

CONSULTATION RESPONSE

**Response to the Scottish Solicitors' Discipline Tribunal's
consultation on the Standard of Proof - March 2019**

Dated: 02 July 2019

1. INTRODUCTION

- 1.1 We welcome the opportunity to respond to the Scottish Solicitors' Discipline Tribunal's ('the SSDT) consultation on the standard of proof applied in the prosecution of conduct complaints.

2. ABOUT US

- 2.1 The Scottish Legal Complaints Commission ('the SLCC') is an independent statutory non departmental public body providing a single point of contact for all complaints about legal services provided by Scottish qualified legal practitioners and their conduct.
- 2.2 We act as the 'gateway' for all such complaints. Our role involves the assessment of eligibility, mediation and resolution, investigation and determination of complaints about inadequate professional services. We refer conduct complaints to the appropriate 'Relevant Professional Organisation' ('the RPOs')¹ for investigation and determination.
- 2.3 We have oversight of complaint handling across the RPOs and the legal profession. We routinely monitor the RPOs' approach to conduct complaints, including their reporting and decision-making.
- 2.4 The RPOs provide us with copies of the relevant tribunal decisions, in accordance with our agreed liaison arrangements.
- 2.5 The Law Society of Scotland ('the LSS') updates us when a decision is made not to prosecute a complaint, and the reason for that. This includes the situation where the LSS appointed 'fiscal' recommends (who is an in-house solicitor employed by the LSS) that a prosecution should not be pursued, and the complaint should be remitted back to one of the LSS's Professional Conduct Sub Committees ('the Sub Committee') for reconsideration.

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

- 2.6 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.
- 2.7 Our [annual report](#)⁴ and [website](#)⁵ have more information on our work.

3. OUR RESPONSE

Q1. Should the Tribunal apply the civil standard of proof in professional misconduct proceedings

- 3.1 We are aware that since the launch of the SSDT's consultation, the Bar Standards Board has changed to the civil standard of proof and the Solicitors Discipline Tribunal has applied to the Legal Services Board for approval to alter its rules to follow the same approach. Our general view is that the SSDT should be moving in line with these other, comparable disciplinary bodies, for the reasons set out below.
- 3.2 We set out our policy position regarding the application of the standard of proof in legal disciplinary proceedings in our response to the Robertson Review⁶. Our general view is that for all legal complaints, the standard should be 'on the balance of probabilities', which would replace the far higher standard of 'beyond reasonable doubt', which is now anachronistic in risk-based professional regulation. Most other professional regulators (both in the UK and abroad) moved away from this approach some time ago, such as the health professions

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/media/95109/slcc-annual-report-2017-18.pdf>

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

⁶ <https://www.scottishlegalcomplaints.org.uk/media/1471/reimagine-regulation-appendices-to-our-roadmap.pdf>

regulators, the General Teaching Council for Scotland, the Scottish Social Services Council and Actuarial Disciplinary Board.

3.3 Adopting a civil standard of proof is generally accepted as being best regulatory practice across the professions. Over the years, we have called upon the RPOs to review their application of the criminal standard in complaints alleging Professional Misconduct, to fall in line with other professional regulators. To date, neither RPO has voluntarily adjusted its attitude, despite the fact there is no statutory obligation to apply this high bar when dealing with conduct complaints.

3.4 We believe that the application of the civil standard would:

- ensure that public interests are at the forefront, rather than those of legal professionals, who may otherwise evade disciplinary sanctions due to evidential, or what is often perceived as ‘technical’ reasons;
- increase public confidence in a process which would deliver a fairer, more cost effective, consistent and modern approach to disciplinary regulation of the legal profession; and
- provide an opportunity for earlier resolution of disciplinary matters, where it is more likely than not that a professional has fallen short of the expected standards. A shift to the civil standard should allow prosecutions to be more proportionate, and cost saving for the profession as a whole, due to the operation of a system where cases can be disposed of as efficiently and effectively as possible.

3.6 In addition to the public protection/interests and consistency arguments, is the need for clarity in an already existing complicated maze of legal regulation. We are acutely aware of the complexity of the current process for the investigation and determination of legal complaints, which includes the prosecution of potential Professional Misconduct through the SSDT’s disciplinary process.

3.7 The application of different standards of proof, particularly in the same complaint, is difficult to both explain and understand. Although the concept of the ‘hybrid issue’ has, for now, been dispelled by the Court of Session, there is still the possibility of a ‘hybrid complaint’, which requires complaints which

contain both service and conduct elements, to be investigated by both the SLCC and the RPO. A further level of complexity is added in a situation where the complaint is about a solicitor and the Sub Committee recommends prosecution before the SSDT.

- 3.8 The possibility of this scenario arising is not an unusual one. Our records show that approximately one third of those complaints dealt with by the SSDT in the last 10 years have also been investigated by both the SLCC and the LSS (or are still in the process of investigation). These three bodies apply different thresholds and standards to the evidence before them, at various times. All three bodies have different processes and policies in place and are governed by various legislative frameworks and Rules. In order to be able to successfully navigate each stage of the complaints process, the parties involved need to understand the systems, policies and procedures being applied. They also need to be aware of the relevant law and Rules and need to be able to make sense of how and when they differ, depending on whether the issue complained of is potentially Inadequate Professional Service, Unsatisfactory Professional Conduct or Professional Misconduct.
- 3.9 It is worth noting that the at the point of accepting a complaint for investigation, we often have limited evidence to prove a complaint one way or another. A complaint may be accepted for investigation based on what we have at the time of the eligibility assessment. Depending on the categorisation of the complaint, the standard or proof which is applied later down the line could be beyond reasonable doubt. This doesn't help to manage expectations early in the complaints process, where the bar for accepting a complaint is relatively low.
- 3.10 Where we categorise a complaint as having a conduct element to it, we do not state whether we think it is Unsatisfactory Professional Conduct or Professional Misconduct, we simply refer the conduct case to the LSS to carry out the investigation and make the assessment about whether the complaint can be proven, or not and if so, to gauge the seriousness of the complaint. Only those complaints which can be proven beyond reasonable doubt can be prosecuted before the SSDT (or could be upheld as Unsatisfactory Professional Conduct, if the complaint is considered to be insufficiently serious to meet the '*Sharp test*'). If a complaint can only be proven on the balance of probabilities, it can

only ever be Unsatisfactory Professional Conduct, regardless of its seriousness.

- 3.11 There is a further factor which complicates matters in the conduct decision process. The complaint cannot merely amount to Inadequate Professional Service. We often see cases where the Sub Committee has decided that there is enough evidence to prove the complaint, but it does not meet the conduct test.
- 3.12 While we appreciate that complaints prosecuted as potential Professional Misconduct can have very serious consequences for lawyers, not all conduct allegations are equally serious. We agree that findings and sanctions need to be proportionate, to protect both the reputation of the legal profession and the public interest.

Q2. If so, should this be implemented by way of a Tribunal Rule?

- 3.13 This seems to be the most sensible approach to effect this change.

4. OUR CONCLUSIONS

- 4.1 Our view is that there should be a change to the standard of proof applied by the SSDT, to ensure that this regulatory body falls in line with many of its counterparts. A change should assist in removing another layer of complexity in an already complicated process. Importantly, adopting a different approach should 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.
- 4.2 We hope these observations facilitate useful further discussion.
- 4.3 As always, we welcome further dialogue on this matters and can be contacted at consult@scottishlegalcomplaints.org.uk.