



Law Society
of Scotland

Consultation Response

Scottish Solicitors' Discipline Tribunal (SSDT) Rules Consultation

January 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

This response is submitted on behalf of the Regulatory Committee of the Law Society of Scotland. The Regulatory Committee (the committee) is a committee of the Council of the Law Society, but exercises the Law Society's regulatory functions independently of the Council, as set out in Section 3F of the Solicitors (Scotland) Act 1980. The committee's core purpose is to ensure that the regulatory functions are exercised independently, properly, and with a view to achieving public confidence and protection.

The committee welcomes the opportunity to consider and respond to the Scottish Solicitors' Discipline Tribunal (SSDT) Rules Consultation. In preparing this response, the committee has been assisted by a working party with a membership comprised of the Clerks to the Professional Conduct Committee, In House Fiscals and external Fiscals. The committee's response to the consultation is set out below.

Specific Comments

1. Standard of Proof

Should the Tribunal include the applicable standard of proof in the new rules?

We have some concern at the suggestion that the standard of proof sits within any new rules. The standard of proof is an evidential burden not a rule and therefore in our view it would be inappropriate to include within rules. In addition, as we understand, the Lord President has the responsibility to approve any new rules.

2. Overriding Objective

Should the Tribunal include an overriding objective in its new rules? If so, what should this include?

We do not think that this is needed. However, as noted within the consultation paper, we recognise that many other tribunals have overarching objectives set out within their own respective rules. In addition, regulators of the legal profession, such as the Law Society of Scotland, have statutory overriding objectives (see section 1 Legal Services (Scotland) Act 2010). If an overriding objective is to be set out within rules, then in considering what should be included within the objective, we suggest that the SSDT looks towards adopting a general wording which promotes and reflects the interests of, and access to, justice.

3. Pleadings

Should the Tribunal continue to follow the system of having a Complaint and Answers? What improvements could be made to make the system more efficient but maintain flexibility? Should the Tribunal have the power to issue directions that the Respondent provides Answers? What should the consequences be for failing to comply? Should there be rules governing procedures for making and determining preliminary pleas raised in the pleadings?

Our view is that the current process of complaint and answer should continue. However, we suggest that consideration should be given to introducing a rule precluding a respondent from lodging late answers, except where the respondent has sought and been granted an order allowing an extension of time. We also suggest that where a respondent has failed to lodge answers then the respondent should be excluded from leading any evidence and be restricted to cross examination.

In addition, where a respondent has failed to lodge any answers, we suggest that notice be given that as the respondent has failed to lodge answers, an order may be sought to prevent the complaint being contested on grounds upon which no notice has been given.

We further suggest that consideration be given to introducing a similar type rule to the Rule 22 Note in Sheriff Court proceedings whereby if a preliminary plea is to be taken, the party advancing that preliminary plea should be ordained to provide a note in support of that within a prescribed period of time.

It would be helpful to expressly state within the rules what should be in the form of complaint. The current rules simply require a brief statement of fact to be set out. However, in practice Averments of Duty and Averments of Professional Misconduct are included, although these are not expressly required. This developed practice has proved helpful and we suggest that consideration be given for this to be incorporated in a new set of rules.

4. Case management

Should the Tribunal incorporate case management powers into its rules? What should be included?

We are supportive of the proposal to incorporate case management powers, therefore realising the benefits that case management can bring and ensuring a helpful, clear and consistent approach to ensure cases are dealt with justly and efficiently, and in a timely manner. Other types of litigation, and legal services, have already embraced case management and the benefits have been recognised. We also suggest that within case management there should be an obligation on any party seeking to use expert evidence, to advise both the SSDT and opposing party by a certain date which is fixed to give reasonable notice and allow the opposite party to consider and prepare for cross examination if appropriate.

5. Service and electronic communication

Should the rules allow for electronic service? Should digital signatures be required? Should there be provisions for deemed and substituted service? Could some hearings be dealt with by video link or telephone conference?

We believe that electronic service is an appropriate and competent method of service subject to the SSDT being able to satisfy itself that delivery has been effected on the recipient. Electronic service is widely used and accepted by many regulators as an effective and appropriate method of service. Therefore, there is opportunity for the SSDT to develop a robust process, perhaps considering encrypted service wherever possible to safeguard rights under GDPR.

In our view it would be appropriate, dependent on circumstances, for some hearings to be dealt with by way of video and audio conference call. The consultation is not clear on whether the decision to deal with a case via audio/video will be one for the Tribunal alone or if this is something for the parties to request and if agreement by all parties will be needed. There may be cases where witnesses are to be called. In those circumstances we believe that video / audio should only be used where there is agreement by all parties. However, there may be occasions where it would be more appropriate for the hearing to proceed via audio/video, for example where one party may be a vulnerable witness or perhaps have mobility issues. Therefore, we suggest that it would be helpful for the SSDT to have a residual general power to deal with some hearings via audio/video given the particular circumstances of the parties.

