Client Relations Office

Complaints Statistics
Complaints Received - April 05 to March 06
Summary

• Complaints which have just had 9 months (received June’05) – 91% closed
• Complaints which have just had 6 months (received Sep’05) – 78% closed
• Live load 1438 (-58)
• Average time taken through all stages – 7 months and 8 days
• 107 live complaints over 12 months old
Average Time Taken - Monthly Comparison

- Average number of days between report returned and closure of the complaint
- Average number of days between sent for report and report returned
- Average number of days between ready for report and sent for report
- Average number of days between intimation and ready for report
- Average number of days between receipt to intimation of complaint
Report Stage to March 06

- No sent to CRO reporters
- No Returned by CRO reporters
- Number waiting at Month End

[Bar chart showing data from February 2004 to March 2006]
Cases over 12 months old = 107
Complaints Received Jan 04 to 04 Apr 06 - Profile

[Graph showing complaints received and status over time, with categories such as Pre Intimation, Intimated, Ready for Report, Sent for Report, Report returned awaiting committee/closure, and Closed.]

Months Elapsed

- 6 mth target
- 9 mth target
Note: This page and next

152 complaints not yet categorised
Client Relations Office

Complaints Statistics

Complaints Received - May 05 to April 06
Summary

• Complaints which have just had 9 months (received July’05) – 90% closed
• Complaints which have just had 6 months (received Oct’05) – 80% closed
• Live load 1418 (-20)
• Average time taken through all stages – 7 months and 14 days
• 100 live complaints over 12 months old
Complaints Received

2005

2006

2006 Cumulative = 1353
Cases over 12 months old = 100
% of Complaints Received in Month - Closed Within 6 & 9 Months (or by 02/05/06)

- % Open as at 02/05/06
- % Closed Between 9 Months & 02/05/06
- % Closed 6 - 9 Months
- % Closed in 6 months

May-05: 75%
June-05: 74%
July-05: 72%
August-05: 76%
September-05: 78%
October-05: 80%
November-05: 72%
December-05: 72%
January-06: 63%
February-06: 46%
March-06: 43%
April-06: 15%

Month Elapsed

% of Complaints Closed Within 6 & 9 Months:
- 6-9 Months
- 6 Months
Client Relations Office
## Complaints Received

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Investment Business Complaints</th>
<th>No of All Other Business Categories</th>
<th>Total No of Complaints</th>
<th>Investment Business complaints - % of Total</th>
<th>% Increase in Investment Business complaints from previous year</th>
<th>% increase in Non Investment Business complaints from previous year</th>
<th>% increase in total from previous year</th>
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<tbody>
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### Graphs

- **% Increase in Investment Business complaints from previous year**
- **% increase in Non Investment Business complaints from previous year**
- **% increase in total from previous year**
Complaints Received 2005 – Business Categories

<table>
<thead>
<tr>
<th>Business Category</th>
<th>No of complaints received</th>
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### Complaints Received Jan to Apr 2006 – Business Categories

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Reason for Complaint - 2005

- **Failure to Advise Adequately**: 44%
- **Delay**: 9%
- **Failure to Communicate**: 8%
- **Failure to Follow Instructions**: 4%
- **Failure to Prepare Adequately**: 2%
- **Breach Code / Guideline / Practice Rule**: 8%
- **Other**: 25%
Causes of Complaint Issues - Jan to Apr 2006

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<td>Failure Advise Adequately</td>
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<td>Failure Communicate</td>
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<td>Failure Prepare Adequately</td>
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Total Number of Complaints Received: 1660
Average number of issues / complaint: 2
Maximum number of issues / complaint: 16
Complaints Received 2005 – Firm Size

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<td>2-5 Partners</td>
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<td>6-9 Partners</td>
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<td>10+ Partners</td>
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<td>No record of no of partners (pre database records)</td>
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Complaints Received 2005 – Upheld

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<tr>
<td>No Still Open</td>
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</table>
Dear Tracey,

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) BILL

I thought it might be helpful for the Committee, in advance of the Minister’s appearance on 30th May, were I to sketch out some of the Society’s views arising from the evidence session with Executive officials on 25th April 2006.

