

# Consultation Response

## Scottish Solicitors' Discipline Tribunal: Consultation on Standard of Proof

5 July 2019



## Introduction

---

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

Our five-year strategy has an overarching objective of leading legal excellence and sets out how we can excel and be world-class, understanding and serving the needs of our members, and protecting the public interest.

We have a statutory duty to work in the public interest, a duty which we are steadfastly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

### **A balanced response**

In the majority of circumstances our duty to represent the interests of the solicitor profession and the public in relation to that profession can be expressed with a unified voice. There are occasions when a subject divides opinion within the Law Society. On these rare occasions, it is appropriate and important that we voice each opinion, with equal prominence, in order to meet our responsibilities to the public and to the solicitor profession.

As the Law Society of Scotland, we are in a privileged position to listen to and present both sides of the argument contributing to and informing the debate as we have done in this response.

Accordingly, this document represents the views of both the Council of the Law Society of Scotland and the independent Regulatory Committee of the Law Society of Scotland. Both have welcomed the opportunity to consider and respond to the Scottish Solicitors' Discipline Tribunal (SSDT) Consultation on Standard of Proof. We have presented the two responses together to ensure both are recognised as views from the Law Society as a whole and are given equal consideration.

### **The Council and the Regulatory Committee**

The Council of the Law Society is the principal decision-making body of the Society. It is made up of solicitor members, mostly elected by solicitors in constituencies covering each part of Scotland, co-opted members representing particular parts of the profession, and non-solicitor members; all of whom ensure we meet our responsibilities to protect the public interest.

The Regulatory Committee was created as part of the Legal Services (Scotland) Act 2010. It is a committee of the Council of the Law Society, but it is independent and exercises the Council's regulatory functions as set out in Section 3F of the Solicitors (Scotland) Act 1980. Its core purpose is to ensure these functions are exercised independently, properly, and with a view to achieving public confidence. Like all

the Regulatory Sub-committees which operate under its supervision, the Regulatory Committee is made up of 50% solicitors and 50% non-solicitors. The chair is a non-solicitor and is elected by the members of the Regulatory Committee.

In order to properly exercise their respective functions, the Regulatory Committee and the Council of the Law Society offer the following comments for consideration.

## Comments by the Regulatory Committee of the Law Society of Scotland

---

### 1. Should the Tribunal apply the civil standard of proof in professional misconduct proceedings?

Yes, we agree with the proposal that the Tribunal should apply the civil standard of proof in professional misconduct proceedings. In considering this, we noted that the principal argument in favour of retaining the status quo is that a finding of professional misconduct against a solicitor can be potentially devastating to both the solicitor's reputation and livelihood. A strike-off order will prevent the solicitor in question from practising. The imposition of less severe sanctions may also have very serious consequences. Therefore, we recognise that there is a valid argument to the effect that for such an important decision to be made about a solicitor's conduct, the Tribunal should be certain beyond reasonable doubt that the solicitor had acted improperly in the manner alleged in any particular case.

However, on the basis of the cases recently prosecuted before the Tribunal, in our experience, the points in issue are rarely evidential, and are much more often as to the merits of the complaints being prosecuted. Therefore, we suggest, there is very little evidence that a significant proportion of prosecutions are failing solely on the standard of proof.

Over the last five years approximately 80% of prosecutions brought by the Law Society have resulted in a finding of professional misconduct. Before any referral to the Tribunal is made, each case is subject to a robust investigative process. This ensures that only those supported by grounded evidence are referred for prosecution. The introduction of a civil standard of proof will not dilute the investigation and evidence gathering process and it will remain the case that only those solicitors who are found to have a compelling case of serious wrongdoing to answer, will be referred to the Tribunal in the first place. We believe that the meticulousness of the investigative process represents an important safeguard to members of the profession who may be concerned by a change to the level of standard of proof.

In addition, we recognise that the Scottish solicitor profession is one of only a handful of professions which currently retain the criminal standard of proof for professional misconduct. There is an increasing recognition within UK professions of the need to elevate and protect the public interest, with the majority of professions adopting the civil standard of proof for misconduct proceedings, for example the medical profession, which introduced the civil standard of proof in 2008. The continued retention of the criminal standard of proof by the Scottish 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. We consider any perpetuation of such a perception to be undesirable. It is contrary to our strategy of leading legal excellence, and that by setting and upholding robust standards our members, clients and employers continue to receive excellent legal and customer service.

## **2. If so, should this be implemented by way of a Tribunal Rule?**

We are not in a position to comment on how any change should be implemented. We think it is for the Tribunal itself to consider the means of implementing any change to the standard of proof in conjunction with the office of the Lord President of the Court of Session.

