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The rule of lawyers: Applying therapeutic jurisprudence at the intersections of wellbeing, disciplinary proceedings and professionalism

Abstract

Recent appeals from decisions of the Solicitors Disciplinary Tribunal in England and Wales have highlighted the complex and problematic interplay between the mental health and wellbeing of individual legal professionals, their professional standards of behaviour, and potential misconduct, including dishonesty. There is growing evidence that the legal profession in the UK is experiencing low levels of wellbeing and significant issues with mental health. Such issues can affect practitioners' ethical choices and decision-making, leading them to be in breach of required professional standards. This paper will use therapeutic jurisprudence as a heuristic lens to explore the therapeutic and anti-therapeutic consequences of the current disciplinary regime for legal professionals in England and Wales in instances where mental health and wellbeing are potentially the key influence upon, or one of the factors contributing to, the alleged breach of professional standards. It will argue that much of the current disciplinary regime is profoundly anti-therapeutic, failing to acknowledge the intersectionality of the issues involved or the significant human cost which can result from its outcomes. In contrast, the paper will argue for the introduction of a fitness to practice regime for solicitors, together with broader shifts in regulatory policy and practice across the legal profession, to facilitate therapeutic consequences both within disciplinary actions and more widely within law.

Introduction

> Lawyers occupy positions of power and trust in society. When they engage in misconduct, their actions not only hurt vulnerable clients and third parties, but may also undermine public confidence in the legal profession as a whole.[1]

The health of the legal profession is an issue that does, or at least should, concern everyone in society. Legal professionals have a crucial role in upholding the rule of law and are intimately involved in the administration of justice and the functioning of the legal system.[2] More prosaically, the legal sector contributes to the economic health of society, generating profits and providing employment.[3] As an employer of hundreds of thousands of individuals, its health also impacts on those people, and their families and communities, in myriad ways.[4]

However, there is a growing evidence-base which indicates that a significant number of legal practitioners experience poor levels of mental health and wellbeing, below those of the general population. This has been confirmed in the United States of

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[1] Leslie C. Levin, Christine Zozula and Peter Siegelman 'A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline' (March 15, 2013) <https://ssrn.com/abstract=2258164> accessed 6th October 2019, 2.

[2] Joseph Raz, *The Authority of Law* (Oxford, Oxford University Press, 1979) 226.

[3] The Law Society of England and Wales, 'Economic Value of the Legal Services Sector' (March 2016) < https://www.lawsociety.org.uk/support-services/research-trends/a-25-billion-legal-sector-supports-a-healthy-economy/> accessed 6th October 2019.

[4] On work-family conflict see Elisa J. Grant-Vallone & Stewart I. Donaldson, 'Consequences of work-family conflict on employee well-being over time' (2001) 15(3) Work & Stress 214.

America (US) through a broad range of empirical work over a number of years.[5] More recently, Australian studies have also indicated that lawyers there experience similar issues.[6] Despite a less well-established body of work in the United Kingdom (UK) the data that is available points to similar conclusions.[7]

The arena of formal disciplinary proceedings within the legal profession is one in which practitioners' issues with mental health and wellbeing are clearly manifested, and which also highlights their potentially problematic intersection with ethical choices and decision-making. This has recently been more widely acknowledged in the UK, due to a recent appeal from the Solicitors Disciplinary Tribunal ('SDT') in the case of *SRA v Sovani James*, *SRA v Esteddar MacGregor*, *SRA v Peter Naylor* [2018] EWHC 3058 (Admin), where a junior solicitor was removed from the profession for dishonest conduct despite evidence she was experiencing work-related mental health issues at the time. [8] However, it is not a new phenomenon, nor is it specific to the UK. There is international evidence that disciplinary tribunals are dealing with a significant number of cases where poor mental health and wellbeing appears to have contributed to the alleged breach(es) of professional standards in question.[9]

This paper will explore the tensions which arise in the disciplinary arena over mental health and wellbeing, applying therapeutic jurisprudence as a heuristic lens or 'method of thinking'.[10] In doing so, it will largely focus on the disciplinary proceedings involving solicitors in England and Wales conducted by the SDT, although comparisons with other parts of the profession, both within the UK and internationally, will be drawn where appropriate. It will argue that the current

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[5] See, for example, Martin Seligman, Paul Verkuil and Terry Kang 'Why Lawyers Are Unhappy' [2001] 23 Cardozo Law Review 33 and Patrick R. Krill, Ryan Johnson and Linda Albert, 'The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys' (2016) Journal of Addiction Medicine 46.

[6] See, for example, N. Kelk, G. Luscombe, S. Medlow and I. Hickie, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers* (2009) Sydney, Brain & Mind Research Institute.

[7] Emma Jones, Neil Graffin, Rajvinder Samra and Mathijs Lucassen 'Mental Health and Wellbeing in the Legal Profession' (Bristol University Press, 2020); Junior Lawyers Division Resilience and Wellbeing Survey Report 2019 <http://communities.lawsociety.org.uk/junior-lawyers/news/jld-resilience-and-wellbeing-survey-report-2019/5067323.article> accessed 11th July 2019; The Positive Group, *Wellbeing at the Bar: A Resilience Framework Assessment by Positive* (April 2015) <https://barcouncil.org.uk/media/348371/wellbeing_at_the_bar_report_april_2015__final_.pdf> accessed 6th October 2019.

[8] *SRA v Sovani James*, *SRA v Esteddar MacGregor*, *SRA v Peter Naylor* [2018] EWHC 3058 (Admin). Similar issues were also raised in the SDT judgments in *SRA v Jonathan Ippazio De Vita & Christopher John Platt & Emily Scott* (Case No. 11696 / 2017) and *SRA v Katherine Gilroy* (Case No. 12039-2019). Earlier reference to cases involving mental health and wellbeing are contained in Mark R. Davies, 'Solicitors, dishonesty and the Solicitors disciplinary tribunal' (2019) 6(2) International Journal of the Legal Profession 141.

[9] *Supra* n 1; Jennifer Moore, Donna Buckingham and Kate Diesfeld, 'Disciplinary Tribunal Cases Involving New Zealand Lawyers with Physical or Mental Impairment, 2009–2013' (2015) 22(5) Psychiatry, Psychology and Law 649; Michelle Sharpe 'The problem of mental ill health in the profession and a suggested solution' in Reid Mortensen, Francesca Bartlett & Kieran Tranter (Eds.) *Alternative perspectives on lawyers and legal ethics: Reimagining the profession* (New York, Routledge, 2010) 269.

