

ANNEX 4 Consultation Response

SOLICITORS DISCIPLINARY TRIBUNAL

RESPONSE TO THE CONSULTATION ON THE MAKING OF
PROCEDURAL RULES IN RELATION TO APPLICATIONS TO
THE TRIBUNAL

INDEPENDENT - IMPARTIAL - TRANSPARENT



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Introduction

1. The Tribunal is constituted as a statutory tribunal under Section 46 of the Solicitors Act 1974. The Tribunal adjudicates upon alleged breaches of rules or the Solicitors Code of Conduct, which are designed to protect the public and maintain public confidence in the legal profession, by defining standards for honesty, probity, trustworthiness, independence and integrity. The Tribunal also adjudicates upon the alleged misconduct of recognised bodies, registered foreign lawyers and persons employed by solicitors. It also hears applications for restoration to the Solicitors' Roll.
2. Solicitor Members of the Tribunal are wholly independent of the Council of the Law Society and have no connection with the Solicitors Regulation Authority ("the SRA"), which instigates over 90% of the cases currently dealt with by the Tribunal.
3. Section 46 of the Solicitors Act 1974 enables the Tribunal to make rules about its procedures. The Tribunal already has rules in place (the Solicitors (Disciplinary Proceedings) Rules 2007 (2007 No.3588)) ("2007 Rules") which are used in relation to the Tribunal's disciplinary jurisdiction. The Tribunal considers that it needs to update these rules.
4. The Tribunal is also empowered to deal with appeals of various kinds. The Tribunal's rules in respect of its appellate jurisdiction are the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 (2011 No.2346) ("Appeal Rules"). As was the case at the time of the consultation, there are no current proposals to change the Appeal Rules.
5. Between 16 July 2018 and 8 October 2018 the Solicitors Disciplinary Tribunal ("the Tribunal") consulted on the making of procedural rules in relation to applications to the Tribunal. The Tribunal published its consultation paper on its website and sent a link to the consultation to the list of consultees at Appendix C of that document and also to the Royal College of Veterinary Surgeons. Consultees were invited to respond to the following questions:
 - (a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?
 - (b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

- (c) Do you consider that the other provisions in the draft rules are fit for purpose?
 - (d) If the answer to question (c) is no, please explain why.
 - (e) Do you have any detailed comments on the drafting of the proposed rules?
 - (f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?
6. This document summarises the responses received, the Tribunal’s decisions and the proposed next steps.

Outcome of the Consultation

- 7. Twenty eight external responses were received. A list of all external respondents is at Annex 2 together with a copy of the responses received.
- 8. Six responses were also received from Members of the Tribunal. Apart from some very specific drafting points the points contained in the Members’ responses were raised in the external responses received.

Summary of Responses- By Question

- 9. Not all of the external respondents answered all questions. In addition a number of consultees responded to certain questions indicating that they had no comment.

Question A – 28 responses

Question B – 18 responses

Question C – 15 responses

Question D – 9 responses

Question E – 18 responses

Question F – 21 responses

- 10. Set out below is a Summary of Responses by the themes that arose from the responses. Additionally, at Annex 1 there is a summary of the responses provided.

11. The responses received that related to specific drafting points have been considered and addressed as part of the analysis of the consultation responses. Lack of specific acknowledgement of such comments in this document should not be taken to mean that those suggestions have not been considered.

Summary of Responses – Themes arising from the consultation

12. The Standard of Proof

The Responses

- 12.1 The Tribunal received twenty eight responses in respect of whether or not the Tribunal should change its rules to allow for the civil standard of proof. The responses received covered a range of issues and are set out in more detail in Annex 1 and are appended in full at Annex 2. The key issues raised were public interest, protection and confidence and the impact on individual solicitors facing proceedings before the Tribunal.
- 12.2 The consensus amongst those who support the retention of the criminal standard of proof is that it provides sufficient safeguards to protect the public and maintain the reputation of the profession. Further it was argued that the criminal standard ensures that any allegations against an individual solicitor are thoroughly investigated prior to proceedings being instigated and that the evidence is tested before the Tribunal. Concern was raised that the civil standard of proof was inappropriate given the seriousness of professional misconduct proceedings and the impact on a solicitor's career if allegations, particularly those involving dishonesty, are found proved.
- 12.3 Those who supported a change from the criminal to the civil standard raised public perception, the fact that other regulatory bodies applied the civil standard and the lack of justification for the retention of the higher standard. They argued that retention of the criminal standard could be viewed as the profession protecting its members.

Comment

- 12.4 Under Rule 10 of the SRA Disciplinary Procedure Rules 2011, in deciding whether or not to instigate proceedings before the Tribunal, the SRA applies an evidential test. This test considers whether there is sufficient evidence to provide a realistic prospect that the application will be upheld by the Tribunal, whether the Tribunal is

likely to revoke a firm's authorisation or to impose a penalty that the SRA are unable to; and whether it is in the public interest to make the application.

12.5 The evaluation under the first limb of the evidential test will necessarily have to take into account the standard of proof applied by the Tribunal at the relevant time. The Tribunal does not anticipate that any change to its standard of proof would alter the investigation and evidence gathering that will be necessary before this test can be properly applied. Irrespective of the standard of proof that the Tribunal applies the Tribunal expects the parties to place cogent evidence before it. Whilst the SRA noted in its response that the use of the criminal standard of proof was costly the Tribunal does not consider that the costs of bringing proceedings will be affected by the standard of proof it applies because of the need for clear and cogent evidence.

12.6 The Tribunal will continue to scrutinise the evidence before it with as much care as ever in reaching its findings. It is clearly established that the more serious the allegation the more cogent the evidence needs to be to prove the allegation (Re B (Children) [2008] UKHL 35). This applies whichever standard of proof is applied. Robust decision making processes and careful, thorough evaluation of the evidence are already embedded as part of the Tribunal's decision making processes and are an important safeguard.

12.7 Irrespective of the standard of proof the Tribunal will continue to operate with the objective of ensuring that the standards and reputation of the solicitors' profession must be maintained. Bolton v The Law Society [1994] 1 WLR 512 sets out the fundamental principle and purposes of the imposition of sanctions by the Tribunal and states:

"...the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth ... a member of the public ... is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires." (per Bingham, then Master of the Rolls)

12.8 The Tribunal's overriding objective is to ensure that all cases brought before it are dealt with justly and in accordance with the Tribunal's duty to protect the public from harm. The Tribunal must ensure public confidence in the reputation of providers of legal services is maintained.

12.9 There is no empirical evidence to assist the Tribunal in reaching its conclusions as to which standard of proof it should apply. A number of the responses referred to suggested figures for a prosecution “success rate”. These figures had not been calculated by the Tribunal and may or may not be accurate. Reference to the type of allegation in the Tribunal’s Annual Report is categorised per allegation and not per case so there will be significantly more allegations than cases and the percentages quoted in the Annual Report need to be viewed in this context. There will be some cases in which some but not all allegations are proved. The information held by the Tribunal is as follows:

	2015	2016	2017	2018
TOTAL NUMBER OF CASES CONCLUDED	115	152	136	168
OF TOTAL CASES CONCLUDED HOW MANY WERE SUBSTANTIVE HEARINGS	100	130	118	107
OF SUBSTANTIVE HEARINGS, TOTAL WITH ALL ALLEGATIONS PROVED	72 (72%)	83 (64%)	91 (77%)	80 (75%)
OF SUBSTANTIVE HEARINGS, TOTAL WITH <u>SOME</u> ALLEGATIONS NOT PROVED	23 (23%)	43 (33%)	25 (21%)	25 (23%)
OF SUBSTANTIVE HEARINGS, TOTAL WITH ALL ALLEGATIONS NOT PROVED	5 (5%)	4 (3%)	2 (2%)	2 (2%)

12.10 In considering the above figures it should be noted that the figures for allegations proved include cases that proceeded to substantive hearing where the respondent admitted some or all of the allegations.

12.11 It is important to bear in mind that not every hearing before the Tribunal results in a solicitor being struck off. In 2018, 78 solicitors and 2 registered foreign lawyers were struck off; 85 solicitors received a fine; 20 solicitors received some form of fixed period suspension; 1 solicitor was indefinitely suspended and 3 Solicitors were reprimanded.

- 12.12 The Tribunal is alive to the potential impact on individual practitioners if the civil standard of proof is introduced. It is possible that a change to the standard of proof might result in the SRA referring more matters to the Tribunal because of a perception that it would be easier to secure a finding against a practitioner. However, balanced against this is the fact that SRA have significant disciplinary powers which they can and do exercise already for less serious matters of professional misconduct so that only the most serious professional misconduct is referred to the Tribunal. In other words, the criteria for deciding whether a case is referred to the Tribunal are based on the seriousness of the allegations, not the standard of proof. In any event, if there were to be an increase in the number of matters of serious professional misconduct referred to the Tribunal and found proved due to a change in the standard of proof then it is arguable that this would be in the public interest. This is because, on this hypothesis, it would have been proved that professional misconduct had occurred, and the reputation of the profession and public confidence would both be enhanced by appropriate sanction being applied. The safeguard for the practitioner is the right to appeal to the High Court.
- 12.13 The Tribunal hears allegations of professional misconduct, not allegations of criminal activity. In some cases the underlying conduct resulting in the proceedings before the Tribunal may have involved criminal activity. However this does not mean that the criminal standard of proof has to be applied. A simple example is in care proceedings, where the harm suffered by the child and which is the subject of the proceedings may have involved criminal activity but the civil standard of proof is applied.
- 12.14 The case law that does exist in relation to the standard of proof in proceedings before the Tribunal was quoted to oppose a change to the standard of proof. For the reasons that follow, the Tribunal does not consider that the fact judicial comment on the standard of proof has been made prevents any change the standard of proof.
- 12.15 The regulatory environment is significantly different from that which prevailed when the last relevant case on the standard of proof was decided (Re D [2008] UKHL 33). For example, the Bar Standards Board have adopted the civil standard. Whilst that decision does not influence the outcome of this consultation, the Tribunal noted that the same arguments as to whether or not the Bar Standards Board could alter its standard of proof were made as have been made in response to this consultation. The Tribunal notes that the decision of the Bar Standards Board to adopt the civil standard and the Legal Services Board's approval of this rule change have not been the subject of legal challenge.

12.16 The Tribunal has the power to make rules as to practice and procedure under s.46 of the Solicitors Act 1974 which provides:

“46.— Solicitors Disciplinary Tribunal.

[...]

(9) [The] Tribunal [...] may make rules—

(a)...

(b) about the procedure and practice to be followed in relation to the making, hearing and determination of applications and complaints”

12.17 A number of responses to the consultation argued that the Tribunal did not have the power to change the standard of proof through making new rules and that the way in which the standard of proof should be re-considered was through case law. The Tribunal has carefully considered these responses but remains of the view that it can alter its standard of proof by way of bringing forward new rules.

12.18 The Tribunal considers that a rule as to standard of proof falls within the ambit of “procedure and practice”. None of the cases relied on by those who argue case law prevents a change to the standard of proof in this way actually state or even imply that any rule making/amending power should be constrained in the manner contended. Whilst the Tribunal must, of course, apply the case law referred to, it does not follow that it cannot change its rules so as to introduce a new standard of proof.

12.19 Dealing briefly with some of the cases mentioned in the responses, Campbell v Hamlett 2005 UKPC 19 (which was an appeal an appeal by a Trinidadian lawyer who had been accused of dishonestly retaining the purchase monies for a property) was qualified as to whether the criminal standard should be followed in all cases of solicitors discipline and as a decision of the Privy Council, not strictly binding on an English court. Lord Carswell’s statement in Re D 2008 UKHL 33 that the criminal standard of proof is required in disciplinary proceedings was obiter. It was not directed to the issue now under consideration and is also now out of date as far as it suggested that the criminal standard of proof applied generally to professional disciplinary proceedings; that is certainly no longer the case.

12.20 The highest the case for a criminal standard of proof being required by the ECHR (or consequentially Human Rights Act 1998) is put is that there is a “*strong argument*” to that effect. No case is cited which actually endorses that principle and the Tribunal does not accept that there could not be a fair trial if the civil standard was applied.

- 12.21 The Tribunal will make express provision as to the standard of proof in its proposed new rules. It is for the Tribunal to decide the appropriate way forward. The Tribunal is aware of the argument that its being in a minority amongst other similar tribunals means it should therefore alter its standard of proof, but it considers this argument irrelevant. The Tribunal will adopt the standard of proof that it considers, having evaluated all of the responses and submissions made, is appropriate. It is not swayed by arguments that it should change simply because it is out of step with other regulated legal professionals.
- 12.22 The Tribunal acknowledges that there is no clear difference between solicitors and other professions that on the face of it would justify a different standard of proof for proceedings before the Tribunal. Solicitors do not have an inherently different role in terms of public interest and protection than say doctors. In both professions the protection of the public is crucial.
- 12.23 The Tribunal has noted that the views of the SRA and Law Society are diametrically opposed on this issue. The Tribunal is aware, from the responses to the consultation, that the views of those within and outside the profession are also, to a large extent, opposed. The Tribunal has fully considered and debated the points made by those both for and against a change.
- 12.24 Having carefully considered all of the responses the Tribunal has ultimately concluded that in the context of proceedings before it the standard of proof that should be applied is the civil standard of proof. The Tribunal is satisfied that the decision it has taken is in its view in the best interests of the public and the profession and that it is in the public interest for the standard of proof to be changed.
- 12.25 In the Tribunal's opinion the civil standard provides better public protection as it allows for findings to be made where it is more likely than not there has been professional misconduct. This would be consistent with the apparent consensus outside the solicitors' profession (demonstrated by the fact that all other professional regulators except vets have adopted the civil standard, and by responses to the consultation from outside the profession) that the public interest is better protected by the civil standard. Having taken into consideration all the factors (including the points raised by respondents to the consultation) the Tribunal considers this to be the correct position to take, notwithstanding the possible consequences that an adverse finding may have on a practitioner.

13. The issue of a Lay Majority

13.1 Draft rule 9 refers to the composition of the Panel. In the draft rules the proposal was that only a Solicitor Member of the Tribunal could chair. Having considered the responses received the proposed rules have been amended to reflect the Solicitors Act 1974 in terms of the chairing of any Panel. This allows for the possibility of a Lay Chair if the President chose to appoint one.

13.2 The Tribunal considered the suggestion that there should be a Lay majority and the possibility of the rules allowing for a Panel to consist of one Solicitor and one Lay Member with the third Member being either a Solicitor or Lay Member.

13.3 In reaching its decisions the Tribunal considered the position in respect of various other regulatory tribunals (or equivalent) and whether they had a professional or Lay majority. Information as to whether or not the body was assisted by a legally qualified advisor was also considered. It was noted that for some non-legal bodies “Lay” members are sometimes lawyers.

BODY	MAJORITY	QUALIFIED ADVISOR
Association of Chartered Certified Accountants (“ACCA”)	Lay	Yes
Health and Care Professions Council (“HCPC”)	Optional	Yes
General Medical Council (“GMC”)	Optional	Yes
General Dental Council (“GDC”)	Optional	Yes
General Optical Council (“GOC”)	Lay	Yes
General Pharmaceutical Council (“GPhC”)	Optional	Yes
Medical Practitioners Tribunal Service (“MPTS”)	Lay	Yes
Nursing and Midwifery Council (“NMC”)	Optional	Yes
Financial Reporting Council (“FRC”)	1 Professional, 1 Lay, 1 Legally qualified	Legally qualified chair
Royal College of Veterinary Surgeons (“RCVS”)	Optional	Yes
Architects Registration Board (“ARB”)	1 Professional, 1 Lay, 1 appointed by the Law Society	Yes

Institute of Chartered Accountants in England and Wales (“ICAEW”)	Lay	Yes
Council Licensed Conveyancers (“CLC”)	Lay	Yes
Chartered Institute of Legal Executives (“CILEX”)	Lay	Yes
Intellectual Property Regulation Board (“IPreg”)	Lay	Yes
Bar Tribunals and Adjudication Service (“BTAS”)	Professional	Yes

13.4 The Tribunal considered the suggestion that there should be a Lay majority and the suggestion that a Panel consist of one Solicitor and one Lay Member with the third Member being either a Solicitor or Lay Member.

13.5 On a number of occasions the appeal court has recognised that the Tribunal is a specialist Tribunal. Most recently in Gale v the Solicitors Regulation Authority [2019] EWHC 222 (Admin) Mr Justice Pepperall said: *“While a decision of the Solicitors Disciplinary Tribunal is somewhat closer to home for a judge than one of the Medical Practitioners Tribunal, it remains true to observe that the SDT is a specialist adjudicative body that has greater experience in the field of regulating the solicitors’ profession than the courts.”*

13.6 Each Member of the Tribunal has a crucial role to play in ensuring that cases are dealt with in accordance with the Tribunal’s overriding objective. Having taken into account all of the responses received the Tribunal decided to maintain the current position. A move from two Solicitors Members to one Solicitor and two Lay Members would change the character of the Tribunal. With a change of dynamic in the Tribunal there would be a significant risk that the Tribunal would lose its identity as an expert Tribunal. In addition the Tribunal considered that having two Solicitor Members meant that each Tribunal is more likely to have a range of experience from practice and this would not be the case with just one Solicitor Member.

14. Fitness to Practise

14.1 The question of whether there should be provision in respect of fitness to practise in the Rules was raised as part of the response to the consultation. Under the Solicitors Act 1974 (as amended by the Legal Services Act 2007) the SRA has the power to introduce procedures in relation to fitness to practise.

- 14.2 The Tribunal noted that the Bar Standards Board Handbook contains detailed provisions as regards fitness to practise, a fitness to practise hearing and the appeal of any decision made by the fitness to practise panel. The Bar Standards Board has an entirely separate procedure as regards consideration of fitness to practise due to the health of the respondent. The fitness to practise procedure is not disciplinary in nature and are run entirely separately from any disciplinary proceedings. In the event that during a disciplinary hearing information comes to light that gives rise to concerns about a barrister's fitness to practise, findings should be made in the disciplinary hearing and the concerns should be recorded and reported to the Professional Conduct Committee of the Bar Standards Board. Such a procedure does not exist at the Tribunal.
- 14.3 The CILEx Investigation, Disciplinary and Appeals Rules 2015 do not contain provision in respect of fitness to practise. However, the CILEx Regulation Health Committee (Procedure) Rules allow the suspension of a member when it is deemed that their fitness to practise is impaired due to medical reasons.
- 14.4 The Tribunal has decided not to make an amendment to the draft rules in respect of fitness to practise on the basis that had Parliament intended the Tribunal to have jurisdiction then this would have been addressed when the SRA was given this power. However, the Tribunal would encourage the SRA to consider carefully whether it should exercise its power to make procedures in relation to fitness to practise.
- 14.5 Health issues are a reoccurring theme in proceedings before the Tribunal. Not infrequently the Tribunal finds itself without medical evidence to assist it in determining applications made on the grounds of physical or mental health. In some instances these issues only emerge during the course of the proceedings but in a number of others these issues are raised by the solicitor concerned with the SRA prior to the issue of proceedings. If medical evidence corroborates the fact that mental or physical ill-health was a significant factor in any professional misconduct and continues to affect the person concerned, the Tribunal would consider a separate fitness to practise regime as more suited to such circumstances than proceedings before the Tribunal.

15. Propensity

- 15.1 There was significant comment within the responses as to whether evidence of propensity should be permitted. It was argued that this should be prohibited unless the criminal standard of proof was retained. There was no specific reference to propensity in the proposed draft rules – the only reference to previous matters was

in draft Rule 41 which refers to the clerk informing the Panel after it had reached its findings as to whether there have been any allegations proved in previous proceedings before the Tribunal.

- 15.2 In proceedings before Bar Tribunals and Adjudication Service details of previous misconduct are not generally admissible until matters have been found proved. In disciplinary proceedings relating to barristers previous findings of misconduct by the Bar Standards Board are specifically included in the list of previous matters that the tribunal will be told about if it makes findings against a barrister. There is no mention of previous matters in the Intellectual Property Regulation Board's guidance. In those Rules previous misconduct is mentioned in Rule 16.2(d) which deals with considering the respondent's disciplinary history when considering the appropriate level of any fine.
- 15.3 In its response, the SRA referred to the admissibility of propensity evidence in criminal proceedings. However, it did not refer to the application process for the admissibility of that evidence, nor to the principle that the evidence of previous matters generally is not admissible save where the Court has ruled that it is. It is and always has been an option for the SRA to apply for evidence of previous matters to be adduced. In criminal proceedings the hurdle for that evidence to be admitted is high. There was a concern expressed in more than one response that seeking to admit evidence as to propensity and supporting the adoption of the civil standard of proof was "cherry picking".
- 15.4 In Manak v SRA [2018] EWHC 1958 Admin there was criticism of the Tribunal for not being aware of previous internal SRA matters. Draft rule 41 has been amended to address this point and the suggested change also picks up to an extent on propensity. It is proposed that once a Panel has announced its findings it will be made aware of any allegations found to have been substantiated against the respondent in any previous disciplinary proceedings before the Tribunal and any internal sanction imposed by the SRA against the respondent.

16. Vulnerable Witnesses

- 16.1 In its response, the SRA raised the question of vulnerable witnesses and whether the Tribunal's Rules should contain specific provision in respect of the cross-examination of such witnesses.

16.2 In considering, both when formulating the draft rules and as a result of the consultation, whether or not there should be some provision in relation to the cross-examination of vulnerable witnesses, the Tribunal considered the need to achieve fairness to both the witness and the respondent.

16.3 The Tribunal has decided not to make an amendment to the proposed rules. It decided that any additional guidance required can be better addressed by way of Practice Direction rather than by way of provision in the rules.

17. Equality and Diversity Implications

17.1 In 2008, Lord Ouseley published a report into his “Independent Review into Disproportionate Regulatory Outcomes for Black and Minority Ethnic Solicitors”. This concluded that BAME solicitors were over-represented in a number of areas including the number of referrals to the Tribunal. His report stated that:

“9.4.4 While decisions of the SDT may be independent of the SRA and outside its sphere of influence, it is also the case that the SDT considers the matters referred to it and, therefore, it is essential that the regulatory process which results in a referral is not tainted by unfairness or discrimination, particularly in view of the serious nature of the sanction that can be imposed, including suspension and striking off.”

17.2 In July 2010 a report by Pearn Kandola “Commissioned research into issues of disproportionality”¹ found that there was no disproportionality against BAME solicitors when looking at all solicitors on the Roll but when restricting the analysis to solicitors admitted in the last ten years, they did identify disproportionality against BME solicitors, in line with the Ouseley report.

17.3 Page 48 of the report stated that:

“Finally, the most consistent pattern that emerges throughout the above findings is that although the SRA processes themselves do not necessarily result in further disproportionality against BME solicitors, a significantly higher proportion of cases raised against BME solicitors are referred to the SDT. It is possible that the cases raised against BME solicitors are simply more complex; however it may also be that the SRA is more cautious about making decisions in these cases. In line with advice from the SRA, it is fair to conclude that being referred to the SDT is a more serious outcome than the case being upheld. An outcome of 'Referred to SDT' will result in the creation of a tribunal

¹ <https://sra.org.uk/.../disproportionality-final-report.pdf>

case against the solicitor(s) involved. The SRA have explored the tribunal cases closed in the last 3 years, and found that 71% (569/798) actually went to the tribunal. It can be the case that even though an initial decision is made to refer someone to the SDT, an alternative resolution is found before this actually happens which explains the 29% that did not reach the tribunal. In the same 3 year period, the statistics provided by the SDT show that 95% of the cases they heard resulted in a reprimand, fine, suspension or strike off. All of these outcomes are as serious, or more serious, than anything the SRA could do at the time.”

17.4 It went on to say at (page 52) that:

“There is one further finding concerning the SRA’s role in disproportionality; the SRA is more likely to refer internally for further investigation cases raised against BME solicitors; these cases are also more likely to be decided at the higher decision-making level of Committee / Panel, and are more likely to be referred to the SDT across all three: conduct, conduct cases referred by the LCS, and regulatory cases. The increased chance of referral to the SDT is in itself an important form of disproportionality, given the level of seriousness often associated with these cases. As discussed in the body of this report, being referred to the SDT usually results in a more serious outcome than the case being upheld; of those who were referred to SDT and went to tribunal, 95% of the cases heard resulted in a reprimand, fine, suspension or strike-off. There is an important question to answer beyond the scope of this current report; that is whether BME solicitors are simply more likely to be involved in more complex cases that need to be referred to the SDT, whether the decisions made at the SDT level are in themselves unfair, or whether a disproportionately low level of cases concerning white solicitors are referred to the SDT.”

17.5 In 2014 Professor Gus John’s Independent Comparative Case Review² found that:

“1.27 Of more concern, is the fact that the data identified a procedural discrepancy in the sanctions given to BME and White solicitors. White solicitors were over represented in receiving lesser sanctions, such as rebukes, whereas 20% of BME solicitors compared to only 7.5% of White solicitors were disciplined with conditions placed on their practising certificates. Clearly, there is a link between the nature of the offence committed and the severity of the sanction issued. However, it is possible that certain practitioners may be more likely to commit certain breaches than others, depending upon their

² <http://www.sra.org.uk/documents/SRA/equality-diversity/independent-comparative-case-review-iccr-gus-john.pdf>

circumstances and the challenges they face in their practice. All of this relates to the question posed earlier: why are BME solicitors with less experience more likely to establish sole practices than Whites and what factors might disproportionately affect these more junior sole practitioners?

1.28 The data collected indicates that the most frequent offence triggering an investigation by either the SRA or SDT related to financial irregularities falling under either a breach of the Solicitors' Account Rules and Practising Regulations (SAR), or Fraud, Dishonesty and Money Laundering (FML). This was the case for investigations into both BME and White solicitors. FML breaches accounted for 60% of BME and 22% of White investigations. Significantly, the majority of these cases were the result of investigations initiated by the SRA themselves, rather than coming from public complaints, law enforcement agencies or other referrals. This would perhaps point to the fact that the SRA is particularly concerned with enforcing regulation concerning the financial practices of law firms; a focus that may disproportionately affect some firms more than others.

1.29 Given the factors mentioned above, a hypothetical example is useful in suggesting reasons why BME solicitors might be disproportionately affected by SRA regulation....”

17.6 The report recommended that:

- The SDT should monitor by ethnicity and gender, the outcomes for those solicitors who appear before it on regulatory charges, to see whether there is any disproportionality; and
- The SDT should ensure that its panel of members include an ethnically diverse range of individuals.

17.7 The Tribunal determines the applications brought before it. It does not choose who appears before the Tribunal or the allegations that the person faces. Whilst the SDT, in line with the report, asks respondents to provide information as to their ethnicity, in 2018 no respondent chose to provide that information. The Tribunal is aware that the SRA intends to publish a report on its disciplinary track record. It is understood that this report will bring together data about the cases that the SRA has referred to the Tribunal, including issues around diversity. The Tribunal will carefully consider the contents of this report when published.

- 17.8 The Members of the Tribunal represent an ethnically diverse range of individuals. Information as to Member and staff ethnicity is provided in the Tribunal’s Annual Report.
- 17.9 Whilst there are some generalised concerns raised in the responses to the consultation that BAME solicitors may be prejudiced there are no specific examples given of how this might occur except for the fact that BAME solicitors tend to work in small firms and may be less able to afford representation before the Tribunal.
- 17.10 In October 2017 the SRA published “Mapping advantages and disadvantages: Diversity in the legal profession in England and Wales”³ in that report at page 28 it stated that there were four career types in the Solicitors’ Profession when the cohort of those admitted to the Roll between 2006 and 2010 was examined. The report stated:

“The four classes differ in terms of their gender and ethnic composition. They exemplify variations in career experiences in relation to the probability of progressing to partner level; working in a central London based firm, and type of legal work.

The solicitor population is not evenly distributed across the four classes, with the greatest proportion located in the first two:

*High-street providers;
City lawyers;
Corporate fast-track;
In-house.*

*The **High-street provider** class is populated predominately by female solicitors, working in regional based firms, who are unlikely to have been promoted to a partner. Solicitors in this class will be undertaking either private client work or commercial law.*

*The majority of the **City lawyer** class are female solicitors with BAME practitioners in particular outnumbering male counterparts. The high probability of City lawyers working in firms with HQs based in central London suggests they are likely to be employed by national/international practices, although employment in niche firms is also a strong possibility. Reflecting women’s predominance in less senior positions, practitioners in this class are unlikely to have been promoted to partner.*

³ The report can be found here: <https://www.sra.org.uk/sra/how-we-work/reports/diversity-legal-profession.page>

*The **Corporate fast-track** class is mainly occupied by white males with BAME males also well represented. Practitioners are most likely to be employed by a large central London based corporate firm, undertaking high income work for a premium client base.*

*The **In-house** class is dominated by white females and white males, whilst also including a significant proportion of BAME women. This group has a high probability of working in-house rather than private practice, which fits well with research showing that women find the demands of in-house work more compatible with family commitments.”*

- 17.11 According to the SRA’s data collection in 2017, 34% of sole practitioners were BAME. BAME solicitors were twice as likely to be sole practitioners as white solicitors. BAME female solicitors were found to have a double disadvantage.
- 17.12 The SRA’s Annual Review 2016/17 ⁴ sets out the diversity profile of law firms including by gender and ethnicity. 48% of lawyers are women. There has been an increase in the proportion of BAME lawyers working in law firms from 14% in 2014 to 20% in 2017.
- 17.13 There is no evidence that the proposed changes will affect any one group of solicitors disproportionately to any other group of solicitors regardless of whether or not the solicitor has a protected characteristic.
- 17.14 No evidence has been provided that the Tribunal sanctions BAME practitioners more harshly than white practitioners. It is possible that because BAME solicitors tend to work in smaller firms that they do not have as many resources available to aid them with compliance as those in larger firms.

18. Sufficiency of Consultation

- 18.1 The consultation document did not explain the reasoning behind every single change to the existing rules. It focussed on a number of those which were considered to be more significant. The Tribunal considered this the appropriate approach. Had the Tribunal explained every single change, the document would have become lengthy and cumbersome, and the reader may not have been able to see the wood for the trees.

⁴ The report can be found here: <https://www.sra.org.uk/sra/how-we-work/reports/annual-review/annual-review-2016-17.page>

- 18.2 In terms of fairness, none of the respondents to the consultation have identified any proposed changes to the existing rules that could be said to deprive someone of a benefit, and which are not explained in the general paragraphs of the consultation document. Whilst the introductory paragraphs in the consultation document were general in nature, the draft rules were appended – and therefore recipients were able to see a great amount of detail. The consultation was targeted, quite properly, at a sophisticated group – mainly in or associated with the legal profession, and also at other similar professional tribunals. Accordingly the Tribunal consider that the consultation struck the right level of specificity given the target audience.
- 18.3 The Cabinet Office principles say that consultations have to *“Give enough information to ensure that those consulted understand the issues and can give informed responses. Include validated impact assessments of the costs and benefits of the options being considered when possible; this might be required where proposals have an impact on business or the voluntary sector.”* The responses indicated that the consultees understood the issues. Having considered the responses and the proposed changes to the draft rules no further consultation is proposed at this stage.

Other points arising from the consultation responses

19. Proposed amendments to draft rule 25 in respect of Agreed Outcomes

- 19.1 The consultation specifically asked whether the Tribunal should change its rules to make provision about Agreed Outcome Proposals. Of those who responded to this question the majority favoured some provision within the rules in respect of Agreed Outcomes. It should be noted that a number of concerns were raised in respect of Agreed Outcomes and multi-respondent cases.
- 19.2 The question of when Agreed Outcome applications should be submitted was also commented upon in the responses. Currently the Standard Directions provide for such applications to be made no less than 28 days before the substantive hearing. In practice such applications are often received far closer to the substantive hearing. This can cause practical listing issues as Agreed Outcome applications need to be listed before a different division of the Tribunal than the Division sitting on the substantive hearing.

19.3 Reference was made to the Practice Direction⁵ in relation to the equivalent of Agreed Outcomes in Disqualification of Director proceedings. For ease of reference the procedure referred to therein is as follows:

“12. Carecraft procedure

12.1 The parties may invite the court to deal with the disqualification application under the procedure adopted in Re Carecraft Construction Co Ltd [1994] 1 WLR 172, as clarified by the decision of the Court of Appeal in Secretary of State for Trade and Industry v Rogers [1996] 4 All ER 854. The claimant must submit a written statement of agreed or undisputed facts, and an agreed period of disqualification or an agreed range of years (e.g. 2 to 5 years; 6 to 10 years; 11 to 15 years).

12.2 Unless the Court otherwise orders, a hearing under the Carecraft procedure will be held in private.

12.3 If the Court is minded to make a disqualification order having heard the parties’ representations, it will usually give judgment and make the disqualification order in public. Unless the Court otherwise orders, the written statement referred to in paragraph 12.1 shall be annexed to the disqualification order.”

19.4 Having considered the responses received the Tribunal decided that that draft rule 25 should be amended with detailed procedure being set out in a Practice Direction. This will allow for more flexibility and ensure that the Tribunal has the ability to proactively case manage as required in each individual case, particularly in multi-respondent cases. A short Practice Direction covering what was draft rule 25 (3) and 25 (4) in the version of the rules appended to the consultation is envisaged.

20. Proposed amendments to other draft rules

20.1 Draft rules 9 (composition of panels) and 25 (agreed outcome proposals) have been addressed above. The following paragraphs address the comments made in respect of some of the other draft rules and the decisions made by the Tribunal. It should be noted that in light of the Services of Lawyers and Lawyer’s Practice (Revocation etc.) (EU Exit) Regulations 2019 a proposed amendment to the definition of “Registered European Lawyer” is also likely to be required.

⁵ https://www.justice.gov.uk/courts/procedure-rules/civil/rules/disqualification_proceedings#12.1

- 20.2 A minor change is proposed to draft rule 14 (6) (supplementary statements) in order to achieve consistency with draft rule 14(1). This was not raised in the responses to the consultation but was identified by the Tribunal as part of a further review of the draft rules.
- 20.3 The SRA considered that the 14 days proposed in draft rule 19 (application for review of order relating to solicitors' employees and consultants) was too short. This is to be amended to 28 days, which is the general period of time allowed for a response in other proceedings before the Tribunal.
- 20.4 The proposed wording of draft Rule 21(1) (case management hearings) was further considered by the Tribunal. As originally drafted it raised the possibility that a case management hearing may be required under the Rules in every case. The Tribunal considers, on reflection, that this would be an unnecessary formality in many cases, leading to unnecessary costs. At present, case management hearings are listed where a time estimate exceeds three days. This is provided for in Practice Direction 6. The Tribunal will amend rule 21 to retain flexibility and ensure that case management hearings are required for effective case management rather than listed to ensure compliance with a rule.
- 20.5 Draft rule 24 (amendment or withdrawal of allegations) requires the Applicant to seek leave to amend or withdraw an allegation. This reflects rule 11(6) of the 2007 Rules. The Tribunal considered the various responses received in respect of this draft rule. The Tribunal decided that it was an important safeguard that the SRA should have to seek leave to withdraw or amend an allegation. If the SRA has seen fit to bring an allegation before the Tribunal and that allegation has been certified as showing a case to answer then if it wishes to withdraw the allegation it is appropriate that it should explain to the Tribunal its reasons, to ensure that allegations are not inappropriately withdrawn.
- 20.6 Draft rule 26 relates to disclosure and discovery. This rule is to be amended to limit the requirements on parties to disclose documents so that they only apply to documents on which the party relies and documents which might assist the other party in the preparation of their case or which might adversely affect their or another party's case; or documents which they are required to disclose by a practice direction. The proposed change is a direct response to concerns raised in the consultation and is based on Civil Procedure Rule 31.
- 20.7 Draft rule 27 (service and sending of evidence and bundles) was the subject of a number of comments. In determining whether any amendment should be made the Tribunal considered rule 19 of the Appeal Rules, upon which draft rule 27 is based.

One response to the consultation queried whether draft Rule 27(2) (a) (which allows for the admission of any evidence, whether or not it would be admissible in a civil trial) accorded with natural justice. Civil proceedings and disciplinary proceedings, whilst having many similarities, are not analogous and the Tribunal did not accept that the proposed rule breached natural justice. In any application as to whether or not such evidence should be admitted, the Tribunal would consider the submissions of the parties before reaching its decision as to admissibility. The Tribunal decided that this provision should be retained. The question of propensity has been addressed separately.

20.8 Draft rule 29 (Civil Evidence Act notices) is to be amended to remove the reference to the Civil Evidence Act 1968 and counter notices.

20.9 A small change is proposed to draft rule 31 (Interpreters and Translators). The change will make it clear that interpreters and translators can participate at hearings more generally, not just in the giving of evidence. It was recognised that some respondents may require an interpreter both to give evidence and to participate in the proceedings. This point was not raised in the responses to the consultation but was identified by the Tribunal.

20.10 It was suggested that draft rule 32(2) (previous findings of record: proof of judgments and admissibility of proof) be reconsidered, should the Tribunal adopt the civil standard of proof, to provide that a civil judgment be conclusive proof of the facts. However the Tribunal did not consider that this change should be made given that in civil proceedings there are different considerations from those in disciplinary proceedings.

20.11 In respect of draft rule 32 it was suggested that any criminal conviction in the UK should be conclusive proof, not just a conviction in England and Wales and an appropriate amendment has been made.

20.12 In respect of rule 35 (public or private hearings) the Tribunal decided that factual witnesses should be excluded from the hearing until their evidence has been given unless the Tribunal gives permission for the witness to be in court. This is consistent with the position in other regulatory hearings. Bar Standards Board rE175 states: *"A witness of fact shall be excluded from the hearing until they are called to give evidence, failing which they will not be entitled to give evidence without the leave of the Disciplinary Tribunal."* Rule 35(6) of the General Medical Council (Fitness to Practise) Rules Order of Council 2004 states: *"A witness of fact shall not, without leave of the Committee or Tribunal, be entitled to give evidence at a hearing unless he has been excluded from the proceedings until such time as he is called."* That

position is also the convention in criminal courts and is not controversial. In criminal proceedings, the only exception to that is the officer in the case in criminal proceedings who usually remains in Court for the entirety of the hearing to assist the prosecutor. There is nothing to preclude the applicant seeking permission for the SRA's investigating officer to be present in the hearing before giving evidence but the Tribunal did not consider that this should be the starting point. In practice the investigating officer normally gives evidence immediately after the advocate for the applicant has opened the case and can thereafter be present in the hearing.

20.13 In respect of draft rule 35 (9) (prohibition of publication leading to identification of persons) the Tribunal's intention had been misunderstood by some of those that responded to the consultation. The Tribunal has decided to amend the draft rule to make its intention clear. The aim of this rule is not to address third party disclosure, which is covered in a separate policy, but to cover the situation where a third party's name is used in an open panel or where material which should not be referred to in a public hearing is referred to in open court.

