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Solicitors' Swan Song?: A Statistical Update on Lawyer Discipline in Queensland

Linda Haller
l.haller@unimelb.edu.au

Heather J. Green
h.green@griffith.edu.au

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SOLICITORS' SWAN SONG?: A STATISTICAL UPDATE ON LAWYER DISCIPLINE IN QUEENSLAND

LINDA HALLER* AND HEATHER J. GREEN#

I Introduction

In 2001 the *Bond Law Review* published an article describing a study of 70 years of professional discipline in Queensland.[1] Five years have now elapsed since that study, and much has occurred in Queensland to make it worthwhile to analyse data from cases heard in the subsequent five years, to compare these with the earlier data, and to seek further explanation for the statistical patterns found.

The period 2001-2005 was the final period during which the Queensland Law Society received complaints about solicitors and prosecuted discipline. That role has now been taken over by an independent body – the Legal Services Commissioner. Many of the cases reported here were investigated and prosecuted by the law society, and decided by the Statutory Committee, under the highly critical eye of the Queensland government and community, and this may have influenced the way they were handled by the society and tribunal.

Perhaps the effect of the political pressure can be overstated. Many would argue that by the beginning of the new millennium the writing was on the wall - that it was inevitable that the society would soon lose its powers.[2] But, as later discussion shows, within the law society itself there still appeared to be some hope that it could retain at least some of its powers. This paper attempts to explore whether this may have affected the types of cases which the society prosecuted, and the way in which it prosecuted them over the last five years of its control.

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* BA, LLB (Monash), LLM (Qld), PhD (Qld), Senior Lecturer in Law, University of Melbourne, Victoria, Australia.

PhD (ClinPsych) MAPS, Lecturer in Clinical Psychology, Griffith University, Gold Coast, Queensland, Australia. This work was supported by a grant to the University of Melbourne from the Legal Practitioner Interest on Trust Accounts Fund, through the Queensland Department of Justice. Research assistance was provided by Amy Little. Our thanks to Reid Mortensen and Leslie Levin for comments on an earlier draft.

1 Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis' (2001) 13 *Bond Law Review* 1-45.

2 Reid Mortensen and Linda Haller, 'Legal Profession Reform in Queensland' (2004) 23 *University of Queensland Law Journal* 280, 281-2, 287.

This report can also be more informative than that published in 2001, as the Legal Services Commissioner has begun to include demographic data as part of his annual reports, which indicate whether – proportionally - various groups of lawyers are over or under-represented in complaints and discipline.

In the following section we explain the legislative changes impacting upon the tribunal as well as the changing political climate in which discipline was prosecuted by the Queensland Law Society, by way of background to the subsequent discussion of the results of this study. A number of aspects of lawyer discipline in Queensland were likely to have been influenced by the current political climate and legislative changes. These include the type of charges prosecuted, the vigour with which they were prosecuted, and the way in which they were disposed of by the tribunal, including how repeat offenders were treated. We also report on demographic features of those facing disciplinary hearings, such as their gender, age, practice location and practice type, where legislation and politics were less likely to have caused changes to discipline over time. While it is beyond the scope of this paper to explore possible reasons for the changes which we see in this demographic data over time, they do deserve some detailed exploration in the future.

II Background

A Legislative Framework

The earlier study reported that legislative changes of the mid 1980s and 1990s, and described below, did not appear to have had a significant impact – even by 2000 - on the types of cases which the society prosecuted or the way in which the tribunal disposed of those cases. A study of the cases prosecuted in the period 2001-2005 may show whether the amendments – particularly those that attempted to increase the consumer focus of discipline - had finally gained traction. Here we focus primarily on two aspects of the legislative amendments – quality of service and costs complaints, and the use of rehabilitative orders.

1 Quality of service and costs complaints

The legislature had been drawing the definition of conduct liable to discipline progressively wider over many years – from the inclusion of 'malpractice' and 'unprofessional conduct' in 1938 to more explicit statements of Parliament's intention in 1997. These amendments extended the definition of unprofessional conduct to include 'serious neglect or undue delay, the charging of excessive fees or costs or a failure to maintain reasonable standards of competence or diligence.'[3] During the

[3] *Queensland Law Society Act 1952* (Qld) s 3B (repealed), inserted by *Queensland Law Society Legislation Amendment Act 1997* (Qld) s 5.

second reading speech of the 1997 Bill, the Attorney-General confirmed the Government's intention to extend the definition of unprofessional conduct and 'broaden the umbrella of matters that come within the ambit of the complaints tribunal',[4] which would increase its workload 'considerably'.[5]

2 Legislation Encouraged Greater Use of Fines and Rehabilitative Orders

Since 1987 the legislation had allowed the tribunal to impose fines of up to $100,000, and since 1988 had allowed the disciplinary tribunal to impose orders which would allow the rehabilitation of the solicitor while he or she remained in practice - orders to make files available for future inspection, to submit reports and to comply with conditions, such as attendance at various continuing legal education courses.[6]

We do not intend to discuss the amendments brought in by the *Legal Profession Act 2004* (Qld) in any great detail here, given that our focus is on cases heard 2001-2005 and only four cases during that period were heard under the new legislation. The 2004 amendments will become of much greater interest over time, particularly now that barristers have been brought under the same regulatory scheme as solicitors, and the tribunal is constituted by a current Supreme Court judge rather than legal practitioners and lay members. For the purposes of this paper, the main point to note about the 2004 amendments is that they followed a long and hard-fought gestation period and finally removed the law society's role in the receipt of complaints and prosecution of discipline.[7]

B Guidance from the Supreme Court

The law society, in deciding what cases to prosecute, and the disciplinary tribunal, in deciding how to dispose of individual cases, were receiving guidance from the Supreme Court of Queensland when that court heard appeals from tribunal decisions, as well as from legislation. There was a divergence in the vision of discipline portrayed in the legislation and seen by the Supreme Court. The court clung to narrower, common law, notions of discipline long after Parliament had

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4 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 May 1997, 1442 (Denver Beanland).

5 Ibid 1440 (Denver Beanland).

6 *Queensland Law Society Act 1952* (Qld) s 6 (3)(ab) (repealed), inserted by *Queensland Law Society Act and Another Act Amendment Act 1988* (Qld) s 5. Amendments in 2004 continued this trend, extending the suggested range of orders to include supervised practice or limited practice: *Legal Profession Act 2004* (Qld) s (4).

