

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Enforcement

Annual Report 2016/17

Professional Conduct Committee
Professional Conduct Department

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Introduction and overview of our work

- 1.1 This annual report provides an overview of the Bar Standards Board's ("BSB") work, in the year from 1 April 2016 to 31 March 2017, on enforcing the professional obligations of barristers and entities authorised by the BSB as set out in the BSB Handbook ("the Handbook").
- 1.2 The work of enforcing the terms of the Handbook is carried out by the Professional Conduct Department ("PCD") and the Professional Conduct Committee ("PCC"). We consider all information received which may indicate a breach of the Handbook¹. Where we are satisfied there is sufficient evidence of a potential breach, we will carry out a formal investigation and, if appropriate, take enforcement action.

Contents of the report

- 1.3 This report is divided into four parts. The first: "What we did", reports on our handling of information and complaints received over the year including trends in caseloads and outcomes. The second part: "How well did we perform", looks at our performance including performance against the agreed indicators, and quality assurance of our work. The third: "Continuous improvement and knowledge management" provides an overview of our mechanisms to improve the enforcement system and the lessons that we can learn from key cases and their outcomes. Finally, in the fourth part we report on the "Wider work of the PCD".

- 1.4 In addition to the information contained in this report, all the key supporting raw data is published on our website in an accompanying Statistical Report for 2016/17.

Data sources

- 1.5 Our enforcement system is supported by a comprehensive Case Management System (CMS) in which all actions taken on information received are recorded. This allows us to track, monitor and assess the progress and outcomes of cases and provide the statistical information set out in this report.
- 1.6 We also carry out an ongoing User Feedback Survey. However, in 2016/17, due to staffing issues, the survey was suspended from January to March 2017 and thereafter there was a delay in sending out questionnaires. This has meant full data for the year is not available and the survey was incomplete at the year end. Therefore, the results of the survey are not included in this report.

Impact of multiple complaints about one barrister

- 1.7 In recent years, the statistics in our Enforcement Reports have been affected by the presence of an unprecedented number of complaints and cases of disciplinary action against one barrister ("Barrister B") and the chambers in which that barrister worked. The high level of complaints about one barrister has inevitably led in places to a slightly distorted picture of the underlying trends in casework on which we have commented in past reports. By the end of 2016/17 all cases related to Barrister B,

¹ Part 2 of the Handbook contains the Bar's Code of Conduct.

some of which were several years old, had been closed following the disbarment of the barrister in question. We have therefore included in this report, where appropriate, two sets of figures: one which includes these multiple complaints and another which excludes them. We hope, in doing so, to provide a more accurate reflection of the overall trends in our casework.

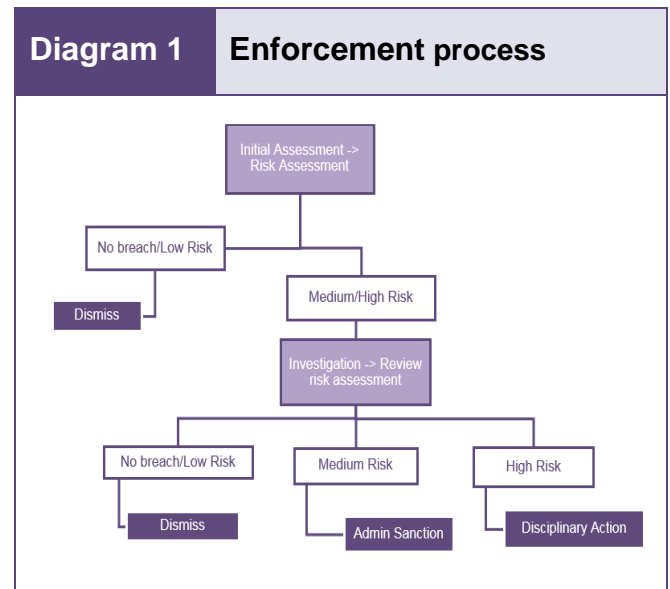
Our approach to enforcement work

- 1.8 The BSB takes a risk based approach to regulation which includes decisions on enforcement action. This means our resources are concentrated on those issues which present the greatest risks to the regulatory objectives². Our Enforcement Strategy³ sets out our approach in more detail and all decisions are taken in accordance with this strategy.

Decision making structure

- 1.9 The enforcement system of the BSB is governed by regulations set out in Part 5 of the BSB Handbook, in particular the Complaints Regulations and the Disciplinary Tribunal Regulations. Under the Complaints Regulations, the power to take decisions in relation to the initial assessment and investigation of complaints is given to the Professional Conduct Committee (PCC). However, the PCC authorises staff in the Professional Conduct Department (PCD) to take a range of decisions on its behalf.
- 1.10 Diagram 1 shows in outline our enforcement process, more detail about

which can be found in subsequent sections.



Professional Conduct Department

- 1.11 The PCD consists of 27 staff divided into three teams.
- 1.12 The staff in the Assessment Team are responsible for the initial assessment of incoming information and complaints. They are authorised by the PCC to take decisions to refer cases for formal investigation or take no action on them. The team also provides advice and assistance to the public in making complaints via our telephone Information Line.
- 1.13 Formal investigations are carried out by staff in the Investigations and Hearings Team. This team is authorised by the PCC, where appropriate, to impose administrative sanctions and in some circumstances, refer cases to disciplinary action. Where disciplinary action is taken, it is this team that prepares and,

² The regulatory objectives are set out at section 1 of the Legal Services Act 2007.

³ Our Enforcement Strategy is published on the BSB website: https://www.barstandardsboard.org.uk/media/1710431/140106_-_enforcement_strategy_-_live_updated_october_2015_.pdf

with the support of our panel of prosecutors, presents cases to Disciplinary Tribunals.

- 1.14 The Operational Support Team has no decision-making powers but provides administrative support to the Professional Conduct Committee.

Professional Conduct Committee

- 1.15 The PCC has the full range of powers to take decisions on enforcement action including imposing administrative sanctions, referring cases of professional misconduct to disciplinary action and, under the Determination by Consent procedure, adjudicating on charges of professional misconduct. The PCC also provides advice to the PCD staff where needed.
- 1.16 The PCC consists of 36 members; currently 20 lay and 16 barristers. It is divided into two teams and meets every three weeks to take decisions on complaints.

Disciplinary action

- 1.17 Where the PCD or PCC decide there is sufficient evidence of a breach of the Handbook which is serious enough to amount to professional misconduct the matter will be referred to disciplinary action. Disciplinary action can either be taken under the Determination by Consent procedure (where charges are decided with the barrister’s consent by the PCC) or by an independent Disciplinary Tribunal.
- 1.18 Disciplinary Tribunal panels are convened and administered by the Bar Tribunal and Adjudication Service (BTAS). The BSB’s role is to bring charges of professional misconduct in front of the independent tribunal panels. In doing this, we are supported by a panel of practising barristers who assist us with the preparation of tribunal cases and represent us at hearings. The panel currently consists of 65 barristers who provide their services pro bono.

Our aims and objectives	
<p>Our main aims are to:</p> <ul style="list-style-type: none"> • Act in the public interest; • Protect the public and other consumers of legal services; • Maintain the high standards of the Bar; • Promote confidence in the complaints and disciplinary process; and • Make sure that complaints about conduct are dealt with fairly, consistently and with reasonable speed. 	<p>Our objectives are to:</p> <ul style="list-style-type: none"> • Deal with complaints made against barristers promptly, thoroughly and fairly; • Ensure appropriate action is taken against barristers who breach the BSB Handbook; and • Be open, fair, transparent and accessible.

Staffing issues in 2016/17

- 1.19 During 2016/17, the PCD experienced a number of staffing problems and this report should be read against that background. Throughout the course of the year, the department operated without its full staff complement. Staff vacancies were at any one time, between 8 and 25%, due mainly to longer term staff moving on and maternity leave. Very sadly, the manager of the Assessment Team, Adrian Turner, who had been with the organisation for 20 years, died in September 2016. The sudden loss of his wealth of experience was a blow to the department.
- 1.20 Despite the challenges, performance during the year was maintained and in some areas improved.

Part 1: What we did

- 2.1 The BSB's complaints procedure consists of four formal stages: initial assessment; investigation; decision on action; and disciplinary action. Prior to commencing the formal process, we also handle a large number of what we term "pre-complaints". The paragraphs below outline the trends in information received, formal complaints registered and the actions taken on cases during the year.
- 2.2 The number of new complaints registered each year represents only a proportion of the cases we work on during a year. However, as this section will show, the underlying pattern is one of decreasing casework. In 2016/17 we worked on 625 cases with 200 remaining open at the end of the year. We therefore closed 425 cases (more than we opened). Last year, 2015/16, the total active caseload was 760 with 245 remaining open at year end. While the number of cases in relation to Barrister B

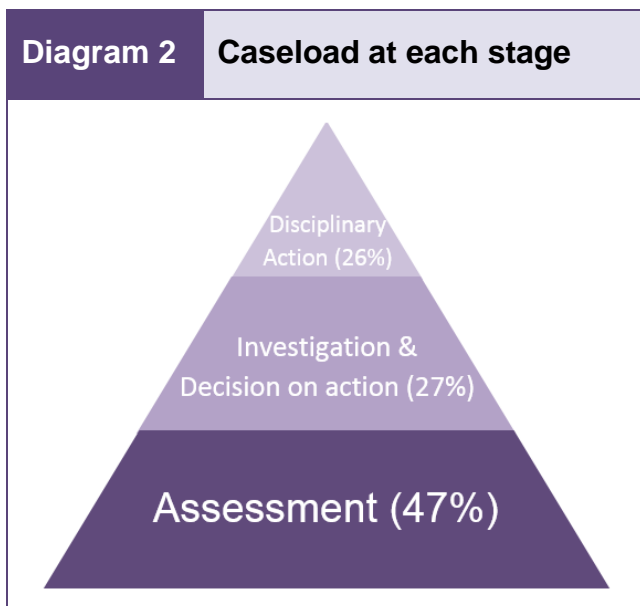
was high in both 2015/16 (89) and 2016/17 (53), excluding these from the figures still leaves an overall picture of a reduced caseload: down by 15%.

- 2.3 As diagram 2 shows, the number of cases at each stage of the process reduces as decisions are taken with ultimately only 26% of formal complaints this year resulting in disciplinary action.

