

# Conduct complaints about Scottish solicitors: Trend analysis report

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## Executive Summary

This report provides analysis of trends in conduct complaints about solicitors in Scotland remitted to the Law Society of Scotland (LSS) for investigation from 2009 to 2014.

The report draws attention to trends in:

- the numbers of conduct complaints;
- the timescales involved in investigations; and
- complaint outcomes.

It also differentiates between findings of Unsatisfactory Professional Conduct (UPC) and Professional Misconduct (PMC).

The report finds that although conduct complaint numbers and timescales are generally decreasing, on average, hybrid complaints – those which incorporate elements of both service and conduct - take 2 years to be dealt with. This is increased to 3 years if there is a prosecution to the Scottish Solicitors' Discipline Tribunal (SSDT). There is currently no mechanism to expedite the investigation and prosecution of serious complaints.

Whilst the rate of decisions being made by the LSS and the number of complaints upheld is steadily increasing, the amount of compensation, fines and training orders remains low. In terms of ensuring consistency of approach and of managing expectations, while the LSS has a tariff and written guidance relating to compensation levels for upheld UPC complaints, no guidance exists for levels of fines. UPC decisions are not published.

In a number of instances, where complaints are referred by the LSS for prosecution before the SSDT, the LSS-appointed fiscal has referred the complaint back to the LSS to reconsider its decision to prosecute. We question the validity of that process.

It is recommended that the LSS:-

- Considers fast-tracking certain types of complaints.
- Continues to work with the SLCC to improve the effectiveness and efficiency of complaint handling, particularly in relation to hybrid complaints.
- Reviews the consistency of sanction awards.
- Revises and publishes written guidance and/or a tariff for UPC sanctions.
- Considers publishing information in relation to UPC decisions.
- Reviews the involvement of the fiscal in the determination process and remitting complaints back for secondary decisions.

## Introduction

The SLCC's oversight function is important to:

- reinforce public confidence about the effectiveness and impartiality of complaint handling by the relevant professional organisations; and
- offer reassurance to the legal profession that disciplinary matters are being dealt with fairly and transparently.

This report focusses on identified trends in conduct complaint handling by the Law Society of Scotland (LSS) over the last 6 years.

We hope that this report will stimulate discussion about the effectiveness of the systems for dealing with conduct complaints and highlight, in particular, where there may be room for change and improvement.

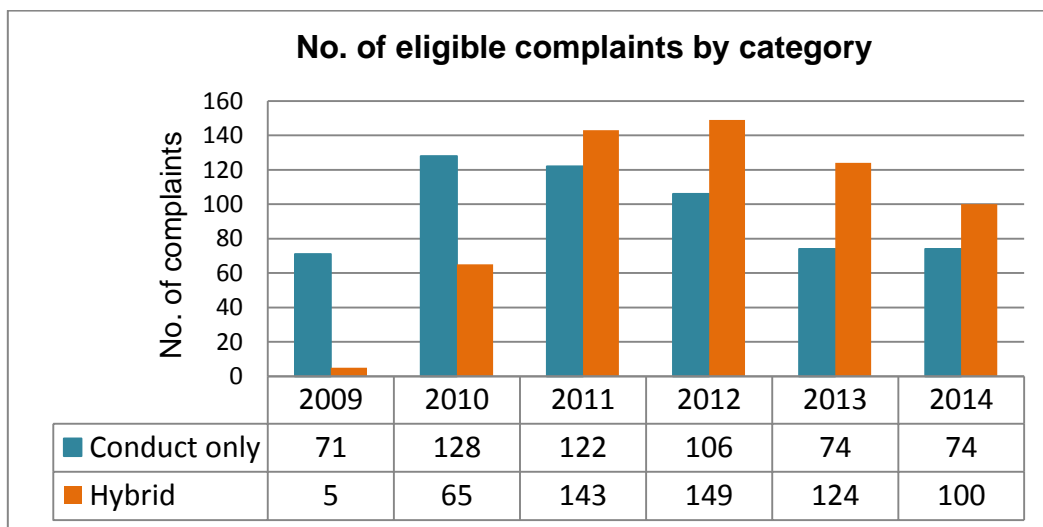
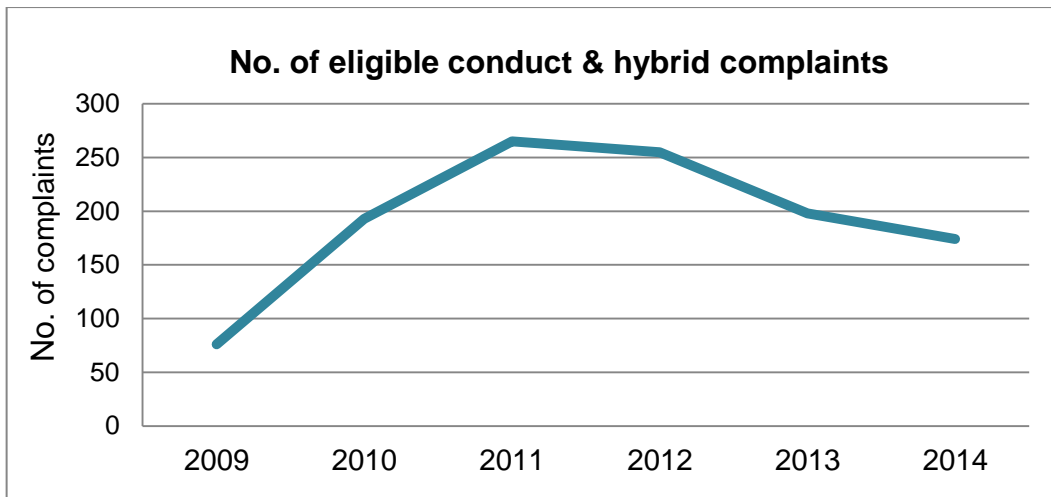
# 1. The complaints framework - definitions