7 Mortensen & Haller, above n 2, 280.

sought to extend the reach of discipline.[8] The court had also discouraged the use of suspension orders,[9] and showed very little support for the use of fines as a disciplinary alternative.[10]

C Political Climate

1 Queensland Law Society

The pressure on the old disciplinary system intensified after 30 April 2000, the cut-off date of the earlier study in the *Bond Law Review*. Just as the 1990s were drawing to a close the government put regulatory reform of the legal profession on the political agenda.[11] In 1999 the Brisbane *Courier Mail* newspaper ran a number of articles suggesting the law society was in dire straits in its management of the fidelity fund.[12] While the government gave the law society further powers to allay concerns over the fidelity fund temporarily, it continued to discuss wide-reaching reform of the profession.[13] More pressure was to come, this time not from fidelity claims but from the law society's poor handling of complaints against lawyers.

In 2002, the *Courier Mail* newspaper ran a series of stories making strong allegations of overcharging by Brisbane law firm Baker Johnson. Clients claimed that more than 100 complaints about the firm had been virtually ignored by the law society.[14] The society responded by commissioning an internal report in August 2002 and the government requested a separate report by the Legal Ombudsman. Both reported in late 2002 and both were critical of the society's past performance, but retired judge Shanahan in his internal report to the society thought the answer was for the society

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8 Linda Haller, *Professional Discipline of the Queensland Legal Profession* (PhD Thesis, University of Queensland, 2006) 340.

9 *Mellifont v Queensland Law Society* [1981] Qd R 17; Linda Haller, 'Waiting in the Wings: the Suspension of Queensland Lawyers' (2003) 3 *QUT Law and Justice Journal* 397-421.

10 Linda Haller 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152-178, 165. This was particularly the case prior to 2000.

11 Queensland Department of Justice and Attorney-General, Legal Profession Reform Discussion Paper (1998).

12 Adrian Evans, 'Queensland Fidelity Compensation 1990-2004: The End of the Money Tree' (2004) 23 *University of Queensland Law Journal* 397, 401-2.

13 Queensland, *Green Paper – Legal Profession Reform* (1999); Queensland Attorney-General and Minister for Justice, Legal Profession Reform, Press Release (13 December 2000).

14 Typical of at least 16 articles which appeared in the *Courier Mail* (Brisbane) between 9-14 August 2002 is Hedley Thomas, 'Charge! Law of the Jungle', *Courier Mail* (Brisbane), 10 August 2002. A partner of the firm was later struck off: *Baker v Legal Services Commissioner* [2006] QCA 145.

to be given *more* power while the ombudsman recommended that an independent body take over the handling of complaints.[15]

In early 2003 the society was still hopeful of retaining its prosecutorial role, and its announcement that it had appointed a retired senior police officer to head its investigation and prosecution section[16] suggested a society committed to a more rigorous disciplinary system – perhaps even a more punitive one.

But by May 2003 it seemed that the society was about to lose its fight. The State Government tabled the Legal Profession Bill, which planned to take all complaint handling and prosecutions out of the society's hands. The society still appeared hopeful of having a significant role in the new structure, expressing confidence that 'the new streamlined processes and first-class team we have recently established at the Law Society will remain a key and integral part of the final outcome.'[17] In the same month the president of the society also chose to issue a press release – 'QLS Takes Action' - announcing the results of four recent decisions of the tribunal,[18] which appeared to be part of the campaign to prove that the society should be allowed to keep its current role. This and other press releases announcing various successful prosecutions and society initiatives were added to a web page regarding the law society's responses to retired Judge Shanahan's report into the Society's handling of complaints.[19] By October 2003, and with a new president, the society appeared to accept that the society's fight had been lost, and simply welcomed the government's indication that society staff were likely to still receive referrals of investigations from the independent Legal Services Commissioner. But by the following month the society was less conciliatory, threatening to be unavailable for complaint investigations if it was to lose its prosecution role.[20]

2 Solicitors Complaints Tribunal

While the society was under pressure, in turn, the disciplinary tribunal had pressures of its own. By the second half of the 1990s, perhaps to protect its *own* position, the law society had become more willing to criticise decisions of the disciplinary tribunal,

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15 Mortensen and Haller, above n 2, 281.

16 Queensland Law Society, 'Law Society Appoints Senior Police Officer to New Post' (Press Release, 21 February 2003).

17 Queensland Law Society, 'Law Society Responds to Government Reform Plans' (Press Release, 6 May 2003).

18 Queensland Law Society, 'QLS Takes Action against Four Solicitors' (Press Release, 15 May 2003).

19 Queensland Law Society, Regulation of the Legal Profession, <http://www.qls.com.au/default.aspx?pid=205> at 7 December 2003.

20 Josh Massoud, 'QLS Won't Cop Policing Role', *Courier Mail* (Brisbane), 14 November 2003.

lodging appeals arguing that the tribunal had been too lenient, even though the tribunal generally was imposing harsher sanctions than it had during the first half of the 1990s,[21] when the society did not lodge any appeals at all.

Even if the disciplinary tribunal did not feel under greater pressure from the *society* to 'get it right', and so avoid an appeal by the society to the Supreme Court, by September 2003 the tribunal's decisions were subjected to even wider, public scrutiny, as they became available in full on the public section of the law society's website.[22] This may have also had an impact on how it decided cases.

This should not be overstated. While the society's loss of its prosecution role would have severe consequences for the society's finances and capability to retain and employ staff, there was less at stake for the members of the Solicitors Complaints Tribunal – at least financially. The lay members received only a small honorarium and lawyer members worked part-time and voluntarily, only receiving reimbursement of expenses. In addition, the attacks about the current regulatory process had been directed primarily at the law society's handling of complaints and prosecutions, not at the tribunal. Tribunal members may have been relieved that the removal of the society's powers may alleviate what past criticism of the society had 'rubbed off' on the tribunal. The lawyer members of the tribunal could also see that they would still have a part to play in the lower level Legal Practice Committee. Finally, the tribunal comprised nine individual solicitor members and three lay members. In summary, it is much less likely that tribunal members were concerned – or sufficiently organised - to fight against the proposed changes.