6. Compensation hearing

Are the current arrangements for Compensation Hearings satisfactory? Should these be provided for in the Rules? Should there be provision for a Tribunal or one of the Chairs/Vice Chairs to deal with compensation based on the papers submitted rather than convening a hearing? What could be done to simplify and streamline the procedure for Respondents and Secondary Complainers?

Yes. Our view is that the current arrangements for compensation hearings are satisfactory. However, we suggest that consideration should be given to compensation hearings having its own separate set of rules. We agree that a provision for a tribunal or one of the Chairs/Vice Chairs to deal with compensation based on the papers submitted rather than convening a hearing would be appropriate. However, there should be the option for the complainer to request a hearing as an alternative.

7. Affidavits

Consultation: Should the new rules extend the use of affidavits to all cases? What procedures ought to be in place to ensure fairness to all?

Yes, we agree that there should be provision allowing affidavits to be used in all cases, however this should stop short of making affidavits compulsory as this may result in such affidavits been considered as evidence in chief by the witness. Such an approach, as adopted by the Court of Session and Sheriff Court in family matters, has resulted in confusion and procedural difficulties. Parties should be permitted to provide affidavits if they so wish, but in doing it is suggested that they be required to provide details as to whom the affidavit originates from and the purpose. The use of affidavits is likely to reduce the length of proceedings and produce cost savings. However, the option should remain open for the witness to be called should any party wish to do so, for example where there are perhaps gaps within the affidavit statements.

8. Vulnerable Witnesses

How should vulnerable witnesses be identified? Should the rules define vulnerability? What special measures should be available? What procedures should be provided for in the rules?

We agree that it would be challenging to define vulnerability as this is subjective dependant on the circumstances, capacity and characteristics of the individual. Perhaps a useful starting point may be the protected characteristics as set out within the Equality Act 2010 and the provisions of the Sheriff Court Ordinary Cause Rules. In relation to special measures, there should be such measures permissible so as to ensure that any vulnerable witness feels able and comfortable to provide their best evidence with no undue stress, which at times can be associated with giving evidence. Several

court and tribunal structures and processes already adopt special measures for vulnerable witnesses and therefore the Rules Group may benefit from looking at these closely.

9. Extract convictions

Should criminal and disciplinary convictions be proved in the ways described above?

We agree that it would be a sensible and logical approach for a conviction of an offence to be proved and evidenced by production of the extract of conviction.

10. Respondents lacking mental capacity / suffering from a mental disorder

Should the Tribunal make provision in its Rules for Respondents to raise issues of capacity?

We agree with this proposal and we note that the SSDT already permit respondents to raise issues relating to mental disorder and fitness and it retains the power to dispose of the cases fairly taking these factors into account, but this is rarely invoked.

However, consideration needs to be given as to when the issues of capacity arose. For example, the issue of capacity at the time of the alleged misconduct, which potentially may be raised as a full or partial defence and issues of capacity at the time of the tribunal hearing, affecting the ability of the respondent to provide adequate instruction or appear before the tribunal. It may therefore be necessary to consider how any rules would approach each situation.

11. Expenses

Should the Tribunal's practice regarding award of expenses be reconsidered? What alternatives could be workable for the Tribunal? Should the unit rate be linked to the rate set by the Lord President for judicial expenses?

Our view is that is that the current position whereby expenses are generally awarded on an agent and client, client paying basis is appropriate and should continue. We agree that in reviewing the unit rate, this should be aligned to the rate set by the Lord President for judicial expenses

12. Particular issues with the 2008 Rules

Are there any other views or suggestions regarding the Rules which have not been raised in this consultation document?

We have set out our suggestions and concerns below:

Rule 2

This relates to interpretation and definitions. A number of the terms used, and the related definitions within Rule 2 appear to have been lifted directly from section 46 Legal Profession and Legal Aid (Scotland) Act 2007, and in our view do not accurately reflect the current processes. For example, 'secondary complainer'; the complaint is always run in the name of the Law Society Council by virtue of section 51 of the 1980 Act. Therefore, the definition may be considered as incompatible with section 51.

Rule 3

We agree that Rule 3 (2) should be amended and reflect section 53 (1) of the 1980 Act to refer to a term of imprisonment of 12 months or more. Section 53 of the 1980 Act was amended by the Legal Services Scotland Act 2010. Prior to that date it mirrored the wording presently set out within the 2008 Rules.