[10] David B. Wexler 'The DNA of Therapeutic Jurisprudence' in Nigel Stobbs, Lorana Bartels and Michel Vols (Eds.) *The Methodology and Practice of Therapeutic Jurisprudence* (Carolina Academic Press, Durham, North Carolina, 2018) 1.

disciplinary regime has profoundly anti-therapeutic consequences in its treatment of cases where mental health and wellbeing have been implicated. Instead, it will suggest that specific new provision needs to be put in place to acknowledge the complex intersections involved in these cases, including a fitness to practice regime for solicitors. However, these changes must be made in tandem with a wider review of accepted notions of professionalism within law. A review which promotes wider regulatory, cultural and structural change to acknowledge the contributory factors to poor mental health and wellbeing within the legal profession. Such factors can exacerbate, or even cause, the difficulties and challenges individual legal professionals can face, to such an extent that their ethical choices and conduct are impacted, as demonstrated in the *James* case.[11]

Therapeutic jurisprudence as a heuristic lens

Therapeutic jurisprudence has been described as a 'field of enquiry' or 'research agenda' which focuses on the impact of law on psychological and emotional wellbeing.[12] It characterizes law, including legal processes and legal actors, as a social force and therapeutic agent which has significant emotional and psychological impacts.[13] Its basic premise is that 'other things being equal, positive therapeutic effects are desirable and should generally be a proper aim of law, and that anti-therapeutic effects are undesirable and should be avoided or minimized'.[14] In other words, those laws and legal behaviours that promote positive emotional and psychological consequences should be encouraged, whereas those with potentially adverse emotional and psychological consequences require a proactive response to ameliorate their potential impact. It is interdisciplinary in nature, generating new questions which can be investigated by academics, practitioners and others, drawing upon insights from the social sciences.[15] Winick (as co-founder of the movement) argues that it is normative in orientation as it 'posits that the therapeutic domain is important and ought to be understood and somehow factored into legal decision making'.[16] However, Winick also emphasises that this does not require the therapeutic (or anti-therapeutic impacts) to be the overriding criteria when evaluating a particular law or action. They can and should be considered, but other considerations may have more weight, depending on the circumstances.[17]

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[11] Jones et al n.7. Conversely, it has also been argued that existing unethical behaviours in the profession can contribute to psychological distress, see Paula Baron 'The Elephant in the Room? Lawyer Wellbeing and the Impact of Unethical Behaviours' (2015) 41(1) *Australian Feminist Law Journal* 87-119.

[12] David B. Wexler *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part* (2010) Arizona Legal Studies, Discussion Paper No. 10-12, 1.

[13] David B. Wexler 'Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence' (1996) 35(2) *Revista de Derecho Puertorriqueno* 273; David B. Wexler (Ed.) *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Durham, North Carolina, Carolina Academic Press, 1990).

[14] Bruce J. Winick 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3(1) *Psychology, Public Policy and Law*, 184, 188.

[15] Susan L. Brooks 'Using therapeutic jurisprudence to build effective relationships with students, clients and communities' (2006) 13 *Clinical Law Review* 213, 216.

[16] Winick n 14, 188.

[17] Winick n 14, 188.

Since its inception, and original application in the field of mental health law[18], therapeutic jurisprudence has been applied to a wide range of legal topics, from drug courts[19] to the environmental justice movement.[20] In terms of legal actors, its focus has tended to be upon the impact of law and legal processes upon the individual who is the ultimate recipient or user of legal services, for example, a client who has instructed a lawyer.[21] However, it is argued that legal professionals can and should be viewed as legal actors, meaning that it is not just the therapeutic and anti-therapeutic impacts of law which arise through their involvement and actions that is relevant. In addition, it is the impacts upon them, both as individuals and a collective grouping, which are a legitimate avenue for enquiry in therapeutic jurisprudence terms.[22]

The focus of therapeutic jurisprudence upon emotional and psychological wellbeing makes it a valuable heuristic to apply to the specific issue of acknowledging and dealing with mental health and wellbeing within the regulation of professionals generally.[23] Perlin, in the US-context, has also applied it to the issue of disciplinary proceedings against lawyers with mental disabilities.[24]. He argues that the unacknowledged tendency of the tribunal is to 'blame lawyers with mental disabilities for their status' and 'minimize the impact of mental disabilities on their actions'.[25] Conversely, he suggests that a therapeutic jurisprudence approach would allow for a frank and explicit acknowledgement of these issues, with the possibility of a more 'sensitive' approach which avoids the 'culture of blame'.[26] Its clear focus on wellbeing provides a lens which enables largely ignored or hidden issues to be explored in a way which furthers wide dialogue and discussion.

Using therapeutic jurisprudence as a heuristic enables an evaluation of the existing disciplinary procedures within the legal profession in terms of its therapeutic and anti-therapeutic effects upon individual legal professionals. However, to do this, it is necessary to consider what should be construed as 'therapeutic' and 'anti-therapeutic'. One of the criticisms of therapeutic jurisprudence has been that these

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[18] David B. Wexler and Bruce J. Winick, 'Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy, Analysis and Research' (1991) 45(5) *University of Miami Law Review* 979.

[19] Caroline S. Cooper, 'Evaluating the Application of TJ Principles: Lessons from the Drug Court Experience' in Nigel Stobbs, Lorana Bartels and Michel Vols (Eds.) *The Methodology and Practice of Therapeutic Jurisprudence* (Carolina Academic Press, Durham, North Carolina, 2018) 287.

[20] Gregory Baker, 'Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law — How Exposing Its Presence in the Environmental Justice Movement Can Legitimize the Paradigm And Make the Case For Its Inclusion into All Aspects of Legal Education and the Practice of Law' (2008) 9 *Florida Coastal Law Review* 215.

[21] Dennis P. Stolle, David B. Wexler, Bruce J. Winick *Practising Therapeutic Jurisprudence. Law as a Helping Profession* (Durham, Carolina, Carolina Academic Press, 2000).

[22] Emma Jones and Anna Kawalek, 'Dissolving the stiff upper lip: Opportunities and challenges for the mainstreaming of therapeutic jurisprudence in the United Kingdom' (2019) 63 *International Journal of Law and Psychiatry* 76; Amiran Elwork and Andrew H. Bemjamin, 'Lawyers in distress' (1995) 23(2) *Journal of Psychiatry & Law* 205.

[23] See, for example, Ian Freckelton and David List 'The Transformation of Regulation of Psychologists by Therapeutic Jurisprudence' (2004) 11(2) *Psychiatry, Psychology and Law* 296.

[24] Michael L Perlin, 'Baby, Look inside Your Mirror: The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities' (2008) 69 University of Pittsburg Law Review 589.

[25] Perlin n 24 603.

[26] Perlin n 24 606.

terms are somewhat nebulous and ill-defined.[27] This critique has been responded to be Winick who argues that it 'allows scholars to 'roam within the intuitive and common sense contours of the concept'.[28] Drawing on the work of Freckelton[29], for the purposes of this paper, a therapeutic approach to disciplinary proceedings will be interpreted as one which seeks to evaluate an individual's professional performance by examining the underlying causes and considering how these can best be rectified. Such an approach is focused upon 'effectively managing risk by identifying it and enabling remedial measures to be instituted to guard against its recurrence'.[30] In construing therapeutic effects in this way, it should be noted that it is not only the final outcome of the disciplinary proceedings which is important, but also the way in which the initial investigation of a complaint and the proceedings themselves are conducted. As Freckelton notes 'There is the potential for the processes to be characterised by alienation, distress and further traumatisation for all involved or for more constructive outcomes to be facilitated; much depends on the values embraced and put into practice by investigators and regulators'.[31] To understand the values driving disciplinary proceedings within the legal profession, it is necessary to briefly consider their historical development and stated aims.