- 1.1. The SLCC is the gateway for all legal complaints. The SLCC categorises complaints into service, conduct or a hybrid of both. A complaint can contain distinct service and conduct issues. It is also possible for individual issues to be categorised as hybrid. All conduct aspects of a complaint must be investigated by the LSS.
- 1.2. Complaints classified as hybrid are investigated by both the SLCC and the LSS. The organisations agree at the outset whether the service or the conduct issues should be investigated first. The decision will usually reflect the seriousness of the complaint and the remedy sought.
- 1.3. Investigations of hybrids are not carried out simultaneously, mainly for practical reasons, as the files will be required for use by each organisation's investigators and decision-makers.

## 2. Overview of trends in conduct complaint numbers, timescales & outcomes

### Numbers of complaints

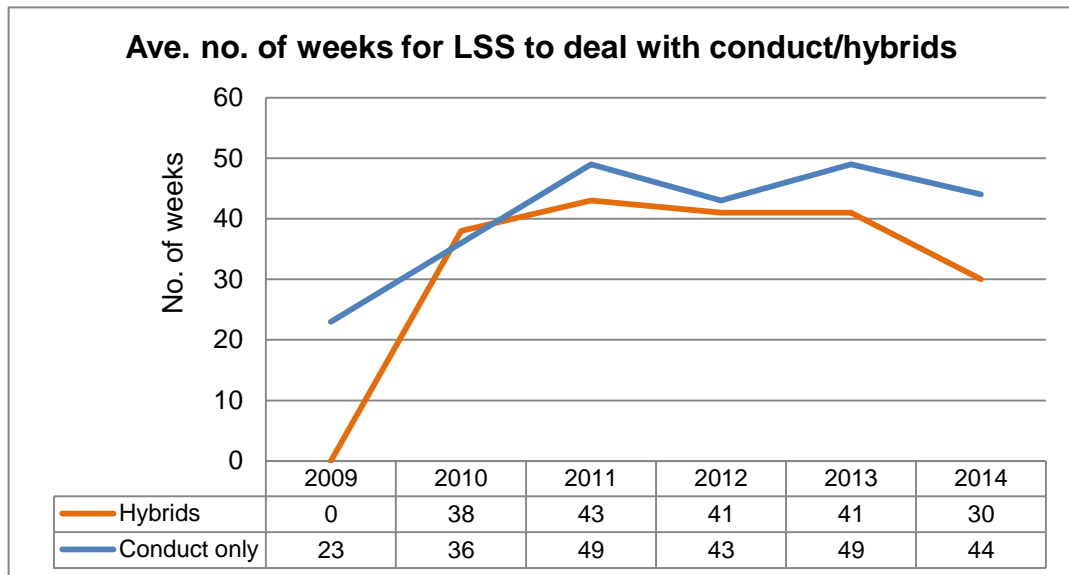
- 2.1. Our records show that between 01 January 2009 and 31 December 2014, the SLCC received 7,390 complaint forms. Of those, 575 were assessed as eligible conduct only complaints and 586 as hybrid; a total of 1,161 complaints.
- 2.2. The tables below show that, while there has been a general decline in the total number of conduct complaints received over the last 3 years, the percentage of complaints being categorised as hybrid, as opposed to conduct only, has generally risen during the 6 year period, resulting in the need for more complaints to be investigated by both organisations.



