The standard of proof applied by the Solicitors Disciplinary Tribunal
1. Introduction

1.1 Background

The Solicitors Disciplinary Tribunal ("the Tribunal") is expected to review the standard of proof it applies as part of a wider consultation on the Solicitors Disciplinary Proceedings Rules 2007 ("the rules"). The review is expected to be launched towards the end of 2017. The Law Society is seeking members' views, as this will help us to engage with the Tribunal.

1.2 Role of the Tribunal

The Solicitors Disciplinary Tribunal is a statutory tribunal established in 1975 by section 46(1) of the Solicitors Act 1974. The Tribunal adjudicates upon alleged breaches of the rules and regulations applicable to solicitors and their firms. It acts as both a first instance decision maker and as an appellate body, considering appeals of decisions made by the Solicitors Regulation Authority (SRA).

As a first instance decision maker, the Tribunal considers the most serious allegations relating to alleged professional misconduct against individual solicitors and firms. The SRA prosecutes cases at the Tribunal when the SRA's own powers are not considered sufficient. This is an arrangement, which is comparable to the court system, where the Magistrates' Court will deal with less serious cases and refer more serious cases to the Crown Court.

Section 46 of the Solicitors Act provides the Tribunal with a wide discretion to regulate its own procedure. It is important that the Tribunal's independence and role in directing its own procedures is respected. The purpose of this paper is to present the Law Society's current position relating to the standards of proof. A position that has been carefully examined by members serving on the Society's Regulatory Processes Committee, Regulatory Affairs Board and Council; however, we are eager to hear the views of the Society's wider membership on this topic.

2. Standard of proof

2.1 Criminal standard vs civil standard

'Standard of proof' can be loosely defined as the level of certainty and quantum of evidence that must be presented before a fact can be said to exist or not exist. As the type of cases before a court can be classified into criminal or civil, so can the standard of proof. The criminal standard is usually defined as 'beyond reasonable doubt' and the civil standard is based upon the 'balance of probabilities'.

2.2 Current position

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 and it is appropriate that where a solicitor's livelihood is at risk, the criminal standard of proof is applied.
Until relatively recently, the standard of proof used for all disciplinary proceedings against solicitors was the criminal standard. In 2010, the SRA began to use its newly enhanced disciplinary powers and, following considerable discussion with the Society and others, opted to use the civil standard of proof. This decision was made in the knowledge that it would create a discrepancy with the Tribunal's procedures and rules, particularly concerning appeals.

Since 2010, there has been increased discussion relating to the suitability of the Tribunal's application of the criminal standard. Those who have argued that the solicitors' profession should move to the civil standard of proof, tend to do so based on comparisons with other regulated sectors. The Society is keen that any decisions that are made should be evidence-based and appropriate to the solicitors' profession. In short, we should not follow other sectors without establishing whether this is in fact the best approach for our specific sector. The Law Society has yet to see any evidence that the current system is problematic in practice. Evidence should be gathered and analysed carefully before a decision is made and there should be a thorough impact assessment.

2.3 The criminal standard of proof: the arguments

The main reason for using the criminal standard of proof is the significant impact that adverse decisions can have on the individuals subject to tribunal proceedings. 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.

It can be argued that the solicitors' disciplinary process, where it is the full might of the regulator against an individual solicitor, is more closely comparable to a criminal trial than civil proceedings, due to the inequality of arms between the two sides. Fair treatment for all is part of upholding the Rule of Law. Solicitors also have a right to a fair hearing under the rules of natural justice, the European Convention on Human Rights and section 6 of the Human Rights Act 1998.

The vast majority of case law supports the use of the criminal standard of proof in Tribunal proceedings. In Fish v. GMC, Foskett J said:

"An allegation of dishonesty should not be found to be established against anyone... except on solid grounds... An allegation of dishonesty against a professional person is one of the allegations that he or she fears most. It is often easily made, sometimes not easily defended and, if it sticks, can be... career-ending... [I]t is an allegation... that should not be made without good..."
At the end of the day, no-one should be found to have been dishonest on a side wind or by some kind of default setting in the mechanism of the inquiry. It is an issue that must be articulated, addressed and adjudged head-on."

2.4 The civil standard of proof: the arguments

The main arguments articulated in support of the civil standard of proof are that:

a) It would make it easier and cheaper for the SRA to prosecute cases;

b) Client protection - there is a perception that the criminal standard protects solicitors rather than clients\(^5\); and

c) Most other sectors use this approach.

The first two arguments assume that the regulator currently has difficulty in prosecuting cases, yet the Law Society has seen no evidence to support this. Indeed, the SRA’s successful prosecutions are widely understood to be very high. Without evidence of detriment under the current arrangements, it is hard to assess whether the consumer protection argument has any merit.

2.5 Are there any other approaches?

2.5.1 "Clear and convincing evidence"

There is a third option available, beyond the binary choice of either the civil or the criminal standard of proof. An instance of the use of such a standard of proof outside those two choices comes from the USA, where the American Bar Association (ABA)’s Model Rules for Lawyer Disciplinary Enforcement\(^6\) lay out a different standard of proof (Rule 18). As is usual with ABA Model Rules, it has been variously adopted in the states, and so this explanation is based on the Model Rule itself, and not on its implementation in any particular state.

The proceedings themselves are ‘sui generis’, being neither civil nor criminal but specific to lawyer discipline. The standard of proof is ‘clear and convincing evidence’, which is described as ‘higher than "preponderance of the weight of credible evidence" which is usually deemed sufficient in civil proceedings, yet not as stringent as "beyond a reasonable doubt" required in criminal cases.’ This is used in ‘Formal charges of misconduct, lesser misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status’.

Interestingly, the burden of meeting the standard of proof switches, depending on the circumstances: in proceedings seeking discipline or transfer to disability inactive

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\(^5\) LSB thematic review of regulators’ disciplinary and enforcement procedures - http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf

\(^6\) https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html
status, the burden is on disciplinary counsel; in proceedings seeking reinstatement, readmission, or transfer from disability inactive status, it is on the respondent.

2.5.2 The "sliding scale" approach

Some regulators are said to have adopted a 'sliding scale' approach to the standard of proof. This approach is increasingly being rejected. Re B [2008], confirmed that there is no sliding scale, that the balance of probabilities test is the scenario or version of events (advanced by the parties), which more probably took place, taking the overall inherent probabilities into account. In Hannam v FCA [2014], the Upper Tribunal said that the sliding scale had been "exposed as heresy". The tribunal said that the normal standard is civil but "there are some civil proceedings in which the criminal standard is applied".  

3. Summary of questions

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

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?

Question 3. Are you aware of any other issues with the Solicitors Disciplinary Proceedings Rules 2007 that should be raised with the Tribunal as part of its review?

4. How to respond

Please send your views via email to regulatoryaffairs@lawsociety.org.uk or by post to:

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7 https://doctorsdefenceservice.com/regulatory-case-law/
8 Hannam v Financial Conduct Authority [2014] UKUT 0233 TCC