The use and role of disciplinary proceedings in the legal profession

The legal profession has had a somewhat uneasy relationship within formal disciplinary proceedings. Nicolson suggests that traditionally there was an assumption the 'demographic homogeneity' of the profession would naturally lead to shared standards of conduct and ethics.[32] This form of exclusion and discrimination was never defensible but is now redundant in an era where the proclaimed focus of legal regulators, such as the Solicitors Regulation Authority ("SRA") in England and Wales is on promoting diversity and inclusivity.[33]

Prior to the Legal Services Act 2007, regulation of both solicitors and barristers was carried out by their respective professional societies, namely, the Bar Standards Board for barristers and The Law Society of England and Wales for solicitors. The SDT was set up under the Solicitors Act 1974 to deal with applications and complaints made under this Act. Following the 2007 reforms, the Legal Services Board was created to oversee legal services generally and the SRA was tasked with

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[27] Samuel Jan Brakel, 'Searching for the therapy in therapeutic jurisprudence' (2007) 33 New England Journal on Civil and Criminal Confinement 455; Bruce Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Inquiry of Law, Psychology and Crime (2004) 11(1) Psychiatry, Psychology and Law 23; Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1(1) Psychology, Public Policy and Law 193.

[28] *Supra* n 13 193.

[29] *Supra* n 23; Ian Freckelton 'Trends in Regulation of Mental Health Practitioners' (2008) 15(3) Psychiatry, Psychology and Law 415.

[30] *Supra* n 29 (2008) 423.

[31] *Supra* n 23 (2004) 297.

[32] Donald Nicolson, 'Demography, discrimination and diversity: a new dawn for the British legal profession?' (2005) 12(2) International Journal of the Legal Profession 201, 201. Rhodes, in the US context, does suggest this applied more at the Bar than to solicitors where there has always been a greater emphasis on formal regulation (Deborah L. Rhodes, 'Moral Character as a Professional Credential' (1985) 94(3) The Yale Law Journal 491,494-495.

[33] This was one of the declared aims of the currently proposed overhaul of the qualification route for solicitors, with the introduction of the Solicitors Qualifying Examination.

the regulation of solicitors in England and Wales. This includes a remit to investigate reports of misconduct and impose written warnings and fines where their Code of Conduct and/or other regulatory requirements are breached.[34] The SRA itself states that its enforcement strategy is to focus on 'the most serious issues' including 'matters that can be described as serious "misconduct" - or conduct that is improper and falls short of ethical standards'.[35] The SDT retained its powers (with the ability to impose increased levels of fines). However, Boon and Whyte note that the SRA and SDT are now 'potential competitors for jurisdiction' with the SRA's gradually extending powers posing 'an existential threat to the SDT'.[36] There is also a right of appeal from the SRA to the SDT and from the SDT to the High Court.

The SDT itself states its purpose as:

> The Tribunal adjudicates upon alleged breaches of the rules and regulations applicable to solicitors and their firms, including The Solicitors' Code of Conduct 2007, the SRA Code of Conduct 2011, and the SRA Principles 2011. The rules and regulations are specifically designed to protect the public, including consumers of legal services, and to maintain the public's confidence in the reputation of the solicitors' profession for honesty, probity, trustworthiness, independence and integrity.[37]

Applications to the SDT in relation to solicitors are generally made by the SRA (acting on behalf of The Law Society of England and Wales).[38] The SRA will make an application if they believe there is a 'realistic prospect' of successfully obtaining an order and that it is 'in the public interest' to apply.[39] Applications can also be made by members of the public ('lay applications') although the SDT has no powers of investigation and cannot award compensation.[40] Sanctions available to the SDT include the imposition of a reprimand, fine, restrictions upon the way a solicitor can practice, suspending a solicitor from practice and striking a solicitor off the Roll of Solicitors administered by the SRA (meaning they are removed from the profession).[41]

It is clear from this summary of the SDT's aims and remit that there are a number of stakeholders in relation to disciplinary proceedings in the solicitor profession. These include the legal professional being investigated, the SRA as the profession's

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[34] Solicitor Regulation Authority 'Code of Conduct for Solicitors, RELs and RFLs' (2018) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ accessed 17th October 2020.

[35] Solicitor Regulation Authority 'Enforcement Strategy' (2019) <https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/sra-enforcement-strategy/> accessed 1st October 2020.

[36] Andrew Boon and Avis Whyte, 'Lawyer disciplinary processes: an empirical study of solicitors' misconduct cases in England and Wales in 2015' (2019) 39(3) Legal Studies 455, 459.

[37] Solicitors Disciplinary Tribunal, 'About Us' <https://www.solicitorstribunal.org.uk/about-us> accessed 6th October 2019.

[38] Solicitors Disciplinary Tribunal, 'Applications' https://www.solicitorstribunal.org.uk/constitutions-and-procedures/applications accessed 1st October 2019.

[39] Solicitor Regulation Authority 'Regulatory and Disciplinary Procedure Rules 2018', rule 6.1, <https://www.sra.org.uk/solicitors/standards-regulations/regulatory-disciplinary-procedure-rules/> accessed 1st October 2020.

[40] *Supra* n 38.

[41] Solicitors Act 1974, s.47; Solicitors Disciplinary Tribunal *Guidance* 'Note on Sanctions (7th Edition)' (November 2019) <https://www.solicitorstribunal.org.uk/constitutions-and-procedures accessed 1st October 2020>.

regulatory body, the original complainant(s) and members of the general public. Before moving on to consider the potential therapeutic and anti-therapeutic effects of disciplinary proceedings upon each of these, it is necessary to consider the role that mental health and wellbeing plays within such procedures.

Mental health and wellbeing within disciplinary proceedings

In evaluating the therapeutic or anti-therapeutic consequences of solicitors' disciplinary proceedings, this paper focuses upon those cases where mental health and wellbeing issues are implicated. A recent empirical study in Victoria, Australia, whilst not referring to mental health issues specifically, notes that the literature on risk factors in disciplinary proceedings is 'small but provocative'.[42] This means that some of the findings are now somewhat dated, although there is no evidence to suggest that the position has altered significantly.

In the US, Levin et al studied the admission records, and any subsequent disciplinary history, of 1,343 lawyers admitted to the Connecticut bar from 1989 to 1992. Of those who were subsequently disciplined, it was found that 36 individuals (23.68%) 'may have experienced psychological issues which may have directly or indirectly contributed to their misconduct'.[43] In 23 cases psychological issues were 'explicitly cited… as a contributing or mitigating circumstance'.[44] The other 13 lawyers had files with information which made reference to psychological issues.

