

## **Amendment to the standard of proof applied during professional misconduct proceedings**

### **For approval by the Legal Services Board**

This application is made in accordance with the requirements set out in the Legal Services Board's (LSB) Rules for Rule Change applications. The Bar Standards Board (BSB) wishes to provide the information below to support its application.

Any queries about this application should be made to:

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## Summary

1. This is an application to amend the standard of proof used in disciplinary proceedings for professional misconduct<sup>1</sup> brought against those regulated by the BSB including: barristers; authorised bodies; and, in some circumstances, their employees and managers. The standard of proof currently applied to professional misconduct allegations is the criminal standard (satisfied “so as to be sure”, sometimes referred to as “beyond reasonable doubt”). This will also amend the standard of proof used when considering whether the disqualification condition has been satisfied.
2. The Bar Standards Board (BSB) is requesting approval to amend its regulatory arrangements to allow the civil standard to be applied (“on the balance of probabilities”, sometimes referred to as “more likely than not”), in line with other professional regulators.
3. Save for a transitional provision, the change proposed requires a single word to be amended within our regulatory arrangements (changing the word “criminal” to “civil” at rE164 of The Disciplinary Tribunals Regulations found in Part 5 Section B of the BSB Handbook). However, the implications of this change are significant and have been consulted on publicly.
4. In making this application we recognise that the use of the civil standard of proof in the enforcement process is now an area of required performance under the Legal Services Board’s regulatory performance framework (Outcome E3 (enforcement))<sup>2</sup>.

## Background

### Current position

5. Under the Legal Services Act 2007 (“the LSA”), the BSB is responsible for regulating barristers called to the Bar and other authorised individuals and bodies (entities), their employees and managers.
6. One of the BSB’s functions is to investigate and, where appropriate, take enforcement action in relation to potential breaches of the BSB Handbook (the Handbook). The BSB’s Professional Conduct Committee (PCC) is empowered to carry out these functions under Part 5, Section A of the Handbook (the Complaints Regulations 2014).
7. Under regulation rE37 of the Complaints Regulations, following an investigation, the PCC may determine whether the conduct under investigation constituted a breach of the Handbook on the balance of probabilities. It may choose to deal with such a breach by way of administrative sanctions, discussed further below.
8. However, if the PCC considers that a potential breach is sufficiently serious that it may, if proved, amount to professional misconduct, and therefore is not appropriate for disposal by way of the imposition of an administrative sanction, it must refer the complaint to disciplinary action - provided that it is satisfied both that there is a reasonable prospect of

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<sup>1</sup> Professional misconduct means a breach of this Handbook by an applicable person which is not appropriate for disposal by way of the imposition of administrative sanctions, pursuant to Section 5.A of the BSB Handbook.

<sup>2</sup> Legal Services Board, ‘Regulatory performance assessments: The process’, December 2017, Paragraph 9, [http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/2017/08122017\\_Regulatory\\_Performance\\_Process\\_Document.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017/08122017_Regulatory_Performance_Process_Document.pdf)

a finding of professional misconduct being made and that it is in the public interest to make the referral. In determining whether there is a reasonable prospect of a finding being made, the PCC takes into account the standard of proof that will be applied to determine whether professional misconduct has occurred i.e. it currently needs to believe that the BSB could prove the case beyond reasonable doubt. If the necessary conditions are met, the resulting disciplinary action can either be taken under the Determination by Consent procedure (the professional misconduct charges are determined by the PCC on the papers with the consent of the relevant person) or, more commonly, in front of a Disciplinary Tribunal.

9. The Bar's independent Disciplinary Tribunals are organised and administered by the Bar Tribunals and Adjudication Service (BTAS). Regulation rE164 of The Disciplinary Tribunals Regulations 2017 (Part 5, Section B of the BSB Handbook) provides that "*The Tribunal must apply the criminal standard of proof when deciding charges of professional misconduct and in deciding whether the disqualification condition has been established*". The same standard is applied to allegations of professional misconduct determined by the PCC under the Determination by Consent procedure as prescribed by the PCC in line with rE70.