**For further information on this response, please contact:**

Michael Greenfield  
Professional Conduct Manager  
Law Society of Scotland  
[michaelgreenfield@lawscot.org.uk](mailto:michaelgreenfield@lawscot.org.uk)

## Comments by the Council of the Law Society of Scotland

---

### 1. Should the Tribunal apply the civil standard of proof in professional misconduct proceedings?

No, we support the continued use of the criminal standard of proof in the Tribunal. The serious consequences of prosecution of cases are good 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 can be certain 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.

Over the last six years a high percentage of the complaints prosecuted before the Tribunal have resulted in a finding of professional misconduct. In 2018, 83% of cases resulted in a finding of professional misconduct.<sup>1</sup> This figure demonstrates that the Tribunal, where there is misconduct, have appropriately made a finding against a solicitor and that the higher standard of proof currently adopted is not a bar to a successful prosecution. This is evidence that the current higher standard of proof is appropriate in such cases.

The 2018 figure is consistent with the figures reported in the preceding five years (see below) and clearly demonstrates that the public are being provided with an excellent level of protection within the current system.

- 2013 – 83% (24 findings of professional misconduct in respect of the 29 complaints dealt with)<sup>2</sup>
- 2014 – 83% (24 findings of professional misconduct in respect of the 29 complaints dealt with)<sup>3</sup>
- 2015 – 83% (25 findings of professional misconduct in respect of the 30 complaints dealt with)<sup>4</sup>
- 2016 – 79% (22 findings of professional misconduct in respect of the 28 complaints dealt with)<sup>5</sup>
- 2017 – 81% (21 findings of professional misconduct in respect of the 26 complaints dealt with)<sup>6</sup>

---

<sup>1</sup> According to the figures published on page 9 of the Scottish Solicitors' Discipline Tribunal Annual Report 2018 available at: <https://www.ssdtd.org.uk/media/351671/annual-report-2018.pdf>

<sup>2</sup> According to the figures published on page 12 of the Scottish Solicitors' Discipline Tribunal Annual Report 2013 available at: <https://www.ssdtd.org.uk/media/21463/annual-report-2013-final.pdf>

<sup>3</sup> According to the figures published on page 16 of the Scottish Solicitors' Discipline Tribunal Annual Report 2014 available at: [https://www.ssdtd.org.uk/media/40518/annual-report\\_final.pdf](https://www.ssdtd.org.uk/media/40518/annual-report_final.pdf)

<sup>4</sup> According to the figures published on page 24 of the Scottish Solicitors' Discipline Tribunal Annual Report 2015 available at: <https://www.ssdtd.org.uk/media/99995/annual-report-2015.pdf>

<sup>5</sup> According to the figures published on page 18 of the Scottish Solicitors' Discipline Tribunal Annual Report 2016 available at: <https://www.ssdtd.org.uk/media/150398/annual-report-2016.pdf>

<sup>6</sup> According to figures published on page 10 of the Scottish Solicitors' Discipline Tribunal Annual Report 2017 available at: <https://www.ssdtd.org.uk/media/237010/annual-report-2017.pdf>

These figures evidence that the current criminal standard of proof is providing robust protection for consumers of legal services and by extension that there is no need to implement a change to the civil standard of proof.

As the consultation paper itself notes at paragraph 11, there is English case law which indicates that the criminal standard of proof should be applied to disciplinary proceedings involving legal practitioners.

We acknowledge that the comments in the case referred to in paragraph 12 of the consultation paper suggested a need to revisit the standard of proof issue, we submit that any change should be evidence-based.

The fact that other regulatory bodies have adopted the civil standard of proof is neither a sound basis for review nor a cogent argument for change.

The current standard of proof provides a necessary safeguard for those accused of wrongdoing in a complaints system which does not require corroboration and accepts hearsay evidence. 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.

In our strategy *Leading Legal Excellence 2015-2020*, we readily 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.

Unlike solicitors in England and Wales, Scottish solicitors are subject to both 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.

Third-party complaints are a particular concern for our in-house members (solicitors providing legal services to their employers and not the general public) as it 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.

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.

Solicitors 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 that this decision may now be taken on the lower standard of 'more likely than not'.

A move away from the criminal standard of proof would inevitably increase the risk of miscarriages of justice against individual solicitors.

We submit that the consistently high rate of successful prosecutions before the Tribunal is evidence contradicting the argument for change as there is appropriate protection afforded to the public in the current system.

Given that the lack of evidence highlighting the need for change it is submitted that the argument for change has not been made.

## **2. If so, should this be implemented by way of a Tribunal Rule?**

Given our position as outlined in response to the first question posed by the consultation, we do not propose to discuss how any change should be implemented.

**For further information on this response, please contact:**

Antony McFadyen  
Senior Solicitor, Professional Practice Team  
Law Society of Scotland  
[antonymcfadyen@lawscot.org.uk](mailto:antonymcfadyen@lawscot.org.uk)