Pre-complaints

- 2.4 In previous Enforcement Reports, we have not reported separately on the statistics relating to "pre-complaints". To provide a more comprehensive picture of the extent of our work, we are for the first time including more detailed information on such complaints.
- 2.5 "Pre-complaint" is a term used to describe information received (other than formal complaints submitted by members of the public or others) which may indicate a breach of the Handbook has occurred. They fall into four broad categories:

- general enquiries received via our Information Line⁴ or other means, which have resulted in a complaint form being sent to the enquirer or the matter being passed to the Legal Ombudsman⁵;
- reports of non-compliance with Handbook provisions from other sections of the organisation e.g. authorisation to practise;
- reports from barristers in accordance with their reporting obligations e.g. reports of serious misconduct;



⁴ Our Assessment Team operates an information line from 9am-5pm weekdays for the purposes of providing the public with initial advice on making a complaint.

⁵ Our regulations require that complaints from clients of barrister are first referred to the Office of the Legal Ombudsman.

- information received from any other source (other than formal complaints) which may indicate a breach of the Handbook has occurred e.g. press reports.
- 2.6 All this incoming information is logged on our system as “pre-complaints”. Where a complainant returns a complaint form, the case will be converted into a formal complaint. Matters referred to the Legal Ombudsman will be closed. In all other cases, the information is assessed to determine whether regulatory action is required (see “Initial Assessment section below for more information”).
- 2.7 Where appropriate, we may refer issues to a barrister’s chambers or other bodies to address. If there is evidence of a potential breach of the Handbook and that breach represents a medium or high risk to the regulatory objectives, we will convert the pre-complaint to an internal complaint⁶ and the matter will be referred for investigation.
- 2.8 In 2016/17, we logged 960 pre-complaints, which was a significant increase on the number logged in 2015/16 (882)⁷. 191 of the pre-complaints were subsequently converted into complaints, a slight decrease on last

year (203). However, the trend indicates that the PCD is handling an increasing number of general enquiries and communications that are not reflected in the number of formal complaints we deal with.

- 2.9 In the paragraphs below, we set out in more detail the trends in relation to some areas of the “pre-complaints” we handle.

Serious misconduct reports

- 2.10 Under the terms of the BSB Handbook, barristers are required to report their own serious misconduct (rC65.7) and also serious misconduct by others (rC66). These requirements were introduced in 2014 and inevitably, with awareness of them becoming more widespread, there has been a year on year rise in the number of such reports. This year we received 110 such reports as compared to 80 in 2015/16: a rise of 38%.
- 2.11 The statistics indicate that barristers are rightly erring on the side of caution in reporting serious misconduct as overall only approximately 53% of reports result in a formal complaint being raised by the BSB.

	Pre-complaint cases	Pre-complaint cases converted	Conversion rate
2014/15	914	206	22.5%
2015/16	882	203	23.0%
2016/17	960	191	19.9%

⁶ Internal complaints are formal complaints raised by the Bar Standards Board of its own motion.

⁷ Prior to 2014/15, pre-complaints were logged in a different format than at present, so the data before that time is not comparable.

Self-reports of serious misconduct

- 2.12 In 2016/17 we received 77 self-reports of serious misconduct from barristers, a considerable increase from the previous two years when the number stood at 30. Looking at the subject matter of these self-reports, they relate to issues such as: dishonesty in professional or personal life; inappropriate communications and drafting; failing to act independently; and holding out as a barrister.
- 2.13 There was a significant increase in 2016/17 in self-reports for failure to obtain/renew a practising certificate, and a small increase in self-reports of misconduct in relation to a barrister's duties to their client: in particular, failing to preserve client confidentiality. There were 13 self-reports of criminal convictions and two for dishonesty. This was an increase on last year but was mainly related to reports of non-criminal driving offences (see paragraph 2.15).
- 2.14 Of the 77 reports submitted in 2016/17, 31 have been assessed as revealing a potential breach of the Handbook warranting further action and therefore converted to formal internal complaints. The self-reports that were taken forward related to a wide range of matters but examples include four convictions for drink driving, five other criminal convictions and the two dishonesty matters referred to above, as well as 11 practising certificate matters.
- 2.15 28 reports were closed without any action being taken: 15 of these related to reports of failing to obtain a practising certificate of which seven arose from circumstances in a single chambers where, inadvertently, barristers working

on secondment had not obtained dual capacity certificates. Four of the reports related to speeding or driving offences which barristers are not required to report. The others related to matters such as failure to keep proper records, potential loss of confidential information, late payment of court orders and holding out as a barrister when not authorised to do so. The circumstances of these latter reports were assessed as being low risk and therefore did not warrant formal action being taken.

Reports of serious misconduct by others

- 2.16 In 2016/17 we received 33 reports of serious misconduct by others, which was a significant drop from last year (50 reports) but a similar number to that in 2014/15 (35 reports). The drop is equally spread across all types of conduct reported and, given the very small numbers of reports as compared to the practising population, it is impossible to draw any conclusions from the decrease.
- 2.17 Of the 33, so far 14 have resulted in internal complaints being raised. They related to matters such as dishonesty in professional or personal life, inappropriate communications, failing to act independently and holding out as a barrister.

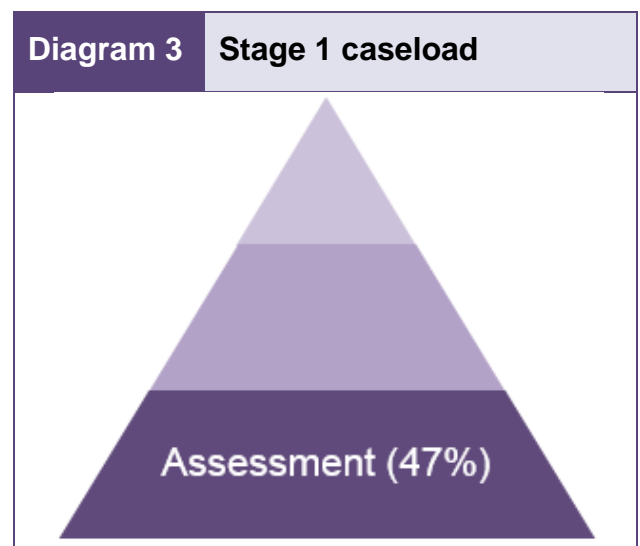
Internal and external complaints

- 2.18 All internal complaints, i.e. those that the BSB raises of its own motion, start as pre-complaints (see above). It is only following an initial assessment that the decision to raise an internal complaint is made.
- 2.19 External complaints are those we receive from external sources such as members

of the public, solicitors, other professionals and organisations or clients of barristers (via the Legal Ombudsman). These are subject to initial assessment after being registered on our system.

Stage 1 – Initial Assessment of complaints

- 2.20 The first stage of the formal enforcement process is carrying out an initial assessment of the information/complaints to determine whether there is evidence of a potential breach of the Handbook that warrants formal investigation with a view to taking enforcement action.
- 2.21 The initial assessment involves an assessment of whether the available evidence reveals a potential breach of the Handbook. If so, a risk assessment is carried out to determine the level of risk to the regulatory objectives: low, medium or high. In most cases, a low level of risk will result in no action being taken but medium and high risk cases will be referred to formal investigation.
- 2.22 In total, we opened 366 complaints over the course of 2016/17 both internal and external. This is 15.7% fewer than last year and the lowest number of registered new complaints in the last five years. The



reasons for this decline are rehearsed in more detail below but the reduction in new complaints about Barrister B was a significant factor. In total, over the last three years, 139 complaints were raised or made about Barrister B or those working in his chambers. If the complaints relating to Barrister B are excluded from the figures, the overall drop in complaints is only 7.6%.

Risk assessments

- 2.23 As previously indicated, if it is determined that the information received, either as an external or internal complaint, discloses a potential breach of the Handbook then the matter is risk assessed.

Table 2 Complaints opened – annual comparison 2012/13 to 2016/17					
Complaint Source	2012/13	2013/14	2014/15	2015/16	2016/17
External	316	300	297	300	254
Internal	175	108	143	134	112
Total	491	408	440	434	366

How do we assess risk?

Each case is rated High, Medium or Low risk based on a combination of two tests:

- Firstly, a series of questions covering common areas of risk or possible risk to consumers of legal services and the public (such as whether the information relates to dishonesty on the part of the barrister). The answers are used to calculate a risk level;
- Secondly, a Case Officer of the PCD will assess the case in context and determine whether the risk level calculated from the answers to the questionnaire is appropriate.

2.24 Risk assessment is a tool used to assist us in determining the most proportionate form of regulatory action taking into account the outcomes set out in the Handbook and the regulatory objectives. The higher the assessment of risk, the more likely it is that the case will be referred for investigation and potential disciplinary action. A low risk level at the initial assessment stage will usually lead to no further action being taken or the matter, if appropriate, being referred elsewhere such as to our Supervision Team, chambers or another body. A medium or high risk level would normally result in a referral to formal investigation.

2.25 A total of 445 cases were subject to initial assessment in 2016/17. This includes cases outstanding from 2015/16 and excludes cases that were still to be

assessed at the end of 2016/17. Of the 445 assessments, 47% (208) did not require a risk assessment as no breach of the Handbook was revealed by the information/complaint or the matter was over 12 months old and did not represent a risk to the regulatory objectives.

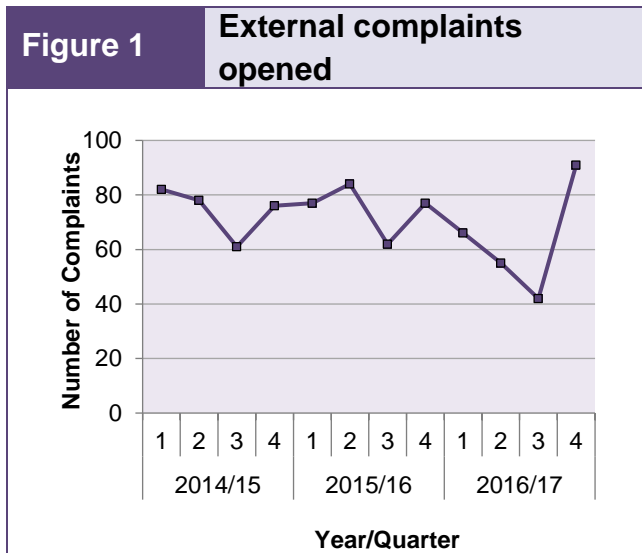
2.26 Of the 237 risk assessments carried out, in 2016/17, the number assessed as high risk was considerably lower than last year at 69 compared to 133 (almost a 50% decrease). However, an analysis of the relevant cases shows that these figures were significantly affected by the large number of high risk cases relating to Barrister B in 2015/16 (42 cases). Nevertheless, the underlying trend in high risk cases is still down.