I have the following comments to make:-

1. Section 1 and Schedule 1

The Society is concerned that the Executive has not come to a position in relation to the lack of an external appeal and the independence of the Scottish Legal Complaints Commission from the Executive. The Executive has had the Opinion of Lord Lester since 31st March 2006 and it is important that the views of the Executive are made clear on this matter at the earliest opportunity, so that the Committee may come to a view as to what the content of its Stage 1 Report should be in relation to this issue.

In relation to the question of appeals against conduct complaints, dealt with at column 2233, it is true that the solicitor is able to appeal from a decision of the Scottish Solicitors Discipline Tribunal to the Court of Session, in terms of section 54 of the Solicitors (Scotland) Act 1980. Any person aggrieved by a decision of the Tribunal relating to the discipline under this Act may, within 21 days of the date on which the decision of the Tribunal is intimated to that person, appeal against the decision to the court and on any such appeal the court may give such directions in the matter as it thinks fit, including directions as to the expenses of the proceedings before the court and as to any order by the Tribunal relating to expenses and the order of the court shall be final. Accordingly, it would be possible for a person who has been aggrieved by a decision of the Tribunal, to take an appeal against that decision, in addition to solicitors and the Law Society of Scotland as the principal body who may make a complaint to the tribunal.
2. **Schedule 1, paragraphs 2(7)(a) – 2(7)(d)**

The Subordinate Legislation Committee raised concerns about the width of the order-making power under this paragraph. The Society is of the view that this power is unduly wide and that Scottish Ministers should not be able to amend the number or composition of the categories of person who are appointed to the Commission.

3. **Schedule 1, paragraph 2(6)**

At column 2218, Mike West on behalf of the Executive, confirmed the policy intention behind the different categories of members of the Commission. Mr. West said “The essence will be to ensure that there is a range of skills and experience among the lawyer members.” However, the Bill does not specifically provide for that range of skills and experience to be reflected in the categories of members. In the Society’s view this paragraph should provide that one member of the Commission should be a practising solicitor, ensuring that those involved have current experience of practice.

4. **Schedule 1, paragraph 5(1)(b)(iii)**

This refers to the criteria for removal on the basis that a member of the Commission is “unable or unfit to discharge the functions of a member”. There is no provision for investigation into the capacity of the member to discharge his or her functions and the process would not appear to be open or transparent.

In the Society’s view, there should be a process for investigation and further elaboration of how a member of the Commission is to be considered to be unable or unfit.

5. **Section 5 – Complaint determined to be a conduct complaint**

There was discussion at column 2219 about the distinction between conduct and service complaints. I enclose a note on the concept of professional misconduct and inadequate professional services which might be of assistance.

There was also discussion about the kinds of process which the Commission would follow. At column 2213, Mr. West explained that “The process will be different from that followed by the professional bodies... The process that the Commission will be following is modelled on the process followed by the Financial Ombudsman service.” The Society is of the view that the arrangements to deal with inadequate professional services under the Bill, should not necessarily reflect those in the Financial Services and Markets Act 2000, which relate to the Financial Ombudsman service. It is important to recognise differences between the financial services industry and the way the legal profession carried out business.

The Society agrees with Mr. West that conduct is a natural function of the professional body and that dealing with conduct complaints fits in with the other functions which the professional bodies carry out. The Society has reservations, however, about the provisions of the Bill in respect of section 16, where the role of the Commission seems to be being extended in terms of section 16(6) into matters which deal with conduct and revisiting decisions rather than handling issues.

I think it is important to point out, in terms of column 2223, a misapprehension which Ms. Miller has in respect of disciplinary power.

At column 2223, Louise Miller states that “… suspension or striking off sanctions would still be within the professional bodies’ control”. In relation to solicitors, the power of suspension or striking off is reserved to the Scottish Solicitors Discipline Tribunal in terms of section 53 of the Solicitors (Scotland) Act 1980. These powers do not rest with the Society in respect of solicitors.

