

SOLICITORS DISCIPLINARY TRIBUNAL

APPLICATION FOR THE MAKING OF PROPOSED NEW
SOLICITORS (DISCIPLINARY PROCEEDINGS) RULES

INDEPENDENT - IMPARTIAL - TRANSPARENT



For approval by the Legal Services Board

This application is made by the Solicitors Disciplinary Tribunal (“Tribunal”) to the Legal Services Board (“LSB”) as the Tribunal wishes to make an alteration to its rules under section 46(9)(b) of the Solicitors Act 1974 and seeks the LSB’s approval to the alteration in accordance with sections 178(2) and (3) of and Part 3 of Schedule 4 to the Legal Services Act 2007. This application is made in accordance with the LSB’s Rules for Rule Change Applications - Version 2 (November 2010).

The Tribunal wishes to provide the information below to support its application.

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Supporting Materials:

- Annex 1:** Table setting out the changes in the proposed new Rules and whether the individual rules formed part of the Solicitors (Disciplinary Proceedings) Rules 2007
- Annex 2:** The proposed Solicitors (Disciplinary Proceedings) Rules
- Annex 3:** Equality Impact Assessment
- Annex 4:** Consultation Response

1. Summary

- 1.1 This is an application for LSB approval of alterations to the Tribunal's rules in accordance with Part 3 of Schedule 4 to the Legal Services Act 2007.
- 1.2 The proposed new Solicitors (Disciplinary Proceedings) Rules include a specific rule specifying the standard of proof that the Tribunal wishes to use in disciplinary proceedings before the Tribunal. The proposed rules also contain a number of changes to the current Solicitors (Disciplinary Proceedings) Rules 2007 ("the 2007 Rules"), effected by a complete replacement of those rules. The Tribunal has consulted publicly in respect of the proposed changes.
- 1.3 The standard of proof currently applied to first instance proceedings before the Tribunal is the criminal standard (sometimes referred to as "beyond reasonable doubt"). The Tribunal is requesting approval to amend the standard of proof applicable in the Tribunal to allow the civil standard to be applied ("on the balance of probabilities"). The Tribunal recognises that this is the most significant change it proposes.

2. Background

2.1 Current position

- 2.1.1 The Tribunal is constituted as a statutory tribunal under Section 46 of the Solicitors Act 1974. The Tribunal adjudicates upon alleged breaches of rules of the Solicitors Code of Conduct, which are designed to protect the public and maintain public confidence in the legal profession, by defining standards for honesty, probity, trustworthiness, independence and integrity. The Tribunal also adjudicates upon the alleged misconduct of recognised bodies, registered foreign lawyers and persons employed by solicitors. It also hears applications for restoration to the Solicitors' Roll.
- 2.1.2 Section 46 of the Solicitors Act 1974 enables the Tribunal to make rules about its procedures. The Tribunal already has rules in place (the 2007 Rules) which are used in relation to the Tribunal's disciplinary jurisdiction. The Tribunal considers that it needs to update these rules.
- 2.1.3 Under the Legal Services Act 2007 ("the LSA"), the LSB is responsible for considering an application by the Tribunal for approval of an alteration of a rule the Tribunal has made under section 46(9)(b) of the Solicitors Act 1974.

2.2 Standard of Proof: Background

- 2.2.1 Historically, the use of the criminal standard of proof in relation to professional misconduct allegations was comparatively common amongst professional tribunals prior to 2008. The Shipman enquiry encouraged the medical professions to consider whether the use of the criminal standard remained appropriate in the public interest. By 2010 all the medical professions that had applied the criminal standard had moved to the civil standard. Apart from the Tribunal, the Royal College of Veterinary Surgeons (“RCVS”) is the only remaining professional regulator in England and Wales that applies the criminal standard when determining allegations of professional misconduct.
- 2.2.2 The Bar Standards Board has recently moved to the civil standard of proof. All of the approved regulators under the LSA now apply the civil standard. This includes the SRA who are the applicant in the majority of first instance proceedings before the Tribunal.
- 2.2.3 The Tribunal applies the criminal standard of proof to first instance proceedings before it. However, it applies the civil standard to determination of appeals under s.44E of the Solicitors Act 1974 (appeals against written rebukes and directions to pay penalties of less than £2,000 given by the Solicitors Regulation Authority (“SRA”)).
- 2.2.4 The LSB has clearly stated on numerous occasions that it considers that the civil standard is the appropriate standard to apply in disciplinary proceedings. This view was set out in the LSB’s paper “Regulatory sanctions and appeals processes; An assessment of the current arrangements”¹ (March 2014) in which it recommended the application of the civil standard across all legal regulators. In its March 2019 report “Enforcement in legal services regulation”² the LSB stated “The LSB remains committed to the consistent use of the civil standard of proof. However, the position has moved on significantly since 2014 and a blanket policy position is no longer required.”
- 2.2.5 The decision in The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal [2016] EWHC 2862 (Admin) did not directly address the issue of the standard of proof that the Tribunal should apply to first instance cases of professional misconduct. However there was some relevant, non-binding comment.

