

Consultation Response

Scottish Solicitors Discipline Tribunal 2024 Rules and Standard of Proof Consultation

9 September 2024

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

As the professional body and regulator for Scottish solicitors, we welcome the opportunity to consider and respond to the Scottish Solicitors Discipline Tribunal (the Tribunal) 2024 Rules and Standard of Proof Consultation.¹

General Remarks

We responded to the Tribunal's consultation in 2019, regarding the Standard of Proof to be applied in matters of professional misconduct.² At that time, as a privileged organisation able to both represent and regulate the Scottish solicitors' profession, we provided a balanced response reflective of this dual role. Accordingly it is therefore correct and appropriate that we again respond in this manner on behalf of both the Council and Regulatory Committee of the Law Society.

The **Council of the Law Society of Scotland** is the Society's decision-making body, responsible for the overall governance regime for the Law Society, ensuring the Society fulfils its statutory obligations. The membership of the Council is made up of elected members from geographical constituencies, co-opted members and non-solicitor members.³

The **Regulatory Committee of the Law Society of Scotland** is responsible for exercising and delivering the Council's regulatory functions, as provided for in legislation.⁴ Although a committee of Council, it has statutory independence in all matters pertaining to exercising regulatory functions and has an equal number of solicitor and non-solicitor members with a non-solicitor chair.⁵

Question under consideration

We note that the consultation asks a single question:

'Should the Tribunal apply the civil standard of proof in professional misconduct proceedings?'

¹ [SSDT Consultation on Standard of Proof 2024](#)

² Law Society of Scotland, [SSDT Standard of Proof Response July 2019](#) .

³ Further information on the Council can be accessed here: [Law Society of Scotland Council](#)

⁴ The Solicitors (Scotland) Act 1980, section 3F.

⁵ Further information on the Regulatory Committee can be accessed here: [Regulatory Committee](#)

In answer to this, we have set out the responses of the Council and the Regulatory Committee separately below.

Response of the Council

The Council of the Law Society maintains the same position as it did when the Tribunal consulted on this matter in 2019.

Therefore, in answer to the posed question: no, we support the continued use of the criminal standard of proof in misconduct proceedings before the Tribunal. The serious consequences of conviction following prosecution of cases is sufficient reason for facts to be established 'beyond reasonable doubt'.

It would be unfair and unjust to potentially end a solicitor's career unless the Tribunal were certain beyond reasonable doubt of the facts on the evidence heard and tested before it. We submit that this requires the retention of the current criminal standard of proof in cases where misconduct is alleged.

In our 2019 response we highlighted that a high percentage of the complaints prosecuted before the Tribunal have resulted in a finding of professional misconduct and this trend has continued.⁶ This demonstrates that the Tribunal, where there is misconduct, has appropriately made a finding against a solicitor and that the higher standard of proof currently adopted is not a bar to a successful prosecution.

The current criminal standard of proof is not a bar to providing robust protection for consumers of legal services and by extension there is no need to implement a change to the standard of proof. We are not aware of any decision in any case within the last four years, turning on the standard of proof, which would justify any change to the status quo.

The consultation paper itself notes at paragraph 14, (as did the Consultation Paper in 2019) that there is English case law which indicates that the criminal standard of proof should be applied to disciplinary proceedings involving legal practitioners. It is also noted that paragraph 15 of the Consultation paper refers to *obiter* comments in an English case from 2016 where there is a need to review the standard of proof "issue". We also note that the Lord President indicated he would not support a criminal standard of proof as mentioned at paragraph 10. This however was in the context of a judicial appointment where there is a more complicated process for removal/sanction if unprofessional conduct is alleged.⁷

We do not believe there is an *issue* in regard to the burden of proof in Tribunal cases and we maintain our position that any change should be evidence-based. We note that there are references to other regulatory bodies having adopted the civil standard of proof. Others doing so is neither a sound basis for review nor a cogent argument for change.

Our view remains that the current standard of proof provides a necessary safeguard for those accused of wrongdoing in a complaints system which does not have the same

⁶ [Reports | Scottish Solicitors' Discipline Tribunal \(ssdt.org.uk\)](https://ssdt.org.uk/Reports)

⁷ The Sheriff (Removal from Office) Order 2024 (SSI 2024/148) [Negative SSI paper \(parliament.scot\)](https://www.parliament.scot/Negative-SSI-paper)

protections in place as the Criminal Courts, in that the Tribunal does not require corroboration and accepts hearsay evidence, as is referred to at paragraph 17 of the Consultation Paper. Solicitors stand for the rule of law and rightly are afforded the presumption of innocence in disciplinary proceedings. This should only be overcome once there is evidence ‘beyond reasonable doubt’ that there has been misconduct.

One of five strategic aims within our 2022-2027 Strategy is *Modern and effective regulation acting in the public interest*.⁸ We continue to acknowledge that the protection of consumers of legal services is an important issue, however, we have not seen any evidence to suggest that the current safeguards are either eroding or curbing that protection. If such evidence were to exist, we would very much welcome sight of it.

Scottish solicitors are subject to complaints of both inadequate professional service and professional misconduct from individuals for whom they were not acting. The Scottish Legal Complaints Commission describes these as third-party complaints.

The Tribunals standard of Conduct Decision Paper of 2019, notes that *In-house solicitors believed that they were particularly vulnerable to third-party complaints and that the standard of proof provided an additional safeguard. Consultees noted that many solicitors already find it very difficult to deal with allegations of misconduct due to financial pressures or mental strain or illness. Reducing the standard of proof would make it more difficult for them to defend themselves*.⁹

Third-party complaints continue to be of a particular concern for our in-house solicitors in particular but also for our members generally as this exposes them to a much wider range of potential complainers. Change in the required standard of proof will increase their concern as it will remove a significant safeguard against the extensive (and potentially punitive) powers that the Tribunal can exercise.

