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Abstract

Six years on from the findings of the *Independent Comparative Case Review* that solicitors from BME backgrounds faced disproportionately poor regulatory outcomes, we look again at the data and conclusions drawn. Looking ahead to the SRA's publication of enforcement statistics which will include a breakdown of outcomes by ethnicity, we put forward suggestions for points the SRA should cover and the approach it could adopt.

The Independent Comparative Case Review – looking back, looking forward

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It's over six years since the publication of the *Independent Comparative Case Review* (ICCR) by Professor Gus John focusing on disproportionate regulatory outcomes for solicitors from BME[1] backgrounds, and around nine years since the data he analysed was recorded. The SRA has changed its regulatory regime twice since much of the data was recorded, first to Outcomes-Focused Regulation, and then to the current Standards and Regulations.[2] While the SRA has promised to publish statistics on regulatory outcomes and ethnicity by early next year, anecdotal evidence indicates that disproportionate outcomes for solicitors from BME backgrounds persist.

While we await the SRA's statistics, now is an opportune moment to look back at Professor John's report, its conclusions and treatment by the SRA. In so doing, we raise a number of points that we believe the SRA ought to cover in its forthcoming statistics and in any strategic response to them.

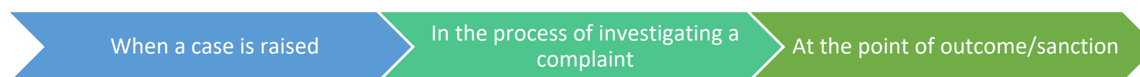
Framing the issue

It is important to be clear at the outset what we mean by disproportionality. It refers to both the percentage of solicitors from BME backgrounds who are subject to regulatory action compared to their proportion in the profession as a whole (and the concomitant percentages for White solicitors), and how the outcomes in their cases compare to those of their White counterparts. These are therefore a distinct set of issues from those relating to the representation of practitioners from BME backgrounds in the profession as a whole, their career progression and their opportunities in different types of firms, though the two issues may well intersect, as we will discuss in more detail below.

[1] We have adopted the terminology used in the ICCR. However, we note both that it is not clear on what basis the SRA and/or Professor John categorises an individual as BME or White, and also the issue raised by the ICCR regarding the wide variety of different backgrounds within these groups, including both those who trained in the UK and those that qualified abroad.

[2] This refers to the rules and principles which govern the profession. Outcomes-Focused Regulation was introduced in late 2011 and was intended to give firms more flexibility by setting out outcomes which needed to be achieved rather than detailed rules. Outcomes-Focused Regulation was replaced in November 2019 by the Standards and Regulations. The Standards and Regulations no longer included expected outcomes, updated the principles and, among other changes, simplified some of the sets of rules. Although the review was commissioned in July 2012 and took over a year and half to complete, much of the data analysed comes from 2009-2011, before the move to Outcomes-Focused Regulation.

In the ICCR, Professor John identified disproportion in 3 stages of the regulatory process:[3]



These three stages clearly involve distinct sets of concerns and actors. Any disproportion arising in the second stage is squarely within the remit of the SRA. However, the SRA is also an instrumental actor, though by no means the only actor, in the first and third stages. In the first stage, for example, although the SRA receives a large proportion of reports and referrals from other sources, including public complaints (which account for more than half of reports raised),[4] the majority of cases analysed in the ICCR were triggered from within the SRA.[5] While there may indeed be a disproportionate number of complaints raised by external sources against lawyers from BME backgrounds,[6] public complaints were the trigger of only a small number of the cases analysed in the ICCR.[7]

In terms of the third stage, the SRA in the first instance makes a decision regarding whether to take no action, to apply the sanctions in its power or to refer the case to the Solicitors Disciplinary Tribunal (SDT). Once a case has been referred to the SDT, the Tribunal will ultimately be making the decision on sanction. However, the actions of the SRA are still relevant in terms of how it investigates the case and frames the allegations, including allegations of dishonesty and breaches of principles, whether it instructs outside solicitors and counsel, and its approach to costs.

So what questions should we be asking?