The Society agrees with Ms. Miller at column 2224 that it is more sensible for the Commission to “concentrate on becoming the consumer body and on getting the consumer remit right”. If the
Commission concentrates on dealing with service complaints, that will meet the requirement for public perception of independence in treatment of these complaints to be satisfied.

6. **Section 20 – Amount of levies and consultation**

The Society also questions the issue raised by Mr. West at column 2233 that the complaints levy is designed as a method of paying for a dispute resolution service and that it is undesirable for the Commission to be perceived as having a financial interest in upholding complaints were the levy to be applied only to successful cases. It cannot seriously be proposed that the people of probity who will be appointed to the Commission would behave in such a self-interested way. The fear of creating a financial interest on the part of the SLCC in the outcome of a complaint will be removed by ensuring that the unsuccessful complainer or solicitor should pay the specific complaint levy.

The Society is concerned at the lack of accountability of the Commission in respect of its budget. The professional bodies ought to be able to veto the budget of the Commission if they think it is excessive or otherwise unduly burdensome.

7. **Section 29 – Monitoring effectiveness of guarantee funds etc.**

The Society does not accept the comments by Louise Miller at column 2244 that there is no need for the professional bodies to get upset about the proposal for oversight over the Guarantee Fund and Master Policy in terms of section 29. The Society does not accept that the “light touch” approach in the Bill will be maintained throughout the life of the Commission. There is no evidence that either the Master Policy or the Guarantee Fund do not work in favour of the client. There is no evidence of undue delay of treatment by the Guarantee Fund or Master Policy issues. The Society plays no part in considering claims under the Master Policy. that is a matter of contract between the insurers and the insured solicitor.

At column 2245, Mr. West reports that the Scottish Consumer Council has reported a lot of complaints that have been made to it about the Master Policy and payments. The Scottish Consumer Council should provide details of the number of complaints which are apparently anecdotal in nature. Mr. West also reports on the investigation by the Office of Fair Trading into the Master Policy. A copy of the response from the Office of Fair Trading is attached to this letter which indicates that the Master Policy was found not to create a distortion of the market.

8. **Section 34**

In relation to the discussion about the definition of inadequate professional services including “any element of negligence” in terms of section 34 which occurred at column 2227. The Society takes issue with the comments by Mr. West that if someone currently makes an negligence complaint against their solicitor “their only option is to take the matter to the courts which is expensive and takes a long time.” The Society refers to the evidence provided by RSA, the lead insurers, and Marsh UK, the brokers, in terms of the length of time which it takes actions of negligence to be dealt with and the small number of cases which go to court. The fact is that most claims are resolved and do not go through the court process.


Louise Miller at column 2243 indicates that the Executive were “mindful of the figure in England and Wales in setting the compensation limit of £20,000 in terms of section 8(2)(d).” The White Paper bears substantial similarly to the proposals in the Bill including the composition of the Legal Services Board which is to be appointed by the Secretary of State for Constitutional Affairs and will be accountable to Parliament through the Secretary of State for Constitutional Affairs, the sponsoring Minister, and the Office of Legal Complaints which will be set at 7-9 members which will be possible to be changed by secondary legislation and where the members of the OLC will have experience of “consumer affairs, the provision of legal services, complaints handling, wider advice sector, civil or criminal proceedings and the working of the courts, legal education and training, the maintenance of professional standards of persons who provide legal services and the
needs of diverse consumers within society. Paragraph 8.3 of the White Paper bears a remarkable similarity to paragraph 3(3) of Schedule 1 of the Bill. Furthermore, the Board of the OLC will consist of a majority of non-lawyers and members of the Board of the OLC will be able to be removed by the Legal Services Board with the agreement of the Secretary of State in certain circumstances.

The level of redress for consumers, in terms of paragraph 8.11, is set at £20,000 which, of course, is a clear reflection on the White Paper.

The Society intends to write to you about some of the other evidence the Committee has heard. I hope to do this by mid-June. If the Committee needs further oral evidence, please let me know.

I hope these comments are helpful when the Committee considers further evidence from the Executive. Please let me know if you wish further elaboration.