What has this study found? Was the mounting political pressure and legislative change reflected in the way in which the law society prosecuted discipline in its last five years, or the way the disciplinary tribunal disposed of cases?

III Methods

All professional disciplinary matters between the beginning of record keeping in 1930 and the end of the Queensland Law Society's annual reporting period on 30 April 2000 had been entered into the Queensland Solicitors' Discipline Database previously. In this project, refinements were made to the database, data from 2000 to mid-2005 were entered, and analyses incorporating more recent data were run.

Data were all cases on record of professional disciplinary proceedings for Queensland solicitors. All professional disciplinary matters between the beginning of

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21 Haller, Solicitors' Disciplinary Hearings, above n 1, 25, Figure 3.

22 Linda Haller, 'Dirty Linen: The Public Shaming of Lawyers' (2003) 10 *International Journal of the Legal Profession* 281, 288.

record keeping in 1930 and June 2005[23] were included. There were 533 cases in total – a further 83 cases were added for the most recent time period using the same data collection techniques described previously.[24] For the periods ended 30 April in each of the years between 2001 and 2004 inclusive, the number of cases annually were 13, 16, 21 and 28 respectively. Five cases were heard during the transition period 1 May 2004 to 30 June 2005; four of these were heard after 1 July 2004 when the new legislation[25] came into effect. As was the case in the earlier article,[26] it was decided to continue to focus on solicitors, and exclude barristers and non-lawyer employees from the analysis, particularly as matters involving non-solicitors were too small in number to analyse separately. Between 2001-2005, only three matters involving barristers and four matters involving non-lawyer employees were heard. These cases and 11 others from the existing dataset concerning non-solicitors were excluded from the present analyses. Data were again analysed using Statistical Package for the Social Sciences (SPSS).[27]

IV Results

A Demographics

1 Gender

Over the entire 75 year period, there were 516 cases involving males, 15 involving females and two where gender was not recorded. Thus, considering cases where gender data were available, 97.2% were cases involving male solicitors and 2.8% involving female. No woman appeared before a disciplinary hearing in Queensland until 22 July 1981 and since that time female solicitors have accounted for only 2 - 6% of disciplinary cases (Table 1).

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[23] There was a change in the time period for reporting that occurred during the period covered by this study. The Queensland Law Society operated on a 12 month reporting cycle from 1 May to 30 April. In 2004 the Legal Services Commission became the coordinating body and began reporting on a financial year basis. For 1930 to 2004, the year refers to the 12 month period ending 30 April of that calendar year (eg 2003 = 1 May 2002 to 30 April 2003). However, to allow for the transition, in this project all cases between 1 May 2004 and 30 June 2005 were counted as "2005" cases (i.e. there was one 14-month period). Similarly, the 5 year period ending in 2005 included 1 May 2000 to 30 June 2005.

[24] Haller, 'Solicitors' Disciplinary Hearings', above n 1.

[25] *Legal Profession Act 2004* (Qld).

[26] Haller, 'Solicitors' Disciplinary Hearings', above n 1.

[27] Coding of raw variables are the same as those shown in appendices 1 and 2 of the 2001 report: Ibid 38.

The under –representation of women is not surprising given that data from many jurisdictions have reported for some years that female lawyers are less likely to generate consumer complaints than male lawyers.[28] A similar trend appears to be the case in Queensland: in both 2005 and 2006 once account is taken of their relative numbers in legal practice,[29] male solicitors were almost three times more likely to have a conduct matter recorded against them than a female solicitor.[30]

But the data on the rate of complaints entering the system do not fully account for the extremely low number of women facing discipline. If the ratio of conduct matters flowed through to disciplinary hearings in equal proportions, we would expect three times as many male lawyers facing a hearing as females, but in fact they outnumber females 20:1. While the conduct investigation and discipline data are not strictly comparable as they come from different time periods, they are consistent with data from Canada suggesting that, even if a complaint is laid against a female lawyer, it is less likely to eventuate in formal disciplinary proceedings.[31] A study of disciplinary action in all jurisdictions of the United States found that women were underrepresented in disciplinary hearings there as well.[32]

There are many possible explanations for the low numbers of women being subjected to complaints and an even smaller proportion facing discipline. These could include the way women relate to clients and respond to complaints and investigations, the areas of law in which they practise, their relative access to trust accounts, and their level of responsibility within law firms, with partners disciplined more often than employee solicitors.[33] Hatamyar and Simmons[34] explored these and a number of other possible explanations for the low number of women lawyers facing discipline

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28 Haller, 'Solicitors' Disciplinary Hearings' above n 1, 14.

29 In 2000, women were reported to comprise between 27 and 40% of lawyers in practice – the reports vary.

30 Legal Services Commissioner (Qld), *Annual Report 2004-2005*, Table 3 5.7.4, *Annual Report 2005-2006*, Table 7.8.4. A similar client dissatisfaction appears to arise in matters which are categorised as 'consumer disputes', with male solicitors more than twice as likely as a female solicitor to be subject to a consumer dispute reported to the Legal Services Commissioner.

31 Bruce Arnold, *A Life Course Dynamics Approach to Professional Deviance and Self-Regulation: The Case of Ontario Lawyers* (PhD Thesis, University of Toronto, 1991) 73.

32 Patricia Hatamyar and Kevin Simmons, 'Are Women More Ethical Lawyers? An Empirical Study', (2004) 31 *Florida State University Law Review* 785. See also Brian Payne, Victoria Time and Arah Raper, 'Regulating Legal Misconduct in the Commonwealth of Virginia: the Gender Influence' (2004) 15 *Women and Criminal Justice* 81, 87.

33 See text below in relation to Practice Type.

34 Above n 32.

in the United States, but did not find any which they felt could adequately explain the difference.[35] This is an area ripe for further research.

