

EXPLANATORY MEMORANDUM TO
THE SOLICITORS DISCIPLINARY RULES 2019
2019 No. 1185

1. Introduction

1.1 This explanatory memorandum has been prepared by the Solicitors Disciplinary Tribunal.

2. Purpose of the instrument

2.1 This instrument introduces new rules in place of the Solicitors (Disciplinary Proceedings) Rules 2007¹.

2.2 The rules update the Solicitors (Disciplinary Proceedings) Rules 2007 and consolidate current practice notes, directions and procedures into one document.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is not subject to parliamentary procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is not subject to parliamentary procedure, no statement is required.

6. Legislative Context

6.1 This instrument contains rules that the Tribunal has made in exercise of the powers conferred by section 46 of the Solicitors Act 1974². The Tribunal's previous rules for first instance proceedings were made in 2007 and required updating and modernising. There are separate rules relating to the handling of certain appeals by the Tribunal and which will remain unchanged. They are contained in the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011³.

6.2 The rules do not implement a new Act, court case or obligation. The rules specify for the first time the standard of proof that the Tribunal will apply for first instance proceedings. The Tribunal is moving from the criminal to the civil standard of proof.

¹ S.I. 2007/3588.

² 1974 c. 47.

³ S.I. 2011/2346.

7. Policy background

What is being done and why?

- 7.1 The Tribunal is constituted as a Statutory Tribunal under Section 46 of The Solicitors Act 1974. The Tribunal adjudicates upon alleged breaches of the rules and regulations applicable to solicitors and their firms. The rules and regulations are specifically designed to protect the public, including consumers of legal services, and to maintain the public's confidence in the reputation of the solicitors' profession for honesty, probity, trustworthiness, independence and integrity.
- 7.2 The Tribunal also adjudicates upon the alleged misconduct of registered European lawyers, registered foreign lawyers and persons employed by solicitors. It also decides applications by former solicitors for restoration to the Roll and by indefinitely suspended solicitors for determination of suspension.
- 7.3 The rules replace the Tribunal's existing first instance hearing rules and consolidate them with some pre-existing practice directions, standard directions and guidance. The aim of this change is to ensure that the Tribunal's requirements and processes are transparent and easily accessible.
- 7.4 Rule 5 (standard of proof) contains by far the most significant change from the previous rules, so far as the Tribunal is concerned. 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 is the only remaining professional regulator in England and Wales that applies the criminal standard when determining allegations of professional misconduct.
- 7.5 All of the approved regulators under the Legal Services Act 2007 now apply the civil standard. This includes the Solicitors Regulation Authority who is the applicant in the majority of first instance proceedings before the Tribunal. To date the Tribunal has applied the criminal standard of proof to first instance proceedings before it. However, it applies the civil standard to the 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).
- 7.6 Another new provision of significance is rule 25 (agreed outcome proposals), which reflects the provisions of a pre-existing practice direction.
- 7.7 Generally, 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. 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.
- 7.8 The Tribunal considers that the rules will help the Tribunal deliver its overriding objective of dealing with cases justly and at proportionate cost. The 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 rules will be of particular assistance to unrepresented parties.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but one aspect of it relates to the withdrawal of the United Kingdom from the European Union. Rules 3(4) and 3(5) make provision about the definition of “European Lawyers”. Rules 3(4) and (5) have been drafted in the context of the rules having been made before exit day but coming into force after the expected exit day of 31 October 2019. The rules have had to provide for different scenarios (a) during any period when the rules are in force before exit day and (b) from exit day.
- 8.2 The reason that the rules are coming into force on 25 November 2019 is because this is the date on which the Solicitors Regulation Authority new standards and regulations come into force and it was considered to be of assistance to the profession if all changes took effect on the same date.
- 8.3 Rules 3(4) and (5) have been agreed with Ministry of Justice lawyers and the definition used in rule 3(5) is based upon the definition contained in paragraph 17 of Schedule 1 to the Services of Lawyers and Lawyer’s Practice (Revocation etc.) EU Exit) Regulations 2019⁴ as amended by regulation 3(12) (p) of the Services of Lawyers and Lawyer’s Practice (Amendment) (EU Exit) Regulations 2019⁵.

9. Consolidation

- 9.1 The 2019 Rules replace both the Solicitors Disciplinary Rules 2007⁶ and revokes a provision which amended those rules (rule 30 of the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011) and no further consolidation is needed.

10. Consultation outcome

- 10.1 Between 16 July and 8 October 2018 the Tribunal consulted on its intention to make the rules. The Tribunal invited views, in particular, on whether it should apply the civil (instead of criminal) standard of proof in line with other professional regulators. But it also highlighted other proposed changes and sought comments on the proposals generally. A draft of the rules was appended to the consultation document.
- 10.2 The Tribunal received 28 external responses to the consultation which it considered very carefully. The Tribunal then submitted the proposed rules to the Legal Services Board for approval. This approval was given on 25 July 2019.
- 10.3 The change to the standard of proof was the primary focus of the majority of those who responded to the consultation with those responding divided as to which standard should be applied.
- 10.4 The consultation document can be found here: <https://tinyurl.com/y2znuyzt> and the Tribunal’s response to the consultation can be found here: <https://tinyurl.com/y2jtc9rn>.

⁴ S.I. 2019/375.

⁵ S.I. 2019/695.

⁶ S.I. 2007/3558.

11. Guidance

- 11.1 Accompanying Practice Directions and guidance for the rules will be provided as required. The rules have been drafted in such a manner as to include as much detail as possible and to minimise the need for supplementary documents.
- 11.2 It is currently envisaged that there will be a Practice Direction in respect of the application procedure for agreed outcomes (rule 25) and a guidance note as to the role of persons assisting the respondent in Tribunal hearings (rule 48(5)).
- 11.3 These documents will be published before the end of October 2019. Their content will reflect current practice and procedure but will ensure that those who are unfamiliar with the Tribunal's requirements can easily access the information that they require.
- 11.4 Practice Directions and Guidance will be published on the Tribunal's website: www.solicitortribunal.org.uk

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because there will be no, or no significant, impact on business.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 These rules will not be monitored or reviewed. However the Policy Committee of the Solicitors Disciplinary Tribunal will review the need for the rules to be updated and/or amended as appropriate in light of any relevant changes to the legal framework.

15. Contact

- 15.1 Geraldine Newbold at the Solicitors Disciplinary Tribunal telephone: 0207 778 0765 or email: Geraldine.Newbold@solicitorsdt.com can be contacted with any queries regarding the instrument.