¹https://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf

² https://www.legalservicesboard.org.uk/Projects/pdf/2019/Enforcement_report_Final.pdf

2.2.6 Leggatt J³, whilst not giving a concluded view in relation to the appropriate standard of proof to be applied, stated as follows:

"I [...] see considerable force in the point that the climate and approach to professional regulation and discipline have changed since Re a Solicitor was decided. Persuasive as [counsel's] submissions were, however, I would decline the invitation to express a concluded view on the question [of the standard of proof] in the present case. To do so would require us to decide whether a previous decision of this court and a decision of the Privy Council should not now be followed. Those authorities do seem to me ripe for reconsideration. But not in a case where the Tribunal was not undertaking a primary fact-finding role so that the question of what standard of proof is appropriate in that situation does not arise. In these circumstances, any views that we express on the point could only amount to obiter dicta and would have no binding force. As the former President of the Queen's Bench Division, Sir Anthony May, said when rejecting a previous attempt by [counsel] on behalf of the SRA to argue this point in a case where it did not affect the decision: "The court is not in the business of conducting academic seminars, because decisions which develop the law need to do so in cases where the point at issue matters.""

2.2.7 Sir Brian Leveson⁴ stated:

"I agree with the cogent analysis of this case in all its aspects. In that regard, I emphasise the observations of Leggatt J in relation to the standard of proof in these cases and underline the need for a re-evaluation of the approach to disciplinary measures intended to protect the public. Notwithstanding [counsel's] encouragement to do so, to go further than the confines of this case would not have been appropriate."

2.2.8 As mentioned above, the Tribunal's first instance rules are currently the 2007 Rules. These are supplemented by a number of Practice Directions (which are supplemental protocols to the rules of procedure) and a Policy/Practice Note on Adjournments. The Tribunal considered that the 2007 Rules should be updated and that as part of that process the standard of proof should be specifically stated within the updated rules, whether the decision was that it should remain the criminal standard of proof or alternatively that the civil standard should be applied.

³ Leggatt J at paragraph 49 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin)

⁴ Sir Brian Leveson P at paragraph 73 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal*

3. Consultation

3.1 Between 16 July 2018 and 8 October 2018 the Tribunal consulted on the making of procedural rules in relation to applications to the Tribunal. The Tribunal published its consultation paper⁵ on its website and sent a link to the consultation to the list of consultees at Appendix C of that document and also to the RCVS. A draft copy of the proposed new rules was attached to the consultation document. The draft did not say one way or another what the standard of proof should be. Consultees were invited to respond to the following questions:

- (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)?
- (b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?
- (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?
- (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?

3.2 Twenty eight external responses were received. In summary those responding were:

Individual members of the profession (9)

Response submitted in individual not professional capacity (1)

Status of respondent not known (2)

Firms (1)

Academics (1)

Legal Regulators (2) – Bar Standards Board (BSB) and the Solicitors Regulatory Authority (SRA)

Other professional regulators/bodies or associations (3) – General Optical Council, Association of British Insurers, NHS Resolution

The Legal Services Consumer Panel (LSCP)

⁵ https://www.solicitortribunal.org.uk/sites/default/files-sdt/CONSULTATION%20ON%20THE%20MAKING%20OF%20PROCEDURAL%20RULES%20IN%20RELATION%20TO%20APPLICATIONS%20TO%20THE%20TRIBUNAL%20-%2016%20JULY%202018_0.pdf