Yours sincerely,

Michael P. Clancy
Director
Mr David Cullen
Registrar
The Law Society of Scotland
26 Drumshonagh Gardens
Edinburgh EH3 7YR

Your ref LS.233/OFT/DC/JB & LS233(OFT)/dc/ctc
Our ref CE/3773/03
Date 11 February 2005

Dear Mr Cullen,

OFT Case Closure: Master Policy for Professional Indemnity Insurance of the Law Society of Scotland.

As you are aware, the Office of Fair Trading ("OFT") has been investigating whether the Law Society of Scotland's ("LSS") rule which requires solicitors to purchase professional indemnity insurance ("PII") through the Master Policy is contrary to the Competition Act 1998 ("CA98"). In particular, our investigation has considered whether the rule is an arrangement that prevents, restricts or distorts competition in the market for solicitors’ services. Following our investigation of this matter, we have decided to close the case. A summary of our investigation and the reasons for our decision not to proceed are set out below. However, we remain concerned that the current arrangements for handling complaints against solicitors in Scotland appear not to have the confidence of the public.

Summary

We opened this case in May 2004 on the basis that we had reasonable grounds to suspect a restriction on competition from the inability of Scottish solicitors to choose their own PII provider and perhaps to seek PII on better terms than are offered by the Master Policy. In particular, we considered whether the Master Policy might be reducing the capacity for solicitors with a good claims record to benefit from the competitive advantage inherent in a lower premium.

A further potential restriction which has been raised repeatedly by users of legal services in Scotland, is that the alleged mutual interest of Scottish solicitors’ in avoiding claims on the Master Policy might be resulting in a refusal to supply services where the client required assistance in acting against another solicitor.

In addition, we considered whether, given the operation of less restrictive arrangements for PII in other jurisdictions such as England and Wales, the decision by the LSS to require all solicitors in
Scotland to obtain their PII through the Master Policy might be considered an unnecessary restriction on competition between solicitors in Scotland.

**Competition and the level of premium**

We have considered the Master Policy guidelines and premium documentation as provided by the LSS and are satisfied that under current arrangements PII premiums do take account of the relative risk associated with different sized legal firms, and the expertise provided by the number of partners within the firm. It appears that bigger practices pay more in premiums and those practices with a high ratio of partners to non-partners pay less than practices with very few partners (and therefore more limited supervision or expertise). Further, and most importantly, a discount or penalty is included in the calculation of premium depending on the practice’s claims record. Thus firms with a good claims history are eligible to receive a premium discount, whereas firms with a poor claims history would pay a higher premium.

On the basis of this information, we have concluded that it is unlikely, given the current arrangements for the setting of premium, that there is strong and compelling evidence that these arrangements appreciably restrict competition between individual solicitors’ firms by denying them the freedom to seek insurance outside of the Master Policy. We have not, in the course of the investigation, received representation from any solicitors’ firm alleging that its ability to compete is restricted by the current arrangements.

We noted from the information provided, that the LSS has in the past regularly reviewed and increased the impact of a firm’s claims record on the level of premium payable under the Master Policy. The LSS has also expressed an intention to continue reviewing this into the future. The OFT encourages the LSS to continue to do this to ensure that the claims record of a solicitors’ firm is adequately reflected when premiums are set under the Master Policy.

**Refusal by solicitors to provide services.**

We have considered whether the alleged mutual interest of Scottish solicitors’ in avoiding claims on the Master Policy might be resulting in a refusal to supply services where the client required assistance in acting against another solicitor. This issue was raised with us by a number of complainants. While there is evidence to suggest that some potential clients have experienced difficulty in finding a solicitor to represent them, we do not have sufficient evidence to prove that the alleged mutual interest of Scottish solicitors in avoiding claims under the Master Policy is a significant factor in a solicitor’s decision not to represent a client. In the absence of such evidence we consider that the difficulties experienced by some legal services clients in obtaining representation, ought to be considered as an access to justice issue and not a competition issue.

