

CONSULTATION RESPONSE

Response to the Scottish Solicitors' Discipline Tribunal Rules Consultation 2019

13 January 2020

A. INTRODUCTION

The SLCC welcomes the opportunity to respond to the Scottish Solicitors' Discipline Tribunal (SSDT) Rules Consultation 2019. We have only responded to those areas where we have specific comment to make.

B. ABOUT US

The Scottish Legal Complaints Commission (SLCC) is an independent statutory public body providing a single point of contact for all complaints against legal practitioners operating in Scotland. The SLCC investigates and resolves complaints about inadequate professional services; refers conduct complaints to the relevant professional body¹ (RPO) and has oversight of complaint handling across the legal profession.

The RPOs provide us with copies of the relevant Tribunal decisions, in accordance with our agreed liaison arrangements.

We do not have oversight of the SSDT's handling of conduct complaints. However, our oversight function in respect of the conduct complaint is resurrected where the SSDT remits a complaint back to the LSS, if it considers that the complaint does not meet the *Sharp* test², but could, potentially, amount to Unsatisfactory Professional Conduct³.

Our [annual report](#)⁴ and [website](#)⁵ have more information on our work.

C. OUR RESPONSE

We welcome the SSDT's proposals to update its Rules, particularly to ensure that the Rules reflect procedures and practice to aid consistency and ensure all parties know

¹ The Relevant Professional Organisations are the Law Society of Scotland; Faculty of Advocates and Association of Commercial Attorneys

² *Sharp -v- The Council of the Law Society of Scotland* 1984 SLT 313 per Lord President Emslie

³ Section 46 Legal Profession and Legal Aid (Scotland) Act 2007

⁴ <https://www.scottishlegalcomplaints.org.uk/about-us/who-we-are/our-annual-report/>

⁵ <http://www.scottishlegalcomplaints.org.uk>

what to expect, to support the Tribunal's purpose of protecting the public from harm and maintaining public confidence in the legal profession, and to achieve the Tribunal's aim to create user-friendly Rules in plain English which assist parties and further the objectives of the Tribunal.

The SLCC, along with the SSDT and other stakeholders, is currently feeding into discussions on proposals for the reform of legal services regulation, following the publication of the Robertson Review. We believe that many of the challenges identified by the Rules Group in this consultation are the product of more fundamental issues with the structure of the present regulatory model, including the strictures of the current statute. We therefore welcome the constructive approach the SSDT has shown towards those reform discussions. We recognise that some of the improvements we would like to see are not within the gift of the SSDT to deliver in updating its Rules, and we have therefore restricted our comments here to issues SSDT can address through this work. However, we very much look forward to working with the SSDT and others to explore opportunities for improvements that could be made to the existing legislation, and to more ambitious longer term reform. We have noted where we believe there may be opportunities for further discussion on some of these issues.

Standard of Proof

We note that the SSDT has recently published its decision on whether to alter the standard of proof which applies in misconduct proceedings.

The SLCC responded⁶ to the SSDT's consultation on this issue in July 2019, stating that our general view is that for all legal complaints, the standard should be 'on the balance of probabilities'. This is on the basis that the far higher standard of 'beyond reasonable doubt' is now anachronistic in risk-based professional regulation, with most other professional regulators (both in the UK and abroad) having moved away from this approach⁷.

⁶ <https://www.scottishlegalcomplaints.org.uk/about-us/rules-policies-and-publications/ssdt-consultation-on-standard-of-proof/>

⁷ This includes the Bar Standards Board, the Solicitors Discipline, health professions regulators, the General Teaching Council for Scotland, the Scottish Social Services Council and Actuarial Disciplinary Board.

We believe that this change would assist in removing another layer of complexity in an already complicated process, and an inconsistency in the evidence required at different stages of the process. It would also provide reassurance to the public and the profession that an up-to-date, proportionate and logical approach is being taken to the regulation of Scottish solicitors.

We are very disappointed that the Tribunal has decided not to alter the standard of proof, and we hope that it might reflect further on this decision. We note the SSdT's comment that "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"⁸, although we welcome the commitment 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"⁹.

However, with the debate about wider reform ongoing, we would reiterate our view that this is a missed opportunity for the SSdT to bring its standard of proof in line with what is already the norm in other comparable regulatory sectors. The SLCC believes this was also an opportunity to show the current system could modernise itself to be more focussed on the public interest, and that by failing to seize that opportunity the case is only strengthened that the Scottish Government must intervene and create a governance model willing and able to change.