20.14 Draft rule 41 refers to sanction. The Tribunal considered the responses to the consultation and the position elsewhere:

- The Association of Chartered Certified Accountants invites the parties to address the panel on the appropriate sanction once adverse findings have been made (Guidance for Disciplinary Hearings).
- The Health and Care Professions Council/Medical Practitioners Tribunal Service hears submissions from both parties.
- CILEx guidance suggests that the parties make submissions on sanction and costs. Rule 30(4)(b) states that on an allegation being found proved: *"the respondent may then make submissions in mitigation and, where appropriate, in respect of costs"*.
- Intellectual Property Regulation Board Rule 15.3 states: *"In the event and to the extent that the Complaint as set out in the Statement of Case is proved, the Disciplinary Board shall give the Respondent the opportunity to present to the Board, within such time as it may direct, an explanation of any mitigating circumstances which the Respondent would like to be taken into account by the Board when deciding upon an appropriate sanction"*.
- The General Optical Council were not specific, however the guidance as regards matters of mitigation states that the committee: *"should also take into account*

any representations about these matters made on behalf of the Council and the registrant, but bearing in mind always that representations are not evidence.” From that it would seem that the prosecution is also entitled to make comment on matters of mitigation and sanction.

- In the Bar Tribunals and Adjudication Service representations are made by the respondent (rE204).

20.15 The Tribunal concluded that there was a difference between the medical tribunals and the legal ones. In medical tribunals, after finding impairment, there then needs to be a consideration of whether the impairment is current – in which case representations will be needed from the prosecuting body. Those would necessarily include submissions on sanction. The Tribunal does not consider the question of whether or not an impairment is current (and nor do any of the other legal regulators) and accordingly the Tribunal decided that it remained appropriate that there should be no provision for the Applicant to make submissions in respect of sanction.

20.16 As part of the consultation response, comparisons were made with the CPS and what happens in the criminal courts. The Tribunal noted that sentencing guidelines are quite prescriptive, are applicable to each offence individually and name a range of mitigating and aggravating factors which will take the offence out of one category and into another. There is not a prescriptive system at the Tribunal, each case is considered individually by reference to the Guidance Note on Sanctions.

20.17 Draft rule 43 refers to costs. A number of submissions were made in respect of costs. The Tribunal is acutely aware of the quantum of costs that are involved in matters before it and the position of the respondent who may be ordered to pay the SRA's costs as well as having to meet their own costs.

20.18 The Guidance Note on Sanctions (currently in its sixth edition) summarises the Tribunal's approach to costs. However, the Tribunal would emphasise that whilst it will consider any costs application on the basis of established legal principles the outcome of each application will be case specific. Should a case have not been properly prepared or brought this will be reflected in the costs order made. The standard of proof applied by the Tribunal does not alter the Tribunal's expectations in respect of the preparation and conduct of the proceedings or the general principles in relation to costs.

- 20.19 The Tribunal expects parties to assist it in ensuring that cases are dealt with effectively, expeditiously and in a proportionate manner. This will ensure that the Tribunal's overriding objective of ensuring that all cases brought before it are dealt with justly and in accordance with the Tribunal's duty to protect the public from harm and to maintain public confidence in the reputation of providers of legal services.
- 20.20 The Tribunal did not identify a need to amend draft rule 43. The Tribunal will robustly exercise its discretion in respect of costs in accordance with its Rules and the relevant Guidance. Any suggestion that cases were not properly prepared by either party for whatever reason could result in costs consequences for the "defaulting" party.
- 20.21 Draft rule 51 relates to the transitional provisions. A number of responses suggested that this should be re-written so that the new rules would apply to misconduct occurring after the date that the rules come into force and not proceedings brought after that date (which may relate to misconduct alleged to have taken place before it). The Tribunal acknowledges that when considering whether or not conduct amounts to misconduct the relevant Code of Conduct should be the one that was in force at the time of the alleged misconduct. But the Tribunal does not consider that it necessarily follows that the procedural rules should also be those which were in force at that time.
- 20.22 If the new rules only applied to misconduct after the date on which they came into force this could result in confusion and unnecessarily complicated proceedings, not least because some allegations could fall to be dealt with under the 2007 Rules and some under the new rules. The Tribunal decided that this was not practical and the draft rule should remain as drafted.

Next Steps

21. The Tribunal will submit an application to the Legal Services Board for approval of its proposed rules. The Legal Services Board is responsible for approving changes to the Tribunal's rules under the Legal Services Act 2007.
22. Once the Legal Services Board have considered the proposed rules, if they are approved, a statutory instrument will need to be made to bring the rules into effect.

ANNEX 1 Analysis of Responses Received

A- Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

- A1. Of the external responses received one did not support the civil or criminal standard and suggested two alternatives. Of the remaining twenty seven, eight considered the Tribunal should change its rules to allow for the civil standard to be applied. Nineteen supported the retention of the criminal standard. It should be noted that this figure comprised (amongst others of) the Law Society, five local law societies, the Solicitors Assistance Scheme, a firm representing respondents and ten individuals. Amongst those in support of the civil standard were other regulatory bodies, the Legal Services Consumer Panel and the Solicitors Regulation Authority.
- A2. Overall, the consultees who were opposed to any change the standard if proof were those who would themselves in an individual or representative capacity (e.g. law societies) be potentially adversely affected thereby in the sense that there would be increased vulnerability to a disciplinary sanction for any relevant professional misconduct. Those consultees who supported a change to the standard of proof were those who in an individual or representative capacity (e.g. consumer groups) would be potentially beneficially affected by the change.
- A3. A number of consultees who favoured the status quo (and the retention of the criminal standard of proof) suggested that the advocates of change were over influenced by a desire to be in the mainstream of modern professional discipline. The advocates of change suggested that those who favoured the status quo were protectionist and putting the interests of the profession above the wider public interest. Those in this group did not accept that the criminal standard provided better public protection than the civil standard.
- A4. One consultee suggested that there should be a detailed analysis of the proportion of prosecutions that fail, the reasons why prosecutions fail and the cost implications before a decision was made on the standard of proof. The basis of this was that if prosecutions fail because of the way they are prepared, pleaded or presented this was not a good reason for lowering the standard of proof.
- A5. The SRA summarised its position by saying: *“We believe that the Tribunal should adopt the civil, rather than criminal, standard of proof, as a matter of public confidence. We call on the Solicitors Disciplinary Tribunal to make this change at the earliest possible opportunity, bringing it into line with the overwhelming majority of tribunals and regulators of the professions.”*

A6. It called for the use of the civil standard to:

“-Ensure a proper balance between protecting the public and the rights of a solicitor accused of breach of our rules

-Ensure that action can be taken when, on the balance of probabilities, an individual or firm presents a risk to the public

-Give the public confidence in the regulatory system and the profession

-Deliver a consistent, fair and efficient disciplinary process.”

A7. Its response described the criminal standard as costly, burdensome, and unfair to users of legal services. The SRA submitted that the criminal standard of proof undermined confidence that regulation of the profession was in the public interest. It also argued that it was disproportionate and encouraged respondents to “fight” proceedings rather than make early admissions whereas the civil standard would ensure users of legal services were offered the same degree of protection as is the case for the consumers of other professional services. It also pointed out that, in its view, the fact that the SRA uses the civil standard and the Tribunal the criminal standard was confusing for everyone especially when the Tribunal was required to apply the civil standard in some matters.

A8. The SRA’s response set out examples in support of change including from the Law Commission in 2012, the Legal Services Board in 2013 and the Insurance Fraud Taskforce in 2016.

A9. The Law Society summarised its position as follows:

“3. We support the use of the criminal standard of proof in the Tribunal. The serious consequences of prosecution of cases with the extremely high prosecution success rate, (higher than any other regulator or the criminal justice system - 98% in 2015/16) is good reason for facts to be established 'beyond reasonable doubt'. It would be unfair and unjust to end a solicitor’s career unless the Tribunal can be sure of the facts on the evidence heard and tested before it.

4. A move away from the criminal standard of proof would inevitably increase the likelihood of miscarriages of justice against individual solicitors. The balance of probabilities test is too low a standard for bringing a case where conviction is terminal to the professional career of a defendant. A finding of guilt at the Tribunal can result in severe consequences for an individual solicitor, (and their firm, employer and any employees) including significant fines, being struck off, reputational damage, and considerable

stress and anxiety on that individual. Even if the sentence is set aside on appeal (and many more cases would go to appeal were the standard to be altered) the costs thereby incurred and damage caused will in many cases be all but irretrievable.

5. The severity of the potential sanctions, alongside the imbalance of power when the resources of the SRA is pitted against an individual solicitor, who is often unable to afford representation, is in many ways comparable to a criminal trial as has been recognised in case-law. There is moral hazard in creating a system that gives such powerful incentives to the regulator as an addition to all other powers it has to control the activities of those it regulates and forestall harm to the public.”

A10. It argued that criminal law supported the standard of proof, that one size did not fit all and that the Tribunal had to take into account a solicitor’s human right to a fair trial. It made specific submissions covering the following points:

- Being sure of the facts before ending a solicitor’s career;
- The serious consequences of proceedings (including financial; reputational; health and wellbeing; and the impact on others);
- The prosecution success rate;
- The fact that solicitors are regulated differently to other professionals (which covered title-based regulation; the nature of the solicitor’s work; how decisions are made and the effect of sanctions; the lack of fitness to practice rules; the legal costs incurred and other legal professions and jurisdictions);
- Disciplinary proceedings are not the same as civil law proceedings.

A11. The Law Society acknowledged that the SRA operated on the civil standard but pointed out that its disciplinary powers were far more limited than the Tribunal’s. The Law Society submitted that given the significant imbalance between the SRA’s ability to prosecute and an individuals’ ability to defend themselves the criminal standard was an important safeguard to avoid a miscarriage of justice.

A12. The Bar Standards Board stated in their response, in the context of the decision to move to a civil standard of proof in disciplinary proceedings relating to barristers, that:

“Given the consensus of those outside of the profession that the public interest is better protected by the civil standard, combined with those supporting voices from within the profession, we found no reason to believe the public interest is better protected by the criminal standard of proof. We are of the view that the same applies to solicitors and that the public interest lies in the SDT moving to apply the civil standard of proof to cases which it hears.”

A13. The General Optical Council, cited Bolton and, commented:

“The GOC supports the Tribunal’s proposal to adopt the civil standard at its hearings. This would be in line with current regulatory practice, including at the Solicitors Regulation Authority (SRA) and all healthcare regulators.

Unlike criminal proceedings, the primary objective of professional disciplinary proceedings is to protect the public rather than punish the registrant, and this objective would be better achieved by the Tribunal taking action in circumstances where they consider that the allegations are probably (but not definitely) made out.”

A14. Two consultees suggested that a change to the civil standard of proof would be ultra vires. RadcliffesLeBrasseur, stated: *“Summary of the legal position: A decision to change the standard of proof to the civil standard would fail to take proper account of English case law but also of the Convention Rights.”* The Law Society described the cases of Bhandari v Advocates Committee 1956 1 WLR 1442, Re A Solicitor 1993 QB 69, Campbell and Re D as *“binding authority”* that the required standard is the criminal standard. The Law Society noted *“a strong argument...that the application of Article 6(2) to disciplinary proceedings means that the criminal standard of proof must be adopted”* and concluded that *“a change to the civil standard fails to take proper account not only of domestic case law, but also of convention rights”*.

B- Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

B1. On the whole those consultees who responded to this question supported the inclusion of provision in respect of Agreed Outcomes within the rules.

B2. One consultee stated that the draft Rule 25 seemed useful but would benefit from a greater choice of outcome. One consultee supported the principle but expressed concern about the potential risk to non-parties to the proposed Agreed Outcome in multi-respondent cases. Another supported the provision provided that it did not

fetter the Tribunal's discretion to refuse to endorse the Agreed Outcome if the Tribunal considered it inappropriate.

- B3. Four consultees agreed that the Tribunal should do this but gave no reason. Two agreed that the Tribunal should make this change and that 28 days was the right time frame with one observing that it should be more than sufficient time to submit such a proposal. Three consultees supported the change but suggested a window of seven days prior to the hearing, with one stating that this was partly because this would allow more time to conduct meaningful discussion between the parties.
- B4. One supported such provision on the basis that the use of Agreed Outcomes was well established and that they were an effective tool in shortening proceedings. This consultee agreed with the inclusion of a requirement to notify all co-respondents in the interests of fairness to all parties. One consultee supported the provision but did not consider that the Tribunal needed to give written reasons (25(6)).
- B5. One consultee supported provision in the rules but stated that it remained unconvinced as to the merits of agreed outcomes as a form of plea bargaining. There was a particular concern where an Agreed Outcome was proposed for some but not all respondents.
- B6. One consultee supported the Tribunal's proposals on Agreed Outcomes and considered that statutory amendments would arguably provide greater clarity and could be achieved using a voluntary process.
- B7. The SRA supported provision in respect of Agreed Outcomes but considered the time limit should be 14 not 28 days. It objected to draft rule 25(3) because of the position of non-parties to the Agreed Outcome. However it supported draft rule 25(4) whilst expressing some reservations. It suggested draft rule 25(7) should refer to reasons rather than written reasons. The SRA expressed concern about the Tribunal's understanding of its role in a process equivalent to the Carecraft procedure.
- B8. The Law Society considered that there should be provision in the rules as Agreed Outcomes were an established Tribunal procedure but made a number of observations on respect of multi-respondent cases including when a final decision should be made on any agreed outcome in such matters.

C- Do you consider that the other provisions in the draft rules are fit for purpose?

D- If the answer to question (C) is no, please explain why.

C/D1. Two consultees agreed that the other provisions in the draft rules were fit for purpose but gave no reason. One considered that they were generally fit for purpose but specifically observed that they made no comment on the operation of the rules in practice.

C/D2. One consultee responded that the rules should be revised after the question of the standard of proof had been decided. This consultee questioned the practice of certifying a case to answer and considered that the draft rules did not adequately address the requirements of open justice. They raised concerns about the Tribunal's disclosure policy and draft rule 35(9) in particular. There was a suggestion that further consultation should be undertaken in a number of areas and that the current consultation was insufficient. The same consultee suggested that the Tribunal issue a statement addressing what that consultee described as apparent bias and the implications of paragraphs 5 and 42 of the SRA's response.

C/D3. One consultee responded no on the basis that the rules should provide for more varied disposals and that the Tribunal should use more imagination in respect of protection and sanction. That consultee drew a distinction between different types of behaviour.

C/D4. One consultee responded that it did consider the other provisions in the rules fit for purpose and noted the robust approach to expert evidence in draft rule 30. The same consultee noted that if the Tribunal adopted the civil standard it may find it easier to prove matters by external findings. Further it suggested consideration of Lay parity with a view to improving public confidence.

C/D5. One consultee expressed the view that there should be a Lay majority (draft rule 9) and that it was concerned that draft rule 35(9) would result in a blanket ban on the publication of information and/or the identity of wrongdoers. This consultee also stated that the cross examination of vulnerable witnesses should not be permitted.

C/D6. Another consultee supported the proposed rules and having in all the requirements in one place but opposed a Lay majority. One consultee queried whether the provisions in draft rule 27(2) (a) as to the admissibility of evidence that would not be admissible in a civil trial accorded with natural justice.

- C/D7. One consultee supported draft rule 24 and draft rule 35(7) which they felt was good as it allowed for untainted evidence. They opposed a Lay majority and considered that the new rules should only apply to offences committed after the rules come into force. They were also of the view that respondents should have the last say.
- C/D8. Another consultee opposed a Lay majority. This consultee commented that draft rule 43 suggested an open approach to costs and that firms should be awarded their costs if they successfully defended themselves.
- C/D9. In respect of costs one consultee stated that costs should not be a factor in deciding the standard of proof. This consultee supported draft rule 24. They considered that evidence of propensity should only be admissible if the criminal standard of proof was retained. They supported draft rule 35(7), considered the respondent should have the last word (draft rule 41) and that draft rule 51 should be amended so the rules only applied to misconduct arising after they came into force.
- C/D10. One consultee responded that the SRA should be required to disclose any document in its possession that might assist the respondent in the preparation of the respondent's case or undermine the applicant's case. This consultee also made some drafting points about Civil Evidence Act notices.

E- Do you have any detailed comments on the drafting of the proposed rules?

- E1. One consultee responded that they did not have any comments as the proposed rules appeared sound.
- E2. One consultee supported the retention of two Solicitor Members to ensure a foundation of knowledge and to avoid the risk of an inefficient decision making progress. The same consultee supported time limits of 14 days (for example in draft rule 19) and the inclusion of draft rule 24. That consultee welcomed draft rule 27 but said propensity should be dealt with on a case by case basis. Draft rules 41 and 43 were supported by this consultee but the consultee had a concern on respect of draft rule 51 in respect of cases and actions that pre-dated the introduction of a possible new standard of proof.
- E3. One consultee considered draft rule 24 should remain and that evidence of propensity should be omitted unless the criminal standard was retained as the SRA should not be allowed to cherry pick rules and procedures to make prosecution more obtainable. The same consultee agreed with draft rule 35(7) but objected to rule 41 as the respondent should always be entitled to have the final say in proceedings and this should not be limited to a brief reply. In their view rule 51 should be amended so

that the proposed rules only apply to offences committed after the implementation of the rules especially in respect of the standard of proof.

- E4. One consultee raised a number of concerns in respect of the proposed rules. This consultee raised a general concern as to the sufficiency of the consultation and suggested that revision of the rules should be undertaken after the decision had been made on the standard of proof. They also raised a number of issues in relation to open justice and the Tribunal's Disclosure Policy and suggested that there should be inclusion in the Rules to address disclosure and in particular public and press access to documentation. This consultee was of the view that the SRA in its response had alleged apparent bias in the composition of the Tribunal's Panels and suggested the Tribunal issue a statement on how it proposed to address the implications of paragraphs 5 and 42 of the SRA's response. The consultee also commented on the potential interaction between a lower standard of proof and a certification of a case to answer and whether if the civil standard was introduced this step should be removed.
- E5. The SRA in those paragraphs had stated that draft rule 9 should provide for a Lay majority to remove the perception of a structural bias in favour of solicitors. It pointed out that the Legal Services Act 2007 having removed the requirement for a Solicitor majority on Panels. It considered that a 14 day time limit in draft rule 19 was insufficient and that it should not require permission to withdraw allegations (draft rule 24). In draft rule 27 the SRA invited the Tribunal to expressly provide that evidence of propensity was admissible.
- E6. The SRA, whilst stating that it understood the intent of the draft rule, also raised a concern in respect of draft rule 35(9) and suggested that this was removed and the subject of separate consultation (including inviting views from the media) given its potential impact on open justice and the freedom of the press.
- E7. The SRA welcomed some clarity on costs as set out in draft rule 41 provided it did not water down the established legal principles. The SRA also considered that it should be able to address the Tribunal on sanction and that evidence of propensity should be admissible. It welcomed draft rule 48 in terms of representatives. The SRA objected to the exclusion of factual witnesses (draft rule 35(7)).
- E8. The SRA suggested that the proposed rules should contain provision in respect of vulnerable witnesses. The SRA raised a concern that a number of the proposed rules were not discussed in detail and that the Tribunal could be accused of insufficient consultation.

- E9. The Law Society made a number of observations in respect of the fact that there is no fitness to practice procedure in the Tribunal. It supported the inclusion of an overriding objective and in particular the reference to “proportionate cost”. It also supported the changes to allow the Clerk more control over administrative matters and for single Solicitor Members to be able to exercise certain functions provided this did not complicate proceedings. The Law Society considered that there should be a Solicitor majority on Panels.
- F- Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?
- F1. One consultee stated that nothing occurred to them and another stated that it did not have access to any data which would suggest adverse impacts for any of those with protected characteristics under the Equality Act 2010 so could not usefully comment. Another stated that it did not believe so and three others simply answered “no”. One consultee said that they had no view on this question.
- F2. One stated that it did not consider that any of the draft rules could result in any adverse impact for any of those with protected characteristics. Another stated that a move to the civil standard would have a positive impact on vulnerable consumers.
- F3. One consultee responded that in its view the proposed new rules were unlikely to affect solicitors appearing before the Tribunal disproportionately because of gender, pregnancy or maternity.
- F4. One consultee considered that a change to the civil standard would adversely impact some if not all of the protected characteristics specified in the Equality Act 2010. The basis for this submission was that the civil standard would allow biases and other subjective opinions to be introduced into the decision. Another consultee considered that any change to the civil standard risked the chance of bias being a factor when decisions were reached whether it be based on age, sex, race or religion. The same consultee stated that the criminal standard required a thorough investigation which in turn limited the extent of bias. This was echoed in another response. Another expressed the view that the introduction of the civil standard of proof would increase the likelihood of bias compared to the criminal standard. They said that this was because the criminal standard required a more thorough investigation that would eradicate some of the bias that may exist of the civil standard was used.
- F5. One consultee raised concerns that the draft rules could impact individuals and smaller firms (where statistically there were more BAME solicitors). This consultee observed that the responses to questions 4 and 5 in the Equality Impact Assessment

appeared to be concerning and contradictory. Another consultee also raised concerns about a disproportionate impact on those from a BAME background and from smaller firms who were less likely to have access to the resources to enable them to defend themselves against charges and meet the costs of the regulator.

- F6. One consultee raised concerns about the sufficiency of the initial Equality Impact Assessment and referred to various reports discussed at paragraph 17 of the Response.
- F7. One consultee did not identify any such effects from the Tribunal's proposals but noted that it would be monitoring its own consensual disposal process in case there was a disproportionate impact on registrants with protected characteristics.
- F8. The SRA considered that all consumers, including vulnerable consumers, would be better protected by the civil standard and by the SRA being allowed to make submissions on sanction. In the SRA's view admitting evidence of propensity would be beneficial in difficult areas such as harassment.
- F9. The Law Society considered that a move to the civil standard could exacerbate the disproportionate representation of BAME solicitors in SRA prosecutions. It invited the Tribunal to carefully consider whether any changes to the rules would disproportionately affect anyone as a result of their protected characteristic.

ANNEX 2 List of the external Stakeholders who responded to the Consultation and their Responses

List of the external Stakeholders who responded to the Consultation

A Callaghan

A Li

A Marks

Association of British Insurers

Association of Women's Solicitors

B Baines

BA Khan

Bar Standards Board

Cardiff Law Society

City of Westminster and Holborn Law Society

C'O'Keefe

General Optical Council

J Bradshaw

L Blackburn

Legal Services Consumer Panel

Leicestershire Law Society

Manchester Law Society Regulatory Affairs Committee

Newcastle Law Society

NHS Resolution

RadcliffesleBrasseur

S Kaufman

Solicitors Assistance Scheme

Solicitor London

Solicitors Regulation Authority

T Bullimore

The Law Society

T Walsh

An individual who asked that their response was not published.

From:

Sent: 25 July 2018 09:50

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: The Consultation on the Standard of Proof in the SDT

The Clerk
Solicitors Disciplinary Tribunal

Dear Sir

I have read the consultation paper with great interest. Apologies for answering a question which is different to that which you pose, but I do wonder if it has to be a straight choice between the criminal and civil standards.

Discipline hearings are neither 'civil' nor 'criminal' in the conventional sense. The criminal standard does seem too high in a matter which is outside the criminal justice system. On the other hand, the adoption of a civil standard is not without difficulties, especially in a more serious case; some might feel that it is not appropriate that one might lose one's livelihood where a charge has 'only' been made out on the balance of probabilities.

There are two other approaches that you might consider:

1. The adoption of an entirely different standard, one that falls some where between the civil and criminal standards - perhaps something along the lines of being satisfied that it is 'likely' that the offence was committed.
2. The adoption of the civil standard, but stipulating that the Tribunal can only impose the most serious penalty in a case where the criminal standard has been satisfied.

I have deliberately kept this short as I am conscious that it raises points that are not actually anticipated by the consultation. I would be happy to discuss this further if you felt it worthwhile to do so.

Yours sincerely

From:

Sent: 08 October 2018 17:14

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: Re: Consultation response

To the Clerk,

Apologies, an amended consultation response is set out below. Please could you use this instead?

41(a) I am a solicitor and therefore may be biased but I do not agree with lowering the standard of proof for the following reasons:

1. Solicitors have an important role in protecting civil liberties, in acting against the state and vested interests, and in acting on behalf of unpopular causes, people and organisations. Other professions have a similar role, including journalists and barristers, but solicitors are the only profession with the power to conduct (and initiate) litigation by default.
2. In a liberal democracy, the public interest is not only in protecting the public from bad solicitors, but also in protecting the independence of solicitors so that they may carry out their role effectively. To achieve this, it is not only important that the regulator is independent from the state but also that there are robust checks on the powers of the regulator.
3. The use of principles-based regulation and the variety of ambiguous and challenging circumstances encountered in daily practice means that the appropriate boundaries of solicitor behaviour are not always clear cut. Solicitors are required to exercise professional judgment to determine the appropriate boundaries of ethical behaviour. They may inadvertently find themselves walking up to the edge of the ethical line in protecting or advancing their clients' interests.
4. Bearing in mind the constitutional role of the solicitor, the risk of chilling effects, and the regulatory backdrop, there is a strong interest in ensuring that we are at least "sure" of the facts and "sure" that the line has been crossed before removing or suspending the rights of a solicitor to practice.
5. In so far as we need to protect the public against bad solicitors, the regulator is already capable of imposing certain sanctions against firms and individuals on the basis of the civil standard. Additionally, market forces and public information may be capable of protecting the public on a standard lower than the civil standard. A sharp review in Chambers, a one-star rating on Google, news of an attempted prosecution by the regulator - all of these can have a reputational impact sufficient to warn people against any issues with a solicitor.

41(b) to (f) - I have not considered these items.

Kind regards,

From:

Sent: 01 December 2017 14:00

To:

Cc:

Subject: Response to consultation on The standard of proof applied by the Solicitors Disciplinary Tribunal

Question 1. What standard of proof do you think should be applied by the Tribunal? Why do you think that?

As a former Law Society Council member, SRA Adjudicator, Chair of the Architects Registration Board's Professional Conduct Committee (and of CIMA's) – now Judicial Appointments Commissioner, Crown Court Recorder, and Deputy High Court Judge – I have never understood why the standard of proof required by the SDT should be different from countless other professions and occupations. The Bar Standards Board has recently changed its standard of proof for professional misconduct from the criminal standard to the civil standard. I believe that for the solicitors' profession to fail to do the same would send a very poor message to our profession, other professions and the public.

The fact that the solicitor's livelihood is at risk – and, as the consultation paper puts it, *“The Tribunal can strike solicitors off and impose fines of unlimited financial value; these sanctions can have a profound and lasting effect on solicitors, ending careers and impacting livelihoods”* - is no different from any other profession. Nor is a dishonesty allegation (or finding) any more serious for a solicitor than, say, an accountant for whom personal integrity is an equally essential quality and who may, just as much as a solicitor, have fellow professionals as partners or employees whose livelihoods will also be affected if the allegation is proved.

It is stated in the consultation paper that, *“The long-standing and continued position of the Law Society is that the Tribunal should apply the criminal standard this is supported by case law..”*

However, the only evidence in the paper cited to substantiate this statement is an extract of a judgment from a judgment by Foskett J in *Fish v. GMC [2012] EWHC (Admin)*.

First of all, the *Fish* case was about a doctor appearing before the GMC, not a solicitor appearing before the SDT. Secondly, the passage cited says nothing at all about the appropriate standard of proof, nor does it say anything about the SDT's application of the criminal standard. Finally, the case was not even about the burden or standard of proof but about the necessity to put squarely to a respondent any allegation of dishonesty. This is a totally different issue, and one that has been long known and applied by disciplinary bodies long before the case of *Fish*.

If, as the consultation paper claims, *“The vast majority of case law supports the use of the criminal standard of proof in [Solicitors Disciplinary] Tribunal proceedings...”*, where is the evidence of this? The consultation paper does not cite even one case in support of this proposition which therefore appears to be mere assertion.

Secondly, it seems to me in the interests of public confidence in the solicitors' profession and for the benefit of the profession's reputation, for solicitors to be held to a higher standard of conduct than the general public. I believe this requires two elements: first, a robust Code of Conduct and secondly, appropriate enforcement of that Code with proportionate sanction for breach.

I do not comment on the Code itself but strongly believe that identifying breaches of the Code by applying an appropriate standard of proof– which I would argue is the civil standard or, at the very least, the sui generis standard applied by the ABA – would achieve the objective of holding solicitors to a higher standard of behaviour than the public. At it is, solicitors are held to a lower standard of conduct than most other professions.

To my mind, for the SDT to retain a criminal standard of proof sends the message that solicitors are more protective of the interests of their own members than of the public they serve. This message would be reinforced were The Law Society, as the profession's representative body, to support retention of the criminal standard – yet the consultation paper appears to suggest just this outcome.

I strongly support an immediate, and well-publicised, change in the standard of proof applied by the SDT from the criminal standard to the civil standard.

Question 2. Are you able to provide evidence on how effectively the criminal standard of proof currently operates in the Tribunal? Are you aware of any occasion where this has inadequately protected clients?

I regard this approach – of providing “evidence” about the SDT's operation of the criminal standard of proof – as wholly misconceived. First, this issue is a matter of principle, not of “evidence”. Secondly, it is virtually impossible to prove a negative – that having a criminal standard applied by the SDT has NOT protected clients (or the public) or NOT enabled a prosecution to proceed. How would it be possible for anyone, let alone ordinary members of the profession, to provide such evidence?

I was taken aback to see this line was being taken by The Law Society when I read about in The Law Society Gazette. I regard it as entirely inappropriate for a profession which I have always believed puts the public interest, the interests of clients and its own reputation before the interests of individual solicitors. If that is no longer the case, then The Law Society has not only fallen in my personal estimation but deserves less respect from other professions, the judiciary and the public too.

Even without formal “evidence”, it seems to me obvious that there will have been cases which did not even reach the SDT because the standard of proof was unlikely to be met, even though there was substantial reason to believe that the solicitor was guilty of misconduct on a balance of probabilities. As a former SRA Adjudicator, I can certainly give in confidence details of a shocking case which a panel of three adjudicators referred a case to the SDT but our decision was internally overruled.

Question 3. Are you aware of any other issues with the Solicitors Disciplinary Proceedings Rules.

I am no longer familiar enough with these to comment.

ABI RESPONSE TO THE SOLICITORS DISCIPLINARY TRIBUNAL CONSULTATION ON THE MAKING OF PROCEDURAL RULES IN RELATION TO APPLICATIONS TO THE TRIBUNAL, PUBLISHED IN JULY 2018

Introduction

1. The ABI is the voice of the UK's world-leading insurance and long-term savings industry. A productive, inclusive and thriving sector, we are an industry that provides peace of mind to households and businesses across the UK and powers the growth of local and regional economies by enabling trade, risk taking, investment and innovation.
2. The UK insurance industry is the largest in Europe and the fourth largest in the world. It is an essential part of the UK's economic strength, managing investments of over £1.7 trillion and paying nearly £12 billion in taxes to the Government. It employs around 300,000 individuals, of which around a third are employed directly by providers with the remainder in auxiliary services such as broking.
3. Our response is limited to addressing the question regarding the standard of proof to be applied in Tribunal hearings.

Detailed comments

Q] Do you consider, in principle, that the Tribunal should change its rules to make provision about agreed outcome proposals?

4. The ABI would support a shift to the civil standard of proof in Tribunal hearings. We were a member of the Government's Insurance Fraud Taskforce which made an explicit recommendation¹ that the standard should be reviewed.
5. The high standards that are required to practice as a solicitor must be upheld. It is imperative that the small minority of solicitors who pose a demonstrable risk to the public must be prevented from practicing.
6. We fully appreciate that a solicitor's livelihood may be at stake and that a solicitor who is struck-off will find it almost impossible to return to the profession. However, most allegations of misconduct are investigated by the Solicitors Regulation Authority (SRA) and even where the SRA believes there has been misconduct, the breach is not automatically referred to the SDT. It is only the most serious breaches that should and would be referred to the Tribunal and would be affected by a change to the standard of proof. Any profession that demands high standards of integrity, ethics and technical competence must be subject to an enforcement process that is commensurate with such standards. We agree with the Tribunal that it is not equitable that a solicitor could

¹ <https://www.gov.uk/government/publications/insurance-fraud-taskforce-final-report>:
Recommendation 14

escape serious sanction where the Tribunal thought it more likely than not that serious misconduct had occurred, but the Tribunal could not be absolutely sure to the criminal standard.

7. We note that almost every professional regulator (with the exception of veterinary surgeons) now applies the civil standard of proof to professional misconduct allegations. We note further that legal contemporaries, licensed conveyancers and legal executives are regulated to the civil standard, the preferred standard of the parent regulator, the Legal Standards Board. Moreover, the Bar Standards Board (BSB) will be applying the civil standard to allegations of misconduct against barristers arising from 1 April 2019.
8. It is vital that public confidence in the legal profession is maintained. Retention of the criminal standard for solicitors is likely to be perceived as being protectionist – giving solicitors preferential treatment compared with other parts of the legal sector (and indeed other professional sectors) - and putting the interests of the profession above the wider public interest.
9. The civil standard would be more proportionate than the criminal standard, is more likely to provide greater public protection, to elicit a positive public reaction and make it easier and less costly for the SRA to prosecute² in appropriate cases.
10. We agree with the assertion of the BSB Board³ that the only clear justification for maintaining the criminal standard would be if it could be shown to provide better public protection than the civil standard. We are not convinced this is the case.
11. Any lowering of the standard of proof must not lead to a reduction in the thoroughness of any investigation conducted by the SRA. The ABI's support for the civil standard is founded on the SRA clearly demonstrating that it conducts investigations fully and properly.

Association of British Insurers
October 2018

² We note that, in June 2017, the SRA failed in its prosecution of Leigh Day and three of its solicitors following the longest ever hearing at the SDT. The respondents were cleared of allegations of misconduct, though lost their bid to recover £5.8m legal costs.

³ https://www.barstandardsboard.org.uk/media/1923922/standard_of_proof_consultation_-_bsb_response_-_final.pdf (paragraph 38)



Association of Women Solicitors

Essential for Success

Solicitors Disciplinary Tribunal

**CONSULTATION ON THE MAKING OF PROCEDURAL RULES
IN RELATION TO APPLICATIONS TO THE TRIBUNAL**

Response by Association of Women Solicitors, London

About Association of Women Solicitors, London

Association of Women Solicitors, London was founded in 1992 and its aims include representing, supporting and developing the interests of women solicitors. Membership is open to women solicitors and trainees and associate membership to other women lawyers including barristers, chartered legal executives and paralegals. For further information please visit our website www.awslondon.co.uk

RESPONSE

Having read the Consultation including Appendix B - Equality Impact Assessment we agree with your view that it is unlikely the proposed new rules would affect solicitors appearing before the Tribunal disproportionately because of gender, pregnancy or maternity.

However we are greatly concerned about proposed new Rule 5 reciting that the standard of proof that will be applied to Tribunal proceedings will be the standard of balance of probabilities applied in civil proceedings.

Thus in disciplinary proceedings with potential to impose a massive fine or end a solicitor's career altogether would be no longer subject to the criminal requirement of beyond reasonable doubt.

We do not believe that the proposed changes will result in greater protection for either the public or women solicitors as complainants (for example in cases of alleged sexual harassment) and could instead prejudice accused but innocent individuals.

In conclusion, we believe that the disciplinary proceedings should remain subject to the criminal requirement of "beyond a reasonable doubt".

-----Original Message-----

From:

Sent: 01 August 2018 15:57

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: Consultation on the making of Procedural Rules in relation to applications to the Tribunal

Dear Sirs

My responses to the questions for consultees are as follows:

(A) I consider that the Tribunal SHOULD change its rules to allow for the civil standard to be applied to cases which it hears.

REASON: As is pointed out in the consultation document, almost all regulatory bodies now use the civil standard and even the Bar Standards Board is to move to the civil standard shortly. The General Medical Council moved to the civil standard in 2008 and has been followed by all the other health regulators. It seems to me that the general public would be aghast at the idea that doctors, nurses and other health professionals are subject to a lower standard of proof in their professional disciplinary hearings than solicitors.

(B) I agree

(C) Yes

(D) n/a

(E) No, they appear to be sound.

(F) Nothing occurs to me.

Thank you.

I am a solicitor holding higher rights of audience in the criminal courts. I have been engaged in disciplinary regulatory work for the last 16 years and I am currently an independent consultant at the SRA.

I am content for my comments to be published.

From:

Sent: 07 October 2018 17:44

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: Consultation

Dear Sirs

Please find attached my response to the consultation:

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

No the standard of proof should remain the same as it currently is. The reasoning for retaining the criminal standard of prove is to ensure a proper balance between protecting the public and the rights of a solicitor accused of breaching the SRA rules. The current standard provides sufficient safeguards in protecting the public against breaches of the rules and safeguards and the risk to the public. Additionally, the public already have sufficient confidence in the regulatory system and the profession. Little or no evidence has been produced in illustrating that confidence in the regulator is low or will be increased by lowering the standard of proof. The SRA have been able to provide a fair and consistent approach in disciplinary proceedings under the current regime however changes in respect of procedural changes could be implemented with allowing the criminal standard of proof to continue.

It is noted the SRA forward the argument of costs in preferring the civil standard of proof. Costs should not be a factor in determining whether proceedings should be instigated. Proper and thorough investigations are to be costly and lowering the standard should not be a manner of circumventing the need for a proper investigation or reducing the amount of work required in the investigation stage. The notion of reduced costs and investigations contradicts the SRAs claim they are seeking to protect both the public and solicitors. Flawed investigations are more likely to result in unfair findings against solicitors especially when based on the civil standard. A safeguard to ensure proper investigations are conducted is retaining the criminal standard of proof this will ensure thorough investigations are carried out in order to achieve the higher standard of proof required and therefore retaining public confidence in the profession. The profession should not only be seen to do justice, it should also carry it out based on certain and sound decisions which can only be achieved based on the criminal standard of proof.

The criminal standard has as illustrated by the increase of prosecutions by the SRA in the last two proceeding years been a sufficient standard to penalise members of the profession who have breached the rules. The question has to be asked why fix something that is not broke? Instead of reducing the standard of proof to encourage or force admissions by members, a more appropriate method may be to introduce a published and agreed sliding scale of credit for early admissions. Early admissions from the outset should be encouraged by highlighting the likely outcome at each stage and the amount of credit that would be afforded for an admission. Allowing a change of standard of proof to increase the discretion

of the SRA leaves the process open to abuse by removing a fundamental safeguard they encounter.