2 Age and Experience

Other trends that are statistically significant are recent increases in the mean age and number of years of experience of solicitors involved in disciplinary hearings (Table 3). These data were available from cases from around 1970 onwards,[36] and show a mean age of 42.4 years[37] and mean of 15.2 years of experience.[38] Mean age and experience increased significantly when comparing five year blocks from 1971 to 2005.[39]

Solicitors in disciplinary proceedings were older on average than practising solicitors as a whole,[40] consistent with a recent study from the United States[41]. Although the median age of Australian lawyers has increased over the relevant period,[42] there was evidence that the increase in age was somewhat greater among disciplinary cases than the overall population of solicitors,[43] suggesting that the age disparity is increasing. Further investigation is necessary to determine the reasons for the apparent disparity. One possible reason could be that in recent years a higher proportion of younger solicitors have entered large firms, which are underrepresented in disciplinary cases (see practice type below). As one of us is a teacher of legal ethics, we would also like to think that another possible reason is that educational standards have increased among law graduates in recent times. But, just as with the under representation of women reported in the previous paragraph, the

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35 Ibid 851.

36 N = 327.

37 SD = 8.8, range 24.9-69.1 years.

38 N = 329. SD = 8.6, range 1.1-43.1 years.

39 One-way ANOVA. $F(6, 320) = 11.91$, $p < .001$. As would be expected, years of experience showed a parallel statistically significant increase over the same time period: $F(6, 322) = 10.24$, $p < .001$.

40 For example, from 2001-2005, Queensland Law Society annual reports showed a mean age of approximately 40.5 years for all solicitors, yet the mean age for solicitors in disciplinary proceedings was 47.3 years

41 Above n 32.

42 Anne Daly, Don Fleming and Philip Lewis, 'Investing In A Legal Education: The Private Rate Of Return To A Law Degree', (2003) *Centre for Labour Market Research Discussion Paper Series 03/1*, 1.

43 Between 1986 and 2001 the median age of Australian law graduates, including those not currently practising as lawyers, increased from 35.9 to 40.8 (ibid). This 4.9 year increase compared with an 8.4 year increase in the mean age of disciplinary cases in the present study over the same period. Similar increases were seen in both mean and median age.

apparent under representation of young solicitors also deserves much closer investigation.

3 Practice Type

Of the 196 cases in which the lawyer was practising at the time of hearing and had their type of practice recorded, 56.6% involved a sole practitioner, 33.7% a partner, 9.2% an employee solicitor and 0.5% a corporate solicitor. Most of the cases which had the type of practice recorded occurred between 1976 and 2000. From 1991-2001, Queensland Law Society figures for solicitors in private practice in Queensland and not insured interstate showed that sole practitioners represented just over 20% of solicitors, partners declined as a proportion from about 40% in 1991 to 25% in 2001, employee solicitors increased from around 40% to over 50% of solicitors in private practice by 2001 and corporate solicitors represented approximately 0.4% of solicitors in private practice. Although the latter figures represent only about 80% of solicitors with practising certificates, they provide sufficient basis to show that sole practitioners were overrepresented in disciplinary actions,[44] employee solicitors were significantly underrepresented, and partners were involved in disciplinary actions at a rate in proportion to the percentage of partners among all solicitors. There was no evidence to suggest a substantial change in the proportion of practice types over time. The one exception was that there has been an increase in the number of solicitors not practising at the time of the hearing, with an increase from 15% of those with practice status recorded during 1976-1980 to 43% by the 1996-2000 period (the latest time period for which these records were available).

4 Practice Location

The practice location was recorded for 458 of the 533 cases since 1930. Over the entire period, 37.3% of cases with practice location recorded involved solicitors working in the Brisbane Central Business District.[45] This proportion peaked around the 1960s or 1970s with up to 68.0% of cases involving Brisbane CBD lawyers in 1961-1965. Since about the 1980s or 1990s there has been an apparent increase in the proportion of cases involving practices outside central Brisbane, such as in suburban Brisbane,[46] and urbanised regional centres such as the Gold Coast and Sunshine Coast (Table 2).[47] The overall trend for a decreased proportion of cases in Brisbane City compared

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[44] One reason for the overrepresentation of sole practitioners in these statistics is that their practising status is captured at the time of discipline, by which time some will have left the partnership in which they were working at the time of the misconduct: Haller, Solicitors' Disciplinary Hearings' n 1, 16.

[45] Postcodes 4000-4003.

[46] Postcodes 4004-4199.

[47] Postcodes 4500-4549

with all other locations in recent years is statistically significant.[48] However, the percentages for specific centres need to be interpreted with caution due to the small number of cases when broken down by region and time period. Records were available from Queensland Law Society for 1991-2001; during this time the proportion of solicitors in private practice in the Brisbane CBD was relatively stable at around 44-48% of solicitors in private practice. Comparing this proportion with the figures from Table 2 for 1991-1995, 1996-2000, and 2001-2005, it can be seen that there were fewer disciplinary hearings for practitioners working from the Brisbane CBD than would be expected. The location effect is also likely to be associated with increased risk of disciplinary actions for sole practitioners, as CBD solicitors represented 44-48% of solicitors in private practice but only 14-15% of Queensland sole practitioners worked in the CBD in the 1991-2001 period.

5 Types of Charges Laid

Table 4 shows the number of cases involving at least one charge of each type. It shows how, for many years, trust account and compliance charges dominated, with only a smattering of other types of charges. Since about 1976, the law society has gradually appeared more willing to lay charges over a broader range of categories, first extending into other types of misleading conduct, then conflicts of interest, and more recently, other aspects of ethics, quality of service, and costs.

(a) Trust Account

Traditionally, disciplinary systems in Queensland and elsewhere focused heavily on prosecuting breaches of trust account and other compliance obligations, to the exclusion of other types of issues. Table 4 shows the preponderance of trust account matters during the late 1990s, figuring in 40 (67%) of all disciplinary cases. This was the same period during which large scale defalcations, including that of Harry Smith,[49] came to public attention. Given the negative publicity generated by those defalcations, it is not surprising that the law society felt it necessary to continue to prosecute trust account matters in 2001-2005, although the rate at which such charges appeared in disciplinary cases dropped from 67% to only 39% of all cases (32 of 83 cases) heard during that later period. More dramatic is the increasing willingness of the law society to bring quality of service matters before the tribunal.

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48 χ^2 (14) = 50.30, $\underline{p} < .001$.

49 Evans, above n 12.

(b) Quality of Service and Costs

As reported in the previous study, the law society's preoccupation with trust account matters continued even in the face of a series of legislative reforms which tried to broaden the disciplinary 'brief' to 'quality of service' matters such as incompetence and neglect.[50]

Table 4 demonstrates how there has been a broader spread of the categories of charges laid in more recent times. The proportion of cases involving quality of service charges has gradually increased in recent years, comprising a gradual increase in the percentage of all charges over time, most noticeably in the period 2001-2005, when they appeared in 36% of cases (30 of 83 cases) – almost surpassing trust account charges as the most commonly appearing charge.[51]

Table 4 also shows that the number of charges relating to costs have also been building over time, although more modestly – appearing in 12 of the 83 cases heard in 2001-2005.