## History

10. The use of the criminal standard of proof in relation to professional misconduct allegations was relatively common among comparable professions prior to 2008. However, the Shipman enquiry in 2004/5<sup>3</sup> encouraged the medical professions to consider whether the use of the criminal standard remained appropriate in the public interest and proposals were put forward by the Law Commission in 2012 to impose the civil standard via legislation. In the event, the proposed legislative provision was not introduced but all the medical professions that had previously applied the criminal standard had moved to the civil standard by 2010.
11. Since the inception of the Legal Services Act 2007 (LSA), all approved regulators under the LSA, except the BSB, have moved to the civil standard if they had not previously been applying it. The position in the wider professional regulatory field is that the BSB and the Royal College of Veterinary Surgeons are now the only professional regulators in England and Wales applying the criminal standard when determining charges of professional misconduct.
12. The Solicitors Disciplinary Tribunal (SDT) also applies the criminal standard. However, it should be noted that the SDT is not deemed under the LSA to be an "approved regulator". The approved regulator for solicitors is the Law Society and the Law Society has, under the LSA, delegated all responsibility for regulation of the solicitors' profession to the Solicitors Regulation Authority (SRA). The SRA has already moved to applying the civil standard to any issues of misconduct within its jurisdiction, and the application of this standard is enshrined in its regulatory arrangements. However, the SDT (constituted as a Statutory Tribunal under Section 46 of The Solicitors Act 1974) operates independently of the SRA and is not subject to the SRA's regulatory arrangements. The SDT continues to apply the criminal standard when determining issues of professional misconduct. However the SDT is currently consulting on the issue of appropriate standard of proof for it to apply in its proceedings<sup>4</sup>.

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<sup>3</sup> The Shipman Enquiry, "*Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future*", 9 December 2004, Para 27.256, [http://webarchive.nationalarchives.gov.uk/20090808163839/http://www.the-shipman-inquiry.org.uk/images/fifthreport/SHIP05\\_COMPLETE\\_NO\\_APPS.pdf](http://webarchive.nationalarchives.gov.uk/20090808163839/http://www.the-shipman-inquiry.org.uk/images/fifthreport/SHIP05_COMPLETE_NO_APPS.pdf)

<sup>4</sup> Solicitors Disciplinary Tribunal, "*Consultation on the making of procedural rules in relation to applications to the Tribunal*", July 2018, <http://www.solicitorstribunal.org.uk/sites/default/files->

13. The prevailing view amongst both the non-legal and legal professions is that the civil standard is the appropriate standard to apply in disciplinary proceedings. This view was endorsed by the Legal Services Board (LSB) in its paper, issued in March 2014, titled '*Regulatory sanctions and appeals processes; An assessment of the current arrangements*<sup>5</sup>' in which it recommended the application of the civil standard across all legal regulators. The recommendation was based on the "*strong public protection arguments*" as cited in a Law Commission consultation paper<sup>6</sup> covering the standard of proof applied in the medical professions. However, in the LSB report, the LSB indicated the standard of proof applied by individual regulators remains a matter for each regulator to take forward and it recognised that achieving uniformity would take time and involve primary or secondary legislation or precedent-setting judicial decisions.
14. The BSB considered in 2011 whether a move to the civil standard would be appropriate. A Working Group, consisting primarily of members of the PCC, was tasked with considering the relevant issues and presenting recommendations to the Board. In the event, the Working Group was divided as to what to recommend and left the issue open to the Board to consider. At that stage, the Board was of the view that the civil standard appeared to be more appropriate than the criminal standard, but it was not prepared to make a unilateral move to change the standard of proof unless the SDT was also minded to do the same. There was also, at that stage, the prospect of potential cases being brought in front of the courts that might consider the issue of the relevant standard of proof to apply within the legal professions. In the event, no such cases have materialised in the last seven years.
15. However, the recent judgment in the case of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin) (which is referred to in the rest of this application as the "Arslan judgment") has provided an indication of the direction of travel should the issue come to be determined by the courts.
16. It is important to note that the Arslan judgement did not directly address the issue of the standard of proof that Disciplinary Tribunals should apply to first instance cases of professional misconduct. Nevertheless, the judges did make some, non-binding, comments about the issue.
17. Legatt J declined to give a concluded view in relation to the appropriate standard of proof to be applied but 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*

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[sdt/CONSULTATION%20ON%20THE%20MAKING%20OF%20PROCEDURAL%20RULES%20IN%20RELATION%20TO%20APPLICATIONS%20TO%20THE%20TRIBUNAL%20-%202016%20JULY%202018\\_0.pdf](http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf)

<sup>5</sup> The full paper can be found at:

[http://www.legalservicesboard.org.uk/projects/thematic\\_review/pdf/20140306\\_LSB\\_Assessment\\_Of\\_Current\\_Arrangements\\_For\\_Sanctions\\_And\\_Appeals.pdf](http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf)

<sup>6</sup> Law Commission, "*Regulation of Health Care Professionals / Regulation of Social Care Professionals in England*", (LCCP 202), Para 9.65,

[http://www.lawcom.gov.uk/wpcontent/uploads/2015/03/cp202\\_regulation\\_of\\_healthcare\\_professionals\\_consultation.pdf](http://www.lawcom.gov.uk/wpcontent/uploads/2015/03/cp202_regulation_of_healthcare_professionals_consultation.pdf)

*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."*<sup>7</sup>

18. Sir Brian Leveson also underlined the need for a re-evaluation of the standard of proof by stating:

*"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."*<sup>8</sup>

19. In light of the Arslan judgment, the Board of the BSB revisited the issue of the appropriate standard of proof to apply to professional misconduct proceedings in early 2017. While the Board remained of the view that, in principle, the civil standard is probably more appropriate in the public interest, it felt that it could not take a decision without first seeking public views on the issue.

## **Consultation**

20. The BSB therefore undertook a public consultation from May to July 2017, seeking views in principle on whether the BSB should move from applying the criminal standard to allegations of professional misconduct to applying the civil standard. The consultation paper was titled "*The Review of the Standard of Proof applied in Professional Misconduct Proceedings*" (the Consultation).

21. The consultation ran for 12 weeks from 2 May 2017 to 21 July 2017 and posed three questions:

1) Do you consider, in principle, that the BSB should change its regulatory arrangements to allow for the civil standard to be applied to allegations of professional misconduct?

2) If your answer to (1) above is "yes", do you consider that the BSB should only change the standard of proof if, and when, the Solicitors Disciplinary Tribunal also does so?

3) Do you consider that a change in the standard of proof could create any adverse impacts for any of those with protected characteristics under the Equality Act 2010?

22. The BSB received 101 responses to the consultation from the following:

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<sup>7</sup> Leggatt J at paragraph 49 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin).

<sup>8</sup> Sir Brian Leveson P at paragraph 73 of *The Solicitors Regulation Authority v Solicitors Disciplinary Tribunal* [2016] EWHC 2862 (Admin).

- Individual members of the profession (80)
- One chambers clerk
- 2 Harcourt Buildings Chambers (a specialist criminal chambers)
- The Bar Council – the Bar’s representative body
- Inns of Court (3) – The Honourable Societies of the Inner Temple, Gray’s Inn and Middle Temple
- A member of the judiciary
- Academics (5)
- Bar associations (2) – the Criminal Bar Association (CBA) and the Commercial Bar Association (COMBAR)
- Legal Regulators (2) – the Cost Lawyers Standards Board (CLSB) and the Solicitors Regulatory Authority(SRA)
- Other professional regulators (2) – the General Medical Council (GMC) and the Institute of Chartered Accountants in England and Wales (ICAEW)
- The Legal Services Consumer Panel (LSCP)
- The Campaign Against Antisemitism (CAA)
- The Solicitors Disciplinary Tribunal (SDT)

23. The responses were reviewed by the Board and a summary of them can be found in the Board’s consultation response paper included as Annex A to this application. The full responses are posted on the BSB’s website<sup>9</sup>. The response paper reflects the views of the Board agreed at its meeting on 23 November 2017 and sets out an analysis of the responses received.

## The proposal

### **The problem we are seeking to address**

24. The BSB decided, based on our statutory obligations, that it would be in the public interest to change the standard of proof applied to professional misconduct charges from the criminal to the civil standard. We fully considered and debated the issues and concerns raised in the consultation responses by those who are against a change. However, we do not consider they provide a sufficiently strong basis or justification for the BSB, as public interest regulator, to retain the criminal standard. In deciding to make the change, we noted that nearly all respondents were agreed that, regardless of whether they were in favour of or against a change, the BSB should take the decision irrespective of what the SDT decides to do on the issue. The BSB therefore decided to pursue unilateral change via this application.

25. We believe that pursuing this change will allow us to better serve the public interest and will align our enforcement activity with current regulatory good practice.

#### *Public interest*

26. The BSB is of the view that a move to the civil standard of proof provides better public protection. We are strongly of the view that in situations where it is more likely than not that a serious breach of an individual’s professional obligations has occurred, it is both appropriate and proportionate for a regulatory body to impose sanctions.