In New Zealand, Moore et al, undertook a study of the 74 cases before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal between 2009 and 2013. They found that 21 of these decisions involved lawyers who were in some way impaired, with the key impairments being 'depression, anxiety, substance misuse, and stress'.[45]

In the UK, there does not appear to be any systematic evidence of the number of cases before the SDT involving issues of mental health and wellbeing. However, it is clear that the recent appeal case of *James*[46] is not a one-off. As well as reference made by Davies in 1990,[47] in 1994, Goodliffe notes that 'In the English cases depression, anxiety and stress are often mentioned, sometimes with and sometimes without medical evidence'.[48]

The *James* case itself involved appeals to the High Court by the SRA on three cases with similar facts. In *James* a junior solicitor was given conduct of a medical negligence claim. After omitting to serve crucial documents, she made a number of misleading statements to her client and her employer and created four backdated letters to corroborate her account that she has been successfully progressing the

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[42] Tara Sklar, Yamna Taouk, David Studdert, Matthew Spittal, Ron Paterson, and Marie Bismark, 'Characteristics of Lawyers Who Are Subject to Complaints and Misconduct Findings' (2019) 16(2) Journal of Empirical Legal Studies 318, 333.
[43] *Supra* n 1, 16.
[44] *Supra* n 1, 16.
[45] *Supra* n 9, 662.
[46] *Supra* n 1.
[47] *Supra* n 8.
[48] Jonathan Goodliffe, 'Alcohol and depression in English and American lawyer disciplinary proceedings' (1994) 89 Addiction 2137, 1242.

file.[49] The SDT found that Ms James's conduct had been dishonest and would therefore normally require her removal from the profession. However, they found that there were, 'exceptional circumstances' justifying a lesser penalty (a suspended suspension), namely that her 'mental health and in particular the conditions of depression and anxiety were a feature of the dishonest conduct and in particular the length of time for which it was perpetuated'.[50] It referred to the pressures placed on junior solicitors by Ms James's employer and highlighted the challenging working environment and culture, all of which was combined with Ms James' own difficult personal circumstances.[51] In *MacGregor*, a partner was found to have been dishonest for failing to report false invoicing, but the SDT found there were again 'exceptional circumstances' as she was under 'unbearable pressure and this impacted on her well-being and functioning'.[52] Similarly, in *Naylor*, the SDT held that an assistant solicitor who had misled a client over progress on a file had demonstrated 'exceptional circumstances' in light of his mental ill-health, caused by extreme stress.[53]

Much of the discussion in the *James* appeals focused on the legal principle of 'exceptional circumstances' and whether or not mental health and pressures of work could be taken into account when applying this. The High Court found that the SDT had erred in its application. It acknowledged that exceptional circumstances 'can and will include matters of personal mitigation including mental health issues and workplace pressures'.[54] However, it also found that the SDT had not balanced these considerations against '…other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance'.[55] It was suggested that the stress and depression experienced by the legal professionals in question was 'in no way exceptional' and that neither mental health nor pressures of work and working conditions could (individually or cumulatively) amount to exceptional circumstances without something more as justification.[56] As a result, the appeals were allowed and the three legal professionals were struck off the Roll of Solicitors, removing them from the profession.

It has been suggested that the High Court's acknowledgement that exceptional circumstances can include issues relating to mental health and workplace environment is a positive step forward.[57] However, the restrictive approach taken to these suggests that these issues will only ever have marginal relevance in cases of dishonesty, thus relegating them to the periphery of future decisions in cases where the individual professional's mental health and wellbeing is implicated.

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[49] *SRA v Sovani James* (2017) Case No. 11657-2017 para. 23.10.
[50] *Supra* n 49 para. 59.
[51] *Supra* n 49 paras. 23.9, 53, 55, 60, 61.
[52] *SRA v Esteddar MacGregor* (2017) Case No. 11643-2017.
[53] *SRA v Peter Naylor* (2017) Case No. 11602-2017.
[54] *Supra* n 8 para. 102.
[55] *Supra* n 8 para. 103.
[56] *Supra* n 8 para.112-113.
[57] Stephen Innes 'SRA v Sovani James – Some Reasons for Optimism' (Wellbeing at the Bar, 16th November 2018) <https://www.wellbeingatthebar.org.uk/2018/11/16/sra-v-sovani-james-some-reasons-for-optimism-stephen-innes/> accessed 4th October 2020.

The consequences for individual legal professionals

Although there appears to be little, if any, empirical data on the consequences of disciplinary proceedings upon individual legal practitioners, it is arguable there are a range of potentially anti-therapeutic effects on both their career and their mental health and wellbeing. In terms of their career, a solicitor who has been struck off the Roll of Solicitors or suspended from practice cannot be employed by a law firm without the written permission of the SRA, who may refuse or impose a range of conditions.[58] The Law Society Gazette (journal of The Law Society of England and Wales) suggests that 'A struck-off solicitor returning to the regulated sector is rare but not unheard of'.[59] In the *James* case, the events under investigation had transpired three years prior to the hearing. During that time Ms James had been successfully practising as a solicitor at a supportive law firm and her employer provided her with a reference indicating they considered her to be 'highly competent'.[60] The High Court's judgment that she be struck off therefore appears to have potentially ended her legal career, unless she was able to obtain SRA approval to continue working in the firm in a different capacity. The reputational issues consequent upon being named in disciplinary proceedings could potentially be stigmatising both within the legal sector, but also more widely when seeking alternative employment.[61] There could, therefore, be long term consequences in terms of an individual legal practitioner's career and financial prospects.

The long-term consequences in terms of mental health and wellbeing could also be significant. Given the evidence of the potential emotional and psychological impacts of court proceedings upon litigants, it can be surmised that both the initial investigation period within disciplinary proceedings and any time period spent within the appeals process (three years for Ms James) will be challenging and uncertain, particularly for an individual already experiencing difficulties with mental health and wellbeing.[62] The impacts of this upon an individual's health, family and many other facets of daily life could be profound.

It can be argued that these consequences provide a form of retribution for the individual legal professional's wrong-doing and/or errors, or act as a form of deterrence. Haller suggests that a retributive element has been present in some judgments on disciplinary matters.[63] However, the stated aims of the SDT do not suggest a retributive function for disciplinary proceedings against solicitors.[64] The focus is on public protection, not punishment of the individual.[65] As retribution has a 'backward focus', upon punishing a person for a previous 'wrong', it is difficult to

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[58] Solicitors Act 1974 s.41.

[59] John Hyde 'Ex-solicitor allowed to work in firm 7 months after strike-off' (The Law Society Gazette*,* 6th May 2020) <https://www.lawgazette.co.uk/news/ex-solicitor-allowed-to-work-in-firm-seven-months-after-strike-off/5104172.article> accessed 5th October 2020.

[60] *Supra* n 49 para. 31

[61] Paula Baron & Lillian Corbin 'Lawyers, mental illness, admission and misconduct' (2019) 22(1) Legal Ethics 28, 36.

[62] Michaela Keet, Heather Heavin & Shawna Sparrow 'Anticipating and Managing the Psychological cost of Civil Litigation' (2017) 34(2) Windsor Yearbook of Access to Justice / Recueil annuel de Windsor d'accès à la justice 73; Christian Diesen & Hugh Koch 'Contemporary 21st century therapeutic jurisprudence in civil cases: Building bridges between law and psychology' (2016) 2(1) Ethics, Medicine and Public Health 13.

[63] Linda Haller 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5(1) *Legal Ethics* 152, 153.

[64] *Supra* n 37.

