



Scottish Solicitors'
Discipline Tribunal

Standard of Proof Consultation – Decision

December 2019

1. The Scottish Solicitors Discipline Tribunal met on 6 December 2019 to consider the responses to its recent consultation on the standard of proof.
2. Although there is no statutory requirement for any particular standard of proof, the Scottish Solicitors Discipline Tribunal has always applied the criminal standard of proof in professional misconduct cases. There is judicial precedent for this. Historically, it was also applied by other professional disciplinary bodies. However, there has been a shift towards use of the civil standard in recent years, particularly since the recommendations following the Shipman Inquiry.
3. In March 2019, the Tribunal opened a consultation on two questions:
 - Should the Tribunal apply the civil standard of proof in professional misconduct proceedings?
 - If so, should this be implemented by way of a Tribunal Rule?
4. The Tribunal received nineteen responses. These came from individual solicitors, the Council of the Law Society of Scotland, the Regulatory Committee of the Law Society of Scotland, The Legal Defence Union, The Scottish Legal Complaints Commission, the Scottish Social Services Commission, the Society of Solicitor Advocates, the Scottish Law Agents Society, LawCare, the Society of Solicitors and Procurators for Stirling and the Glasgow Bar Association. Of the nineteen responses, fifteen supported the status quo. Four supported a change to the civil standard of proof.
5. Overall, individual solicitors and the bodies which represent solicitors accused of misconduct were in favour of the *status quo*. It is those consultees which could potentially be adversely affected by any change. Those groups already using the civil standard and others who might benefit from it, supported change. This trend was neatly encapsulated by the two responses from the Law Society of Scotland. The Council supported the status quo, but the Regulatory Committee suggested the civil standard was appropriate.
6. Those who support the criminal standard of proof noted the punitive sanctions available to the Tribunal and the devastating effect these can have on individuals' careers and lives. They likened findings of misconduct to criminal convictions and suggested that they should only be employed where a case against a solicitor has been proved beyond reasonable doubt.
7. Several consultees said it was not sufficient just to "follow the crowd" without evidence that the change was necessary or desirable. The high conviction rate was highlighted as an example

of how the system appears to work in the prosecution's favour. It was said that this demonstrated that the public is protected and there is no need to further skew the balance against solicitors. Proponents of the criminal standard of proof said it provided a safeguard for accused solicitors in a system which does not have the protections criminal courts offer.

8. 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. Supporters of the criminal standard said that changing the standard of proof could risk the confidence of the profession in the Tribunal. Particularly in the short term, any change would create uncertainty among Tribunal users about the quality of evidence required. They said it would increase the risk of miscarriages of justice against solicitors.
10. Some Tribunal users noted that the issues before the Tribunal are rarely evidential and usually turn on their merits. There was a suggestion that the Tribunal is likely to look for the same clear and cogent evidence of misconduct and that a change to the standard of proof is unlikely to change the conviction rate.
11. Consultees in favour of change pointed out that the consequences for lawyers were no less severe than members of other professions which used the civil standard. Other regulators had moved to the civil standard as part of best regulatory practice. There were few remaining professions still using the criminal standard. They highlighted the positive effect a change might have on public protection and public perception. They noted that barristers and solicitors in England and Wales would soon be judged by the civil standard and questioned why Scottish solicitors should be subject to a different standard of proof.
12. It was suggested that using a universal standard of proof would create some clarity in a confusing system. One body thought that it should lead to earlier resolution of cases which would ultimately save resources.
13. Four consultees supported the standard of proof being clarified in a rule (whether that is the criminal or civil standard). Two were against this and suggested that the Tribunal might be acting beyond its powers and against ECHR authorities if it were to effect change in this way.
14. The Tribunal reflected that its purpose was to protect the public from harm and maintain public confidence in the legal profession. It must act within the legislative framework and the principles of natural justice.
15. The Tribunal carefully considered all the responses to the consultation. It noted that the issue was not straightforward. There were good and valid arguments on both sides.

16. The Tribunal considered that the consequences for solicitors found guilty of misconduct could be extremely serious. However, other very important decisions are based on the balance of probabilities, for example, property rights and child custody and contact arrangements.
17. The Tribunal considered the public perception of continuing to use the criminal standard when other tribunals and regulators apply the civil standard of proof. On one view, public confidence might be enhanced if a lower standard of proof was employed. However, the confidence of the public and the profession would not be maintained if a lower standard of proof resulted in injustice to solicitors accused of professional misconduct.
18. The Tribunal noted most of the responses were in favour of the use of the criminal standard. There was also a lack of evidence upon which to justify change. The Tribunal was mindful that it did not want to inadvertently create inequality between the parties.
19. There was no suggestion from consultees or others that the current regime created injustice. On the face of it, the conviction rate is high. Proponents of the criminal standard used the conviction rate to justify the continuing use of the criminal standard. However, the Tribunal did not have information regarding the cases which were not prosecuted due to the regulator assessing that there was insufficient evidence to satisfy the criminal standard of proof. It was difficult therefore to assess the value of the conviction rate in this context.
20. The Tribunal noted the recent Review of Legal Services Regulation in Scotland.¹ A formal Scottish Government response to the report will be published in due course. The standard of proof might be considered as part of that wider review which the Tribunal hopes will also tackle pressing issues such as the delay in complaints reaching the Tribunal and the absence of a fitness to practise regime.
21. Therefore, the Tribunal considered that it was not appropriate at this stage to alter the standard of proof applicable in misconduct proceedings. There was no evidential basis to apply a different standard. It was not appropriate to change it for the sake of perception only. It would be unwise to change one part of a whole system which is already under review and which might be altered by legislation in due course. However, the Tribunal considered that it would be prudent to keep the matter under review in the light of the experience of the Solicitors Disciplinary Tribunal in England and Wales and the result of the Government's response to the Robertson Review.
22. The Tribunal having decided not to alter the standard of proof, did not have to determine the answer to the second question in the consultation document which asked how any change should be made.

¹ ['Fit for the Future' Report of the Independent Review of Legal Services Regulation in Scotland by Esther Robertson](#)