Rules 4 and 5

We agree with the views, as set out within the consultation document, that there is too great an obligation placed on the Law Society Council to contact every secondary complainer. Perhaps the obligation should be restricted. For example, the obligation to intimate to the secondary complainer that there may be a right to seek compensation but not requiring to seek confirmation whether they intend to make a claim. The secondary complainer can thereafter make a separate claim within a specified time limit and it is not incumbent upon the Council securing that information before being able to lodge the complaint.

In relation to secondary complainers, we suggest that it should be the responsibility of the SSDT to keep secondary complainers informed of the progress or otherwise of a prosecution in particular in relation to claims for compensation and compensatory hearings. Fiscals do not and should not have input into secondary complainers claims for compensation as they cannot represent a secondary complainer. In our view it would be more appropriate for the SSDT to inform secondary complainers of timetables to help to avoid any confusion for secondary complainers of the role of the Fiscal in relation to their claim.

Rule 6

We agree with suggested changes to Rule 6 as set out within the consultation document and which correspond to an extent, to our suggestion in relation to Pleadings as set out above at number 3.

Rule 9

See our response to 'Pleadings' at number 3 above.

Rule 12

We agree with the views of the Rules Group that it would be sensible and consistent to introduce a change to the rule whereby there is a fourteen day time limit for intimation of both productions and witnesses prior to a hearing. We expect that this would be incorporated into any case management provisions included within the new rules.

Rule 14

The secondary complainer is designated as a party to the complaint and should not be excluded from the proceedings.

14(4) We believe that case law and jurisprudence is sufficiently clear without the necessity of a rule. However, it may provide certainty for this to be included within a rule.

14 (5)(a) Our view is that the current process, whereby there is no requirement for documents to be spoken to by any person, is fair and permits hearings to proceed if the respondent fails to turn up. It is worth noting, for example, that there is no obligation in civil proceedings to lead evidence of the validity of for example documents of debt in undefended cases.

Rules 21 – 26

In our view, these rules are collectively unclear in relation to dealing with an appeal marked by a party litigant. The party litigant appears to be given longer than the twenty one day time limit to comply with Rule 21. In our experience what inevitably happens is a party litigant lodges an appeal on the twenty first day in terms of Form 4 but does not set out what the grounds of appeal are and why the appeal should be considered by the SSDT. Those litigants are then given a further period within which to amplify upon the Form 4 which goes beyond the time limit specified within the rule. This, in our view, is arguably incompetent.

We suggest that the rules should make it clear that where an appeal is lodged in terms of Form 4, this should set out in full the grounds of appeal in the correct form and where this is not the case then it should be rejected at the outset. The current process effectively allows appellants to extend the twenty one day time limit.

Rule 40

Yes, we agree with the suggestion that there should be sanctions for failing to comply with a direction of the SSDT. We suggest that it may be appropriate to consider incorporating into the new rules for case management so that if a party fails to comply with either a direction or a time limit within the case management procedure, there would be some form of sanction or “By Order Hearing” to enquire of the defaulting party why they have done so, with a potential penalty in expenses. However, and separately, if a sanction would be to have a right of argument removed then it is proper the SSDT/ should give a formal warning first to the defaulting party which provides the option of compliance.

Rule 41 and 42

We suggest that consideration be given to amending these rules to reflect that the SSDT should be issuing an interlocutor to all parties following any hearing which takes place. It is particularly important where there is either a Procedural or a Preliminary Hearing, for both parties to know exactly what the tribunal’s decision was and how it has been recorded by the SSDT. This would ensure certainty for all parties and remove potential challenges where there have been views expressed by the tribunal but these are not recorded in a formal interlocutor.

Rule 45

We believe that the SSDT should have a general power to allow amendments and corrections to ensure an efficient process.

Rule 50

We have no objection to amendments to Rule 50 to streamline the process providing that any amendments retain the duty to provide proper notice and opportunity to comply where the tribunal is going to restrict a party from fully arguing their positions for failing to comply with directions.

Rule 53

We are aware that Rule 53 is currently the focus an ongoing matter which is being considered by the SSDT and therefore we are not in a position to comment.

Rule 55

From our reading of Rule 39 in conjunction with para 4 of sch 4 to the 1980 Act, there does not appear to be anything that restricts the chair or vice chair to solicitor members. Perhaps this could be explored and attended to in the SSDT’s own practice?

Miscellaneous and additional comments

We agree with the proposal to adopt gender neutral terms in relation to Chair and Vice Chair.

We agree that it would be sensible to replicate the procedure for citing witness, which is set out within the 1980 Act, into the rules.

In addition, and overall, we believe that the rules should be as specific as possible, but provide for a general dispensing power in relation to any breaches of those rules.

For further information, please contact:

Brian Simpson
Regulation Policy Executive
Law Society of Scotland
DD: 0131 476 8184
briansimpson@lawscot.org.uk