



Scottish Solicitors'
Discipline Tribunal

Annual Report 2019

For the year 1 November 2018 to 31 October 2019

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Chair's Introduction

Nicholas Whyte

Last year, Esther Roberton's report, "Fit for the Future" was produced following her Independent Review of the Regulation of Legal Services in Scotland. This year, the Tribunal participated in the Government's consultation on the recommendations contained in that report. The Tribunal has highlighted its concerns about the convoluted complaints process, the delay in cases reaching the Tribunal, the absence of a fitness to practise regime for solicitors, the current arrangements for appointing solicitor members, and



the inability to impose interim orders on solicitors whose actions may be a danger to the public. Most pertinent to the Tribunal was Esther Roberton's suggestion that there should be a single disciplinary tribunal for all legal professionals. The Tribunal believes that the continuation of a disciplinary tribunal for solicitors that is completely independent of any regulator, is essential. The Tribunal has made suggestions for improvement which it believes will satisfy its aims of protecting the public and upholding the reputation of the profession.

While waiting on the Government's proposals regarding legal regulation, the Tribunal carried out two consultations to identify positive adjustments it could make which did not require changes to legislation. The Tribunal consulted on whether it should apply the civil rather than the criminal standard of proof in misconduct proceedings. At a special general meeting on 6 December 2019, the Tribunal decided to keep using the criminal standard of proof (beyond reasonable doubt) in professional misconduct proceedings. A [summary of its decision](#) is available on the Tribunal website. The Tribunal also started the process of redrafting its procedural rules. The current rules have been in operation for eleven years. They are no longer fit for purpose. The Tribunal wishes to create user-friendly rules in plain English which assist parties and further the objectives of the Tribunal. A small group of Tribunal members met during this reporting year to discuss the deficiencies in the current rules and potential amendments. It agreed possible areas for change and published a [consultation document](#). Several interested parties provided feedback and the group is due to meet again in the next reporting year. It is hoped that the new rules will be drafted in the 2019-2020 period. Stakeholders will be consulted on the draft rules.

No appeals were lodged this year against the decisions of the Tribunal. An appeal against one decision this year was lodged after the year end and is still outstanding. A Tribunal decision on expenses was judicially reviewed. The judicial review was unsuccessful. However, in the light of the comments made in the postscript to [the decision](#), the Tribunal's guidance on expenses has been updated.

At the end of this year, three legal members left the Tribunal. Alan McDonald and Douglas MacKinnon served the Tribunal for many years but have had to leave as a result of their retirement from practice. Carla Fraser resigned from the Tribunal when she was accepted to train as an Advocate. We wish them all the best. From 1 November 2019, the Lord President appointed David Dickson, Deborah Lovell and Vincent McGovern as legal members to the Tribunal. They have a wealth of experience which will be invaluable to the Tribunal in the coming years.

Nicholas Whyte
Chair

Lay Members' Representative

Ian Shearer

Why should lay members be involved in judicial roles in the tribunal system? This question was among those examined in a landmark review of the UK tribunal system some twenty years ago by Sir Andrew Leggatt. His answer could be seen as equally relevant to professional disciplinary tribunals, even though outside the review's scope. He referred to one of the "distinct advantages" of tribunals: "tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and are the better for that range of skills". Many consultees had felt that "non-lawyers... [had] a valuable role in ensuring that tribunals were representative of the communities in which they serve and in which they operate. It was said that they broadened the experience which tribunals brought to bear on a decision, particularly in relation to decisions of fact".



This year, the Tribunal's lay members (all selected by the Scottish Government following a rigorous Public Appointments process) have continued to play a vital part in representing the public interest, partly through considering cases from the perspective of ordinary citizens – the consumers of legal services. They help to underpin the Tribunal's independence, and to support the Tribunal's objectives of protecting the public from harm and maintaining public confidence in the legal profession through the upholding of standards of professional conduct.