The SRA have/are heavily citing the civil standard being that in place for medical professions. It is clear the civil standard is required for these professions. The lower standard for these professions ensures life changing consequences are put to scrutiny to prevent them occurring. It is not saying the standard of proof for these professions is ideal but rather a necessity due to the consequences likely to be suffered by patients. In an ideal world where medical professions did not impact health and wellbeing to the extent they do the criminal standard would be the appropriate standard however as a preventive measure it is required a civil standard should be used for those professions.

A lowering of the standard will make decisions more susceptible to bias being applied by the panel. Whereas a higher test will eradicate some of the bias panel members subconsciously possess. As mentioned in the draft rules the SRA support the notion that other criminal rules (bad character, agreed outcomes etc) should be introduced but the criminal standard of proof should be disregarded. Put simply the SRA should not be able to cherry pick elements that strengthen their position. The additional factors are welcomed but only if the criminal standard is kept.

Finally, should the criminal standard be replaced by the civil standard an inherent risk that may exist is one of double jeopardy. The respondent may be acquitted in a criminal court but tried again before the SDT – this quite simply would be unfair to the respondent having to face two sets of proceedings for the same circumstances.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

The proposal to include a rule dealing with Agreed Outcomes is supported in principle. An agreed outcome will be beneficial to all parties concerned and appear to be in the public interest as they will ensure swift outcomes and certainty. Although cost should be a sub factor of any proceedings in theory agreed outcomes should reduce the need for unnecessary hearings.

The only point of concern is the 28 day window prior to hearings. A more realistic window will likely be 7 days prior to the hearing. This will allow respondents to settle more matters as they will be aware of more facts closer to the hearing and the reduced time frame in theory should result in more matters being settled prior to hearings. It also allows for more time to conduct meaningful discussions between the parties.

c) Do you consider that the other provisions in the draft rules are fit for purpose?

(d) If the answer to question (c) is no, please explain why

(e) Do you have any detailed comments on the drafting of the proposed rules?

Withdrawal of allegations – draft rule 24 – this rule should remain as it gives oversight to the SRA and increases public confidence. Withdrawn allegations may be subject to cost

applications and requiring them to be withdrawn officially before the SDT may result in less scrupulous prosecutions being commenced in the first place.

Evidence of propensity – put simply this rule should be omitted unless the criminal standard is retained – the SRA should not be allowed to cherry pick rules and procedures to make prosecution more obtainable. Matters before the tribunal should be tried on the merits of the allegations faced alone without the attempt to muddy the waters with other instances.

Factual witnesses – 35 (7) – should remain as it prevents any tainting of evidence by factual witnesses who may intentionally or subconsciously alter their evidence having heard ongoing proceedings.

Sanction – 41 – this rule should not be allowed – the respondent should always be entitled to have the final say on proceedings and not a “brief reply” to the SRAs representations. Sanctions should be left to the tribunal with the SRA providing assisting when required. Not responding to the respondents remarks if anything it should be the other way around with the respondent having the final say.

Rule 51 – any proposed changes to the rules should only apply to offences committed (not the date of proceedings) after the implementation of the rules especially in respect of the standard of prove.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

Any change in the standard of prove to the civil standard risks the chance of bias being a factor when decisions are reached. Whether it be based on age,sex,race or religion. The criminal standard of prove requires a thorough investigation which in turn limits the extent of such bias.

Kind Regards

SDT consultation on the making of procedural rules in relation to applications to the Tribunal – BSB Response

1. The Bar Standards Board (BSB) welcomes the opportunity to respond to the Solicitor's Disciplinary Tribunal (SDT) consultation, *Consultation on the making of procedural rules in relation to applications to the Tribunal*¹.
2. We have given careful consideration to the SDT's consultation paper and have restricted our response to the first question advanced by the SDT, whether the SDT should change the standard of proof applied to cases which it hears.

Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

3. The Bar Standards Board is of the view that it is right in principle for all cases brought against regulated professionals, regardless of profession, to be decided on the civil standard of proof. We reached this view after a significant period of consultation² on the issue which ran from May 2018 to July 2018.
4. The individual responses to the consultation can be found on our website³ as well as our response⁴ which summarises our findings following the close of the consultation.
5. On 7 September 2018 the BSB subsequently submitted an application to the Legal Services Board for the approval of amendments to our Handbook in order to give effect to a change in the standard of proof, from the criminal standard to the civil standard, applied during professional misconduct proceedings⁵. Consideration of that application is ongoing⁶.

¹ *Consultation on the making of procedural rules in relation to applications to the Tribunal*, Solicitor's Disciplinary Tribunal, July 2018, accessible at: http://www.solicitortribunal.org.uk/sites/default/files-sdt/CONSULTATION%20ON%20THE%20MAKING%20OF%20PROCEDURAL%20RULES%20IN%20RELATION%20TO%20APPLICATIONS%20TO%20THE%20TRIBUNAL%20-%202016%20JULY%202018_0.pdf

² *Review of the Standard of Proof Applied in Professional Misconduct Proceedings*, Bar Standards Board, May 2018, accessible at:

https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf

³ *Summary of Responses*, Bar Standards Board, accessible at:

https://www.barstandardsboard.org.uk/media/1923918/standard_of_proof_-_consultation_responses.pdf

⁴ *Standard of Proof Consultation – BSB Response*, Bar Standards Board, accessible at:

https://www.barstandardsboard.org.uk/media/1923922/standard_of_proof_consultation_-_bsb_response_-_final.pdf

⁵ *Application to LSB for the approval of amendments to the standard of proof applied during professional misconduct proceedings*, Bar Standards Board, September 2018, accessible at: https://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2018/20180910_Application.pdf

⁶ *Current applications*, Legal Services Board, accessible at:

https://www.legalservicesboard.org.uk/Projects/statutory_decision_making/current_applications.htm

6. Some of the reasons for our decision were:

- The civil standard of proof provides the best possible protection for the public, this was supported by a consensus of respondents to our consultation from outside of the profession as well as a number of respondents from within the profession;
- Whilst some professions may be more vulnerable to groundless or malicious complaints, reputationally or otherwise, we were not convinced that this was unique to members of the legal professions. Many professions such as GPs, pharmacists and dentists have similar vulnerabilities and yet have regulatory bodies which use the civil standard of proof;
- Were there to be an increase in groundless or malicious complaints due to a change in the standard of proof there is no reason to believe that this would lead to a greater number of those complaints being found proved. A lower standard of proof does not equate to a lower standard of scrutiny of evidence and our investigatory processes will remain as robust as at present;
- The Legal Services Consumer Panel has identified the issue of ‘silent sufferers’ (consumers who had a complaint but did nothing about it). They have previously noted that the proportion of ‘silent sufferers’ had increased from 35% in 2016 to 49% in 2017, highlighting the importance of increasing public confidence in professional regulation; and,
- The need to avoid a public perception of the use of the criminal standard as “protectionism” and working in the interests of the profession rather than the public.

7. Given the consensus of those outside of the profession that the public interest is better protected by the civil standard, combined with those supporting voices from within the profession, we found no reason to believe the public interest is better protected by the criminal standard of proof. We are of the view that the same applies to solicitors and that the public interest lies in the SDT moving to apply the civil standard of proof to cases which it hears.

Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

8. N/A

Do you consider that the other provisions in the draft rules are fit for purpose?

9. N/A

If the answer to question (3) is no, please explain why.

10. N/A

Do you have any detailed comments on the drafting of the proposed rules?

11. N/A

Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

12. N/A

Sent: 06 October 2018 14:15

To: SDT Feedback feedback@solicitorsdt.com

Subject: Cardiff + District Law Society's Response to Consultation on the Making of Procedural Rules in Relation to Applications to the Tribunal

“Response to Consultation on the Making of Procedural Rules in Relation to Applications to the Tribunal”

Introduction

The Incorporated Law Society for Cardiff and District trades under the name Cardiff and District Law Society (CDLS). CDLS is the largest local law society in Wales. It has a membership of over 2,000 including solicitors, barristers, legal executives and academic lawyers. CDLS appoints a number of specialist committees, including a Regulatory Issues Sub-committee. Through these committees CDLS responds to a number of public consultations on matters which affect the professional lives of solicitors in the Cardiff and District area. CDLS welcomes the opportunity to respond to the Solicitors Disciplinary Tribunal's Consultation on the Making of Procedural Rules.

Response

In answer to the particular questions posed at the conclusion of the Consultation, we respond as follows:

a) Do you consider in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears ?

We do not consider that that the Tribunal should change its rules to allow for the civil standard to be applied in cases it hears. We support retaining the the criminal standard of proof in all disciplinary cases.

We support the retention of the criminal standard of proof for the following reasons:

- The Tribunal must be absolutely certain before potentially ending a solicitor's career. A solicitor is likely to have faced a long and expensive route to qualification. Modern tuition fees alone (for a three year degree course and one year LPC) will probably have been in excess of £40,000.00. Accordingly, we contend that any decision which could deprive solicitors of their career should be beyond a reasonable doubt rather than the civil standard;
- There are serious and life changing consequences of any decision made by the Tribunal. Any finding against a solicitor will have a huge impact whether it be to their financial situation, reputation or health and well-being. We are firmly of the view that the Tribunal should be absolutely certain of any alleged wrongdoing before making a decision of this nature;
- There is already a high prosecution success rate in the prosecution and so we question the need for such a change;
- The proceedings are not civil proceedings. Disciplinary tribunal proceedings are accusatorial in nature, much more akin to the criminal courts than the civil arena where the lower standard is applied. It is submitted that a lower standard is suitable for

example in compensatory schemes rather than punitive proceedings which should continue to have allegations proved to the criminal standard;

- Unlike in civil proceedings, costs are rarely awarded to the Respondent in the disciplinary proceedings; in actual fact, quite the opposite is true and the Respondent is often required to pay a proportion of the Applicant's costs even where the Applicant has been entirely unsuccessful. The proposed rules do not make any provision for the amendment of this;
- There is a huge disparity of arms when cases are brought before the Tribunal. The SRA is able to call on a huge level of resources in order to prepare their case for presentation to the Tribunal. In the majority of cases, the Respondent is only able to apply a fraction of those resources in their defence;
- There is a concern that the Applicant in proceedings will not prepare cases or conduct a thorough investigation if a lower standard is applied. As a regulator, the SRA should conduct a thorough and robust investigation which reveals all aspects of the circumstances surrounding alleged misconduct (even where that is detrimental to their own case). The concern is that with a lesser standard of proof, investigations will not be properly conducted so that as soon as there is some evidence which would fit the civil standard is obtained no further investigation will be seen as necessary. A continued requirement to prove cases to the criminal standard would ensure that investigations are carried out to the fullest degree.

There is case law to support our contention that the continued use of the criminal standard is appropriate. Please see :

- (1) Re A Solicitor [1993] QB 69 – (Lord Lane CJ) – *“It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof to the point where they feel sure that the charges are proved or, put in another way, proof beyond reasonable doubt.”*
- (2) Campbell v Hamlet [2005] 3 All ER 1116 : *“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”*.

b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals ?

Yes. The use of Agreed Outcomes is well established in Tribunal proceedings and their use should continue as they are an effective tool in shortening proceedings therefore saving time and costs. We agree with the inclusion of a requirement to notify all co-respondents of any proposed Agreed Outcome in the interests of fairness to all parties; notice will enable any co-respondent to make any reasonable comment in the time allowed.

c) Do you consider that the other provisions in the draft rules are fit for purpose ?

Yes

d) If the answer to question (c) is no, please explain why ?

N/A

e) Do you have any detailed comments on the drafting of the proposed rules ?

Only to reaffirm and emphasise our support for the continued use of the criminal standard of proof in SDT cases.

f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act ?

We do not have access to any data which would suggest adverse impacts for any of those with protected characteristics under the Equality Act and so we cannot usefully comment.

This response is submitted on behalf of the City of Westminster & Holborn Law Society.

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

We cannot see a justification for the change in the rules either in the consultation or more generally and consider that the change is likely to undermine confidence in the Tribunal in the long term. It should go without saying that the Tribunal needs both the confidence of the public and the trust of the profession. We are concerned that the proposed change would diminish the trust of the profession and could, ironically, lead to a reduction in public protection.

In practice, in the experience of regular Tribunal advocates, it is a rare case in which the application of the criminal standard of proof has a material impact on the outcome of a case from the prosecution perspective. The SRA's "success" or "conviction" rate at the Tribunal is exceptionally high and there is no evidence that any person has been put at risk as a result of the Tribunal applying the criminal standard.

We make the point at the outset that there has never been an appeal on which the standard of proof was a decisive factor. In the two significant decisions where standard of proof was expected to be a material issue within the last decade, the Court has declined to adjudicate on what was, in each case, an academic argument which did not determine the outcome of the appeal.

The SDT is bound by the Legal Services Act 2007 to act consistently. The LSB has declined to propose or approve regulatory changes because of a lack of evidence in support of proposed changes (see, eg the proposal to regulate will writing and administration of estates declined for lack of evidence and the SRA's 2014 attempts to amend professional indemnity insurance requirements rejected for lack of evidence). Taking into account the lack of any evidence in support of a change of the SDT's approach to the standard of proof, it could be argued that the move away from the criminal standard is inconsistent with the SDT's statutory obligations and the current ethos of evidence based regulation.

We note the focus in discussions on this topic on issues of public protection (albeit in rather vague and generic terms) – that focus is entirely natural in the context of professional regulation. We would however urge the SDT to consider a number of points which have not (so far as we are aware) figured significantly in the debate surrounding the standard of proof.

- (i) The SDT is not any other regulator. It is not one of a class of regulators with similar constitutions and powers such that there can be a persuasive argument for absolute consistency. Its powers were specifically set out in some detail in the Solicitors Act 1974 (as subsequently amended) and have been the subject of extensive High Court precedent. Accordingly, whilst the approach of other regulators may be informative, there are issues unique to the legal profession which may call for a different approach. In our view the following factors are of relevance:-
 - a. Regulatory vs Disciplinary processes. The SRA does not rely upon the SDT to address issues of immediate public protection. The powers of intervention and the ability to impose immediate conditions on both firm authorisation and individual practising certificates do not require the SRA to prove any misconduct – let alone to any particular standard – it is sufficient for the SRA to identify a specified risk. The principal immediate methods of protecting the public are therefore already within the remit of the SRA and, insofar as they require proof of any facts at all, the civil standard is already adopted.

Accordingly, the balance within the specific regulatory framework applicable to solicitors is already heavily weighted in favour of public protection. The SDT, whilst it is firmly wedded to the principles set out in *Bolton* for understandable reasons, is not the institution which is primarily tasked with managing risk – nor could it be given the time it usually takes for alleged misconduct to be investigated by the SRA, adjudicated upon and brought before the SDT. It is entirely common for the SDT to adjudicate on misconduct allegations two or more years after they have occurred where solicitors have been in practice in the interim with no issues.

The role of assessing and managing immediate risk falls firmly on the SRA. The SDT's role is far more akin to that of the criminal courts – it is the court in which allegations of misconduct are tested and appropriate censure is imposed whether by way of fine, suspension or strike off. Plainly part of the rationale for that censure is to ensure that misconduct cannot be repeated and that lessons are learned but the decision is inevitably backward looking – it is a sanction for conduct which has already occurred.

Whilst we appreciate that there is some blurring of the edges in terms of role and jurisdiction in relation to practising conditions and, in particular s.43 orders, this has been historically answered by the SDT adopting the civil standard when dealing with s.43 orders.

The SDT has no role at all in assessing the suitability of applicants for admission to the profession. That function is entirely down to the SRA and appeals remain to the High Court.

It follows that the argument that there is some diminution in public protection by virtue of the SDT maintaining the criminal standard of proof does not withstand detailed scrutiny.

- b. The path to restoration. S.29A The Medical Act 1983 contains an express provision requiring medical regulators to create rules dealing with the restoration of a licence which has been withdrawn. There is no similar provision in the Solicitors Act 1974; indeed, the powers of the SDT to deal with an application for restoration to the Roll have been consistently construed in a way which makes it extremely difficult for solicitors to demonstrate sufficient rehabilitation to justify an application for restoration. Accordingly, the erasure of a medical practitioner from the register is more akin to a five year suspension than a strike off decision.
- c. The right to practice a profession. The right to practice a profession is protected by Art 8. ECHR. That is a qualified right which may be interfered with as is necessary in a democratic society for the purposes of, inter alia, ensuring public safety, the economic wellbeing of the country, the prevention of disorder and crime or the protection of the rights and freedoms of others. If the purpose of the shift to the civil standard is to make it easier for solicitors to be removed from the Roll, there is, inevitably a need to consider whether the change would still meet the balancing act required by Article 8. Is it really necessary in a democratic society for an individual to be permanently deprived of his ability to practise his profession if there is reasonable doubt that he is guilty of misconduct and even where there are myriad other measures available to ensure that the public is protected?
- d. Where the proposed sanction is a fine, the measure of public protection is limited to the maintenance of the reputation of the profession. The fine itself in no way protects

or compensates any affected clients or third parties and its only function is to stand as a disincentive for the Respondent and others to act improperly in the future.

- (ii) A shift to the civil standard must cut both ways. In any trial, the evidential burden falls on the party seeking to prove an issue. Accordingly, whilst the SRA must currently prove dishonesty to the criminal standard, the Respondent must also prove facts he raises in his defence to the criminal standard. Where, for example, mental illness is pleaded as a defence, the current regime requires that that too is proven to the criminal standard. A shift to the civil standard may therefore make it easier for solicitors to prove facts raised in their defence and result in more cases failing at the Tribunal.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

Yes. We remain unconvinced as to the merits of agreed outcomes as a form of plea bargaining however if the practice is to be permitted at all, clear rules are plainly appropriate. We urge the Tribunal to pay particular attention to the risk of inconsistency and injustice where agreed outcomes are proposed for some but not all Respondents.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

Generally, yes. We make no comment on the operation of the rules in practice.

(d) If the answer to question (c) is no, please explain why.

(e) Do you have any detailed comments on the drafting of the proposed rules?

Generally, yes. We make no comment on the operation of the rules in practice.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

No.

-----Original Message-----

From:

Sent: 08 October 2018 21:36

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: Consultation

Please find below my response to the consultation.

a) the standard of proof should remain as it is. The current standard sufficient protection to the public and professionals. No evidence has been produced to show confidence in the regulator will increase confidence in the public. Introducing the civil standard may give rise to respondents facing two sets of proceedings when rules are breached. The figures published in the consultation illustrate the sra are still able to regulate the profession effectively as can be seen in the increase in the proceedings over the last two years.

b) the proposal for agreed outcomes is agreed. It will enable certainty for all parties involved. The only point to be raised is the 28 day period. In practical terms this should be changed to 7 days to allow the possibility for more outcomes to be agreed.

c/d/e) rule 24- this should remain in place as it will allow some oversight over allegations.

Rule 35(7)- this is a good rule, it will allow for untainted evidence to be given at hearings.

Draft rule 41- the respondent should always be given the last say in proceedings.

Rule 51- any change in ruled should only apply to offences committed after the implementation of the rules, and should not apply for proceedings commenced after the implementation of the rules for offences committed before the implementation of the rules.

Should majority lay members be introduced there is a real risk that decisions will be made/ based without the necessary legal expertise that solicitor members of panels will provide.

f) the introduction of the civil standard of proof will increase the likelihood of bias compared to the criminal standard. The reason for this being the criminal standard will require a more thorough investigation and will eradicate some of the bias that may exist if the civil standard is used.

General Optical Council (GOC) response to Solicitors Disciplinary Tribunal's consultation on the making of procedural rules in relation to applications to the Tribunal

About us

We are one of [12 organisations](#) in the UK known as health and social care regulators. These organisations oversee the health and social care professions by regulating individual professionals. We are the regulator for the optical professions in the UK. We currently register around 30,000 optometrists, dispensing opticians, student opticians and optical businesses.

We have four core functions:

- Setting standards for optical education and training, performance and conduct.
- Approving qualifications leading to registration.
- Maintaining a register of individuals who are qualified and fit to practise, train or carry on business as optometrists and dispensing opticians.
- Investigating and acting where registrants' fitness to practise, train or carry on business is impaired.

Response to the consultation

(a) Do you consider, in particular, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

The GOC supports the Tribunal's proposal to adopt the civil standard at its hearings. This would be in line with current regulatory practice, including at the Solicitors Regulation Authority (SRA) and all healthcare regulators.

Unlike criminal proceedings, the primary objective of professional disciplinary proceedings is to protect the public rather than punish the registrant, and this objective would be better achieved by the Tribunal taking action in circumstances where they consider that the allegations are probably (but not definitely) made out.

As Sir Thomas Bingham MR held in *Bolton v Law Society*, "A profession's most valuable asset is its collective reputation and the confidence which that inspires. Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

In any event, the experience of the GOC is that very few cases turn on disputed facts; the central issue is generally whether agreed facts amount to professional misconduct / impairment of fitness of practise, and what is the appropriate sanction.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25).

The GOC supports the Tribunal's proposals on agreed outcomes.

The GOC introduced its own 'consensual panel disposal' process this year, with a view to encouraging registrant participation and improving public protection by expeditious management of appropriate cases. The policy is available on our website: https://www.optical.org/en/news_publications/news_item.cfm/goc-introduces-consensual-panel-disposal-policy

The Tribunal's proposed statutory amendments will arguably provide greater clarity than could be achieved by introducing a voluntary process. The requirement for agreement on facts and sanction (rule 25(2)) will compel parties to work together to resolve these issues, while the ability to direct a case management hearing (rule 25(6)) will retain the Tribunal's power to test the agreed outcome proposal.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

Yes. The GOC notes a robust approach to expert evidence (Rule 30), which will support the Tribunal's regulatory objectives.

If the Tribunal adopts the civil standard of proof, it may find it easier to prove matters by external findings (Rule 32(2)), for example where a party seeks to rely on the judgment of a tribunal that uses the civil standard.

The Tribunal may wish to consider the appropriateness of introducing lay parity: a number of regulators, e.g. the Institute of Chartered Accountants in England and Wales (ICAEW) and health regulators (including the GOC) have introduced lay majorities with a view to improving public confidence.

(d) If the answer to question (c) is no, please explain why.

N/A

(e) Do you have any detailed comments on the drafting of the proposed rules?

No.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

The GOC has not identified any such effects from the Tribunal's proposals, but we will be monitoring our own consensual disposal process in case there is a disproportionate impact on registrants with particular characteristics.

J Bradshaw

From:

Sent: 04 October 2018 16:57

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: Consultation on changing standard of proof for SDT

Good afternoon,

I should like to submit a short response to one question of the consultation relating to the proposal to lower the standard of proof to the civil standard for cases brought before the SDT:

- a. No, I do not agree this should not be done. Statistically the SRA's success rate at the SDT is very high as things stand, without changing the burden of proof. Further, the SDTs draconian powers to levy punitive fines and life changing measures requires a criminal standard of proof. If the standard is lowered, will the SDT relinquish its punitive fining powers?

Yours faithfully

Please find my response to the consultation by the SDT below.

41.

(a)

No I do not believe the Tribunal should change its rules to allow the civil standard to be applied to cases which it hears.

The cost of bringing a matter to the SDT and then running it should not factor into a decision regarding the standard of proof that is necessary. Allegations should be brought forward for the sake of justice and not cost. The criminal standard of proof will also ensure frivolous allegations brought forward to besmirch or improve positive result statistics are less likely to be brought forward due to a cost, however minimal being added the standard of proof. Also, any matter brought forward should be thoroughly mapped out and based **on hard evidence in order to not waste the SDT's time and avoid any costly lengthy Tribunals**. This would therefore provide a simple cost effective process for all parties involved, whereas a civil standard based on probabilities will give rise to opinionated arguments that will stretch out the process and cost more in the long run from either longer discussions or the consequential dramatic increase in appeals of such probability based decisions.

There is no substantial reason to change the standard of proof, no evidence has been presented of the public's lack of confidence in the criminal standard of proof. On the contrary, a watering down of the standard of proof would only **lower the public's confidence in the SDT, as a decision** based on probabilities only introduces biases and subjective opinions rather than decisions based on hard evidence. Furthermore, there is strong public interest in ensuring proper protections are in place for not only accusers and witnesses but also the accused as well. There should be no imbalance between the parties involved and only an unbiased criminal standard of proof can ensure a just result.

Furthermore, the statistics provided demonstrate that a change is not needed. The number of cases has risen showing that the SRA believe that they have confidence to bring forward more cases and that the ability to win such cases is still strong enough to increase their workload.

(b)

Yes I agree that the Tribunal should change its rules to make provision about agreed outcome proposals and that 28 days should be more than sufficient time to submit such a proposal.

(c)

(d)

(e)

As in draft rule 9, two panel members must be solicitor members on one must be a lay member. As similar to other Tribunal structures there must be a foundation of knowledge of the matter at hand but, also an element of

outside knowledge for a possible new or different perspective. A solicitor majority will safeguard the background knowledge of the matter, this with valued input from the one lay member will produce a diverse panel. If the panel was formed of two lay members and one solicitor there is a risk of the majority of the knowledge of the panel being unrelated to the matter and could result in an inefficient decision making process.

In order to avoid wasting the time of the SDT and ensure the accused is not subjected to a lengthy and unruly process such time limits as draft rule 19 of 14 days are welcome.

As with many of the suggestions put forward by the Solicitors Regulation Authority, SRA, they give too much power to the SRA and draft rule 24 would be necessary to not allow the SRA free reign to make allegations of any Solicitor however unfounded, with no recourse. If an allegation could be freely amended or withdrawn there would be no incentive to fact check such allegations that could damage a professionals career or personal life. For any professional body there should be a cost when pursuing such matters for the benefit of the Tribunal to save wasted time and for the accused from embarrassment. It is also in the public interest for the SRA to follow the correct guidelines when pursuing allegations and show restraint to not pursue any allegation brought forward not based on solid evidence as this would be a fruitless and costly endeavour.

The draft rule 27, if unbiased will be a welcome addition and should not expressly allow evidence of propensity as this should be dealt with on a case by case basis and would not be appropriate in all matters. In addition, this would likely introduce bias as to an accused intentions and further strays from the foundation of equality.

As in the criminal courts and draft rule 41, a respondent is given the right to make submissions in respect of the sanction. This is a welcome rule that has and should still be true in Tribunals.

Draft rule 43 is a welcome clarification and highlights the need for there to be consequences or costs for the actions of professionals such as Solicitors and the SRA and will be a worthy deterrent against overzealous allegations. Furthermore, if with the criminal standard of proof it would be far less likely for a costs order to be made against the SRA as they would have already prepared **the proof "beyond a reasonable doubt" and that moving to a civil standard** could introduce uncertainty and increase the costs to the SRA from costs orders and time when managing possible unrealistic allegations.

Lastly, draft rule 51 would benefit from a
It would be unjust for new rules to be introduced and affect cases and actions that pre-date the possible introduction of a new standard. Any change of standard may be unfair to any prosecutions that pre date any change. It may also leave open the possibility of abuse by the SRA for example a matter that did not previously satisfy the criminal standard may then be re commenced,

this would be unfair and an abuse of process as matters should be determined by the rules in place at the time of the alleged rule break.

(f)

The change in the standard of proof from a criminal standard to civil would adversely impact some if not all of the protected characteristics in the Equality Act. When a civil standard is used it introduces an element of probability, the likelihood a person would have committed the offence being discussed or the chance that the proposed evidence is enough to possibly end the accused professionals career and current life as they know it. This element of probability is always subjective and can never be objective because there are no mechanisms or tools that can give you a 100% accurate view of the current allegation or characters without a criminal standard. This therefore allows biases and other subjective opinions be introduced into the decision that should have no footing at a Tribunal. The criminal standard ensures that any allegations, evidence and arguments put before the Tribunal and therefore any decisions made, are securely based on hard evidence to ensure the judgement is **"beyond reasonable doubt."**



08 October 2018

Dear Sir/Madam

Consultation on making of procedural rules in relation to applications to the Tribunal.

The Legal Services Consumer Panel (the Panel) welcomes the opportunity to respond to the Solicitors Disciplinary Tribunal's (SDT) consultation. Please see below our responses to the questions raised in the consultation.

A. Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

The Panel is of the strong opinion that the current standard of proof does not serve the interest of consumers' or the public.

The Panel has in the past said that moving from the criminal standard of proof to the civil standard of proof will be fairer on consumers, and it may also act as a positive incentive for solicitors to deliver good services. Adopting the civil standard of proof will also bring the SDT in line with the rest of the legal services profession bodies in England and Wales.

In our response to the Bar Standards Board¹ on the same subject, we referred to the Law Commission's assessment of the issue when it considered the standard of proof adopted by the health and social care professionals. In its assessment of the issue, the Law Commission said that the civil standard of proof should be adopted:

*"There are strong public protection arguments for adopting the civil standard [of proof]. The criminal standard [of proof] implies that someone who is more likely than not to be a danger to the public should be allowed to continue practising, just so long as the panel is not sure that he or she is a danger to the public. It seems to us that professional regulation is quite different from the criminal context, where the state is required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her."*²

¹ Legal Services Consumer Panel, *Review of the standard of proof applied in professional misconduct proceedings*, July 2017.

² Law Commission, *"Regulation of Health Care Professionals; Regulation of Social Care Professionals in England Report"*, (LC 345), March 2014.

Additionally, in 2014, the Legal Services Board (LSB) recommended that both the SDT and the Bar Tribunals and Adjudication Service should adopt the civil standard of proof.³ At the time, the LSB argued that a solicitor or barrister who is more likely than not to be “incompetent” may be a risk to the liberty of their clients. The LSB also said that it cannot be right that a professional who probably stole client funds is allowed to continue practising just because the regulator is not sure beyond reasonable doubt that they stole client funds. The LSB went on to make the important point that the organisation that considers complaints against judges, the Judicial Conduct Investigations Office, uses the civil standard of proof when it considers allegations against judicial office holders’ personal conduct. This has been the case since the inception of the office. We completely agree with the LSB’s arguments.

The SDT is overdue in its consideration of this issue, and in implementing the LSB’s recommendation for change. Moreover, we believe that having the same standard of proof as the Solicitors Regulation Authority (SRA) will facilitate better understanding of decisions and may improve consistency.

B. Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

The Panel welcomes the proposal to include a rule dealing with Agreed Outcomes, which is in essence an early settlement without a full tribunal hearing. We believe that where appropriate, there is a strong public interest in resolving disputes as cost effectively and as quickly as possible.

The SDT has proposed a 28 day time limit for the submission of an Agreed Outcome Proposal. The Panel agrees that 28 days is sufficient for applicants to reach an agreement. It would however be useful for the SDT to clarify whether this is 28 working or calendar days, to avoid any confusion for applicants.

**C. Do you consider that the other provisions in the draft rules are fit for purpose?
D. If the answer to question (C) is no, please explain why. E. Do you have any detailed comments on the drafting of the proposed rules?**

Composition of Panels

In the proposed new rules, draft rule 9, the SDT suggests that the panel, for the hearing of any application, should be composed of a majority of solicitors, and not lay members (two out of three members must be solicitors). However, we understand that the Legal Services Act 2007 removed section 46(6) of the Solicitors Act (1974) which required a solicitor majority on any Tribunal panel hearing a case. It is our strong view that draft rule 9 should be amended to require a lay majority. This would support public confidence by addressing any perception of a structural bias in favour of solicitors.

Disclosure of publication

In the new proposed rule 35(9), the SDT suggests the possibility of making a direction prohibiting the disclosure or publication of “*specified documents or information relating to the proceedings; or any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified.*” The Panel is concerned that this

³ The Legal Services Board, “*Regulatory sanctions and appeals processes*”, March 2014.

appears to be a far reaching blanket ban on the publication of information and/or identification of potential wrongdoers. In general, the Panel believes documents and information relating to the proceedings should be published. This is crucial for transparency, consumer protection and public confidence in the Tribunal's work. However, we accept that there may be limited circumstances where information and/or identities of individuals needs cannot be readily shared until the end of a matter or indeed where ever whistle-blowers are involved. However, the SDT should clearly define these scenarios and use exemptions in these cases.

Protecting vulnerable witnesses

We agree with the SRA's point⁴ that the SDT should prevent cross-examination of an 'alleged victim' by the 'alleged perpetrator'.

F. Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

The Panel believes the proposed change of standard of proof would have a positive impact on vulnerable consumers. Vulnerable consumers will be better protected if regulated persons who have probably breached conduct rules are disciplined appropriately. The civil standard of proof should also give encouragement to vulnerable consumers and their representatives to raise concerns and seek redress when appropriate. We are not aware of any good reasons why the draft rules should have a disproportionate impact on solicitors with a protected characteristic.

We would be very happy to meet and discuss any aspect of this response in further detail. Please contact Lau Ciocan for further queries at lau.ciocan@legalservicesconsumerpanel.org.uk.

Yours sincerely

Sarah Chambers



Chair

Legal Services Consumer Panel

⁴ The SRA, *Consultation on the making of procedural rules in relation to applications to the tribunal*, September 2018.



Solicitors Disciplinary Tribunal
CONSULTATION ON THE MAKING OF PROCEDURAL RULES
IN RELATION TO APPLICATIONS TO THE TRIBUNAL

Response by Leicestershire Law Society

About Leicestershire Law Society

Leicestershire law Society was founded in 1860 as an organisation for local solicitors. Its current objects include representing the interests of its members locally and nationally. More information can be found at www.leicestershirelawsociety.org.uk.

RESPONSE

We are greatly concerned about proposed new Rule 5 reciting that the standard of Proof that will be applied to Tribunal proceedings will be the balance of probabilities applied in civil proceedings.

Thus in disciplinary proceedings with potential to impose a massive fine, “trash” a professional reputation or end a solicitor’s career altogether would be no longer subject to the criminal requirement of beyond reasonable doubt.

We note that the civil standard is applied in other professional disciplinary proceedings but do not believe that this impacts in the same way on other professions. The way in which sanctions are applied is very different as is the impact of those sanctions as set out in the Law Society of England and Wales’ response.

We do not believe that the proposed changes will result in greater protection for the public and could instead prejudice accused but innocent individuals.

The current conviction rate at the Solicitors’ Disciplinary Tribunal (SDT) at 96%¹ is currently far higher than in any other professional disciplinary tribunal or in the criminal justice system generally. The Solicitors Regulation Authority (SRA) has already responded to the consultation and it does not claim that it brings fewer prosecutions or charges because of the current standard of proof. It is difficult to see how the public requires greater protection than it currently receives.

However, we do believe that the perception of some members of the profession, particularly sole practitioners and smaller firms who have limited resources to fight a prosecution and those who currently distrust or are fearful of the motivations of the SRA will perceive that they are being treated unfairly. We believe that some practitioners fear not only the sanction likely to be imposed but also the cost of defending an action and the likely imposition of a cost order of tens of thousands of pounds, even if they successfully defend all charges. As a consequence, they accept a regulatory settlement even when they believe they have a defence and this is likely to increase if the standard of proof is lowered.

We know from a previous report commissioned by the SRA ² that BAME firms were disproportionately represented amongst those subjects to investigation and that the eventual outcome of the SRA’s investigations ended with more severe sanctions being applied to BAME respondents. Whilst these results are not evidence of discrimination or racism on an institutional level, many BAME practitioners are distrustful of the actions of the regulator and these statistics lead to greater fear of the outcome of any investigation. A lower of the standard of proof applied can only heighten such fear.

¹ Solicitors Disciplinary Tribunal Annual Report 2016, page 16

² Independent Comparative Case Review Professor Gus John February 2014

This report is now over 6 years old but anecdotally local BAME firms still have the same fears and anxieties.

Our geographical legal sector area Leicestershire and Rutland is heavily populated with the smaller entities (niche, sole practitioner, small High St LLP) many owned by ethnic minority solicitors and looking after vulnerable individuals. We reproduce below the statistics collated by The (national) Law Society indicating that the vast majority of local entities are small firms with less than 4 partners with more than a third of the individual solicitors identifying as BAME.

Number and size of firms in Leicestershire as at August 2017

Region_name	Sole	2-4 partners	5-10 partners	11-25 partners	Zero partners
East Midlands	84	57	12	2	1

Individual PC holders in private practice in Leicestershire at January 2018

	Leicestershire		
	Female	Male	Total
BAME	129	113	242
White / European	245	254	499
Unknown	56	56	112
Total	430	423	853

Drawing on that specialist knowledge we have read the Response submitted by The Law Society of England and Wales and endorse its concerns in particular at paragraph 86 (f) on the EDI impact of the proposed changes to the burden of proof. Our view is that there will be greater adverse impact on BAME solicitors, their (often small niche) entities and their clients.

Numerous local firms have closed over the past few years and we believe that momentum will continue if the proposed change to the burden of proof is

implemented, reducing both provision of legal services and competition.

In conclusion, we believe that disciplinary proceedings should remain subject to the criminal requirement of “beyond a reasonable doubt”. We believe that the regulator should refocus its efforts on building confidence in its approach to smaller firms, particularly those from a BAME background. Both the SRA and the SDT should consider how it can ensure that those from such backgrounds can participate in disciplinary investigations and hearings without facing such a disproportionate cost burden.

Leicestershire Law Society
Non contentious business sub committee
Sept 2018



Response on behalf of Manchester Law Society to the Solicitors Disciplinary Tribunal Consultation on the making of procedural rules in relation to applications to the Tribunal.

This response is submitted on behalf of Manchester Law Society ('MLS') members. By way of background, MLS has a membership of over 3,000 solicitors and firms. It is one of the Joint V local law societies along with Birmingham, Bristol, Liverpool and Leeds. MLS has an active COLP and COFA forum which meets regularly and this consultation has been discussed within that forum.

The questions posed by the SDT and our responses are set out below.

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

We strongly believe that the criminal standard of proof should continue to be applied in the Solicitors Disciplinary Tribunal.

Whilst it is recognised that other regulators have moved away from the criminal burden of proof, this does not necessarily mean it is right for the SDT to do so. The LSB's stated preference for the civil standard to be used is based on public protection arguments, i.e. that the application of the civil standard is more appropriate for protecting the public than the application of the criminal standard. However, there is no evidence to suggest that the public is not being protected or is being put at an increased risk by the application of the criminal standard and this is supported by the high success rates for prosecutions in the Solicitors Disciplinary Tribunal.

In contrast, whilst there is no evidence that the current system leads to unfair decisions, a lower standard of proof could lead to more respondents feeling that there is no point in trying to defend allegations at a hearing, particularly when the costs implications of doing so could be ruinous. This could lead to respondents admitting to allegations which they might otherwise have successfully defended, and the consequences could be career-ending.