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<sup>9</sup> Consultation responses summary:

[https://www.barstandardsboard.org.uk/media/1923918/standard\\_of\\_proof\\_-\\_consultation\\_responses.pdf](https://www.barstandardsboard.org.uk/media/1923918/standard_of_proof_-_consultation_responses.pdf)

27. When put in the context of the wider regulatory and justice system, it is our view that this change is in line with the type of decision making used elsewhere in the professional regulatory field. For example, The Institute of Chartered Accountants in England and Wales (ICAEW) in responding to the consultation said:

*“The civil standard of proof has always been the basis for disciplinary arrangements within ICAEW since its formation in the 19th century. A key part of the professional accountability of an ICAEW Chartered Accountant is that a high standard of integrity, ethics and technical competence is required, and the public interest duty explicit within the charters require an enforcement process cogniscent of public perception. These are principles we feel are woven into the Legal Services Act underpinning public and consumer interest. The civil standard of proof is a natural feature of this regulatory environment.”*

28. In relation to the justice system, it is our view that members of the Bar are no different to the individuals who are exposed to the potentially devastating consequences of decisions taken in a range of civil proceedings in the courts. Such proceedings can cover behaviour that would amount to a criminal offence, regardless of whether the offence has previously been proved in the criminal courts. Clients of barristers, particularly those working at the family Bar, are exposed to devastating and life changing decisions taken on the civil standard. However, if their barrister is accused of serious breaches of their professional obligations, they are currently afforded the higher protection of the criminal standard. This view is effectively summarised by one respondent to the consultation who said:

*“If the public interest in protecting vulnerable children from abuse or neglect by parents means that it is legitimate to “find” parents guilty of abuse even where no criminal charge has been brought, and even where the evidence is likely insufficient to secure a conviction, then it is difficult I think to argue that the public interest in protecting the public from rogue or incompetent barristers should not lead to a similar conclusion in relation to disciplinary proceedings for the bar. It’s my career, but it’s somebody’s child. And there is a limited impact on the public we are protecting if some barristers are wrongly found guilty of misconduct (save insofar as it narrows the pool of good lawyers by one and may put off others from joining or staying in the profession so narrowing the pool further in future).”*

29. Further, in proposing the change to the standard of proof, we have taken into account the impact on the justice system of practitioners who pose a serious risk being able to continue to operate within the system when it is more likely than not they have committed serious breaches of their professional obligations.

30. It may be the case that a move to the civil standard leads to more members of the profession being sanctioned for serious failures to abide by their professional obligations. Many of those against a change expressed strong concerns about the potential negative impacts on the behaviour of some sections of the Bar that could flow from a change as a direct consequence of the potential increased exposure to unfounded complaints. Views were expressed that these negative impacts would act against the effective administration of justice and against the public interest and therefore represent a reason for maintaining the criminal standard. Such detriment could arise from barristers taking a more defensive, risk-averse and over-protective approach to dealing with both clients and opponents, particularly litigants in person. Further examples of such behavioural changes included: reduced compliance with the cab rank rule; reduced willingness to take on public access work; a reluctance to engage with clients or litigants in person; and, a reduction in those willing to enter publicly funded areas of practice. The Bar Council (when expressing arguments against a change), described these issues as a

having a “chilling effect” on those already practising at the publicly funded Bar as well as those contemplating a career in such areas.

31. The BSB considers that, given the checks and balances in the complaints and disciplinary system to “weed” out unfounded complaints<sup>10</sup>, it would be extremely disappointing if a profession that prides itself on its integrity and relies on its reputation, were to react to a change in the standard of proof by making such significant behavioural changes. Further, some of the anticipated behavioural changes presented by those against a change amount to breaches of the BSB Handbook. Therefore, rather than acting to reduce potential exposure to disciplinary action flowing from a change to the standard of proof, we are of the view that they are more likely to increase that exposure.
32. On balance, if it is correct that more members of the profession will be sanctioned for serious failures to abide by their professional obligations, it further supports the view that a change to the standard of proof will better protect the public (see also paragraphs 57 to 58).
33. Many of those who supported a change also referred, with varying degrees of concern, to their view that it was unjustifiable that a barrister could escape sanction where a tribunal was satisfied that it was more likely than not that misconduct had occurred. Indeed, the Bar Council response indicated that those barristers in support of a change were “*dismayed*” at such a prospect. Some responses (including Gray’s Inn, the General Medical Council (GMC) and the Legal Services Consumer Panel (LSCP)) specifically referred to, and endorsed, the Law Commission’s conclusion<sup>11</sup>, in 2012, that such a situation was not acceptable (in relation to medical practitioners).
34. Gray’s Inn also pointed to the regulatory objectives under which the BSB operates which include “protecting and promoting the public interest” and “protecting and promoting the interests of consumers”. It commented that:

*“It is difficult to see how these laudable regulatory objectives are achieved by allowing barristers to continue to practise where evidence proves on a balance of probabilities that they are dishonest and/or have sexually assaulted their clients.”*

35. In supporting a change to the civil standard, one member of the judiciary pointed out “*that the purpose of professional discipline is the protection of the public which, in this context, includes the proper functioning of the justice system in the public interest.*”
36. Considering all of these points, it is our view that the public interest arguments in favour of changing the standard of proof outweigh the interests of the profession and the individual impacts on members of the profession, if any do indeed manifest.

#### *Current regulatory practice*

37. In applying the criminal standard of proof to professional misconduct allegations, the BSB is out of step with current regulatory practice and other regulators. This is an issue of significant concern. However, the mere fact that most other regulators apply the civil standard of proof does not of itself make it appropriate for the Bar to do so to. This view was expressed by a number of respondents to the consultation. However, if we were of

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<sup>10</sup> Please see paragraphs 60 to 63 of Annex A.

<sup>11</sup> Law Commission, “*Regulation of Health Care Professionals; Regulation of Social Care Professionals in England Report*”, (LC 345), [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf)



the view that a genuine and justifiable basis exists for the Bar to be treated differently, then we would not shy away from the maintaining the current position.

38. However, there do not appear to be any legitimate, objectively justifiable, arguments for the Bar to be treated differently as a matter of principle. The Bar Council, in responding to the consultation and putting forward the views of those who were against a change, succinctly summarised many views expressed in the responses when it said:

*“Barristers are particularly vulnerable to complaints for a number of reasons. First, they operate in adversarial circumstances, in which one party to the proceedings will lose. A loss can create a client’s sense of grievance against his lawyers. Barristers may thus be subject to complaints because clients are unhappy with the outcome of the case, not because the barrister is guilty of misconduct.*

*It is often easier for a disaffected client to blame his lawyer than acknowledge fault on his own part. In that sense the legal profession is different from other professions: lawyers are often instructed to defend the conduct or character of their clients. If that defence proves unsuccessful, a client has an incentive to blame others to deflect responsibility. This dynamic is less evident in other professions.*

*Barristers who work in difficult publicly-funded practice areas, in which clients stand to lose a great deal (eg liberty, custody of a child) and which deal with emotive issues, such as family law, crime, immigration and employment, are vulnerable because it has become the exception rather than the norm for barristers instructed in such cases to be habitually attended by any representative from their instructing solicitors. This may be contrasted with the position of barristers in the majority of privately-funded civil law and commercial cases. The lack of third party presence, coupled with the impracticality of barristers being able to take notes of every conversation, or requesting their client to sign a brief note after every interaction, means that barristers are less able to protect themselves against unfounded allegations of misconduct. This problem may be particularly acute during a contested hearing.*

*In a similar vein, barristers increasingly come up against litigants in person who are likely to blame and on occasion make unfounded allegations against the barrister who acts against them. Again, this will often arise when the barrister has no professional client in attendance at court or during tribunal hearings.”*

39. Ultimately, the question of current regulatory practice largely comes down to what is in the public interest. We consider that there is insufficient justification (such as clear differences between the Bar and other professions) to warrant taking a different approach to the standard of proof from almost all other professional regulators. In forming this view, we recognise the force of some respondents to the consultation such as one barrister who said:

*“It should not be necessary to wait for a Harold Shipman of the Bar to emerge for our profession to decide whether the criminal standard of proof gives the public enough protection. I do not accept that barristers and veterinarians are uniquely vulnerable to false complaints. We are vulnerable, especially criminal lawyers who now often lack a solicitor’s representative to be a witness in client meetings or in Court: an aggrieved criminal may be more tempted than others to make a false allegation. But we are not so vulnerable as to deserve greater protection than solicitors or doctors.”*

40. Given the nature of self-employed practice at the Bar, it goes without saying that a barrister’s reputation is fundamental to their ability to maintain and attract business. The

view from those who are against a change is that disciplinary proceedings have a disproportionate reputational impact on barristers as compared to other professions. While it is accepted that the self-employed Bar is in a different position to other professions that operate in the main in an employed context, the Bar is by no means unique. Many dentists, pharmacists and General Practitioners (GPs) are self-employed and face very similar reputational issues, but all are subject to the civil standard of proof in disciplinary proceedings. The lack of third party witnesses to incidents and the inability to keep copious notes of conversations is also not unique to the Bar: GPs and many other medical professionals rarely have third party witnesses to their interactions with patients or the time to take detailed notes of interactions.