Risk Profile	High risk	29% [69]
	Medium risk	28% [66]
	Low/no risk	43% [102]

External Complaints

2.27 **Number:** as Table 2 indicates, the number of external complaints opened in 2016/17 reduced by 46 as compared to 2015/16. However, last year, 38 new external complaints were opened, related to Barrister B, whereas only two were opened in 2016/17⁸. Therefore, the sharp reduction in external complaints this year is almost entirely due to the absence of new complaints about this barrister. The underlying trend in receipt of external complaints is a gradual decline of about 10 complaints year on year for the last three years.

⁸ The majority of complaints related to Barrister B involved either a failure to administer chambers properly or failures to co-operate with the Legal Ombudsman i.e. a failure to comply with orders by the Ombudsman to return fees and/or pay compensation to clients.



2.28 While the general trend in external complaints over the last five years has been downward, the last quarter of 2016/17 saw a very sharp increase in the number of external complaints received, with 91 being registered (Figure 1). This is higher than any other quarter in the last five years. It is still too early to tell whether this is an isolated occurrence or the start of an upwards trend in receipt of complaints.

2.29 **Sources of external complaints:** the trends in relation to the various sources of external complaints remain similar to previous years. The main categories of complaints are from civil or family law litigants numbering 49 (19%) and 35 (14%) respectively.

2.30 We also record whether complaints are received from litigants in person. The number of complaints from litigants in person has been gradually declining year on year from the peak in 2011/12. In that year, they rose from previous single figures per year to 80 but by 2016/17 the number had gradually dropped to 47. Nevertheless, they still account for almost one fifth (18.4%) of all external

complaints submitted. The gradual reduction may indicate that the justice system and barristers are becoming more used to, and better able to deal with, the increasing presence of litigants in person within the system.

2.31 It is also interesting to note the categories of sources of external complaint that did not give rise to any, or any significant numbers, of complaints in 2016/17. Complaints from criminal defendants remained low at only 19 (7%) of all external complaints. This low pattern has existed since the Legal Ombudsman came into existence in 2010 and all complaints from clients of barristers have been channelled through the Ombudsman’s Office. The low level of conduct referrals indicates that the concerns of criminal clients are mainly associated with the level of service provided and not the professional conduct of their barristers.

2.32 Also, the BSB started authorising and regulating entities, as opposed to just individual practitioners, in April 2015. As at end of March 2017, 64 entities had been authorised but no complaints had been received about any of these entities.

2.33 2016/17 saw a sharp increase in the number and percentage of complaints where the source of the complaint was classified as “other”: up from 45 in 2015/16 to 75 in 2016/17 which represents nearly 30% of the recorded sources of external complaints. It will always be the case that we receive complaints which are hard to classify. An analysis of these complaints indicates that there has been an increase in complaints from members of the public

who have no direct connection with the barrister they are complaining about and the issues relate to matters they have heard or read about in the press or on social media, including actions of politicians who are called to the Bar. However, the increase in the “Other” category indicates that a review of our categorisation and further staff training in this area are required.

- 2.34 **Subject matter of external complaints:** Table 3 shows the most common categories of breaches of the Handbook about which external complaints are made. These categories cover nearly 90% of complaints received. The figures show that there have been some changes in the subject matter of external complaints in the last year.
- 2.35 Allegations about all forms of misleading (the court, persons or statements/submissions) were still the largest category and increased by 27%

from 71 in 2015/16 to 97 in 2016/17. Allegations about inappropriate handling of evidence or information, while still small in number, increased substantially: up by 143% from seven last year to 17 in 2016/17. However, 88% of these complaints were dismissed without an investigation.

- 2.36 There were also significant decreases in some categories: allegations of dishonesty dropped by 40% from 25 to 15 but 12 of these were dismissed. Allegations of rudeness/misbehaviour out of court saw a similar drop from 23 in 2015/16 to 13 this year (43%) with the majority being dismissed (9) on initial assessment.
- 2.37 With such small numbers, it is difficult to draw any conclusions from these statistics about the conduct of barristers but the fluctuations provide some indication of the nature of public concerns whether or not they are

Table 3		External complaint statistics in 2016/17																													
Total complaints received	254	Referrals from the Legal Ombudsman	13																												
Complaint categories <table border="1"> <caption>Complaint Categories Data</caption> <thead> <tr> <th>Category</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Other Categories</td> <td>50%</td> </tr> <tr> <td>Civil Litigants</td> <td>19%</td> </tr> <tr> <td>Family Law Litigants</td> <td>14%</td> </tr> <tr> <td>Barristers/Solicitors/Judges</td> <td>10%</td> </tr> <tr> <td>Criminal Proceedings</td> <td>7%</td> </tr> </tbody> </table>		Category	Percentage	Other Categories	50%	Civil Litigants	19%	Family Law Litigants	14%	Barristers/Solicitors/Judges	10%	Criminal Proceedings	7%	Complaint aspects <table border="1"> <thead> <tr> <th>Aspect</th> <th>Complaints</th> </tr> </thead> <tbody> <tr> <td>Misleading the Court</td> <td>48</td> </tr> <tr> <td>Making misleading submissions or statements</td> <td>41</td> </tr> <tr> <td>Inappropriate communications with clients or others</td> <td>18</td> </tr> <tr> <td>Inappropriate handling of information or evidence</td> <td>17</td> </tr> <tr> <td>Dishonesty</td> <td>15</td> </tr> <tr> <td>Rudeness/misbehaviour out of Court</td> <td>13</td> </tr> <tr> <td>...</td> <td></td> </tr> </tbody> </table>		Aspect	Complaints	Misleading the Court	48	Making misleading submissions or statements	41	Inappropriate communications with clients or others	18	Inappropriate handling of information or evidence	17	Dishonesty	15	Rudeness/misbehaviour out of Court	13	...	
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assessed as amounting to breaches of the Handbook.

Internal Complaints

2.38 The section above on pre-complaints provides an overview of the types of cases that result in internal complaints being raised. In general, as Table 2 shows, the ongoing trend is a downwards one with 112 internal complaints being opened in 2016/17 as compared to 134 in 2015/16 (a 16% drop). The decrease cannot be attributed to specific types of complaint as the fluctuations are across the board. Approximately 40% (42) of the complaints opened related to reports of serious misconduct. However, it should be noted that there are difficulties in comparing types of complaints to previous years as the categories we assign were amended during 2015/16 to better reflect the terms of the Handbook.

2.39 **Subject matter of internal complaints:** of the 112 internal complaints opened 55% (62) related to non-compliance with practising requirements: mainly failure to renew or obtain a practising certificate (54). This is an increase on last year of 38% when the number of such cases was 39. Most of the practising certificate complaints relate to the authorisation process not being completed on time. In many cases the period in which the barrister practised without a certificate was short. Nevertheless, such conduct presents a risk given that exercising rights of audience when not authorised to do so is potentially a criminal offence and clients, during the period of non-authorisation, are not able to seek redress from the Legal Ombudsman.⁹

2.40 One area that has seen a decrease is the number of cases relating to barristers failing to provide information promptly to

Aspect	2015/16	%	2016/17	%
Failing to renew practising certificate	5	4%	28	25%
Failure to obtain practising certificate	5	4%	26	23%
Performing reserved legal activities when not authorised to do so	6	4%	8	7%
Holding out as a barrister when not authorised to do so	3	2%	7	6%
Criminal conviction other than drink driving	15	11%	7	6%
Failing to provide information promptly to the BSB	15	11%	2	2%
Practising without a practising certificate	15	11%	N/A	0%
Failure to complete Authorisation to Practice	14	10%	N/A	0%
...				

⁹ The Legal Ombudsman's jurisdiction only covers barristers who are authorised to practise at the time the event giving rise to a complaint occurs.

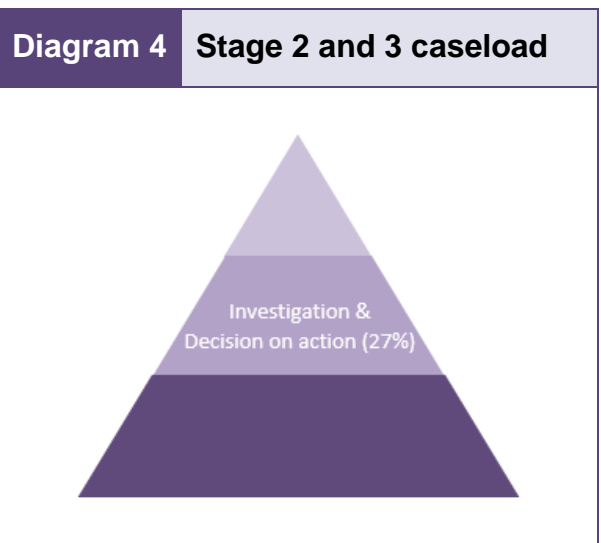
the BSB. Last year we reported that there were 14¹⁰ such cases, this year there were only two. Closer analysis shows that half the complaints in this category last year related to referrals from the Supervision Team in relation to barristers failing to provide income validation when requested to do so. The requirement to provide income levels as part of the authorisation to practise process was first introduced in 2016. Therefore, it is positive that the number of internal complaints in this area has decreased.

Outcome of complaints at the initial assessment stage

2.41 In total 194 formal complaints were closed at the initial assessment stage without any action being taken in 2016/17, 192 of which were external complaints. This equates to 45.5% of all decisions taken on complaints, which is an increase on 2015/16 when 40% were closed at the initial assessment stage but below the figure of 50% closed at this stage in 2014/15. As stated above, the main reason for closing complaints at this early stage was insufficient or no evidence of a breach of the Handbook.

Decisions at the initial assessment stage are normally taken by staff under delegated authority and it is rare that cases are referred to the PCC for decision. In 2016/17, 95% of initial assessment decisions were taken by staff which is in line with previous years.

Stage 2 and 3 – Investigation and decision



2.42 Following a referral to formal investigation, the distinction between external and internal complaints become less relevant as the same investigation process is followed for all complaints.

Case study

The PCD received a complaint from a member of the public who was involved in civil litigation. The complainant had overheard the barrister on the other side make a disparaging comment about her to her representative whilst in court. She felt the remark was insulting and not what would have been expected of a barrister, nor directly relevant to the case before the court. At the initial assessment stage it was determined that, while there was evidence of a breach of the Handbook, the risk to the regulatory objectives was low and did not require regulatory intervention. It was considered a more proportionate approach was for the matter to be dealt with under the chambers' complaints procedure. The complaint was therefore dismissed but referred to the chambers. The chambers investigated and partially upheld the complaint. The barrister apologised to the complainant.

¹⁰ Number differs to that presented in Table 4 due to data error last year which was corrected post publication.