[65] *Supra* n 37.

justify its application in terms of public protection.[66] In addition, there is the potential for separate criminal proceedings to be taken against the individual involved, or for a civil action for professional negligence, both of which have a clearer link to notions of retribution.[67]

This suggests that deterrence is a potentially more viable justification for the anti-therapeutic consequences experienced by individuals.[68] The formal sanctions imposed as a result of the disciplinary proceeding can certainly be seen as a form of deterrent, however, it is more questionable whether other, unquantified subsequent impacts should be viewed in this way. This is particularly the case where mental health and wellbeing issues have been implicated within the individual's actions/response. If these issues were driven by wider cultural and structural issues within the law putting almost intolerable pressures upon practitioners, then it seems unlikely that the individuals involved were making rational decisions and choices, or that others in the same position would be able to appropriately weigh-up and evaluate the consequences of their actions.[69]

The current use of solicitor disciplinary proceedings where mental health and wellbeing issues are implicated in the conduct of individual legal practitioners can be seen to have significant potential anti-therapeutic consequences for the individual involved. The limited justifications for these in terms of that particular individual (namely, forms of retribution or deterrence) do not appear sufficiently strong to support the continuation of the *status quo*. However, it is not possible to consider the individual legal practitioner in isolation. A point noted by Slobogin, in his critique of the term 'therapeutic' is that a form of balancing act is required in which it is acknowledged that 'the excitement of recognizing that a rule is therapeutic for some must not blind them toward its potentially negative impact on others'.[70] Therefore, having considered the consequences for the individual legal professional involved, it is also necessary to balance these against the consequences for other key stakeholders involved in solicitor disciplinary proceedings, namely, the original complainant(s), the SRA and the public.

The consequences for the original complainant, the SRA and the public

It is arguable that the interests of the original complainant(s) should be taken into consideration as it is likely they have experienced some form of consequence as a result of the individual practitioner's conduct, for example, the complainant may be a client who has been impacted.[71] However, despite the ability of such individuals to submit 'lay applications', the stated aims of the SDT do not appear to focus upon this particular group. The creation of the Legal Ombudsman may, in part at least, explain

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[66] *Supra* n 63 154.
[67] Stephen M. Hines, 'Attorneys: The Hypocrisy of the Anointed--The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings' (1996) 49(4) Oklahoma Law Review 731, 748.
[68] Stephen G. Bené, 'Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions' (1991) 43(4) Stanford Law Review 907.
[69] *Supra* n 63 161.
[70] *Supra* n 27 216.
[71] Solicitor Regulation Authority 'Supervision' <https://www.sra.org.uk/solicitors/supervision/> accessed 10th October 2020.

this seeming omission. The Legal Ombudsman investigates individuals' complaints against legal service providers and has the ability to order a range of sanctions, include requiring an apology and/or the payment of compensation.[72] As a result, it appears to perform the function of providing reparation to complainants. In addition, as referred to above, there is the possibility of criminal or civil proceedings in appropriate cases.[73]

The stated aim of the SRA, as the body who investigates complaints and either imposes sanctions or makes referrals to the SDT, is to 'work to protect members of the public and support the rule of law and the administration of justice'.[74] The notion of public protection is arguably sufficiently wide to encompass a range of interpretations. Zacharias suggests that it can encompass four potential objectives.[75] The first of these is the protection of 'client interests' which, as has been discussed, appears to instead fall largely within the remit of the Legal Ombudsman. The second objective is focused upon an investigation of the 'offending lawyer' in a potentially retributive manner which seems to sit uneasily within the remit of the SDT.[76] The notion of sanctions having a retributive effect upon an 'offending lawyer' has been referred to above, where its limitations were referred to.[77]

The third objective is an emphasis on the impact of the messages communicated through the 'disciplinary process' as a way of reinforcing the 'professional standards in guiding lawyer behaviour'.[78] This appears to reflect the view of Menon, who suggests that disciplinary actions are a way of communicating messages to the public and the regulatory body's members.[79] If this is construed as more than mere deterrence (which was discussed above), then the question must arise as to the messages that are being communicated. In fact, the decision in *James* was the subject of considerable controversy in the legal press.[80] The SRA's approach has also been criticised by the Junior Lawyers Division of the Law Society of England and Wales.[81] There is therefore an argument that the procedures in this case have

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[72] Legal Ombudsman 'Scheme Rules' (1 April 2019) <https://www.legalombudsman.org.uk/media/mvzfqf0a/scheme-rules-april-2019.pdf> accessed 1st October 2020.

[73] *Supra* n 67.

[74] Solicitor Regulation Authority 'SRA Corporate Strategy 2020 to 2023' < https://www.sra.org.uk/sra/corporate-strategy/> accessed 10th October 2020.

[75] Fred C. Zacharias 'The Purpose of Lawyer Discipline' (2003) 45 William & Mary Law Review 675, 678.

[76] *Supra* n 37.

[77] *Supra* n 75.

[78] Supra n 75.

[79] Sundaresh Menon, 'Medicine and Law: Comparative Perspectives on Professional Conduct and Discipline' (2018) Annals Academy of Medicine < http://www.annals.edu.sg/PDF/SundareshMenon/LectureCJMarch2018_2.pdf> accessed 6th October 2019.

[80] See, for example, John Hyde, 'A career has ended. But did the public need Sovani James to be struck off?' (The Law Society Gazette 13th November 2018) <https://www.lawgazette.co.uk/commentary-and-opinion/a-career-has-ended-but-did-the-public-need-sovani-james-to-be-struck-off-/5068285.article accessed 11th October 2020> accessed 11th October 2020; Legal Cheek, 'Junior solicitor whose hair fell out as she struggled to meet billing targets struck off after successful SRA appeal' (13th November 2018) <https://www.legalcheek.com/2018/11/junior-solicitor-whose-hair-fell-out-as-she-struggled-to-meet-billing-targets-struck-off-after-successful-sra-appeal/> accessed 11th October 2020.

[81] The Junior Lawyers Division of The Law Society of England and Wales, 'Letter from the Junior Lawyers Division to the SRA' (6th May 2020) <file:///C:/Users/lw1ejj/Downloads/SRASDTCLM6%20May%202020.pdf> accessed 11th October 2020.

cast doubt upon the role and approach of the SRA, rather than successfully communicating key messages about professional standards to either solicitors or the wider public. More broadly, it is difficult to see how imposing severe sanctions in cases where mental health and wellbeing have been implicated, particularly where this has been exacerbated by challenging and even toxic working environments, culture and managerial practices, will assist in sending appropriate messages to the wider legal profession. Instead, it seems to be promoting the problematic notion that an individual legal professional must be resilient at all costs, something which is both harmful and impossible to achieve.[82] Each of these three objectives therefore appear to have potentially significant anti-therapeutic consequences for a range of stakeholders.

The remaining interpretation of proposed by Zacharius is a focus on 'the profession as a whole' and it is this that appear most relevant to a broader conceptualisation of public protection.[83] Equating public protection to a whole-profession focus suggests the SRA should be focused on promoting competence and ethical behaviour throughout the solicitors' profession. This clearly supports the SRA's stated purpose of ensuring 'high professional standards'.[84] It also suggests potentially therapeutic consequences for the public, who will have access to a high standard of legal advice and guidance if this purpose is achieved. However, the currently disciplinary approach appears to do little to tackle the root causes of problems with competence and ethical behaviour within the legal profession. Instead it seems to focus upon penalising the individual whose actions are the effect, rather than the cause, of the issues. In her seminal paper, Rhodes, discussing the moral character requirements placed upon US lawyers, identifies that the imposition of such requirements have two aims, firstly that of public protection (also more recently referred to as consumer protection) and, secondly, that of preserving professionalism, in other words, maintaining the status and standing of the profession by filtering out anyone viewed as undesirable.[85] Rhodes notes that the second of these roles may well be less frequently articulated.[86] It appears that this analysis could similarly be applied to the approach of the SRA to disciplinary proceedings, with an emphasis on removing the individual practitioner involved rather than tackling the problematic structural and cultural issues which underlie the actions in question and thus taking a profession-wide approach. This is in stark contrast to Freckelton's description of a therapeutic disciplinary procedure which emphasises the need to focus upon the underlying causes of the individual's actions to consider how to rectify these.[87]

Perhaps the strongest justification available for this current individualised focus is a form of consequentialism.[88] In other words, the argument that the consequences for

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[82] Christine Parker, 'The 'Moral Panic' Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response' (2014) 37(3) University of New South Wales Law Journal 1103.