41. We therefore do not see any clear or legitimate justification for barristers being treated differently from other professions nor do we consider the profession is uniquely vulnerable to unfounded complaints

### **Nature and effect of proposed changes**

42. In order for us to give effect to a change in the standard of proof there is one direct change to our regulatory arrangements that must be made.

#### *Direct changes*

43. rE164 of The Disciplinary Tribunals Regulations found in Part 5 Section B of the BSB Handbook currently reads:

“The *Disciplinary Tribunal* must apply the criminal standard of proof when deciding charges of *professional misconduct* and in deciding whether the *disqualification condition* has been established.”

44. In giving effect to the change to the standard or proof, the BSB proposes that the relevant regulation be amended to read:

“The *Disciplinary Tribunal* must apply the ~~criminal~~ **civil** standard of proof when deciding charges of *professional misconduct* and in deciding whether the *disqualification condition* has been established.”

45. Currently the PCC is required to find that “there is a *realistic prospect of a finding of professional misconduct being made*”, this requires that the PCC have regard to the standard of proof which will be applied by the Disciplinary Tribunal. If the PCC considers that there isn’t sufficient evidence to satisfy the criminal standard of proof, then it will not find that there is a realistic prospect of success. The relevant provision is rE38 of The Complaints Regulations found in Part 5 Section A of the BSB Handbook:

“Where the *PCC* has concluded that rE37.4 is applicable, it must refer the complaint to a *Disciplinary Tribunal*, subject to rE40, provided that no *complaint* shall be referred unless the PCC is satisfied that:

.1 there is a *realistic prospect of a finding of professional misconduct being made* or there is a *realistic prospect of the disqualification condition being satisfied*; and

.2 that it is in the public interest, having regard to the *regulatory objectives* to pursue disciplinary proceedings.”

46. There is no need to amend this provision as the change to rE164 detailed above will carry through such that the PCC would, under the changed standard or proof, consider

whether there is a realistic prospect of a finding of professional misconduct being made on the civil standard. For the avoidance of doubt, this also applies to charges under the Determination by Consent (DBC) procedure and findings that the disqualification condition is satisfied.

#### *Consequential amendments*

47. To give effect to the change, a transitional provision will need to be specified in the regulations. Our intended approach is to apply the new standard to conduct occurring on or after the introduction date.

48. The following new regulation, rE261A, will therefore need to be added to the Disciplinary Tribunals Regulations found in Part 5 Section B of the BSB Handbook:

**“rE261A** Notwithstanding the provisions in rE164 and rE261, the *Disciplinary Tribunal* must apply the criminal standard of proof when deciding:

1. charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*; and
2. whether the *disqualification condition* has been established, in relation to an applicable person’s alleged breach of duty or other conduct which occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019.”

49. The Determination by Consent procedure<sup>12</sup> uses the same standard of proof applied by the Disciplinary Tribunal process. This is not necessarily as clear as it could be in the current regulations and to ensure clarity in relation to the change in the standard of proof, we consider the following provision should be added as rE70A of the Complaints Regulations found in Part 5 Section A of the BSB Handbook:

**“rE70A:** *Where a matter is to be considered under the Determination by Consent procedure as per rE67, the standard of proof to be applied is the civil standard of proof.*”

50. This will need to be accompanied by its own transitional arrangement. The wording below mirrors the wording used in the new rE261A, it will be added as rE100A of the Complaints Regulations found in Part 5 Section A of the BSB Handbook:

**“rE100A** in considering matters under the *determination by consent procedure*, the PCC must apply the criminal standard of proof when deciding charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*.

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<sup>12</sup> DBC is an alternative way of dealing with cases which would normally be referred to a disciplinary tribunal. The process is entirely voluntary and requires express written consent. Under DBC, the case will be dealt with on the papers by the PCC.