- 2.43 In 2016/17, 175 new cases were referred to formal investigation and added to the number of cases outstanding from 2015/16, the overall number of live investigations in 2016/17 was 228.
- 2.44 At end of an investigation, the case is reviewed and a decision taken as to what action, if any, should be taken. In some cases, the investigation shows that no breach of the Handbook has occurred or there is insufficient evidence of a breach and the case will be dismissed. In others, where the breach is supported by the evidence, the risk may be considered too low to warrant regulatory action. In the remaining cases a decision will be taken as whether the risk (seriousness of the conduct) is one that warrants the imposition of an administrative sanction or referral to disciplinary action. Such decisions can either be taken by staff under delegated authority or will be taken by the PCC at a meeting.
- 2.45 Administrative sanctions (warnings and fines) are not disciplinary in nature. They are imposed where there is evidence of a breach of the Handbook on the balance of probabilities and the breach is not sufficiently serious to amount to professional misconduct.

- 2.46 In 2016/17 a total of 111 cases were closed at the investigation stage which is in sharp contrast to the 235 closed at this stage in 2015/16.
- 2.47 **Dismissals:** the majority of the closures (73) at the investigation stage were dismissed. This represents 16% of the total closures during the year. This compares to 157 that were dismissed at this stage in 2015/16. The reduction in numbers is a reflection of the decreasing caseload overall (see paragraph 2.2 above). In most cases the decision to dismiss a complaint post-investigation was due to insufficient evidence of a breach or the conduct being of such a low risk that action would not have been appropriate.
- 2.48 **Administrative sanctions:** In 2016/17, 38 cases were the subject of administrative sanctions (9% of all cases closed), 33 of which were warnings. In the main, the sanctions were imposed for breaches of the practising requirements regulations. The number of administrative sanctions in 2015/16 was much higher at 77 but this was due to an unexpected rise in that year in the number of pupils failing to complete the authorisation process properly on first registration. Proactive steps were taken

Table 5		Complaint outcomes 2016/17	
Outcome	#	%	
Closed without investigation	194	52%	
Closed after investigation (No enforcement action)	73	20%	
Administrative sanction	38	10%	
Referred to disciplinary action	66	18%	

to address that issue and no such cases arose in 2016/17. Overall, the trend in administrative sanctions is an upwards one which reflects the increasing use of this power as a more proportionate form of action for medium risk cases.

2.49 **Referrals to disciplinary action:** a total of 66 new cases were referred to some form of disciplinary action in 2016/17: 58 to a tribunal and eight to the Determination by Consent (DBC) procedure. The number of referrals to Tribunal was significantly lower than 2015/16 when 103 cases were referred. However, this picture is distorted by referrals in relation to Barrister B. If these are removed, the figures show a more consistent pattern with referrals in 2016/17 standing at 46 as compared to 53 in 2015/16. This underlying falling trend reflects greater use of administrative sanctions and the overall decrease in caseload.

2.50 **Decisions post investigation:** one striking feature of the decisions taken post-investigation, is the increase in the number of staff decisions. This reached the highest level in three years, building upon increases in previous years. In

2014/15, 42% of decisions were taken by staff, in 2015/16 it stood at 58% and this year 69%. While some of the staff decisions were in relation to complaints about Barrister B, the rise demonstrates a wider trend reflecting our risk based approach. It also reflects the BSB's revised governance principles that emphasise the need for decisions to be taken at the lowest appropriate level. The PCC decision making powers are therefore rightly and increasingly reserved for the most serious and high risk cases: indeed, 70% of the decisions to refer to disciplinary action were taken by the PCC with only 30% taken by staff.

Requests for Review

2.51 Under the Complaints Regulations, where there is new evidence, or some other good reason, the PCC or staff (under delegated authority) can reopen a complaint and reconsider it. In most cases, this arises where a complaint has been dismissed, either before investigation or afterwards.

2.52 This year there were 32 such requests, eight of which resulted in a decision to dismiss being reopened. This shows a very different picture to 2015/16 when 60

Case study

A barrister reported to the BSB the serious misconduct of another barrister. The report related to an assertion in court that certain correspondence had been sent when it had not and therefore the assertion was false and misleading. Following an initial assessment of the report, it was determined that there was sufficient evidence of a potential breach of the Handbook by the barrister and that the conduct was high risk given the potential impact on the administration of justice. An internal complaint was raised and an investigation carried out.

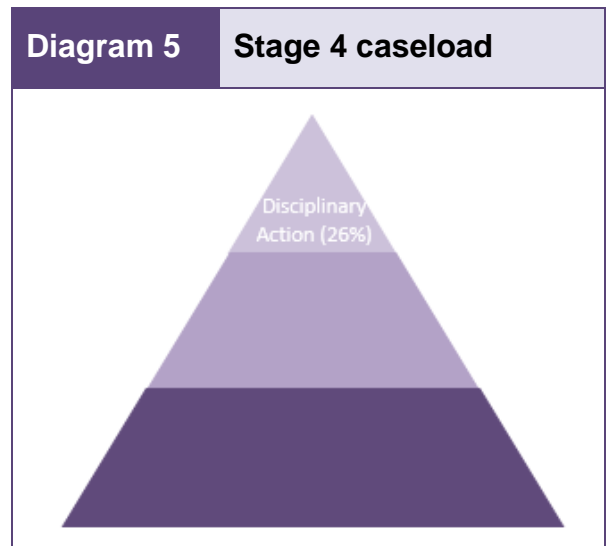
The investigation revealed that while the misleading statement had been made, it had been made in good faith. The barrister had confirmed with the instructing solicitors that the communication had been sent and relied on this when making the assertion to the court. It subsequently turned out that the information he had been given was incorrect. Therefore, at the end of the investigation, it was determined no breach had occurred as the barrister had not knowingly or recklessly misled the court. The complaint was dismissed.

such requests for review were recorded but only one resulted in a decision to reopen or reconsider. The reduction in the number of such reviews arises from a decision in the Assessment Team to apply a more stringent interpretation on the registering of requests for review. This approach has since been changed and we will again be registering disagreements with a decision as “request for reviews” even though an explicit request may not have been made. It is therefore likely that the number of reviews recorded will increase again in 2017/18.

2.53 The number of valid requests for review where the original decision was changed rose significantly in 2016/17: from 1 to 8. Seven involved a review of a decision to dismiss a complaint at the initial assessment stage which were replaced with decisions to investigate. The remaining one involved a decision to dismiss a complaint after investigation but the case was reopened on the basis of new evidence. This is a worrying increase in successful reviews but an anomaly as compared to the low level of cases reopened in previous years. It is likely it is due to the unusual staff turnover and level of staff vacancies in the Assessment Team over the year.

Stage 4 - Disciplinary action

2.54 Cases that are referred to disciplinary action are those where the conduct is assessed as being serious, considering all the circumstances, and poses the greatest risk to the regulatory objectives. A decision to take disciplinary action will only be made where it has been



determined that: an administrative sanction is not appropriate; there is a reasonable prospect of proving professional misconduct to the criminal standard; and it is in the public interest to take action.

2.55 Disciplinary action takes two forms: Determination by Consent (DBC) and Disciplinary Tribunal. DBC is an entirely consensual process reserved for lower level professional misconduct which would not attract a sanction greater than a fine and where the facts are not in dispute. Decisions on DBC cases are made by the PCC on the papers. All other cases of professional misconduct are heard in front of independent Disciplinary Tribunals convened by the Bar Tribunal and Adjudications Service (BTAS).

2.56 In 2016/17 110 cases¹¹ were closed at the disciplinary action stage: nine by DBC and 101 during Tribunal proceedings although not all reached a final hearing. This represents 26% of all case closures in 2016/17.

¹¹ This number does not represent the number of hearings as cases can be heard together.

2.57 **DBC:** Of the nine DBC cases, eight arose from internal complaints relating to reporting requirements such as reports of lower level criminal convictions (e.g. convictions for drink driving). These were cases where the BTAS sentencing guidance indicates that a reprimand or low level fine is appropriate. Eight of the DBC cases resulted in a disciplinary finding which included four in relation to criminal convictions and two related to breach of practising requirements. One case was dismissed when scrutiny of the material provided during the process meant that professional misconduct could not be proved.

2.58 **Disciplinary Tribunals:** A total of 101 tribunal cases were concluded in 2016/17, four of which were withdrawn in the early stages following advice from a member of the prosecution panel. 97 cases were determined by a Tribunal. This is a significant increase on previous years but reflects the large number of cases involving Barrister B that were finally heard or concluded in 2016/17 having been commenced up to three years earlier. Almost half the cases determined by a Tribunal (49) were withdrawn by the BSB offering no evidence. In nearly all these cases this action was taken following the disbarment of the barrister and therefore it was no longer necessary to pursue other outstanding disciplinary cases. In the case of Barrister B, 46 cases were withdrawn at the end of the year when he was formally disbarred after all avenues of appeal had been exhausted.

2.59 If the withdrawn cases are removed from the figures, 51 cases were fully considered by a Tribunal which is more in line with previous years. Of these 51

Determination by Consent

The DBC procedure is an alternative way of dealing with cases which would otherwise be referred to a disciplinary tribunal.

Under DBC, if the barrister agrees, the case against them will be dealt with on the papers and the PCC decides whether the individual is in breach of their professional obligations as set out in the Handbook and, if so, what sentence to impose. Sanctions can include reprimands or fines, but not suspensions or disbarments which can only be imposed by a Disciplinary Tribunal panel.

The barrister is given the opportunity to accept or reject the PCC's finding(s) and sentence.

The aim of the DBC procedure is to conclude the disciplinary process more quickly than a referral to a Disciplinary Tribunal hearing.

cases, 44 resulted in one or more charges being proved: an uphold rate of 86% which is similar to previous years. This level of successful prosecutions is in no small part due to the dedication and expertise of our panel of pro bono barristers who provide invaluable assistance by representing the BSB at Tribunals.

2.60 Of the four cases where all charges were dismissed, in three of these the panel heard the barrister give live evidence and found that the facts were not proved to the criminal standard of proof. In the other, the panel found the facts were proved but did not find that the conduct amounted to professional misconduct.

2.61 **Disciplinary sanctions:** Table 6¹² shows the sanctions imposed following a disciplinary finding either by DBC or by a Disciplinary Tribunal. In line with previous years, the most common sanction was a fine which was imposed in 52% of cases. This year saw a significant rise in the number of barristers disbarred with 19 being disbarred as compared to seven in 2015/16. Eleven disbarments related to criminal convictions (seven for dishonesty) which is also an increase (last year there were only three disbarments for criminal convictions, all for fraud). Three disbarments related to dishonesty in another form. Other reasons for disbarment include findings by the Solicitors Disciplinary Tribunal and, in one case, posting anti-Semitic comments on Twitter.