It is frequently remarked how often lay members have influenced case outcomes one way or the other, just as the solicitor members will also sometimes persuade the lay members on matters of professional principle or practice. There is no set pattern to this, and no routine picture of greater or lesser severity in discipline among either group: what is notable is exactly what the Leggatt report described – the application of a very broad range of individual professional (and life) experience to a complex, and sometimes finely-balanced, caseload. Perhaps the fact that no appeals to Tribunal decisions were lodged during the year (although one has been lodged after the year end and is still outstanding) may provide some evidence of the general robustness of this collegiate process.

As the Chairman has noted, there is continuing uncertainty about how the Scottish Government's overarching review of the regulation of the legal profession will eventually be taken forward. Whatever is proposed, we will continue to feed the lay members' perspective into discussions and to emphasise the importance of the Tribunal's independence and of the involvement of lay people.

Likewise lay members made a full and effective contribution – again on both sides of the debate – to the Tribunal's recent deliberations on whether to move to the civil standard of proof, with some bringing valuable observations from experiences in other similar jurisdictions; and they also led some good sessions at the annual Training Day.

I continue to represent the lay members within the group (referred to by the Chairman) currently reviewing the Tribunal's rules. We have an ongoing mission, alluded to in last year's report, to modernise procedures and to present them to our users and external audiences in plain English – as far as is possible, whilst balancing these aims with regulatory frameworks and legal certainty. On this theme of effective communications, it is encouraging to read in this report that in only two years, there has been a nearly 20% increase in views of the findings page of the Tribunal's website.

Whilst the number of complaints reaching the Tribunal remained broadly the same, we can also see a significant increase in the overall number of sitting days, up from 38 to 58 (albeit caused partly by one very lengthy case), and more time having to be devoted to procedural and evidential issues. This places a substantial additional workload and burden on the Tribunal office. I should like to end by thanking the Clerk, Nicola Ross, and her team for all their dedicated efforts and their ever-efficient and cheerful administration of the Tribunal. Thanks too to the Chairman and all the other members for their commitment, mutual support and advice.

Ian Shearer
Lay Members' Representative

Introduction

About the Tribunal

The Scottish Solicitors' Discipline Tribunal deals with serious disciplinary issues in the solicitors' profession in Scotland. The Tribunal is an important part of solicitors' regulation. It helps protect the public and maintain the reputation of the profession by upholding its standards. It is independent of the Law Society of Scotland.

Tribunal Members

The Tribunal is made up of twelve solicitor and twelve non-lawyer members (sometimes referred to as lay members). Solicitor members are not paid while lay members are paid by the Scottish Government. Solicitor members are nominated by the Law Society and appointed by the Lord President. Vacancies are advertised on the Tribunal's website, the Society's website and in the Journal. Non-lawyer members are nominated through the Public Appointments system and appointed by the Lord President. At each hearing, the Tribunal comprises two solicitor and two non-lawyer members. As well as nominating the solicitor members, the Law Society prosecutes practitioners before the Tribunal and also has an obligation to fund the Tribunal.

SSDT Administration Limited

The Tribunal is assisted in its administration by a private company limited by guarantee, SSDT Administration Limited. The company employs the Clerk and administrative staff.

Business

- Complaints of professional misconduct,
- Complaints that a solicitor has been convicted of an act involving dishonesty or any other criminal offence which resulted in a fine equivalent to level 4 on the standard scale or imprisonment of more than 12 months,
- Appeals stemming from the Law Society's determinations regarding unsatisfactory professional conduct, and
- Applications for restoration to the roll of solicitors in Scotland or for removal of a restriction on a practising certificate.

All complaints about legal practitioners are made in the first instance to the Scottish Legal Complaints Commission (SLCC). It refers conduct matters to the Law Society. After investigation, the Law Society prosecutes cases it considers might constitute professional misconduct before the Tribunal. Professional misconduct is defined in *Sharp v Law Society of Scotland* 1984 SLT 313 as a serious and reprehensible departure from the standards of conduct to be expected of competent and reputable solicitors. It is necessary to consider all the circumstances and the degree of the practitioner's culpability. There are many ways of committing professional misconduct, both in a practitioner's work and private life. The Tribunal's website contains all Tribunal decisions of the last fifteen years.