### Timescales

- 2.3. The time taken to deal with complaints depends on a number of factors, including how the complaint has been categorised and the outcome.
- 2.4. The LSS does not have a fast-track system to deal with certain types of complaints – for example, those complaints which are particularly serious or where the solicitor has already accepted the allegations raised. The LSS has a formal complaints process which it follows in every case.

2.5. The following table shows the average time taken by the LSS to deal with complaints, from the date that the complaint was sent for investigation to the date of determination (or discontinuation) in each year:



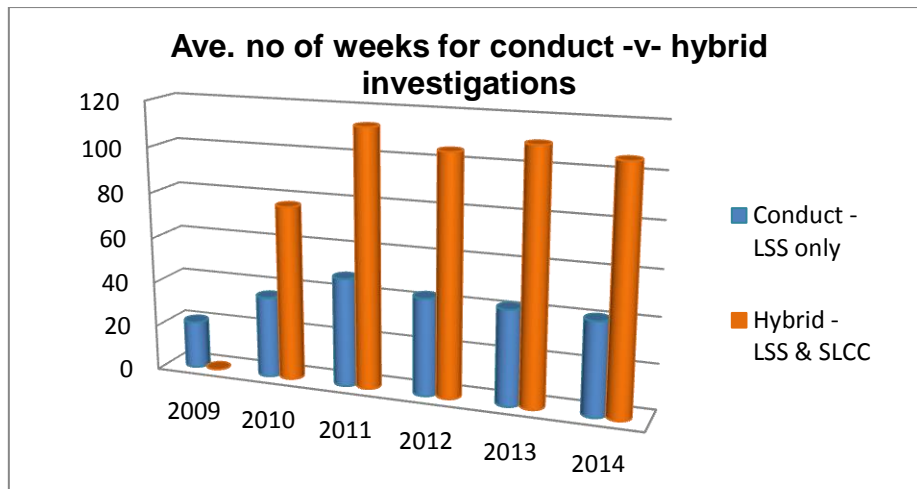
2.6. Although it has been taking the LSS slightly longer, on average, to investigate complaints categorised as conduct only (as opposed to hybrid complaints), it can be seen that most recently the time taken by the LSS to investigate complaints is declining, particularly in relation to hybrid complaints.

2.7. Needless to say, a drop in complaints results in a reduction in caseloads, which has a positive impact on the time available to deal with each complaint and the efficiency in progressing complaints through the investigation process.

2.8. In keeping with the decline in complaint numbers, the LSS has reduced its overall timescales from 36 weeks to 30 weeks.