## Risk

51. The proposed change to the standard of proof will allow us to better address risks faced by the public and consumers in the provision of legal services. The ability to apply sanctions to people we regulate who are more likely than not to have seriously breached their professional obligations means that there is a reduced likelihood that behaviour, which is a risk to the public, is not suitably addressed.
52. A further risk arises out of the misalignment between the BSB applying the civil standard of proof and the Solicitor's Disciplinary Tribunal (SDT) applying the criminal standard of proof. Whilst the SDT is not an approved regulator under the LSA, the Tribunal does adjudicate upon alleged breaches of the rules and regulations applicable to solicitors' firms which may include employed barristers.
53. The SDT's Chief Executive commented on the BSB's consultation by stating:

*"The SDT will remain the master of its own destiny in this debate. Its membership will do what it believes to be right in a rational, informed, evidence-based manner. The SDT will lead on the issue of the standard of proof applied in its proceedings on its own terms and in its own time and will not be distracted by the sometimes ill-informed rhetoric of others. The SDT is watching the BSB consultation with interest, recognising that the Bar's tribunal is a smaller body than the SDT with different issues."*<sup>13</sup>

54. The SDT's response to the BSB's consultation is published on the SDT website. It limited its response to question two: whether the "BSB should only change to the standard of proof if and when the Solicitors Disciplinary Tribunal also does so?". The SDT stated:

*"The Tribunal would not wish its decisions to delay or accelerate the Bar Standard Board's proper reflections on their own rules.*

*The Tribunal will itself, as part of the exercise of bringing forward its proposed new rules, be consulting on the appropriate standard of proof to apply"*<sup>14</sup>

55. It is the BSB's view that, since it is right for the standard of proof to be amended, the change should not await the outcome of the SDT's deliberations and that the BSB should instead take the lead on this issue.
56. This may lead to a situation where members of the Bar and their instructing solicitors are held to different standards of proof for the same or similar behaviour, potentially even having been involved in the same course of conduct. However, in pursuing this application, the BSB has also taken into account that the present system already contains such anomalies. This is particularly so in the context of Alternative Business Structures where barristers can already work alongside accountants, legal executives, and solicitors all of whom are subject to the civil standard (save at the SDT). Accordingly, while some anomalies would be created by a change, at least until the SDT changes its standard of proof, others would be eliminated. It is also relevant that the SDT is currently

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<sup>13</sup> SDT President, Edward Nally's comments can be found at: <http://www.solicitortribunal.org.uk/news/sdt-response-bsb-standard-proof-consultation>

<sup>14</sup> Solicitor's Disciplinary Tribunal, 'Response to Bar Standards Board Consultation: Review of the Standard of Proof Applied in Professional Misconduct Proceedings', July 2017, Para 4-5, <http://www.solicitortribunal.org.uk/sites/default/files/sdt/SDT%20Response%20-%20BSB%20Consultation%2020.07.17.pdf>

consulting on changing its standard of proof to the civil standard, If the outcome is in favour of making the change, then the anomalies produced by the BSB's change could be short lived.

57. A further risk identified by some respondents to the consultation is the negative impact failing to make a change could have on the public perception of the BSB's processes. The Legal Services Consumer Panel noted the importance of public confidence in professional regulation when they raised the issue of 'silent sufferers' (consumers who had a complaint but did nothing about it). They noted that "*the proportion of 'silent sufferers' increase from 35% in 2016 to 49% in 2017*".

58. Concerns about the impact on public perception were also echoed by the Bar Council (when expressing arguments in favour of a change), stating:

*"...concerns were expressed about the public perception of the standard. There were concerns that the public could perceive the criminal standard as mere protectionism working in the profession's interest rather than in the wider public interest."*

## **The regulatory objectives**

59. The BSB has not identified any significant adverse impacts upon any of the regulatory objectives as a result of making the change to the standard of proof and the consequential amendments to the regulations. We do not consider that there will be any impact upon the constitutional principles of the rule of law or access to justice. Nor do we consider that this will restrict the promotion of competition in the provision of services or the public's understanding of the citizen's legal rights and duties.

60. In contrast, it is felt that the changes will actively promote the regulatory objectives in the following ways:

### **Protecting and promoting the public interest**

61. It is in the public interest that behaviour which is more likely than not to pose a risk to the public is addressed effectively, and that serious breaches of professional obligations are not allowed to continue without sanction.