Hearings

Tribunal hearings are generally held in public. The website [diary](#) details all Tribunal hearings, both substantive and procedural. Tribunal [findings](#) generally appear on the website about three months after the date of the Tribunal hearing. The findings are not placed on the website until the period for appealing has expired.

Respondents

Solicitors, conveyancing and executry practitioners and registered European and foreign lawyers can be prosecuted before the Tribunal. The Faculty of Advocates has its own complaints committee and disciplinary tribunal.

Procedure

The Tribunal is governed by the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 which are approved by the Lord President. The Tribunal intends to redraft its rules in 2020.

The Complainers (most frequently the Law Society), produce a Complaint which is lodged with the Tribunal and the Respondent practitioner is invited to submit Answers to that Complaint. Often, there is adjustment of the pleadings. This is similar to civil procedure, but some terminology is borrowed from criminal procedure. For example, the solicitor acting on behalf of the Complainers is called the "Fiscal" and the Tribunal decides whether a Respondent is "guilty" or "not guilty" of professional misconduct. Solicitors sometimes represent themselves at Tribunal hearings. Others are represented. Representation does not require to be by a solicitor.

There are no strict rules of evidence. Hearsay is admissible and there is no requirement for corroboration. The Tribunal has the right to control its own procedure. Procedural hearings are used for case management. More frequently in recent years, the Tribunal has had to deal with legal debates and pleas in bar of trial. Evidence is given on oath or by way of affirmation. The Tribunal can receive evidence by way of affidavit.

The burden of proof in professional misconduct cases is on the Complainers. The facts in a professional misconduct case must be proved beyond reasonable doubt notwithstanding that the Tribunal deals with the civil rights of solicitors. The Tribunal is one of the last Tribunals to use this standard and consulted in 2019 on whether it should, like the English Solicitors Disciplinary Tribunal, move to the civil standard. The Tribunal decided that it would continue to apply the criminal standard meantime but that the matter would be kept under review. The reasons for its decision are available on the [News](#) section of the Tribunal website. In respect of appeals relating to unsatisfactory professional conduct, the standard of proof is on the balance of probabilities.

If the Tribunal is not satisfied that the practitioner is guilty of professional misconduct, it will find the practitioner not guilty. However, if it considers that the practitioner may be guilty of unsatisfactory professional conduct it must remit the complaint to the Council of the Law Society for consideration.

Expenses

The Tribunal has the power under the Solicitors (Scotland) Act 1980 Act to award expenses. Expenses are usually awarded to the successful party and include the expenses of the Tribunal. These can run to several thousand pounds and are a serious consideration when solicitors are considering how to run their defence or whether to bring an appeal.

Publicity

Every decision of the Tribunal is published in full subject to the terms of paragraph 14A of Schedule 4 to the Solicitors (Scotland) Act 1980. Occasionally publicity is deferred, for example, pending the conclusion of criminal proceedings. The impact of publicity on solicitors found guilty by the Tribunal is significant. The decisions appear on the Tribunal website and are reported in the Journal.

Values and Objectives

The Tribunal strives to ensure so far as possible that all cases brought before it are dealt with in accordance with the legislative framework and the principles of natural justice, bearing in mind the importance of protecting the public from harm and maintaining public confidence in the legal profession. The Tribunal endeavours to deal with cases efficiently and expeditiously. The Tribunal has a duty to be independent, impartial and transparent.

Tribunal Business

The vast majority of the Tribunal's work involves hearing complaints of professional misconduct. These Complaints are becoming more complicated and require more Tribunal time. The Tribunal sat on 58 days this year. In 2017, the Tribunal sat on 47 days and in 2018, the Tribunal sat on 38 days. One long-running case accounts for several additional days this year. However, the trend also reflects the number of extra days required for the Tribunal to deal with preliminary issues. This year, the Tribunal heard many more applications regarding procedural and evidential issues than it has in the past and in a handful of cases, has produced separate interlocutors and decisions at different stages of these cases.

Cases

Tribunal Cases

The Tribunal received 35 new Complaints this year compared to 34 new Complaints last year. The year concludes with twenty cases outstanding, which is the same as last year.



The Tribunal decided 40 cases this year.