[83] *Supra* n 75.

[84] *Supra* n 74.

[85] *Supra* n 32, 507-512. It should be noted that in the US controls around entry to the profession are aimed at least in part at preventing future misconduct, with explicit questions around mental health found as standard in applications for admission to State Bars (Patrick L. Baude, 'An Essay on the Regulation of the Legal Profession and the Future of Lawyer's Characters,' (1993) 68(3) Indiana Law Journal 647).

[86] *Supra* n 32.

[87] *Supra* n 29.

[88] Andrew Boon, 'Regulation and discipline' in Andrew Boon (Ed.), *Lawyers' Ethics and Professional Responsibility* (Oxford, Hart Publishing, 2015) 63, 73.

the complainant in question, and the wider public, remain the same regardless of the causes of the behaviour - the public are protected thus those involved in disciplining individual legal professionals are able to 'go to bed without running the risk of suffering from sleepless nights'.[89] To the extent this is correct, it suggests a potential disjuncture between what represents a therapeutic effect for the individual legal professional involved and what represents a therapeutic effect for the wider public. However, this could also be construed as a question of short-term versus long-term consequences. In the short term, the particular individual has been removed, but in the long-term the factors that contributed to the behaviour are likely to lead to further instances. Given this, a reliance on consequentialism seems inadequate.

When considering the consequences for key stakeholders, it seems that there is a potential short-term benefit for public protection in the existing system of discipline for solicitors. However, there is also a strong argument that its treatment of individuals where mental health and wellbeing is implicated is not likely to result in effective long-term public protection where the wider cultural and structural issues remain untackled. It is notable that the SRA's own Enforcement strategy states that 'As well as making sure solicitors are competent, we want to promote a culture where ethical values and behaviours are embedded', acknowledging at least in part that there is a need for such a longer-term approach and suggesting that this is a valid aim for solicitors' disciplinary proceedings.[90] Given this, it is important to consider whether a different approach, the introduction of a fitness to practice regime, would result in either more therapeutic (or less anti-therapeutic) consequences for the individual legal practitioner involved and the potential impact upon such other stakeholders.

Fitness to practice regimes

In a recent consultation response, the SDT urged the SRA to consider the creation of a fitness to practice regime for solicitors in England and Wales.[91] The SRA are given the power to introduce such procedures under the Solicitors Act 1974 (as amended by the Legal Services Act 2007). The purpose of such a regime is to distinguish between those who have (allegedly) committed professional misconduct and those whose mental or physical health is impaired to such an extent that they are unable to continue their legal practice at that time. In making this suggestion, the SDT commented that:

> Health issues are a reoccurring theme in proceedings before the Tribunal. Not infrequently the Tribunal finds itself without medical evidence to assist it in determining applications made on the grounds of physical or mental health. In some instances these issues only emerge during the course of the

[89] Tom Daems, 'Criminal Law, Victims, and the Limits of Therapeutic Consequentialism' in Bert Keirsbilck, Woter Devroe & Erik Claes (eds) *Facing the Limits of the Law* (Springer, Berlin, Heidelberg, 2009) 143.

[90] Solicitor Regulation Authority 'Enforcement Strategy' <https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/sra-enforcement-strategy/> accessed 12th October 2020.

[91] Solicitors Disciplinary Tribunal, 'Response to the consultation on the making of procedural rules in relation to applications to the tribunal' (1st April 2019) <https://www.solicitorstribunal.org.uk/sites/default/files-sdt/CONSULTATION%20RESPONSE.pdf> accessed 15th March 2021, paras. 14.4-14.5.

> proceedings but in a number of others these issues are raised by the solicitor concerned with the SRA prior to the issue of proceedings.[92]

The SRA does have the discretion to take into account physical and mental ill-health when considering disciplinary action. [93] However, this appears to relate solely to how this would impact the individual legal practitioner's ability to participate within those proceedings.[94] In addition, it notes that it can intervene where such ill-health is interfering with an individual's competence to practice and impose conditions, however, it is unclear how often this occurs and what standards the SRA use to make such decisions.[95]

In contrast to the solicitors' profession, the Bar Standards Board ('BSB'), regulators of barristers in England and Wales, has a clearly delineated fitness to practice regime. Under definition 222 of Part 6 of the BSB Handbook, an individual is defined as 'unfit to practise' where that person:

> (a) is incapacitated due to his physical or mental condition (including any addiction); and as a result,
>
> (b) as a result, the Individual's fitness to practise is impaired; and,
>
> (c) his or her suspension or disqualification, or the imposition of conditions is necessary for the protection of the public.[96]

This is then dealt with entirely separately from the general disciplinary system.

This indicates that the introduction of a fitness to practice regime for solicitors has the potential for some individual practitioners who would otherwise be involved in disciplinary proceedings to be diverted down the fitness to practice route at an earlier stage, potentially removing some of the possible pressures involved in the current process. However, the consequences, such as suspension or disqualification, could remain the same, depending upon the severity of the individual's mental condition.

Three separate issues arise in relation to the BSB's regime which are informative when considering its potential application to solicitors. Firstly, there is the question of its purpose. Here, the Practice Direction makes it clear that this is, once again, primarily the protection of the public.[97] The emphasis is on the consequences (or potential consequences) to the public of the individual concerned remaining in legal practice, not on the lived experience or impact on the individual themselves.[98] Of course, it is clear that public protection has to be factored in, at least to some extent, within a professional setting. Therefore, the fact that this type of mental health issue

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[92] *Supra* n 91, para. 14.5.

[93] Solicitor Regulation Authority 'SRA investigations: Health issues and medical evidence' <https://www.sra.org.uk/solicitors/guidance/sra-investigations-health-issues-and-medical-evidence/> accessed 12th January 2021.

[94] *Supra* n 93.

[95] *Supra* n 93.

[96] Bar Standards Board, 'Bar Standards Board Handbook fourth edition' (September 2019) <https://www.barstandardsboard.org.uk/media/1999614/bsb_handbook_version_4.2.pdf> accessed 6th October 2019.

[97] Bar Standards Board and Council of the Inns of Court, 'Joint Guidance on the Fitness to Practise procedure' (November 2018) <https://www.barstandardsboard.org.uk/media/1989786/fitness_to_practise_panels.pdf> accessed 6th October 2019.

[98] *Supra* n 29.

is now being dealt with outside the disciplinary process arguably does have a therapeutic consequence in sending a message to individuals that mental health will be acknowledged by regulators such as the BSB in a more appropriate and nuanced fashion.