### **Encouraging an independent, strong, diverse and effective legal profession**

62. The consultation requested views on potential impacts under the Equality Act 2010. Following this consultation, and based on our own findings, there is no clear evidence that would indicate that a change in the standard of proof would have a disproportionate impact on any particular protected characteristics. Nevertheless, we are by no means complacent and will continue to monitor the system for any indications of unfair treatment.

63. The impact of these changes will be monitored via the ongoing monitoring and reporting processes carried out by the BSB as a standard part of our work. This includes the collection and analysis of equality and diversity statistics related to the enforcement system as well as the regular reports to the BSB's regulatory Committees and the annual performance report which is made available to the public,

64. The change in the standard of proof will serve to enhance our ability to take action against anyone who is in breach of their professional obligations. This will include those

who have undermined the profession's independence, strength, diversity and effectiveness.

### **Promoting and maintaining adherence to the professional principles**

65. The change in the standard of proof will allow us to be more effective in taking action where there has been a serious breach of the professional obligations and, in so doing, allow us to promote and maintain adherence to the associated professional principles.

## **The Better Regulation Principles**

66. The BSB considers that the change to the standard of proof and the consequent amendments to the Handbook regulations will assist us in meeting our obligations to have regard to Better Regulation Principles. These would be met in the following ways:

### **Transparent**

67. As with all BSB regulations the new regulations described above will be published on the BSB website. We have identified no reason to believe that the system's transparency will be adversely impacted by this change.

### **Accountable**

68. We have identified no reasons to believe that the system's accountability will be adversely impacted by this change. Indeed, accountability to the public for effective regulation will be enhanced.

### **Proportionate**

69. The change in the standard of proof is a proportionate means of aligning the BSB with good regulatory practice and a way of ensuring that the public are protected as effectively as possible.

### **Consistent**

70. Having considered the regulatory arrangements of other regulators, we are satisfied that this aligns the BSB with good regulatory practice. The responses from other regulatory bodies to the consultation supports this.

### **Targeted**

71. The change is targeted at only those persons who seriously breach their professional obligations. It will have no impact on anyone whose behaviour accords with their professional obligations or is of a less serious nature and can be addressed through alternative administrative sanctions where the civil standard is already applied.

## **Desired Outcomes**

72. In proposing this change, the BSB has sought to improve upon our current regulatory practice in such a way that the public is better protected in the future. We also recognise the importance of maintaining a modern regulatory system and believe that this change will bring us into line with good regulatory practice.

## Other Approved Regulators

73. Our proposed changes are consistent with the approach taken by other regulators. As discussed in the consultation paper, only the BSB and the Royal College of Veterinary Surgeons currently apply the criminal standard of proof. The SDT also applies this standard but is not an approved regulator, please see paragraphs 52 to 55 above for a discussion on the risks associated with the SDT's position whilst noting that the SDT is also considering a move to the civil standard of proof.
74. A variety of regulators were invited to provide comments on the consultation paper. Of the responses received all were positive, save for the Bar Council (which is an approved regulator under the LSA but delegates its regulatory functions to the BSB). We do not consider that the proposed changes will impact upon any of the Approved Regulators under the LSA.

## Implementation timetable and operational readiness

75. In our consultation response paper, we took the preliminary view that the change in the standard of proof would apply to conduct on or after the date of the introduction of the change. We remain of this view and believe that doing so will ensure fairness to the profession and a reasonable transitional period. The necessary transitional provisions specifying this approach can be found at paragraphs 47 to 50.
76. Subject to operational readiness, we would like to bring these changes into effect on 1 April 2019. This will provide the necessary time to prepare for the change, including training all relevant parties, and to allow the profession to adjust. This is a brief outline of the implementation milestones:

Application submission	Sep 2018
Application approval and communication	Sep 2018 to Oct 2018
Policy and guidance changes	Oct 2018 to Jan 2019
Training for staff, PCC members, BTAS and Prosecutors	Jan 2019 to Mar 2019

77. With regards to training, this will of course need to be provided to members of the PCC and its proposed successors, BSB staff, prosecutors and BTAS panel members. The training will include, but will not be limited to:
- The different implications of the use of the criminal and civil standards of proof;
  - The transitional arrangements and how to apply those arrangements, including an understanding of when each standard of proof should apply;
  - The use of the civil standard of proof in the Determination by Consent procedure; and,
  - The applicability of the revised standard of proof to considering allegations, and proceedings, involving Disqualification Orders.