Law Societies – the Law Society (TLS) and 5 regional Law Societies

Others (2) – Association of Women’s Solicitors and Solicitors Assistance Scheme

- 3.3 All of the responses were reviewed by the Tribunal’s Policy Committee and a summary of them can be found at Annex 1 of the Tribunal consultation response paper which was published on 8 April 2019 and is at Annex 4 of this application. The responses are set out in full at Annex 2 of the consultation response.
- 3.4 There was significant comment on the standard of proof that the Tribunal should apply. Of the external responses received one did not support the civil or criminal standard and suggested two alternatives. Of the remaining twenty seven, eight considered the Tribunal should change its rules to allow for the civil standard to be applied. Nineteen supported the retention of the criminal standard. It should be noted that this figure comprised (amongst others of) the Law Society, five local law societies, the Solicitors Assistance Scheme, a firm representing respondents and ten individuals. Amongst those in support of the civil standard were other regulatory bodies, the Legal Services Consumer Panel and the SRA.
- 3.5 Overall, the consultees who were opposed to any change to the standard of proof were those who would themselves in an individual or representative capacity (e.g. law societies) be potentially adversely affected, in the sense that there would be increased vulnerability to a disciplinary sanction for any relevant professional misconduct. Those consultees who supported a change to the standard of proof were those who in an individual or representative capacity (e.g. consumer groups) would be potentially beneficially affected by the change in the sense that the hurdle for proving cases of misconduct would be lower.
- 3.6 A number of consultees who favoured the status quo (and the retention of the criminal standard of proof) suggested that the advocates of change were over influenced by a desire to be in the mainstream of modern professional discipline. Some of those who favoured a change (and a move to the civil standard) suggested that those who favoured the status quo were protectionist and putting the interests of the profession above the wider public interest. Those in this group did not accept that the criminal standard provided better public protection than the civil standard.
- 3.7 The question of whether case law precluded the Tribunal from changing its standard of proof through the making of new rules was raised by some consultees, including the firm representing respondents. This firm argued that given the SRA’s “high success rate” there was no need to change the law to protect the public interest or maintain public confidence in the profession. The firm also commented on the

proposed new rules and made some suggestions which were incorporated, wholly or partially, into the final proposed new rules.

- 3.8 The consultation asked specifically whether in principle the Tribunal should change its rules to make provision about agreed outcome proposals (proposed rule 25). On the whole those consultees who responded to this question supported the inclusion of provision in respect of Agreed Outcomes within the rules. There were a number of suggested amendments made to the original wording of proposed rule 25. Having considered the responses received the Tribunal decided that that proposed rule 25 should be amended with detailed procedure being set out in a Practice Direction. This will allow for more flexibility and ensure that the Tribunal has the ability to proactively case manage as required in each individual case, particularly in multi-respondent cases.
- 3.9 There were a number of specific comments on the proposed rules that were considered and resulted in changes being made to a number of the proposed rules. The amendments made to the proposed rules following the conclusion of the consultation are explained in the Tribunal's consultation response document and shown in red on the proposed rules at Annex 3 of that document.
- 3.10 A limited number of consultees responded to the question in the consultation as to whether they considered the other provisions in the proposed rules fit for purpose. A number of consultees provided a response to the question as to whether they had any detailed comments on the drafting of the proposed rules. There was significant overlap in the responses to these two questions. Although not referred to in the consultation, the issue of a Lay majority in Tribunal panels was raised, with submissions for and against a Lay majority. For the reasons set out in the response to the consultation this is not something that the Tribunal is proposing. Costs, propensity, disclosure and transitional arrangements also received specific comment in the responses received. A number of amendments were made to the proposed rules as a result of the consultation.

4. The Proposed Application

4.1 The Applicant's existing rules and their nature and effect

- 4.1.1 The Tribunal's existing rules for first instance proceedings are the 2007 Rules. The 2007 Rules regulate procedure for the making, hearing and determination of applications made to the Solicitors Disciplinary Tribunal constituted under the Solicitors Act 1974 (as amended). There are also six Practice Directions and a Policy/Practice Note on Adjournments. Standard Directions are issued once a matter

has been certified and currently these contain provision in respect of the Agreed Outcome process that is in place.