This suggests that the prosecutor – at the time the Queensland Law Society and now the Legal Services Commissioner - has finally taken on board the fact that regulatory obligations – including the power to discipline - do extend to these negligence type complaints.

6 Types of Charges Proven

Table 5 shows the proportion of cases in which at least one charge was admitted or found proved, over five year periods. A case prosecuted by the law society was least likely to be successful in the 1950s, 1960s, and early 1980s.[52] However, in the final ten years of its role as prosecutor, the society improved its success rate, to 96.7% of all cases in 1996-2000 and then 100% of the 83 cases prosecuted in 2001-2005 – a perfect result.

We need to be careful about drawing too many conclusions from these patterns over time, given the small number of cases involved, but there could be many reasons for an increased success rate. Solicitors may have become more willing to cooperate with prosecutions and plead guilty to charges. Equally, the law society may have prepared its prosecutions more thoroughly or fought them harder than in earlier years,

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50 Linda Haller, *Professional Discipline of the Queensland Legal Profession*, above n 8, 340.

51 The total will be more than 100% as the charge types are not mutually exclusive; in other words, cases may include charges of more than one type.

52 Less than 80% of cases found proved. These apparent differences across time need to be interpreted with caution as they are based on relatively small numbers of cases in each time period.

especially given that the stakes were now higher for the society's future. This argument is possible given that in March 2003 the society put a retired senior police officer in charge of their restructured Investigations and Prosecutions Department, appointed four other new staff to assist him and more than doubled the amount of money spent on investigations and prosecutions in 2003.[53] The pressure for prosecutions to succeed is also suggested by the society's reference to its 'low failure rate before the Solicitors' Complaints Tribunal and experienced prosecutorial team' when expressing disappointment that it may lose its prosecution role.[54]

Categories of charges did not have an equal probability of being found proved (Table 5). Previous success rates are likely to be one factor influencing a prosecutor's propensity to proceed with similar types of charges in the future, and Levin suggests the reluctance to prosecute matters relating to quality of service has been because they are hard to prove.[55] This is not borne out by the results shown in Table 5 – trust account charges appeared only slightly easier to prove (94.5% success rate overall) than quality of service charges (90.0% overall). However, Table 5 only looks at the success rate of charges brought. What is more likely is that quality of service matters are less likely to be prosecuted in the first place, because of perceived evidentiary difficulties. Levin's comments would be better tested by examining the number of investigations into quality of service matters and how they were disposed of– whether by prosecutions or otherwise.

7 Types of Penalties Imposed

The preference for various types of orders - removal of an individual from the roll, for the suspension of their practising certificate or the imposition of a fine – continues to fluctuate over time.[56]

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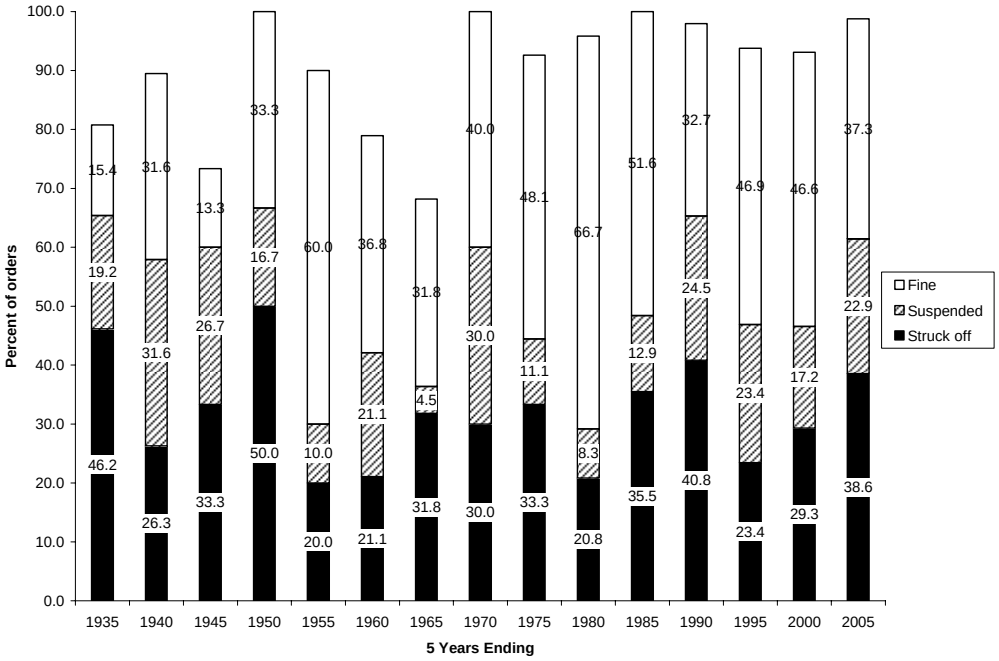
53 From $311,360 to $805,506: Queensland Law Society, 75th Annual Report, 2002-2003, 84.

54 Josh Massoud, 'QLS Won't Cop Policing Role', *Courier Mail* (Brisbane), 14 November 2003. It also championed a successful appeal from a tribunal decision in its newsletter to members: 'Court of Appeal Victory', (2004) 24(3) *Proctor* 6.