2.9. The following table illustrates the average time that it has been taking both the LSS and the SLCC collectively to assess eligibility, investigate and determine (but not prosecute) hybrid complaints in each year:



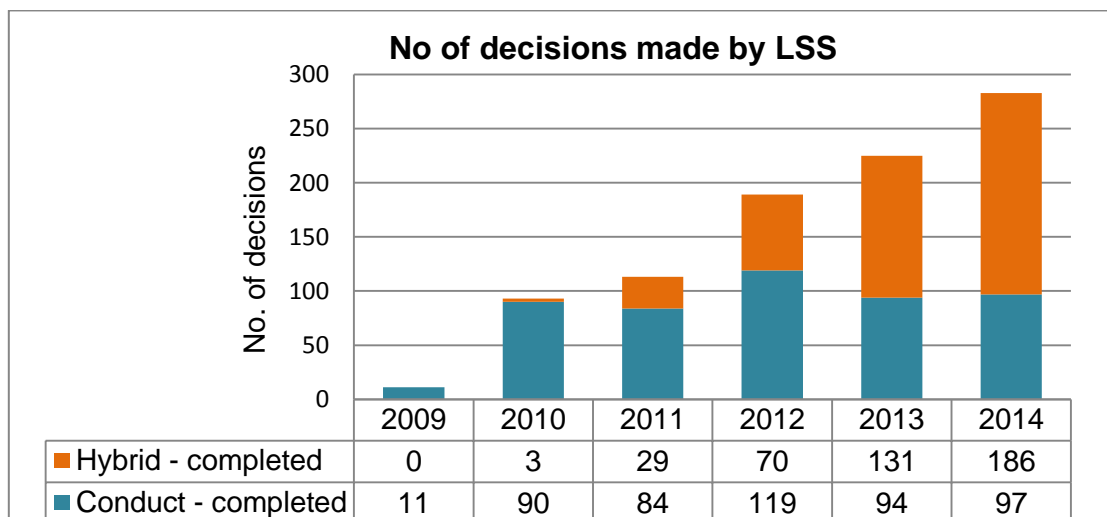


2.10. The total time which it takes for hybrid complaints to be investigated (by both organisations) is twice as long as those complaints which have a single categorisation.

### Outcomes

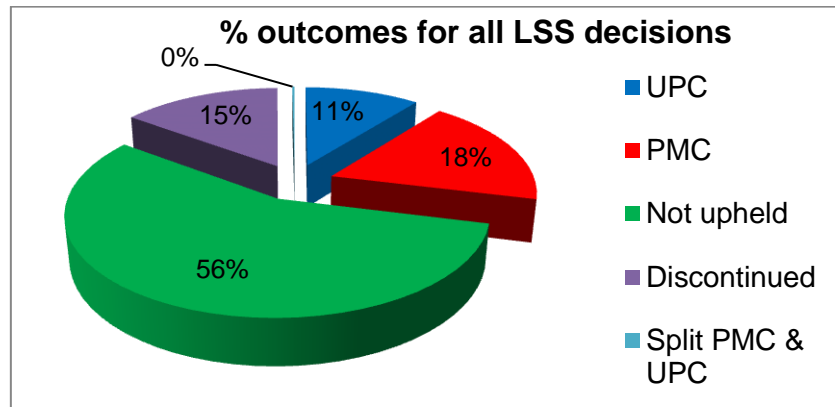
2.11. During the period 2009 to 2014, the LSS made 914 decisions in relation to conduct complaints.

2.12. While there has been a gradual decline in the total number of complaints being accepted for investigation, the LSS has significantly increased its decision-making over the course of the last 3 years:

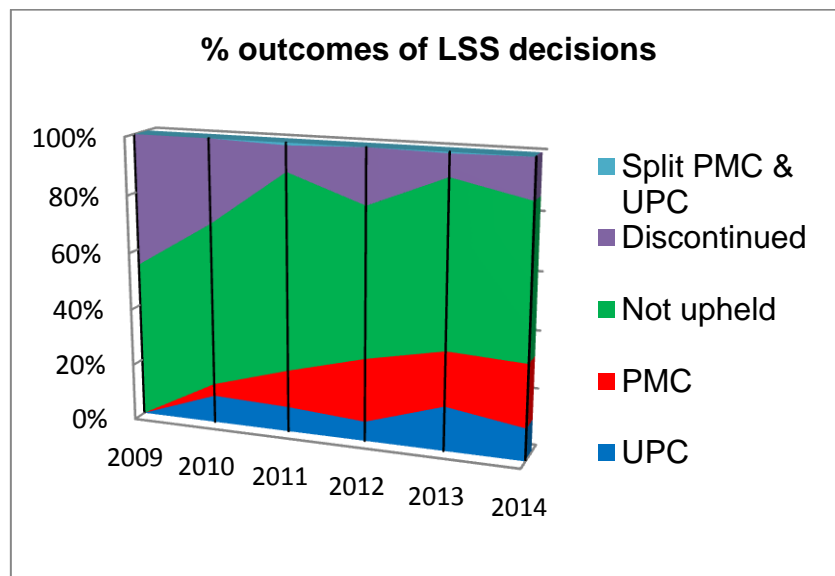


2.13. The total number of decisions made was at its highest in 2014; a total of 283 decisions.

2.14. Of all decisions made by the LSS over the last 6 years, less than half were upheld. The following table shows the percentage breakdown of all decisions:



2.15. However, when the figures are examined in terms of annual trends, the numbers for the last few years show that the percentage of complaints being upheld as UPC and/or prosecuted before the SSDT has increased:



2.16. In the next sections of the report we will look at UPC and PMC complaints in more detail.

### 3. Unsatisfactory Professional Conduct

3.1. 'Unsatisfactory Professional Conduct' is defined as:

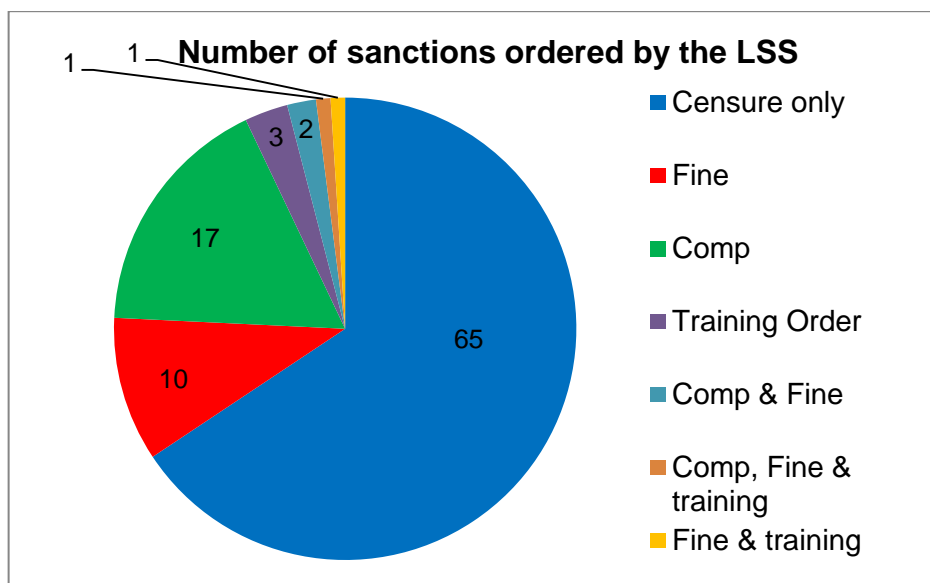
*“Conduct by a solicitor which is not of the standard which could reasonably be expected of a competent and reputable solicitor but which does not amount to Professional Misconduct and which does not comprise merely inadequate professional services”.*

3.2. The LSS applies the balance of probabilities as the standard of proof when deciding whether a finding of UPC should be made against a solicitor.

3.3. During the period 2009 to 2014, the LSS made a total of 99 UPC findings against 86 solicitors. The following sanctions were applied:

- 65 censures - no additional sanction.
- Fines - total £5,650.
- Compensation - total £7,095.
- 5 training orders - money laundering; role of the Client Relations Manager; conflict of interest; practice management/cash room practice; Civil Legal Aid practice and procedure.