One case was brought under section 53(1)(b) of the Solicitors (Scotland) Act 1980. Cases under this section are brought on the basis that a solicitor has been convicted by any court of an act involving dishonesty or has been fined an amount equivalent to level 4 on the standard scale or more or sentenced to imprisonment for a term of 12 months or more.

In 29 cases, findings of professional misconduct were made. The cases cover a wide range of misconduct which is explored further in the "Grounds" section of this report. Findings of professional misconduct result in sanctions from censure at the least serious end of the scale to strike off at the most grave.

In three cases, the Tribunal returned not guilty verdicts. In one of these, the Tribunal remitted the Complaint to the Law Society under section 53ZA of the Solicitors (Scotland) Act 1980 for consideration of unsatisfactory professional conduct.

The Tribunal dealt with seven appeal cases under section 42ZA of the Solicitors (Scotland) Act 1980. Three of these were withdrawn or dismissed, two were refused, one was allowed, and one was partially successful.

Grounds

The subject matter of the Tribunal's cases can be researched using the Tribunal's searchable database of [findings](#). As usual, the Tribunal dealt with a wide variety of cases this year. Executries have continued to provide the basis for several established cases of professional misconduct.

There were fewer conveyancing and litigation cases this year. Common themes include failures with Accounts and Practice Rules, delay in dealing with matters, and misleading or failing to reply to the Law Society or others. The chart shows the grounds of professional misconduct established this year. A single case may have multiple grounds.