55 Leslie Levin, 'Reflections on Queensland's Lawyer Discipline Reforms' (2006) 9 *Legal Ethics* (forthcoming).

56 Haller Solicitors' Disciplinary Hearings, above n 1, 25.

Figure 1
Most Popular Types of Orders Imposed 1930-2005



(a) Strike of Orders

In the most recent five year period 2001-2005, lawyers were more likely to have their name removed (be struck off) than in the previous ten years, with strike off orders rising to 38.6% of all orders. This increase was not associated with a change in the types of charges found proved. There were six categories of charges with a sufficient number of cases to examine patterns over time. For five of the six charge categories, the probability of a strike off if charges were found proved was higher in 2001-2005 than over the entire period of the database – 1930-2005. This was the case for misleading conduct (57% strike off in 2001-2005 cf 46% over entire time period), conflict of interest (39 cf 26%), ethics (56 cf 42%), quality of service (41 cf 30%) and compliance (30 cf 17%). Interestingly, in the sixth category, matters with a trust account matter found proved had a *lower* probability of strike off in 2001-2005 (31%) than in the overall time period (44%). For cases involving deliberate misappropriation of trust monies, the 2001-2005 figure for strike offs (67%) was closer

to the pattern over the entire time period as to how deliberate misappropriation was dealt with (72% strike offs), showing that the reduced strike off rate for trust account matters in 2001-2005 was largely associated with less serious mishandling of trust account monies. Thus, with the possible exception of trust account matters, orders more frequently involved the highest penalty in the most recent period than in the preceding decade.

(b) Suspensions

Despite the fact that the Supreme Court of Queensland had directed in earlier appeals against tribunal decisions that suspension orders were to be used with caution,[57] they continue to prove popular with the tribunal, comprising 22.9% of orders in 2001-2005, an increase from 17% in the previous five year period.

(c) Fines

Fines can suffer from an identity crisis in a system which claims to not intend to punish but only protect the public,[58] and it is difficult to see how a fine imposed in secret could deter other lawyers from misconduct.[59] But fines have been able to play a much greater deterrent role since 2003, when tribunal orders became much more widely published,[60] suggesting that the tribunal would use fines more often. Conversely, in the last five years of its operation, the tribunal may have been concerned that fines would be seen as a soft option. What the statistics do show is that fines dropped in popularity, from 47% of orders in 1996-2000 to 37% in 2001-2005.

(d) More creative, proactive orders

For many years the legislation has encouraged the use of less traditional orders – orders that use more creative methods of increasing the chance that no further misconduct will occur in the future –such as ones requiring that the lawyer practise under supervision, consult a mentor, undertake further legal training, or install a computerised office system. Given that 'quality of service' charges were more likely to be laid in 2001-2005 than in previous periods, it may have been thought that these types of cases could be dealt with in more constructive ways, through orders which would increase the quality of service, such as by requiring the lawyer to attend

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57 Linda Haller, 'Waiting in the Wings: the Suspension of Queensland Lawyers' (2003) 3 *QUT Law and Justice Journal* 397-421.

58 Linda Haller 'Disciplinary Fines' above n 10.

59 Ibid.

60 Haller, 'Dirty Linen', above n 22, 288.

further training or to operate under supervision for a period of time. We examined cases in which a restitutive or rehabilitative order was made. This involved one or more of the following: orders limiting practice to working as an employee for a specified period, to waive a lien over a document, repay fees, pay compensation to a client or affected party, make practice records available for inspection, provide reports to the regulatory body, undertake further training, undertake counselling, or undertake specific limitations on areas of practice (such as not taking on personal injury or litigation matters). The tribunal chose not to use these orders alone. As Table 6 shows, they were most frequently made in combination with another penalty and their use has been increasing over time. For instance, in 2001-2005, rehabilitation or restitution type orders were made in 35 of the 83 cases heard during this period – usually in combination with a fine (20 cases), or suspensions (10 cases).

It is pleasing to see rehabilitative orders being used more commonly, particularly in combination with orders such as fines and suspensions. Otherwise a lawyer may continue to practise – or return to practise - in exactly the same way as they did before. Rehabilitative type orders increase the possibility that the underlying problem which led to misconduct or poor service will be addressed. But such orders were still only made in 35 of the 83 cases heard in the period 2001-2005. While it makes no sense to improve the lawyering skills and ethical insight of a person whose name is struck from the roll, this still left 16 cases in which individuals were simply suspended or fined.

It would be unrealistic to expect these orders in all cases in which a suspension or fine is imposed. Many of these more proactive forms of order are expensive to supervise, and it does not seem that the legislation made it clear who was to bear the costs of supervision – the disciplinary tribunal or law society.

8 Repeat Offenders

One way of looking at how well the disciplinary system is working is to look at how repeat appearances have been dealt with over time. If disciplinary action is providing an effective deterrent, the number of solicitors reappearing before the tribunal should be low. Table 7 shows a number of comparisons over time between solicitors with a previous appearance before a disciplinary hearing and those appearing for the first time. All solicitors with a previous hearing are included as repeat appearances even if there was no adverse finding against them at the previous hearing.

The first two columns of Table 7 examine how many solicitors appearing before the disciplinary body had previous disciplinary appearances. Between 1951-1970, the majority of individuals attending hearings had previously appeared before the disciplinary body, suggesting that the system was not working effectively in deterring further misconduct. In the period 1966-1970, very few cases were heard

(only 11 in total during this time) of which 9 cases (82%) involved solicitors who had previous appearances. In the decades before and after this peak period, around 30-35% of cases involved repeat appearances. Since 1981, these figures have improved to around 20-25% of cases, suggesting that the deterrent effect of disciplinary action has been gradually increasing. The most recent time periods show 26% repeat offenders in 1991-1995, improving to 22% in 1996-2000 and further improving to 19% in 2001-2005.

If the system is working well, one would also expect a higher proportion of more severe penalties among repeat offenders, and a corresponding reduction in less severe penalties for these individuals. Taking more severe penalties as a strike off or loss or suspension of a practising certificate, and less severe penalties as fines or 'other' penalty, Table 7 shows that the expected pattern for repeat appearances has most consistently been shown in the time periods from 1991-2005, with a further improvement in 2001-2005 compared with 1996-2000. For instance, in 2001-2005, solicitors who had appeared before the tribunal on a previous occasion had a 44% chance of being struck off, compared to only 37% of those appearing for the first time. First time offenders in 2001-2005 were more likely to receive a fine (42% of such cases) than were those appearing for a second or subsequent time (19%).

V Conclusion

Some of the findings reported here will prove to be cold comfort for the Queensland Law Society. There is evidence to show that – albeit belatedly – the society became more willing to follow the intent of the legislature and prosecute more 'quality of service' matters, and that it pursued prosecutions with more vigour.

Any changes in the approach of the disciplinary tribunal itself are more difficult to discern, and are less likely to have occurred as the result of any perceived political pressure, given that tribunal members had much less invested than the Queensland Law Society in whether disciplinary functions would be reallocated or not .