As regards the concern expressed that solicitors could be seen to be accorded what might appear to be preferential treatment compared with other professions in England and Wales, we consider that it is highly unlikely that the public in general would have any awareness of the standards of proof that are applied by regulators in misconduct proceedings let alone be concerned about it so if, as above, there is no evidence to suggest that public protection is at risk by maintaining the criminal standard, the SDT should not change its position.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

We agree that reference to Agreed outcomes should be referred to in the new Rules. There have been issues recently in relation to Agreed Outcomes in cases where there is more than one respondent.





More clarity as to the Tribunal's approach when considering whether there is a risk of prejudice to those respondents not party to the Agreed Outcome would be beneficial for practitioners, the SRA and respondents alike.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

We agree that by updating and incorporating all the Tribunal's requirements in one place, this will make it easier for practitioners to locate the necessary information and to more clearly understand the procedures in the SDT.

(d) If the answer to question (c) is no, please explain why.

(e) Do you have any detailed comments on the drafting of the proposed rules?

See comments above regarding Agreed Outcome procedure.

We are aware that the SRA in its response has suggested that there should be a lay majority on a Tribunal panel. We wish to make it clear that our members strongly object to this suggestion. It is right that solicitors should be judged by their peers who will have had experience of the practical realities of practice. There is no evidence to suggest that public protection is at risk by the current constitution of the Tribunal and we believe that its current constitution is one which works well and should remain.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

We are concerned that the proposed changes to the burden of proof could potentially have an equality impact in relation to smaller firms and/or individuals who are less likely to have the benefit of management liability/D and O insurance cover. The larger firms (even where they do not have insurance cover for disciplinary proceedings) will have sufficient resources to defend allegations made against them irrespective of the burden of proof being applied but smaller firms (where statistically there are more BAME solicitors) may not and this could result in the consequences identified in our response to question (a).

We also note that question 4 of the Equality Impact Assessment ("EIA") asks what existing sources of information will be used to help identify the likely equality impact on different groups to which the SDT has responded "*there is no existing source of information that will assist...*" Question 5 then asks about what gaps there are in information that make it difficult or impossible to form an opinion on how the proposals might affect different groups of people to which the response is "*Not so far as can be ascertained*". The two responses appear to be contradictory and concerning.

Accordingly, in our view, the EIA needs to be considered further by the SDT before making such a fundamental change to its Rules.



This is the response from the Newcastle upon Tyne Law Society. We are a local law society in the north-east of England covering a very large geographical area from Berwick upon Tweed in the north down to Durham City in the south. This includes the conurbations of Newcastle upon Tyne and Gateshead, the Metropolitan areas of North and South Tyneside and the rural areas of Northumberland and North Durham.

1. The implications of an adverse finding for an individual or firm can be severe and for an individual can lead to a suspension or ban from practice. Even a fine or costs can be substantial. As an example the firm of White & Case PLC was fined £250,000 and an individual partner £50,000 for breaches of the Code which did not involve integrity and related to a significant risk of a conflict of interest which was not identified and a failure to protect confidential information. We would suggest the powers available to the SDT are equivalent to a criminal sanction and therefore the criminal standard of proof is appropriate.

2. We have seen no evidence of the civil standard leading to injustice or unrighted wrongs. Examples are the recent decisions involving firms representing persons bringing actions against the Armed Services.

3. The civil standard will increase the risk of solicitors and firms having adverse findings which are not justified which would be unconscionable.

4. The law remains a profession and that is something that we must guard closely. As such we have to meet extremely high standards to qualify as Solicitors and earn the right to have our names added to the Roll. Being a Solicitor is a formal qualification, just like a Dr, architect or accountant. We are required to undertake training and development and to declare every year (with payment) that we still fulfil the necessary criteria to maintain the qualification and title of Solicitor.

(i) If it is necessary for us to reach and maintain such high standards to become and remain a Solicitor, then it is incumbent on our regulator to reach similar exacting standards if it wishes to remove (in disgrace) that title and qualification from a Solicitor.

(ii) The SRA has very wide ranging powers that it can exert on firms and individuals in less serious cases and

/ or where it does not have sufficient evidence for a case before the SDT.

(iii) The SDT is the correct forum for the most serious charges and it is right that the standard of proof and evidence required must be of the highest calibre. A charge before the SDT is a very grave matter, tantamount to criminal proceedings. A finding against a solicitor can have draconian consequences and destroy his livelihood.

(iv) This Society does not agree with the suggestion that the standard in the tribunal should turn on the gravity of the charges. Only the most serious of cases are heard in this forum. The standard of proof should remain 'beyond reasonable doubt' for the reasons outlined above.

(v) **We have seen and support the detailed and considered response to this consultation submitted by the Law Society of England and Wales to the SDT and published on the Law Society website www.lawsociety.org.uk on 5th October 2018**

8th October 2018

NHS Resolution Response to Consultation by the Solicitors Disciplinary Tribunal on the making of Procedural Rules in relation to Applications to the Tribunal

Introduction

NHS Resolution is a Special Health Authority, formed in 1995. We administer a number of risk pooling schemes on behalf of the Secretary of State for Health and Social Care. These schemes cover clinical negligence, employers' liability, public liability and other types of claim against NHS bodies and some private providers of NHS healthcare in England. As such, we are major commissioners of legal services from our panel solicitors and have extensive experience of dealing with solicitors acting for claimants. We also employ a small number of solicitors who act "on the record" in clinical negligence cases.

We shall deal with the questions in accordance with paragraph 41 of the consultation document as follows:

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears?

Yes – we do. To the extent that the rules are intended to protect the public against negligent or incompetent solicitors, the civil standard is entirely appropriate. Where solicitors have misappropriated funds or committed other forms of criminality, those issues will be dealt with in the criminal courts. Where the Tribunal deals with a case involving criminal or allegedly criminal conduct, it would be right in our view for it to apply a civil standard because the Tribunal is not a criminal court but rather is concerned with establishing whether or not a solicitor has acted with probity, integrity and in accordance with the rules, which are different concepts from criminality, and appropriate for consideration against a civil standard of proof.

Given that the Bar Standards Board will be applying the civil standard to allegations of misconduct with effect from 1 April 2019, it would be wholly anomalous for the Tribunal to retain the criminal standard because that would mean different parts of the legal profession being assessed against significantly different criteria.

Our view is reinforced by the fact that in the other profession with we work closely, namely medical practitioners, the civil standard has been applied since at least 2010. We consider that solicitors should be judged by equivalent standards to doctors.

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care.



2.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals?

Yes – we do. This appears to be a sensible way of resolving cases by agreement, subject to the over-riding discretion of the Tribunal not to approve such an outcome if this is considered to be inappropriate.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

Yes – we are broadly in agreement although we do question whether the provision in 27(2)(a) that the Tribunal may admit evidence which would not be admissible in a civil trial in England accords with natural justice.

(d) If the answer to question (c) is no, please explain why

Not applicable – see our previous answer.

(e) Do you have any detailed comments on the drafting of the proposed rules?

No – other than those made above.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

We do not believe so.

NHR Resolution

8 October 2018

By Email

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RadcliffesLeBrasseur

The Clerk
The Solicitors Disciplinary Tribunal

8 October 2018

Sent by Email Only

Our Ref:
NGW/NGW/PBUSINESS.NGW

Your Ref:
21768611v1

Dear Sirs

We are writing in response to the Tribunal's consultation on its new rules, and we set out below our answers to the consultation questions.

(a) Do you consider in principle that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears?

We support the criminal standard.

The legal position

The Tribunal has power under section 46(9) of The Solicitors Act 1974 to make rules about its procedure. That power must be exercised in accordance with the law.

A change in the standard of proof would not be compatible with English case law or the decisions of the European Court of Human Rights on article 6 cases relating to professionals facing disciplinary proceedings.

1. English case law

The Courts have said that the standard of proof should be higher than the civil standard in serious cases for more than seventy years. In particular:

- In 1956, in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 the Privy Council said, in cases of professional misconduct involving deceit or moral turpitude, they could not envisage any body of professional men who would be willing to condemn on a mere balance of probabilities.
- In 1993, in *Re a Solicitor* [1993] QB 69 Lord Lane CJ said that the Tribunal should apply the criminal standard where what is alleged is tantamount to a criminal offence.
- In 2006, in *Campbell v Hamlett* [2005] UKPC 19 in the Privy Council, Lord Brown said that the criminal standard should apply in all disciplinary proceedings involving the legal profession.

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- In 2008, in *re (D) v Life Sentence Review Commissioners (Northern Ireland)* [2008] UKHL 33 in the House of Lords, Lord Carswell said on an obiter basis that the criminal standard is the standard required in disciplinary proceedings brought against members of a profession.

2. The European Court of Human Rights – article 6 rights

The Tribunal is a public authority for the purpose of the Human Rights Act 1998. By section 6(1) of the HRA, the Tribunal must not act in a way which is incompatible with a convention right.

By article 6, a solicitor has a right to a fair trial, and any decision on the standard of proof must take account of the solicitor's article 6 right to a fair trial.

We are aware of two decisions in the European Court of Human Rights which support the principle that the civil standard is insufficient in serious cases:

In *Albert and Le Compte v Belgium* (7299/75;7496/76) the European Court of Human Rights had to decide whether the provisions of article 6(2) and 6(3)(a), (b) and (d) applied to disciplinary proceedings taken against a Belgian Doctor who was accused of deliberately issuing false medical certificates. That is significant because articles 6(2) and (3) apply additional safeguards to criminal proceedings which are not applied to civil proceedings. The ECHR recognised that disciplinary The Tribunal has power under section 46(9) of The Solicitors Act 1974 to make rules about its procedure. That power must be exercised in accordance with the law.

- proceedings are different to criminal proceedings but said that articles 6(2) and 6(3) (a), (b) and (d) should apply to disciplinary proceedings in the same way as they do to a person charged with a criminal offence.
- In *Brown v UK* (38644/97) a solicitor complained to the ECHR that a fine of £10,000 breached his article 7 rights. Article 7 provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. The ECHR decided that the complaint was inadmissible because the severity of the penalty was not such that the disciplinary proceedings should be treated as criminal proceedings. The decision is significant as it shows that the severity of the sanction is a determining factor when deciding whether disciplinary proceedings should be treated as criminal proceedings for the purpose of article 7.

3 summary of the legal position

A decision to change the standard of proof to the civil standard would fail to take proper account not only of English case law but also of the convention rights.

Changes in the law

1. The consultation paper refers to the High Court's comment in *Arslan v SRA* that the case law on the standard of proof seems to be "ripe for reconsideration." That does not justify a change in the

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Tribunal's rules. The comments in *Arslan* were made on an obiter basis without consideration of the rationale for the decisions made by the Courts since 1956. They were also made in the expectation that any future reconsideration or change in the law would be made by the Courts. Legatt J said in *Arslan* that "decisions which change the law should be made in cases where the point at issue matters". The underlining (which is ours) shows that Legatt J contemplated that if there is to be any change, it should be made by case law by the Courts.

2. Similarly, in 2009, in *Richards v The Law Society* [2009] EWHC 2087, Sir Anthony May, the President of the Queens Bench Division, said that Counsel for the SRA had come close to accepting that the High Court is bound by the authorities and insofar as the authorities might arguably leave some room for manoeuvre, that is better debated and decided in a case where the standard of proof makes a difference and probably in the House of Lords.
3. It has been open to the SRA to challenge the law on the standard of proof by an appeal to the Courts in any number of cases decided by the Tribunal. The SRA has consistently declined to do so, and has instead proceeded with appeals on the basis that the criminal standard applies. For example in *Afolabi v SRA* [2011] EWHC 2122 at paragraph 25 the SRA's Counsel stated that he wanted to "leave open" the question as to which standard should apply, but accepted the appeal should proceed on the basis the criminal standard applied.
4. If the SRA, or any other interested party, considers that there is a strong case as a matter of law for changing the standard of proof, the issue should be determined by the Courts by the appeal process.
5. It is particularly important for any changes in the law on the standard of proof relating to the solicitors profession to be considered by the Court because Parliament has conferred the jurisdiction to discipline solicitors on two separate bodies – the Tribunal under section 47 of the Solicitors Act 1974 and the High Court under section 50 of the Solicitors Act 1974. If the Tribunal adopts the civil standard, the two bodies with statutory jurisdiction to strike off solicitors will have differing and inconsistent standards of proof.

The public interest and public confidence in the profession

1. The SRA has a high success rate in the Tribunal. From an evidential point of view, there is no need to change the law to protect the public interest or maintain public confidence in the profession.
2. The impetus for change appears to have instead arisen from a Regulator's concern that the law should be changed so that it is seen to favour the consumer, regardless of whether the change is in fact needed for procedural reasons.
3. The consultation paper appears to support that principle. Paragraph 25 of the consultation paper refers to a possibility that a solicitor might "avoid a disciplinary sanction" when it is more likely than not that there has been professional misconduct, and states that "the Tribunal recognise the argument that this position may be perceived by the public as working in the interest of the profession and not in the interest of the public."

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4. However there is nothing to suggest that is how the public view the matter. The criminal standard has been applied for over seventy years, and there is no evidence to suggest the use of that standard has damaged public confidence in the profession over the past seventy years.
5. The Tribunal should also take account of the opposite position. It is wrong for the Tribunal to make a finding of dishonesty against a respondent when the Tribunal is not sure whether he is dishonest.
6. As the success rate shows that a change in the standard is not needed from an evidential point of view, and as there is nothing to suggest that public confidence in the profession has been damaged over the past seventy years by use of the criminal standard, the Tribunal should respect the decisions of the English Courts and the ECHR, and keep the criminal standard, to ensure that Tribunal members make decisions affecting the lives of others in a fair manner, and do not make findings of dishonesty which could plague a solicitor for the rest of his life, in circumstances where the Tribunal members are not even sure that he has acted dishonestly.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

Yes, but we suggest the phrase "which the parties must attend" should be removed from rule 25(6).

That is because the SRA at times enters into agreed outcomes with some but not all of the respondents in a case. If the Tribunal has concerns about an agreed outcome which require a directions hearing, it will not always be necessary for the respondent who is not entering into the agreed outcome to attend the directions hearing. A mandatory requirement that all parties including the non participating respondents must attend the direction hearings will unnecessarily add to the expense of the proceedings.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

Yes, subject to the following comments.

1. Rule 26 - disclosure

We believe the SRA should be required under rule 26 to disclose any documents in its control which might assist the Respondent in the preparation of his case or which might undermine the applicant's case.

That would be consistent with the Tribunal decision in *SRA v Zysblat* (11222-2014). In *Zysblat* the Tribunal said that the SRA should have fully addressed the issue of whether there were documents in its control which might assist the Respondent in the preparation of his defence or which might in any way undermine the applicant's case.

It would also be consistent with the decision of the Court of Appeal in *Bank Mellat v HM Treasury* [2010] EWCA civ 483. In *Bank Mellat*, Lord Neuberger said that there is an irreducible minimum right under article 6(1) and the common law for a respondent to be given sufficient information to enable him to actually refute, insofar as that is possible, the case made against him.

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If the test for disclosure is limited to what the Tribunal considers to be necessary at the time of an application, the Tribunal and the respondent may never know whether the applicant holds documents which ought to be disclosed under article 6(1) and the decision in *Bank Mellat*.

2. Rule 29 - Civil Evidence Acts

The Civil Evidence Act 1995 repealed the hearsay provisions of Part 1 of the Civil Evidence Act 1968, including the provision for service of counter notices under section 8 of the 1968 Act.

As the hearsay provisions in the 1968 Act have been repealed, we suggest that Rule 29 should only refer to the 1995 Act.

We also suggest that the reference to counter notices in Rule 29(3) should be removed because the 1995 Act does not contain provisions for service of counter notices.

(d) If the answer to question (c) is no, please explain why.

Please see (c) above.

(e) Do you have any detailed comments on the drafting of the proposed rules?

Please see (c) above.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

No

We would be grateful if the comments set out above could be taken into account.

Yours faithfully


RadcliffesLeBrasseur

By Email:

The Solicitors Disciplinary Tribunal

6th October 2018

Our Ref:

Dear Sirs,

Re; Consultation on the Making of Procedural Rules in Relation Applications to the Tribunal-Rule 5 The Standard of Proof

11. It is noted that the current standard is that which applies in criminal courts “beyond reasonable doubt” or “ so as to be sure+.

12. The fact that the criminal standard of proof has applied for a long period of time should make us cautious in amending it. It may be that unprofessional conduct revealed in the Shipman case would not have been prevented by any change in the procedural rules of the medical profession. Their rules are a matter for them and our rules are a matter for us. Perhaps as lawyers, dealing with rules at the coalface, as opposed to dealing with health, we ought to be better able to frame rules than some other professions. They deal with life and death whereas we deal with less conclusive areas of work.

13. Noted: The Bar, it should be noted, has no exposure to holding Client Money at all and so should be distinguished.

14. Noted.

15. The LSB observations are sensible as a “one size fits all” approach could be oppressive in some circumstances.

16. Noted

17. The approach of applying the Criminal Standard to “what is alleged is tantamount to a criminal offence” seems with respect to be a sensible approach. Having said that, sometimes criminal offences are strict liability, such as driving without a Licence or Insurance. Yet even these require a Criminal Standard. There are many areas of the Criminal Law where even though Strict Liability applies (e.g. S1 Firearms Act 1968 and the sanctions are severe-minimum 5 years Imprisonment), that the Criminal Standard is still required. In the Criminal Law Defences are proved on the civil standard. I believe that this is the right approach for if it applies to Murder which is as serious an offence as possible to consider, and also applies to Common Assault which is at the other end of the scale, then why shouldn't the same standards apply where the consequences of a guilty finding for a professional persons be considered in the same way.

18. There is no anomaly per se. If a Barrister perjures himself then perhaps the

consequence should be the same as for a Solicitor but the criminal presumption should apply so that it is beyond reasonable doubt. The SRA, as recently as 2007 asserted "The standard of proof shall be the civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt." in the Annex to the Procedural Rules.

19. The words of the Privy Council in *Campbell v Hamlet* [2005] UKPC 19 are not to be lightly eschewed.

20. Arslan didn't deal with a review of the subject because it wasn't the appropriate forum.

21.-24 Noted

25. It is not a sensible argument to suggest that merely because many other professions have relaxed the burden of proof all must do so. Only dead fish swim with the stream. In any event it depends upon what the Solicitor is accused of. ASBOs (for less than criminal behaviour) and many other Orders were introduced as Protective Orders in the Criminal Law to protect the public. Regulatory offences of Solicitors perhaps are more capable of strict liability than some other Misconduct allegations. The burden of proof may be mitigated by analogy with such protective orders, but for serious allegations, with dire life changing consequences, verging on serious criminal conduct it ought to remain the criminal burden. The simple dichotomy between the two burdens lacks imagination.

41. (a) No

(b) It seems useful but it would benefit from greater choice of Outcome

(c) No.

(d) My premise is that the purpose is not met until the rules provide for more varied disposals in

Outcome appropriate to circumstances

(e) I have no time at present but would like you to use more imagination on both protection and

sanction. There is a vast difference between deliberate, negligent, and grossly negligent

behaviour. There is also a difference between regulatory misconduct and fundamental criminal

behaviour. Conditions on Practising Certificates are protective.

(f) No comment to make

Solicitors Assistance Scheme Response to the Consultation on the making of procedural rules in relation to applications to the Tribunal October 2018

Background-about the Solicitors Assistance Scheme

The Solicitors' Assistance Scheme (SAS) offers free confidential help and advice for all solicitors in England and Wales, their families and employees on any problem troubling them, whether personal or professional. We offer a lifeline to solicitors with problems by providing a fellow practitioner who will listen and help.

The scheme has been in operation since the 1970s. It maintains a specialist panel of around 80 solicitors. Entry to the panel is by application and interview and review by the whole Committee of the SAS. Panel members must demonstrate specialist knowledge in the area applied for and demonstrate their commitment to the ethos of the SAS.

The scheme members offer a minimum of one hour of pro bono advice and assistance.

Panel members frequently choose to give more than one hour's free advice given the financial difficulties of many of the callers but this is voluntary and decided by the panel member on a case by case basis. Panel members routinely take calls at evenings and weekends as those in distress are often not able to discuss their difficulties during office hours. Panel members guarantee confidentiality to those making enquiries and many contact the scheme anonymously.

The help required can range from problems that can easily be solved within the initial advice period to more complex problems. Panel members also refer callers to Lawcare and the Solicitors Benevolent Association (SBA), if appropriate.

The SAS now offers specialist advice in the following areas:

Employment

Money laundering

Insolvency

Fraud & Crime

Voluntary Closures or disposals of practice

Complaints & Negligence

Practice management

Regulatory (Practice issues, COLP/COFA issues, Authorisation Issues)

Disciplinary (Practicing Certificate issues & conditions, Self-Reports, SRA investigations, SDT referrals, and breaches of the accounts rules)

Partnership

Interventions

The details of the panel members and their areas of specialism are listed in leaflets available at the Solicitors Disciplinary Tribunal and the Law Society and on the SAS website. The website has been re-designed so that each view of the panel list on the website features panel members in a random order.

The majority of the advice given relates to regulatory and disciplinary matters.

How is the SAS contacted?

Callers usually self-refer but referrals to members of the panel are also made by Lawcare, SBA representatives, Law Society staff (particularly in practice advice) and local law societies.

It is believed that the majority of users contact panel members direct however there is also the option of contacting the SAS using a generic e-mail address or a telephone helpline.

Those who contact the SAS via the website or helpline are given the details of 2 specialists relevant to their problem. The specialists are selected from a rota and details of the names given to the caller recorded.

Response:

We do not support the Tribunal adopting the civil, rather than criminal, standard of proof.

1. Public confidence

It is suggested that this change is required to maintain public confidence and to bring the SDT into line with other tribunals and regulators of the professions. There is no evidence that a change to the standard of proof is required to meet public confidence or that there is any lowering of public confidence in the profession.

There are many reasons why a prosecution could fail, it cannot be expected that a prosecution rate should be a 100% not least of which, the respondent may be innocent of the charges.

There is no evidence put forward by the SRA or the SDT to suggest that prosecutions are not brought because of the higher standard of proof.

Given the very high success rate of prosecutions at the SDT -98% in 2016- far higher than any other regulator or anywhere in the criminal justice system, it would seem the public is adequately protected and there is no evidence to suggest that public confidence has been adversely affected by the use of the criminal standard.

2. Balancing the public interest with the rights of a solicitor

The SAS of course accepts that the public must be protected but the rights of the solicitor cannot be ignored, a balance must be struck. A finding at the Tribunal can result in the loss of reputation and livelihood of a solicitor and the livelihood of those employed by the solicitor. Given the very high level of successful prosecutions at the SDT, it cannot be said that the standard of proof needs to be amended to protect the public interest and it is suggested that insofar as the standard of proof is concerned this is at the right level. Indeed a disciplinary tribunal may question why the level of successful prosecutions is so high if the balance of interests is met.

3. The Law

Notwithstanding obiter comments in Arslan, the Courts have made it clear that the appropriate standard of proof in disciplinary proceedings concerning solicitors is the criminal standard. The Courts have independent jurisdiction to discipline solicitors, pursuant to section 50 of the Solicitors Act 1974. The High Court, Crown Court, and the Court of Appeal may impose sanctions on solicitors as officers of the Senior Courts, including an order that a solicitor's name be struck off the Roll. The standard the courts have adopted is that of the criminal standard.

The Tribunal has a statutory power under section 46(9) of the Solicitors Act 1974 to make its own rules about the procedure and practice but it is also a public authority for the purpose of the Human Rights Act 1998 (HRA). It is thus under an obligation not to act in a way which is incompatible with a convention right.

In the case of *Albert and Le Compte v Belgium* (7299/75;7496/76) the European Court of Human Rights (ECHR) in considering whether or not sections of Article 6 -the right to a fair trial applied to disciplinary proceedings, recognised that disciplinary proceedings are analogous to criminal proceedings:

"In the opinion of the Court, the principles set out ... are applicable, mutatis mutandis, to disciplinary proceedings ... in the same way as in the case of a person charged with a criminal offence."

We submit that this requires a higher standard of proof to be applied in disciplinary proceedings than that in a civil matter. There is also a qualified right under Article 8 to practice a profession, we question if protection of this right be satisfied, if there is reasonable doubt that a solicitor should be prevented from practicing.

4. Costs savings

At paragraph 18 of its response, the SRA stated that, *'The use of the criminal standard of proof is costly, burdensome, unfair to the users of legal services and undermines confidence that regulation of the profession is in the public interest'*.

It is difficult to understand in what manner there will be a cost savings in respect of the cases before the SDT and no evidence has been put forward to support this. The cases will still need to be fully investigated and properly presented to the SDT.

Alternatively, it may be that the SRA are suggesting that they could adopt a more broad brush approach or produce lower quality evidence which would be extremely troubling and potentially unjust, particularly given the number of solicitors who are unable to afford representation at a Tribunal.

In any event, the costs of prosecutions are met either by the individual solicitor or where costs cannot be recovered by the profession as a whole. There is no financial burden on the public. Indeed even in the rare cases where a solicitor has been totally exonerated, the usual order is that the solicitor is still ordered to pay the costs of the SRA.

5. Other regulators

Fair comparisons cannot be drawn with other regulators who operate in different arenas in a different manner. The sanctions do not carry the same impact for example; the suspension of a doctor is far less likely to result in complete loss of livelihood than that of a solicitor. If the solicitor owns the business, particularly a sole practitioner, the business is likely to fold and may have to be intervened in. Solicitors may find it harder to find employment even with a lesser sanction as professional indemnity insurers may increase premiums for firms who employ them or if they do not, the perception is that they will do. Most professional disciplinary bodies apply the least sanction necessary rather than the requirement in England and Wales to strike off for dishonesty other than in exceptional circumstances. Other UK solicitor disciplinary tribunals maintain the criminal standard and at least one, the Law Society of Scotland do not automatically strike off for dishonesty.

6. Fairness

The SAS Committee members who between them have very many years' experience in representing solicitors at the SDT, have encountered solicitors and firms who notwithstanding their belief that they have a defence, have opted to reach an agreed outcome because of the inequality of arms between the regulator and the solicitors, particularly those in small firms. Individual solicitors and firms rarely have insurance cover and the cost of representation, lost partner and solicitor time even in quite small matters often make it uneconomical and sometimes impossible for solicitors to defend the charges, particularly when even if they are entirely successful, they will not recover their own costs and may still be ordered to pay those of the SRA. The number of solicitors who accept findings against them even when this is unfounded will increase. The unfairness will be increased if the SRA succeeds in its proposals to have increased fining powers.

7. Diversity

It is noted that the diversity impact statement prepared by the SDT had only a very small number of responses and therefore was unable to draw any conclusions. However based on the committees' experiences, those who contact them either through the scheme or instruct them privately tend to be disproportionately from a BAME background and from smaller firms. This group are less likely to have access to the resources to enable them to defend themselves against charges and meet the costs of the regulator and therefore in our opinion, there will be an impact on those who share a protected characteristic.

Given the lack of evidence that requires an increase in the standard of proof to protect the public or for any other reason, proposals to change the standard of proof are unjust.

On behalf of the Committee of the Solicitors Assistance Scheme:

Linda Lee

Andrew Blatt

Gareth R Edwards

Richard Nelson

David Taylor

Nigel West

8 October 2018

From:

Sent: 02 October 2018 17:10

To: SDT Feedback <feedback@solicitorsdt.com>

Subject: Consultation on the making of procedural rules in relation to applications to the tribunal

This response is being made by a senior practitioner in the City, who has spent most of the last 30 years working in a large international law firm but also engaged in a variety of not for profit and voluntary sector projects. It is being made on an anonymous basis to avoid the embarrassment if not difficulty of misunderstanding if not disagreement on the part of the regulators and on the basis that the SDT should give the response the same weight it would give to an openly authored response. For the avoidance of doubt, neither I nor my firm have any current matters before the SDT (nor have I ever had any matter before the SDT). That said, some of the questions raised in the consultation resonate with experience and information of which I am aware. Accordingly, I respond to the six questions in paragraph 41 of the consultation paper as follows:

- A. If a change is to be permitted to the standard of proof, the SDT might helpfully make clear to the profession that it is unlikely to make a great deal of difference in practice. In cases of professional dishonesty the difference between the application of the civil and criminal standard of proof is little, if illusory, and there may be some advantage in terms of public perception if the civil standard is adopted. However, if this is to be the case, it is critical that the SDT does not yield to the publicly acknowledged request from the SRA for the composition of the SDT panels to be changed in favour of a majority of lay members. It is hard to see why the public would be encouraged to know that the standards by which professionals should be judged would be determined by individuals who may have no connection with that profession and no experience of operating within it. Moreover, there are many reasons why the SRA's proposal is undesirable. Space limits a full debate in writing. That said, it is obvious that the SRA's rules are often subjective and require to be balanced against each other in many day to day contexts. It is neither fair nor appropriate to ask individuals with no experience of carrying out those balancing exercises to conduct an appraisal and reach decisions of potentially critical importance to lawyers, law firms and clients alike. Further, there is no evidence that lawyers who ex hypothesi are better placed to judge the standards and expectations of their own professional requirements are nonetheless in some way lacking in the experience and skill to judge whether there had been material breaches of the rules. The original purpose of having a lay member on the panel was to provide an additional perspective that may be (but invariably was rarely) lost on the legally trained members themselves. But to switch the composition of the panel, so that those lay perspectives become potentially the dominant source of skill and expertise to determine whether there had been rule breaches, seems to us to be a step in the wrong direction. So far as we are aware, no other professional disciplinary body examines its own members through a majority of lay members who may have no training in the profession at all. If the training, and experience that the profession provides to its members, is meant to mean anything, it should surely be brought to bear in appropriate measure in the context of a tribunal matter. In any event, it is questionable whether a change in favour of a lay majority could be made without requiring primary legislation to change the 2007 rules.
- B. I agree that it would be helpful to contain some express provisions to deal with agreed outcome proposals.
- C. Generally yes. However note D below.
- D. Rule 43 (costs) is to a degree surreal. It suggests that there is an open approach to costs, which in the ordinary context would be understood to follow the usual civil rule on costs shifting. In practice, however, the SDT very rarely awards costs to solicitors who succeed in

dismissing cases against them. That ought to change. The cost for a small firm defending itself to the tribunal could be prohibitively high. It may risk the entire future of the firm and the practitioners in it. If such a firm has succeeded against those odds, then it should generally have its costs of the winning party. The rules should provide for this. The position of the SDT and the SRA is of course completely different: no one case could carry the same level of criticality as a single case could for a firm.

E. No.

F. No.



Solicitors
Regulation
Authority

SRA Consultation Response

Consultation on the making of procedural rules in
relation to applications to the tribunal

Solicitors Disciplinary Tribunal

19 September 2018

Consultation on the making of procedural rules in relation to applications to the tribunal: Response from the Solicitors Regulation Authority (SRA)

Introduction

1. The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. We regulate in the public interest, as do all regulators, so our priority is public protection.
2. We welcome the opportunity to respond to this consultation on the proposed update of the Solicitors (Disciplinary Proceedings) Rules 2007.

Summary

3. We believe that the Tribunal should adopt the civil, rather than criminal, standard of proof, as a matter of public confidence. We call on the Solicitors Disciplinary Tribunal to make this change at the earliest possible opportunity, bringing it into line with the overwhelming majority of tribunals and regulators of the professions.
4. We support the proposal to include a rule dealing with Agreed Outcomes, as there is a strong public interest in disputes being resolved by agreement. We have made some detailed comments on draft rule 25, including reducing the time limits for filing Agreed Outcome Proposals to ensure a better balance between convenience for the Tribunal and the public interest.
5. In relation to whether the other provisions are fit for purpose, we have commented on several of the draft rules. In particular, we believe that draft rule 9 should be amended to require a lay majority, supporting public confidence by removing the perception of a structural bias in favour of solicitors. The Legal Services Act 2007 removed the requirement for a solicitor majority on any Tribunal panel hearing a case, but the Tribunal reinstated this in the rules in 2007. More than ten years later these redrafted rules retain that provision.
6. In our view, draft rule 24 should be removed, as there is no current justification for requiring the Tribunal's permission to withdraw an allegation. The pursuit of allegations is a matter for the SRA, not the Tribunal.

7. While we understand the apparent intent of the proposed rule 35(9), by which the Tribunal would be able to prohibit publication of a wide range of information, we are however concerned that this has significant implications. This proposal should be the subject of a separate and fully argued consultation not least because of its potential impact on open justice and freedom of the press. Such a rule must also not undermine such legal principles.
8. On costs, draft rule 43 offers welcome clarity on costs, provided it is not interpreted in time as watering down the legal principles established in the courts which enable regulators to bring difficult cases without significant risk of an adverse costs order.
9. We also propose that draft rule 41 should be amended to allow the SRA to make submissions on sanctions. This will help to avoid panels imposing inappropriate sanctions which provide insufficient public protection, followed by SRA appeal with the associated time and cost burden on the Court and all parties.
10. We welcome draft rule 27 on evidence and submissions and consider that the Tribunal should also expressly provide that evidence of propensity is admissible. This may be of particular benefit in for example, cases where there are allegations of harassment. We also suggest the Tribunal makes rules or a practice direction on protecting vulnerable witnesses.
11. We also welcome the clarity in the draft rule 48 about the need for the Tribunal to ensure that representatives are either properly qualified or can assist only with the Tribunal's permission.
12. We suggest minor changes to rule 19.
13. We believe that proposed rule 35(7) to exclude factual witnesses from hearings goes against the practice in the civil courts. In our view, the position should be that the Tribunal can exclude factual witnesses in its discretion, upon application and where there is a genuine justification for doing so.
14. Overall, we are concerned that a number of the proposed rules are not discussed in any detail, or at all, in the consultation paper itself, bringing with it the serious risk of the Tribunal being accused of insufficient consultation by not highlighting potentially significant changes. The Tribunal may wish to consider separate consultation in several areas.
15. We have also commented on the potential equalities impacts. We note that all consumers, including vulnerable consumers, will be better protected by use of the civil standard of proof and by allowing the SRA to make submissions on sanctions. As set out in paragraph 10 and 52, we believe that admitting evidence of propensity would be beneficial in difficult areas such as, but not only, harassment.

Consultation response

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

16. We fully support the application of the civil standard of proof by the Tribunal.
17. We have consistently called for the standard of proof in disciplinary proceedings to be the civil standard.¹ This is to:
 - ensure a proper balance between protecting the public and the rights of a solicitor accused of breach of our rules
 - ensure that action can be taken when, on the balance of probabilities, an individual or firm presents a risk to the public
 - give the public confidence in the regulatory system and the profession
 - deliver a consistent, fair and efficient disciplinary process.
18. The use of the criminal standard of proof is costly, burdensome, unfair to the users of legal services and undermines confidence that regulation of the profession is in the public interest.
19. The criminal standard is disproportionate, putting the interests of individual members of the profession ahead of the interests of the public, with the risk of associated poor outcomes for the users of legal services and a loss of confidence in the profession.
20. The higher burden of proof also creates an incentive for defendants to fight cases, rather than to make early admissions. The higher burden of proof aligns with the criminal process rather than with a public interest risk-based regulatory system. It is important where a defendant faces conviction and imprisonment but has no place in modern regulation.
21. Using a civil standard of proof is usual regulatory practice in the professions, both in the UK and internationally. The use of the civil standard by the SDT would therefore make sure that the users of legal services are offered the same degree of protection as is the case for the consumers of other professional services.
22. Support for the change to the civil standard has also been echoed by others. The consultation paper highlights some examples of judicial comments supporting a move to the civil standard of proof which we will not repeat. We endorse the comments of the courts.
23. Other examples of support for the change include:

¹ For example, we sought to persuade the court to find that the civil standard was correct in 2009 but the point did not arise on the facts and so was not decided: Richards v Law Society [2009] EWHC 2087 (Admin)

- a consultation paper from the Law Commission in 2012², which made “strong public protection arguments” for adoption of the civil standard of proof in medical regulation: *“It seems to us that professional regulation is quite different from the criminal context, where the state is required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her.”*
- the Legal Services Board, which has repeatedly made it clear that using the civil standard of proof for legal regulation is in the public interest. In a paper in 2013³ it said *“a consistent approach to the civil standard of proof for all enforcement decisions would reduce cost, improve consistency, better protect the public and reduce the risks of regulatory arbitrage”*
- the Insurance Fraud Taskforce report of January 2016 which recommended that there be a review of the standard of proof used in cases put before the Solicitors Disciplinary Tribunal, highlighting what they saw as an “inconsistent approach” and that the criminal burden of proof is *“disproportionate... and may limit the deterrent message that such powers send out.”* They noted that the SDT applying a standard of proof which is more generous to solicitors this “means [the SRA's] enforcement actions may not act as a credible deterrent.”

24. A change to the civil standard would also bring the SDT in line with most other tribunals across the professions. The civil standard is used widely by other regulators including all the health professions regulators, Accountancy and Actuarial Discipline Board, General Institute of Public Finance and Accountancy, General Teaching Council for Scotland and the Royal Institution of Chartered Surveyors. Disciplinary matters around the conduct of judges are also dealt with using the civil standard of proof. Internationally, most states in America have adopted the Model Rules for Lawyer Disciplinary Enforcement, which use a civil standard of proof. Disciplinary cases by the Upper Canada Law Society and the Australian Health Practitioner Regulation Agency are determined to the civil standard.

25. We regulate in the public interest and, like the overwhelming majority of modern regulators, make our own regulatory decisions on the civil standard of proof. That means that if it is clear on the balance of probabilities that there has been a breach, we may impose an appropriate sanction up to a maximum fine for “traditional” law firms and solicitors of £2,000. We have argued that the fining level for traditional law firms should be increased to save all parties the costs of prosecution at the Tribunal and because swift resolution is in the public interest. We also apply the civil standard of proof to cases involving

² Law Commission (2012) “Regulation of Health Care Professionals / Regulation of Social Care Professionals in England”, (LCCP 202), http://www.lawcom.gov.uk/app/uploads/2015/03/cp202_regulation_of_healthcare_professionals_consultation.pdf

³ Legal Services Board (2013) A blueprint for reforming legal services regulation http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reforming_legal_services_regulation_final_09092013.pdf (p.57)

licensed bodies and can disqualify individuals from involvement in such bodies and fine them up to £50m. We can fine the body up to £250m.