Even with a focus exclusively on the role of the SRA, there are clearly a wide range of questions which could be asked both in terms of the different stages and processes in which the SRA conducts its work (outlined above), and in terms of how disproportion might manifest. This could include, for example, discrimination or unconscious bias in application of procedures and exercise of discretion; [8] discrimination or unconscious bias operating on the way in which SRA officers interact with members of the profession;[9] disparity in the way in

[3] ICCR, pg. 9 at 1.14
[4] The SRA's *Upholding Professional Standards 2017/2018* report indicated that of the 11,508 reports the SRA received in 2017-2018, 6,868 came from the public. Only 781 came by SRA internal referral. We appreciate these statistics are not directly comparable given that the data set from the ICCR is from several years earlier. See also the Pearn Kandola *Solicitor's Regulation Authority: Commissioned Research into Issue of Disproportionality* report (Pearn Kandola Full Report, July 2010), Pg. 35
[5] 57.4% of cases analysed for respondents from BME backgrounds were triggered by 'Internal SRA Section' and 48.3% for White respondents (see ICCR, Pg. 84 at 6.33). We do recognise, however, that the number of cases underlying these statistics is relatively small (112, 54 respondents from BME backgrounds and 58 White respondents), and that the picture could have been affected by the method of selecting the cases for analysis.
[6] See Pearn Kandola Full Report, July 2010.
[7] 5.6% of investigations involving respondents from BME backgrounds and 5.2% of involving White respondents (see ICCR, Pg. 84 at 6.33)
[8] The SRA's initial response to a report by Lord Ouseley (July 2008)was to accept "the review finding that progress in embedding equality and diversity has been slow and that we must address issues of discretion and possible prejudice which may result in disproportionate outcomes for BME practitioners, as part of our programme of ensuring that we have the best organisation to deliver regulation in the public interest" (see ICCR, pg. 26 at 2.7). It appears that the Equality Implementation Group chaired by Lord Ouseley played a role in ensuring that a review of certain files where racial discrimination had been alleged formed part of the ICCR.
[9] To give an example, if someone in the SRA applied the policies and procedures to the letter but treated a practitioner from a BME background in what was experienced as a discriminatory way during an investigation, this is both a serious issue and could well impact the way in which the practitioner conducts themself during the investigation with a consequent impact on outcome. We note that as being investigated by the SRA is not a universal professional experience, a solicitor might experience certain conduct from an SRA officer as discriminatory even if it does not in reality differ from how that

which policies and procedures, even if applied consistently, impact practitioners from different backgrounds due to external factors and/or the way in which these policies and procedures are designed.[10]

In commissioning the ICCR, the SRA was primarily focused on one aspect of this: "*whether there is disparity in the way the SRA applies its policies and procedures in dealing with BME practitioners as compared to others with a view to identifying potential improvements to such practices, policies and procedures to maximise fairness and consistency…*".[11] Although the ICCR did ultimately end up touching upon a wider range of issues, the SRA's initial focus was fairly narrow.

What did the report find?

There is no substitute for reading the report, but we have extracted a few of the headline statistical findings here:

- Solicitors from BME backgrounds were **over-represented in SRA investigations** between 2009-2012: solicitors from BME backgrounds accounted for 13% of solicitors but 25% of SRA new conduct investigations[12]

- Solicitors from BME backgrounds were **over-represented in SRA interventions** between 2009-2012: solicitors from BME backgrounds accounted for 25% of SRA investigations, but 29% of interventions[13]

- Solicitors from BME backgrounds that were investigated by the SRA were **more often referred to the SDT** than their White counterparts: solicitors from BME backgrounds accounted for 25% of new conduct investigations, but 33% of cases referred to SDT[14]

- Solicitors from BME backgrounds were **more likely to have conditions imposed on their practising certificates**: solicitors from BME backgrounds accounted for 25% of new conduct investigations, but 32% of investigated solicitors who had conditions to attached to their practising certificates[15]

- There was disparity in terms of the **sanctions received** from the SRA, although the evidence for this is more equivocal. In general, a greater proportion of White solicitors in the cases reviewed received a Finding and Warning, Rebuke, or Suspension of their practising certificate. In contrast, a great

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officer might treat all other solicitors under investigation. As this can have an impact on engagement with the SRA and therefore on the outcome, this should be considered by the SRA. Some of the qualitative data in report is instructive in this regard, even when it does not necessarily relate to discrimination. See, for example, the quote from a solicitor whose practice was intervened on pg. 167 at 10.11: "solicitors experience the SRA as having a presumption of guilt as its starting point. The solicitor therefore has to prove s/he is not guilty as charged, even when the event is the result of a simple oversight that could readily be rectified".