4.2 The nature and effect of the proposed alterations

4.2.1 The proposed rules regulate procedure for the making, hearing and determination of applications made to the Solicitors Disciplinary Tribunal constituted under the Solicitors Act 1974 (as amended). They replace the previous 2007 Rules.

4.2.2 Part 1 contains introductory provisions. Rule 4 sets out (for the first time) the overriding objective of the rules, which is to enable the Tribunal to deal with cases justly and at proportionate cost. Rule 5 sets out the standard of proof to be applied at the Tribunal's proceedings. It is currently the standard applicable in criminal proceedings but is proposed to be the standard applicable in civil proceedings. Rule 6 makes general provision about the regulation of procedure.

4.2.3 Part 2 makes provision about the constitution of the Tribunal, and sets out the duties of the Tribunal's clerks. Part 3 sets out the procedure to be followed when making applications to the Tribunal. Part 4 contains provisions about case management, including provisions about standard directions, case management hearings, agreed outcome proposals, disclosure and discovery. Part 5 makes provision about evidence, including the service of evidence, written evidence, expert evidence, and admissibility of evidence about convictions and character evidence.

4.2.4 Part 6 makes provision about hearing procedures, including about whether hearings should be held in public or private, proceedings in absence of a party, recording of hearings and the decision making procedure. Part 7 contains miscellaneous provisions, including about awards of costs, sending and serving of documents, calculating time and legal representation.

4.2.5 At Annex 1 to this application there is a table setting out the changes in the proposed new rules and whether the individual rules formed part of the 2007 Rules. The table sets out the reason for each change and/or addition.

4.2.6 In summary there are eight proposed new rules (or sub-sections of rules) based on existing provisions in the Tribunal's Practice Directions or Standard Directions namely:

- Rule 4 (The overriding objective);
- Rule 20 (Standard directions);
- Rule 21 (Case management hearings);

- Rule 23 (Adjournments);
- Rule 25 (Agreed Outcome Proposals);
- Rule 26 (Disclosure or discovery);
- Rule 33 (Adverse inferences);
- Rule 43 (5) (Costs).

4.2.7 The Tribunal’s reasons for proposing the eight new rules (or sub-sections of rules) are as follows:

- Rule 4 (The overriding objective): this proposed rule is based on the provision in respect of the overriding objective as currently set out in Practice Direction 6 (which was made in October 2013). An overriding objective rule is commonplace in other professional disciplinary jurisdictions and in court rules.
- Rule 20 (Standard directions): 20(1) adds a proposed rule requiring the issuing of Standard Directions (being the directions that are made when a set of proceedings is issued). The proposed rule draws from Paragraph 4 of Practice Direction 6 and reflects established practice. 20(2) sets out the matters which may be included in the Standard Directions. 20(3) mirrors the matters set out in Paragraph 8 of Practice Direction 6 with revision of the wording to make it more concise. 20(4) defines the terms “Answer” and “statement of readiness” – which are procedural documents used in Tribunal proceedings and were previously referred to in Paragraphs 7 and 12 of Practice Direction 6.
- Rule 21 (Case management hearings): this proposed rule sets out provision for when case management hearings must and may be held; how these hearings can be heard and the information that the parties should have available. On the whole this rule reflects established practice.
- Rule 23 (Adjournments): this proposed rule is drawn from the Tribunal’s 2002 Policy/Practice Note on Adjournments. It sets out the documentary evidence required and who will consider the application.
- Rule 25 (Agreed Outcome Proposals): this proposed rule permits applications for submissions of proposed Agreed Outcomes and set out the way in which such an application will be processed/considered. Provision for Agreed Outcome applications is currently set out in the Standard Directions.
- Rule 26 (Disclosure or discovery): this proposed rule sets out the procedure for consideration of an application for disclosure. The proposed Rule draws from

Practice Direction 2 and provides clarity for the parties. It sets out the Tribunal's powers in respect of making an order for disclosure and specifies what a party is required to disclose.

- Rule 33 (Adverse inferences): the proposed rule incorporates into the Tribunal's rules its power to draw adverse inferences currently set out in Practice Direction 5.
- Rule 43 (5) (Costs): the proposed rule makes provision to require a Statement of Means to be provided if a Respondent wishes to make representations as to costs. This reflects paragraph 13 of Practice Direction 6.