26. The lack of alignment between the use of the civil standard in these components of the regulatory process and the Tribunal adherence to the criminal standard is confusing for everyone and not in the public interest. It is also noteworthy that the SDT is required to apply the civil standard of proof in applications for orders under section 43 of the Solicitors Act 1974.
27. In 2017 we welcomed a proposal⁴ from the Bar Standards Board (BSB)⁵ to move to the civil standard. After wide consultation, the BSB has decided that it will be making this change, subject to the approval of the Legal Services Board (LSB), from March 2019.
28. Change at the SDT would therefore mean consistency across legal regulators in the public interest, removing any potential for regulatory arbitrage (whereby an individual could select a regulator with a disciplinary system that is perceived to be more lenient) and increasing consistency.
29. In continuing to apply the criminal standard of proof, the Tribunal would be out of step with most professional regulators, including all the legal services regulators in England and Wales.
30. In conclusion, we strongly support the use by the Tribunal of the of the civil, rather than criminal, standard of proof. We call on the SDT to make this change at the earliest possible opportunity.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

31. We support the proposal to include a rule dealing with Agreed Outcomes.
32. It is well recognised that there is a strong public interest in disputes being resolved by agreement. Agreed Outcomes benefit the public by supporting quick and certain action to ensure public protection. They also significantly reduce costs for all concerned and for those who fund regulation.
33. We understand that the Tribunal would find it administratively useful for Agreed Outcome Proposals to be filed 28 days before a hearing (and note that the requirement to serve the Proposal on others beforehand increases the 28 days by a further seven in terms of an agreement being reached). However, in our view, respondents in the SDT are like many other litigants and increase their focus on the case at the last minute. The overriding objective and the public interest in an agreed outcome may therefore be impeded by too long a time period for filing. A period of 14 days would be

⁴ Solicitors Regulation Authority (2017) SRA response - BSB consultation on standard of proof <https://www.sra.org.uk/sra/consultations/consultation-responses/bsb-response.page>

⁵ Bar Standards Board (2017) Review of the Standard of Proof Applied in Professional Misconduct Proceedings – Consultation Paper https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf

more appropriate and shows balance between the Tribunal's convenience and the public interest.

34. We do not believe that proposed rule 25(3) should be included. The principle is presumably the avoidance of criticism in regulatory decisions or judgments of people who are not parties either substantively or, here, are not parties to the Agreed Outcome. The analogous case law on this includes In re Pergamon Press⁶, FCA v Macris⁷ and Taveta Investments Limited v Financial Reporting Council.⁸
35. The principle is well understood although there may well be a difference between regulatory notices and the judgments of a statutory tribunal such as the SDT (even where the judgment arises from an agreed outcome). There are inevitably cases on the borderline such as where a solicitor is facilitating dubious transactions for others and it is unrealistic to try to avoid at least some implied criticism of those responsible for what is, in many examples, very likely to be a fraud. The Tribunal and the SRA are experienced in dealing with this issue.
36. There is also a public interest in regulatory decisions being transparent about such concerns so that members of the public understand both why a solicitor has been disciplined and the wider risks. Any such issues should be dealt with in each case and not by an exclusionary rule which may lead to difficulties in cases with a strong public interest element.
37. We support the proposed rule 25(4). However, we think that "does not relate to" may be too vague and it should be made clear that it means respondents who are not parties to the Agreed Outcome Proposal. We do not think it necessary for the Applicant to provide proof of service. Similarly, it seems unduly restrictive and potentially unfair to other respondents for the Applicant only to provide to the Tribunal responses "received by the end of the period mentioned in paragraph (4)(b)" particularly in view of the short time scale of seven days.
38. The requirement for "written reasons" in proposed rule 25(7) is unduly prescriptive and should simply state "reasons".
39. There is some concern about the Tribunal's understanding of its role in what is a process equivalent to the Carecraft procedure (Re Carecraft Construction Co Ltd⁹, as clarified by the decision of the Court of Appeal in Secretary of State for Trade and Industry v Rogers¹⁰) in directors' disqualification proceedings and that it is developing a potentially clumsy and expensive process. The equivalent provision in the High Court is in the *Practice*

⁶ [1971] Ch 388

⁷ [2017] UKSC 19

⁸ [2018] EWHC 1662 (Admin)

⁹ [1994] 1 WLR 172

¹⁰ [1996] 4 All ER 854

*Direction: Directors' Disqualification Proceedings*¹¹ and is simpler. The risk is the process in the proposed rule becomes the norm. It may be that some or all paragraphs (6) to (9) would be better placed in a practice direction particularly since the use of mandatory wording in rules can be unnecessarily inflexible.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

(d) If the answer to question (c) is no, please explain why

(e) Do you have any detailed comments on the drafting of the proposed rules?

40. In relation to the other provisions in the draft rules as outlined, we make a number of specific points, as follows. We have also noted several key areas which we think should be included in this review of the Rules.

A lay panel majority – draft rule 9

41. We remind the Tribunal of the removal by the Legal Services Act 2007 of section 46(6) of the Solicitors Act (1974) which required a solicitor majority on any Tribunal panel hearing a case. SDT rules¹² reinstated this requirement, and over ten years later this remains in the proposed new rules as draft rule 9.

42. We believe that this rule should be amended to require a lay majority, supporting public confidence by removing the perception of a structural bias in favour of solicitors.

43. This would bring the Tribunal in line with many other regulators which use a lay majority – for example, CiLEx Regulation, the General Optical Council and the General Social Care Council - as well as others that vary the panel composition depending on member availability.

Reviewing orders relating to solicitors' employees and consultants – draft rule 19

44. The time limit of 14 days in the proposed rule is too short, bearing in mind that the Tribunal is dealing with public interest matters and not civil litigation between private parties. We suggest that the time limit for our response should be 28 days.

¹¹ https://www.justice.gov.uk/courts/procedure-rules/civil/rules/disqualification_proceedings#12.1

¹² Rule 4 of The Solicitors (Disciplinary Proceedings) Rules 2007: "Subject to rules 6(1) and 6(3), a Division shall be constituted for the hearing of any application or matter relating to an application. Two of the Division members shall be solicitor members and one shall be a lay member and (unless the President shall determine otherwise) a solicitor member shall act as Chairman." Rule 6 relates to the certification of a case to answer.

Withdrawal of allegations – draft rule 24

45. The proposed rule 24 should be removed. There is no justification for requiring the Tribunal's permission to withdraw an allegation. In practical terms, we make public interest decisions on whether to pursue or withdraw allegations as cases progress. Seeking permission leads to additional costs for both parties, and so is both inefficient and costly. In the absence of permission to withdraw we may consider that it is our duty to offer no evidence against an allegation.
46. This provision is understood to go back at least until the late 1800s and was to prevent lay applications being settled and issues being hidden. It is overly bureaucratic and has no relevance in circumstances where the vast majority of cases are now brought by us as a statutory regulator and where we are bound by the regulatory objectives in the Legal Services Act 2007 and are publicly accountable. If there is any residual concern about lay applications that should be addressed by rules applicable to them.
47. The provision also gives the impression that the Tribunal in some way supervises the work of the SRA. That is not part of its judicial function. The pursuit of allegations is a matter for the SRA, not the Tribunal.

Service and sending of Evidence and bundles – draft rule 27

48. We welcome the detailed provision in this proposed rule. Again, in a public interest environment, exclusionary rules of evidence need to be tempered in balance with the importance of fairness to respondents.
49. We consider that the Tribunal should expressly provide that evidence of propensity is admissible. We discuss that below although we note that the broad wording in the proposed rule may have that effect: "*The Tribunal may... admit any evidence whether or not it would be admissible in a civil trial in England and Wales*". It is important however to raise the issue transparently and to consider whether an express rule is necessary.

Evidence of propensity

50. The SRA Disciplinary Procedure Rules 2011 include that a report for adjudication:

"may also include evidence of the *person's* propensity to particular behaviour..."
51. Propensity may be relevant both in the sense of a tendency towards particular behaviour (such as to assault clients) or by way of patterns of behaviour. Many serious cases become evident when a pattern or sequence is noticed such as overcharging in estates or apparent incompetence in transactions which in fact discloses the facilitation of alleged fraud by others.
52. The clearest current example where propensity evidence may be important in ensuring public protection is in the difficult arena of harassment (sexual or

otherwise) cases where people are particularly vulnerable and perhaps only one of several alleged victims is available to support a specific allegation, but the evidence of other similar incidents may be probative. To some extent, the evidence may be admissible as “similar fact evidence” but it would be more transparent to state clearly that evidence of propensity is admissible.

53. There is a parallel with such evidence in criminal cases. The Criminal Justice Act 2003 (CJA 2003) allows bad character evidence to be admitted where it is relevant to an important matter in issue between the defendant and the prosecution.¹³ Whether the defendant has a propensity (namely, evidence of a character trait making it more likely that the defendant had behaved as charged¹⁴) to commit offences of the kind with which he or she is charged is a “matter in issue” between the defendant and prosecution.
54. Evidence of propensity includes previous convictions that are not of the same description or category as well as other evidence of misconduct or disposition towards misconduct.
55. Misconduct is defined in the CJA 2003¹⁵ as “the commission of an offence or other reprehensible behaviour”. Reference to reprehensible behaviour can include non-conviction related behaviour and reprehensible conduct. The CPS guidance on reprehensible behaviour states that reprehensible conduct should be:

“looked at objectively taking account of whether the public would regard such conduct as reprehensible such as racism, bullying, a bad disciplinary record at work for misconduct; a parent who has had a child taken into care and of course minor pilfering from employers. Conduct that should not be regarded as reprehensible could include consensual sexual activity between adults of the same sex. The term 'reprehensible conduct' will avoid arguments about whether or not conduct alleged against a person amounted to an offence where this has not resulted in a charge or conviction.”

56. In R v Mitchell¹⁶ the Supreme Court considered the following question:

“Whether it was necessary for the prosecution, relying on non-conviction bad character evidence on the issue of propensity, to prove the allegations beyond a reasonable doubt before the jury could take them into account in determining whether the defendant was guilty or not.”

57. Lord Kerr held that it was not necessary (in a case where there are several incidents which are relied on by the prosecution to show a propensity on the part of the defendant) to prove beyond reasonable doubt that each incident happened in precisely the way that is alleged to have occurred and the facts of each individual incidents do not need to be considered in isolation from each other:

¹³ Section 101(1)(d) of the CJA 2003

¹⁴ R v D; R v P; R v U [2011] EWCA Crim 1474

¹⁵ Section 112 of the CJA 2003

¹⁶ [2016] UKSC 55

“The jury is entitled to – and should – consider the evidence of propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury’s deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another. The question impelled by the Order is whether, propensity has been proved.”

58. We do not suggest that the criminal law be imported into the Tribunal but it is telling that in that very serious arena evidence of propensity is admissible.
59. The rules should include express provision for the admission of evidence of propensity. Such evidence from the respondent is already admissible in the Tribunal in certain circumstances (namely, from referees on the question of dishonesty¹⁷).
60. In a public protection environment, evidence of propensity should be admissible and of course the Tribunal can give it such weight as it thinks fit.

Protecting vulnerable witnesses

61. We welcome the Tribunal’s current guidance on special measures and note that this is not being included in the rules. That may be appropriate to provide some flexibility in terms of updating and amendment. On the other hand, there is clarity by including such provisions in rules.
62. Although there is a current high level of concern about harassment cases, the Tribunal will be aware that such cases have been brought before it in the past and the issues are not new. We note however that the law has been developing in this situation for some time and that the Tribunal may need to adopt further rules.
63. Essentially, the key protections seem to be:
 - (1) “Special measures” at a hearing – evidence by video link, behind screens or in private – the Tribunal and the General Medical Council (GMC) have provided for such measures.
 - (2) Prevention of cross-examination of an alleged victim by the alleged perpetrator personally – the GMC has provided for this but the SDT has not. There are of course implications such as the need to appoint a representative to conduct the cross-examination.
 - (3) Advance authorisation of cross-examination of the alleged victim – in criminal cases, in very brief terms, the judge authorises the questions that are going to be asked. This is in the Criminal Procedure Rules but neither the GMC nor the SDT make provision for it.

¹⁷ See Donkin v The Law Society [2007] EWHC 414 (Admin) and Bryant v Law Society [2007] EWHC 3043 (Admin)

64. If the Tribunal does not consider it can or should make rules on these issues at this stage it may wish to consider making a practice direction.

Factual witnesses; restrictions on publication - draft rule 35

Factual witnesses

65. We do not consider the proposed rule 35(7) to exclude factual witnesses from the hearing to be appropriate in a civil jurisdiction.
66. The approach should be as discussed in Luckwell v Limata¹⁸ namely that witnesses should be allowed to be present at a public hearing unless there is good reason to exclude them.
67. An approach has developed by default in the Tribunal of excluding SRA staff, which we consider to be inappropriate. In cases involving more than one respondent, all respondents are present (as they rightly should be) observing all evidence, including each others'. In terms of our staff, the reality is that genuine factual disputes are rare and it is overly cautious to exclude them from the hearing. The position should be that the Tribunal can exclude factual witnesses at its discretion, upon application and where there is a genuine justification for doing so.
68. The proposed rule could also have unintended consequences. It may be premised on the main witnesses to be excluded being SRA investigators but respondents could be motivated to generate spurious factual disputes in an attempt to exclude other SRA personnel.

Rule 35(9) and the media

69. We consider that proposed rule 35(9) has wide implications and should be removed and made the subject of a fully considered consultation.
70. While we are largely neutral on the rule's apparent intent (provided it does not, or is not used, to undermine the clear principles of law in SRA v Spector¹⁹) we believe that it requires careful discussion and delineation in a properly structured consultation. The consultation should invite views from the media, which would be directly impacted by the draft rule.
71. For example, the proposed rule raises the question of whether a media organisation is or is not bound by a direction "*prohibiting the... publication of... any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified*".
72. Our view is that this proposal should be withdrawn and be the subject of a properly articulated consultation with the involvement of interested parties and a discussion of the related general law.

¹⁸ [2014] EWHC 536 (Fam)

¹⁹ [2016] EWHC 37 (Admin)

Allowing the SRA to make submissions on sanction – draft rule 41

73. Draft rule 41 states that the Respondent will be entitled to make submissions by way of mitigation. In our view, the procedure should be that the respondent is invited to make submissions on sanction by way of mitigation, the SRA should then make submissions on sanction (and any reply to the mitigation) and the respondent should be permitted a brief reply.
74. We consider that appeals to the High Court on sanction might be rarer if we can assist the Tribunal with submissions on sanction. Examples where that may have helped include SRA v Ali & Chan²⁰ (fines overturned as unduly lenient, leading to suspensions in a case related to Stamp Duty Land Tax), SRA v Davies & Taman²¹ (one year suspensions increased to three years in the Ecohouse investment scheme case), and perhaps Manak v SRA²² where parts of a restriction order imposed by the Tribunal were overturned by the Divisional Court on the grounds that the respondent had not been able to make representations upon them. In Manak, submissions on sanction from us may also have assisted in avoiding that outcome, particularly in view of our statutory role, and long experience, in imposing conditions on practising certificates and licences on a risk basis.
75. It would be helpful for all parties if the SRA assisted the Tribunal with its view as regulator of the appropriate public interest outcome. The High Court has consistently taken account of our views in the context of contested interventions: see Sheikh v Law Society²³, para 90, recently quoted in Neumans LLP v Law Society²⁴ a decision substantively upheld by the Court of Appeal²⁵ which quoted the trial judge's comment that one of six reasons for not ordering withdrawal of the intervention was "*The SRA, whose views are entitled to respect, considers that the intervention should continue.*"
76. The convention that the prosecution does not make submissions on sanction has long been removed in the criminal courts. Prosecutors in criminal cases assist the courts in relation to sentence, as set out in Crown Prosecution Service guidelines:²⁶

"At the stage of sentencing the prosecutor has an important responsibility to assist the court to reach its decision as to the appropriate sentence. That role also extends to protecting the victim's interests in the acceptance of pleas and the sentencing exercise.

Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise: Rule B:4 provides: The prosecution advocate represents the public interest, and should be ready to assist the court to reach its decision as to the appropriate sentence. This will

²⁰ [2015] EWHC 2659 (Admin)

²¹ [2017] EWHC 2882 (Admin)

²² [2018] EWHC 1958 (Admin)

²³ [2006] EWCA Civ 1577

²⁴ [2017] EWHC 2004 (Ch)

²⁵ [2018] EWCA Civ 325

²⁶ <https://www.cps.gov.uk/legal-guidance/sentencing-overview>

include drawing the court's attention to: any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim; where appropriate, to any evidence of the impact of the offending on a community; any statutory provisions relevant to the offender and the offences under consideration; any relevant sentencing guidelines and guideline cases; and the aggravating and mitigating factors of the offence under consideration.

The prosecution advocate may also offer assistance to the court by making submissions, in the light of all these factors, as to the appropriate sentencing range.”

77. In September 2010, we suggested to the SDT that we should be able to make submissions on sanction. We consider that in a public protection and risk-based jurisdiction it is right and appropriate for the regulator to assist the Tribunal, and indeed respondents, in terms of understanding the sanction they may face, by setting out its view of sanction. The Tribunal's reluctance to allow submissions on sanction concerns us as a potential parallel with its previous failure to draw adverse inferences from respondents who do not give evidence.

78. Reducing the number of appeals against sanction would help to ensure appropriate public protection is put in place quickly and save Court and party resources. In modern, risk-based regulation, submissions on sanction by the primary statutory regulator are clearly in the public interest. It is difficult to see any disadvantage in such submissions being made.

Costs – draft rule 43

79. We welcome the clarity in draft rule 43 although we question whether it is strictly necessary.

80. Since the Tribunal does not discuss this proposed Rule in the consultation paper, it must be the case that it is not considered to involve significant change. On that basis, while we are concerned that Rule 43(4)(a) might lead to satellite litigation as each party seeks to argue about the “conduct” of the other, we do not object on the basis that the underlying principles are a matter of law and that the Tribunal cannot be seeking to change principles established in the Court of Appeal by way of a consultation that is silent on any such issue.

81. A statutory regulator has a duty to bring sometimes difficult cases and should not be equated with a civil litigant. The Tribunal should respect the public interest nature of applications made to it and not seek to water down by rule a legal principle which the courts consider important to ensure that regulators are not dissuaded from bringing difficult cases:

“Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov, as a “shambles from start to finish”, when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow

the event. The “event” is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage.”²⁷

82. An alternative wording could be:

“whether the application was properly brought or defended reasonably;”.

Representatives – draft rule 48

83. We welcome the clarity in the draft rule 48 and the need for the Tribunal to ensure that representatives are either properly qualified or can assist only with the Tribunal’s permission.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

84. Many users of legal services have protected characteristics and it is important that they are properly protected. That makes it all the more important that the civil standard of proof is used to protect all legal services consumers, as is the case for the users of most professional services.

85. Amending draft rule 41 so that we can make submissions on sanctions could reduce the number of appeals by us against sanction, with several of the examples given illustrating that these are often cases where there is strong public interest in ensuring proper protections. That may be because they affect large numbers of people or people who are particularly vulnerable.

86. As set out at paragraph 52, allowing evidence of propensity could benefit vulnerable people. Propensity evidence may be particularly relevant in sexual harassment cases where people are particularly vulnerable and perhaps only one of several alleged victims is available to support a specific allegation, but evidence of other similar incidents may be useful.

²⁷ [2007] EWCA Civ 233

Contact details

87. Submitted by Steven Toole, Head of Public Affairs, on behalf of the SRA
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BY EMAIL ONLY

19 July 2018

Dear Sirs

Consultation response

This is a response to the consultation paper issued by the Tribunal in July 2018 (“the paper”).

I have practised civil litigation as a solicitor and at the Bar, but this response is not submitted in either of those capacities. I have never appeared as a respondent before any disciplinary (or other) tribunal.

Paragraph 41 of the paper invites responses to six questions.

Question (a)

“(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft Rule 5)?”

My comments in response to that question are as follows:

1. The question suggests that the new Rule 5 would “allow” the civil standard to be applied. Were the civil standard adopted, the new Rule 5 would require that standard to be applied.
2. The paper does not provide adequate evidence to enable question (a) to be answered on a properly informed basis. The paper does no more than refer to (i) obiter comments made in a number of reported authorities and (ii) the practices of disciplinary tribunals in other professions.

In its “Comments on the LSB’s draft paper on sanctions and appeals” (February 2014), the Tribunal was critical of the LSB’s preference for the civil standard of proof. It described the LSB’s enthusiasm for that standard as “look[ing] like a small tail wagging a large dog. It continued:

“...For the LSB to support a proposal for adopting the civil standard of proof on the basis that five small players in the legal market use it, without attempting any real analysis of

the sort of misconduct or the number of cases they handle each year, is not a sound foundation for proposing wholesale change to the standard of proof, sanctions and the appeals regime.”

Having made such comments about the LSB’s approach, it is unsatisfactory that the Tribunal is now holding its own consultation on the standard of proof through a paper which (with respect) contains no “real analysis” or “sound foundation”.

3. The reported authorities make clear that the current standard to be applied in the Tribunal is the criminal standard. The Privy Council put that point beyond any doubt in *Campbell v Hamlet*. That is high authority, but the paper refers to various decisions (from lower courts) in which obiter comments have been made about the standard of proof.

In some of those cases, the SRA tried to interest the court in a discussion about the standard of proof when that was not a question which the court needed to consider. This seems to have been done in an attempt to garner obiter dicta which the SRA could then deploy against the Tribunal if it (the Tribunal) showed reluctance to move to a lower standard proof. It is far from clear that the obiter comments which were made in such cases reflected any lengthy consideration of the relevant issues: courts do not usually give detailed consideration to issues which do not need to be decided.¹ Still less is it clear that the court had the benefit of any relevant evidence.

4. The paper refers to the standard of proof applied in other disciplinary tribunals. The impression given by the paper is that the Tribunal feels that it is “lagging behind” those tribunals in continuing to apply the criminal standard of proof.

The fact that other tribunals apply the civil standard proof should not be a weighty factor in any decision about altering the standard in the Tribunal. The paper refers to the Shipman case. Harold Shipman was a medical profession who turned out to be a serial murderer of his patients. A more extreme case would be hard to imagine. His case may help to explain why medical disciplinary tribunals altered their practices, but it provides no useful lessons on how solicitors who transgress the rules should be treated.

5. It is not clear that there is any valid comparison with the practices adopted by Tribunals which deal with professionals who dispense medical services to humans. Such professionals have the capacity to kill or seriously injure their clients. Solicitors have the capacity to cause significant financial loss and distress to their clients, but their misconduct does not cause injury or death.

6. The paper fails to mention that, when the GMC adopted the civil standard, it did so in the belief that that standard was sufficiently flexible to allow a more stringent test to be applied in serious cases. That belief was based upon the case law² as it was then understood. Since

¹ When the SRA tried to interest the court in a discussion about the standard of proof in *Richards v Law Society* [2009] EWHC 2087 (Admin), Sir Antony May made clear (at [21]) that “the court is not in the business of conducting academic seminars”. That admonition did not deter the SRA from trying to raise the point in subsequent cases where it did not fall to be decided, as part of what seems to be an ongoing campaign to lower the standard.

² Including, in particular, the judgment of Richards LJ in *R (AN) v Mental Health Review Board (Northern Region)* [2005] EWCA Civ 1605: “...the civil standard of proof is flexible in its application and enables proper account to be taken of the seriousness of the allegations to be proved and of the consequences of proving them...Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its

then, the courts have made clear that the civil standard does not incorporate a “sliding scale” or require an especially cogent standard of evidence where the allegation is particularly serious.³ The paper does not consider whether, in a case involving allegations of a criminal type (for example, dishonesty), the Tribunal would expect there to be especially cogent evidence before convicting the respondent.

7. As noted above, any alteration to the standard of proof in the Tribunal needs to be based upon a full consideration of all relevant evidence. A striking feature of the paper is that it contains no evidence at all. There is no evidence about the proportion of cases which result in a conviction. There is no evidence which explains why prosecutions fail. Consultees cannot be expected to go through the Tribunal’s previous annual reports in the hope of gleaning this information.

Anecdotal evidence suggests that the proportion of prosecutions which result in a conviction is over 90%.⁴ The paper contains nothing which addresses this point. Neither is there anything which compares the conviction rate in the Tribunal with the conviction rates in other disciplinary tribunals.

Assuming that the conviction rate in the Tribunal is indeed more than 90%, it is appropriate to ask why there is perceived to be any need to lower the standard of proof. A conviction rate at that level is in itself extraordinary: it serves to confirm that the SRA does not struggle with the standard of proof and the Tribunal does not find it difficult to convict those who appear before it. The paper contains no analysis of those prosecutions which do fail. What types of allegations did they involve? Why did they fail? Were they SRA prosecutions or “private” prosecutions? Were they poorly prepared or presented? Did the standard of proof have anything to do with their failure? These are important questions, but none of them is addressed.

8. The paper refers to the regulatory objectives contained in section 1 of the LSA 2007. Those objectives are not relevant to the question which is being asked. They apply to the regulators (the SRA and the LSB), not the Tribunal (which is independent of the SRA and the LSB). No one disputes that the regulators’ aim is (and should be) to protect the public, rather than protect the interests of the profession. However, there is a risk that the wishes of the SRA - which appears before the Tribunal every working day of the year - will not be appropriately balanced by the views of practitioners or members of the public. In reality, very few solicitors are likely to have (or make) the time to respond to the consultation and very few members of the public are likely to be aware of it. By contrast, the SRA can (and will) devote significant time and resources to pushing for a lowering of the standard of proof.

9. As regards the Tribunal, the “public protection” argument is, in any event, overstated. This is because it chooses to overlook the facts that:

application. In particular, the more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities” (at [59] and [62]).

³ “GMC: time to reconsider the civil standard of proof”, Ann R Coll Surg Engl (Suppl) 2013; 95: 56–58 (Royal College of Surgeons of England Bulletin).

⁴ This issue is of such importance to the consultation that the Tribunal should not allow it to be dealt with anecdotally. The Tribunal should produce the relevant statistics itself, in an easily accessible format.

(i) No one has put forward any credible argument (or evidence) to the effect that, under its current Rules, the Tribunal is failing to protect the public. If the conviction rate is anything like 90%, it would be absurd for anyone to contend that the Tribunal is somehow failing the public. The Tribunal's primary duty is to try respondents fairly, not to put the SRA's or the respondent's interests above or below the perceived interests of the public. To ensure the independence of the Tribunal, that duty should not be confused or elided with the regulatory objectives or the SRA's duty to protect the public. The Tribunal should be careful to ensure that references to public protection do not cause it to feel "morally blackmailed" into lowering the standard of proof.

(ii) By the time an inept or dishonest solicitor ends up before the Tribunal, the damage has already been done. The best way of protecting the public from inept or dishonest solicitors is to (a) ensure the highest standards of competence and integrity at the stage of entry to the profession and (b) require solicitors to carry copper-bottomed insurance policies.

(iii) The SRA has significant disciplinary powers, short of commencing a prosecution in the Tribunal. It does not hesitate to exercise those powers when it feels it appropriate to do so; and it has shown itself to be keen to extend its own disciplinary powers, with the result that more cases are dealt with "in-house".

(iv) Where there is a suspicion of dishonesty, the SRA can take immediate steps to protect the public by intervening in the solicitor's practice. It can do this without warning and without obtaining anyone's permission. It does not need to prove its case before a court or tribunal before making the intervention. No more effective weapon exists for protecting the interests of the public. By contrast, prosecuting the solicitor in the Tribunal is likely to take many months, irrespective of the standard of proof. The truth is that, where the SRA suspects dishonesty which appears to be causing loss to clients, it intervenes in the solicitor's practice - it does not stop to file a Rule 5 statement in the Tribunal (or worry about the standard of proof in the Tribunal).

10. Lowering the standard of proof would (at least in theory) make it less likely for the SRA to lose a case. In turn, the likelihood of a costs order being made against the SRA is reduced. Even with the current (criminal) standard of proof, it is rare for the SRA to be ordered to pay a respondent's costs when it does lose a case: a respondent who wins a case is likely to be met with an argument to the effect that he should still pay the SRA's costs (or bear his own costs), unless the SRA's handling of the prosecution was a "shambles".⁵

Reducing the standard of proof would therefore increase the pressure on a respondent not to contest allegations, if only to try to avoid the costs consequences of contesting them. The paper says nothing about any potential costs implications of altering the standard of proof. Neither does it consider the fact that it is already difficult for solicitors to contest allegations, because their professional indemnity insurance is unlikely to cover the costs of proceedings in the Tribunal.⁶

⁵ *Baxendale-Walker v Law Society* [2007] EWCA Civ 233.

⁶ This is because the SRA changed the minimum terms to remove from insurers the obligation to cover the costs of defending proceedings in the Tribunal. It has been reported that the defence costs in *SRA v Leigh Day* were £7million. The respondents were able to afford those costs only because they happened to have a policy of D&O insurance which covered them.

11. I suggest that there is already a significant imbalance of arms and resources in cases heard by the Tribunal. The SRA appears before the Tribunal every day. Its resources are enormous (and I am not aware of any case in which the Tribunal has imposed costs caps or budgets). Its solicitors and advocates appear before the Tribunal with such frequency that they are well known to the Tribunal.

By contrast, a respondent solicitor may only face the Tribunal upon one occasion during his (or her) career. He may be based hundreds of miles from the Tribunal's offices in EC4. If he is able to fund representation, the solicitors/counsel whom he instructs are unlikely to have the advantage of dealing with cases in the Tribunal on a regular basis. Reducing the standard of proof would tilt matters yet further in favour of the SRA.

12. The paper notes that, when making disciplinary decisions which do not involve the Tribunal, the SRA applies the civil standard. What the paper fails to point out is that, when deciding to adopt that standard, the SRA did so in the full knowledge that it would create an apparent conflict between the standard applied by the SRA and the standard applied by the Tribunal.⁷ That bears the hallmark of a tactical decision, aimed at putting the Tribunal in a position in which it appeared old-fashioned and out of step with the SRA.⁸ It should not now operate as a reason for lowering the standard which the Tribunal applies. It is crucial to the credibility and integrity of the Tribunal that it is not perceived as being pushed⁹ into making changes which are (or might be) driven by the interests, desires or tactical manoeuvrings of the SRA.

Summary in respect of question (a)

13. We have already arrived at a position where:

(1) The SRA has resources vastly in excess of those who appear as respondents in the Tribunal.

(2) Most solicitors do not have insurance which covers the costs of defending proceedings in the Tribunal, because the SRA chose to remove such cover from the minimum terms of insurance.

(3) The SRA is rarely ordered to pay a respondent's costs, even where it loses a prosecution.

(4) The SRA is believed to win almost all prosecutions which it brings in the Tribunal.

⁷ "This decision was made [by the SRA] in the knowledge that it would create a discrepancy with the Tribunal's procedures and rules, particularly concerning appeals": the Law Society's document entitled "The standard of proof applied by the Solicitors Disciplinary Tribunal", 2017, at paragraph 2.2.

⁸ Indeed, it allowed the SRA's Chief Executive (Paul Philip, formerly of the GMC) to say (after the decision in *Arslan*) that "It is clearly wrong that the SDT applies a different standard to that of the SRA. This is a civil jurisdiction and the civil standard should apply. We will continue to push for this change to be made" (Legal Futures, 11 November 2016).

⁹ The SRA's word: see note 8 above.

One could be forgiven for thinking that, by pushing for a lowering of the standard of proof in the Tribunal while trying to extend its own disciplinary powers and removing the need for insurance cover for disciplinary cases, the SRA wishes to arrive at a situation in which (i) few cases go anywhere near the Tribunal and (ii) if a case does go before the Tribunal, it is almost impossible for a respondent to fight it or win it. That would be a deeply unhealthy position to arrive at, but it appears to be the “direction of travel”. It is incumbent upon the Tribunal to do its part to ensure that solicitors who are accused of misconduct have access to an independent tribunal in which they will get a fair trial on a level playing field.

14. It is no part of the SRA’s job to engineer a system in which it holds all the cards and cannot lose; and it is no part of the Tribunal’s job to acquiesce in such a system or meekly “fall into line” with other tribunals. In circumstances where the Tribunal has always applied the criminal standard (and that practice was approved by the Privy Council as recently as 2005), there need to be compelling reasons, based upon proper evidence, to justify an alteration in that standard. As a specialist tribunal for practitioners in the legal profession, the Tribunal should understand the need for evidence. The paper does not provide any evidence upon which a decision could be made, with the result that it does not enable its readers to respond on an adequately informed basis.

15. I respectfully suggest that a great deal more research and analysis needs to be done (and published) by the Tribunal if any consultation on the standard of proof is to be meaningful. As matters stand, there is no evidence to suggest that the existing standard of proof is not working or needs to be changed.

Question (b)

“(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?”

Yes.

Questions (c), (d) and (e)

“(c) Do you consider that the other provisions in the draft rules are fit for purpose?”

(d) If the answer to question (c) is no, please explain why.

(e) Do you have any detailed comments on the drafting of the proposed rules?”

These questions overlap. My comments are as follows:

1. Revising the Rules is an exercise which should be undertaken after any question about the standard of proof has been decided. The standard of proof is something which demands a consultation of its own. The responses to that consultation are likely to contain details which would then feed into a separate consultation about whether/how to amend the Rules.

2. It is not clear whether existing practice directions (or practice notes) would survive the introduction of the new rules.

3. The draft Rules do not consider the potential interaction between any lowering of the standard of proof and the certification of a case to answer. If the standard of proof were

lowered, it might be that the need to certify a case to answer could be removed altogether. Even on the current (criminal) standard, few cases fail at the certification stage.¹⁰ The practice of certifying a case to answer is of questionable utility (and fairness), because it involves making an initial decision without seeing the respondent's Answer or hearing anything from him. Certifying a case to answer then puts the respondent at a disadvantage should he wish to try to strike out any of the allegations (because at least one member of the Tribunal has already certified that there is a case, without hearing from the respondent).

A better approach would be for the Rules to abandon the practice of certifying of a case to answer and, instead, make express provision for a respondent to apply for the striking out (or summary dismissal) of a case (or part of a case). Such a provision could (and should) be included in the Rules, irrespective of the standard of proof which is being applied.

4. A significant failing of the draft Rules is that they do not adequately address the requirements of open justice, which apply in the Tribunal in the same way that they apply in the courts: *SRA v Spector* [2016] EWHC 37 (Admin). In this respect, the draft Rules are not fit for purpose. Both the Civil Procedure Rules and the Criminal Procedure Rules contain clear rules which entitle members of the public to obtain certain documents from the court file. Provision should be made for members of the public and journalists to obtain copies of Rule 5 statements (as they are currently called) and Answers to those statements. As matters stand, the Tribunal is extremely reluctant¹¹ to release any statements of case or documents to third parties. That approach is not consistent with the principle of open justice. It calls into question the Tribunal's claim to be "transparent".

5. The matter is not dealt with adequately or appropriately by the Tribunal's Disclosure Policy (July 2017). The Disclosure Policy is little known and puts an inappropriate burden on members of the public/journalists to make out a case for disclosure.

6. It is troubling that the Disclosure Policy appears to have been introduced without any consultation or publicity. Even more troubling is that the fact that the Disclosure Policy does not properly reflect the relevant authorities, including (for example) *R (Guardian News and Media) Ltd v City of Westminster Magistrates' Court* [2012] EWCA Civ 420. As the courts have made clear, the "default position" is that documents which are referred to during proceedings should be available to the public, not withheld from them unless they can show good reasons for wishing to see them.

7. The Disclosure Policy inverts that position by (i) indicating that documents are unlikely to be disclosed until the proceedings are over and the time for any appeal has expired and (ii) requiring the requester to make out a case for disclosure. Anyone who reads the Policy will

¹⁰ The paper should include details of the number/proportion of cases which fail at the certification stage.

¹¹ I base this upon my own experience of trying to obtain such documents from the Tribunal during 2016. That entailed extensive correspondence, in which the Tribunal's staff (not panel members) gave the impression that my requests were an unwelcome intrusion into the Tribunal's operations. The Tribunal's (and the SRA's) refusal to provide documents resulted in a 16-page decision from the Law Society's FOI Adjudicator (the adjudication known as RH, YZ and SL, decided in December 2016). The Tribunal was invited to (but did not) participate in that adjudication. It is not clear whether the introduction of the Disclosure Policy was connected with the adjudicator's decision, because the genesis of the Policy has not been explained. The Tribunal may be unaware that the adjudication process has now been abolished by the SRA, with the result that there is no realistic prospect of a member of the public obtaining Tribunal documents from the SRA.

sense the Tribunal's innate reluctance to disclose documents. It is difficult to see that a court would uphold the Policy, were its lawfulness to be challenged.

8. Revision of the Rules provides a good opportunity to (i) review the Policy and ensure that it accords with the relevant authorities and (ii) ensure that the question of public access to documents in dealt with in the Rules (not in a separate Policy). I suggest that Rule 35 be expanded to address the question of third party access to documents.

9. My proposed wording, which is based upon the relevant provision in the Civil Procedure Rules (Rule 5.4C), is as follows:

“Subject to any direction previously given by the Tribunal under Rule 35(9), any member of the public or journalist who pays any reasonable fee prescribed by the Tribunal may, whether by attending the Tribunal's offices during working hours or by submitting a written request, inspect (or obtain a copy of) the following documents, namely:

- (a) Any application of the kind referred to in Rule 12(1).
- (b) Any statement of the kind referred to in Rule 12(2), save that any documents exhibited to such a statement shall not be disclosed without the permission of the Tribunal.
- (c) Any supplementary statement of the kind referred to in Rule 14(1), save that any documents exhibited to such a supplementary statement shall not be disclosed without the permission of the Tribunal.
- (d) Any answer of the kind referred to in Rule 20(2), save that any documents exhibited to such an answer shall not be disclosed without the permission of the Tribunal.
- (e) Any judgment or order given or made in public by the Tribunal.
- (f) Any other document if the Tribunal gives permission.
- (g) Any application for permission under this part of this Rule shall be made to the Tribunal in writing. If the Tribunal wishes to hear argument (or inform the parties to the relevant proceedings) before deciding whether to give the relevant permission, it shall give such directions as it consider appropriate.

Question (f)

“(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?”

My comments are follows:

- 1. Appendix B to the paper is an “Equality Impact Assessment Initial Screening”. That screening seems to assume that (i) there will be no adverse impacts and (ii) nothing said by anyone responding to the consultation is likely to have any effect on this.
- 2. That is a bold (if not complacent) stance for the Tribunal to be adopting in its initial screening, not least because it appears to be based on no information beyond 18 “equality and

diversity monitoring forms” which the Tribunal received from respondents during 2015, 2016 and 2017.

3. Appendix B states that “there is no existing source of information that will assist in identifying the likely equality impacts on different groups of people”. It might have been expected that the paper would at least mention the reports produced by Lord Ouseley (2008), Pearn Kandola (2010) and Professor John (2014), even if it then concluded that nothing in those reports was of any relevance to any of the matters - including the standard of proof - which are the subject of the consultation. Not mentioning any of those reports in the “Equality Impact Initial Screening” suggests that that screening is a “tick-box” exercise, based upon just 18 completed questionnaires over a three-year period.