There is certainly much to be gained from further investigation of why women are under-represented in both complaints and discipline. It will also be interesting to follow the progress of the prosecution of disciplinary matters and the approach of the tribunal in the next few years. The Legal Services Commissioner believes the new concept of 'unsatisfactory professional conduct' is much broader than previous notions of conduct liable to discipline, and could include 'the sorts of honest

mistakes, errors of judgement and poor standards of client service that give rise to legitimate consumer grievance.'[61]

Given the commissioner's endorsement of the legislation's consumer protection focus, we may expect a shift in the types of cases which come before the disciplinary tribunal. But this will not necessarily be the case. The commissioner is likely to use his prosecution powers very selectively. The law society did use its summary power to impose censures, admonish and seek undertakings from solicitors as an alternative to formal disciplinary proceedings. Very little information is available as to how the society exercised its summary powers or otherwise dealt with complaints, apart from the 1.7%[62] which led to formal disciplinary hearings. Although the society sometimes used these other powers, it was wary of using its mediation powers, partly because it was afraid of this being seen as a soft option.[63] The 2004 legislation appears to give the Legal Services Commissioner less formal power to deal with matters in a summary way than the society had,[64] but he has interpreted his powers to dismiss complaints in the public interest[65] broadly. In particular, he has indicated that he is less likely to bring proceedings – at least in less serious matters – if the lawyer has acknowledged their past failings, made amends, cooperated with the Commissioner and put steps in place to ensure the same situation does not arise again.[66]

While we are likely to see changes in the types of matters brought before the Legal Practice Tribunal and the Legal Practice Committee by the commissioner, we are also likely to see changes in the approach of those two new bodies. While for many years the higher level tribunal was constituted by two lawyers and a lay person, the Legal Practice Tribunal is now constituted by a sitting Supreme Court judge, who is merely assisted by a practitioner and lay person.[67] The reduced lay and practitioner input into disciplinary decisions, the exposure of barristers to statutory discipline, the interplay between the traditional focus of members of the Supreme Court – now expressed through the tribunal - and the commissioner's determination to increase the consumer protection focus of discipline suggests that it will be useful to see how professional discipline continues to evolve in Queensland in the coming years.

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61 Legal Services Commissioner (Qld), *Prosecution Guidelines*, 5, <http://www.lsc.qld.gov.au/policies/prosecution270306.pdf> at 8 February 2006.

62 Haller, 'Solicitors' Disciplinary Hearings, above n 1, 6. (This is the figure for the 1990s.)

63 Legal Ombudsman (Qld), *14th Annual Report July 2000to June 2001* (2001) 15.

64 Linda Haller, 'Imperfect Practice' (2004) 23 *University of Queensland Law Journal* 280, 420.

65 *Legal Profession Act 2004* (Qld) s 274.

66 Legal Services Commissioner (Qld), above n 61, 7-8,

67 *Legal Profession Act 2004* (Qld) s 473(3), 444(2).

Table 1
Gender by Five-Year Periods (Solicitors with Disciplinary Hearings)

Time Period	% Male	% Female	Number with gender recorded
1931-1935	100.0	0.0	27
1936-1940	100.0	0.0	40
1941-1945	100.0	0.0	16
1946-1950	100.0	0.0	15
1951-1955	100.0	0.0	13
1956-1960	100.0	0.0	21
1961-1965	100.0	0.0	25
1966-1970	100.0	0.0	11
1971-1975	100.0	0.0	30
1976-1980	100.0	0.0	26
1981-1985	94.7	5.3	38
1986-1990	98.2	1.8	57
1991-1995	94.2	5.8	69
1996-2000	95.0	5.0	60
2001-2005	94.0	6.0	83
Overall	97.2	2.8	531

Table 2

Percent of Cases in Each Postal Region by Five-Year Periods (Solicitors with Disciplinary Hearings)

Time Period	Brisbane City	Brisbane Suburbs	Gold Coast	Ipswich & North	Toowoomba	Western Qld	Sunshine Coast	Central Qld	Far North Qld	NSW	Number with postal region recorded
1931-1935	33.3	0.0	3.7	3.7	9.4	0.0	3.7	29.6	18.5	0.0	27
1936-1940	45.0	0.0	2.5	0.0	22.0	2.5	0.0	15.0	10.0	5.0	40
1941-1945	18.8	0.0	0.0	0.0	8.3	6.3	0.0	18.8	50.0	0.0	16
1946-1950	46.7	0.0	0.0	6.7	2.0	0.0	6.7	26.7	13.3	0.0	15
1951-1955	46.2	0.0	0.0	0.0	9.7	0.0	0.0	30.8	15.4	0.0	13
1956-1960	42.9	0.0	14.3	0.0	2.0	4.8	4.8	19.0	14.3	0.0	21
1961-1965	68.0	0.0	8.0	0.0	2.0	0.0	0.0	12.0	12.0	0.0	25

1966-1970	54.5	9.1	0.0	0.0	2.0	0.0	18.2	18.2	0.0	0.0	11
1971-1975	65.5	6.9	6.9	3.4	2.0	0.0	3.4	13.8	0.0	0.0	29
1976-1980	53.8	19.2	7.7	7.7	2.0	0.0	3.8	7.7	0.0	0.0	26
1981-1985	52.2	0.0	17.4	0.0	6.3	0.0	21.7	0.0	0.0	4.3	23
1986-1990	21.7	39.1	21.7	0.0	6.3	0.0	0.0	8.7	4.3	0.0	23
1991-1995	34.0	32.1	17.0	5.7	3.9	0.0	0.0	3.8	5.7	0.0	53
1996-2000	21.7	28.3	25.0	1.7	8.7	0.0	11.7	5.0	0.0	0.0	60
2001-2005	19.7	35.5	25.0	1.3	3.3	0.0	10.5	2.6	2.6	1.3	76
Overall %	37.3	17.0	13.8	2.2	4.4	0.7	5.9	10.7	7.2	0.9	-
Overall number	171	78	63	10	20	3	27	49	33	4	458

Table 3
Mean Age and Years of Experience by Five-Year Periods (Solicitors with Disciplinary Hearings)