3.4. The following chart illustrates the number of sanctions over the 6 year period:



- 3.5. Although the total amount of compensation and fines imposed by the LSS has increased significantly in 2013 and 2014, of the 67 complaints upheld as UPC during that period, 70% resulted in solicitors being censured with no award of compensation being made or fine being imposed.
- 3.6. It was identified that 13 findings of UPC related to complaints raised by the LSS against its own members. The majority of these complaints related to accounting issues. Although all 13 solicitors were automatically censured, only 1 training order was made and 3 solicitors were fined. In fact, over the 6 year period, the LSS has imposed fines in only 10% of cases where there has been a finding of UPC.
- 3.7. Of the 99 findings of UPC, 52 related to hybrid complaints. Of those, the LSS awarded compensation totalling £3,150 in 8 cases and fines totalling £1,850, against 5 solicitors. In respect of those same 52 complaints, the total amount of compensation awarded by the SLCC for inadequate professional service (IPS) was £59,608.64.
- 3.8. The scope of this analysis did not include examination of the rationale behind the sanction imposed in each individual complaint. Although it was noted that the LSS has written guidance in relation to compensation levels, there is no evidence of this guidance being applied by investigators or decision makers. No such guidance exists in relation to the levels of fines which can be ordered by its Committees. The decision as to how much the compensation award or fine should be is made on a case-by-case basis, although, in considering compensation, the LSS takes into account any prior award made by the SLCC for the same complaint.
- 3.9. Findings of UPC are not published by the LSS in the same way that findings of Professional Misconduct are usually published by the SSDT. Although the finding is recorded on the solicitor's record which is held internally by the LSS, there is no public record.

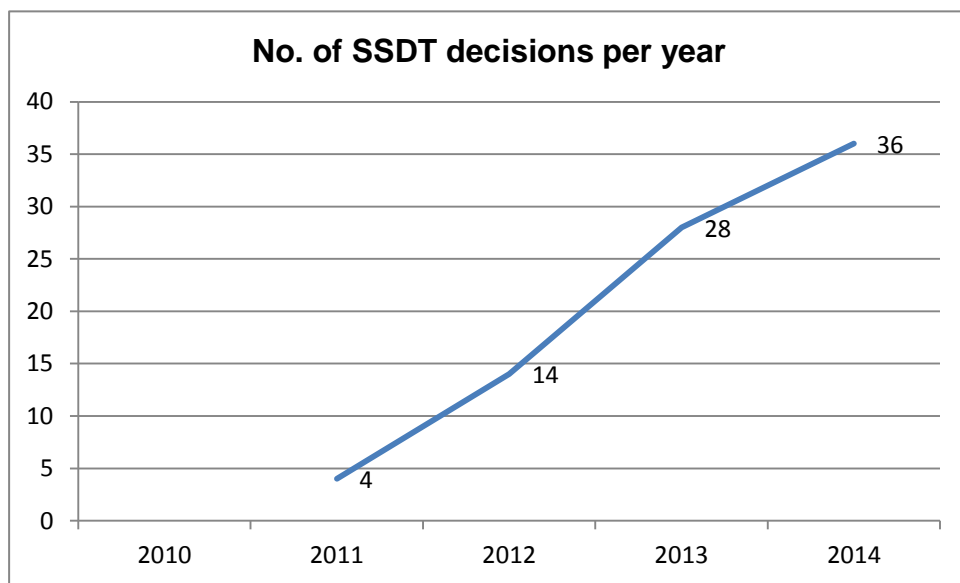
## 4. Professional Misconduct

- 4.1. 'Professional Misconduct' is not defined in statute. However, the following test is applied by the LSS (and the SSDT):

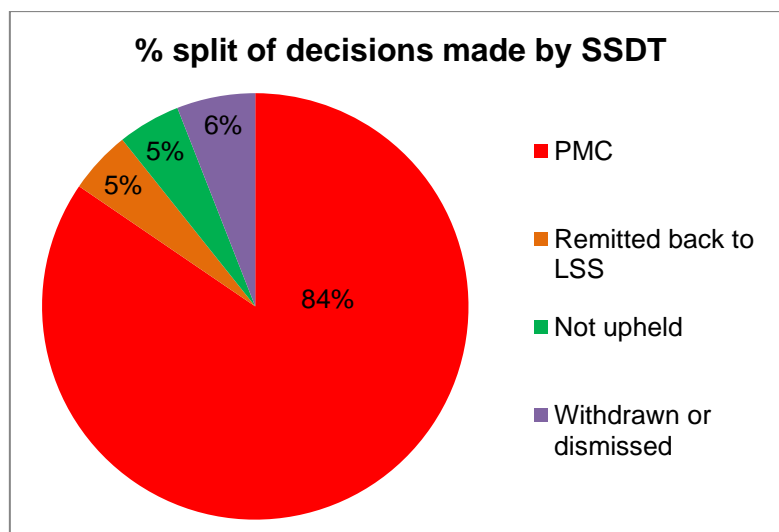
*“There are certain standards of conduct expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as being serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is made”.*