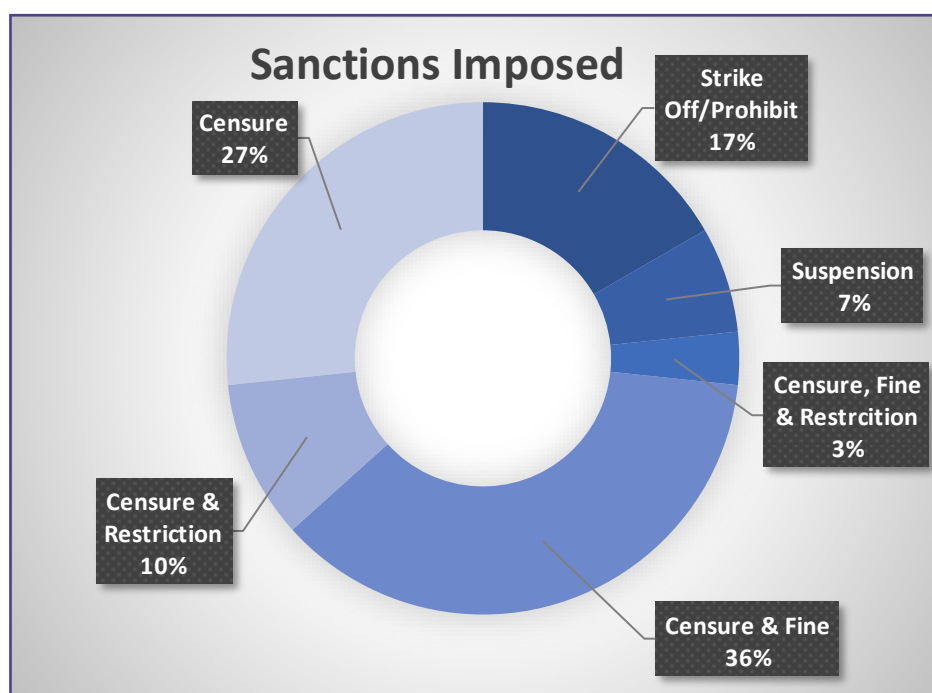


Sanctions

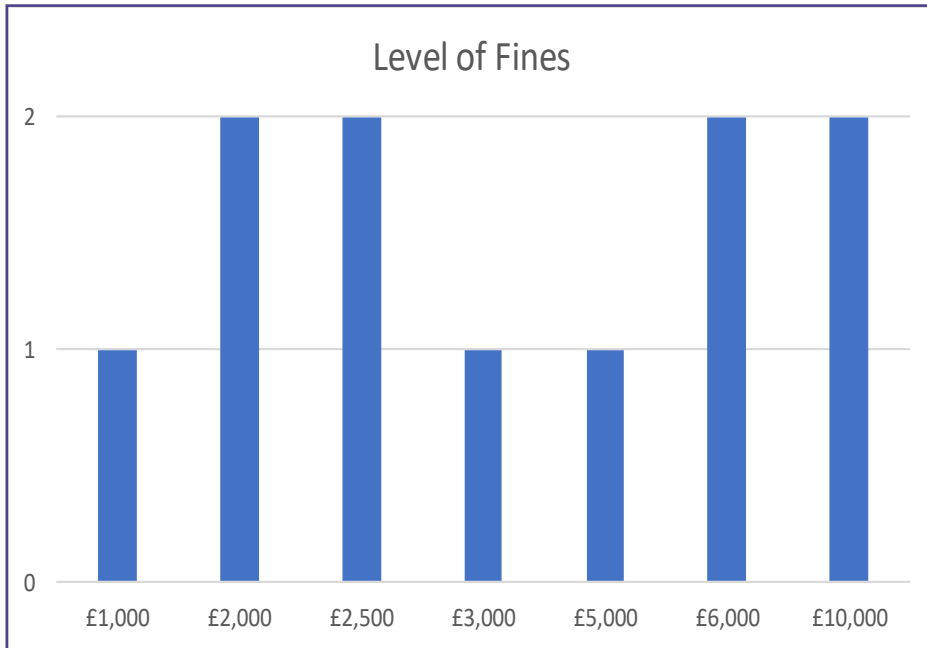
The Tribunal's sanctions range from censure to strike off. The Tribunal applies [indicative sanctions guidance](#).

In professional misconduct cases the Tribunal can censure practitioners. This is the equivalent of an admonition in the criminal courts. It can impose a fine of up to £10,000. The Tribunal has the power to order that a practitioner's practising certificate is made subject to such terms and conditions as the Tribunal may direct. Often the condition imposed is that the practitioner practises as an assistant to another solicitor approved by the Law Society. However, any condition can be imposed. The Tribunal can suspend a solicitor from practice for such time as it determines. The Tribunal can also order that a practitioner's name is struck from the Roll of Solicitors in Scotland. If a person has already removed his/her name from the Roll, the Tribunal can prohibit restoration to the Roll. The sanctions for solicitors convicted of crimes of dishonesty or other serious offences are similar to those for misconduct, although there is no power to issue a fine or compensation in these cases.

The Tribunal also has the power to award compensation up to £5,000 for any loss, inconvenience or distress to any Secondary Complainer directly affected by the misconduct. Secondary Complainers are the people who have made the original complaint about a solicitor. They are often, but not limited to, clients of the Respondent Solicitor.



This year, eight solicitors were censured. This sanction is most often used when the matter is at the less serious end of the scale, is an isolated incident and the solicitor demonstrates remorse and insight. It is used where there is no risk to the public and so no requirement for supervision.