2.62 **Recovery of fines:** Fines imposed totalled £31,900 in 2016/17: £27,550 in disciplinary fines and £4,350 in administrative sanction fines. This is consistent with the previous two years. Of the 25 fines due to be paid in 2016/17, seven were paid within the time

allowed and 23 overall. We continue to chase the other two outstanding. The BSB has no express power to recover fines owing. Where there is non-compliance we try to work with the barrister to achieve payment including allowing payment by instalments. If after concerted attempts, it is not possible to obtain full payment, we will raise an internal complaint for failing to comply with a disciplinary finding.

Appeals

2.63 Where administrative sanctions have been imposed, or findings of professional misconduct have been made by a Disciplinary Tribunal, barristers have the right to appeal against the findings and/or the sentence imposed. Appeals against administrative sanctions are heard by an Appeal Panel convened by BTAS, whereas appeals against Disciplinary Tribunal outcomes are made to the High Court.

2.64 Only one appeal was received against the imposition of an administrative sanction in 2016/17, which is in line with

Sentence	2015/16		2016/17	
	Barristers	%	Barristers	%
Disbarred	7	21%	19	40%
Suspended	9	27%	5	10%
Fined	16	47%	25	52%
Reprimanded	10	29%	16	33%
Advised as to Future Conduct	1	3%	1	2%
Other	0	0%	0	0%

¹² The number of sanctions imposed is higher than the number of cases as multiple sanctions can be imposed in relation to one case.

previous years. The panel found the imposition of the administrative sanction for failing to maintain a complaints procedure, was warranted but reduced the fine imposed from £1000 to £750.

2.65 Five new appeals to the High Court were lodged against Disciplinary Tribunal decisions in 2016/17. This is considerably fewer than in 2015/16 although the 21 disciplinary appeals lodged in that year were filed by only six individual barristers and Barrister B lodged 15 of them. At the start of 2016/17, 20 appeals remained outstanding.

2.66 However, 23 appeals were decided during the year¹³, considerably more than in previous years, leaving only three outstanding appeals at the end of the 2016/17 year. Of these 23 appeals, 19 (83%) were dismissed and four (including the appeal against the administrative sanction referred to above) were successful, which is a

broadly similar number of successful appeals to previous years.

2.67 In one of the four appeals that was allowed, the BSB unsuccessfully sought to cross-appeal on the basis of what we considered to be an unduly lenient sentence. We always review the outcome of Disciplinary Tribunal cases and consider whether, in the public interest, an appeal would be appropriate where charges are dismissed. However, we rarely lodge appeals against findings of Disciplinary Tribunals which is reflection of the quality of decisions taken by BTAS Tribunals.

Legal action

2.68 In addition to the right of appeal, barristers can also exercise their right to challenge decisions made by the BSB or by a Disciplinary Tribunal by way of Judicial Review proceedings. Challenge by way of judicial review is also available to complainants. Claims against the BSB

Case study

A barrister made a self-report to the BSB of serious professional misconduct. It followed an internal chambers investigation that had established the barrister had been undertaking public access work over a period of three years without informing chambers or sending client care letters. In doing so, he had not only breached the public access rules in place to protect clients but had also deliberately avoided paying chambers fees on the income from the public access work.

The initial assessment determined that there was sufficient evidence of more than one breach of the Handbook and the risk to the regulatory objectives was high given the potential dishonesty involved. An internal complaint was raised and the matter investigated. At the end of the investigation, the matter was referred to the PCC. The PCC concluded there was clear evidence of breaches of the Handbook, that the conduct was high risk and amounted to professional misconduct. It was therefore not suitable for the imposition of an administrative sanction and the PCC referred the case to a five-person Disciplinary Tribunal on the basis that the dishonesty involved would, if proved, warrant consideration of a disbarment. The Tribunal found the charges in relation to dishonesty proved and disbarred the barrister.

¹³ This includes appeals outstanding from 2015/16, as well as some appeals that were lodged in 2016/17.

- are also occasionally lodged in the Employment Tribunal and civil courts.
- 2.69 The number of legal claims dealt with in 2016/17 was similar to previous years. At the start of 2016/17, there were three judicial review applications pending and two discrimination claims – one in the Employment Tribunal and one in the Court of Appeal. During the course of the year a further two judicial review applications were made.
- 2.70 Two of the pending applications for judicial review were lodged by Barrister B. The applications were refused as being totally without merit by the High Court and an Extended Civil Restraint Order was made against Barrister B.
- 2.71 The third pending judicial review matter was somewhat more complex. The BSB had previously successfully judicially reviewed a decision of a cost assessor who had been appointed by a Disciplinary Tribunal following an unsuccessful prosecution of charges by the BSB. The barrister subsequently appealed the judicial review decision, with partial success. The Court of Appeal remitted the matter back to a reconvened Disciplinary Tribunal to fix the correct costs rate and the outcome is still awaited.
- 2.72 The two new judicial review applications received during the year were made by complainants in relation to complaints which had been dismissed in whole or in part. One application for review was dismissed. The second application remains outstanding and has not yet reached permission stage although a connected application for an injunction to stop disciplinary proceedings was refused.
- 2.73 In relation to the two discrimination claims, the Employment Tribunal matter had not reached a final hearing and remained outstanding at the end of the year. The Court of Appeal claim was unsuccessful; however, permission has been granted to the appellant to appeal to the Supreme Court on a specific point relating to the limitation period for bringing the claim.
- 2.74 The department was also the subject of one further civil claim in relation to an investigation and a subsequent referral to a tribunal which we later withdrew. The case was settled.

Part 2: How well did we perform

- 3.1 The BSB uses a number of mechanisms to monitor the performance of the enforcement system to ensure that we handle complaints fairly, consistently and with reasonable speed. These include key performance indicators and other service standards and quality assurance mechanisms. We also strive for continuous improvement by reviewing outcomes of cases for indications of systemic and quality issues that need to be addressed.
- 3.2 This section sets out the results of this performance monitoring during the year.

Performance Indicators

- 3.3 The PCD is committed to dealing with complaints in a prompt manner. We have three operational performance indicators (OPIs) which we use to track how long it takes us to assess and investigate complaints. These are combined to

produce an over-arching corporate Key Performance Indicator (KPI), which we use to monitor overall performance in these areas.

- 3.4 The KPI and our three operational indicators (OPIs) are set out in Table 7, along with our performance against them for the year. Our KPI target for the year was to conclude or refer to disciplinary action 80% of cases within our service standards (i.e. eight weeks for the initial assessment of complaints, five months for concluding internal complaint investigations and eight months for concluding external complaint investigations)¹⁴.
- 3.5 In 2016/17 we met the KPI target of 80% with a year-end outturn of 80.1%. Compared to the two previous years this is an improvement as we did not meet the target. In 2015/16 our performance against the KPI was 75.7% and in 2014/15, 68.9%. While the target was achieved against a background of falling caseloads, it also came in a year of

Indicator	Description	Performance	Target
KPI	The percentage of complaints concluded or referred to disciplinary action within service standards	80.1%	80%
OPI 1	The percentage of complaints concluded or referred to investigation within 8 weeks	84.6%	80%
OPI 2	The percentage of external complaints concluded or referred to disciplinary action within 8 months following investigation	70.4%	80%
OPI 3	The percentage of internal complaints concluded or referred to disciplinary action within 5 months following investigation	76.4%	80%

¹⁴ The calculations exclude periods of time that complaints are put on hold e.g. pending the outcome of court proceedings.

understaffing across the department and vacancies in the PCC. On balance, it represents an improvement in performance for which the staff and PCC are to be commended.

3.6 Outcome against the OPIs:

performance in relation to each of the underlying operational indicators was slightly different. Our aim of completing initial assessments of external complaints within eight weeks of receipt was met in nearly 85% of cases and therefore exceeded the target of 80%. However, we fell short of our aims in relation to the time taken to investigate complaints which includes referral of any

relevant matters to the PCC and taking decisions to impose administration sanctions. Our aim is to try to complete investigations of external complaints within eight months of receipt of a complaint and we achieved this in 70% of cases against a target of 80%. Performance was better in relation to the investigation of internal complaints, which we try to complete in five months: we did so in 76% of cases against the target of 80%.

3.7 There is no one clear reason for why the targets for investigations were missed this year but overall, the staffing issues in the Investigations and Hearings Team