4. Professor John’s report noted that “in the case of eventual referral to the SDT, BME cases made up 33% of the cases referred, and accounted for 25% of new cases, while White cases were proportionally underrepresented making up only 67% of referrals in relation to 75% of new cases”. Professor John made recommendations directed at the Tribunal, one of which was that the Tribunal should “monitor by ethnicity and gender, the outcomes for those solicitors who appear before it on regulatory charges to see whether there is any disproportionality”. While it may prove to be a fair assumption that lowering the standard of proof will be equally bad news for all respondents, a paper which relates to that issue should contain detailed (and up-to-date) monitoring information of the kind to which Professor John was referring.

Yours faithfully

Ms Geraldine Newbold
The Solicitors Disciplinary Tribunal
Fifth Floor, Gate House
1 Farringdon Street
London EC4M 7LG

BY EMAIL ONLY

1 October 2018

Dear Ms Newbold

Supplemental consultation response

This letter is supplemental to my consultation response dated 19 July 2018. It arises out of (i) points made in the SRA's response to the consultation (published by the SRA on 27 September 2018) and (ii) two very recent decisions of the Tribunal (which are relevant to question (a) in the consultation paper).

1. "Insufficient consultation"

1.1 I agree with the comment which the SRA makes at paragraph 14 of its response:

"We are concerned that a number of the proposed rules are not discussed in any detail, or at all, in the consultation paper itself, bringing with it the serious risk of the Tribunal being accused of insufficient consultation by not highlighting potentially significant changes. The Tribunal may wish to consider separate consultation in several areas."

1.2 However well-intentioned it may be, the consultation paper is too thin on evidence and information to amount to an adequate consultation. It seeks to cover far too much ground in one go. Question (a) should be the subject of its own consultation. Questions (c) to (e) are unacceptably unfocused, which puts an inappropriate burden on consultees. Question (f) appears to be treated by the Tribunal as little more than a formality.

1.3 As a result of the unfocused phrasing of questions (c) to (e), the SRA's response raises points - the composition of panels and "a perception of structural bias" - which do not feature anywhere in the consultation paper:

"...draft Rule 9 should be amended to require a lay majority, supporting public confidence by removing the perception of a structural bias in favour of solicitors. The Legal Services Act 2007 removed the requirement for a solicitor majority on any Tribunal panel hearing a case, but the Tribunal reinstated this in the rules in 2007. More than ten years later these redrafted rules retain that provision" (paragraph 5 of the SRA's response).

“...[draft Rule 9] should be amended to require a lay majority, supporting public confidence by removing the perception of a structural bias in favour of solicitors” (paragraph 42 of the SRA’s response.)

1.4 Other consultees will have been unaware that a topic as important as perceived structural bias was intended to form part of the consultation or was going to be raised in the SRA’s response (which was not published until seven working days before the closing date of the consultation). That is not a satisfactory way to allow a consultation to proceed.

2. Allegations of apparent bias

2.1 Allegations of perceived structural bias are allegations of apparent bias.¹ By alleging apparent bias resulting from the composition of panels under the existing Rule 4, the SRA has called into question every trial conducted by the Tribunal over the last ten years. It is not clear whether the SRA appreciates the implications of its references to perceived bias.

2.2 The conventional way to make allegations of bias is through an application to recuse (or on an appeal or judicial review in the High Court). As the SRA implicitly concedes in paragraph 5 of its response, it has had a decade in which to do those things.

2.3 For reasons which it has not explained, the SRA has chosen not to follow the conventional routes and, instead, has alleged apparent bias in a response to a consultation paper. Having decided to proceed in that manner, the allegations need to be set out clearly by the SRA and addressed in detail by the Tribunal, before being addressed by consultees. It would be inappropriate for the Tribunal to make any decisions on such matters without giving consultees the time (and information) which they need to consider them fully.

2.4 It should be pointed out that paragraphs 5 and 42 of the SRA’s response do not sit comfortably with the various cases in which the SRA has opposed appeals brought by solicitors on the ground of alleged bias.² It is, of course, open to the Tribunal to invite the SRA to (i) withdraw its references to perceived bias, (ii) pursue those allegations in the correct forum or (iii) confirm that it is waiving any right to allege bias in respect of cases which have already been decided (or are currently being heard) by panels constituted under the existing Rule 4.

2.5 On any view, the Tribunal should issue a statement which explains when and how it proposes to address the allegations. In order to that, the Tribunal may think it sensible to take legal advice on the implications of paragraphs 5 and 42 of the SRA’s response.

3. Separate consultations

¹ See, for example, *SW v Secretary of State for Work and Pensions* [2010] UKUT 73 (AAC), at [3] and [53].

² See, for example, *Sancheti v SRA* [2017] EWHC 86 (Admin), at [71]: “On behalf of the SRA, it is submitted that *Pine v Law Society* CO/1385/2000 provides authoritative confirmation that the members of the SDT are independent and impartial”. If the SRA’s position is that the individual members of the Tribunal are independent and impartial but the panels constituted under Rule 4 are infected by apparent bias, one would have expected it to say that to the Court.

3.1 This is the most important consultation which the Tribunal has conducted since it was created in 1974. The consultation paper fails to reflect that. It seeks to cover an enormous amount of ground without providing the appropriate level of information or analysis. Despite (or perhaps because of) the breadth of the consultation, the paper makes no attempt to explain whether changes other than those set out in the draft Rules were considered and discarded by the Tribunal.

3.2 When I have asked for more material (in particular, documents showing the genesis of the Disclosure Policy), the Tribunal has refused to provide it. Again, that is not a satisfactory way to conduct a consultation. There is no good reason for refusing to provide the paper trial in respect of a Policy which affects the public and press.

3.3 A large part of the consultation paper is devoted to just one point (the standard of proof), but consists of little more than obiter comments on that point, without any accompanying evidence to inform any debate about whether the standard should be altered. The relevant evidence (being the proportion of prosecutions which fail and the reasons for those failures) is held by the Tribunal and the SRA. None of it appears in the consultation paper and none of it appears in the SRA's response.

3.4 Most consultees will be well aware of the dicta for and against an alteration in the standard of proof. Quoting those dicta to them takes the matter no further: they need to see the evidence referred to above, not obiter dicta. Paragraphs 16 to 22 of the paper appear to have been lifted word-for-word (and without attribution) from paragraphs 13 to 19 of the BSB's *Review of the Standard of Proof Applied in Professional Misconduct Proceedings* (May 2017). It is not unreasonable to expect a highly-resourced Tribunal³ to do more than recycle text used in a BSB consultation paper.

3.5 The Tribunal devotes just two pages of the consultation paper (paragraphs 27 to 39) to covering all other aspects of the proposed new Rules. That inadequacy is made worse (not better) by the comment that "It is envisaged that some subjects will be addressed in updated practice directions but that there will be fewer than currently exist" (paragraph 39). What subjects is the Tribunal talking about? Why are those subjects not being addressed as part of the consultation, rather than being hived off to unspecified practice directions (upon which there will be no consultation)?

3.6 I respectfully suggest that the Tribunal rethink its approach to the consultation and break it down into a number of separate consultations⁴, each supported by a paper which contains the proper level of information and analysis. Given that there appears to be no urgent need to revise the Rules, and given that the SRA has used the consultation as an opportunity to allege systemic apparent bias, it is not clear why the Tribunal would object to such a course of

³ The Tribunal's budget for 2018 (as approved by the Legal Services Board) is almost £3 million, all of which is funded by solicitors.

⁴ For example: (1) the standard of proof; (2) open justice and the rights of the public and press; (3) the composition of panels and the SRA's allegation of apparent bias; (4) agreed outcomes; (5) interlocutory applications, including adjournments; (6) the conduct of trials, including rules relating to evidence and witnesses; (7) costs. Trying to cover all these areas in one consultation is unrealistic and means that important considerations are likely to be overlooked.

action.⁵ As the SRA points out in the comment quoted in paragraph 1.1 above, not adopting that course of action exposes the Tribunal to the risk that someone will challenge the effectiveness of the current consultation (or of any decisions made by the Tribunal as a result of it).

3.7 I trust that the comments which I make above will be seen as constructive, which is what they are intended to be. It is in no one's interests - least of all the interests of the public - to conduct a consultation which is not adequately structured or whose effectiveness may be called into question.

4. Standard of proof

4.1 A recent decision of the Tribunal provides a rare example of a prosecution failing because the SRA failed to prove its case to the criminal standard. The case in question is *SRA v Mardon* (11756-2017; judgment dated 19 September 2018).

4.2 As is clear from paragraph 34.34 of the judgment, one of the reasons (or, perhaps, the only reason) for the Tribunal's decision was that the SRA had failed to obtain a crucial file:

“The Tribunal having taken into account all the evidence it had heard and the documents provided found that it was most unsatisfactory that a full copy of the contemporaneous file had not been obtained by [the SRA] from [EBR Attridge LLP] and provided to the Tribunal. In light of this, the Tribunal could not say with any certainty that Mr Williamson's evidence could be preferred over the evidence given by the Respondent. From the evidence that was available to the Tribunal, it could not conclude that the Respondent had at any time advised Mr Williamson to plead guilty.”⁶

4.3 Despite that criticism of the SRA (and despite the dismissal of the case), it appears that no costs order was made in favour of the Respondent.⁷

4.4 Another recent case (*SRA v Good, Fear and Park* (11681-2017; judgment dated 13 September 2018) provides an example of a prosecution failing on a pleading point. In paragraph 33 of its judgment, the Tribunal stated that:

“[The Tribunal's] dismissal of the allegations against [the Third Respondent] were [sic] as a result of the drafting of allegation 1.1. Had the 2 components (success fees and hourly rates) been separate allegations or in the alternative, the Tribunal would have found that her conduct was in breach of both Principles 2 and 6. However, the allegation was not so drafted and thus the Tribunal felt obliged to dismiss the allegations against her.”

⁵ Indeed, the SRA's allegation of apparent bias - of which the Tribunal was presumably not forewarned and upon which the Tribunal may now need to take legal advice - means that it would be unwise to plough on with the consultation in its current format. The problem cannot be solved by the expedient of addressing the allegation of bias and extending the date for responses beyond 8 October 2018, because that would not remedy the general lack of information and analysis in the consultation paper.

⁶ It is not clear how these words fit with paragraph 30 of the judgment, in which the Tribunal states that “On 9 July 2010, the Respondent advised Mr Williamson to plead guilty”.

⁷ The judgment does not mention costs (or any applications for costs).

4.5 Despite the dismissal of the allegations against Ms Park (which included an allegation of dishonesty), she was ordered to pay part of the SRA's costs (which were almost £300,000).

4.6 I do not suggest that these two cases (*Mardon* and *Good, Fear and Park*) shed much light on whether the standard of proof should be lowered. However, I do suggest that they illustrate that it would be inappropriate to make any decision about altering the standard of proof on the basis of the current consultation paper, which is wholly lacking in relevant detail.

4.7 No decision on that topic should be made without first conducting (and publishing) a detailed analysis of (a) the proportion of prosecutions which fail, (b) the reasons why prosecutions fail and (c) the costs implications. The information needed to produce such an analysis is held by the Tribunal and the SRA, but has not been provided to other consultees. If (as may or may not be the case) prosecutions fail as a result of the way in which they are prepared, pleaded or presented, that is not a good reason for lowering the standard of proof.

Yours sincerely



The Solicitors Disciplinary Tribunal's consultation on the making of procedural rules in relation to applications to the Tribunal

Law Society response
October 2018



Introduction

1. We are responding to the Solicitors Disciplinary Tribunal's ("the Tribunal") consultation on the standard of proof it applies in its proceedings, together with other procedural rules. At the end of last year, we sought our members' views on this issue in anticipation of the consultation;¹ 37 out of 40 members who responded expressed support for retention of the criminal standard of proof.
2. The Tribunal performs an important function in maintaining high standards in the profession and giving a fair hearing to a small number of solicitors that are referred to it by the Solicitors Regulation Authority (SRA) because of the serious nature of the allegations against them. As the Tribunal is independent we respect that it can decide on its own rules and we welcome the opportunity to respond to the consultation. It is vital that the proposals are carefully considered, as the consequences for solicitors, their clients and the reputation of the profession with the public are serious, with important wider implications for the whole profession.

Executive summary

3. We support the use of the criminal standard of proof in the Tribunal. The serious consequences of prosecution of cases with the extremely high prosecution success rate, (higher than any other regulator or the criminal justice system - 98% in 2015/16) is good reason for facts to be established 'beyond reasonable doubt'. It would be unfair and unjust to end a solicitor's career unless the Tribunal can be sure of the facts on the evidence heard and tested before it.
4. A move away from the criminal standard of proof would inevitably increase the likelihood of miscarriages of justice against individual solicitors. The balance of probabilities test is too low a standard for bringing a case where conviction is terminal to the professional career of a defendant. A finding of guilt at the Tribunal can result in severe consequences for an individual solicitor, (and their firm, employer and any employees) including significant fines, being struck off, reputational damage, and considerable stress and anxiety on that individual. Even if the sentence is set aside on appeal (and many more cases would go to appeal were the standard to be altered) the costs thereby incurred and damage caused will in many cases be all but irretrievable.
5. The severity of the potential sanctions, alongside the imbalance of power when the resources of the SRA is pitted against an individual solicitor, who is often unable to afford representation, is in many ways comparable to a criminal trial as has been recognised in case-law. There is moral hazard in creating a system that gives such powerful incentives to the regulator as an addition to all other powers it has to control the activities of those it regulates and forestall harm to the public.
6. One of the arguments put forward to justify a move to the civil standard, is that other professions have already made this move. However, we do not believe that "one size fits all" in applying the civil standard of proof to all professions. Currently, the SRA operates to the civil standard when dealing with prosecution of offences for which it considers a lesser range of sanctions is to be suitable and only brings cases to the Tribunal when more severe sanctions are thought by the SRA to be appropriate (and no settlement agreement has

¹ Standard of proof applied by the SDT – Your views (11 April 2018):
<http://www.lawsociety.org.uk/news/stories/standard-of-proof-applied-by-sdt-your-views/>

been reached). The SRA's disciplinary powers are far more limited than the Tribunal's powers. Given that the consequences of the Tribunal's sanctions are so serious, the Tribunal should not use the civil standard, as adopted by the SRA.

7. While other regulators, such as the General Medical Council, have changed their standard for good reasons, those reasons do not transfer to the solicitor profession.
8. There is no evidence that the public is not being properly protected by the criminal standard of proof, and as such it would not serve the public interest to make the change. Further it may damage the public interest by making solicitors reluctant to act in certain cases and apply a more cautious approach that reduces the levels of service that they may be willing to offer to needy clients. In many cases, solicitors bear individual responsibility for all aspects of their cases and will work with documents meaning there is a clear audit trail of their work and the facts as to what has taken place, such that a proper investigation can show clearly there has been a breach beyond a reasonable doubt, particularly as some breaches, for example the accounts rules, are strict liability.

Case law supports the criminal standard of proof

9. The Courts have made clear that the appropriate standard of proof in disciplinary proceedings concerning solicitors is the criminal standard.
10. The Tribunal's consultation states that the leading authorities are *Re a Solicitor* [1993] QB 69, and *Campbell v Hamlet* [2005] 3 All ER 1116. It should be noted that those are not the only authorities, and that the Courts have stated that the standard of proof should be higher than the civil standard in serious cases for over seventy years.
11. In 1956, in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 the Privy Council said the standard of proof should be higher than the civil standard for the following reason:

*"In every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men. . . who would be content to condemn on a mere balance of probabilities"*²

12. In 1993, in *Re a Solicitor* [1993] QB 69 Lord Lane CJ stated:

*"We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, put in another way, proof beyond reasonable doubt."*³

13. The reference to "the tribunal" was a reference to the Solicitors Disciplinary Tribunal; Lord Lane stated that the Solicitors Disciplinary Tribunal must apply the criminal standard when the allegations are tantamount to a criminal offence.
14. The standard of proof was considered again in 2006 on an appeal to the Privy Council in *Campbell v Hamlett* [2005] UKPC 19. In *Campbell v Hamlett*, The Privy Council considered whether the criminal standard should apply to all proceedings, or whether *Bhandari v*

² *Bhandari v Advocates Committee* on appeal from the Court of Appeal for Eastern Africa [1956] 1 WLR 1442 at page 1452

³ *Re a Solicitor* [1993] QB 69 at page 81

Advocates Committee (which had been followed in *Re a Solicitor*) was good authority for saying the criminal standard should only apply when the allegations were tantamount to a criminal offence.

15. Lord Brown clearly stated that the criminal standard should apply in all proceedings:

*“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. If and insofar as the Privy Council in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 may be thought to have approved some lesser standard, then that decision ought no longer, nearly fifty years on, to be followed.”⁴*

16. The criminal standard was confirmed by the House of Lords in *re (D) v Life Sentence Review Commissioners (Northern Ireland)* [2008] UKHL 33 by Lord Carswell, who said on an obiter basis:

“Much judicial time has been spent in the last 50 or 60 years in attempts to explain what is required by way of proof of facts for a court or tribunal to reach the proper conclusion. It is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt. The latter standard is that required by the criminal law and in such areas of dispute as contempt of court or disciplinary proceedings brought against members of a profession”⁵

17. It is submitted that these cases amount to binding authority that the standard of proof in disciplinary proceedings in the Solicitors Disciplinary Tribunal is the criminal standard. Although the Tribunal has a statutory power under section 46(9) of the Solicitors Act 1974 to make its own rules about the procedure and practice to be followed in the hearing and determination of complaints, the statutory power must be exercised in accordance with the law.

18. Paragraph 16 of the Tribunal’s consultation paper states that the main case law on the standard of proof was decided prior to the introduction of the Legal Services Act 2007. The provisions of the Legal Services Act 2007 came into force at various dates from 7 March 2008 onwards. The House of Lord’s decision in *Re D* was made after the 7 March 2008 commencement date, on 11 June 2008. The High Court has proceeded with appeals since 2008 on the basis of *Campbell v Hamlett* that the required standard is the criminal standard.⁶

19. Paragraphs 20 to 22 of the Tribunal’s consultation paper refer to comments of the High Court in *Arslan v SRA* to the effect that the case law on the standard of proof seems to be “ripe for reconsideration”. Those comments were made on an obiter basis without consideration of the rationale for the decisions made over the past seventy years. Further they were made in the expectation that any future reconsideration or change in the law would be made by the Courts. Leggatt J stated:

“. . . I would decline the invitation to express a concluded view on the question [of the standard of proof] in the present case. To do so would require us to decide whether a previous decision of this Court and a decision of the Privy Council should not now be

⁴ As per Lord Brown of Eaton-under-Heywood, paragraph 16

⁵ As per Lord Carswell at paragraph 23

⁶ See for example *Afolabi v SRA* [2011] EWHC 2122 at paragraph 23

followed. Those authorities do seem to me ripe for reconsideration. But not in [this case]

...

As the former President of the Queen's Bench Division, Sir Anthony May, said when rejecting a previous attempt by [Counsel] on behalf of the SRA to argue this point in a case which did not affect the decision: . . . " . . . decisions which develop the law need to do so in cases where the point at issue matters."

20. It is particularly important for any changes in the law on the standard of proof relating to the solicitors' profession to be considered by the Court because the Courts have independent jurisdiction to discipline solicitors, pursuant to section 50 of the Solicitors Act 1974. Solicitors are officers of the Senior Courts. The High Court, Crown Court, and the Court of Appeal may impose sanctions including an order that a solicitor's name be struck off the Roll. If the Tribunal introduces a rule adopting the civil standard, the bodies with statutory jurisdiction to strike off solicitors will have differing and inconsistent standards of proof.
21. It should be noted that it is open to the SRA, as the regulator, to ask the Court to reconsider the issue of the standard of proof on any number of cases decided by the Tribunal by applying the criminal standard of proof, if the SRA considers there is a good reason in the public interest for changing the law. The SRA has to date not considered it appropriate to do so.

Human rights and disciplinary proceedings

22. The Tribunal is a public authority for the purpose of the Human Rights Act 1998 (HRA). Under section 6(1) of the HRA, the Tribunal is under an obligation not to act in a way which is incompatible with a convention right.
23. A decision on the standard of proof must take account of the solicitor's article 6 right to a fair trial. A decision which does not have regard to the right to a fair trial could be incompatible not only with article 6, but also with article 8 (as an unfair sanction could infringe a solicitor's right to respect for private and family life⁷) and article 1 of the First Protocol (protection of property).
24. Article 6 provides:

"1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

⁷ In *Mateescu v Romania* (11944/10), the ECHR said there had been a violation of his Article 8 rights.

- 3 *Everyone charged with a criminal offence has the following minimum rights:*
- (a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - (b) *to have adequate time and facilities for the preparation of his defence;*
 - (c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - (e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”*

25. In *Albert and Le Compte v Belgium* (7299/75;7496/76) the European Court of Human Rights (ECHR) had to decide whether the provisions of article 6(2) and 6(3)(a), (b) and (d) applied to disciplinary proceedings taken against a Belgian Doctor based on allegations that the doctor had issued false medical certificates inaccurately warranting that a person was unfit for work. Whilst recognising that disciplinary proceedings are different to criminal proceedings, the ECHR stated:

“In the opinion of the Court, the principles set out in paragraph 2 (art. 6-2) and in the provisions of paragraph 3 invoked by Dr Albert (that is to say, only sub-paragraphs (a), (b) and (d)) (art. 6-3-a, art. 6-3-b, art.6-3-d) are applicable, mutatis mutandis, to disciplinary proceedings subject to paragraph 1 (art. 6-1) in the same way as in the case of a person charged with a criminal offence.”

26. In view of the ECHR decision in *Albert and Le Compte v Belgium*, the Tribunal should recognise that persons charged with disciplinary proceedings require greater safeguards than those afforded to defendants in civil proceedings and that articles 6(2) and 6(3) (a), (b) and (d) should apply in the same way as they do to a person charged with a criminal offence.

27. There is a strong argument for saying that the application of article 6(2) to disciplinary proceedings means that the criminal standard of proof must be adopted. The presumption of innocence until proof of guilt cannot apply to disciplinary proceedings in the same way as in the case of a person charged with a criminal offence if the standard of proof is lower.

28. The emphasis placed by the ECHR on the need to apply parts of articles 6(2) and 6(3) to disciplinary proceedings as if the professional was charged with a criminal offence is compatible with the decisions made by the English and Welsh Courts that the criminal standard of proof should apply to disciplinary proceedings. Equally, the support by some third parties for a change to the civil standard fails to take proper account not only of domestic case law but also of the convention rights.

Responding to the Tribunal's questions

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

29. No, the Tribunal's rules should not change to apply the civil standard to cases it hears. The Law Society supports using the criminal standard of proof in disciplinary cases. Our support for retaining the criminal standard of proof is based on our members' views which can be summarised under the following headings:

- Being sure of the facts before ending a solicitor's career;
- Serious consequences of proceedings;
- The prosecution success rate;
- Solicitors are regulated differently to other professionals;
- Disciplinary proceedings are not the same as civil law proceedings.

30. We urge the Tribunal to carefully consider each of these reasons before making any change to their rules.

The Tribunal should be sure of the facts before ending a solicitor's career

31. We consider that the Tribunal should be "satisfied as to be sure" before ending a career in the legal profession. The Tribunal's powers include the ability to strike a solicitor from the Roll, or to order an indefinite suspension from practice. Such Orders of the Tribunal will therefore end a solicitor's career and will often mean financial ruin arising from permanent loss of livelihood. Given the draconian nature of the Tribunal's powers, it should be sure of the facts in all cases.

32. A strong theme emerging from the respondents to our member briefing, is that it is only fair and justified for solicitors to lose their qualification and livelihood if they have actually committed a serious breach of the code, rather than it simply being likely their conduct has fallen short of the required standard. In other words, if there is a reasonable doubt that the solicitor has breached the rules, it would be unfair and unjust to end their career.

33. The financial consequences to solicitors are considerable for any appearance at the Tribunal, even for minor offences. There is a cost to the individual and a firm in preparing for and appearing at a tribunal which is not analogous for other professions. Defence costs are often unaffordable and could be increased were the standard of proof to be altered. Unlike some other professions such as accountants, the loss of the title of solicitor prevents the solicitor from practising and if they are a sole practitioner, their firm will have to close immediately, even in the case of suspension.

34. On this basis our members told us it is unreasonable to have their qualification taken away if a reasonable doubt exists as to whether they did something wrong. As one of the respondents stated in response to our member briefing, *"To deprive a solicitor of their livelihood and reputation on a 50/50 test is entirely unreasonable."*

35. Only the Tribunal or the Senior Courts can order the ultimate sanction to strike a solicitor from the Roll. We submit that the civil standard of proof is not a fair test on which to base a decision for this ultimate sanction. Even with more minor sanctions, such as a fine, or reprimand, a solicitor can experience career difficulties, severe financial consequences and

serious reputational damage. Further details about the devastating consequences of Tribunal proceedings for solicitors are set out below.

Serious consequences for solicitors

36. The serious consequences were referred to as “*life-changing*” by one respondent to our member briefing. The consequences can be categorised under the following headings; financial, reputation, health and wellbeing and impact on others.

Financial

37. The Tribunal has the power to issue an unlimited fine. Fines (and other sanctions) are made according to the Tribunal’s Guidance on Sanctions.⁸ Some tribunals which have the civil standard of proof, such as the Medical Practitioners Tribunal Service do not have a power to fine the respondent. While the SRA operates on the civil standard and has the power to issue a fine, this is limited to £2,000 for solicitors and others working in traditional law firms.⁹

38. The Tribunal will consider the financial means available to a solicitor and the total financial detriment which is suffered. This will include any costs order and any adverse financial impact of the decision itself. Whilst the Tribunal’s fines take a proportionate view of any findings made and of the solicitor’s financial circumstances, the legal costs involved in the proceedings can often exceed any financial sanction imposed.

39. The consequences can also be felt, even if no allegations are upheld. For example, only in exceptional circumstances will the applicant (usually the SRA) be ordered to pay costs. The respondent is often liable to pay both their own and the applicant’s costs, even though their conduct has not amounted to any breach of the professional rules.¹⁰ Many solicitors feel there is an inequality in the whole process, as the SRA will be able to fund professional representation, including specialist advocates, whereas solicitors often have to deal with the proceedings themselves, at a time of immense stress, without any knowledge or experience of regulatory litigation.

Reputation

40. The public nature of the proceedings can affect the solicitor’s reputation in their professional community and social life. Findings from the Tribunal are published on its website and are frequently reported in the legal and local press. As a result of this, for even a relatively minor breach, solicitors may struggle to find employment following Tribunal proceedings, be unable to secure any professional indemnity insurance and be excluded from professional accreditations.

Health and wellbeing

41. Disciplinary proceedings can affect a solicitor’s health, due to the anxiety caused by lengthy SRA investigations and subsequent Tribunal proceedings, when the outcome could result in the end of their career. For this reason, only cases that are sound evidentially,

⁸ [Solicitors Disciplinary Tribunal Guidance Note on Sanctions \(5th Edition 2016\)](#)

⁹ Section 44D, Solicitors Act 1974

¹⁰ In the costs judgment of Leigh Day, Case No. 11502-2016, the Tribunal applied the cases of Baxendale-Walker v The Law Society [2006] EWHC (Admin) and Perinpanathan v Westminster Magistrates Court [2010] EWCA Civ 40. A Tribunal member noted that the SRA had a “*protected position as regards costs compared to a normal litigant and had to be mindful of that privileged position.*”

should be progressed to the Tribunal. We contacted Lawcare, an independent charity supporting legal professionals, who told us that they are regularly contacted by solicitors facing such proceedings and who are suffering from personal and health consequences of investigations and disciplinary proceedings. While we are unable to share individual experiences as they are confidential, the Tribunal should be fully aware of the devastating effects, not only of a sanction, but of the long process involved.

42. A solicitor's poor health and wellbeing can also contribute to the cause of breaches of the rules. Unlike other professions, matters relating to a solicitor's health are not certain to be heard in private unlike other professional tribunals and there are no "fitness to practise" rules. As stated in our summary of members' views, whilst the SRA adopts the approach of continuing without fitness to practise protections for practitioners who are unfit for a temporary period and whilst the sanctions remain so grave, the evidential burden is an essential safeguard.

Impact on others

43. The impact of a solicitor being referred to the Tribunal is not just felt by the solicitor and their families. If the solicitor owns their own firm, the employment and careers of those working in the practice will also be adversely affected. If the solicitor is employed, their employer will also be impacted, particularly in smaller firms. Clients will be inconvenienced, if they have to transfer instructions to other firms, particularly with litigation cases when a newly instructed firm would need time to review the file. Those depending on the solicitor for an income will also be impacted. Practically, findings from the Tribunal can result in bankruptcy and loss of a family home.

Summary

44. As the consequences of being referred to the Tribunal are so serious for solicitors, no innocent solicitor should be subject to these consequences in cases where the Tribunal is not satisfied so as to be sure of the facts. While the SRA operates on the civil standard, its disciplinary powers are far more limited, whereas the Tribunal can issue unlimited fines, suspend a solicitor from practice indefinitely and strike them off the Roll.

The prosecution success rate at the Tribunal

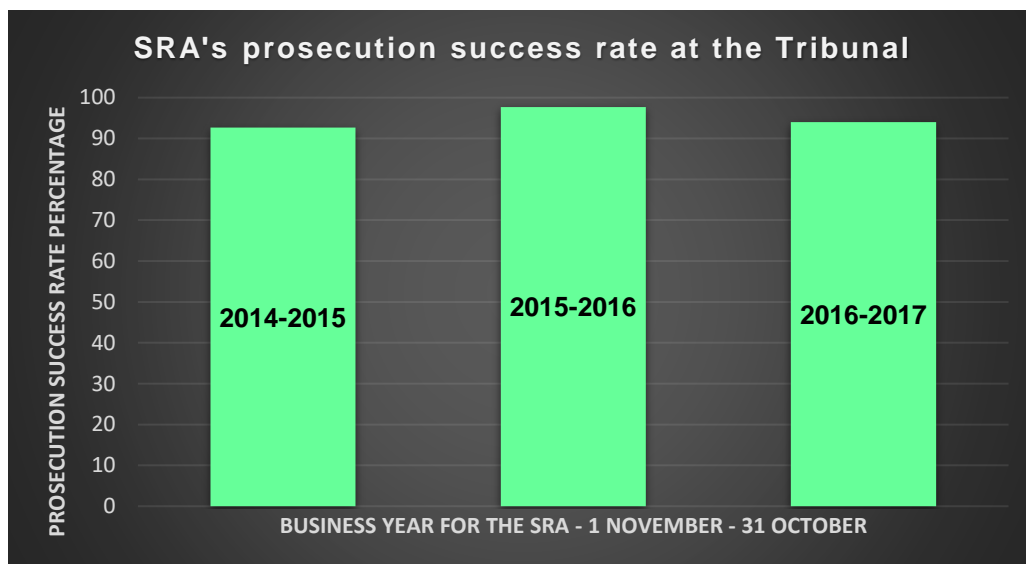
45. While the Tribunal is one of few professional disciplinary tribunals that retain the criminal standard in England and Wales, the prosecution success rate is much higher than other professional regulators, even though it retains the criminal standard of proof. As a regulator the SRA enjoys the highest prosecution success rate of any regulator, or prosecution authority we have found.
46. In 2016, out of 214 orders made by the Tribunal, there were only 9 cases where allegations were not upheld at least in part and this reflects a conviction rate of 96%.¹¹ The conviction rate of the Crown Prosecution Service for 2016 - 2017 is 83.9%¹² and in the Crown Court

¹¹ Solicitors Disciplinary Tribunal Annual Report 2016, page 16 <https://goo.gl/uAAqJq>

In 2016, the total number of orders made was 214, 9 of which were "No Order, Costs Only Order, or Case Dismissed" and 11 cases were withdrawn. A further 6 cases appear to involve a solicitor's application, rather than a prosecution so have been discounted. (9 cases out of 208 orders equates to 4.3%). It is possible that in any of the 9 cases that involved a costs only order, a finding was made by the Tribunal, the so prosecution rate could be higher.

¹² Crown Prosecution Annual Report 2016 – 2017, page 4

alone where more serious offences are tried the rate is 78.9%.¹³ The SRA's annual report for 2016-2017, contains data about the prosecutions made which are shown below.¹⁴ In the business year 2015-2016, the SRA's report notes there were only 3 cases out of 129 cases brought where the Tribunal did not find in their favour.¹⁵



47. Other professional tribunals also have a much lower prosecution success rate, despite adopting the lower civil standard, such as the General Medical Council and General Dental Council. We can therefore conclude that the SRA's prosecution rate is not only far higher than professional tribunals, but significantly higher than in the criminal justice system as a whole.

48. Given the prosecution success rate, we would suggest there is no evidence to support an argument that solicitors are not being held to account for their actions, or that there is a need to change the standard of proof to protect the public interest.

Solicitors are regulated differently to other professionals

49. In response to our member briefing, our members told us that that a like-for-like comparison with other professions was not possible. The Tribunal should take account of the following:

- title-based regulation;
- the nature of solicitors' work;
- how decisions are made and the effect of sanctions;
- lack of fitness to practise rules;
- legal costs incurred;
- other legal professions and jurisdictions.

¹³ Ibid, page 6

¹⁴ <https://www.sra.org.uk/sra/how-we-work/reports/annual-review/annual-review-2016-17.page>

¹⁵ Page 62, SRA Annual Review 2016/17

Title-based regulation

50. Unlike some professionals, such as accountants, solicitors operate under a title that is protected by statute.¹⁶ This protects the public from being provided with poor quality legal services and also ensures protections of compulsory regulation, insurance and a compensation fund. Some professionals, such as accountants, may continue to provide services under their professional title, without belonging to any professional body. In contrast, solicitors, if suspended or struck off the Roll, cannot refer to their title as stated above.

The nature of solicitors' work

51. In response to our member briefing, it was noted that the nature of work done by solicitors is different from that of other professions. Solicitors often make a finely balanced professional judgement in litigation, including cases against the State by way of a judicial review. Clients ask solicitors to make these judgement calls, described by one respondent to our briefing as a "50/50 judgement". It was argued that access to justice could be restricted, if the finely balanced judgements solicitors make are subject to scrutiny on the balance of probabilities, as solicitors may decline instructions. One respondent stated, *"It may discourage solicitors from taking on difficult cases - because of the inherent additional risks that the difficult cases pose to the profession."*

Decisions and effect of disciplinary sanctions

52. Respondents to our member briefing thought the effects of the Tribunal's sanctions are more severe than those of other tribunals. An example given is that an order for suspension denies any income for a solicitor, when doctors employed by the NHS may be suspended on full pay. The maximum period for suspension of a doctor is generally one year whereas solicitors can face an indefinite suspension.¹⁷ Solicitors are therefore more likely to suffer financial damage, or even destruction of a practice and loss of livelihood.

53. A doctor who commits a serious act of misconduct will often be suspended, undertake specific training to protect the public and to some degree be reintroduced to the profession by careful supervision through conditions. By contrast solicitors with similar levels of seriousness will be struck off and excluded from the profession permanently.

54. A doctor is judged on their fitness to practise on the date of the hearing, giving them the opportunity to demonstrate insight and remediation. No such possibility is afforded to a solicitor who may be struck off, despite later actions and conduct which may suggest such a severe sanction is no longer necessary.

55. The starting point for a solicitor found to be dishonest is to strike them from the Roll,¹⁸ however, other regulators approach discipline from the perspective of what is the minimum

¹⁶ Section 21, Solicitors Act 1974 and Section 17, Legal Services Act 2007

¹⁷ The GMC refer cases to the Medical Practitioners Tribunal Service who have powers to restrict, suspend, or revoke a doctor's registration. The MPTS has issued guidance on its sanctions: https://www.mpts-uk.org/DC4198_Sanctions_Guidance_Feb_2018_23008260.pdf This Sanctions Guidance confirms that *"The length of the suspension may be up to 12 months and is a matter for the tribunal's discretion, depending on the seriousness of the particular case."* (Page 29, paragraph 99). Only in cases where the doctor's health or knowledge of English is such as to present a risk to the public can a suspension be longer than 12 months.

¹⁸ Findings of the Tribunal in respect of David Christopher James Barr, Case 11539-2016, paragraph 83

penalty that is necessary and, consequently, removal from their profession is less likely to happen. The Tribunal uses its sanctions policy, but it is bound by case law on allegations of dishonesty. It is only in exceptional circumstances that the Tribunal is permitted to give a sanction other than strike-off where a solicitor has been found to be dishonest.

56. Those responding to our members' briefing, with experience of regulation in other professions stated that the nature of the allegations is different, "*. . . alleged breaches before the SDT are often technical. . . , many of the allegations are in respect of breaches of procedural codes, accounts rule requirements, or other regulations or of relatively unspecific requirements which need to be interpreted.*"
57. Our members also told us that solicitors are more likely to be responsible for the conduct of others in their practice, which means Partners or Directors of a firm being held vicariously liable for the acts of their employees.

Fitness to practise rules

58. As referred to above, the SRA has not currently formulated fitness to practise rules despite having the power to do so. The Legal Services Act 2007 amended Section 31 of the Solicitors Act 1974 and added the phrase "fitness to practise" to the rule options, whereas previously, it only had the power to make rules in relation to professional practice and conduct.
59. The aim of Fitness to Practise rules is to prescribe the manner in which any issues concerning a solicitor's fitness or ability to practise for health reasons should be managed under regulatory rules. They should be designed to cover a range of circumstances, including where a solicitor has a physical or mental condition that affects their ability to practise as a result of any underlying condition. The Tribunal and the SRA should consider how fitness to practise rules should work for solicitors, as these are already in force for barristers.
60. Neither the SRA in its proposed Handbook, or the Tribunal in its proposed new rules address this. Whilst 'fitness to practise' is not defined, based on other professional tribunals, it implies that wrong-doing resulting from health issues, is treated differently to misconduct. This would permit both the SRA in its decision to prosecute and the Tribunal in hearing the matter to consider whether the solicitor has sufficiently recovered not to be impaired, or to be able to safely practise with conditions imposed, or to permit a return to practise once the solicitor has recovered from the illness which impaired their ability to practise.
61. It would only be possible to make a fair comparison with other professionals if the impact of the sanctions imposed by the Tribunal more closely reflected the treatment of other professionals, including the adoption by the SRA and Tribunal of fitness to practise rules. If the regulators do not acknowledge health (physical or mental health) then the risk of harsh sanctions must be subject to the gate keeping of being sure that the misconduct is proven. It should be noted that the Bar Standards Board has adopted fitness to practise rules.

Legal costs

62. The costs in disciplinary proceedings for other professionals are managed differently. Other professions face a lower risk of an adverse costs order, in contrast to solicitors who must fund their own legal costs as well as those incurred by the SRA.