**Alternative PII arrangements to those of the Master Policy**

Finally, we considered whether the decision to maintain in force a Master Policy and to require all solicitors to obtain their PII cover under the policy was restrictive of competition, where alternative arrangements, less restrictive of the freedom of solicitors to choose how best to obtain PII cover, were successfully operated in other jurisdictions. In particular, we considered the PII arrangements of the Law Society of England and Wales. In this regard, we considered that under current arrangements there may be a benefit to the LSS, its members and their clients, of collective
bargaining by the professional body to secure uniform and affordable PII for Scottish solicitors. It was not clear, given the scale of the profession in Scotland, that the apparent benefits of the England and Wales arrangements, in terms of greater freedom to solicitors to seek insurance directly from an approved pool of insurers, could similarly be achieved in the context of solicitors in Scotland. We did not, therefore, consider that there is strong and compelling evidence that the decision by the LSS to maintain in force the Master Policy arrangements had the effect of preventing restricting or distorting competition. We note that the LSS has reviewed on a number of occasions the appropriateness of arrangements for PII and we would encourage it to continue to conduct such reviews regularly with a view to ensuring that arrangements in place are those that minimise restriction to competition while ensuring that solicitors have adequate PII cover.

**Consumer concerns about arrangements for complaints and redress**

A remaining concern (although not one that appears to be directly related to competition at present), is the consumer disquiet in Scotland in relation to the operation of the Master Policy, and of complaints handling and consumer redress more generally, that was apparent in representations that were made to OFT in the course of this investigation. To serve the public interest effectively, the effect of the Master Policy on the handling of complaints against solicitors needs to be viewed with trust by the public. Questions have been raised by a number of complainants about whether there is sufficient distance between the LSS and the brokers and insurers, which highlight the importance to consumers of robust and independent systems of redress. This is a major theme of the recently published Clementi\(^1\) report that makes recommendations about the arrangements for complaints handling and redress in relation to the legal profession in England and Wales.

As you may be aware, the OFT has a role under the Enterprise Act 2002 to provide general advice and promote competition. We will be making representations to the Scottish Executive about the implications of the Clementi report for users of legal services in Scotland. Either by responding to the forthcoming Scottish Executive consultation on complaints or otherwise, we will be recommending to the Scottish Executive that in considering future arrangements for complaints handling and redress in Scotland it has full regard to the recommendations in the Clementi report.

We indicated to you last year that we would consider arranging a meeting with LSS staff to discuss this investigation. Given that we are closing the case, we do not believe it is necessary to meet. We hope that your offer remains open however, should further issues arise regarding competition that we wish to discuss with you.

Thank you for your cooperation in this matter.

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\(^1\)Review of the Regulatory Framework for Legal Services in England and Wales: Final Report; published 15 December 2004
Yours sincerely

[Signature]

Carissa Roberts
Case Officer
Competition Enforcement Division 6
NOTE ON THE CONCEPT OF PROFESSIONAL MISCONDUCT AND INADEQUATE PROFESSIONAL SERVICES

Professional Misconduct Complaints

Complaints of professional misconduct are akin to a criminal, as opposed to a civil matter. In short, what this means is that it is for the professional body to assess the conduct or behaviour of the solicitor and where appropriate look to take disciplinary action. Disciplinary action would be in the interests of the public and the profession in the most serious cases looking to ensure that someone who had breached Practice Rules of the Code of Conduct in the most serious circumstances could not practice again. In the case of solicitors, where the Society believes that professional misconduct may have been committed, it can prosecute the solicitor involved before the Scottish Solicitors Disciplinary Tribunal. It is the Tribunal which actually makes decisions of guilt in relation to professional misconduct, not the Society.

Matters of professional misconduct include breach of Rules, breach of the Code of Conduct, dishonesty, breaching a client’s confidentiality, and acting in a conflict of interest situation.

A complaint about a solicitor’s professional misconduct could be raised by a non client, or could be raised by the professional body itself, if it was brought to its attention e.g. through the media and could include the conviction of a solicitor for a criminal offence e.g. drug dealing.

Complaints of inadequate professional services directly arise as a result of the contract between a solicitor and a client. That means that issues relating to service can be things like failure to respond to a telephone call, failure to reply to a letter, failure to tell a client how the business is progressing and failure to explain to the client either the costs being incurred or the likelihood in a court matter that expenses will be awarded if the client is unsuccessful.

