



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 Board<sup>1</sup> 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."*<sup>2</sup>

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

<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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 point<sup>4</sup> 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](mailto:lau.ciocan@legalservicesconsumerpanel.org.uk).

Yours sincerely

Sarah Chambers



Chair

Legal Services Consumer Panel

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