[10] This was not a key focus for the SRA, perhaps due to the timing of the report, given that the SRA was transitioning to a new regulatory regime. Indeed one of the agreed additions to the terms of reference was to "Examine how current cases are being processed and how recently concluded cases were dealt with under Outcomes Focused Regulation (OFR) in order to highlight the impact of 'improvements to SRA policies and processes' and the extent to which the OFR approach to regulation is helping to eliminate disproportionality and maximise fairness and consistency'." See ICCR, Pg. 33 at 3.8.

[11] ICCR, Pg. 25 at 2.1

[12] 2009: 19%, 2010: 27%, 2011: 27%, 2012: 27%. See ICCR, Pg. 64-65 at 6.10

[13] 2009: 19%, 2010: 38%, 2011: 30%, 2012: 28%. See ICCR, Pg. 64-65 at 6.10

[14] 2009: 34%, 2010: 31%, 2011: 35%, 2012: 32%. See ICCR, Pg. 64-65 at 6.10

[15] 2009: 32%, 2010: 29%, 2011: 34%, 2012: 31%. See ICCR, Pg. 64-65 at 6.10

proportion of solicitors from BME backgrounds had their cases closed with no action or only a cost direction, or received conditions on their practising certificate.[16]

What should we conclude from this?

It is clear from these statistics that practitioners from BME backgrounds were (and according to our anecdotal evidence still are) facing disproportionate regulatory outcomes. What such statistics cannot tell us though, is *why* this is the case. While we agree with Professor John that "it is important that these results are *not immediately* interpreted as evidence of discrimination or racism on an institutional level",[17] they should, arguably be taken as *prima facie* evidence that disparity or discrimination may be an issue for the SRA. Of course, as noted above, the SRA's policies and procedures could be applied consistently, but their impact could be greater on solicitors from BME backgrounds for a number of reasons. But such statistics should provoke very serious reflection.

In trying to tackle the question of why, the ICCR tried to look at other factors which could account for disproportion, and also carried out a file review of a small sample of cases in which discrimination had been alleged by the Respondents.

The report highlighted a number of trends in terms of the levels of experience and types of practice that the respondents from BME and White backgrounds were working in:

- Respondents from BME backgrounds had on average **been on the Roll for fewer years** than White respondents[18]
- Respondents from BME backgrounds had on average been **qualified for fewer years before becoming sole practitioners**.[19]
- Respondents from BME backgrounds had on average had **held fewer practising certificates**.[20]

After reviewing the six specific files in which the respondents had alleged discrimination, the ICCR noted that "Whilst we are not judges and it was not our business to conclusively determine one way or another whether discrimination had occurred in these cases…[in] the cases we reviewed, the solicitors in question made allegations of discrimination that did not appear to be supported by specific evidence".[21]

[16] See ICCR, Pg. 76-77 at 6.24. See also the breakdown of sanctions received for specific categories of cases (Solicitors Accounts Rules; Fraud, dishonesty and money laundering) where disparity is perhaps clearer, though sample sizes are smaller.

[17] ICCR, Pg. 111 at 6.59, emphasis added.

[18] Average number of years on the Roll: 12 for BME group SRA adjudicated (range 24), 28 for White group SRA adjudicated (range 44), 10 for BME group SDT cases (range 21), 22 for White group SDT cases (range 43). See ICCR, Pg. 66-68 at 6.15-6.16

[19] Average number of years from qualification to sole practitioner: 6 years for BME group SRA adjudicated (range 17), 19 years for White group SRA adjudicated (range 34), 6 years for BME group SDT cases (range 21), 10 years White group SDT cases (range 43). See ICCR, Pg. 69-71 at 6.17-6.18

[20] Average number of practising certificates: 11 for BME group SRA adjudicated, 15 for White group SRA adjudicated, 8 for BME group SDT cases, 13 for White group SDT cases. See ICCR, Pg. 71-73 at 6.19-6.20

[21] ICCR, Pg. 126-7 at 7.9 and 7.10. Without wishing to delve into methodological criticisms, some of which are acknowledged in the ICCR, it is also worth reiterating that experiences of discrimination can have an impact even where they would not meet (or not be able to evidence meeting) the legal test for discrimination. Furthermore, in relation to the difficulties with SRA file reviews overall, the ICCR noted: "Crucially, caseworkers/supervisors should be required to state clearly on the face of the file their reasons for the decisions they make and for the discretion they exercise in each case.

