will work with the reviewer in an open and transparent manner, ensuring that he has access to information and documents that would enable him to fulfil the terms of reference.

All aspects of the review are to be completed within the budget agreed with the SRA, including any external fees.

November 2012