- 4.2. The LSS applies a test of proof beyond all reasonable doubt for complaints of Professional Misconduct (PMC). Where it appears that the test has been met, the complaint is usually referred by the LSS Professional Conduct Sub Committee to the SSDT for prosecution.
- 4.3. Between 2010 and the end of 2014, the LSS decided in 182 cases that a solicitor's conduct was capable of amounting to PMC and that the solicitor should be prosecuted before the SSDT.
- 4.4. In the usual course of events, the LSS will instruct a solicitor or "fiscal" to prepare and lodge the complaint on behalf of the LSS. It is not unusual to see a number of complaints by different complainers being amalgamated at this stage. Although this can prolong the prosecution process, it ensures that all of the issues against the same solicitor are considered by the SSDT at the same time.

- 4.5. Although the LSS is the primary complainer in a prosecution, the original complainer may become a party to the proceedings. This allows the SSDT to award compensation to the person who originally raised the complaint. However, the original complainers must either present their claim for compensation themselves, or instruct a new solicitor to act on their behalf. The SSDT advises complainers that if a claim for compensation fails, there is the possibility of expenses being ordered against the complainer.
- 4.6. Since the end of 2010, the number of findings made by the SSDT has been increasing significantly year on year; from 4 decisions in 2011 to 36 in 2014:



- 4.7. As at the end of 2014, 84% of all prosecutions resulted in findings of Professional Misconduct:



- 4.8. There is no timescale within which a complaint needs to be lodged with the SSdT following the LSS's decision to prosecute, and it can take some time for the fiscal to prepare a case for prosecution. On average, the length of time that it takes for the complaint to be prosecuted is 1 year (in 2013 the average length of time from the LSS decision date to the date of the SSdT decision was 51 weeks; in 2014 the average was 56 weeks).
- 4.9. Where PMC has been upheld, various sanctions have been imposed by the SSdT, ranging from censures, fines and restricted practising certificates to solicitors being struck off the Roll. Despite being given the power under the current legislation to make awards of compensation, this has happened in relatively few cases – possibly as a consequence of the circumstances described in paragraph 4.5 above. A full breakdown of the sanctions awarded is set out in the SSdT's Annual Reports.
- 4.10. During the period 2009 to 2014, we identified 4 instances where complaints were remitted by the SSdT back to the LSS for investigation as potential UPC. A finding of UPC was made in 1 case, with compensation of £600 being awarded in favour of the complainer. Another complaint was dismissed. The 2 other complaints are still pending.
- 4.11. However, we also identified 13 instances where a complaint initially referred by the LSS for prosecution did not reach the SSdT. These were complaints where the LSS's decision to prosecute a solicitor had been reviewed by the fiscal and remitted back to the LSS for reconsideration, the rationale being that a prosecution had little or no prospects of success. In these circumstances, the LSS has made a further decision, either to uphold the complaint as UPC or to take no further action regarding the complaint.
- 4.12. Whilst appearing to be a pragmatic approach, the adoption of this practice in effect means that the decision of a properly constituted committee is being challenged by a single individual solicitor acting as the LSS-appointed fiscal. The committee is then relying on the advice of that fiscal and overturning its decision to lodge a complaint with the SSdT.

## 5. Conclusions and recommendations

- 5.1. Since a peak in 2011, conduct complaint numbers have continued to fall. However, the categorisation of complaints is changing, as the percentage of hybrid complaints being admitted into the investigation process increases.
- 5.2. The reduction in complaint numbers is undoubtedly a contributory factor to the reduction in the length of time that it takes for complaints to be investigated by the LSS. This has enabled the LSS to reduce its overall timescales from 36 weeks to 30 weeks. The LSS decision-making rate continues to increase year-on-year.
- 5.3. However, classifying complaints as hybrid doubles the length of time that it takes for the complaint to be dealt with, as both the SLCC and the LSS carry out separate investigations of the same complaint. Although steps are taken by the organisations to avoid duplication, this is difficult to manage, as different tests apply for service, UPC and PMC.