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What did the SRA conclude?

In its response to the ICCR, the SRA concluded that "there was no evidence of direct discrimination, including in the individual cases reviewed, in the way the SRA applied its regulatory policies and processes".[22] It did, however, recognise that it needed to "identify and explain the reasons for any disparity".[23] This is part of the challenge that we hope the SRA will rise to with its upcoming statistics. We particularly challenge the SRA to be self-reflective and transparent, and keep in mind two key points.

1. **Absence of evidence is not evidence of absence**

The SRA went on to say in its response to the ICCR that it needed to "demonstrate through evidence that there is no institutional bias or discrimination in the way we regulate".[24] It is important to recognise that not all forms of institutional bias or discrimination are easy to evidence, and the fact that statistical analyses or limited, targeted review exercises based primarily on file reviews[25] have not found evidence of bias or discrimination does not, without more, justify the conclusion that these do not exist.[26]

While it is possible that disproportionate outcomes exist in an absence of institutional bias or discrimination, we hope that, should the upcoming statistics indicate disproportionate outcomes persist, the SRA acknowledges that this amounts to *prima facie* evidence of bias and that what is required before drawing any firm conclusions is a proper reflection on where and how such bias may be operating. The SRA did acknowledge in its response to the ICCR that there were "internal factors" which contributed towards disproportionality, giving the examples of the regulatory arrangements, the exercise of discretion and leadership and culture.[27] We expect that the SRA will aim not just to clarify what steps it is taking, but also how it monitors the impact of these steps and its overall performance in this regard.[28]

While a triggering event, complaint or episode causing a case to be raised might be identical as between two solicitors, of whatever ethnicity, the context and mitigating circumstances involving one solicitor might give rise to a regulatory response that is vastly different from those of the other. On the face of it, the absence of a like-for-like decision might appear discriminatory or at best idiosyncratic. The reasons for SRA action, or for the apparent lack of consistency in regulatory action in respect of similar events are not always clear on reviewing files. Fuller and better recording of reasons could make for more transparency and would help ensure that unconscious bias and stereotypical beliefs and attitudes are not informing the decision making process." Pg. 43-4 at 4.50

[22] SRA's initial response to the Independent Comparative Case Review (SRA's Response), 3 June 2014, Pg. 3 at 2.1

[23] SRA's Response, Pg. 4 at 2.6

[24] SRA's Response, Pg. 4 at 2.6

[25] The author of the ICCR recognised the difficulties in researching this issue on the basis of file reviews: "Another important aspect of the review, which was also very dependent on file quality and file management, especially in the light of 4.5 and 4.6 above, was the availability of evidence of how SRA personnel explain their decisions and judgements, so that one is able to see how a decision was made and have a clear explanation of the evidential tests used. This is necessary for one's ability to assess whether unconscious bias is at work, or whether stereotypical judgements are being made. This is particularly relevant with regard to referrals to the SDT via the adjudication process. It is especially important in respect of the SRA's application of the 'public interest' test.", Pg. 39-40 at 4.32

[26] We recognise that the Pearn Kandola Full Report indicated that ethnicity was often not a statistically significant factor. However, without further information on the sample sizes for specific tests and without knowing the results of these tests, it is difficult to assess these findings. In any event, should the upcoming SRA statistics show that disproportionality persists, such analysis ought to be repeated.

[27] SRA's Response, Pg. 5 at 2.7, 2.11

[28] We note that the SRA's Response set out from Pg. 6 onwards some steps being taken; however, it is unclear the extent to which all of these steps continue to be implemented.

2. Correlation is not causation

We have noted above a number of trends which the ICCR report found regarding the profiles of respondents from BME backgrounds and White respondents in the cases reviewed. These factors, and the hypotheses that the report puts forwards, should not be accepted as accounting for disproportionality without further review.