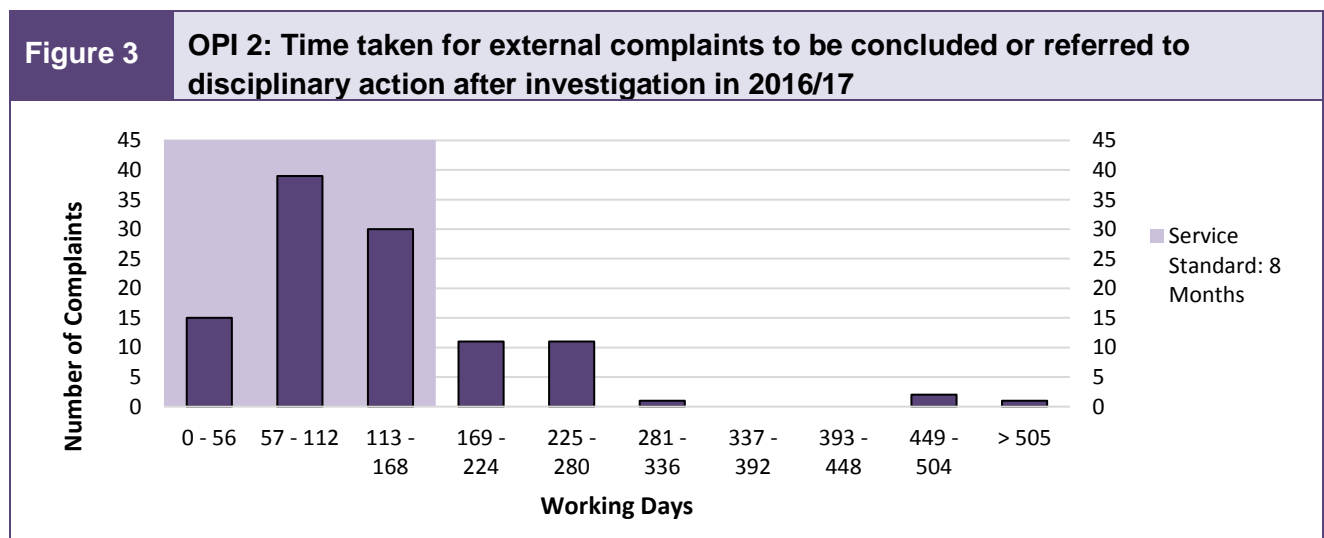
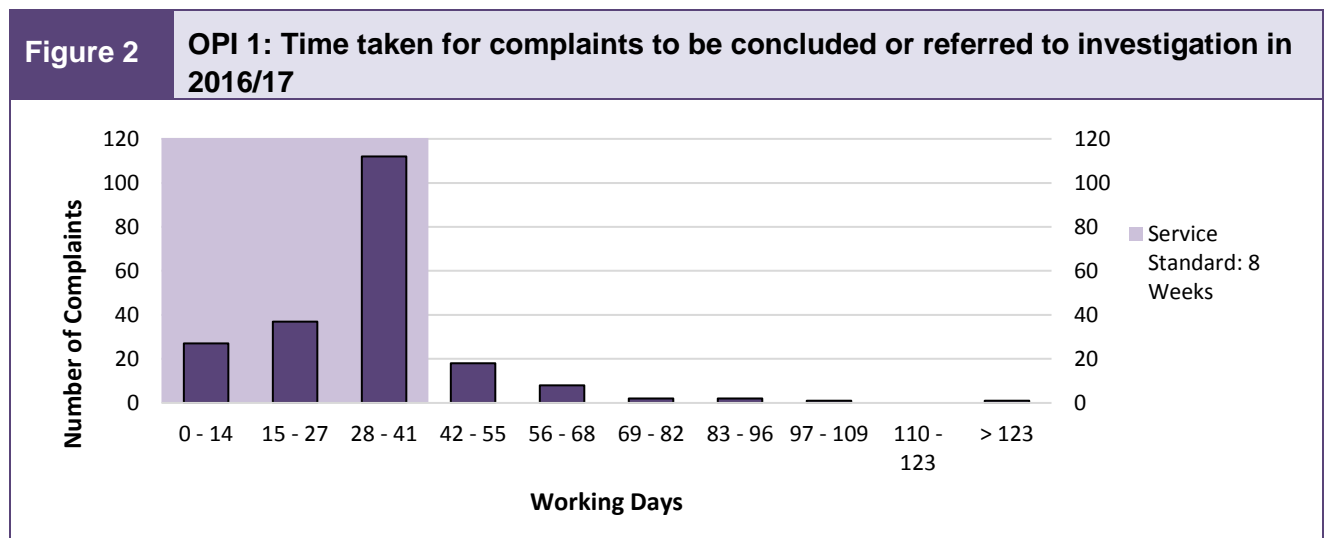
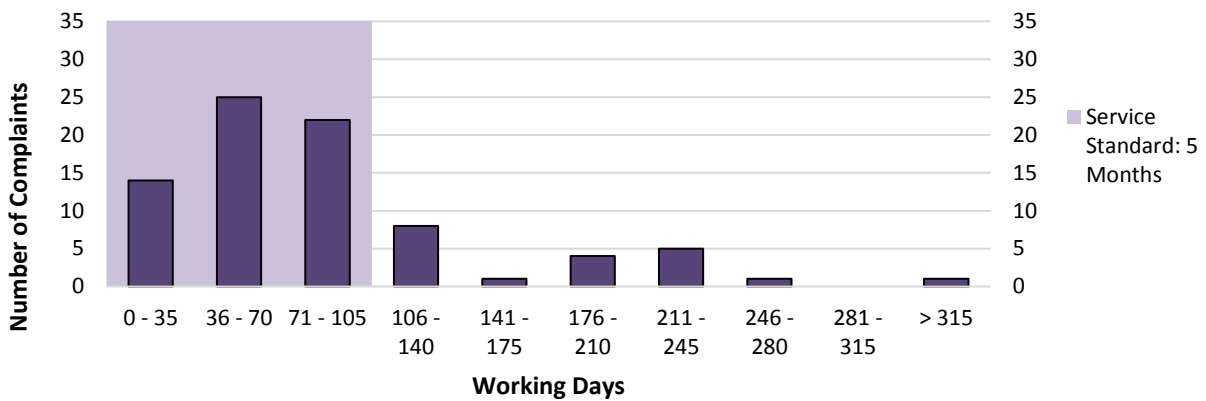


Figure 4

OPI 3: Time taken for internal complaints to be concluded or referred to disciplinary action after investigation in 2016/17



combined with vacancies on the PCC in the first half of the year led to it taking longer to complete some cases.

- 3.8 An analysis of the cases closed outside OPI's indicates that a relatively common theme was delays at PCC level. These delays are a product of the summer period when availability is more limited, the absence of a PCC meeting in August and vacancies on the PCC which were not filled until the beginning of 2017.
- 3.9 Figures 2 to 4 illustrate how long it took us to assess and investigate complaints in 2016/17.

Disciplinary action – service standards

- 3.10 While we do not have formal performance indicators in relation to disciplinary action, we still monitor the time taken to conclude Determination by Consent and Disciplinary Tribunal cases and have internal service standards for these stages. Our aim is to conclude DBC cases within 93 days of the date of the referral to the process following investigation. The service standards for the completion of Tribunal proceedings,

following referral, differ according to whether the proceedings relate to an internal or external complaint and whether they are in front of a three or five-person tribunal panel. Table 8 shows the relevant service standards and compares those figures to the completion of the Determination by Consent and Disciplinary Tribunal stages in 2016/17.

- 3.11 Performance in concluding the disciplinary action stages has improved slightly. However, it remains the position that the service standards are not achieved in most cases.
- 3.12 **DBC:** four out of the eight cases dealt with under the DBC procedure were concluded outside the 93 working days service standard as compared to seven out of 10 last year. This is a small improvement but still represents a relatively low performance against our standards. During the year, we reviewed whether the time allowed to complete the DBC process was reasonable and concluded that it was.
- 3.13 **Disciplinary Tribunals:** the time taken for Disciplinary Tribunals to progress from referral to hearing improved compared with 2015/16, with 29% of

three-person Tribunals arising from external complaints concluding within our service standards compared to none in 2015/16. Also, we managed to conclude 56% of five-person Tribunals within the service standard: up from 40% in 2015/16. Unfortunately, it remained the case that no three person Tribunals in relation to internal complaints were completed within the service standards as was the case in 2015/16.

- 3.14 The progress of Tribunal cases is, to a large extent, outside our direct control and is always subject to unpredictable delays arising from issues such as defence challenges and applications to adjourn. As we have commented on in previous annual reports, disciplinary casework continues to be increasingly litigious and this is a significant factor in the length of time it takes to conclude cases.
- 3.15 It is important that we progress cases as swiftly as possible and therefore we closely monitor the progress of disciplinary cases. We are satisfied that

there are no clear areas of avoidable delay in the system and the Independent Observer recognised the efforts made to minimise avoidable delay (see paragraph 3.29 below).

- 3.16 We will continue to monitor this area closely in 2017/18. Revised Disciplinary Tribunal Regulations are due to be introduced in Autumn 2017 which include a number of provisions that we hope will streamline the Tribunal process.

End-to-end times

- 3.17 The performance indicators and service standards described above exclude any periods when a case is put on hold or is formally adjourned by a Tribunal. This is invariably because the barrister is suffering from ill health or there are ongoing court or other proceedings which are relevant to the consideration of a complaint and therefore no action can be taken until they are concluded. The indicators also only show what proportion of complaints fell inside or outside of the time periods allowed. We therefore also

Stage	Type	Service Standard		Stages Completed		Percentage of Stages Within Service Standards	
		(Days)	(Months)	2015/16	2016/17	2015/16	2016/17
Determination by Consent	Internal	93	3	10	8	30%	50%
3-person Disciplinary Tribunal	Internal	86	2.8	5	14	0%	0%
3-person Disciplinary Tribunal	External	166	5.4	1	7	0%	29%
5-person Disciplinary Tribunal	Both	197	6.4	10	73	40%	56%

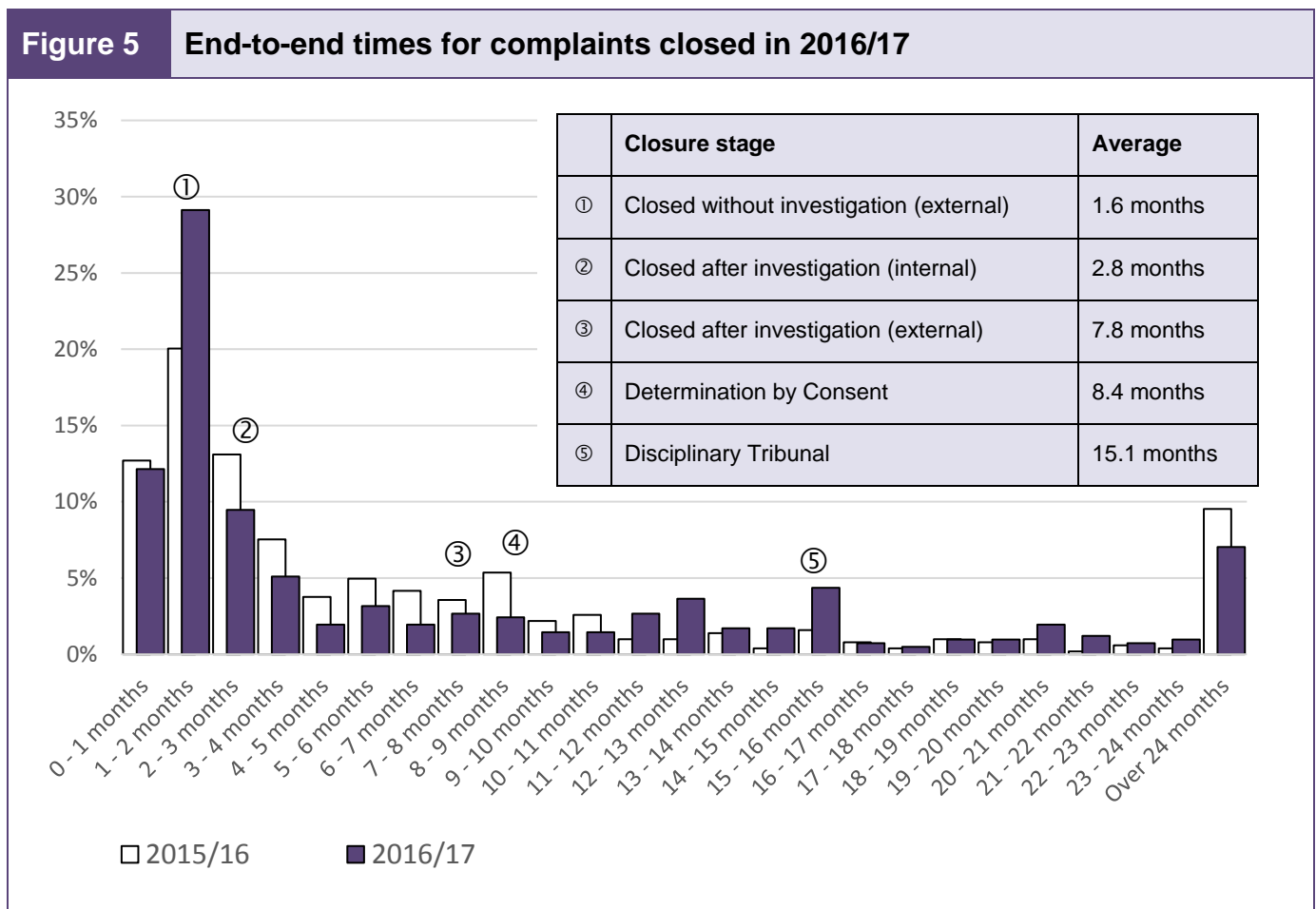
report on end-to-end times for our entire enforcement process. These indicate how long – in real time – complaints took to close in 2016/17.