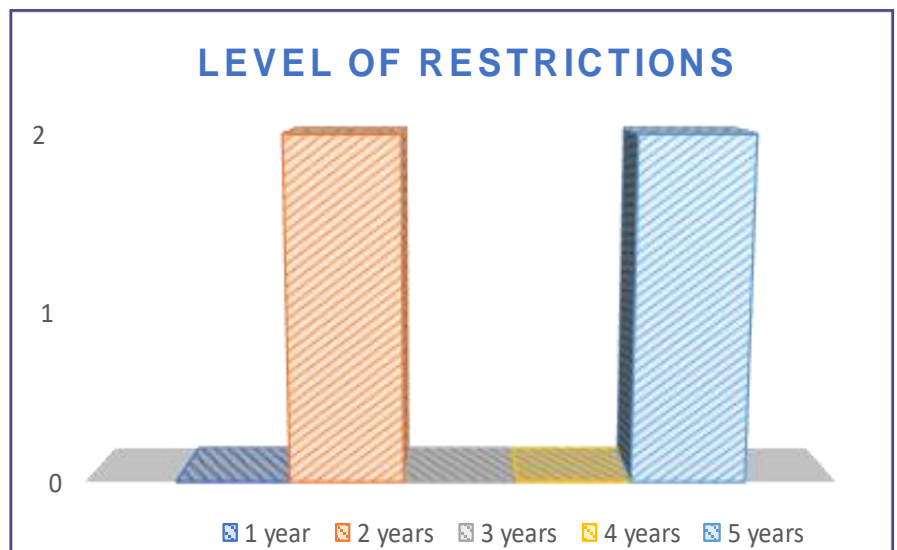


The Tribunal also imposed fines in 11 cases this year. A total of £50,000 of fines were imposed. Fines are used when there is no risk to the public. Fines can be added to censures to show the seriousness of the solicitor's conduct. The maximum fine the Tribunal can impose against a solicitor is £10,000.

Three solicitors had their practising certificates restricted so that they are only allowed to practise under the supervision of a solicitor approved by the Law Society of Scotland. One solicitor was censured, fined and restricted. In

these cases, the Tribunal considered that the solicitor might be a danger to the public if allowed to work unsupervised. The professional misconduct revealed areas of the solicitors' practice which required review, retraining and supervision but the public would not be at risk if they were working under supervision. Solicitors with

restricted practising certificates cannot, for example, practise as a manager. Therefore, they cannot be partners or sole practitioners in solicitors' firms.



Two solicitors were suspended and five were struck off the Roll of Solicitors in Scotland. The individuals struck off the roll tended to have committed an act of dishonesty. Frequently, this involves clients' money. However, some also involved dishonesty in the way solicitors had conducted themselves with clients, other solicitors or advocates, or the courts. In once case, the Respondent's conduct was considered incompatible with him remaining on the roll of solicitors.

All cases turn on their own facts and circumstances. However, the following are examples of the conduct which led to each sanction. More detailed information can be found on the [searchable database of findings](#) on the Tribunal website.

Strike Off

- Conviction for embezzlement which involved dishonesty with client money
- Misleading and lying to clients
- Dishonesty when notarising a document
- Dishonesty with fees and client funds
- Conduct bringing the solicitor's integrity into question and the profession into disrepute

Suspension

- Failure to deal properly with cases over a lengthy period
- Taking fees and failing to complete the work

Censure, Fine and Restriction

- Dishonesty regarding historic client balances

Censure and Restriction

- Accounts Rules breaches including deficits on the client account
- Failure to settle outlays timeously
- Misleading conduct
- Failure to communicate effectively
- Delay in winding up estates

Censure and Fine

- Accounts Rules breaches
- Conflict of interest
- Anti-money laundering failures
- Inappropriate use of social media
- Failure to communicate effectively
- Failure to act diligently
- Making allegations of dishonesty without foundation
- Repeated convictions for drink driving/failing to provide a breath sample to police

Censure

- Failures to communicate effectively
- Misleading conduct
- Accounts Rules breaches
- Criminal conviction for assault

Appeals under Section 42ZA

Section 42ZA appeals against unsatisfactory professional conduct decisions made by the Law Society are received from solicitors and lay appellants. This year, the Tribunal dealt with seven appeals. Three of these were withdrawn or dismissed, two were refused, one was allowed, and one was partially successful.

The appeal should identify any error of fact or law made by the Law Society when the Sub Committee reached its decision. Appellants can find it difficult to structure their appeals appropriately and set out clear and succinct grounds of appeal. The Tribunal has attempted to assist by providing guidance notes on its website but this remains a persistent problem.

In appeals cases the Tribunal can quash or confirm the determination of the Law Society. It can quash the censure accompanying the determination. It can quash, confirm or vary the direction being appealed against. It can order retraining of the practitioner, impose a fine not exceeding £2,000 and award compensation up to £5,000.