However, although this shift in position by the BSB may have some form of positive, washback effect, the focus is very much on resolving each discrete case which arises. It does not acknowledge the wider cultural issues involved, which are likely to permeate a range of cases. It is possible that this is intentional, given other initiatives already running in tandem[99], but it certainly indicates that the introduction of a fitness to practice regime, with a stated focus on public protection in individual cases, is not on its own an effective way to tackle the wide issues within the legal profession relating to mental health and wellbeing. Indeed, standing alone, it continues the trend which Douglas has identified (in the US context) of leaving any interventions in relation to mental health and wellbeing until the point where retrospective actions is required, focused on 'a complaint or negative event' that triggers further involvement.[100]

This argument is further reinforced by statistics on the usage of the fitness to practice regime, which demonstrate that the procedure is not well-used. The Bar Tribunals & Adjudication Service reports indicate that between 2013 and 2018 there were only one or two fitness to practice hearings per year.[101] Given what is known about wellbeing at the Bar,[102] this could suggest that it is either being significantly under-used, or is only targeted at the extremes of circumstances, or some combination of the two reasons. There does not appear to be any literature on the Bar's fitness to practice procedure, other than the formal regulations and guidance, available to clarify the reasons for this, but, again drawing on the wider evidence on mental health and wellbeing in law that is available, it can be speculated that individual barristers would be keen to avoid such a procedure. Despite what has been termed a 'wellness turn' in law,[103] there still remains a stigma around mental health and wellbeing which the current legal culture arguably fosters and perpetuates.[104] Rothstein (in the context of the US law school) emphasises that 'confidentiality is key to the success of treatment programmes' when exploring the conflicts that can arise between the requirement placed on individuals and law schools to disclose information on mental health to protect the public, and the reluctance to disclose difficulties and request help that can arise as a result.[105]

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[99] See, for example, the Wellbeing at the Bar portal < https://www.wellbeingatthebar.org.uk/> accessed 6th October 2020.

[100] Danielle Douglas, 'From Buzzed to Bended: The All Too Ordinary Career Path of Attorneys (2016) 42(1) The Journal of the Legal Profession 359.

[101] The Bar Tribunals & Adjudication Service, 'Annual Report 2018' < https://www.tbtas.org.uk/about-us/annual-report/btas-annual-report-2018/btas-annual-report-2018/> accessed 5th October 2019; The Bar Tribunals & Adjudication Service, 'Annual Report 2015' < https://www.tbtas.org.uk/about-us/annual-report/btas-annual-report-2015/> accessed 5th October 2019.

[102] *Supra* n 7 (Positive).

[103] Richard Collier, 'The Wellbeing of Legal Academics – A Missing Piece of the Legal Profession's 'Wellness' Turn?' (29th March 2019) < http://slsablog.co.uk/blog/uncategorized/the-wellbeing-of-legal-academics-a-missing-piece-of-the-legal-professions-wellness-turn/> accessed 5th October 2019.

[104] *Supra* n 7 (Jones et al).

105 Laura Rothstein, 'Law students and lawyers with mental health and substance abuse problems: protecting the public and the individual' (2007) 69 University of Pittsburg Law Review 531, 553.

Understandably, where it is a future or current career that is potentially at risk, individuals will be wary about any formal involvement and may actively seek to avoid it. Brooke has referred to the imposition of 'second penalties' for lawyers who undergo treatment for alcohol or substance abuse, incurred by the subsequent impact on their career.[106] She quotes one solicitor who states:

> I was 48. Most jobs are aimed at solicitors qualified for not more than five years--unless they have a client following.[107]

In addition, colleagues may also be reluctant to disclose any such issues. In their study of lawyers in Victoria, Australia, Sklar et al found that 'fewer than 10 percent" of complaints were raised by colleagues, despite them being "well-placed to observe and assess misconduct among their peers'.[108] All of this reinforces the notion of a stigma around mental health and wellbeing which is likely to inform legal professionals' perceptions of any fitness to practice regime.

Therefore, while it is possible that the consequences for an individual practitioner may be more therapeutic in nature if a fitness to practice regime is in place, this is neither clear-cut nor certain. The focus on public protection suggests that there would be little difference in terms of the consequences for other key stakeholders, such as the SRA and public. It appears that a fitness to practice regime alone is insufficient to promote long-term therapeutic consequences across the legal profession, which would in turn have a more tangible long-term therapeutic benefit for individual professionals. To achieve this form of sustained therapeutic impact, it is necessary to also tackle the underlying structural and cultural issues.

Legal structures, law firm culture and notions of professionalism

In their recent article on the SDT, Boon and Whyte comment on its intersection with socialisation into the legal profession.[109] They argue that the work of the SDT is focused upon 'irredeemable failures of the socialisation process'.[110] This may well be true when considering individuals' whose alleged misconduct is due to a lack of ethical understanding or care. However, for those legal professionals who are experiencing severe issues with mental health and wellbeing, the position is arguably different. Indeed, it is possible that it is their very socialisation into harmful norms within legal culture that may have contributed to their misconduct. Given the impact of legal culture on mental wellbeing and health, it could be argued that over-socialisation, or at least unhealthy forms of socialisation are at the root of their predicament. Legal practitioners are being socialised into a culture that perpetuates the stigma around mental health and wellbeing, individualises potential solutions and offers limited attempts to challenge the wider *status quo*.[111] This is exacerbated by

[106] Deborah Brooke, 'Impairment in the Medical and Legal Professions' (1997) 43(1) Journal of Psychosomatic Research 27, 33.
[107] *Supra* n 106.
[108] *Supra* n 42, 333.
[109] *Supra* n 36, 461.
[110] *Supra* n 36, 461.
[111] *Supra* n 7.

structural issues, including a heavy reliance on chargeable hours and billing targets, which fosters a relentless pace of work and competitive atmosphere.[112]

There is a strong argument that it is these damaging cultural and structural norms which are having a detrimental impact on the competence and ethical standards of on the legal profession as a whole, which is then manifested in disciplinary proceedings involving individual legal practitioners. In the *James* case it was acknowledged by the High Court that the culture of her employer was "toxic and uncaring".[113] Whilst both the SDT and the High Court viewed the fact that Ms James did not take opportunities to rectify her error as an aggravating factor (as opposed to a case involving a single 'moment of madness')[114], it can be argued that this reflects the significance of a legal culture where mistakes are viewed as failures and line managers are often ill-equipped to deal sensitively with issues of mental health and wellbeing.[115] In the more recent *Scott* case, the SDT accepted Scott's submissions over 'the pressures she was under' in relation to her failing to report more senior members of staff engaged in dishonest conduct because she feared dismissal and also referred to her 'unpleasant working environment'.[116]

These examples demonstrate that employers and their senior management have a key role to play in perpetuating (or challenging) structural and cultural norms. There is also evidence of structural and cultural norms impacting upon mental health and wellbeing far more widely across the legal profession.[117] Structurally, the positioning of private practice as a commercial concern and the subsequent emphasis on chargeable hours, billing targets and client recruitment and retention is potentially problematic.[118] Culturally, a hyper-masculine focus on long hours and competition is also prevalent.[119] The emphasis on the culture within a firm is echoed by Holmes et al in their Australian study of eight trainee solicitors in their first year of training who note that:

> Law graduates who make the transition to legal 'professional' begin to construct for themselves a professional identity. Whether that new identity reflects the traditional ideals of professionalism, or a more technical approach

[112] *Supra* n 7 (Jones et al) Chapter 3; Maryam Omari and Megan Paull, ''Shut up and bill': Workplace bullying challenges for the legal profession' (2013) 20(2) International Journal of the Legal Profession 141; Adele J. Bergin and Nerina L. Jimmieson, 'Australian Lawyer Well-being: Workplace Demands, Resources and the Impact of Time-billing Targets' (2014) 21(3) Psychiatry, Psychology and Law 427.