3.18 Figure 5 illustrates how long each of the complaints closed in 2016/17 took from opening to final closure: whether this was at the initial assessment, investigation or disciplinary action stages. Also marked on the chart, are the average times taken for different complaint outcomes.

3.19 Overall the average time to conclude cases of all types reduced from to 3.4 months to 2.8 months which is a significant improvement on 2014/15 when it stood at 4.4 months. The figures show that there has been a slight decrease in the average time for a complaint to be closed after initial

assessment down from 1.8 months to 1.6 months. However, there has been a small increase in the average time to close external complaints after investigation: up from 7.4 months to 7.8 months. Further, the percentage of cases closed within three months was greater in 2016/17 than in the previous year - approximately 50.7% of cases as compared to 45.7%.

3.20 There are more marked improvements in the time taken to conclude disciplinary cases, with DBC taking on average 1.5 months less than in 2015/16 and the average time taken to conclude Tribunals also decreasing by 1.5 months from 16.6 months last year to 15.1 months this year.



3.21 It is also apparent that the percentage of long running cases, over two years in age, has reduced. In 2015/16, there were 50 such cases and this has reduced to 33. Our close tracking of these cases shows that progress on all these cases has been delayed due to lengthy periods when the cases have been put on hold or a Tribunal has ordered that a matter be adjourned. In nearly all cases this is due to the ill health of the barrister or connected ongoing police/or court action which must be concluded before the BSB can proceed further.

Quality assurance

3.22 As well as monitoring performance against service standards, we also have a number of quality assurance mechanisms in place to ensure the enforcement system is operating effectively.

Quality Review Sub-Committee (QRSC)

3.23 As indicated above, the PCC has authorised staff in PCD to take certain decisions on complaints including the ability to dismiss complaints, impose administrative sanctions and refer complaints to disciplinary action. In order to ensure that the quality of the staff decision making remains high, twice a year, the Quality Review Sub-Committee (QRSC) of the PCC – a three-member panel with a lay chair – spot-checks a percentage of staff decisions. The QRSC assesses the timeliness, thoroughness, transparency and accessibility of PCD decision-making along with the decision itself.

3.24 The QRSC reviewed 10% of the decisions made by PCD staff during the

course of 2016/17. In total 25 cases were reviewed in 2016/17 and the QRSC agreed with the decisions taken by staff in all cases. The panel provided useful feedback for staff on the clarity of one letter to a complainant but also commended staff on the content of another letter which they assessed as “very good”.

Independent Observer

3.25 Another quality assurance mechanism the BSB had in place up until the end of 2016, was the lay Independent Observer (IO) who was tasked with monitoring the enforcement system to ensure that it was operating in line with its aims and objectives. The role reported to the Governance, Risk and Audit Committee (GRA) and as such worked independently from the enforcement system, the PCD and the PCC.

3.26 The second IO, Isobel Leaviss, was appointed in May 2011 and remained in post until December 2016 when the role was dis-established.

3.27 The IO role provided invaluable oversight of the system and a wide range of improvements were made as a result of IO recommendations. However, a review of the BSB’s organisation wider quality assurance mechanisms has led to the introduction of a new quality assurance framework. This framework provides for an external audit function covering all aspects of the BSB’s work and not just the enforcement system. This will allow the BSB to focus on the areas of highest risk and ensure our resources are directed effectively. Therefore, a separate and dedicated audit function for the enforcement system is no longer considered necessary.

3.28 During her tenure, the IO made a total of 66 recommendations, all of which were accepted by the BSB. They covered issues such as: reviewing the enforcement web pages; making the BSB's service complaints policy more accessible for complainants; a more rigorous system for monitoring cases referred to the BSB by the Legal Ombudsman; various changes to the case management system to allow for better monitoring; and, most recently, improvements to the equality and diversity monitoring and training for the PCC and the prosecution panel.

3.29 The IO presented a final report on her work to the Board in January 2017 covering the period 2011-2016¹⁵. In it, she commented that:

“Overall, I am able to give the BSB a substantial level of assurance that its enforcement system has been operating in line with its aims and objectives... Throughout the period, I have observed effective leadership and clarity of purpose. The BSB's enforcement strategy has become more risk-based and outcome focused and there is a comprehensive framework of policies, procedures and 'templates' to support well-reasoned, robust and consistent decision-making... I have been impressed by the collective dedication of all those involved to ensuring that due process is followed and the handling of cases is thorough, considered and fair... I have observed determined efforts to minimise avoidable delays whilst ensuring that all parties have reasonable opportunities to raise issues and respond to concerns.”

¹⁵ The IO's final report can be found at: https://www.barstandardsboard.org.uk/media/1818794/final_io_report_2016.pdf

Part 3: Continuous improvement and knowledge management

- 4.1 The results and feedback from the various performance monitoring mechanisms described in Part 3 above, are used by the PCD management to make improvements and ensure that we continue to meet our commitment to providing a high-quality service. We also regularly review our procedures following the conclusion of cases, particularly tribunal hearings, judicial reviews and appeals. Any lessons that we can learn from these cases are fed back into the system to ensure continuous improvement.
- 4.2 To assist with this work, we appointed a Professional Support Lawyer (PSL) who joined the department in October 2015. Therefore 2016/17 was the first full year when we had benefit of this post. This has led to improvements in knowledge management and a more robust and rigorous approach to identifying lessons to learn from cases and acting on them.
- 4.3 We maintain a central 'Lessons to Learn' log which is available to all staff and captures any issues arising from cases at any stage of the process including issues arising from Tribunal cases and High Court appeal judgments. The log is reviewed monthly by the PCD Managers when action points are identified and taken forward. Such issues include: amending our approach to, and internal guidance document on, service of documents; adapting our standard letters to make them clearer; extending and developing the use of investigation plans;

and taking witness statements at an earlier stage in the process.

- 4.4 This lessons to learn log also provides a mechanism for identifying issues for inclusion in our regular newsletters to staff, the PCC and members of the prosecution panel. Reader feedback indicates that these newsletters are widely read and are an effective means of communication to assist with keeping participants in the enforcement system up to date.
- 4.5 **Training:** we also use performance and feedback information to inform the PCD training programme which is designed to ensure the maintenance, updating and development of legal knowledge and associated skills within the Department. In 2016/17 the training programme included: refresher training on disclosure of evidence and data protection as well as defence approaches to conducting litigation that are encountered in some of our more complex investigations and hearings. We also ran a two-day course provided by external trainers on investigative practice which covered investigation techniques and plans, interviewing witnesses, taking statements, and report writing. A small number of staff from other legal regulators also attended the course.

Casework lessons

- 4.6 A wide range of issues learnt from cases have led to changes and improvements or have revealed wider matters that the BSB may need to consider. Set out below are just a few of these arising from appeal judgments and legal action against the BSB.

4.7 In one appeal case, where we cross-appealed on the basis of undue leniency in the sentence, the appellant was successful in having the finding overturned due to the submission of new medical evidence on appeal. However, the High Court in its judgment also considered the issue of whether charges relating to a lack of integrity could be proved without the conduct also including dishonesty. It decided that lack of integrity and dishonesty are synonymous and therefore the charges laid by the BSB, which covered a lack of integrity only without dishonesty, could not have been proved (they related to the inappropriate sexual touching of females at a chambers party). This interpretation of integrity was also taken in another case decided by the High Court in relation to an appeal against a Solicitors Disciplinary Tribunal (SDT) decision and we understand that decision is being appealed to the Court of Appeal. However, in another recent appeal to the High Court from a decision of the SDT, although not central to the decision, the Court indicated that there was a distinction between integrity and dishonesty. The position is therefore uncertain but the recent interpretation of integrity has implications for the wording of the BSB's Core Duty 3 – "*you must act with honesty and integrity*" - and we are closely watching developments in the courts.

4.8 In another appeal, the High Court overturned one of two professional misconduct charges found against the barrister on the basis that the Tribunal had wrongly concluded that the criminal offence to which the charges related included an element of dishonesty. The

case related to a criminal conviction following call to the Bar that arose from behaviour prior to call. While not pivotal to the High Court decision, the court raised a question as whether the BSB had jurisdiction over such conduct. This has prompted consideration by our Strategy and Policy department as to whether there is a need to change our Handbook provisions and also a review of our existing cases to assess whether any of them were similarly affected.

4.9 Another, widely reported, appeal that was decided in 2016/17 related to a disciplinary case that commenced in 2012 but was not heard until this year. The BSB was heavily criticised by the High Court for our approach in the case to taking and relying on witness statements. The complainant had refused to give live evidence and we therefore asked the Tribunal to admit the complainant's statement into evidence which it agreed to do. However, the statement had been taken by the complainant's solicitors who had a vested interest in the outcome of the complaint. The court considered the BSB acted entirely wrongly in relying on the statement produced by the solicitors and that we should have taken steps to obtain an independent statement from the complainant. It also considered we should have taken greater steps to ascertain the reasons why the complainant could not attend by making direct contact with the witness.

4.10 Previous cases had highlighted there may be an issue with our approach to taking witness statements and the stage in our process when this is done. Therefore, by the time the appeal was heard, steps had already been taken to

address the issues which included the commissioning of training on investigative techniques and taking witness statements. Case Officers are now required to prepare and follow investigation plans, which are continually reviewed to ensure that appropriate, independent witness statements are taken.