4.2.8 There are a further twenty seven proposed new rules (or sub-sections of rules) which are new. A number of these rules reflect established practice. The proposed new provisions are:

- Rule 2 (Scope)
- Rule 5 (Standard of proof)
- Rule 8 (The Clerk to the Tribunal and other clerks and staff)
- Rule 10 (Functions exercisable by a single solicitor member)
- Rule 11 (Application of the Rules in Chapter 1)
- Rule 12(4) (Method and form of application - lay applications)
- Rule 13(2) (Certification of case to answer)
- Rules 14(3) and (4) (Supplementary Statements)
- Rule 16 (Adjournment of application pending Law Society Investigation)
- Rule 17(3) (Applications for restoration and termination of indefinite suspension)
- Rule 18 (Application to vary or remove condition on practice)
- Rule 22 (Procedural applications)
- Rule 27 (Service and sending of Evidence and bundles)
- Rule 28(5) (Written Evidence)
- Rule 30 (Expert evidence)
- Rule 31 (Interpreters and Translators)
- Rule 34 (2) – (5) (Publication of cause lists)
- Rule 35(3), (4) (6)-(10) (Public or private hearings)
- Rule 38(1) and (3) (Evidence and submissions during hearings)
- Rule 39 (2)-(3) (Recording of the hearing)
- Rule 40 (3)-(5) (Decisions)
- Rule 41 (2)(b) and (4)(Sanction)
- Rule 43 (3) and(4) (Costs)
- Rule 44 (2) – (6) (Sending and service of document)

- Rule 47 (Calculating time)
- Rule 48 (Representatives)
- Rule 49 (Amendments to the 2011 Appeal Rules)

4.2.9 Given the very large number of amendments, at Annex 1 there is a table setting out the proposed rules and the reason for their inclusion and reference should be made to that document for the reason that a proposed rule or sub-section has been included. By way of overview the Tribunal considers the amendments proposed will provide clarity for the parties and assist with effective case management.

4.2.10 It should be noted that the definition of European lawyer may need to be amended but given the uncertainty about the timing of the UK leaving the European Union the Tribunal cannot as yet be certain as to the required wording and it is currently included in the proposed rules in the alternative.

4.2.11 In addition to the proposed rules highlighted above, the wording of a number of the 2007 Rules has been refined to reflect minor changes since 2007 and to improve clarity.

4.2.12 The Tribunal considers that the nature and effect of the proposed alterations is such that it will help the Tribunal deliver its overriding objective of dealing with cases justly and at proportionate cost. The proposed new rules provide clarity and transparency as to the Tribunal's requirements and procedures. This will assist with effective and efficient case management. The level of detail in the proposed rules will be of particular assistance to unrepresented parties.

4.3 Why the Applicant wishes to make new rules and amend its Standard of Proof

4.3.1 The 2007 Rules have served the Tribunal well. However the 2007 Rules require updating. As far as is possible the Tribunal has approached the revision of the 2007 Rules in such way that as much detail as possible has been included in the proposed rules themselves rather than being set put separately in practice directions. This will assist all parties to the proceedings in understanding the Tribunal's procedural requirements.

4.3.2 For those familiar with the 2007 Rules and associated documents, the 2007 Rules, whilst outdated in certain aspects, remain fit for purpose and are applied effectively. However for those less familiar with the requirements the fact that the 2007 Rules are supplemented by a number of additional documents can make it harder to understand the requirements that are in place.

- 4.3.3 In the Tribunal's opinion the civil standard provides better public protection as it allows for findings to be made where it is more likely than not there has been professional misconduct. This would be consistent with the apparent consensus outside the solicitors' profession (demonstrated by the fact that all other professional regulators except the RCVS have adopted the civil standard, and by responses to the consultation from outside the profession) that the public interest is better protected by the civil standard.
- 4.3.4 Having taken into consideration all the factors (including the points raised by respondents to the consultation) the Tribunal considers this to be the correct position to take, notwithstanding the possible consequences that an adverse finding may have on a practitioner. The Tribunal recognises that a move to the civil standard may result in more members of the profession being sanctioned for serious failures to abide by their professional obligations. However the Tribunal considers that the public protection argument in favour of changing the standard of proof outweighs the interests of the profession and the individual impacts on members of the profession.
- 4.3.5 The Tribunal will continue to scrutinise the evidence before it with as much care as ever in reaching its findings. It is clearly established that the more serious the allegation the more cogent the evidence needs to be to prove the allegation. This applies whichever standard of proof is applied. Robust decision making processes and careful, thorough evaluation of the evidence are already embedded as part of the Tribunal's decision making processes and are an important safeguard.