To give an example, the ICCR notes:

> "In terms of the number of years a solicitor had been on the roll at the time of their investigation, clear differences were evident between the ethnic groups. For cases held by both the SRA and the SDT, White solicitors had been on the roll for more than twice as long as their BME counterparts. A possible explanation for this relates to the fact that, according to the data, the BME solicitors investigated had established sole practises with only 6 years post qualification experience (PQE), compared to 19 years PQE for White solicitors. Less experienced sole practitioners are more likely to fall foul of SRA regulation as they lack the resources to both ensure best practice is always followed and to insulate themselves against investigation. Therefore, the issue that arises is why BME solicitors are more likely to establish themselves on their own, with relatively little experience, in comparison to White solicitors."[29]

We know from the SRA's statistics for the profession that solicitors from BME backgrounds are over-represented in sole practices. It may also be that there is a difference in the distribution of solicitors from BME backgrounds and White solicitors by numbers of years on the Roll, such that in a random sample of BME and White practitioners, the BME solicitors would on average have been on the Roll for fewer years and would on average have set up sole practices with less experience.[30] To understand if this factor contributes towards *regulatory* disproportion, we would need to understand the extent to which the SRA is more likely to take action against solicitors of any ethnicity who have been on the Roll for fewer years and who are sole practitioners.[31]

Looking forward to the new statistics, we suggest that in order to inform a more nuanced analysis the SRA would do well to look at the following issues and metrics, some of which were raised as early as 2005[32] or were previously investigated in the Pearn Kandola report:

- The **proportion of SRA enforcement that targets sole practitioners and small firms (irrespective of ethnicity)**.[33] As the SRA already publishes data regarding the proportion of solicitors from BME backgrounds in different sizes of firms, this would add nuance to the question of whether the higher proportion of practitioners from BME backgrounds in sole practices and small firms remains a significant factor.[34]

[29] Pg. 11 at 1.26

[30] On this point, see Pearn Kandola Full Report, July 2010, Pg. 20

[31] This point was covered to certain extent in the Pearn Kandola Full Report, July 2010, at Pg. 30, which said: "Given that ethnicity does not directly predict (i.e. is not directly related to) whether a case is raised against a solicitor, but that there are a disproportionate number of cases raised against BME solicitors, a further analysis was undertaken to identify whether any of the three identified predicting factors are linked to BME status. The findings indicate that BME solicitors are indeed more likely to have been admitted to the Roll for fewer years." The question we should arguably then be asking is among a sample of junior solicitors, that is, those that have been on the roll for fewer years, are there a disproportionate number of cases raised against solicitors from BME backgrounds?

[32] See pages 172-173 of the ICCR, in which Professor John refers to a 2005 evaluation carried out for the Law Society

[33] The SRA Response noted that its "diversity monitoring report indicates that smaller firms are themselves more likely to be the subject of some form of regulatory intervention" (Pg. 7 at 3.5). The report no longer appears to be available on the SRA website, and as such we have not been able to compare the statistics.

[34] Professor John notes on pg. 163 at 10.1 that "The vast majority of the solicitors who are subject to regulatory action are sole practitioners and the vast majority of solicitors' firms that are intervened are small firms with less than ten and often

- **A breakdown of SRA enforcement by the area of law a firm/individual practices in**. This could help add nuance to the hypothesis raised in the ICCR that certain areas of law may be at higher risk of regulatory action. Further analysis of the SRA's statistics for the profession could also help us to understand the extent to which BME practitioners are concentrated in these areas.[35]

- A breakdown of the **types of allegations formulated by the SRA** (e.g. Accounts Rules breaches, conflict of interest etc) by ethnicity, and the **proportions of each, by ethnicity, where the SRA made parasitic dishonesty allegations**. For key categories, data should also include **sanctions** received by ethnicity.

- The proportions of solicitors from BME backgrounds and White backgrounds having **multiple cases raised against them**, and the **sources of these complaints**. The Pearn Kandola report found that "once BME solicitors have one conduct case raised against them they are more likely to have later conduct cases", something which is "not reflected in the white solicitor population".[36] It would be important to understand if this remains the case, and the extent to which the sources for subsequent complaints come from within the SRA.

- Statistics relating to the **number of complaints made regarding the SRA, the proportion of these which alleged discrimination, and their outcomes**.

Further to this, greater reflection is needed on the qualitative experience of different practitioners' engagement with the SRA, the SDT and the SRA's complaints body.