Time Period	Age			Years of Experience		
	N	Mean (SD)	Range	N	Mean (SD)	Range
1971-1975	8	32.2 (4.2)	27.8-40.9	8	7.4 (4.4)	2.9-17.4
1976-1980	22	39.6 (9.4)	29.5-69.1	21	12.3 (9.3)	1.6-42.2
1981-1985	35	38.8 (8.2)	25.8-59.7	35	11.8 (7.4)	2.8-33.1
1986-1990	52	38.9 (7.6)	24.9-59.6	53	12.4 (7.1)	1.1-34.0
1991-1995	69	40.9 (8.4)	27.5-68.9	69	13.4 (7.9)	2.5-39.6
1996-2000	60	45.2 (8.3)	29.3-68.9	60	17.4 (8.5)	4.4-43.1
2001-2005	81	47.3 (7.6)	26.3-63.5	83	19.9 (8.0)	2.4-36.9
Overall	327	42.4 (8.8)	24.9-69.1	329	15.2 (8.6)	1.1-43.1

Table 4
Cases in Which Charges of Various Categories Laid During Five-Year Blocks

Time Period	Trust Account	Compli-ance	Misleading	Conflict	Ethics	Quality	Costs	Docu-ments	Commu-nication	**Number of Cases**[1]
1931-1935	18	3	4	0	1	3	0	0	0	**27**
1936-1940	29	12	4	1	1	1	1	0	0	**40**
1941-1945	8	9	2	0	3	0	0	0	0	**16**
1946-1950	6	5	0	0	3	0	0	0	0	**15**
1951-1955	3	7	1	0	0	0	0	0	0	**13**
1956-1960	10	6	1	1	2	4	0	1	0	**21**
1961-1965	9	10	1	0	6	3	1	0	0	**26**
1966-1970	4	4	0	0	1	1	0	0	1	**11**
1971-1975	14	18	2	1	0	0	1	0	0	**30**

[1] The number of cases in each time period does not equal the sum of cases for charge categories, as cases could have charges laid in more than one category

1976-1980	14	9	7	1	5	2	2	0	0	**26**
1981-1985	16	8	11	8	8	3	0	0	0	**38**
1986-1990	28	15	20	14	6	5	5	1	0	**57**
1991-1995	23	25	26	18	15	7	5	3	2	**70**
1996-2000	40	21	22	16	7	11	7	1	2	**60**
2001-2005	32	23	25	18	14	30	12	4	4	**83**
Total laid	**254**	**175**	**126**	**78**	**72**	**70**	**34**	**10**	**9**	**533**

Table 5
Percentage of Charges Found Proved by Time Period and Charge Category

Time Period	Percent	Charge Category	Percent
1931-1935	88.9	Trust fund	94.5
1936-1940	92.5	Conflict	93.6
1941-1945	93.8	Compliance	90.9
1946-1950	80.0	Quality	90.0
1951-1955	76.9	Documents	90.0
1956-1960	90.5	Communication	88.9
1961-1965	65.4	Misleading	87.3
1966-1970	90.9	Costs	85.3
1971-1975	86.7	Ethics	76.4
1976-1980	92.3	-	-
1981-1985	78.9	-	-
1986-1990	86.0	-	-
1991-1995	87.1	-	-
1996-2000	96.7	-	-
2001-2005	100.0	-	-
Overall	89.1	**-**	**-**

Table 6
Penalties by Five-Year Periods ("Highest" Penalty) for Cases also Involving Restitution/Rehabilitation Orders (by number of cases)

Time Period	Struck off	Suspended	Fined	Censured	Education/ reports/other	Total Number of Cases
1931-1935	0	1	0	0	0	1
1936-1940	0	1	0	0	0	1
1941-1945	0	0	0	0	0	0
1946-1950	0	0	0	0	0	0
1951-1955	0	0	0	0	0	0
1956-1960	0	0	0	0	0	0
1961-1965	0	0	1	1	0	2
1966-1970	0	0	0	0	0	0
1971-1975	0	0	0	0	0	0
1976-1980	0	0	0	0	0	0
1981-1985	0	0	0	0	0	0
1986-1990	0	1	3	0	0	4
1991-1995	0	6	4	1	0	11
1996-2000	3	6	12	0	3	24
2001-2005	4	10	20	0	1	35
Overall	7	25	40	2	4	78

Table 7
Repeat Appearances Compared With First Appearances for Disciplinary Matters[a]

Time Period	Proportion of Cases		Penalty as percentage of cases [b]			
	Number of cases:	% Repeat	Struck off	Suspended	Fined	Other
1931-1935	4 (23)	15	25 (48)	25 (17)	0 (17)	25 (17)
1936-1940	12 (28)	30	33 (21)	25 (32)	17 (36)	17 (7)
1941-1945	5 (11)	31	40 (27)	40 (18)	20 (9)	0 (36)
1946-1950	4 (11)	27	25 (45)	0 (18)	25 (27)	0 (0)
1951-1955	7 (6)	54	14 (17)	0 (17)	43 (50)	0 (17)
1956-1960	14 (7)	67	14 (29)	21 (14)	43 (14)	14 (29)
1961-1965	14 (12)	54	36 (17)	7 (0)	36 (17)	7 (50)
1966-1970	9 (2)	82	22 (50)	33 (0)	33 (50)	0 (0)
1971-1975	11 (19)	37	18 (37)	18 (5)	64 (32)	0 (11)
1976-1980	9 (17)	35	22 (18)	22 (0)	56 (65)	0 (6)

1981-1985	6 (32)	16	67 (22)	17 (9)	17 (47)	0 (0)
1986-1990	12 (45)	21	33 (36)	17 (22)	17 (31)	8 (0)
1991-1995	18 (52)	26	33 (17)	33 (17)	22 (50)	0 (8)
1996-2000	13 (47)	22	31 (28)	23 (15)	31 (49)	15 (4)
2001-2005	16 (67)	19	44 (37)	38 (19)	19 (42)	0 (1)
Overall	154 (379)	29	31 (29)	23 (16)	31 (39)	6 (8)

[a] In each column, data for repeat offenders are shown first and then any parentheses enclose the comparison figures for solicitors appearing for the first time.

[b] Percent of cases heard during time period that received the particular penalty (expressed as a proportion of all cases heard rather than of all cases in which a penalty applied). "Other" penalties include censure, education, reports, costs, and other specific orders or undertakings not elsewhere included.