5. The Regulatory Objectives

5.1 Protecting and Promoting the public interest

- 5.1.1 It is in the public interest for the Tribunal's rules and procedures to be updated and to reflect its current practice and procedure. The expansion of the matters now specifically addressed in the rules themselves will assist the parties to first instance proceedings before the Tribunal. The additional clarity in the proposed rules increases transparency as to how the Tribunal operates and its expectations of all parties in proceedings before it. The proposed rules will ensure effective case management which is key to the efficient and expeditious conduct of proceedings before the Tribunal.
- 5.1.2 It is in the public interest that the Tribunal is able to find proved allegations of misconduct on the basis that it is more likely than not to have occurred. This will ensure that appropriate findings can be made and suitable sanction imposed where there have been serious breaches of professional obligations.

5.2 Supporting the constitutional principle of the rule of law

5.2.1 The proposed change to the Tribunal's rules and to its standard of proof is neutral in respect of this regulatory objective.

5.2.2 The changes proposed by the Tribunal to its rules will ensure that proceedings before the Tribunal are accessible, intelligible, clear and predictable. The additional clarity in the proposed rules allows all parties to understand the Tribunal's expectations and processes. The proposed rules enshrine the Tribunal's approach to fairness both to the applicants and to respondents who can be assured of a fair hearing in accordance with Article 6 of the Convention on Human Rights.

5.3 Improving access to justice

5.3.1 The proposed changes to the Tribunal's rules are neutral in respect of this regulatory objective. As stated above the changes proposed by the Tribunal to its rules will ensure that proceedings before the Tribunal are accessible, intelligible, clear and predictable. In bringing forward the proposed rules the Tribunal has sought to add clarity to the 2007 Rules and to incorporate its requirements and processes in one document so far as practicable. Whilst the Tribunal would not go so far as to say that this would improve access to justice (given the majority of those who appear before the Tribunal in whatever capacity are legally qualified) there is no identified negative impact on this regulatory objective.

5.3.2 The proposed change to the Tribunal's rules to its standard of proof could be seen as both positive and negative in respect of this regulatory objective. Applicants to first instance proceedings would argue that the lower standard of proof increases access to justice. Respondents would argue that it decreases their access to justice as the evidence required to find that they are guilty of professional misconduct could be lower. The Tribunal considers the overall effect is neutral and considers the cogency of the evidence that it will require an important safeguard in ensuring respondents receive a fair hearing.

5.4 Protecting and promoting the interest of consumers

5.4.1 The Tribunal's opinion, after consideration of the arguments, evidence and consultation responses, is that the civil standard provides better protection and promotes the interests of the public as consumers of legal services. This is because it allows for findings to be made where it is more likely than not there has been professional misconduct rather than findings only being made where it is beyond reasonable doubt that there has been professional misconduct.

5.4.2 The additional clarity provided in the proposed rules will ensure that the Tribunal's processes and procedures are clear and accessible to all those who wish to make an application to the Tribunal or are appearing before the Tribunal. However, as the Tribunal's rules do not impact on the standards of professional conduct expected of those involved in the legal profession the Tribunal considered that the other proposed changes to the Tribunal's rules are neutral in respect of this regulatory objective.

5.5 Promoting competition in the provision of legal services

5.5.1 The proposed change to the Tribunal's rules and to its standard of proof is neutral in respect of this regulatory objective.

5.6 Encouraging an independent, strong, diverse and effective legal profession

5.6.1 The Tribunal has concluded that the proposed change to the Tribunal's rules and to its standard of proof is neutral in respect of this regulatory objective.

5.6.2 The proposed new rules provide clarity in respect of the Tribunal's practice and incorporate provisions previously contained in the Standard Directions and Practice Directions. This should make the requirements clearer for all applicants and respondents.