[113] *Supra* n 8 para. 113.

[114] *Supra* n 49 para. 51; *Supra* n 8, para. 114.

[115] *Supra* n 7 (Jones et al) Chapter 4.

[116] *Supra* n 8, paras. 38.6 and 50.6.

[117] *Supra* n 7; Joanne Bagust, 'The Culture of Bullying in Australian Corporate Law Firms' (2014) 17(2) Legal Ethics 177; Cheryl Ann Krause and Jane Chong, 'Lawyer Wellbeing as a Crisis of the Profession' (2019) 71(2) South Carolina Law Review 203.

[118] *Supra* n.112; *Supra* n 7 (Jones et al) Chapter 3.

[119] Hilary Sommerlad, 'A pit to put women in': professionalism, work intensification, sexualisation and work–life balance in the legal profession in England and Wales' (2016) 23(1) International Journal of the Legal Profession 61; Richard Collier, 'Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)' (2016) 23(1) International Journal of the Legal Profession 41.

> to lawyering, will depend partly on the models of 'professionalism' that new lawyers encounter in their first workplace.[120]

In their article, Boon and Whyte refer to the SRA's proposed introduction of the Solicitors Qualifying Examination, to replace the current academic and vocational stages of training in England and Wales.[121] The two parts to this Examination will be open to anyone with any degree (or equivalent) without requiring a (or any) specific form of legal education or training. The notion of a qualifying period of work experience also appears likely to allow for the validation a much wider range of legal experience than the current training contract (for example, time spent as a student advising in a *pro bono* clinic). Boon and Whyte suggest that a move away from the prescription of the current academic requirements of a qualifying law degree and Legal Practice Course represents a move towards a form of 'corporate patronage' for those in corporate employment, as represented by the growth of bespoke vocational courses designed for firms. As a result:

> It potentially replaces the professional ideal of a common educational experience with an induction into the culture of a specific organisation.[122]

Given employers' role in perpetuating existing, problematic structural and cultural norms this raises the spectre of 'professionalism' becoming even more synonymous with ways of working that are detrimental to mental health and wellbeing.

The SRA can impose significant sanctions on law firms, including rebukes and fines of up to £250 million (depending on the type of firm) where its standards and requirements are breached. However, given mental health and wellbeing are not explicitly referred to within these standards and requirements, it seems unlikely that such sanctions will be levied in relation to the type of structural and cultural norms raised above. In addition, there would appear to be significant difficulties with evidencing the impact of such norms on individual's health, particularly given their prevalence and ingrained nature.

At present, for solicitors, the disciplinary process does not clearly recognise the significance and potential impact of mental health and wellbeing issues upon the actions of individual legal professionals. Instead, it focuses on sanctioning and/or removing individuals using the notion of public protection as the over-riding justification for this. By failing to fully acknowledge the importance of mental health and wellbeing issues, it fails to tackle the underlying cultural and structural norms which are contributing to the actions of individuals in disciplinary proceedings. This leads to a range of anti-therapeutic effects for the individual involved and prioritises a short term individualised solution over making broader long term changes. To promote a therapeutic approach to discipline, there is a need to work for cultural change which can challenge unhealthy legal norms and socialisation and thus proactively tackle factors contributing to issues with mental health and wellbeing. In a recent paper in the US context, Krause and Chong argue that what is often characterised as a 'crisis' of wellbeing within the legal profession is actually symptomatic of a wider crisis of the legal profession generated by unfulfilled psychological needs which result from the wider priorities and values which are

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[120] Vivien Holmes, Tony Foley, Stephen Tang & Margie Rowe 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012) 15(1) Legal Ethics 29, 29.

[121] *Supra* n 36.

[122] *Supra* n 36, 461.

prevalent within the profession.[123] They argue that 'At bottom, restoring wellness must start with reviving the concept of belonging and our perception of our profession as a noble calling.'[124] This accords with Freckelton's discussion of disciplinary procedures through a therapeutic jurisprudence lens, where he suggests 'there is much to be said in favour of identifying and addressing root causes of individual instances of unprofessional conduct'.[125] While the legal profession fails to do this it is failing not only individual legal professionals but also its other key stakeholders, including the general public.

Conclusion

Applying therapeutic jurisprudence to solicitors' disciplinary proceedings provides a valuable heuristic by which to explore the system's treatment of individuals' with mental health and wellbeing issues. By characterising individual legal practitioners, and the legal profession collectively, as legal actors, it facilitates a consideration of the effects of the current disciplinary system. By emphasising that therapeutic (or anti-therapeutic) consequences are not the sole determinant of reform and change, and defining such terms widely, it is able to facilitate a consideration of the needs of a range of key stakeholders, including the SRA, the original complainant and the general public.[126] Such a consideration demonstrates that the existing system is profoundly anti-therapeutic for the individual legal practitioner involved with little justification in terms of the impacts upon other stakeholders. It is clear that such mental health and wellbeing issues are not individual but instead link to much larger structural and cultural issues within the legal profession overall. For example, the focus on long hours and presenteeism and the pressures of chargeable hours and billing targets.[127] A fitness to practice regime allows a regulator to provide an important indication of their commitment to acknowledging issues of mental health and wellbeing and would act as a helpful acknowledgment of the problematic nature of cases involving issues relating to impairment. However, there is little evidence to date to suggest that this can, on its own, provide an effective solution to the types of cases which the SDT have been tackling for years, where mental health and wellbeing is implicated.

Instead there is a need to challenge the wider structural and cultural norms within the legal profession which contribute to issues with mental health and wellbeing. In other words, tackling its causes, rather than the results. This requires the involvement of many stakeholders within the legal profession. Education and training having a key role to play in promoting the wider changes required (alongside relevant academic research into these), for example, law degrees can validly teach legal ethics and critical perspectives on the legal profession to promote early reflection and awareness. This, in turn, could promote a wider conception of professional ethics which could be embedded within SQE Part 1. The type of skills being assessed in SQE Part 2 should also be re-evaluated in light of shifting notions of professionalism and the impact of legal culture. At a practice level, regulators such as the SRA

[123] *Supra* n 117 (Krause and Chong), 204.
[124] *Supra* n 117, 244.
[125] Freckelton n 29, 424.
[126] *Supra* n 14.
[127] *Supra* n 6.

should review the competencies required from legal professionals and wellbeing and emotional competence made explicit within these (but with a caveat around assessment being reflective and sensitive to diversity). There must also be an increasing role for Continued Professional Development to counter-act unhealthy norms within the legal workplace. All of this requires educators, employers, regulators and other representative bodies to work together to produce a framework for sustainable and effective change. Doing so may well be difficult and challenging, but cases such as *James* demonstrate just how necessary such work is to shift to a legal profession which treats its individual members in a truly therapeutic fashion.