We would generally agree with the Rules Group's view that the standard of proof should be codified in the new Rules. However, with the SSdT stating its intention to keep the matter under review, we would be concerned if codifying this within the Rules could present a barrier to future timely amendment, should the SSdT's decision change, and would welcome assurances that this would not be the case.

⁸ <https://www.ssdtd.org.uk/media/425562/standard-of-proof-decision.pdf>

⁹ <https://www.ssdtd.org.uk/media/425562/standard-of-proof-decision.pdf>

Pleadings

We welcome the Rules Group's objective to simplify the system to ensure that proceedings are flexible and user-friendly for everyone engaging with it; in particular Respondents, Appellants and Secondary Complainers representing themselves.

We note that as SSDT hearings follow investigations by the Law Society of Scotland (and potentially by the SLCC where there have also been service issues raised), all parties are likely to have already been required to respond to the complaint, and that this evidence should be able to inform the SSDT's consideration and decision making, including where a Respondent does not provide Answers. This should also resolve the issue raised in relation to Lodging of Answers (Rule 9).

The consultation paper states that "the Rules Group wish to consult on how Complaints should be brought before the Tribunal". We believe there is a broader discussion to be had about the current process for dealing with conduct complaints, which includes how Complaints are brought before the Tribunal, as well as related procedures which take place prior to and following Tribunal proceedings. The SLCC would welcome the opportunity to discuss this further with the SSDT, and the Law Society of Scotland, to consider what improvements might be made. We believe this might prove useful in informing the SSDT's thinking and provide practical solutions for some of the issues raised in this consultation, including in relation to Pleadings, Answers and Compensation Hearings.

Service and Electronic Communication

The SSDT should seek to use the most appropriate methods of communication for the task, and it would make sense for the Rules to enable this, although it may be better to avoid specifying these to allow for changes in available communication methods, or the needs of a particular case or party. We would welcome the Tribunal giving consideration to the implications of this for accessibility and vulnerability, ensuring that parties are not negatively affected by the use of a particular method of communication, and to take advantage of the opportunities afforded by electronic communication. For example, the proposal for Rule 11 to be amended to remove the requirement to give notice by post or Sheriff Officer, could instead allow for electronic notices to be sent,

meeting the need to remove slower/ less cost-effective methods, while still ensuring a reminder to attend is issued.

Compensation Hearings

We believe the arrangements for compensation should be provided for in the Rules. This would ensure all parties know what to expect.

The current arrangements would benefit from being more consumer friendly, removing barriers to participation (for example having to request an extra hearing, or potentially paying a bond of caution). Secondary Complainers should never be in the position of having to decide not to pursue or continue with an appeal or a claim for compensation because the cost or risk of cost is prohibitive.

We believe that the suggestion that there could be “provision for a Tribunal or one of the Chairs/Vice Chairs to deal with compensation based on the papers submitted rather than convening a hearing” warrants further consideration. Should this reduce the burden on the Secondary Complainer and ensure swift redress, then it would be welcome. However, this proposal would need to be assessed for any unintended consequences on the likelihood of Secondary Complainers being disadvantaged in terms of likelihood of receiving redress or the amount of redress awarded. As a point of principle, Secondary Complainers should not be materially disadvantaged by any change to the arrangements for Compensation Hearings.

If this provision were to be agreed, consideration would also need to be given to how to ensure Secondary Complainers are kept informed about the process and outcome of the Complaint, and any subsequent compensation decisions.

We believe that it should be expected that an understanding of any Secondary Complainer’s loss, inconvenience or distress that may inform a case for compensation to be awarded will have been considered as part of the LSS’s investigation into the conduct complaint, and should therefore be available to the SSDT in order to make a decision on this matter without requiring any further investigation or hearing by the Tribunal. This would be in keeping with the current Rule 5, which states that “it shall

be the duty of the Council [...] to ascertain from every secondary complainer whether that secondary complainer claims to have been directly affected by that misconduct and wishes to seek compensation for any loss, inconvenience or distress resulting from it"¹⁰.

Should the SSDT decide to proceed with changes to the Rules relating to compensation or Compensation Hearings, we would be keen to discuss this further.

We also note the SSDT's comments to the Robertson Review¹¹ regarding compensation, and we welcome its commitment to both seeking ways to make the current system work more effectively for Secondary Complainers, and advocating for a more consumer friendly compensation process than is possible within the current legislation.