5.6.3 The Tribunal's standard of proof will change to the civil standard under these proposals. This means that the allegations made against all respondents will need to be proved on the balance of probabilities rather than beyond reasonable doubt. Whilst concerns have been raised that those with a protected characteristic are less able to afford representation before the Tribunal the Tribunal does not consider that there will be an equality impact on any specific group of people. The Tribunal process and procedure will remain the same, the difference will be at a substantive hearing in terms of the standard of proof applied by the Tribunal.

5.6.4 The Tribunal has considered the responses to the consultation but has not identified any impact (positive or negative) of the proposed changes (both to the proposed rules and the Standard of proof) Having undertaken an Equality Impact Assessment (at Annex 3 to this application) the Tribunal considers that these concerns are related to the areas of practice of specific groups rather than the impact of the proposed changes themselves.

5.7 Increasing public understanding of the citizen's legal rights and duties

5.7.1 The proposed change to the Tribunal's rules and to its standard of proof is neutral in respect of this regulatory objective. There will be no alteration to a citizen's ability to make an application to the Tribunal; if anything the process and procedure in respect of Lay Applications will be easier for citizens to understand.

5.8. Promoting and maintain adherence to the professional principles

5.8.1 The proposed change to the Tribunal's rules are neutral in respect of this regulatory objective. Increased clarity in the proposed rules may in turn increase public confidence in the work of the Tribunal as they may be able to better understand the way in which the Tribunal operates and its procedures. However, the proposed rules themselves are neutral in promoting and maintaining adherence to the professional principles.

5.8.2 The change to the standard of proof may have a positive impact on the promotion and adherence to professional principles in so far as the fact that misconduct only has to be proved to be more likely than not rather than beyond reasonable doubt may deter practitioners from taking risks where conduct may not be considered to be in accordance with the professional principles.

6. **The Better Regulation Principles**

The Tribunal has considered the proposed change to its rules and to its standard of proof in light of the Tribunal's obligation to have regard to Better Regulation Principles. These would be met in the following ways:

6.1 Transparent

6.1.2 The new rules will be published on the Tribunal's website. The new rules will be made as a Statutory Instrument that will be available from a number of sources.

6.1.3 The inclusion of matters currently addressed in practice directions within the rules will increase transparency. The specific inclusion of a rule that sets out the standard of proof applied by the Tribunal will increase transparency.

6.1.4 No adverse impact in relation to this application has been identified in respect of transparency either in relation to the rules themselves or specifically in relation to the standard of proof.

6.2 Accountable

6.2.1 The Tribunal is always independent, impartial and transparent. By clarifying provision in its rules and specifying the standard of proof it will apply, the Tribunal increases its accountability. Parties to first instance proceedings will have a greater understanding of how the Tribunal operates, including who can make what decisions, and of the Tribunal's expectations of the parties.

6.2.2 The Tribunal has not identified any reason to consider that its accountability will be adversely impacted by either the changes to its rules generally or specifically by the change to the standard of proof.

6.3 Proportionate

6.3.1 The change in the standard of proof is proportionate and ensures that the reputation of the profession and the public are protected as effectively as possible.

6.3.2 The other proposed changes to the rules are also proportionate and ensure that proceedings before the Tribunal will be dealt with efficiently, which is in the public interest as well as in the interest of the parties.

6.4 Consistent

6.4.1 Having considered the standard of proof applied by other Tribunals and by the majority of regulators, the Tribunal is satisfied that the change to the standard of proof is consistent with the approach taken in disciplinary proceedings relating to a range of professions including doctors and barristers.

6.4.2 The proposed new rules are largely based on the 2007 Rules and the Tribunal's Practice Directions. The Tribunal has not identified any reason to consider that its consistency will be adversely impacted by this change. If anything it will be improved as the Tribunal's expectations and procedures are more clearly stated and encapsulated in one document rather than across several documents.

6.5 Targeted

6.5.1 The proposed new rules (including the standard of proof) are targeted at only those persons who are alleged to have seriously breached their professional obligations such that either the SRA or a lay applicant make an application to the Tribunal alleging professional misconduct.

6.5.2 The proposed new rules including the lower standard of proof will have no impact on anyone whose behaviour accords with their professional obligations. In 2018 the Tribunal received 122 first instance applications. In December 2018 according to the SRA's website⁶ there were 192,866 solicitors on the Roll of whom 143,198 were practising. On these figures the proposed changes will impact less than 0.1% of practising solicitors.