The Society can make a finding that a solicitor has provided inadequate professional services and may apply the sanctions set out in section 42A. It is also open to the Scottish Solicitors Discipline Tribunal to make a finding of inadequate professional services and apply the sanctions too.

Hybrid Complaints

There are possibly between, in terms of current legislation, fifteen and twenty percent of complaints which contain an element of service and conduct. There is a clear concern that, in terms of the Bill, there would be a delay in dealing with these matters, because a decision would require to be made as to which matter should be considered first.

This matter is in fact relatively easily resolved by the agreement of a protocol between the professional bodies and the Commission, in relation to how these matters would normally be dealt with. The Law Society of Scotland already operates such protocols (a Memorandum of Understanding) in its dealing with complaints where the Financial Services Authority and the Office of the Immigration Services Commissioner are involved.

What it would be necessary to do to make this work would be for a Memorandum to be drawn up, setting out circumstances where the Commission would deal with a service complaint in front of a conduct complaint. This would be the vast majority of cases.
The only circumstances where the professional body might deal with the matter first, would be if the conduct alleged was so serious that the potential sanction to be applied would lead to a solicitor losing their livelihood i.e. being struck off or possibly suspended.

In addition to the Memorandum of Understanding, there should be a Standing Panel with a member of the Commission and a member of the professional body to review any cases where it is thought either the question of the seriousness of the conduct issue is not clear or where it is thought that the conduct is the most serious issue and should be taken first. Like the Law Society of Scotland’s current Sifting Panels, such a Panel could meet on a weekly basis, thus ensuring any delay was kept to a minimum.
NOTE ON THE CONCEPT OF PROFESSIONAL MISCONDUCT AND INADEQUATE PROFESSIONAL SERVICES

Further detail/sanctions

The Scottish Solicitors Discipline Tribunal may exercise its powers against a solicitor if he or she has been guilty of professional misconduct.

There is no statutory definition of “professional misconduct”. However, the concept has been the subject of judicial comment. Lord President Emslie, in discussing professional misconduct, observed:

“There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct.”

The Lord President, in this case of Sharp –v- The Council of the Law Society of Scotland, [1984 SC120] went on to explain that the whole circumstances and the degree of culpability required to be considered when determining a complaint.

Under section 53 of the Solicitors (Scotland) Act 1980, the powers exercisable by the Scottish Solicitors Discipline Tribunal shall be exercisable if—

(a) after holding an inquiry into a complaint against a solicitor the Tribunal is satisfied that he has been guilty of professional misconduct, or

(b) a solicitor (whether before or after enrolment as a solicitor), been convicted by any court of an act involving dishonesty or has been sentence to a term of imprisonment of not less than 2 years, or

(c) an incorporated practice has been convicted by any court of an offence, which conviction the Tribunal is satisfied renders it unsuitable to continue to be recognised under section 34(1A), or

(d) after holding an inquiry into a complaint, the Tribunal is satisfied that an incorporated practice has failed to comply with any provision of this Act or of rules made under this Act applicable to it.

The sanctions which the Tribunal can impose are:

(a) to order that the name of the solicitor be struck off the Roll; or

(b) to order that the solicitor be suspended from practice as a solicitor for such time as it may determine; or

(ba) order that any right of audience held by the solicitor by virtue of section 25(a) of the Solicitors (Scotland) Act 1980 be suspended or revoked;

(c) subject to subsection (3) impose on the solicitor or, as the case may be, the incorporated practice a fine not exceeding £10,000; or

(d) censure the solicitor or, as the case may be, the incorporated practice; or
(e) impose such fine and censure him as the case me be, or it, ; or

(f) order that the recognition under section 34(1A) of the incorporated practice be revoked; or

(g) order that an investment business certificate issued to a solicitor, a firm of solicitors, or an incorporated practice be -

(i) suspended for such time as they may determine; or
(ii) subject to such terms and conditions as it may direct; or
(iii) revoke.