63. Our members question whether a respondent should have to pay any contribution to costs at the Tribunal, as the Tribunal is funded through the practising certificate fee and contributions from firms. The costs awarded to the SRA in 2017 were £2,725,193.¹⁹ It is rare for any award of costs to be made against the SRA.

64. If cases were brought on a balance of probability test, the costs rules would need to be revisited, together with the principle by which the SRA recovers costs. At present, even if no allegations are upheld the SRA is unlikely to be ordered to pay the respondent solicitor's costs.²⁰

Other legal professions and jurisdictions

65. Those that would prefer to see the Tribunal adopt a civil standard of proof, cite that it is now an exception for a tribunal to apply the criminal standard. However, many professions in other jurisdictions still operate using the criminal standard. This includes the Law Societies of Scotland, Northern Ireland and the Republic of Ireland. It appears that France operates on the basis of a free assessment of the evidence and the German Federal Bar uses the criminal standard.

66. Currently, practitioners subject to the Establishment of Lawyers Directive, can register to provide legal services in other European jurisdictions. While the effects of Brexit are unknown at the time of writing, it would appear inconsistent for professions in other jurisdictions to operate a different standard, particularly, if any rights to carry out legal work across jurisdictions are maintained.

67. CILEx Regulation and the Bar Standards Board either operate on, or plan to adopt the civil standard of proof. However, there are still significant differences between solicitors and these other types of lawyer and their regulators.

Bar Standards Board

68. The nature of the work done by barristers is different. While barristers can apply to their regulator to offer services directly to the public, usually barristers accept instructions through a solicitor and will present a case at court.

69. It is rare for barristers to hold clients' money. Twenty-five percent of substantiated allegations against solicitors related to technical breaches of the SRA Accounts Rules (SARs), which did not involve any dishonesty or loss to clients²¹. SARs are complex and a breach is a strict liability offence. Consequently, barristers enjoy much reduced risks in practice and this is reflected in lower insurance premiums.²² Whereas solicitors are targeted by fraudsters because they hold clients' money and as a result have inadvertently become involved in investment scams and have subsequently been prosecuted at the Tribunal.

¹⁹ Solicitors Disciplinary Tribunal's Annual Report 2017: <http://www.solicitortribunal.org.uk/sites/default/files-sdt/Solicitors%20Disciplinary%20Tribunal%20Annual%20Report%202017.pdf>

²⁰ In the costs judgment of Leigh Day, Case No. 11502-2016, the Tribunal applied the cases of Baxendale-Walker v The Law Society [2006] EWHC (Admin) and Perinpanathan v Westminster Magistrates Court [2010] EWCA Civ 40. A Tribunal member noted that the SRA had a "protected position as regards costs compared to a normal litigant, and had to be mindful of that privileged position."

²¹ SDT Annual Report 2017, Page 31

²² According to the Bar Mutual's rating schedule 2018-2019 the cost of premiums vary between 0.15% - 2.00% of income for all areas of work except "Revenue". Solicitors pay on average 4.9% of turnover on their insurance premiums.

Solicitors also face greater cybersecurity threats because they hold clients' money and personal data.

70. While the Bar Standards Board also now regulates entities and alternative business structures, it is very much a new entrant, regulating 93 entities as at 11 September 2018, as opposed to over 10,000 firms regulated by the SRA. Therefore, as there are less prosecutions against businesses, they will be less complex and often more straightforward, whereas prosecutions against solicitors' firms will have far reaching consequences not only for the Partners involved, but for all employees who will often have not been involved in any wrongdoing.

CILEx Regulation

71. Other legal professionals are also in a different position to solicitors because they carry out a more limited range of legal services.²³ Chartered Legal Executives are subject to a disciplinary process on the balance of probabilities and like barristers their regulator is a new entrant to entity-based regulation, with just 13 entities currently operating. Therefore, they are less likely to own and manage their own firms than solicitors and consequently face less risks in practice.

Disciplinary proceedings are not civil law proceedings

72. Disciplinary proceedings are in many respects closely related to criminal proceedings as identified in case law. The proceedings are accusatorial – the respondent is alleged to be guilty of professional misconduct. If proved, the respondent may be subjected to a penalty, in the case of solicitors, striking-off, suspension, or an unlimited fine (like the criminal courts, the fine is payable to HM Treasury). To the respondent required to appear before the Tribunal, the proceedings must seem far closer to criminal than to civil proceedings.

73. A civil standard is appropriate for compensation and redress schemes, such as employed by the Legal Ombudsman and in negligence proceedings, but not professional discipline.

74. Proceedings are also analogous to criminal law proceedings because of the imbalance of power between the SRA, as the applicant in nearly all proceedings and solicitors who often appear unrepresented. This is reflective of the Crown in criminal proceedings and a defendant in a criminal trial, except that the imbalance of power is compensated by public funding through the Legal Aid Agency. Legal Aid or similar financial help is not available for solicitors when appearing in the Tribunal. Even where the standard of proof is set at the criminal standard, there is a risk of a miscarriage of justice. Without any professional representation, that risk is significantly increased.

75. The imbalance of power is demonstrated by the financial resources available to the SRA in its prosecutions. According to the SRA, it spends 10% of its income generated through practising certificates and firms' annual fees on disciplinary proceedings.²⁴ The total income for the 12 months to 31 October 2017 for the SRA was £57,328,000.²⁵ Therefore, in the last business year the SRA spent over £5 million pounds on purchasing "Disciplinary legal

²³ CILEx practitioners only gain the right to practise one reserved legal activity automatically on qualification; the right to administer oaths.

²⁴ Fee Policy 2018/2019 (August 2018) <http://www.sra.org.uk/mysra/fees/fee-policy-2018-2019.page>

²⁵ See page 45, The Law Society Group Annual Report 2016/17

fees” which appear to relate to outside expertise on disciplinary matters. This percentage is listed separately and is in addition to staff costs and intervention costs.²⁶

76. On the basis that there is a significant imbalance between the SRA’s ability to prosecute, and an individual’s ability to defend themselves, the criminal standard becomes an important safeguard to avoid a miscarriage of justice.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

77. Yes, agreed outcomes are now an established Tribunal procedure, which should be incorporated in its Rules. An agreed outcome has the benefit of shortening hearings and proceedings, saving time and costs for both the respondent and applicant.

78. We note that the proposed Rule 25 includes a requirement to serve notice of an Agreed Outcome on any other parties to the proceedings, as it will be relevant to the other parties how the matter has been disposed of. This would be necessary to avoid the concerns raised in the case of *SRA v Downes and others*:²⁷

*“ . . . Downes, Broome and the SRA had negotiated an agreed outcome for those two solicitors; and the tribunal had accepted the agreed outcome without anybody informing the other respondents about what was happening.”*²⁸

79. The Tribunal should consider the other issue raised in respect of multi-respondent cases; the prospect that facts may not be agreed with all respondents. In addition, not all respondents will bear equal culpability for the alleged breaches and some may wish to test, as it is their right, the evidence in open proceedings, which allow for witness evidence to be adduced.

80. For these reasons, the Tribunal should consider making a final decision on any agreed outcome, at the end of all the proceedings, once the final hearing has taken place for those respondents who are not in agreement with the SRA. This is to ensure fairness to parties who would otherwise be left facing their hearing with pre-determined facts and a decision about the level of culpability which they had no opportunity to comment on.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

81. The inclusion of an Overriding Objective, “ . . . to enable the Tribunal to deal with cases justly and at proportionate cost” is important as it will focus both the parties’ minds and the members of the Tribunal during the proceedings. One of the concerns expressed by our members is the high cost of Tribunal proceedings. The respondent, who usually pays both their own costs and those of the applicant, will usually pay substantial costs, often of several thousand pounds, in excess of any financial penalty.²⁹

²⁶ The SDT’s Annual Report 2017 states that, “The total sum of costs awarded in favour of the SRA was £2,725,193. . . The quoted costs figure does not include cases where costs were referred by the Tribunal for detailed assessment by a High Court Costs Judge.”

²⁷ case number 11642-2017

²⁸ Comments by Gregory Treverton-Jones QC in The Law Society Gazette

<https://www.lawgazette.co.uk/practice-points/are-agreed-outcomes-working-properly/5066036.article>

²⁹ For an example, see the Tribunal Findings in the case of Anup Shah Case No. 11450-2015; fine of £2,000 and costs incurred of £16,000. Also, <https://www.lawgazette.co.uk/practice/tribunals-regret-at-160k-cost-of-failed-sra-case/5058582.article>

82. Changes that make the rule more efficient and proportionate are also welcome. We received comments from our members to the effect that the rules should be as simple as possible, minimising the cost of the proceedings.

83. The provision in the rules for a single solicitor member to exercise certain functions, will allow the Tribunal to operate in a proportionate manner, in respect of minor issues.

84. We note that a single Tribunal member may make a decision in the following cases, pursuant to Rule 10 of the proposed rules:

- 8(6)(c): variation of directions;
- 8(6)(d) determining applications for adjournment of procedural or substantive hearings in accordance with rule 23(2);
- 8(6)(i) determining applications in respect of substituted service (see rule 46);
- 27(3): directions relating to lodging of bundles;
- 22(4) (f) and (g): determining procedural applications.

85. The Law Society is supportive of these changes to allow the Clerk more control over minor administrative processes, provided all the Tribunal's processes, additional discretion for the Clerk and single Tribunal members, in no way complicate proceedings, in which unrepresented parties often find themselves.

(e) Do you have any detailed comments on the drafting of the proposed rules?

86. Detailed drafting is a matter for the Tribunal, however the members of the Law Society Regulatory Processes Committee will be happy to assist in any further revisions of the technical rules.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

87. Yes. A move to the civil standard of proof could exacerbate the disproportionate representation of Black and Minority Ethnic solicitors in SRA prosecutions. The issue of disproportionate disciplinary action was the subject of detailed reports commissioned by the SRA.³⁰ The independent comparative case review made a number of findings. In its executive summary it noted that, "*In the case of eventual referral to the SDT, BME cases made up 33% of the cases referred, and accounted for 25% of new cases, while White cases were proportionally underrepresented making up only 67% of referrals in relation to 75% of new cases.*"³¹ The entire report should be read to ensure a full appreciation of the findings, and the Tribunal should carefully consider, in the light of the report, whether any change to its rules will not disproportionately affect anyone as a result of their protected characteristic under the Equality Act.

³⁰ Independent Comparative Case Review (2014) Professor Gus John <http://www.sra.org.uk/sra/equality-diversity/reports/independent-comparative-case-review.page>

³¹ Paragraph 18, Report Executive Summary by Professor Gus John

Ms G Newbold
Clerk and Chief Executive
Solicitors Disciplinary Tribunal

15 October 2018

Dear Ms Newbold

Composition of the Tribunal's panels (draft rule 9)

We write further to our submission of 8 October 2018 and request that this letter is considered alongside our consultation response.

We have read the submission of the Solicitors Regulation Authority and oppose their suggestion that the Tribunal's panels should have a lay majority.

The Law Society supports a solicitor majority on the Tribunal's panels, as set out in Rule 9 of the Tribunal's proposed rules.

The roles of Tribunal Members

The role of a legally qualified Chair is quite different to that of the professional member of a Tribunal. The Chair's focus is to ensure the proceedings are conducted in accordance with the Tribunal's rules and established legal principles, managing the parties and the proceedings.

In most professional disciplinary tribunals, the importance of the role of the professional member is recognised. Charges are often framed in terms of conduct unbecoming a member of that profession and it is apposite that the professional has a unique insight into professional practice and understanding the situations that can arise in a profession and how they should be dealt with.

The layperson's perspective is equally important as they embody the public view and bring a different perspective thus maintain public confidence; however it is not clear why an additional lay person would confer additional benefit to a Tribunal.¹

Expert legal knowledge and professional insight into how to effectively manage a practice

We consider the professional insight into running a practice to be of great importance in making decisions about a solicitor's conduct. The solicitor members are experienced professionals and able bring their legal expertise and knowledge from practice to bear in arriving at difficult decisions about a solicitor's conduct.

Many of the allegations before the SDT are based on the way in which a practice is managed and how it should be run. Solicitors face complex ethical situations which are outside of normal commercial practice. They operate client accounts which are not common in commerce. Solicitor input is vital in

¹ It should be noted that the Bar have both 3 and 5-person Tribunals. Only the 5 Person Tribunal (3 barristers one of whom is a judge) can consider the most serious cases and have the power to suspend or disbar a barrister. In serious cases where the barrister's livelihood is at stake, there is a barrister judge to manage the proceedings and two additional barrister members.

deciding if an allegation concerning the way a practice is managed should be upheld. There has been judicial recognition of the importance of this professional perspective when decisions of the Tribunal have been considered. This expertise is also vital when considering the confidence of the profession in the decisions of the Tribunal.

Procedural fairness

The Tribunal must also ensure procedural fairness to the respondents and adherence to the Tribunal's procedural rules, as has been highlighted by some flawed applications. A solicitor member is in the best position to understand the legal issues arising from the numerous court judgments on regulatory issues involving solicitors, the right to a fair trial as provided for in the Human Rights Act 1998, any parallel civil or criminal legal proceedings and the admissibility of evidence. This is particularly important when the Tribunal exercises its appellate jurisdiction when reviewing decisions of the Solicitors Regulation Authority.

Public confidence

There is no evidence that public confidence is reduced by the presence of only one lay member or how that would be enhanced if there was an additional member.

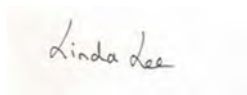
It should be noted that in the recent Leigh Day case, where the solicitors were acquitted on all charges that it was the solicitor member who gave the dissenting judgment.

No evidence to demonstrate the Tribunal does not operate effectively

There is no evidence offered by the SRA in support of their opinion that a lay majority would enhance the public confidence in proceedings. We are not aware of any information to suggest that the public is not being adequately protected by the Tribunal's current rules, retaining a solicitor majority on its panels. The extremely high prosecution success rate (as high as 97% in 2015-16) demonstrates that the Tribunal's current panel composition is effectively holding solicitors to account for their actions.

We strongly urge the Tribunal to maintain its established procedures to maintain a solicitor majority on its panels and to only consider making changes to established procedure when there is good evidence to support such a change.

Yours sincerely

A handwritten signature in black ink that reads "Linda Lee". The signature is written in a cursive style and is positioned above the typed name and title.

Linda Lee
Chair
Regulatory Processes Committee

From

Sent: 08 October 2018 07:18

To: SDT Feedback feedback@solicitorsdt.com

Subject: Consultation

Dear Sirs

Please find attached my response to the consultation:

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

No the standard of proof should remain the same as it currently is. The reasoning for retaining the criminal standard of prove is to ensure a proper balance between protecting the public and the rights of a solicitor accused of breaching the SRA rules. The current standard provides sufficient safeguards in protecting the public against breaches of the rules and safeguards and the risk to the public. Additionally, the public already have sufficient confidence in the regulatory system and the profession. Little or no evidence has been produced in illustrating that confidence in the regulator is low or will be increased by lowering the standard of proof. The SRA have been able to provide a fair and consistent approach in disciplinary proceedings under the current regime however changes in respect of procedural changes could be implemented with allowing the criminal standard of proof to continue.

It is noted the SRA forward the argument of costs in preferring the civil standard of proof. Costs should not be a factor in determining whether proceedings should be instigated. Proper and thorough investigations are to be costly and lowering the standard should not be a manner of circumventing the need for a proper investigation or reducing the amount of work required in the investigation stage. The notion of reduced costs and investigations contradicts the SRAs claim they are seeking to protect both the public and solicitors. Flawed investigations are more likely to result in unfair findings against solicitors especially when based on the civil standard. A safeguard to ensure proper investigations are conducted is retaining the criminal standard of proof this will ensure thorough investigations are carried out in order to achieve the higher standard of proof required and therefore retaining public confidence in the profession. The profession should not only be seen to do justice, it should also carry it out based on certain and sound decisions which can only be achieved based on the criminal standard of proof.

The criminal standard has as illustrated by the increase of prosecutions by the SRA in the last two proceeding years been a sufficient standard to penalise members of the profession who have breached the rules. The question has to be asked why fix something that is not broke? Instead of reducing the standard of proof to encourage or force admissions by members, a more appropriate method may be to introduce a published and agreed sliding scale of credit for early admissions. Early admissions from the outset should be encouraged by highlighting the likely outcome at each stage and the amount of credit that would be afforded for an admission. Allowing a change of standard of proof to increase the discretion of the SRA leaves the process open to abuse by removing a fundamental safeguard they encounter.

The SRA have/are heavily citing the civil standard being that in place for medical professions. It is clear the civil standard is required for these professions. The lower standard for these professions ensures life changing consequences are put to scrutiny to prevent them occurring. It is not saying the standard of proof for these professions is ideal but rather a necessity due to the consequences likely to be suffered by patients. In an ideal world where medical professions did not impact health and wellbeing to the extent they do the criminal standard would be the appropriate standard however as a preventive measure it is required a civil standard should be used for those professions.

A lowering of the standard will make decisions more susceptible to bias being applied by the panel. Whereas a higher test will eradicate some of the bias panel members subconsciously possess. As mentioned in the draft rules the SRA support the notion that other criminal rules (bad character, agreed outcomes etc) should be introduced but the criminal standard of proof should be disregarded. Put simply the SRA should not be able to cherry pick elements that strengthen their position. The additional factors are welcomed but only if the criminal standard is kept.

Finally, should the criminal standard be replaced by the civil standard an inherent risk that may exist is one of double jeopardy. The respondent may be acquitted in a criminal court but tried again before the SDT – this quite simply would be unfair to the respondent having to face two sets of proceedings for the same circumstances.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

The proposal to include a rule dealing with Agreed Outcomes is supported in principle. An agreed outcome will be beneficial to all parties concerned and appear to be in the public interest as they will ensure swift outcomes and certainty. Although cost should be a sub factor of any proceedings in theory agreed outcomes should reduce the need for unnecessary hearings.

The only point of concern is the 28 day window prior to hearings. A more realistic window will likely be 7 days prior to the hearing. This will allow respondents to settle more matters as they will be aware of more facts closer to the hearing and the reduced time frame in theory should result in more matters being settled prior to hearings. It also allows for more time to conduct meaningful discussions between the parties.

1. c) Do you consider that the other provisions in the draft rules are fit for purpose?

(d) If the answer to question (c) is no, please explain why

(e) Do you have any detailed comments on the drafting of the proposed rules?

Withdrawal of allegations – draft rule 24 – this rule should remain as it gives oversight to the SRA and increases public confidence. Withdrawn allegations may be subject to cost applications and requiring them to be withdrawn officially before the SDT may result in less scrupulous prosecutions being commenced in the first place.

Evidence of propensity – put simply this rule should be omitted unless the criminal standard is retained – the SRA should not be allowed to cherry pick rules and procedures to make

prosecution more obtainable. Matters before the tribunal should be tried on the merits of the allegations faced alone without the attempt to muddy the waters with other instances.

Factual witnesses – 35 (7) – should remain as it prevents any tainting of evidence by factual witnesses who may intentionally or subconsciously alter their evidence having heard ongoing proceedings.

Sanction – 41 – this rule should not be allowed – the respondent should always be entitled to have the final say on proceedings and not a “brief reply” to the SRAs representations. Sanctions should be left to the tribunal with the SRA providing assisting when required. Not responding to the respondents remarks if anything it should be the other way around with the respondent having the final say.

Rule 51 – any proposed changes to the rules should only apply to offences committed (not the date of proceedings) after the implementation of the rules especially in respect of the standard of prove.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

Any change in the standard of prove to the civil standard risks the chance of bias being a factor when decisions are reached. Whether it be based on age,sex,race or religion. The criminal standard of prove requires a thorough investigation which in turn limits the extent of such bias.

ANNEX 3

Proposed Rules – as amended Post Consultation

(changes from the version upon which we consulted are shown in red)

2019 No.

LEGAL PROFESSION, ENGLAND AND WALES

The Solicitors (Disciplinary Proceedings) Rules 2019

Made - - - - - ***

Coming into force - - - - - ***

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The Solicitors Disciplinary Tribunal, following approval by the Legal Services Board, in exercise of the powers conferred by section 46(9), (10) and (12) of the Solicitors Act 1974(a) and section 178(1) of the Legal Services Act 2007(b), makes the following Rules:

PART 1

Introductory

Citation and commencement

1. These Rules may be cited as the Solicitors (Disciplinary Proceedings) Rules 2019 and come into force on XX.

Scope

2. These Rules apply to—

- (a) any application made to the Tribunal under any enactment, including the following provisions of the 1974 Act—
 - (i) section 43(1) (applications relating to the control of solicitors' employees and consultants);
 - (ii) section 43(3) (applications for review of orders made in respect of applications under section 43(1));
 - (iii) section 43(4) (applications for costs in relation to applications under section 43);
 - (iv) section 47(1)(a) to (f) (applications in relation to solicitors and former solicitors);
- (b) any complaint made to the Tribunal under any enactment, including the following—
 - (i) section 43 of the Administration of Justice Act 1985 (legal aid complaints relating to solicitors);
 - (ii) section 31(2) of the 1974 Act (complaints in respect of failure to comply with rules as to professional practice, conduct and discipline);
 - (iii) section 32(3) of the 1974 Act (complaint in respect of failure to comply with accounts rules and trust accounts rules);
 - (iv) section 34(6) of the 1974 Act (complaint in respect of failure by solicitor to comply with rules relating to accountants' reports);
 - (v) section 34A(2) of the 1974 Act (complaint in respect of failure by employee of solicitor to comply with rules relating to professional practice, conduct and discipline);
 - (vi) section 34A(3) of the 1974 Act (complaint in respect of failure by employee of solicitor to comply with rules relating to accountants' reports);
 - (vii) section 37(4) of the 1974 Act (complaint in respect of failure by solicitor to comply with indemnity rules);
 - (viii) section 44(2) of the 1974 Act (complaint in respect of contravention of order under section 43(2) in respect of solicitors' employees and consultants).

Interpretation

3.—(1) In these Rules—

“the 1974 Act” means the Solicitors Act 1974;

(a) 1974 c.47. Section 46(9) was amended by the Legal Services Act 2007 (c. 29), Schedule 16(1) paragraph 47(5).
(b) 2007 c.29.

“the 2007 Act” means the Legal Services Act 2007(a);

“applicant” means a person making an application;

“application” means an application or complaint to which these Rules apply and which is made in accordance with these Rules;

“prescribed form” means the appropriate form published by the Tribunal on its website;

“authorised body” means—

(a) a body which holds a licence in force under Part 5 of the 2007 Act granted by the Solicitors Regulation Authority;

(b) a recognised body under section 9 of the Administration of Justice Act 1985(b);

(c) a sole solicitor’s practice recognised under section 9 of the Administration of Justice Act 1985;

“business day” means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in England and Wales under section 1 of the Banking and Financial Dealings Act 1971(c);

“case to answer” means an arguable case;

“clerk” means any clerk appointed under rules 8(1) and (2);

“the Clerk to the Tribunal” means the Clerk to the Tribunal who is in office at the date these Rules come into force, or the Clerk to the Tribunal subsequently appointed under rule 8(1);

“a lay application” means an application other than one—

(a) made by the Society; or

(b) to which Chapter 2 of Part 3 of these Rules applies;

“panel” means a panel appointed under rule 9(1) for the hearing of an application or any matter connected with an application;

“party” means an applicant or respondent;

“practice direction” means a direction made under rule 6(3);

“practice notice” means a notice made under rule 6(3);

“the President” means the President of the Tribunal, elected under rule 7(2);

“respondent” means any party to an application other than the applicant;

“the Society” means the Law Society and includes any duly constituted committee of the Law Society or any body or person exercising delegated powers of the Law Society, including the Solicitors Regulation Authority;

“solicitor members” and “lay members” have the same meaning as in section 46 of the 1974 Act (d);

“Statement” means a written statement (including a witness statement) signed by the individual making the statement and containing a declaration of truth in the following form—

“I believe that the facts and matters stated in this statement are true”;

“the Tribunal” means the Solicitors Disciplinary Tribunal and where a panel has been appointed for the hearing of an application or any matter connected with it, includes a panel;

(a) 2007 c.29.

(b) 1985 c.61. Section 9 was amended by the European Communities (Lawyer’s Practice) Regulations 2000 (S.I. 2000/1119), Schedule 4, paragraph 15(2); the Legal Services Act 2007 (c. 29), Schedule 16(2), paragraph 81(2), (3) and (4) and Schedule 23, paragraph 1 and the Legal Services Act 2007 (The Law Society) (Modification of Functions) Order (S.I. 2015/401), Schedule 1(2) paragraphs 18(3), (4) and (5).

(c) 1971 c.80.

(d) Section 46 was amended by the Legal Services Act 2007 (c. 29), Schedule 16(1), paragraph 47(2) and modified by the Solicitors Act 1974 (c. 47), section 44E(2), the Administration of Justice Act 1985 (c. 61), section 43(2)(a) and Schedule 2, paragraph 14C(2), the European Communities (Lawyer’s Practice) Regulations 2000 (2000/1119), Schedule 4, paragraph 10 and the Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (No.2) Order 2011 (2011/2863), articles 4(3) and (4).

“Vice President” means a Vice President of the Tribunal, elected under rule 7(3);

(2) References in these Rules to solicitors include, where appropriate, former solicitors.

(3) References in these Rules to registered foreign lawyers are references to lawyers whose names are entered in the register of foreign lawyers maintained under section 89 of the Courts and Legal Services Act 1990(a) and include, where appropriate, those who have ceased to be registered in that register or whose registration has been suspended.

[(4)References in these Rules to registered European lawyers are references to lawyers whose names are entered in the register of European lawyers maintained by the Society under regulation 15 of the European Communities (Lawyer’s Practice) Regulations 2000(b) and include, where appropriate, those who have ceased to be registered in that register or whose registration has been suspended.]

[(4) References in these Rules to registered European lawyers are references to—

(a) those lawyers—

(i) whose names were entered in the register of registered European lawyers maintained by the Law Society under regulation 15 of the European Communities (Lawyer’s Practice) Regulations 2000, as it had effect immediately before exit day, at a time before exit day, but

(ii) in relation to whom regulation 5 of the Services of Lawyers and Lawyer’s Practice (Revocation etc.) (EU Exit) Regulations 2019 does not apply;

(b) those lawyers whose names are entered in the register of registered European lawyers maintained by the Law Society under regulation 15 of the European Communities (Lawyer’s Practice) Regulations 2000, as that regulation has effect by virtue of regulation 5 of the Services of Lawyers and Lawyer’s Practice (Revocation etc.) (EU Exit) Regulations 2019 and includes, where appropriate, those who have ceased to be registered in that register or whose registration has been suspended.]

The overriding objective

4.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases justly and at proportionate cost.

(2) The Tribunal will seek to give effect to the overriding objective when it—

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.

(3) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) ensuring that the case is dealt with efficiently and expeditiously;
- (c) saving expense;
- (d) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues.

(4) The parties are required to help the Tribunal to further the overriding objective set out above.

(a) Section 89 was amended by the European Communities (Lawyer's Practice) Regulations 2000 (2000/1119), Schedule 4, paragraph 14(2) and the Legal Services Act 2007 (c. 29), Schedule 16(3), paragraph 125.

(b) S.I. 2000/1119.

Standard of proof

5. The standard of proof that will be applied to proceedings considered under these Rules is the standard applicable in ~~civil/eriminal~~ proceedings.

Regulation of procedure and practice directions

6.—(1) Subject to the provisions of the 1974 Act, these Rules and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may dispense with any requirements of these Rules in respect of notices, Statements, witnesses, service or time in any case where it appears to the Tribunal to be just so to do.

(3) The Tribunal (or a panel of Tribunal members consisting of no fewer than five members of whom no fewer than two must be lay members) may give such notices or make such directions concerning the practices or procedures of the Tribunal as are consistent with these Rules and as the panel considers appropriate.

(4) Practice notices and practice directions may be promulgated under the authority of the President.

PART 2

Constitution

President and Vice Presidents

7.—(1) The President holding office at the date these Rules come into force may not hold the office of President for a total period exceeding six years and will only be eligible for re-election as President if he or she has not previously been re-elected as President.

(2) The Tribunal, by a simple majority, must elect a solicitor member to be its President to hold office for a term not exceeding three years and the member so elected may be re-elected for a further term not exceeding three years.

(3) The Tribunal, by a simple majority, must elect one solicitor member and one lay member to be its Vice Presidents for a term not exceeding three years and the members so elected may be re-elected for a further term not exceeding three years. The Vice Presidents may exercise any functions as are exercisable under these Rules by the President, as the President may direct.

(4) The Tribunal must meet at least once in each calendar year and must publish an annual report, a copy of which must be sent to the Master of the Rolls, the Society and the Legal Services Board.

The Clerk to the Tribunal and other clerks and staff

8.—(1) The Tribunal must appoint a Clerk to the Tribunal.

(2) The Tribunal may appoint other clerks to assist the Clerk to the Tribunal.

(3) The Clerk to the Tribunal is responsible to the Tribunal for the administration of the Tribunal in an efficient manner, including the general supervision of the other clerks and other administrative staff; maintaining records and collecting statistics required by the Tribunal.

(4) The Clerk to the Tribunal or any other clerk appointed by the Tribunal under this Rule must be a solicitor or barrister of not less than ten years' standing.

(5) The office of the Clerk to the Tribunal must be vacated if—

- (a) in the Tribunal's opinion, with which the Master of the Rolls agrees, the Clerk to the Tribunal is physically or mentally incapable of performing his or her duties; or

- (b) the Clerk to the Tribunal—
 - (i) resigns; or
 - (ii) retires; or
 - (iii) is removed from office by a resolution of the Tribunal approved by the Master of the Rolls.
- (6) The Tribunal may prescribe the duties for which the clerks are to be responsible and those duties must include arrangements for—
- (a) the submission of applications for certification as to whether or not there is a case to answer (see rule 13);
 - (b) making pre-listing arrangements;
 - (c) variation of directions;
 - (d) determining applications for adjournment of procedural or substantive hearings in accordance with rule 23(2);
 - (e) considering parties' non-compliance with directions and orders (see rule 20(3));
 - (f) securing a record of hearings (by electronic recording or other means) (see rule 39);
 - (g) advising the Tribunal on matters of law or procedure;
 - (h) preparing draft judgments for the consideration of the panel which heard an application (see rule 40);
 - (i) determining applications in respect of substituted service (see rule 46);
 - (j) drawing orders and findings and sending them to the Society.

Composition of panels

9.—(1) The Tribunal must appoint a panel of three members of the Tribunal for the hearing of any application. Two of the panel members must be solicitor members and one must be a lay member.

(2) The President may appoint a ~~solicitor~~ member to be the chair of a panel.

(3) If the President does not appoint a chair of a panel, a solicitor member must act as the chair.

Functions exercisable by a single solicitor member

10. A single solicitor member may exercise the functions set out in—

- (a) rule 8(6) (c) (d) and (i) (duties for which clerks are responsible);
- (b) rule 27(3) (directions relating to lodging of bundles);
- (c) rule 22 (4) (f) and (g) (determining procedural applications)

PART 3

Applications

CHAPTER 1

Applications by the Law Society and lay applications

Application of Rules in Chapter 1

11.—(1) Rules 12, 13 and 14 apply to applications made by the Society and to lay applications.

(2) Rule 15 applies to applications made by the Society.

(3) Rule 16 applies to lay applications.

Method and form of application

12.—(1) An application to which this Rule applies must be sent to the Tribunal offices and must be made using the prescribed form.

(2) The application must be supported by a Statement setting out the allegations, the facts and matters supporting the application and each allegation contained within it and exhibiting any documents relied upon by the applicant.

(3) In the case of an application made by the Society, the application must be accompanied by—

- (a) sufficient copies of the application and supporting documents to enable the Tribunal to retain one complete set and to serve one complete set on each respondent;
- (b) a time estimate for the substantive hearing;
- (c) a schedule of the Society’s costs incurred up to and including the date on which the application is made.

(4) In the case of a lay application, the application must be accompanied by three copies of the application and supporting documents and one further copy for any second and each further respondent.

Certification of case to answer

13.—(1) An application made in accordance with rule 12 must initially be considered by a solicitor member (“the initial solicitor member”) for consideration of the question of whether there is a case to answer in respect of the allegations made in the application.

(2) If the initial solicitor member considers that there is a case to answer in respect of all the allegations made and is not of the opinion that the question is one of doubt or difficulty then the initial solicitor member must certify that there is a case to answer.

(3) If the initial solicitor member is minded not to certify that there is a case to answer in respect of all or some of the allegations made or is of the opinion that the question is one of doubt or difficulty, the question must be considered by a panel of three members of the Tribunal, two of whom must be solicitor members and one of whom must be a lay member. The initial solicitor member may be a member of the panel. If the panel considers that there is a case to answer in respect of any of the allegations made then it must certify that there is a case to answer in respect of those allegations.

(4) If the panel decides that there is no case to answer in respect of any of the allegations made, it may refuse or dismiss the application, or part of it, without requiring the respondent to answer the allegations and without hearing the applicant. The applicant must be provided with written reasons explaining the decision.

(5) If a panel or solicitor member certifies that a case to answer is established in respect of all or any of the allegations made, a clerk must serve a copy of each of the documents referred to in rule 12(3) or (4), as the case may be, on each respondent.

Supplementary Statements

14.—(1) An applicant who has made an application to which this Rule applies may, subject to paragraph (4), send supplementary statements to the Tribunal containing additional facts or matters on which the applicant seeks to rely or further allegations in support of the application.

(2) A supplementary statement must be supported by a Statement setting out any new allegations, facts and matters supporting the application and each allegation contained within it and exhibiting any new documents relied upon by the applicant.

(3) In the case of an application made by the Society, when a supplementary statement is sent to the Tribunal, the Society must provide—

- (a) sufficient copies of the supplementary statement and supporting documents to enable the Tribunal to retain one complete set and to serve a complete set on each respondent;
- (b) a revised time estimate for the substantive hearing;
- (c) a revised schedule of the Society's costs incurred up to and including the date on which the supplementary statement is sent;
- (d) any proposed directions for the future progression of the case, including any proposals to vary any existing directions.

(4) In the case of a lay application, when a supplementary statement is sent to the Tribunal, the applicant must provide sufficient copies of the supplementary statement and supporting documents to enable the Tribunal to retain one complete set and to serve a complete set on each respondent.

(5) The applicant will not be permitted to send a supplementary statement without leave of the Tribunal—

- (a) more than 12 months from the date of the application under rule 12;
- (b) less than 30 days before the date fixed for the substantive hearing of the application.

(6) Rule 13 applies in respect of any supplementary statement containing **additional facts or matters on which the applicant seeks to rely or further allegations in support of the application against the respondent** as it applies to an application made in accordance with rule 12.

Applications in respect of solicitors' employees

15. In a case where an application is made for an order under section 43(2) of the 1974 Act, the solicitor, recognised body, registered European lawyer or registered foreign lawyer by or for whose benefit the respondent is employed or remunerated—

- (a) may also be named or joined as a respondent to the application; and
- (b) must be joined as a respondent to the application if the Tribunal so directs.

Adjournment of application pending Law Society investigation

16.—(1) The panel may adjourn the consideration of the question of whether to certify any application to which this Rule applies for an initial period of up to three months to enable the Society to carry out its own investigations and consider whether to—

- (a) initiate its own application; or
- (b) by agreement with the applicant, take over conduct of the application.

(2) After the expiration of the initial adjournment period, the application may be referred to a panel on the first available date for further review and consideration, subject to the provisions of paragraph (3).

(3) If at the expiration of the period specified by the Tribunal under paragraph (1) the Society has not made a decision as to whether to initiate or take over the conduct of an application, the Tribunal may adjourn the matter for a further period of up to three months, after which the application must be referred to a panel on the first available date for further review and consideration.

CHAPTER 2

Applications by solicitors, etc.

Applications for restoration and termination of indefinite suspension

17.—(1) This Rule applies to applications made to the Tribunal under section 47 of the Act by—

- (a) a former solicitor seeking restoration to the Roll of Solicitors kept by the Society under section 6 the 1974 Act^(a);
- (b) a person seeking restoration to the register of European lawyers or the register of foreign lawyers if his name has been withdrawn or removed from either register by the Tribunal;
- (c) a solicitor, registered European lawyer or registered foreign lawyer seeking the termination of an indefinite period of suspension from practice imposed by the Tribunal.

(2) An application to which this Rule applies must be sent to the Tribunal and must be made using the prescribed form.

(3) The application must be supported by a Statement setting out the facts and matters supporting the application and exhibiting any documents relied upon by the applicant.

(4) The Society must be a respondent to any application to which this Rule applies.

(5) The applicant must serve on the Society-

- (a) a copy of the application; and
- (b) a Statement in support of the application.

(6) Every application to which this Rule applies must be advertised by the applicant in the Law Society's Gazette and in a newspaper circulating in the area of the applicant's former practice (if available) and must also be advertised by the Tribunal on its website.

(7) Any person may, no later than 21 days before the hearing date of an application to which this Rule applies, serve on the Tribunal and the parties to the application notice of that person's intention to oppose the allowing of the application and the Tribunal may allow the person to appear before it at the hearing of the application, call evidence and make representations upon which the Tribunal may allow the person to be cross-examined.

Application to vary or remove conditions on practice

18.—(1) This Rule applies to applications made to the Tribunal to vary or remove conditions on practice imposed by the Tribunal.

(2) An application to which this Rule applies must be sent to the Tribunal and must be made using the prescribed form.

(3) The application must be supported by a Statement setting out the facts and matters supporting the application and exhibiting any documents relied upon by the applicant.

(4) The Society must be a respondent to any application to which this Rule applies.

Application for review of order relating to solicitors' employees and consultants

19.—(1) An application for a review of an order made under section 43(3)(a) of the 1974 Act must be sent to the Tribunal and must be made using the prescribed form.

(2) The application must be supported by a Statement setting out the facts and matters supporting the application and exhibiting any documents relied upon by the applicant.

(3) An application under section 43(3)(a) of the 1974 Act must be served on the Society and the Society must, within ~~14~~ 28 days of the service of the application, send a Statement to the Tribunal setting out the facts and matters on which it relied in making the order under section 43(2) of the 1974 Act.

(a) Section 6 was amended by the Constitutional Reform Act 2005 (c. 4), Schedule 11(4), paragraph 21(2) and the Legal Services Act 2007 (c. 29), Schedule 23, paragraph 1.

PART 4

CASE MANAGEMENT

Standard Directions

20.—(1) Following certification of a case to answer under rule 13, standard directions must be issued by a clerk and sent to the parties.

