

In Defence of the SSDT Quasi-Criminal Prosecution System

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The Scottish Solicitors Discipline Tribunal consulted last year on the standard of proof which it should adopt in relation to misconduct cases. Unusually for a consultation there was no steer on the part of the Tribunal as to why it was consulting again after only six years and whether it was proposing change or not. Furthermore the Tribunal adopted new rules in 2024 and at that time there was no suggestion of changes to the standard; the Tribunal has hitherto applied 'beyond a reasonable doubt' (criminal standard) in misconduct cases. In other matters which are referred to the Tribunal the standard applied is the 'balance of probabilities' (civil standard).

The History of the provisions

The Legal Aid and Solicitors (Scotland) Act 1949 made brief reference to disciplinary matters; s23 referred to complaints being made and gave the Law Society of Scotland [LSS] power to appoint a "fiscal" to investigate and "prosecute complaints". Those words are suggestive of a quasi-criminal process. Those provisions were brief in the extreme and matters were accordingly largely left to the LSS to develop. The 1949 Act refers to striking from the roll and suspension somewhat obliquely in s24. It is clear that these potential sanctions can lead to a temporary or permanent removal of a practitioner's livelihood. From that time the practice in such matters was to apply the criminal standard which makes sense when the consequences are so severe.

Those provisions were entirely replaced by the Solicitors (Scotland) Act 1980 which has been heavily amended over the years but remains the bedrock of the process. Section 51 of the Act retains the language of "complaint" and "fiscal". The criminal standard is still suggested. Looking at the powers of the Tribunal set out in Schedule 4 to the Act para 13 The Tribunal shall set out in their decision ... including particulars of the "conviction and sentence". Once more the language used is associated with criminal activity. The Scottish Parliament has scrutinised this Act on several occasions, most recently with the Regulation of Legal Services (Scotland) Act 2025 and has chosen not to amend the wording. This is, it is submitted, significant.

The powers of the Tribunal are now much more extensive than those it enjoyed under the 1949 Act and the 2025 has replaced the maximum "fine" (again a term from criminal law) of £10,000 with unlimited fines. That may have been necessary to comply with the anti-money laundering

regime which ironically the Chancellor of the Exchequer announced in the autumn of 2025 is to be removed from professional bodies such as the LSS and given to the Financial Conduct Authority. It is a remarkable power which could put out of business even the largest of practices.

Judicial Pronouncements on the Standard

As recently as 2005 in, *Campbell v Hamlet* [2005] UKPC 19, a case before the Privy Council, their Lordships opined "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." Now of course that case originating in Trinidad and Tobago is not binding in Scotland but remains highly persuasive. Since that time standards in other professional tribunals for medical professionals (following the Harold Shipman case) and vets (by Order in Council) have adopted the civil standard. In *Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (known as *Arslan*) in *obiter* comments the Divisional Court expressed the view that the decision in *Campbell v Hamlet* was ripe for reconsideration but declined to express matters more directly on the basis those comments would themselves be *obiter* and not binding. Since *Arslan* the Solicitors Disciplinary Tribunal in England has adopted the civil standard through a rule change.

The SSDT itself has equated proceedings before the Tribunal with criminal proceedings for driving while disqualified. *O'Donnell* [2018] SSDT 1744 (preliminary pleas).

2025 Consultation

The SSDT consultation in 2025 came as something of a surprise having consulted on the matter in 2019 when it concluded that the criminal standard should remain. It has not explained what changes in circumstances have occurred in the intervening six years justifying reconsideration. SLAS responded to the consultation, making this point and advocating retention of the criminal standard. The SSDT statement on adopting the civil standard was terse, comprising 93 words and stating that members of the Tribunal had voted and determined to adopt that standard. There has not been any publication of the responses received nor any development of arguments for and against departing from the established standard. All of which would be good practice for any public body. Nor has the Tribunal made any statement of how the change is to be effected and how it would apply to cases currently initiated which have yet to be heard. These are significant issues to be resolved

It is not known how many submissions were received; none are published on the SSDT website nor any

summary or of the arguments which the members of the SSDT considered. Some of the submissions of other players in the field have been made available via those organisations. The Law Society of Scotland made two conjoined submissions, one from the Council of the Law Society which recommended retention of the criminal standard and one from the now largely autonomous Regulatory Committee which of course deals with investigations of complaints of misconduct recommended adoption of the civil standard.

Absence of evidence from SSDT decisions of need to change

It is not clear from the published decisions of the SSDT on how many occasions the standard of proof is even addressed. In many cases the conduct itself is not in issue; rather it is the complexion of that conduct which is not a matter of proof but the exercise of some sort of measuring against the *Sharp* test of serious and reprehensible breach of the standard expected of a solicitor. A review of cases before the SSDT through 2025 revealed five cases where misconduct was not established. In none was the standard of proof an issue. Two, *Bisiaux* and *Oliver*, the pleadings on behalf of the LSS were inadequate. See panel below.

Docherty [2025] SSDT 1998

Not guilty of misconduct. In offering settlement of claim included condition to withdraw complaint against his firm. Held this conduct fell well short of the standard required but was not misconduct.

Bisiaux [2025] SSDT 2012

Firm held historic balances at 2019 inspection. Intervention on closure of firm in 2021 which itself followed on further inspection. LSS had no or insufficient details of how long balances had been held. Firm was in surplus to extent of £15k at time of intervention. SSDT held there was insufficient information to constitute misconduct.