**RECOMMENDATION: The LSS and SLCC should continue to work together on reducing timescales for the investigation of hybrid complaints. Alternative ways of working, and utilising the evidence and reports prepared by the primary investigating organisation, should see a decrease in the total amount of time that complaints (particularly hybrids) are taking to be dealt with and ensure that disciplinary matters are brought before the SSDT as quickly as possible.**

- 5.4. The LSS takes all complaints through its formal process, regardless of the category of complaint, the seriousness of the allegation or whether the solicitor has admitted that he/she is at fault, for example, in cases where the solicitor has already been convicted of a criminal offence.
- 5.5. The time that it takes, on average, for a solicitor to be prosecuted before the SSDT is approximately 1 year. In the case of a hybrid complaint, this can mean that the average length of time to reach the overall conclusion of the complaint – including both service and conduct aspects – is 3 years.



- 5.6. Whilst in certain circumstances the LSS can suspend solicitors from practice, thus protecting the public, it can only do so in limited situations.

**RECOMMENDATION:** In order to protect both the public and the integrity of the profession, the LSS should consider adopting a fast-track system to expedite complaints that are of a serious nature, to ensure that, where appropriate, solicitors are brought before the SSDT as a matter of urgency.

**RECOMMENDATION:** The LSS should also consider whether there are alternative ways of dealing with complaints that are essentially regulatory matters raised by the LSS itself. These complaints tend to follow financial inspections or relate to the solicitor's failure to engage with the LSS. The evidence is often beyond reasonable doubt and therefore less investigation is required.

- 5.7. It is important that there is consistency in the sanctions ordered in complaints where there have been findings of UPC. No guidance is available for considering levels of fines, and there is no evidence that the guidance relating to compensation levels is being used. Although only a small number of fines and compensation awards have been made to date, it would be beneficial for the LSS's decision-makers to have more comprehensive guidance to assist when deciding the amount of compensation to award or fine to impose.
- 5.8. This would also ensure that investigators are assisted in the preparation of their reports and that Committees apply a consistent approach.
- 5.9. In addition, publishing the tariff and/or guidance on the LSS's website and providing a copy to the parties to the complaint would assist in managing expectations and promote better transparency and openness in the conduct complaint determination process.

**RECOMMENDATION:** The LSS should consider revising its guidance on sanctions to include levels of fines and should publish this guidance.

- 5.10. UPC findings are recorded on solicitors' records held within the LSS, but are not made known to the public.

- 5.11. The SLCC considers that knowledge is an important part of complaint avoidance. Understanding the reasons why certain conduct is not merely inadequate service but meets the test for UPC, without being so serious as to warrant prosecution, should be an important part of a solicitor's ongoing training. Practitioners may be at a disadvantage if they are unaware of the LSS's rationale for making findings of UPC.
- 5.12. It is also important for the public to understand when conduct might or might not meet the test for UPC, as this could impact upon their decision to make a complaint.

**RECOMMENDATION: In terms of transparency, education and the better management of both consumer and solicitor expectations, the LSS should consider whether UPC decisions should be published on its website, either in full or anonymised.**

- 5.13. In cases where the LSS Professional Conduct Sub Committee decides that a solicitor should be prosecuted to the SSDT, that decision is based on whether the relative seriousness of the solicitor's conduct could meet the test for PMC. A complaint should be made to the SSDT at that stage.
- 5.14. Section 3A of the Solicitors (Scotland) Act 1980 specifies that the decision to make a complaint to the SSDT is not one which can be delegated by a committee to an individual.
- 5.15. Having made the decision to make the complaint to the SSDT, we question whether it is within the intent and spirit of the legislation that the Committee subsequently revisits such a decision – based on the advice of an individual, the fiscal – on the basis of the prospects of a successful prosecution.

**RECOMMENDATION: The LSS should give consideration to reviewing the current practice of remitting complaints back to the Professional Conduct Sub Committee on the advice of the LSS-instructed fiscal.**