(2) The standard directions may specify—

- (a) the date fixed for the substantive hearing of the matter;
- (b) the date by which a respondent must send to the Tribunal and serve on every other party an Answer to the allegations contained in the Statement served under rules 12 and 14 and a reply to the application and Statement served under rules 17, 18 and 19;
- (c) the date by which the respondent must send to the Tribunal and serve on every other party all documents on which the respondent intends to rely at the substantive hearing;
- (d) the date by which the parties must send to the Tribunal and serve on every other party a list of witnesses upon whose evidence they intend to rely at the substantive hearing;
- (e) the date by which the parties must notify the Tribunal of any intention to rely on expert evidence;
- (f) the date on which any case management hearing will take place;
- (g) the date by which the parties must send a statement of readiness to the Tribunal;
- (h) the date by which hearing bundles (and the number of copies) must be sent to the Tribunal;
- (i) any other standard direction which the Tribunal considers appropriate to ensure the management of matters in accordance with the overriding objective of these Rules mentioned in rule 4.

(3) If a party fails to comply with the standard directions, any other direction or any of these Rules, the matter may be listed for a non-compliance hearing before a clerk, who will make appropriate directions, which may include listing the matter before the Tribunal which may direct that—

- (a) evidence which has not been sent or served as directed may not be relied upon without permission of the Tribunal;
- (b) an adverse costs order be made in default of compliance, which may be ordered to be paid immediately to any other party;
- (c) adverse inferences that the panel hearing the matter considers appropriate may be drawn at the substantive hearing from the failure to comply.

(4) In this rule—

- (a) an “Answer” is a document which sets out—
 - (i) which allegations in the Statement are admitted and which are denied; and
 - (ii) the reasons for denial;
- (b) a “statement of readiness” is a document—
 - (i) confirming that the parties are ready for the substantive hearing;
 - (ii) setting out what, if any, further directions are required by the parties; and
 - (iii) setting out whether the time estimate for the final hearing is the same as was anticipated when standard directions were issued or at any subsequent case management hearing, or otherwise providing a revised time estimate.

Case management hearings

21.—(1) A case management hearing must be arranged by the Tribunal or a clerk in cases where—

- (a) ~~a time estimate or revised time estimate provided by the Society under rule 12(3)(b) or 14(3)(b) is three days or more;~~ a clerk considers that the holding of a case management hearing is justified by reason of the time estimate or revised time estimate provided by the Society under rule 12(3)(b) or 14(3)(b); or
- (b) the clerk who reviews the application on receipt identifies issues which in the opinion of the clerk justify the holding of a case management hearing.

(2) A case management hearing may be arranged by the Tribunal or a clerk at any other time before the hearing of an application.

(3) A case management hearing may be heard by the Tribunal or a clerk and may take place by telephone, in person, or by such electronic means as may be approved by the Tribunal.

(4) If the Tribunal notifies the parties in advance of a case management hearing that a further hearing is to be fixed or is likely to be fixed at the case management hearing, the parties must attend the case management hearing equipped with their dates to avoid and the dates to avoid of any witnesses.

(5) If on receipt of a list of witnesses (see rule 20(2)(d)) or a statement of readiness (see rule 20(2)(g)) a clerk considers that a further case management hearing is required, a further case management hearing date may be fixed so that any further directions can be made.

Procedural applications

22.—(1) Any procedural application must be—

- (a) made using the prescribed form; and
- (b) sent to the Tribunal and served on every other party, together with any relevant supporting documentation.

(2) The Tribunal, single solicitor member or clerk must issue written reasons for its decisions on procedural applications.

(3) Any party aggrieved by a decision of a clerk under paragraph 8(6) may request that the application be re-determined by a panel or single solicitor member by notifying the Tribunal of this request within 14 days of receipt of the written reasons for the decision.

(4) In this rule, a “procedural application” means an application for—

- (a) a variation of directions;
- (b) an adjournment of the hearing of an application (see rule 23);
- (c) an amendment or withdrawal of an allegation (see rule 24);
- (d) disclosure and discovery (see rule 26);
- (e) leave to call or adduce expert evidence (see rule 30);
- (f) a direction that special measures may be provided or used to assist vulnerable witnesses or respondents;
- (g) a direction that a witness or respondent may give their evidence or otherwise participate in the proceedings by videolink or other electronic means;
- (h) any other procedural application, including an application for a stay of proceedings for abuse of process, and general applications to exclude or adduce evidence.

Adjournments

23.—(1) An application for an adjournment of the hearing of an application must be supported by documentary evidence of the need for the adjournment.

(2) An application for an adjournment made more than 21 days before the hearing date will be considered by a clerk or a single solicitor member on the papers.

(3) An application for an adjournment made 21 days or less before the hearing date will be considered by the panel listed to sit on the substantive hearing on the papers unless it is in the interests of justice for the matter to be dealt with at an oral hearing.

Amendment or withdrawal of allegations

24. No allegation made in an application may be amended or withdrawn without leave of the Tribunal.

Agreed Outcome Proposals

25.—(1) The parties may up to 28 days before the substantive hearing of an application (unless the Tribunal directs otherwise) submit to the Tribunal an Agreed Outcome Proposal for approval by the Tribunal.

(2) An Agreed Outcome Proposal must—

- (a) contain a statement of the facts that are agreed between the relevant parties;
- (b) set out the agreed proposed penalty and an explanation as to why the penalty would be in accordance with any guidance published by the Tribunal on sanctions imposed by the Tribunal;
- (c) be signed by the relevant parties; and
- (d) comply with any relevant practice direction made by the Tribunal in respect of Agreed Outcome Proposals.

~~(3) A statement under paragraph (2)(a) must not include a statement that any person is at fault in respect of any allegation made in relation to the application unless—~~

~~(a) there has been a finding of fact to that effect by a judicial or quasi-judicial body; or~~

~~(b) the person in question has indicated to the Tribunal in writing that the statement is accurate.~~

~~(4) In cases where there is more than one respondent and the Agreed Outcome Proposal does not relate to all of the respondents, the applicant must—~~

~~(a) serve a copy of the Agreed Outcome Proposal on all the other respondents;~~

~~(b) invite those respondents to provide any responses to the applicant within seven days of service;~~

~~(c) inform the Tribunal when the Agreed Outcome Proposal is submitted that all other respondents have been served and provide proof of the same together with the details of any responses received by the end of the period mentioned in paragraph (4)(b).~~

(3) If the Tribunal approves the Agreed Outcome Proposal in the terms proposed it must make an Order in those terms. The case must be called into an open hearing and the Tribunal must announce its decision.

(4) If the Tribunal wishes to hear from the parties before making its decision the Tribunal may direct that there be a case management hearing **which the parties to the proposed Agreed Outcome Proposal** must attend for the purpose of making submissions before a final decision is reached. The case management hearing must be heard in private.

(5) Where the Tribunal is not satisfied that it is appropriate to make an Order in accordance with paragraph (3) it must provide **written** reasons to the parties who may then submit a revised proposal. If the Tribunal is satisfied with the revised proposal, it must make an Order in accordance with it.

(6) Some or all of the same members of the panel appointed in respect of the application may consider the initial Agreed Outcome Proposal, any submissions made at a case management hearing and any revised proposal but may not subsequently participate in the panel for the substantive hearing (if there is one).

(7) If on considering a submission under this rule the Tribunal decides not to make an Order in accordance with paragraph (3) it must make directions for the substantive disposal of the matter by a panel consisting of members who were not on the panel which considered the submission.

(8) If on considering a submission under this rule the Tribunal decides not to make an Order and the Tribunal does not publish that decision or announce it in an open hearing, no information will be published or announced about the submission save that the Agreed Outcome Proposal was not approved.

Disclosure and discovery

26.—(1) If an application is made for the disclosure or discovery of material, the Tribunal may make an order that material be disclosed where it considers that the production of the material is necessary for the proper consideration of an issue in the case, unless the Tribunal considers that there are compelling reasons in the public interest not to order the disclosure.

(2) Any order made by the Tribunal will only apply to material that is in the possession or under the control of a party.

(3) An order made under paragraph (1) will not oblige the parties to produce any material which they would be entitled to refuse to produce in proceedings in any court in England and Wales.

(4) A party to proceedings before the Tribunal is required to disclose only—

(a) the documents on which the party relies;

(b) any documents which –

(i) adversely affect that party's own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) any documents which the party is required to disclose by a relevant practice direction.

PART 5 EVIDENCE

Evidence generally and service and sending of Evidence and bundles

27.—(1) Without prejudice to the general powers in Parts 2 and 3 of these Rules the Tribunal may give directions in relation to an application relating to any of the following—

- (a) the exchange between parties of lists of documents which are relevant to the application, or relevant to particular issues, and the inspection of such documents;
- (b) the provision by parties of statements of agreed matters;
- (c) issues on which the Tribunal requires evidence or submissions;
- (d) the nature and manner of the evidence or submissions that the Tribunal requires;
- (e) the time at which any evidence or submissions are to be sent;
- (f) the time to be allowed during the hearing for the presentation of any evidence or submission.

- (2) The Tribunal may—
- (a) admit any evidence whether or not it would be admissible in a civil trial in England and Wales;
 - (b) exclude evidence that would otherwise be admissible where—
 - (i) the evidence was not provided within the time allowed by a direction given under these Rules or a practice direction; or
 - (ii) the evidence was otherwise provided in a manner that did not comply with a direction given under these Rules or a practice direction; or
 - (iii) it would otherwise be unfair, disproportionate or contrary to the interests of justice to admit the evidence.
- (3) Unless otherwise directed by the Tribunal, in cases where the Society is the applicant, it must send five copies of a paginated hearing bundle to the Tribunal no later than 14 days before the date listed for the substantive hearing.

Written Evidence

- 28.**—(1) If no party requires the attendance of a witness, the Tribunal may accept the Statement of that witness as evidence in respect of the whole case or of any particular fact or facts.
- (2) Every Statement upon which any party proposes to rely must be sent to the Tribunal by that party and served on every other party on a date determined by the Tribunal which must be no less than 28 days before the date fixed for the hearing of the application. The Statement must be accompanied by a notice, using the prescribed form.
- (3) Any party on whom a notice has been served under paragraph (2) and who requires the attendance of the witness in question at the hearing must, no later than seven days after service of the notice require, in writing, the party on whom the notice was served to produce the witness at the hearing.
- (4) Any application for a witness summons must be made to the High Court.
- (5) If a Statement has not been served in accordance with paragraph 28(2) in relation to a witness, a party must apply to the Tribunal for permission—
- (a) to produce that Statement; and
 - (b) for the witness to give evidence at the hearing.
- (6) Any party to an application may, by written notice, not later than 21 days before the date fixed for the hearing, request any other party to agree that any document may be admitted as evidence.
- (7) If a party desires to challenge the authenticity of a document which is the subject of paragraph (6), that party must, within seven days of receipt of the notice served under that paragraph, give notice that he or she does not agree to the admission of the document and that he or she requires that its authenticity be proved at the hearing.
- (8) If the recipient of a notice given under paragraph (6) does not give a notice in response within the period mentioned in paragraph (7), that recipient is deemed to have admitted the document unless otherwise ordered by the Tribunal.

Civil Evidence Act notices

- 29.**—(1) Subject to the following provisions of this Rule, ~~the Civil Evidence Act 1968 (a) and~~ the Civil Evidence Act 1995(aa) apply in relation to proceedings before the Tribunal in the same manner as they apply in relation to civil proceedings.

(2) Any notice given under the provisions of the ~~Acts mentioned in paragraph (1)~~ **Civil Evidence Act 1995 as so applied** must be given no later than the latest date for the service of witness statements under rule 28.

~~(3) Any counter notice must be given within seven days of receipt of the notice.~~

Expert evidence

30.—(1) No party may call an expert or adduce in evidence an expert's report at the substantive hearing of an application without leave of the Tribunal.

(2) An application under this rule must be determined by a panel.

(3) The Tribunal may permit expert evidence to be adduced where it considers that such evidence is necessary for the proper consideration of an issue or issues in the case.

(4) If two or more parties wish to submit expert evidence on a particular issue, the Tribunal may direct that the evidence on that issue is to be given by a single joint expert.

(5) The Tribunal may, at any stage, direct that a discussion take place between experts for the purpose of requiring the experts to identify and agree the expert issues in the proceedings and provide a joint schedule setting out the matters that are agreed and not agreed. The Tribunal may specify the issues which the experts must discuss.

(6) Any expert evidence must be in the form of a Statement and must set out—

- (a) the expert's professional qualifications;
- (b) the substance of all material instructions (including a general description of the documents provided), whether written or oral, on the basis of which the Statement was written;
- (c) a declaration that the expert understands and has complied with the expert's duty to assist the Tribunal on matters within the expert's expertise and understands that this duty overrides any obligation to any party from whom the expert has received instructions or by whom they are paid.

Interpreters and Translators

31.—(1) If any witness or respondent requires the assistance of an interpreter to **participate in a hearing** ~~give their evidence~~ the Tribunal must be notified of this fact by the party **requiring the interpreter** ~~relying on that evidence~~ when sending the list of witnesses.

(2) Where a witness statement has been translated from a language other than English it must be accompanied by a Statement confirming—

- (a) the language in which the original witness statement was made; and
- (b) that the translator has translated the witness statement into English to the best of the translator's skill and understanding.

Previous findings of record

32.—(1) A conviction for a criminal offence in **the United Kingdom England and Wales** may be proved by the production of a certified copy of the certificate of conviction relating to the offence and proof of a conviction will constitute evidence that the person in question was guilty of the offence. The findings of fact upon which that conviction was based will be admissible as conclusive proof of those facts save in exceptional circumstances.

(2) The judgment of any civil court, or any tribunal exercising a professional or disciplinary jurisdiction, in or outside England and Wales (other than the Tribunal) may be proved by producing a certified copy of the judgment and the findings of fact upon which that judgment was based is admissible as proof but not conclusive proof of those facts.

(3) Where the Tribunal has made a finding based solely upon the certificate of conviction for a criminal offence which is subsequently quashed the Tribunal may, on the application of the Law Society or the respondent to the application in respect of which the finding

arose, revoke its finding and make such order as to costs as appear to be just in the circumstances.

Adverse inferences

33. Where a respondent fails to—

- (a) send or serve an Answer in accordance with a direction under rule 20(2)(b); or
- (b) give evidence at a substantive hearing or submit themselves to cross-examination;

and regardless of the service by the respondent of a witness statement in the proceedings, the Tribunal is entitled to take into account the position that the respondent has chosen to adopt and to draw such adverse inferences from the respondent's failure as the Tribunal considers appropriate.

PART 6

HEARINGS AND COSTS

Publication of cause lists

34.—(1) A cause list will be published on the Tribunal's website before the case is due to be heard.

(2) Any party or other person who claims to be affected by an application may apply to the Tribunal for the cause list to be anonymised on the grounds of—

- (a) exceptional hardship; or
- (b) exceptional prejudice

to a party, a witness or any person affected by the application.

(3) Any person making an application under paragraph (2) must serve a copy of that application together with a Statement in support on all parties to the proceedings, and—

- (a) the application must be served no later than 28 days before the hearing in relation to which the application is made; and
- (b) must be made using the prescribed form.

(4) The Tribunal may in its discretion consider the application on the papers or list it for an oral hearing.

(5) If the Tribunal is satisfied that either of the grounds in paragraph (2) are met, the Tribunal must direct that the cause list be anonymised in such a way that appears to it to be just and proper.

Public or private hearings

35.—(1) Subject to paragraphs (2), (4), (5) and (6), every hearing of the Tribunal must take place in public.

(2) Any person who claims to be affected by an application may apply to the Tribunal for the hearing of the application to be conducted in private on the grounds of—

- (a) exceptional hardship; or
- (b) exceptional prejudice

to a party, a witness or any person affected by the hearing.

(3) Any person who makes an application under paragraph (2) must serve a copy of that application and a Statement in support on all parties to the proceedings. If there is no objection to the application from any of the parties, the Tribunal will consider the application on the papers unless it considers that it is in the interests of justice for the application to be considered at an oral hearing.

(4) If the Tribunal decides that the application made under paragraph (2) is to be considered at an oral hearing, that hearing will take place in private unless the Tribunal directs otherwise.

(5) The Tribunal may, before or during a hearing, direct without an application from any party that the hearing or part of it be held in private if—

- (a) the Tribunal is satisfied that it would have granted an application under paragraph (2) had one been made; or
- (b) the Tribunal considers that a hearing in public would prejudice the interests of justice.

(6) The Tribunal may give a direction excluding from any hearing or part of it any person—

- (a) whose conduct the Tribunal considers is disrupting or likely to disrupt the hearing;
- (b) whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;
- (c) whose attendance at the hearing would otherwise prejudice the overriding objective of these Rules.

(7) Other than a party to the proceedings, a factual witness is excluded from the hearing until their evidence has been given, unless the parties agree or the Tribunal directs otherwise.

(8) Save in exceptional circumstances, where the Tribunal disposes of proceedings following a hearing held in private, it must announce its decision in a public session.

~~(9) The Tribunal may make a direction prohibiting the disclosure or publication of any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified.~~

- ~~(9) The Tribunal may make a direction prohibiting the disclosure or publication of—~~
- ~~(a) specified documents or information relating to the proceedings; or~~
 - ~~(b) any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified.~~

(10) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if it is satisfied that—

- (a) the disclosure would be likely to cause any person serious harm; and
- (b) it is in the interests of justice to make such a direction.

Proceeding in absence

36. If a party fails to attend and is not represented at the hearing and the Tribunal is satisfied that notice of the hearing was served on the party in accordance with these Rules, the Tribunal may hear and determine any application and make findings, hand down sanctions, order the payment of costs and make orders as it considers appropriate notwithstanding that the party failed to attend and is not represented at the hearing.

Application for re-hearing

37.—(1) At any time before the Tribunal's Order is sent to the Society under rule 42(1) or within 14 days after it is sent, a party may apply to the Tribunal for a re-hearing of an application if—

- (a) the party neither attended in person nor was represented at the hearing of the application; and
- (b) the Tribunal determined the application in the party's absence.

(2) An application for a re-hearing under this rule must be made using the prescribed form accompanied by a Statement setting out the facts upon which the applicant wishes to rely together with any supporting documentation.

(3) If satisfied that it is just to do so, the Tribunal may grant the application upon such terms, including as to costs, as it thinks fit. The re-hearing must be held before a panel comprised of different members from those who determined the original application.

Evidence and submissions during the hearing

38.—(1) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath or affirmation and may administer an oath or affirmation for that purpose.

(2) The Tribunal may, at any hearing, dispense with the strict rules of evidence.

(3) Without restriction on the general powers in Parts 2 and 3 of these Rules, the Tribunal may, pursuant to the overriding objective set out in rule 4(1), give directions in relation to—

- (a) the provision by the parties of statements of agreed matters;
- (b) issues on which it requires evidence to be given or submissions to be made and the nature and manner of the evidence or submissions it requires;
- (c) the time at which any evidence or submissions are to be given or made;
- (d) the time allowed during the hearing for the presentation of any evidence or submission;
- (e) the time allowed for cross-examination of a witness.

Recording of the hearing

39.—(1) All hearings of the Tribunal will be electronically audio-recorded.

(2) Where hearings of the Tribunal are held in public, a copy of the recording must be disclosed to any person on request, subject to any direction by the Tribunal in relation to the release of the recording.

(3) Where a hearing is held in private, a copy of the electronic recording may only be disclosed to the parties and only on the provision of an undertaking that the recording or any transcript of the hearing or any part of it will not be made public.

Decisions

40.—(1) The Tribunal may announce its decision at the conclusion of the hearing or may reserve its decision for announcement at a later date. In either case the announcement must be made in public unless rule 35(8) applies.

(2) As soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings, the Tribunal must provide to each party a judgment containing written reasons for its decision, signed by a member of the Tribunal.

(3) As soon as reasonably practicable following a case management hearing, the Tribunal will provide to each party a memorandum containing written reasons for its decisions, signed by a member of the Tribunal.

(4) Decisions on applications made during the course of a substantive hearing will be announced in a public session and the written reasons will be contained in the judgment issued at the conclusion of the proceedings.

(5) The Tribunal or a clerk may, at any time, correct a clerical error or omission in a judgment or memorandum.

Sanction

41.—(1) At the conclusion of the hearing, the Tribunal must make a finding as to whether any or all of the allegations in the application have been substantiated.

(2) **If the Tribunal makes a finding that any or all of the allegations in the application have been substantiated, the Tribunal must ask—**

- (a) the clerk whether any allegations were found to have been substantiated against the respondent in any previous disciplinary proceedings before the Tribunal; and
- (b) the Society (in those cases where the Society is the applicant) whether it has imposed any sanction against the respondent in respect of conduct which has not been the subject of any previous disciplinary proceedings before the Tribunal.

~~A clerk must then inform the Tribunal whether allegations were found to have been substantiated against the respondent in any previous disciplinary proceedings before the Tribunal.~~

- (3) The respondent will be entitled to make submissions by way of mitigation, including character references, in respect of the sanction, if any, to be imposed by the Tribunal.
- (4) The Tribunal will have regard to its guidance on sanctions in force at the time when determining the appropriate sanction.

The Order

42.—(1) The making of the Order that contains the Tribunal’s decision must be announced by the Tribunal pursuant to Rule 40(1) and a copy of the Order signed by a member of the Tribunal must be sent by the Tribunal to the Society as soon as reasonably practicable following the hearing.

(2) An Order takes effect once it has been announced by the Tribunal in public session or in private where rule 35(8) applies.

Costs

43.—(1) At any stage of the proceedings, the Tribunal may make such order as to costs as it thinks fit, which may include an order for wasted costs.

(2) The amount of costs to be paid may either be decided and fixed by the Tribunal following summary assessment or directed by the Tribunal to be subject to detailed assessment by a taxing Master of the Senior Courts.

(3) Without prejudice to the generality of paragraph (1), the Tribunal may make an order as to costs in circumstances where—

- (a) any application, allegation or appeal is withdrawn or amended;
- (b) some or all of the allegations are not proved against a respondent;
- (c) an appeal or interim application is unsuccessful.

(4) The Tribunal will first decide whether to make an order for costs and will identify the paying party. When deciding whether to make an order for costs, against which party, and for what amount, the Tribunal will consider all relevant matters including the following—

- (a) the conduct of the parties and whether any or all of the allegations were pursued or defended reasonably;
- (b) whether the Tribunal’s directions and time limits imposed were complied with;
- (c) whether the amount of time spent on the matter was proportionate and reasonable;
- (d) whether any hourly rate and the amount of disbursements claimed is proportionate and reasonable;
- (e) the paying party’s means.

(5) If the respondent makes representations about the respondent’s means, the representations must be supported by a Statement which includes details of the respondent’s assets, income and expenditure (including but not limited to property, savings, income and outgoings) which must be supported by documentary evidence.

PART 7
MISCELLANEOUS

Sending and service of documents

44.—(1) Any document to be sent to the Tribunal or any other person or served on a party or any other person under these Rules, a practice direction or a direction given under these Rules must be—

- (a) sent by pre-paid first class post or by document exchange, or delivered by hand, to the Tribunal's or other person's office or as the case may be the address specified for the proceedings by the party (or if no such address has been specified to the last known place of business or place of residence of the person to be served); or
- (b) sent by email to the email address specified by the Tribunal or other person or specified for the proceedings by a party (or if no such address has been specified to the last known place of business or place of residence of the person to be served); or
- (c) sent or delivered by such other method as the Tribunal may direct.

(2) Subject to paragraph (3), if a party specifies an email address for the electronic delivery of documents the Tribunal and other parties will be entitled to serve (and service will be deemed to be effective) documents by electronic means to that email address, unless the party states in writing that service should not be effected by those means.

(3) If a party informs the Tribunal and every other party in writing that a particular form of communication, other than pre-paid post or delivery by hand, should not be used to send documents to that party, that form of communication must not be used.

(4) Any recipient of a document sent by electronic means may request that the sender send a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.

(5) The Tribunal will proceed on the basis that the address, including an email address, provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary by that party or representative.

(6) If a document submitted to the Tribunal is not written in English, it must be accompanied by an English translation and a Statement from the translator confirming that the translator carried out the translation and setting out the translator's qualifications.

Deemed Service

45. A document sent or served within the United Kingdom in accordance with these Rules or any relevant practice direction is deemed to be served on the day shown in the following table—

<i>Method of service</i>	<i>Deemed date of service</i>
1. First class post (or other service which provides for delivery on the next business day)	The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day; or if not, the next business day after that day.
2. Document exchange	The second day after it was left with, delivered to or collected by the relevant service provider provided that day is a business day; or if not, the next business day after that day.
3. Delivering the document by hand to or leaving it at an address	If it is delivered to or left at the address on a business day before 4.30p.m., on that day; or in any other case, on the next business day after that day.

4. E-mail or other electronic method	If the e-mail or other electronic transmission is sent on a business day before 4.30p.m., on that day; or in any other case, on the next business day after the day on which it was sent.
5. Fax	If the transmission of the fax is completed on a business day before 4.30p.m., on that day; or in any other case, on the next business day after the day on which it was transmitted.
6. Personal service	If the document is served personally before 4.30p.m. on a business day, on that day; or in any other case, on the next business day after that day.

Substituted service by the applicant

46.—(1) If the applicant believes that there is no reasonable prospect of being able to effect service on a respondent using the methods set out in rule 44 it may apply to the Tribunal for a direction for substituted service. This application must be made in writing and set out—

- (a) the steps that have been taken to establish the address, place of business or email address of the respondent; and
- (b) the proposed alternative method of service.

(2) The application may be determined by the Tribunal, a panel, a single solicitor member or a clerk, who may make a direction for substituted service if it is in the interests of justice to do so.

Calculating time

47.—(1) Subject to rule 45 an act required by these Rules, a practice direction or a direction given under these Rules to be done on or by a particular day must be done by 4:30 p.m. on that day unless otherwise directed.

(2) If the time specified by these Rules, a practice direction or a direction given under these Rules for doing any act ends on a day other than a business day, the act is done in time if it is done on the next business day.

Representatives

48.—(1) Any party may appoint a legal representative to represent that party in the proceedings.

(2) If a party appoints a legal representative, that party must send to the Tribunal and every other party written notice of the representative's name and address, together with a copy of the notice.

(3) Anything permitted or required to be done by a party under these Rules may be done by the legal representative of that party, except signing a witness statement.

(4) A party who receives due notice of the appointment of a legal representative—

- (a) must send to the legal representative any document which, at any time after the appointment, is required to be sent to the represented party, and need not send that document to the represented party; and
- (b) may proceed on the basis that the representative is and remains authorised as such until they receive written notification to the contrary from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who, with the permission of the Tribunal, may assist the party in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).

(7) In this rule “legal representative” means—

- (a) a solicitor;
- (b) a barrister;
- (c) a person who, for the purposes of the 2007 Act, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meanings given by Schedule 2 to that Act.

Amendments to the 2011 Appeals Rules

49. The Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011(a) are amended as follows—

- (a) In rule 2 (interpretation)—
 - (i) for the definition of “the 2007 rules” substitute the following definition—

““the 20189 rules” means the Solicitors (Disciplinary Proceedings) Rules 20189”;
 - (ii) In the definition of “clerk”, for “the 2007 rules” substitute “the 20189 rules”;
- (b) In rule 5(1) for the words “listed in Rule 3(11) of the 2007 Rules” substitute “listed in Rule 8(6) of the Solicitors (Disciplinary Proceedings) Rules 20189”.
- (c) In rule 5(2) for the words “Rule 3(11) of the 2007 Rules” substitute “Rule 8(6) of the Solicitors (Disciplinary Proceedings) Rules 20189”
- (d) In rule 27(1) for “5pm” substitute “4.30p.m.”

Revocation

50. The Solicitors (Disciplinary Proceedings) Rules 2007 are revoked.

Transitional provisions

51.—(1) These Rules do not apply to proceedings in respect of which an Application is made before the date on which these Rules come into force and those proceedings will be subject to the Solicitors (Disciplinary Proceedings) Rules 2007 as if they had not been revoked.

Signed by authority of the Solicitors Disciplinary Tribunal

Gate House, 1 Farringdon Street, London EC4M 7LG
[Date] 2019

Edward Nally
President
Solicitors Disciplinary Tribunal

(a) S.I. 2011/2345.

EXPLANATORY NOTE

(This note is not part of the Order)

These Rules regulate procedure for the making, hearing and determination of applications made to the Solicitors Disciplinary Tribunal constituted under the Solicitors Act 1974 (as amended). They replace the previous 2007 rules.

Part 1 contains introductory provisions. Rule 4 sets out (for the first time) the overriding objective of the rules, which is to enable the Tribunal to deal with cases justly and at proportionate cost. Rule 5 sets out the standard of proof to be applied at the Tribunal's proceedings. ~~It is the standard applicable in criminal proceedings~~ It was formerly the standard applicable in criminal proceedings but is now the standard applicable in civil proceedings. Rule 6 makes general provision about the regulation of procedure.

Part 2 makes provision about the constitution of the Tribunal, and sets out the duties of the Tribunal's clerks.

Part 3 sets out the procedure to be followed when making applications to the Tribunal.

Part 4 contains provisions about case management, including provisions about standard directions, case management hearings, agreed outcome proposals, disclosure and discovery.

Part 5 makes provision about evidence, including the service of evidence, written evidence, expert evidence, and admissibility of evidence about convictions and character evidence.

Part 6 makes provision about hearing procedures, including about whether hearings should be held in public or private, proceedings in absence of a party, recording of hearings and the decision making procedure.

Part 7 contains miscellaneous provisions, including about awards of costs, sending and serving of documents, calculating time and legal representation.

The Rules revoke the Solicitors (Disciplinary Proceedings) Rules 2007.

The Rules make reference throughout to the types of forms that must be used in relation to Tribunal proceedings. These forms can be found on the Tribunal's website at the following address:

www.solicitorstribunal.org.uk

ANNEX 4 Equality Impact Assessment - Relevance to Equality Duties

Equality Impact Assessment - Relevance to Equality Duties

The EIA should be used to identify likely impacts on:

- disability
- race
- sex
- gender (including gender identity)
- age
- religion or belief
- sexual orientation
- pregnancy and maternity

1. Name of the proposed new or changed legislation, policy, strategy, project or service being assessed.

1.1 Proposed new Solicitors (Disciplinary Proceedings) Rules to replace the Solicitors (Disciplinary Proceedings) Rules 2007 (“the 2007 Rules”) and to amend applicable provisions of the Solicitors Disciplinary Tribunal (Appeals and Amendments) Rules 2011 (“the 2011 Appeal Rules”).

2. Individual responsible for completing the Equality Impact Assessment.

2.1 Geraldine Newbold, Clerk, Solicitors Disciplinary Tribunal.

3. What is the main aim or purpose of the proposed new or changed legislation, policy, strategy, project or service and what are the intended outcomes?

3.1 The Tribunal adjudicates upon alleged breaches of the rules and regulations applicable to solicitors and their firms, including the Solicitors’ Code of Conduct 2007, the SRA Code of Conduct 2011, and the SRA Principles 2011. The Tribunal also adjudicates upon the alleged misconduct of registered foreign lawyers and persons employed by solicitors. It also decides applications by former solicitors for restoration to the Roll and by indefinitely suspended solicitors for determination of suspension.

3.2 The 2007 Rules govern the procedure in relation to such applications. The proposed new Solicitors (Disciplinary Proceedings) Rules replace the 2007 Rules in order to provide greater clarity as to the Tribunal’s procedures, and include additional provisions that reflect changes to the Tribunal’s practices since 2007. The Tribunal consulted on whether it should use the criminal or civil standard of proof. Apart from when considering appeals against internal decisions of the Solicitors Regulation

Authority, the Tribunal currently applies the criminal standard of proof.

4. What existing sources of information will you use to help you identify the likely equality impacts on different groups of people?

4.1 The two main groups of people that are involved in Tribunal proceedings are the applicants and the respondents. The majority of applications are made by the Solicitors Regulation Authority and the majority of respondents are solicitors or their employees. There is no existing source of information that will assist in identifying the likely equality impacts on different groups of people.

4.2 The Tribunal considered the following sources of information:

- Lord Ouseley’s “Independent Review into Disproportionate Regulatory Outcomes for Black and Minority Ethnic Solicitors” (2008)
- Pearn Kandola’s “Commissioned research into issues of disproportionality” (2010)
- Professor Gus John’s Independent Comparative Case Review (2014)
- Mapping advantages and disadvantages: Diversity in the legal profession in England and Wales” (SRA- 2017)
- SRA’s Annual Review 2016/17
- The equality and diversity information held by the Tribunal
- The responses received to the consultation

5. Are there gaps in information that make it difficult or impossible to form an opinion on how your proposals might affect different groups of people? If so what are the gaps in the information and how and when do you plan to collect additional information?

5.1 As part of its consultation the Tribunal asked the question “Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?” It received 21 responses. The analysis of these is set out in Annex 1.

5.2 These responses either did not identify any adverse impacts or did not set out potential impacts in relation to specific groups of people.

- 5.3 The Tribunal concluded that there was no evidence that the proposed changes would affect any one group of respondents disproportionately to any other group of respondents regardless of whether or not the respondent has a protected characteristic.
- 5.4 It is anticipated that the proposed rules will affect all groups of people in the same way as the 2007 Rules currently affect all groups of people. The decision in respect of the standard of proof will be applicable to cases against all respondents.
- 5.5 The Tribunal acknowledges that it has limited information. As set out in the initial screening assessment, respondents in Tribunal proceedings are asked to complete a questionnaire in respect of equality and diversity information. In 2018 no responses were received.
- 5.6 The Tribunal is aware that the SRA intends to publish a report on its disciplinary track record. It is understood that this report will bring together data about the cases that the SRA has referred to the Tribunal, including issues around diversity. The Tribunal will carefully consider the contents of this report when published.

6. Having analysed the initial and additional sources of information, is there any evidence that the proposed changes will have a **positive impact** on any of these different groups of people and/or promote equality of opportunity?

Please provide details of which benefits from the positive impacts and the evidence and analysis used to identify them.

- 6.1 The proposed new rules provide clarity in respect of the Tribunal's practice and incorporate provisions previously contained in the Standard Directions and Practice Directions. This should make the requirements easier to understand for all applicants and respondents.
- 6.2 The Tribunal has considered the responses to the consultation but has not identified any impact (positive or negative) of the proposed changes as part of the consultation process. The Tribunal has considered the concerns expressed in the responses to the consultation but considers that these are related to the areas of practice of specific groups rather than the impact of the proposed changes themselves.

7. Is there any feedback or evidence that additional work could be done to promote equality of opportunity?

If the answer is yes, please provide details of whether or not you plan to undertake this work. If not, please say why.

- 7.1 The Tribunal has considered the responses to the consultation but has not identified any additional work that can be done to promote equality of opportunity. The proposed rules make provisions for directions in relation to Special Measures and such applications will be considered on a case by case basis.
- 7.2 The Tribunal has considered the concerns expressed in the responses to the consultation but considers that these are related to the areas of practice of specific groups rather than the impact of the proposed changes themselves.
- 7.3 The Tribunal does not investigate matters, it adjudicates upon allegations of misconduct in applications made to it. The Tribunal therefore has no influence over the matters it receives. It will continue to deal with all parties before it in a fair, transparent and open manner that promotes equality of opportunity.

8. Is there any evidence that proposed changes will have **an adverse equality impact** on any of these different groups of people?

Please provide details of who the proposals affect, what the adverse impacts are and the evidence and analysis used to identify them.

- 8.1 There is no such evidence at this stage.
- 8.2 The Tribunal has considered the responses to the consultation but has not identified any adverse equality impact of the proposed changes as part of the consultation process. The Tribunal has considered the concerns expressed in the responses to the consultation but considers that these are related to the areas of practice of specific groups rather than the impact of the proposed changes themselves.

9. Is there any evidence that the proposed changes have **no equality impacts**?

Please provide details of the evidence and analysis used to reach the conclusion that the proposed changes have no impact on any of these different groups of people.

- 9.1 The proposed new rules provide clarity in respect of the Tribunal's practice and incorporate provisions previously contained in the Standard Directions and Practice Directions. This should make the requirements clearer for all applicants and respondents.
- 9.2 The Tribunal's standard of proof will change to the civil standard under these proposals. This means that the allegations made against all respondents will need to be proved on the balance of probabilities rather than beyond reasonable doubt. Whilst concerns have been raised that those with a protected characteristic are less able to afford representation before the Tribunal the Tribunal does not consider that

there will be an equality impact on any specific group of people. The Tribunal process and procedure will remain the same, the difference will be at a substantive hearing in terms of the standard of proof applied by the Tribunal.

9.3 The Tribunal has considered the responses to the consultation but has not identified any impact (positive or negative) of the proposed changes as part of the consultation process. The Tribunal has considered the concerns expressed in the responses to the consultation but considers that these are related to the areas of practice of specific groups rather than the impact of the proposed changes themselves.

9.4 The nature of the proposed amendments are such that any disparate impact looks very unlikely. The provisions apply equally to all and there is no basis to surmise those sharing any protected characteristic would be in any way disadvantaged. Each protected characteristic has been considered individually and the conclusions are set out below.

9.5 Protected Characteristic – Disability

9.5.1 The proposed rules would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of disability. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

9.6 Protected Characteristic – Gender (including gender identity)

9.6.1 The proposed rules would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of gender. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

9.7 Protected Characteristic – Race

9.7.1 The proposed rules would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of gender. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

9.8 Protected Characteristic – Age

9.8.1 The age of those involved in proceedings in the Tribunal varies. The proposed rules

would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of age. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

9.9 Protected Characteristic – Religion and Belief

9.9.1 The proposed rules would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of religion and belief. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

9.10 Protected Characteristic – Sexual Orientation

9.10.1 The proposed rules would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of sexual orientation. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

9.11 Protected Characteristic – Pregnancy and Maternity

9.11.1 The proposed rules would replace the existing rules and update them. It is not anticipated that the proposed rules would affect people disproportionately because of issues of pregnancy and maternity. The position will be monitored when the new rules are introduced. If any issues in respect of protected characteristics are identified by the Tribunal then these will be considered and an action plan developed.

Summary

9.12 At this stage no equality impacts have been identified. A number of concerns were expressed as part of the response to the consultation and the Tribunal has considered these but does not consider that these concerns are directly related to the proposed new rules.

10. Is a full Equality Impact Assessment Required?

10.1 This is not considered necessary.

11. Even if a full EIA is not required, you are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equality impacts. Please provide details of how you will monitor evaluate or review your proposals and when the review will take place.

11.1 This Equality Impact Assessment has been reviewed by the Policy Committee of the Solicitors Disciplinary Tribunal and signed off by the President of the Tribunal on its behalf:

A handwritten signature in black ink, appearing to read 'Edward Nally', with a stylized flourish at the end.

Signed

Edward Nally, President of the Solicitors Disciplinary Tribunal

Dated 01 April 2019