Response Form

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1. **Should the Tribunal apply the civil standard of proof in professional misconduct proceedings?**
2. **If so, should this be implemented by way of a Tribunal Rule?**

Responses:

Response to Question 1

No, the Tribunal should not apply the civil standard of proof in Professional Misconduct proceedings

The Basis for the Tribunal

This is Section 50 of the Solicitors (Scotland) Act 1980. Section 52 of the Act allows the tribunal "with the concurrence of the Lord President" to set its own rules. It most recently did this by way of the Scottish Solicitors Discipline Tribunal Rules 2008. Neither the Act nor the Rules state the standard of proof that the Tribunal has to apply.

Some significant terminology used in the Act

Section 51 allows the Council of the Law Society to appoint a solicitor "to act as fiscal".

The Act refers to a "complainer". Section 53 allows the Tribunal to find that a solicitor "has been guilty of professional misconduct". and to impose a fine not exceeding £10,000 (the limit that a sheriff can impose on a summary complaint). The terminology of fiscal, guilt, complainer and fine are all redolent of a criminal court. This is hardly surprising given that the Tribunal is quasi-criminal. The complaints that are prosecuted before it concern the most serious alleged breaches of professional standards.

Penalties

Cases of Inadequate Professional Service and Unsatisfactory Professional Conduct are not processed by the SSDT and the lower standard of "balance of probability" applies. IPS and negligence are civil in nature rather than criminal so the lower standard is proportionate and appropriate.

UPC is more penal in nature than IPS but it is lower in seriousness than Professional Misconduct so one can see the argument for the balance of probability standard applying to it. If any change should be made we believe that it should be raising the standard of beyond reasonable doubt to UPC rather than by lowering the standard in relation to Professional Misconduct.

The penalties that the SSDT may impose can easily deprive a solicitor or his or her livelihood. Striking off and suspension or a restriction on a practising certificate can end a career. So can a heavy fine. In addition, unlike the criminal courts, not only can the Tribunal impose a fine, it can require the solicitor to pay the expenses of the Fiscal and the Clerk and the Tribunal. Also unlike many offenders in the criminal courts, a solicitor can have his or her name published in the Journal of the Law Society of Scotland, on the web and generally made public. Loss of reputation can be extremely damaging and embarrassing regardless of how serious the sanction is.

The Public Interest

It is not in the general public interest to have a legal profession in Scotland where solicitors are unable to do their job without fear of being unfairly accused of misconduct by disgruntled clients or third parties, of which there are many, and faced with prosecution before a tribunal applying what is a relatively low standard of proof. Of course there is a public interest, one shared with the profession, in ensuring that solicitors guilty of Professional Misconduct should be prosecuted and brought to account just as that accused persons found guilty should be convicted. Point 13 of the Consultation document states;

"proponents of the civil standard argue that it is not in the public interest for solicitors to avoid a disciplinary sanction when it is **more likely than not** that they are guilty of professional misconduct."

However, if the argument is deployed that some solicitors who are probably guilty should not escape conviction and sanction the logical step must be to remove the "beyond reasonable doubt" standard in every forum, including the criminal courts. After all, the argument must be that some criminals are able to escape justice when it is more likely than not that they are guilty.

It is also important to note that accused persons have more protection in the criminal courts than do solicitors who are prosecuted before the SSDT. In a trial the Crown requires to corroborate its evidence. It cannot rely on hearsay. In practice the accused has the right to silence. He or she need not incriminate himself or herself. However, a solicitor who declines to explain himself or herself before the SSDT will be taken to have refused to co-operate, with adverse consequences. It is therefore even more appropriate important and reasonable that the standard in the SSDT should be that of beyond reasonable doubt.

Balancing of interests

In our view the fairest way of balancing the interests of the profession and the public is to leave matters as they are. The Privy Council held in the Trinidad and Tobago appeal case of *Campbell v Hamlet*, 25th April 2005 that the criminal standard of proof is the correct standard in all disciplinary proceedings concerning the legal profession. Other authority was quoted which supported that conclusion. We assume that the Privy Council felt that this was fair to the public, consumers and the legal profession.

We do not consider that the parallel consultation process in England, with its references to English cases and institutions such as the SRA should determine how things are done in Scotland. Our system is independent.

Response to Question 2

No. This proposal should not be implemented by a rule change. If it is to be made at all a matter of such importance should be by amendment to the Solicitors (Scotland) Act 1980. It would be interesting to observe how that statutory change stood up to scrutiny if a Human Rights point were to be taken.

The Glasgow Bar Association

18th June 2019