While we recognise that there is a delicate balance to be struck between the possible consequences that an adverse finding may have on a practitioner and the need to provide adequate public protection measures, the consequences of a disciplinary finding for a solicitor are potentially career-ending and given its significance, we believe that a finding should only be made when professional misconduct has been established to the criminal standard of proof.

Our members are clear that they do not wish the standard of proof lowered and the Council fully support their position. Given that it is an individual’s career that is potentially at stake we appreciate these concerns. A move away from the criminal standard of proof would inevitably increase the risk of miscarriages of justice against individual solicitors.

Given the lack of evidence highlighting the need for change, our view remains that the argument for change has not been made.

Response of the Regulatory Committee

In considering the current consultation, and the single question posed, the Regulatory Committee (the committee) has considered its previous policy position which advocated

⁸ [Strategy 2022-27 | Law Society of Scotland \(lawscot.org.uk\)](#)

⁹ At paragraph 8 [SSDT - Standard of Proof consultation decision 2019](#)

for the Tribunal to adopt the civil standard of proof in cases of professional conduct, this being on the ‘balance of probabilities’. The committee considers that there is no persuasive argument that would cause it to favour the current status quo of the standard of proof remaining ‘beyond reasonable doubt’ and to shift its position from that as previously stated in 2019.

The committee remains of the view that the appropriate standard of proof in a modern disciplinary regime should be the civil standard. This is reflective of many other regulated professions which focus on the public interest. For example, the health and care profession regulators, Accountancy and Actuarial Discipline Board, General Institute of Public Finance and Accountancy, General Teaching Council for Scotland and the Royal Institution of Chartered Surveyors. In legal regulation in England and Wales, the Solicitors Regulation Authority, Bar Standards Board and Solicitors Discipline Tribunal also apply the civil standard. Indeed, there are very few regulated professions that still retain the criminal standard.

It should be noted that there are often important distinguishing features between these regimes and the system for regulating Scottish solicitors. Many of the regimes which adopt the civil standard of proof operate a fitness to practise model of regulation, particularly the health and care regulators. This means there is an additional test to be considered between a finding of misconduct and sanction. This test is usually expressed as whether the regulated person’s fitness to practise is **currently** impaired. The effect of this is that not all acts or omissions which amount to misconduct result in the regulated person being sanctioned. This helps ensure sanctions are reserved for matters where the regulated person’s ability to practise safely remains compromised and/or whether public confidence in the profession would be undermined without a sanction.

The Tribunal has a discretion under section 53(2) of the Solicitors (Scotland) Act 1980 to make a finding of professional misconduct without imposing a sanction. However, in our experience of prosecuting complaints before the Tribunal, a sanction almost always follows a finding of professional misconduct. If the Tribunal decides to move to the civil standard, one option to address the concerns voiced by solicitors would be to develop the Tribunal’s sanctions guidelines. This could involve introducing a more defined process and approach between finding professional misconduct and imposing a sanction, similar to the approach taken in other regulatory regimes.

We also note from the consultation document, that the Lord President, in relation to a previous consultation exercise on the Tribunal’s rules in 2023, indicated that ‘...*he would not concur with a rule setting out the criminal standard of proof for professional misconduct cases, drawing the Tribunal’s attention to the standard of proof employed by the Fitness for Judicial Office Tribunal...*’¹⁰

It is also worth noting that the Faculty of Advocates, as we understand, is currently consulting with its members on whether the civil standard should be adopted for its own internal disciplinary proceedings.¹¹

¹⁰ SSDT Consultation on Standard of Proof 2024, paragraph 10.

¹¹ SLCC - [Review of the Faculty of Advocates’ complaints process](#)

This further highlights the widespread regulatory shift towards a more modern and appropriate disciplinary process focused on the public interest.

Regulatory proceedings regarding conduct are civil proceedings, not criminal hearings. Therefore conduct matters should not be measured against the criminal standards. The purpose of regulatory proceedings is to protect the users of legal services, the reputation of the solicitor profession and ultimately the public at large. The criminal standard of beyond reasonable doubt is a very high bar and is appropriate where a person's liberty may be at stake, and it rightfully sits in the criminal justice sphere of a democratic society, but the committee's view is that it has no place in regulatory disciplinary proceedings.

This is a view also expressed by the joint Law Commissions which have stated '*... The criminal standard [of proof] implies that someone who is more likely than not to be a danger to the public should be allowed to continue practising, just so long as the panel is not sure that he or she is a danger to the public. It seems to us that professional regulation is quite different from the criminal context, where the state is required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her.*'¹²

As we previously highlighted in our 2019 response, the outdated and continued retention of the criminal standard of proof by the Tribunal and the solicitor profession, and the main arguments in support of this, may be perceived by the public as a failure to recognise the public interest need and undermines what is otherwise a robust regulatory framework.

In summary, the committee strongly consider that the appropriate standard of proof should be the civil standard. This would:

- protect the interests of the user of legal services and the public more widely by ensuring sanctions are applied where, on the balance of probabilities, there is a risk,
- place the consumer interest first ahead of those of individual solicitors,
- provide and strengthen public confidence in the regulatory and disciplinary framework of the solicitor profession,
- align regulation of solicitors in Scotland more closely with regulation of legal professionals in England and Wales and other regulated professionals,
- deliver a modern disciplinary process that is consistent and fair.

¹² Law Commission / Scottish Law Commission / Northern Ireland Law Commission Joint Consultation Paper [LCCP 202 / SLCDP 153 / NILC 12](#) at Para 9.65

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