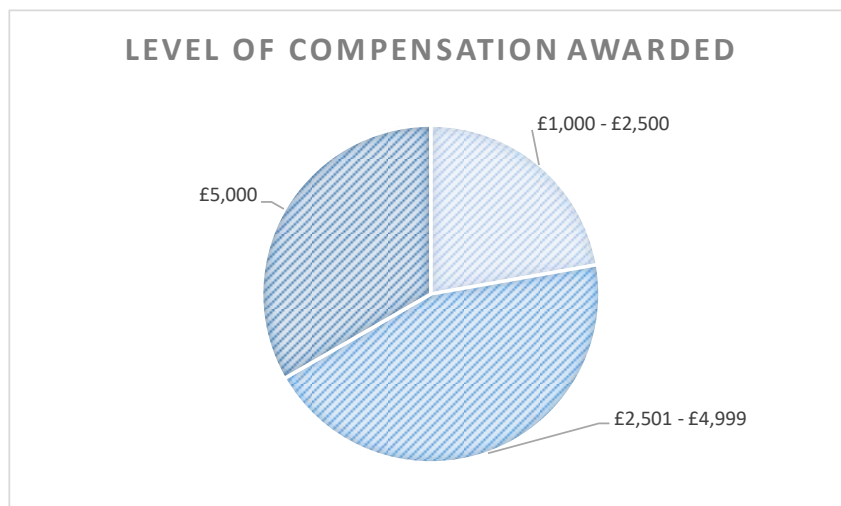
Secondary Complainers

Secondary Complainers become parties to the proceedings only after a finding of professional misconduct is made. Prior to this, they have no direct input into the Tribunal process. Once a finding of professional misconduct is made, Secondary Complainers are invited to make a claim for compensation and provide evidence. The Tribunal hears evidence and submissions and decides whether it is appropriate to make an award of compensation. This can take place on the same day as the hearing on professional misconduct but more often occurs at a separate compensation hearing. There can be cost implications for Secondary Complainers if additional Tribunal time is required to deal with their claim and an award is not made in their favour. The Tribunal recognises that it can be difficult for Secondary Complainers to deal with the formal Tribunal procedures and has provided [guidance notes](#) on its website.

This year, 19 Complaints lodged with the Tribunal identified Secondary Complainers. In two cases, no claims were lodged. In four cases claims were settled or withdrawn. Awards were made in nine cases. There are four claims outstanding to be dealt with in the next reporting year.



The level of award to Secondary Complainers ranged from £1,000 to £5,000. The maximum amount of compensation which the Tribunal can award is £5,000. The total amount of compensation awarded to Secondary Complainers was £33,950. In the event that Respondents do not pay the



compensation awarded by the Tribunal, Secondary Complainers have to take steps themselves to recover the money.

Appeals to the Court of Session

No Tribunal cases were appealed to the Court of Session this year. However, one decision was judicially reviewed, [Ahmed-Sheikh v Scottish Solicitors Discipline Tribunal](#).



The Tribunal had found a solicitor guilty of professional misconduct. A motion made on her behalf for no expenses due to or by was rejected by the Tribunal. There was no motion nor discussion about the scale of expenses. The Tribunal awarded expenses against her on the agent and client scale. She took issue with the award of expenses. She did not appeal under the statutory provisions. Instead, she brought a petition for Judicial Review of the Tribunal's decision to award expenses on the agent and client scale.

The Judicial Review Petition was dismissed as incompetent because the petitioner failed to exhaust her statutory remedy. An appeal on expenses alone is competent under section 54(1A) of the Solicitors (Scotland) Act 1980. The term "decision" in this section has a broad meaning encompassing the order for expenses made alongside the finding of guilt. This was sufficient to deal with the petition, but for the sake of completeness, Lord Ericht went on to consider the Tribunal's approach to expenses. He found that the Tribunal did not err in law. In following its conventional line on expenses when no motion was made to depart from it, the Tribunal did not fetter its discretion. However, it was suggested that the Tribunal should consider providing a guidance note or otherwise publicising its usual principle when it comes to expenses. The Tribunal therefore updated its guidance and included a link to this case on the "news" section of its website.

SSDT Administration Limited

The Tribunal is assisted in its administration by a private company limited by guarantee, SSDT Administration Limited. The company was incorporated on 9 June 2016. The company number is SC537615. The current directors of the company are Nicholas Whyte, Colin Bell, Ian Shearer and Kay Hampton. The Clerk acts as company secretary. The company employs the Clerk and administrative staff. The registered office of SSDT Administration Limited is Unit 3.5, The Granary Business Centre, Coal Road, Cupar, Fife KY15 5YQ.