Wider issues

- 4.11 The outcomes of several Tribunal hearings provide a useful insight into the enforcement issues we are currently dealing with and the issues facing the profession.
- 4.12 **The internet and social media:** a live and very pertinent issue is that of barristers' use of social media to express their views. We receive an increasing number of complaints each year about comments made by barristers on social media. This often involves the PCC considering the boundaries between professional and personal life as well as freedom of expression. Many of the complaints are dismissed as being legitimate expressions of opinions. Even though the comments may be offensive to some, or indeed many, as a regulator we need to balance our regulatory reach with barristers' rights to express their views.
- 4.13 However, in one case decided in 2016/17, an unregistered barrister was disbarred as a result of a large number of offensive "tweets" made from his private Twitter account, in which he had also occasionally mentioned that he was a barrister. The tweets were anti-Semitic

and were also abusive towards other groups of persons. The Tribunal considered that tweets issued from an open Twitter account were not conduct in a person's private life, and were equivalent to the barrister shouting comments out of a window or standing in the street. The Tribunal concluded that, while persons can say what they like as a matter of law, to be a member of the Bar is to be a member of an honourable profession. If a person known to be a barrister speaks in a way which is highly disparaging of groups of people it was the Tribunal's view that it would be highly probable that it would diminish not only the trust and confidence the public placed in the individual barrister but also in the profession.

- 4.14 As a result of this case, in February 2017, the BSB published updated guidance for barristers using social media¹⁶.
- 4.15 In another disciplinary case, a barrister was found to have committed professional misconduct as a result of information published on his professional website. The barrister made statements about his performance as compared to others working in the same field which could not be independently supported and were misleading.
- 4.16 These cases demonstrate that, as social media and the internet become more prominent in our daily lives, there is an increasing need for barristers to be very careful about what they post whether in their professional or personal lives.
- 4.17 **Failure to report:** as usual, a number of the professional misconduct findings in

¹⁶ The link to the updated guidance for barristers using social media can be found here: https://www.barstandardsboard.org.uk/media/1821624/bsb_social_media_guidance_pdf.pdf

2016/17 related to relatively low level criminal convictions or findings by other regulators which must be reported. While it is inevitable that disciplinary action will follow from a criminal conviction, the level of sanction will differ according to the seriousness of the offence but also according to whether the conviction was voluntarily and promptly reported. A failure to report will result in an additional disciplinary charge and could lead to more serious sanctions being imposed. In one case, a barrister unsuccessfully appealed the imposition of a £250 fine for failing to report a conviction. The High Court, in dismissing the appeal, referred to the barrister's "non-delegable and inescapable duty" to self-report.

Proceeding in the barrister's absence

- 4.18 An increasing number of hearings have proceeded in the absence of the barrister in recent years - this is particularly the case with unregistered barristers. There are provisions in the Handbook (rule E148, Disciplinary Tribunal Regulations 2014) that allow for hearings to proceed in the absence of the defendant if the Tribunal considers it just to do so. However, it is important for barristers to attend disciplinary hearings, as Tribunals have the power to proceed and even disbar them in their absence.

Part 4: Wider work of the PCD

- 5.1 The PCD and PCC's primary function is to consider and take action where the BSB Handbook has been breached. However, our work throughout the year encompasses a number of other areas including participating or leading on change projects. This work is outlined in the paragraphs below.

Disciplinary history checks

- 5.2 The PCD holds the records for disciplinary findings against barristers and therefore we are the source of information for enquiries about the disciplinary history of barristers. Such enquiries are usually made for the purpose of issuing a Certificate of Good Standing. However, we also provide information to: the Judicial Appointments Commission (for use in processing applications for judicial office); the Queen's Counsel Appointments body (in relation to applications for silk) and the Inns of Court (in relation to appointments of pupil supervisors). In 2016, we also started carrying out checks for the Chartered Institute of Legal Executives (CILEx) in relation to prospective registrants.
- 5.3 Disciplinary checks are carried out by the PCD's Operational Support Team (OST) and in 2016/17 they completed a total of 878 disciplinary history checks including 241 in relation to Queen's Counsel applications, 124 in relation to judicial applications and 315 for CILEx.

Data Protection Act enquiries

- 5.4 The PCD regularly receives requests under the Data Protection Act from individuals asking for copies of personal

data that the BSB holds about them. These are known as subject access requests (SARs). They are handled by trained staff in our OST and can take up a considerable amount of time and staff resource given the statutory time lines for responding.

- 5.5 In 2016/17, we received seven SARs. Of these, five were from barristers who were the subject of complaint(s) and two were from complainants. Such requests can be a considerable drain on resources and can involve several weeks of work.

Projects

Public Information Project

- 5.6 We concluded the Public Information Project in 2016 which started in 2014. This project was designed to improve the information we provide to the public about the enforcement system. In 2015/16 we completed the overhaul of the website pages with the assistance of Law for Life, a specialist Public Legal Education organisation. The final phase of the project was to review our leaflets and create new versions based on the work carried out in the website. The revised leaflets were posted on the BSB website in September 2016 and are now distributed in hard copy with all relevant communications.

Joint Disciplinary Tribunals Working Group

- 5.7 As part of an initiative led by the Legal Services Board (LSB) and the Chief Executives of the front-line legal service regulators to find ways to work more collaboratively within legal professional regulation, a Joint Disciplinary Working Group was set in 2016 to take forward ideas on the potential alignment of

aspects of the legal professions' disciplinary systems. Senior managers in the PCD are involved in the Group.

- 5.8 The work carried out in 2016/17 involved completing the mapping of the various disciplinary processes operated by the regulators to identify both differences and similarities with a view, in time, to aligning them where possible. Work also started on mapping the approaches taken to the publication of disciplinary information with a view to aligning the information available to the public and the terminology used. The Group will continue this work in 2017/18 and a conference is planned for autumn 2017 to discuss relevant issues arising from disciplinary cases.

Disciplinary Tribunal Regulation Review

- 5.9 The project to implement the revised Disciplinary Tribunal Regulations, which commenced in 2014, continued throughout 2016/17. It was originally envisaged that the new regulations would be introduced in January 2017 but delays occurred due to the need to process other LSB applications and also issues with the framing of the original application which was resubmitted. The Legal Services Board approved the revised regulations at the end of June 2017 and they will come into force in October 2017.

Standard of Proof project

- 5.10 Over recent years, the BSB has been considering the issue of the appropriate standard of proof to apply to professional misconduct allegations. A public consultation paper on whether the standard of proof applicable to professional misconduct allegations

should be changed from the criminal standard (beyond reasonable doubt) to the civil standard (on the balance of probabilities) was developed during 2016/17 and issued on 2 May 2017. The outcome of the consultation will be made public in Autumn 2017 and reported in our 2017/18 Enforcement Report.

Governance review – enforcement decision making processes

- 5.11 The PCD is also involved in two major projects arising from the BSB's ongoing modernisation of its governance and regulatory approach. Both projects will continue through to 2019/20.
- 5.12 **Centralised Assessment:** this project started in 2014/15. Its aim is the centralisation of the assessment of all incoming information to replace the various assessment processes carried out in different departments across the BSB. This will allow for more consistent handling of incoming information and risk assessment. The idea is to create a Centralised Assessment Team (CAT) which will handle all initial assessments including those carried out in relation to enforcement complaints.
- 5.13 **Enforcement decision making:** the Board has also agreed, in principle, to changing the model for enforcement decision making post-investigation and at PCC level. The idea is to allow for smaller panels of decision makers to take decisions on referrals of complaints to disciplinary action and DBC cases. This will involve replacing the PCC with a pool of decision makers from which the smaller panels can be appointed. These panels will take decisions on all regulatory matters that require independent decision making. The

detailed proposals on this are still being worked up and the intention is to carry out a public consultation on the changes in early 2018 with a view to changing the system in April 2019.

Conclusions and action points

- 6.1 2016/17 was a difficult and challenging year for the PCD and PCC given the background of staffing issues in the PCD and vacancies on the PCC. Against this background, the overall outturn for the year has been very positive and shows improvements in many areas.
- 6.2 After several years, the unprecedented level of complaints associated with one barrister, and his chambers, have now been concluded. The ongoing presence of these cases in the system over the last few years has distorted the figures and distracted from the underlying trends.
- 6.3 The underlying trend is that new complaints are declining and consequently the numbers of investigations and disciplinary cases are also decreasing.
- 6.4 In this context, it may not be surprising that we have been able to meet the KPI, of 80% of cases closed within the relevant service standards, for the first time in three years. However, we have also dealt with an increase in general enquiries and pre-complaints while continuing to reduce the average time to process complaints: down from 4.4 months in 2014/15 to 2.8 months this year. The number of long running cases has also reduced. These are achievements for which the PCC and PCD members should be commended given the challenging circumstances. They also indicate that, regardless of any particular in-year issues, the enforcement system is becoming more efficient.
- 6.5 The performance outlined in this report indicates that the BSB's enforcement system remains robust and is operating efficiently. This conclusion was supported by the Independent Observer in her outgoing report of performance over the last five years.
- 6.6 There are also clear indications that the BSB's changes to its regulatory approach in recent years are proving to be effective. The trends in this report, demonstrate that our regulation and the enforcement system are now more focussed on risk and outcomes. This is demonstrated by the upwards trend in level of reports of serious misconduct by the profession, the underlying increase in the use of administrative sanctions and the PCC's increasing focus on the more serious conduct cases.
- 6.7 It is positive, that the uphold rate at Tribunals remains high with 86% of professional misconduct cases resulting in a finding on one or more charges. This shows that we are referring appropriate cases to disciplinary action.
- 6.8 The impact of the BSB's governance reforms and our commitment to ensuring that decisions are taken at the lowest appropriate level can also be seen in the increased level of staff decision making: up from 42% in 2014/15 to 69% this year.
- 6.9 Our continuous improvement and knowledge systems have also developed over the last year. The appointment of a PSL has created more robust feedback mechanisms that assist us with ensuring that we identify issues from the outcome of cases and we make appropriate improvements.

- 6.10 On the downside, there has been an increase in the number of decisions taken at the initial assessment stage that have been overturned on review. This may indicate an issue with our approach to decisions taken at this stage which needs to be addressed.
- 6.11 We have also been subject to one high profile High Court appeal in which the BSB was severely criticised but from which we have learnt lessons that have fed back into improving the system.

Action points

- 6.12 As well as continuing to work on the long-term projects to modernise the system, we intend to carry out the following actions in 2017/18 to improve further the efficacy of the enforcement system:
- Maintain and enhance our staff skills through a comprehensive programme of training and skills development
 - Continue to monitor closely the time taken to conclude disciplinary cases to ensure that all avoidable delay is addressed
 - Consider any improvements that can be made at the initial assessment stage to reduce the number of decisions overturned on review
 - Continue to develop our system of logging lessons arising from cases to support continuous improvement

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Director of Professional Conduct

Aidan Christie QC

**Chair of the Professional Conduct
Committee**

July 2017