Hypotheses raised by the ICCR about why lawyers from BME backgrounds might be more likely to work in small firms and sole practices, such as having less 'social and cultural capital' and career limitations are clearly important to interrogate, and it is to the SRA's credit that it is seeking to promote and improve diversity in the profession. However, this should be in parallel with more critical reflection on the SRA's own practices.

Who regulates the regulator?

The more qualitative elements of the ICCR raise some important points in this regard. A clear theme is the lack of transparency and accountability in the way in which the SRA carries out its regulatory functions and the way it interacts with members of the profession. This is especially in terms of the way in which it balances its different regulatory objectives set out in the Legal Services Act, and how it uses the 'public interest' to justify decision-making. This is borne out by our anecdotal evidence, where a key concern raised is the extent to which the SRA

no more than four partners. BME solicitors are over-represented in both categories, *hence the correlation between ethnicity and regulatory action*" [emphasis added]. It is our contention that a more robust statistical analysis, should the SRA make this data available, should compare the extent of disproportion based on size of practice. While it is clear that disproportion is a complex issue and there are likely to be many factors contributing to it, such analysis could help to better build this picture and target further investigation and solutions.

[35] The ICCR hypothesises "Frustrations and limitations in career opportunities may result in a BME individual working for smaller firms or deciding to advance their prospects by starting sole practices, relatively soon after qualifying. It is perhaps also the case that some BME solicitors, recognising the fundamental principle of providing access to legal representation, may choose to establish practices aimed at serving BME communities. The disciplines practised by these BME sole practitioners will therefore reflect the needs of the communities they serve and may demonstrate an emphasis on criminal, immigration, welfare rights, or residential conveyancing law, over corporate or commercial law. Due to the nature of client billing, specialising in certain disciplines may affect the financial standing and cash-flow situation of a law firm. In this Report, no data relating to the correlation between disciplines practised, breaches committed and sanctions given, was analysed." Pg. 13 at 1.30

[36] Pearn Kandola Full Report, July 2010, at Pg. 37

conducts investigations in a way that can reasonably be said to meet the statutory requirements of transparency, accountability and good regulatory practice. Some of this has a specific impact on practitioners from BME backgrounds, such as the SRA invoking the 'public interest' argument as a reason to take into account previous regulatory history,[37] but much of it may not. It is of significance that many of the recommendations put forward by the ICCR regarded the SRA's overall regulatory approach,[38] and that the ICCR concluded that the move to Outcomes-Focused Regulation would likely not have a positive impact on disproportionality. [39]

We are now at an important juncture. While the SRA is due to publish updated statistics on regulatory outcomes, it is also about a year since the SRA's new Standards and Regulations came into force, and there has quite rightly been renewed public interest in issues of racism and discrimination following the Black Lives Matter movement. The opportunity is there for an honest discussion around disproportionality and wider regulatory issues. We have tried to set out some suggestions here for how the SRA can more positively and transparently engage with these issues going forward. We look forward to engaging in constructive discussion and debate on these important matters with the SRA, solicitors and other key stakeholders in the profession. And we look forward to playing our part in making sure that these discussions result in real, meaningful change.

[37] See, for example, "There are clearly situations in which it would be sensible and indeed responsible to take regulatory history into account when deciding whether or not to prosecute, but just invoking 'the public interest' can never be a sufficient reason for doing so. One of the criticisms we heard frequently during this review was that the SRA quotes 'the public interest' at every turn without feeling the need to demonstrate how the interest of the public is served or hampered, actually or potentially, by what it does or might fail to do./ We believe that unless the SRA adopts a much more nuanced approach to referral to the SDT, it will simply be compounding the BME disproportionality that it recognises and is seeking to eliminate." ICCR, Pg. 57-8 at 5.50-5.51

[38] See, for example, R1, R4, R7, R10, R11, R13, R36, R44. Another key set of recommendations focus on the need for the SRA to better measure and understand the impact of its regulation.

[39] "Whatever amount of training in diversity awareness, cultural sensitivity, cultural competence, decision making, etc., supervisors operating OFR might receive, or might have had prior to joining the SRA, unless there is clarity and firm leadership in respect of how the organisation understands and seeks to pursue its regulatory objectives, having full regard to the diversity of the profession, OFR operational methodology is likely to give rise to the same disproportionate outcomes as before." ICCR, Pg. 60 at 5.64