Financial Information

	Year to 31/10/19	Year to 31/10/18
Total Costs of the Tribunal (including lay members' costs)	£260,458.99	£198,145.30
Costs recoverable from Respondents	£96,188.85*	£96,789.54
Costs per <i>solicitor</i> with a practising certificate (excluding lay members' costs paid for by the Scottish Government)	£17.06	£13.97
Costs per <i>solicitor</i> with a practising certificate if all recoverable costs were received from Respondents	£9.30*	£5.87

* These are estimated costs. One case is under appeal and the expenses cannot be finalised until the conclusion of the proceedings.

The Tribunal is funded by the Law Society in accordance with its obligations under paragraph 22 of Schedule 4 to the Solicitors (Scotland) Act 1980.

Total Tribunal costs for the reporting year were £260,548.99. This is made up of £211,430.42 of funding from the Law Society and £49,028.57 paid by the Scottish Government in respect of lay members' costs.

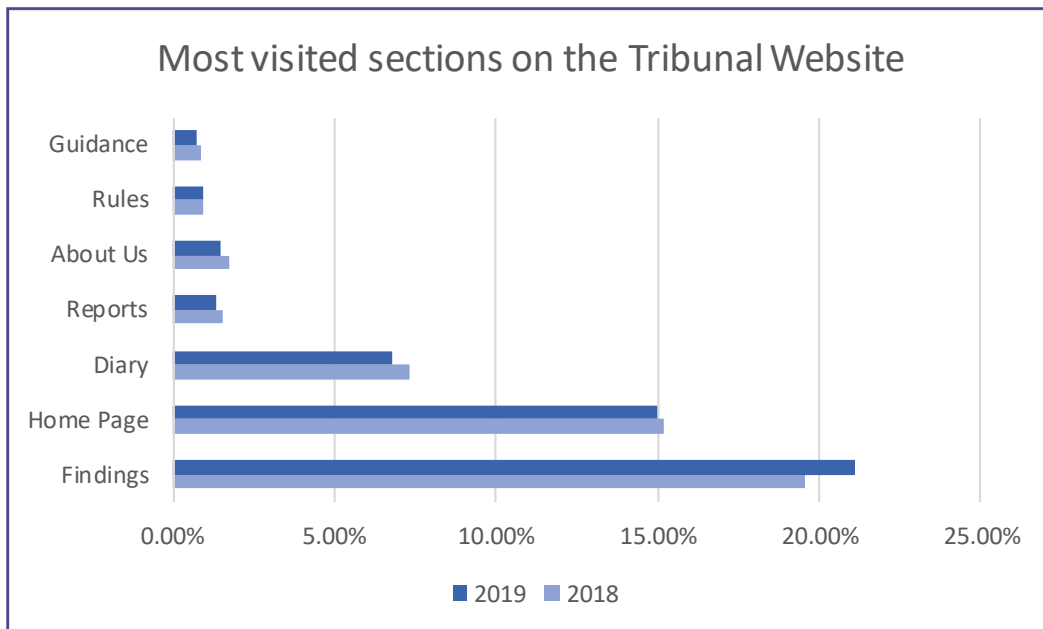
Tribunal costs includes the legal expenses the Tribunal had to pay arising from the Judicial Review case this year. The Tribunal and the Law Society were found liable to the petitioner in respect of the expenses occasioned by the permission hearing on 13 June 2019. However, otherwise, the petitioner was found liable to the Tribunal and the Law Society in the expenses of process. Assuming these expenses are recovered, the total costs of the Tribunal this year will be reduced. However, the account has not yet been taxed so this is not reflected in the figures above.

Tribunal Website

The Tribunal’s website is frequently used by Tribunal members and the public. This year, the findings page was accessed 31,044 times. In 2018, it was accessed 28,895 times. In 2017, it was accessed 26,148 times.

Helpful documents are available on the [Guidance page](#) which provides advice for Tribunal users and the media. This page was accessed 1,332 times this year.

The diary page is updated regularly. This was reviewed 9,936 times this year compared to 7,672 times last year.



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