



Scottish Solicitors'
Discipline Tribunal

Consultation on Standard of Proof

June 2024

Introduction

1. The Scottish Solicitors' Discipline Tribunal is an independent formal judicial body constituted by statute.¹ It is subject to the appellate jurisdiction of the Court of Session.
2. The Tribunal deals with the following business:
 - Complaints of professional misconduct;²
 - Complaints that a solicitor has been convicted of an act involving dishonesty or any other criminal offence which resulted in a fine equivalent to level 4 on the standard scale or imprisonment of more than 12 months;³
 - Appeals stemming from the Law Society's determinations regarding unsatisfactory professional conduct;⁴ and
 - Applications for restoration to the roll of solicitors in Scotland.⁵
3. The burden of proof in professional misconduct cases is on the Complainer (usually the Law Society of Scotland). The facts in a misconduct case must be proved to the criminal standard of proof (beyond reasonable doubt). In respect of all other matters, the civil standard of proof (balance of probabilities) is applied.
4. The Tribunal is governed by the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 which are approved by the Lord President.⁶ Hearsay evidence is admissible. There is no requirement for corroboration.
5. The Tribunal can impose a range of sanctions from censure at the lowest end of the scale to strike off at the highest.
6. The Tribunal's mission statement is to ensure so far as possible that all cases brought before the Tribunal are dealt with in accordance with the legislative framework and the principles of natural justice, bearing in mind the importance of protecting the public from harm and maintaining public confidence in the legal profession. The Tribunal endeavours to deal with

¹ Under Sections 50-54 and Schedule 4 of the Solicitors (Scotland) Act 1980 as amended

² Section 53(1)(a) of the 1980 Act

³ Section 53(1)(b) of the 1980 Act

⁴ Section 42ZA(9), (10), (11) and (12) of the 1980 Act

⁵ Section 10 of the 1980 Act

⁶ Section 52(2) of the 1980 Act. The Scottish Solicitors' Discipline Tribunal Procedure Rules 2024 will apply to all Complaints, Appeals and Applications lodged after 1 September 2024.

cases efficiently and expeditiously. The Tribunal has a duty to be independent, impartial and transparent.

7. Further information on the Tribunal can be obtained from its [website](#) and its most recent [annual report](#).
8. In March 2019, the Tribunal consulted on whether it ought to continue to use the criminal standard of proof in professional misconduct cases. It received nineteen responses. Fifteen supported the status quo. Four supported a change to the civil standard of proof. Overall, individual solicitors and the bodies which represent solicitors accused of misconduct were in favour of the *status quo*. 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.
9. In December 2019, the Tribunal decided to keep using the criminal standard for professional misconduct cases. The Tribunal highlighted 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.⁷
10. The Tribunal recently consulted on new procedural rules which included a rule setting out the use of the criminal standard of proof in professional misconduct cases. The Lord President 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.⁸

Standard of Proof

11. Currently, the Scottish Solicitors Discipline Tribunal applies the criminal standard of proof in cases of professional misconduct. The Tribunal invites views on whether it should instead apply the civil standard.
12. There is no statutory requirement for a particular standard, but the Tribunal has always employed the criminal standard in misconduct cases. 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.
13. In England and Wales, the Solicitors Disciplinary Tribunal and the Bar Standards Board now apply the civil standard of proof to all their proceedings. The Faculty of Advocates and the

⁷ See [Regulation of Legal Services \(Scotland\) Bill](#)

⁸ [Sheriff John Brown case](#)

Royal College of Veterinary Surgeons, along with the Scottish Solicitors' Discipline Tribunal, are the only other professional disciplinary bodies in the UK which still apply the criminal standard of proof.

14. There is English case law which indicates that the criminal standard of proof should be applied to disciplinary proceedings involving legal practitioners. In [Campbell v Hamlet \[2005\] UKPC 19](#) the Privy Council stated:
“that the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt.”
15. However, the comments in [Solicitors Regulation Authority v Solicitors Disciplinary Tribunal \[2016\] EWHC 2862](#) (also known as the “Arslan judgment”) suggested that the courts are of the view that there is a need to revisit the standard of proof issue, although that case was not the appropriate vehicle for doing so.
16. Proponents of the civil standard argue that it is not in the public interest for solicitors to avoid a disciplinary sanction when it is more likely than not that they are guilty of professional misconduct. This could be perceived by the public as working in the interests of the profession and not the public or consumers. There is an argument that professional misconduct cases involving solicitors should not be subject to a different standard of proof than other professions. It is said that it is not appropriate to apply the criminal standard in civil proceedings.
17. On the other hand, the standard of proof might provide a safeguard for those accused of wrongdoing in a system which does not require corroboration and accepts hearsay evidence. Those who support the criminal standard argue that the consequences of a disciplinary finding for a professional in terms of the loss of livelihood and reputation are so serious that those consequences should only flow when the Tribunal is in no doubt that professional misconduct has been established.⁹ The Tribunal should not alter the standard of proof just because other bodies have done so and any decision should be evidence-based.
18. The Scottish Solicitors Discipline Tribunal wishes to review again the appropriate standard of proof to apply in professional misconduct cases. In accordance with its mission statement, it will have regard to the principles of natural justice, the protection of the public from harm and maintenance of public confidence in the legal profession. To inform its consideration, the Tribunal wants to seek wider views about the issue from the profession, the public and other stakeholders.

⁹ Treverton-Jones et al., *Disciplinary & Regulatory Proceedings* (9th ed) paragraph 9.49

Question

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

Responses

Please send your responses to the Tribunal Office by email before **5pm on 13 September 2024**.

Please use the response form on page 5 and email this document to enquiries@ssdt.org.uk using the subject heading 'Standard of Proof'. Please make it clear in your response if you do not wish it to be shared outside the Tribunal.

Response Form

Please email the completed document to enquiries@ssdt.org.uk with the subject heading
"Standard of Proof"

Name:

Organisation:

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

Response:

Consultees

Architects Registration Board
Association of Commercial Attorneys
Bar Standards Board
Citizens Advice Scotland
Citizens Advice Scotland Access to Justice Sub Group
Equality and Human Rights Commission
Faculty of Advocates
General Medical Council
General Teaching Council for Scotland
Institute of Chartered Accountants in Scotland
LawCare
Law Society of England and Wales
Law Society of Scotland
Legal Defence Union
Legal Services Board and Legal Services Consumer Panel, England & Wales
Lord President
Nursing and Midwifery Council
Professional Standards Authority
Royal College of Veterinary Surgeons
Society of Solicitors in the Supreme Courts of Scotland
Scottish Consumer Council
Scottish Legal Complaints Commission Board
Scottish Legal Complaints Commission Consumer Panel
Scottish Civil Justice Council: Access to Justice Committee
Scottish Courts and Tribunal Service
Scottish Law Agents Society
Society of Solicitor Advocates
Solicitors Disciplinary Tribunal, England and Wales
Solicitors Regulatory Authority
The Bar Council, England & Wales
Which?
WS Society