7. Desired Outcomes

7.1 In bringing forward new rules the Tribunal has sought to ensure that its practice and requirements are clearly stated and understood. In proposing a change to the standard of proof the Tribunal considers that the reputation of the profession and public confidence in the profession will be maintained and protected with no adverse impact on the vast majority of solicitors who adhere to their professional code of conduct.

8. The Approved Regulators

8.1 In its response to the consultation the SRA called for the Tribunal to adopt the civil standard of proof. It supported the proposal to include a rule in respect of Agreed Outcomes and made a number of comments on specific proposed rules. The SRA considered that the proposed new rules should be amended to provide for a Lay rather than a Solicitor majority. The SRA expressed concern that a number of the proposed rules were not discussed in detail. The SRA made a number of comments on potential equalities impacts. It noted that all consumers would be better protected by the use of the civil standard.

8.2 The SRA will need to ensure it complies with the new rules. As these are in the main a codification of the 2007 Rules, current practice directions and standard directions the implementation of the new rules are unlikely to have a detrimental impact on the SRA.

8.3 The SRA is an advocate for the Tribunal moving to the civil standard of proof. This change will align the standard of proof used by the approved regulator and its disciplinary Tribunal.

8.4 The proposed change also means that the Tribunal will be consistent with the approach taken by other disciplinary tribunals and all of the approved regulators under the LSA.

⁶ https://sra.org.uk/sra/how-we-work/reports/data/population_solicitors.page

8.5 The Tribunal does not consider that the proposed changes will impact upon any of the Approved Regulators under the LSA other than the SRA who will view it as a positive change.

9. Implementation timetable

9.1 The proposed transitional provisions provide that the rules will not apply to proceedings in respect of which an application is made before the date on which the proposed rules come into force and those proceedings will be subject to the 2007 Rules as if they had not been revoked.

9.2 A number of responses to the consultation suggested that that the new rules should only apply to misconduct occurring after the date that the rules come into force and not proceedings brought after that date (which may relate to misconduct alleged to have taken place before it). The Tribunal acknowledges that when considering whether or not conduct amounts to misconduct the relevant Code of Conduct should be the one that was in force at the time of the alleged misconduct. But the Tribunal does not consider that it necessarily follows that the procedural rules should also be those which were in force at that time.

9.3 If the new rules only applied to misconduct after the date on which they came into force this could result in confusion and unnecessarily complicated proceedings, not least because some allegations could fall to be dealt with under the 2007 Rules and some under the new rules.

9.4 Subject to operational readiness, the Tribunal would like to bring these changes into effect on 25 November 2019. This will provide the necessary time to prepare for the change, including training Tribunal Members and staff. It provides stakeholders with sufficient time to undertake training. It will also allow the profession to adjust.

9.5 The 25 November 2019 is a significant date for the solicitors' profession in that it is the date that the SRA's new regulations will come into force. Whilst there is an argument that it may be easier for the profession if the changes are staggered the counter argument is that if the SRA's new requirements and the Tribunal's new rules come into force on the same day then the profession will not need to undertake separate preparation for the two sets of changes within a short period of time.

9.6 The Tribunal has considered the potential impact on its budget and in particular, the required number of hearing days. There is a possibility that more cases will be referred to the Tribunal by the SRA if the move to the civil standard of proof is approved. However, the timescales for appeals means that any potential impact on

the Tribunal's budget is unlikely to be quantifiable until the latter part of 2020 at the earliest. This is because once the SRA has decided to refer a case to the Tribunal it has a maximum target period of 20 weeks to send the proceedings to the Tribunal. If a matter is certified the Tribunal aims to list a substantive hearing within 6 months of issue of the proceedings in most cases. Any consequential increase in hearing days required for these cases will therefore not be seen until at least the 3rd, if not the 4th, quarter of 2020.

9.7 This is a brief outline of the implementation milestones:

Application Submission	May 2019
Application decision and communication	May to July 2019
Application for a Statutory Instrument (40 days negative resolution procedure)	July to October 2019 (allowing for summer recess depending on timing)
Stakeholder Liaison	October/November 2019
Training for Tribunal Members and clerks	October/November 2019