Campbell [2025] SSDT 1982

Solicitor bought property with mortgage which was let to friend's mother with the friend providing the deposit. On her death solicitor retained part of the sale price and remitted balance to friend. SSDT that no legal service had been provided to friend and while this may have amounted to unsatisfactory professional conduct fell short of misconduct.

Berlow [2025] SSDT 1999

The solicitor had made a series of online comments robustly expressed in response to posts he considered antisemitic. The SSDT was aware of his Art 10 right to free speech. It was determined that none of the comment amounted to misconduct.

Millar & Campbell [2025] SSDT 2000 & 2001

The solicitor and her assistant acted for a company in relation to the creation of a commercial lease. Two years later while with a new firm that accepted instructions from another company in relation to the purchase of the property by the new company which had been successful on offering at auction. They had not examined the legal pack prior to the auction so the complainer was obliged to proceed with the purchase with title etc as it stood. SSDT held that in the circumstances there was no misconduct by serial conflict of interest. Nonetheless their conduct might have amounted to unsatisfactory conduct.

Oliver [2025] SSDT 2011

The solicitor was charged with having acted for the executor and one of the beneficiaries of the estate as well as another beneficiary. The SSDT dismissed the complaint as irrelevant as there were no averments that he had acted for the other beneficiary.

It is accepted that in one other case, *Woodburn* [2025] SSDT 2010, where a variety of analogous matters were averred, one element was not upheld on the basis that the evidence was insufficient. The case was one of personal conduct in relation to a junior member of staff. That however did not prevent findings of misconduct in relation to other elements and made no difference to the outcome.

Any change in standard would, it is submitted, open up the possibility of more complaints in two categories. Firstly in relation to 'guilt by association' cases. In *Fyfe* [2016] SSDT 1718 the solicitor was found to have 'permitted or acquiesced' in a scheme whereby payments were made to firm account rather than client account. Where misconduct is suspected by a principal of their colleague then there may already be a reluctance to report this where they may be dragged into the frame by association. Protections for whistleblowing are, in our view, already inadequate. Guilt by association cases in our view are more likely to occur with the civil standard and this is a concern.

Secondly, personal conduct cases such as *Woodburn*, would, it is submitted, become more common with the civil standard of proof. They are often 'he said, she said' matters which, in our view, are more HR cases rather than matters of professional misconduct. It is noted that the SSDT south of the border seems to have heard a spate of such cases since the civil standard was adopted. We do not condone the conduct in such cases and while more serious cases ought properly to be brought to the attention of the SSDT it seems to us that such matters may more appropriately be dealt with by HR professionals or in some cases Employment Tribunals. The SSDT, in our

view, is not the appropriate forum for such cases which may be encouraged by the civil standard being applied.

The consequences of a finding of professional misconduct are severe. Even if the sanction applied is not strike off, a fine under the 2025 Act can be unlimited and the costs of a case plus the expenses awarded to the Society can exceed the ability of a practitioner to pay. The removal of the ability to enjoy the right to practice and the fruits thereof are possessions protected by A1P1 ECHR. There is no doubt that the Tribunal is a public body in Scotland and must apply Convention rights is reaching a decision, something the SSDT acknowledged in *Berlow* [2025] SdT 1999, in relation to freedom of speech. Thus the Tribunal must determine in broad terms whether the sanction serves a legitimate purpose and that the measure adopted is proportionate, that no less serious sanction can be applied which would secure the same outcome. Public protection is clearly a legitimate purpose and it remains a matter for the SSDT to deliberate on whether a sanction less than striking off could achieve the same result. Sanction of course only becomes a live issue where the facts have been established by whichever standard is applied. The Regulatory Committee of LSS suggested in their response to the SSDT consultation supporting the lower standard there might be finding of misconduct but no sanction. That fails to consider that sanction only follows a finding of misconduct, rendering their argument entirely spurious. It also fails to address the *Sharp* test of serious and reprehensible breach being established for there to be misconduct and then to apply no sanction; that would constitute a dereliction of duty by the SSDT.

The references in the 1980 Act and in the 2024 Rules to "guilty", "prosecution", "fiscal" and "fine". Outcomes are treated like "convictions"; a solicitor's "Record" is lodged with SSDT by the fiscal. It is not suggested that Scottish solicitors are privileged, falling into a special category, which justifies retention of the criminal standard. Rather, it is submitted that the Scottish legislation falls into a special category and borrows from the language of criminal law. As a result the standard of evidence required should be commensurate with the statutory scheme. Whether the 1980 Act provisions are by accident or design is not the matter of debate; the scheme was not amended in the 2025 Act even in relation to the language employed. The only conclusion which can be reached is that the criminal standard remains appropriate.

Unprofessional Conduct was introduced in the 2007 Act by the Scottish Parliament as conduct which is not of the standard which could reasonably be expected of a competent and reputable solicitor...but which does not amount to professional misconduct". There is no suggestion in the legislation that the criminal style

process should apply and the civil standard has been applied since then.

CLSS and the Profession seem to have understood the need for balance between protection of the public and fairness and natural justice for solicitors in relation to misconduct matters.

As noted above the Regulatory Committee advocated for change to the civil standard as aligned with other tribunals of a similar nature without recognising the legislative framework which sets matters apart. The Committee were of the view that the proceedings were civil in nature and the criminal standard had no place in regulatory disciplinary proceedings. They cite "public perception" as requiring the civil standard but offer no evidence in support. No account seems to have been taken of the absence of any cases before the SSDT being lost for want of establishing the criminal standard.

In summary, the existing system works perfectly well for everyone. It is a Scottish system tried and tested utilising a robust model robust producing fair results, with the protection of the public uppermost. The case for change has not been made out.