Vulnerable Witnesses

We very much welcome the SSDT giving consideration to this issue. We believe that the SLCC Consumer Panel's work on consumer vulnerability¹² may be helpful in the SSDT's consideration of a broad and flexible definition of vulnerability that considers how both individuals' circumstances and characteristics can impact on the likelihood of them being considered at risk of vulnerability, as well as broader consideration being given to the needs of vulnerable witnesses (and indeed vulnerable accused) across the justice system. While we would welcome a commitment to specify within the Rules that special measures can be accommodated by the Tribunal, and potentially some examples given, we do not believe the Rules should limit those measures to the extent that the SSDT is not able to provide any particular practicable measure that an individual vulnerable witness may require, simply because it is not included in the Rules. It would be more helpful for the Rules to outline how vulnerability will be assessed, considered and acted upon than to detail specific measures. We would specifically highlight that Secondary Complainers may often display vulnerabilities in dealing with procedures like an SSDT hearing.

¹⁰ <https://www.ssd.org.uk/media/25808/tribunal-rules-2008.pdf>

¹¹ <https://www2.gov.scot/Resource/0053/00535377.pdf>

¹² <https://www.scottishlegalcomplaints.org.uk/about-us/consumer-panel/vulnerable-consumers/>

Respondents lacking mental capacity/suffering from a mental disorder

We are not best placed to comment on this issue. However, we agree that, in the absence of a fitness to practise regime for solicitors, careful consideration should be given to how the Tribunal can best ensure the public are protected from potentially harmful actions.

Responsibility for Secondary Complainers

We note the issues raised in the consultation in relation to the responsibility which Rules 4 and 5 place on the Complainers regarding Secondary Complainers. We believe that Secondary Complainers should have a right to their interest in the case being communicated to the Tribunal, and to be contacted and kept informed about the process and outcome of the case, as well as any subsequent compensation arrangements or decisions. We believe the Complainers are best placed to fulfil this role. Should any changes to these Rules be considered, consideration would need to be given to how to ensure that the rights of Secondary Complainers are not affected.

We refer to our previous suggestion of a broader discussion between the SSDT, the Law Society of Scotland and the SLCC about the current process for dealing with conduct complaints, as we believe the matter identified here by the Rules Group (“Rules 4 and 5 refer to complaints made on behalf of any secondary complainer but Complaints are made to the Tribunal under Section 51(1) by the Council, not on behalf of secondary complainers”) would benefit from further detailed consideration and discussion.

Duplication of complaints

We broadly support Rule 17 which allows two or more complaints against the same Respondent to be conjoined, but we believe the SSDT should give further consideration to the implications of this (and any other proposals, such as allowing for two Complaints against different Respondents to be conjoined) for issues such as potential limits on available sanctions, confidentiality, the impact of potential delays on parties and on the public interest and public protection; and clarify its approach.

Amendment of complaint or appeal

We note that Rule 45 allows the Tribunal to make or permit an amendment to any allegation contained in a complaint. However, we would welcome clarification on the implications of this for the original complaint expressed by Secondary Complainants, particularly in circumstances where the complaint is then remitted back to the LSS, for consideration as Unsatisfactory Professional Conduct.

We therefore recommend:

- **that the Tribunal keep the standard of proof under review and should provide an assurance that codifying the current standard within the Rules would not present a barrier to future timely amendment, should the SSDT's decision change**
- **that the SSDT work with the Law Society of Scotland and the SLCC to consider what improvements might be made to the current process for dealing with conduct complaints**
- **that further proposals should be brought forward for consultation to make arrangements for compensation more consumer friendly and to ensure swift redress, and that these arrangements should be provided for in the Rules**
- **that any proposals for changes to Rules regarding Secondary Complainers are brought forward for further consultation to ensure that their rights are not affected**
- **that the Rules Group should ensure it seeks views from consumers and consumer organisations on its proposals, as they develop.**

Conclusions

We hope these comments are helpful and are grateful for the opportunity to contribute to the consultation. The SLCC would like to offer its assistance to the Rules Group as it considers its proposals further. We have significant experience of supporting bodies

to develop and update their Rules, and believe we could provide useful insight from this to the Tribunal. We also believe this is an opportunity for the SSDT to consult more widely and draw in learning and perspectives from different organisations, including other tribunals, consumers and consumer organisations. We hope to be able to discuss these matters further with the SSDT as this work develops.